

THE INDIAN LAW REPORTS ALLAHABAD SERIES



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93. Hon'ble Mr. Justice Arun Kumar Singh Deshwal

[Ahmad Ahsan & Anr. Vs. Sri Suresh](#)
Page- 310

[Ashok Singh & Ors. Vs. D.I.O.S.](#)
Page- 391

[Ajai Kumar Singh Vs. State Public Services Tribunal, Lko. & Ors.](#) **Page-** 385

[Ashu Jain Vs. State of U.P. & Ors.](#)
Page- 1039

[Ajay Bahadur Vs. State of U.P. & Ors.](#)
Page- 516

[Ashwani Sharma & Anr. Vs. State of U.P.](#)
Page- 95

[Ajay Kumar Vs. State of U.P. & Ors.](#)
Page- 470

[Basdev Vs. State of U.P. & Ors.](#)
Page- 260

[Amit Goel & Ors. Vs. State of U.P. & Ors.](#)
Page- 139

[Bhanwar Singh @ Karamvir Vs. State of U.P.](#)
Page- 1048

[Amit Kumar Vs. State of U.P. & Ors.](#)
Page- 803

[Bharat Petroleum Corp. Ltd. Vs. U.O.I.](#)
Page- 1129

[Amritansh Pandey Vs. State of U.P. & Ors.](#)
Page- 281

[C/m Intermediate College, Babusarai, Bhadohi Vs. State of U.P. & Ors.](#) **Page-** 1002

[Anil Kumar \(Engineer\) Vs. State of U.P. & Ors.](#)
Page- 133

[Chhotai & Ors. Vs. State of U.P.](#)
Page- 606

[Anil Kumar Ahirwar Vs. State of U.P.](#)
Page- 649

[Committee of Management Jai Prakash Charitable Trust Vs. State of U.P. & Ors.](#)
Page- 288

[Anil Kumar Sharma & Ors. Vs. State of U.P. & Ors.](#)
Page- 382

[Daya Ram Pasi Vs. State of U.P.](#) **Page-** 636

[Anjuman Siddiquia Jamia Noorul Oloom Munshipur, Mubarakpur Azamgarh & Ors. Vs. State of U.P. & Ors.](#)
Page- 977

[Desh Raj Singh Vs State of U.P. & Ors.](#)
Page- 103

[Arun Kumar Jain & Ors. Vs. P.O., Debts Recovery Tribunal, Allahabad & Ors.](#)
Page- 821

[Dev Narain Vs. State of U.P. & Anr.](#)
Page- 692

[Ashish Kumar Pandey & Ors. Vs. State of U.P. & Ors.](#)
Page- 779

[Dinesh Kumar Gupta & Ors. Vs. State of U.P. & Anr.](#)
Page- 29

[Dr. B.K. Gupta Vs. Judge Small Cause Court, Agra & Anr.](#)
Page- 431

<u>Gauri Garg Vs. I.O.C. & Ors.</u>	Page- 492	<u>Khalid Anwar @ Anwar Khalid Vs. C.B.I.</u>	Page- 582
<u>Golu @ Arun Patel Vs. State of U.P. & Ors.</u>	Page- 1074	<u>Krishna & Anr. Vs. State of U.P. & Anr.</u>	Page- 702
<u>Govardhan Vs. State of U.P.</u>	Page- 147	<u>Krishna Kumar Vs. State of U.P. & Ors.</u>	Page- 362
<u>H.K.S. Developers Pvt. Ltd. Vs. State of U.P. & Ors.</u>	Page- 813	<u>Kusum Devi & Anr. Vs. State of U.P. & Anr.</u>	Page- 6
<u>Indian Oil Corporation Ltd. & Anr. Vs. The Commercial Court, Varanasi & Anr.</u>	Page- 921	<u>Kuvendra Pal Singh Vs. State of U.P. & Ors.</u>	Page- 225
<u>Ishtiyak Vs. State of U.P.</u>	Page- 75	<u>M/S Agc Realty Pvt. Ltd. Vs. Smt. Raj Rani</u>	Page- 1151
<u>Itwari & Ors. Vs. State of U.P.</u>	Page- 619	<u>M/S Anjali Exim Pvt. Ltd. Vs. State of U.P. & Ors.</u>	Page- 521
<u>Jamshed & Ors. Vs. State of U.P. & Anr.</u>	Page- 697	<u>M/S Anjali Exim Pvt. Ltd. Vs. State of U.P. & Ors.</u>	Page- 528
<u>Jeet Lal Saroj Vs. State of U.P. & Ors.</u>	Page- 783	<u>M/S Anjali Exim Pvt. Ltd. Vs. State of U.P. & Ors.</u>	Page- 535
<u>Jose Papachen & Anr. Vs. State of U.P. & Anr.</u>	Page- 23	<u>M/S Anjali Exim Pvt. Ltd. Vs. State of U.P. & Ors.</u>	Page- 541
<u>Jugal Kishore Srivastava Vs. State Of U.P.</u>	Page- 896	<u>M/S Aryan Group of Guard Services, Lko. Vs. U.O.I. & Ors.</u>	Page- 973
<u>Kallu & Ors. Vs. State of U.P.</u>	Page- 641	<u>M/S Maa Vaishno Traders, Kaushambi Vs. State of U.P. & Ors.</u>	Page- 142
<u>Karan Singh & Ors. Vs. State of U.P. & Anr.</u>	Page- 684	<u>M/S Ramkali Balika Inter College, Sultanpur & Anr. Vs. State of U.P. & Ors.</u>	Page- 487
<u>Kashi Ram Vs. Ramji Lal</u>	Page- 718	<u>Mahaveer & Ors. Vs. State of U.P. & Ors.</u>	Page- 852

[Maresh Chandra Vs. State of U.P. & Anr.](#) **Page- 663**

[Noor Ahmad Vs. Mohd. Ahmad](#) **Page- 320**

[Maresh Kumar Yadav Vs. State of U.P.](#) **Page- 21**

[Om Prakash @ Prakash & Anr. Vs. The State of U.P.](#) **Page- 586**

[Managing Director U.P. Jal Nigam \(Rural\) Lko. & Anr. Vs. Babban Singh & Anr.](#) **Page- 214**

[Padmashri Dr. Usha Sharma Vs. State of U.P. & Anr.](#) **Page- 106**

[Maqbool Hasan Vs. State of U.P. & Anr.](#) **Page- 1032**

[Paltoo Ram Yadav Vs. State of U.P. & Ors.](#) **Page- 495**

[Mohan Lal Rathi Vs. U.O.I. & Anr.](#) **Page- 944**

[Prabhat Bhatnagar Vs. State of U.P. & Ors.](#) **Page- 809**

[Mohd. Arif Vs. State of U.P. & Anr.](#) **Page- 679**

[Praveen Kumar Vs. State of U.P. & Ors.](#) **Page- 760**

[Mohd. Ayub Rizvi & Ors. Vs. Smt. Salma Khan & Anr.](#) **Page- 556**

[Prem & Ors. Vs. State of U.P.](#) **Page- 625**

[Mohd. Ismail & Ors. Vs. State of U.P. & Anr.](#) **Page- 409**

[Priyadarshini Singh Vs. State of U.P. & Ors.](#) **Page- 414**

[Mohit Kumar Goyal Vs. State of U.P. & Anr.](#) **Page- 667**

[Radhey Shyma & Anr. Vs. State of U.P. & Anr.](#) **Page- 128**

[Mrs. Pratibha Tripathi Vs. U.O.I. & Ors.](#) **Page- 771**

[Rahul Saxena @ Bhola/Bholu Vs. State of U.P. & Ors.](#) **Page- 152**

[Navneet Nain @ Navneet Agarwal Vs. The New India Assurance Co. Ltd. & Anr.](#) **Page- 299**

[Rajeev Singh & Ors. Vs. State of U.P. & Anr.](#) **Page- 742**

[Neeru Kumar Yadav & Anr. Vs. State of U.P. & Anr.](#) **Page- 10**

[Rajendra Kumar Vs. Kunwar Bhartendra Singh](#) **Page- 1165**

[New Okhla Industrial Development Authority, District Gautam Budh Nagar Vs. M/s. Pathik Software Education Pvt. Ltd., Pandav Nagar, Delhi & Anr.](#) **Page- 159**

[Ram Bachani Vs. A.D.J. Lucknow](#) **Page- 548**

[Ram Kali Devi Vs. State Of U.P. & Ors.](#) **Page- 905**

<u>Ram Kumar Vs. State of U.P. & Anr.</u> Page- 1045	<u>Sharda Singh Vs. Vijay Kumar Rastogi</u> Page- 911
<u>Ramesh Chandra Pal Vs. State of U.P. & Ors.</u> Page- 376	<u>Sheshmani Chaubey Vs. State of U.P. & Ors.</u> Page- 767
<u>Ramji Singh Vs. Directorate of Enforcement Alld. Sub-Zonal Office</u> Page- 561	<u>Siddhant @ Aashu Vs. State of U.P. & Ors.</u> Page- 1057
<u>Ramnarayan Pandey & Ors. Vs. State of U.P. & Anr.</u> Page- 1173	<u>Smt. Meera Devi & Anr. Vs. State of U.P. & Ors.</u> Page- 1021
<u>Ramveer Vs. State of U.P. & Ors.</u> Page- 1016	<u>Smt. Meeru Seth Vs. The State of U.P. & Ors.</u> Page- 858
<u>Ramvir Singh Vs. State of U.P. & Ors.</u> Page- 1026	<u>Smt. Prema Devi Vs. Devideen & Ors.</u> Page- 915
<u>Ranvir Singh Vs. State of U.P.</u> Page- 46	<u>Smt. Premlata Pandey Vs. State of U.P. & Ors.</u> Page- 1013
<u>Raster Images Pvt. Ltd. Tamil Nadu Vs. State of U.P. & Anr.</u> Page- 1099	<u>Smt. Sangeeta Shukla Vs. State of U.P. & Ors.</u> Page- 1184
<u>Raza Hussain @ Raja Miyan Vs. Addl. Commissioner Lko. & Ors.</u> Page- 481	<u>Smt. Yasmeen Zia Vs. Smt. Haneefa Khursheed & Ors.</u> Page- 314
<u>Razia & Anr. Vs. State of U.P. & Ors.</u> Page- 884	<u>Sonu @ Pinku Vs. State of U.P.</u> Page- 1092
<u>Sameer Singh Vs. State of U.P.</u> Page- 594	<u>Srimati Maya Devi Smarak Siksha Samiti Vs. State of U.P. & Ors.</u> Page- 156
<u>Sanjay Kumar Singh Vs. Dir. Mahila Kalyan U.P. Lko. & Ors.</u> Page- 967	<u>State of U.P. & Ors. Vs. Uttar Pradesh Senior Basic Shikshak Sangh</u> Page- 195
<u>Sarita Yadav Vs. Saroj Devi & Ors.</u> Page- 866	<u>State of U.P. Vs. Mahipal Singh</u> Page- 958
<u>Shahrukh Saleem Vs. State of U.P. & Ors.</u> Page- 220	<u>Subhash Chand Vs. State of U.P. & Ors.</u> Page- 399

[Sudheer Kumar Jain Vs. State of U.P. & Ors.](#) **Page-** 842

[Sunil Kumar Katiyar Vs. State of U.P.](#) **Page-** 1083

[Sunil Kumar Singh III Vs. State of U.P. & Anr.](#) **Page-** 244

[Sunil Prakash Gaur Vs. State of U.P.](#) **Page-** 38

[Tarkeshwar & Ors. Vs. State of U.P. & Ors.](#) **Page-** 505

[The Committee of Management, Meerut & Anr. Vs. The State of U.P. & Ors.](#) **Page-** 834

[The New India Assurance Co. Ltd., Allahabad Vs. Smt. Pramila & Ors.](#) **Page-** 192

[U.O.I. & Anr. Vs. Mohd. Yunush & Ors.](#) **Page-** 427

[U.O.I. & Ors. Vs. Sri Kaushalya Nandan Sharan Verma & Anr.](#) **Page-** 750

[U.P. Corp. Fed. Ltd. & Anr. Vs. P.O., Industrial Tribunal, Lko & Ors.](#) **Page-** 889

[Uday Pratap Singh Vs. District Basic Education Officer, Basti & Ors.](#) **Page-** 346

[Urmila Singh Chauhan Vs. State of U.P. & Anr.](#) **Page-** 34

[Uttar Pradesh Power Corp. Contract Employees Sangh, Lko Vs. State of U.P. & Ors.](#) **Page-** 775

[Vinod Kumar Gupta Vs. State of U.P.](#) **Page-** 938

[Vipin Kumar Vs. State of U.P. & Ors.](#) **Page-** 848

[Vishwanath Vishwakarma Vs. State of U.P. & Ors.](#) **Page-** 366

A. Criminal Law -Criminal Procedure Code,1973-Section 438 - Indian Penal Code, 1860-Section 306-application-rejection- the deceased has committed suicide within the precincts of the house of the applicants, as such this case law also does not hold good to the present case and the exception cannot be drawn here. The applicants are named in the FIR- In the present case, already the proceedings under Sections 82 and 83 Cr.P.C. are complete and applicants have also failed in the application filed u/s 482 Cr.P.C. - The judgment of Apex Court passed in the case of Kamlesh does not apply to the present case as in the said case, the F.I.R. was challenged in the petition under Section 482 Cr.P.C. as is the practice at Rajasthan High Court, as such even after the petition challenging the F.I.R. is concerned, the application under Section 438 Cr.P.C. is very much taken up and decided by this Court-Herein, the applicants had challenged the final report (charge-sheet) and failed- the application

1. List has been revised.
2. Heard Sri Daya Shankar Mishra, learned Senior Counsel assisted by Sri Abhishek Kumar Mishra, learned counsel for the applicants, Sri Ved Prakash Shukla, learned counsel for the informant and Sri

Sunil Kumar, learned A.G.A. for the State as well as perused the material placed on record.

3. The present anticipatory bail application has been filed on behalf of the applicants in Case Crime No.75 of 2022, under Section 306 IPC at Police Station-Naini, District Prayagraj with a prayer to enlarge them on anticipatory bail.

PROSECUTION STORY:

4. The deceased, who happens to be the husband of the informant, is stated to be a Marine Engineer and had left his job and started doing the contract job at Prayagraj as his father had fallen ill and was bed ridden, but the said money earned used to be transferred to the account of his ailing father, as such his family was dependent on the money being given to them by his father Balram Mishra, who has subsequently expired. Out of the said wedlock, there is a five year old daughter. The deceased is stated to have committed suicide in the night of 5/6.01.2022 and the informant could reach the house of her in-laws on 07.01.2022 from Ahmedabad. The behaviour of her in-laws was not proper, as such she left her in-laws house after Terahawi of her husband and she received a WhatsApp message from the mobile of the father-in-law which was being used by her husband, whereby a suicide note was sent to her. The FIR was instituted on 19.02.2022 at Police Station Naini at Prayagraj as such.

RIVAL CONTENTIONS:

(Arguments on behalf of applicants)

5. Learned Senior Counsel has argued that the applicants were granted anticipatory bail till the submission of report under Section 173(2) Cr.P.C. by the Sessions Judge, Prayagraj and have not misused the opportunity granted earlier on.

6. Learned Senior Counsel has vehemently argued at Bar that no ingredients of Section 306 I.P.C. are fulfilled as there is no overt act assigned to the applicants and even Section 107 I.P.C. is not attracted in the present case as the applicants, who are the ladies, have not abetted the deceased to commit suicide. Learned Senior Counsel has further stated that the co-accused Manohar Mishra has been granted regular bail by this Court vide order dated 17.07.2023 passed in Criminal Misc. Bail Application No.29923 of 2023 and the very said order categorically indicates that the ingredients of Section 306 I.P.C. are not fulfilled. Learned Senior Counsel has further stated that the applicants, being ladies, are also entitled for anticipatory bail as no purpose shall be fulfilled by sending them behind the bars.

7. Their reputation in the society shall stand tarnished and there is no likelihood of them tampering the evidence as the final report (charge-sheet) has already been submitted. They are ready to cooperate in the trial as they have already cooperated during investigation.

8. Learned Senior Counsel has further stated that there is no eye-witness of the said incident. The said FIR has been lodged after a delay of more than a month, as such the said inordinate delay is also a valid ground for grant of anticipatory bail to the applicants.

9. Learned Senior Counsel has further stated that the judgment of this Court passed in **Shivam vs. State of U.P. and Another¹**, is *per-incuriam* as it has not laid down any law as it is not a ratio that has to be relied, rather the reference of paragraph 43(8) is only *obiter-dicta*.

10. Learned Senior Counsel has placed reliance on the judgment of Apex Court passed in the case of **Kamlesh & Anr. vs. The State of Rajasthan & Anr.²**, whereby it has been opined that a petition U/s 438 Cr.P.C. is very much maintainable even after dismissal of an application filed U/S 482 Cr.P.C.

11. Learned Senior Counsel has further placed reliance on paragraph nos.10 and 11 of the judgment of this Court passed in **Criminal Misc. Anticipatory Bail Application U/S 438 Cr.P.C. No.57 of 2023 (Vijay Pal Prajapati vs. State of U.P.)**, whereby much reliance has been placed on the judgment of **Kamlesh (supra)**, which are quoted as under:-

"10. In Kamlesh and another versus State of Rajasthan and another, 2019 SCC OnLine SC 1822, the Hon'ble Supreme Court was deciding a Criminal Appeal filed against an order passed by Rajasthan High Court whereby an application for grant of anticipatory bail was rejected by the High Court only on the ground that petition under Section 482 Cr.P.C. praying for quashing of FIR, has already been rejected. The Hon'ble Supreme Court held that: -

"5. We are of the view that the order of the High Court cannot be sustained. High Court ought to have considered the application on merits. The fact that petition under Section 482 Cr.P.C.

was dismissed for quashing was not conclusive and could not be the reason for rejecting the application."

11. Therefore, the law is clear that the dismissal of the applicant's application under Section 482 Cr.P.C. would not be a bar against consideration of the merits of his application for anticipatory bail."

12. Learned Senior Counsel has further placed reliance on the judgment of Apex Court passed in **Petition(s) For Special Leave to Appeal (Crl.) No.6057 of 2021 (Vinod Kumar Sharma & Anr. vs. State of Uttar Pradesh & Anr.)**, whereby it is stated that the order to the accused to surrender and apply for regular bail includes anticipatory bail also.

13. Learned Senior Counsel has also placed reliance on paragraph nos.11 and 12 of the judgment of this Court passed in **Criminal Misc. Anticipatory Bail Application U/S 438 Cr.P.C. No.8059 of 2023 (Dr. Rajni Tripathi vs. State of U.P.)**, whereby the anticipatory bail was granted to the delinquent therein even after the application under Section 482 Cr.P.C. was disposed of and much reliance was made on the judgment of **Vinod Kumar Sharma and Another vs. State of Uttar Pradesh and Another³**.

14. Learned Senior Counsel has also placed reliance on the judgment of this Court passed in **Criminal Misc. Anticipatory Bail Application U/S 438 Cr.P.C. No.4560 of 2023 (Udit Arya vs. State of U.P.)**, whereby even after the proceedings under Section 82 Cr.P.C. were taken up against the delinquent therein, the anticipatory bail of the accused was allowed.

(Arguments on behalf of informant/State)

15. Per contra, learned counsel for the informant and learned A.G.A. have vehemently opposed the anticipatory bail application on the ground that the applicants have not come with clean hands as they have already relinquished the opportunity granted under Section 482 Cr.P.C. and the present case is squarely hit by paragraph 43(2), (8) and (10) of the judgment of this Court passed in **Shivam (supra)**.

16. Learned counsel for the informant has also placed reliance on the judgment of Apex Court passed in the case of **Prem Shankar Prasad vs. State of Bihar & Anr.**⁴, whereby it is categorically opined that after the proceedings under Sections 82 and 83 Cr.P.C. have been undertaken against the delinquent, the application under Section 438 Cr.P.C. is not maintainable.

17. Learned counsel for the informant has further stated that in the present case, already the proceedings under Sections 82 and 83 Cr.P.C. are complete on 18.01.2023 and they have also failed in the application filed under Section 482 Cr.P.C. No.3934 of 2023, as such the applicants are not entitled for anticipatory bail.

CONCLUSION:

18. As far as the judgment of Apex Court passed in the case of **Kamlesh (supra)** is concerned, the said case law does not apply to the present case as in the said case, the F.I.R. was challenged in the petition under Section 482 Cr.P.C. as is the practice at Rajasthan High Court, as such even after the petition challenging the

F.I.R. is concerned, the application under Section 438 Cr.P.C. is very much taken up and decided by this Court. Herein, the applicants had challenged the final report (charge-sheet) and failed.

19. As far as the judgment of **Vijay Pal Prajapati (supra)** is concerned, the said judgment also cannot be considered applicable to the present case as it is based on the judgment of the Apex Court passed in **Kamlesh (supra)**. The said judgment also does not carry any force as far as the case of the applicant is concerned and is *per-incuriam*.

20. Learned Senior Counsel for the applicants has also placed reliance on the judgment of **Vinod Kumar Sharma (supra)**, whereby it has been opined that the word 'regular bail' includes the provisions of Section 438 Cr.P.C. The said argument hold good and it is very true that even if the order for regular bail is passed, the anticipatory bail can be taken up, but the said case law also do not apply to the present case as we have to see the case on his own merits and the said judgment of this Court passed in the case of Dr. **Rajni Tripathi (supra)** has been placed on the said judgment of Apex Court passed in the case of **Vinod Kumar Sharma (supra)**. Thus, they do not apply to the present case.

21. The judgment of this Court passed in **Udit Arya (supra)** also does not apply to the present case as in that case of dowry death, the cause of death was chronic illness and she had died in her parental house. Only the order under Section 82 Cr.P.C. was issued that too a few days before filing of the anticipatory bail application. The proceedings were not complete. No case under Section 304-B I.P.C. was made out, as such an exception

was drawn. In the present case, the proclamation under Sections 82 and 83 Cr.P.C. was completed on 18.01.2023 itself and a period of more than six months have passed and herein, the deceased has committed suicide within the precincts of the house of the applicants, as such this case law also does not hold good to the present case and the exception cannot be drawn here. The applicants are named in the FIR.

22. The eminent jurist Benjamin N. Cardozo, a former Judge of Supreme Court of America, in his book '**The Nature of the Judicial Process**', has stated that the precedents cannot be applied in any given dispute without some element of discretion, for which Judges must take responsibility. He says 'most Judges are inclined to say that what was once thought to be the exception is the rule, and what was the rule is the exception now'. The relationship between logic and experience is important in the context of invoking precedents.

23. After hearing learned counsel for the parties and taking into consideration paragraph 43(2), (8) and (10) of the judgment of this Court passed in **Shivam (supra)** and also the facts of the case, I do not find it a fit case to grant anticipatory bail to the applicants.

24. The present anticipatory bail application is hereby found devoid of merits and is accordingly **rejected**.

25. However, it is provided that if the applicants appear before the court below and apply for regular bail, their prayer for bail shall be considered and decided in accordance to law as expeditiously as possible.

(2023) 9 ILRA 10
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.08.2023

BEFORE

THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Criminal Misc. Anticipatory Bail Application U/S
 438 CR.P.C. No. 8564 of 2023

Neeru Kumar Yadav & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:
 Sri Padmaker Pandey

Counsel for the Opposite Parties:
 G.A., Sri Anurag Shukla

A. Criminal Law-Criminal Procedure Code,1973-Section 438 - Indian Penal Code, 1860-Sections 323 & 308- the charge-sheet was filed in the matter and cognizance was taken - Several processes were sent to the accused applicant to procure his appearance before the Court, but since he was absconding, non-bailable warrant was issued against him and subsequently the Court found that he was deliberately avoiding the service of the process and his appearance before the Court- the applicant has utterly failed to show any valid reason for his abscondence and also to put forth any compelling circumstance under which he had been unable to honour and comply with and to submit himself to the process of the Court which resulted into issuance of punitive process against him and for making a declaration against him to bring him under the category of a proclaimed offender-The present applicant, against whom process under Section 82 Cr.P.C. has been issued and who has been declared as a proclaimed offender, is not entitled for the protection by way of anticipatory bail in the light of the law laid

down in Prem Shankar Prasad case .(Para 1 to 13)

B. As regards the implication of proclamation having been issued against the appellant, we have no hesitation in making it clear that any person, who is declared as an "absconder" and remains out of reach of the investigating agency and thereby stands directly at conflict with law, ordinarily, deserves no concession or indulgence. By way of reference, we may observe that in relation to the indulgence of pre-arrest bail in terms of Section 438 CrPC, this Court has repeatedly said that when an accused is absconding and is declared as proclaimed offender, there is no question of giving him the benefit of Section 438 CrPC.(Para 11)

The application is rejected. (E-6)

List of Cases cited:

1. Abhishek Vs St. of Mah. (2022) 8 SCC 282
2. Prem Shankar Prasad Vs St. of Bih. 7 anr. (2021) SCC OnLine SC 955
3. St. of M.P. Vs Pradeep Sharma (2014) 2 SCC 171

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

1. Supplementary affidavit filed today is taken on record.

2. Crl. Misc. Exemption Application No.02 of 2023 is allowed.

3. At the very outset, learned counsel for the applicants submits that he is not pressing the anticipatory bail application in respect of **applicant no.1 Neeru Kumar Yadav**, as he is already under judicial custody. He confines his prayer only to the extent of prayer for granting anticipatory bail to the **applicant no.2 Lallan @**

Pushpendra Singh during the pendency of trial in Case Crime No.530 of 2018 (Case No.3420 of 2018, State of U.P. Vs. Neeru and Others) under Sections 323, 308 IPC, Police Station Dibiyapur, District Auraiya.

4. Heard learned counsel for the applicant, learned A.G.A for the State as well as learned counsel for the informant / opposite party no.2 and perused the record.

5. A NCR was filed under section 323 IPC by the informant of the case against the applicants no.1 and 2 along with two other co-accused persons on 24.1.2018 at 20:10 p.m. alleging therein that an assault was made by them with kicks, fists, lathi and danda upon him on 24.1.2018 at 17:00 p.m. During course of investigation, section 308 IPC was added to the matter. Thereafter, after investigation, charge-sheet was submitted.

6. It is submitted by the learned counsel for the applicant no.2 that the applicant is innocent and has no concern with the present matter. He has been falsely implicated in this matter. Allegations levelled against the applicant are false. Applicant's case is squarely covered under Section 438 Cr.P.C. It is further submitted that the present case is a cross case and a cross F.I.R. was lodged on behalf of the applicant's side as Case Crime No.73 of 2018 under sections 354, 323, 506 IPC and that was lodged prior to the NCR made by the informant side in this matter.

It is further submitted that no specific role of assault has been assigned to the present applicant in the alleged crime. It is further submitted that except one injury caused to the informant / injured as nasal bone fracture, all other injuries are simple in nature. It is further submitted that during

course of investigation the applicant has been cooperative with the investigation of the case. He never received any summon / process by the Court after submission of the charge-sheet and had absolutely no knowledge about the punitive process issued against him by the Court.

It is further submitted that the criminal history of the applicant has been explained by way of supplementary affidavit. On the aforesaid grounds a prayer for grant of anticipatory bail has been made.

7. Per contra, learned A.G.A. as well as learned counsel for the informant / opposite party no.2 vehemently opposed the prayer for anticipatory bail. At the very outset, it has been submitted that process under section 82 Cr.P.C. has already been issued by the court concerned on 16.6.2023 against the applicant no.2 after adopting the required procedure to procure the appearance of the applicant before it.

It is further submitted that the anticipatory bail application moved by the applicant before the Sessions Court was rejected on 14.7.2023 and even on that date the applicant had already been declared as a proclaimed offender by the Court. In support of his contention, reliance has been placed upon the decisions of the Hon'ble Apex Court in **Prem Shankar Prasad Versus State of Bihar and Another, 2021 SCC OnLine Supreme Court 955 and State of Madhya Pradesh vs. Pradeep Sharma, (2014) 2 Supreme Court Cases 171.**

It is further submitted that grievous injuries have been caused to the informant / injured in this case and specific role of assault has been assigned to the present applicant in the statement of the injured himself given to the Investigating

Officer under section 161 Cr.P.C. It is further submitted that the applicant is not cooperating with the trial court at all and in view of the established legal principles for consideration for grant of anticipatory bail, he is not entitled for anticipatory bail in the present matter.

8. A perusal of the record reflects that the charge-sheet in this matter was filed in 2018 and cognizance was taken on 24.8.2018. Several processes were sent to the accused applicant to procure his appearance before the Court, but since he was absconding, non-bailable warrant was issued against him on 28.10.2022 and subsequently the Court found that he was deliberately avoiding the service of the process and his appearance before the Court. An order was passed to issue process under section 82 Cr.P.C. by the Court on 16.6.2023 against the applicant. The anticipatory bail application of the present applicant was rejected by the Sessions Court on 14.7.2023. It is explicitly clear that when such application was being heard by the Sessions Court, Auraiya, the accused applicant had already been declared 'a proclaimed offender'.

9. The present applicant, against whom process under Section 82 Cr.P.C. has been issued and who has been declared as a proclaimed offender, is not entitled for the protection by way of anticipatory bail in the light of the law laid down in Prem Shankar Prasad case (supra) and State of Madhya Pradesh vs. Pradeep Sharma (supra).

10. Further more, the applicant has utterly failed to show any valid reason for his abscondence and also to put forth any compelling circumstance under which he had been unable to honour and comply with and to submit himself to the process of the

Court which resulted into issuance of punitive process against him and for making a declaration against him to bring him under the category of a proclaimed offender. Since no such exceptional ground exists in favour of the applicant, he, without adhering himself to the legal process issued by the Court, is bereft of protection provided by the statute by way of anticipatory bail.

11. Recently, the Hon'ble Apex Court in **Abhishek Vs. State of Maharashtra, (2022) 8 SCC 282** has reiterated the legal dictum in respect of grant of anticipatory bail to an absconder and held as hereunder :

"68. As regards the implication of proclamation having been issued against the appellant, we have no hesitation in making it clear that any person, who is declared as an "absconder" and remains out of reach of the investigating agency and thereby stands directly at conflict with law, ordinarily, deserves no concession or indulgence. By way of reference, we may observe that in relation to the indulgence of pre-arrest bail in terms of Section 438 CrPC, this Court has repeatedly said that when an accused is absconding and is declared as proclaimed offender, there is no question of giving him the benefit of Section 438 CrPC." (Prem Shankar Prasad case (supra) referred to.)

12. In view of the established law laid down by the Hon'ble Apex Court, I deem it not a fit case for grant of anticipatory bail to the present applicant. Such a person, who does not cooperate with the investigation / trial at all and has been a willful defaulter, is not entitled for any relief from this Court by way of granting anticipatory bail.

13. Accordingly, and in view of the above, this anticipatory bail application is **rejected**.

(2023) 9 ILRA 13
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.08.2023

BEFORE

THE HON'BLE NALIN KUMAR SRIVASTAVA, J.

Criminal Misc. Anticipatory Bail Application U/S
438 of CR.P.C. No. 9261 of 2023

Kaushal Anand **...Applicant**
Versus
State of U.P. & Anr. **...Opposite Parties**

Counsel for the Applicant:

Anshu Singh, Sri Hemendra Pratap Singh

Counsel for the Opposite Parties:

G.A., Sri Jitendra Pal Singh Jadaun, Seema Singh Jadaun

A. Criminal Law-Criminal Procedure Code,1973-Section 438 - Indian Penal Code,1860-Sections 323, 328, 376 & 506-complainant had willingly been stayed with the appellant and continued with the relationship and since the relationship was not working out, it was held that it was no ground to lodge an F.I.R. for the offence under Section 376 (2) (n) IPC, but the elements of seducement, concealment of marital status with ulterior motive on the part of the accused and commission of rape upon the victim by adopting deceitful means present in the case in hand- As a married person having his wife and two children, the applicant was never in a position to marry with the prosecutrix, but the concealment of his marital status from the victim of the case and making physical relations with her is a discernible fact that since the very inception, he never intended to marry with the prosecutrix and with malafide motives he was only fulfilling his lust-not only in her statement

under Section 161 Cr.P.C., but in the statement under Section 164 Cr.P.C. as well the prosecutrix, who is said to be a model, has avowed consistently the whole story and sequence of incidents in respect of the commission of the crime alleged against the applicant and has narrated how rape was committed to her by the applicant after administering some intoxicant in the cold drink to her and pretending himself to be a bachelor- if it is established and proved that from the inception the accused who gave the promise to the prosecutrix to marry, did not have any intention to marry and the prosecutrix gave the consent for sexual intercourse on such an assurance by the accused that he would marry her, such a consent can be said to be a consent obtained on a misconception of fact as per Section 90 of the IPC and, in such a case, such a consent would not excuse the offender and such an offender can be said to have committed the rape as defined under Sections 375 of the IPC and can be convicted for the offence under Section 376 of the IPC.(Para 1 to 22)

B. To summarise the legal position that emerges from the above cases, the "consent" of a woman with respect to Section 375 must involve an active and reasoned deliberation towards the proposed act. To establish whether the "consent" was vitiated by a "misconception of fact" arising out of a promise to marry, two propositions must be established. The promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given. The false promise itself must be of immediate relevance, or bear a direct nexus to the woman's decision to engage in the sexual act. (Para 11)

C. The relief of Anticipatory Bail is aimed at safeguarding individual rights. While it serves as a crucial tool to prevent the misuse of the power of arrest and protects innocent individuals from harassment, it also presents challenges in maintaining a delicate balance between individual rights

and the interests of justice. The tight rope we must walk lies in striking a balance between safeguarding individual rights and protecting public interest. While the right to liberty and presumption of innocence are vital, the court must also consider the gravity of the offence, the impact on society, and the need for a fair and free investigation. The court's discretion in weighing these interests in the facts and circumstances of each individual case becomes crucial to ensure a just outcome. (Para 20)

The application is rejected. (E-6)

List of Cases cited:

1. Pratibha Manchanda & anr. Vs St. of Har. & anr. (2023) SCC OnLine SC 785
2. Sushila Aggarwal & ors. Vs St. (NCT of Delhi) & anr. (2020) 5 SCC 1
3. Mr. X Vs St. of Mah. & anr. (2023) 124 ACC 673
4. Naim Ahamed Vs St. (NCT of Delhi) (2023) LiveLaw SC 66 CRLA No.257 of 2023, SLP (Crl.) No.8586 of 2017
5. Yedla Srinivasa Rao Vs St. of A.P. (2006) 11 SCC 615 : (AIR Online 2006 SC 40, para 13)
6. Deepak Gulati Vs St. of Har. (2013) 7 SCC 675 : (AIR 2013 SC 2071)
7. Pramod Suryabhan Pawar Vs St. of Mah. & anr. (2019) AIR SC 4010

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

1. Counter affidavit filed on behalf of the informant / opposite party no.2 is taken on record.

2. Apprehending his arrest in Case Crime No.568 of 2023, under Sections 323, 328, 376, 506 IPC, Police Station Quarsi, District Aligarh, the present anticipatory

bail application has been moved on behalf of the applicant **Kaushal Anand** seeking anticipatory bail.

3. Heard learned counsel for the applicant, learned A.G.A. for the State as well as learned counsel for the informant / opposite party no.2 and perused the record.

4. Prosecution story as unfolded in the F.I.R. is that the applicant developed family relations with the prosecutrix and after administering some intoxicant in the cold drink, he committed rape with her on 19/20.4.2022 and subsequently on so many occasions the prosecutrix was physically exploited by the applicant. Concealing his marital status, the applicant used to insist the prosecutrix to get married with him and during the sequence of events, he also assaulted the prosecutrix as a result whereof she sustained injuries and the applicant also procured some obscene photos and videos relating to the prosecutrix and used it as a tool to blackmail her. An F.I.R. was lodged on 23.6.2023 and investigation started, which is going on.

5. It has been submitted by the learned counsel for the applicant that applicant is innocent and he has apprehension of his arrest in the above-mentioned case, whereas there is no credible evidence against him. Allegations levelled against the applicant are false. He has been falsely implicated in this case. It is further submitted that the F.I.R. of this case has been lodged very belatedly without any plausible explanation of delay.

It is further submitted that it is a case of consensual relationship where the major prosecutrix with her own will and consent made physical relations with the

applicant and a huge monetary help was also offered by the applicant to her. It is further submitted that they have been in sweet and close relations with each other and only to grab the money from the applicant, F.I.R. has been lodged on the basis of false and fabricated facts.

It is further submitted that the anticipatory bail application was moved before the Sessions Court by the applicant on 27.6.2023, which was rejected by the Court on 18.7.2023, but in the meanwhile, during the interregnum period, a process under section 82 Cr.P.C. was also issued against the applicant under the instructions of the Court on 11.7.2023 and the applicant, as such, was not a willful defaulter.

It is further submitted that a twisted story has been averred by the prosecutrix in her statement under section 164 Cr.P.C. It is also submitted that on the alleged dates of rape and physical exploitation, the applicant and prosecutrix were staying happily together and relevant photographs have been annexed with the affidavit. It is also submitted that the medical report of the prosecutrix is a suspicious piece of evidence and she has refused for her internal examination by the doctor.

It is further submitted that as a matter of fact, opposite party no.2 herself has played fraud with the Government and an F.I.R. was lodged against her as case crime no.362 of 2021 under sections 177, 420 IPC by the District Program Coordinator, District T.B. Disease Centre, Aligarh. It is further submitted that during the course of investigation, an application along with affidavit was given to S.S.P., Aligarh by one Priyanka Chauhan, who is said to be the friend of the prosecutrix, wherein she has narrated the factum of a friendly live-in relationship between the

applicant and the prosecutrix herself. It is further submitted that the criminal history of the applicant has been duly explained and as such he is entitled for anticipatory bail. In support of his submissions, reliance has been placed upon the decision of the Hon'ble Apex Court in **Ansaar Mohammad Vs. The State of Rajasthan and Anr., 2022 LiveLaw (SC) 599**, by the applicant.

6. Per contra, learned A.G.A. as well as learned counsel for the informant / opposite party no.2 opposed the prayer for anticipatory bail and it has been submitted that by concealing his marital status, the accused applicant started making physical relations with the prosecutrix, which shows his fraudulent intention towards the victim of the case. Being a family person, he could not legally marry with the prosecutrix, but concealing the material facts, the accused applicant made an insistence upon the prosecutrix to marry with him and developed physical relations and committed rape upon her after administering some intoxicant to her.

It is further submitted that since the very inception of the relationship the accused applicant had never any intention to marry with the prosecutrix. It cannot be termed as a case of consensual physical relationship between two major persons of opposite sex. It is further submitted that on few occasions, the applicant transferred some money in the bank account of the prosecutrix to show a different colour of his relationship with her, but as soon as this fact came to the knowledge of the prosecutrix, she immediately transferred the same amount in the bank account of the applicant and statement of account in this respect has been annexed with the counter affidavit filed by the opposite party no.2 herself.

It is also submitted that as the applicant has been a willful defaulter and a process under section 82 Cr.P.C. was issued against him under the instructions of the Court, an F.I.R. under section 174-A IPC was also lodged against the applicant by reason of his abscondence. It is further submitted that after rejection of the anticipatory bail application by the Sessions Court, Aligarh, the prosecutrix was threatened by the applicant and he also made some obscene photographs relating to the prosecutrix viral on social media and an F.I.R. as case crime no.719 of 2023 under section 507 IPC and section 67 of Information Technology Act was also lodged against him on 23.7.2023.

It is also submitted that when the prosecutrix was bitterly beaten by the applicant, she was medically examined and injuries were found over her body. It is further submitted that the proceedings in pursuance to the F.I.R. dated 3.4.2021 lodged against the opposite party no.2 are stayed by the Hon'ble Apex Court in S.L.P. No.7636 of 2021 vide order dated 8.10.2021. It is further submitted that the offence is very heinous in nature and on the basis of the evidence collected during the course of investigation so far, active role in the commission of the offence on the part of the applicant is established and he is not entitled for anticipatory bail.

7. It is in the backdrop of the aforesaid factual scenario and the consideration of the rival submissions made by both the sides, the present matter has to be looked into.

8. The statement made by the victim under Section 164 Cr.P.C. recorded before a Magistrate on a sexual offence undoubtedly stands on a different footing than that of recorded under Section 161 Cr.P.C. by the

Investigating Officer of the case. The sanctity of the statement recorded under Section 164 Cr.P.C. has been emphasized by a coordinate Bench of this Court in **Dharmendra @ Patra Vs. State of U.P. (Order dated 1.10.2021 passed in Criminal Misc. Bail Application No. - 31695 of 2021)** by holding as follows :

"11. The statement made by the prosecutrix/victim under Section 164 of the Code before the Magistrate stands on a high pedestal and sanctity during the course of investigation than that of her statement recorded under section 161 of the Code by the Investigating Officer."

9. In the light of the aforesaid observation, it is found that in the case in hand, not only in her statement under Section 161 Cr.P.C., but in the statement under Section 164 Cr.P.C. as well the prosecutrix, who is said to be a model, has avowed consistently the whole story and sequence of incidents in respect of the commission of the crime alleged against the applicant and has narrated how rape was committed to her by the applicant after administering some intoxicant in the cold drink to her and pretending himself to be a bachelor he, subsequently on many occasions, physically and mentally exploited her and also made an assault upon her and his marital status subsequently came to the knowledge of the prosecutrix. As a married person having his wife and two children, the applicant was never in a position to marry with the prosecutrix, but the concealment of his marital status from the victim of the case and making physical relations with her is a discernible fact that since the very inception, he never intended to marry with the prosecutrix and with mala fide motives he was only fulfilling his lust.

10. The Hon'ble Supreme Court in **Dr. Dhruvaram Murlidhar Sonar Vs. The State of Maharashtra & Ors., 2019 0 AIR (SC) 327** had an occasion to deal with the subject under consideration and it was held:

"20. Thus, there is a clear distinction between rape and consensual sex. The court, in such cases, must very carefully examine whether the complainant had actually wanted to marry the victim or had mala fide motives and had made a false promise to this effect only to satisfy his lust, as the later falls within the ambit of cheating or deception. There is also a distinction between mere breach of a promise and not fulfilling a false promise. If the accused has not made the promise with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act would not amount to rape. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused and not solely on account of the misconception created by accused, or where an accused, on account of circumstances which he could not have foreseen or which were beyond his control, was unable to marry her despite having every intention to do. Such cases must be treated differently. If the complainant had any mala fide intention and if he had clandestine motives, it is a clear case of rape. The acknowledged consensual physical relationship between the parties would not constitute an offence under Section 376 of the IPC."

11. The same view was reiterated by the Hon'ble Supreme Court in **Pramod Suryabhan Pawar Vs. State of Maharashtra and Anr., AIR 2019 Supreme Court 4010** wherein the legal dictum on the subject was affirmed by holding that :

"14. In the present case, the "misconception of fact" alleged by the complainant is the appellant's promise to marry her. Specifically in the context of a promise to marry, this Court has observed that there is a distinction between a false promise given on the understanding by the maker that it will be broken, and the breach of a promise which is made in good faith but subsequently not fulfilled. In *Anurag Soni v State of Chhattisgarh*, (2019) SCC OnLine SC 509 : (AIR 2019 SC 1857) this Court held:

"37. The sum and substance of the aforesaid decisions would be that if it is established and proved that from the inception the accused who gave the promise to the prosecutrix to marry, did not have any intention to marry and the prosecutrix gave the consent for sexual intercourse on such an assurance by the accused that he would marry her, such a consent can be said to be a consent obtained on a misconception of fact as per Section 90 of the IPC and, in such a case, such a consent would not excuse the offender and such an offender can be said to have committed the rape as defined under Sections 375 of the IPC and can be convicted for the offence under Section 376 of the IPC."

Similar observations were made by this Court in *Deepak Gulati v State of Haryana*, (2013) 7 SCC 675 : (AIR 2013 SC 2071) :

"21. ... There is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the court must examine whether there was made, at an early stage a false promise of marriage by the accused..."

15. In *Yedla Srinivasa Rao v State of Andhra Pradesh*, (2006) 11 SCC 615 : (AIR Online 2006 SC 40, para 13), the accused forcibly established sexual

relations with the complainant. When she asked the accused why he had spoiled her life, he promised to marry her. On this premise, the accused repeatedly had sexual intercourse with the complainant. When the complainant became pregnant, the accused refused to marry her. When the matter was brought to the panchayat, the accused admitted to having had sexual intercourse with the complainant but subsequently absconded. Given this factual background, the court observed:

"10. It appears that the intention of the accused as per the testimony of PW 1 was, right from the beginning, not honest and he kept on promising that he will marry her, till she became pregnant. This kind of consent obtained by the accused cannot be said to be any consent because she was under a misconception of fact that the accused intends to marry her; therefore, she had submitted to sexual intercourse with him. This fact is also admitted by the accused that he had committed sexual intercourse which is apparent from the testimony of PWs 1, 2 and 3 and before the panchayat of elders of the village. It is more than clear that the accused made a false promise that he would marry her. Therefore, the intention of the accused right from the beginning was not bona fide and the poor girl submitted to the lust of the accused, completely being misled by the accused who held out the promise for marriage. This kind of consent taken by the accused with clear intention not to fulfil the promise and persuading the girl to believe that he is going to marry her and obtained her consent for the sexual intercourse under total misconception, cannot be treated to be a consent...."

The Hon'ble Apex Court further held that -

"18. To summarise the legal position that emerges from the above cases,

the "consent" of a woman with respect to Section 375 must involve an active and reasoned deliberation towards the proposed act. To establish whether the "consent" was vitiated by a "misconception of fact" arising out of a promise to marry, two propositions must be established. The promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given. The false promise itself must be of immediate relevance, or bear a direct nexus to the woman's decision to engage in the sexual act."

12. The same principle of law was reiterated recently by the Hon'ble Supreme Court in **Naim Ahamed v State (NCT of Delhi), 2023 LiveLaw (SC) 66 (Criminal Appeal No.257 of 2023 arising out of SLP (Crl.) No.8586 of 2017 dated 30.1.2023.**

13. In almost similar matter wherein the prosecutrix, who happened to be a model by profession, was suppressed by the masculine power of the accused forcefully and rape was committed to her and she was also assaulted under the threatening to make a compromise with the accused to get success in the modelling profession, the Hon'ble Apex Court in a recent judgment passed in **Mr. X versus State of Maharashtra and another, 2023 (124) ACC 673**, quashed and set-aside the orders granting anticipatory bail to the accused under Sections 354, 354-B, 376, 506 IPC.

14. The legal dictum enumerated in the aforesaid decisions of the Hon'ble Supreme Court squarely applies in the facts and circumstances of the case in hand, which negates the prayer of the present accused applicant for grant of anticipatory bail to him.

15. Reliance has been placed upon Ansaar Mohammad (supra) case on behalf of the applicant, but the facts of the aforesaid case differ from the present one, as the aforesaid case was relating to a relationship between two major persons of opposite sex and it was held that the complainant had willingly been stayed with the appellant and continued with the relationship and since the relationship was not working out, it was held that it was no ground to lodge an F.I.R. for the offence under Section 376 (2) (n) IPC, but the elements of seducement, concealment of marital status with ulterior motive on the part of the accused and commission of rape upon the victim by adopting deceitful means present in the case in hand, were missing in the case above-mentioned. Hence, the ratio of law enumerated in Ansaar Mohammad (supra) is deducible from the application of law applicable to the peculiar facts and circumstances of the present case.

16. The issuance of process under Section 82 Cr.P.C. resulting into lodging of the F.I.R. under Section 174-A IPC against the present applicant on account of his abscondence is another factum which the learned A.G.A. has made a ground of assailment to the present anticipatory bail application.

17. Contending to that, counsel for the applicant has made a specific but however, oral submission that anticipatory bail was moved by the applicant before the Court of Session on 27.6.2023, which was rejected by the Sessions Court on 18.7.2023, but during the pendency of the said anticipatory bail application, a process under Section 82 Cr.P.C. was issued against him on 11.7.2023, which was certainly against the provisions of law and the

scheme of personal liberty guaranteed to him by the Constitution as well and lodging of an F.I.R. under Section 174-A IPC in furtherance of the punitive action taken against the applicant was also a glaring example of misuse of power by the investigating agency which was fully aware of the fact of pendency of anticipatory bail application before the Court of law.

18. Further, it was submitted that in view of pending application for grant of anticipatory bail, it was not justified for the court concerned to pass an order to issue a process under Section 82 Cr.P.C. against the applicant, but in my view even on this ground if this Court considers the anticipatory bail application moved by the applicant, the merits of this case restrict this Court to lean its discretion in favour of the applicant and to grant anticipatory bail to him.

19. In **Sushila Aggarwal and others vs. State (NCT of Delhi) and another, (2020) 5 SCC 1**, the Hon'ble Apex Court has held that while considering an application for grant of anticipatory bail, the court has to consider the nature of the offence, the role of the person, the likelihood of his influencing the course of investigation, or tampering with evidence including intimidating witnesses, likelihood of fleeing justice, such as leaving the country, etc. It has further been held that Courts ought to be generally guided by considerations such as the nature and gravity of the offences, the role attributed to the applicant, and the facts of the case, while considering whether to grant anticipatory bail, or refuse it. Whether to grant or not is a matter of discretion.

20. Adverting to the peculiar facts and circumstances of this case, the Court finds

that offences of such nature cannot be confined to affect the life and dignity of the prosecutrix of this very case only, but in such type of cases, a larger public interest is always involved. Highlighting the need to analyze the matters of such type in this perspective, the Hon'ble Apex Court in **Pratibha Manchanda & Anr. Vs. State of Haryana & Anr., 2023 SCC OnLine SC 785** expressly held as under :

"19. The relief of Anticipatory Bail is aimed at safeguarding individual rights. While it serves as a crucial tool to prevent the misuse of the power of arrest and protects innocent individuals from harassment, it also presents challenges in maintaining a delicate balance between individual rights and the interests of justice. The tight rope we must walk lies in striking a balance between safeguarding individual rights and protecting public interest. While the right to liberty and presumption of innocence are vital, the court must also consider the gravity of the offence, the impact on society, and the need for a fair and free investigation. The court's discretion in weighing these interests in the facts and circumstances of each individual case becomes crucial to ensure a just outcome."

21. Hence, considering the settled principles of law regarding anticipatory bail, submissions of the learned counsel for the parties, nature of accusation, role of applicant and all attending facts and circumstances of the case, without expressing any opinion of the merits of the case, in my view, it is not a fit case for anticipatory bail to the applicant.

22. The anticipatory bail application is **rejected**.

(2023) 9 ILRA 21
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.09.2023

BEFORE

THE HON'BLE BRIJ RAJ SINGH, J.

Criminal Misc. Bail Application No. 9465 of 2023

Mahesh Kumar Yadav **...Applicant**
Versus
State of U.P. **...Opposite Party**

Counsel for the Applicant:
Ashish Kumar Maurya, Vikas Vikram Singh

Counsel for the Opposite Party:
G.A.

A. Criminal Law-Criminal Procedure Code,1973-Section 439 - Indian Penal Code,1860-Sections 498-A & 304-B -3/4 D.P. Act- the deceased was suffering from schizophrenia bipolar disorder and she committed suicide-the applicant himself got treated his wife continuously for one year which is evident from the medical papers- general allegation of dowry demand is levelled and there was no prior information of any harassment and dowry demand- the case of the applicant is supported by the medical jurisprudence of Modi and the deceased was suffering from bipolar disorder that is why she committed suicide-prior to present case, no FIR was ever lodged by the complainant or the deceased against the applicant or in-laws and after 3 years and 11 months when this incident occurred, the allegation of dowry demand has been levelled against the applicant and his family members-The applicant has no previous criminal history-Therefore, the applicant is entitled to be released on bail on the ground of parity.(Para 1 to 8)

The application is allowed. (E-6)

List of Cases cited:

Mariano Anto Burno & anr. Vs Insp. of Police
(2022) SCC Online SC 1387

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

1. Supplementary affidavit filed on behalf of the applicant, is taken on record.

2. Heard Vikas Vikram Singh, learned counsel for the applicant and Sri Rajesh Kumar Singh learned A.G.A.-I for the State.

3. The present bail application has been filed by the applicant with a prayer to enlarge him on bail in Case Crime No.180 of 2023 under Sections 498-A, 304-B IPC and 3/4 Dowry Prohibition Act, Police Station Bhadokhar District Raebareli

4. It has been submitted by learned counsel for the applicant that the deceased was missing alongwith her one year and half month of child on 18.04.2023.The dead body of child was recovered on 19.04.2023 and dead body of the deceased was recovered on 20.04.2023 from Sharda Canal. FIR was lodged by the father of the deceased mentioning therein that his daughter (deceased) was married with the applicant on 23.05.2019. The applicant and his family members used to harass his daughter and they were demanding additional dowry. The allegation levelled in the FIR is to the effect that the complainant was asked by the applicant to register the agricultural land in his favour because the complainant had no male issue. Learned counsel for the applicant has submitted that the deceased was suffering from schizophrenia and schizoaffective disorder-bipolar deceased. He has invited attention of this Court towards Annexure no.6 to the affidavit filed in support of the bail application which is the papers of All India

Institute of Medical Science Raebareli. It has been submitted by learned counsel for the applicant that the deceased was further treated by private doctor Sri G.S. Verma, Verma, Neuro Psychiatric Centre, Raebareli . The medical papers are annexed as Annexure no.7 to the affidavit filed in support of the bail application. Thereafter the deceased was treated by Dr. R.K. Thukral in Lucknow. The diagnosis has been mentioned by the doctor that the deceased is suffering from "*Schizophrenia (simple type with paranoid features)*3 with *Co-existing mixed Anxiety Depressive Symptoms with Decline in Social, Cognitive & Occupational Performance with... Schizoaffective disorder-bipolar type with H/o few Episodes in the past*" The medical papers dated 01.04.2023 are annexed as annexure no.8 to the affidavit filed in support of the bail application. The necessary pleadings have been made by the applicant in the affidavit from paragraph 14 to 18 regarding medical treatment done to the deceased. In reply to the said paragraphs no.14-18, it has been stated by the State in the counter affidavit that for three years just after marriage, no medical papers have been shown by the applicant rather the treatment has been done between the years 2022-2023 but the medical papers and medical treatment of the deceased have not been denied by the State.

5. Learned counsel for the applicant has relied upon the paragraph nos. 34, 37 and 38 of the judgment passed in Hon'ble Supreme Court in the case **Mariano Anto Burno and another Vs. Inspector of Police** reported in 2022 SCC Online SC 1387 where the Apex Court has observed that with respect to bipolar disorder with which the deceased was suffering, it refers to a disorder associated with episodes of mood swings ranging from depressive lows to

manic highs. Learned counsel for the applicant has submitted that a person suffering from bipolar disorder becomes sad hopeless or irritable most of the time. Learned counsel for the applicant has submitted that general allegation of dowry demand is attributed and the deceased committed suicide by drowning herself alongwith infant child of one and half year. It cannot be said that the applicant would drown his own daughter alongwith deceased which is quite unnatural. He also relied upon para -3 under Chapter XXXIII of Modi's Medical Jurisprudence and Toxicology and has submitted that the case of the applicant is supported by the medical jurisprudence of Modi and the deceased was suffering from bipolar disorder that is why she committed suicide. Learned counsel for the applicant has mentioned in paras nos. 3 and 4 of the supplementary affidavit that prior to present case, no FIR was ever lodged by the complainant or the deceased against the applicant or in-laws and after 3 years and 11 months when this incident occurred, the allegation of dowry demand has been levelled against the applicant and his family members. The applicant has no previous criminal history and there is no possibility of fleeing away from the judicial process or tempering with the witnesses and in case, the applicant is enlarged on bail, he shall not misuse the liberty of bail. The applicant is in jail since 15.05.2023.

6. On the other hand, Sri Rajesh Kumar Singh, learned A.G.A.-I has opposed the prayer for bail and has submitted that it is case of dowry death. The statement of the complainant-father of the deceased has also been recorded under section 161 Cr.P.C. in which he has mentioned that applicant used to ask him to register the land in his favour because he has no male issue and on this pressure his daughter

was suffering from bipolar disorder that is why she committed suicide. He also submitted that the allegation of dowry demand is levelled and the marriage has taken prior to four years therefore, section 304-B and 113 of the Evidence Act is attracted and the applicant is not entitled for bail.

7. Without expressing any opinion on the merits of the case and after hearing learned counsel for the parties and looking into overall facts and circumstances of the case as well as the argument that the deceased was suffering from schizophrenia bipolar disorder and she committed suicide, the argument that the applicant himself got treated his wife continuously for one year which is evident from the medical papers annexed in the affidavit filed in support of the bail application, the argument that general allegation of dowry demand is levelled and there was no prior information of any harassment and dowry demand, therefore, I am of the opinion that the applicant is entitled to be released on bail on the ground of parity.

8. Let the applicant, namely, **Mahesh Kumar Yadav**, be released on bail in the above case crime number on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of Court concerned with the following conditions :-

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

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

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

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

It is made clear that the observations made in this order are limited to the purpose of determination of this bail application and will in no way be construed as an expression on the merits of the case. The Trial Court shall be absolutely free to arrive at its independent conclusions on the basis of evidence led unaffected by anything in this order.

(2023) 9 ILRA 23
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 06.09.2023

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Appeal No. 877 of 2023

Jose Papachen & Anr. ...Appellants
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Appellants:
Vishva Nath Pratap Singh

Counsel for the Respondents:
G.A.

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

Criminal Law - Criminal Procedure Code, 1973 - Sections 82, 161, 309, 313 & 437(3) - Indian Penal Code, 1860 - Sections 174-A & 229-A - Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Sections 3(1)(dha) & 14-A(2) - U.P. Prohibition of Unlawful Conversion of Religion Act, 2021 - Sections 3, 4 & 5(1) - Constitution of India, 1950 - Article 21- Appeal - against the rejection of Bail Application by the Special Judge S.C./S.T. Act - FIR - Bail Application - St. opposed the bail application - arguing that the appellants were actively involved in mass religious conversions through illicit means - **Appeal** - the appellants argued that they are innocent and have been falsely implicated due to political rivalry - and the complainant is not competent to lodge the F.I.R. since he is neither the aggrieved person, nor his/her parents, brother, sister or any other person, who is related to him/her by blood, marriage or adoption is aggrieved person as provided under Section 4 of Act, 2021 - **Court finds that**, there was no material evidence to show that the appellants used undue influence or allurement for mass conversion - the court also observed that the F.I.R. was not lodged by a competent person as required under Section 4 of the Act, 2021 - consequently, the court concluded that the appellants are not involved in the alleged activities and have been falsely implicated - thus, appeal is allowed and the impugned order is reversed and set-aside - let the appellants are to be enlarged on bail under the conditions specified in the judgment - further, direction issued to trial court to expedite the trial within a period of one year by following the provisions of section 309 of Cr.P.C. (Para - 16, 17, 18, 19, 21)

Appeal Allowed. (E-11)

List of Cases cited:

Dataram Singh Vs St. of U.P. & anr., reported in (2018) 3 SCC 22

1. This Court vide order dated 24.08.2023 had passed the following order:

"1.The case is being taken up in the revised call.

2. Learned A.G.A. has already filed the counter affidavit. In reply thereto learned counsel for the appellant has filed the rejoinder affidavit. The same are available on record.

3. Vide order dated 31.07.2023 this Court had passed the following order:

"Learned A.G.A. has filed counter affidavit today in Court. The same is taken on record.

Learned counsel for the appellants prays for and is allowed ten days' time to file rejoinder affidavit.

As per Office Report dated 28.07.2023, notice has already been served upon opposite party no.2 but neither any counter affidavit has been filed till date nor any counsel is present to represent the opposite party no.2.

As a last opportunity, ten days' time is granted to the opposite party no.2 for filing counter affidavit.

Two days, thereafter, is allowed to the learned counsel for the appellants to file rejoinder affidavit.

Put up this case on 24.08.2023. "

4. Today, when the case is taken up, neither any counsel has appeared on behalf of opposite party No. 2 nor counter affidavit has been filed on her behalf. It appears that the opposite party No.2 is interested to contest the case.

5. In the above circumstances, as the matter pertains to bail, this Court has no option but to proceed for final arguments to decide the present appeal.

6. Heard Sri Vishva Nath Pratap Singh, learned counsel for the appellants

and Ms. Shikha Sinha, learned A.G.A. for the State.

7. Judgement reserved.”

2. The present criminal appeal under Section 14-A (2) Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act has been preferred against the impugned order dated 03.03.2023 passed by court of learned Special Judge S.C./S.T. Act, Ambedkar Nagar, in Bail Application No. 178/2023 (Jose Papachen and another Vs. State of U.P.), arising out of Case Crime No. 0031/2023, under Section 3 and 5 (1) of Uttar Pradesh Prohibition of Conversion of Religion Act, 2021 (here-in-after referred to as “Act 2021”) and Section 3 (1) (Dha) SC/ST Act, Police Station Jalalpur, District Ambedkar Nagar, whereby the bail application of the appellant has been rejected.

3. Learned counsel for the appellants submits that on 24.01.2023 an F.I.R. was lodged under Section 3 and 5 (1) of Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act, 2021(herein after called as the Act, 2021) and Section 3(1) (dha) of Schedule Caste and Schedule Tribe (Prevention of Atrocities) Act, 1989 (Amendment 2015) against the appellants at Police Station Jalalpur bearing F.I.R. No. 0031 by the complainant, who is Zila Manti of Bhartiya Janta Party Ambedkar Nagar, alleging therein that the appellants are engaged for conversion of religion by various allurement amongst the communities of Scheduled Caste and Scheduled Tribe since three months. Consequently, the members of Scheduled Caste and Scheduled Tribe are annoyed with the activities of conversion of Religion by the appellants.

4. Learned counsel for the appellants further submits that the appellants are

innocent and has been falsely implicated in the present case due to political rivalry. The appellants are not involved in any such type of activities, as alleged in the F.I.R. and the F.I.R. has been lodged only to defame the image of the appellants and their entire family in the society.

5. Learned counsel for the applicant has placed emphasis on Section 3 of the Act, 2021 which provides prohibition of conversion from one religion to another religion by misrepresentation, force, fraud, undue influence, coercion and allurement, clearly specifying that conversion on the aforesaid grounds from one religion to another religion is prohibited. False allegations regarding allurement and undue influence for the purposes of mass conversion have been made. It has also been alleged that free treatment was being provided to patients in the hospital which can not be said to be a temptation for purposes of mass conversion.

6. Learned counsel for the applicant has also placed emphasis on Section 4 of the Act, 2021 which is being quoted here-in-below:

“4. Person competent to lodge First Information Report-Any aggrieved person, his/her parents, brother, sister, or any other person who is related to him/her by blood, marriage or adoption may lodge a First Information Report of such conversion which contravenes the provisions of Section 3.”

7. Learned counsel for the appellants further submits that the embargo under Section 4 as to who can lodge an F.I.R. regarding an offence under Section 3 of the Act, 2021 is absolute. The complainant is neither the aggrieved person, nor his/her

parents, brother, sister or any other person, who is related to him/her by blood, marriage or adoption is aggrieved person as provided under Section 4 of the Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act, 2021. Complainant just being the Zila Mantri of ruling party has lodged the instant first information report for gaining his political goodwill amongst the members of society, although he is not competent to lodge the present FIR as per the provisions of Section 4 of the Act 2021.

8. Learned counsel for the appellants further submits that the appellants are not involved in activity of attempt to convert, either directly or otherwise, any other person from one religion to another by use or practice of misrepresentation, force, undue influence, coercion, allurement or by any fraudulent means and they have been falsely implicated in the present case and the complainant has no locus to lodge the present F.I.R. as provided under Section 4 of the Act, 2021.

9. Learned counsel for the appellants further relied on the statements of villagers recorded under Section 161 Cr.P.C. and submits that villagers have stated in their statements that the appellants used to give them good teachings and even distribute Holy Bible books to them and even encourage them to get their children educated and it was further stated by the villagers that appellants used to organize assembly of villagers and used to perform “Bhandara” and they also implant amongst the children the knowledge to live peacefully. They even instructed the villagers not to enter into altercation and also not to take liquor.

10. Learned counsel for the applicant emphasized upon the definition of "allurement". He submits that providing good teachings, distributing Holy Bible books, encouraging children to get education, organizing assembly of villagers and performing “Bhandara” and instructing the villagers not to enter into altercation and also not to take liquor do not amount to allurement, rather it would be a failure on the part of the State to provide basic facilities to individuals in need of the same.

11. Learned counsel for the appellant further submits that accused/appellant is languishing in jail since 24.01.2023, who has no previous criminal history, and in case the appellant is enlarged on bail, he shall not misuse the liberty of bail and he shall also fully cooperate with the trial. He has further submitted that there is no possibility of the appellant to intimidate or pressurize the witnesses or any other persons acquainted with the facts of the present case.

12. For the aforesaid reasons, learned counsel for the appellants submits that the instant criminal appeal deserves to be allowed and the order dated 03.03.2023 passed by court of learned Special Judge S.C./S.T. Act, Ambedkar Nagar, in Bail Application No. 178/2023 (Jose Papachen and another Vs. State of U.P.), arising out of Case Crime No. 0031/2023, under Section 3 and 5 (1) of Uttar Pradesh Prohibition of Conversion of Religion Act, 2021 and Section 3 (1) (Dha) SC/ST Act, Police Station Jalalpur, District Ambedkar Nagar, deserves to be set aside and consequently, the accused/appellants deserve to be enlarged on bail during pendency of the trial.

13. Several other submissions in order to demonstrate the falsity of the allegations made against the appellant have also been placed forth before the Court. The circumstances which, according to the counsel, led to the false implication of the accused have also been touched upon at length. It has been assured on behalf of the appellant that he is ready to cooperate with the process of law and shall faithfully make himself available before the court whenever required and is also ready to accept all the conditions which the Court may deem fit to impose upon him. It has also been pointed out that the accused is not having any criminal history and he is in jail since 24.01.2023 and that in the wake of heavy pendency of cases in the Court, there is no likelihood of any early conclusion of trial.

14. Per contra, learned A.G.A. has vehemently opposed the prayer by submitting that there is active participation of accused/appellant in the crime. He states that the present case concerns mass religious conversions within the State of Uttar Pradesh from Hindu religion to Christianity through illicit means. The appellants are allegedly using psychological pressure for forceful conversions, as part of their plan to set up an Christianity state. Learned AGA further submits that appellants use to allure people by undue influence just to convert people from other religions to Christianity to carry out mass conversions. Therefore, the accused/ appellant is not entitled to be enlarged on bail and the instant criminal appeal deserves to be dismissed. However, he has been unable to dispute the other factual submissions advanced by the learned counsel for the accused/appellants that the complainant is Zila Manti of a ruling party is neither the aggrieved person, his/her parents, brother, sister or any other

person, who is related to him/her by blood, marriage or adoption, as provided under Section 4 of the Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act, 2021, thus he is not competent to lodge the present F.I.R.

15. In the considered opinion of this Court, after a detailed discussion and evaluation of the material on record it is to be taken into consideration by this Court that primary allegation against the appellants is of having contravened the provisions of Section 3 of the Act of 2021, which prohibits conversion or attempt of conversion either directly or otherwise from one religion to another by use of practice of misrepresentation, force, undue influence, coercion, allurement or by any fraudulent means. But there does not appear to be any material as to show that appellants had used any undue influence or allurement to the said villagers for mass conversion. Rather appellants were involved in providing good teachings to children and promoting the spirit of brotherhood amongst the villagers and there does not appear to be existence of any material which would suggest conversion by use of force.

16. It also requires to be noted that the instant first information was not lodged by the competent person as required under Section 4 of the Act of 2021. The various categories of person enumerated in Section 4, who are competent to lodge the first information report are any aggrieved person. The words "any aggrieved person" at the very start of the said section can be interpreted to mean any person, especially since there is no provision under the I.P.C. or Cr.P.C., which bars or prohibits any person from lodging a first information report regarding cognizable offence.

However, the words " any aggrieved person" is qualified by the subsequent categories and the words his, her parents, brother, sisters or blood relations by marriage and adoption included. Therefore, the words "any aggrieved person", if taken by themselves are extremely wide. The scope of the said term is completely whittled down by subsequent categories and therefore, it has to be said that any aggrieved person would be a person but is personally aggrieved by his or her fraudulent conversion be it an individual or in a mass conversion ceremony. Any interpretation to the contrary would render the remainder of Section 4 after the words "any aggrieved person " wholly redundant and also render the Section itself completely meaningless. Under the said circumstances the first information report dated 24-01-2023 was not lodged by a competent person.

17. After perusing the record in the light of the submissions made at the bar and after taking an overall view of all the facts and circumstances of this case, the nature of evidence, the period of detention already undergone, unlikelihood of early conclusion of trial and also in absence of any convincing material to indicate the possibility of tampering with the evidence and considering the fact that there appears force in the argument of learned counsel for the appellants that the appellants are not involved in activity of attempt to convert, either directly or otherwise, any other person from one religion to another by use or practice of misrepresentation, force, undue influence, coercion, allurement or by any fraudulent means and they have been falsely implicated in the present case and the complainant has no locus to lodge the present F.I.R. as provided under Section 4 of the Act, 2021 and there also appears

force in the argument of learned counsel for the appellants that providing good teachings, distributing Holy Bible books, encouraging children to get education, organizing assembly of villagers and performing "Bhandara" and instructing the villagers not to enter into altercation and also not to take liquor do not amount to allurement and further considering that the complainant is Zila Mantri of a ruling party and is neither the aggrieved person, his/her parents, brother, sister or any other person, who is related to him/her by blood, marriage or adoption, as provided under Section 4 of the Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act, 2021, thus the complainant is not competent to lodge the present F.I.R. and further considering the fact that appellant is in jail since 24.01.2023 and has now by done a substantial period of detention and further considering the larger mandate of the Article 21 of the Constitution of India and the law laid down by the Hon'ble Apex Court in the case of **Dataram Singh Vs. State of UP and another**, reported in (2018) 3 SCC 22, this Court is of the view that the learned court below has failed to appreciate the material available on record, the impugned order passed by the trial court is liable to be set aside.

18. Accordingly, the appeal is **allowed**. Consequently, the order dated 03.03.2023 passed by court of learned Special Judge S.C./S.T. Act, Ambedkar Nagar, in Bail Application No. 178/2023 (Jose Papachen and another Vs. State of U.P.), arising out of Case Crime No. 0031/2023, under Section 3 and 5 (1) of Uttar Pradesh Prohibition of Conversion of Religion Act, 2021 and Section 3 (1) (Dha) SC/ST Act, Police Station Jalalpur, District Ambedkar Nagar is hereby **reversed** and **set aside**.

19. Let the appellants, **Jose Papachen and Sheeja**, be enlarged on bail in Case Crime No. 0031/2023, under Section 3 and 5 (1) of Uttar Pradesh Prohibition of Conversion of Religion Act, 2021 and Section 3 (1) (Dha) SC/ST Act, Police Station Jalalpur, District Ambedkar Nagar with the following conditions:-

(i) The appellants shall furnish a personal bond with two sureties each of like amount to the satisfaction of the court concerned.

(ii) The appellants shall appear and strictly comply following terms of bond executed under section 437 sub section 3 of Chapter- 33 of Cr.P.C.:-

(a) The appellants shall attend in accordance with the conditions of the bond executed under this Chapter.

(b) The appellants shall not commit an offence similar to the offence of which they are accused, or suspected, of the commission of which they are suspected, and

(c) The appellants shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade them from disclosing such facts to the Court or to any police officer or tamper with the evidence.

(iii) The appellants shall cooperate with investigation /trial.

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

(v) The appellants shall remain present before the trial court on each date fixed, either personally or through their counsel. In case of their absence, the trial court may proceed against them under Section 229-A of the Indian Penal Code.

(vi) In case, the appellants misuse the liberty of bail during trial, in order to secure their presence, proclamation under section 82 Cr.P.C. is

issued and the appellants fail to appear before the court on the date fixed in such proclamation, then, the trial court shall initiate proceedings against them, in accordance with law, under Section 174-A of the Indian Penal Code.

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

20. It is clarified that the observations, if any, made in this order are strictly confined to the disposal of the prayer for bail and must not be construed to have any reflection on the ultimate merit of the case.

21. The trial court is also directed to expedite the trial of the aforesaid case, within a period of one year from today, by following the provisions of Section 309 Cr.P.C., strictly without granting any unnecessary adjournments to the parties, in case there is no other legal impediment.

(2023) 9 ILRA 29
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 18.09.2023

BEFORE

THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Criminal Appeal No. 2263 of 2023

Dinesh Kumar Gupta & Ors. ...Appellants
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Appellants:
 Pradeep Kumar Shukla, Skand Bajpai

Counsel for the Respondents:

G.A.

Criminal Law - Criminal Procedure Code, 1973 - Sections 156(3), 161, 228 & 482 - Indian Penal Code, 1860 - Sections 323, 354, 354-Kha, 427, 452, 504 & 506 - Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Sections 3(1)(da), 3(1)(dha), 3(1)(w), 3(1)(v), 3(1)(va), 3(2)(v-a), 14-A & 14-A(1) - Appeal – for quashing the chargesheet & summoning order – Application U/s 1456 (3) Cr.P.C. - Allegations of assault, abuse, and threats made by the accused against the informant and her mother-in-law, who belong to a scheduled caste - investigated - chargesheet – Summoning order - appellants argued that the allegations were false and motivated since a land dispute pending between the parties – Evaluation of Evidence - Court found that, the FIR and St.ments did not provide specific details of the caste-related insults and that the incident appeared to be related to a land dispute rather than caste-based discrimination – Hence, court partially allowed the appeal, quashing the summoning order under the SC/ST Act but allowing the trial court to proceed for the charges framed under the IPC against the appellants after affording opportunity of hearing to the both sides, directions issued accordingly – however, the appellants will be at liberty to file discharge application for those charges before the trial court. (Para – 9, 10, 11, 12)

Appeals are partly allowed. (E-11)

List of Cases cited:

1. Ramesh Chandra Vaishya Vs St. of U.P. & anr, 2023 SCC OnLine SC 668, ,
2. Hitesh Verma Vs St. of Uttrakhand & anr, (2020) 10 SCC 710,
3. B. Venkateswaran & ors. Vs P. Bakthavatchalam, 2023 SCC OnLine SC 14,

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

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

2. Instant Criminal Appeal under Section 14-A (1) of the Scheduled Caste and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 been filed by the appellants to set aside/quash the chargesheet filed in the case by police after investigation against the appellants and set aside the summoning order dated 17.5.2023 passed by the learned Additional Sessions Judge/Special Judge (SC/ST Act), District Gonda, in Sessions Trial No.453 of 2023, arising out of Case Crime No.0125 of 2023, under Sections 323, 354-Kha, 427, 452, 504, 506 IPC and Sections 3(1)(da), 3(1)(dha), 3(1)(w) and 3(2)(v-a) of SC/ST Act, State vs. Harishchandra and others.

3. As per the office report dated 15.9.2023, notice issued by this Court has been served on respondent No.2 but none appeared on her behalf to press present criminal appeal.

4. Brief facts of the case are that the informant Smt. Kanchan moved an application under Section 156(3) Cr.P.C. before learned Special Judge (SC/ST Act) for registration of case and investigation by police with averments that the applicant belongs to scheduled caste and a poor lady. The accused persons are influential and powerful persons. There is enmity of land dispute between the informant and accused persons. The accused persons are trying to grab her land and to achieve this object, on 28.9.2022, at about 12:00 hours in the day they came to the house of informant armed with clubs, sticks and farsa. They started abusing her, gave beating to her mother-in-law and extended threat of life to her. When the informant went to save her mother-in-

law, they started beating her and torn her blouse. The informant came inside her home to save her life, the accused persons trespassed into the house by pushing the door and insulted the applicant and her mother-in-law by using caste specific words. They also abused her and stated to get the house vacated. They began damaging the households and also threw the some goods outside. The localites came and intervened, then the accused persons went away with threatening to vacate the land. Learned Special Judge, SC/ST Act, directed registration of a case and investigation on said application. Police investigated the case and filed chargesheet against accused persons under Sections 504, 506, 323, 354-Kha, 452, 427 IPC and Sections 3(1)(da), 3(1)(dha), 3(1)(w) and 3(2)(v-a) by finding complicity of accused persons. Learned Special Judge took cognizance of the offence on the basis of chargesheet against present appellants and issued summons to them for their appearance to face trial vide order dated 17.5.2023.

5. Learned counsel for the appellants submitted that the ingredients of Sections 3(1)(da), 3(1)(dha) are not made out in the case. The injuries of informant and her mother-in-law as shown in their respective injury reports are of simple in nature. There is no description of contents or the words allegedly used by the appellants to insult the informant and her mother-in-law by using that they belong to scheduled caste. A perusal of FIR and statements of the witnesses recorded under Section 161 Cr.P.C. do not countenance the allegations that the accused persons assaulted or committed any offending act against the informant or her mother-in-law by only reason that they belong to scheduled caste. In fact the appellants have been falsely

implicated in the case due to land dispute between the family of informant and accused persons. An FIR antecedent in time to present FIR at the instant of Naina Devi, mother of the appellant Nos.1, 2 and 3 was lodged on 28.9.2022, vide Crime No.413 of 2022, under Sections 323, 504, 506 IPC against Suresh and Brhmadan, who are relatives of present informant and present case is counter blast of said FIR dated 28.9.2022 and in that case also, chargesheet has been filed on 7.10.2022. An application under Section 156(3) Cr.P.C. was filed by the informant in present case on 18.10.2022, in which the incident of same date is shown, thus both the cases may be treated as cross-case. Learned counsel for the appellant placed reliance on a judgement of Apex Court in **Ramesh Chandra Vaishya vs. State of Uttar Pradesh and Another, 2023 SCC OnLine SC 668**, wherein Apex Court in SLP filed against dismissal of application under Section 482 Cr.P.C. by the appellants above cited judicial pronouncements in a cases under Sections 323, 504 IPC and Section 3(1)(X) of SC/ST Act placed reliance on its previous judgement passed in Hitesh Verma vs. State of Uttarakhand and Another, (2020) 10 SCC 710 and observed in paragraph No.18 as under:-

"18. That apart, assuming arguendo that the appellant had hurled caste related abuses at the complainant with a view to insult or humiliate him, the same does not advance the case of the complainant any further to bring it within the ambit of section 3(1)(x) of the SC/ST Act. We have noted from the first F.I.R. as well as the charge- sheet that the same makes no reference to the utterances of the appellant during the course of verbal altercation or to the caste to which the complainant belonged, except for the

allegation/observation that caste-related abuses were hurled. The legislative intent seems to be clear that every insult or intimidation for humiliation to a person would not amount to an offence under section 3(1)(x) of the SC/ST Act unless, of course, such insult or intimidation is targeted at the victim because of he being a member of a particular Scheduled Caste or Tribe. If one calls another an idiot (bewaqoof) or a fool (murkh) or a thief (chor) in any place within public view, this would obviously constitute an act intended to insult or humiliate by user of abusive or offensive language. Even if the same be directed generally to a person, who happens to be a Scheduled Caste or Tribe, per se, it may not be sufficient to attract section 3(1)(x) unless such words are laced with casteist remarks. Since section 18 of the SC/ST Act bars invocation of the court's jurisdiction under section 438, Cr.PC and having regard to the overriding effect of the SC/ST Act over other laws, it is desirable that before an accused is subjected to a trial for alleged commission of offence under section 3(1)(x), the utterances made by him in any place within public view are outlined, if not in the F.I.R. (which is not required to be an encyclopaedia of all facts and events), but at least in the charge-sheet (which is prepared based either on statements of witnesses recorded in course of investigation or otherwise) so as to enable the court to ascertain whether the charge sheet makes out a case of an offence under the SC/ST Act having been committed for forming a proper opinion in the conspectus of the situation before it, prior to taking cognisance of the offence. Even for the limited test that has to be applied in a case of the present nature, the charge-sheet dated 21 st January, 2016 does not make out any case of an offence having been

committed by the appellant under section 3(1)(x) warranting him to stand a trial."

6. Learned counsel for the appellant next placed reliance on a judgement of Apex Court in **Hitesh Verma vs. State of Uttrakhand and Another, (2020) 10 SCC 710**, wherein Apex Court in criminal appeal filed against the order of Uttrakhand High Court passed in an application under Section 482 Cr.P.C. observed in paragraph Nos.13 and 15 as under:-

"13. The offence under Section 3(1)(r) of the Act would indicate the ingredient of intentional insult and intimidation with an intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe. All insults or intimidations to a person will not be an offence under the Act unless such insult or intimidation is on account of victim belonging to Scheduled Caste or Scheduled Tribe. The object of the Act is to improve the socio-economic conditions of the Scheduled Castes and the Scheduled Tribes as they are denied number of civil rights. Thus, an offence under the Act would be made out when a member of the vulnerable section of the Society is subjected to indignities, humiliations and harassment. The assertion of title over the land by either of the parties is not due to either the indignities, humiliations or harassment. Every citizen has a right to avail their remedies in accordance with law. Therefore, if the appellant or his family members have invoked jurisdiction of the civil court, or that respondent No.2 has invoked the jurisdiction of the civil court, then the parties are availing their remedies in accordance with the procedure established by law. Such action is not for the reason that respondent No.2 is member of Scheduled Caste.

15. As per the FIR, the allegations of abusing the informant were within the four walls of her building. It is not the case of the informant that there was any member of the public (not merely relatives or friends) at the time of the incident in the house. Therefore, the basic ingredient that the words were uttered ?in any place within public view? is not made out. In the list of witnesses appended to the charge-sheet, certain witnesses are named but it could not be said that those were the persons present within the four walls of the building. The offence is alleged to have taken place within the four walls of the building. Therefore, in view of the judgment of this Court in Swaran Singh, it cannot be said to be a place within public view as none was said to be present within the four walls of the building as per the FIR and/or charge-sheet."

7. In **B. Venkateswaran and Others vs. P. Bakthavatchalam, 2023 SCC OnLine SC 14**, Hon'ble Apex Court set aside the impugned order passed by High Court of Madras under Section 482 Cr.P.C., wherein the High Court refused to quash the criminal proceeding instituted by the private respondent against the petitioner for offence under Section 3(1)(v) and (va) of SC/ST (P.A.) Act. Hon'ble Apex Court observed that "It appears that a private dispute was going on between the parties with respect to the illegal construction. As per the allegations in the complaint, the original complainant had purchased the vacant land and constructed the building. In the entire complaint, there are no allegations that the complainant is obstructed and / or interfered with enjoyment of his right on his property deliberately and willfully knowing that complainant belongs to SC/ST. From the material on record, it appears that a civil

dispute is converted into criminal dispute and that too for the offence under the provisions of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. It seems that the private civil dispute between the parties is converted into criminal proceedings. Initiation of the criminal proceedings for the offences under Sections 3(1)(v) and (va) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, therefore, is nothing but an abuse of process of law and Court.

8. Per contra, learned AGA opposed the prayer made in present criminal revision and submitted that the judgement cited by learned counsel for the revisionist given by Hon'ble Supreme Court in orders passed by concerned High Court on petition under Section 482 Cr.P.C. He also submitted that second prayer made by the appellant in present appeal is not cognizable in criminal appeal as that relates to quashment of chargesheet, which can only be challenged in proceeding under Section 482 Cr.P.C. He next submitted that all the grounds taken in present appeal may be taken by the appellant in application under Section 228 Cr.P.C. seeking discharge before the trial court. Learned counsel for the appellants further submitted that the relief sought in present appeal are not barred under law and this Court is empowered to consider the same and pass the appropriate orders in present criminal appeal.

9. Considering the rival submissions made by learned counsel for the parties, facts and circumstances of the case, allegations leveled against the appellants and material on record, this court find that in FIR a general allegation has been made by he informant that the accused persons at

the time of incident insulted the informant and her mother-in-law by using caste specific words but the contents of those words are not divulged in FIR, even in statement under Section 161 Cr.P.C., the contents of those caste specific words were not disclosed. The incident of abusing, assaulting, threatening are alleged to have occurred outside and inside the house of the informant and there is no allegations either in FIR or in statement of victims under Section 161 Cr.P.C. that accused persons had insulted them in public view by using caste specific words.

10. There appears land dispute between the parties before the day of incident. Therefore, it cannot be said that the informant or her mother-in-law were assaulted or abused or threatened by the accused persons only due to the fact that they belong to scheduled caste. This Court is of the considered opinion that the charge under Sections 3(1)(da), 3(1)(dha), 3(1)(w) and 3(2)(v-a) of SC/ST Act are not made out in the case against the present appellants. Therefore, the summoning order of the appellants in said provisions under SC/ST Act is liable to be quashed. This Court has not given any opinion with regard to other charges under IPC and trial may be commenced by the learned trial court in accordance with law for those charges. However, the appellants will be at liberty to file discharge application for those charges before learned court below, if they consider it proper at appropriate stage and it is expected that the same will be considered and disposed of expeditiously, of course, subject to provisions of bail applicable in the case.

11. Accordingly, present appeal is **partly allowed** and the summoning order dated 17.5.2023 passed by learned

Additional Sessions Judge/Special Judge (SC/ST Act), District Gonda for charge under SC/ST Act is hereby quashed with above observations.

12. Learned Additional Sessions Judge/Special Judge (SC/ST Act), District Gonda is at liberty to frame charges under IPC against the appellants after affording opportunity of hearing to both sides and in case charges are framed, the case will be remanded to learned CJM concerned for trial.

(2023) 9 ILRA 34

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: LUCKNOW 14.09.2023

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Appeal No. 2620 of 2023

Urmila Singh Chauhan

...Appellant

Versus

State of U.P. & Anr.

...Respondents

Counsel for the Appellant:

Kirti Prakash Singh, Karan Veer Singh

Counsel for the Respondents:

G.A.

Criminal Law - Criminal Procedure Code, 1973 - Section 438 - Indian Penal Code, 1860 -Section 323, 504 & 506 - Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 - Sections - 3(1)(da)(dha) & 18- Appeal - for set aside the impugned order, rejecting the anticipatory Bail - FIR - Allegations are that the informant was asked to vacate the house in which they were living on rent - The informant received the order for vacation from the officer concerned - One-third portion of the house was allotted to the appellant, while another one-

third portion was allegedly grabbed by the appellant illegally - The complainant asked the appellant to pay the amount of Rs.7,02,000/- through a legal notice, but the appellant abused the complainant with caste-specific abusive language and on the date of the incident, when the complainant was watering the plants, the accused persons started assaulting the complainant and their wife, and abused them with caste-specific language - The appellant contended that the entire prosecution story was false and fabricated and lodged with malafide intention to implicate the appellant's family - court finds that, as the alleged incident took place inside the house of the complainant and not in the public place nor there was any public view, thus, no question arose that there is any public humiliation cause to the appellant for lodging the case under section 3(1)(Da)(Dha) of the SC/ST Act - and there is nothing to show that other sections of the IPC are also attracted in the case - the appellant's application for anticipatory bail was rejected by the trial court on the ground that Section 18 of the SC/ST Act bars such applications - held, the incident took place inside the house and not in a public place or public view, and therefore, no public humiliation was caused to the appellant - and in view of the law laid down by the Supreme Court, court is of the view that the learned court below has failed to appreciate the material available on record, - therefore, the impugned order rejecting the anticipatory bail of the appellant is hereby set aside and reversed - hence, appeal is allowed - the appellant was granted anticipatory bail with certain conditions. (Para - 10, 11, 12, 13)

Appeal Allowed. (E-11)

List of Cases cited:

1. Dataram Singh Vs St. of UP & anr., reported in (2018) 3 SCC 22,
2. Hitesh Verma Vs St. of Uttarakhand, (2020) 10 SCC 710,
3. Gopal Mishra Vs St. of U.P. & ors.; Criminal Misc. Writ Petition No.16343 of 2020,

4. Prathvi Raj Chauhan Vs U.O.I. & ors.; (2020) 4 SCC 727.

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

1. Heard.

2. The present appeal has been filed with a prayer to allow the appeal as well as to set aside the judgement and order dated 22.08.2023 passed by the learned Special Judge, S.C./S.T. Act, Lucknow in F.I.R. No.69 of 2021, under Sections 323, 504, 506 I.P.C. and Section 3(1)(Da)(Dha) of S.C./S.T. Act, Police Station Krishna Nagar, District Lucknow.

3. The prosecution case in brief is that the informant was asked to vacate the house in which he was living on rent of Rs.5,000/- per month. The informant received the order for vacation from the officer concerned. As per the order, one third portion was allotted to the appellant, wherein she was living with her family. Another one third portion was grabbed by the appellant illegally. The complainant asked the appellant to pay the amount of Rs.7,02,000/- through a legal notice, however, the appellant abused the complainant with caste abusive languages. On the date of incident, when the complainant was watering the plants, the accused persons started assaulting the complainant as well as his wife and had abused them in caste abusive languages.

4. As per the affidavit filed in support of the appeal, the contention of the appellant is that the entire prosecution story is false and fabricated. No case under the Sections of 3(1)(Da)(Dha) of S.C./S.T. Act is attracted against the appellant. As per the averment made in the affidavit, the incident is alleged to have taken place inside the

house i.e. inside the boundary wall of house and garden, which is neither a public place nor there was any public view and the instant appellant was not present at the time of the alleged incident. It has also been contended that even the offence under the provisions of I.P.C. is also not attracted against the appellant as there is no injury found on the person of the victim and even medical report is also not available. Thus, the entire prosecution story appears to be false and lodged with malafide intention to implicate the entire family of the appellant, who is a lady.

5. Her further averment is that by means of the impugned order dated 22.08.2023, the application seeking anticipatory bail by the present appellant came to be rejected by learned trial Court on the ground that entertaining such application for anticipatory bail is specifically barred and excluded by virtue of Section 18 of Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 (hereinafter referred to as 'Act, 1989').

6. Being germane to the present controversy, Section 18 of SC/ST Act is quoted herein below :

"18. Section 438 of the Code not to apply to persons committing an offence under the Act.?Nothing in section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence under this Act."

7. Her further averment is that the aforesaid impugned order dated 22.08.2023 is patently illegal insofar as the same has been passed without considering the law laid down by Hon'ble the Apex Court in

Prathvi Raj Chauhan Vs. Union of India and Other; (2020) 4 SCC 727 and judgment rendered by a Division Bench of this Court in the case of **Gopal Mishra Vs. State of U.P. and Others; Criminal Misc. Writ Petition No.16343 of 2020**. Her further averment is that the incident does not took place in the public view and public place, therefore, she may be given benefit of judgment rendered by the Hon'ble Supreme Court in the case of **Hitesh Verma Vs. State of Uttarakhand, (2020) 10 SCC 710**, wherein in para 13 and 18, Hon'ble the Supreme Court has opined as under:-

"13. All insults or intimidations to a person will not be an offence under the Act unless such insult or intimidation is on account of victim belonging to Scheduled Caste or Scheduled Tribe. The object of the Act is to improve the socio-economic conditions of the Scheduled Castes and the Scheduled Tribes as they are denied number of civil rights. Thus, an offence under the Act would be made out when a member of the vulnerable section of the Society is subjected to indignities, humiliations and harassment. The assertion of title over the land by either of the parties is not due to either the indignities, humiliations or harassment. Every citizen has a right to avail their remedies in accordance with law. Therefore, if the appellant or his family members have invoked jurisdiction of the civil court, or that respondent No.2 has invoked the jurisdiction of the civil court, then the parties are availing their remedies in accordance with the procedure established by law. Such action is not for the reason that respondent No.2 is member of Scheduled Caste.

18. Therefore, offence under the Act is not established merely on the fact

that the informant is a member of Scheduled Caste unless there is an intention to humiliate a member of Scheduled Caste or Scheduled Tribe for the reason that the victim belongs to such caste. In the present case, the parties are litigating over possession of the land. The allegation of hurling of abuses is against a person who claims title over the property. If such person happens to be a Scheduled Caste, the offence under Section 3(1)(r) of the Act is not made out."

8. On the basis of above, it is further averred that denial of anticipatory bail on the basis of bar contained in Section 18 of Act, 1989 is not sustainable. Therefore, the appellant is entitled for anticipatory bail.

9. Per contra, learned A.G.A. has vehemently opposed the prayer by submitting that Section 18 of SC/ST Act provides specific bar, in order to prevent and protect atrocities being committed in respect of members belonging to SC/ST Community. Therefore, such enactment should be construed strictly and in this view of the matter, no fault with the impugned order can be found.

10. Considering the averments made in the affidavit filed in support of the appeal as well as submissions made by learned A.G.A. for the State and going through the contents of the impugned order passed by the trial court dated 22.08.2023 and the contents of the F.I.R., as the alleged incident took place inside the house of the complainant and not in the public place nor there was any public view, thus, no question arose that there is any public humiliation caused to the appellant for lodging the case under Section 3(1)(Da)(Dha) of S.C./S.T. Act and even there is nothing to show that other Sections of the I.P.C. are also attracted in the case of the appellant and also

considering the Section 18 of the Act, 1989 which provides that there is a bar to grant anticipatory bail as well as considering the law laid down by Hon'ble the Apex Court in the case of **Prathvi Raj Chauhan (Supra)** and judgment rendered by a Division Bench of this Court in the case of **Gopal Mishra (Supra)** and further considering the Article 21 of the Constitution of India and the law laid down by the Hon'ble Apex Court in the case of **Dataram Singh vs. State of UP and another, reported in (2018) 3 SCC 22** and **Hitesh Verma (Supra)**, this Court is of the view that the learned court below has failed to appreciate the material available on record. The order passed by the court below is liable to be set aside.

11. Accordingly, the appeal is **allowed**. Consequently, the impugned judgment and order dated 22.08.2023 passed by the learned Special Judge, S.C./S.T. Act, Lucknow in F.I.R. No.69 of 2021, under Sections 323, 504, 506 I.P.C. and Section 3(1)(Da)(Dha) of S.C./S.T. Act, Police Station Krishna Nagar, District Lucknow rejecting the anticipatory bail of the appellant, is hereby **set aside** and **reversed**.

12. It is directed that in the event of arrest of the appellant, namely, **Urmila Singh Chauhan** in F.I.R. No.69 of 2021, under Sections 323, 504, 506 I.P.C. and Section 3(1)(Da)(Dha) of S.C./S.T. Act, Police Station Krishna Nagar, District Lucknow, she shall be released forthwith by the Station House Officer of the police station concerned, on her furnishing a personal bond of Rs.50,000/- with the following condition:-

(i) That the accused-appellant shall make herself available for interrogation by police authorities as and

(iii) That the accused-appellant shall not leave India without the previous permission of the Court.

13. It is made clear that the observation made herein above are only confined to the disposal of the instant criminal appeal i.e. anticipatory bail application only and has no effect on the ultimate merit of the case.

(2023) 9 ILRA 38
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.08.2023

BEFORE

THE HON'BLE SANJAY KUMAR PACHORI, J.

Criminal Appeal No. 3480 of 2002

Sunil Prakash Gaur ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:

Sri R.N. Pandey, Sri A.K. Pandey, Sri Alok Kumar Mishra, Ms. Suman Sirohi, Sri Rajesh Kumar Singh, Sri Shyam Singh Somvanshi

Counsel for the Respondent:

A.G.A.

Criminal Law - Criminal Procedure Code, 1973 - Sections 313 & 437-A - Indian Penal Code, 1860 - Sections 307, 353, 504

& 506 - Appeal – against conviction and Sentence – FIR – informant is a Junior Engineer alleged that the appellant came to his office with an open can of kerosene oil and asked to prepare his salary - The first informant told him that his salary had been paid for the period he had worked - After hearing these words, the appellant poured kerosene oil upon the first informant and threatened him with dire consequences - He also threw a burning match stick upon the first informant but the first informant fled away from the spot and saved himself – investigation – Chargesheet – conviction – sentence – Evaluation of Evidence - Court finds that, the appellant argued that no recovery memo of the can of kerosene oil had been proved by the prosecution - PW-2 and PW-3 had not seen the appellant pouring kerosene oil upon the first informant - PW-1 is a solitary witness of the incident - there is material contradiction between the St.ment of PW-1 and other two eye witnesses - The court examined the entire ocular evidence and noted several contradictions and omissions in the testimony of the witnesses – held - the prosecution failed to prove the charge of offense punishable under Section 307 of I.P.C. against the appellant beyond pale of doubt – the appellant is entitled to the benefit of doubt and hence, appeal is allowed – impugned conviction as well as sentence is set aside – consequently, appellant is acquitted of all charges. (Para – 31, 32, 33, 34)

Appeal Allowed. (E-11)

List of Cases cited:

1. Yogesh Singh Vs Mahabeer Singh & ors., (2017) 11 SCC 195,
2. Balaka Singh & ors. v. St. of Pun., AIR 1975 SC 1962,
3. Vadivelu Thevar Vs The St. of Madras, AIR 1957 SC 614,
4. C. Muniappan & ors.. Vs St. of T.N., AIR 2010 SC 3718.

(Delivered by Hon'ble Sanjay Kumar
Pachori, J.)

1. The Present Criminal Appeal has been preferred to set-aside the judgment and order dated 23.8.2002, passed by Additional Sessions Judge, Court No. 10, Allahabad in Session Trial No. 259 of 1996 (State Vs. Sunil Prakash Gaur), by which the trial court convicted the appellant under Section 307 of I.P.C. and sentenced him in Case Crime No. 1824 of 1992 under Section 307 of I.P.C., to undergo five years rigorous imprisonment with fine of Rs. 1,000/-, and in default of payment of fine, three months rigorous imprisonment.

2. Brief facts of the case are that the first information report dated 23.12.1992 was lodged by Junior Engineer of Jal Nigam at 02:45 P.M. stating that at about 01:45 P.M. on the same day, the appellant came to his office with an open can of kerosene oil and asked to prepare his salary. The first informant told him that his salary has been paid for the period he has worked. After hearing these words, the appellant poured kerosene oil upon the first informant and threatened him with dire consequences. He also threw a burning match stick upon the first informant but the first informant fled away from the spot and saved himself. On commotion, R.K. Gupta, R.P. Sharma, Radheyshyam and Indra Mani Tiwari, reached at the spot. Police picket also reached there and brought the appellant to the police station. After completion of investigation, charge sheet was submitted against the appellant and the appellant denied the charge and claimed trial.

3. In order to prove the prosecution case, four witnesses have been examined; PW-1 Pramod Kumar Singh (first informant), PW-2 Radheyshyam Mishra, PW-3 Indra Mani Tripathi and PW-4 S.I. Gorakh Nath Rai. After examining the

prosecution witnesses, statement of the appellant was recorded under Section 313 of Cr.P.C., wherein he stated that the prosecution evidence is false and he has been falsely implicated in the present case due to enmity. The appellant has filed attested copy of the judgment and order dated 28.03.2001 passed in Criminal Case No. 4793 of 1999 (State Vs. Sunil Prakash Gaur) under Sections 353, 504, 506 of I.P.C. passed by Special Chief Judicial Magistrate, Allahabad. The appellant did not adduce any other oral or documentary evidence.

4. Before the trial Court, the appellant argued that no recovery memo of can of kerosene oil had been proved by the prosecution. PW-2 Radheyshyam Mishra and PW-3 Indra Mani Tripathi had not seen the appellant pouring kerosene oil upon the first informant. PW-1 is a solitary witness of the incident. PW-2 and PW-3 have not seen the incident of pouring of kerosene oil by the appellant upon the first informant and throwing a burn matchstick upon him. There is material contradiction between the statement of PW-1 Pramod Kumar Singh and other two eye witnesses. It was further argued that the Investigating Officer PW-4 S.I. Gorakh Nath Rai, has not found any kerosene oil over the ground at the time of the inspection of the place of incident.

5. The trial court held that the statement regarding empty can of kerosene oil was recorded in the General Diary, which was proved as Ex.-Ka-5, in which it is mentioned that empty can of kerosene oil along-with the appellant has been brought to the police station. The trial court further observed that PW-2 and PW-3 have reached at the place of incident after pouring kerosene oil upon the first informant and they had never stated that

they saw the incident of pouring kerosene oil.

6. The trial court further observed that the appellant had not disputed the fact of the PW-1 that he poured the kerosene oil upon the first informant and threw a burn matchstick upon him as stated in his examination-in-chief.

7. The trial court further observed that the statement of the PW-4 S.I. Gorakh Nath Rai, Investigating Officer has no relevance. It is further observed that after three days of the incident, there was no possibility to found kerosene oil over the ground at the place of incident.

8. Being aggrieved by the trial court's judgment and order, the appellant has preferred this appeal.

9. Learned counsel for the appellant vehemently argued that there is material contradiction between the evidence of PW-1 (first informant) and other eye witnesses (PW-2 and PW-3). In support thereof, it has been pointed out that:

(a) PW-1 has stated that the appellant reached in the office room of the first informant and poured kerosene oil upon him and threw a burn matchstick on him; whereas, PW-2 and PW-3 stated that they had seen the appellant and the first informant quarrelling in the veranda.

(b) PW-1 stated that on commotion, PW-2 and PW-3 had reached the place of incident and they had seen the appellant pouring kerosene oil over him and throwing a burn matchstick; whereas PW-2 and PW-3 have stated that they had not seen the appellant pouring kerosene oil and throwing any burning a matchstick upon the first informant.

(c) As per statement of PW-1, place of the incident is the office of PW-1, which is in the room; whereas the PW-2 and PW-3 stated that they had seen a quarrel between the appellant and PW-1 in the veranda.

(d) PW-1 has stated that the appellant poured kerosene oil upon his clothes, whereas PW-2 and PW-3 had not seen any kerosene upon the cloths of PW-1.

(e) There is no recovery of cloths of the first informant (PW-1), whereas PW-1 has stated that the appellant poured kerosene oil over his cloths, whereas the first informant (PW-1) and police picket have reached the place of the incident and PW-1 lodged the F.I.R. promptly (i.e. within one hour of the incident).

(f) There is no recovery of empty kerosene can by which the appellant poured the kerosene upon the first informant (PW-1).

(g) There is no recovery of kerosene earth or other article which was not taken from the place of the incident. PW-4 the I.O. has stated that the he did not find any kerosene oil over the place of the incident.

10. **Per contra**; learned A.G.A. for the State defended the impugned judgment and order passed by the trial court and submitted that the appellant has committed a heinous crime. Considering the gravity of the offence, the present criminal appeal is liable to be dismissed.

11. I have heard Sri Rajesh Kumar Singh, learned counsel for the appellant and Sri Ramesh Kumar Singh, learned A.G.A. for the State and perused the material on record.

12. Before I proceed to dwell into the merit of the contention raised before me, it

will be appropriate to discuss the scrutiny of entire ocular evidence which is as follows:

13. PW-1 Pramod Kumar Singh, in his examination-in-chief stated that on 23.12.1992, when he was working in the office at about 01:45 P.M., at the same time, the appellant came there with the kerosene oil and asked to prepare his salary but he told him that his salary has been paid for the period he has worked. After hearing these words, the appellant poured kerosene oil over the first informant and threatened him with dire consequences and threw a matchstick upon him but he saved himself. On commotion R.K. Gupta, R.P. Sharma, Radheyshyam and Indra Mani Tiwari, (other office bearers) reached at the spot and police picket also reached there and brought the appellant to the police station along-with a can of kerosene oil.

14. PW-1 stated in his cross-examination that prior to the incident the first informant and the appellant were working together. The appellant was working with first informant since 1983. PW-1 further stated that the Investigating Officer inspected the place of incident on the next date of the incident, but he did not remember when his statement was recorded. The Investigating Officer inspected the place of incident only one time. It is further stated that the at the time of incident, the appellant was not working with him and he had transferred some days before.

15. The following suggestions had been asked as;

It is wrong to say that the salary of 4 to 6 months was due; it is wrong to say that the first informant stopped the bonus of

the appellant for two years; it is wrong to say that the service of the appellant was terminated on the recommendation of the first informant. However, it is true that this court has stayed the termination order. It is wrong to say that the first informant got annoyed due to filing of an application by the appellant for the arrears of salary, due to which a false case has been registered.

It is noteworthy that as per evidence of PW-1, the incident took place in his office and the appellant entered into his office with a can of kerosene oil and poured the kerosene oil over his body and threw a matchstick over him, but no fire was enlightened. It is also significant that on commotion, other office bearers PW-2 Radheyshyam Mishra and PW-3 Indramani Tripathi and police had reached the spot immediately and they had seen the incident and F.I.R. was lodged promptly but the cloths of the PW-1 and can of kerosene oil were not taken into possession.

16. PW-2 Radheyshyam Mishra, in his examination-in-chief stated that the appellant was sub-ordinate to the first informant. Prior to 8 years ago at about 02:00 P.M., when he reached in the office of H.C. Gupta, hearing the noise he went to the spot and saw that P.K. Singh (PW-1) and the appellant were arguing and quarrelling. He also saw that the kerosene oil was spread on the floor of office below the table of P.K. Singh. When the appellant tried to escape, people surrounded him and brought him to Colonelganj police station.

17. PW-2 has stated in his cross-examination that he saw the appellant and first informant arguing each other in the portico (veranda). He did not hear that the appellant has asked to prepare his salary and he was not present in the room at the time of incident. The appellant was

working as sub-ordinate to PW-1 at the time of the incident.

Having gone through the evidence of PW-2, the witness saw the appellant and the first informant in the portico (veranda) but he did not reach the place of incident. The witness saw kerosene oil below the table but it is significant that there is material contradiction between the statement of the PW-1 and PW-2. Firstly, he has stated in his examination-in-chief that he reached at the place of incident (office situated in a room) and saw a manhandling between the appellant and the first informant; whereas in his cross-examination he has stated that he saw the appellant and the first informant in the veranda.

It is significant that witness had not seen any kerosene soaked clothes of the first informant and also did not see the fire burning in the office. It is significant that PW-2 did not see any act of pouring kerosene oil and throwing a burn matchstick upon the first informant and PW-2 stated that at the time of the incident, the appellant was sub-ordinate to the first informant but PW-1 has stated that the appellant was not working with him at the time of the incident.

18. PW-3 Indramani Tripathi, in his examination-in-chief stated that the appellant was sub-ordinate to P.K. Singh (PW-1) on the date of incident. Prior to 9 years ago at about 02:00 P.M. hearing the noise, he went to the spot and saw that P.K. Singh, and the appellant were arguing and quarrelling for preparing salary and kerosene oil was spread on the floor of office below the table of P.K. Singh. After that police came and brought the appellant to police station.

19. PW-3 in his cross-examination stated that he was not present in the room. He went along with first informant to the police station. His statement under Section 161 of Cr.P.C. was recorded after one month of the incident. No article was recovered from the spot. The salary of the appellant got prepared on the basis of recommendation of the first informant and the appellant was sub-ordinate of the first informant.

It is noteworthy that in examination-in-chief, this witness has stated that he reached at the place of incident (room) where hot talks were exchanged between the appellant and first informant and the kerosene oil were spread over the table and below the table. At the time of incident, he was not present in the room and no article was recovered from the place of incident. There is no dispute with regard to reaching in the room of this witness (PW-3). PW-3 had not seen any fire or burning matchstick or kerosene soaked clothes of the first informant.

It is significant that PW-2 and PW-3 reached immediately after the incident but they had not seen any kerosene oil over the cloths of the first informant.

20. PW-4 S.I. Gorakh Nath, has investigated the case and during the investigation, he noted the statement of witnesses and prepared the site map which is Ex-Ka-2 and also submitted the charge sheet against the appellant in the court, which is Ex-Ka-3.

21. PW-4 S.I. Gorakh Nath, in his cross-examination stated that the F.I.R. was not lodged in his presence. The statement of the first informant was recorded on the same day of the lodging of the F.I.R. On 26.12.1992, he had gone for inspection. At

the time of the inspection, the kerosene oil was not found there.

It is significant that the statement of PW-4 was recorded by the Investigating Officer on the same day, but kerosene soaking cloths were not taken into possession by the Investigating Officer. It is significant that the Investigating Officer had not taken any kerosene soaking earth or simple earth from the place of incident.

22. PW-1 first informant/ injured has stated that the appellant was not his subordinate at the time of incident; whereas PW-2 and PW-3 stated in their cross-examination have stated that the appellant was under administrative control of the PW-1. There is inconsistency between the statement of PW-1, PW-2 & PW-3 with regard to motive of the incident.

23. Having noticed the contentions of learned counsel for the parties and having taken a glimpse of the evidence on record, now I shall weigh the argument of learned counsel for the appellants that there is contradiction with regard to motive of the incident.

24. Now I shall proceed to examine contradictions and omissions in the testimony of the witnesses which have been highlighted during the course of arguments. There are following material contradiction between the testimony of the witnesses:

(a) PW-1 has stated that the appellant reached in the office room of the first informant and poured kerosene oil upon him and threw a burn matchstick on him; whereas, PW-2 stated that they had seen the appellant and the first informant quarrelling in the veranda and PW-2 stated

that he was not present in the room at the time of the incident.

(b) PW-1 stated that on commotion, PW-2 and PW-3 had reached the place of incident and they had seen the appellant pouring kerosene oil over him and throwing a burn matchstick; whereas PW-2 and PW-3 have stated that they had not seen the appellant pouring kerosene oil and throwing any burning a matchstick upon the first informant.

(c) As per statement of PW-1, place of the incident is the office of PW-1, which is in the room; whereas the PW-2 stated that they had seen a quarrel between the appellant and PW-1 in the veranda.

(d) PW-1 has stated that the appellant poured kerosene oil upon his clothes, whereas PW-2 and PW-3 had not seen any kerosene upon the cloths of PW-1.

(e) There is no recovery of cloths of the first informant (PW-1), whereas PW-1 has stated that the appellant poured kerosene oil over his cloths, whereas the first informant (PW-1) and police picket have reached the place of the incident and PW-1 lodged the F.I.R. promptly (i.e. within one hour of the incident).

(f) There is no recovery of empty kerosene can by which the appellant poured the kerosene upon the first informant (PW-1).

(g) There is no recovery of kerosene earth or other article which was not taken from the place of the incident. PW-4 the I.O. has stated that the he did not find any kerosene oil over the place of the incident.

25. As to what would be the consequence of such discrepancy in the testimony of the eye-witnesses, it would be useful to notice few decision of the Apex Court. In **Yogesh Singh v. Mahabeer Singh and Others**, (2017) 11 SCC 195, the

Apex Court has observed as under; (SCC p. 212, para 29)

“29. It is well settled in law that the minor discrepancies are not to be given undue emphasis and the evidence is to be considered from the point of view of trustworthiness. The test is whether the same inspires confidence in the mind of the Court. If the evidence is incredible and cannot be accepted by the test of prudence, then it may create a dent in the prosecution version. If an omission or discrepancy goes to the root of the matter and ushers in incongruities, the defence can take advantage of such inconsistencies. It needs no special emphasis to state that every omission cannot take place of a material omission and, therefore, minor contradictions, inconsistencies or insignificant embellishments do not affect the core of the prosecution case and should not be taken to be a ground to reject the prosecution evidence. The omission should create a serious doubt about the truthfulness or creditworthiness of a witness. It is only the serious contradictions and omissions which materially affect the case of the prosecution but not every contradiction or omission.” (See: *Rammi @ Rameshwar v. State of M. P.*¹; *Leela Ram (dead) through Duli Chand v. State of Haryana & Anr.*²; *Bihari Nath Goswami v. Shiv Kumar Singh & Ors.*³; *Vijay @ Chinee v. State of Madhya Pradesh*⁴; *Sampath Kumar v. Inspector of Police, Krishnagiri*⁵; *Shyamal Ghosh v. State of Bengal*⁶ and *Mritunjoy Biswas v. Pranab @ Kuti Biswas and Anr.*⁷)

26. In **Balaka Singh and Others v. State of Punjab**, AIR 1975 SC 1962, the Apex Court observed:

“8...It is true that, as laid down by this Court in Zwinglee Arivel v. State of

*Madhya Pradesh*⁸, and other cases which have followed that case, the Court must make an attempt to separate grain from the chaff, the truth from the falsehood, yet this could only be possible when the truth is separable from the falsehood. Where the grain cannot be separated from the chaff because the grain and the chaff are so inextricably mixed up that in the process of separation the Court would have to reconstruct an absolutely new case for the prosecution by divorcing the essential details presented by the prosecution completely from the context and the background against which they are made, then this principle will not apply...”

27. In **Vadivelu Thevar v. The State of Madras**, AIR 1957 SC 614, the Apex Court held that if the testimony of a sole witness is found by the court to be entirely reliable, there is no legal impediment in recording the conviction of the accused on such proof. It has been further laid down that the law of evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the testimony of a single witness, the court may classify the oral testimony into three categories, namely, (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. In the first two categories there may be no difficulty in accepting or discarding the testimony of the single witness. The difficulty arises in the third category of cases. The court has to be circumspect and look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon the testimony of a single witness. A similar view has been expressed in *Kusti Mallaiah vs State of A.P.*⁹, *Lallu Manjhi and Anr. v. State of Jharkhand*¹⁰, *Jhapsa Kabari and Ors. v. State of Bihar*¹¹.

28. There are several lapses in the investigation of the case like non-recovery of kerosene can, kerosene soaked cloths of PW-1 and kerosene earth and simple earth from the place of the incident. However, it is well-settled that any omission on the part of the Investigating Officer cannot go against the prosecution case if it is otherwise supported by reliable and credible evidence. In **C. Muniappan and Ors. v. State of Tamil Nadu, AIR 2010 SC 3718**, the Apex Court observed as under;

“The defect in the investigating by itself cannot be ground for acquittal. If primacy is given to such designed or negligent investigation or to the omissions or lapses be perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. Where there has been negligence on the part of the investigating agency or omissions, etc. which resulted in defective investigation, there is a legal obligation on the part of the Court to examine the prosecution evidence dehors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the object of finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation.”

29. Thus the prosecution cannot be doubted merely on the ground of non-recovery of can of kerosene oil, kerosene soaking earth or simple earth from the place of incident and kerosene soaking cloths of the first informant/ injured PW-1 but in the present case PW-1 had reached the police station immediately after the

incident without changing the clothes F.I.R. was lodged by him and the Investigating Officer PW-4 has recorded the statement of the first informant on the same day and there was ample opportunity to recover the articles noticed above.

30. The prosecution has not proved the recovery of the can of kerosene oil. The Investigating Officer did not found any kerosene oil at the place of incident at the time of inspection. There is material contradictions between the evidence of PW-1 and the evidence of PW-2 and PW-3. As per prosecution case, police personnel came at the place of incident but no independent witness was examined regarding the same fact.

31. On a totality of the consideration of entire evidence and keeping in mind the settled position of law, I am unhesitatingly of the opinion that the testimony of eye-witnesses PW-1 Pramod Kumar Singh, PW-2 Radheyshyam Mishra, PW-3 Indra Mani Tripathi and PW-4 S.I. Gorakh Nath Rai, is unreliable. In support of this conclusion regard be had to the following circumstances:

(i) Despite lodging the F.I.R. immediately after the incident, kerosene soaking cloths of the first informant and can of kerosene oil were not recovered.

(ii) As per prosecution case, not a single article was burnt in the incident and PW-2 and PW-3 have not stated anything with regard to seeing the incident of pouring kerosene oil.

(iii) There is material contradiction between the statement of PW-1, PW-2 & PW-3 with regard to place of incident.

(iv) There is material contradiction in the evidence of PW-1, who

stated that PW-2 and PW-3 had reached the place of incident and they saw the incident; whereas PW-2 stated that they had seen the appellant and the first informant in the Varanda.

(v) No kerosene soaking earth and simple earth were recovered from the place of incident. PW-4 Investigating Officer had stated that he did not see any kerosene oil over the place of incident at the time of inspection.

32. The contrary view taken by the trial court is against the weight of the evidence. I hardly find objective evaluation, analysis, or scrutiny of evidence in a proper perspective. The serious infirmities pointed out by the defence raising doubt with regard to the prosecution case have been brushed aside by the learned trial judge. The trial court, in my view, was not right and justified in lightly brushing aside the contradictions and omissions borne out from the prosecution evidence, that too, when the entire prosecution rested on a sole eye-witness, PW-1 Pramod Kumar Singh.

33. For all the reasons recorded and discussed above, I am of the considered view that the prosecution has failed to prove the charge of offence punishable under Section 307 of I.P.C. against the appellant Sunil Prakash Gaur beyond reasonable doubt. As the evidence on record does not bring home the guilt of the appellant beyond the pale of doubt, the appellant is entitled to the benefit of doubt. Consequently, the appellant is entitled to be acquitted of the charge for which he was tried.

34. As a result, criminal appeal is **allowed**. The judgment and order of conviction as well as sentence recorded by

the trial court dated 23.08.2022 is set aside. The appellant is acquitted of all the charges. The appellant is on bail, therefore, his personal bonds and sureties are hereby discharged. The appellant Sunil Prakash Gaur will fulfill the requirement of section 437-A Cr.P.C. to the satisfaction of the trial Court at the earliest.

35. The trial court record be returned forthwith together with a certified copy of this judgment for compliance. The office is further directed to enter the judgment in compliance register maintained for the purpose of the Court.

(2023) 9 ILRA 46
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.09.2023

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Capital Case No. 4050 of 2016
 Reference No. 7 of 2016

Ranvir Singh **...Appellant**
Versus
State of U.P. **...Respondent**

Counsel for the Appellant:
 Ms. Tanisha Jahagir Monir

Counsel for the Respondent:
 G.A.

Criminal Law-Criminal Procedure Code, 1973-Section 374(2) - Indian Penal Code, 1860- Sections 302/34, 302/120B - Arms Act, 1878 - Section 25 of-Challenge to-Capital punishment- ocular testimony of PW-2 and PW-3 that supports the prosecution case, is reliable and trustworthy-The contradictory statements have been made with an ulterior motive to

save their real brother-The portion of their oral testimony that corroborates the prosecution case can be segregated from the unreliable statements made in their testimony and can be considered as credible evidence-It is settled law that the court should separate the grain from the chaff while appreciating the oral testimony-These witnesses are not only neighbours but also the real brothers of the deceased-It is entirely natural for them to be curious to know what is happening in their brother's nearby residence upon hearing the sounds of gunshots in the odd hours of the night-Considering the circumstances, where multiple rounds of firing occurred over a span of ten to twenty minutes, it is expected that both witnesses would have witnessed the incident- Furthermore, the material on record indicates that due to prolonged cross-examination with significant intervals, their testimony may have been influenced by the defence- The oral testimony of PW-1 is also reliable, as there are no significant contradictions or serious discrepancies that would render his testimony untrustworthy-The prosecution has successfully established the motive, and it is evident from the manner in which the incidents occurred and the intent behind the offense that only the appellant, and no one else, committed the crime- the trial court has rightly placed reliance on the statements of PW-1, PW-2, PW-3-The finding of guilt for offense under Section 302/34 IPC rendered by the trial court is just and proper-From the prosecution evidence, the charge under Section 302/34 IPC stands proved beyond reasonable doubt, against the appellant-However, the finding of guilt returned by the trial court for offence under Section 25 of the Arms Act based on the evidence of recovery under Section 27 of the Evidence Act is not sustainable- the appellant-accused is over 75 years of age. Considering all facts and circumstances, imposing the death penalty at this point of time will not be just-the sentence of death is modified to imprisonment for life with a fine of Rupees two lacs.(Para 1 to 82)

The appeal is partly allowed. (E-6)

List of Cases cited:

1. Jayantilal Verma Vs St. of M.P. (2020) SCC Online SC 944
2. Jarnail Singh Vs the St. of Pun.b (2009) 9 SCC 719
3. St. of U.P. Vs Shambu Nath Singh (1958) AIR SC 376 (2000) 5 SCC 668 (2001) 5 SCC 667
4. Vinod Kumar Vs St. of Punj. CRLA No.554 of 2012
5. Sharad Birdhichand Sarda Vs St. of Mah. (1984) 4 SCC 116
6. Jaikam Khan Vs St. of U.P. (2021) SCC Online SC 1256
7. Gulab & anr. Vs St. of U.P. CRLA No.2410 of 1985

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

1. Heard Ms. Tanisha Jahangir Monir, learned counsel for the appellant, and Ms. Archana Singh, learned AGA for the State.

2. This capital criminal case (appeal) has been preferred by the appellant Ranvir Singh against the judgment and order dated 20/21.07.2016 passed by Additional Sessions Judge, court no.4 Bulandshahr in S.T. No.33 of 2009 (State vs. Ranvir Singh and another) under section 302/34 and 302/120 B IPC, P.S. Aurangabad, District Bulandshahr whereby the appellant has been convicted U/s 302 IPC and sentenced to penalty of death with a fine of Rs. 1 lac and in default of payment of fine rigorous imprisonment of 2 years. The appellant has also been convicted in S.T. No. 35 of 2009 under section 25 of the Arms Act and

sentenced to undergo three years rigorous imprisonment with a fine of Rs. 50,000/- and in default of payment of the fine, he has been directed to undergo further rigorous imprisonment of one year.

3. The Additional Sessions Judge has also made a reference to this Court under section 366 Cr.P.C. registered as reference no.7 of 2016. The appeal and the reference have been heard together and are being disposed of by this common judgment.

NARRATION OF FACTS

4. This is a case where Sukhveer and his entire family comprising 7 members namely Sukhveer Singh (D-1) his two sons Surya Pratap (D-2) and Abhishek (D-3), his two daughter-in-laws Mamata (D-4) and Lata (D-5 full term pregnant), his wife Suremvala (D-6) and grandson Cheekoo aged about two years (D-7) were exterminated in the night of 28/29.07.2008. Four persons were charge-sheeted namely Ranvir Singh, Manveer Singh alias Sanjeev Kumar (brothers of Sukhveer Singh), A S/o Ranvir Singh, and Smt. Devendri W/o of Ranvir Singh. During trial, A was declared juvenile and his file was separated whereas Manveer Singh alias Sanjeev Kumar and Smt. Devendri W/o Ranveer Singh have been acquitted of the charges of the offence of criminal conspiracy.

5. Brief facts of the case are that in the intervening night of 28/29.07.2009 at 3:20 am, information was received in the city control room from mobile no.9410670741 of which entry is made to the effect that at village Barari the house of Sukhveer Singh (D-1) has been surrounded by miscreants and incessant firing is going on and some murders have also been committed. On receiving this information

the police team headed by SHO Balveer Singh (P.W.-9) reached the village by which time several persons had gathered at the house of Sukhveer Singh (D-1). The police team witnessed the scary scene. Six bodies with bullet injuries were strewn all over the house and the body of Sukhveer Singh (D-1) was lying at his tube well.

6. FIR of this case was lodged on the written report of Sanjeev Kumar S/o Shiv Charan Singh with the allegations that his brother Sukhveer Singh was sleeping at his tube- well situated at his agricultural field. His two sons Surya Pratap alias Rinku and Abhishek and their wives Mamata and Lata and the wife of Sukhveer Singh namely Suremvala and Chiku the son of Surya Pratap were sleeping inside their house. In the night at about 2 a.m., some unknown miscreants after scaling the boundary wall entered the house and started indiscriminate firing and done to death the wife of Sukhveer, both the sons of Sukhveer, their wives, and grandchild Cheeku. Hearing the sound of gunshots the villagers and family members challenged the miscreants but they did not allow anyone to move forward and the miscreants after committing murder of all the family members of Sukhveer Singh went away. Thereafter, the complainant and others went to the field of Sukhveer and saw that he was also done to death by slitting his neck. All the family members have been done to death by the miscreants and the bodies are lying on the spot. On the aforesaid written information, an FIR case crime no.199 of 2008, U/s 302 IPC against unknown was registered.

7. S.I. Surendra Singh (P.W.-4) conducted the inquest on the dead body of Mamata (D-4) and prepared the required papers which are Ex. Ka.-6 to Ka.-12, he also conducted the inquest of the dead body

of Cheekoo (D-7) and prepared the inquest and required papers marked as Ex.Ka.-12 to Ex.Ka.-17. He also conducted the inquest on the dead body of Surya Pratap alias Tinku (D-2) and prepared the required papers marked as Ex.Ka.-18 to Ka.-23. He also collected blood-stained and plain *baan* of the cot, part of bed sheets, and pillow covers underneath the dead bodies of Surya Pratap and Cheekoo. He also collected the blood-stained and plain earth below the dead bodies of Surya Pratap, Mamata, and Cheekoo. Six empty cartridges of 315 bore were also collected by him from the spot. S.I. Surendra Singh prepared its memo Ex. Ka.-24. S.I. Rajendra Prasad Sharma (P.W.-5) conducted the inquest on the dead body of Smt. Lata (D-5) and prepared the inquest report and the required papers Ex. Ka.-25 to Ka.-29. He also conducted the inquest on the dead body of Suremvala (D-6) and prepared the inquest report and the required papers as Ex. Ka.-30 to Ka.-34. He also collected pieces of the blood-stained and plain stairs and blood-stained and plain earth where the dead body of Smt. Lata was lying. Three empty cartridges 315 bore and two bullets were also collected from the stairs and a memo Ex. Ka.-35 was prepared. S.I. Rajeev Kumar (P.W.-7) conducted the inquest on the dead body of Abhishek (D-3) and prepared the inquest report and the required papers, Ex. Ka.-39 to Ka.-42. One empty cartridge of 12 bores and one empty cartridge of 315 bores from the spot were also collected along with blood-stained and plain earth and prepared its memo Ex. Ka.-51. The inquest on the dead body of Sukhveer (D-1) was conducted by S.I. Suresh Chandra and the inquest report and required papers Ex. Ka.-53 to Ka.-57 were prepared. He also collected blood-stained and plain earth from the spot and prepared its memo Ex. Ka.-52.

8. During the investigation, one Krishnaveer Singh S/o Jagveer Singh (not

examined) gave an application to S.O. Aurangabad which has been made part of the case diary. However, this written report could not be proved by the prosecution due to the death of Krishnaveer Singh. The Investigation officer also recorded the statement of Krishnaveer Singh. The Investigating Officer prepared the site plans Ex.Ka.-50. The Investigating Officer Inspector Balveer Singh also recorded the statements of Pyare Singh, Jagveer Singh S/o Shiv Charan Singh the real brothers of Sukhveer Singh (D-1), and Amar Pal Singh S/o Jai Charan Singh. Their statements U/s 164 Cr.P.C. were also got recorded by the Investigating Officer before the Magistrate. The witnesses Amar Pal Singh, Pyare Singh, and Jagveer Singh have also submitted affidavits to the SSP along with the application which have been made part of the case diary.

9. On 30.07.2008 at about 1:30 pm one of the accused Ranvir Singh was arrested by the police and on interrogation the accused confessed his crime and also disclosed that the country-made pistol and *balkati* (sharp edge weapon) used in the crime had been concealed by him and he can get it recovered. The police party along with accused Ranvir came to the paddy field of Ranvir. From the corner of the field under the Jamun tree, the accused removing the old beed, got recovered two country-made pistols of 315 bore and four live cartridges. Thereafter at his instance, one *balkati* and ladder used in the offence was also recovered from the house of the accused. Both the *balkati* and bamboo ladders were blood stained, the recovery memo Ex.Ka.-58 was prepared and the case crime no.200 of 2008, U/s 25 of Arms Act was registered against accused Ranvir. After investigation, a charge sheet under section 302/34, 302/120B IPC Ex.Ka.-61

was filed against Ranvir Singh, Manveer Singh alias Sanjeev Kumar, A and Smt. Devendri W/o Ranvir Singh.

10. The investigation of crime no.200 of 2008 under section 25 of the Arms Act was conducted by S.I. Surendra Singh (P.W.-4). He recorded the statements of witnesses and prepared the site plan Ex. Ka-66, obtained prosecution sanction Ex. Ka.68 and submitted charge-sheet Ex. Ka.67 against Ranvir Singh. Both the sessions trials were committed to the court of sessions being sessions trial no.33 of 2009 and 35 of 2009.

11. Charges under Sections 120B, 302 read with Section 34 I.P.c. and Section 25 Arms Act were framed against accused Ranvir Singh, while accused Devendra and Manveer @ Sanjeev were charged for the offense under Sections 120 I.P.C. The accused pleaded not guilty and claimed trial.

12. The prosecution relied on the oral testimony of the following witnesses:

- i. Amar Pal Singh (P.W.-1)
- ii. Pyare Sing (P.W.-2)
- iii. Jagveer Singh (P.W.-3)
- iv. S.I. Surendra Singh (P.W.-4)
- v. S.I. Rajendra Prasad Sharma (P.W.-5)
- vi. Dr. Shivanath Singh (P.W.-6)
- vii. S.I. Rajeev Kumar Yadav (P.W.-7)
- viii. Dr. Y.P. Singhal (P.W.-8)
- ix. Inspector Balveer Singh (P.W.-9)
- x. S.I. Jagroshan (P.W.-10)
- xi. Constable Niranjana Prasad Sharma (P.W.-11)
- xii. Subrati (P.W.-12)

The aforesaid witnesses have proved 72 prosecution papers as Ex. Ka-1 to Ex. Ka-72 and material exhibit 1 to 57.

13. The statements of accused Ranvir Singh, Manveer Singh alias Sanjeev Kumar and Smt. Devendri were recorded U/s 313 Cr.P.C. The accused denied the allegations made by the prosecution against them and submitted that they had been falsely implicated. The accused Ranvir Singh has also denied that he has made any disclosure statement and any recovery was made at his instance. The accused Ranvir Singh has also stated that the police were not investigating the case properly and under the pressure of the mob he pushed the police officer, due to this he has been falsely implicated. He is innocent. The accused Manveer Singh alias Sanjeev in his additional statement has stated that he lives separately from his other brothers and has no concern with them. He has lodged the FIR of this case and he has not entered into any criminal conspiracy. The accused Devendri has stated that she is innocent and has been falsely implicated. However, no evidence in defence has been produced by the accused.

14. The learned trial court after hearing the counsels for both the parties, by the impugned judgment and order has held the accused Ranvir Singh guilty and sentenced him as above. The learned trial court acquitted the other co-accused namely Manveer Singh alias Sanjeev Kumar and Smt. Devendri from the charges leveled against them.

AUTOPSY REPORTS

15. The postmortem of **Sukhveer Singh (D-1)** was conducted at 12:45 p.m. The deceased was aged about 55 years and

the body average built. Rigor mortis was present on the entire body. Following anti-mortem injuries were noticed:

i. Lacerated wound 6cm x 1.5 cm x bone deep on left side head, 4 cm above left ear at 4 O'clock position, obliquely placed. Brain material coming out.

ii. Lacerated wound 4 cm x 1 cm x bone deep on left side head, obliquely placed, 4 cm above injury no.1.

iii. Lacerated wound 6 cm x 1cm x muscle deep on the left ear, vertically placed.

iv. Incised wound 12cm x 6 cm x bone deep in front of the neck in middle part, all vessels, trachea, skin cut.

v. Incised wound 8cm x 1.5cm x muscle deep, in front of neck under the chin.

In the internal examination, the brain and its membrane, both lungs, liver, spleen, and kidneys were pale. The parietal bone was fractured. The brain and its membrane were lacerated, in the stomach 100 ml fluid was present. Both the chambers of the heart were empty. The cause of death was due to shock and hemorrhage as a result of ante-mortem injuries and the duration of death was about half a day.

16. The postmortem of **Lata (D-5)** was conducted on 29.07.2008 at 2:00 pm. The age of the deceased was about 24 years, the body was average built, and rigor mortis was present. The following ante mortem injuries were noticed:

i. Firearm wound of entry on right side of the occipital region of the head, 3cm x 2cm x brain cavity deep, blackening and tattooing around the wound, 3cm away from the left ear at 3 O'clock position.

ii. Firearm wound of exit on the right side of the interior part of the head, 3cm x 2.5 cm x communicating with injury no.1. On exploration occipital and parietal right sides fractured, membrane and brain were lacerated.

iii. Firearm wound of entry 3cm x 2cm x chest cavity deep on the back of the chest, 7cm below the root of the neck, and 2cm away from the midline of the body.

iv. Firearm wound of exit on front of chest, 4cm x 2.5cm x chest cavity deep at level of right nipple communicating to injury no.3.

v. Firearm wound of entry on the inner side to the knee joint, margin inverted, 2cm x 1cm x muscle deep, on exploration one metallic bullet recovered from soft tissues, 6cm below the knee joint.

In internal examination brain, its mambrane, both lungs, liver, spleen, and kidneys were pale, 250 ml., semi-digested food was present in the stomach. The uterus was gravid having a full-term male fetus.

In the opinion of the doctor, the cause of death was due to shock and hemorrhage as a result of antemortem injuries and the duration of death was about half a day.

17. The postmortem of **Mamata (D-4)** was conducted at 3:00 pm on 29.07.2008. The age of the deceased was about 24 years, the body was average built, and rigor mortis was all over the body. Following ante mortem injuries were noticed:

i. Firearm wound of entry, back on the chest at the inferior angle of left scapula bone, 3cm x 2cm x chest cavity deep, blackening tattooing around the wound, margins inverted, 3cm away from the midline of the body.

ii. Firearm wound of exit on front of the chest, just on the side of sternum border at the left nipple, 3.5 cm x 1.8cm x communicating with injury no.1, on exploration left lung and pleura lacerated and 1.5 ltrs blood in the chest cavity.

iii. Firearm wound of entry on the front of the chest just outside the primary border at the level of the right nipple, 3cm x 1.5 cm x chest cavity deep, blackening tattooing around the margins, on exploration right lung lacerated and one metallic bullet recovered from right lung.

iv. Firearm wound of entry on the front of the chest (sternum bone) in the middle part, 2cm x 1.5 cm., Chest cavity deep margins inverted, on exploration one metallic bullet was recovered from the thoracic zone.

In the internal examination, the brain and its membranes, both lungs, liver, spleen, and kidneys were pale, and 200 ml of semi-digested food was present in the stomach. The uterus was non-gravid.

In the opinion of the doctor, the cause of death was due to shock and hemorrhage. The duration was about half a day.

18. Dr. Shivnath Singh (P.W.-6) has proved the aforesaid three postmortem report as Ex. Ka-36 to Ka.38. The witness has further opined that the death of all three deceased may have occurred at about 2:00 a.m. in the night of 28/29.07.2008.

19. The postmortem of **Abhishek (D-3)** was conducted at 12:50 p.m. The age of the deceased was about 25 years and the body was average built, rigor mortis was present. The following ante mortem injuries were noticed:

i. Gunshot wound of entry 3cm x 2cm x chest cavity deep on the left side of

the chest, 10cm below left nipple at 6 O'Clock, margins inverted lacerated blackening and tattooing present.

ii. Gunshot wound of the entry left side of face 4cm x 3cm x brain cavity deep just anterior to the left ear. Blackening and tattooing present. Margins inverted lacerated. Brain matter coming out.

iii. Gunshot wound of exit 3cm x 2 cm x cranial cavity deep on right side of head 3cm above the right ear, margins lacerated and everted.

In internal examination, both the temporal and base of the brain were broken, brain and its membranes were lacerated. The left lung and its membranes were lacerated, and two wad pieces and 9 pellets were recovered from the left lung. 100 gms of semi-digested material was in the stomach.

The cause of death was due to shock and hemorrhage as a result of ante-mortem injuries. The duration was about half a day.

20. The post-mortem of the **Surem Vala (D-6)** was conducted on 29.07.2008 at 1:20 pm. The age of the deceased was about 52 years, the body was averagely built, and rigor mortis was present. Following ante mortem injuries were noticed:

i. Gunshot wound of entry 2cm x 2cm x brain cavity deep on mid of forehead, 3cm above the nasal bridge, margin lacerated inverted.

ii. Gunshot wound of exit 3cm x 3cm on the back of the head, 4cm above neck margins, everted, lacerated.

iii. Abrasion 3cm x 2cm on the anterior aspect of the right knee.

iv. Abrasion 2cm x 1cm on the anterior aspect of the left knee.

v. Abrasion 3cm x 2cm on the right side of the head just lateral of the left eyebrow.

vi. Traumatic swelling with fracture right wrist, lacerated wound 3cm x 2cm x bone deep.

In the internal examination, the frontal occipital bone was fractured brain and its membranes were lacerated, 200 ml of semi-digested food material was present in the stomach. The cause of death was shock and hemorrhage and the duration was about half a day.

21. The postmortem of the **Cheekoo (D-7)** was conducted on 29.07.2008 at about 2:10 pm. The age of the deceased was about two years, the body was average built. Rigormortis was present. Following antemortem injuries were noticed:

i. Gunshot wound of entry 1cm x 1.5 cm x chest cavity deep in the right side, back of the chest, 3cm from the midline and 7cm below the root of neck, margins lacerated, inverted, blackening and tattooing present.

ii. Gunshot wound of entry 2cm x 2 cm on right side back of the chest, 3 cm from the midline and 4cm below injury no.1. Blackening and tattooing present, chest cavity deep.

iii. Gunshot wound of exit, 3cm x 2cm x chest, cavity deep on the right side front of the chest, just above the right nipple.

iv. Gunshot wound of exit, 3cm x 3cm chest cavity deep, margins lacerated everted, on the left nipple.

In internal examination on the right side second and fourth and on the left side fourth and fifth ribs were broken. Both lungs and their membranes were lacerated. 150 ml of clotted blood was present in the chest cavity. 50 ml liquid was present in the

stomach. The cause of death was shock and hemorrhage and the duration was about half a day.

22. The postmortem of **Surya Pratap (D-2)** was conducted at 2:30 p.m. The age of the deceased was about 26 years, the body was average built, and rigor mortis was present. Following injuries were noticed on the body:

i. Gunshot wound of entry, 3cm x 3cm on the left side of the face, on the left eye, margins inverted, lacerated, cranial cavity deep, blackening and tattooing present.

ii. Gunshot wound of exit, 5cm x 4cm, cranial cavity deep on the top of head, 12 cm above left ear pinna and 15 cm above nasal bridge, margins lacerated everted.

iii. Gunshot wound of entry 2cm x 2cm x chest cavity deep on the right side of the chest on level of the nipple, margins inverted, lacerated, blackening, tattooing present.

iv. Gunshot wound of entry, 2cm x 1cm, right side of chest, chest cavity deep, 4cm below injury no.4, margins inverted, blackening and tattooing present.

In the internal examination, the frontal and parietal bones were fractured, second to fifth right side ribs were broken. Both lungs, membranes, and heart were lacerated. 75 ml of clotted blood was found in the chest cavity. 50 ml liquid was present in the stomach. The cause of death was shock and hemorrhage and the duration was about half a day.

23. Dr. Y.P. Singhal (P.W.-8) has proved the aforesaid postmortem reports as Ex.Ka-45 to Ka.-48.

PROSECUTION EVIDENCE

24. Amar Pal Singh P.W.-1 in his examination-in-chief has stated that on the night i.e. 28/29.07.2008, he had gone to ease himself and sat down in the field of Pyare Singh which is adjacent to the house of Sukhveer Singh (D-1). He heard the sound of indiscriminate firing and saw the light of the torch. It was 2-2:15 a.m. After some time the firing stopped, thereafter he saw Ranvir Singh and A coming out from the house of Sukhveer Singh, both of them were holding country-made pistols and torches. A bamboo ladder was on the right shoulder of Ranvir Singh and both of them went on the way which goes outside the village. The witness has further stated that he has also heard Ranvir saying to A that Sukhveer has been killed at the tube well and the rest have been killed at the house and no one is alive. The house of Ranvir is on the way which goes outside the village, and both of them entered the house. The witness came to his house thereafter with co-villagers he went to the house of Sukhveer Singh (D-1). When he went inside, he saw that all the family members of Sukhveer were lying dead. He became frightened and did not tell about the incident to anyone. On the next day i.e. 30.07.2008 Ranvir Singh was arrested. On 3rd day he directly went to the police station and narrated the entire incident to the S.O.

25. Pyare Singh (P.W.-2) in his examination-in-chief stated that they are five brothers, he is the eldest then Jagveer then Ranvir then Sukhveer and then Manveer, All the five brothers lives next to one another towards the west of the village. His house is in the east of Ranvir Singh. The house of Manveer is in the southeast and the house of Sukhveer is in the east. There was deep enmity between Ranvir and Sukhveer on account of the elopement of

Pinki. The witness further stated that the incident occurred at 2 - 2:30 am on the night of 28/29.07.2008, he was sleeping in the west of his "hutment". He woke up, to the gunshots and screams. The firing continued for 10-12 minutes towards the east of his house. After gunshots turned silent, he saw A standing at the door of the house of Sukhveer and Ranvir had gone towards east to fetch the ladder. Ranvir came back within a minute carrying a ladder. He identified Ranvir and A in the light of the torch. Both of them were alighting torches, both were holding country-made pistols and they went away towards the west. He saw both of them from a distance of five steps. They were saying that they had completed the task. The witness further stated that on 14.08.2008 he came to Bulandshahr and got an affidavit addressed to SSP prepared. He and his brother Jagveer have also given application with affidavit related to the incident to the SSP. The witness has identified his signatures on the affidavit and application which have been marked as Ex. Ka-1 to Ka-2. The witness has further stated that on 25.07.2011 he came to Bulandshahr to got recorded his statement U/s 164 Cr.P.C. The witness has proved and identified his signatures on the statement recorded U/s 164 Cr.P.C., which has been marked as Ex. Ka-3. The examination-in-chief was recorded on 26.09.2011.

26. His cross-examination was recorded on 05.12.2011 in which he did not support the prosecution version and stated that at the time of the incident, he was irrigating his field with Naresh. When the gunshots turned silent, he and Naresh came to the spot. There was total darkness and police were present, he had not seen any of the accused, and he told the police that he had not seen the incident. He has also

stated that his earlier statement was under the pressure of the police and government advocate. His statement U/s 164 Cr.P.C., was also under the pressure of the police. The witness was declared hostile, on prayer of the prosecution. In cross-examination by the prosecution, the witness has stated that two months after the incident he left village Barari after selling the entire property and his house had turned into ruins. The witness was confronted with the statements U/s 161 and 164 Cr.P.C. The witness has stated that he has not given these statements, he only put his signature on the statement recorded under section 164 Cr.P.C. under the fear of the police. The same fact has been stated about the affidavit given to SSP. However, the witness has admitted that after the death of Sukhveer Singh (D-1), his property was inherited by his mother. His son Madanpal has got executed the sale deed of six bigha land from his mother.

27. Jagveer Singh (P.W.-3) has stated that they were five brothers. Pyare Singh, Jagveer Singh, Ranveer Singh, Sukhveer Singh and Manveer alias Sanjeev Kumar. The houses of all the five brothers are at one place. His house is on the northwest corner and the house of Ranveer is in front of it. In the south, the house of Pyare Singh is adjacent to the house of Ranveer and in the southeast, there are houses of Manveer and Sukhveer. There is a 20 ft' wide *kharanja* east-west between his house and the house of Ranveer. Earlier relations of all the brothers were cordial. But for some time the relations between Ranveer and Sukhveer were strained due to a dispute over boundary (*med*) and the elopement of Pinki the daughter of Ranveer.

28. The witness has further stated that the incident occurred on the night of 28/29.07.2008 at about 2:00 a.m. He was

sleeping in his house. He woke up to the sound of gunshots. It came to his notice that the firing was taking place in the house of Sukhveer Singh (D-1). For 20 minutes, the firing continued and he could not come outside. He remained in his house as he had no arms. The witness has further stated that he saw two persons (Ranveer and A) in front of the house of Sukhveer. At that time, he was only suspicious. They were holding torches and they had alighted it. He became sure when both the accused themselves confessed at the police station that they have committed the murders. At the time of the incident, he was only suspicious and could not identify the accused. Both of them came towards his house. Ranveer removed the ladder from the corner of the house of Sukhveer Singh (D-1). Besides torches and ladders, they were also holding country-made pistols. When both of them came near his house he went back and at that time he identified both of them. He clearly heard both of them saying that the entire family of Sukhveer Singh (D-1) had been eliminated. Thereafter they went into their house. The witness has further stated that at the time of the incident, his brother Pyare was irrigating his field by tube well.

29. The witness has further stated that on 14.08.2008 he came to SSP Office Bulandshahr and got the affidavit and application prepared. The witness has identified his signatures on the application and affidavit (Ex. Ka-4) On 25.08.2008 he came to the court where his statement was recorded before the Magistrate which is true and correct. The witness has identified his signature on it marked as (Ex.Ka-5).

30. In his cross-examination held on 28.01.2013 the witness has stated that he is hard of hearing and also had a weak vision

and used spectacles. The house of Amar Pal, the witness of this case is at a distance of 800 meters to the east of the house of Sukhveer Singh (D-1) and there are several vacant places near his house. None of his brothers keep *medicines*. The witness has further stated about the topography and various dimensions. He has also stated that there are no stairs to reach the second floor of the house of Sukhveer Singh (D-1) and the ladder is used for the purpose. The witness has further stated that it is his notice that Amar Pal is a witness in 4-5 cases of sections 302 & 307 IPC and loot. Amar Pal has deposed in the case of Yashveer Pradhan of Manohar Gari and Ranveer in the case U/s 302 and 307 IPC. Amar Pal has also lodged a false report U/s 307 IPC crime no.136 of 2015 on 05.05.2012 against his son Subhash, Manoj, and Sharad son of his sister. The police have submitted a final report in it. Nanak Chand the son of Sheeshpal who has died, the *tau* of Amar Pal had also sold 2.5 bigha land to Dvendri wife of Ranveer. At that time Kiranpal, one son of Nanak Chand was minor. After Kiranpal attained majority Amar Pal has filed a civil suit for both the lands which are still pending. The witness has denied the presence of Amar Pal in the night of 28/29.07.2008 or on 29.07.2008 in the village.

31. On 04.06.2013 the witness again appeared in the court for cross-examination and has stated that the house of Sukhveer Singh (D-1) where the murders were committed is not visible from his house. He came to know about the murders of the family members of Sukhveer after 20-30 minutes of the incident. The witness has further stated that he is not a witness of any of the inquest or memo. For the first time, he came to know about the involvement of Ranveer and his son in the incident, the

next day at the police station. The witness has stated that if anything else has been mentioned in his statement then it is wrong. The witness has further stated that he has given the statement U/s 164 Cr.P.C. on tutoring of the police however, the witness has admitted that at the time of preparation of the affidavit, he has told that miscreants were extending life threats and he was so afraid that he did not tell anything to anyone. The witness has denied that at the time of the incident, he was not present in the village.

32. On 04.06.2013 during further cross-examination, the witness stated that the police came to the spot an hour after the incident. Sanjeev alias Manveer scribed the report on dictation at about 10:00 am, thereafter the witness said that he was not aware of the timing, and it was lodged in the morning. The witness has also stated that there are no stairs in the house of Sukhveer Singh (D-1) and without using a ladder, the second floor and third floor cannot be accessed. The witness stated that he is not certain whether the police had collected country-made pistols, cartridges, and *balkati* lying on the spot on the date of the incident but he had seen these things at the police station on the evening of 29.07.2008. The witness has also stated that his brother Ranveer had informed the police at Dial 100 number about the incident in the night.

33. The witness has also stated that hearing the gunshots, he has closed the door of his room. The firing continued for 20-25 minutes. It was total darkness. After 20 minutes, when the firing stopped, he came out of his house, a crowd was gathered there and they entered into the house of Sukhveer. The dead bodies of *SuremVala* and Lata were lying on the

stairs. The dead body of Abhishek was lying towards the north of the two rooms on the first floor. The witness has stated that he came to give an affidavit. The affidavit was got typed by him and it was prepared in consultation with the police, relatives, and advocates. The witness has also stated that he knew that Peetam Singh had lodged a report U/s 323, 504, 324, 325, 307, 452 IPC at P.S. Aurangabad against Harcharan, Amit, Rinku, Tinku S/o Sukhveer Singh and Sukhveer Singh. After the death of Sukhveer, his property devolved on his mother Ram Kali. Ram Kali died on 26.11.2009 at the house of Madan Pal. Kusumlata the wife of Madan Pal had secretly got executed the sale deed of six bigha land from Ram Kali on 21.11.2009. He has filed the original suit no.15 of 2011 in the court of Civil Judge Bulandshahr against Kusum Lata. There was no litigation between Ranveer and Sukhveer. No report was lodged for the elopement of Pinki by Ranveer, only a missing report was lodged. The witness has also stated that police have interrogated about the incident but he has not given any statement.

34. The witness was re-examined on 07.12.2015. When confronted about the previous statements, the witness has stated that he had given the statement that two tin gates were fixed in his house. The witness has further admitted that at the time of the incident, these gates were not installed. The witness has also stated that he has enmity with Amar Pal. The witness has also admitted that he has given the statement that he saw two persons Ranveer and A in front of the house of Sukhveer. At that time it was only suspicion, they were holding torch and they had alighted the torch. The suspicion was confirmed on the next day when both confessed that they had

committed murders. The witness has also admitted that he has given the affidavit to SSP and his statement was recorded U/s 164 Cr.P.C. before the Magistrate. He has given this statement voluntarily on the counseling of police and relatives.

35. Subrati (P.W.-12) is also another public witness. The witness has not corroborated the prosecution case. He has stated that Sukhveer Singh and six members of his family were done to death in the night seven years ago. Sukhveer Singh, Pyare Singh, Jagveer Singh, Ranvir Singh, and Manveer Singh are real brothers. Their houses are situated towards the west of the village at one place in a cluster. The tube well of Sukhveer Singh is situated in his agricultural field towards the west of his house. The witness has feigned ignorance about the fact that the daughter of Ranvir has eloped with someone. The witness has further stated that he is not on visiting terms with accused Sanjeev alias Manveer and Ranvir. He has denied the prosecution case that in his presence Ranvir, his wife Devendri, Sanjeev alias Manveer, and Subhash son of Jagveer were conspiring to exterminate Sukhveer and his family. He has also denied that he has made any money transactions with Ranvir. He also disowned his statement recorded U/s 161 Cr.P.C. The witness has been declared hostile.

36. S.I. Jagroshan Singh (P.W.-10) is a witness of recovery alleged to be made at the instance of accused Ranvir, on the basis of his disclosure statement. The witness has stated that on 30.07.2008 he was accompanying S.O. Balveer Singh, when the police party reached village Barari, in search of the accused Ranvir, he was seen coming in front of his house, and he was arrested at 1:30 pm. On interrogation, he

confessed his crime and further stated that he could get recovered the country-made pistol, *balkati*, and ladder used in the offence. The police party with Ranvir came to the paddy field of Ranvir. Two country-made pistols of 315 bore and 4 live cartridges were got recovered by the accused concealed in the beed under the tree situated in the field. The accused Ranvir also got recovered one blood-stained *balkati* and a bamboo ladder from his house. The country-made pistols, live cartridges, and *balkati* were sealed, and a memo Ex. Ka.58 was prepared.

37. The remaining witnesses are formal in nature. S.I. Surendra Singh P.W.-4 has conducted the inquest proceeding on the dead body of Mamata, (D-4) Cheekoo (D-7), and Surya Pratap (D-2) and has also prepared other related papers. The witness has proved the inquest report and other related papers for postmortem as Exs. Ka.7 to Ka.27. The witness has also collected the blood-stained and plain *baan* of the cot, pieces of blood-stained and plain bedsheet, pillows and blood-stained and plain earth, six empty cartridges of 315 bore found on the spot and has prepared its memo Ex.Ka-24.

38. S.I. Surendra Singh (P.W.-4) is also the Investigating Officer of crime no.200 of 2008 U/s 25 of Arms Act, he has stated about the various steps taken during the investigation and has proved the site plan, the charge-sheet, and the prosecution sanction as Ex.Ka66 & Ka-68. He has also proved the chik report, the report of the record keeper with regard to the destruction of original GD, and a copy of GD in the handwriting of constable Mangal Sen as Ex. Ka.68 to Ka.70.

39. S.I. Rajendra Prasad Sharma (P.W.-5) has conducted the inquest on the

dead body of Smt. Lata (D-5) and Smt. Surem Vala (D-6). The witness has proved the inquest report and other related papers for postmortem as Ex.Ka-25 to ka.34. He has also collected the blood-stained piece of floor and three empty cartridges of 315 bore and two bullets from the site and prepared its memo Ex.Ka-35. The witness has also proved the material Ex.Ka-8 to Ka.20.

40. S.I. Rajeev Kumar Yadav (P.W.-7) has conducted the inquest on the dead body of Abhishek (D-3) and has proved the inquest report and other related papers for postmortem as Ex. Ka.40 to Ka.44.

41. Constable Niranjana Prasad Sharma (P.W.-11) has prepared the Chik FIR and GD entry of the case and has proved the documents as Ex. Ka.61 to Ka.65.

42. S.I. Balveer Singh (P.W-9) is the Investigating Officer. This witness has stated that on 28.07.2008 he was posted as SHO P.S. Aurangabad. On the night of 28/29.07.2008 at about 2:30 a.m. a message was received from the city control room that some miscreants had encircled the house of Sukhveer Singh at village Barari and the firing was going on. Some persons have been murdered. This message was conveyed to him by Constable Keshav Dev. He along with S.I. Jagroshan, S.I. Surendra Singh, S.I. Rajeev Kumar, S.I. Suresh Chandra, Constable Kuldeep and Constable Kapil Kumar came at village Barari. At the house of Sukhveer, people were present. The scene there was horrifying. Inside the house of Sukhveer, the dead bodies of two women were lying on the stairs of the second floor, one dead body was lying on the ground floor, dead body of a woman and one child were lying on the cot. They

were shot dead. Thereafter he came to the tube well of Sukhveer where the dead body of Sukhveer was lying on the ground in the paddy field near the tube well. The murder was committed with a sharp-edge weapon. The higher authorities were informed about the incident. Some police officers were deployed to search the accused but no accused could be traced at that time. After making a search for the accused, he again came back to the spot where S.I. Veer Singh, Constable Begraj Singh, and Constable Vijay Singh were present with the inquest register. He received the Chik FIR and a copy of the case diary, recorded the statement of complainant Sanjeev Kumar. Meanwhile, the higher authorities with extra force and field unit vehicles also came to the spot. The relatives of the deceased and the dog squad also came there. The higher authorities of the police made an inspection of the house of Sukhveer as well as the tube well. They also interrogated the villagers who in a sotto voice disclosed that if Ranvir and his son were interrogated then the correct facts about the incident could be revealed because the families of Ranvir and Sukhveer are on inimical terms. With complainant Sanjeev Kumar, he came to the other place of incident, the tube well of Sukhveer, and made an inspection of it and directed his subordinate to conduct the inquest proceeding of the dead body of Sukhveer. He came back to the house of Sukhveer with complainant Sanjeev Kumar, made the inspection of the place of occurrence there and prepared the site plan. The witness has proved both the site plans as Ex.ka.49 and Ka.50. The witness has further stated that he also directed S.I. Suresh Chandra, S.I. Rajeev Kumar, S.I. Rajendra Prasad Sharma and S.I. Surendra Singh to conduct the inquest proceeding on the dead bodies. The empty cartridges, the blood-

stained and plain earth were also taken from the place of occurrence and its memos were prepared. The witness has proved the memos prepared by S.I. Rajveev Kumar and S.I. Suresh Chandra as Ex. Ka.51 and Ka.52. He has also proved the inquest report of Sukhveer and related papers in the handwriting of S.I. Suresh Chandra as Ex.Ka-53 to Ka.57. The witness has further stated that on 30.07.2008 he recorded the statements of Jagveer Singh, Pyare Singh, and Subhash Chandra. On the same day, one Krishnaveer gave a written report about the incident, the entry of which was made in the GD No.14 at 8:45 a.m. and he included this written report in his investigation. He recorded the statement of Krishnaveer.

43. The witness has further stated that on 30.07.2008, he arrested the accused Ranvir at about 1:30 pm. He recorded his statement. The accused Ranvir confessed his crime and stated that he could get recovered the country-made pistol, *balkati* (sharp edge weapon), and bamboo ladder used in the commission of the offence. On his disclosure statement, he went with Ranvir at the place indicated by him. He tried to procure the public witnesses but none became ready. The accused Ranvir came to his paddy field and got recovered two country-made pistols of 315 bore and four empty cartridges under the jamun tree after removing beed. He also got recovered one *balkati* and one bamboo ladder from his house. The country-made pistols, the empty cartridges, and *balkati* were sealed separately and a recovery memo was prepared. The witness has proved it as Ex. Ka-58. Thereafter he came to the police station and got the case under section 25 of the Arms Act registered against the accused Ranvir.

44. The witness has further stated that on 31.07.2008 he recorded the statements

of witnesses Subhash and Subrati who implicated Manveer and Devendri. Section 120B IPC was added, on the basis of their statements. On 01.08.2008 Manveer and Devendri were arrested, they also confessed their crimes. On the same day, A was also arrested. His statement was recorded. He also confessed his crime and stated that he could get recovered the country-made pistols and blood-stained clothes. On the basis of the disclosure statement, he came to the place indicated by him, the paddy and sugarcane field of Manveer. The blood-stained clothes worn by him and his father contained in a black bag were recovered. Two country-made pistols were also recovered from the bag. This recovery was made at 7:20 a.m. One empty cartridge was found in each barrel of the country-made pistols. The country-made pistols and the empty cartridges were sealed separately and a memo was prepared. He also prepared the site plan of the place of recovery and has proved it as Ex. Ka.60.

45. The witness further stated that on 10.07.2008 he filed an application in the court for the Narco Test of A and Ranvir. On 16.08.2008 the affidavits of Pyare Singh and Jagveer Singh the brother of the deceased through SSP in support of the statement U/s 161 Cr.P.C. were received by him. He made it part of the case diary. He recorded further statements of Pyare Singh and Jagveer Singh on 17.08.2008 in which they corroborated their earlier statements and averments made in the affidavits. On 25.08.2008 he moved an application before the court for recording the statements of witnesses Amar Pal, Pyare Singh, and Jagveer U/s 164 Cr.P.C., and on his application, the statements were recorded. On 03.09.2008 the court granted permission for the Narco Test of Ranvir

and A. On 30.09.2008 he sent the case property for forensic examination to the forensic science laboratory, Agra. On 21.10.2008 the accused Ranvir and A were taken to Delhi for a polygraphy test where their Narco Test was conducted at Central Forensic Science Lab. On 22.10.2008 and 23.10.2008 he recorded the statement of formal witnesses of Panchayatnama. He also recorded the statements of the recovery memo. On 26.10.2008 after completing the investigation, submitted the charge sheet. The witness has proved it as Ex. Ka.61. The witness has also proved the FSL reports Ex. Ka.62 and Ka.63. The witness has also proved the material Exhibits 21 to 57. The witness further stated that till the conclusion of the investigation, the polygraphy test report was not received by him. However the record reveals that the accused has refused to undergo the narco test.

SUBMISSIONS ON BEHALF OF THE APPELLANT

46. Learned counsel for the appellant contended that there is no sufficient evidence against the appellant-accused. The two eyewitnesses Pyare Singh (P.W.-2) and Jagveer Singh (P.W.-3) have not supported the prosecution case. In cross-examination, Pyare Singh (P.W.-2) has turned hostile. He has stated that the police officers had browbeaten and compelled him to give a statement against the appellant-accused who had scuffled with the police officer during the investigation. The police officials have threatened to implicate him as well if he refused to give a statement against the accused-appellant. It is also contended that a similar statement regarding false implication has been given by co-accused Manveer, in his statement U/s 313 Cr.P.C. The other eye witness

Jagveer Singh (P.W.-3) although has not been declared hostile, in his cross-examination the witness has not supported the prosecution case. He has stated that he is not an eyewitness. There was no line of site from his house to the crime scene and his eyesight was also very weak. He has also stated that he had given the statement against the appellant after being tutored by the police. He has also stated that the appellant was singled out by the police on the very first day when they went to lodge a report and were separated from the company of others. The witness has also stated that the country-made pistols, cartridges, and *balkati* (sharp edge weapon) were taken by the police from the place of the incident. He has also stated that it was the appellant who had made a phone call to the police after which the police reached the spot. The prosecution case does not find support from the statements of Pyare Singh (P.W.-2) and Jagveer Singh (P.W.-3) the so-called eyewitnesses. The learned counsel further contended that the evidence of a hostile witness cannot be treated as washed off the record. The prosecution, as well as the defence, may use the evidence of a hostile witness in so far as it is in their favour. Learned counsel placed reliance on the case law of Satpal vs. Delhi Administration (1976) 1 SCC 727.

47. Learned counsel also contended that the examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts which the witness justified in his examination-in-chief so the statement of cross-examination of these two witnesses cannot be ignored. The learned counsel on the point placed reliance on the following two case laws

I. *Sanjay vs. State of Maharashtra criminal writ petition no.1764 of 2019 dated 13.01.2020.*

II. *Inder Sain vs. CBI, 2018 SCC Online P& H 4604.*

48. It is next contended that another eye witness Amar Pal Singh (P.W.-1) is a chance witness as well as a pocket witness of the police. His house is far away from the place of occurrence. He has told his presence near the place of occurrence to attend the call of nature, as he was suffering from dysentery. His oral statement is full of contradictions and discrepancies. He stated that he wanted to take *medicine* for his ailment from one of the brothers of the deceased. This fact has been contradicted by P.W.-2 & P.W.-3 as they have denied that they deal in *medicines* or give treatment. He has admitted that his statement was recorded by the police after three days of the incident. His presence at the place of the incident was also disputed by Jagveer Singh (P.W.-3) and Subrati (P.W.-12) as they have stated that he was in another village on the date of the incident. The explanation for his presence on the spot is not satisfactory. From his statement, it can be adduced that he has a history as a pocket witness of police and he is unemployed. So his testimony is not trustworthy. The learned trial court has wrongly placed reliance on his testimony as well as the testimony of Pyare Singh (P.W.-2) Jagveer (P.W.-3). Being a chance witness, his oral statement is unreliable. Learned counsel cited the following case laws in support of her arguments:

I. *Jarnail Singh vs. the State of Punjab, (2009) 9 SCC 719,*

II. *Amar Singh vs. State (NCT of Delhi), 2020 SCC Online SC 826.*

49. It is next contended that the prosecution has failed to bring unclinching

ocular testimony and motive and thus failed to prove the case beyond a reasonable doubt. Learned counsel placed reliance on criminal appeal no.3067 of 2013 Uma Ram alias Om Prakash vs. State of U.P. date of decision 10.07.2018.

50. It is also contended that Subarti (P.W.-12) i.e. the other public witness has not supported the prosecution case. He stated that a false statement had been recorded by the police indicating him as a witness to some conspiracy between the appellant and other co-accused. He has also disputed the recovery and stated that when he went to the house of the deceased, he found a ladder and a country-made pistol on the first floor of the house and a *balkati* next to the body of Sukhveer. This witness has also supported the statement of the accused that the appellant has been falsely implicated as he was engaged in a scuffle with the police after the incident tearing the clothes of circle officer Vipul Dwivedi. This witness has supported the original version of the FIR, according to which the entire family was done to death by unknown assailants. Learned counsel also contended that the incident had occurred in the dead hours of the night in the darkness and no one had seen the incident. Even the so-called eyewitnesses Amar Pal (P.W.1) Pyare Singh (P.W.2) and Jagveer (P.W.-3) had not stated that they had seen anyone firing at the deceased. Their testimony is limited to witnessing an event after the incident.

51. It is also contended that the alleged recovery of two country-made pistols and four live cartridges, one *balkati*, and one bamboo ladder at the instance of appellant-accused Ranveer is false and planted which is established from the statement of the prosecution witnesses

itself. They have stated that these articles were already lying at the scene of occurrence. There is no independent public witness of this recovery. The recovery of country-made pistols and live cartridges are from open place. So this evidence is also wholly unreliable. In support of arguments, the learned counsel placed reliance on the following case laws:

I. *Ishwar Tudu vs. State of West Bengal*, 2019 Cri. LJ 3358

II. *Bijendra Alias Mandar vs. State of Haryana*, CRLA 2438 of 2010 dated 08.11.2021.

52. It is also contended that the report of the dog squad has not been placed on the record which indicates that no clue was found. If the appellant was involved in the incident, the report of the dog squad should have implicated him, not bringing the same on record, draw adverse inference against the prosecution. In this regard, learned counsel placed reliance on the following case laws:

I. *Jaikam Khan vs. State of U.P.*, 2021 SCC Online SC 1256

II. *Gulab and another vs. State of U.P. Criminal Appeal No.2410 of 1985*:

53. It is further contended that the alleged recovery of blood-stained clothes of the appellant also does not corroborate the prosecution story as no blood has been found on the clothes. *Balkati* and brick-containing blood stains have not been examined for fingerprints. The bullets recovered from the bodies of the deceased have also not been examined.

54. Lastly it is contended that parameters of circumstantial evidence for the purpose of determining the guilt of the

accused have been laid down in the case of *Sharad Birdhichand Sarda v. State of Maharashtra* [*Sharad Birdhichand Sarda v. State of Maharashtra*, (1984) 4 SCC 116]. The Apex Court has held as under:

"Reaffirmed the panchsheel test of circumstantial evidence which is based Page 245-354 on five core principles:

(1) Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions. (2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty, (3) the circumstances should be of a conclusive nature and tendency. (4) they should exclude every possible hypothesis except the one to be proved, and (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability, the act must have been done by the accused. "

SUBMISSIONS ON BEHALF OF THE STATE

55. Per-contra the learned AGA contended that all three eyewitnesses Amar Pal Singh (P.W.-1), Pyare Singh (P.W.-2), and Jagveer Singh (P.W.-3) are residents of the same village. The houses of Pyare Singh and Jagveer Singh are adjacently located to the house of Sukhveer Singh where the incident of murder of six family members of Sukhveer Singh had occurred. Several rounds of firing have taken place, inviting the attention of the whole village

which is evident from the averments of the FIR. All three eyewitnesses, in their examination-in-chief, have fully corroborated the prosecution version and the involvement of the appellant-accused in the incident is fully established from it. Pyare Singh (P.W.-2) and Jagveer Singh (P.W.-3) being the real brother of the appellant-accused, in their cross-examination have not supported the prosecution version just to save him from the gallows. Although they have corroborated their statements recorded U/s 161 Cr.P.C. and Section 164 Cr.P.C. in which they have clearly implicated the appellant-accused. They have stated that they had seen the appellant-accused coming from the house of Sukhveer and holding country-made pistols and a ladder just after the firing stopped and going to his house. Their statements of examination-in-chief, cannot be ignored merely because they have stated otherwise in their cross-examination. Their presence on the spot is natural. Amarpal Singh (P.W.-1) is also an eyewitness. He is not a pocket witness as alleged by the defence. He is a witness to the other cases which are related to him. The incident was so horrifying that no one dared to come forward and only when the accused were arrested, did the witness come forward to depose because of this his statement U/s 161 Cr.P.C. has been recorded after three days.

56. It is further contended that two country-made pistols 315 bore and four live cartridges and one *balkati* used in the commission of the offence have been recovered on the basis of a disclosure statement made by the appellant. The Forensic Lab Report further confirms that the empty cartridges found at the scene of occurrence have been fired from the country-made pistols recovered at the

instance of the appellant-accused. So this evidence also supports the prosecution case. The trial court has already acquitted the co-accused Manveer and Devendri as the lone witness of conspiracy Subrati has turned hostile while the case of the appellant-accused is on a different footing, he has actually participated in the commission of the crime and has been seen by the eyewitnesses.

57. It is also contended that the motive of the incident has also been proved by the prosecution evidence. The relationship between the family of Sukhveer Singh (deceased) and Ranveer Singh (appellant accused) was sour. This fact has been consistently stated by all the public witnesses. There is no serious infirmity or contradictions in their statements. They have not supported the prosecution case in their cross-examination due to ulterior motives. So the trial court has rightly rejected their testimony of cross-examination and placed reliance on their examination in chief. The learned trial court has properly appreciated the evidence on record and has rightly placed reliance on the statements of eyewitnesses. The offence has been committed with the intention of eliminating the entire family of Sukhveer Singh. This motive can be attributed to the appellant only. There is no illegality or infirmity in the finding of guilt returned by the trial court. The sentence awarded is also proportionate as the incident is horrifying in which the entire family of seven members including a two-year-old child has been exterminated.

ANALYSIS

58. In all twelve witnesses have been examined by the prosecution to prove its case, out of which four witnesses are public

witnesses. It is pertinent to mention that the FIR of this case was registered on written information of Sanjeev Kumar alias Manveer S/o Shiv Charan Singh the real brother of Sukhveer Singh (D-1). During the course of the investigation, it was found that complainant Sanjeev Kumar alias Manveer Singh was also involved in a criminal conspiracy to commit the murders, therefore he was also implicated and a charge-sheet has been submitted against him. So the first information report dated 29.07.2008 is not proved.

a. Evidence Of Criminal Conspiracy

59. Subrati (P.W.-12) was examined by the prosecution to prove criminal conspiracy hatched by the accused persons namely Ranveer Singh, his son A, his wife Devendri, and Manveer Singh alias Sanjeev, the other brother of Sukhveer Singh (D-1). According to the prosecution in the presence of the witnesses Subrati and Subhash, the accused persons were talking about the plan to eliminate Sukhveer Singh and his family. The witness Subrati (P.W.-12) has not supported the prosecution case in this respect and has turned hostile. The other witness Subhash has not been examined by the prosecution. The learned trial court did not rely upon this part of the prosecution evidence and has acquitted the co-accused Manveer alias Sanjeev and Devendri from the charges of criminal conspiracy.

b. Ocular Evidence

60. Pyare Singh (P.W.-2) and Jagveer Singh (P.W.-3) in their examination in chief have supported the prosecution case. They have stated that on the fateful night at about 2:00 a.m., they woke up to the sound of firing but due to fear and safety, they could

not come out from their houses. When the firing stopped they came out and then they saw the appellant-accused Ranveer and his son coming out from the house of Sukhveer (D-1). They identified them in the light of the torch. Both accused had country-made pistols in their hands. The witness Jagveer Singh (P.W.-3) also stated that both came near his house then he properly identified them. Both the witnesses have also stated that they heard them, saying that they have finished Sukhveer and his entire family. They have also corroborated their previous statements recorded U/s 161 & 164 Cr.P.C. From the evidence on record, it is fully established that the houses of Pyare Singh and Jagveer Singh, as well as the houses of other brothers Ranvir (accused) and Manveer (co-accused), are near the place of occurrence i.e. the house of Sukhveer Singh (D-1).

61. Pyare Singh (P.W.-2) is the real brother of the deceased. His house is adjacent to the house of the deceased Sukhveer Singh. So he is a natural witness. However Pyare Singh (P.W.-2) when stood up for cross-examination after a gap of about two months and a half, turned hostile. In the examination-in-chief, the witness has stated that at the time of occurrence, he was sleeping inside his house, he woke up to the sound of firing. He has also stated that the firing continued for 10 to 12 minutes in the east of his house. While in the cross-examination, the witness stated that he heard the sound of firing at about 2:00 a.m. and at that time he was irrigating his field with Naresh which is situated about 2-3 furlong. When the firing stopped, he and Naresh came to the place of occurrence. It was total darkness. The police were present and a large crowd had also gathered there. He has disclosed to the police that he has not seen the incident. This statement in the

cross-examination is not trustworthy because the police reached the place of occurrence after more than an hour. There was no chance that just after the firing stopped and the witness came to the spot, the police personnel could be present there. This witness in his cross-examination has also admitted that he did not go to the tube well of Sukhveer as he came to the place of occurrence from another way, whereas he has admitted that the tubewell of Sukhveer (D-1) was on the way and when he went to irrigate the field he passed through the tube well. This is also very unnatural conduct. It is fully established that the cross-examination of the witness was recorded after a considerable gap. Being the real brother of the appellant-accused, the witness appears to have changed his version to save the accused. His statement in the cross-examination is wholly unreliable and liable to be discarded. The true facts which emerge from his examination-in-chief can be segregated from the incompatible statements made in the cross-examination. As stated above, this witness has corroborated his previous statements recorded U/s 161 & 164 Cr.P.C. To meet out this eventuality in his cross-examination, the witness has stated that all his earlier statements i.e. the statements recorded U/s 161 & 164 Cr.P.C. and examination-in-chief were under the pressure and intimidation of the police/public prosecutor. The witness has not made any complaint either to the court or any other authority regarding pressure or intimidation. The order-sheet also reveals that the examination-in-chief of the witness was recorded on 26.09.2011 but the cross-examination was deferred on the adjournment application of the accused and the court fixed 10.10.2011 for cross-examination. On the date fixed adjournment application was again moved

from the defence side which was allowed and the cross-examination was deferred. Thereafter 24.10.2011, 31.10.2011, 14.11.2011 & 28.11.2011 was fixed for cross-examination, where proceedings got adjourned for other reasons. When on 05.12.2011 the witness stood up for cross-examination, he turned hostile.

62. After the examination-in-chief of the witness concludes, it is expected that cross-examination will follow either on the same day or immediately thereafter. Deferring the cross-examination successively, on flimsy pretext, for long periods has been viewed negatively as it provides opportunity to the accused to influence the witness, as appears to be the case in this case. Filing of successive applications for adjournment and ultimately succeeding in securing hostility of the witness, ought not be allowed to succeed when the cumulative weight of the evidence on record indicates that persistent case of witness in supporting the prosecution case was consistent, otherwise, and the version of the witness in the cross-examination otherwise appears to be improbable and contrary to the weight of evidence on record. We are thus inclined to rely upon the testimony of P.W.-2 made in the examination-in-chief while ignoring his version in the cross-examination.

63. The law is also settled that the evidence of a hostile witness cannot be rejected outrightly. Both parties are entitled to rely on such part of the evidence which assists their case. The evidence of a hostile witness remains admissible and is available for the court to rely on the dependable part thereof as sound acceptable and duly corroborated by other reliable evidence, available on record. Whether the testimony of a hostile witness subject to scrutiny, may

be relied on or nullified, would depend on the circumstances of each case. The aforesaid legal position has been laid down in a number of cases. In *Satpal vs. Delhi Administration* (Supra) relied on by the appellant the same principle of law has been laid down.

64. Jagveer Singh (P.W.-3) is also the real brother of the appellant-accused Ranveer. He is also a natural witness as his house is also adjacent to the house of Sukhveer Singh (D-1). From his testimony, it is fully established that at the time of occurrence, he was sleeping inside his house. He woke up to the sound of firing. He has also stated that the firing continued for 20 to 30 minutes. So it is quite natural that when the firing was going on in the house of his brother he would have tried to know as to what was happening. It is true that in his cross-examination the witness has stated that he came to know about the murders of family members of Sukhveer after 20 to 30 minutes and he has not stated any facts regarding the incident to any person. He came to know about the involvement of Ranveer and his son for the first time on the next day at P.S. Aurangabad. He has also stated that he had given the statement before the Magistrate U/s 164 Cr.P.C. on tutoring of police but at the same time, he has also admitted that in his affidavit he has stated that the assailants were threatening with death to anyone who came in between. He has denied the defence suggestion that he was not present in the village Barari on the night of the incident. He has further admitted that he with his brother Pyare Singh came to Bulandshahr to submit an affidavit. Although the witness has not been declared hostile by the prosecution but from his cross-examination it appears that he has not supported the prosecution's version of

being an eyewitness. He has been re-examined by the prosecution in which he has categorically admitted that he has given the statement that Ranveer and A met him in front of the house of Sukhveer. They were holding torches, at that time he was suspecting them, and this suspicion was confirmed when they themselves confessed at the police station that they have committed the murders. It is also evident from the order-sheet that the examination-in-chief of the witness was recorded on 21.05.2012 and his cross-examination concluded on 05.06.2013 after more than a year. Number of dates after considerable gaps were fixed and on several dates, cross-examination was deferred on adjournments moved by the accused. The witness has supported the prosecution case in his examination-in-chief but due to long drawn proceeding of cross-examination, the witness could not stand firm. The manner in which the trial court has conducted the proceeding of recording the cross-examination of witnesses in such a heinous offence is not appreciable. Cross-examination of such an important witness has been dragged for more than a year and frequent adjournments have been granted without recording any reason. Long dates have also been fixed while adjourning the cross-examination. The practice adopted by the trial court is against the settled legal norms.

65. In Vinod Kumar vs. State of Punjab, Criminal Appeal No.554 of 2012, the Apex Court has deprecated the practice of piecemeal examination of the witness. Para- 1,2,3,4,5,6, are quoted below:

1. If one is asked a question, what afflicts the legally requisite criminal trial in its conceptual eventuality in this country the two reasons that may earn the status of

phenomenal signification are, first, procrastination of trial due to non-availability of witnesses when the trial is in progress and second, unwarranted adjournments sought by the counsel conducting the trial by the trial courts, despite a statutory command under Section 309 of the Code of Criminal Procedure, 1973 (CrPC) and series of pronouncements by this Court. What was a malady at one time, with the efflux of time, has metamorphosed into malignancy. What was a mere disturbance once has become a disorder, a diseased one, at present.

2. The instant case frescoes and depicts a scenario that exemplifies how due to the passivity of the learned trial Judge, a witness, despite having stood embedded absolutely firmly in his examination-in-chief, has audaciously and, in a way, obnoxiously, thrown all the values to the wind, and paved the path of tergiversation. It would not be a hyperbole to say that it is a maladroitness and ingeniously designed attempt to strangle and crucify the fundamental purpose of the trial, that is, to arrive at the truth on the basis of evidence on record. The redeeming feature is, despite the malevolent and injurious assault, the cause of justice has survived, for there is, in the ultimate eventuate, a conviction which is under assail in this appeal, by special leave.

3. The narration of the sad chronology shocks the judicial conscience and gravitates the mind to pose a question, is it justified for any conscientious trial Judge to ignore the statutory command, not recognize “the felt necessities of time” and remain impervious to the cry of the collective asking for justice or give an indecent and uncalled for burial to the conception of trial, totally ostracizing the concept that a civilized and orderly society thrives on rule of law which includes “fair

trial” for the accused as well as the prosecution.

4. In the aforesaid context, we may recapitulate a passage from Gurnaub Singh V. State of Punjab. “... We are compelled to proceed to reiterate the law and express our anguish pertaining to the manner in which the trial was conducted as it depicts a very disturbing scenario. As is demonstrable from the record, the trial was conducted in an extremely haphazard and piecemeal manner. Adjournments were granted on a mere asking. The cross-examination of the witnesses was deferred without recording any special reason and dates were given after a long gap. The mandate of the law and the views expressed by this Court from time to time appears to have been totally kept at bay. The (2013) 7 SCC 108 learned trial Judge, as is perceptible, seems to have ostracised from his memory that a criminal trial has its own gravity and sanctity. In this regard, we may refer with profit to the pronouncement in Talab Haji Hussain v. Madhukar Purshottam Mondkar wherein it has been stated that an accused person by his conduct cannot put a fair trial into jeopardy, for it is the primary and paramount duty of the criminal courts to ensure that the risk to fair trial is removed and trials are allowed to proceed smoothly without any interruption or obstruction.”

5. Be it noted, in the said case, the following passage from Swaran Singh V. State of Punjab, was reproduced.

“It has become more or less a fashion to have a criminal case adjourned again and again till the witness tires and gives up. It is the game of unscrupulous lawyers to get adjournments for one excuse or the other till a witness is won over or is tired. Not only is a witness threatened, he is abducted, he is *maimed*, he is done away with, or even bribed. There is no protection

for him. In adjourning the matter without any valid cause a court unwittingly becomes a party to the miscarriage of justice.”

6. In this regard, it is also fruitful to refer to the authority in State of U.P. V. Shambu Nath Singh, wherein this Court deprecating the practice of a Sessions AIR 1958 SC 376 (2000) 5 SCC 668 (2001) 5 SCC 667 Court adjourning a case in spite of the presence of the witnesses willing to be examined fully, opined thus:

“9. We make it abundantly clear that if a witness is present in court he must be examined on that day. The court must know that most of the witnesses could attend the court only at a heavy cost to them, after keeping aside their own avocations. Certainly, they incur suffering and loss of income. The meager amount of *bhatta* (allowance) that a witness may be paid by the court is generally a poor solace for the financial loss incurred by him. It is a sad plight in the trial courts that witnesses who are called through summons or other processes stand at the doorstep from morning till evening only to be told at the end of the day that the case is adjourned to another day. This primitive practice must be *reformed* by the presiding officers of the trial courts and it can be *reformed* by everyone provided the presiding officer concerned has a commitment towards duty.”

66. As analyzed above, it is clear from the material on record that initially both witnesses have supported the prosecution case. They have categorically stated that they saw the appellant-accused holding country-made pistols in his hands coming out from the house of D-1. They identified him in the light of the torch. They also saw him going inside his house thereafter. The cross-examination was deferred on the

adjournment sought by the accused. The cross-examination of Pyare Singh PW-2 was recorded after a gap of two months and a half while the cross-examination of Jagveer Singh (PW-3) was recorded over a period of more than a year, with several adjournments. Pyare Singh (PW-2) turned hostile and resiled from his examination-in-chief. Jagveer Singh (PW-3) could not stand firm in his cross-examination and made statements adverse to the prosecution about the ocular version of the incident. However, their deposition of cross-examination itself shows that it is totally false and the witnesses are resiling from their previous statements for other reasons. False statements can be segregated from the true. So their statements of cross-examination do not affect the veracity of their deposition which supports the prosecution and it can be safely relied on.

67. The third witness Amar Pal Singh (P.W.-1) has also supported the prosecution case. The witness stated that at the time of occurrence, he had come to ease himself, in the field of Pyare Singh which is situated near the place of occurrence. This witness has also stated that when he was easing himself, he heard the sound of firing and also saw the light of the torch. After some time he saw Ranveer Singh and A coming out from the house of Sukhveer Singh and both were holding country-made pistols in their hands and also holding torches, they went on the way which goes out of the village. They were talking that they had killed Sukhveer Singh at his tube well and remaining members of the family in their house, they went inside their house. The witness has been cross-examined at length by the defence regarding the topography near his house and the place of occurrence and also about the occurrence but there is no serious discrepancy or material contradiction which makes his testimony unreliable.

68. From the evidence on record, it is established that several rounds of firing have taken place, several empty cartridges and bullets have been found from the spot while bullets and pellets have also been found from the dead bodies. The prosecution witnesses Pyare Singh (P.W.-2) and Sukhveer Singh (P.W.-3) have also stated that the firing took place for 10 to 20 minutes. According to testimony of Amar Pal Singh (P.W.-1), his house is situated about 250 meters from the house of Sukhveer Singh (D-1). Although Jagveer Singh P.W.-3 has told this distance to be about 800 meters. However, it is not disputed that Amar Pal Singh (P.W.-1) is a resident of the same village. Considering the aforesaid circumstances the entire evidence and material available on record, the ocular testimony of Amar Pal Singh (P.W.-1) cannot be discarded merely on the ground that his house is located at a distance from the place of occurrence.

69. There is no such rule of law that a chance witness cannot be believed. The testimony of a witness cannot be discarded merely on the grounds of his being a chance witness. What is required is to make close scrutiny of the probability and reason for a chance witness being present on the spot and if on the touchstone of such a close scrutiny, the chance witness is otherwise found reliable and trustworthy his testimony cannot be rejected merely on the ground that he is a chance witness. The same principle of law has also been laid down by the Apex Court in *Jarnail Singh vs. the State of Punjab* (2009) 9 SCC 719 relied on by the side of the appellant-accused.

70. It is correct that all the above three witnesses are not eye witnesses of the incident of firing which has occurred inside the house but they have heard the sound of firing and have seen the appellant accused

coming out from the house of the deceased holding country made pistols just after the firing stopped, the appellant accused going on the way and entering his house, in the same transaction. So the oral testimony of the witnesses is admissible under section 6 of the Evidence Act and can be relied.

c. Evidence Of Recovery U/S 27 Of The Evidence Act.

71. The prosecution has also relied on the evidence of recovery of a country-made pistol, *balkati*, and ladder used in the commission of the offence on the disclosure statement made by accused Ranveer. Inspector Balveer Singh (P.W.-9) has stated that on 30.07.2018 at about 1:30 p.m. the accused Ranveer was arrested he was interrogated and his statement was recorded. The accused Ranveer confessing his crime also offered to get the country-made pistol, bamboo ladder, etc., used in the commission of the offence, recovered. On this, he with accompanying police force came to the place indicated by accused Ranveer. On the way attempt was made to take public witnesses but no one became ready for it. Thereafter the accused Ranvir came to his paddy field and from the beed kept under the *jamun* tree, two country-made pistols 315 bore and four cartridges, and from the gallery of his house, one *balkati* and one bamboo ladder got recovered. The country-made pistols, cartridges, and *balkati* were sealed separately and a memo was prepared. It was signed by the witness and accompanying police personnel. The signatures of the accused were also got on it. The witness has proved the recovery memo as Ex. Ka-58. Another witness S.I. Jagroshan Singh (P.W.-10) has also been produced in support. This witness has also stated that on 30.07.2008 he was

accompanying S.O. Balveer Singh and reached village Barari from where the accused Ranvir was arrested near his house. He was interrogated. He confessed his crime. He disclosed that he could get recovered the country-made pistols, *balkati*, and ladder used in the offence. On this, at his indication, all came to the paddy field of Ranvir and accused Ranvir got recovered two country-made pistols of 315 bore, and four live cartridges 315 bores from the beed under the jamun tree. He also got recovered one blood-stained *balkati* and one bamboo ladder from the gallery of his house. The recovered country-made pistols, cartridges, and *balkati* were sealed separately and the memo was prepared. The witness has proved his signature on the recovery memo.

72. There is no independent public witness of this recovery. Both the witnesses are police personnel and members of the police party that arrested the accused Ranvir. From the cross-examination of S.I. Jagroshan (P.W.-10), it is clear that he has failed to answer the material particulars. He has also given evasive replies, he has failed to disclose the place where the recovery memo was prepared and the case property was sealed. He has admitted that the houses of witnesses Jagveer and Pyare are adjacent to the place of recovery and has also stated that no one from the public came during the entire proceeding while they stayed there for about two hours. This is also established from the evidence on record that the place of recovery of country-made pistols and live cartridges is an open field. Inspector Balvir Singh (P.W.-9) in his cross-examination has admitted that he has not prepared any disclosure statement of accused Ranvir and neither took any signature. He has also admitted that the place of recovery is adjacent to the public

way. So considering the aforesaid facts and analysing the material on record, we do not find this prosecution evidence to be reliable. The trial court has committed an error in relying on this piece of evidence.

d. Forensic/ Ballistic Evidence

73. The empty cartridges of 315 bore and 12 bores and piece of bricks recovered from the place of occurrence and other articles found from the dead bodies of the deceased persons, the two country-made pistols 315 bores and four live cartridges of 315 bore, *balkati* alleged to be recovered at the instance of the accused Ranvir, the two country-made pistols, two empty cartridges of 315 bore found in its barrel and clothes of the accused persons kept in a bag and recovered at the instance of co-accused A have been sent for forensic examination. The report of the forensic science laboratory is Ex. Ka. 62 and Ka-63. According to report Ex.Ka-62 no blood stains were found on the clothes alleged to be recovered at the instance of A kept in a black colour bag. No blood stain was also found on the piece of brick recovered from the spot. However, human blood has been found on *balkati*, one danda of the ladder, and the clothes of the deceased. According to forensic laboratory report Ex. Ka-63 one of the empty cartridges found from the spot was found to be fired from a country-made pistol of 315 bore recovered at the instance of accused Ranvir but the report does not confirm that the wad and the bullets recovered from the dead bodies during postmortem examination was actually fired from the country-made pistol recovered at the instance of accused Ranvir Singh. As per the analysis of recovery U/s 27 of the Evidence Act, the recovery of country-made pistols at the instance of accused Ranveer Singh (D-1) has been disbelieved.

So this piece of evidence also does not support the prosecution's version. The trial court has committed an error in relying upon this evidence.

e. Motive

74. According to the prosecution, there was deep enmity between the families of Sukhveer (deceased) and Ranveer (appellant-accused). Earlier to the incident, Pinki the daughter of the appellant-accused, Ranveer had eloped and the appellant-accused and his family suspected the hands of Sukhveer (D-1) in it. There was also a dispute regarding the boundary (*med*) of the agriculture field. Pyare Singh (P.W.-2) and Jagveer Singh (P.W.-3) the real brothers of the Sukhveer Singh (D-1) have corroborated the prosecution case in this respect. Pyare Singh (P.W.-2) has stated that Pinki the daughter of Ranveer had eloped and due to this there was deep enmity between Ranveer and Sukhveer (D-1). Jagveer Singh (P.W.-3) has also stated that for some time, the relationship between Sukhveer and Ranveer was strained and there was enmity between them due to the elopement of Pinki the daughter of Ranveer, and the dispute of *med*. The motive attributed to the appellant is that the above reasons prompted the appellant to wipe out the entire family of D-1 to eliminate even his future generation.

75. These witnesses have been cross-examined on this aspect by the defence. They have only stated that no report was lodged by Ranveer in respect of the elopement of his daughter, however, a missing report was lodged by him. It is also stated that no case in the court was pending between them with regard to land disputes. Pyare Singh (P.W.-2) in his cross-examination has also stated that Sukhveer

Singh (D-1) was involved in a dispute with Jatavs of the village but no report was lodged in this respect. Jagveer Singh (P.W.-3) has also stated that it is in his knowledge that before the incident one Preetam Singh has lodged a report U/s 323, 504, 324, 325, 307 and 452 IPC against Rinku (D-2), Tinku (D-3) S/o Sukhveer Singh, Sukhveer Singh (D-1) and some other persons at P.S. Aurangabad. These statement only shows that there was some dispute between the deceased and his sons with co-villager. These statements in cross-examination do not nullify the oral evidence of these witnesses with regard to the motive of the incident against the appellant accused.

76. The evidence and material, available on record clearly establish that the offence has been committed with the intention to exterminate Sukhveer Singh (D-1) with his entire family and not just to harm Sukhveer Singh (D-1) and his two sons D-2 & D-3. The authors of the crime were fully aware of the topography of the place and the interiors of the house of Sukhveer Singh (D-1), the number of persons present in the house, the fact that Sukhveer Singh (D-1) is sleeping at his tube well. The assailants first committed the murder of Sukhveer Singh (D-1) at his tube well by using sharp edge weapon, so that no one could be *alarmed*. Thereafter they came to the house of Sukhveer Singh (D-1) and to ensure that no one should escape used firearms, killing the remaining six family members including a pregnant lady and a two-year-old child. In the backdrop of facts, circumstances and evidence on record, the motive is attributed only to the appellant and no one else and it is a strong circumstance against the appellant accused. The prosecution evidence in this respect is clinching and trustworthy. Considering the facts,

circumstances and the nature of the evidence, the motive is significant.

CONCLUSION

77. The part of the ocular testimony of Pyare Singh (PW-2) and Jagveer Singh (PW-3), that supports the prosecution case, is reliable and trustworthy. The contradictory statements have been made with an ulterior motive to save their real brother, the appellant, from the gallows. The portion of their oral testimony that corroborates the prosecution case can be segregated from the unreliable statements made in their testimony and can be considered as credible evidence. It is settled law that the court should separate the grain from the chaff while appreciating the oral testimony. These witnesses are not only neighbours but also the real brothers of the deceased. It is entirely natural for them to be curious to know what is happening in their brother's nearby residence upon hearing the sounds of gunshots in the odd hours of the night. Considering the circumstances, where multiple rounds of firing occurred over a span of ten to twenty minutes, it is expected that both witnesses would have witnessed the incident. Furthermore, the material on record indicates that due to prolonged cross-examination with significant intervals, their testimony may have been influenced by the defence. The oral testimony of Amar Pal Singh PW-1 is also reliable, as there are no significant contradictions or serious discrepancies that would render his testimony untrustworthy. The prosecution has successfully established the motive, and it is evident from the manner in which the incidents occurred and the intent behind the offense that only the appellant, and no one else, committed the crime.

78. In the case of Jayantilal Verma vs. the State of M.P. (2020) SCC Online SC 944 in which a married woman was found dead in her matrimonial home, the apex court upheld the conviction of her husband even though a large number of witnesses had turned hostile. The apex court made the following observations:

“That is not an unusual event in the long drawn out trials in our country and in the absence of any witness protection regime of substance, one has to examine whatever is the evidence which is capable of being considered, and then come to a finding whether it would suffice to convict the accused.”

79. In view of the above, the trial court has rightly placed reliance on the statements of Amar Pal Singh PW-1, Pyare Singh PW-2, and Jagveer Singh PW-3. The finding of guilt for offense under Section 302/34 IPC rendered by the trial court is just and proper. There is no illegality or infirmity in it. From the prosecution evidence, the charge under Section 302/34 IPC stands proved beyond reasonable doubt, against the appellant. However, the finding of guilt returned by the trial court for offence under Section 25 of the Arms Act based on the evidence of recovery under Section 27 of the Evidence Act is not sustainable.

80. Now comes the question of the quantum of punishment. The trial court has imposed the death penalty for the offence under Section 302 IPC, categorizing it as one of the rarest of the rare cases. While there is no doubt that the offence has been committed in a gruesome manner, with the intention of exterminating the entire family and ending the future generation of real brother (D-1), several aggravating factors

weigh against the appellant. Six individuals, including a pregnant woman and an infant, met their tragic end through indiscriminate firing in their home while the head of the family was slaughtered at his tubewell, all while they slept during the night. These circumstances are undeniably severe.

81. Mitigating factors to consider are that about fifteen years have elapsed since the incident. Appellant-accused is under incarceration since then. The age of the appellant-accused as mentioned in his statement recorded under Section 313 Cr.PC, in the year 2015, was around 69-70 years. So at present, the appellant-accused is over 75 years of age. Considering all the aforementioned facts and circumstances, imposing the death penalty at this point of time will not be just. It will be proper to modify the sentence to imprisonment for life with a fine of Rupees two lacs. In the event of default in the payment of the fine, three years of rigorous imprisonment shall be imposed.

82. The appeal is partly allowed. The conviction of the appellant-accused for offence under Section 302/34 IPC is maintained. However, the sentence is modified from the death penalty to imprisonment for life and a fine of Rupees two Lacs, in default of payment of the fine three-years rigorous imprisonment. The conviction and sentence for the offence under Section 25 of the Arms Act are set aside. The reference is decided accordingly.

SPECIAL COMMENTS

83. Before parting with the judgment we are constrained to express our pain and anguish regarding the handling of such a heinous offence by the concerned police

authorities and the trial court. This case serves as a glaring example of a poor and botched investigation, inadequate supervision and also a haphazard and piecemeal manner of trial.

84. In this case, the police authorities arrived at the scene about an hour, after the incident. A dog squad was also called. With promptness, the inquest proceedings and postmortem examination were conducted. However, after the initial actions and perhaps after the cremation of the deceased, it was all left to the investigating officer to proceed as per his wishes. The investigating officer conducted the investigation in an ordinary, routine, and seemingly casual manner with a whimsical attitude. In the initial investigation, he proceeded with the story that the appellant and his son with his two friends, have executed the crime. These facts are mentioned in the statement of the appellant-accused recorded by the investigating officer under Section 161 Cr.P.C. There is a clear statement that the co-accused, the son of the appellant brought along his two friends, and all four were responsible for the offence. However, the investigating officer in a whimsical manner altered this narrative at his wishes and convenience while recording the statement of the co-accused, the appellant's son. In this statement, it was mentioned that only the appellant and his son were involved, denying the involvement of the two associates of the Appellant's son in the commission of the offence, confining the investigation for the actual commission of the offence in respect of the appellant and his son, without confronting them on the point. However, the investigating officer implicated two other persons, the first informant and the wife of the appellant developing a theory of conspiracy on the

basis of improbable evidence which fell flat in the court. It also appears that the investigating officer has not made diligent efforts to collect other potentially critical evidence. One empty 12-bore cartridge was also found at the scene of the crime yet the recovery made by the investigating officer consisted of only 315-bore country-made pistols. No police custody remand was obtained for any of the accused.

85. These critical lapses in the investigation have gone unnoticed by the supervisory authority i.e. the Circle Officer (Police), suggesting a lackadaisical approach on his part.

86. The malaise of the administration of the criminal justice system lies in the fact that the concerned police authorities approach such serious crimes solely from a law and order perspective. When a heinous offence occurs, higher police and administrative authorities look in action and remain in action for some period but as soon as the dust settles down, they go back to their slumber as if nothing has happened. They don't ensure whether the matter is investigated properly, all possible evidence is collected which may stand the scrutiny of the law, the witnesses are provided adequate security so that they may depose in the court without any fear and all the witnesses are produced at the earliest opportunity.

87. In general, it has been observed that, in dealing such offences, the concern of the police is limited to making the arrest and thereafter filing a chargesheet on half-baked evidence. The supervising authority also deals with the investigation casually, often failing to apply due diligence and only putting signatures without even mentioning dates. After the submission of

the chargesheet, no one bothers to monitor the court proceedings to ensure the timely and secure attendance of key witnesses, resulting in inordinate delay and lingering of the trial, leaving witnesses vulnerable.

88. It has also been observed that in general the public prosecutors come to the court ill-prepared limiting themselves to the statements recorded u/s 161 Cr.P.C., without reviewing thoroughly the entire case material available in the case diary causing serious lapses. They are not even aware of the exact status of the witness and what documents are on record, that a particular witness has to prove. Material documents are left unproven, resulting in recalling the witness and additional opportunities for the defense to cross-examine, ultimately prejudicing the prosecution's case.

89. The trial court also fails in its duty of fair and speedy trial in accordance with the law by granting frequent adjournments upon mere request, even when the deposition of the witness has started.

90. It is essential for all involved to address these issues. Additionally, it is crucial to recognize that the investigation phase is pivotal in the administration of criminal justice. However, it falls in the hands of inept officers who lack proper legal knowledge resulting in a botched investigation. Investigation is also the last thing on their list of priorities. To ensure a fair and proper investigation it is necessary that the investigating agency must be a separate entity equipped with officers who are able, qualified and have expertise in this field.

(2023) 9 ILRA 75
APPELLATE JURISDICTION

CRIMINAL SIDE
DATED: ALLAHABAD 29.08.2023

BEFORE

**THE HON'BLE DR. KAUSHAL JAYENDRA
THAKER, J.**
THE HON'BLE UMESH CHANDRA SHARMA, J.

Criminal Appeal No. 4700 of 2019
Alongwith
Criminal Appeal No. 2916 of 2018

Ishtiyak **...Appellant**
Versus
State of U.P. **...Respondent**

Counsel for the Appellant:

Sufiya Bano, Sri Anil Kumar, Sri Apul Misra,
Sri Ashok Kumar Singh, Sri Aushim Luthra,
Sri Mohd. Akhtar

Counsel for the Respondent:

G.A.

A. Criminal Law-Criminal Procedure Code, 1973-Section 374(2) - Indian Penal Code, 1860-Sections 148, 302/149 & 307/149-Challenge to-Conviction- All the accused persons were armed with katta, revolver and bomb-They were knowing that accused whose shot hit and killed the deceased was having a deadly weapon which he would use to achieve the common object of the unlawful assembly- Further more, they even exhorted each other to kill the family members of the informant side-It has been proved from the evidence of PW-1 that after hitting the deceased accused had fired upon him but he escaped- It has also been proved that one of the accused had exploded bomb on the spot and the residue in the shape of rope had been recovered from the spot-the alleged offence was committed by the convict appellants being a member of unlawful assembly to achieve the common object there was prior enmity between the convict appellants and the informant, his family members and his neighbour - neighbour was earlier assaulted by the

accused persons, in which the informant was one of the witnesses-As it is a case of direct evidence, therefore, motive has no much significance- Thus, the trial court has rightly convicted all the accused persons under Sections 148, 307 read with Section 149, 302 read with Section 149 IPC, therefore, no interference is warranted in the appeals.(Para 1 to 104)

B. The applicability of Section 34 requires the consideration of both, the physical as well as the mental aspect of ingredient of this section. As against this, Section 149 does not insist only on the mental element and therefore, it is not necessary that a member of an unlawful assembly must have actually participated in commission of the offence. (Para 97)

The appeals are dismissed. (E-6)

List of Cases cited:

1. Iqbal & anr Vs St. of U.P. (2017) 11 SCC 93
2. Vinubhai Ranchodbhai Patel Vs Rajivbhai Dudabhai Patel & ors. (2018) 7 SCC 743 (744)
3. Gangadhar Behra Vs St. of Ori. (2003) CrLJ 41 SC
4. Asharful Vs St. of U.P. (1987) AIR SC 721
5. St. of Mah. Vs Kashirao (2003) CrLJ 4464 SC
6. Allauddin Mian Vs St. of Bih. (2007) 9 SCC 791
7. Bhagwan Singh Vs St. of M.P. (2002) AIR SC 1621
8. Unus Vs St. of M.P. (2003) CrLJ 817 SC
9. Ramvilas Singh Vs St. of Bih. (1969) AIR SC 1593
10. Sunil Balkrishna Bhoir Vs St. of Mah. (2009) 2 SCC (Cri) 226
11. Bishu Sarkar & ors. Vs St. of W.B. (2017) 11 SCC 105

12. Chittarmal, Moti Vs St. of Raj. (2003) AIR SC 796

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

1. Heard Sri Apul Misra, learned counsel for all the accused-appellants, Sri Vikas Goswami, learned AGA for the State and perused the record.

2. Criminal Appeal No.2916 of 2018 has been preferred against the judgment and order dated 04.04.2018 passed in ST No.642 of 1996 (State of UP Vs. Allau and others) arising out of Case Crime No.121 of 1996, by Sri Santosh Kumar Tiwari, Additional Sessions Judge-II, Azamgarh by which the trial court convicted the accused persons namely Allau under Section 148 IPC for fine of Rs.3,000/-, under Section 302 IPC for life imprisonment and fine of Rs.25,000/-, under Section 307/149 IPC for five years rigorous imprisonment and fine of Rs.5,000/-; accused Saddik under Section 148 IPC for fine of Rs.3,000/-, under Section 302/149 IPC for life imprisonment and fine of Rs.25,000/-, under Section 307 IPC for five years rigorous imprisonment and fine of Rs.5,000/-; accused Gufran under Section 148 IPC for fine of Rs.3,000/-, under Section 302/149 IPC for life imprisonment and fine of Rs.25,000/-, under Section 307/149 IPC for five years rigorous imprisonment and fine of Rs.5,000/- with default stipulation. It was also directed that all the sentences shall run concurrently.

3. Out of the above three convicts Allau has died and accused Gufran and Saddik are alive and are on bail.

4. Since accused Allau has died, hence Criminal Appeal No.2010 of 2018

had been abated vide order dated 11.01.2019.

5. Accused Ishtiyak has preferred Criminal Appeal No.4700 of 2019 against the judgment and order of conviction and sentencing dated 27.06.2019 passed in ST No.642-A of 1996 (State of UP Vs. Ishtiyak) arising out of Case Crime No.121 of 1996, by Sri Gaurav Kumar Srivastava, Special Judge (SC/ST Act), Azamgarh by which the accused Ishtiyak was convicted under Section 148 IPC for Rs.3,000/- as fine, under Section 302/149 IPC for life imprisonment and Rs.25,000/- as fine, under Section 307/149 IPC for five years rigorous imprisonment and Rs.5,000/- fine with default stipulation and an amount of compensation is also to be paid to the widow Urmila Devi wife of the deceased Faujdar.

6. In brief, facts of the case are that informant Jagdish son of Ram Singar Harijan moved a written complaint dated 21.04.1996 at Police Station Kotwali Deogaon, District Azamgarh that in the night of 21.06.1996 at about 12:45 a.m. Allau, Ismidar, Gufran, Ishtiyak, Jahid and Saddik who have enmity with Kalpnath of his village on account of a litigation in which scuffle had taken place last year and he had testified himself, reached at his door with country-made pistol and revolver and exhorted to kill him. In the meantime, Allau fired at his brother Faujdar which hit him. Hearing the hue and cry villagers Nandlal, Vikrama and other villagers reached there. By then Saddik with an intention to kill him fired upon him from which he narrowly escaped. The incident was seen by several persons present on the spot. Abusing them the accused persons had returned. Keeping the injured Faujdar on the cot when he was coming to the police

station, Faujdar fell unconscious on the way (Faujdar later on succumbed). Hence, FIR be lodged and necessary action be taken.

7. On the basis of above written complaint an FIR at Crime No.121 of 1996, under Sections 147, 148, 149, 302, 307, 504, 506 IPC and Sections 3(1)(x), 3(2)(v) of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 (in short 'the SC/ST Act') had been lodged at 01:50 a.m. on 21.06.1996. The investigation officer (IO) recorded the statement, prepared site plan and other papers and after recording the statement of the witnesses submitted the charge sheet against the accused Allau, Ismidar, Gufran, Ishtiyak, Jahid and Saddik under the aforesaid sections. Learned CJM, Azamgarh took cognizance, provided the copies of the prosecution papers to the accused persons and committed the case to the court of sessions. After hearing on the framing of charge except accused Allau rest of the accused persons were charged under the aforesaid sections. Allau was charged under Sections 147, 307/149, 302 IPC and Sections 3(1)(x), 3(2)(v) SC/ST Act. Accused persons denied the charges and sought trial.

8. During the course of trial accused Jahid and Ismidar died and accused Ishtiyak had absconded, therefore, the case with regard to accused Jahid and Ismidar was abated and the case with regard to accused Ishtiyak had been separated but later on when he was arrested, his trial had been conducted as ST No.642-A of 1996 (State of UP Vs. Ishtiyak).

9. In ST No.642 of 1996 following witnesses were examined by the prosecution:-

1	PW-1	Jagdish, informant
2	PW-2	Smt. Urmila w/o deceased faujdar
3	PW-3	Swaminath
4	PW-4	Anant Dev
5	PW-5	Arvind Kumar
6	PW-6	Ganesh

10. In ST No.642 of 1996 following documentary evidences were produced by the prosecution:-

1	Ex.Ka-1	Written complaint
2	Ex.Ka-2	Charge sheet
3	Ex.Ka-3	Site plan
4	Ex.Ka-4	Postmortem report
5	Ex.Ka-5	Chik FIR
6	Ex.Ka-6	Carbon copy kaymi case GD
7	Ex.Ka-7	Photonash
8	Ex.Ka-8	Inquest report
9	Ex.Ka-9	Recovery memo with regard to blood stained piece of kathari and residue of rope of explosive substance
10	Ex.Ka-10	Search memo of house of Nanhey
11	Ex.Ka-11	Search memo of house of Kamruddin
12	Ex.Ka-12	Search memo of house of accused Saddik
13	Ex.Ka-13	Search memo of house of accused Allau
14	Ex.Ka-14	Search memo of house of Saghir Ahmad

11. After closure of the evidence, statements of the accused Allau, Saddik and Gufran were recorded under Section 313 CrPC in which they denied the prosecution case and alleged that there was false deposition by the prosecution witnesses. They further stated that their farm was near

the *harijan basti* which was often damaged by them, because of which there was regular altercation. They were trapped due to village party-bandi. Accused persons did not examine witnesses in defence but had produced charge sheet No.344-B/2 from list 343-B.

(I) Brief discussion on the statements of prosecution witnesses-

12. PW-1, informant, Jagdish has deposed that his brother Faujdar had been killed on 21.06.1996 at about 12:30 a.m. He and his brother were laying nearby on separate cots. He was laying on the cot and after urinating he had not slept. There was an enlightened electric bulb of 200 watt and there was light in the nearby area. He saw that accused Allau, Ismidar, Saddik, Jahid, Ishtiyak and Gufran came there from the east side. Allau, Jahid, Saddik, Ishtiyak and Gufran had country-made pistol in their hands. Ismidar had revolver in his hand. The witnesses recognized the accused Allau, Ismidar and Saddik in the court and said that these people had also come there and said that "kill the rascal". Allau first fired at his brother Faujdar with a pistol when they made-a-noise his mother and sister-in-law, Nandlal and Vikram of his village reached there. Saddik had also fired at him with pistol but the bullet could not hit him. The women of his house also witnessed the incident. The accused ran away abusing and throwing bombs to spread panic. They took their injured brother to Deogaon Police Station with the help of some people. Due to injury his brother had fainted on the way. On his written complaint Ex.Ka-1, the FIR had been lodged. His brother Faujdar was sent from the police station to the PHC, Lalganj in a government jeep. After leaving his brother at the hospital he returned to the

village. Shiv Pujan of his village came home and informed that his brother had died. The accused have enmity with his neighbour Kalpnath whose house was to the south of his house.

13. The accused had severely beaten Kalpnath with sticks, lathi etc. He had given statement in support of Kalpnath, therefore, accused were infuriated with them. To the south of his cot there was cot of Faujdar. Women of his family had slept on the west side. There was blood on his brother's cot. The IO had recorded his statement.

14. PW-2, Smt. Urmila has deposed that five years ago her husband had been killed in the night at about 12:30 a.m. At the time of incident her husband, brother-in-law, Jagdish and mother-in-law Dilraji were sleeping side by side with the children at the same place. By then Allau, Gufran, Ismidar, Saddik and Ishtiyak came from east side. Allau had country-made pistol in his hand, Ismidar was carrying a revolver. Rest of the accused had arms in their hands. Accused Allau killed her husband Faujdar with country-made pistol. The bullet hit him. Rest of the accused were shouting and saying that kill the bastard. Witnesses Nandlal, Vikram etc. had reached there. Accused Saddik shot at her brother-in-law, Jagdish with a country-made pistol but he survived as the bullet could not hit him. Her husband Faujdar was taken to Deogaon Hospital on a cot. Due to bullet injury her husband died on the way. The IO had recorded her statement. She knows Kalpnath of her village. Before this incident there was a criminal case between Kalpnath of her village, the accused Allau and others. In that case, his brother-in-law Jagdish had testified against the accused, that is why they harboured enmity.

15. PW-3, Swaminath CO, IO Circle Lalganj has deposed that prior to him the case was investigated by his predecessor Anant Dev Tiwari. He recorded the statement of accused Allau in paper no.3. In paper no.4 he observed the earlier statement, copied the inquest and recorded the statement of witnesses Nand Lal, Vikram, Kalpnath, Manilal, Janardan Gautam, Smt. Urmila and Smt. Dilraji. On 29.06.1996 and on 02.07.1996 he had recorded the statement of SI Suresh Rai, Constable Govind Pandey and Harishankar Prasad. On 05.07.1996 he had recorded the statement of Dr. Sanjiv Kumar Gupta SI Mohd. Saeed and accused Gufran, Ishtiyak and Jahid. He had also recorded the statement of Head Constable Ram Sudh and after finding charges proved against the accused persons, he had submitted the charge-sheet against the accused Allau, Ismidar, Gufran, Ishtiyak, Jahid and Saddik under Sections 147, 148, 149, 307, 302, 504, 506 IPC and Sections 3(1)(x), 3(2)(v) of the SC/ST Act witnesses proved the charge sheet Ex.Ka-2.

16. PW-4, Anant Dev, IO has deposed that on the day of occurrence he was posted as CO Lalganj when the aforesaid case was lodged in Kotwali Deogaon. He had initiated the investigation. He prepared paper no.1 and copied chik FIR and amendment under Section 302 IPC and after endorsing injury letter, he reached on CHC, Lalganj and directed SI Mohd. Saeed to conduct inquest. After reaching on the spot, he recorded statement of the informant Jagdish and on his pointing inspected the place of occurrence and prepared site plan Ex.Ka-3. He also recorded the statement of Shiv Pujan, Ramjeet and Harish Chandra in paper no.1A. People had jammed the road for the incident. After convincing them, he raided

the accused persons on 22.06.1996 and accused Ismidar and Saddik were arrested and their statements were recorded thereafter he was transferred.

17. PW-5, Arvind Kumar has deposed that he had come with postmortem report registered in his register dated 21.06.1996. PM No.381/1996 is being noted in the hand writing and signature of Dr. Sanjiv Kumar its original inquest is on the file. The register was compared and found correct on which Ex.A-4 was inserted.

18. Autopsy of the dead body of the deceased Faujdar was conducted on 21.06.1996 at 03:15 p.m. in which the external injury was 1cm x 1cm with margin inverted in left gluteal region deep x cavity. No blackening or tattooing was found. The doctor had received a bullet from the bottom. In the opinion of the doctor cause of death was due to ante mortem injury on the body and also shock and haemorrhage. Thus, this witness has given secondary evidence with regard to the postmortem report.

19. PW-6, Ganesh Yadav has given secondary evidence regarding chik FIR and kaymi case GD which was written by Constable Moharrir Ram Sudh. He deposed that he has seen him reading and writing and he recognizes his writing and signature very well. The chik FIR and kaymi case GD Ex.Ka-5 and Ex.Ka-6 respectively is in his hand writing and signature. This witness has also given secondary evidence with regard to the inquest prepared by SI Suresh Ram and has deposed that he has seen him reading and writing. He recognized and proved the inquest and other papers Ex.Ka-9 to Ex.Ka-14.

20. So far as the trial of the absconding accused Ishtiyak is concerned,

after recording the evidence of PW-1 to PW-5 accused Ishtiyak had absconded and after his surrender further trial with regard to accused Ishtiyak had been concluded. The accused Ishtiyak had also denied the prosecution story, charges and the evidence produced by the prosecution and has said the prosecution story to be false and that the witnesses have falsely deposed against him. The criminal case has been initiated on account of enmity and refused to adduce any evidence in defence. He further stated himself to be innocent and to have been falsely implicated on account of enmity.

21. Both the trial courts concluded that all the accused persons were the residents of same village and witnesses of fact were well aware with them and they had also been recognized committing the alleged crime in the light of the enlightened bulb.

22. In Criminal Appeal No.2916 of 2018 accused Gufran and Saddik have taken ground that the order of conviction and sentencing passed against the appellants is against the weight of evidence on record and against the law. The accused have not caused any injury either to the deceased or to the informant. The sentence awarded to the appellants is too severe. Hence, the appeal be allowed and the impugned judgment and order be set aside.

23. In Criminal Appeal No.4700 of 2019, the accused Ishtiyak has taken ground that conviction and sentencing passed against the appellant is against the weight of evidence on record and against the law. The accused has not caused any injury either to the deceased or to the informant. The sentence awarded to the appellant is too severe. The appellant has falsely been implicated due to bad and

malicious motive. He is neither previous convict nor wanted in any criminal case nor he has any criminal history except present what appears to be false and fabricated case. The judgment and order of the trial court is not sustainable in the eyes of law. Hence, the appeal be allowed and order of conviction and sentence recorded by the trial court be set aside.

(II) Discussion on the merit on the following issues-

(i) FIR

24. In this case, FIR against the named accused persons has been lodged just after the incident and thus there is no delay or defect in lodging the FIR.

(ii) Motive

25. In this case, no motive has been assigned in the FIR but during the statement under Section 161 CrPC and also in the statement before the court all the witnesses have given motive behind the commission of crime that prior to this incident, there was enmity between the accused persons and neighbour Kalpnath who belongs to his community. Earlier, accused persons had badly beaten Kalpnath by stick and hockey etc. regarding which PW-1 had deposed against the accused persons, therefore, they were annoyed. Prior enmity has also been accepted by the accused persons in their statement under Section 313 CrPC. Thus, it is proved that there was enmity between the parties. Enmity is double edged weapon, it may be a cause to commit the offence and also to falsely implicate the accused persons, it has to be seen later on that this incident had occurred on account of prior enmity or accused persons had been falsely implicated. In this regard the legal

proposition has been stated in **Nagraj Vs. State, (2015) 4 SCC 739; Wakkar and others Vs. State of UP, (2011) 3 SCC 306 and Nathuni Yadav and others Vs. State of Bihar and another, (1998) 9 SCC 238.**

(iii) Mens rea

26. The prosecution case is that on account of prior enmity accused persons had formed an unlawful assembly and reached on the spot with deadly weapons to commit murder of the informant but they targeted the deceased easily. Crime is a wrong to the society involving breach of law which has criminal consequences attached to it, i.e. prosecution by the State in the criminal court and the possibility of punishment being imposed on the wrong doer. The concept of crime is dynamic in nature and it keeps on changing with changes in social norms, values and perceptions about wrongful human conduct in a society. Such as in case of live-in-relationship.

27. There are following elements of crime:

(i) there should be an overt act (*actus*) or omission;

(ii) it should have been done with criminal intent (*mens rea*);

(iii) the act or omission, as the case may be, should be a prohibited conduct under the existing law of crimes; and

(iv) it should carry some kind of sanction by way of punishment.

28. So far the overt act or omission is concerned, mere intention or *mens rea* shall not by itself constitute a crime unless it is accompanied by external overt act. The criminal law not only holds the person who

has committed a crime liable to be punished, an attempt to commit a crime is also an offence punishable under Sections 511 and 307 IPC.

29. So far the second ingredients is concerned, mens rea or guilty mind is an essential ingredient of a crime which may be direct, indirect or implied. The implied mens rea is also turned as constructive mens rea which imposes absolute liability on the offender. Irrespective of the fact whether he knew that what was doing was a crime or not. For instance, a person selling adulterated food or edible item shall be held guilty and cannot be escaped saying that the actual adulterator was his master.

30. In the context of mens rea, a distinction has to be drawn between intention and motive. Mens rea means guilty mind. What is relevant in deciding the guilt of the offender is intention of doing with particular act i.e. crime and not the motive behind doing that act. An act to be treated as crime, should be prohibited or forbidden under the existing penal law.

31. As a general rule, the burden of proof in a criminal case lies on the prosecution because of the principle that an accused is presumed to be innocent until he is proved guilty. In case of any doubt regarding participation or involvement of the accused in the crime, he is entitled to the benefit of doubt and may be discharged or acquitted. Where two similar possibility of guilty of offence do not arise, the benefit shall go to the accused and he shall be acquitted.

32. The normal rule is that a person should be held liable for an act and no one can be penalized for the act of the other but there are exceptions that on the basis of

collective responsibility another person participating slightly in the offence may be punished.

33. Here, it is the case of the prosecution that on account of prior enmity accused persons had formed an unlawful assembly and reached on the spot to commit murder of the informant but they targeted the deceased easily.

(iv) Inquest

34. In this case inquest Ex.Ka-8 has been conducted within the reasonable time just after the incident. The witnesses of the inquest have also stated that the alleged offence had been caused by the accused persons by fire arm. At the time of inquest, copy of the FIR and the chik FIR and after conversion of the case into Section 302 IPC amended parcha were also annexed by the IO with the inquest report. After the inquest, the dead body was sent for postmortem where postmortem had been conducted by Dr. Sanjiv Kumar Gupta. The postmortem report Ex.Ka-4 has been proved by PW-5, Arvind Kumar, Pharmacist.

35. As per postmortem report, the cause of death was shock and haemorrhage as a result of firearm injury. A bullet was also recovered from the dead body.

36. After inspecting the place of occurrence, the IO had prepared the site plan Ex.Ka-3 in which all the relevant facts have been shown and mentioned. According to site plan, accused persons had fired from place-A, seven steps away from the cot where the deceased had slept. The accused persons had come from the north-east side and after committing the offence they dispersed towards south-east from the

place of occurrence. No argument has been advanced by learned counsel for the appellant regarding any discrepancy in the site plan.

(v) Witnesses

37. Relation witnesses & interested witnesses: The testimony of a witness in a criminal trial cannot be discarded merely because the witness is a relative or family member of the victim of the offence. In such a case, court has to adopt a careful approach in analysing the evidence of such witness and if the testimony of the related witness is otherwise found credible, accused can be convicted on the basis of testimony of such related witness. (see **Bhagwan Jagannath Markad Vs. State of Maharashtra, (2016) 10 SCC 537; Dhari and others Vs. State of UP, AIR 2013 SC 308**).

38. **Inimical witnesses:** Enmity of the witnesses with the accused is not a ground to reject their testimony and if on proper scrutiny, the testimony of such witnesses is found reliable, the accused can be convicted. However, the possibility of falsely involving some persons in the crime or exaggerating the role of some of the accused by such witnesses should be kept in mind and ascertained on the facts of each case. (see **Dilawar Singh Vs. State of Haryana, (2015) 1 SCC 737; Ramesh Harijan Vs. State of UP, (2012) 5 SCC 777**).

39. **Independent witnesses & effect of their non-examination:** If a witness examined in the court is otherwise found reliable and trustworthy, the fact sought to be proved by that witness need not be further proved though there may be other witnesses available who could have been

examined but were not examined. Non-examination of material witness is not a mathematical formula for discarding the weight of the testimony available on record however natural, trustworthy and convincing it may be. It is settled law that non-examination of eye-witness cannot be pressed into service like a ritualistic formula for discarding the prosecution case with a stroke of pen. Court can convict an accused on statement of a sole witness even if he is relative of the deceased and non-examination of independent witness would not be fatal to the case of prosecution. (see: **Mukesh and another Vs. State (NCT of Delhi) and others, AIR 2017 SC 2161 (Three-Judge Bench); Sadhu Saran Singh Vs. State of UP and others, (2016) 4 SCC 357 and Avtar Singh Vs. State of Haryana, (2012) 9 SCC 432**).

40. **When independent witness won over by the accused:** Non-examination of independent eye witnesses is inconsequential if the witness was won over or terrorised by the accused. (see **Dharnidhar Vs. State of UP and others, (2010) 7 SCC 759; Dalbir Kaur and others Vs. State of Punjab, (1976) 4 SCC 158**).

41. **Public prosecutor not bound to examine all witnesses:** Explaining the provisions of Sections 231, 311 CrPC and Sections 114, 134 of the Evidence Act, the Supreme Court had ruled that prosecution need not examine its all witnesses. Discretion lies with the prosecution whether to tender or not witness to prove its case. Adverse inference against prosecution can be drawn only if withholding of witness was with oblique motive. (see **Bhagwan Jagannath Markad (supra); Nand Kumar Vs. State of Chhatisgarh, (2015) 1 SCC 776**;

Rohtas Kumar Vs. State of Haryana, 2013 CrLJ 3183 SC). Thus, non-examination of other witnesses is not fatal for the prosecution.

42. Witnesses when partly reliable & partly unreliable: Maxim "*falsus in uno, falsus in omnibus*" is not applicable in India. Principle of "false in one, false in all" cannot be applied in relation to the depositions of a witness who has been found lying on a particular fact and whose remaining part of testimony is otherwise truthful. Even if major portion of evidence of a witness is found deficient but residue is sufficient to prove the guilt of the accused, notwithstanding the acquittal of number of co-accused-conviction can be recorded. (see **Mani Vs. State, 2009 (67) ACC 526 (SC); Kalegura Padma Rao and another Vs. State of AP, AIR 2007 SC 1299; Kulvinder Singh Vs. State of Punjab, AIR 2007 SC 2868**).

43. Mode of Assessing reliability of a witness: In **Lallu Manjhi and another Vs. State of Jharkhand, AIR 2003 SC 854**, the Supreme Court has laid down certain factors to be kept in mind while assessing the testimony of a witness: "The Law of Evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the testimony of a single witness, the Court may classify the oral testimony into three categories, namely (i) wholly reliable, (ii) wholly unreliable and (iii) neither wholly reliable, nor wholly unreliable. In the first two categories there may be no difficulty in accepting or discarding the testimony of the single witness. The difficulty arises in the third category of cases. The Court has to be circumspect and has to look for corroboration in material particulars by

reliable testimony, direct or circumstantial, before acting upon testimony of a single witness".

44. Eye witnesses and how to judge their credibility: If the testimony of an eye witness is otherwise found trustworthy and reliable, the same cannot be disbelieved and rejected merely because certain insignificant, normal or natural contradictions have appeared into his testimony. If the inconsistencies, contradictions, exaggerations, embellishments and discrepancies in the testimony are only normal and not material in nature, then the testimony of an eye-witness has to be accepted and acted upon. Distinctions between normal discrepancies and material discrepancies are that while normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. (see **Ashok Kumar Chaudhary Vs. State of Bihar, 2008 (61) ACC 972 (SC); Dimple Gupta (minor) Vs. Rajiv Gupta, AIR 2008 SC 239**).

45. It is a night occurrence which had been occurred at the house of the informant, therefore, PWs-1 and 2 are the real, truthful and natural witnesses and their testimony cannot be discarded.

(vi) Source of light

46. According to the accused-appellants, the Lalganj Electric Feeder was not working since ten days before the incident. In this regard, no document regarding non-activation of Lalganj Electric Feeder has been produced from the defence side. Though a suggestion in this regard has been given to the informant PW-1 but neither any cross-examination in this regard has been made from PW-2 nor any suggestion has been given that the Lalganj

Electric Feeder was not working at that time. Hence, it is concluded that this plea has been taken only for the sake of argument and it has no substance.

47. Identification of accused by witnesses in poor light, no light or darkness: In criminal trials, argument by defence is often advanced that because of poor light, no light or darkness or night, the PWs could not have identified the accused. But in the cases noted below, the Supreme Court has clarified that a witness, who is accustomed to live in darkness, poor light or no light, can identify the accused even in such conditions.

48. It was a trial under Section 302/34 IPC. Accused were known to PWs. Occurrence had taken place at about 11:00 p.m, two days prior to the new moon day. Parties were used to live in the midst of nature and accustomed to live without light. Further, they were close relatives and living in the neighbouring huts. In view of these facts, the defence contention that the ocular witnesses could not have witnessed the occurrence was rejected by the apex court and conviction upheld. (see **Shivraj Bapuraj Jadhav and others Vs. State of Karnataka, (2003) 6 SCC 392**).

49. It was a murder trial. The victim had himself signed the FIR, made statements under Section 161 CrPC and died on way from police station to hospital. Occurrence had taken place at about 08:00 to 09:00 p.m. in the night. Victim and the witnesses had recognized the accused even in the night. Accused had challenged the deceased with insulting utterances before firing at him. The victim and the eye witnesses who were present at about 8 to 10 steps away from the place of occurrence, had, therefore, full opportunity

to identify the accused. Conviction was upheld. (see **Gulab Singh Vs. State of UP, 2003 (4) ACC 161 All (DB)**).

50. It was a criminal trial under Section 302/149, 201 IPC. Place of occurrence was verandah of the deceased. Lanterns (two) were said to be kept and lighting on the verandah near the place of occurrence. Mother, sister and neighbour of the deceased, being eye witnesses, had deposed during trial to have identified the accused persons in such poor light. Accused were convicted by the trial court. Argument of the accused/appellants before Supreme Court was that the two lanterns said to be kept on the verandah (place of occurrence) were neither seized nor produced before the court and even if it is supposed that the lanterns were there on the floor of the verandah, the lanterns could cast their light near the floor and, therefore, it was not possible for the eye witnesses to have identified the accused persons in such poor light even if the place of occurrence was verandah or courtyard. The Supreme Court rejected the argument and held "as the incident took place in village and the visibility of villagers are conditioned to such lights and it would be quite possible for the eye witnesses to identify men and matters in such light". (see **Ram Gulam Chowdhary Vs. State of Bihar, 2001 (2) JIC 986 SC**).

51. In this case, the deceased was murdered by the accused in the night while issuing copies of voter list and caste certificates and the hurricane lamp said to be lighting near the place of occurrence was not seized and produced by the investigating officer. The defence argument was that the eye witnesses could not have identified the accused as the hurricane lamp said to be the only source of light was not

produced by the prosecution in the court. The Supreme Court, upholding the conviction by rejecting the argument, held that it could legitimately be inferred that there would be some source of light to enable the deceased to perform his job. (see **B. Subba Rao Vs. Public Prosecutor, High Court of AP, 1998 (1) JIC 63 SC**).

52. "The visible capacity of urban people who are acclimatized to fluorescent light is not the standard to be applied to villagers whose optical potency is attuned to country made lamps. Visibility of villagers is conditioned to such lights and hence it would be quite possible for them to identify men and matters in such lights". (see **Kalika Tewari Vs. State of Bihar, JT 1997 (4) SC 405**).

53. Where the murder had taken place at night and the source of light was not indicated in the FIR and the accused and the eye witnesses were closely related, it has been held by the Supreme Court that the evidence of eye witnesses cannot be discarded. (see **State of UP Vs. Sheo Lal, AIR 2009 SC 1912**).

54. Where the witness had stated that he had seen the attack in the light of scooter head light, it has been held that mere absence of indication about source of light in FIR for identifying assailants does not in any way affect the prosecution version. (see **S. Sudershan Reddy Vs. State of AP, AIR 2006 SC 2716**).

55. **Moonless night & when torch not taken into possession by IO:** Where the murder had taken place in a moonless night and the eye witnesses had stated that they had identified the accused in torch light but the torch had not been taken into possession by the IO and both the parties

belonged to the same village and were well known to each other, it has been held that merely because non taking of torch into possession by the ASI would not mean that witnesses were not credible and conviction under Sec 302 IPC was held proper. (see **Durbal Vs. State of UP, 2011 CrLJ 1106 SC**).

56. On the basis of above, it is concluded that there was light and as the accused persons were well acquainted with the witnesses, thus, they were rightly recognized on the place of occurrence and their presence cannot be doubted.

57. In this regard, it is material that a plea has been taken that on the date and time of occurrence accused Saddik and Jahid were not present at their house and were out of village but in this regard neither statement nor evidence has been given by these accused persons in their examination under Section 313 CrPC or in defence. Neither such cross-examination has been made from PW-2 nor any suggestion in this regard has been given to PW-2. Hence, this Court is of the conclusion that the argument that on the date and time accused Saddik and Jahid were not present has been made only for the sake of argument and there is no truth in it.

58. From the side of the appellants only one argument has been made in the appeals that except Allau none of the convicts had attacked upon the deceased, informant PWs-1 and 2 or any other family members of the deceased. Hence, their role is separable from that of the accused Allau.

59. In this case accused Allau, Jahid and Ismidar have died. Accused Gufran and Saddik had faced trial in ST No.642 of

1996 but accused Ishtiyak had escaped and he appeared only after a long gap in the year 2018 and he was separately tried in ST No.642-A of 1996.

60. In this case as the accused Allau had died it has been argued that the deceased, Faujdar was attacked by him from katta, rest of the accused persons would not be liable under Sections 147, 148, 302/149 IPC.

61. As per prosecution case and evidence accused Allau had killed Faujdar from katta, accused Ismidar had revolver in his hand and accused Ishtiyak, Gufran and Saddik had also katta in their hands. It was a night occurrence which had occurred at about 12:30 a.m. when most of the villagers are in deep sleep. From the prosecution evidence and circumstances, it appears that the accused persons had chosen odd hours so that no or least resistance could be faced from the side of the informant. At that time target remains passive. During the course of commission of crime, bomb was also exploded and residue of bomb in the form of rope has also been found on the place of occurrence but no charges under the Explosive Substances Act, 1908 and Section 7 Criminal Law (Amendment) Act were framed, is a matter of concern.

62. In this case, motive to commit the alleged crime and previous enmity has also been proved. On account of motive forming mens rea to give a lesson and to commit the offence has also been proved. All the accused persons were armed with deadly weapon and they had come on the spot in a group in the form of unlawful assembly and with knowledge that in case of emergency these deadly weapons would be used. In this regard it would be proper to reproduce Section 141 IPC which is as under:-

"141. Unlawful assembly.—An assembly of five or more persons is designated an “unlawful assembly”, if the common object of the persons composing that assembly is—

Firstly.—To overawe by criminal force, or show of criminal force, the Central or any State Government or Parliament or the Legislature of any State, or any public servant in the exercise of the lawful power of such public servant; or

Secondly.—To resist the execution of any law, or of any legal process; or

Thirdly.—To commit any mischief or criminal trespass, or other offence; or

Fourthly.—By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

Fifthly.—By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

Explanation.—An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly."

63. According to Section 141 IPC to constitute an unlawful assembly following ingredients are necessary which are; (i) an assembly of five or more persons; (ii) they must have a common object; and (iii) the common object must be one of the five specified in the section.

64. The person forming unlawful assembly should have common object. It is immaterial whether they had such common object right from the beginning when they

assembled together or they developed it at a later stage which may be even at the time when the offence is being committed.

65. In **Masalti Vs. State of UP, AIR 1965 SC 202** it has been held that mere presence of a person in an assembly does not make him member of an unlawful assembly unless it is shown that he had committed or omitted to do something which would make him a member of unlawful assembly or his case falls under Section 142 IPC.

66. In **Bishambhar Vs. State of UP, AIR 1971 SC 2381** it was held that common object is something which pertains to faculty of mind. Therefore, no direct evidence can be available to prove common object. It is a question of fact to be determined on the basis of circumstances of the case. It must be stated that mere presence of a person in the unlawful assembly does not make it a member of that assembly unless it is shown that while being present there, he did some act or omission which would be sufficient to make him a member of that assembly. For instance, where a person having knowledge that some persons have assembled to commit an unlawful act, remains present in the assembly, it will make him a member of that unlawful assembly and he shall be criminally liable like any other member of that unlawful assembly.

67. The Supreme Court in **Lalji Vs. State of UP, AIR 1989 SC 754** held that though no hard and fast rule can be laid down to determine common object of the unlawful assembly, but it may be reasonably gathered from the nature of the assembly, the kind of arms carried and used, behaviour of the members of

assembly prior to or at the time of and after the incident and the acts, gestures and language used by members while making use of the arms or weapons.

68. Section 142 IPC reads as under:-

"142. Being member of unlawful assembly.—Whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly."

69. In **Banwari Ram Vs. State of UP, AIR 1998 SC 674** it has been held that it is for this reason that passive spectators or curious on-lookers are not considered as members of unlawful assembly despite their presence in such assembly because they do not share the common object of the members of that assembly.

70. According to this Court, this pronouncement cannot be applied in favour of the convicts. In the case at hand as they were not the passive spectators or curious on-lookers because they had come with deadly weapons in their hands alongwith accused Allau, in the fateful night in odd hours. After completing their job and on being satisfied, they returned attempting to kill the informant PW-1, throwing bomb and also abusing the family members of the informant.

71. In order to punish a person as a member of unlawful assembly it is not necessary that the member of such assembly must have committed some overt act, the only requirement is that he must have the knowledge about the common object of such assembly. If he did have, he will be punishable for being a member of unlawful assembly. (see **Yunis @ Kariya Vs. State of MP, (2003) 1 SCC 425**).

72. Sections 143, 144 and 146 IPC read as under:-

“143. Punishment.—Whoever is a member of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to six month, or with fine, or with both.

144. Joining unlawful assembly deadly weapon.—Whoever, being armed with any deadly weapon, or with anything which, used as a weapon of offence, is likely to cause death, is a member of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

x x x x x

146. Rioting.—Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting.”

73 . The offence of rioting is punishable under Section 147 IPC.

74. The essential ingredients of Section 146 are:-

“(1) there must be five or more persons forming an unlawful assembly;

(2) they should have been animated by a common unlawful object;

(3) there must be use of force or violence by the unlawful assembly or any member of such assembly; and

(4) that force and violence used should be in furtherance of their common unlawful object.”

75. Section 147 IPC reads as under:-

“147. Punishment for rioting.—Whoever is guilty of rioting, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.”

76. In **Kirtan Bhuyyan Vs. State of Orissa, AIR 1992 SC 1579** it was held that the accused who was a member of an unlawful assembly struck a knife-blow on the neck of the deceased which cut one of the vital blood-veins resulting in his death. He was convicted under Section 302 read with Section 149 IPC while other members were convicted under Section 147 IPC. On appeal, the Supreme Court upheld the judgment of the High Court and held that the accused who caused murder was rightly separated from other accused persons who were members of unlawful assembly.

77. Section 148 IPC reads as under:-

“148. Rioting, armed with deadly weapon.—Whoever is guilty of rioting, being armed with a deadly weapon or with anything which, used as a weapon of offence, is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

78. The offence under Section 148 is an aggravated form of rioting mentioned in Section 146 IPC. It, therefore, provides for enhanced punishment for a person who is armed with a deadly weapon while committing rioting. The distinction between Sections 146 and 148 lies in the fact that in order to constitute offence under Section 146, members of "unlawful assembly" need not carry weapon while person charged under Section 148 IPC must be armed with deadly weapons.

79. Section 146 defines the offence of rioting, Section 147 prescribes punishment for rioting and Section 148 prescribed punishment for offence of rioting armed with deadly weapons.

80. Where in an unlawful assembly that used force, if along with others, there was only one member armed with a deadly weapon, he alone, and not the other unarmed members of the assembly, will be liable to punishment under Section 148 and the rest of the members will be liable under Section 147.

81. In **State of Andhra Pradesh Vs. Thakkiyaram Reddy**, 1990 CrLJ 2668 (SC) it was observed that there was bitter enmity between two groups. The miscreants arrived with deadly weapons trespassed into the house of deceased by breaking open the door with the object of killing him. They dragged the deceased from his bed room to the court-yard of the house and beat him to death. Held that the accused in this case were liable under Section 302 read with Section 148 as all of them had formed an unlawful assembly with the common object of causing death of the deceased.

82. Section 149 IPC reads as under:-

“149. Every member of unlawful guilty of offence committed in a prosecution of common object.—If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members or that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.”

83. The ingredients of the offence under Section 149 IPC are:-

“(1) commission of an offence by any member of an unlawful assembly;

(2) such offence must have been committed in prosecution of the common object of the assembly; or must be such as the members of the assembly knew to be likely to be committed.”

84. Explaining the nature, scope and object of Section 149, the Supreme Court in **Vinubhai Ranchodbhai Patel Vs. Rajivbhai Dudabhai Patel and others**, (2018) 7 SCC 743 (744) observed that the Section conceives in larger public interest to maintain tranquillity of society and preventing offenders from claiming impunity on ground that their activity as member of unlawful assembly was limited. It propounds vicarious liability in two contingencies by declaring that if member of unlawful assembly commits offence in prosecution of common object of unlawful assembly, every member will be guilty of offence committed by other members of unlawful assembly and even in cases where some members do not share common object to commit particular offence, but if they had knowledge of fact that some other members of assembly are likely to commit that particular offence in furtherance of common object, they would be liable. It may be noted that Section 149 does not create a separate offence but only declares vicarious liability of members of unlawful assembly in certain circumstances.

85. The Supreme Court in **Gangadhar Behra Vs. State of Orissa**, 2003 CrLJ 41 (SC) held that the expression "in prosecution of the common object" used in the section has to be strictly construed to mean "in order to attain the

common object". The word "knew" used in the second part of Section 149 is something more than a mere possibility and it is also different from the expression "might have known".

86. In **Masalti** (supra) the Supreme Court also held that in fact, Section 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of a common object of that assembly, or such as the members of that assembly knew to be likely to be committed in furtherance of that object, every person who, at the time of committing of that offence, is a member of the same assembly is guilty of that offence; and that emphatically brings out the principle that the punishment prescribed under Section 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of unlawful assembly.

87. In **Asharful Vs. State of U.P., AIR 1987 SC 721** it was held that two innocent small girls were killed by the accused persons in a gruesome manner just to teach a lesson to their mother with whom the accused had some property dispute. Every member of the killing team was held to be equally guilty and sentenced to death, this being a rarest of rare case.

88. In **State of Maharashtra Vs. Kashirao, 2003 CrLJ 4464 SC** the Supreme Court reiterated that commission of an overt act in prosecution of common object is not at all the necessary condition for conviction of the member of an unlawful assembly under Section 149. The only requirement is that he should have knowledge that the assembly was unlawful and was likely to commit an act which fell

within the ambit of Section 141 in prosecution of a common object.

89. The Supreme Court in **Allauddin Mian Vs. State of Bihar, (2007) 9 SCC 791** has laid down the principle when vicarious liability is created under Section 149. In order to fasten vicarious liability on any member of unlawful assembly, the prosecution, must prove that the act constituting the offence was done in prosecution of common object of that assembly or the act done is such as the member of that assembly knew to be likely to be committed in prosecution of common object of that assembly. Then, every member of unlawful assembly will render himself liable under Section 149 for the criminal act/acts of any other member(s) of that assembly provided same is done in prosecution of common object or such that every member knew to be likely committed.

90. In **Bhagwan Singh Vs. State of MP, AIR 2002 SC 1621** the Supreme Court made it clear that for the 'common object' under Section 149 prior concert or agreement/consent for committing assault is not at all necessary. It is generally felt that when deadly assault is committed by a group of armed persons, it is difficult to assess the role of individual member. Therefore, in order to hold them guilty under Section 149 it is sufficient to prove that all the members of such unlawful assembly had a common object and each of them had the knowledge of such assault likely being committed, though all of them may not necessarily be armed with weapons.

91. In **Unus Vs. State of MP, 2003 CrLJ 817 (SC)** the Supreme Court ruled that where it has been proved that accused

was a member of unlawful assembly and was present at the scene of incident, he may be convicted under Section 149 although he might not have committed any overt act in prosecution of the common object. Similar view was expressed by the Apex Court in **Ramvilas Singh Vs. State of Bihar, AIR 1969 SC 1593** wherein it was held that the offence committed by one or more members of the unlawful assembly will be construed to have been done by all the members provided their knowledge about the common object is proved by the prosecution.

92. Contrary to that learned counsel for the appellants relied on **Sunil Balkrishna Bhoir Vs. State of Maharashtra, (2009) 2 SCC (Cri) 226** in which all the accused persons allegedly came on the spot at about 07:30 p.m. The accused no.1 asked for a gold pendent from the deceased Ramdas which was the subject matter of the dispute between the parties and in relation whereunto quarrel had taken place as the earlier occasion. The deceased, in response thereto is said to have stated that he had returned the said gold pendent to some persons hailing from Panchpakhadi area. At that time the accused no.2 allegedly caught hold of shirt of the deceased, a scuffle ensued between the accused no.2 and the deceased. PW-1 with the wife of the accused no.1 intervened and separated them. No report of the incident was accepted by the police and the police directed them to pacify both the parties and sent them back. Thereafter PW-1 came to the house of the deceased and at about 09:00 p.m. both of them came back to the house of the deceased. Ramdas expressed his desire to have his dinner and requested PW-1 at his place to wait whereafter he promised to go to the complainant's house. At that time PW-1 saw 6-7 persons coming towards his house. Accused no.2 was having a knife in his hand, and

accused nos.3 to 6 were having swords in their hands. PW-1 was asked to call the deceased to which he replied that he was taking his dinner, and they could talk to him after he finished his meal. He was then allegedly assaulted by accused no.3 by a sword by its blunt side on the shoulder, whereafter the accused entered into the house of the deceased. Baburao, PW-5 father of the deceased tried to resist them and in the process, caught hold of the sword which was in the hand of the accused no.6 resulting in sustaining of bleeding injuries. The accused allegedly entered into the room. The deceased was assaulted with kicks and fist blows. Accused no.2, Anil Mhatre stabbed the deceased Ramdas with a knife.

93. Learned counsel for the appellants referred paragraph-24 of the said judgment in which the Apex Court held as under:-

“24. Applying the tests laid down by this Court in the aforementioned decisions, we are of the opinion that no case had been made out as against the appellants to arrive at a conclusion that they are guilty of commission of an offence under Section 302/149. We would assume that they were guilty under Section 452 of the Indian Penal Code but they have remained in custody for sufficiently long time. We, therefore, are of the opinion that having regard to the facts and circumstances of this case, these appeals should be accepted. Appellants herein are in custody. They are directed to be set at liberty in connection with certain other offences. The appeals are allowed and the impugned judgment is set aside.”

94. In this case the accused was convicted only under Section 452 IPC.

95. Learned counsel for the appellants has also relied on the judgment in **Bishu**

Sarkar and others Vs. State of West Bengal, (2017) 11 SCC 105 which was a case under Section 302/34 IPC in which appellants were convicted and sentenced under Section 302/34 IPC. In this case it has been established that none of the appellants dealt any blow by weapon. Though they participated in the scuffle, therefore, given benefit of doubt they were acquitted from the charge under Section 302/34 IPC. It was held that on the basis of evidence accused no.1 was author of the fatal injury and the appeal at his instance has been dismissed. The Apex Court concluded that none of the appellants has dealt with any blow by any weapon and all they did was to participate in the scuffle. According to PWs-2 and 5 the present appellants had caught hold of Raju Bose. But it is not clear from the record whether such act was so intended to enable accused no.1 to deal the fatal blow. PW-3 was completely silent on this aspect. Hence, given benefit of doubt the appeal was allowed and the appellants were acquitted.

96. According to this Court, it was not a case under Section 149 IPC committed by any member of the unlawful assembly in furtherance of achieving the object of such assembly. There is distinction between the common intention and common object which has been defined by the Apex Court in **Chittarmal, Moti Vs. State of Rajasthan, AIR 2003 SC 796** which reads as under:-

“It is well settled by a catena of decisions that Section 34 as well as Section 149 deal with liability for constructive criminality i.e. vicarious liability of a person for acts of others. These sections deal with combinations of persons who become punishable as sharers in an offence. Thus they have a certain

resemblance and may to some extent overlap, but there is clear distinction between the two.

Common intention denotes action in concert and necessarily postulates the existence of a pre-arranged plan implying a prior meeting of the minds, while common object does not necessarily require proof of prior meeting of minds or pre-concert. Despite this substantial difference between the two sections, they also to some extent overlap and it is a question to be determined on the facts of each case whether the charge under section 149 overlaps the ground covered by section 34. Thus, if several persons numbering five or more, do an act and intend to do it, both sections 34 and section 149 may apply... However, the non applicability of section 149 is not a bar in convicting the appellants under section 302 read with section 34 IPC, if the evidence discloses commission of an offence in furtherance of the common intention of them.”

97. On the basis of these observations made by the Supreme Court, the distinction between common intention (Section 34) and common object (Section 149) may briefly be stated as follows:-

1. Though both sections deal with joint constructive liability the provisions of Section 34 are more extensive than those of Section 149.

2. Section 149 to be applicable, requires an assembly of at least five persons, whereas in case of Section 34 this number is minimum two.

3. Section 34 does not specify any particular intention, i.e. it may be any intention, but Section 149 applies only to cases where ‘common object’ is one of those as specified in Section 141 IPC.

4. Section 34 does not insist on commission of a criminal act (i.e., offence) in actual furtherance of common intention but the offence for the applicability of Section 149 has to be one which the member of the unlawful assembly knew to be likely to be committed in prosecution of the common object.

5. Section 34 is a mere rule of evidence but creates no distinct offence, whereas Section 149 creates a specific offence. Commenting on this point, Justice Beg of the Allahabad High court (who later became the Chief Justice of India), observed that Section embodies merely a declarator provision relating to joint criminal liability whereas Section 149 envisages a distinct specific offence.

6. Last but not the least, the applicability of Section 34 requires the consideration of both, the physical as well as the mental aspect of ingredient of this section. As against this, Section 149 does not insist only on the mental element and therefore, it is not necessary that a member of an unlawful assembly must have actually participated in commission of the offence.

7. The conviction of a person charged under Section 149 may be altered to one of Section 34 IPC in a case where the existence of unlawful assembly (as specified under Section 141) is not proved, but not vice versa."

98. Contrary to that learned AGA relied on the judgment in **Iqbal and another Vs. State of UP, (2017) 11 SCC 93** in which referring to the judgment in **Lalji** (supra) the Supreme Court observed which reads thus:-

"11. In the instant case after having held that the appellants formed an unlawful assembly carrying dangerous weapons with the common object to

resorting to violence (as described in the charge) it was not open to the High Court to acquit some of the members on the ground that they themselves did not perform any violent act, or that there was no corroboration of their participation. In other words, having held that they formed an unlawful assembly and committed an offence punishable with the aid of Section 149 IPC, the High Court erred in examining which of the members only did actively participate and in acquitting those who, according to the court, did not so participate. Doing so would amount to forgetting the very nature and essence of the offence created by Section 149 IPC. The court in undeserving cases cannot afford to be charitable in the administration of criminal justice which is so vital for peace and order in the society."

99. Whether the judicial pronouncements cited by the learned counsel for the appellants would apply or the aforesaid judicial precedents relied on by the learned AGA would apply on the case at hand has to be seen in the light of the facts and circumstances of this case.

100. In this case it has been proved that there was prior enmity between the convict appellants and the informant, his family members and his neighbour Kalpnath. Kalpnath was earlier assaulted by the accused persons, in which the informant was one of the witnesses. As it is a case of direct evidence, therefore, motive has no much significance.

101. In this case, it has been proved that the convict appellants had chosen the odd hour (night time) when the informant and his family would certainly be sleeping and the common object of the unlawful assembly could be easily achieved. In this

case, all the accused persons were armed with katta, revolver and bomb. They were knowing that accused Allau whose shot hit and killed the deceased was having a deadly weapon which he would use to achieve the common object of the unlawful assembly. Further more, they even exhorted each other to kill the family member(s) of the informant side. It has been proved from the evidence of PW-1 that after hitting the deceased accused Saddik had fired upon him but he escaped. It has also been proved that all the accused persons were abusing the whole family members of the deceased by calling them “chamaria”. It has also been proved that one of the accused Jahid had exploded bomb on the spot and the residue in the shape of rope had been recovered from the spot even then no application of the Explosive Substances Act had been made. From the evidence on record, it has been proved that in the aforesaid circumstances, the informant and his family members were not in position to defend themselves.

102. On the basis of above, this Court is of the view that the alleged offence was committed by the convict appellants being a member of unlawful assembly to achieve the common object and they left the place of occurrence only when other persons of the vicinity reached and intervened and they thought that any counter could also be happened against them. Even after the incident they did not run away from the spot but they left the spot abusing the informant and his family members.

103. On the basis of above, this Court is of the view that the trial court has rightly convicted all the accused persons under Sections 148, 307 read with Section 149, 302 read with Section 149 IPC, therefore, no interference is warranted in the appeals.

The appeals are devoid of merits and are liable to be dismissed.

104. Accordingly, these criminal appeals are hereby dismissed.

105. The accused appellants, Gufran and Saddik be taken into custody. They shall be sent to jail to serve the sentence and also to deposit the fine imposed upon him.

106. Let lower court record be sent back to the Court of Additional Sessions Judge, Court No.2, Azamgarh alongwith a copy of this judgment for compliance and consignment.

(2023) 9 ILRA 95

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 29.08.2023

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA

THAKER, J.

THE HON'BLE UMESH CHANDRA SHARMA, J.

Criminal Appeal No. 5776 of 2017

Ashwani Sharma & Anr.

...Appellants

Versus

State of U.P.

...Respondent

Counsel for the Appellants:

Sri Vikas Sharma, Sri Anil Kumar Dubey, Sri Anurag Pathak, Sri Bed Prakash Rai, Sri Chandra Bhan Dubey, Sri Garun Pal Singh, Sri Harshit Pathak

Counsel for the Respondent:

G.A., Sri Pradeep Kumar Rai, Sri Saurabh Trivedi

(A) Criminal Law - Criminal Procedure Code, 1973 - Section 313 - Indian Penal

Code, 1860 -Sections 34, 299, 300, 302, 304, 304-I & 304-II : - Appeal – against conviction & sentence – FIR – alleged that, the incident occurred, when the informant's brother was beaten by three boys of and their father (appellant no. 1), leading to his death – offence of murder – investigation – chargesheet u/s 302/34 IPC – two accused sons of appellant was minor hence their case was not committed - conviction and sentenced – Evaluation of Evidence & quantum of punishment - court finds that – there was no undue or unreasonable delay in lodging FIR, - witnesses included the informant, the deceased's wife, and an independent witness and Medical examination revealed multiple injuries on the deceased , - motive is not spelt out form any of the evidence - however, death was not premeditated and concluded that the offence was culpable homicide not amounting to murder, punishable under Section 304 Part-I IPC – hence, court convert the conviction of the accused-appellant from Section 302 IPC to section 304-part I IPC – sentence is reduced to the period already undergone & fine to be deposited within four weeks of release from incarceration – Accordingly, Appeal is partly allowed. (Para – 12, 13, 15, 28, 29)

Appeal is partly allowed. (E-11)

List of Cases cited:

1. Nirmala Devi Vs St. of H.P., 2023 INSC 662,
2. Khokan@ Khokhan Vishwas Vs St. of Chattisgarh, 2021 LawSuit (SC) 80,
3. Pravat Chandra Mohanty Vs St. of Odisha, (2021) 3 SCC 529,
4. Pardeshiram Vs St. of M.P., (2021) 3 SCC 238,
5. Tukaram & ors.Vs St. of Mah., reported in (2011) 4 SCC 250,
6. B.N. Kavatakar & anr. Vs St. of Karn., reported in 1994 SUPP (1) SCC 304,
7. Veeran & ors. Vs St. of M.P. Decided, (2011) 5 SCR 300,
8. Mohd. Giasuddin Vs St. of A.P., [AIR 1977 SC 1926],
9. Deo Narain Mandal Vs St. of U.P. [(2004) 7 SCC 257],
10. Ravada Sasikala Vs St. of A.P. AIR 2017 SC 1166,
11. Jameel Vs St. of UP [(2010) 12 SCC 532],
12. Guru Basavraj Vs St. of Karn., [(2012) 8 SCC 734],
13. Sumer Singh Vs Surajbhan Singh, [(2014) 7 SCC 323],
14. St. of Pun. Vs Bawa Singh, [(2015) 3 SCC 441],
15. Raj Bala Vs St. of Har., [(2016) 1 SCC 463].

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

1. Heard Sri Bed Prakash Rai, learned counsel for the appellants and learned A.G.A. for the State.

2. This appeal challenges the judgment and order dated 28.8.2017 passed by Additional Sessions Judge, Court No.11, Meerut, in Sessions Trial No. 979 of 2014 (State vs. Monu and Another) convicting accused-appellants under Section 302 read with Section 34 of Indian Penal Code, 1860 (hereinafter referred to as 'IPC') and sentenced the accused-appellants to undergo imprisonment for life with fine of Rs.10,000/- and in case of default of payment of fine, further to undergo imprisonment for a period of one year and under Section 504 IPC to undergo imprisonment for one year each.

3. In brief, facts of the case are that informant Jitendra Kumar on 14.4.2014 at 23:46 moved Tehrir, Ex. Ka-1, alleging

therein that his brother Indresh Kumar, deceased, lived at Ganga Nagar along with his family. On 14.4.2014 in the morning his niece Shiwangi was teased by three boys namely Nishu, Rahul and Monu @ Mayank sons of Ashwani Sharma. The mother of the boys was apprised about the aforesaid incident. At about 8:00-8:30 P.M. when his brother alongwith his wife was coming from his Parichitgarh clinic and when they reached in front of Jagdamba Health Club in O block Ganga Nagar Meerut, the aforesaid three boys along with their father surrounded his brother and started beating him. On hue and cry, Neetu Sharma @ Jitendra son of Ramesh Chandra Sharma also reached there, he and his brother's wife told that Monu @ Mayank and Rahul had caught hold of Indresh and Nishu Sharma and their father Ashwani Sharma with intention to kill, gave multiple blows from baseball.

4. On the aforesaid Tehrir an F.I.R., Ex. Ka-4, Case Crime No. 221 of 2014 under Section 302 I.P.C. was lodged at Police Station Inchauli, District Meerut against the accused Monu @ Mayank, Ashwani Sharma, Nishu and Rahul.

5. On investigation being put into motion, the investigating officer recorded the statements of all the witnesses and submitted the charge-sheet to the learned Magistrate. The learned Magistrate on finding the offences to be triable by Court of Sessions, committed the case to the Court of Sessions. However, the accused Nishu Sharma and Rahul Sharma were minor hence their case was not committed.

6. On 9.3.2016 the charges under Section 302/34 and 504 I.P.C. were framed against the accused. The accused-persons pleaded not guilty and wanted to be tried.

The Trial started and the prosecution examined 8 witnesses who are as follows:

1	Jitendra Kumar-	PW1
2	Neelam Sharma	PW2
3	Neetu Sharma	PW3
4	Constable Pramod Kumar	PW4
5	Dr. Vinay Bhargav	PW5
6	S.I. Hans Ras Bhadoriya	PW6
7	S.I. Mukesh Kumar	PW7
8	Inspector Pramod Kumar Singh	PW8

7. In support of ocular version following documents were filed:

1	F.I.R.	Ex.Ka.1
2	Inquest	Ex.Ka.2
3	Chik F.I.R.	Ex. Ka.3
4	Corbon copy report no. 45 dated 14.4.2014	Ex.Ka.4
5	Post-mortem report	Ex.Ka.5-6
6	Site Plan	Ex.Ka.7
7	Arrest Memo of the accused and recovery memo of baseball	Ex.Ka.8
8	Site Plan of recovery	Ex.Ka.9
9	Letter of S.I.	Ex.Ka.10
10	Letter to C.M.O.	Ex.Ka.11
11	Police Form No. 13	Ex.Ka.
12	Police Form No. 379	Ex.Ka. 13
13	Sealed	Ex.Ka. 14
14	Charge-sheet	Ex.Ka. 15
15	F.S.L. Report	Ex.Ka.16

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

9. In brief the relevant evidence of the prosecution witnesses are as follows:

(a) P.W.-1, informant, Jitendra Kumar, has deposed that the deceased was his younger brother who used to live at Ganga Nagar along with his family. On 14.4.2014, in the morning his niece Shiwangi was teased by three boys namely Nishu, Rahul and Monu @ Mayank sons of Ashwani Sharma. The mother of the boys was apprised about the incident. The deceased also informed the informant about the aforesaid incident. At about 8:00-8:30 P.M. when his brother alongwith his wife was coming from his Parichitgarh clinic and when they reached in front of Jagdamba Health Club in O block Ganga Nagar Meerut, the aforesaid three boys along with their father surrounded his brother and started beating him. On hue and cry, Neetu Sharma @ Jitendra son of Ramesh Chandra Sharma also reached there, he and his brother's wife told that Monu @ Mayank and Rahul had caught hold of Indresh and Nishu Sharma and their father Ashwani Sharma with intention to kill, gave multiple blows from baseball due to which he becoming unconscious fell down. On hue and cry Neetu Sharma @ Jitendra and other people reached there and the assailants ran away. Indresh was rushed to Surya Nurshing Home by these people where during the treatment Indresh died. Thereafter a complaint scribed by his younger brother Sanjeev was produced by this witness in the police station Inchauli at 11:45 P.M. on which police reached there and conducted inquest, prepared inquest report Ex. Ka-2 which has been proved by this witness. This witness admits that he is not an eyewitness of the incident.

(b) P.W.-2, Smt. Neelam Sharma, who was present on the spot, has deposed in support of prosecution version and has

deposed that the accused persons were already present on the spot and when they reached there, the accused persons surrounded them, Rahul and Monu @ Mayank caught hold of her husband, accused Ashwani Sharma and Neeshu Sharma assaulted him by baseball due to which he fell down unconscious. On commotion Neetu Sharma @ Jitendra and other people reached there. During the course of deposition this witness identified the accused persons. She also deposed that at the time of incident there was street light and bulb of the nearby houses. This witness has given intact evidence even in cross-examination.

(c) P.W.-3, Neetu Sharma, an independent witness, has deposed in support of prosecution version that at about 8:30 P.M. on 14.4.2014, he was buying goods in the Ganga Market, he heard commotion coming from the side of Jagdamba Health Club and reached there and saw that 3-4 persons were assaulting Indresh, two persons had caught hold of him and two other were hitting him from baseball and a woman who claimed herself to be wife of the victim, was crying nearby. At the time of deposition this witness recognized two accused persons in the Court. He further deposed that when he and other persons reached on the spot, accused persons ran away. The deceased was lying in unconscious state. He and other persons transported the deceased to Surya Nurshing Home and had admitted there. The deceased had communicated the reason behind the incident was teasing of his daughter by the sons of Aswani Sharma when she used to go to school.

(d) P.W.-4, Constable Pramod Kumar, has proved chik F.I.R., Ex. Ka-3 and Kayami G.D. Ex. Ka-4.

(e) P.W.-5, Dr. Vinay Bhargav, has conducted the autopsy of the dead body

of the deceased at 1:40 P.M. on 15.4.2014 and found following injuries on the person of the deceased:

External Injury:

(i) There were swelling on the left side of the head in an area of 10 cm X 8 cm.

(ii) There was an injury on the forehead of the skull in an area of 6 cm X 2 cm.

(iii) Swelling on the right temporal region in an area of 12 cm X 8 cm, blood was oozing from right ear. There was also swelling in the lower part of the neck in an area of 10 cm X 8 cm.

In the internal examination, this witness found that the meninges were reddish and there was bleeding. The interior and the temporal regions of the brain were also reddish. The cause of the death was head injury caused on 14.4.2014 at 9-10 P.M. The witness has deposed that the clothes of the deceased were sealed. This witness has proved the post-mortem report as Ex. Ka-5 & Ex. Ka-6.

During the cross-examination, on being asked by counsel for the defence, this witness has deposed that it is difficult to say that the injury occurred due to falling on the road after colliding of head of the deceased from a strong object. He further deposed that it is also difficult to say that the injuries are accidental or inflicted by someone.

(f) P.W.-6, S.I. Hansraj Singh Bhadauriya, I.O. being in-charge of S.O. of Police Station- Inchauli, has deposed that he had copied the chik F.I.R., written complaint, statement of the informant and after inspecting the place of occurrence on the pointing of the informant, had prepared site plan, Ex. Ka-7, he had arrested accused Neetu and Ashwani from Kaseru Baxar Chauraha and on the pointing of accused

Neeshu, recovered baseball used in commission of crime and has prepared recovery memo Ex. Ka-8 and site plan of the recovery, Ex. Ka-9. He had also copied post mortem report and after obtaining N.B.W. against absconding accused Rahul and Monu, had initiated the proceeding under Section 82 & 83 Cr.P.C. Lastly they had surrendered on 24.4.2014 thereafter he had recorded their statements.

(g) P.W.7, S.I. Mukesh Kumar, has conducted inquest, Ex.Ka-2, and related paper viz report R.I., report C.M.O., Challan Lash, Photo Lash, Ex. Ka-10 to Ka-13 and has proved them. He deposed that he had sent the dead body for post-mortem.

(h) P.W.-8, Inspector Pramod Kumar Singh, has deposed that after transfer of first I.O., he had received the investigation and had copied the inquest and post-mortem report in C.D. and had recorded the statement of S.I. Mukesh Kumar, constable Rajendra Kumar and constable Manoj Kumar and witness of the inquest Jitendra Kumar along with statement of Smt. Neelam. After finding sufficient evidence, he had submitted charge-sheet, Ex. Ka-15.

10. All the formal witnesses have proved the documentary evidence prepared by them during their deposition.

11. The learned counsel for the accused-appellants has relied on the judgment of *Nirmala Devi Vs. State of Himanchal Pradesh, 2023 INSC 662*, wherein the Apex Court has held in para 13 & 14 as follows:

“13. It is to be noted that the weapon used in the crime is a stick which was lying in the house, and which, by no means, can be called a deadly weapon.

Therefore, the possibility of the appellant causing the death of the deceased while being deprived of the power of self-control, due to the provocation on account of the deceased not agreeing to pay Rs.500/- to PW-1, cannot be ruled out.

14. We further find that it will also be necessary to take into consideration the background in which the offence took place. There used to be persistent quarrels between the deceased and the appellant. In one of such incidents, the leg of the appellant was fractured by the deceased, and a case was already pending against him for the said offence."

12. On the basis of above pronouncement the learned counsel for the appellants argued that in this case, the crime is said to be caused by baseball stick which can not be said to be a deadly weapon. It can not be said that it is sufficient to commit an offence of murder as defined under Section 302 I.P.C. He further argued that if there was any ***Mens Rea*** of killing the deceased, the accused would have taken and used any other deadly weapon like fire-arm, pierce, gadasa etc.

13. From the perusal of evidence of the witnesses, it has been established that there is no undue or unreasonable delay in lodging the F.I.R. The accused were identified by P.W.-2, wife of the deceased who was present on the spot. P.W.3 Neetu Sharma, has also remained intact in support of prosecution and has also recognized two accused who were present in the Court at the time of his deposition. The trivial personal motive behind the commission of crime has also been established. It can not be disputed that forehead of a person is not the vital part and if anyone with intention

to kill a person gives only one blow with all his force, the person may die.

14. In this case the deceased has died during the course of treatment. A trivial dispute between the parties took an adverse turn which resulted into death of a guardian of the family.

15. Now the question arises as to whether it is a case of murder as defined under Section 300 I.P.C. and punishable under Section 302 I.P.C. or it is a culpable homicide not amounting to murder as defined under Section 299 IPC and punishable under Section 304 IPC.

16. We are convinced that it was homicidal death but, it would be seen whether it is homicidal death punishable under Section 302 or Section 304 Part I or Part II of IPC?

17. It would be relevant to refer Section 299 of the Indian Penal Code, which read as under:

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

18. The academic distinction between 'murder' and 'culpable homicide not amounting to murder' has always vexed the Courts. The confusion is caused, if Courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and

application of these provisions seems to be to keep in focus the keywords used in the various clauses of Section 299 and 300 of I.P.Code. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

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

s

19. In latest decision in **Khokan@Khokhan Vishwas v. State of Chattisgarh, 2021 LawSuit (SC) 80**, where the facts were similar to this case, the Apex Court has allowed the appeal of the accused appellant and altered the sentence. The decision of the Apex Court in the case of Anversinh v. State of Gujarat, (2021) 3 SCC 12 which was related to kidnapping from legal guardian, wherein it

was established that the Court while respecting the concerns of both society and victim, propounded that the twin principle of deterrence and correction would be served by reducing the period of incarceration already undergone by the accused. In our case, this is not that gruesome matter where the accused cannot be dealt with in light of all these judgments. Decisions in **Pravat Chandra Mohanty v. State of Odisha, (2021) 3 SCC 529 & Pardeshiram v. State of M.P., (2021) 3 SCC 238** will also enure for the benefit of the accused.

20. On overall scrutiny of the facts and circumstances of the present case coupled with the opinion of the Medical Officer and considering the principle laid down by the Apex Court in the Case of **Tukaram and Ors Vs. State of Maharashtra, reported in (2011) 4 SCC 250** and in the case of **B.N. Kavatakar and Another Vs. State of Karnataka, reported in 1994 SUPP (1) SCC 304**, we are of the considered opinion that it was a case of homicidal death not amounting to murder.

21. From the upshot of the aforesaid discussions, it appears that the death caused by the accused was not premeditated, accused though had knowledge and intention that his act would cause bodily harm to the deceased but did not want to do away with the deceased. Hence the instant case falls under the Exceptions 1 and 4 to Section 300 of IPC. While considering Section 299 as reproduced herein above offence committed will fall under Section 304 Part-I as per the observations of the Apex Court in **Veeran and others Vs. State of M.P. Decided, (2011) 5 SCR 300** which have to be also kept in mind.

22. We come to the definite conclusion that the death was not

premeditated. The precedents discussed by us would permit us to uphold our finding which we conclusively hold that the offence is not punishable under Section 302 of I.P.C. but is culpable homicide not amounting to murder, punishable U/s 304 (Part I) of I.P.C.

23. This takes us to the alternative submission of learned counsel for the appellant that the quantum of sentence is too harsh and requires to be modified. In this regard, we have to analyse the theory of punishment prevailing in India.

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

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

are to reform him, you must improve him and, men are not improved by injuries."

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

26. In **Ravada Sasikala vs. State of A.P.** AIR 2017 SC 1166, the Supreme Court referred the judgments in **Jameel vs State of UP** [(2010) 12 SCC 532], **Guru Basavraj vs State of Karnatak**, [(2012) 8 SCC 734], **Sumer Singh vs Surajbhan Singh**, [(2014) 7 SCC 323], **State of Punjab vs Bawa Singh**, [(2015) 3 SCC 441], and **Raj Bala vs State of Haryana**, [(2016) 1 SCC 463] and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right

of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformatory and corrective. At the same time, undue harshness should also be avoided keeping in view the reformatory approach underlying in our criminal justice system.

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

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

justice system. We may also record that while going through the factual scenario the appellant cannot be said to have a motive or intention to do away with the deceased who was his relative. The motive is not spelt out from any of the evidence.

29. Therefore, on totality of the facts and circumstance and the oral testimony of the eye-witnesses coupled with the medical evidence permit us to convert the conviction of the accused-appellant from Section 302 I.P.C. to Section 304 Part-I I.P.C. The fact that the accused-appellants were incarcerated in jail for more than 11 years and six years respectively, the sentence is reduced to the period already undergone. Fine of Rs. 10000/- to be deposited within four weeks of release from incarceration. If fine is not deposited within four weeks they shall be lodged in jail to undergo default sentences of three months.

30. In view of the above, this criminal appeal is partly allowed. Record and proceedings be sent back to the Court below forthwith.

(2023) 9 ILRA 103

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 04.07.2012

BEFORE

THE HON'BLE DHARNIDHAR JHA, J.

THE HON'BLE RAMESH SINHA, J.

Criminal Appeal U/S 372 CR.P.C. No. 7726 of
2010

Desh Raj Singh

...Appellant

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Appellant:

Sri Vikas Sharma, Mamta Singh

Counsel for the Respondents:

Govt. Advocate

Criminal Law - Criminal Procedure Code, 1973 - Sections 161 & 372 - Indian Penal Code, 1860 - Sections 34, 201 & 302 - Indian Arms Act, 1959- Sections 4 & 25- Criminal Appeal - filed by informant - against acquittal of accused – FIR – offence of Murder – Evidence and Motive - Recovery of weapon - Court finds that, the evidence provided by the prosecution witnesses was insufficient to establish the guilt of the accused - the court also noted that the motives presented, including a land dispute and an alleged illicit relationship, were not convincingly established - additionally, the recovery of a knife was doubted due to the chance of fabrication destroys the evidence – consequently, the appeal was dismissed, and the acquittal was upheld. (Para – 12, 13)

Appeal Dismissed. (E-11)

(Delivered by Hon'ble Dharnidhar Jha, J.
&
Hon'ble Ramesh Sinha, J.)

1. We have heard the learned counsel appearing on behalf of the informant who has brought into question the judgment of acquittal dated 28.10.2010 passed by the learned Additional Session Judge, Court no. 4, Bulandsahar in Session Trials No. 91 of 2009 & 90 of 2009. By the impugned judgment, the learned trial judge acquitted the two respondents of charges under Sections 302/34, 201 I.P.C. and 25/4 of the Indian Arms Act.

2. The prosecution case was that the deceased, the son of the informant, namely, Dinesh, had gone to take tuition but he did not come back and subsequently his dead body was found lying near a fodder store where his sleepers and other belongings were also found. His throat had been slit to murder him. This information was lodged against unknown accused persons on 27.11.2008.

3. The second information was lodged by the informant, after being dictated to his brother, on 28.11.2008 in which it was specifically alleged that the accused persons, namely, Arvind, Naresh alongwith Lalit Kumar had committed the murder of his son and the two persons, namely, Gajendra (not examined) and Than Singh (P.W.-2) had seen them coming from the place of occurrence.

4. The Doctor found the corresponding injuries on the throat of the deceased and there could not be any doubt that injury on the throat of the deceased and another wound somewhere on the scrotum of the deceased had been caused by a weapon like a knife. Thus, leaving no doubt in the manner of commission of the murder of the deceased that he had been assaulted with some sharp cutting weapons to be killed.

5. During the course of the trial, P.W.-1, the informant, himself came to support the report but as may appear from the very F.I.R., in the court also, he was not projecting himself as an eye witness. He was placing the same facts on account of deriving the knowledge about the movement of two accused persons namely, Naresh and Arvind Kumar from the place of occurrence and just around the time of occurrence on 27.11.2008.

6. Out of the two persons, namely, Than Singh and Gajendra Singh, the later did not turn up for his evidence. But, Than Singh stated that he had seen the accused persons coming from that direction and when he wanted to know the purpose they were simply asked to mind his business and went inside their house.

7. The learned trial Judge has held that the fact that the accused persons who

were seen coming from the place of occurrence had committed murder which fact was stated by P.W.2 in his evidence, had not been stated by him during the course of investigation and he had merely stated that they had been merely seen moving around the place of occurrence.

8. We are of the view that merely being seen somewhere around the place of occurrence or coming from that side, may not be fit enough to raise an inference of culpability unless some other incriminating circumstances and facts in relation thereto are placed before this Court. Thus, what we find is that P.Ws. 1 and 2 were of no avail to the prosecution. We have already noted that Gajendar Singh was not produced.

9. The learned counsel appearing for the appellant has drawn our attention towards some part of evidence of P.W.-1 in which he stated about the motive of the commission of offence. One motive was that respondent no. 2 Naresh sold four bigha of land to the informant and he wanted the land back to him and the informant being not ready for that, respondent Naresh was nursing a grudge against him.

10. The learned trial Judge has noted that P.W.-1 has stated in his evidence that purchase of land had taken place four years prior to the occurrence and mutation of the name of the informant into the government's record had already been made, as such, it could not be such a strong motive so as to impelling the accused persons to commit the offence. The other motive which was assigned by the informant was that his son was carrying an illicit relationship with the sister of respondent Arvind but the learned trial judge has noted that this fact was neither

stated in the first F.I.R. nor in the second and it was for the first time that he was making the statement in court, but had also stated the fact in his statement under Section 161 Cr.P.C.

11. We are of the view that the rejection of the motive by the learned trial judge may not be said to be an atrocious judicial finding calling upon us to interfere with the order of acquittal. The reason for our finding is that even if the motive had been established, it could not have taken place of proof of charges and, secondly, the motive does not appear established to the hilt so as to pointing out that for these two reasons the accused persons could have been impelled to commit the crime. It was rightly held that transaction which was concluded four years prior in respect of a land and had virtually concluded finally and irreversibly could not be a motive for commission of offence as regards the motive of illicit relationship. We find that except the bald statement no supporting evidence either of the lady with whom the deceased was carrying on his relationship or anyone from the village, was brought on record.

12. We further find that there is an evidence of recovery of a knife at the pointing of appellant Arvind. However, we want to note that that recovery was not admissible against other respondent. So far as the recovery is concerned, the trial court has rightly doubted the findings of blood on that recovered knife because it was embedded in earth and it was allegedly brought out after removing earth. The chance of fabrication destroys the evidence of discovery of the fact and that too when it is being challenged by the respondent by stating that he had not led the police to any discovery of a fact.

13. On the reasons, which we have just pointed out, we are of the opinion, that the judgement of acquittal could have been the only probable result of the trial and as such, this appeal lacks merit and we dismiss the appeal.

(2023) 9 ILRA 106
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.09.2023

BEFORE

THE HON'BLE SHIV SHANKER PRASAD, J.

Criminal Revision No. 408 of 2020

Padmashri Dr. Usha Sharma ...Revisionist
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionist:

Sri Ashwini Kumar Awasthi, Sri Anurag Vajpeyi, Sri Manish Tewary (Sr. Advocate)

Counsel for the Opposite Parties:

G.A., Sri Bhavya Sahai, Sri Mayank Yadav, Sri Pradeep Kumar Mishra, Sri Vivek Kumar Singh, Sri Vinay Saran (Sr. Advocate)

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 397/401 - revision - Indian Penal Code, 1860 - Sections 302 & 34 - court can exercise the power under Section 319 Cr.P.C. only after the trial proceeds and commences with the recording of the evidence and also in exceptional circumstances - power under Section 319 of Cr.P.C. is to be invoked and exercised before the pronouncement of the order of sentence where there is a judgment of conviction of the accused - adding of a person as an accused on the basis of some suspicion created by a witnesses would be travesty of justice - When there is no direct evidence, Hearsay evidence cannot be the basis for issue of summons.(Para - 40,43,50)

To quash/set aside - final judgment of conviction passed - Sessions Judge passed order to summon revisionist - face trial under Section 319 Cr.P.C. - at belated stage - revisionist summoned after order of sentence of co-accused - no evidence against the accused-revisionist - to be guilty of offence - only witnesses i.e. P.W.-1 and P.W.-2 giving opinion - revisionist might have committed offence - neither any opportunity of hearing nor any notice has been issued to the revisionist to have her say - present criminal revision preferred by revisionist. **(Para - 7,44,50,51)**

(B) The Code of Criminal Procedure, 1973 - Section 319 - Power to proceed against other persons appearing to be guilty of offence - "Judges condemned when guilty is acquitted" - innocent should not be punished, at the same time, real culprit should not be allowed to escape.(Para - 24)

HELD:-Judgment and order cannot be legally sustained and quashed. No Magistrate or any court of law can invoke or exercise powers under Section 319 Cr.P.C. for summoning any person to face trial as an accused after passing of order of sentence qua co-accused. **(Para - 55)**

Criminal Revision allowed. (E-7)

List of Cases cited:

1. Hardeep Singh Vs St. Of Punj. , (2014) 3 SCC 92
2. S. Jayaraj Vs St. of T.N. , 2015 SCC OnLine Mad 14197/(2015) 2 LW (Cri) 574
3. Sukhpal Singh Khaira Vs St. of Punj. , 2023 (1) SCC 289
4. Brindavan Das & ors. Vs St. of W.B., (2009) 3 SCC 329/AIR 2009 1248 (SC)/(2009) SAR CrI. 117
5. Periyasamy & ors. Vs Nallasamy, (2019) 4 SCC 342/AIR 2019 SC 1426
6. G. Palanisamy Vs St. , 2003 (2) MWN (Cr.)

7. Labhuji Amratji Thakor Vs St. of Guj. , (2019) 12 SCC 644/2018(4) MLJ(CrI) 739 (SC)

8. Asha Vs St. of Karn., 2016 SCC OnLine Kar 9030

9. Jogendra Yadav Vs St. of Bihar, (2015) 9 SCC 244

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

1. Heard Mr. Manish Tewary, learned Senior Advocate assisted by Mr. Ashwini Kumar Awasthi, learned counsel for the revisionist, Mr. Vinay Saran, learned Senior Advocate assisted by Mr. Pradeep Kumar Mishra, learned counsel for the opposite party no.2 and Mr. R.N. Singh, learned A.G.A. for the State as well as perused the entire material available on record.

CHALLENGE TO THE PRESENT CRIMINAL REVISION

2. This revision under Section 397/401 Cr.P.C. has been filed on behalf of the revisionist, namely, Padamshri Dr. Usha Sharma with a prayer to quash/set aside the judgment and order dated 12th December, 2019 passed by Additional Sessions Judge, Court no.1, Meerut in Sessions Trial No.1057 of 2008 (State of U.P. Vs. Sachin Malik & Others), arising out of Case Crime No. 269 of 2004, under Sections 302 and 34 I.P.C., Police Station Medical, District Meerut whereby the revisionist has been summoned by the trial judge to face trial under Section 319 Cr.P.C.

3. GENESIS OF THE CASE

One Siddhartha Chaudhary (for short "deceased") was a second year student of Meerut Medical College and was found dead in room no. 38 of L.J.B. Hostel

which was allotted to Sachin Malik on 06-07-2004. The warden informed the Police as well as his parents who reached Meerut from Muzaffarnagar. The dead body was sealed and removed from the room even before the parents of the deceased arrived, who both are doctors. The parents on enquiry from the warden and the Principal were told that report had been lodged to the police, which in fact was not lodged as per information received by them (parents).

4. As per the report lodged by Dr. Surendra Singh Grewal (informant/opposite party no.2) i.e. father of the deceased on 6th July, 2004, on reaching the mortuary they (parents of the deceased) asked the doctors who were to conduct the postmortem examination to show the dead body and after looking at the body they found swelling and blueness on the face of the deceased. The deceased had an injury on the lip and one tooth was also broken, which showed that the deceased was asphyxiated by blocking the air passage and it was a case of murder, so they requested the doctors who were to conduct the postmortem examination to mention these things in the report, but on receiving the copy of the post mortem report, they did not find it mentioned. Instead of death by strangulation, the postmortem report mentioned that "cause of death could not be ascertained" under pressure from the Principal Dr. Usha Sharma (revisionist herein). It was a clear case of murder of deceased Siddhartha, in which Principal Dr. Usha Sharma, Sachin Malik, Amandeep Singh and Yashpal Rang were involved and the aforesaid persons along with others were trying to manifest it as suicide. Dr. Usha Sharma i.e. Principal was protecting the accused persons as she had misrepresented that case as registered whereas it wasn't, and therefore the

informant approached S.S.P. to get the case registered and investigated, who vide his endorsement STC-256-A/04 sent it for registration of F.I.R. and on the basis of which Case Crime No.269/2004 under Section 302 IPC was registered vide F.I.R. No. 199/2004 dated 9th August, 2004.

5. After investigation, the Police filed closure report on 15th February, 2006 against which the informant filed objections. On considering the material available on record like the statements of witnesses recorded under Section 161 Cr.P.C., the observations made by the Human Rights Commission, etc., the Special Chief Judicial Magistrate Meerut vide detailed order dated 6th December, 2006 while rejecting the closure report submitted by the Investigating Officer, had summoned the accused persons, namely, Sachin Malik, Amandeep Singh and Yashpal Rana to face trial, but partly accepted the closure report submitted against the revisionist Dr. Usha Sharma. Thus, case against only three accused namely Sachin Malik, Amandeep Singh and Yashpal Rana had been committed for trial on 8th August, 2008. Charges were framed by the trial court against accused persons, namely, Sachin Malik, Amandeep Singh and Yashpal Rana on 29th August, 2014 under Section 302/34 I.P.C. to which all three accused persons pleaded not guilty and claimed trial, As many as twenty witnesses have been examined by the prosecution whereas one witness has been examined by the accused persons in defence.

The incriminating circumstances were put before the accused persons. In their statements under Section 313 Cr.P.C. all three accused persons denied the allegations levelled against them and stated

that final report is correctly filed by the Investigating Officer and they had no enmity with the deceased.

6. Vide judgment and order dated 12th December, 2019, the trial court, namely, Additional Sessions Judge, Court No.1, Meerut, after considering the arguments of ADGC (Criminal) and that of defence counsel and going through the written arguments filed on behalf of accused persons on 22-5-2019, including the rulings cited therein and also perusing the entire material available on record during the course of trial has convicted the three accused persons, namely, Sachin Malik, Yashpal Rana, and Amandeep Singh for the offence punishable under Section 302 I.P.C. and sentenced them to undergo rigorous imprisonment for life along with fine of Rs. 1,00,000/- each.

7. It is pertinent to mention here that after passing final judgment of conviction, the concerned Sessions Judge has passed an order to summon the revisionist for facing trial under Section 319 Cr.P.C. at such a belated stage. It is against this part of the judgment and order dated 12th December, 2019 that the present criminal revision has been preferred by the revisionist.

CASE OF THE REVISIONIST

8. The revisionist is wholly innocent and in no way she was connected with the aforesaid criminal case, which was initiated after lodging of a very belated FIR by opposite party no.2/first informant, namely, Dr. Surendra Singh for the death of his son Siddhartha Chaudhary, who was a student of Medical College Meerut, at police station Medical, District Meerut on 09.08.2004 at 2015 hours with respect to an incident which occurred on 06.07.2004. It

was on the strength of completely baseless and frivolous allegations qua the alleged actions taken by the revisionist after the death of Siddhartha Chaudhary, in order to cover up the same that the revisionist, who was the then Principal of Medical College Meerut, has also been arrayed as an accused along with other co-accused persons, namely, Sachin Malik, Yashpal Rana and Amandeep Singh, who were students of Medical College Meerut at that time.

9. The revisionist is a highly qualified and decorated doctor having a renowned career. She is also a Padmashri Awardee. Her qualifications and accomplishments have been given in paragraph-7 of the affidavit accompanying the present criminal revision.

10. According to the allegations as set out in the first information report it has been claimed by the first informant that on 06.07.2004 he was informed by the warden of Medical College Meerut regarding the death of his son Sidharth Chaudhary, whereafter the first informant and his wife travelled from Muzaffarnagar to Medical College Meerut. However the inquest proceedings had been concluded only after information of the present incident was given to the police by the college through Dr. Vinay Agrawal and it is completely on vague/baseless suspicion that the present FIR has been lodged against the revisionist and the co-accused persons. The co-accused Sachin Malik along with the deceased Sidharth Chaudhary were both 2nd year students of Medical College Meerut and co-accused Yashpal Rana and Amandeep Singh were their seniors at Medical College Meerut at the time of the occurrence of the present incident and the revisionist was the Principal of the college.

After information regarding the unfortunate demise of the son of the first informant was given by the hospital's authorities to the police, inquest proceeding took place on 06.07.2004 at 3.30 p.m. Perusal of the postmortem examination report dated 06.07.2004 prepared by Dr. Harpal Singh and Dr. M.K. Gulati reveals that no ante-mortem injury was seen on the body of the deceased and the cause of death could not be ascertained, hence viscera was preserved. The same opinion also emanates from the inquest report, wherein no visible injuries were found on the corpse of the deceased and the opinion regarding cause of death was suggested as consumption of some kind of poison. Subsequently the viscera report was also submitted by the forensic science laboratory Agra on 06.10.2004 with the finding that ethyl alcohol poison was found in the visceral organs of the deceased. However, the first informant Dr. Surendra Singh Grewal, after lapse of a month from the date of incident, filed a very malicious application the basis of which the present first information report came to be lodged on 09.08.2004. During the course of trial, the inquest report along with postmortem report and viscera report have duly been proved by P.W.5 Rajeev Kumar Kaushik (who prepared the inquest report) and P.W.6 M.K. Gulati (Doctor who conducted postmortem report). Allegations levied in the first information report are completely in teeth of the postmortem report and viscera report

11. From the testimonies of P.W.1 first informant Dr. Surendra Singh Grewal and P.W.2 Smt. Surendarjeet Kaur (wife of first informant), it is evident that the FIR was lodged after due consultation, hence the veracity of the contents of the same is completely doubtful and the delay incurred

in the lodging of the same would also demolish the very essence of the prosecution case.

12. After the lodging of the present FIR the investigation of the present case commenced and the initial investigating officer P.W.19 Mahesh Chandra Yadav could not find any cogent evidence to fortify the allegations levied by the first informant. Thereafter upon a representation made by the first informant, the investigation of the present case was transferred to the C.B.C.I.D. and the Deputy S.P. C.I.D. B.S. Chauhan (P.W.18) by the order of zonal officer dated 17.02.2005 and both the investigating officers after recording statements of material witnesses arrived at the same conclusion that the deceased Sidharth Chaudhary habitually consumed alcohol and drugs and would often be in an inebriated state injuring himself and also that he had no enmity with either of the accused persons, as such a final report was filed in the present matter on 15.02.2006. Against aforesaid final report the first informant filed a protest petition and subsequently vide order dated 06.12.2006 the court of learned Special C.J.M. Meerut, rejected the final report as far as the co-accused Sachin Malik, Yashpal Rana and Amandeep Singh are concerned and they were summoned to face trial, however, the final report against Dr. Usha Sharma i.e. revisionist was accepted with the observation that not even a prima-facie offence appears to be made out against her. Thereafter the matter was committed to the court of sessions on 08.08.2008 and after the framing of charges against co-accused Sachin Malik, Yashpal Rana and Amandeep Singh on 29.08.2014 under section 302 and 34 I.P.C., the trial of the present case commenced. During the course of trial the testimonies of P.W.1 Dr.

Surendra Singh and P.W.2 Smt. Surendarjeet Kaur were recorded and both the first informant and his wife, who are accomplished doctors, having depth knowledge in the field of medical science, have accordingly forwarded a very tutored and concocted version in their depositions, however their testimonies are in stark contrast with the medical evidence on record and hence no reliance ought to have been placed upon the testimonies of both these highly partisan and interested witnesses. In any case both P.W.1 and P.W.2 have failed to give any direct evidence in the present matter and their testimonies pertaining to the cause of death of their son is completely conjectural in nature and a very feeble attempt has been made of foisting a motive behind the commission of the present offence, which no man of ordinary prudence would be tempted even in the slightest to believe or place reliance upon.

13. So far as the co-accused persons, namely, Sachin Malik, Yashpal Rana and Amandeep Singh are concerned, it is clear that co-accused Sachin Malik was the batch-mate of deceased Sidharth Chaudhary at Medical College, Meerut and co-accused namely, Yashpal Rana and Amandeep Singh were his seniors and there were some financial disputes between them and the deceased, as claimed by P.W.1 and P.W.2 in their testimonies. However, the same has no concern with the revisionist and a very far-fetched conspiracy has been insinuated by P.W.1 and P.W.2 with the sole oblique motive of roping the revisionist in the present case without any viable basis for the same, apart from mere oral allegations made by P.W. 1 and P.W. 2, without any supporting or corroborating material or evidence.

14. The trial court has erringly placed over reliance upon the testimonies of P.W.1 and P.W.2 and has drawn his conclusion,

which is completely against the record of the present case, hence the summoning of the revisionist in the present case is completely bad in the eyes of law and hence, the same deserves to be set aside. The trial court has completely disregarded the testimonies of various prosecution witnesses who were studying along with the co-accused persons and deceased Sidhartha Chaudhary at Medical College, Meerut, all of them have stated that the deceased habitually consumed drugs and alcohol, would often injure himself in an inebriated state, his attendance in medical college was falling short, on the night of the fateful incident he was seen staggering in the corridors of the hostel and was then taken to the room of co-accused Sachin Mallik where possibly on account of excessive consumption of alcohol/drugs he was found dead in the morning and a completely nonplussed Sachin Malik informed college authorities regarding the death of the deceased. None of the said witnesses made any mention of any tension or dispute between either of the accused persons with the deceased and there is not even a whisper regarding the complicity or involvement of the revisionist by any of the witnesses. P.W.10 Dr. Bharat Singh who was a batch-mate of co-accused Amandeep and Yashpal had, a day before the incident, found the son of the first informant lying out in the open in an intoxicated condition, when said witness took him to the hostel and the other students informed him that this was daily occurrence.

15. Collective perusal of all the aforesaid testimonies of the prosecution witnesses, in addition to the findings of the postmortem report and viscera report would unequivocally and without any shadow of doubt exculpate the revisionist and the other accused persons of any criminal

liability in the present case, however the learned trial court has not appreciated the testimonies of the prosecution witnesses in its right perspective and has in a very arbitrary manner disbelieved the postmortem examination report and the viscera report terming it as incongruent and has formed its own opinion regarding the cause of death of the deceased to be probably as a result of asphyxia. The learned court below has termed P.W.17 Dr. Amar Singh, who is working as the assistant medico legal expert Lucknow, as the star witness of the prosecution and though this witness has submitted a report, based on a mere perusal of the medical reports and inquest report, that prima-facie the present case appears to be one of murder as the symptoms noted in the postmortem report and viscera report appear to be that of asphyxia, however while placing reliance on said testimony the learned trial court has failed to appreciate the fact that said perfunctory opinion was arrived at without admittedly perusing all requisite documents and in any case his opinion is based on assumptions and presumptions, hence the same should have more cautiously been read into by the learned trial court.

16. The learned trial court has also arrived at a very precarious finding that there is no documentary evidence regarding the fact that the deceased was a habitual drunkard, inspite of acknowledging the fact that various witnesses have claimed that the deceased was a regular drinker and was also seen staggering on the night of the incident and has erroneously arrived at the finding that the deceased had not consumed liquor. The impugned judgment and order passed by the learned trial court, particularly to the extent of the summoning of the revisionist u/s 319 Cr.P.C. in the

present case, is entirely perverse and has been passed without any application of its judicial mind by the learned trial court and the same is nothing but a product of wild conjecturing and unsubstantiated surmises drawn by the learned trial court.

17. Perusal of the entire record of the present case would establish that there is no direct evidence whatsoever as far as the revisionist is concerned and neither has any cogent motive for the revisionist to have been complicit or have any hand in the unfortunate death of Siddhartha Chaudhary. In fact the prosecution case as far as the accused persons under trial is also, at best, reliant upon circumstantial evidence, that to of a non-existent nature, which fails to even link the chain of circumstances leading up to the death of deceased Sidhartha Chaudhary, is much less complete such chain. However, inspite of the facts and circumstances mentioned above, the Trial Court has in an unprecedented, irregular and illegal manner, while convicting the co-accused persons in the present case, vide the same impugned order, summoned the Principal of Medical College Meerut Dr. Usha Sharma to face trial in the present case. The summoning of the revisionist in the present case, erroneously exercising the powers under section 319 Cr.P.C., after becoming Functus Officio of the matter at hand, is completely bad in the eyes of law and hence the same deserves to be set aside. In any case, upon sifting the entire material and evidence on record of the present case, there is no iota of cogent or even credible evidence to justify the summoning of the revisionist in the present case. The revisionist is a 76 year old lady, having a very decorated career in the medical field and commands the utmost respect in society. She has no criminal history and as such it would be a travesty of

justice if she would have to go through the rigours of trial, that to when there is no evidence or material on record warranting the same.

18. SUBMISSIONS ADVANCED ON BEHALF OF THE REVISIONIST

(i) The revisionist has been summoned to face trial under the provisions of Section 319 Cr.P.C. at the time of the delivery of judgment. Section 319 Cr.P.C. clearly stipulates that where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed, meaning thereby that the Court may not proceed against such person by issuing summon to face trial under Section 319 Cr.P.C. at the time of delivery of judgment. Therefore, such orders clearly hit the statutory provision. In support of such plea, learned counsel for the revisionist has relied upon the judgment of the Constitution Bench of the Apex Court in the case of *Hardeep Singh V. State Of Punjab*, reported in (2014) 3 SCC 92.

(ii) It is discernible from Section 319 Cr.P.C. that the evidence that can be used to summon a person to face trial by using the provisions of Section 319 Cr.P.C. is the "evidence" collected during trial.

(iii) From perusal of entire records of the case, it is evident that no prima facie case is made out against the revisionist and also there is no direct allegation or evidence found against the revisionist. From the testimonies of P.W.1 Dr. Surendra Singh Grewal, P.W.2 Smt. Surendra Jeet Kaur Grewal, P.W.3 Mrinal

Rathi, P.W.4 Dr. Ajeet Singh, P.W.9 Md. Gayas, P.W.10. Dr. Bharat Singh, P.W.11 Kunwar Pal Singh and P.W.12 Anil Kumar, it is also apparently clear that except P.W.1 and P.W.2, the rest of the witnesses have not even made a reference of the revisionist, insofar as P.W.1 and P.W.2 are concerned they only expressed their apprehension which has not been supported by either any evidence or any reasoning in the light of such situation there is no earthly reason to justify the summoning of the revisionist. From the testimony of P.W.-1 i.e. informant/opposite party no.2, it also apparent that the same is nothing but apprehension/suspicion without any basis. There is no other circumstance indicating any culpability. The said deposition given by P.W.-1 is nothing but a delusional quote given by the first informant. Apart from the above there is no other evidence of any nature. Thus, in the absence of any material the summoning is unjustified and perverse. In support of such plea, the constitution bench judgment of the Apex Court in the case of **Hardeep Singh V. State Of Punjab**, reported in (2014) 3 SCC 92 has been relied upon. The following observations laid down by the Apex Court has also been referred:

"though only a prima facie case is to be established from the evidence led before the court, not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity. "The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes un rebutted, would lead to conviction."

In view of the above law laid down by the Apex Court, it has been submitted that in the absence of such satisfaction, the court should refrain from

exercising power under Section 319 Cr.P.C. And thus the summoning of the revisionist in the present case deserves to be set aside.

(iv) Findings recorded by the trial court while passing the impugned judgment and order are based merely on conjectures and surmises and there is no mention of any direct role of the revisionist in the present case. Perusal of the testimonies and the findings of the post mortem as well as the viscera report would exculpate the revisionist of any criminal liability.

(v) There is no injury mentioned in the inquest or the post mortem examination report. It is not to be forgotten that P.W.1 and P.W.2 are by profession doctors and as such they have deposed obliquely in respect of signs of post mortem in an attempt to somehow foster a case. As per the post mortem report, no injury was seen on the body of the deceased and even in the inquest report there is no mentioning of any visible injury. The viscera report mentioned the cause of death to be the presence of Ethyl Alcohol poison.

(vi) The arguments advanced from the side of the prosecution regarding the smell of alcohol is purely dependent on the time period elapsed between the death and the post mortem examination report as such there can be no consideration of the same.

(vii) Even if such a dichotomy exists, there is no occasion to assume the culpability of the revisionist. The deposition of P.W.1 and P.W.2 is in terms of casting aspersions and allegations in air against the revisionist which are not supported by any reasoning or evidence, thus, there is no reason to even be suspicious regarding the culpability of the revisionist.

(viii) In the absence of any cogent material which may constitute any sought

of evidence, the summoning of the revisionist is totally unjustified. The trial court while passing the impugned judgment and order, has not even recorded any finding qua the existence of material but has merely summoned the revisionist on apprehension /presumption /conjectures /surmises in the internal page number 32 of the judgment. The reasons assigned for such summoning are totally unjustified and perverse.

(ix) The allegations were levelled in an unjustifiably delayed first information report. Investigation as per Chapter XII Cr.P.C. took place in respect of the alleged offence, ultimately resulting in filing of a final report in favour of all the accused persons including the revisionist under the provisions of Section 173(2) Cr.P.C. Subsequently after filing of the protest petition vide order dated 06.12.2006 the court of Special CJM Meerut rejected the final report qua the other accused but the final report in respect of the revisionist was accepted by the same order. The first informant thereafter has not challenged the order dated 06.12.2006 before any forum/court of law, as such the order of acceptance of the final report in respect of the revisionist became absolute. Thus, taking a cumulative view of the facts and circumstances, there is no earthly reason to summon the revisionist to face trial by using the provisions under Section 319 Cr.P.C. and the order dated 07.12.2019 and 12.12.2019 summoning the revisionist is perverse, unjustified and patently illegal.

(x) The prevalent proponent of law quintessentially enshrined by the Hon'ble Apex Court in the case of Hardeep Singh (2014) 3 SCC 1992 would lend support to the aforesaid averment on behalf of the revisionist and would bar summoning her in the present case under section 319 Cr.P.C.

On the cumulative strength of the aforesaid, learned counsel for the revisionist submits that the order impugned passed by the trial court summoning the revisionist to face trial under Section 319 Cr.P.C. being contrary, arbitrary and illegal is liable to be quashed.

SUBMISSIONS OF THE LEARNED COUNSEL FOR THE OPPOSITE PARTIES

19. Per contra, learned counsel for opposite party no.2 and the learned A.G.A. for the State have disputed the submissions made by the learned counsel for the revisionists by contending that there is no illegality or infirmity in the order passed by the trial judge summoning the revisionist under Section 319 Cr.P.C. for facing trial in the case in hand.

19. Apart from the above, Mr. Vinay Saran, learned Senior Counsel appearing for opposite party no.2 has contended as follows:

(I) The deceased Siddhartha Chaudhary was a second year student of Meerut Medical College raised his voice against the corrupt practices prevailed in the Medical College including the Principal Usha Sharma (the Revisionist) in the admission of students in various courses and moved several complaint against the higher authorities. In support of the same, a copy of the complaint dated 3.4.2004 has been enclosed as -SCA-XIII to the supplementary counter affidavit.

(II) PW-1 Surendra Singh Grewal and PW-2 Smt. Surendra Jeet Grewal have clearly deposed before the trial Court about the motive for the murder, that the revisionist Usha Sharma, the Principal of the Medical College, often used to threaten

Siddhartha (deceased) that she would not allow him to become a leader like Dr. Mahipal Chaudhary (who earlier exposed her corrupt practices) and thus, she conspired with other co-accused to get him killed in a pre-planned manner.

(III) Admittedly, the deceased Siddhartha Chaudhary, who was a second year student of Meerut Medical College was allotted Room No. 42 at L.J.B. Hostel, but strangely he was found dead in room No. 38 of L.J.B. Hostel, which was allotted to the co-accused Sachin Malik on 6th July, 2004 in unnatural circumstance with visible injuries on his body.

(IV) The revisionist from the very beginning misled the Police and the parents of the deceased including the first informant and no immediate information of the unnatural death was promptly given to the parents of the deceased and they were informed quite late at about 10:30 am about the incident and further before the parents could reach the college, the body of the deceased was shifted to mortuary by manipulating the place of occurrence so that the parents could not see the actual situation and their only son.

(V) The revisionist Dr. Usha Sharma shielded the co-accused persons by misleading the investigation and the information of unnatural death was communicated to the Police Station-Medical on 6th July, 2004 at 11:00 a.m. recorded in G.D. no. 24 which is apparent from the statement of PW-7, Sub-Inspector Sohanveer Singh.

(VI) P.W.-5, Sub-Inspector Rajeev Kumar Kaushik who conducted the panchayatnama (inquest report) of the deceased, has categorically stated that he conducted the inquest at Room No. 38 of LJB Hostel and also noticed blueness on the face and the chest of the deceased and

he has further stated that it was not a normal death.

(VII). P.W.-1 Dr. Surendra Singh has stated before the trial judge that on visible inspection of the body of his son, he noticed that the face, eyes, chest, hands and nails of hands were deeply cyanosed. He also found froth coming out from his mouth and nose. He further noticed that the lower lip of the deceased had a cut mark on the right side and one incisor tooth of upper jaw was broken. (Indicating use of force to administer something soon before the death). Further when he opened his eyes, he found pin head size blood spots in both eyes (another typical symptom of strangulation). On turning the body of the deceased by him, on the mortuary table, the back, chest and neck were blue in colour. He also did not find smell of urine or stool etc. which showed that his clothes had been changed after death. P.W.-2 Smt Surendra Jeet Singh Greval, mother of the deceased also noticed aforesaid injuries on the body of the deceased which is apparent from her statement recorded before the trial Court.

(VIII). P.W.-6 Dr. M.K. Gulathi who conduct the postmortem examination on the dead body of the deceased Siddhartha Chaudhary, has stated that though no external injuries were found but nails and lips were blue and further he has stated that there was no sign of injury on the chest or on the face. There was no urine or excreta on the clothes and since the cause of death was not ascertained therefore viscera was preserved. Dr. Amar Singh, PW-17 who was examined as Medico Legal Expert, has stated that his report was based on documents sent by the S.S.P. i.e. Postmortem Report, Panchayatnama, on the basis of which he gave the report that prima facie it was case of murder.

(IX.) The parents of the deceased, who were also medical doctors by profession and were running a nursing home in Muzaffarnagar, complained that the police was not properly investigating the case under pressure of the revisionist Principal Usha Sharma and she was trying to give it a colour of suicide and the witnesses were also under her pressure as she being the Principal of Medical College and the witness being students and staff of Medical College could not dare to speak against her.

(X.) The judgment and order dated 07.12.2019 and also the order dated 12.12.2019 are wholly legal and have been passed after giving full opportunity of hearing and discussion on merits. While holding the accused Sachin Malik, Yashpal Rana and Amandeep Singh guilty, the trial judge, on the same day rightly summoned the Revisionist Usha Sharma to face the trial after rightly holding that there was sufficient material on record to proceed against her, while exercising the power under Section 319 Cr.P.C. and thereafter fixed 12.12.2019 for hearing the matter on the point of sentence for the convicted accused person.

(XI). The proposition of exercising the power under Section 319 Cr.P.C. before pronouncing the sentence has been justified and upheld by the Constitutional Bench of the Hon'ble Supreme Court in the case of **Sukhpal Singh Khaira Vs State of Punjab** reported in 2023 (1) SCC 289.

(XII). The Revisionist Usha Sharma, who being a "Padmashree awardee" was extremely influential and she left no stone unturned to mislead the investigation in order to save the accused persons (now convicted) and herself and also to save the reputation of the medical college. Because of the influence of

revisionist Usha Sharma, the family of the deceased were misled on the pretext that the FIR had already been lodged by the College/ University/ Administration, although no such first information report was registered by them hence the delay in lodging the FIR was fully explained.

(XIII). The records of the case i.e. statements of the witnesses recorded under section 161 Cr.P.C., inquest report, Post mortem report as well as the evidence of the prosecution witnesses especially P.W.-1-Surendra Singh Greval and P.W.-2-Surender Jeet Singh Greval, P.W.-5 Sub-Inspector Rajiv Singh Kausik and P.W.-17-Dr. Amar Singh clearly go to show that there appears to be enough strong and cogent evidence which was more than prima-facie against the revisionist which was sufficient to summon her by exercising the power under Section 319 Cr.P.C.

(XIV). The material/evidence on record against the revisionist was found to be more than prima facie to show that the revisionist indulged actively in misleading the prosecution and influenced the investigation so as to save the accused persons for causing disappearance of evidence of offence and to screen the offender from legal punishment by using the influence and superior position being 'Padamashree' awardee and highly qualified doctor and principal of a medical college.

(XV). The trial judge, while passing the impugned order, has taken all the precautions and waited till the end of trial and did not hurriedly summon the revisionist exercising its powers under Section 319 Cr.P.C. While summoning the revisionist the trial Judge has followed all the precautions and guidelines as framed by the Apex Court in the case of **Hardeep Singh Vs. State of Punjab**, reported in (2014) 3 SCC 92.

(XVI). The revisionist from the very beginning, by misusing her influence and clout, has misled the police during the investigation and for this very reason no first information report was promptly lodged by medical college administration as also the family members of the first informant were also misled which resulted in delay of lodging of the actual FIR by the first Informant who bonafidely believed that the correct report of the incident was already lodged by the College.

(XVII). There is ample material on record collected during the investigation as well as during the trial against the revisionist which goes to show that because of her interference, homicidal death of deceased Siddhartha Chaudhary was tried giving a colour of a suicide or death caused by excessive alcohol drinking by the deceased.

(XVIII). The trial Judge has rightly considered the entire material collected during the course of investigation as well as the material brought on record during the trial and thereafter finding that there was more than prima facie case against the revisionist summoned her by exercising the power under section 319 Cr.P.C., the order on the protest petition cast no bar upon the powers exercised under 319 Cr.P.C. as in the present case the material brought on record during the course of trial was also taken on record. In support of the said submission, reliance upon the judgment of the Madras High Court in the case of **S. Jayaraj vs. State of Tamilnadu** reported in *2015 SCC OnLine Mad 14197(2015) 2 LW (Cri) 574*, has been placed.

On the cumulative strength of the aforesaid, learned counsel for opposite party no.2 submits that the trial judge has summoned the revisionist on 7.12.2019 i.e.

before sentencing the accused persons and he was well within his jurisdiction to exercise the powers under section 319 Cr.P.C. as has been held by the constitutional bench of the Apex Court in the case of **Sukhpal Singh Khaira Vs State of Punjab** reported in 2023 (1) SCC 289.

20. This Court has considered the submissions made by the learned counsel for the parties and gone through the records of the present criminal revision spastically the order impugned along with judgment and order of conviction passed against the co-accused persons.

LEGAL ISSUES

21. **Two legal issues, which are up for consideration before this Court are:**

(a) Whether the trial judge has recorded his prima facie satisfaction for summoning the revisionist to face trial while passing the impugned order under Section 319 Cr.P.C.?

(b) Whether the trial judge has rightly/legally exercised its powers under Section 319 for summoning the revisionist to face trial by the order impugned after passing the judgment and order of conviction against the co-accused persons and at the time of passing the order of sentence against the co-accused persons?

22. Before considering the first issue, it is necessary for this Court to reproduce Section 319 Cr.P.C., which is being quoted herein below:

“319. Power to proceed against other persons appearing to be guilty of offence.---(1) Where, in the course of any inquiry into, or trial of, an offence, it

appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

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

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

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

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

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

EXPLANATION OF SECTION 319 CR.P.C.

23. From bare reading of Section 319 Cr.P.C. this Court is of the view that the language used in Sec. 319 Cr.P.C. is plain, simple and unambiguous. However, there are some grey areas which sometimes deviate the Court for the established principles of law.

24. Before going to analyze Section 319 Cr.P.C., it would be necessary to understand the principles highlighting the Section and the nature of power vested with

the Court including the court of sessions. Section 319 Cr.P.C. springs out of the doctrine “Judges condemned when guilty is acquitted”. This doctrine must be used as beacon light while explaining the ambit and spirit underlying the enactment of Section 319 Cr.P.C. It is also based on the principle that innocent should not be punished, at the same time, real culprit should not be allowed to escape.

25. The power under Section 319 Cr.P.C. is the really an extraordinary power which is conferred upon the court and it should be used sparingly only if compelling reasons/circumstances exist for taking cognizance against other person against whom action has not been taken. Section 319 Cr.P.C. is a special provision and it seeks to meet an extraordinary situation. It although confers of vide amplitude but is required to be exercised sparingly.

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

27. A scrutiny of Section 319 Cr.P.C.. would show the Section has four parts from sub-Sections (1) to (4). The first part deals about when and how the power under the section can be exercised. The second part speaks about how to secure the presence of the newly added accused, if he is not attending the court. The third part depicts

how the presence of the newly added accused can be secured if he is not attending the court. The fourth part speaks about how the court should proceed and try against the said accused.

28. Qua when and how the power can be exercised, Sec. 319 (1) Cr.P.C. says that there are three ingredients must be satisfied:

(i) Firstly, there is any enquiry or trial of an offence.

(ii) Secondly, it appears from the evidence the any person not being an accused has committed any offence.

(iii) Thirdly, for which, the person to be tried together with the accused.

If the above ingredients are satisfied, any new accused can be added. Moreover, the words used in section 319(1) Cr.P.C., namely 'enquiry' or 'trial', 'appear', 'evidence', 'any person' assume greater importance.

29. Section 319 Cr.P.C. empowers only to the 'court' proceeds against such person. The word court includes court of Sessions (Sec.9 Cr.P.C.), Court of Judicial Magistrate (11 Cr.P.C.) and Court of Metropolitan Magistrate (16 Cr.P.C.). [Ref.: **Hardeep Singh (Supra)**].

30. Power under section 319 of the code can be exercised by the court suo moto or on an application by someone including accused already before it, if it is satisfied that any person other than an accused has committed an offence and he is to be tried together with the accused.

31. Section 319 Cr.P.C. allows the court to proceed against any person who is not an accused in a case before it. Thus, the person against whom summons are issued in

exercise of such powers, has necessarily not to be an accused already facing trial. The very purpose invoking Section 319(1) Cr.P.C. clearly shows that even persons who have been dropped by police during investigation, but against whom evidence showing their involvement of the offence comes before the court are included in the expression 'any person not being accused'.

32. If a person had not been charge-sheeted he may come within the purview of the description of such a person has contained in Section 319 Cr.P.C. of the Court. Although, he is not named in the charge sheet or he has been discharged from the case, which would warrant in prosecution thereafter with a good chance of his conviction. However, concerning a person who has been discharged no proceedings can be commenced against him directly under Section 319 Cr.P.C. without recourse to provision of Section 300(5) read with Section 398 Cr.P.C. A person not named in FIR and not charge sheeted can be summoned under Section 319 Cr.P.C. Even though, any person initially be named in the FIR as an accused, but not charge sheeted can also be added to face trial. Where a person was not summoned by the Magistrate under Section 204 Cr.P.C. but his name surfaced in the statement recorded under Section 244 Cr.P.C. a person can be summoned as accused under Section 319 Cr.P.C. Power under Section 319 Cr.P.C. can be exercised against the person not to subjected to investigation or a person placed in column 2 of charge sheet against whom cognizance had not been taken or a person who has been discharged. The accused against whom proceeding has been quashed can also be added under Section 319 Cr.P.C.

FINDINGS RECORDED BY THE TRIAL COURT

33. This Court now comes to the legality or otherwise of the order impugned. The court below by means of the order impugned has recorded following finding for summoning the revisionist to face trial under Section 319 Cr.P.C.:

“Before parting with the case, it is observed that every effort was made to twist the fact and give colour of suicide or natural death to the homicidal 'death of the deceased and even non- cooperation with the CID and medico-legal expert of the State. The documents demanded by them, were also withheld and even Viscera was destroyed to avoid 2nd examination as the Forensics Science Laboratory report mentions death by Ethyl Alcohol poisoning, which is not even remotely proved on record by other evidence, and it is quite divergent to the facts proved on record. The name of Usha Sharma, Principal of Medical College where all the 3 accused and the deceased were studying and the post mortem examination report, also remains silent on the violence part of the incident speaks volumes against Usha Sharma, who seems to have kept the steering of the case in her hand, and even concealed the fact of death from the parents, did not report homicidal death and her complicity is very vocally pointed out by PW-1 and PW-2, the parents of deceased, but she has not been charge-sheeted. In fact, none of the accused was charge-sheeted and the case saw the light of the day on the basis of objections to the closure report having been filed. Although name of Usha Sharma cropped up as an accomplice during investigation, and during trial using powers under Section 319 would have delayed the case, for another couple of years, which was already delayed for a decade, and therefore, this power is exercised at a belated stage and

Usha Sharma is hereby ordered to be summoned to face trial. Copy of statements of witnesses, and relevant documents along with the committal file be separated so that the trial of newly summoned accused is not delayed.

Let Dr. Usha Sharma, the then Principal of Medical College, Meerut be summoned for facing trial on 16-01-2020.”

**FINDING ALONG WITH
ANSWER OF THIS COURT TO ISSUE
NO.1 SUPPORTED BY CASE LAWS**

34. From the records it is an admitted position that the trial judge has passed the judgment and order convicting the co-accused persons, namely, Sachin Malik, Yashpal Rana and Amandeep Singh on 7th December, 2019, whereas the order sentencing them under Section 302 I.P.C. read with Section 34 I.P.C. to undergo life imprisonment along with fine of RS. 1,00,000/- each has been passed on 12th December, 2019 and after passing the order of sentence, the order impugned has been passed summoning the revisionist to face trial under Section 319 Cr.P.C.

35. It necessary for this Court to answer the question as to when or which stage, any court like Magistrate or Sessions Judge can pass order for summoning any person to face trial under Section 319 Cr.P.C. for examining the legality or otherwise of the order impugned.

36. The answer of such question crops up from bare reading of first part of Section 319 Cr.P.C. in which it has clearly been provided that during the course of inquiry or trial, any court can pass such order for summoning any person as an accused to face trial, meaning thereby that no Court

can pass such order after ending/conclusion of trial.

37. The Five Judges' of a Constitution Bench of the Apex Court in the case of **Hardeep Singh Vs. State of Punjab & Others reported in (2014) 3 SCC 92** while dealing with the provisions of Section 319 Cr.P.C. has framed following questions:

"6.1. (i) What is the stage at which power under Section 319 Cr.P.C. can be exercised?"

(ii) Whether the word "evidence" used in Section 319 (1) Cr.P.C. could only mean evidence tested by cross-examination or the court can exercise the power under the said provision even on the basis of the statement made in the examination-in-chief of the witness concerned?

(iii) Whether the word "evidence" used in Section 319 (1) Cr.P.C. has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial?

(iv) What is the nature of the satisfaction required to invoke the power under Section 319 Cr.P.C. to arraign an accused? Whether the power under Section 319 (1) Cr.P.C. can be exercised only if the court is satisfied that the accused summoned will in all likelihood convicted?

(v) Does the power under Section 319 Cr.P.C. extend to persons not named in the FIR or named in the FIR but not charged or who have been discharged?"

38. On the basis of aforesaid questions, the Apex Court has considered the said case in three stages i.e. the stage at which such powers can be invoked and, secondly, the material on the basis whereof the invoking of such powers can be

justified. To add as a corollary to the same, thirdly, the manner in which such power has to be exercised, also has to be considered.

39. To the first question i.e. what is the stage at which power under Section 319 Cr.P.C. can be exercised?, the Apex Court after highlighting and taking into consideration certain earlier judgments of the Apex Court from paragraph 25 onwards has opined in paragraph no.40, 47, 53 and 54 which read as follows:

*"40.. Even the word "course" occurring in Section 319 Cr.P.C., clearly indicates that the power can be exercised only during the period when the inquiry has been commenced and is going on or the trial which has commenced and is going on. It covers the entire wide range of the process of the pre-trial and the trial stage. **The word "course" therefore, allows the court to invoke this power to proceed against any person from the initial stage of inquiry upto the stage of the conclusion of the trial.** The court does not become functus officio even if cognizance is taken so far as it is looking into the material qua any other person who is not an accused. The word "course" ordinarily conveys a meaning of a continuous progress from one point to the next in time and conveys the idea of a period of time; duration and not a fixed point of time. (See: Commissioner of Income-tax, New Delhi (Now Rajasthan) Vs. M/s East West Import & Export (P) Ltd. (now known as Asian Distributors Ltd.) Jaipur, AIR 1989 SC 836).*

..
47. Since after the filing of the charge-sheet, the court reaches the stage of inquiry and as soon as the court frames the charges, the trial commences, and therefore, the power under Section 319 (1)

Cr.P.C. can be exercised at any time after the charge-sheet is filed and before the pronouncement of judgment, except during the stage of Section 207/208 Cr.P.C., committal etc., which is only a pre-trial stage, intended to put the process into motion. This stage cannot be said to be a judicial step in the true sense for it only requires an application of mind rather than a judicial application of mind. At this pre-trial stage, the Magistrate is required to perform acts in the nature of administrative work rather than judicial such as ensuring compliance of Sections 207 and 208 Cr.P.C., and committing the matter if it is exclusively triable by Sessions Court. Therefore, it would be legitimate for us to conclude that the Magistrate at the stage of Sections 207 and 209 Cr.P.C. is forbidden, by express provision of Section 319 Cr.P.C., to apply his mind to the merits of the case and determine as to whether any accused needs to be added or subtracted to face trial before the Court of Sessions.

...

53. It is thus aptly clear that until and unless the case reaches the stage of inquiry or trial by the court, the power under Section 319 Cr.P.C. cannot be exercised. In fact, this proposition does not seem to have been disturbed by the Constitution Bench in *Dharam Pal (CB)*. The dispute therein was resolved visualizing a situation wherein the court was concerned with procedural delay and was of the opinion that the Sessions Court should not necessarily wait till the stage of Section 319 Cr.P.C. is reached to direct a person, not facing trial, to appear and face trial as an accused. We are in full agreement with the interpretation given by the Constitution Bench that Section 193 Cr.P.C. confers power of original jurisdiction upon the Sessions Court to add

an accused once the case has been committed to it.

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

40. On the basis of such finding, the Apex Court has answered the said question in paragraph no.55, which is being quoted herein below:

“55. Accordingly, we hold that the court can exercise the power under Section 319 Cr.P.C. only after the trial proceeds and commences with the recording of the evidence and also in exceptional circumstances as explained herein above.” (Emphasis supplied)

41. Recently, considering the same issue the Five Judges’ of Constitution

Bench of the Apex Court in the case of **Sukhpal Singh Khaira Vs. State of Punjab** reported in (2023) 1 SCC 289, has firstly framed one of the following issues:

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

42. For answering the said issue, the Constitution Bench of the Apex Court has recorded its finding in paragraph nos. 32 to 38, which are being quoted herein below:

“32. Therefore, from a perusal of the provisions and decisions of this Court, it is clear that the conclusion of the trial in a criminal prosecution if it ends in conviction, a judgment is considered to be complete in all respects only when the sentence is imposed on the convict, if the convict is not given the benefit of Section 360 of Cr.P.C. Similarly, in a case where there are more than one accused and if one or more among them are acquitted and the others are convicted, the trial would stand concluded as against the accused who are acquitted and the trial will have to be concluded against the convicted accused with the imposition of sentence. When considered in the context of Section 319 of Cr.P.C., there would be no dichotomy as argued, since what becomes relevant here is only the decision to summon a new accused based on the evidence available on record which would not prejudice the existing accused since in any event they are convicted.

33. In that view of the matter, if the Court finds from the evidence recorded

in the process of trial that any other person is involved, such power to summon the accused under Section 319 of Cr.P.C. can be exercised by passing an order to that effect before the sentence is imposed and the judgment is complete in all respects bringing the trial to a conclusion. While arriving at such conclusion what is also to be kept in view is the requirement of sub-section (4) to Section 319 of Cr.P.C. . From the said provision it is clear that if the learned Sessions Judge exercises the power to summon the additional accused, the proceedings in respect of such person shall be commenced afresh and the witnesses will have to be re-examined in the presence of the additional accused. In a case where the learned Sessions Judge exercises the power under Section 319 of Cr.P.C. after recording the evidence of the witnesses or after pronouncing the judgment of conviction but before sentence being imposed, the very same evidence which is available on record cannot be used against the newly added accused in view of Section 273 of Cr.P.C. As against the accused who has been summoned subsequently a fresh trial is to be held. However while considering the application under Section 319 of Cr.P.C., if the decision by the learned Sessions Judge is to summon the additional accused before passing the judgment of conviction or passing an order on sentence, the conclusion of the trial by pronouncing the judgment is required to be withheld and the application under Section 319 of Cr.P.C. is required to be disposed of and only then the conclusion of the judgment, either to convict the other accused who were before the Court and to sentence them can be proceeded with. This is so since the power under Section 319 of Cr.P.C. can be exercised only before the conclusion of the trial by passing the judgment of conviction and sentence.

34. Though Section 319 of Cr.P.C. provides that such person summoned as per sub-section (1) thereto could be jointly tried together with the other accused, keeping in view the power available to the Court under Section 223 of Cr.P.C. to hold a joint trial, it would also be open to the learned Sessions Judge at the point of considering the application under Section 319 of Cr.P.C. and deciding to summon the additional accused, to also take a decision as to whether a joint trial is to be held after summoning such accused by deferring the judgment being passed against the tried accused. If a conclusion is reached that the fresh trial to be conducted against the newly added accused could be separately tried, in such event it would be open for the learned Sessions Judge to order so and proceed to pass the judgment and conclude the trial insofar as the accused against whom it had originally proceeded and thereafter proceed in the case of the newly added accused. However, what is important is that the decision to summon an additional accused either suo-moto by the Court or on an application under Section 319 of Cr.P.C. shall in all eventuality be considered and disposed of before the judgment of conviction and sentence is pronounced, as otherwise, the trial would get concluded and the Court will get divested of the power under Section 319 of Cr.P.C. Since a power is available to the Court to decide as to whether a joint trial is required to be held or not, this Court was justified in holding the phrase, "could be tried together with the accused" as contained in Section 319 of Cr.P.C. , to be directory as held in *Shashikant Singh (supra)* which in our opinion is the correct view.

35. One other aspect which is necessary to be clarified is that if the trial against the absconding accused is split up

(bifurcated) and is pending, that by itself will not provide validity to an application filed under Section 319 of Cr.P.C. or the order of Court to summon an additional accused in the earlier main trial if such summoning order is made in the earlier concluded trial against the other accused. This is so, since such power is to be exercised by the Court based on the evidence recorded in that case pointing to the involvement of the accused who is sought to be summoned. If in the split up (bifurcated) case, on securing the presence of the absconding accused the trial is commenced and if in the evidence recorded therein it points to the involvement of any other person as contemplated in Section 319 of Cr.P.C. , such power to summon the accused can certainly be invoked in the split up (bifurcated) case before conclusion of the trial therein.

36. In analysing the issue and making the above conclusion on all aspects, we are also persuaded by the view taken by this Court, among others, in the case of *Rajendra Singh Vs. State of U.P. & Another* , (2007) 7 SCC 378 wherein it is concluded with regard to the object of Section 319 of Cr.P.C. as hereunder:-

"20. The power under Section 319 of the Code is conferred on the court to ensure that justice is done to the society by bringing to book all those guilty of an offence. One of the aims and purposes of the criminal justice system is to maintain social order. It is necessary in that context to ensure that no one who appears to be guilty escapes a proper trial in relation to that guilt. There is also a duty to render justice to the victim of the offence. It is in recognition of this that the Code has specifically conferred a power on the court to proceed against others not arrayed as accused in the circumstances set out by this section. It is a salutary power enabling the

discharge of a court's obligation to the society to bring to book all those guilty of a crime.

21. Exercise of power under Section 319 of the Code, in my view, is left to the court trying the offence based on the evidence that comes before it. The court must be satisfied of the condition precedent for the exercise of power under Section 319 of the Code. There is no reason to assume that a court trained in law would not exercise the power within the confines of the provision and decide whether it may proceed against such person or not. There is no rationale in fettering that power and the discretion, either by calling it extraordinary or by stating that it will be exercised only in exceptional circumstances. It is intended to be used when the occasion envisaged by the section arises.”

37. We have also kept in view the point by point analysis of the object and power to be exercised under Section 319 of Cr.P.C., as has been indicated in para 34 of Manjit Singh Vs. State of Haryana and Others, (2021) SCC Online SC 632.”

43. On the basis of such finding, the Apex Court has answered the said issue in paragraph no. 39 (I), which reads as follows:

“The power under Section 319 of Cr.P.C. is to be invoked and exercised before the pronouncement of the order of sentence where there is a judgment of conviction of the accused. In the case of acquittal, the power should be exercised before the order of acquittal is pronounced. Hence, the summoning order has to precede the conclusion of trial by imposition of sentence in the case of conviction. **If the order is passed on the same day, it will have to be examined on the facts and circumstances of each case and if such**

summoning order is passed either after the order of acquittal or imposing sentence in the case of conviction, the same will not be sustainable.”

(Emphasise supplied)

44. From deeper scrutiny of the provisions of Section 319 Cr.P.C., two Constitution Benches of Five Judges’ of the Apex Court in the cases of **Hardeep Singh and Sukhpal Singh Khaira (Supras)**, this Court is of the firm opinion that as per first part of Section 319 Cr.P.C., any Magistrate or Court of Sessions can invoke or exercise powers under Section 319 Cr.P.C. during the course of inquiry or trial, as per the opinion expressed in the case of **Hardeep Singh (Supra)**, any Magistrate or Court of Sessions can pass any order under Section 319 Cr.P.C. only after the trial proceeds and commences i.e. before pronouncement of judgment of conviction or acquittal, whereas in accordance with the law settled in the case of **Sukhpal Singh Khaira (Supra)**, the power under Section 319 Cr.P.C. is to be invoked and exercised before the pronouncement of order of sentence where there is a judgment of conviction of the accused. However, in the present case, judgment of conviction of co-accused has been passed on 7th December, 20 and the order of sentence has been passed on 12th December, whereas the order impugned summoning the revisionist to face trial as an accused has been passed after passing the order of sentence of co-accused. In such circumstances, this Court finds that the order impugned clearly hits the provisions of Section 319 Cr.P.C. as well as the settled proposition of laws settled by the Constitution Bench of the Apex Court in the cases of **Hardeep Singh and Sukhpal Singh Khaira (Supras)**.

**FINDING ALONG WITH
ANSWER OF THIS COURT TO ISSUE
NO.2 SUPPORTED BY CASE LAWS**

45. Now this Court deals with the evidence or prima satisfaction on the basis of which the trial judge has passed the order impugned summoning the revisions under Section 319 Cr.P.C. to face trial as an accused.

46. From the provisions of Section 319 Cr.P.C. as well as the judgments of the Apex Court including the above Constitution Benches' Judgment of the Apex Court in the case of **Hardeep Singh (Supra)** and **Sukhpal Singh Khaira**, this Court finds in a nutshell for the exercise of discretion under Section 319 Cr.P.C. that all the relevant factors have to be kept in view and an order is not required to be made mechanically merely on the ground that some evidence had come on record implicating any person.

47. Since issue of summons under Section 319 Cr.P.C. entitles a *denovo* trial and large number of witnesses have been examined and their re-examination could prejudice the prosecution and delay the trial, the trial court has to exercise such discretion with great care and perspicacity [Ref.: **Brindavan Das and others Vs. State of West Bengal** reported in (2009) 3 SCC 329/AIR 2009 1248 (SC)/(2009) SAR CrI. 117].

48. In the case of **Periayasamy and others Vs. Nallasamy** reported in (2019) 4 SCC 342/AIR 2019 SC 1426 the Apex Court has held that Summoning of additional accused u/s. 319 Cr PC without evidence held to be improper. The test that has to be applied under Section 319 Cr.P.C. is one which is more than prima facie case as exercised at the time of taking the charge but short of satisfaction to an extent that the evidence if goes un rebutted would lead to conviction [**Ref.:Hardeep Singh (Supra)**].

49. In the present case while passing the impugned order, the trial judge has only relied upon the evidence of P.W.1 and P.W.-2 who only suspected the revisionist in helping the co-accused and also in diverting and influencing the investigation so as to colour the homicidal death into suicidal death in order to safe guard the prestige of the medical college and he has also recorded that the post-mortem report, medico legal report and other documents have been withheld even Viscera was destroyed to avoid 2nd examination as the Forensics Science Laboratory report mentions death by Ethyl Alcohol poisoning, which is not even remotely proved on record by other evidence, and it is quite divergent to the facts proved on record. He has further doubted the post mortem report which is silent on the injury of the deceased. It is on the basis of such suspicion that the impugned order has been passed. Apart from the above, the trial judge has not recorded his prima facie satisfaction on the evidence available on record on the date of judgment of conviction and sentence against the revisionist as has been observed by the Constitution Bench of the Apex Court in the case of **Hardeep Singh (Supra)** as well as other judgments of the Apex Court on the same issue referred to above. This Court also finds that the trial judge while passing the order impugned for summoning of the revisionist has relied upon the same evidence on the basis of which, final report has been submitted by the Investigating Agency against the revisionist and the co-accused persons, whereas the final report has been accepted qua revisionist only and the same has been rejected against the co-accused. At the time of framing of charge as well as during the course of trial, the revisionist has not been named as an accused except in the testimonies of P.W.-1

and P.W.-2, who have not filed any protest petition during the course of investigation or any application under Section 319 Cr.P.C.

50. Since there was no evidence against the accused-revisionist to be guilty of offence, but only witnesses i.e. P.W.-1 and P.W.-2 giving opinion that the revisionist might have committed offence, hence order of trial judge for addition of revisionist as accused on such evidence would be unjustified, because adding of a person as an accused on the basis of some suspicion created by a witnesses would be travesty of justice (**Ref.: G. Palanisamy Vs. State** reported in 2003 (2) MWN (Cr.)). When there is no direct evidence, Hearsay evidence cannot be the basis for issue of summons [Ref.: **Brindaban Dass (Supra) & Labhuji Amratji Thakor Vs. State of Gujarat** reported in (2019) 12 SCC 644/2018(4) MLJ(Crl) 739 (SC)].

51. In the present case also, before passing the order impugned by the trial judge for summoning the revisionist to face trial as an accused, neither any opportunity of hearing nor any notice has been issued to the revisionist to have her say.

52. The point raised in the case of **Asha Vs. State of Karnataka** reported in 2016 SCC OnLine Kar 9030 is that whether the trial court is justified in summoning the petitioners as accused in terms of Section 319 Cr.P.C. without giving them an opportunity of being heard? Whenever a person is sought to be summoned as an additional accused in terms of Section 319 Cr.P.C., not only prior notice calling upon him to show cause is to be issued, but also the judge dealing with the case has to take extra caution to satisfy himself/herself that

stronger evidence exists as the basis for taking such action.

53. It is always incumbent upon criminal courts to issue prior notice to a person calling upon him or her to show cause as to why he/she should not be made an additional accused. Only on giving an opportunity of being heard, a suitable order should be passed. If the order is passed summoning a particular person in terms of Section 319 Cr.P.C. without giving prior notice, such an order would not withstand the legal scrutiny. Hence all criminal courts are expected to keep in mind this aspect of the matter as explained by the Hon'ble apex court in the case of **Jogendra Yadav Vs. State of Bihar** reported in (2015) 9 SCC 244.

CONCLUSIONS

54. From perusal of the finding recorded by the court below while passing the order impugned including its conclusion as well as the provisions of Section 319 Cr.P.C. and the laws laid down by the Apex Court in the cases, on the subject which have been detailed above, it is crystal clear that the court below has not recorded any finding qua the ingredients provided in Section 319 Cr.P.C. with regard to the evidence for coming to the strong suspicion and his prima facie satisfaction to summon the revisionsit to face trial under Section 319 Cr.P.C. as also he has not examined the law laid down by the Apex Court in the cases of **Hardeep Singh and Sukhpal Singh Khaira (Supras)** on the issue as to when such power under Section 319 Cr.P.C. can be invoked and be exercised by any Magistrate or Court. In absence of such finding and examination, such an order like the impugned order is an absurd order, which may warrant

interference by this Court exercising its revisional power under Section 397/401 Cr.P.C.

55. On overall scrutiny and evolitional of the aforesaid observations and submissions made by the learned counsels for the parties as also the finding recorded in the order impugned, this Court holds that the judgment and order dated 7th/12th December, 2019 passed by Additional Sessions Judge, Court no.1, Meerut in Sessions Trial No.1057 of 2008 (State of U.P. Vs. Sachin Malik & Others), arising out of Case Crime No. 269 of 2004, under Sections 302 and 34 I.P.C., Police Station Medical, District Meerut cannot be legally sustained and is hereby quashed. Since no Magistrate or any court of law can invoke or exercise powers under Section 319 Cr.P.C. for summoning any person to face trial as an accused after passing of order of sentence qua co-accused, no further orders are required to be passed by this Court in that regard at such a belated stage.

56. The present criminal revision succeeds and is allowed.

57. There shall be no orders as to costs.

(2023) 9 ILRA 128
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 20.09.2023

BEFORE

THE HON'BLE RAM MANOHAR NARAYAN
MISHRA, J.

Criminal Revision No. 436 of 2014

Radhey Shyma & Anr. ...Revisionists
Versus

State of U.P. & Anr. ...Opposite Parties

Counsel for the Revisionists:

Ajeet Kumar

Counsel for the Opposite Parties:

Govt. Advocate

(A) Criminal Law - Revision - Indian Penal Code, 1860 - Sections 323 & 504 - The Code of Criminal Procedure, 1973 - Section 313 & 155 (2) - Probation of Offenders Act 1958 - Section 4 - power of court to release certain offenders on probation of good conduct, Section 12 - Removal of disqualification attaching to conviction - In every case, to prove the charge under Section 323 I.P.C. the existence of injury report or its proof by medical officer concerned is not necessary.(Para - 15)

Non-cognizable report - accused assaulted P.W. 1 and his son - abusing four persons and two witnesses - no specific allegations in NCR or witnesses - general allegations that accused abused injured persons - no evidence that accused insulted witnesses - intent to provoke - to commit breach of peace or any offense - Appellants convicted - released on probation - filed criminal appeal against Sessions Judge Court's affirmed judgment - contesting both trial and appellate court's orders - probation period ended - revisionists filed probation bonds - directed by trial court - affirmed by appellate court orders. **(Para -2,14,17)**

HELD:-Appellant's conviction under Section 323 I.P.C. maintained , while their conviction under Section 504 I.P.C. quashed, indicating that Section 323 I.P.C. is not an offense of morale turpitude. In light of Hon'ble Apex Court person released on probation of good conduct will not incur any disqualification due to conviction recorded by trial court as provided under Section 12 of Probation of Offenders Act, 1958. Courts below committed no illegality and said charge proved beyond reasonable doubt against convict persons.**(Para – 16,19,20)**

Revision partly allowed. (E-7)

List of Cases cited:

1. Fiona Shrikhande Vs St. of Maha. , AIR 2014 SC 957
2. Trikha Ram Vs V.K. Seth, AIR 1988 SC 285: 1987 (Supp) SCC 39
3. Harichand Vs Director of School Education, (1998) 2 S.C.C. 383

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

1. Heard learned counsel for the revisionist and learned A.G.A. for the State and perused the record.

2. Instant Criminal appeal has been preferred against judgment and order dated 03.06.2014 passed by learned Sessions Judge Court No. 8 Barabanki in Criminal Appeal No. 88/20213, whereby the judgment and order dated 23.08.2013 passed by learned trial court convicting the appellants from charge under Sections 323, 504 I.P.C. and releasing them on probation of good conduct has been affirmed. The revisionist has assailed the judgment and orders of both the courts below the Trial Court as well as the appellate court in present Criminal Revision.

3. The factual matrix of the case in brief of that the informant Abdul Majid lodged a non-cognizable report before Police Station Kotwali Nagar, District Barabanki by oral information to the effect that the accused persons Pratap Narayan, Tej Narayan, Radhey Shyam and Pawan Kumar asked to dig the platform (chabutra) of the informant, when he objected the accused persons assaulted him by sticks, his son Mohd. Siraj ran to save him on cries of his father but the accused assaulted him also. The co-villagers rushed to the

spot on commotion and saved the informant and his son and they also saw the incident. The police investigated the case by orders of the other court dated 14.06.2002 passed under Section 155 sub-section 2 Cr.P.C. and submitted charge-sheet against named accused persons. The accused Pratap Narayan died during the pendency of the trial and the trial was abated against him. The prosecution examined PW. 1 Abdul Majid (injured), PW. 2 Rajendra and P.W. 3 Mohd. Siraj (injured) for the prosecution evidence to support NCR version in their testimony, and statements of the accused persons were recorded under Section 313 Cr.P.C. they denied the accusation made against them and stated that they were falsely implicated in the case due to enmity of litigation; accused Tej Narayan and Radhey Shyam stated that they are running a shop of cement the informant Abdul Mazid had borrowed cement for constructing his house and when the accused demanded their money the informant side lodged false and concocted case against the accused persons by creating false injuries. Accused Pawan Kumar stated that he has only been implicated in the present case due to reason of being brother of accused Radhey Shyam.

4. Learned Trial Court observed after perusal of evidence on record in the light of accusation made in NCR that incised wound was found on person of injured Abdul Majid, Mohd. Siraj. The allegations in the statements of the witnesses that the accused persons had assaulted the injured with sharp edged weapons is not found trustworthy, the injuries of these injured persons are in the nature of lacerated wound and contusion, which is normally caused by some hard and blunt object like lathi. The witnesses Abdul Majid and Mohd. Siraj have stated that accused Pratap

Narayan and Radhey Shyam and Pawan has beaten lathi. It also appears that Pratap Narayan and his two sons had caused the incident and the name Tej Narayan is falsely added in prosecution version.

5. Learned trial court found the injuries of injured Abdul Majid, Mohd Siraj of simple in nature. As per the injury report but observed that the concerned medical officer has not been examined to prove the injury report, thus these injury reports are not admissible in evidence for want of requisite proof. However, even if, the injury reports are not admissible, the charge under Section 323 I.P.C is proved by evidence of PW-1 and PW-3, this is not in every case that injuries of the injured are to be proved by evidence of medical witness in a case under Section 323 I.P.C. which defines simple hurt and this offence can also be proved by evidence of eye witnesses. Learned trial court also observed that Section 504 I.P.C. is also made out against the said accused persons. The learned trial court acquitted the accused Tej Narayan of charge under Section 323, 504 I.P.C. but convicted the accused Radhey Shyam and Pawan Kumar for charge under Section 323,504 I.P.C. However, Trial Court while taking into consideration the nature of offence and fact that the accused persons have not had any criminal history directed to release them on probation of good conduct, instead of sentencing. The accused Radhey Shyam and Pawan Kumar were released on probation of good conduct for one year on personal bond and two surety of Rs. 15,000/- and they are directed to appear before D.P.O. once in three months, during period of probation one year.

6. The accused persons assailed the judgment and order of learned trial court before court of session and the appeal was

decided by learned Additional Sessions Judge-12 Barabanki by judgment and order dated 03.06.2014. Learned appellate court observed that no medical examination of the injured was carried out but this fact will not adversely affect the prosecution case, even no adverse inference can be drawn due to fact that P.W. 2 has been declared hostile.

7. The appellate court observed that the contradiction pointed out of by the defence in statements of P.W.1 P.W. 2 and P.W. 3 are of minor nature and no serious contradiction appears in their evidence. Although, the injuries of P.W. 1 and P.W. 3 are not proved by the evidence of medical reports but the injured persons have testified the manner and mode of receiving injuries for the proof of offence under Section 323 I.P.C. the injury report is not necessary; the statement of the accused under Section 313 I.P.C. are not in the nature of evidence and because the said statement is not given on oath. They could not adduce any oral or documentary evidence in their defence. Learned trial court has not committed any illegality while convicting and releasing the accused persons Radhey Shyam and Pawan Kumar on probation of good conduct.

8. Learned counsel appearing for the revisionist submitted that as many as four persons faced trial for the charge under Section 323, 504 I.P.C. and out of them two persons Radhey Shyam and Pawan Kumar were convicted of charge under Section 323, 504 I.P.C. However, aid of Section 34 I.P.C. has not been taken by learned trial court as well as learned appellate court while convicting and affirming the conviction of accused persons in absence of charge under section 34 I.P.C the role assigned to each of the accused person will

be taken into consideration individually as the accused persons have not been convicted on the basis of Section 34 I.P.C. The revisionist Pawan Kumar has been assigned role of causing hurt to mother of P.W. 3 Mohd. Siraj by hitting her on her stomach but neither her medical examination was conducted nor she appeared as a witness before the Court.

9. P.W. 2 Rajendra has no supported prosecution version in his testimony before the Court and he had stated that he had not seen the accused persons assaulting the witnesses Abdul Majid and Mohd. Siraj. The injuries reports of P.W. 1 and P.W. 3 are not proved during the trial for want of production of medical evidence of the doctor who had prepared the reports. There are material contradictions in statements of witnesses which are taken into consideration by learned courts below. The conviction of the appellants are not sustainable under law under Section 34 I.P.C. committed by the revisionist. The revisionist have completed the period of probation as awarded long before and as directed by court below but even then they are suffering civil consequences and even the police authorities have not cleared the application moved by the revisionist of the presence of pass-port at their end.

10. He lastly submitted that as many as six persons are stated to have caused injuries to the witnesses however, only one lacerated wound is found on top of head and one contusion on right side of scapula mentioned in the injury report of Abdul Majid and one lacerated wound and one contusion is shown in injury report of Mohd. Siraj, however, these injuries reports are also not liable to be read in evidence due to non-examination of their (medical officer) who prepare these injuries reports.

11. Per contra, learned A.G.A. appearing for the State submitted that there is no good ground to warrant the interference of this Court in concurrent findings to courts below regarding conviction and release of the revisionist on probation of good conduct. Learned courts below had rightly observed that in case under Section 323 I.P.C. the production and examination of medical witness is not mandatory and even in absence of injury report the conviction under Section 323 I.P.C. can be maintained.

12. PW. 1 Mohd. Siraj, the injured had stated in his evidence that Tej Narayan has assaulted him and his father on head. The accused persons has assaulted his mother and sister and Pawan Kumar hit his mother on her abdomen by club. He has not named any persons of neighbourhood as witness, the report was lodged by his father first of all Ram Narayan hit the witnesses, he became unconscious due to injuries he received by banka on his head.

13. So far as the charge under Section 504 I.P.C. is concerned, Hon'ble Supreme Court in *Fiona Shrikhande v. State of Maharashtra*, AIR 2014 SC 957 held as under:-

"However, Section 504 comprises of the following ingredients, viz (a) intentional insult, (b) the insult must be such as to give provocation to the person insulted, and (c) the accused must intent or know that such provocation would cause another to break the public peace or to commit any other offence. The intentional insult must be of such a degree that should provoke a person to break the public peace or to commit any other offence. The person who intentionally insults intending or knowing it to be likely that it will give

provocation to any other person and such provocation will cause to break public peace or to commit any other offence, in such a situation the ingredients of section 504 are satisfied. One of the essential elements constituting the offence is that there should have been an act or conduct amounting to intentional insult and the mere fact that the accused abused the complainant, as such, is not sufficient by itself to warrant a conviction under section 504."

14. In the present case a non-cognizable report lodged at the instance of P.W. 1 Abdul Majid on the basis of the oral statement has stated therein the accused persons assaulted him and his son Mohd. Siraj while abusing them four persons named in NCR and two witnesses Prem and Rajendra are mentioned therein. No specific allegation in the NCR as well as in the statements of witnesses aid to which of the accused abused which witness are injured at the time of the incident, there are general allegation against the accused persons that they had abused the injured persons while assaulting them. There is nothing in NCR as well as in evidence of witnesses that the accused persons had insulted the witnesses with intent to provoke them to commit breach of peace or to commit any offence, as stated by Hon'ble Apex Court In *Fiona Shrikhande v. State of Maharashtra* (supra). Therefore, in the absence of specific acquisition and evidence his charge under Section 504 I.P.C. the same is not found to be proved on the basis of evidence laid by prosecution during trial. Therefore, charge under Section 504 I.P.C. is not proved beyond reasonable doubt in the present case in the accused person released to be acquitted charge under Section 504 I.P.C. So far as under Section 323 I.P.C. is concerned although the accused reasons are

not convicted with assistance of Section 34 I.P.C. but from on the basis of acquisition in NCR and evidence abused by the witnesses P.W. 1 and P.W. 3 during trial the fact that convicted accused persons voluntarily caused herein on P.W. 1 and P.W. 3 the informant and his son respectively.

15. The leaned courts below have rightly observed in impugned judgments that in every case, to prove the charge under Section 323 I.P.C. the existence of injury report or its proof by medical officer concerned is not necessary.

16. The medical evidence is essentially an opinion evidence and even in absence of medical evidence the charge under Section 323 I.P.C. may be proved on the basis of oral testimony of the witnesses as in the present case, the injury reports of P.W. 1 and P.W. 3 are placed on record but the same was not proved during trial by any medical evidence Thus, in the light of foregoing discussion, the learned courts below has committed no illegality and said charge is proved beyond the reasonable doubt against the convict persons.

17. The revisionists have been extended benefit of Section 4 probation of good conduct by the trial court and instant sentence at once. They were directed to be released on the probation of good conduct for proved offences and were directed to be placed under supervision of District Probation Officer. This is admitted that the period of probation has already expired and the revisionists had filed probation bonds pursuant direction of the trial court which has been affirmed by orders of appellate court.

18. Section 4 Probation of Offenders Act 1958 provides for power of these certain offenders on probation of good conduct when any person found guilty of offence committed, and offence did not punishable and the court by

which are found guilty of the opinion that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct when notwithstanding anything contained in any other law for the time being the court may, instead of sentencing him at once, direct that to release on interim bail with or without sureties to appear and face sentence when called upon during such not exceeding three years, as the court may direct, and in the meantime to keep the peace and good behavior for specified period altogether.

19. In the present case the conviction of appellant of the charge under Section 323 I.P.C. is maintained and their conviction under Section 504 I.P.C. has been quashed in this judgment the charge under Section 323 I.P.C. under Section 323 I.P.C. is not an offence of moral turpitude.

Section 12 of probation of Offenders Act 1958 is very relevant which provides as under:-

"12. Removal of disqualification attaching to conviction. Notwithstanding anything contained in any other law, a person found guilty of an offence and dealt with under the provisions of section 3 or section 4 shall not suffer disqualification, if any, attaching to a conviction of an offence under such law: Provided that nothing in this section shall apply to a person who, after his release under section 4 is subsequently sentenced for the original offence."

"In view of S. 12, Probation of Offenders Act, an offender who has been released on probation shall not suffer disqualification attaching to a conviction of the offence for which he has been convicted notwithstanding anything contained in any other law, instead of dismissing him from service he should have been removed from service so that the order of punishment did not

operate as a bar and disqualification for future employment with Government. Under the circumstances, the impugned order of dismissal is converted into an order of removal from service. Subject to this modification the appeal fails and is dismissed: Trikha Ram v. V.K. Seth AIR 1988 SC 285: 1987 (Supp) SCC 39."

Similarly, where a person is convicted under S. 408, I.P. Code but has been released on probation under S. 4 (1) of the Probation of Offenders Act, S. 12 does not debar the authority to take into account the said conviction of the said Government employee for dismissing him from service: Harichand v. Director of School Education (1998) 2 S.C.C. 383."

20. Offence under Section 323 IPC is not an offence of moral turpitude, therefore in the light of Hon'ble Apex Court it appears that a person released on probation of good conduct will not incur any disqualification due to conviction recorded by trial court as provided under Section 12 of Probation of Offenders Act, 1958.

21. In the light of the foregoing discussion and observations the revision is **partly allowed** in the manner as stated above.

(2023) 9 ILRA 133

REVISIONAL JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 10.08.2023

BEFORE

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

Criminal Revision No. 1077 of 2022

**Anil Kumar (Engineer) ...Revisionist
Versus**

State of U.P. & Ors. ...Opposite Parties

Counsel for the Revisionist:

Sri Dhanraj Singh Yadav, Sri Abhishek Mayank, Sri Akhilesh Kumar Ojha, Sri Dhananjay Kumar, Sri Girraj Singh, In Person, Sri Naveen Kumar Yadav, Sri Satya Dheer Singh Jadaun

Counsel for the Opposite Parties:

G.A.

(A) Criminal Law - Revision - Indian Penal Code, 1860 - Sections 342, 376, 511 & 506 - The Code of Criminal Procedure, 1973 - Section 161 & 164 - The Protection of Children From Sexual Offences Act, 2012 - Section 5/6 - accused can be discharged where no connection is found between the accused and commission of crime - right to seek discharge by an accused is valuable statutory right and same cannot be taken lightly by the trial court - truthfulness, sufficiency and acceptability of the material produced can be determined only at the stage of trial - Framing of charge is an exercise of jurisdiction by trial court in terms of Section 228 of the Code, unless the accused is discharged under Section 227 of the Code. (Para - 8)

(B) Criminal Law - The Code of Criminal Procedure, 1973 - Section 227 - Judge while considering the question of framing of charge under Section 227 Cr.P.C. has undoubted power to sift and weigh evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out - Once the charges are framed, the accused is put to trial and thereafter the accused may either be acquitted or convicted, but he cannot be discharged - defence of the accused is not looked into at the stage when the accused seeks to be discharged under Section 227 Cr.P.C. (Para -10,11)

Case involves a missing 10-year-old girl who was held hostage by a revisionist - intending to commit rape - accused was charged after investigation - discharge application - rejected - trial court framed charges against accused -

evidence recorded - three witnesses of fact examined - hence revision. **(Para - 6,11)**

HELD:- Trial court dismissed revisionist's application of discharge, citing victim's support of the F.I.R. version under Sections 161 and 164 Cr.P.C. Victim, a minor aged around 10 years at the time of the incident in 2017, cannot be considered a material witness. Revisionist's grounds and documents can be brought before the trial court during the defense evidence stage, as the trial is ongoing. **(Para - 12)**

Revision dismissed. (E-7)

List of Cases cited:

1. Madhu Limaye Vs St. of Maha. , (1977) 4 SCC 551
2. Ratilal Bhanji Mithani Vs The St. Of Maha. , 1979 SC 94
3. Stree Atyachar Virodhi Parishad Vs Dilip Nathumal Chordia , 1989 SCC (1715)
4. St. Of Orissa Vs Debendra Nath Padhi , AIR 2005 SC 359

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

1. As per office report dated 27.05.2022, notice was served on opposite party No. 2, as per report of C.J.M. Ghaziabad, but none appeared on his behalf to contest present revision.

2. Revisionist appeared in-person before the Court.

3. Heard the submissions of revisionist learned A.G.A. for the State and perused the record.

4. Instant criminal revision has been preferred against order dated 02.03.2022, passed by learned Special Judge (POCSO Act) Court No. 2/Additional Sessions

Judge, District- Ghaziabad in Criminal Case No. 162 of 2017, arising out of Case Crime No. 483 of 2017, under Sections 342, 376, 511, 506 I.P.C. and Section 5/6 POCSO Act, P.S. Modi Nagar, District- Ghaziabad, whereby the learned court rejected the application 14Kh by impugned order wherein the revisionist-accused had prayed for his discharge under Section 227 Cr.P.C. The F.I.R. has not been lodged in the case by parents of the victim but by one Brijendra Kumar Tomar, Fufa of the victim. The case has been concocted against the revisionist by said uncle of victim, the victim was around 8 years of age at the time of incident and presently, she is around 15 years, in fact, she has been used by her said uncle to depose against the revisionist during investigation. But after dismissal of discharge application by impugned order, case was fixed for evidence and the victim in her statement as P.W. 3 recorded on 03.03.2023 by trial court, has deposed that at the time of incident, she was of 9 years of age, the incident occurred on 17.07.2017 at 12:00 hours in the noon. She had not identified the accused person in the court, she also stated that he did nothing against her, he never threatened her with life, her medico-legal examination was conducted at the instance of police. She was confronted with statement under Section 164 Cr.P.C. wherein she acknowledged her signature and photograph. The witness has been declared hostile at the instance of prosecution. He next submitted that learned court below framed charges against him initially under Sections 342, 376, 511, 506 I.P.C. and Section 5/6 POCSO Act on 19.01.2021. This Court vide order dated 07.12.2021 in Application under Section 482 No. 12347 of 2021 set aside order dated 19.01.2021 for framing of charge and directed the learned trial court to pass a

speaking order on the application filed on behalf of the accused persons on 12.01.2021. But learned trial court has dismissed the discharge application vide impugned order dated 02.03.2022 without considering the grounds taken in said application. The informant side engaged in *Maar Peet* with the revisionist and damaged the car of the revisionist and got a false F.I.R. lodged by misusing data of another person, only to save themselves. There are material contradiction in the statement of victim recorded under Section 161 Cr.P.C. and statement under Section 164 Cr.P.C. during investigation. Her medico-legal examination report did not supported the prosecution version. On the plot of revisionist two gates are situated and if one gate is closed children/persons can easily get access into his plot through second gate. The complainant has framed the victim to depose against the applicant during investigation by issuing threat to her, the present case has been lodged at the instance of the complainant only to extort money from the revisionist. Learned trial court while dismissing application for discharge has not applied its judicial mind, no case is made out against the revisionist for which he has been charged by the court below, therefore, the impugned order dated 02.03.2022 is liable to be set aside and revisionist may be discharged of those charges.

5. *Per contra*, learned A.G.A., Sri Deepak Kapoor, submitted that there are ample evidence collected during investigation against the revisionist on the basis of which charge has been framed against the revisionist and discharge application was dismissed by learned court below by impugned order, the victim has stated complicity of the accused revisionist for said charges in her statement under

Section 161 and 164 Cr.P.C. and for the purpose of framing of charge, the evidence and material collected during investigation can only be relied upon. An opinion regarding merits of the case on basis of some evidence adduced during trial after framing of charge is not warranted in the present revision, as the statement of P.W.3 has been recorded after passing of impugned order and during trial. There is no illegality or irregularity in impugned order passed by learned court below and revision should be dismissed.

6. In present case, F.I.R. was lodged by one Brijendra Kumar against revisionist on 17.07.2017 under Sections 342, 376, 511, 506 and Section 5/4 POCSO Act at P.S.- Modinagar, District- Ghaziabad with averment that his daughter aged around 10 years got missing since 02:00 P.M. and in course of her search, he came to know that his daughter has been kept as hostage by accused, who had detained her for 5 hours in his house by gagging her mouth by clothes and tethering her hands and feet with intention to commit rape on her. When the informant came to know about the incident, he knocked at the door of the house of accused and found his daughter in frightened condition. The statement of victim was recorded on 18.07.2017, wherein she supported F.I.R. version and she stated that her neighbouring uncle Anil, took her at his home by closing her mouth and got her sit on a chair by tethering her hands and feet, however, he freed her from bondage and laid her down on bed. He intended to commit some wrong act with her. One Chanchal Madam had seen this, but she was not allowed to come out. The incident was further elaborated by the victim in her statement under Section 164 Cr.P.C. recorded by Magistrate on 24.07.2017, wherein she made specific

allegations against the accused regarding attempt to commit rape on her, although there are some factual variations in both the statements. Kumari Chanchal, the witness of fact also corroborated some factual aspects of the case revealed in medico-legal examination report of the victim dated 18.07.2017. It is stated that Anil had wrongly confined the victim and molested her. However, in medico-legal examination report, no external injury was found on her person. The accused was chargesheeted after investigation under Sections 342, 376, 511, 506 I.P.C. and Section 5/4 POCSO Act, on the basis of evidence collected during investigation. The case of accused is that there is property dispute between accused and the informant, who is relative of the victim and got false F.I.R. against the accused with a view to exert pressure on accused and to grab the disputed property. The learned trial court framed charge against the accused after rejection of discharge application by impugned order. The informant is husband of sister of the father of victim. In present case, trial had already commenced and the victim has been examined in which she has not supported prosecution case and turned hostile. The revisionist has also alleged that the victim and complainant used to demand illegal money by adopting blackmailing tactics against the revisionist for settlement of the case before court below and also threatened him that the revisionist has some audio recording in support of this version as stated in supplementary affidavit dated 24.03.2022. The audio recording of conversation of the victim and appellant exculpates him. The revisionist has filed various letters, documents and photographs in support of his version that he has been falsely framed by the victim at the instance of the informant due to personal grudge against the accused. The informant has

stated in his evidence that he had adopted the victim as he was not having any daughter. The date of birth of victim is 24.11.2009, the parents of victim are alive. The victim was examined as P.W. 3 by the trial court.

7. In instant case discharge application was moved by the revisionist before court below under Section 227 of Cr.P.C. which reads as under:

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

8. The discharge application is allowed usually in those cases where there is no evidence collected during investigation, which in any manner connect the accused with the commission of alleged crime. No charge can be framed in absence of even a prima facie material (oral/documentary) being adduced by the prosecution in the charge-sheet. In other words, the accused can be discharged where no connection is found between the accused and commission of crime. Undoubtedly, the right to seek discharge by an accused is valuable statutory right and same cannot be taken lightly by the trial court. The accused can also be discharged in frivolous cases with a view to nip in a bud in such cases by discharging the accused before trial, because a litigant, caught in a frivolous case, loses a self of himself in the legal battle to protect himself and his reputation. This would not only save judicial time but also cost of public

money and would also protect the right to liberty enshrined under Article 21 of the Constitution of India. However, this is settled law that truthfulness, sufficiency and acceptability of the material produced can be determined only at the stage of trial. Framing of charge is an exercise of jurisdiction by trial court in terms of Section 228 of the Code, unless the accused is discharged under Section 227 of the Code.

9. Hon'ble Apex Court in leading case of **Madhu Limaye v/s State of Maharashtra (1977) 4 SCC 551** held that the orders framing charges or refusing charges are not interlocutory or final and thus are not affected by section 397(2) of Cr.P.C. The High Court should invoke the same carefully and judiciously for the effective administration of the criminal justice system. The High court must prevent the abuse of the process of law especially when the material and on record evidence show a brazen attempt to persecute an innocent. Trial court while addressing a discharge application must sift through the evidence and find if there are sufficient grounds to suspect. It is imperative for the High Court in criminal revision to revisit the case while deciding the revision petition filed against an order rejecting discharge application by the trial court.

10. It is settled law by catena of judicial authority that the Judge while considering the question of framing of charge under Section 227 Cr.P.C. has undoubted power to sift and weigh evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon facts of each case, where the

materials placed before the Court disclose grave suspicion against the accused which has not been properly explained, the Court will be, fully justified in framing a charge and proceeding with the trial. The court cannot act merely as a Post-office or mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities etc., however, at this stage there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial. If on the basis of the material on record, the court could form an opinion that the accused might have committed the offence, it can frame the charge, though for conviction the opinion is required to be proved beyond reasonable doubt that the accused has committed the offence. At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge, the court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible. Even at the stage of framing of charge, the sufficiency of material for the purpose of conviction is not required to be gone into and a prayer of discharge can be allowed only if, the court finds that the material is wholly insufficient for purpose of trial. It is also a settled proposition of law that even when there are materials raising strong suspicion against an accused, the court will be justified in rejecting a prayer for discharge and in granting an opportunity to the prosecution to bring on record the entire evidence in accordance with law, so that case of both the sides may be considered appropriately on conclusion of trial.

11. In the present case, the order passed by learned trial court dismissing application of the accused-revisionist for discharge, has been assailed through filing instant criminal revision, whereas the factual position is that after dismissal of discharge application on 07.12.2021, the trial court framed the charges against the accused revisionist and evidence has been recorded. Inasmuch as three witnesses of fact have already been examined in the case. Hon'ble Supreme Court in **Ratilal Bhanji Mithani vs The State Of Maharashtra 1979 SC 94**, held that after framing of charge, the question of discharge does not arise. The same view was taken in the case of **Stree Atyachar Virodhi Parishad vs Dilip Nathumal Chordia 1989 SCC (1715)**. Once the charges are framed, the accused is put to trial and thereafter the accused may either be acquitted or convicted, but he cannot be discharged. Discharge post framing of charge is not recognized in the Criminal Procedure Code. So far as the electronic and documentary evidence propounded by the revisionist in support of his claim of innocence and false implication by the informant is concerned, Hon'ble Supreme Court in **State Of Orissa vs Debendra Nath Padhi AIR 2005 SC 359**, held that defence of the accused is not looked into at the stage when the accused seeks to be discharged under Section 227 Cr.P.C. "The record of the case", used in Section 227CrPC, is to be understood as the documents and the articles, if any, produced by the prosecution. The Code does not give any right to the accused to produce any document at the stage of framing of the charge. At the stage of framing of the charge, the submission of the accused is to be confined to the material produced by the police.

3. Devnath Yadav Vs St. of U.P. & ors. , Crl. Misc.W.P. No. 1131 of 2021

(Delivered by Hon'ble Ms. Nand Prabha Shukla, J.)

1. Heard learned counsel for the petitioners, learned counsel for the first informant and learned A.G.A. for the State.

2. The instant writ petition seeks quashing of the FIR dated 16.02.2023 giving rise to Case Crime No.56 of 2023, under Sections 3 and 4 of the Prevention of Damages to Public Property Act, 1984, Police Station- Civil Lines, District- Muzaffarnagar.

3. The main contention of learned counsel for the petitioner is that the First Information Report is malicious because the property over which constructions are alleged to be in the process of being raised is not evacuee property as it has been held that 214.84 sq. meters of plot no.835 area 0.061 and plot no.843 area 0.082 hectares is not enemy property. This order has been passed by the Assistant Custodian Enemy Property U.P. and Uttrakhanad 08.02.2019. The order dated 02.08.2019 filed as Annexure 11 to this writ petition declares only 214.84 sq. meters of plot no.835 area 0.061 and plot no.843 area 0.082 hectares to be not enemy property.

4. The First Information Report mentions these two plots, but also contains mention of Plot number 842, which is not covered by the order relied upon, and therefore the first submission of learned counsel for the petitioner is not liable to be accepted.

5. For the same reason, the submission of learned counsel for the

petitioner that the FIR had been lodged, pending consideration of a review application does not improve the case of the petitioner.

6. The next submission of learned counsel for the petitioner is that raising of constructions would not bring the action within the purview of Section 3 or 4 of the Prevention of Damages to Public Property Act. In support of this submission, reliance has been placed upon the judgment in ***Ashok Kumar and Another Versus State of UP*** passed in an Application U/S 482 No. 20181 of 2021 dated 06.04.2022 and the order dated 06.08.2020 passed in Application U/S 482 No. 9964 of 2020 , ***Munsi Lal and Another Vs. State of U.P. and Another***. The judgment in the case of Ashok Kumar (supra) relies upon the judgment in Munsi Lal (supra).

7. Both these cases cited pertain to land of Gaon Sabha and one of the reasons given for quashing the proceedings under the Prevention of Damages to Public Property Act was that Section 67 of the Revenue Code, 2006 provides a complete procedure for dealing with encroachment/unauthorized occupation of Gaon Sabha land, which is a complete code in itself. The relevant part of the judgment in Munsi Lal reads as follows:-

"The area which is covered by the P.D.P.P. Act, 1984 is, thus, confined to the destruction or damage to the 'public property' within the meaning of Section 2(b) of the Act during the course of riots or public demonstrations (commotion). The said provisions, in the considered opinion of the Court, cannot be invoked for lodging the criminal complaint or the first information report on the allegations of damage or loss caused to the Gram Sabha

land by illegal encroachment against a person permanently residing in the village or a tenure holder of any land in the village in question."

8. Admittedly, the impugned FIR alleges constructions being raised over land, at least part whereof, is enemy property and under the control of the Custodian.

9. Under the circumstances, the petitioners are not entitled to any benefit under the judgments cited.

10. Besides, the judgment in the case of Munshi Lal (supra) has been considered by a Division Bench of Court in Criminal Misc. Writ Petition No. 1131 of 2021, ***Devnath Yadav Versus State of U.P. and 3 others***, with an observation that:

"Upon a careful perusal of the Prevention of Damage to Public Property Act, 1984, we find that Section 2(a) of the Act provides that the word "mischief" occurring in the Act shall have the same meaning as in Section 425 of the Indian Penal Code, which is quoted below -

"Section 425 :Mischief : *Whoever with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits "mischief".*

Admittedly, the land in question is public utility land having been reserved during consolidation operations for use as pasture land for grazing cattle. Any encroachment thereon, as is admitted by the petitioner, means that the same cannot be used as pasture land. As such the

situation of the property has been changed by the petitioner by construction of a boundary wall. Such construction prevents the use of the land encroached upon as pasture land and has diminished its value or utility. The act of the petitioner is therefore, covered by Section 425 of the Indian Penal Code. Therefore, there is no doubt that the encroachment by the petitioner over public utility land, reserved as pasture land, amounts to a mischief within the meaning of the term under Section 425 IPC.

Section 3(1) of the Prevention of Damage to Public Property Act, 1984 provides that who ever commits mischief in respect of any public property shall be punished with imprisonment for a term upto five years with fine.

Land reserved for its use as pasture land is land reserved for a public purpose. It is, therefore, public utility land. It is also land covered by Section 67 of the Revenue Code, 2006 wherein no right can accrue in favour of any person. It is also not disputed that the land in question has been reserved for a public purposes, namely, for its use as pasture land.

It is no doubt true that Section 67 of the Revenue Code, 2006 provides a complete procedure for eviction of unauthorized occupants of Gaon Sabha land, which may or may not be public utility land. The said provision is only for eviction and for recovery of damages on account of such unauthorized occupation and user of land belonging to the State under the management of the Gaon Sabha. It is a purely civil remedy with no criminality, attached. The same encroachment, of public utility land, under the Prevention of Damage to Public Property Act, is a criminal offence, visited by penal consequences, namely, imprisonment and fine. Besides, no order

for eviction of an unauthorized occupant can be passed under the Prevention of Damage to Public Property Act. Therefore, in our considered opinion, the two provisions, namely, 67 of the Revenue Code and Sections 2,3 and 5 of the Prevention of Damage to Public Property Act operate in different fields. In case the legislature in its wisdom, considered it fit to declare any action to be also a criminal act, the same, does not require to be read down or its scope to be narrowed down. Since, the two provisions operate in different spheres, it cannot be accepted that there is any overlap. There is no bar for the institution and prosecution of Civil and Criminal proceedings regarding an act, if both have the mandate of law. In any case, an act can give rise to both criminal and civil liability and therefore, both civil and criminal proceedings can be resorted to simultaneously.

*Coming to the judgement in the case of **Munshi Lal (supra)**, we find that the learned Single Judge, proceeded on the premise that Prevention of Damage to Public Property Act, 1984 was enacted to curb vandalism and damage to public property. The first sentence of its Statement of Objects and Reasons reads as follows -*

"With a view to curb acts of vandalism and damage to public property, including destruction and damage caused during riots and public commotion, a need was felt to strengthen the law to enable the authorities to deal effectively with cases of damage to public property."

The use of the word "including" has been given a restrictive interpretation in the judgment cited. We are of the opinion that the said word is illustrative bringing also within its ambit, "destruction and damage caused during riots and public commotion" as stated in the Statement of Objects and Reasons. The use of word "including" therefore, cannot be read to mean that the Prevention of Damage to Public Property Act can be invoked only where

damage to public property is occasioned by vandalism, riots or public commotion.

In our considered opinion, the learned Single Judge has taken a narrow view of Section 3(1) of the Act and has primarily relied upon Sections 3(2) of the Act as also upon Section 4 of the Act for arriving at the final conclusion, in the judgement cited.

However, we find that in view of Section 425 of IPC and Section 3(1) of the Prevention of Damage to Public Property Act, 1984, the action of the petitioner clearly falls within the purview of these two sections, especially when construction of a boundary wall over public property is clearly admitted by petitioner."

11. The afore-cited judgments is a complete answer to the arguments raised by learned counsel for the petitioners and, therefore, no relief is liable to be granted in this writ petition. It is also not established that plot no.842 over which constructions are being raised as per the allegations in the FIR, is not enemy property.

12. Accordingly the writ petition fails and is dismissed.

(2023) 9 ILRA 142

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 05.09.2023

BEFORE

**THE HON'BLE ANJANI KUMAR MISHRA, J.
THE HON'BLE VIVEK KUMAR SINGH, J.**

Criminal Misc. Writ Petition No. 10716 of 2023

M/S Maa Vaishno Traders, Kaushambi

...Petitioner

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioner:

Sri Santosh Tripathi, Mandvi Tripathi

Counsel for the Respondents:

G.A.

(A) Criminal Law - Indian Penal Code, 1860 - Sections 379 - The U.P. Minor Mineral (Concession) Rules, 2021 - Sections 3(1), 58, 72(1) & 76 - Mines and Minerals (Regulation of Development) Act 1957 - Sections 4, 21 & 22 - The Prevention of Damage to Public Property Act, 1984 - Sections 3 & 4, - There is no bar to the lodging of an FIR even where cognizance is barred except on a complaint in writing by the duly authorized officer for contravention of the provisions of the U.P. Minor Minerals (Concession) Rules, 2021.(Para -7)

Surprise inspection carried out by S.D.M. - allegation in FIR - mining carried out in an area beyond lease granted to petitioner-contains ingredients of cognizable offence - contention - no offence disclosed from allegations in FIR - offences alleged against petitioner are under four enactments. **(Para - 3,9,10,11)**

HELD:-Petitioner cannot derive any benefit from Section 22 of the Act and an FIR with regard to an offence under Section 4(1) or 4(1-A) of the Act can be lodged, as they are cognizable offences in view of Section 21(6). FIR cannot be quashed because offences alleged against the petitioner are such regarding which an FIR could have been lodged as also because the allegation therein constitute offences. **(Para -20,23)**

Writ Petition dismissed. (E-7)

List of Cases cited:

Jayant etc. Vs St. of M.P.

(Delivered by Hon'ble Anjani Kumar
Mishra, J.
&
Hon'ble Vivek Kumar Singh, J.)

1. Heard learned counsel for the petitioner and learned A.G.A. for the State.

2. The instant writ petition seeks quashing of the FIR dated 21.05.2023 giving rise to Case Crime No.177 of 2023, under Sections 379 I.P.C. & Sections 3(1), 58, 72(1) of the U.P. Minor Mineral (Concession) Rules, 2021, Sections 4, 21 of Mines and Minerals (Regulation of Development) Act 1957 and Sections 3, 4 of the Prevention of Damage to Public Property Act, 1984 at Police Station Sarai Akil, District Kaushambi.

3. The contention of learned counsel for the petitioner is that no offence is disclosed from the allegations in the FIR.

4. It is next contended that no mining was being carried out on the spot at the time of the surprise inspection carried out by the S.D.M., Chail, the Circle Officer, Chail and the Mining Officer, Chail. In any case, the offences are compoundable. Moreover, Section 22 of the Mines and Minerals (Development and Regulation) Act, 1957 (*hereinafter referred to as "the Act, 1957"*) clearly provides that "*No court shall take cognizance of any offence punishable under this Act or any rules made thereunder except upon complaint in writing made by a person authorised in this behalf by the Central Government or the State Government.*" Therefore, the first information report could not be lodged.

5. It is next contended that Rule 72(1) of the U.P. Minor Mineral (Concession) Rules, 2021 (*hereinafter referred to as "the Rules, 2021"*) only provides that "*a holder of a mining lease or permit or his agent is required to issue a pass in Form MM-II or Form e-MM-II to any person carrying, a*

consignment of minor mineral by a vehicle, animal or any other mode of transport.”

6. He has also referred to following Rules to support this contention, namely:-

(i) **Section 3(1) of the Rules** permits_“*mining operations in an area to which which the rules apply only in accordance with the terms and conditions of a mining lease or mining permit*”

(ii) **Section 58 of the Rules** provides the “*penalties or contravention of the provisions of rule 3. It lays down that on conviction for contravention of provisions of Rule 3, imprisonment of either description for a term which may extend up to five years or with fine which shall not be less than of 2 lacs rupees per hectare and which may extend to five lacs rupees per hectare of the area, or with both.*”

and

(iii) **Rule 76 of the Rules** which provides that “*No court shall take cognizance of any offence punishable under these rules except on a complaint in writing made by the District Officer or any officer authorised by him in this behalf*”

7. Learned AGA has opposed the writ petition and has stated that the FIR also alleges an offence under the Indian Penal Code namely Section 379 IPC, which is a cognizable offence. Therefore, the FIR cannot be quashed. He has also relied upon the decision of the Apex Court in Jayant etc. Vs. State of Madhya Pradesh, to submit that there is no bar to the lodging of an FIR even where cognizance is barred except on a complaint in writing by the duly authorized officer for contravention of the provisions of the U.P. Minor Minerals (Concession) Rules, 2021 (hereinafter referred to as “the Rules, 2021”).

8. We have considered the submissions made by learned counsel for the parties and perused the record.

9. The FIR alleges that during a surprise inspection held on the intervening night of 20/21.05.2023, it was discovered that mining had been carried out in an area of 40 m x 58 meters x .7 meter beyond the area, which was subject matter of a lease in favour of M/S Maa Vaishno Traders, whose proprietor was Jagdish Prasad, the petitioner and that the same amounted to theft of a minor mineral. The mined material had also been transported contrary to law.

10. The offences alleged against the petitioner or under four enactments, The Indian Penal Code, The Prevention of Damage to Public Property Act, 1984, The Mines and Minerals (Development and Regulation) Act, 1957 and the U.P. Minor Minerals (Concession) Rules, 2021.

11. In so far as the offences under the provisions of the IPC and provisions of Prevention of Damage to Public Property Act, 1984 are concerned, these offences are cognizable offences and the FIR to that extent could be lodged and it contains the ingredients of a cognizable offence.

12. It is no doubt true that insofar as the offences under the U.P. Minor Minerals (Concession) Rules, 2021 are concerned, the same, in view of Rule 76 are non cognizable and cognizance thereof, can be taken only on the basis of a complaint in writing by an officer authorized to file such complaint.

13. The position as far as the Mines and Minerals (Development and Regulation) Act, 1957 (hereinafter referred

to as “the Act, 1957”) is concerned is slightly different.

14. The allegation in the FIR is that mining has been carried out in an area beyond the lease granted to the petitioner. It is therefore, an offence under Section 4(1) of the Mines and Minerals (Development and Regulation) Act, 1957 (hereinafter referred to as “the Act, 1957”), which reads as follows:-

“Section 4. Prospecting or mining operations to be under licence or lease.

(1) [No person shall undertake any reconnaissance, prospecting or mining operations in any area, except under and in accordance with the terms and conditions of a reconnaissance permit or of a prospecting licence or, as the case may be, of a mining lease, granted under this Act and the rules made thereunder]:

Provided that nothing in this sub-section shall affect any prospecting or mining operations undertaken in any area in accordance with terms and conditions of a prospecting licence or mining lease granted before the commencement of this Act which is in force at such commencement.

Provided further that nothing in this sub-section shall apply to any prospecting operations undertaken by the Geological Survey of India, the Indian Bureau of Mines, the Atomic Minerals Directorate for Explorations and Research of the Department of Atomic Energy of the Central Government, the Directorates of Mining and Geology of any State Government (by whatever name called), and the Mineral Exploration Corporation Limited, a Government Company within the meaning of clause (45) of Section 2 of the Companies Act, 2013 (18 of 2013) and any

such entity that may be notified for this purpose by the Central Government.”

(1A) No person shall transport or store or cause to be transported or stored any mineral otherwise than in accordance with the provisions of this Act and the rules made thereunder.

(2) No [“reconnaissance permit, prospecting licence or mining lease] shall be granted otherwise than in accordance with the provisions of this Act and the rules made thereunder.

(3) Any State Government may, after prior consultation with the Central Government and in accordance with the rules made under section 18, [“undertake reconnaissance, prospecting or mining operations with respect to any mineral specified in the First Schedule in any area within that State which is not already held under any reconnaissance permit, prospecting licence or mining lease.”

15. The penalties for contravention of Section 4(1) or 4(1-A) are provided in Section 21 of the Act, 1957. Sub-section 1 of Section 21 is relevant and reads as follows:-

Whoever contravenes the provisions of sub-section (1) of sub-section (1-A) of section 4 shall be punishable with imprisonment for a term which may extend to five years and with fine may extend to five lakh rupees per hectare of the area.

16. Even more importantly sub-section 6 of Section 21 provides that “notwithstanding anything contained in the Code of Criminal Procedure, 1973(2 of the 1974), an offence under sub-section 1 shall be cognizable.”

17. This subsection 6 has been incorporated by Act No.37 of 1986 w.e.f. 10.02.1987.

18. Section 22 of this Act of 1957 provides that no Court shall take cognizance of any offence punishable under this Act or any Rule therein except on a complaint in writing by a person authorized in this behalf by the Central Government or State Government.

19. It would be relevant to note that Section 22 is a provision, which has existed in the Act since its promulgation in the year 1957. Sub-section 6 of Section 21, noticed above, has been incorporated w.e.f. 10.02.1987.

20. Under the circumstances, therefore, Section 22(6) is an exception to the general provision mentioned Section 22, regarding offence under the Mines and Minerals (Development and Regulation) Act, 1957. The offences alleged under the impugned FIR are under Section 4(1) and 4(1-A) of the Act 1957. The same therefore, are cognizable offences in view of Section 6 of Section 21. Therefore, the petitioner cannot derive any benefit from Section 22 of the Act and an FIR with regard to an offence under Section 4(1) or 4(1-A) of the Act can be lodged, as they are cognizable offences in view of Section 21(6).

21. Insofar as the offences under the U.P. Minor Minerals (Concession) Rules, 2021 are concerned, the field would be governed by the ratio in the case of Jayant etc. (supra). In the concluding part of this judgment, the Apex Court has summarized its conclusions in 5 points. For the purposes of the instant case, point (iv) is relevant and reads as follows:-

“(iv) that in respect of violation of various provisions of the MMDR Act and the Rules made thereunder, when a

Magistrate passes an order under Section 156(3) of the Code and directs the concerned In-charge/SHO of the police station to register/lodge the crime case/FIR in respect of the violation of various provisions of the Act and Rules made thereunder and thereafter after investigation the concerned In-charge of the police station/investigating officer submits a report, the same can be sent to the concerned Magistrate as well as to the concerned authorised officer as mentioned in Section 22 of the MMDR Act and thereafter the concerned authorised officer may file the complaint before the learned Magistrate along with the report submitted by the concerned investigating officer and thereafter it will be open for the learned Magistrate to take cognizance after following due procedure, issue process/summons in respect of the violations of the various provisions of the MMDR Act and Rules made thereunder and at that stage it can be said that cognizance has been taken by the learned Magistrate.”

22. The impugned FIR therefore, could be lodged also as regards to offences under the U.P. Minor Minerals (Concession) Rules, 2021, which are governed by Section 22 of the Act.

23. Under the circumstances, we are constrained to hold that the submissions made by learned counsel for the petitioner lack substance. The FIR cannot be quashed for the reasons given above because the offences alleged against the petitioner are such regarding which an FIR could have been lodged as also because the allegation therein constitute offences.

24. The writ petition, therefore, fails and is **dismissed**.

(2023) 9 ILRA 147
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.08.2023

BEFORE

THE HON'BLE RAHUL CHATURVEDI, J.
THE HON'BLE MOHD. AZHAR HUSAIN
IDRISI, J.

Criminal Misc. Writ Petition No. 12619 of 2023

Govardhan **...Petitioner**
Versus
State of U.P. **...Respondent**

Counsel for the Petitioner:

Sri Akhilesh Srivastava, Sri Saksham Srivastava

Counsel for the Respondent:

G.A.

(A) Criminal Law - Indian Penal Code, 1860 - Sections 323, 504, 506, 354, 354B & 452 -The Uttar Pradesh Control of Goondas Act, 1970 - Section 2(b), 3 - "Goonda" - *habitually* commits the offences - on one stray incident only petitioner could not be deemed to be habitual offender on the basis of that single incident - "one" cannot be treated to be a 'habitual offender' unless and until there is a tendency of recurrence of the offence. (Para -12,13)

Show cause notice issued by DM - against petitioner - for purposes of bringing an additional offence within four corners of Goondas Act - quashing of - only one criminal case - one beat report - solitary case - "prescribed printed proforma" - without application of mind by executive authorities - general nature of material allegations against petitioner - granted anticipatory bail till conclusion of trial - witnessing rampant misuse of provisions Goondas Act. **(Para - 2,4, 13,15)**

HELD:-Notice is nothing, but a sheer abuse of power vested in the executive authorities of the

district. No uniformity in the executive authorities of the districts of UP regarding applicability of this deterrent enactment causing unwarranted piling up of the cases, challenging the notices under this Act etc.. Direction issued to State Government to form a uniform guide lines in light of judgment. Show cause notice quashed. **(Para - 20,21)**

Writ Petition allowed. (E-7)

List of Cases cited:

1. Kailash Jaiswal Vs St. Of U.P. & ors. , Crl. Misc. W. P. No. 10241 of 2019
2. Suresh Tewari Vs St. of U.P. & ors., 2018 (5) ALJ 1

(Delivered by Hon'ble Rahul Chaturvedi, J.
 &
 Hon'ble Mohd. Azhar Husain Idrisi, J.)

1. Heard Sri Akhilesh Srivastava, learned counsel for the petitioner and the learned A.G.A. for the State and also perused the record.

2. Present petition has been filed on behalf of petitioner Govardhan seeking following main prayer:

"Issue a writ, order or direction in the nature of Certiorari quashing the show cause notice dated 15.6.2023, issued by the Additional District Magistrate (Finance & Revenue), Aligarh, in Case No. 3400 of 2023 (State Vs. Govardhan), under Section 3 of the Uttar Pradesh Control of Goondas Act, 1970, Police Station Chharra, District Aligarh (Annexure No. 1 to the writ petition)."

3. Normally, we do not entertain such type of petitions, where only show cause notice is issued by the Additional District Magistrate (Finance & Revenue), Aligarh

(the Executive Authority of the District), in Case No. 3400 of 2023, State Vs. Govardhan), under Section 3 of the Uttar Pradesh Control of Goondas Act, 1970, Police Station Chharra, District Aligarh.

4. In the instant case, the notice under Section 3 of the Uttar Pradesh Control of Goondas Act, 1970 dated 15.6.2023 has been issued on the basis of two cases, (i) Case Crime No. 69 of 2023, under Sections 323, 504, 506, 354, 354B, 452 IPC, Police Station Chharra, District Aligarh and (ii) Rapat No. 20, dated 3.5.2023. On the basis of these "so called two cases" the Additional District Magistrate (Finance & Revenue), Aligarh has issued a notice under aforesaid section of the Act, 1970 against the petitioner for the purposes of bringing an additional offence within the four corners of Uttar Pradesh Control of Goondas Act, 1970. For this objective the person must be a "Goonda" and this expression of "Goonda" has been defined in Section 2(b) of the Uttar Pradesh Control of Goonda Act, 1970.

5. The peculiar feature of this enactment that the person who is branded as "Goonda" should be ousted from the municipal limits of the city as a preventive measure by the executive authorities of the district by passing externment order. That the person either himself or as a member or leader of a gang, who is habitually commits the offences mentioned in the Section 2(b) of the Act or he has got the tendency to commit the offence time and again. If a person is having a solitary case to his credit, he cannot be branded that he has a habitual Goonda pleaded by the learned counsel for the petitioner.

6. Provisions of Uttar Pradesh Control of Goonda Act, 1970 are applicable in the

entire State of U.P. From the plain reading of the enactment, it could be said with utmost certainty that this enactment has been promulgated to save the citizens from habitual "Goonda". The expression of Goonda has been defined in Section 2(b) of Uttar Pradesh Control of Goonda Act, 1970 which is as under:

2(b) "Goonda" means a person who-

(i) either by himself or as a member or leader of a gang, habitually commits or attempts to commit, or abets the commission of an offence punishable under Section 153 or Section 153-B or Section 294 of the Indian Penal Code or Chapter XV, or Chapter XVI, Chapter XVII or Chapter XXII of the said Code; or

(ii) has been convicted for an offence punishable under the Suppression of Immoral Traffic in Women and Girls Act, 1956; or

(iii) has been convicted not less than thrice for an offence punishable

under the U.P. Excise Act, 1910 or the Public Gambling Act, 1867 or Section 25, Section 27 or Section 29 of the Arms Act, 1959; or

(iv) is generally reputed to be a person who is desperate and dangerous to the community or

(v) has been habitually passing incident remarks or teasing women or girls; or

(vi) is a tout.

7. Its punishment is provided in Section 3 of the aforementioned enactment that when it appears to the District Magistrate that any person is a "Goonda" or his movements or acts in the district or any part thereof may cause or are calculated to alarm, danger or harm to the persons or property of the district. The

District Magistrate feels and have a sufficient material of believing that, he is engaged or about to engage in the District or any part thereof, in the commission of offence referred to in sub-clauses (i) to (iii) of clause (b) of Section 2, or its abetment of such an offence and no witness would come forward to give evidence against him, meaning thereby, that individual has earned lots of bad name and has got sufficient 'nuisance value' in the district. By this reason of apprehension with regard to the safety of their person or property, the District Magistrate may pass externment order for a period of six months as specified in law with sole motive to save the citizens from the wrath of that individual "Goonda". Thus, it can safely be termed that under this enactment, the District Magistrate are empowered to handle such type of miscreants and oust them from the municipal limit of the district maximum for the period of six months by way of preventive measures. This is a deterrent law whereby a person who is termed as a "Goonda" is asked to leave the premises of the district. It shall be branded as "Goonda" for rest of his life.

8. The District Magistrate before exercising this extraordinary and unusual powers conferred by this enactment, must exercise with all caution and care, but we are noticing that there is a rampant misuse of provisions of this enactment. The executive authorities for the extraneous consideration exercising this extraordinary powers at their whims and capricious and are issuing notices on a solitary case or some beat reports. This amounts to make the deterrent enactment blunt. The indiscreet exercise of provisions of Goonda Act and sending the notices to the persons is not based on executive authorities' sweet will or choice. Issuing notice on solitary

case is quite irritating and unnecessarily, there is piling up of litigation. In the instant case there is solitary case and solely on this basis no executive authority can justify that the petitioner is a 'habitual offender' or involved in the cases mentioned in Section 2(b) of the Uttar Pradesh Control of Goondas Act, 1970.

9. It is a fundamental right of every citizen to reside peacefully and profess his business, but if the executive authorities are issuing notice under this deterrent law, then they must be doubly sure about the individual's past image, his past credentials, his family, social educational back ground and after assessing all these factors if the executive authorities comes to the conclusion that individual is a "Goonda" or a potential threat to society at large and should be thrown out from the municipal limits, then only by well reasoned order, after applying his own independent judicial mind pass a well reasoned order for externment of that individual or even issue notice to that individual calling upon him to justify his past conduct.

10. The public perception regarding the individuals' image carries weight. If the individual is enjoying a bad reputation and name in the area and coupled with the fact that he has got a chequered past then executive authorities are well within their right to issue notice to that individual or to pass an externment order for that individual. Trivial and insignificant offences having one or two in number would not make the person branded as a "Goonda". This adjective "Goonda" itself carries bundle load of bad name, and the executive authorities casually and irresponsibly brand a person as a Goonda, goes without saying, that his entire future and reputation would go to dogs and cause

irreparable damage to his name and reputation of his family.

11. Sri Srivastava, learned counsel for the petitioner has relied upon a judgment of this Court in the case of **Kailash Jaiswal Vs. State Of U.P. And 3 Others (Criminal Misc. Writ Petition No. 10241 of 2019) decided on 14.11.2022** in which the co-ordinate Bench of this Court while relying upon the judgment of **Suresh Tewari Versus State of U.P. and others, 2018 (5) ALJ 1** opined that requirement of applicability of clause (1) of Section 2 of Uttar Pradesh Control of Goondas Act, 1970 is that a person who either himself or as a member or leader of a gang habitually commits or attempt to commits or abets the commission of offence is punishable as referred in the clause (1) itself.

12. Paragraph nos. 11, 12, 14 & 16 of **Kailash Jaiswal (Supra)** are reproduced hereunder:

"11. In this backdrop, it is submitted that the notice under the U.P. Goondas Act Is not only malicious but misuse of the power vested upon the District Magistrate, the proceedings have been initiated in colourable exercise of power to coerce the petitioner to vacate the premises which admittedly does not vest with the State. Further, it is submitted that on a single case, proceedings under the U.P. Goondas Act cannot be initiated as the petitioner is not a habitual offender.

*12. Reliance has been placed on the decision of this Court rendered in **Suresh Tewari Versus State of U.P. and others, 2018 (5) ALJ 1.***

14. Learned counsel for the petitioner submits that impugned notice is not in conformity with the Rule 4 of the U.P. Control of Goondas Rules, 1970. He

further submits that Section 3 of the U.P. Control of Goondas Act, 1970 (hereinafter to be referred to as the "Act") confers powers on the concerned District Magistrate to extern anyone, who is the Goonda outside the district or to place restriction on his movement. If the District Magistrate is satisfied that the matters set forth in clauses (a), (b) and (c) of sub-Section (1) of the Goondas Act are made out he may issue notice to the Goonda informing him of the general nature of material allegations against him in clause (d) of the Act. He further submits that in the instant case clause (d) mentions about the only case registered against the petitioner being Case Crime No. 212 of 2019, thus the second respondent has mechanically noted the case pending against the petitioner in the prescribed proforma without applying its mind, as well as, without recording satisfaction about the matter set out in clauses (a), (b) and (c) of Act.

*16. The Division Bench of this Court in **Suresh Tewari (2018(5) ALJ1)**, held relying upon the Supreme Court judgment that on one stray incident only petitioner could not be deemed to be habitual offender on the basis of that single incident. Para no. 19 reads thus:-*

19..... The requirement of applicability of the clause (i) is that Goonda means that a person who either by himself or as a member or leader of a gang, habitually commits or attempts to commit, or abets the commission of offences punishable referred to in the said clause. In the impugned show cause notice there is a description of only one criminal case against the petitioner, while as per the definition and the law settled by this Court as well by the Hon'ble Apex Court, one cannot be treated to be a habitual offender unless and until there is recurrence of offences. Since there is a reference of one

stray incident only in the notice, the petitioner could not be deemed to be a habitual offender on the basis of that single incident only and so the notice fails to satisfy the legal requirement."

13. In the impugned notice, there is a description of only one criminal case and one beat report against the petitioner while as per the definition and law settled by the Hon'ble Apex Court as well as by this Court "one" cannot be treated to be a 'habitual offender' unless and until there is a tendency of recurrence of the offence. In the instant case there is a solitary case to the credit of the petitioner, in which he has been granted anticipatory bail till the conclusion of trial, we find that this notice is nothing, but a sheer abuse of power vested in the executive authorities of the district.

14. In addition to above, there is mandatory requirement of the law, that if the executive authority is satisfied that the proceedings under Goonda Act spells out offences under clause (a), (b) and (c) of sub-Section 1 of the Act, he may issue notices to the particular "Goonda" informing him general nature of material allegations against him in clause (d) of the Act, his image among the masses, his nuisance value by which he is a potential threat to the peace and public order of the society at large.

15. But in the instant case, in the notice under challenge spells out the cases required against the petitioner which is allegedly issued on a "prescribed printed proforma" without application of mind by the executive authorities. Not only this, except enumeration of pending solitary case and a beat report, there is total lack of any judicial mind spelling out the general

nature of material allegations against the petitioner, making entire impugned notice per se defective and cannot be acted upon any further.

16. We record our strong displeasure in such type of routine pasting of such provisions of the Uttar Pradesh Control of Goondas Act, 1970 and Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 in a most capricious and casual way.

17. At this juncture, learned A.G.A. stood up and informed the Court that in addition to the cases mentioned in the show cause notice, the petitioner is also involved in two-three more cases which do not find place in the show cause notice. This submissions advanced by the learned A.G.A. itself is amusing. This clearly indicates that one hand does not know what another hand is doing. All of a sudden learned A.G.A. woke up and revealed that in addition to two cases mentioned in impugned notices, the petitioner has got two more cases. The Court cannot take the judicial notice of those additional cases; we cannot permit this hide and seek practice with the proposed "Goonda" i.e. the petitioner.

18. Present matter is squarely covered by the aforesaid judgment and liable to be quashed. Accordingly, we are quashing the show cause notice dated 15.6.2023, issued by the Additional District Magistrate (Finance & Revenue), Aligarh, in Case No. 3400 of 2023, State Vs. Govardhan), under Section 3 of the Uttar Pradesh Control of Goondas Act, 1970, Police Station Chharra, District Aligarh.

19. *Registrar General, High Court is directed to circulate the copy of this*

judgment apprising all the executive authorities of the State of U.P. to strictly adhere the ratio laid down mentioned above. Hence forth it is expected from the authorities that they would necessarily spell out 'general nature of particular allegations against the proposes Goonda', his personal image among the masses his social family background and then only pass a well reasoned order not on a prescribed proforma while issuing a show cause notice and thereafter a pass a well reasoned order of externment, (if at all required and needed) by the said executive authorities concerned. All the District Magistrates and the executive authorities working under him are directed to take appropriate action hence forth and proceed against the individual where they have got a strong reason to believe that the individual is rogue to the society and his externment is a desirable.

20. As mentioned above, we are witnessing rampant misuse of the provisions of Uttar Pradesh Control of Goondas Act, 1970. There is no uniformity in the executive authorities of the districts of UP regarding applicability of this deterrent enactment causing unwarranted piling up of the cases, challenging the notices under this Act etc.

(A). Thus in this regard, it is directed that the State Government too would form a uniform guide lines regarding the applicability of this Act in the light of the above judgment.

(B). This guidelines must be framed latest by 31st October 2023 and shall be circulated among all the District Magistrates of the Districts, so that they may strictly adhere to those guidelines and their shall be Uniformity in the application

of the provisions of Uttar Pradesh Control of Goondas Act, 1970.

21. With this direction, the writ petition stands **allowed**. The impugned show cause notice dated 15.6.2023 issued by the Additional District Magistrate (Finance & Revenue), Aligarh is hereby quashed. No order as to cost.

(2023) 9 ILRA 152

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 28.08.2023

BEFORE

**THE HON'BLE ANJANI KUMAR MISHRA, J.
THE HON'BLE VIVEK KUMAR SINGH, J.**

Criminal Misc. Writ Petition No. 12808 of 2023

**Rahul Saxena @ Bhola/Bholu ...Petitioner
Versus
State of U.P. & Ors. ...Respondents**

Counsel for the Petitioner:

Sri Nagesh Kumar Dwivedi, Sri Ashwini Kumar, Sri Sushil Kumar Srivastava

Counsel for the Respondents:

G.A.

(A) Criminal Law - The U.P. Gangsters and Anti-Social Activities (Prevention) Act. 1986 - Sections 2/3 - The U.P. Gangsters and Anti-Social Activities (Prevention) Rules, 2021 - Rule 5 & 10 , Public Gambling Act, 1867 - Section 3/2 , Certified copy - not defined - definition of phrase as per Law Lexicon & Black's Law Dictionary - copy of a document signed and certified as a true copy by the officer to whose custody the original is entrusted - copy, which is certified to be true in terms of Section 76 of the Evidence Act is also a certified copy - 'certified copy' as a duplicate of an original, usually an official document, certified as an exact

reproduction, usually by the officer responsible for issuing or keeping the original.(Para - 9)

Quashing of FIR - contention - Gangsters Act provisions invoked in two base cases - investigation incomplete - Rule 5 and 10 of U.P. Gangsters and Anti-Social Activities (Prevention) Rules not complied with - making FIR illegal - required papers for approval - lack certified copy of base case charge-sheets and recovery memos - not sent along with documents - certified copy means a copy issued from the Court - preventing gang chart from being approved.**(Para - 3,4)**

HELD:-Contention that a certified copy is a court-issued copy is rejected in the judgment, indicating that the first contention cannot be accepted. No joint meeting held prior to approval of gang chart by DM. No foundation for such an assertion in the writ petition or the supplementary affidavit.**(Para - 10,13)**

Writ Petition dismissed. (E-7)

List of Cases cited:

1. Master @ Ramzan Vs St. of U.P. through Principal Secy. Home & ors. 2020 0 Supreme (All) 855
2. Ankit Sharma @ Ankit Kumar Vs St. of U.P. 2022 LawSuit(All) 1595
3. Binni Lala @ Vinod Kumar Jain Vs St. of U.P & Ors., Crl. Misc. Writ Petition No. 19638 of 2022

(Delivered by Hon'ble Anjani Kumar
Mishra, J.
&
Hon'ble Vivek Kumar Singh, J.)

1. Learned counsel for the petitioner has filed supplementary affidavit in the Court today which is taken on record.

2. Heard learned counsel for the petitioner and learned A.G.A. for the State.

3. The instant writ petition seeks quashing of the FIR dated 26.07.2023 giving rise to Case Crime No.0303 of 2023, under Sections 2/3 of the U.P. Gangsters and Anti-Social Activities (Prevention) Act., Police Station- Kila, District- Bareilly.

4. The contention of learned counsel for the petitioner is that the provisions of the Gangsters Act have been invoked against the petitioner on the basis of two base cases. However, the investigation in the base cases was not complete. He has also vehemently argued that Rule 5 and 10 of the U.P. Gangsters and Anti-Social Activities (Prevention) Rules have not been complied with. The first information report is, therefore, illegal and is liable to be set aside.

5. He has also submitted that the papers which were required to be forwarded to the approving authority lack the certified copy of the charge-sheets of base cases and the recovery memos. These were not sent along with the documents, for approval. He submits that a certified copy means a copy issued from the Court. Since, the charge-sheet had not been submitted in court, no certified copy could have been issued or annexed with the gang chart at the point in time it was approved by the approving authority.

6. Learned counsel for the petitioner also paced reliance on the judgments of this being *Master @ Ramzan Vs. State of U.P. through Principal Secretary Home and others 2020 0 Supreme (All) 855 and Ankit Sharma @ Ankit Kumar Vs. State of U.P. 2022 LawSuit(All) 1595* in support of his submissions.

7. Learned AGA has opposed the writ petition and has stated that the gang chart,

copy whereof is annexed with the supplementary affidavit, specifically mentions two base cases against the petitioners being Case Crime No. 88 of 2022 under Section 420 IPC, Police Station-Kila, District-Bareilly wherein the charge-sheet No. 151A/2022 is dated 12.06.2023 and the other base case is Case Crime No. 89 of 2022 under Section 3/4 of the Gambling Act, Police Station Kila, District Bareilly wherein charge-sheet No. 152A of 2022 is also dated 12.06.2023. Therefore, the submission of learned counsel for the petitioner lacks merit.

8. We have considered the submissions made by learned counsel for the parties and perused the record. Primarily, the submission of the learned counsel for the petitioner is that the words "certified copy" used in Rule 10(1) means a certified copy issued by the Court. It is, therefore, the contention that till such time the charge-sheet in the base cases has not been filed before the Court, no action on its basis can be taken under the provisions of the Gangsters Act. This is the also import of the two judgments that have been cited by learned counsel for the petitioner.

9. The import of words certified copy have been considered by this Court in the judgment dated 02.05.2023 in **Crl. Misc. Writ Petition No. 19638 of 2022 Binni Lala @ Vinod Kumar Jain Vs. State of U.P and others.** It has been held as follows:

"The term certified copy has not been defined either in the Indian Penal Code, the Criminal Procedure Code or the U.P. Gangsters and Anti Social Activities (Prevention) Act or the Rules framed thereunder.

"The definition of the phrase as per the Law Lexicon, 3rd Edition, 2012, as follows:-

Certified copy: *A copy of a document signed and certified as a true copy by the officer to whose custody the original in entrusted. A certified copy of a deed imports that it is an office copy taken from the record of deeds and certified by the proper officer."*

The Law Lexicon also states that a copy, which is certified to be true in terms of Section 76 of the Evidence Act is also a certified copy. It also means an authenticated copy and a certificate issued by an officer is only a written declaration of the fact that the copy is a true copy of the original.

Black's Law Dictionary Eight Edition (South Asian Edition), defines a 'certified copy' as a duplicate of an original, usually an official document, certified as an exact reproduction, usually by the officer responsible for issuing or keeping the original.

.....
Under the circumstances, it is difficult to accept the argument of learned counsel for the petitioner that a certified copy means a copy issued by the Court on payment of charges, as is understood in common parlance. It is not the case of the petitioner that the charge-sheet appended along with gang chart was not certified by the SHO as being a true copy of the original. The gang chart that has been prepared on the basis of the charge-sheet annexed along with it is therefore a valid document and the submission that there was non compliance of the Rule 10(1) of the Rules cannot be accepted.

The second limb of the argument of learned counsel for the petitioner that a charge-sheet on the basis of which a gang chart has been prepared must be one filed

in Court and cognizance thereof must have been taken before the same could be relied upon to invoke the provisions of the Gangsters Act is something which is not to be found in the relevant rule namely Rule 10. This argument cannot be accepted also because Rule 5(c) provides that the Gang Chart shall not approved without the investigation in the base case having been completed. An investigation is treated as complete after the investigation officer prepares the charge-sheet and forwards it to his superior for approval."

10. Therefore, the submission of learned counsel for the petitioner that a certified copy means a certified copy issued by the Court has not been accepted in the judgment aforesaid. Accepting the reasoning, the first contention of learned counsel for the petitioner cannot be accepted.

11. The second submission of learned counsel for the petitioner is that the requisite documents specified in the Rule 10 of the Rules did not form part of the dossier which were sent to the approving authority for grant of approval. Averments in this regard are to be found in paragraph 52 and 54 of the supplementary affidavit which read as follows:-

"52. That in the present case the Police did not annexed the certified copy of charge-sheet and the recovery memo along with the Gang Chart. The entire proceeding for the approval of gang chart is absolutely illegal and is arbitrary in manner.

54. That after going through the aforesaid facts and circumstances of the case it is clear that no provisions of Rule-5, 8 and 10 of the Rules, 2021 complied. The Investigating Officer giving a wrong impression that the charge sheet has been

submitted, therefore, in such circumstances required under Rule-8(5) would be warranted, which clearly mentioned that on discovering an adverse situation the Incharge of Public Station shall be held liable for the negligence of department and criminal proceeding."

12. What is interesting is that these two paragraphs and the averments, therein, have been sworn on the basis of legal advice. The submissions, therefore, cannot be said to be factual assertions. For this reason alone, even this argument of learned counsel for the petitioner cannot be accepted.

13. Although it has been argued that no joint meeting had been held prior to the approval of the gang chart by the District Magistrate, the same also is without substance. There is no foundation for such an assertion in the writ petition or the supplementary affidavit.

14. It is difficult to accept this argument also because the petitioner would not be aware of the factual circumstances. There is no requirement of any notice of such joint meeting nor is the accused entitled to participate in the same. Such position can at best be culled out from the circumstances of the case. However, no such circumstances have been brought to the notice of Court which would even remotely lead to a conclusion that no joint meeting as provided under Rule 5 was not held.

15. In view of the foregoing, submissions of learned counsel for the petitioner, we do not find favour of this Court.

16. The writ petition, under the circumstances, is devoid of merit and is dismissed.

(2023) 9 ILRA 156
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.08.2023
BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.
THE HON'BLE MS. NAND PRABHA SHUKLA, J.

Criminal Misc. Writ Petition No. 16327 of 2022
 Connected with
 Criminal Misc. Writ Petition No. 15652 of 2022

Srimati Maya Devi Smarak Siksha Samiti
...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
 Sri Lokesh Kumar Dwivedi, Sri R.K. Ojha

Counsel for the Respondents:
 G.A., Agarwal Archi Piyush, Sri Pratik Chandra

(A) Criminal Law - The U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986 - Sections 3/2 & 14 (1) - Attachment of property - Section 14(3) - Appointment of an administrator, Section 15 - Release of property.

FIR was registered - against one and his gang members - District Magistrate attached property owned by accused - under Section 14(1) of Act - institution was locked from outside - attachment order was pasted on wall - administrator appointed - students of the institution - be transferred to other institutions - directions - Petitioner (Manager) aggrieved by transfer of students to another institution - order is a consequential order - not under challenge.
(Para - 5, 8,9,11)

HELD:-Order dated 14.10.2022, which is a consequential order, is in compliance with the order dated 13.10.2022, which has not been filed or challenged in this writ petition as well as connected writ petition, and cannot be

interfered with until challenged and set aside.**(Para - 21)**

Writ Petitions dismissed. (E-7)

(Delivered by Hon'ble Ms. Nand Prabha Shukla, J.)

1. Heard Sri R. K. Ojha, learned Senior Advocate assisted by Sri Lokesh Kumar Dwivedi, learned counsel for the petitioners, Sri Manish Goyal, learned Additional Advocate General for the State of U.P. and Sri Pratik Chandra, learned counsel for the respondent No.4.

2. Writ Petition No. 16327 of 2022, filed by the Manager of Srimati Maya Devi Smarak Siksha Samiti, seeks quashing of the order dated 14.10.2022 passed by the Registrar, Professor Rajendra Singh Rajju Bhaiya University, Prayagraj.

3. The second relief claimed is a mandamus directing the respondents to make necessary arrangements for studies of the students of the institution after opening the lock put on the institution so that they may complete their studies.

4. Writ Petition No. 15652 of 2022 is by two persons who allege to be students of Srimati Maya Devi Smarak Siksha Samiti and this writ petition seeks a mandamus directing respondent nos. 2 and 3 to make available necessary facilities for study of the students by opening the lock put on the institution.

5. Briefly stated, an FIR dated 16.08.2020 was registered giving rise to Case Crime No. 0218 of 2020, under Section 3/2 of the U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986, Police Station Adyogik Kshetra, District-

Prayagraj against gang leader Dilip Mishra and his gang members, namely, Shubham Mishra, Neeraj Singh @ Akand Pratap Singh @ Karam Singh @ Anu Pandey. The District Magistrate, Prayagraj attached the property owned by the accused i.e., the institution, namely, Srimati Maya Devi Smarka Siksha Samiti/Maya Devi Smarak Sikshan Avam Prasikshan Sansthan, Maya Devi Smarak Vidhi Mahavidalaya, Pura Pandey, Post TSL Naini vide order dated 30.08.2020 under Section 14(1) of the Act. In compliance of the said order, the institution was locked from outside on 11.09.2020 and the attachment order was pasted on the wall of the institution.

6. It is contended by Sri R. K. Ojha that the institution in question is managed by a registered society. If one member of such registered society has been booked under the provisions of the Gangsters Act, the institution, as a whole, cannot be attached. The District Magistrate in exercise of powers under Section 14(1) of the Gangsters Act by his order dated 30.08.2020 has attached the institution treating it to be a private property of an individual. The application filed under Section 15 of the Act on 27.10.2020 for release of this property has not been decided till date. The petitioner, therefore, was forced to file Writ Petition No. 8937 of 2022. This petition was disposed of with the observation that in view of the Section 14(3) of the Act, it was incumbent upon the District Magistrate to ensure the appointment of an administrator of the attached institution.

7. Consequent to the said order of the High Court, an administrator has been appointed, vide order dated, 11.08.2022.

8. The administrator, sought directions regarding enrollment and examinations of the next session. In

response to the letter of the administrator dated 01.10.2022, the Registrar, Professor Rajendra Singh Rajju Bhaiya University, Prayagraj replied that the students of the institution, which had been attached and sealed under orders of the District Magistrate under Section 14(1) of the Gangsters Act, be transferred to other institutions.

9. Petitioner in CrI. Misc. Writ Petition No. 16327 of 2022, the Manager of Srimati Maya Devi Smarak Shiksha Samiti is primarily aggrieved by the transfer of students to another institution. It has been submitted that no such provision exists under the State Universities Act. Moreover, once the recognition of the institution is in existence, the students therefrom cannot be transferred to another institution. It is also submitted that the institution is a private self financed institution and in case the students are transferred, the institution itself will be destroyed.

10. It is lastly submitted that Section 14(3) of the Act empowers District Magistrate for appointment of an administrator to administer property attached under Section 14(1) of the Act, however, this power does not mean that the administrator is entitled to take steps which would lead to the destruction of the institution itself.

11. Shri Manish Goyal, learned Additional Advocate General has submitted that the representation made by the petitioner on 27.10.2020 has not been placed on record. Impugned in the writ petition is the order dated 14.10.2022 (annexure-8) to the writ petition. This order is a consequential order and has been passed, as per the directions issued by the Vice Chancellor on 13.10.2022, which order is not under challenge.

12. He has also submitted that during physical inspection of the institution, no laboratories etc., were found to be in existence and, therefore, in the interest of students, directions were issued for their transfer to other institutions.

13. It is also submitted that the students of the institution have not come forward challenging their transfer to other institutions. On the strength of the aforementioned submission, it has been submitted that the institution was running on paper alone.

14. Shri Prateek Chandra, who appears for the fourth respondent has submitted that the order dated 14.10.2022 has been passed in the interest of the students as the institution was found locked at the time of inspection.

15. In rejoinder, Sri R. K. Ojha, learned Senior Advocate relying upon paragraph-8 of the writ petition stated that it has been averred therein that the representation under Section 15(1) of the U.P. Gangsters and Anti-Social Activities (Prevention) Act filed on 27.10.2020 for the release of the institution has not been decided till date and this assertion has not been denied in the counter-affidavit filed by the State. In paragraph 9 of the counter-affidavit, it has been stated that the contents of the paragraph 8 of the writ petition need no comment.

16. He has reiterated that the representation that has been decided by the District Magistrate on 11.08.2020 is the representation made for appointment of an administrator. The main representation for release of the property has not been decided till date and is still pending adjudication. He has also referred to Section 6 of the

Societies Registration Act and has also submitted that the interest of the institution is also to be borne in mind and that the interest of the students alone cannot be the basis of the impugned order.

17. Learned AGA has submitted that the petitioner had made only one representation on 27.10.2020 under Section 15 of the Act. The second representation was made on 03.08.2022 after the earlier writ petition filed by the petitioner was decided being Crl. Misc. Writ Petition No. 8937 of 2022. Both these representations stand decided by the District Magistrate vide order dated 11.08.2022 as would be clear from the perusal of the last sentence of this order.

18. Insofar as the other Writ Petition No. 15652 of 2022 is concerned, no separate submissions have been made, although, the Court has been informed that the Senior Advocate appearing in both petitions is the same.

19. It is also submitted on behalf of the State that this petition is by two LLB students seeking a direction for opening of lock of the institution. This petition is nothing but sponsored litigation and in any case, the petition has been filed prior to the passing of the impugned order transferring the students to other institutions which is not under challenge in this Petition. Under the circumstances, therefore, this petition has for all practical purposes, been rendered infructuous.

20. From the submissions noted above, the following two issues are up for consideration. First, the illegality or otherwise of the order dated 14.10.2022 passed by the Registrar, Professor Rajendra Singh Rajju Bhaiya University, Prayagraj.

9 All. New Okhla Industrial Development Authority, District Gautam Budh Nagar Vs. M/s. Pathik 159 Software Education Pvt. Ltd., Pandav Nagar, Delhi & Anr.

The second issue for consideration is whether the representation filed by the petitioner under section 15(1) of the Gangsters Act has been decided or not.

21. Perusal of the order dated 14.10.2022 clearly reveals that it is a consequential order passed in compliance of the order dated 13.10.2022 passed by the Vice Chancellor. This fact finds a mention in the order dated 14.10.2022. Neither the order dated 13.10.2022 has been filed on record nor is the same under challenge in this writ petition. The order dated 14.10.2022 being a consequential order, the same cannot be interfered with till such time, the order dated 13.10.2022 passed by the Vice Chancellor of the University is challenged and set aside.

22. Under the circumstances, the order dated 14.10.2022, a consequential order cannot be faulted. A writ of certiorari for quashing of this order, therefore cannot be issued.

23. Insofar as the second issue, as to whether the representation filed by the petitioner under section 15(1) of the Act has been decided or not. It would be relevant to note that this representation is admittedly dated 27.10.2020. Yet another representation was made by the petitioner on 03.08.2022 after the decision in Writ Petition No. 8937 of 2022.

24. From bare perusal of Annexure 5 to the writ petition, which is the order passed by the District Magistrate on 11.08.2022. It is clear that both these representations stand decided by this order. Since the representation dated 27.10.2020 filed by the petitioner has not been annexed with the writ petition, it cannot be gainfully argued that the same has not been decided by the order dated 11.08.2022.

25. All others submissions made at the Bar on behalf of the petitioner are inconsequential because the main order that required challenge, namely, the order of the Vice Chancellor dated 13.10.2022 is neither on record nor under challenge.

26. Under the circumstances, addressing all other arguments raised by the petitioner would be a purely academic exercise.

27. In view of the foregoing, and since the two issues which arise for consideration in the writ petition has been decided against the petitioner, the writ petition fails and is dismissed.

28. Even connected Writ Petition No.15652 of 2022 is dismissed as the order passed by the Vice Chancellor on 13.10.2022 and the consequential order passed by the Registrar on 14.10.2022 are not under challenge in this writ petition.

29. Accordingly, both writ petitions are dismissed.

(2023) 9 ILRA 159

APPELLATE JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 06.09.2023

BEFORE

**THE HON'BLE MAHESH CHANDRA
TRIPATHI, J.**

THE HON'BLE PRASANT KUMAR, J.

First Appeal Defective No. 218 of 2022
Connected with
First Appeal No. 467 of 2022

**New Okhla Industrial Development
Authority, District Gautam Budh Nagar
...Appellant**

Versus

**M/s. Pathik Software Education Pvt. Ltd.,
Pandav Nagar, Delhi & Anr. ...Respondents**

Counsel for the Appellant:

Sri Kaushalendra Nath Singh

Counsel for the Respondents:

Ms. Shreya Gupta, Sri Shiv Om Vikram Singh Chauhan, Sri Vishnu Gupta (Sr. Advocate), Sri Shashi Nandan (Sr. Advocate)

A. Civil Law-The Commercial Courts Act, 2015-Sections 16 & 2(1)(c)-substantial question of law- whether the dispute involved in the present case can be considered as commercial dispute- in the instant case though the parties have executed the lease deed of the land in question which was subsequently cancelled by the notice- the plaintiff company approached the appellant authority for grant of lease in respect of an immovable property for the purpose of trade and commerce-The lease deed of the plot in question was executed and pursuant to the lease deed the plaintiff company deposited 30% of the amount- the possession of the land was handed over to the plaintiff company- In terms of Clause 13 (A) of the lease deed the plaintiff company had to complete the construction within five years from the actual date of possession, which could be extended further two years-Neither it deposited the required money in terms of the agreement nor moved any application for enlargement of time for construction- Consequently, the lease deed was cancelled and the property was re-allotted in favour of the defendant company- The instant suit has been filed for adjudication of a dispute arising out of the lease deed relating to immovable property- There is nothing on record to show that at the time when the lease deed was executed the property was being exclusively used in trade and commerce so as to bring dispute within the ambit of sub-clause (vii) of Section 2(1)(c) of the Commercial Court Act, 2015-Merely because, the property is likely to be used in relation to trade and commerce, the same cannot be the ground to attract the jurisdiction of the

Commercial Court- A dispute relating to immovable property per se may not be a commercial dispute but the same becomes a commercial dispute, if it falls under sub-clause (vii) of Section 2 (1) (c) of the Act- Thus, Learned Commercial Court totally misinterpreted the definition of commercial dispute and failed to appreciate that there is a difference between the "Commercial Dispute and Commercial Relation"- Hence, the finding of learned Commercial Court that there is a commercial dispute between the parties suffers from infirmity-The Commercial Court had no jurisdiction to decide the present dispute between the parties.(Para 1 to 73)

B. Section 2 (1) (c) of the Commercial Court Act, 2015 clears that the expression "used" must mean "actually used" or "being used". If the intention of the legislature was to expand the scope, in that case the phraseology "likely to be used" or "to be used" would have been used. A matter will fall under the jurisdiction of the Commercial Court or the Commercial Division of the High Court on the following factors namely (i) it shall be a commercial dispute within the meaning of Section 2(1)(c) of the Commercial Court Act, 2015; and (ii) such commercial disputes are of a specified value as per Section 2 (i) of the Commercial Court Act, 2015. a dispute relating to immovable property per se may not be a commercial dispute but the same becomes a commercial dispute, if it falls under sub-clause (vii) of Section 2 (1) (c) of the Act viz. "the agreements relating to immovable property used exclusively in trade or commerce". The words "used exclusively in trade or commerce" are to be interpreted purposefully. The word "used" denotes "actually used" and it cannot be either "ready for use" or "likely to be used" or "to be used". It should be "actually used".(Para 69, 70)

The appeals are allowed. (E-6)

List of Cases cited:

- 9 All. New Okhla Industrial Development Authority, District Gautam Budh Nagar Vs. M/s. Pathik 161 Software Education Pvt. Ltd., Pandav Nagar, Delhi & Anr.
1. Kailash Devi Khanna Vs DD Global Capital Ltd. Innova A.M. Tech L.L.P., Gautambuddh Nagar.
 2. R. Kumar Vs T.A.S. Jawahar Ayya
 3. M/S Glasswood Realty Pvt Ltd Vs Chadravilas Kailashkumar
 4. Ujwala Raje Gaekwar Vs Hemaben Achyut Shah (2017) SCC Guj 583
 5. Shri Saurav Jain & anr. Vs M/s A. B. P. Design & anr.
 6. Federation of A.P. Chambers of Com. & Inds. & ors.. Vs St. of A.P. & ors.
 7. Chandrika Misir Vs Bhaiya Lal
 8. LC in Nokes Vs Doncaster Amalgamated Collieries Ltd.
 9. Harbhajan Singh Vs Press Council of India
 10. Corp of the City of Victoria Vs Bishop of Vancouver Island
 11. Attorney General Vs Milne
 12. Crawford Vs Spooner
 13. Vasu Healthcare Pvt. Ltd Vs Gujarat Akruti TCG Biotech Ltd.
 14. Messrs. Trojan & Co. Ltd. Vs Rm. N.N. Nagappa Chettiar

(Delivered by Hon'ble Mahesh Chandra
Tripathi, J.
&
Hon'ble Prasant Kumar, J.)

1. We have heard Sri Kaushalendra Nath Singh and Sri A.B. Singhal, learned counsel for New Okhla Industrial Development Authority; Sri Vishnu Gupta, learned Senior Advocate, assisted by Mr. S.O.V.S. Chauhan, learned counsel for M/s Pathik Software Education Private Limited and Sri Shashi Nandan, learned Senior Advocate, assisted by Ms. Shreya Gupta, learned counsel for M/s

2. Both appeals arise out of common judgment and decree dated 28.3.2022 passed by the Presiding Officer, Commercial Court, Gautam Budh Nagar in Suit (Comm) No.167 of 2021 (M/s Pathik Software Education Pvt. Ltd. vs. CEO New Okhla Industrial Development Authority and two others).

3. Learned counsel for the parties agreed that both appeals may be disposed of at this stage without calling for original record as the relevant records alongwith the pleadings are already appended alongwith the appeals and they have no objection, in case these appeals are decided without summoning the record.

4. With the consent of learned counsel for the parties, both these appeals are being decided by a common judgment.

5. The brief facts, which led to the present situation, are that M/s Pathik Software Education Private Limited¹, Pandav Nagar, which is plaintiff in the suit, now referred as plaintiff company, is a Private Limited Company having its registered office at E-52, Pandav Nagar, Delhi-110092 and it is engaged in the business of education etc. The plaintiff company was allotted a land bearing no.30 area 2100 sq. mtrs. situated at Sector 142 Noida, District Gautam Budh Nagar, U.P. on 17.02.2006 by New Okhla Industrial Development Authority², which is defendant no.1 in the suit, referred as defendant authority and the lease deed of the plot in question was executed on 19.01.2007.

6. The relevant clauses of the lease deed are as follows:-

“LEASE DEED

This lease deed made on this 1th day of January in the year Two Thousand Seven between New Okhla Industrial Development Authority a body corporate constituted under Section 3 of the U.P. Industrial Area Development Act 1976 (U.P. Act No.6 of 1976) hereinafter called the Lessor which expression shall unless the context does not so admit include its successors of the first part and M/s Pathik Software Education Pvt. Ltd., a company within the meaning of Company Act, 1956 having its registered office E-52, Pandav Nagar, Delhi-92, through its Director Smt. Brijesh Singh W/o Sh. Joginder Singh R/o E-292A, Sector-22, Noida, Distt. G.B. Nagar, U.P., hereinafter called Lessee which expression shall unless the context does not so admit includes its successors, administrators, representatives and permitted assignees of the other part.

..
NOW THE LEASE DEED
WITNESSES AS FOLLOWS:

1. That in consideration of total premium of Rs.79,25,400.00 (Rupees Seventy Nine Lac Twenty Five thousand Four hundred only) towards the land premium calculated @ Rs.3774/- per sq. mtrs out of which 30% i.e. 23,77,620.00 (Rupees Twenty Three lac Seventy Seven thousand Six hundred Twenty only) has been paid by the lessee to the lessor the receipt where of the lessor hereby acknowledges and balance Rs.55,47,780.00 (Rupees Fifty Five lac Forty Seven thousand Seven hundred Eighty only) shall be paid to the lessor in Sixteen half yearly equal installment alongwith interest @ 11% per annum compounded half yearly as per the following:

1st instalment	Rs.3,46,737.00 + Interest on or before 16.08.2006
2nd instalment	Rs.3,46,737.00 + Interest on or before

	16.02.2007
3rd instalment	Rs.3,46,737.00 + Interest on or before 16.08.2007
4th instalment	Rs.3,46,737.00 + Interest on or before 16.02.2008
5th instalment	Rs.3,46,737.00 + Interest on or before 16.08.2008
6th instalment	Rs.3,46,737.00 + Interest on or before 16.02.2009
7th instalment	Rs.3,46,737.00 + Interest on or before 16.08.2009
8th instalment	Rs.3,46,737.00 + Interest on or before 16.02.2010
9th instalment	Rs.3,46,737.00 + Interest on or before 16.08.2010
10th instalment	Rs.3,46,737.00 + Interest on or before 16.02.2011
11th instalment	Rs.3,46,737.00 + Interest on or before 16.08.2011
12th instalment	Rs.3,46,737.00 + Interest on or before 16.02.2012
13th instalment	Rs.3,46,737.00 + Interest on or before 16.08.2012
14th instalment	Rs.3,46,737.00 + Interest on or before 16.02.2013
15th instalment	Rs.3,46,737.00 + Interest on or before 16.08.2013
16th instalment	Rs.3,46,737.00 + Interest on or before 16.02.2014

.....
.....

9. That the lessee will complete construction and obtain occupancy certificate from the building cell department within the validity period of the approved building plans and put the same in operation as per plans approved by the lessor and as per provision of clause No.13 of this lease deed for allotment and cancellation of plot. In case such allottee/lessee who are interested to avail exemption of stamp duty has to obtain approval of Development Plan within 18 months from the date of registration of

9 All. New Okhla Industrial Development Authority, District Gautam Budh Nagar Vs. M/s. Pathik 163 Software Education Pvt. Ltd., Pandav Nagar, Delhi & Anr.

Lease Deed from the competent authority of the lessor and complete the 40% of the total permissible covered area on the allotted plot within 3 years from the date of handing over of possession and also have to complete whole construction within five years from the date of handing over of possession.

In the event of Lessee's not complying with above clause Bank Guarantee submitted by the Lessee will be invoked and encashed.

Provided that the lessee has the option of availing exemption from stamp duty shall execute an Agreement and submit Bank Guarantee as per provision of Government order No.KNO5-305/11-2005-500 (136) 2003 Dt. 19.01.2005, 3014/76-6-05/500 (40)/2000 dated 19.12.2005, and 2168/78-2-2005/46 IT/2005 dated 30.12.2005.

The Lessee is not willing to avail the benefit of exemption of stamp duty vide undertaking dt. 19.1.2007.

.....

.....

13. (A) The allottee/Lessee will complete construction and obtain occupancy certificate from the competent Authority of the Lessor within the validly period of the approved building plan. The Lessee/Allottee shall ensure the functioning on the allotted plot as per schedule give below.

PLOT UPTO 1000 SQ. MTRS

Within two years from the actual date of possession.

PLOTS ABOVE 1000 SQ. MTRS. BUT UPTO 2000 SQ. MTR.

Within three years from the actual date of possession.

PLOTS ABOVE 2000 SQ. MTRS. BUT UPTO 4000 SQ. MTRS.

PLOT ABOVE 4000 SQ. MTRS.

Within five years from the actual date of possession.

B. In case of non adherent to the aforementioned schedule for functioning, the cancellation of allotment and / or determination of Lease Deed with forfeiture of money would be effected as per rules and the possession of the plot would be resumed by the lessor with structure thereof, if any and the allottee/lessee will have no right to claim compensation thereof. However, in exceptional circumstances, an extension may be allowed by the lessor on payment of such charges and subject to terms and conditions, as deemed fit by the lessor.

C. In the event of an extension, extension charges @ 4% of the premium would be chargeable for grant of extension for each year on pro rata monthly basis. The rate of extension charges as mentioned above may be reviewed by the lessor. In the event of extension not being granted, cancellation may be exercised following with revocation of lease deed with forfeiture amount as per then prevailing policy of the lessor, in such an event the lessee will be at liberty to remove construction if any, in such eventuality. The rate of extension charges as mentioned above may be revised by the Lessor/Chief Executive Officer without notice.

It is further classified that the provision of clause no.9 of this lease deed shall not of applicable in respect of allotment and cancellation of plot as this clause No.9 is applicable in cases of those lessees who one interested in availing exemption from stamp duty only.

...

....

26. And it is hereby agreed and declare by and between the parties to these present as follows:

i) Notwithstanding anything contained herein above, if in the opinion of the lessor (whose decision shall be final and binding) any breach or violation of terms and conditions of the registration/allotment/lease deed or non-deposit of dues & any of the covenants/conditions herein before contained and is to be observed and performed and in particular and without prejudice to the generality of the sub clause if lessee transfer (s) assign (s) relinquish (s) or mortgage (s) the whole of the demised premises before construction of a building on its part as herein before provided within the period mentioned above or if the lessee or the persons in whom the right is hereby created are adjudged insolvent.

ii) It shall be lawful for the LESSOR, without prejudice to any other action, to re-enter the demised plot or any part thereof and determine this lease and forfeit the amount as per rules and thereupon.

iii) If at any time of re-entering the demised plot shall not have been occupied by nor any building constructed by LESSEE, the LESSOR may re-allot the demised plot and refund the payment if any after making adjustment as required without deducting arrears of lease/interest/extension/charges and other charges as per rules.

iv) If at any time- entering the demised plot shall not have been occupied by any building constructed by the LESSEE, thereon, the LESSEE shall within a period of three months from the date of re-entry remove from the demised plot all erection or building fixtures and things which at any time and during the said terms shall be affixed or get upon the demised plot and leave the same in a good condition as it was on the date of demise, and default of the same shall become the property of

the LESSOR without payment of any compensation to the LESSEE for the land and building structure and things therein within the LESSEE may be paid such amount as may work out in accordance with the principle given in the sub-clause (ii) above, provided that the LESSOR may at its option agree to purchase from the LESSEE his interest in the demised plot.

v) Any loss suffered by the LESSOR on a fresh grant of the demised plot breaches of conditions as a aforesaid on part of LESSEE for or any person claiming through or under him shall be recoverable by the LESSOR.

vi) All notice order or other documents required under the terms of the lease or under U.P. Act, No.6 of 1976 or any rule or regulation made thereunder shall be deemed to be duly served as provided under Section 43, of U.P. Urban Planning and Development Act, 1973 as re – enacted and notified by U.P. Residents Act, 1974 (Act No.30 of 1974) re – enacted with modification.

vii) The provisions of U.P. Industrial Area Development Act, 1976 and as any rules and regulations framed under the act or any direction issued shall be binding on the LESSEE and his/her/their successive.

viii) All power exercised by the LESSOR under this lease may be exercised by Chairman / CEO. The LESSOR may also authorise any of its officers to exercise all or any of the powers by it under this rule.

ix) Any relaxation or concession granted by the LESSOR to LESSEE shall not in any way prejudice the legal rights of the LESSOR.

x) Any disputes arising with regards to this deed shall be subjected to the jurisdiction of Civil Courts at Gautam

9 All. New Okhla Industrial Development Authority, District Gautam Budh Nagar Vs. M/s. Pathik 165 Software Education Pvt. Ltd., Pandav Nagar, Delhi & Anr.

Budh Nagar or High Court of Judicature at Allahabad.

xi) The land is in peaceful possession of the LESSOR and is being handed over to the LESSEE free from any encroachment and obstruction.

xii) The Chairman / CEO of the LESSOR reserves the right to make such amendments, additions alterations or modification, in terms and conditions of the lease from time to time as he may consider just and reasonable.

xiii) Subject to the sub- clause (ix) in case of any clarification or interpretation regarding these terms and conditions of the lease deed, the decision of Chairman. CEO of the LESSOR will be final and binding on the LESSEE.

xiv) The lessee shall complete the project within stipulated period as mentioned in clause 9 and 13 of lease deed. In case the lessee fails to comply with the terms and condition of allotment letter, lease deed brochure or not make the project functional within stipulated period as mentioned in clause 9 and 13 of lease deed. That action shall be taken as per rules and regulations of the Authority regarding cancellation.

xv) The terms and conditions of brochure, allotment letter dt. 17.02.2006, lease, building bye – laws as amended from time to time shall be binding on LESSEE.”

7. Admittedly, the possession of the land was handed over to the plaintiff company on 01.02.2007 and in terms of the lease deed the plaintiff company has to complete the construction within five years from the actual date of possession i.e. 01.02.2007 and further to pay the defendant authority in terms of the instalments fixed in the lease deed. Once the plaintiff company failed to comply with the aforesaid conditions then the defendant

authority issued notices to the plaintiff company on 19.12.2013, 26.02.2014, 17.06.2020 and 14.07.2020 but the said notices were not responded by the plaintiff company. Finally, the defendant authority vide order dated 07.01.2021 had cancelled the lease deed executed in favour of the plaintiff company.

8. Thereafter, the plaintiff-company had filed a Writ C No.13225 of 2021 (M/s Pathik Software Education Pvt. Ltd. vs. State of UP and 2 others) before this Court assailing the validity of the order dated 07.01.2021. However, the writ petition was dismissed on 27.7.2021 as withdrawn with liberty to file a fresh with better particulars. Meanwhile, the defendant authority had proceeded to make allotment of the plot in question in favour of M/s Innova AM Tech LLP, which is defendant no.2 in the suit, referred as defendant company3.

9. The plaintiff company instituted a suit under the Commercial Courts Act registered as C.S. (Comm) No.167 of 2021 (M/s Pathik Software Education Pvt. Ltd. vs. CEO New Okhla Industrial Development Authority and others) in the Commercial Court, Gautam Budh Nagar seeking following reliefs:-

“19. यह कि वादी निम्न लिखित अनुतोष की याचना करता है:-

अ. यह कि द्वारा घोषणात्मक डिक्री, प्रतिवादी संख्या 1 द्वारा भुखण्ड संख्या 30, क्षेत्रफल 2100 वर्गमीटर, सैक्टर 142, नौएडा जिला गौतम बुद्ध नगर के आवंटन को निरस्त करने के लिये जारी पत्र दिनांक 07/01/2021 को शुन्य व अकृत घोषित किया जावे तथा प्रतिवादी संख्या 1 के द्वारा उपरोक्त भुखण्ड के निरस्तीकरण के सम्बन्ध में की गई समस्त कार्यवाहियों को शुन्य व अकृत घोषित फरमाया जावे।

ब. यह की द्वारा सर्वकालीन स्थाई निषेधाज्ञा प्रतिवादी संख्या 1 व 3 को निषेधित किया जावे कि वह भुखण्ड संख्या 30,

क्षेत्रफल 2100 वर्गमीटर, सैक्टर 142, नौएडा जिला गौतम बुद्ध नगर की रजिस्ट्री प्रतिवादी संख्या 2 के हक में ना करे तथा प्रतिवादी संख्या 1 व 2 को निषेधित किया जावे कि वह वादी के उपरोक्त भुखण्ड संख्या 30, क्षेत्रफल 2100 वर्गमीटर, सैक्टर 142, नौएडा जिला गौतम बुद्ध नगर के वादी के शान्तिपूर्ण कब्जे में किसी प्रकार से हस्तक्षेप करने या किसी भी प्रकार से तृतीय पक्ष का हित उत्पन्न करने के बाज रहे।

स. यह कि वाद व्यय वादी को प्रतिवादीगण से दिलाया जावे।

द. यह कि अन्य कोई अनुतोष जो राय अदालत हितकर वादी हो प्रतिवादीगण से दिलाया जावे।"

10. The defendant authority had filed objections on 25.08.2021 under Order XXXIX Rule 1 & 2 of C.P.C. and taken specific stand that the Commercial Court had no jurisdiction to try and decide the suit because the provisions of the Order VII Rule 11 of C.P.C. are applicable. Section 2 (1) (b) of the Commercial Courts Act, 2015 defines the meaning of "Commercial Court" and sub-section (1) (c) of Section 2 defines the meaning of "Commercial Dispute", wherein every category of the commercial disputes has been defined but nowhere such type of material is available, which co-relates to the present dispute under the suit. Therefore, the present suit of the plaintiff company is barred by the provisions of Section 9 of C.P.C.. The defendant authority has also taken an objection that the civil suit is barred by the provisions of Sections 34, 38 & 41 of Specific Relief Act. The suit of the plaintiff company is also barred by the provisions of Section 12A of Commercial Court Act, 2015.

11. The defendant authority had also filed detailed written statement (WS) on 04.09.2021 and resisted the suit contending that before cancelling the plot in question the defendant authority sent letters/notices dated 19.12.2013, 26.02.2014, 17.06.2020

and 14.07.2020 to the plaintiff company at the available address and the address given by the plaintiff company in the lease deed but the notice dated 17.06.2020 was returned back with the remarks "Bina Pata Bataye Chhod Gaye" (left without giving the address). Therefore, it was incorrect that the plaintiff company had not received the letters. The objection was also taken that at both the addresses i.e. of the address of the company and also at the address of the Director, the letter dated 07.01.2021 was served to the plaintiff company and also the Director of the company.

12. The plot was duly allotted in favour of the plaintiff company on 17.02.2006 @ Rs.3700/- per sq. meters and the location charges @ 2% were also added. Accordingly, the premium rate was charged @ Rs.3774/- per Sq. meters only and within 30 days from the date of allotment letter, the plaintiff company had to deposit 30% amount of the total premium, which was to the tune of Rs.18,35,755/- including one year lease rent of Rs.1,98,135/- and the balance amount of 70% of the total premium alongwith interest @ 11% was to be paid in instalments by the plaintiff company. After allotment, the lease deed was executed on 19.01.2007 and the possession of the plot in question was also handed over to the plaintiff company on 01.02.2007. While filing the written statement, specific objection was also taken to the effect that the plaintiff company had incorrectly stated that he had deposited total premium but in fact, the plaintiff company had never deposited the balance amount of the lease rent against the plot in question. Once the terms and conditions of the lease deed had been flouted by the plaintiff company and it failed to clear the outstanding amount then the defendant authority served the demand

notice dated 26.02.2014 to pay the amount of Rs.1.12 crores upto 15.03.2014. Thereafter, another letter was served on 17.06.2020 to pay the amount of Rs.1,69,00,000/- within 15 days from the receipt of the letter but the said letter was returned back with the aforementioned remarks. When the plaintiff company did not pay the outstanding amount, the defendant authority issued a demand notice on 14.07.2020 to pay Rs.1,69,00,000/- within seven days. It is also claimed that the defendant authority had issued a demand notice on 13.12.2019 for Rs.2,69,78,938/- but subsequently, through another demand notice dated 03.02.2020 the amount to the tune of Rs.50,00,000/- was adjusted, which was already deposited by the plaintiff company on 16.05.2015 and accordingly, amended demand notice was served. Before cancelling the lease deed of the plot in question the defendant authority had sent various show cause notices but in spite of the repeated notices the plaintiff company did not respond to the notice, and neither deposited the amount in question nor raised any construction over the plot in question and further not obtained completion certificate after raising the construction within five years from the actual date of possession, which all were mandatory as per the lease deed. Therefore, the said act was in violation of Clause 13 (A) of the lease deed and accordingly, the defendant authority had cancelled the allotment on 07.01.2021 and taken back the possession of the plot in question on 18.02.2021. Thereafter, the same was allotted to the defendant company on 17.06.2021 under "Institutional Plots Scheme OES 2020-2021" and the defendant company had deposited the sale consideration.

13. In the suit proceeding the defendant company had also filed written statement stating therein that the defendant

company is engaged in the business of IT Software Products and Services. It applied for allotment of an institutional plot and made a pre-deposit of Rs.31,14,300/- as required in the public notice dated 22.02.2021. Thereafter, the defendant authority decided to allot the plot in question vide allotment letter dated 17.06.2021 and as per the terms of the allotment, the defendant authority was required to make a further payment of 30% of the total value of the plot, amounting to Rs.1,11,49,194/-, which was deposited by the defendant company on 22.06.2021. Thus, the defendant company has made payment of Rs.1,42,63,494/-. The defendant company has not only made the payment of huge amount to the defendant authority but it is also holding the balance payment of Rs.2,13,95,241/-, which is payable to defendant authority in respect of the plot. Total cost of the project is more than Rs.37 crores and the defendant company has already arranged the said amount but till date on account of the pendency of the said proceeding, it cannot utilise the said amount for any other purpose.

14. The defendant company took an objection in written statement that admittedly, the plaintiff company has breached the terms of the lease deed dated 19.01.2007 and it had neither paid the balance amount nor had commenced the construction on the plot within the stipulated period of five years. Further the plaintiff company had not sought any extension of time for completion of the construction. **As per lease deed dated 19.01.2007 the maximum period of time for completing the construction including two year's extension was seven years, which had already expired in the year 2014** and consequently, the lease deed

dated 29.01.2007 was cancelled by the defendant authority. The plaintiff company made a default in payment of instalments under the lease deed dated 19.01.2007 and as such, it was not entitled to any relief from the Commercial Court. The defendant company had also obtained the balance sheets of the plaintiff company for the years 2015-2019 from the 'Ministry of Corporate Affairs', which indicated that the plaintiff company was an inactive, shell company and it has no business operations, no turnover and nil income. The amount of Rs.1,00,78,716/- paid to the defendant authority was reflected in its balance sheet as long term unsecured loans taken by the plaintiff company. The plaintiff company did not has any money, whatsoever, to either make the balance payment due to the defendant authority qua the plot in question or to make the construction on the plot in terms of the lease deed. It was also averred in the written statement that the allotment of an institutional plot was made to business entities by defendant authority on the concessional rate to promote business and employment. The plaintiff company with no operations, nil turnover and no business record whatsoever, was neither legally nor morally entitled to the benefit of the allotment of the said plot. The plaintiff company was only incorporated on 19.12.2005 just to procure the lease rights of the said plot.

15. The Commercial Court, after exchange of the affidavits and pleadings, had framed three issues namely (i) jurisdiction of this Court to entertain the present matter; (ii) application under Order 13A CPC and (iii) application under Order XXXIX Rules 1 and 2 CPC. Firstly, the Commercial Court had proceeded to deal with the jurisdiction of the Court to entertain the suit (issue no.i) and found that

admittedly "Memorandum of Article of Association" of the plaintiff company stated that it was a company formed for earning profits and further the lease deed was executed by the defendant authority in favour of the plaintiff company in the institutional area. Again the plaintiff company was incorporated with an intention to earn profits by conducting business of computer/software training institute. The Commercial Court had also taken note of the fact that the plaintiff company was a registered company under the Companies Act, 1956 and works for gain and profit. The terms of the lease deed, which was executed between the parties, speaks of development of suit property as computer/software institute etc. for its gains/profits. The lease deed was also executed between the parties, which was itself a contract between the parties and the allegation of the plaintiff company against the defendant authority was breach and violation of the terms of the said lease deed i.e. contract. Therefore, as there was breach of contract the Commercial Court had every jurisdiction to entertain the matter as there was a commercial dispute. Therefore, the dispute fell within the ambit of Section 2 (1) (c) (vii) of the Commercial Courts Act, 2015. The Commercial Court held that the present dispute between the parties is undoubtedly a commercial dispute in terms of Section 2 of the Commercial Courts Act, 2015 and thus, the Commercial Court has jurisdiction to decide the dispute.

16. So far as the second issue with regard to the application of the defendant company under Order XIII A of the CPC was concerned, the Commercial Court found that in the present case, the only dispute raised by the plaintiff company was that the plaintiff company was not served with the demand notice and subsequent

cancellation notice as per the terms of the lease deed resulting in cancellation of the land in question and the plaintiff company had defaulted in making payments to the defendant authority as per the terms of the lease deed. The Commercial Court found that as there was dispute with regard to the payment, non-payment, sending of notice/non-sending of notice at various addresses of the plaintiff company and all other relevant issues in the present dispute were already on record, therefore, no evidence was required to be adduced. The Commercial Court had proceeded to decide the actual dispute based upon the pleadings of the parties and official record filed by the defendant authority before the Court. It also opined that only dispute between the parties were that the plaintiff claimed non-receipt of payment notice on its registered office as per lease deed and the defendant's plea was regarding non-payment of dues and non-construction of the building on the leased premises as per lease deed. The Commercial Court further found that the defendant company had no substantial right against the plaintiff company. There is no contract between the plaintiff company and the defendant company and only rights of the defendant company was against the defendant authority. Since there was no dispute with regard to the relevant facts between the parties and thus, the Commercial Court was of the opinion that the suit be decided summarily under Order XIII of the CPC.

17. Thereafter, the Commercial Court had proceeded to discuss the case on its merits qua service of notice, non-payment of dues/non-constructions on the leased land property and the relevant law and found that admittedly, the aforesaid lease deed was executed between the plaintiff company and the defendant authority on

19.01.2007, wherein rights and obligations of the parties were clearly mentioned. The lease deed is a complete contract between the plaintiff company and the defendant authority. As per the terms of the lease deed the plaintiff company was to make the entire payment of the consideration amount to the defendant authority within the stipulated period and in case of default the plaintiff company was liable to pay interest to the defendant authority @ 14% and allotment was also liable to be cancelled as per Clause-2 of the allotment letter dated 17.02.2006. As per the lease deed dated 19.01.2007 the entire consideration amount was to be paid by 16.02.2014, out of which Rs.23,77,620/- was paid at the time of execution of the lease deed and the remaining amount of Rs.55,47,780/- plus interest was to be paid in 16 equal half yearly instalments of Rs.3,46,737/- plus interest. In case of default the plaintiff company was required to pay 14% interest compounded half yearly on the defaulted amount instead of 11% within the time period i.e. upto 16.02.2014. The plaintiff company was to complete the construction at the site within five years from the date of actual possession and in case of non-compliance of the construction, the allotment was liable to be cancelled.

18. The Commercial Court found that purported notices dated 30.06.2020 and 14.07.2020 were sent to the plaintiff company, wherein a demand of Rs.1,69,00,000/- was raised against the plaintiff company and these dues included interest for non-payment of amount and penalty for non-construction on the suit property from the year 2013. As per record of the defendant authority, the amount due till 31.12.2020 was of Rs.1,96,10,802/- which included an amount of Rs.25,09,710/- for non-construction and the

defendant authority had extended the time of construction on payment of extension charges. The Commercial Court further found that the demand notices dated 17.06.2020 and 14.07.2020 were not received by the plaintiff company and they were returned back with the endorsement "left without giving the address". The Court found that both the notices dated 17.06.2020 and 14.07.2020 were sent only at the residential address of one of the Directors of the plaintiff company and no notice was sent at the registered office of the plaintiff company at E-52, Pandav Nagar, Delhi-110092. In the lease deed between the plaintiff company and the defendant authority, the registered office of the plaintiff company was shown as E-52, Pandav Nagar, Delhi – 110092 and the residential address of one of the Director Smt. Brijesh Singh was shown as E-292A, Sector 22, Noida, U.P. It was also alleged that the cancellation notice of the plot was sent at both the addresses i.e. registered address – E-52, Pandav Nagar, Delhi – 110092 and E-292A, Sector 22, Noida, District Gautam Budh Nagar, U.P.. From the aforesaid facts, the Commercial Court opined that the demand notices dated 17.06.2020 and 14.07.2020 were not sent at the registered office of the plaintiff company but were rather sent at the residential address of one of its Director, which was in breach of Section 43 of U.P. Urban Planning and Development Act, 1973.

19. The Commercial Court further found that the cancellation notice dated 07.01.2021 was sent to both the addresses of the plaintiff company i.e. registered office and residential address of one of the Director of the plaintiff company and thus, it cannot be said by the defendant authority that the demand notice was not required to

be sent at the registered office or the demand notice was duly served as per Section 43 of the Act, 1973. The Court further observed that the cancellation notice was sent to the plaintiff company at both the addresses but the demand notice was sent at the residential address of one of the Director of the Company and it was not sent at the registered address of the plaintiff company. There was breach on the part of the plaintiff company in adhering to the terms of the lease deed. However, the aforesaid breach was condonable and the defendant authority itself condoned this breach by raising a demand to the tune of Rs.1,69,00,000/- which included the penalty for non-construction on the plot and the interest on the late payment. The Commercial Court held that the defendant authority had the power to cancel the lease deed but it was not exercised as per the terms of the lease deed and thus, the cancellation notice dated 07.01.2021 was found to be in violation of terms of the contract between the parties and consequently, all subsequent actions were unsustainable. After considering the evidence, the Commercial Court by judgment and decree dated 28.3.2022 decreed aforesaid Suit (Comm) No.167 of 2021 with following directions:-

“i) Cancellation notice dated 07.01.2021 cancelling the lease deed dated 19.01.2007 of land bearing Plot No.30, measuring 2100 sq. mtrs. Situated at Sector 142 Noida Gautam Budh Nagar, U.P. by New Okhla Industrial Development authority, is declared null and void and hence set aside;

ii) all consequential actions subsequent to the aforesaid cancellation notice dated 07.01.2021 are also declared as null and void;

iii) Defendant No.1 is directed to issue fresh demand notice for recovery of pending dues/penalties against the plaintiff upto 31.03.2022 within 15 days from the date of the judgment. It is clarified that all benefits (waivers on penalty, interest etc.) which are available to the other allottees similar to the plaintiff shall also be given to the plaintiff as per rules of the authority;

iv) the plaintiff is at liberty to pay the aforesaid amount within 30 days from the receipt of demand notice as mentioned in para (iii) above. It is clarified that in case the plaintiff fails to make the payment of entire dues of the Defendant No.1 within 30 days the Defendant No.1 shall be at liberty to take action as per the terms of the lease deed;

v) the Defendant No.2 is at liberty to avail all its contractual rights against the Defendant No.1 (including re-allotment/refund with interest etc.) and this judgement is not affecting any legal right of the Defendant No.2 against Defendant No.1;

vi) all pending applications including application under Order XXXIX Rules 1 and 2 CPC etc. stand disposed of in the light of above order.

vii) no order as to cost.”

20. Sri Kaushalendra Nath Singh, learned counsel for the defendant authority submitted in support of First Appeal Defective No.218 of 2022 that the category of commercial disputes, which are in jurisdiction of the Commercial Court, are enumerated in the Commercial Courts Act, 2015. Admittedly, the plaintiff company did not commence any construction on the plot in question within stipulated period of five years and further the plaintiff company had not sought extension of time for constructions in terms of Clause 13B and 13C of the lease deed. The plaintiff

company failed to adhere the payment schedule contained in Clause-1 of the lease deed dated 19.01.2007 and made default in payment as per the lease deed, despite receipt of show cause notices dated 19.12.2013 and 26.02.2014 from the defendant authority. The plaintiff company had not made any sincere efforts to comply with the terms of the lease deed dated 19.01.2007. Even though the land was free from any encroachment and possession was also handed over to the plaintiff company but the plaintiff company failed to comply its obligations by not paying the future instalments, and not starting the business within the stipulated time for which the plot was allotted at a concessional rate. The plaintiff company did not seek extension of time, they had virtually abandoned the project. Ultimately, the defendant authority had no other option except to cancel the allotment made in favour of the plaintiff company in terms of Clause 13 of the lease deed and the plot was re-allotted to the defendant company on 17.06.2021. The plaintiff company did not dispute receipt of the show cause notice dated 19.12.2013 sent by the defendant authority seeking an explanation for failure to raise constructions on the demised plot within the time stipulated in the lease deed.

21. Learned counsel drew attention to the relief sought in the suit and submitted that the suit of the plaintiff company was valued at Rs.80 lakhs whereas, the valuation of the plot was much higher. As such, the suit filed by the plaintiff company was undervalued and the court fees paid was insufficient. The valuation of a suit has to be in accordance with the Court Fees Act, even if the relief pertains to a right in immovable property. There is no provision in the lease deed, which mandates service of prior notice upon the lessee (plaintiff

company) prior to cancellation/termination of the lease deed. The Commercial Court illegally concluded that the demand notices were not sent on the registered address of the plaintiff company and as such, the cancellation of the lease deed was without requisite notice as mentioned in sub-clause (vi) of Clause 26 of the lease deed. Sub-clause (vi) of clause 26 of the lease deed was not at all attracted to the case at hand inasmuch as the allotment made in favour of the plaintiff company was cancelled in terms of Clause 13B and 13C of the lease deed. Under the lease deed the defendant authority was not required to send a notice prior to cancellation of the allotment. The notice was sent to the Director of the plaintiff company at E-292A, Sector-22, NOIDA, which was the address for all correspondence by the plaintiff company. There was sufficient compliance of the provisions of Section 43 of the Act, 1973. The plaintiff company was using the aforesaid address as its place of business from the date of application for allotment of the land in question till the date of last payment by the plaintiff company. In the plaint the only case set up by the plaintiff company to challenge the cancellation of lease deed was that the notices dated 13.12.2019, 03.02.2020, 17.06.2020 and 14.07.2020 were not sent to the registered address of the plaintiff company and the same were sent to E-292A, Sector-22, NOIDA. The Commercial Court had erred in law in concluding that the lease deed was cancelled without serving the requisite notice.

22. Learned counsel for the defendant authority submitted that the plaintiff company had challenged the notice dated 07.01.2021 in Writ C No.13115 of 2021 and the same was dismissed as withdrawn. The suit was not maintainable and the

Commercial Court had no jurisdiction to decide the same as per Order VII Rule 11 of CPC. Section 2 (1) (b) of Commercial Court Act, 2015 defines the meaning of “Commercial Court” constituted under sub-section (1) of Section 3. Further under Section 2 (1) (c) the meaning of Commercial Dispute is defined. Every category of the commercial disputes has been defined but, nowhere, such type of claim is available, which co-relates to the present dispute under the suit. Therefore, the present suit of the plaintiff is barred by the provisions of Section 9 of CPC. The Commercial Court failed to consider that the plaintiff company has become a victim of its own wrongs and there is no law or grounds to save the illegal interests of the plaintiff. The Commercial Court also failed to realize that the suit was barred by the provisions of Sections 34, 38 and 41 (e) of the Specific Relief Act, 1963 and further the suit was barred by the provisions of Section 12A of Commercial Court Act, 2015.

23. Sri Kaushalendra Nath Singh further submitted that the lease deed did not contain any provision for issuance of notice before cancellation in case of breach of the lease deed by the plaintiff company, it was an admitted fact that the show cause notices were sent to the plaintiff company in the years 2013 and 2014, which were duly received by the plaintiff company, address was allegedly changed only in the year 2015. Despite receipt of these notices, the plaintiff-company did not take any concrete steps to rectify the breaches or even asked for further time for carrying out construction. The Commercial Court erred in law in not appreciating this aspect of the matter and further committed procedural illegality in deciding the application (42-Ga) under Order 13A CPC and interim

9 All. New Okhla Industrial Development Authority, District Gautam Budh Nagar Vs. M/s. Pathik 173 Software Education Pvt. Ltd., Pandav Nagar, Delhi & Anr.

injunction application (6GA) under Order XXXIX Rules 1 and 2 CPC alongwith the suit itself vide the impugned judgement. The Commercial Court further exceeded its jurisdiction in directing the defendant authority to provide to the plaintiff company "all benefits (waiver of penalty, interest etc.) which are available to the other allottees", while raising fresh demand for recovery of pending dues/penalties. Section 2 (1) (c) (vii) of Commercial Courts Act, 2015 will come into play only if the lease deed is relating to immovable property 'used' exclusively in trade or commerce. Referring to the terms of lease deed and the averments made in the plaint, it was submitted that the land was given on lease for conducting business, which was yet to commence and therefore, the lease deed was not one relating to property 'being used' for trade or commerce, but property 'to be used' for such purpose. In support of his submission, he had placed reliance on the judgement of Hon'ble Supreme Court in **Ambalal Sarabhai Enterprises Ltd. vs. K.S. Infraspace LLP & another**⁵.

24. Sri Shashi Nandan, learned Senior Advocate assisted by Ms. Shreya Gupta, Advocate for defendant company has made detailed submissions referring to the documents to contend that the plaintiff company has not adhered to the payment schedule contained in Clause-1 of the lease deed and has defaulted in the payment of the dues payable under the lease deed despite receipt of show cause notices dated 19.12.2013 and 26.02.2014 sent by the defendant authority. Admittedly, the plaintiff had not completed the construction or obtained completion certificate after raising the construction within five years of from the actual date of possession. Neither the plaintiff company sought any extension of time for construction nor paid 4%

extension charges in terms of Clause 13-B & C of the lease deed. The defendant authority was well within its rights to have cancelled the lease deed in terms of Clauses 13-B and C of the lease deed. It was open to the defendant authority to re-enter the lease premises in case the same was not occupied and no building had been constructed thereon by the lessee (plaintiff company) and the plot could be re-allotted by the defendant authority under Clause 26-III of the lease deed. The plaintiff company has not disputed receipt of show cause notice dated 19.12.2013 sent by the defendant authority seeking an explanation for non-construction on the allotted plot within the stipulated time and further it did not offer any explanation whatsoever in the plaint filed before the Commercial Court as to what steps the plaintiff company took to seek further extension of time for construction. The plaintiff company received a show cause notice dated 26.02.2014 from the defendant authority demanding an amount of Rs.1,12,00,000/- by 15.03.2014 but the plaintiff deposited only Rs.50,00,000/- on 16.05.2015. The plaintiff failed to explain as to why it did not comply with the demand made vide the said notice and what steps the plaintiff took to remedy the breach and default after the receipt of notice dated 26.02.2014 from the defendant authority. At no point of time the plaintiff company had informed to the defendant authority regarding change of its address, viz E-292A, Sector 22, Noida. In fact, right from the date of application for allotment till the date of last payment, the plaintiff company was using the said address for all communication purposes, even the same address is mentioned in the recital of the lease deed. The plaintiff company had also mentioned the same very address to be its address even in the year 2021, when it had filed Writ C No.13225 of

2021 before this Court, which was dismissed as withdrawn.

25. The learned Senior Advocate for the defendant company further submitted that the defendant company had filed a detailed written statement indicating, therein, that the defendant company had obtained the balance sheet of the plaintiff company for the years 2015-19 from the Ministry of Corporate Affairs, wherein, the plaintiff company was infact shown as an inactive company, which has no business operations, no turnover and no income. The amount of Rs.1,00,78,716/- paid by the plaintiff company to the defendant authority in respect of the said plot was reflected in its balance sheet as long term unsecured loans taken by it. At the relevant point of time the plaintiff company did not have any money whatsoever to either make the balance payment due to the defendant authority or to make the construction on the plot as required under the terms of the lease deed. He submitted that the allotment of institutional plot at special rates was made to business entities by the defendant authority to promote business and employment in the Noida. However, the plaintiff company with no operations, nil turnover and no business, was neither legally nor morally entitled to benefit from such allotment. The plaintiff company was incorporated on 19.12.2005 before the process of bidding of the plot in question and it was formed only to procure the lease rights of the said plot at discounted allotment rates so as to later sell it at premium in the market. The defendant company has already invested a sum of Rs.1,42,63,494/- (Rs.1,11,49,194/- + Rs.31,14,300/-) for the plot in suit and the remaining payment, which is to be made upon execution of the lease deed, has been kept on hold by the authority. The project

proposed to be implemented by the defendant company on the plot in question was worth more than Rs.37 crores and has potential of providing employment to hundreds of persons. The allotment was made by the defendant authority in favour of the defendant company upon perusal of the project report submitted by it. The averments in the written statement filed by the defendant company remained unrebutted by the plaintiff company and the Commercial Court did not take it into consideration and made observations that the defendant company has no substantial right against the plaintiff as there is no privity of contract between the plaintiff and the defendant company.

26. Sri Shashi Nandan, learned Senior Advocate further submitted that before the Commercial Court, it was not the case of the plaintiff company that no breach of the terms of the lease deed was committed by it. The plaintiff company had challenged the cancellation of lease only on the ground that the purported notices were not sent at registered address of the plaintiff company office, rather sent at the place, which were already abandoned by the plaintiff company and further no notice was published or affixed. He submitted that the lease deed did not contain any such provision for issuance of notice before cancellation in case of breach by the lessee. It is an admitted fact that the show cause notices were sent to the plaintiff by the defendant authority as early as in 2013 and 2014, which were duly received by it whereas the plaintiff had claimed in para 11 of its plaint that its address changed only in 2015. Despite receipt of the said notices, the plaintiff company took no steps to rectify the breaches. The plaintiff relied upon the provision of Section 43 of the Act, 1973, which simply stipulates that any

notice required to be sent to a company under the provisions of the Act, 1973, it may be sent at its registered office or its principal office or its place of business. The consistent use of the said address by the plaintiff itself in all its documents including the lease deed shows that the plaintiff projected the said address as its place of business and the provisions of the Act, 1973 do not provide for any prior notice to be sent to an allottee/lessee prior to cancellation and in case of breach of the terms of the lease deed, the notices were duly sent by the defendant authority to the plaintiff company at its place of business.

27. Ms. Shreya Gupta, Advocate for the defendant company had also made detailed submissions and referred documents (written statement) filed by the defendant-authority to contend that the dispute raised in the suit is not a 'commercial dispute' as defined under the Commercial Courts Act, 2015. The plaintiff company was not using the property/land, which was earmarked for the purpose and admittedly, the construction was also not made within stipulated time in terms of the lease agreement. She further submitted that even purported claim of the plaintiff company is also contrary to record. Admittedly, the land involved was not being used for trade or commerce and even the plaintiff company had not sought for any extension of time for raising constructions for establishing unit or to use for commercial purpose. It was contended that the suit was filed seeking a declaration that the allotment of the plot in favour of the defendant company by the defendant authority may be declared as null and void. Further, the plaintiff company had sought a relief of permanent injunction restraining the defendant company and defendant authority from interfering in the possession

of the plaintiff company. Further defendant authority may be restrained from executing the lease deed in respect of the plot in favour of the defendant company. The land was not used for trade or commerce and therefore, a suit in the said form could not be maintained before the Commercial Court. The Commercial Court had exceeded its jurisdiction in directing the defendant authority to raise a fresh demand for recovery of pending dues/penalties, by providing 'all benefits (waiver on penalty etc.) to the plaintiff company, which were available to other allottees'. In issuing such directions the Commercial Court granted relief numbers (iii), (iv) & (v), which were not even prayed for by the plaintiff company, therefore, the impugned judgement is nullity. She submitted that the impugned judgment and decree is untenable as the Commercial Court went further in granting to the plaintiff company the liberty to pay the amount to defendant authority within 30 days from the receipt of fresh demand notice. In doing so the Commercial Court had re-written the terms of the contract entered between the parties. The aforesaid indulgence granted to the plaintiff company was wholly illegal and unwarranted and renders the impugned judgement as nullity. She lastly submitted that the plaintiff company which was not only made default in payment but also made default in adhering the schedule for the construction and making the unit operational in terms of the lease deed, the cancellation of the lease by the defendant authority was entirely valid and legal. The plaintiff company was not at all entitled to receive such discretionary reliefs by the Commercial Court, which had patently acted not as a civil court but like a writ court exercising extra ordinary powers. The discretion was illegally exercised by the Commercial Court in favour of the plaintiff

company and as such, the impugned judgement is liable to be set aside by this Court. In support of her submission, she had placed reliance on the judgement of Apex Court in **Bachhaj Nahar vs. Nilima Mandal and another⁶ and Mrs. Akella Lalitha vs. Sri Konda Hanumantha Rao & another⁷**.

28. On the other hand, Sri Vishnu Gupta, learned Senior Advocate for the plaintiff company submitted that the plaintiff-company had not been served with the demand notice/show cause notice. The plaintiff company had changed its residential address after 16.05.2015 but the registered office of the plaintiff company remained at E-52, Pandav Nagar, Delhi. The defendant authority deliberately did not send the demand notice at the registered office of the plaintiff company which resulted in non-payment and subsequent cancellation of the lease deed of the plaintiff company. The plaintiff company had referred the resolution of the defendant authority dated 30.07.2019, wherein, it was resolved that all the allottees, who have not paid the lease amount should be served with notices and in case the notices are not served or received, the notices were required to be affixed at the correspondence address or to ensure the publication in newspaper via public notice. In the present case the demand notice was not sent to the registered office of the plaintiff company, which was mentioned in the lease deed and further no notice was published in the newspaper. Thereafter the plaintiff company filed the aforesaid suit seeking declaration of the cancellation notice dated 07.01.2021 as null and void and the possession of the suit property may not be taken from the plaintiff company wherein, an interim injunction was passed by the Court on 12.08.2021 restraining the

defendant authority from transferring the property to any other person till the next date. In the suit proceeding both the defendants filed their written statement and taken similar pleas in their written statements by stating that the plaintiff company had not complied with the terms of the lease deed/contract between the parties and the termination of the lease deed by the defendant authority and the subsequent re-allotment of the suit property in favour of the defendant company was legal. After completing inter-se pleadings and hearing the parties at length the Commercial Court had decreed the aforesaid suit on 28.03.2022 and declared the cancellation notice dated 07.01.2021 as null and void and all consequential actions subsequent to the aforesaid cancellation notice dated 07.01.2021 have also been declared as null and void and the defendant authority has rightly been directed to issue fresh demand notice for recovery of pending dues/penalties against the plaintiff company upto 31.03.2022, within 15 days from the date of the judgment. In support of his submission, he has placed reliance on the judgment of Apex Court in **Sri Saurav Jain & Anr. vs. M/s A.B.P. Design & Anr⁸**. He submitted that there is no infirmity or illegality in the judgement and decree and as such both the first appeals are liable to be dismissed.

29. Heard rival submissions and perused the record.

30. At the outset, it is noticed that the consideration required in the present case is as to whether the agreement/transaction between the parties, which is subject matter of suit, could be considered as a “commercial dispute” so as to enable the Commercial Court to entertain the suit.

31. The preamble of the Commercial Courts Act, 2015 reads as under:-

“An Act to provide for the constitution of Commercial Courts, Commercial Appellate Courts, Commercial Division and Commercial Appellate Division in the High Courts for adjudicating commercial disputes of specified value and matters connected therewith or incidental thereto.”

32. The Statement of Objects and Reasons of the Commercial Courts Act, 2015 read as under:-

“Statement of Objects and Reasons The proposal to provide for speedy disposal of high value commercial disputes has been under consideration of the Government for quite some time. The high value commercial disputes involve complex facts and question of law. Therefore, there is a need to provide for an independent mechanism for their early resolution. Early resolution of commercial disputes shall create a positive image to the investor world about the independent and responsive Indian legal system.”

33. It is necessary to take note of Section 2 (1) of the Commercial Courts Act, 2015, which defines “commercial dispute” as under:-

“Sec.2(1) In this Act, unless the context otherwise requires,-

(a) “Commercial Appellate Courts” means the Commercial Appellate Courts designated under Section 3-A;

(aa) “Commercial Appellate Division” means the Commercial Appellate Division in a High Court constituted under sub-section (1) of Section 5;

(b) “Commercial Court” means the Commercial Court constituted under sub-section (1) of Section 3;

(c) “commercial dispute” means a dispute arising out of –

(i) ordinary transactions of merchants, bankers, financiers and traders such as those relating to mercantile documents, including enforcement and interpretation of such documents;

(ii) export or import of merchandise or services;

(iii) issues relating to admiralty and maritime law;

(iv) transactions relating to aircraft, aircraft engines, aircraft equipment and helicopters, including sales, leasing and financing of the same;

(v) carriage of goods;

(vi) construction and infrastructure contracts, including tenders;

(vii) **agreements relating to immovable property used exclusively in trade or commerce;**

(viii) franchising agreements;

(ix) distribution and licensing agreements;

(x) management and consultancy agreements;

(xi) joint venture agreements;

(xii) shareholders agreements;

(xiii) subscription and investment agreements pertaining to the services industry including outsourcing services and financial services;

(xiv) mercantile agency and mercantile usage;

(xv) partnership agreements;

(xvi) technology development agreement;

(xvii) intellectual property rights relating to registered and unregistered trademarks, copyright, patent, design, domain names, geographical indications and semiconductor integrated circuits;

(xviii) agreements for sale of goods or provision of services;

(xix) exploitation of oil and gas reserves or other natural resource including electromagnetic spectrum;

(xx) insurance and re-insurance;

(xxi) contract of agency relating to any of the above; and

(xxii) such other commercial disputes as may be notified by the Central Government.

Explanation.- A commercial dispute shall not cease to be commercial dispute merely because-

(a) it also involves action for recovery of immovable property or for realising of monies out of immovable property given as security or involves any other relief pertaining to immovable property;

(b) one of the contracting parties is the State or any of its agencies or instrumentalities, or a private body carrying out public functions;

(d) "Commercial Division" means the Commercial Division in a High Court constituted under sub-section (1) of Section 4;

(e) "District Judge" shall have the same meaning as assigned to it in clause (a) of Article 236 of the Constitution of India:

(f) "Document" means any mater expressed or described upon any substance by means of letters, figures or marks, or electronic means, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matters;

(g) "Notification" means a notification published in the Official Gazette and the expression "notify" with its cognate meanings and grammatical variations shall be construed accordingly;

(h) "schedule" means the Schedule appended to the Act; and

(i) "Specified Value", in relation to a commercial dispute, shall mean the value of the subject matter in respect of a suit as determined in accordance with Section 12 [which shall not be less than three lakh rupees] or such higher value, as may be notified by the Central Government." [Subs. by Act 28 of 2018, sec. 4(II), for "which shall not be less than one crore rupees" (w.r.e.f. 3-5-2018)].

34. As noted above, clause (i) of Section 2 of the Commercial Courts Act, 2015 defines "Specified Value", in relation to a commercial dispute, shall mean the value of the subject matter in respect of a suit as determined in accordance with Section 12 [which shall not be less than three lakh rupees] or such higher value, as may be notified by the Central Government. Section 12 provides for criteria for valuation of the suit, application or appeal for the purpose of the Act.

35. Section 3 of the Commercial Courts Act, 2015 deals with Constitution of Commercial Courts. As per Section 3 (1) of the Commercial Courts Act, 2015 the State Government may, after consultation with the High Court, by notification, constitute such number of Commercial Courts at District level, as it may deem necessary for the purpose of exercising jurisdiction and powers conferred on those courts under this Act. Sub-section (2) of Section 3 provides that the State Government shall, after consultation with the concerned High Court specify, by notification, the local limits of the area to which the jurisdiction of a Commercial Court shall extend and may, from time to time, increase, reduce or alter such limits. Under sub-section (3) the State Government may, with the concurrence of the Chief Justice of the High Court appoint one or more persons having experience in

9 All. New Okhla Industrial Development Authority, District Gautam Budh Nagar Vs. M/s. Pathik 179 Software Education Pvt. Ltd., Pandav Nagar, Delhi & Anr.

dealing with commercial disputes to be the Judge or Judges, of a Commercial Court either at the level of District Judge or a court below the level of a District Judge.

36. Section 5 of the Commercial Courts Act, 2015 deals with the Constitution of Commercial Appellate Division. Section 5 (1) reads as under:-

“5. Constitution of Commercial Appellate Division. – (1) After issuing notification under sub-section (1) of Section 3 or order under sub-section (1) of Section 4, the Chief Justice of the concerned High Court shall, by order, constitute Commercial Appellate Division having one or more Division Benches for the purpose of exercising the jurisdiction and powers conferred on it by the Act.

(2) The Chief Justice of the High Court shall nominate such Judges of the High Court who have experience in dealing with commercial disputes to be Judges of the Commercial Appellate Division.”

37. Section 6 of Commercial Courts Act, 2015 deals with the jurisdiction of Commercial Court. Section 6 of the Act reads as under:-

“6. Jurisdiction of Commercial Court. - The Commercial Court shall have jurisdiction to try all suits and applications relating to a commercial dispute of a Specified Value arising out of the entire territory of the State over which it has been vested territorial jurisdiction.

Explanation. – For the purposes of this section, a commercial dispute shall be considered to arise out of the entire territory of the State over which a Commercial Court has been vested jurisdiction, if the suit or application relating to such commercial dispute has

been instituted as per the provisions of sections 16 to 20 of the Code of Civil Procedure, 1908 (5 of 1908)”.

38. Section 7 deals with the jurisdiction of Commercial Divisions of High Courts. Section 7 of the Commercial Courts Act, 2015 reads as under:-

“7. Jurisdiction of Commercial Divisions of High Courts. – All suits and applications relating to commercial disputes of a Specified Value filed in a High Court having ordinary original civil jurisdiction shall be heard and disposed of by the Commercial Division of that High Court:

Provided that all suits and applications relating to commercial disputes, stipulated by an Act to lie in a court not inferior to a District Court, and filed or pending on the original side of the High Court, shall be heard and disposed of by the Commercial Division of the High Court:

Provided further that all suits and applications transferred to the High Court by virtue of sub-section (4) of Section 22 of the Designs Act, 2000 (16 of 2000) or Section 104 of the Patents Act, 1970 (39 of 1970) shall be heard and disposed of by the Commercial Division of the High Court in all the areas over which the High Court exercises ordinary original civil jurisdiction”.

39. As per Section 11 of the Act, notwithstanding anything contained in the Act, a Commercial Court or a Commercial Division shall not entertain or decide any suit relating to any commercial dispute in respect of which the jurisdiction of the civil court is either expressly or impliedly barred under any other law for the time being in force.

40. Section 13 of Commercial Courts Act, 2015 deals with appeals from decrees of Commercial Courts and Commercial Divisions. As per Section 14 of the Act, the Commercial Appellate Court and the Commercial Appellate Division shall endeavour to dispose of appeals filed before it within a period of six months from the date of filing of such appeal. Fast Track Procedure for deciding the Commercial Disputes.

41. Section 15 of the Act deals with transfer of pending cases. Section 15 of the Act reads as under:-

“15. Transfer of pending cases.

– (1) All suits and applications, including applications under the Arbitration and Conciliation Act, 1996 (26 of 1996), relating to a commercial dispute of Specified Value pending in a High Court where a Commercial Division has been constituted, shall be transferred to the Commercial Division.

(2) All suits and applications, including applications under the Arbitration and Conciliation Act, 1996 (26 of 1996), relating to a commercial dispute of a Specified Value pending in any civil court in any district or area in respect of which a Commercial Court has been constituted, shall be transferred to such Commercial Court:

Provided that no suit or application where the final judgment has been reserved by the Court prior to the constitution of the Commercial Division or the Commercial Court shall be transferred either under sub-section (1) or sub-section (2).

(3) Where any suit or application, including an application under the Arbitration and Conciliation Act, 1996 (26 of 1996), relating to a commercial dispute

of specified value shall stand transferred to the Commercial Division or Commercial Court under sub-section (1) or sub-section (2), the provisions of this Act shall apply to those procedures that were not complete at the time of transfer.

(4) The Commercial Division or Commercial Court, as the case may be, may hold case management hearings in respect of such transferred suit or application in order to prescribe new timelines or issue such further directions as may be necessary for a speedy and efficacious disposal of such suit or application in accordance 3 [with Order XV-A] of the Code of Civil Procedure, 1908 (5 of 1908).

Provided that the proviso to sub-rule (1) of Rule 1 of Order V of the Code of Civil Procedure, 1908 (5 of 1908) shall not apply to such transferred suit or application and the court may, in its discretion, prescribe a new time period within which the written statement shall be filed.

(5) In the event that such suit or application is not transferred in the manner specified in sub-section (1), sub-section (2) or sub-section (3), the Commercial Appellate Division of the High Court may, on the application of any of the parties to the suit, withdraw such suit or application from the court before which it is pending and transfer the same for trial or disposal to the Commercial Division or Commercial Court, as the case may be, having territorial jurisdiction over such suit, and such order of transfer shall be final and binding.”

42. Insofar as transferred cases as per Section 15 (4) of the Act, the Commercial Division or Commercial Court shall prescribe new timelines or issue further directions for speedy and efficacious disposal of such suit or application in accordance with Order XVA of the Code of

9 All. New Okhla Industrial Development Authority, District Gautam Budh Nagar Vs. M/s. Pathik 181 Software Education Pvt. Ltd., Pandav Nagar, Delhi & Anr.

Civil Procedure. New time period for filing written statement shall be prescribed and the proviso to sub-rule (1) of rule 1 of Order V of the Code of Civil Procedure shall not apply to the transferred cases and the Court may, in its discretion, prescribe a new time period within which the written statement shall be filed.

43. As per Section 16 of the Commercial Courts Act, 2015 the provisions of the Code of Civil Procedure as amended under the Act, shall apply in the trial of suit in respect of a commercial dispute of a specified value. Section 16 of the Act reads as under:-

“16. Amendments to the Code of Civil Procedure, 1908 in its application to commercial disputes. – (1) The provisions of the Code of Civil Procedure, 1908 (5 of 1908) shall, in their application to any suit in respect of a commercial dispute of a Specified Value, stand amended in the manner as specified in the Schedule. (2) The Commercial Division and Commercial Court shall follow the provisions of the Code of Civil Procedure, 1908 (5 of 1908), as amended by this Act, in the trial of a suit in respect of a commercial dispute of a Specified Value.

(3) Where any provision of any rule of the jurisdictional High Court or any amendment to the Code of Civil Procedure, 1908 (5 of 1908), by the State Government is in conflict with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), as amended by this Act,

44. From the perusal of the provisions extracted as above, it is noticed that the disputes arising out of **lease deed of immovable property used exclusively in trade or commerce** will qualify to be a commercial dispute to be tried by

Commercial Courts. The question, therefore, would be that in the instant case though the parties have executed the lease deed of the land in question on 19.01.2007, which was subsequently cancelled by the order/notice dated 07.01.2021 and presently in the aforesaid suit the declaration/cancellation of the notice dated 07.01.2021 pertaining to the land in question is sought, whether the immovable property involved could be considered as being used exclusively in trade or commerce.

45. In the case of **Bachhaj Nahar vs. Nilima Mandal & Anr.** (supra), Hon'ble Supreme Court dealt with the issue as to whether court can go beyond what is pleaded in pleadings for adjudication and while deciding the appeal also made a distinction on what is to be determined while adjudicating upon easement rights. The Supreme Court held that courts cannot exercise its judicial position to grant relief which is not even sought by parties in the pleadings. Relevant paras of the above judgement are reproduced hereinafter:-

“22. The observation of the High Court that when a plaintiff sets forth the facts and makes a prayer for a particular relief in the suit, he is merely suggesting what the relief should be, and that it is for the court, as a matter of law, to decide upon the relief that should be granted, is not sound. Such an observation may be appropriate with reference to a writ proceeding. It may even be appropriate in a civil suit while proposing to grant as relief, a lesser or smaller version of what is claimed. But the said observation is misconceived if it is meant to hold that a civil court may grant any relief it deems fit, ignoring the prayer.

23. It is fundamental that in a civil suit, relief to be granted can be only with reference to the prayers made in the

pleadings. That apart, in civil suits, grant of relief is circumscribed by various factors like court fee, limitation, parties to the suits, as also grounds barring relief, like *res judicata*, estoppel, acquiescence, non-joinder of causes of action or parties etc., which require pleading and proof. Therefore, it would be hazardous to hold that in a civil suit whatever be the relief that is prayed, the court can on examination of facts grant any relief as it thinks fit. In a suit for recovery of Rs. one lakh, the court cannot grant a decree for Rs. Ten lakhs. In a suit for recovery possession of property 'A', court cannot grant possession of property 'B'. In a suit praying for permanent injunction, court grant a relief of declaration or possession. The jurisdiction to grant relief in a civil suit necessarily depends on the pleadings, prayer, court fee paid, evidence let in, etc.

24. In the absence of a claim by plaintiffs based on an easementary right, the first defendant did not have an opportunity to demonstrate that the plaintiffs had no easementary right. In the absence of pleadings and an opportunity to the first defendant to deny such claim, the High Court could not have converted a suit for title into a suit for enforcement of an easementary right. The first appellate court had recorded a finding of fact that plaintiffs had not made out title. The High Court in second appeal did not disturb the said finding. As no question of law arose for consideration, the High Court ought to have dismissed the second appeal. Even if the High Court felt that a case for easement was made out, at best liberty could have been reserved to the plaintiffs to file a separate suit for easement. But the High court could not, in a second appeal, while rejecting the plea of the plaintiffs that they were owners of the suit property, grant the relief of injunction in regard to an

easementary right by assuming that they had an easementary right to use the schedule property as a passage.

25. We accordingly allow these appeals and set aside the judgment and order of the High Court and restore the judgment of the first appellate court. Parties to bear their respective costs."

46. In the case of **Messrs. Trojan & Co. Ltd. vs. Rm. N.N. Nagappa Chettiar**⁹, the Apex Court considered the issue as to whether relief not asked for by a party could be granted and that too without having proper pleadings. The Apex Court held as under:-

"It is well settled that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found. Without an amendment of the plaint, the Court was not entitled to grant the relief not asked for and no prayer was ever made to amend the plaint so as to incorporate in it an alternative case."

47. In the case of **Vasu Healthcare Private Limited vs. Gujarat Akruiti TCG Biotech Limited**¹⁰ the Division Bench of Gujarat High Court held that on a plain reading of Clause 2(1) (c) of Commercial Courts Act, 2015 the expression "used" must mean "**actually used**" or "**being used**". It is further explained that if the intention of the legislature was to expand the scope, in that case the phraseology "likely to be used" or "to be used" would have been employed. The relevant part of the judgement is reproduced herein below:-

"Therefore, if the dispute falls within any of the clause 2(c) the dispute can be said to be "commercial dispute" for which the Commercial Court would have

jurisdiction. It is required to be noted that before the learned Commercial Court the original plaintiff relied upon section 2(c)(i), 2(c)(ii) and 2(c)(xx) of the Commercial Courts Act only. Learned Counsel appearing on behalf of the original plaintiff has candidly admitted and/or conceded that the case shall not fall within clause 2(c)(i); 2(c)(ii) or 2(c)(xx) of the Commercial Courts Act. It is required to be noted that before the learned Commercial Court it was never the case on behalf of the original plaintiff that case would fall within section 2(c)(vii) of the learned Commercial Court. Despite the above we have considered on merits whether even considering section 2(c)(vii) of the Commercial Courts Act, the dispute between the parties can be said to be “commercial dispute” within the definition of section 2(c) of the Commercial Courts Act or not? Considering section 2(c)(vii), “commercial dispute” means a dispute arising out of the agreements relating to **immovable property used exclusively in trade or commerce**. As observed hereinabove, at the time of filing of the suit and even so pleaded in the plaint, the immovable property/plots the agreements between the parties cannot be said to be agreements relating to **immovable property used exclusively in trade or commerce**. As per the agreement between the party after getting the plots on lease from the GIDC, the same was required to be thereafter developed by the original defendant No. 1 and after providing all infrastructural facilities and sub-plotting it, the same is required to be given to other persons like the original plaintiff. It is the case on behalf of the original plaintiff that as the original defendant No. 1 has failed to provide any infrastructural facilities and develop the plots and therefore, a civil suit for specific performance of the agreement has been filed. There are other alternative prayers

also. Therefore, it cannot be said that the agreement is as such relating to **immovable property used exclusively in trade or commerce**. It is the case on behalf of the original plaintiff that as in clause (vii) of section 2(c), the phraseology used is not “**actually used**” or “**being used**” and therefore, even if at present the plot is not used and even if it is likely to be used even in future, **in that case also, section 2(c)(vii) shall be applicable and therefore, the Commercial Court would have jurisdiction**. The aforesaid has no substance. As per the cardinal principle of law while interpreting a particular statute or the provision, the literal and strict interpretation has to be applied. It may be noted that important words used in the relevant provisions are “**immovable property used exclusively in trade or commerce**”. If the submission on behalf of the original plaintiff is accepted in that case it would be adding something in the statute which is not there in the statute, which is not permissible. On plain reading of the relevant clause it is clear that the expression “used” must mean “**actually used**” or “**being used**”. If the intention of the legislature was to expand the scope, in that case the phraseology used would have been different as for example, “**likely to be used**” or “**to be used**”. The word “used” denotes “**actually used**” and it cannot be said to be either “**ready for use**” or “**likely to be used**”; or “**to be used**”. Similar view has been taken by the Bombay High Court (Nagpur Bench) in the case of Dineshkumar Gulabchand Agrawal (Supra) and it is observed and held that the word “used” denotes “**actually used**” and not merely “**ready for use**”. It is reported that SLP against the said decision has been dismissed by the Hon’ble Supreme Court.”

(emphasis supplied)

48. The provisions of Section 2(i)(c)(vii) of the Commercial Court Act, 2015 has to be read as it is. The Statute lays down that only those agreement relating to immovable property which has been exclusively put to use in trade or commerce would be included in the ambit of Section 2(1) of the Commercial Courts Act, 2015. The Statute is absolutely clear, plain and unambiguous, hence, the Courts are bound to give effect to that meaning. Since the Statute is precise and unambiguous then it is imperative to expound those words in their natural and ordinary sense. The words used in the clause clearly lay down the intent of the law makers. Hence, Clause vii of Section 2(1)(c) of the C.C. Act 2015 has to be read as it is and cannot be expounded to give larger intent.

49. In an identical situation, Lord Brougham in **Crawford v. Spooner**¹¹ has held as under :

“to take the words as the Legislature have given them, and to take the meaning which the words given naturally imply, unless where the construction of those words is, either by the preamble or by the context of the words in question, controlled or altered.”

50. Viscount Haldane, LC in **Attorney General v. Milne**¹², has held as under :

“if the language used “has a natural meaning we cannot depart from that meaning unless, reading the statute as a whole, the context directs us to do so”.

51. Lord Atkinson in **Corp of the City of Victoria v Bishop of Vancouver Island**¹³ has held as under :

“In the construction of statutes, their words must be interpreted in their ordinary grammatical sense unless there be something in the context, or in the object of the statute in which they occur or in the circumstances in which they are used, to show that they were used in a special sense different from their ordinary grammatical sense.”

52. Viscount Simon, LC in **Nokes v Doncaster Amalgamated Collieries Ltd**¹⁴ has held that :

“The golden rule is that the words of a statute must prima facie be given their ordinary meaning.”

53. Hon’ble Apex Court in **Harbhajan Singh vs. Press Council of India**¹⁵ has held as under :

“....Legislature does not waste its words. Ordinary, grammatical and full meaning is to be assigned to the words used while interpreting a provision to honour the rule- Legislature chooses appropriate words to express what it intends, and therefore, must be attributed with such intention as is conveyed by the words employed so long as this does not result in absurdity or anomaly or unless material - intrinsic or external - is available to permit a departure from the rule.”

54. In **Chandrika Misir v. Bhaiya Lal**¹⁶, Hon’ble Supreme Court was hearing a special leave petition concerning the possession of parties over the suit property which was the subject of the U.P. Zamindari Abolition and Land Reforms Act (Act 1 of 1951). While adjudicating on whether the suit was barred by limitation, Justice DG Palekar, speaking for a two Judge bench, observed that the civil court

9 All. New Okhla Industrial Development Authority, District Gautam Budh Nagar Vs. M/s. Pathik 185 Software Education Pvt. Ltd., Pandav Nagar, Delhi & Anr.

did not have jurisdiction to entertain the suit at all. Although the plea of bar on jurisdiction had not been raised in the courts below, the Apex Court held that:

“6. It is from this order that the present appeal has been filed by special leave. It is to be noticed that the suit had been filed in a civil court for possession and the Limitation Act will be the Act which will govern such a suit. It is not the case that U.P. Act 1 of 1951 authorises the filing of the suit in a civil court and prescribes a period of limitation for granting the relief of possession superseding the one prescribed by the Limitation Act. It was, therefore, perfectly arguable that if the suit is one properly entertainable by the civil court the period of limitation must be governed by the provisions of the Limitation Act and no other. In that case there would have been no alternative but to pass a decree for possession in favour of the plaintiffs. But the unfortunate part of the whole case is that the civil court had no jurisdiction at all to entertain the suit. It is true that such a contention with regard to the jurisdiction had not been raised by the defendant in the trial court but where the court is inherently lacking in jurisdiction the plea may be raised at any stage, and, it is conceded by Mr Yogeshwar Prasad, even in execution proceedings on the ground that the decree was a nullity. If one reads Section 209 and 331 of the U.P. Act 1 of 1951 together one finds that a suit like the one before us has to be filed before a Special Court created under the Act within a period of limitation specially prescribed under the rules made under the Act and the jurisdiction of the ordinary civil court is absolutely barred.”

55. In the case of **Federation of A.P. Chambers of Commerce & Industry and**

Ors. vs. State of A.P. and Ors.¹⁷ the Apex Court observed as under:-

“6. Section 3 of the said Act speaks of “land is used for any industrial purpose”, “land is used for any commercial purpose” and “land is used for any other non-agricultural purpose”. The emphasis is on the word “is used”. For the purpose of levy of assessment on non-agricultural lands at the rate specified in the Schedule for land used for industrial purposes, therefore, there has to be a finding as a fact that the land is in fact in praesenti in use for an industrial purpose. The same would apply to a commercial purpose or any other non-agricultural purpose.” “9. We are in no doubt whatever, therefore, that it is only land which is actually in use for an industrial purpose as defined in the said Act that can be assessed to non-agricultural assessment at the rate specified for land used for industrial purposes. The wider meaning given to the word “used” in the judgment under challenge is untenable. Having regard to the fact that the said Act is a taxing statute, no Court is justified in imputing to the legislature an intention that it has not clearly expressed in the language it has employed.”

(emphasis supplied)

56. In the case of **Shri Saurav Jain & Anr v. M/s A. B. P. Design & Anr** (supra) the Apex Court has held that though the appellant did not assail the finding of the trial Court on the issue of jurisdiction before the Allahabad High Court under Order XLI Rule 22 CPC either by filing a memorandum of cross-objection or otherwise, he was not precluded from raising the argument before the Supreme Court. The Supreme Court, in view of its

plenary jurisdiction under Article 136 of the Constitution read with its power to do complete justice under Article 142, can entertain new grounds raised for the first time, if it involves a question of law which does not require adducing additional evidence, specifically one concerning jurisdiction of the court which goes to the root of the matter. Relevant paragraph-39 of the judgement reads as under:-

“39. We have come to the conclusion that the suit instituted by the first respondent had to be dismissed. The judgment of the Trial Judge dismissing the suit was correct, but for the following reasons: (i) The purported transfer of the suit land by Zahid Hussain to the first respondent was before the Repeal Act was enacted. The dual conditions stipulated under Section 5(3) of ULCRA were not fulfilled before the transfer was made since the statement under Section 6 had not been submitted and the Competent Authority had not issued a notification under Section 10(1) of the ULCRA (which was in operation at the time). Therefore, even if the Zahid Hussain had the title to the suit land, the transfer to the first respondent was null and void under section 5(3) of ULCRA; (ii) When Zahid Hussain had filed a declaration seeking permission for transfer of the suit land, the permission under Section 27 of ULCRA was not granted since there was a pending suit concerning the said land. He then filed another application seeking permission for transfer of land admeasuring 1295 sq. mt of his ‘retainable’ 2000 sq. mt. of land. The permission that was granted under Section 27 of ULCRA by the Office of the Competent Authority on 5 May 1993 was for the transfer of lands from his ‘retainable’ property and not the suit land; (iii) The plaintiff- first respondent has

artfully drafted the plaint to challenge the validity of the auction and sought an injunction and declaration, when the substantive cause of action of the suit arises out of the land ceiling proceedings; (iv) The ULCRA impliedly excludes the jurisdiction of the civil court on matters arising out of the ceiling proceedings; and (v) Though the appellant did not assail the finding of the Trial Court on the issue of jurisdiction before the High Court under Order XLI Rule 22 CPC either by filing a memorandum of cross-objection or otherwise, he is not precluded from raising the argument before this Court. This Court in view of its plenary jurisdiction under Article 136 of the Constitution read with its power to do complete justice under Article 142, can entertain new grounds raised for the first time if it involves a question of law which does not require adducing additional evidence, specifically one concerning jurisdiction of the court which goes to the root of the matter.”

57. In **Ambalal Sarabhai Enterprises Ltd** (supra) Hon’ble Supreme Court held that the dispute relating to immovable property per se may not be a commercial dispute but it becomes a commercial dispute if it falls under sub-section (vii) of Section 2 (1) (c) of the Commercial Court Act, 2015. It was further held that the words “used exclusively in trade and commerce” are to be interpreted purposefully. The word “used” denotes “**actually used**” and it cannot be either “ready for use” or “likely to be used” or “to be used”. It should be “actually used.”. The relevant part of the judgement is reproduced herein below:-

“24. It appears that the trial court has proceeded under the footing that the parties to the suit more particularly, the

appellant-plaintiff seems to be carrying on business as Estate Agent and to manage land, building, etc. and the very object as enumerated in Memorandum and Articles of Association of the appellant-plaintiff company established that the property in question are being used exclusively in trade or commerce rather in the business of the plaintiff. As rightly pointed out by the High Court, there is nothing on record to show that at the time when agreement to sell came to be executed in 2012, the property was being exclusively used in trade and commerce so as to bring dispute within the ambit of sub-clause (vii) of Section 2(1)(c) of the Act. Merely because, the property is likely to be used in relation to trade and commerce, the same cannot be the ground to attract the jurisdiction of the Commercial Court.

25. In the case of Ujwala Raje Gaekwar v. Hemaben Achyut Shah 2017 SCC Guj 583, a Special Civil Suit No.533/2011 was instituted for declaration that the sale deed valued at Rs.17.76 crores executed by the appellant-original defendant No.1 in favour of respondent No.4 be declared illegal and also, for permanent injunction with respect to the land in question. The appellants-defendants thereon filed an application that in sale deed, it has been clearly mentioned that the agreement relating to **immovable property used exclusively in trade or commerce** and falls within the meaning of Section 2(1)(c)(vii) of the Commercial Courts Act and that the matters above, the value of rupees one crore are to be transferred to the Commercial Court. Trial court rejected the said application which was challenged before the Gujarat High Court. The Gujarat High Court held that the aim, object and purpose of establishment of Commercial Courts, Commercial Divisions and Commercial Appellate Divisions of the

High Court is to ensure that the cases involved in commercial disputes are disposed of expeditiously, fairly and at reasonable cost to the litigant, and if such a suit which is as such arising out of the probate proceedings and/or is dispute with respect to the property are transferred to the Commercial Division/Commercial Court, there shall not be any difference between the Regular Civil Courts and the Commercial Division/Commercial Courts and the object for the establishment of the Commercial Division/Commercial Courts shall be frustrated.

26. In Vasu Healthcare Private Limited v. Gujarat Akruti TCG Biotch Limited & Another 2017 SCC OnLine Guj 724, referred to in extenso by my learned Brother, it was held that “on plain reading of the relevant clause, it is clear that the expression “used” must mean “**actually used**” or “**being used**”. If the intention of the legislature was to expand the scope, in that case the phraseology used would have been different as for example, “likely to be used” or “to be used”. The word “used” denotes “**actually used**” and it cannot be said to be either “ready for use” or “likely to be used”; or “to be used”. We entirely agree with the above purposive interpretation adopted by the Gujarat High Court.

27. The object and purpose of the establishment of Commercial Courts, Commercial Divisions and Commercial Appellate Divisions of the High Court is to ensure that the cases involved in commercial disputes are disposed of expeditiously, fairly and at reasonable cost to the litigants. Keeping in view the object and purpose of the establishment of the Commercial Courts and fast tracking procedure provided under the Act, the statutory provisions of the Act and the words incorporated thereon are to be

meaningfully interpreted for quick disposal of commercial litigations so as to benefit the litigants especially those who are engaged in trade and commerce which in turn will further economic growth of the country. On the above reasonings, I agree with the conclusion arrived at by my esteemed brother Justice A.S. Bopanna”

58. Bombay High Court in **M/S Glasswood Realty Pvt Ltd vs Chadravilas Kailashkumar**¹⁸ has held that the dispute arising out of transactions between the persons who are classified in Clause 1 of Section 2(c) only qualify to be covered by the definition of ‘commercial dispute’. The Court further held that it is necessary to adopt a careful approach in scrutinizing whether the dispute would fall within the purview of ‘commercial dispute’, and if not, it would fall in the category of ordinary civil dispute and such dispute cannot be permitted to be tried by Commercial Court but has to be tried as a normal suit under the prescribed provisions of CPC.

59. The Delhi High Court in **Kailash Devi Khanna vs. DD Global Capital Ltd.**¹⁹ held that all suits for recovery of monies cannot brought under Section 2(1)(c)(i) of the Act where the suit is not based on any transaction relating to mercantile documents.

60. The Madras High Court in **R. Kumar vs. T.A.S. Jawahar Ayya**²⁰ was of the view that since the plaintiffs did not transact in the capacity of financiers, the dispute was not a "commercial dispute" and that an ordinary transaction of the four classes of persons mentioned in 2(1)(c)(i) arising out of mercantile documents alone would fall within the definition of a commercial dispute.

61. The object and purpose of the establishment of Commercial Courts, Commercial Divisions and Commercial Appellate Divisions of the High Court is to ensure that the cases involved in commercial disputes are disposed of expeditiously, fairly and at reasonable cost to the litigants. Keeping in view the object and purpose of the establishment of the Commercial Courts and fast tracking procedure provided under the Act, the statutory provisions of the Act and the words incorporated thereon are to be meaningfully interpreted for quick disposal of commercial litigations so as to benefit the litigants especially those who are engaged in trade and commerce which in turn will further boost the economic growth of the country.

62. Though such rival contentions were put forth by the counsel on either side, the said submissions cannot be dealt with in abstract. Instead the nature of the dispute and the jurisdiction to try the same is to be reflected in the pleadings set up in the suit itself before the Commercial Court. The pleadings made in the averments in the plaint would at the outset be relevant to confer jurisdiction to the competent Commercial Court. Therefore, before advertng to the merits and other aspects, it would be necessary to carefully examine the plaint, written submission and other pleadings set up by the parties before the Commercial Court. The defendant company has referred to the nature of the transaction between the appellant authority and plaintiff company. As the details regarding the pleadings and plaint were already given in detail as above, this is admitted situation that in terms of the lease agreement neither the plaintiff company deposited the amount as per scheduled nor raised any construction within stipulated

time. Even it has not moved any application for extension or enlargement of time for raising the constructions even before filing of the suit.

63. The Commercial Court is exclusively constituted to try the commercial disputes, which has jurisdiction to try the same. In that background, a perusal of the prayer made in the plaint would essentially indicate that the suit was filed seeking declaration/cancellation of notice dated 07.01.2021 issued by the defendant authority by which the lease deed dated 19.01.2007 executed in favour of the plaintiff company was cancelled by the defendant-authority. Even if the immovable property under the lease deed was the subject matter, it is necessary to plead and substantiate that the same was being used in trade or commerce due to which the jurisdiction of Commercial Court was invoked. Without such basic pleadings in the plaint, any explanations sought to be put forth subsequently would only lead to a situation that if an objection is raised, in every suit a consideration would be required based on extraneous material even to ascertain as to whether the intended transaction between the parties was of such nature that it is to be construed as a commercial dispute.

64. The defendant company had filed written statement in the aforesaid suit, which was appended with the paper book, stating inter alia certain facts and also that a decree of declaration and dislodge or extension is discretionary relief to which the plaintiff company was not entitled for the reason that the defendant company had also filed the balance sheet of the plaintiff company for the year 2015-19 from the 'Ministry of Corporate Affairs' and perusal thereof clearly shows that the plaintiff

company concealed the fact that, it was inactive shell company, which had no business operations, no turnover and nil income. The amount of Rs.1,00,78,716/- paid by the plaintiff company to the defendant authority in respect of the plot was reflected in its balance sheets as long term unsecured loans taken by the plaintiff company, which was on record and therefore, on the basis of record it was also pressed before us that at the relevant time the plaintiff company had no money whatsoever, to either make the balance payment to the defendant authority or to make constructions on the said plot as required under the terms of the lease deed. Therefore, it was also pleaded in the written statement by the defendant company that the allotment of an institutional plot at special rates was made to business entities by the defendant authority to promote business and employment in the Noida region. But in fact the plaintiff company is a company with no operations, nil turnover and no business record whatsoever and neither it was legally nor morally entitled to benefit from such allotment. It was also pleaded in the written statement filed by the defendant company that the plaintiff company was only incorporated on 19.12.2005 shortly before process of bidding of the plot in question just to procure lease rights of the said plot at the discounted allotment rates so as to later sell it at premium in the market, and to make a quick buck, as a real estate deal.

65. It was also pressed that even though the appellant company filed detailed written statement, which remained un rebutted by the plaintiff company, but the Commercial Court did not take into consideration and rather brushed aside the said objection with the summary

observations that the defendant company had no substantial right against the plaintiff company as there is no privity of contract between the plaintiff company and the defendant company. Before the Commercial Court it was conveniently pressed by the plaintiff company as there was no breach of the lease deed. The only case set up by the plaintiff company to challenge the cancellation of the lease on the ground that the notices dated 13.12.2009, 03.02.2020, 17.06.2020 and 14.07.2020 sent by the defendant authority prior to cancellation, were not sent to the registered address of the plaintiff company but in fact the same were sent to E-292A, Sector 22, Noida, which was the address of the Director of the company at which the plaintiff company was no longer available and further no notice was affixed at the correspondence address or to ensure the public notice.

66. In this backdrop, we have also examined the lease deed, which does not contain any provision for issuance of notice before cancellation in case of breach by lessee, contrarily as per record it is admitted fact that the show cause notices were sent to the plaintiff company by the defendant authority as early as in 2013 and 2014, which is duly acknowledged/claimed in para-11 of the plaint that its address changed only in the year 2015. The plaintiff company had not pleaded any case in the plaint regarding any steps or measures in response to the aforesaid notices. Heavy reliance has also been placed by the Commercial Court on the provisions of Section 43 of the Act, 1973, which stipulates that any notice required to be sent to a company under the provision of the Act may be sent at its registered office or its principal office or its place of business. It is also reflected from the record that the plaintiff company has consistently used the

said address in all its documentation including the lease deed, which shows that the plaintiff company projected the said address as its place of business. In fact the same address has been used as the company's address in the earlier writ petition (Writ C No.13225/2021) filed before this Court in 2021. Hence, the contention, that the address was changed in 2015, is also not accepted.

67. From the statements made in the plaint it is evident that the plaintiff company approached the appellant authority for grant of lease in respect of an immovable property for the purpose of trade and commerce. The lease deed of the plot in question was executed on 19.01.2007 and pursuant to the lease deed the plaintiff company deposited 30% of the amount. Admittedly, the possession of the land was handed over to the plaintiff company on 01.02.2007. In terms of Clause 13 (A) of the lease deed the plaintiff company had to complete the construction within five years from the actual date of possession, which could be extended further two years. Neither it deposited the required money in terms of the agreement nor moved any application for enlargement of time for construction. Consequently, the lease deed was cancelled and the property was re-allotted in favour of the defendant company. The aforesaid suit was filed seeking declaration/cancellation of notice dated 07.01.2021 whereby the lease deed dated 19.01.2007 executed in favour of the plaintiff company was cancelled by the defendant authority. The instant suit has been filed for adjudication of a dispute arising out of the lease deed relating to immovable property.

68. There is nothing on record to show that at the time when the lease deed was executed in 2007, the property was being exclusively used in trade and commerce so as to bring dispute within the

9 All. New Okhla Industrial Development Authority, District Gautam Budh Nagar Vs. M/s. Pathik 191 Software Education Pvt. Ltd., Pandav Nagar, Delhi & Anr.

ambit of sub-clause (vii) of Section 2(1)(c) of the Commercial Court Act, 2015. Merely because, the property is likely to be used in relation to trade and commerce, the same cannot be the ground to attract the jurisdiction of the Commercial Court.

69. The question arises in aforementioned facts as to whether the dispute involved in the present case can be considered as commercial dispute, which would be within the ambit of Commercial Court Act, 2015. On plain reading of Section 2 (1) (c) of the Commercial Court Act, 2015 it is clear that the expression “used” must mean “**actually used**” or “**being used**”. If the intention of the legislature was to expand the scope, in that case the phraseology “likely to be used” or “to be used” would have been used. A matter will fall under the jurisdiction of the Commercial Court or the Commercial Division of the High Court on the following factors namely (i) it shall be a commercial dispute within the meaning of Section 2(1)(c) of the Commercial Court Act, 2015; and (ii) such commercial disputes are of a specified value as per Section 2 (i) of the Commercial Court Act, 2015.

70. From the above it has been established that a dispute relating to immovable property per se may not be a commercial dispute but the same becomes a commercial dispute, if it falls under sub-clause (vii) of Section 2 (1) (c) of the Act viz. “the agreements relating to **immovable property used exclusively in trade or commerce**”. The words “used exclusively in trade or commerce” are to be interpreted purposefully. The word “used” denotes “**actually used**” and it cannot be either “ready for use” or “likely to be used” or “to be used”. It should be “**actually used**”.

71. On a perusal of the Statement of Objects and Reasons of the Commercial Court Act, 2015 and the various amendments to Civil Procedure Code and insertion of new rules to the Code applicable to suits of commercial disputes it is evident that it has been enacted for the purpose of providing an early disposal of high value commercial disputes. A purposive interpretation of the Objects and Reasons and various amendments to Civil Procedure Code leaves no room for doubt that the provisions of the Act require to be strictly construed. If the provisions are given a liberal interpretation, the object behind constitution of Commercial Division of Courts, viz. putting the matter on fast track and speedy resolution of commercial disputes, will be defeated. If we take a closer look at the Statement of Objects and Reasons, words such as ‘early’ and ‘speedy’ have been incorporated and reiterated. The object shall be fulfilled only if the provisions of the Commercial Court Act, 2015 are interpreted in a narrow sense and not hampered by the usual procedural delays plaguing our traditional legal system.

72. Learned Commercial Court totally misinterpreted the definition of commercial dispute and failed to appreciate that there is a difference between the “Commercial Dispute and Commercial Relation”. As such, the finding of learned Commercial Court that there is a commercial dispute between the parties suffers from infirmity.

73. In view of above, we are of the considered opinion that there is no commercial dispute. The Commercial Court had no jurisdiction to decide the present dispute between the parties. Once we have decided commercial Court has no jurisdiction in view of Commercial Court

74. For the aforesaid reasons we allow both appeals and set aside the judgment and decree dated 28.3.2022 passed by the Presiding Officer, Commercial Court, Gautam Budh Nagar in Suit (Comm) No.167 of 2021.

Civil Law – Motor Vehicles Act, 1988 – Section 167 - Income Tax Act, 1961 – Section 194-A (3) (ix) :- Appeal – challenging the Award by insurance company – Accident is not disputed – deceased was a trolley puller died on spot, left behind his father, widow, four sons and a daughter – Claim –The tribunal considered the deceased's age to be between 30-35 years, his income to be Rs. 2700/- per month, deducted 1/3rd towards

1. National Insurance Comp. Ltd. Vs Pranay Sethi & ors., AIR 2017 (SC) 5157,
2. Sarla Verma Vs Delhi Transport Corp., (2009) 6 SCC 121,
3. Lakkamma Vs United India Insurance Co. Ltd. AIR 2021 SC 3301,
4. A.V. Padma Vs Venugopal, Reported in 2012 (1) GLH (SC), 442,
5. Smt. Hansaguri P. Ladhani Vs The Oriental Insurance Comp. Ltd., reported in 2007(2) GLH 291,
6. Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 (Smt. Sudeśna & ors. Vs Hari Singh & anr.),
7. Bajaj Allianz General Insurance Company Private Ltd. Vs U.O.I. & ors. - Writ Petition(s)(Civil) No(s). 534/2020 – SC - order dated 27.01.2022.

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

1. Heard Sri P.K.Sinha, learned counsel for the appellants and Sri Sharve Singh, learned counsel for the respondents in F.A.F.O No. 1202 of 1999, Sri Sharve Singh, learned counsel for the appellants in F.A.F.O No. 1979 of 2021 and Ms Aarushi Khare, learned counsel for respondents.

2. These appeals, challenges the judgement and award dated 29.5.1999 passed by M.A.C.T/IVth-Additional District Judge, Allahabad (hereinafter referred to as "Tribunal") in M.A.C.P. Case No. 234 of 1997. The accident is not in dispute. The only question which remains to be considered in these appeals is whether the compensation awarded is just compensation in view of the settled legal position of law.

3. Brief facts as culled out from the record are on 23.01.1997 deceased Chaggu Lal at about 3:00 p.m was taking his trolley towards Mahoba at the same time a truck bearing no. U.P. 15B 2657 driven by its driver rashly and negligently hit the trolley of deceased as a result of which Chaggu Lal died on the spot.

4. The deceased Chaggu Lal was a trolley puller in a shop who has left behind him his father, widow, four sons and a daughter. The tribunal has considered his age between the age bracket of 30-35 years and considered his income to be Rs. 2700/- p.m, deducted 1/3rd towards personal expenses, granted multiplier of 17, added Rs. 7000/- towards non pecuniary damages and granted interest at the rate of 12%.

5. It is submitted by Sri P.K. Sinha, learned counsel for the appellants in

F.A.F.O No. 1202 of 1999 that income considered by the tribunal is on the higher side and the rate of interest at 12% was not the rate in the year 1999 as against this Sri Sharve Singh, learned counsel for the claimant's in F.A.F.O No. 1979 of 2021 submitted that no amount under the head of future loss of income has been calculated by the tribunal. It is vehemently submitted by Ms Aarushi Khare, learned counsel for the insurance company in F.A.F.O No. 1979 of 2021 that the amount awarded is just and proper rather the appellant of the insurance company for challenging the compensation awarded is likely to be allowed and therefore she adopts the submission of Sri P.K.Sinha, learned counsel for the appellants in F.A.F.O No. 1202 of 1999.

6. As far as interest is concerned the appeal of the insurance company will have to be allowed. The rate of interest even in the year of accident namely in 1997 was 9% and not 12% and therefore the amount awarded would be recalculated with 9% for the date of filing of the writ petition till the decision of award.

7. The deceased was in the age bracket of 36 to 40 years which has been seriously disputed by Sri Sharve Singh, learned counsel that deceased had left behind his widow, four sons and a daughter and therefore it is submitted by Sri Sharve Singh, learned counsel that deduction of 1/3rd for personal expenses should be 1/5th as per the judgment of Apex Court in **National Insurance Company Limited Vs. Pranay Sethi and others, AIR 2017 (SC) 5157**. It is further submitted that under the head of non pecuniary damages only Rs. 7000/- has been which is less compared to the amount to be awarded. The tribunal could not have gone by the U.P.

Motor Vehicles rules and awarded Rs. 7000/- as non-pecuniary damages.

8. Having considered the facts and circumstances of the case, the deceased was a trolley puller in a shop, his income in the said place can be considered Rs. 27,00/- p.m. as decided by the tribunal, 40% of this monthly income would have to be added. The deceased was in the age bracket of 36-40 years at the time of accident hence multiplier of 17 as per the judgment of **Sarla Verma Vs. Delhi Transport Corporation, (2009) 6 SCC 121**, would be admissible. As far as the submission of Sri Sharve Singh, learned counsel that 1/5th should be deducted, this Court cannot accept the same as all the children would part one portion between them, hence, 1/3rd deducted for personal expenses is just and proper and Rs. 70,000/- for non pecuniary damages.

9. Hence, the total compensation payable to the appellants is computed herein below:

- i. Income : Rs.2700/-
- ii. Percentage towards future prospects : 40% namely Rs.1080/-
- iii. Total income : Rs. 2700 + 1080 = Rs. 3780/-
- iv. Income after deduction of 1/3rd : Rs. 2520/-
- v. Annual loss : Rs. 2520 x 12 = Rs. 30,240/-
- vi. Multiplier applicable : 17
- vii. Total loss : Rs. 30,240 x 17 = Rs. 5,14,080/-
- xii. Amount under non-pecuniary head : Rs.70,000/-
- xiii. Total compensation : 5,84,080/-

10. The interest on the enhanced amount would be 9% from the date of

filing of the claim petition till the amount is deposited but thereafter, for the period for which it has remained pending on the list without even the appeal been condoned, it is rightly pointed out by Sri. P.K.Sinha and Ms Aarushi Khare, learned counsels for the insurance company that interest would be slashed as per the judgment of Apex Court in **Lakkamma Vs. United India Insurance Co. Ltd. AIR 2021 SC 3301**, hence 4% on enhanced amount from the dated of filing of the claim petition till the amount is deposited.

11. No amount shall be kept in fixed deposit. The minor children would have become major by now, the daughter might have been married she shall be summoned and the amount proportionate to their share would be paid by account payee cheque by the tribunal in view of the judgment of **A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442**.

12. No other grounds are urged orally when the matter was heard.

13. In view of the above, the appeal is partly allowed. Judgment and award passed by the Tribunal shall stand modified to the aforesaid extent. The respondent-Insurance Company shall deposit the additional amount within a period of 12 weeks from today with interest as directed above.

14. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of **A.V. Padma (supra)**, the order of investment is not passed because applicants /claimants are neither illiterate or rustic villagers.

15. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of

Smt. Hansaguri P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291, total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 (**Smt. Sudesna and others Vs. Hari Singh and another**) while disbursing the amount.

16. Fresh Award be drawn accordingly in the above petition by the tribunal as per the modification made herein. The Tribunals in the State shall follow the direction of this Court as herein aforementioned as far as disbursement is concerned, it should look into the condition of the litigant and the pendency of the matter and judgment of **A.V. Padma (supra)**. The same is to be applied looking to the facts of each case.

17. The Tribunal shall follow the guidelines issued by the Apex Court in **Bajaj Allianz General Insurance Company Private Ltd. v. Union of India and others** vide order dated 27.1.2022, as the purpose of keeping compensation is to safeguard the interest of the claimants. As 10 years have elapsed, the amount be

deposited in the Saving Account of claimants in Nationalized Bank without F.D.R.

18. Record be sent back to the tribunal.

19. This Court is thankful to all the four learned counsels for getting this old appeal disposed of.

(2023) 9 ILRA 195
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 30.08.2023

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

Special Appeal No. 29 of 2022
 with other connected cases

State of U.P. & Ors. ...Appellants
Versus
Uttar Pradesh Senior Basic Shikshak Sangh ...Respondent

Counsel for the Appellants:
 Mohit Jauhari

Counsel for the Respondent:
 Girish Chandra Verma

A. Service Law – Constitution of India – Article 14 & 16 – Right to equality – Rational Classification – New Pension Scheme – GO dated 08.04.2009 clarifying to cover all such educational institutions, which came under grant-in-aid subsequent to 01.04.2005, under the New Pension Scheme (NPS) – Constitutional validity challenged – Classification between aided and unaided institution – Permissibility – UP St. Aided Educational Institutions Employees Contributory Provident Fund, Insurance Pension Rules, 1964 is made applicable only to aided

institution – Effect – Held, distinction between the institutions receiving grant-in-aid and un-aided is embedded in the Pension Rules itself – When a new scheme is introduced, a demarcation line has to be drawn between the employees, who are wholly covered under the existing scheme and those who are not. While doing so, the St. Government has not violated the spirit of Articles 14 and 16 of the Constitution of India either in the matter of fixing the cut-off date or classifying the educational institutions. The St. Government while issuing the clarificatory order dated 08.04.2009 had in mind this broad classification which does not offend the rule of equality in any manner – Classification made is rational and the same does not suffer from any constitutional or legal infirmity. (Para 14, 31, 32, 35, 42 and 47)

Special Appeal allowed. (E-1)

List of Cases cited:

1. Special Appeal No. 123 of 2013; U.P. Senior Basic Shikshak Sangh Sindhi Vidyalaya Vs St. of U.P. & ors.
2. Shailendra Daina & ors. Vs S.P. Dubey & ors.; 2007 (5) SCC 535
3. N. Suresh Nathan & anr. Vs U.O.I.& ors.; 1992 Supp. (1) Scc 584
4. Rajinder Singh (Dr.) Vs St. of Punjab & ors.; 2001 (2) UPLBEC 1502
5. Shyam Sadan Singh (Dr.) Vs Chancellor, Deen Dayal Upadyyay University of Gorakhpur & ors.; 2002 (1) UPLBEC 152
6. Girdhari Lal Shankwar Vs St. of U.P. & ors.; 2014 (1) UPLBEC 657
7. Narinder S. Chadha & ors. Vs Municipal Corporation of Greater Mumbai & ors.; 2015 (33) LCD 1743
8. Buddhiram Vs St. of U.P. & ors.; 2013 (1) ADJ 254

9. Sudhir Kumar Consul Vs Allahabad Bank; (2011) 3 SCC 486

(Delivered by Hon'ble Om Prakash Shukla, J.)

(1) Heard Sri Sanjeev Singh, learned Standing Counsel appearing for the appellants-State authorities and Dr. L. P. Misra along with Sri G.C. Verma, Sri J.B.S. Rathour, Sri Vinay Misra, Sri P. K. Singh Bisen, Sri Prashant Arora, Sri Samrendra Nath Pandey, Sri Hari Prakash Yadav, Sri Neerav Chaurasiya, Sri Krishna Madhav Shukla, Sri Ajay Kumar, Pt. S. Chandra, Sri Mohd. Ateeq Khan, Sri Shobhit Mohan Shukla, Sri Prasiddha Narayan Singh, Sri Ram Kumar Maurya, Sri Vindhya Washini Kumar, Sri Ghaus Beg, Sri Umesh Kumar Srivastava and Sri Pradeep Kumar Shukla, learned Counsel appearing for the respondents at length.

(2) In Special Appeal Defective No. 98 of 2022, the office has reported a delay of 38 days.

(3) Having heard learned Standing Counsel appearing for the appellants and the learned Counsel for appearing for the respondents and having gone through the averments made in the application seeking condonation of delay, we find that the delay has sufficiently been explained. Accordingly, the prayer for condonation of delay is allowed and the delay in filing the special appeal is condoned.

(4) The aforesaid Special Appeals have been filed under Chapter VIII Rule 5 of Allahabad High Court Rules, 1952 assailing the judgment and order dated 16.06.2021, as corrected vide order dated 07.07.2021 passed by the learned Single Judge in a bunch of writ petitions, leading Writ Petition No. 3458 (SS) of 2009, *U.P.*

Senior Basic Shiksha Sangh v. State of U.P. and others, whereby the writ petitions filed by the petitioners/respondents have been allowed with certain directions. The operative portion of the **impugned judgment** and order reads as under:-

“The respondents are directed to treat the petitioners of the connected writ petitions and members of association of leading writ petition to be covered under Old Pension Scheme and to pay pension to the retired teaching and non teaching staff accordingly. It is further directed to permit the managements to deposit manager's contribution with simple interest excluding the deducted amount from each of the petitioner within a period of two months from the date of production of a certified copy of this order and to reckon the service rendered by the petitioners in the institutions from the date of their approval to the appointment made on their respective posts and to pay pension under OPS within a further period of two months from the date of production of a certified copy of this order. In case the service required for reckoning the qualifying service for the payment of pension is insufficient, the service rendered prior to taking into consideration on grant in aid list shall be counted for the purpose after deposit of managers contribution and accordingly the pension shall be released in their favour.”

BRIEF HISTORY

(5) Before entering into the real question involved in the bunch of these intra-Court appeals, it would be apt to narrate the chequered history of the dispute as under:-

(a) One set of litigation traces its origin at High Court, Lucknow, whereas,

the other having been instituted on the same issue at High Court of Judicature at Allahabad has also some bearing for the purpose of deciding the present bunch of Special Appeals and a brief discussion in this regard would be inevitable.

(b) The writ petitions filed at Lucknow were instituted ranging from the year 2009 to 2021. Likewise, the writ petitions instituted before this Court at Allahabad were also filed from the year 2009 onwards.

(c) It is relevant to clarify at the very outset that the institutions brought under grant-in-aid prior to 01.04.2005 having a limited grievance as regards the deposit of managerial contribution stood distinguished for the reason that their case was protected under the New Pension Scheme (NPS) in its well-defined terms, therefore, the issue of depositing the managerial contribution was set at rest and has been complied with leaving no scope for any further adjudication and is not the subject matter of adjudication in the present bunch of Special Appeals.

(d) The present bunch of Special Appeals, in fact, relates to the institutions comprising of the teaching and non-teaching staff appointed therein which were taken on grant-in-aid after the enforcement of New Pension Scheme (NPS) w.e.f. 01.04.2005. The controversy might not have arisen if these 1,000 educational institutions had not been brought under grant-in-aid as on 01.12.2006, wherein these teachers working in the said institutions started agitating their grievance in the representative capacity through U.P. Senior Basic Shiksha Sangh and individually too for protection of the benefits under the Old Pension Scheme (OPS) on various grounds.

(e) The classification spelt out in the Government Order dated 08.04.2009

became the cause which the aggrieved persons took up jointly and severally before this Court through writ proceedings both at Allahabad and Lucknow. A writ petition in representative capacity was also filed by U.P. Senior Basic Shiksha Sangh at Lucknow.

(f) For drawing a clear picture of litigation, it would be relevant to refer to six writ petitions which were instituted at Allahabad and came to be decided by a common judgment rendered on 26.09.2012. The relevant details with respect to the aforesaid six writ petitions are described in the chart below:-

ALLAHABAD

Sl. No.	Particulars of writ petition	Description of Institution as on 01.04.2005	Date of Judgment	Result
1	Writ-A No. 45217 of 2012, Budhram v. State of U.P. and others	Unaided	26.09.12	Dismissed
2	Writ-A No. 45229 of 2012, Yogendra Nath Mishra v. State of U.P. and others	Unaided	26.09.12	Dismissed
3	Writ-A No. 47000 of 2010, Ram Niranjana Mishra and another	Unaided	26.09.12	Dismissed
4	Writ-A No. 55778 of 2010, Ram Yagya Shukla v. State of U.P. and others	Unaided	26.09.12	Dismissed
5	Writ-A No. 47649 of 2012, Khyali Ram v. State of U.P. and others	Aided	26.09.12	Allowed
6	Writ-A No. 44742 of 2012, Bhagwan Das Maurya v. State of U.P. and others	Aided	26.09.12	Allowed

(g) The aforesaid six writ petitions were decided treating the case of **Budhram** as the leading writ petition. It is also evident from the chart above that out of these writ petitions, two writ petitions which were allowed related to the institutions that were already under grant-in-aid prior to 01.04.2005 and with respect to the same, the controversy has already been settled. Insofar as the four writ petitions which were dismissed are concerned, one of the petitioners, namely, Ram Yagya Shukla instituted a Special Appeal No.1843 of 2012 whereby the common judgment and order dated 26.09.2012 was assailed and the same was dismissed by a Division Bench of this Court at Allahabad on **29.10.2012**.

(h) The aforesaid judgment rendered on **29.10.2012** being relevant for our purpose is reproduced hereunder:-

Heard learned counsel for the parties and perused the order under appeal whereby the bunch of writ petitions have been dismissed by a common order.

Learned writ Court has come to the conclusion that since the institution of the petitioners have been included in grant-in-aid list after 01.04.2005 when the new pension scheme had been introduced, the claim of the petitioners would be governed under the new pension scheme.

Learned counsel for the appellant has submitted that a more favourable treatment has been granted to the employees of secondary educational institutions in the matter of grant of benefit of old pension scheme. Our attention was drawn to the averments made in paragraph Nos. 19 and 20 of the writ petition which run as follows :-

"19. That the petitioner is attaching the departmental order dated 13.04.2007 and 30.03.2007 relating to Secondary Education which provides

counting of services rendered in unaided institution and for deposit of CPF/GPF with interest for getting the pensionary benefits as Annexure No. 11 to this writ petition.

20. That the last two lines of the order dated 08.04.2009 it denies pensionary benefits to all the employees of the Institution which came into grant in-aid-list after 01.04.2005 is illegal arbitrary and violative of Article 14 of the Constitution of India, hence liable to be quashed."

On considering the aforesaid submission and the averments extracted above, we are unable to agree with the submission that the respondents have made any hostile discrimination against the appellant. It is apparent from the pleadings and materials on record that the benefits of old pension scheme have been denied to all the employees of the institutions which came into grant-in-aid list after 01.04.2005.

We do not find any good reason to take a different view than that of the writ Court.

The appeal is devoid of merit and is accordingly dismissed."

(i) The common judgment rendered on 26.09.2012 was also challenged in Special Appeal Defective No. 388 of 2013, Budhiram v. State of U.P. and others at Allahabad which was allowed in terms of the order passed on 19.08.2017 which for ready reference is reproduced below:

"Civil Misc. Delay Condonation Application No. 111552 of 2013

Cause shown for the delay in filing of the Special Appeal is to the satisfaction of the Court.

Delay is condoned.

This application is allowed.

Order on memo of Appeal

The issue raised by means of the present Special Appeal stands decided under the Division Bench judgment of this Court dated 22 September 2016 passed in Special Appeal Defective No. 560 of 2016 connected with Special Appeal Defective No. 561 of 2016 filed by the State of U.P.

In view of the said judgment, this Appeal is also disposed of for the same reason and with same directions. The impugned order dated 26.02.2012 is hereby set aside.

Let the writ petition be listed afresh before the learned Single Judge for decision in the light of the observations made in the judgment dated 22 September 2016.

This Special Appeal is allowed."

*(j) The aforesaid order was passed keeping in view the Division Bench judgment of the High Court at Allahabad passed on **22.09.2016** in two intra-Court Appeals filed by the State i.e., Special Appeal Defective No. 560 of 2016 decided alongwith Special Appeal Defective No. 561 of 2016. According to the judgment dated **22.09.2016** of which reference was made in the above order, the Special Appeal No. 388 of 2013 filed by **Budhiram** which ought to have been dismissed, **yielded a fortuitous result.***

*(k) It is relevant to note that the Division Bench judgment passed at Allahabad on **22.09.2016** in the two intra-Court appeals filed by the State, significantly took note of two other judgments viz the Division Bench decision in U.P. Senior Basic Shiksha Sangh Sindhi Vidyalaya as well as **Budhiram** (Single Judge) both of which had set the controversy at rest.*

*(l) The Division Bench judgment dated **22.09.2016** somehow could not mention the Division Bench judgment dated **29.10.2012** whereby the Single Judge*

judgment in the leading case of **Budhiram** was upheld with the dismissal of Special Appeal No. 1843 of 2012 filed by similarly situated person as compared to **Budhiram** viz. Ram Yagya Shukla.

(6) Now coming to the **pending litigation at Lucknow**, it is to be noticed that the writ petition filed in representative capacity by U. P. Senior Basic Shiksha Sangh, i.e., Writ Petition No. 3458 (SS) of 2009 in the meantime was also dismissed by the High Court at Lucknow on 04.01.2013. The judgment so rendered by the learned Single Judge at Lucknow did not derive its strength from the dismissal of four similar Writ Petitions at Allahabad vide judgment dated 26.09.2012 or the dismissal of Special Appeal on **29.10.2012** arising therefrom filed by a similarly situated person (*Ram Yagya Shukla*), i.e., Special Appeal No. 1843 of 2012. The principle applied by the Writ Court at Lucknow, however, stood in line with the aforesaid judgments rendered at Allahabad.

(7) The U.P. Senior Basic Siksha Sangh feeling aggrieved against the Writ Court judgment dated 04.01.2013 chose to institute Special Appeal No. 123 of 2013 before this Court at Lucknow and the same was dismissed on merit by a detailed judgment passed on **04.12.2015**. This judgment rendered in the case of U.P. Senior Basic Shiksha Sangh on **04.12.2015** was the one which was relied upon by the Division Bench at Allahabad while allowing the two **State** intra-Court Appeals vide judgment dated **22.09.2016**.

(8) It is interesting to note that the two State intra-Court Appeals which were allowed on **22.09.2016** arose out of the two anomalous orders passed by the Writ Court on 18.04.2014 which were in conflict with

the judgment of **Budhiram** decided on 26.09.2012 whereby the four writ petitions of similarly situated persons were dismissed. The Division Bench while allowing the State Appeals on **22.09.2016** held the **Budhiram** judgment to be a good law and rightly so. The reason being that the **Budhiram** judgment was already upheld by the Division Bench on **29.10.2012** as a result of dismissal of Special Appeal No. 1843 of 2012 and secondly, the Special Appeal No. 123 of 2013 filed by U. P. Senior Basic Shiksha Sangh relating to the same issue was also dismissed on **04.12.2015**.

(9) It is a travesty of justice that Special Appeal Defective No. 388 of 2013, which was liable to be dismissed, fortuitously re-opened a closed controversy by order dated 19.08.2017 quoted above. The discrepancy becomes more evident when the order passed on 19.08.2017 is seen to have been driven in the light of the judgment dated **22.09.2016** according to which the appeal which ought to have been dismissed stood allowed under some illusion. The result of Special Appeals on the same issue both at Lucknow and Allahabad can be summarized in the chart below:-

Sl. No.	Particulars of Special Appeal	Place of Institution	Date of impugned judgment	Result/ Date of judgment
(1)	Special Appeal No. 1843 of 2012, <i>Ram Yagya Shukla v. State of U.P. and others</i>	Allahabad	26.09.12 (<i>Budhiram judgment</i>)	Dismissed/ 29.10.12
(2)	Special	Luckno	04.01.13	Dismissed/

	Appeal No. 123 of 2013, <i>U.P. Senior Basic Shiksha Sangh v. State of U.P. and others</i>	w		04.12.15
(3)	Special Appeal Defective No. 560 of 2016, State of U.P. and others v. Mahaveer Singh Yadav alongwith Special Appeal Defective No. 561 of 2016, State of U.P. and others v. Mahesh Prasad Srivastava	Allahabad	18.04.14	Allowed/ 22.09.16
(4)	Special Appeal Defective No. 388 of 2013, Budhiram v. <i>State of U.P. and others</i>	Allahabad	26.09.12 (<i>Budhiram judgment</i>)	Allowed/ 19.08.17 (Fortuitously)
(5)	Review Application No. 1502 of 2016 in Special Appeal No. 123 of 2013, <i>U.P. Senior Basic Shiksha Sangh v. State of U.P. and others</i>	Lucknow	04.12.15	Allowed/ 07.11.19 (As a result of order dated 19.08.17)

(10) It is an unfortunate situation that whatever was settled by two Division Bench judgments dismissing Special Appeal No. 1843 of 2012 on **29.10.2012** (Ram Yagya Shukla vs. State of U.P.) and Special Appeal No. 123 of 2013 filed by the U.P. Senior Basic Shiksha Sangh on **04.12.2015** which guided to allow the two State intra-Court Appeals viz., Special Appeal Defective No. 560 of 2016 alongwith Special Appeal Defective No. 561 of 2016 by relying upon the above decisions on **22.09.2016**, yet the real effect of law, **was miserably misunderstood** by the Division Benches while remitting Special Appeal Defective No. 388 of 2013 on 19.08.2017 and based thereon, allowing the Review Application No. 1502 of 2016 thereafter on 07.11.2019. A fortuitous situation sometimes cannot be ruled out in judicial process and **the mistake is acknowledged**.

(11) The re-opening of a closed issue, in the aforesaid manner, both at Lucknow and Allahabad in complete oblivion of atleast two Division Bench judgments rendered on **29.10.2012** and **22.09.2016** in the respective Special Appeals was erroneous particularly when both the abovementioned judgments had become final and were not assailed at all by the affected teachers similarly situated.

(12) On an empirical analysis of the judgment rendered in Review Application No. 1502 of 2016 at Lucknow or the order dated 19.08.2017 rendered in Special Appeal No. 388 of 2013 at Allahabad, it is quite clear that the applicability of New Pension Scheme (NPS) enforced by the State Government vide Government Order

dated 28.03.2005 though adjudicated upon finally was fortuitously re-opened in respect of the unaided institutions brought under grant-in-aid subsequent to the cut-off date, i.e., 01.04.2005. The New Pension Scheme (NPS) which was framed by the State Government and made applicable w.e.f. 01.04.2005 vide Government Order dated 28.03.2005, for ready reference, reads as under:-

*“The State Government, in consideration of its long term fiscal interest and following broadly the pattern adopted by the Central Government, has approved the following proposal of introducing a new defined contribution pension system in place of the existing defined benefit pension scheme, **for new entrants to the service of the State Government and of all State controlled autonomous institutions and State - aided private educational institutions where the existing pension scheme is patterned on the scheme for Government employees and is funded by the consolidated fund of the State Government:-***

*(i) **From 1st of April, 2005, the new defined contribution pension system would mandatorily apply to all new recruits to the service of the State Government and of all State controlled autonomous/State aided private educational institutions referred to above.** However, employees covered by the existing pension scheme whose service would be of less than ten years on 1st April, 2005 may also voluntarily opt for the new pension system in place of the existing pension scheme.*

(ii) Under the new defined contribution pension system, the employee would make a monthly contribution equal to 10 percent of the salary and dearness allowance. A matching employer's

*contribution would be made by the State Government or by the concerned autonomous institution/private educational institution. However, the State Government would provide grant to the concerned autonomous institution private educational institution for making employer's contribution until the institutions is at a position to make the contribution itself. The contribution and investment returns would be deposited in an account to be known as pension tier I account. No withdrawals would be allowed from this account during the service period. The existing provisions of defined benefit pension and **GPF would not be available to the new recruits covered by the new defined contribution pension system.***

(iii) Since new recruits would not be able to subscribe to GPF, they may also have a voluntary tier II account, in addition to the pension tier I account. However, employer would not make contribution to tier II account. The assets in Tier II account would be invested/managed through exactly the same procedure as for pension tier I account. However, the employee would be free to withdraw part of all the 'second tier' of his money anytime.

(iv) Employee can normally exit tier I of the pension system at the time of retirement. At exit the employee would be mandatorily required to invest 40 percent of pension wealth to purchase an annuity from a recognized insurance company so as to provide for pension for the lifetime of the employee and his dependent parents and his spouse at the time of retirement. The remaining pension wealth would, however, be received by the employee as a lump sum which he would be free to utilise in any manner. In case of employee exiting the pension tier I before retirement, the mandatory annuitisation would be 80 percent of the pension wealth.

(v) *There would be several pension fund managers who would offer mainly three categories of investment options. The pension fund managers and the record keeper would jointly give out easily understood information about past performance so that the employee is able to make informed choices of the investment options.*

2. *The effective date for operationalization of the new pension system shall be 1st of April, 2005."*

(13) It is this New Pension Scheme (NPS) application whereof has become a subject matter of dispute. The scope of its applicability is a bone of contention by the teaching and non-teaching staff working in about 1,000 educational institutions that came to be brought within the wings of grant-in-aid w.e.f. 01.12.2006 or thereafter.

(14) The real dispute revolves round the interpretation made by the State Government vide Government Order dated 08.04.2009 whereby all such educational institutions which came under grant-in-aid subsequent to 01.04.2005 were clarified to be covered under the New Pension Scheme (NPS).

LEGAL PROVISIONS

(15) Briefly stated, the case of the appellants/respondents is that in 1958, Education Code was issued and on 17.12.1965, the State Government issued a Government Order by which Uttar Pradesh State Aided-educational Institution Employees' Contributory Provident Fund-Insurance-Pension Rules, 1964 [here-in-after referred to as '**1964 Rules**'] were framed. Thereafter, on 19.08.1972, Uttar Pradesh Basic Education Act, 1972 [briefly, it is stated as '**1972 Act**'] has come into

force. Later on, in the year 1975, the State Government promulgated Uttar Pradesh Recognized Basic Schools (Recruitment and Conditions of Service of Teachers and Other Conditions) Rules, 1975 [in short, it is referred to as '**1975 Rules**'] in exercise of powers conferred under Section 19 (1) of the 1972 Act.

(16) On 10.03.1978, the State Government issued a Government Order wherein it was provided that the teachers of the aided Junior High Schools who are governed by the Triple Benefit Scheme of 1964 and who had either retired after 01.03.1977 or due to retire after 01.03.1977 may be given the pension at the rate applicable to the employees of the State Government on fulfillment of two primary conditions – one is that these teachers with effect from 01.03.1977 would be governed by General Provident Fund, instead of Contributory Provident Fund and accordingly, GPF amount would be deducted w.e.f. 01.03.1977 and the managerial contribution accrued upto 28.02.1977 shall be deposited with the Government alongwith interest there upon and the next condition is that in case of death of any teacher, the family of such Teacher would neither be entitled for death-cum-gratuity nor family pension. The Government Order has further envisaged that the Triple Benefit Scheme dated 17.12.1965 and Appendix VIII of the Education Code 1958 would stand amended to the above extent.

(17) On 13.03.1978, the Uttar Pradesh Recognized Basic Schools (Junior High Schools) (Recruitment and Condition of Service of Teachers) Rules, 1978 [shortly, they are stated as '**1978 Rules**'] have been promulgated. Simultaneously, in the same year 1978, the State Government notified

Uttar Pradesh Junior High Schools (Payment of Salaries of Teachers and Other Employees) Act, 1978 [in brevity, it is stated as '1978 Act'].

(18) On 13.06.1984, the State Government issued Uttar Pradesh Recognized Basic Schools (Junior High Schools) (Recruitment and Conditions of Service of Ministerial Staff and Group 'D' Employees) Rules, 1984 [for short, it is referred to as '**1984 Rules**'].

(19) During the period 1989-1998, several basic schools were established in the State of U.P. On 23.05.1998, the State Government issued a Government Order whereby it has been provided that the period which has been spent by the teaching staff and non-teaching staff in a Junior High School prior to the date on which the said Junior High School was granted grant-in-aid shall be reckoned for the purpose of determining qualifying service for pension provided that up-to-date amount of Managerial Contribution Contributory Provident Fund alongwith interest in respect of the said employee in the G.P.F. Account is deposited by 31.03.1998. Thereafter, vide Government Orders dated 17.02.1999 and 26.07.2001, time limit for depositing the Managerial Contribution accruing under Triple Benefit Scheme with interest has been extended upto 30.06.1999 and 31.03.2002 respectively.

(20) Thereafter, the State Government issued a Government Order dated 05.02.2017 permitting the institutions which were taken on grant-in-aid prior to 01.04.2005 to deposit the Managerial Contribution with interest latest by 30.06.2017 in respect of duly selected teaching and non-teaching staff of their

respective schools for the purpose of counting the service rendered by them when the schools were not on grant-in-aid.

(21) The issue in the present intra-Court Appeals relates to the educational institutions brought under grant-in-aid subsequent to 01.04.2005.

DISCUSSION IN THE CONTEXT OF SUBMISSIONS MADE

(22) This Court may note that the educational institutions in which the members of U.P. Senior Basic Shiksha Sangh are working have not been impleaded as a party. Moreover, all such institutions are stated to have been brought under grant-in-aid subsequent to the date of enforcement of New Pension Scheme (NPS) on 01.04.2005. The institutions brought under grant-in-aid subsequent to the cut-off date are now regulated under the New Pension Scheme (NPS) by an order of the State issued on 28.03.2005 clarified by Government Order dated 08.04.2009.

(23) It was the clarificatory order alone which was impugned by the U.P. Senior Basic Shiksha Sangh and other petitioners whose writ petitions having been allowed by a common judgment passed by the learned Single Judge on 16.06.2021 has given rise to the present bunch of intra-Court appeals filed by the State of U.P.

(24) Sri Sanjeev Singh, learned Standing Counsel for the State has argued that notwithstanding the fact that Special Appeal No. 388 of 2013 and Review Application No. 1502 of 2016 were allowed, nevertheless, the binding effect of the two judgments dated **29.10.2012** and **22.09.2016** deciding the respective Special

Appeals in favour of the State could not be brushed aside by the learned Single Judge for it being binding precedents on the issue and a contrary view expressed by the learned Single Judge is erroneous and was impermissible under law.

(25) The next submission made by learned Counsel for the State is to the effect that in none of the writ petitions, the aggrieved parties have questioned the legality of New Pension Scheme (NPS) enforced w.e.f. 01.04.2005, therefore, it was not open to the learned Single Judge to read down the New Pension Scheme (NPS) contrary to the clarification made by the State Government vide Government Order dated 08.04.2009 on the premise of Rule 19 of 1978 Rules which has ceased to operate w.e.f. 01.04.2005 by a retrospective amendment in the said Rule remaining unchallenged.

(26) The learned Counsel for the State has also argued that the language of Rules 3 and 4 of 1964 Rules in unequivocal terms says that the Old Pension Scheme (OPS) would be applicable only to the institutions already under grant-in-aid, therefore, once the Old Pension Scheme (OPS) came to an end on 01.04.2005, the resultant protection cannot be extended to those institutions which were brought under grant-in-aid subsequent to the cut-off date. It has also been argued by learned Counsel for the State that the new entrants with respect to educational institutions have to be given a purposive interpretation and not the one as the learned Single Judge has opined in the **impugned judgment**.

(27) Learned Counsel for the State has further argued that the argument of discrimination advanced by the aggrieved persons in the light of a cut-off date has no

basis once it is admitted that the institutions came under grant-in-aid subsequent to the date of enforcement of New Pension Scheme (NPS), therefore, any challenge to the clarificatory order issued on 08.04.2009 would not leave the scheme open for a different interpretation particularly when the argument of discrimination was repelled under two binding precedents already rendered.

(28) *Per contra*, learned Counsel for the private respondents have subtly restricted their argument by highlighting that the limited controversy which was delved into by the learned Writ Court is evident from paragraphs 24 to 30 of the **impugned judgment** and the same for ready reference are extracted hereunder:

“24) Direction was issued by this Court to the State Government for giving information in regard to recommendation made by respondent No.2 for extension of date. Thereafter, the impugned order dated 08.04.2009 has been passed.

25) Assailing the impugned order, submission of learned Senior Counsel for the petitioners is that the impugned order is neither policy decision nor government order; therefore, the rider imposed in regard to applicability of NPS upon the petitioners is arbitrary and contrary to applicable rules.

26) Their next submission is that vide impugned order the Special Secretary of State Government has tried to modify the NPS implemented upon the employees who entered in service on or after 01.04.2005. In case of petitioners, in bunch of matters, none of the petitioner has entered in service on or after 01.04.2005. Thus, his submission is that the impugned order is contrary to NPS and cannot be modified by

an executive order passed by the respondents.

27) Their further submission is that the impugned order overlooked Rule 19 of Rules of 1978. Rule 19 does not carve out the distinction between aided and unaided institutions. The Special Secretary has also failed to appreciate the fact that the service rendered by the teachers and non teaching staff while the institution was not on grant in aid list has been made basis for taking the institution on the list of grant in aid.

28) The State Government issued government orders according to government order issued in year 1978 as per scheme of 1965 and decisions were taken for depositing the managerial fund in regard to adding the service of teachers and non teaching staff rendered by them before providing grant in aid for payment of pensionary benefits.

29) His further submission is that the Special Secretary was having no authority to add his own view by passing the impugned order in the notification dated 28.03.2005, whereby NPS was enforced.

30) In support of his submissions, he relied upon certain judgments, which are as under:

i) *U.P. Senior Basic Shikshak Sangh Sindhi Vidyalaya Vs. State of U.P. and others*; Special Appeal No.123 of 2013.

ii) *Shailendra Daina and others Vs. S.P. Dubey and others*; 2007 (5) SCC 535.

iii) *N. Suresh Nathan and another Vs. Union of India and others*; 1992 Supp. (1) Scc 584.

iv) *Rajinder Singh (Dr.) Vs. State of Punjab and others*; 2001 (2) UPLBEC 1502.

v) *Shyam Sadan Singh (Dr.) Vs. Chancellor, Deen Dayal Upadhyay*

University of Gorakhpur and others; 2002 (1) UPLBEC 152.

vi) *Girdhari Lal Shankwar Vs. State of U.P. and others*; 2014 (1) UPLBEC 657.

vii) *Narinder S. Chadha and others Vs. Municipal Corporation of Greater Mumbai and others*; 2015 (33) LCD 1743.”

(29) It is in the light of aforesaid submissions and decisions referred to by the Writ Court that learned counsel for the respondents have defended the **impugned judgment** passed by the learned Single Judge.

ANALYSIS

(30) Having heard learned counsel for the parties at length; the first question that crops up is whether there lies any distinction between the institutions operating under grant-in-aid and those which are un-aided as far as the applicability of pension scheme is concerned. For this purpose, the Court would refer to Rules 3 and 4 of Uttar Pradesh State Aided-educational Institution Employees' Contributory Provident Fund-Insurance-Pension Rules, 1964 which are quoted below:

“3. These rules shall apply to permanent employees serving in State aided educational institutions of the following categories run either by a Local Body or by a private Management and recognized by a competent authority as such for purposes of payment of grant-in-aid:

- (1) Primary Schools;
- (2) Junior High Schools;
- (3) Higher Secondary Schools;
- (4) Degree Colleges;

(5) Training Colleges.”

“4. (a) These rules are intended to the employees of the State aided educational institutions, three types of service benefits, viz., Contributory Provident Fund, Insurance and Pension (Triple Benefit Scheme). The quantum of the benefits and the conditions by which they are governed are described in the succeeding Chapters.

(b) An employee already in permanent service on the date of enforcement of these rules shall be given an option to elect these new rules or to continue to be governed by the existing rules applicable to him.

(c) No employees shall be allowed option to choose only a part of the Scheme except as otherwise specifically provided for in these rules.

(d) Option once exercised shall be final.”

(31) From a plain reading of the aforesaid Rules, it is clear that for the purposes of Old Pension Scheme (OPS) a clear distinction is drawn under the Rules itself that the same shall apply to the educational institutions operating under grant-in-aid.

(32) The Writ Court while appreciating the arguments advanced has essentially ruled in favour of the petitioners (respondents herein) on two basic grounds. Firstly that the clarification of the New Pension Scheme (NPS) by Government Order dated 08.04.2009 is **discriminatory** and secondly that **there does not lie any distinction between the aided and unaided institutions for the purposes of regulating the condition of pension.**

(33) Taking up the question of distinction between the two categories of

institutions first, it is to be noted that vide Government Order dated 17.12.1965, Triple Benefit Scheme, i.e., (i) Contributory Provident Fund, (ii) compulsory Life Insurance and (iii) Pension including Family Pension was introduced but this was made applicable with effect from 01.10.1964 only to Government aided institutions. Rules 3 and 4 of Chapter I of the Rules provide that the said Rules shall apply to permanent employees serving in State aided educational institutions viz. (1) Primary Schools; (2) Junior High Schools; (3) Higher Secondary Schools; (4) Degree Colleges and (5) Training Colleges run either by a Local Body or by a Private Management and recognised by a competent authority. Rule 4 of the aforesaid Rules specifically provides that these rules are intended to ensure to the employees of the State aided educational institutions, three types of service benefits viz Contributory Provident Fund, Insurance and Pension (Triple Benefit Scheme) the quantum of the benefits and the conditions by which they are governed are described in the succeeding Chapters.

(34) In view of above, it is abundantly clear that the Uttar Pradesh State Aided Educational Institutions Employees Contributory Provident Fund, Insurance Pension Rules, 1964 are not applicable or attracted where the educational institutions are not under grant-in-aid.

(35) To clarify further, it is necessary to point out that when a new scheme is introduced, a demarcation line has to be drawn between the employees, who are wholly covered under the existing scheme and those who are not. While doing so, the State Government has not violated the spirit of Articles 14 and 16 of the

Constitution of India either in the matter of fixing the cut-off date or classifying the educational institutions. The State Government while issuing the clarificatory order dated 08.04.2009 had in mind this broad classification which does not offend the rule of equality in any manner. The broad principles as to the classification were culled out by the Apex Court in the case of *Confederation of Ex-servicemen associations and others Vs. Union of India and others reported in [(2006) 8 SCC 399]* in para – 30 of the judgment and the same is quoted below:

"30. In our judgment, therefore, it is clear that every classification to be legal, valid and permissible, must fulfil the twin test, namely,

(i) the classification must be founded on an intelligible differentia which must distinguish persons or things that are grouped together from others leaving out or left out; and

(ii) such a differentia must have rational nexus to the object sought to be achieved by the statute or legislation in question."

(36) Learned Standing Counsel appearing for the State has argued that the State Government at the relevant point of time had three categories of persons under consideration viz. (a) Government Servants (b) the employees working on pensionable service in autonomous bodies and (c) the educational institutions receiving grant-in-aid and governed under the Pension Rules, 1964. Therefore, the submission put forth by the learned counsel for the respondents was strongly opposed when the respondent-petitioner argued that New Pension Scheme (NPS) was enforced irrespective of the distinction between two categories of institutions.

(37) Learned Counsel for the State would contend that the classification made was founded on an intelligible differentia in the light of aforementioned decision which the learned Counsel for the respondents would refute by pointing out that in view of all other requisites for recruitment being equal, such a classification is discriminatory.

(38) It is to be clarified that pension is one of the conditions of service regulated under the Rules. The conditions of recruitment would not bring the two categories of institutions at par unless the element of grant-in-aid is found to exist as on the cut-off date which is decisively relevant for the classification. The hostile discrimination argued on the ground of appointment being made prior to 01.04.2005 in the unaided educational institutions under the same Service Rules may have a relevance for the purpose of fixation of salary of which the benefit was extended but the conditions of Old Pension having ceased to exist after 01.04.2005 onwards, the same would not revive automatically as a matter of right on the ground of the institutions coming under grant-in-aid subsequent to the cut-off date. The condition of pension is open to be regulated independently and for the purposes of classification, the existing scheme must apply on the specified cut-off date.

(39) This Court having considered the rival arguments does not find that the case at hand is a case of hostile discrimination. The Writ Court, in our humble view, got swayed away by the arguments advanced by the respondents contrary to the mandate of law.

(40) Admittedly, the schools in which the petitioners (respondents herein) have been teaching or working were not under

grant-in-aid when the New Pension Scheme (NPS) was introduced, therefore, they were not entitled to the benefit of Old Pension Scheme (OPS) as they came under grant-in-aid on 1.12.2006 much after the enforcement of the new scheme, i.e., 01.04.2005. The new scheme was made applicable to the staff of schools which came under grant-in-aid on or after 1.4.2005. The petitioners (respondents herein) are covered within that cut off date.

(41) Since the institutions were not on grant-in-aid list at the time of implementation of Scheme, the Government Orders dated 10.3.1978, 23.5.1998, 17.2.1999, 26.7.2001 and 8.3.2002 were not applicable in their case. The date on which the institutions in which the members of the respondent-association were serving came under grant-in-aid only on 1.12.2006, therefore, it is the new scheme which shall be applicable upon them. By the Government Order dated 08.04.2009, it was only clarified that only New Pension Scheme (NPS) shall be applicable to the employees of the schools which came under grant-in-aid after 1.4.2005. The association has not been able to show or indicate any reason as to how the subsequent Government Order dated 8.4.2009 is discriminatory, arbitrary or without jurisdiction. In any case, a clarification order does not expand or alter the scope of the original provisions.

(42) The distinction between the institutions receiving grant-in-aid and un-aided is embedded in the Pension Rules itself, therefore, the submissions of the learned Standing Counsel that there ought to be some demarcating line regarding the classification of institutions, which are covered by the new contributory pension scheme and the persons, who were getting

the benefit of the earlier rules governing their service conditions is well conceived. The classification as pointed out cannot be said to be discriminatory. So far as the case of the teachers' association is concerned they are entitled only to the benefit of New Pension Scheme (NPS) because on the date of its implementation though they were not the new entrants or recruits to the service but because on the said date, when the new scheme came to be implemented, the schools itself were not under grant-in-aid in which they were serving. The distinction so made cannot be faulted with for implementation of the New Pension Scheme (NPS). Government Order dated 8.4.2009 is very clear on the point that only new scheme shall be applicable to the employees of the schools that came under grant-in-aid on or after the enforcement of the new Contributory Pension Scheme. Therefore, the relief for including the employees, who had put in ten years service prior to cut-off date as prayed for by the Association on the ground of discrimination or arbitrariness has no legal basis to stand on any ground whatsoever. The classification made, in the considered opinion of this Court, cannot be said to be discriminatory or arbitrary.

(43) The Government Order dated 28.3.2005 makes it clear that the Old Pension Scheme (OPS) was replaced by the New Pension Scheme and by the subsequent Government Order it was made clear that the employees of schools which came under grant in aid shall be governed by the new scheme only. This clarification cannot be said to be discriminatory or arbitrary.

(44) In *Buddhiram Vs. State of U.P. and others*, [2013 (1) ADJ 254], this issue has been directly dealt with in paragraph

Nos. 28 to 36, which deserve to be reiterated hereunder:-

"28. Now coming to the second category of cases wherein the staff of institution, who have been appointed in the institution prior to 01.04.2005, when it was unaided but after institution has been included in the grant-in-aid w.e.f. 01.04.2005, qua them State Government has taken policy decision that those institutions who have been included in the grant-in-aid list after 01.04.2005 they shall be governed by new pension rules. Once State Government has proceeded to take policy decision that teaching and nonteaching staff in the institution in question would be governed by new pension policy after being included in the grant-in-aid list of the State Government, can grievance be raised by the petitioners on the said score that same is arbitrary or unreasonable. Uttar Pradesh State Aided Educational Institutions Employees Contributory Provident Fund, Insurance Pension Rule, 1964 are not applicable or attracted when the institution in question is not on in the grant-in-aid and the provision of Uttar Pradesh State Aided Educational Institutions Employees Contributory Provident Fund, Insurance Pension Rule, 1964 would be applicable qua the institution from the date when it has been taken into grant-in-aid list of the State Government, as such said rules become applicable in the institution concerned only when it is included in the grant-in-aid list. Admittedly after 01.04.2005, once said group of institution has been included in the grant-in-aid list of the State Government w.e.f. 01.12.2006 and a new pension scheme has been there, then petitioners cannot claim as a matter of right that they should be covered by old pension Rules.

29. This much has been accepted that at the point of time when institution in question has been included in the grant-in-aid list entire benefit of earlier service of unaided stage has been clubbed and benefit of the earlier service rendered has been extended qua grant of pay scale, increment and other benefits etc.

30. The services rendered at unaided stage has not at all been waste, and due care has been taken to extended the benefits admissible in the lieu of the same. Question is can said service be also included as part of the qualifying service specially when appointment in question has been made prior to 01.04.2005 and admittedly institution in question has been brought into the grant-in-aid list of the State Government w.e.f. 01.12.2006.

31. This Court in the case of *Chandra Bhushan Bajpai Vs. Joint Director of Education, Kanpur Mandal, Kanpur and others (Civil Misc. Writ Petition No. 32132 of 2001 decided on 21.08.2008) reported in 2008(3) UPLBEC 2333* has taken the view that qualifying service period for pension is to be considered on the parameter as is required under the Rules of 1964. In the said case petitioner was claiming counting of period of service rendered by him in the unaided, Non-Government Junior High School and said claim of the petitioner has not been accepted and service rendered at unaided stage has not at all been counted. Paragraphs 6, 7, 8 and 9 of the said judgment being relevant is extracted below:

For the purpose of qualifying service U.P. Contributory Provident Fund Insurance Pension Rules are applicable wherein Rule 19(a) and (b) reads as under:

"19 (a) Service will not count for pension unless the employee holds a substantive post on a permanent establishment.

(b) Continuous temporary or officiating service followed without interruption by confirmation in the same or another post shall also count as qualifying service. (See also C.S.R. Para 422)."

7. The benefit of the aforesaid Rule would have been attracted to the case in hand provided the petitioner would have worked in a institution which was provided grant in aid. Rule 3 of the aforesaid Rules clearly provides that it is applicable to permanent employees serving in State aided education institutions. Rule 3 reads as under:

"3. These rules shall apply to permanent employees serving in State aided educational institutions of the following categories run either by a Local Body or by a Private management and recognised by a competent authority as such for purposes of payment of grant-in-aid.

- (1) Primary Schools;
- (2) Junior High Schools;
- (3) Higher Secondary Schools;
- (4) Degree Colleges;
- (5) Training Colleges."

8. It is clear case of the respondents that the institution in question was brought in grant-in-aid list in March 1961 though the petitioner served therein prior thereto. Therefore, U.P. Contributory Provident-Insurance-Pension Rules which came into force on 1.10.1964 are not applicable at all. Learned counsel for the petitioner could not place any other provision to substantiate his claim that the said service can be counted. Pension is not a bounty but as a matter of fact, a right, yet the mode and manner of its payment is governed strictly by relevant Rules. Unless the Rules provide, no person can claim a particular service in a particular employment for counting as qualifying service. The Apex Court, in D.S. Nakara

Vs. Union of India 1983 (1) SCC 305 while holding pension as a right, observed as follows:

"pension is a right and the payment of it does not depend upon the discretion of the Government but is governed by the rules and a government servant coming within those rules is entitled to claim pension. It was further held that the grant of pension does not depend upon anyone's discretion." (Para 20)

9. Learned counsel for the petitioner could not place before the Court any provision under which the services rendered in a recognised but un-aided Non-Government Junior High School could have been counted."

32. This Court in the case of **Kunwar Bahadur Sinha Vs. Director of Education. U.P. Lucknow and others (Civil Misc. Writ Petition No. 13741 of 1990 decided on 05.05.1995) reported in 1995 (2) UPLBEC 1264** has proceeded to mention that Rule 19(b) of Rules 1964 has not at all been considered whereas sub-Rule (b) of Rule 19, provides that continuous temporary or officiating service followed without interruption by confirmation in the same or another post shall also count as qualifying service. In the said case it has been mentioned that Regional Deputy Director of Education it seems has not noticed clause (b) of Rule 19 of the Rules and has premised the impugned order solely on Clause (a) of Rule which provides that service will not count for pension unless employee holds a substantive post on a permanent establishment. In said case at no point of time issue was raised in respect of institution being grant-in-aid list.

33. New pension scheme has been effectuated w.e.f. 01.04.2005 and it has been mentioned therein that it would be

applicable to those set up incumbent who had been appointed after 01.04.2005 and it is true that appointment of petitioners had been made prior to 01.04.2005 but the institution in question has been brought in the grant-in-aid list after 01.04.2005 and benefit of past service when the institution in question was unaided has been extended and the State Government has taken policy decision that new pension scheme shall be applicable qua institutions included in grant-in-aid list w.e.f. 01.04.2005. Pension is a right and the payment of it does not depend on the discretion of the government but is governed by Rules, and once new pension scheme has been enforced w.e.f. 01.04.2005, and conscious decision has been taken to include teaching and non-teaching staff under the new pension scheme, wherein institution has been brought on grant-in-aid list after 01.04.2005, under the new pension scheme, cannot be faulted, as benefit has to be allowed keeping in view the financial resources of the Government, and coupled with this, the teaching and non-teaching staff of institution included in the grant-in-aid after 01.04.2005, form a different class, as prior to said date the provisions of U.P. Contribution Provident-Insurance Pension Rules 1964 was not at all applicable or attracted, and from the date i.e when the provisions of the said Rule have become available i.e after 01.04.2005, new pension scheme has been introduced, in view of this said policy decision cannot be faulted, as same is neither arbitrary nor irrational and there is rational basis for framing such a policy.

34. Apex Court in the case of *Commander HQ Vs. Capt. Biplavendra Chand reported in JT 1997 SC 371* has taken the view that pension is payable to them who fall within the ambit of Rules. Similar view has been taken in the case of

T.N. Electricity Board Vs. Veeraswamy reported in 1999 (2) ESC (SC) 1036 (SC).

35. Apex Court, in the case of *Sudhir Kumar Kansal Vs. Allahabad Bank 2011 (2) ESC 243* has, in the matter of grant of pension, either under the old rule or the new rule, proceeded to mention that in society governed by rule of law sympathies cannot override the Rules and Regulations, and in the said case view has been taken accordingly that appellant was not eligible to claim any benefit under Old Pension Scheme.

36. Inevitable conclusion is that once institution in question has been included in grant-in-aid list after 01.04.2005 and thereafter new pension scheme has been introduced and it has been stated that the claim of petitioners would be governed under the new scheme then said category of incumbents as matter of right cannot claim to be governed under old scheme, and their claim of pension will fall within the ambit of Rules as has been introduced w.e.f. 01.04.2005."

(45) The aforesaid judgment in the case of **Budhiram** (supra) that was relied upon by the learned single Judge in another case and the writ petition was disposed of on the same terms, came to be challenged in Special Appeal No.734 of 2014 in which appeal was also dismissed on 10.8.2015 upholding the ratio in the case of **Budhiram** (supra). The strength of three Division Bench judgments viz. **29.10.2012**, **10.08.2015** and **22.09.2016** was not weighed at all by the learned Single Judge in the decision making process of the **impugned judgment**. It appears, the learned Single Judge might have been driven by some mistaken impression in overlooking the said judgments of the Division Bench and concluded that the respondents were entitled for the Old

Pension Scheme (OPS), although at the relevant time, when the Old Pension Scheme (OPS) was replaced by the New Pension Scheme, these institutions were not in the grant-in-aid list. This Court finds it relevant to quote a passage from the judgment of Apex Court in *Sudhir Kumar Consul vs. Allahabad Bank* [(2011) 3 SCC 486], which inter alia states:

“We have sympathies for the appellant but, in a society governed by Rule of law, sympathies cannot override the Rules and Regulations. We may recall the observations made by this Court while considering the issue of compassionate appointment in public service. In *Life Insurance Corporation of India v. Asha Ramachandra Ambekar and Anr.* (1994) 2 SCC 718, wherein the Court observed:

"The High Courts and the Administrative Tribunals cannot confer benediction impelled by sympathetic consideration.... Yielding to instinct will tend to ignore the cold logic of law. It should be remembered that "law is the embodiment of all wisdom". Justice according to law is a principle as old as the hills. The Courts are to administer law as they find it, however, inconvenient it may be."

(46) We may also point out that the Rules, 1964 clearly specify in Rules 3 and 4 that the said Rules shall apply to State aided educational institutions. They did not apply to unaided institutions.

It is for this reason that the new scheme which has been introduced under the policy dated 28.3.2005 w.e.f. 1.4.2005 also recites that it will apply to State aided Educational Institutions which clearly means that those institutions, which were brought under the grant-in-aid list thereafter, would only be entitled to the benefit under the new

scheme and not of the benefits of the earlier scheme. Thus, if the Rules, 1964 provide for extending of benefits to only State aided Institutions, then a mandamus cannot be issued to modify the same to apply it to unaided institutions by reading down the difference.

(47) This Court has no doubt that the classification made is rational and the same does not suffer from any constitutional or legal infirmity on the facts mentioned above. There is no challenge or relief prayed that the 1964 Rules are irrational being applied only to aided institutions and there is equally no challenge to the retrospective amendment in Rule 19 of the relevant Service Rules, 1978.

(48) The judgment passed in **Budhiram** (supra) was upheld in Special Appeal No. 1843 of 2013 (*Ram Yagya Shukla*) holding that the Court is unable to agree with the submission that the respondents have made any hostile discrimination against the appellant. It is apparent from the pleadings and materials on record that the benefits of old pension scheme ceased to apply to all the employees of the educational institutions which came into grant-in-aid list after 01.04.2005. Thus the notification issued on 28.03.2005 introducing New Pension Scheme (NPS) effective from 01.04.2005 applies to all the educational institutions brought under grant-in-aid subsequent to the cut-off date.

(49) In view of what has been recorded above, this Court is of the considered view that after issuance of notification dated 28.03.2005, all such institutions which came under grant-in-aid after 01.04.2005 shall be regulated under the New Pension Scheme (NPS).

(50) Thus, the reasoning given in the impugned order that since the respondents were appointed prior to 01.04.2005, although the

grant-in-aid was provided to their institutions after promulgation of the New Pension Scheme (NPS), are entitled for Old Pension Scheme (OPS) is not tenable in the eyes of law and is contrary to the very spirit of New Pension Scheme (NPS).

(51) For the reasons stated above, all the Special Appeals, except Special Appeal Defective No. 74 of 2022 are **allowed** and the **impugned judgment** and order dated 16.06.2021, as corrected vide order dated 07.07.2021 in the bunch of writ petitions, leading Writ Petition No. 3458 (SS) of 2009, *U.P. Senior Basic Shiksha Sangh v. State of U.P. and others*, passed by the learned Single Judge is **set aside**, so far as it relates to the educational institutions coming under grant-in-aid after 01.04.2005.

(52) Since Special Appeal Defective No. 74 of 2022 pertains to Dying-in-Harness matter, **list it before the appropriate Court in the next cause list.**

C.M. Application No. IA/6/2023

In re:

Case :- SPECIAL APPEAL No. - 29 of 2022

Appellant :- State Of U.P. Thru. Prin. Secy. Basic Edu. Dept. And 2 Others

Respondent :- Uttar Pradesh Senior Basic Shikshak Sangh Thru. Its Secretary Sri Awadhesh Kumar Singh

Counsel for Appellant :- Mohit Jauhari
Counsel for Respondent :- Girish Chandra Verma

(Delivered by Hon'ble Attau Rahman Masoodi, J.

&

Hon'ble Om Prakash Shukla, J.)

1. The special appeal was listed today before this Court for delivery of the judgment.

2. Before the judgement could be delivered, the correction application came to be presented before us on mention being made by learned counsel for the applicant.

3. The application seeks correction in the memo of amended copy of the writ petition as well as the special appeal insofar as the description of respondent 'Sangh' is concerned.

4. Learned counsel for the applicant has stated that the name of the Secretary of the respondent in Special Appeal No. 29 of 2022 (petitioner in writ petition no. 3458 of 2009) is wrongly mentioned as 'Awadhesh Kumar Singh' in place of 'Awadhesh Kumar Mishra'.

5. The application in the absence of any objection is allowed. Let necessary correction be made in the memo of the writ petition as well as the special appeal.

(2023) 9 ILRA 214

APPELLATE JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 30.08.2023

BEFORE

**THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE OM PRAKASH SHUKLA, J.**

Special Appeal Defective No. 620 of 2023

**Managing Director U.P. Jal Nigam (Rural)
Lko. & Anr. ...Appellants**

Versus

Babban Singh & Anr. ...Respondents

Counsel for the Appellants:

Vijay Vikram Singh

Counsel for the Respondents:

Savita Jain, Rishabh Kapoor

A. Service Law – UP Government Servant (Discipline and Appeal) Rules, 1999 – Civil Service Regulations – Reg. 351-A – UP Retirement Benefits Rules, 1961 – Rule 9(1) – Recovery from pension – Non-payment of retiral benefit – Initiation of disciplinary proceeding after retirement – Permissibility – No sanction of Board of Director was taken – No charge-sheet was drawn up – Effect – Held, the proceedings for recovery from pension, wholly or in part, or any amount from retiral dues, cannot be initiated save with the sanction of Board of Directors – Impugned order seeking to recover the pecuniary loss from the retiral dues payable to the respondent-employee without there being any sanction of the Board of Directors, is wholly without jurisdiction. (Para 13, 17 and 20)

Appeal dismissed. (E-1)

List of Cases cited:

1. U.P. St. Sugar Corp. Ltd. Vs Kamal Swaroop Tondon; (2008) AIR SCW 1241
2. W.P. No. 2555 of 2008; Ratnakar Bhagwanrao Mahajan Vs District & Sessions Judge, Jalna & anr. decided on 24.09.2008

(Delivered by Hon'ble Attau Rahman
Masoodi, J.
&
Hon'ble Om Prakash Shukla, J.)

(1) This Special Appeal has arisen out of the judgment/order rendered by the Writ Court in Writ-A No.5341 of 2012 on 01.03.2023. By means of the impugned judgment, the Writ Court has allowed the writ petition with a further direction to pay retiral dues along with interest @ 7% per

annum up to the actual payment made. Four months period was granted for making compliance of the judgment passed. The appellants, namely, U.P. Jal Nigam have come up against the aforesaid judgment in the present *intra-court* appeal filed under Chapter VIII Rule 5 of the High Court Rules.

(2) Learned counsel for the appellants has submitted that the respondent-petitioner had retired from service from the post of Junior Engineer on 30.04.2010. This fact was not disputed by the appellants before the Writ Court as well. It appears that a show cause notice was issued on 16.03.2011 against the respondent-employee alleging therein some irregularities on the strength of certain communications which were made from 2009 to 2010 while he was in service.

(3) In these circumstances, the case at hand is a case of initiation of proceedings after an employee, who had already retired from service. Learned counsel for the appellants has submitted that by virtue of an office memorandum dated 03.02.2003 the Board of Directors, erstwhile U.P. Jal Nigam had passed a resolution whereby the applicability of Civil Service Regulations as well as U.P. Government Servant (Discipline and Appeal) Rules, 1999 (here-in-after referred to as 'the Rules, 1999') was extended by reference to the employee of erstwhile U.P. Jal Nigam with a modification in Regulation 351-A. The modification in Regulation 351-A was to the extent that the word "Governor" shall be read as the Board of Directors. Therefore, the aforesaid rules became applicable to the retired employees of U.P. Jal Nigam for all purposes.

(4) Learned counsel for the appellants has argued that once the aforesaid rules are applicable to the retired employees of erstwhile U.P. Jal Nigam, learned Single Judge fell in error while observing that no departmental proceedings were initiated or the ingredients of Regulation 351-A were not available; and the observations so recorded being perverse would vitiate the judgment impugned herein.

(5) According to the learned counsel, the issuance of show cause notice for the purposes of recovery did constitute initiation of departmental proceedings as per law and action taken for recovery from retiral dues and pension was after following the procedure of show cause notice calling for a reply duly complied with before passing the recovery order, thus, it was not open to the Writ Court to strike down the recovery order on such a ground. Learned counsel for the appellants has further argued that it is not a case where respondent-petitioner was deprived of the retiral dues without following due procedure under law and the case at hand was erroneously construed to be deprivation of property contrary to the mandate of law as provided under Article 300-A of the Constitution of India. Learned counsel for the appellants has also argued that the order of recovery passed after issuance of a show cause notice did not require any other except what was followed. The respondent-employee submitted his reply in response to the show cause notice and the same was considered by the competent authority while passing the order dated 18.08.2012 as well as the order dated 17.10.2011 giving rise to the writ petition.

(6) The sum and substance of the arguments made by the appellants' counsel

is that the action taken against the respondent-petitioner being in consonance with the law and having afforded adequate opportunity, did not suffer from any jurisdictional error or procedural error. Therefore, allowing the writ petition in such circumstances along with 7% interest on the payment due is certainly an order contrary to law and deserves to be set aside.

(7) Ms. Savita Jain, learned counsel appearing for the respondent-petitioner not disputing the fact that a resolution was passed by the Board of Directors on 03.02.2003, whereby, Civil Service Regulations as well as the Rules, 1999 were made applicable to the employees of erstwhile U.P. Jal Nigam, has submitted that it is a case of retired employee, who could not be visited with punishment of recovery except by following rigors of Regulation 351-A in its strict language and the scope thereof. Learned counsel for the respondent-petitioner inviting our attention to the resolution passed by the Board of Directors on 09.06.2011 has pointed out that even the resolution of the Board placed before this Court is a resolution passed much later than the issuance of show cause notice dated 16.03.2011 to which the respondent-petitioner helplessly submitted his reply on 13.04.2011 and thereafter the recovery order was passed on 18.08.2012. It is, thus, submitted that even if there existed a power with the Board to initiate the proceedings by resolution against the retired employee in terms of Regulation 351-A of the Civil Service Regulations, yet, the same was not available as on the date of issuance of show cause notice and the same lacked the sanctity of law. Mere reply submitted against the show cause notice which was without jurisdiction would not legitimise the same and the defence remains open.

(8) Having regard to the submissions put forthwith by the learned counsel representing the respondent-petitioner, it would be necessary to refer to the Regulation 351-A of the Civil Service Regulations and relevant extract of the Regulations is reproduced herein:

Note: The Governor to be read as "the Board of Directors".

"351-A. The Governor reserves to himself the right of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period and the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused to Government, if the pensioner is found in departmental or judicial proceedings to have been guilty of grave misconduct, or to have caused pecuniary loss to Government by misconduct or negligence, during his service, including service rendered on re-employment after retirement :

Provided that-

(a) such departmental proceedings, if not instituted while the officer was on duty either before retirement or during re-employment-

(i) shall not be instituted save with the sanction of the Governor.

(ii) shall be in respect of an event which took place not more than four years before the institution of such proceeding; and

(iii) shall be conducted by such authority and in such place or places as the Governor may direct and in accordance with the procedure applicable to proceedings on which an order of dismissal from service may be made.

(b) judicial proceedings, if not instituted while the officer was on duty

either before retirement or during re-employment, shall have been instituted in accordance with sub-clause (ii) of clause (a); and

(c) the Public Service Commission, U.P., shall be consulted before final orders are passed.

[Provided further that of the order passed by the Governor relates to a cash dealt with under the Uttar Pradesh Disciplinary Proceedings, (Administrative Tribunal) Rules, 1947, it shall not be necessary to consult Public Service Commission].

Explanation- For the purposes of this article-

(a) departmental proceedings shall be deemed to have been instituted when the charges framed against the pensioner are issued to him or, if the officer has been placed under suspension from and earlier date, on such date; and

(b) judicial proceedings shall be deemed to have been instituted:

(i) in the case of criminal proceedings, on the date on which complaint is made, or a charge-sheet is submitted, to a criminal court; and

(ii) in the case of civil proceedings, on the date on which the plaint is presented or, as the case may be, an application is made, to a civil court.

Note- As soon as proceedings of the nature referred to in this article are instituted the authority which institutes such proceedings shall without delay intimate the fact to the Audit Officer concerned."

(9) The structural analysis of Regulation 351-A is a prudent way for our purpose leads us to deduce the following principles which are not exhaustive:

(I.) Regulation 351-A by virtue of its opening sentence applies to pension or any part thereof and nothing more.

(II.) Regulation 351-A requires sanction of Governor, if departmental proceedings are not instituted while the officer was on duty before retirement or during re-employment.

(10) The necessary concomitants of Regulation 351-A for the purposes of continuity or initiation of proceedings is the pecuniary loss caused to the employer while in service or if the proceedings are initiated after retirement, such loss is bound to be shown to have occurred out of an event four years before the date of initiation of proceedings and for which the procedure to be followed would be of the proceedings on which an order of dismissal from service may be made, meaning thereby, that withholding of pension or any part thereof, is a major penalty.

(11) In the present case, it is not the case of appellants that any proceeding whatever was initiated against the respondent-employee within the meaning of disciplinary action before retirement. Even if, it may be assumed that the disciplinary proceedings in the matter for recovery of pecuniary loss are initiated with the issuance of show cause notice, yet the same in the present case was issued after the date of retirement, therefore, the case at hand is a case of initiation of proceedings after retirement.

(12) The impugned notice was issued under Regulation 351-A of Civil Service Regulations read with Rule 9(1) of U.P. Retirement Benefits Rules, 1961. Rule 9(1) of the U.P. Retirement Benefits Rules, 1961 is also extracted hereunder:

"9. Miscellaneous.-(1)

Government will have the right to effect recoveries from a gratuity or family pension sanctioned under Parts II and III in the same circumstances as recoveries can be effected from an ordinary pension under Article 351-A of the Civil Service Regulations."

(13) A conjoint reading of Regulation 351-A and Rule 9(1) extracted above leads to a simple inference that the proceedings for recovery from pension, wholly or in part, or any amount from retiral dues, cannot be initiated save with the sanction of Board of Directors.

(14) In the present case, the notice on 16.3.2011 necessarily ought to have been issued after the sanction by the Board of Directors but there is no such sanction of the Board of Directors for any such notice, therefore, the same was without jurisdiction. The resolution placed on record passed by the Board of Directors on 9.6.2011 was clearly not in existence on the basis of which the notice dated 16.3.2011 could be issued. The resolution dated 9.6.2011 under agenda item no. 155.12(ba) had resolved as under:

मद संख्या	एजेण्डे विवरण	का निदेशक मण्डल द्वारा लिया गया निर्णय
155ण12 (ब)	श्री बब्बन सिंह, जू0ई0 ;सेवानिवृत्तद्ध के विरुद्ध सी0एस0आर0 के नियम-351-ए के अन्तर्गत प्रारम्भ की गयी विभागीय जॉच कार्यवाही का अनुमोदन प्राप्त	निदेशक मण्डल द्वारा अनुमोदन प्रदान किया गया।

	करने के सम्बन्ध में।	

(15) A close reading of the minutes of the resolution aforesaid clearly shows that sanction for proceedings under Regulation 351-A alone was approved and there is no reference to Rule 9(1) of U.P. Retirement Benefit Rules, 1961 for the purposes of any recovery from gratuity or family pension.

(16) Needless to reiterate that Regulation 351-A merely provides for the recovery of loss caused to the employer by the employee from pension payable to him, wholly or in part whereas Rule 9(1) postulates recovery from the amount of gratuity or family pension admissible to an employee. In both eventualities the procedure applicable to the proceedings is the same on which an order of dismissal from service may be made, meaning thereby that the competent authority after obtaining sanction from the Board of Directors is bound to hold a regular enquiry against the charged pensioner and draw the proceedings accordingly.

(17) When the requirement of law is applied to the case at hand, it becomes clear that the competent authority had merely issued a show cause notice to the respondent-employee without drawing up any charge sheet reducing the facts in the form of definite charges as provided under Rule 7 of U.P. Government Servants (Discipline and Appeal) Rules 1999.

(18) There is no explanation either before the writ court or in appeal arising out of the writ court order, as to why such a procedure was not followed before passing the impugned order.

(19) In nutshell the impugned order was passed in utter violation of the requirements of Regulation 351-A, therefore, the justification pleaded on the basis of the resolution passed by the Board of Directors on 09.06.2021 if assumed valid, yet the procedure adopted does not satisfy the mandate of law.

(20) This Court would note that recovery from the retiral dues permitted to be made from a pensioner under Rule 9(1) of the U.P. Retirement Benefit Rules, 1991 are sanctified in no other manner than conditions provided under Regulation 351-A of Civil Service Regulations, therefore, any such action would also require a specific resolution to be passed by the Board of Directors for that purpose which in the instant case does not seem to have been done at all. The impugned order seeking to recover the pecuniary loss from the retiral dues payable to the respondent-employee without there being any sanction of the Board of Directors, in the facts and circumstances of the case is wholly without jurisdiction. This view is supported by a judgment rendered by the Apex Court in the case of **U.P. State Sugar Corporation Ltd. vs. Kamal Swaroop Tondon**, reported in (2008) AIR SCW 1241 and a Division Bench judgment of the Bombay High Court at Aurangabad in the case of **Ratnakar Bhagwanrao Mahajan vs. District and Sessions Judge, Jalna and another**, decided on 24.09.2008 (W.P. No.2555 of 2008).

(21) The impugned action resorted to in the instant case is bad in the eye of law for more reasons than one when analysed empirically but for the present, if the proceedings fall on the touchstone of want of sanctity by the Board of Directors as per law and the essential procedure which the

competent authority ought to have followed but has failed, therefore, we are unable to differ with the observation of the learned Writ Court that the ingredients of Regulation 351-A were not followed.

(22) For the reasons spelt out in the impugned judgment as well as what has been recorded above, the impugned judgment on the grounds urged before us in this appeal do not lead us to a different view calling for interference and the Special Appeal arising out of the judgment impugned is hereby **dismissed**. The direction for payment of arrears along with interest @ 7% is however set aside in the peculiar facts of the case.

(23) Before parting, we may observe that the case at hand clearly shows that the competent authority as well the Board of Directors at the relevant point of time acted *dehors* the rules which, in fact, has occasioned the loss to the Nigam simply on account of their non-obedience to the rules well known.

(24) It is a deliberate failure of the competent authority and the Board to follow the procedure prescribed under law that the imputations of pecuniary loss levelled against the employee were rendered incapable of being converted into an actionable claim. The competent authority in place at the time of issuing the notice as well as the Board responsible at the relevant point of time deserve to be proceeded against both for civil action for recovery as well as criminal action permissible under law.

(2023) 9 ILRA 220
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.07.2023

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE MANISH KUMAR NIGAM, J.

Writ A No. 10418 of 2023

Shahrukh Saleem ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
 Sri Virendra Jaiswal

Counsel for the Respondents:
 C.S.C.

Civil Law - Motor Vehicles Act, 1988 - Section 51(5) - Registration Certificate - Financier took possession of the vehicle due to default in loan repayment - Petitioner's claim that R.C. was not refused to be handed over is immaterial - Requirement of 'refusal to deliver R.C.' or 'absconding' not a sine qua non - Where loan default and repossession are proved, Registering Authority has power to issue fresh R.C. in favour of financier - Proper notice issued to petitioner - No illegality in impugned order.

Held - Once it is established that the vehicle was purchased on finance and possession taken due to default in repayment, the Registering Authority is empowered under Section 51(5) to issue a fresh R.C. to the financier - The refusal or absconding by the registered owner is not mandatory but only illustrative - Issuance of fresh R.C. in such circumstances does not cause prejudice.

Petition dismissed.

(Delivered by Hon'ble Manoj Kumar Gupta, J.
 &
 Hon'ble Manish Kumar Nigam, J.)

1. The instant petition has been filed challenging the order dated 14.06.2023 passed by respondent no. 2 i.e. Assistant Regional Transport Officer (Administration), Bareilly and for a mandamus restraining respondent no. 2 from issuing fresh Registration Certificate in favour of respondent no. 3.

2. The facts in brief are that the petitioner had taken finance from respondent no. 3 for purchasing a truck bearing Registration No. UP25 CT-6625. In the writ petition, the petitioner has not disclosed the amount of finance/assistance taken by him from the said respondent, however, it is stated in paragraph no. 5 of the writ petition that the petitioner had contributed Rs. 8,00,000/- out of Rs. 42,00,000/-, the total price at which the truck was purchased. Meaning thereby that the remaining amount was financed by respondent no. 3. It was to be returned by the petitioner in monthly installments.

3. It is also admitted in the writ petition that the petitioner could not deposit the monthly installments. It appears that respondent no. 3 on account of default on part of the petitioner in paying the installments, exercised its right to possess the vehicle. Accordingly, its possession was taken on 23.05.2021 by respondent no. 3. Thereafter, respondent no. 3 requested the Regional Transport Officer, Bareilly by filing Form-36 to issue fresh Registration Certificate (for short 'RC') in its name. When the R.T.O. did not transfer the vehicle in favour of respondent no. 3 even after lapse of considerable time, it filed writ petition No. 7366 of 2023 before this Court with the aforesaid grievance. The writ petition was disposed of vide order dated 28.04.2023 directing the R.T.O. to take final decision in the matter within six

weeks. Thereafter, the R.T.O. has passed the impugned order dated 14.06.2023, directing for grant of fresh Registration Certificate for the remaining period of validity in favour of respondent no. 3 after realizing requisite fee in exercise of power under Section 51(5) of the Motor Vehicle Act, 1988.

4. The impugned order records that after receipt of Form-36 from respondent no. 3, a notice dated 10.11.2022 was issued in Form-37 to the petitioner. In response to it, the petitioner filed his objection and submitted that the vehicle may not be transferred in favour of respondent no. 3. The objection of the petitioner was forwarded by R.T.O. to respondent no. 3 seeking its comments on the same. Respondent no. 3 submitted its reply thereto on 05.12.2022. In the said reply, respondent no. 3 reiterated that the petitioner had defaulted in payment of the outstanding amount despite notice to him. The R.T.O. in the impugned order has noted that the petitioner in his objection has not mentioned anything about payment of the outstanding amount. Thereafter, the R.T.O. being satisfied that the petitioner had taken financial assistance from respondent no. 3 for purchasing the vehicle; that respondent no. 3 had taken possession of the vehicle owing to default on part of the registered owner in repaying the loan in terms of the agreement relating to finance, directed for fresh RC being issued in name of respondent no. 3.

5. Learned counsel for the petitioner submits that power under Section 51(5) of the Motor Vehicle Act, 1988 could only be exercised in case the registered owner refuses to deliver the certificate of registration or has absconded. He submits that the original Registration Certificate

was lying in the vehicle at the time its possession was taken by respondent no. 3 and therefore, it was not a case of refusal to deliver the Certificate of Registration.

6. Section 51 (5) of the Act reads as follows:-

“(5) Where the person whose name has been specified in the certificate of registration as the person with whom the registered owner has entered into the said agreement, satisfies the registering authority that he has taken possession of the vehicle from the registered owner owing to the default of the registered owner under the provisions of the said agreement and that the registered owner refuses to deliver the certificate of registration or has absconded, such authority may, after giving the registered owner an opportunity to make such representation as he may wish to make (by sending to him a notice by registered post acknowledgment due at his address entered in the certificate of registration) and notwithstanding that the certificate of registration is not produced before it, cancel the certificate and issue a fresh certificate of registration in the name of the person with whom the registered owner has entered into the said agreement:

Provided that a fresh certificate of registration shall not be issued in respect of a motor vehicle, unless such person pays the prescribed fee:

Provided further that a fresh certificate of registration issued in respect of a motor vehicle, other than a transport vehicle, shall be valid only for the remaining period for which the certificate cancelled under this sub-section would have been in force.”

7. The main ingredient for exercise of power under sub section (5) of Section 51 is the

establishment of the fact that the registered owner had purchased vehicle by taking finance and had defaulted in repayment of the amount in terms of the said agreement. The other necessary ingredient is that the financier has taken possession of the vehicle from the registered owner. All these ingredients are fully established in the instant case. The stipulation regarding refusal on part of registered owner to hand over certificate of registration or that he had absconded is not sine qua non for exercise of the power. It only indicates that notwithstanding the aforesaid two contingencies, the registering authority still has power to cancel the certificate and issue a fresh certificate of registration in the name of person with whom the registered owner had entered into the agreement of finance.

8. The above conclusion is also borne out from perusal of Rule 61 (2) and (3) of the Central Motor Vehicles Rules, 1989 and Form 36 in which application is made by the Financier for issue of a fresh certificate of registration in its name and Form 37 in which notice is issued to the registered owner calling for his explanation. Rules 61 (2) and (3) are reproduced below:-

“Rule 61 (2) The application for the issue of a fresh certificate of registration under sub-section (5) of section 51 shall be made in Form 36 and shall be accompanied by a fee as specified in rule 81.

(3) Where the registered owner has refused to deliver the certificate of registration to the financier or has absconded then the registering authority shall issue a notice to the registered owner of the vehicle in Form 37.”

9. Form 36 and Form 37 which are also relevant are reproduced below for ready reference:-

FORM 36
 [(see rule 61 (2))]
**APPLICATION FOR ISSUE OF A
 FRESH CERTIFICATE OF
 REGISTRATION IN THE NAME OF
 THE FINANCIER**

To,
 The Registering Authority,

I/We

(financier)

have taken possession of motor
 vehicle no. make.....model

.....owing to the default of
 the registered owner.....

(name)

.....

(full address)

under the provisions of the agreement
 of hire-purchaser/lease/ hypothecation:

(1) The certificate of Registration of
 the said vehicle is surrendered herewith.

(2) The registered owner has refused
 to deliver the certificate of Registration to
 me/us.

(3) The registered owner is
 absconding.

I/We request you to cancel the
 certificate and issue a fresh certificate of
 registration in my/our name.

I/We enclose a fee of
 Rs.....

Date.....

Signature of the Financier

Specimen signature of the Financier

1.

2.

[My/Our mobile number is

.....

.....]

Copy to the original Registering
 Authority.

*Strike out whichever is inapplicable.

FORM 37
 [See rule 61 (3)]
**NOTICE TO THE REGISTERED
 OWNER OF THE MOTOR VEHICLE
 TO SURRENDER THE CERTIFICATE
 OF REGISTRATION FOR
 CANCELLATION AND ISSUE OF
 FRESH REGISTRATION
 CERTIFICATE IN THE NAME OF
 THE FINANCIER**
 (To be made in duplicate and duplicate
 copy to be sent to the Financier
 simultaneously on issue of notice)
**OFFICE OF THE REGISTERING
 AUTHORITY.**

Ref.

Number..

Dated.....

Shri/Smt./Kumari.....

.....(Regd.

Owner) is/

are hereby informed
 that.....(financier)
 has/have reported that he/they have taken
 possession of the motor vehicle bearing
 registration

number.....cover
 ed by an agreement of hire-
 purchase/lease/hypothecation, owing to
 your default under the provisions of the
 said agreement and that-

*(1) You have refused to deliver the
 Certificate of Registration to him/her/
 them.

*(2) You have absconded.

He/She/They have requested to cancel
 the Certificate of Registration and issue a
 fresh certificate of Registration in
 his/her/their name.

You are, therefore, directed to surrender the Certificate of Registration of the said motor vehicle which has been retained by you in spite of your having lost the possession and thereby the ownership of the motor vehicle under section 2(30) and to send your representation in this regard, if any, to this office within seven days from the date of receipt of this notice by you, failing which a fresh Certificate of Registration will be issued in the name of the Financier, cancelling the Certificate of Registration held by you, in accordance with section 51(5).

Date.....

.....
 *Strike out whichever is inapplicable.
 (Signature of the Registering Authority
 To
 The
 Financier.....

.....

(To be sent by Registered Post
 Acknowledgment Due)].

10. Form 36 in which application is made by the Financier for issue of a fresh certificate of registration requires the Financier to mention as to whether certificate of registration of the said vehicle is surrendered therewith or the registered owner has refused to deliver the certificate of registration or is absconding. Notice in Form 37 is issued to the registered owner only in the event he refuses to deliver the certificate of registration or had absconded. In such an event, he is called upon to surrender the certificate of registration, failing which, a fresh certificate of registration would be issued in the name of Financier, cancelling the certificate of registration held by the registered owner.

11. The aforesaid provisions clearly reveal the scheme of the Act and the Rules to the effect that when there is default on part of the registered owner in repaying the loan to the financier in terms of the agreement and on account of which the financier takes possession of the vehicle, the finance becomes entitled to a fresh certificate of registration in his name. The registered owner is, therefore, required to surrender the certificate of registration so that it is cancelled and a fresh certificate of registration is issued in the name of the financier. Where the registered owner does not surrender the certificate of registration or absconds, he is put to notice and when even thereafter the certificate of registration is not produced, the Registering Authority has been conferred with power to issue new registration certificate to the financier notwithstanding the fact that the original registration certificate had been withheld by the registered owner or had absconded. Therefore, we find no force in the submission of learned counsel for the petitioner that the power under Section 51 (5) of the Act could not be exercised unless the registered owner refuses to surrender the registration certificate or absconds.

12. Moreover, in case, the certificate was lying in the vehicle at the time it was repossessed, the impugned order directing for the vehicle being registered in the name of the financier would not cause any prejudice nor could be said to be contrary to any provision of law.

13. It also appears from the record that the petitioner had filed some complaint before the Consumer Forum and which is stated to be pending. In the written statement filed by respondent no. 3 in the said proceedings, it had taken the stand that the petitioner had taken loan of Rs.

39,00,000/- and apart from it he had also taken personal loan of Rs. 49,000/-. There is another amount of Rs. 1,01074/- which was advanced to the petitioner for taking insurance of the vehicle and the said amount was also to be repaid by the petitioner in monthly installments in which also he committed default.

14. As already noted, the petitioner has not clarified any fact relating to the amount taken as loan and the amount repaid by him.

15. Consequently, we find no merit in the present petition. The impugned order does not call for any interference in exercise of writ jurisdiction.

16. The petition is **dismissed**.

(2023) 9 ILRA 225
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.08.2023

BEFORE

THE HON'BLE VIKAS BUDHWAR, J

Writ A No. 50745 of 2017

Kuvendra Pal Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sri Bidhan Chandra Rai, Sri Ashok Khare,
Sri Bhaiya Lal Yadav, Sri V.K. Upadhyay
(Sr. Advocate)

Counsel for the Respondents:

C.S.C., Sri Dinesh Kumar Mishra, Sri G.C. Saxena S.C., Sri Shashi Nandan (Sr. Advocate).

A. Service Law – UP Pravidhik Shiksha Adhiniyam, 1962 – Section 22-A – Post of

Lecturer (Economics) – Selection – Award of the marks – Scope of interference – Director of Technical Education found irregularity in selection process and therefore disapproved the appointment – Validity challenged – Held, a close look of the minutes of the Selection Committee dated 22.01.1994 r/w the letter of the Director dated 17.05.1989 clearly goes to show that the marks have been awarded in such a manner so as to oust the deserving candidates – The Courts of law cannot be a mute spectator and in case it is found from the perusal of the documents available on record that illegality has been committed in awarding marks then obviously, the Courts would not interfere with the decision taken by the appropriate authorities under the relevant statute who are enjoined to take decision while annulling the selections. (Para 40)

B. Service Law – Constitution of India – Article 226 – Writ – Expert’s view – Scope of interference – Director, being expert of the matter found irregularity in the decision of Selection Committee in awarding the marks – Validity of Director’s decision challenged – Held, the Courts of law are not experts in academic matters relating to the award of marks by the selection committee and they cannot travel into the mind of the academicians who awarded marks under various parameters – The impugned order passed by the Director of Technical Education records valid reasons for disapproving the appointments which this Court in exercise of the jurisdiction under Article 226 of the Constitution of India cannot hold to be illegal, particularly when the Director of Technical Education is an expert of the said subject. (Para 40 and 42)

Writ petition dismissed. (E-1)

List of Cases cited:

1. Asha Saxena Vs S.K. Chaudhari & ors.; 1991 (17) ALR 267 (FB)

2. Writ C No. 5497 of 2020; Dr. Prasannanshu Vs Selection Committee Vice Chancellor, National Law University, Delhi & Anr. decided on 14.09.2020

3. Civil Misc. Writ Petition No. 53334 of 1999; Rajendra Bharti Vs Director of Technical Education, U.P. Kanpur & ors. decided on 20.05.2004

4. Dr. Salik Tewari Vs Chancellor, Gorakhpur University & ors.; 1999 (1) AWC 407

5. Rekha Chaturvedi Vs University of Rajasthan; 1993 Supp (3) SCC 168

6. B.C. Mylarappa @ Dr. Chikkamylarappa Vs Dr. R. Venkatasubbaiah & ors.; JT 2008 (11) SC 73

7. Civil Misc. Writ Petition No. 21318 of 2004; Ramesh Pati Tripathi Vs St. of U.P. & ors. decided on 02.04.2007

8. Writ A No. 19620 of 2014; Amar Pal Vs St. of U.P. & ors. decided on 08.01.2014

9. Srikantha S.M. Vs Bharat Earth Movers Ltd. decided on 07.10.2005

10. J.N. Srivastava Vs U.O.I.; AIR 1999 SC 1571

11. Dr. Keshav Ram Pal Vs U.P. Higher Education Services Commission; AIR 1986 SC 597

12. Express Newspapers Pvt. Ltd. & ors. Vs U.O.I. & ors.; 1986 (1) SCC 133

(Delivered by Hon'ble Vikas Budhwar, J.)

1. Heard Shri V.K. Upadhyay, learned Senior Counsel assisted by Shri Bhaiya Lal Yadav along with Sri Bidhan Chandra Rai, learned counsel for the writ petitioner, Sri Shashi Nandan, learned Senior Counsel assisted by Sri G.C. Saxena, learned Standing Counsel for State-respondents and Sri Dinesh Kumar Mishra, learned counsel

who appears for third and fourth respondents.

2. The brief facts of the case shorn of unnecessary details as worded in the writ petition are that the third respondent, M.G. Polytechnic, Hathras (in short 'Institute') is affiliated to Board of Technical Education governed under the provisions of the Uttar Pradesh Pravidhik Shiksha Adhiniyam, 1962, U.P. Act No. XVII of 1962 (in short '1962 Act') possessing an approved scheme of administration under Section 22-A of 1962 Act.

3. Records reveal that a government order was issued on 08.04.1991 addressed to the second respondent, Director, Technical Education, Directorate of Technical Education, District Kanpur, U.P. providing for creation of four post of Lecturers in Electronics discipline in the third respondent- institute amongst other posts.

4. It is the case of the writ petitioner that as per the provisions contained under the approved Scheme of Administration of the third respondent- institute, a selection committee was contemplated to conduct selections which consisted of (i) Chairman, Managing Committee or a person nominated by him/her, (ii) An expert selected by Chairman of Managing Committee out of the panel of experts prepared by Director of Technical Education, (iii) A representative of the Director of Technical Education, (iv) One representative of All India Council of Teacher Education/Northern region office of Government of India, Ministry of Education (Technical) and; (v) Principal.

5. In para 6 of the writ petition, it has been further averred that in order to

conduct selections for appointment on the post of Lecturers in various disciplines as per the Scheme of Administration, the second respondent Director, Technical Education, Directorate of Technical Education, District Kanpur, U.P. nominated a selection committee in particular for the post of Lecturer (Electronics), one Sri K.K. Tripathi, Head of the Department, Electronics Engineering, HBTI, Kanpur was made expert member. An advertisement was also published by the third respondent-institution in employment newspaper on 8.10.1993 inviting applications from the eligible candidates for being considered for appointment against several vacancies of Lecturers in the third respondent institution including two post of Lecturers in Electronics.

6. The writ petitioner claiming himself to be fully eligible and qualified in all respects while working on the post of Corporal in Indian Air force since 27.12.1993 applied for the post of Lecturer in Electronics on 13.10.1993. The petitioner was issued an interview letter to appear in the interview. Writ petitioner claims to have appeared in the interview.

7. In para 10 of the writ petition, it has been further averred that the selection committee comprising of Sri K.K. Tripathi, Head of the Department Electronics Engineering HBTI, Kanpur along with expert members comprising of Sri Y.P. Singh, President of Managing Committee and G.P. Singh Principal/Secretary of Committee of Institution in question on the basis of the marks obtained by the writ petitioner found him to be suitable and forwarded the entire documents in this regard before the second respondent-Director, Technical Education, Directorate of

Technical Education, District Kanpur, U.P.

8. As per the writ petitioner in purported exercise of the powers conferred under Sub-section (3) of section 22-F of the 1962 Act, the Managing Committee of the third respondent proceeded to issue an appointment order in favour of the writ petitioner on 12.03.1994 appointing him on the post of Lecturer (Electronics).

9. Proceedings of the selection committee dated 22.01.1994 was placed in the meeting of the Managing Committee which was also approved by the Managing Committee vide minutes dated 14.05.1994.

10. Writ petitioner in para 13 and 14 of the writ petition has further averred that he has wide experience to his credit and his selection was based on merit.

11. Petitioner further claims to have been accorded joining on 23.04.1994 and he was assigned various assignments which he carried out to the satisfaction of the third respondent in question. Appreciation letters have also been appointed by the writ petitioner reference whereof has been given in para 17, 18 and 19 of the writ petition.

12. Since the regular pay scale/salary was not being extended to the petitioner and one Sri Amit Mishra, who was also sailing on the same boat, so they preferred writ petition No. 106 of 1996 (S.B.) seeking relief for a mandamus commanding the respondents therein to pay regular salary to the petitioners from the date of the appointment with all consequential benefits including arrears.

13. However, in the meantime, on 18.03.1994 an order passed by the second respondent, Director, Technical Education, Directorate of Technical Education, District Kanpur, U.P. whereby the appointment of the writ petitioner was disapproved on the post of Lecturer (Electronics). Consequently, an amendment application was filed in the said writ petition which was allowed. Subsequently, the said writ petition was transferred to this court from the Lucknow bench and was re-numbered as Civil Misc. Writ A No. 25791 of 1997.

14. Records further reveal that the officiating Principal of the third respondent- institution passed an order dated 14.03.2001 terminating the services of the writ petitioner. The writ petitioner filed of ***Writ A No. 11976 of 2001 (Kuvendra Pal Singh Vs. State of U.P. and others)***.

15. In the said writ petition, an interim order was passed on 30.03.2001, which is extracted as under:

"Until further orders, the operation of the impugned order dated 14.03.2001 and dispossession of the petitioner from the official accommodation shall remain stayed."

16. The ***Writ A No. 25791 of 1997 (Amit Mishra and another Vs. State of UP and another)*** challenging the order dated 18.03.1994 passed by the second respondent, Director, Technical Education, Directorate of Technical Education, District Kanpur, U.P. came up for final consideration on 23.08.2016, wherein the order dated 18.03.1994 passed by the second respondent was set aside observing that the premise on which the disapproval has been made was non-existent as

approval was not needed of the second respondent at the stage of conducting selection but approval was needed prior to the issuance of the appointment order, in view of the language employed under Section 22 (F) of the 1962 Act. However, in the operative portion of the order while setting aside the order dated 18.03.1994, the second respondent, Director, Technical Education, Directorate of Technical Education, District Kanpur, U.P. was directed to examine the matter afresh and pass appropriate orders in accordance with law. The operative portion of the judgment and order dated 28.03.2016 passed in ***Writ-A No. 25791 of 1997 (Amit Mishra and another Vs. State of U.P. and another)*** is being quoted below;

"17. Director now shall examine the matter afresh and pass a appropriate order in accordance with law and if he does find any otherwise valid reason for disapproval, approval shall be granted and petitioner shall be entitled to all consequential benefits from the date of their appointment."

18. In the result and subject to above direction, the writ petition is allowed. Impugned order dated 18.03.1994 is hereby set aside."

17. On the same day, the writ petition preferred by the writ petitioner, ***Writ A No. 11976 of 2001*** challenging the termination order dated 14.03.2001 passed by the third respondent-institution came to be allowed entitling the writ petitioner for all consequential benefits.

18. Pleadings further reveal that the order dated 23.08.2016 passed in both the writ petitions was subject matter of challenge in SLP(C) CC No. 6810 of

2017 and SLP (C) CC No. 8260 of 2017 before the Apex Court which came to be dismissed as withdrawn on 01.05.2017 with liberty to approach high court by way of filing review petition.

19. It has also been informed that the review applications preferred by the respondents have been rejected on 04.12.2019.

20. Post remand, now the second respondent, Director, Technical Education, Directorate of Technical Education, District Kanpur, U.P. has proceeded to pass an order date 13.09.2017 cancelling the entire selection process while holding that the selection process was not in accordance with the law.

21. Questioning the order dated 13.09.2017 second respondent, Director, Technical Education, Directorate of Technical Education, District Kanpur, U.P. as well as seeking mandamus directing the respondents to restore the recommendation of the selection committee dated 22.01.1994 for a selection and appointment of the writ petitioner as Lecturer (Electronics) in the third respondent-institution, the present writ petition has been filed.

22. While entertaining the present writ petition on 01.11.2017, the order dated 13.09.2017 was kept in abeyance and notices were issued to the third and fourth respondent calling response.

23. A counter affidavit has been filed on behalf of first and second respondent sworn by the Head of the Department, Computer Government Girls Polytechnic, Allahabad on 15.12.2017 to which a rejoinder affidavit has been filed on

11.03.2018. On behalf of respondent Nos. 3 and 4 who happens to be the Managing Committee of the Committee in question and the Principal, a counter affidavit has been filed on 03.04.2018 to which a rejoinder affidavit has been filed on 14.04.2018. Further a supplementary affidavit has been filed dated 18.09.2001 which is available on record.

24. A compilation of the judgments has also been filed which is also on record.

25. Sri V.K. Upadhyay, learned Senior Counsel assisted by Sri Bhaiya Lal Yadav along with Sri Bidhan Chandra Rai, learned counsel for the writ petitioner have sought to argue that the order dated 13.09.2017 passed by the second respondent, Director, Technical Education, Directorate of Technical Education, District Kanpur, U.P. suffers from patent illegality and cannot be sustained in the eyes of law on various grounds, firstly the selections are of the year 1994 and they could not have been canceled after a period of approximately 13 years, particularly, when the writ petitioner was appointed through a selection committee constituted in accordance with the scheme of administration duly approved by the second respondent, Director, Technical Education, Directorate of Technical Education, District Kanpur, U.P. pursuant to an advertisement and conferring of benefit while issuing of an appointment order on 12.03.1994 and joining on 23.04.1994. Secondly, the order dated 18.03.1994 passed by the second respondent-Director, Technical Education, Directorate of Technical Education, District Kanpur, U.P. did not question the selection and the appointment of the writ petitioner on the ground of any illegality committed in the selections, however, the only ground taken for disapproval was that prior

approval of the Director was not taken before conducting selections and once the said ground stood disapproved in a judicial scrutiny by this Court affirmed up to the Apex Court and in review petitions then taking of a new ground questioning the selections is totally impermissible as it amounts to be an afterthought just to denude the writ petitioner of his legitimate rights. Thirdly, a procedure has been contemplated under the statute itself being the Uttar Pradesh Pravidhik Shiksha Adhiniyam, 1962 for the purposes of prescribing qualifications of appointment of Principal and Teachers and the mode of selections, then the guidelines/the letter of the second respondent, Director, Technical Education, Directorate of Technical Education, District Kanpur, U.P. addressed to the Principals of the institution dated 17.05.1989 would not apply and thus while adopting the said criteria with regard to holding the selection to be illegal is not permissible. Fourthly, the selection committee has selected a candidate on the basis of over all assessment then the second respondent, Director, Technical Education, Directorate of Technical Education, District Kanpur, U.P. has no authority under law to annul the said decision while holding the said selection to be illegal. Fifthly, while taking a decision for approving or disapproving the selection/appointment, the second respondent, Director, Technical Education, Directorate of Technical Education, District Kanpur, U.P. was not required to go into the issue with regard to the subjective and the objective analysis of the selection committee while awarding marks and further in absence of any provision contained in the statute in question nothing could be borrowed from outside. Sixthly, the order of the Director of Technical Education impugned in the writ petition tantamount to review which is

thoroughly impermissible as fresh grounds have been injected to the denude the claim of the writ petition.

26. In a nutshell, the argument of learned Senior Counsel who appears for the writ petitioner is that the selection of the writ petitioner on the post of Lecturer (Electronics) was strictly in accordance with law as per the scheme of the administration approved by the Director Technical Education, thus, there being no complaint of any corner, the selections could not be said to be illegal, particularly, when the grounds which have been taken post remand were never the ground which was earlier pressed into service.

27. Sri V.K. Upadhyay, learned Senior Counsel for the writ petitioner further submits that the guidelines which the respondents are proposing to apply in the selections which has been issued under the signatures of the Director, Technical Education, Directorate of Technical Education, District Kanpur, U.P. addressed to the Principals of Aided Institutions in the State of Uttar Pradesh is in a form of a letter, as such it does not partake the character of any Rule, Regulation or a Government Order and thus it tantamounts to introduce certain aspects which are not provided under the act itself, consequently, the said letter even does violence to the statutory enactment and the same is *ultra vires*. It is thus, being sought to be argued that any direction issued by the second respondent-Director, Technical Education, Directorate of Technical Education, District Kanpur, U.P. which is not contemplated under the Rules cannot be pressed into service so as to point out any deficiency in the selections. Submission is, only under the statutory provisions of the 1962 Act, the power vest under Section 22 of the 1962

Act to frame rules and under Section 24 to make bylaws. As the letter of the second respondent-Director, Technical Education, Directorate of Technical Education, District Kanpur, U.P. dated 17.05.1989 does not either qualify to be a rule or regulation, thus, the respondents could not have canceled the selection on the premise that the guidelines stipulated in the said letter was not followed while making selections. Further submission has been made on behalf of the writ petitioner that the writ petitioner had got himself discharged from Indian Air force and had applied for the post in question, hence it would be quite hard to cancel the selections in the year 2017 which were held in the year 1994 as in the entire service and academic career would be jeopardized. Accordingly, he prays that the order impugned in the writ petition dated 13.09.2017 passed by the second respondent-Director, Technical Education, Directorate of Technical Education, District Kanpur, U.P. be set aside and the writ petitioner be accorded all the benefits as sought in toto.

28. Countering the said submission Sri Shashi Nandan, learned Senior Counsel assisted by Sri Gopal Chandra Saxena for the State-respondents has argued that the decision of the second respondent-Director, Technical Education, Directorate of Technical Education, District Kanpur, U.P. is perfectly valid in accordance with law and no fault whatsoever can be attributed in that regard. He submits that though, the advertisement was issued in the year 1993 and the selections were conducted in the year 1994, however, the second respondent-Director, Technical Education, Directorate of Technical Education, District Kanpur, U.P. proceeded to decline approval to the appointment of the writ petitioner on a wrong premise that prior approval was

needed under Section 22-F of the 1962 Act before conducting selections, however the same was rightly turned down in the writ proceedings at the behest of the writ petitioner in *Writ A- No. 25791 of 1997* decided on 23.08.2016 while remitting the matter back to the second respondent-Director, Technical Education, Directorate of Technical Education, District Kanpur, U.P. to examine the matter a fresh and to pass appropriate orders. Consequent to the examination of the entire issue after perusing the record, the second respondent-Director, Technical Education, Directorate of Technical Education, District Kanpur, U.P. found that there were glaring irregularities conducted in the selection by the selection committee which occasioned passing of the impugned order.

29. Submission is that there is no delay in cancellation of the selection as consequent to the order passed on 23.08.2016 by Writ Court when the issue was examined then in the year 2017, the order impugned has been passed on 13.09.2017. He submits that in the wake of the fact that the order dated 13.08.1994 was an order which even in fact was not passed after examining the criteria and the procedure adopted by Selection Committee but the same was passed on the premise that prior approval before selection was not taken from the second respondent, thus it is contended that the action of the respondents cannot be faulted. Sri Shashi Nandan, learned Senior Counsel for the State while inviting the attention towards the order impugned in the writ petition has submitted that with respect to the selection of Lecturer (Electronics), two posts were advertised and as many as 110 applicants applied. He submits that as per the minutes of the selection committee, the first page of the same has been signed by the Dr. G.B.

Singh, Principal, Sri K.K. Tripathi, Special Secretary and Sri Y.P. Singh, chairman, however the second page wherein a chart has been tabulated containing the heading of academic qualification, technical qualification, attainment of marks over and above the minimum qualification and interview, there is a signature only of the Principal, members-Secretary, however the signature of Special-Secretary and chairman are found missing and in the third page, the signatures of three members is already there. It is being further demonstrated that once a selection committee comprises of three members then obviously separate marks is to be awarded under the aforesaid heading by all the three members, however there has been no separate marks awarded by the three members which even in fact is a glaring irregularity. While drawing attention towards the letter of the Director dated 17.05.1989 providing for the guidelines and the yardsticks according to which marks are to be awarded by the members of the selections committee under different heads, it is sought to be submitted that the entire selection has been tailored in such a manner so as to confer benefit to the petitioner herein and one Sri Amit Mishra as in the case of the writ petitioner (Kuvendra Pal Singh), he obtained only 5 marks under the parameter of academic qualification maximum marks being 10 and 20 marks under the parameter of technical qualification maximum 40 marks. However, he was awarded 29 marks under the parameters of viva voce, maximum 30 marks. So far as Amit Mishra is concerned, he also obtained 5 marks under the parameter of academic qualifications out of 10 marks and 30 marks under the parameters of Technical qualification maximum whereof is 40 marks and 28 marks in viva voce totally 30 marks just in

order to secure selection to them as the other candidates namely Atul Srivastava and Km. Jyoti Rawat, Ashok Kumar, they were awarded 10 marks under the parameter of academic qualification, 40 marks under the parameter of technical qualification, and they were awarded only 8 marks in interview. Illustration to the said effect has been given in the case of Atul Goyal, Piyush Chandra Gupta, Arvind Srivastava, etc. Additionally, it has been argued that as per the letter of the second respondent-Director, Technical Education, Directorate of Technical Education, District Kanpur, U.P. dated 17.05.1989 in case a candidate possesses higher qualifications then the minimum qualification so required then the maximum marks would be 20 and looking into the qualification and experience, the marks would be awarded and so far as the marks with regard to experience is concerned, two marks are to be awarded each year maximum to 10.

30. The submission is that since in the interview 1/3rd marks were required for being selected being 10 marks out of 30 marks, the selection committee just in order to eliminate the chances of deserving candidates had awarded less than 10 marks under the criteria interview out of marks 30 marks, despite the fact that those candidates had obtained higher marks under the parameters of Academic qualification and Technical qualification. According to the learned Counsel for the respondents, the letter of the Director of Technical Education dated 17.05.1989 was loud and clear and the same cannot be said to be *ultra vires* of any of the provisions contained under the 1962 Act. Additionally, it is also argued that in the normal conduct of business it is widely known that the selecting body, the case may be either U.P. Public Service Commission or Union

Public Service Commission and U.P. Subordinate Service Selection Commission they can devise their own procedure for awarding marks under different category, once the same does not find presence in the statutes.

31. Apart from the same, it has been further argued that under Section 22-F of the 1962 Act, deliberately the word “approved” has been employed which signifies that the Director before taking a decision either to approve or disapprove the selection or the appointments has to apply its independent mind after going through the records in order to be satisfied as to whether the selections were held in a legal manner or not. Thus, it is being sought to be argued that the Director cannot act as a post-office while putting his rubber stamp without perusing and being satisfied in that regard.

32. Before embarking an enquiry upon the arguments advanced by the rival parties with relation to the legality and validity of the orders impugned in the writ petition, it would be apposite to notice not only relevant statutory provisions but also the documents which would be germane for deciding the controversy in question.

**Minutes of Selection Committee dated
22.01.1994**

चयन समिति की बैठक दिनांक 22.01.1994 की
कार्यवाही की संलग्नक अंक तालिका।
प्रवक्ता इलेक्ट्रानिक्स पद (सामान्य)

क्र०सं०	अभ्यर्थी का नाम	ऐकेडेमिक योग्यता के आधार पर प्राप्तांक	टेक्नीकल योग्यता के आधार पर प्राप्तांक	न्यूनतम से अधिक योग्यता के आधार पर प्राप्तांक	साक्षात्कार के आधार पर प्राप्तांक
1	श्री अनिल कुमार सोनी	10	30	-	10

2	श्री राम कमल शर्मा	10	30	-	8
3	श्री अतुल श्रीवास्तव	10	40	-	8
4	श्री आघास कुमार शर्मा	10	20	-	10
5	श्री राहुल वर्मा	10	30	-	5
6	श्री विक्रम सिंह पवार	10	20	-	12
7	श्री मो० सुल्तान अहमद अन्सारी	0	20	-	10
8	श्री सत्यप्रकाश तिवारी	5	30	-	10
9	श्री अनुज कुमार सक्सेना	5	40	-	9
10	श्री बसन्त कुमार	10	30	-	10
11	श्री अवधेश कुमार गौतम	5	20	-	8
12	श्री नरेन्द्र सिंह	10	30	-	11
13	श्री उपेन्द्र कुमार शुक्ला	10	30	-	12
14	कु० ज्योति रावत	10	40	-	8
15	श्री अतुल गोयल	10	40	-	4
16	श्री निवास अगनोरा	10	20	-	10
17	श्री अरविन्द श्रीवास्तव	10	40	-	3
18	श्री राजेश कुमार तमैया	10	30	-	10
19	श्री पियूष चन्द्र गुप्ता	10	40	-	9
20	श्री संजय कुमार	10	20	-	8
21	ज्योति स्वरूप गुप्ता	10	30	-	11
22	श्री विवेक श्रीवास्तव	10	30	-	10
23	श्री मनोज कुमार मित्तल	10	30	-	10
24	श्री अशोक कुमार	10	40	-	8
25	श्री मोहम्मद सलीम वेग	10	40	-	9
26	श्री गोविन्द कुमार शर्मा	10	30	-	11
27	श्री देवेश कुमार द्विवेदी	10	30	-	12
28	श्री सुशील कुमार सिंह	5	30	-	10
29	श्री काली प्रकाश श्रीवास्तव	10	30	-	13
30	श्री राजेश तिवारी	5	20	-	9

31	श्री रामफल सत्यार्थी	5	20	-	9
32	श्री विजय कुमार शुक्ला	10	20	-	10
33	श्री कुवेन्द्रपाल सिंह	5	20	-	29
34	श्री राजीव कुमार सिंह	5	30	-	10
35	श्री राजीव कुमार गुप्ता	10	30	-	8
36	श्री रजनेश कुमार यादव	5	30	-	12
37	श्री शरद संजीव शर्मा	10	10	-	10
38	श्री मौन अहमद इदर्शी	10	30	-	11
39	श्री वीरेन्द्र कुमार सिंह	10	30	-	10
40	श्री प्राणेश कुमार	10	30	-	10
41	श्री विजय कुमार अग्रवाल	10	30	-	12
42	श्री सुशील कुमार शर्मा	5	20	-	5
43	श्री योगेन्द्र सिंह	5	30	-	5
44	श्री महेशपाल सिंह चौहान	10	20	-	12
45	श्री हेमन्त पुरोहित	10	30	-	10
46	श्री सन्दीप अग्रवाल	10	30	-	10
47	श्रीमती अन्जुल गंगवार	10	40	-	8
48	श्रीमती जिज्ञासा आत्रेय	5	30	-	10
49	श्री योगेन्द्र सिंह	5	20	-	5
50	श्री मनियाल	10	30	-	12
51	श्री सुदीप कुमार पण्डा	5	30	-	11
52	श्री राजेन्द्र प्रसाद यादव	10	20	-	8
53	श्री हरीपाल यादव	10	30	-	10
54	श्री अनुरूढ़ कुमार रांगा	5	30	-	10
55	श्री अमित मिश्रा	5	30	-	28
56	श्री आत्माराम	10	30	-	10
57	श्री सदरसू महेश्वरी	10	30	-	10
58	श्री उमेश सिंह	5	30	-	11
59	श्री कपिल कुमार श्रीवास्तव	10	30	-	12
60	श्री दिनेश चन्द्र	10	30	-	12
61	श्री प्रमोद कुमार अग्रवाल	5	30	-	12

62	श्री हेमचन्द्र विष्ट	10	30	-	12
63	श्री सत्य कामत	10	30	-	10
64	श्री राजीव रन्जन पाण्डेय	10	30	-	11

(डा० जी०पी० सिंह (के०के० त्रिपाठी) (वाई०पी० सिंह)

प्रधानाचार्य विशेषज्ञ सचिव, अध्यक्ष, प्रबन्ध समिति,
सदस्य सचिव हेड आफ डिपार्टमेंट, एम०जी०
प्रबन्ध समिति, इलेक्ट्रानिक्स, इंजी०, पालीटेक्निक, हाथरस।
एम०जी० एच०बी०टी०आई,
पालीटेक्निक, कानपुर।
हाथरस।

Order dated 13.09.2017 of the Director of Technical Education

मा० उच्च न्यायालय द्वारा पारित उक्त आदेश के अनुपालन में याचीगणों के चयन के अनुमोदन पर निर्णय लिये जाने हेतु संस्था एम०जी० पालीटेक्निक, हाथरस में चयन समिति द्वारा प्रवक्ता इलेक्ट्रानिक्स के 02 पद एवं प्रवक्ता विद्युत के 02 पद पर की गई चयन की कार्यवाही से सम्बन्धित संस्था प्रधानाचार्य के पत्र सं० 16 ई०एस०(ए)/481 दिनांक 15.02.1994 द्वारा प्रेषित प्रस्ताव एवं संलग्न अभिलेखों का पुनः परीक्षण किया गया, जिसमें निम्न कमियां/त्रुटियां पाई गई:-

1- संस्था के प्रेषित पत्र दिनांक 15.02.1994 द्वारा प्रवक्ता इलेक्ट्रानिक्स के 02 पद हेतु 110 अभ्यर्थियों के प्राप्त आवेदन पत्रों के आधार पर उनका विवरण उल्लिखित करते हुए 7 पृष्ठों पत्र संलग्न है तथा प्रवक्ता विद्युत (सामान्य) के 01 पद हेतु कोई विवरण पत्र संलग्न नहीं से मिलान (स्क्रीनिंग) करते हुए प्राप्त वैध आवेदन पत्र एवं निरस्त किये गये आवेदन पत्रों का निर्माण कर वैध आवेदनकर्ताओं को साक्षात्कार हेतु बुलाने का निर्माण किया जाना चाहिए था, परन्तु उक्त पत्रों पर न तो चयन समिति के सदस्यों के हस्ताक्षर हैं और न ही जन्म अनुभव प्रमाण पत्रों का मान्य/अमान्य माने जाने के सम्बन्ध में कोई टिप्पणी अंकित की गई है जो नियमों के परिप्रेक्ष्य में सही नहीं है।

2. प्रवक्ता इलेक्ट्रानिक्स के पदों पर गठित चयन समिति की बैठक दिनांक 22.1.1994 से सम्बन्धित अंकों का चार्ट प्रेषित किया गया है, जिसमें 64 अभ्यर्थियों का चयन समिति द्वारा साक्षात्कार के पश्चात प्रदत्त अंकों का विवरण 02 पृष्ठों में प्रेषित किया गया है, जिसमें प्रथम पृष्ठ पर मात्र तत्कालीन प्रधानाचार्य, एम०जी० पालीटेक्निक, हाथरस के ही हस्ताक्षर हैं तथा समिति के

अन्य 02 सदस्यों के हस्ताक्षर नहीं है। पृष्ठ-2 पर चयन समिति के तीनों सदस्यों क्रमशः 1- डा० जी०पी० सिंह, प्राधानाचार्य/सदस्य-सचिव, 2-श्री के०के० त्रिपाठी विशेषज्ञ/सदस्य, (इलेक्ट्रानिक्स) 3-श्री वाई०पी० सिंह, अध्यक्ष, प्रबन्ध समिति द्वारा हस्ताक्षर किये गये हैं। प्रथम पृष्ठ पर मात्र प्राधानाचार्य के हस्ताक्षर होने से चयन समिति के सभी सदस्यों द्वारा साक्षात्कार के अंक प्रधान किये गये हैं, सिद्ध नहीं होता है तथा एकल हस्ताक्षर होने के कारण उसको बदले जाने (Manipulation) की सम्भावना से भी इन्कार नहीं किया जा सकता है। नियमानुसार अंक चार्ट के सभी पृष्ठों चयन समिति के सभी सदस्यों के हस्ताक्षर होने आवश्यक हैं, क्योंकि चयन समिति के सभी सदस्यों द्वारा साक्षात्कार के अंक प्रदान किये जाते हैं।

3. चयन समिति द्वारा अभ्यर्थियों का साक्षात्कार निम्न आधार पर किये जाने का उल्लेख किया गया है:-

एकेडेमिक योग्यता	टेक्निकल योग्यता	न्यूनतम से अधिक योग्यता	साक्षात्कार के अधिकतम अंक
10	40	20	30

उक्त संदर्भ में निदेशक प्राविधिक शिक्षा, उत्तर प्रदेश के पत्र सं० 17-35 ए०डी० कैम्प/ई-35-एक्स विविध दिनांक 17.05.1989 द्वारा समस्त प्राधानाचार्य, सहायता प्राप्त बहुधंधी संस्थान, उत्तर प्रदेश को नियुक्ति हेतु शैक्षिक योग्यता, अनुभव तथा साक्षात्कार के लिए अंकों के मापदण्ड का निर्धारण किया गया है, जिसमें व्याख्याता पद हेतु इण्डरमीडिएट प्रथम श्रेणी-10 अंक, द्वितीय श्रेणी-05 अंक, (अधिकतम-10 अंक) डिग्री 75 प्रतिशत से अधिक-40 अंक, प्रथम श्रेणी-30 अंक, द्वितीय श्रेणी-20 अंक, (अधिकतम-40 अंक) निर्धारित अर्हता से उच्च प्राविधिक अर्हता-10 अंक, अनुभव के लिए 02 अंक प्रतिवर्ष अधिकतम 10 अंक (कुल 20 अंक) (अर्हता तथा अनुभव की प्रकृति को देखते हुए चयन समिति द्वारा अंक दिये जायेंगे) तथा साक्षात्कार हेतु 30 अंक (साक्षात्कार में एक तिहाई से कम अंक प्राप्त होने पर चयन नहीं किया जायेगा) कुल 100 अंक का निर्धारण करते हुए चयन किये जाने का प्राविधान किया गया है।

उपर्युक्त आदेश के परिपेक्ष्य में चयन समिति द्वारा न्यूनतम से अधिक योग्यता के 20 अंक प्रदर्शित किये गये हैं तथा अनुभव से सम्बन्धित किसी भी अभ्यर्थी को कोई भी अंक आवंटित नहीं किया गया है, जो नियमानुसार सही नहीं है।

चयन समिति की बैठक दिनांक 22.01.1994 की कार्यवाही के साथ संलग्न अंक चार्ट क्रमांक-19, क्रमांक-24, क्रमांक-25 पर दर्शाये गये अभ्यर्थियों को एकेडेमिक एवं टेक्निकल

योग्यता के अंक 10+40 तथा क्रमांक-9 के अभ्यर्थी को 05+40 अंक दिया जाना प्रदर्शित है, जो कि अधिकतम अंक है। परन्तु इन अभ्यर्थियों को चयन समिति द्वारा सुनियोजित तरीके से साक्षात्कार में 03 से 09 अंक प्रदान किये गये हैं, ताकि उनको चयन से वंचित रखा जा सके, चूँकि निदेशक, प्राविधिक शिक्षा, उत्तर प्रदेश के पत्र दिनांक 17.05.1989 में साक्षात्कार में एक तिहाई से कम अंक प्राप्त होने पर चयन नहीं किया जायेगा, का उल्लेख है। संलग्न अंक चार्ट के प्रथम पृष्ठ पर मात्र प्राधानाचार्य के ही हस्ताक्षर होने के कारण (चयन समिति के समस्त सदस्यों के हस्ताक्षर न होने के कारण) उक्त पृष्ठ को बदले जाने अथवा (Manipulation) किये जाने की सम्भावना है। अतः उक्त कार्यवाही नियमों के परिपेक्ष्य में त्रुटिपूर्ण एवं नियम विरुद्ध है।

4. चयन समिति द्वारा प्रेषित अंक तालिका में 64 अभ्यर्थियों में 62 अभ्यर्थियों का साक्षात्कार में न्यूनतम 03 एवं अधिकतम 13 अंक ही प्रधान किये गये हैं तथा मात्र 02 अभ्यर्थी अमित मिश्रा को 28 अंक दिये गये हैं, जिसमें प्रथम स्थान पर चयनित श्री अमित मिश्रा के (05+30+28) कुल 63 अंक तथा द्वितीय स्थान पर चयनित श्री कुवेन्द्र पाल सिंह को (05+20+29) कुल 54 अंक तथा प्रतीक्षा सूची में श्री काली प्रसाद श्रीवास्तव के (10+30+13) कुल 53 अंक होते हैं। जबकि पूर्ण चयन सूची में 09 अभ्यर्थी जिनके एकेडेमिक योग्यता के 10 अंक और टेक्निकल योग्यता (डिग्री) के 75 प्रतिशत अंक से अधिक होने के कारण 40 अंक अर्थात् कुल 50 अंक पूर्व से ही निर्धारित होने के कारण, सुनियोजित तरीके से साक्षात्कार में एक तिहाई से कम अंक प्रदान करते हुए उनका चयन नहीं किया गया क्योंकि साक्षात्कार में एक तिहाई से कम अंक प्राप्त होने पर चयन नहीं किया जायेगा का उल्लेख समिति के तीनों सदस्यों द्वारा साक्षात्कार के समय अभ्यर्थियों को दिये गये अंकों का अलग अलग विवरण पत्र संलग्न नहीं है, नियमानुसार तीनों सदस्यों द्वारा दिये गये अंकों का औसत निकाल कर साक्षात्कार के अंक प्रदान किये जाने चाहिए थे तथा उक्त कार्यवाही किये जाने की स्थिति में सभी 64 अभ्यर्थियों के साक्षात्कार के अंक पूर्णांक में नहीं हो सकते, उक्त से स्पष्ट है कि चयन समिति द्वारा नियमानुसार चयन की कार्यवाही पूर्ण नहीं की गई, अतः चयन की कार्यवाही त्रुटिपूर्ण है। उक्त से स्पष्ट होता है कि उक्त चयन प्रक्रिया निष्पक्ष/पारदर्शी रूप से सम्पन्न नहीं की गयी है।

5. निदेशक, प्राविधिक शिक्षा के पत्र दिनांक 17.05.1989 द्वारा सहायता प्राप्त संस्थाओं में सीधी भर्ती से नियुक्ति हेतु गठित चयन समितियों के लिये शैक्षिक योग्यता, अनुभव तथा साक्षात्कार के लिये अंकों के मापदण्ड का निर्धारण किया गया,

जिसमें व्याख्याता पद हेतु अनुभव के अभ्यर्थियों की योग्यता अनुभव के विवरण पत्र में अभ्यर्थियों के दर्शाये गये अनुभव के आधार पर अनुभव के कोई अंक प्रदान नहीं किये गये हैं, जबकि उक्त पत्र में साक्षात्कार के लिए निर्धारित 30 अंक (साक्षात्कार में एक तिहाई अंक प्राप्त होने पर चयन नहीं किया जायेगा) को आधार मानते हुए प्रवक्ता इलेक्ट्रानिक्स में 09 अभ्यर्थियों को साक्षात्कार में एक तिहाई से कम अंक देकर उनका चयन नहीं किया गया, तथा अभ्यर्थियों को अनुभव का कोई अंक प्रदान न कर चयन में अनियमितता बरती गई है, उक्त कार्यवाही त्रुटिपूर्ण है।

6. प्रवक्त विद्युत के पद हेतु निदेशक प्राविधिक शिक्षा, उत्तर प्रदेश के पत्र सं० 29258/ई-35-एक्स-56(एस) दिनांक 24.07.1993 द्वारा प्रवक्ता विद्युत हेतु प्राविधिक शिक्षा अधिनियम-1962 के नियम-22 एफ के क्रम में प्रेषित सूची में तीन नामों का निम्नांकित पैल संस्था को प्रेषित किया गया:-

1. डा० विश्वनाथ सिन्हा, प्रो० इलेक्ट्रानिक्स इंजी०, आई०ई०टी० लखनऊ।

2. विभागाध्यक्ष, विद्युत इंजी०, रूडकी विश्वविद्यालय, रूडकी।

3. डा० एल०पी० सिंह, प्रो० रिटायर्ड विद्युत इंजी० विभाग, आई०ई०टी० विभाग, टाइप- पांच आई०आई०टी० लखनऊ।

प्रबन्ध समिति द्वारा विशेषज्ञ सदस्य हेतु किसी 01 नाम का चयन प्राविधिक शिक्षा अधिनियम-1962 (यथा संशोधित-1974) के प्रस्तर-22 एफ (3) के अनुसार किया जाना चाहिए था, परन्तु प्रधानाचार्य द्वारा दिनांक 21.01.1994 को चयन समिति की बैठक में उपर्युक्त तीनों विशेषज्ञों के स्तान पर श्री के०के० त्रिपाठी हेड आफ डिपार्टमेंट इलेक्ट्रानिक्स इंजी०, एच०बी०टी०आई०, कानपुर को विशेषज्ञ/सदस्य नियुक्त किये जाने के कारण उक्त चयन विधिक रूप से अमान्य है। क्यों कि प्रवक्ता विद्युत पद हेतु गठित विशेषज्ञ पैल से विषय विशेषज्ञ न लेकर इलेक्ट्रानिक्स विषय हेतु गठित पैल से विशेषज्ञ श्री के० के० त्रिपाठी से साक्षात्कार कराया जाना नियम विरुद्ध है।

अतएव उपरोक्त कमियों/त्रुटियों के कारण प्रधानाचार्य, एम०जी० पालीटेक्निक हाथरस के पत्रांक 16 ई०एस०(ए)/481 दिनांक 15.02.1994 द्वारा प्रेषित चयन समिति की संस्तुति के आधार पर प्रवक्ता इलेक्ट्रानिक्स पद हेतु चयनित अभ्यर्थी श्री अमित मिश्रा एवं श्री कुवेन्द्र पाल सिंह तथा प्रवक्ता विद्युत पद हेतु चयनित श्री अनुराग सिंह एवं श्री रामनयन निषाद (अनुसूचित जाति) के चयन का अनुमोदन प्रदान किया जाना सम्भव नहीं है।

अतः मा० उच्च न्यायालय द्वारा पारित आदेश दिनांक 23.08.2016 के अनुपालन में परीक्षणोपरान्त चयन का अनुमोदन प्रदान न करते हुए, चयन की कार्यवाही को निरस्त किया जाता है।

(कफील अहमद)

निदेशक

प्राविधिक शिक्षा, उत्तर प्रदेश।

Letter of Director of Technical Education **order dated 17.05.1989**

प्रेषक,

निदेशक,

प्राविधिक शिक्षा,

कानपुर।

सेवा में,

समस्त प्रधानाचार्य

सहायता प्राप्त बहुधन्धी संस्थान,

उत्तर प्रदेश।

संख्या:- 17-35 एडी कैम्प/ई-35-एक्स-विविध कानपुर:

दिनांक 17 मई 1989

विषय:- सहायता प्राप्त पोलीटेक्निकों में चयन समितियों के अन्तर्गत पदों पर सीधी भर्ती से नियुक्ति हेतु गठित चयन समितियों के लिए शैक्षिक योग्यता अनुभव तथा साक्षात्कार के लिए अंकों के मापदण्ड का निर्धारण।

महोदय,

उपर्युक्त विषयक सहायता प्राप्त संस्थाओं में नियुक्तियों के सम्बन्ध में निर्देश दिये जाते हैं कि तत्काल प्रभाव से विभिन्न पदों पर नियुक्तियों के चयन हेतु शैक्षिक योग्यता, अनुभव तथा साक्षात्कार के लिए निम्न प्रकार अंकों का मापदण्ड निर्धारित किया जाए चयन के लिए गठित समितियाँ इसके अनुसार ही अभ्यर्थियों का चयन करेंगी-

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यह भी निर्देश दिये जाते हैं कि कृपया उपर्युक्त निर्णय से चयन समितियों के सदस्यों को यज़ासमय अवगत कराया जाना सुनिश्चित करने का कष्ट करें।

33. I have heard the learned counsel for the rival parties and perused the record carefully.

34. Undisputedly, the present controversy relates to the selection on the post of Lecturer Electronics in third respondent- institution, M.G. Polytechnic, Hathras. It is not in dispute that as per the

Section 22-A of the 1962 Act, there happens to be an approved Scheme of Administration of the third respondent-institution. Further parties are also in agreement that the said Scheme of Administration was approved by the second respondent-Director, Technical Education, Directorate of Technical Education, District Kanpur, U.P. on 28.12.1990. As per the rival parties on 08.04.1991, four posts of Lecturers in Electronics were sanctioned and on 24.07.1993 in accordance with the Scheme of Administration, a selection committee was constituted for selection on the post of Lecturer Electronics comprising of Shri K.K. Tripathi, Head of the Department Electronics Engineering HBTI, Kanpur as expert member. Pursuant to the advertisement, the writ petitioner along with the others applied and they were selected. The contention is that the selections held in the year 1994, selecting the writ petitioner could not have been cancelled after a period of approximately 13 years as it was too late of the day to cancel the selections. The said argument of the learned Counsel for the writ petitioner though appears to be attractive at the first blush but it is liable to be rejected at the very threshold as the entire exercise undertaken by the second respondent-Director, Technical Education, Directorate of Technical Education, District Kanpur, U.P. was in pursuance of the order of the Writ Court dated 23.08.2016 passed in Writ-A No. 25791 of 1997 (Amit Mishra and another Vs. State of U.P. and others) whereby though the disapproval order dated 18.03.2014 was set aside by this Court but matter was remitted back to the second respondent-Director, Technical Education, Directorate of Technical Education, District Kanpur, U.P. to pass a fresh order in accordance with law. Once the order of the Writ Court has attained finality then the objection of delay, if any, is not available with the writ petitioner.

35. So far as the another limb of the argument of the learned Senior Counsel for the writ petitioner that the grounds which have been taken in the order impugned was available with the Director before he proceeded to pass the order dated 18.03.1994 is concerned, the same also does not hold any water, particularly when the Director at the time of the passing of the order dated 18.03.1994 had not adverted to the merits but had proceeded to pass an order on the premise that prior approval before selection was not taken.

36. As regards, the argument of learned Senior Counsel for the writ petitioner that the impugned order dated 13.09.2017 suffers from malice in law and fact, since the said grounds for disapproval were never taken either at the stage of filing of Special Leave Petition before the Hon'ble Supreme Court and review is concerned, this Court is of the opinion that there was no occasion for the second respondent-Director, Technical Education, Directorate of Technical Education, District Kanpur, U.P. to have taken the said grounds in the pleadings either in Special Leave Petition or Review as the said ground became available post remand by virtue of the order dated 23.08.2016 in Writ A No. 25791 of 1997.

37. Much emphasis has been laid upon by the learned Senior Counsel for the writ petitioner, that Section 22-A, 22-E read with Section 22-F provides for the appointment of the members of the selection committee, qualifications for appointment of Principals and Teachers and is wide enough to govern the selection procedure to be adopted by the selection committee and thus the letter of the Director of Technical Education, second respondent being non-statutory is *ultra*

vires and in excess of the authority vested with it and accordingly the reliance so placed on the letter of the Director dated 17.05.1989 for holding the selections illegal was totally uncalled for, in the opinion of the Court, is misconceived and out of context, inasmuch as, the 1962 Act no doubt is a statutory enactment dealing with the various aspects of the matter, however, from the plain reading of the statutory enactment in the shape of 1962 Act, this Court finds that there is no procedure envisaged as to how the Selection Committee is to award marks and what would be the criteria in awarding the marks. In order to deal with the said eventuality, the Director of Technical Education has modulated a guidelines which is in the form of the letter dated 17.05.1989. Even in fact the guidelines in the shape of letter dated 17.05.1989 does not supplant and does violence with the provisions of the statutory enactment but it provides an aid for giving effect to the aims of the object of the statute for conducting selections. Moreover, law does not contemplate vacuum as once certain aspects of the matter are missing in a statute then they can obviously be dealt with by filling the gaps while issuing Government orders or departmental letters in that regard. Obviously, the Selection Committee cannot be given a free hand to conduct selections according to its whims and fancies as there has to be a codified guidelines providing for the awarding of marks under various parameters. Thus, according to Court, the inter- departmental letter dated 17.05.1989 of the Second respondent- Director, Technical Education, Directorate of Technical Education, District Kanpur, U.P. cannot be said to be illegal or *ultra vires* more so, when the writ petitioner had not challenged the said letter in the present petition.

38. Now coming to another aspect of the matter, whether there was any discretion available to selection committee in awarding marks to the respective candidates in the wake of the letter of the Director Technical Education, second respondent dated 17.05.1989. A close reading of the recommendations/minutes of the Selection Committee dated 22.01.1994 with regard to post of Lecturer Electronics would go to show that though they were two posts earmarked for Lecturer Electronics but as many as 110 applicants applied for the same. 64 candidates appeared before the Selection Committee. The total number of marks for selection on the post of Lecturer Electronics was 100. Bifurcation of the same is maximum 10 marks for Academic Qualification, 40 marks for Technical Qualification, 20 marks for a candidate who is possessing higher qualifications then the minimum qualifications and 30 marks for Interview. The letter of the Director Technical Education, Kanpur dated 17.05.1989 further bifurcates the marks under various parameters with regard to Instructors having High School plus Diploma, Instructors Intermediate Plus Diploma and Lecturers, Intermediate plus Degree. Here, as apparent from the minutes of the Selection Committee dated 22.01.1994 the candidates have been awarded marks under the Academic Qualification, Technical Qualification and Interview, however, none of the candidates were awarded marks under the parameters of possession of higher marks then the minimum marks which is maximum 20. The letter of the Director Technical Education, Kanpur dated 17.05.1989 itself provides maximum 20 marks for those candidates who have educational qualification over and above the minimum qualification with experience and with regard to experience, two marks

have to be awarded every year maximum to 10. Though it is being sought to argued on behalf of learned Senior Counsel for the writ petitioner that it was the discretion of the members of the Selection Committee to award marks under the said parameter or not and their assessment cannot be put to scrutiny by the second respondent- , Director, Technical Education, Directorate of Technical Education, District Kanpur, U.P. and even by this Court in exercise of Article 226 of the Constitution of India, thus the awarding of marks by the experts could not be questioned. Sri Shashi Nandan, learned Senior Counsel who appears for the State-respondents submits that there is no question of any discretion available with the Selection Committee as these marks are codified and once any candidate has educational qualifications more than the minimum and experience then he/she ought to have been granted marks and it is highly inconceivable that none of the candidates were to be granted marks under the said parameters.

39. In the opinion of the Court, the marks which were earmarked to be 20 under the parameters of possession of higher qualification then the minimum qualification and experience is codified mark thus non-awarding of the marks itself amounts to a situation whereby the Selection Committee had committed an error, particularly, when large number of candidates were already present and participated in the selections. Insofar as the other finding recorded in the order impugned that just an order to eliminate the chances of selections of deserving candidates, they have been granted less marks under the parameter, interview is concerned, a perusal of the minutes of the Selection Committee dated 22.01.1994 shows that the candidate at serial No. 3

Atul Srivastava, serial No. 14 Kumari Jyoti Rawat, serial No. 15 Atul Goyal, serial No. 17 Arvind Srivastava, serial No. 24 Ashok Kumar, serial No. 25 Md. Salim Beg, serial No. 47 Smt. Anjul Gangman had obtained 10 marks under the parameters of academic qualification and 40 marks under Technical qualifications, however they were awarded 08, 08, 04, 03, 08, 09 and 08 marks in interview. As already discussed above, the total marks for interview was 30 and in case a candidate obtained less than 1/3rd marks that he would be eliminated from selection, thus as per the impugned order in order to deprive the said deserving candidates, they were awarded less marks, as whereas the writ petitioner whose name finds place at serial No. 33 he obtained 5 marks under academic qualification, 20 marks under Technical qualification and was awarded 29 marks under the parameter of interview so as to give him total 55 marks. In the case of one Sri Amit Mishra whose name finds at serial No. 55, he obtained 5 marks under the parameter of academic qualification and 30 marks under Technical qualification and he was awarded 28 marks making him selected. Though Sri V.K. Upadhyay, learned Senior Counsel for the writ petitioner submits that awarding of marks in interview is based upon various factors, performance of the candidates and its alertness at the time of interview and the said assessment of selection committee cannot be questioned. On the other hand, Sri Shashi Nandan who appears for the State respondents submits that there is no quarrel to the said proposition but the facts of the case are itself clear that just in order to eliminate the deserving candidates, the entire exercise has been undertaken and it cannot be said a sheer co-incidence as the same can be with respect to one or two candidates but not with regard to many candidates as depicted in the minutes of the

Selection Committee and in particular the fact that no marks were awarded under the parameters of possession of higher qualifications over and above the minimum qualifications and experience.

40. Though the Courts of law are not experts in academic matters relating to the award of marks by the selection committee and they cannot travel into the mind of the academicians who awarded marks under various parameters. However what is to be seen is the fact that as to whether there exist a codified procedure or criteria for awarding marks or not in the shape of any guidelines. In the present case, there exist a letter of the Director of Technical Education, second respondent dated 17.05.1989 dealing with the said subject providing for the criteria on the basis where of marks are to be awarded to a candidate under various parameters. A close look of the minutes of the selection committee dated 22.01.1994 read with the letter of the Director dated 17.05.1989 clearly goes to show that the marks have been awarded in such a manner so as to oust the deserving candidates. The Courts of law cannot be a mute spectator and in case it is found from the perusal of the documents available on record that illegality has been committed in awarding marks then obviously, the Courts would not interfere with the decision taken by the appropriate authorities under the relevant statute who are enjoined to take decision while annulling the selections. In view of the irregularities, noticed in the order of the Director of Technical Education, second respondent dated 13.09.2017, this Court finds inability to take a different view from a view which has already been taken by an authority enjoined under the statute to take a decision.

41. Notably, the Director of Technical Education under section 22-F of

the 1962 Act is to accord approval to the appointments. The said power is wide enough so as to examine the record in order to find out as to whether the selections were done in accordance with law or not. The Director on the receipt of the recommendation of the selection committee is to apply its mind which signifies that he has to seriously go through the process and the procedure adopted by the selection committee and act in a impartial and transparent manner. The Director cannot be a postman so as to put his rubber stamp while approving the selection. The legislature while enacting Section 22-F was quite conscious and that is why approval was required at the stage of appointment and not at the stage of selection as the two said stages are quite different. Approval at the stage of appointment implies that the Director in exercise of powers under Section 22-F of the 1962 Act is to examine the various aspects relating to the merits of the selection and the procedure adopted by the selection committee.

42. Interestingly, the impugned order passed by the Director of Technical Education records valid reasons for disapproving the appointments which this Court in exercise of the jurisdiction under Article 226 of the Constitution of India cannot hold to be illegal, particularly when the Director of Technical Education is an expert of the said subject enjoined under the statutory provision to examine the record and to take a decision either to approve or disapprove the appointments.

43. Learned Senior Counsel for the writ petitioner has though relied upon the judgement in the case of *Asha Saxena Vs. S.K. Chaudhari and Ors.* a full Bench decision reported in *1991 (17) ALR 267* so

as to contend that it was not justified on the part of the respondents in cancelling the selections after a long span of time, however, the said judgement is of no aid to the writ petitioner, particularly when the said judgements relates to a seniority dispute wherein the seniority list was challenged by the aggrieved person after enormous and unexplained delay which resulted in creation of vested rights in favour of the other party. However, in the present case, the issue is with regard to selections and by virtue of the order of the Writ Court in a writ petition preferred by the writ petitioner itself the matter was remitted back to the Director of Technical Education to pass appropriate orders. Reliance has also been placed upon the judgment of Hon'ble Delhi High Court in *Writ-C No. 5497 of 2020 (Dr. Prasannanshu Vs. Selection Committee Vice Chancellor, National Law University, Delhi & Anr. decided on 14.09.2020, Civil Misc. Writ Petition No. 53334 of 1999 (Rajendra Bharti Vs. Director of Technical Education, U.P. Kanpur & Others) decided on 20.05.2004, Dr. Salik Tewari Vs. Chancellor, Gorakhpur University and others in 1999 (1) AWC 407, Rekha Chaturvedi Vs. University of Rajasthan in 1993 Supp (3) Supreme Court Cases 168, B.C. Mylarappa @ Dr. Chikkamylarappa Vs. Dr. R. Venkatasubbaiah and Ors. reported in JT 2008 (11) SC 73, Civil Misc. Writ Petition No. 21318 of 2004 (Ramesh Pati Tripathi Vs. State of U.P. & others) decided on 02.04.2007, Writ A No. 19620 of 2014 (Amar Pal Vs. State of U.P. And 3 others) decided on 08.01.2014, Srikantha S.M. Vs. Bharat Earth Movers Ltd. decided on 07.10.2005, J.N. Srivastava Vs. Union of India reported in AIR 1999 SC 1571, Dr. Keshav Ram Pal Vs. U.P. Higher Education Services Commission, reported*

in AIR 1986 SC 597 and Express Newspapers Pvt. Ltd. And others Vs. Union of India and others reported in 1986 (1) SCC 133, so as to buttress the submission that the selection committee vest with wide powers to award marks and the said assessment cannot be put to judicial scrutiny and further delay in cancellation of selection is not either justified nor permissible under law. There is no quarrel to the aforesaid proposition of law, however applicability of the judgements depends upon the facts of the individual case. Here in the present case, the decision of the selection committee was put to scrutiny before the Director of Technical Education as per the statute, the Director of Technical Education being an expert found glaring irregularities in the selection procedure. This Court under Article 226 of the Constitution of India in writ jurisdiction cannot act as a super expert sitting over the decision of the Director who is also an expert in the relevant subject.

44. More so, when in the present case, there are certain redeeming features which even in fact denude then the writ petitioners for grant of benefits namely (i) letter dated 17.05.1989 not only provides for the parameters under which marks is to be awarded but also codifies the marks (ii) non-awarding of marks to any candidates by the Selection Committee under the parameter of possession of higher qualification than the minimum and experience totaling to marks 20 marks. (iii) Awarding of less than 1/3rd marks in many cases under the parameter of interview, the candidates who obtained higher marks under the parameters of Academic and Technical qualifications. (iv) awarding of higher marks under the parameters of interviews to those candidates who had

obtained less marks under the parameters of Academic qualification and Technical qualification (v) Non-challenge to the letter of the Director Technical Education dated 17.05.1989 providing for the guidelines for awarding marks under various parameters (vi) Director of Technical Education while considering the case approval/disapproval is enjoined to examine the records of the Selection Committee and to take a decision after recording reasons and passing an informed decision. (vii) There is no delay in canceling the selection.

45. Lastly, it has also been argued on behalf of the writ petitioner that none of the candidates who had appeared in the selection and who have been awarded lesser marks in the interview had filed any complaint or preferred any writ petition alleging that they were illegally excluded from the selection thus, the exercise of the power by the Director Technical Education, second respondent, could not be said to be justified. In the opinion of the Court, mere non-challenge on the part of any of the candidate would not matter, particularly when selections have been conducted in utter disregard to the letter of the Director of Technical Education dated 17.05.1989 and there were various shortcomings noticed by Director, Technical Education.

46. Though in the order impugned of Director of Technical Education, second respondent other shortcomings have been noticed that the every page of the minutes of the selection committee dated 22.01.1994 did not bear signatures of the three members of the selection committee but in view of the other core and fundamental issues, noticed and discussed above, this Court is not addressing to the same.

47. On equity, Shri V.K. Upadhyay, learned Senior Counsel for the writ petitioner has submitted that the writ petitioner has been confronted with a peculiar situation as one hand, he after getting himself discharged from Indian Air force had applied for selection and appointment on the post of Lecturer (Electronics) but his appointment was not approved by the Director of Technical Education and on the other hand on being terminated by the officiating Principal of the Institute on 14.03.2001, the writ petitioner preferred *Writ A No. 11976 of 2001* in which an interim protection was granted and finally the writ petition was decided in his favour on 23.08.2016 but he was never allowed to join the post in question. He thus submits that the entire academic qualification and service career of the writ petitioner would be jeopardized. This Court in the wake of the categorical finding recorded by the Director of Technical Education in its order dated 17.09.2017 is unable to come to the rescue of the writ petitioner. However, in case of non-according of joining on the post of Lecturer (Electronics) at the end of the management of the respondent-institute, it is always open for the writ petitioner to claim damages from it.

48. Resultantly, in view of the foregoing discussion, this Court is of the firm opinion that the order of Director of Technical Education, second respondent dated 13.09.2017 does not suffer from any manifest illegality so as to warrant any interference in the present proceedings.

49. Accordingly, the writ petition is **dismissed**.

50. Interim order, if any, stands vacated.

51. No order as to cost.

(2023) 9 ILRA 244

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 29.08.2023

BEFORE

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

THE HON'BL RAJEEV MISRA, J.

Writ A No. 53425 of 2015

Sunil Kumar Singh III ...Petitioner
Versus

State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:

Sri Pankaj Kumar Singh, Sri Ashok Khare,
Sri Ashok Kumar Nigam, Sri Vikas Budhwar

Counsel for the Respondents:

C.S.C., Sri Manish Goyal, Sri Ashish Mishra

A. Service Law – Civil Judge (Junior Division) – Adverse entry – Circular dated 15.05.2007 provides that the material which is sought to be relied upon, for awarding the adverse entry must be disclosed to the concerned Officer – Non-compliance thereof made the review application liable to be allowed – In enquiry nothing adverse was found against the petitioner – Effect – Circular dated 19.05.2007 directs the reporting authority to write Annual Confidential Remarks of Judicial Officers – Non-compliance – Effect – Held, once the complaints made against the petitioner were found untruthful, the very basis for awarding adverse entry to the petitioner has vanished. It would thus be a travesty of justice to maintain the adverse entry awarded to the petitioner even when the complaints made against him were found untruthful – High Court, after quashing the adverse entry, directed to award promotion to HJS Cadre with retrospective effect i.e.

UPHJS 2015. (Para 11, 29, 32, 34, 37 and 38)

B. Interpretation of Statute – Rule of construction – Where the law prescribes a thing to be done in a particular manner, it can be done in that manner alone and not otherwise – *Nazir Ahmand's case* relied upon (Para 29)

Writ petition allowed. (E-1)

List of Cases cited:

1. Rajendra Singh Verma (dead) through & ors. Vs Lieutenant Governor (NCT of Delhi); (2011) 10 SCC 1
2. Nazir Ahmad Vs King Emperor; AIR 1936 Privy Council 253
3. Writ A No. 60546 of 2015; Khaliquzzama Vs St. of U.P. & ors. decided on 22.05.2017
4. Service Bench No. 6108 of 2017; Rajvir Singh Vs Hon'ble Allahabad High Court Alld. Thru. Registrar General & ors. decided on 01.10.2018

(Delivered by Hon'ble Rajeev Misra, J.)

1. This writ petition under article 226 of the Constitution of India has been filed for a writ of certiorari seeking quashing of annual confidential remarks awarded by the District Judge, Ghaziabad to the petitioner for the year 2013–14 (Annexure-2 to the writ petition), the decision taken by Administrative Committee of High Court of Judicature at Allahabad as communicated to the petitioner, vide letter dated 1.6.2015, (Annexure- 4 to the writ petition) rejecting representation of the petitioner against the said adverse entry inasmuch as, in the opinion of Administrative Committee, no illegality was committed by the then District Judge in awarding adverse entry to the petitioner for the year, 2013-14, as well as communication dated 4.7.2015 (Annexure-

6 to the writ petition), whereby the second representation filed by petitioner against the adverse entry awarded to him for the year 2013-14, has also been rejected, but on the ground of maintainability.

3. Record shows that the petitioner Sunil Kumar Singh-III was selected by the U.P. Public Service Commission for U.P. Judicial Services in the year 2000. After selection, petitioner was duly appointed as Civil Judge, Junior Division and was posted at Lucknow on 23.12. 2003. It is the case of the petitioner that since his initial appointment, his work and conduct has always been appreciated by his superiors. On account of above, petitioner has been awarded good/very good entries in his Annual Confidential Reports in his tenure of service up to the period 2012-13. For ready reference, the details of the same are tabulated herein under:

Sl. No.	Year	Place of posting	Integrity	Rating	Authority
1.	2003-04	Lucknow	Certified	Good	Administrative Judge
2.	2004-05	Saharanpur	Certified	Good	Adverse remark as fair was expunged by Hon'ble Court as per information communicated to District Judge Saharanpur vide Registrar Confidential D.O. No. C. 130/Df. (A)/2006 dated 23.2.2006.
3.	2005-06	Saharanpur	Beyond doubt	Good	District Judge
4.	2006-07	Saharanpur	Beyond doubt	Good	District Judge
5.	2007-08	Saharanpur	Certified	Good	Administrative Judge

6.	2008-09	Kanshiram Nagar	Certified	Very Good	Administrative Judge
7.	2009-10	Kanshiram Nagar	Beyond doubt	Very Good	District Judge
8.	2010-11	Kanshiram Nagar	Beyond doubt	Very Good	District Judge
9.	2011-12	Kanshiram Nagar	Certified	Good	Administrative Judge
10.	2012-13	Ghaziabad	Certified	Good	Administrative Judge
11.	2013-14	Ghaziabad	Doubtful	Average	Subject matter of present writ petition
12.	2014-15	Pilibhit	Awaited	Awaited	--

4. In the year 2013–2014, petitioner was posted as Additional Chief Judicial Magistrate at Ghaziabad. According to petitioner, he had performed his duty to the best of his ability, yet in the year 2013–14, the then District Judge, Ghaziabad awarded an adverse entry to petitioner for the said period i.e. 2013-14, which is to the following effect **“Integrity doubtful” as there are several complaints against the petitioner.**

5. Feeling aggrieved by the aforesaid adverse entry awarded to petitioner, he made a representation dated 10.10.2014 before the High Court, Allahabad. According to the learned counsel representing respondent 2, since the then District Judge, Ghaziabad, who had awarded aforementioned adverse entry to petitioner, was elevated to the Bench of this Court and also in view of the resolution dated 01.10.1997 passed by the Administrative Committee of this Court as well as in accordance with the provisions of Chapter 3 Rule 4 of the High Court Rules, the said representation of the petitioner was

placed before a Committee of the High Court. The said committee upon consideration of the representation of the petitioner made the following recommendation:-

"The officer has submitted above mentioned representation dated 10.10.2014 against the adverse remarks recorded by the then District Judge, Ghaziabad (as Hon'ble Judge of this Court) for the year 2013-14, reproduced below:

<i>"1(a) Integrity of the Officer whether beyond doubt, doubtful or positively lacking. Note: If the officer's integrity is doubtful or positively lacking, it may be so stated with all relevant facts, reasons(s) supporting material.</i>	<i>Doubtful There were several complaints</i>
<i>2. Overall assessment of the merit of the officer (outstanding, Very Good, Good, Average, Poor)</i>	<i>Average</i>

6. Subsequent to above, the Administrative Committee of this Court rejected the aforesaid representation filed by the petitioner, vide undated Item Agenda Number-20 of the meeting dated 1.6.2015. The said decision was communicated to petitioner by the Deputy Registrar of High Court, vide his letter dated 1.6.2015. For ready reference, the decision of the Administrative Committee referred to above is extracted herein under:

"Agenda Item No. 20:

Representation dated 10.10.2014 of Shri Sunil Kumar Singh - III, the then Additional Chief Judicial Magistrate, Ghaziabad presently posted as Civil Judge (Senior Division), Pilibhit.

"The officer has submitted above mentioned representation dated 10.10.2014 against the adverse remarks

recorded by the then District Judge, Ghaziabad (as Hon'ble Judge of this Court) for the year 2013-14, reproduced below:-

"1(a) Integrity of the officer whether beyond Doubtful, doubtful or positively lacking. There were several Note: If the officer's integrity is doubtful or complaints, positively lacking, it may be so stated with all relevant facts, reason(s) & supporting material.

2. Overall assessment of the merit of the officer Average (outstanding, Very good, good, Average, Poor)

We have perused the representation of the officer, the ACR recorded by the then District Judge (as Hon'ble Judge of this Court) for the relevant year.

The officer in his representation has stated that the District Judge did not send remarks in time, to the High Court and no reason for delay has been recorded. There is no material for recording his integrity as doubtful. The remarks have not been given in prescribed proforma. The reporting officer has not disclosed the nature and particulars of the complaints. He has worked with utmost devotion, sincerity and integrity and no complaint was ever brought to his notice. He has requested to expunge the adverse remarks recorded by the District Judge, Ghaziabad (Now Hon'ble Judge of Court) for the year 2013-14.

We have been informed that a Vigilance Enquiry no.13/2014 is also pending against the officer.

The Committee is of the view that the then District Judge, later on elevated as the Hon'ble Judge of the High Court, after witnessing the work and conduct of the officer for the whole of the year, has doubts about the integrity of the officer, the same can not be said to be

without any basis. Therefore, the representation of the officer is devoid of any force and is recommended to be rejected."

7. Subsequently, the petitioner made another representation dated 10.10.2014 with the prayer that matter be placed before Administrative Committee for considering the adverse entry awarded to the petitioner for the year 2013–2014 in the light of the facts stated in the representation itself. However, the said representation was not considered on the ground that since the said representation is second representation, therefore, same is not maintainable. A communication dated 4.7.2015 was sent to petitioner regarding aforesaid. For ready reference, the same is reproduced herein under:

"I am desired to refer to the representation dated 16.5.2015 of Sri Sunil Kumar Singh-III the then A.C.J.M Ghaziabad presently Civil Judge (Sr. Div). Pilibhit against the adverse remarks occurring in the annual confidential remarks recorded by the then District Judge, Ghaziabad for the year 2013-14 as well as for upgradation of his overall assessment of merit and to say that on its consideration, the Hon'ble Court has been pleased to order that the said representation be filed as the same is not enertainable in view of full Court resolution dated 6.1.1990 being second in nature.

Sri Sunil Kumar Singh-III, aforesaid may kindly be informed accordingly"

8. Thus feeling aggrieved by above, petitioner has now approached this court by means of present writ petition.

9. Instant writ petition came up for admission on 17.9.2015 and this court passed the following order:

"C.A. within a period of one month.

R.A. within two weeks thereafter.

List this petition for admission/hearing in the week commencing 26 October 2015"

10. In compliance of above order dated 17.9.2015, a counter affidavit has been filed by the High Court, wherein the claim of petitioner has been disputed. Ultimately present writ petition came to be dismissed, vide order dated 22.1.2020 passed by a Division Bench of this court comprising of Hon'ble Mr Justice Sudhir Agrawal and one of us Hon'ble Mr. Justice Rajeev Misra. The order dated 22.1.2020 reads as under:

"1. Heard Sri Vikas Budhwar, learned counsel for petitioner and Sri Ashish Mishra, learned counsel for respondent.

2. Petitioner has been communicated adverse entry by District Judge, Ghaziabad in Annual Confidential Remark (hereinafter referred to as "ACR") for the period 01.04.2013 to 31.03.2014, and has withheld integrity of petitioner.

3. Learned counsel for petitioner submitted that no specific reasons have been given, but he could not dispute that withholding of integrity has been confirmed by Administrative Judge and also by this Court's Administrative Committee.

4. Aforesaid orders having become final, we do not find that there is any reason to interfere with remarks given

by District Judge, since, same stands already endorsed by Administrative Judge as well as Administrative Committee of this Court. Moreover, aforesaid orders are not under challenge in this petition.

5. Dismissed accordingly. Interim order, if any, stands vacated. ”

11. Feeling aggrieved by aforementioned order dated 22.1.2020, petitioner filed a review petition seeking review of the order dated 22.1.2020 and same came to be registered as Review Application No. 8 of 2020. The aforesaid review application was nominated by Hon'ble the Chief Justice to this Bench as Hon'ble Sudhir Agarwal, J. was not available. The review application came to be allowed by this court vide order dated 10.5.2023. The same reads as under:

“(Order on the Review Application)

1. Heard Mr. Ashok Kumar Nigam, the learned counsel for review petitioner, the learned Standing Counsel representing Respondent 1 and Mr. Rakesh Mishra, the learned counsel representing Respondent 2.

2. This review petition has been filed seeking review of the order dated 22.01.2020 passed by a Division Bench comprising of their Lordships Hon'ble Mr. Justice Sudhir Agarwal and Hon'ble Mr. Justice Rajeev Mishra. For ready reference, the above order dated 22.01.2020 is extracted hereinunder:-

“1. Heard Sri Vikas Budhwar, learned counsel for petitioner and Sri Ashish Mishra, learned counsel for respondent.

2. Petitioner has been communicated adverse entry by District Judge, Ghaziabad in Annual Confidential Remark (hereinafter referred to as

“ACR”) for the period 01.04.2013 to 31.03.2014, and has withheld integrity of petitioner.

3. Learned counsel for petitioner submitted that no specific reasons have been given, but he could not dispute that withholding of integrity has been confirmed by Administrative Judge and also by this Court's Administrative Committee.

4. Aforesaid orders having become final, we do not find that there is any reason to interfere with remarks given by District Judge, since, same stands already endorsed by Administrative Judge as well as Administrative Committee of this Court. Moreover, aforesaid orders are not under challenge in this petition.

5. Dismissed accordingly. Interim order, if any, stands vacated.

Order Date :- 22.1.2020”

3. Since His Lordship Hon'ble Sudhir Agarwal J. is no longer available, the present review petition has therefore, been nominated by Hon'ble Chief Justice to this Bench vide order dated 18.01.2021. Accordingly, the aforementioned review petition has come up before this Bench.

4. Mr. Ashok Kumar Nigam, the learned counsel for review petitioner submits that the order dated 22.01.2020 is liable to be reviewed on the ground that there are error apparent on the face of the record. Elaborating his submission, he submits that order under review is based on an erroneous premise that the adverse entry awarded to the review petitioner by the District Judge was confirmed by the Administrative Judge and also by the Administrative Committee of the High Court. The said recital has been contradicted by submitting that since the District Judge who had awarded the adverse entry to the review petitioner for the period 01.04.2013 to 31.03.2014 was

subsequently elevated to the Bench of this Court and therefore, the matter was not placed before the Administrative Committee.

5. He next submits that adverse entry can be awarded to a judicial officer but the same has to be inconsonance with the circular dated 15.05.2007 issued by the High Court which provides that the material which is sought to be relied upon, for awarding the adverse entry must be disclosed to the concerned Officer. However, the adverse entry was awarded to the writ petitioner in derogation of the above.

6. According to the learned counsel for review petitioner, it is on account of above that the Bench while hearing the review petition on 11.07.2022 directed that the original record be placed. On the above premise, he submits that order under review is therefore, liable to be reviewed by this Court.

7. Mr. Ashish Mishra, the learned counsel representing High Court has placed the original record before the Bench. We have examined the same. On a specific query raised by us as to whether, the material relied upon by the District Judge for awarding adverse entry to the petitioner was disclosed to the review petitioner or not, he has fairly submits that the adverse entry has been awarded to the review petitioner on the basis of discrete inquiry conducted by the then District Judge.

8. It is thus apparent that the circular dated 15.05.2007 has not been complied with by the District Judge while awarding adverse entry to the review petitioner for the period 01.04.2013 to 31.03.2014.

9. In view of the discussion made above, the inescapable conclusion is that the order under review suffers from errors

apparent on the face of the record. We accordingly review the order dated 22.01.2020.

10. The review petition is allowed.

11. Let the matter appear for hearing on merits on 22.05.2023.”

12. We have heard Mr. Ashok Kumar Nigam, the learned counsel for petitioner and Mr. Ashish Mishra, the learned counsel representing respondent 2.

13. Mr. Ashok Kumar Nigam, the learned counsel for petitioner in support of present writ petition submits that right from the year 2003 up to 2013, the petitioner has never been awarded an adverse entry. For the first time in his carrier, the petitioner was awarded an adverse entry in the year 2013–14. In support of above, he has referred to the chart giving the details of annual confidential remarks awarded to the petitioner, which has already been extracted in the preceeding part of this judgment.

14. According to the learned counsel for petitioner, the Reporting Officer i.e. the then District Judge handed over the charge of his office on 2.2.2014, but the adverse entry was awarded by him to the petitioner on 10.9.2014 i.e after seven months of his having relinquished the office.

15. With reference to Rule 5(2) of All India Services (Confidential Rolls) Rules, 1970, he submits that ordinarily, the annual entry should have been awarded within the period while the District Judge was still in office or within a period of one month thereafter. Reference was then made to Rules 5(2) and 5(5) of the aforementioned Rules and on basis thereof, it is sought to be contended that since the then District Judge, Ghaziabad, who had awarded

adverse entry to the petitioner, had handed over the charge on 02.02.2014, therefore, he had no authority to write the annual confidential report of the petitioner. Similarly, reference was also made to Chapter-8 of Rules 8.11 of the aforesaid Rules in support of the submission that even under the said Rules, it is provided that Reporting Officer shall award the entry within one month of his retirement or demission of Office. However in the present case, the Reporting Officer i.e. the then District Judge, Ghaziabad had already relinquished his office on 02.02.2014 and therefore, he could not have awarded the annual entry to the petitioner after expiry of a period of seven months from the date he relinquished his office i.e. on 10.09.2014.

16. Attention of the Court was then invited to the circular letter No. 23 6F (C/2007) dated 19.5.2007. The said circular has been made applicable with retrospective effect from 1.4.2007. The same is on record at page 120 of the paper book. The note appended to column A of head note 1 is relevant for the controversy in hand. Accordingly, the same is reproduced hereinunder:-

"a. Integrity of the Officer whether beyond doubt, doubtful or positively lacking.

NOTE: If the officer's integrity is doubtful or positively lacking, it may be so stated with all relevant facts, reasons(s) & supporting material."

17. On the basis of aforesaid note appended to column A of Head Note 1 of the circular, it is contended by the learned counsel for petitioner that annual confidential remarks for the year 2013-14 could have been awarded to the petitioner

only as per the norms provided in the aforesaid circular itself.

18. With reference to above, he submits that all relevant facts, reasons and supporting material should have been mentioned along with the entry so awarded by the then District Judge to the petitioner. However in the present case, the then District Judge has simply awarded an adverse entry to the petitioner, which is to the following effect **"Doubtful, There were several complaints"**. Since the adverse entry awarded to the petitioner for the year 2013-14 is not in consonance with the note appended to column 1A of the circular dated 19.5.2007, as the material particulars are conspicuous by their absence, therefore, the said adverse entry awarded to the petitioner is liable to be quashed by this court.

19. It is further contended by the learned counsel for petitioner that as per the stand of respondent-2 as it explicit from the written arguments submitted by the learned counsel for respondent-2 and also the record, it is evident that in respect of complaints made against the petitioner, a Vigilance Enquiry No. 13 of 2014 was initiated. Subsequently, the same was converted into **Departmental Enquiry No. 06 of 2017**. The Enquiry Officer submitted his report dated 1.2.2019. Ultimately, the enquiry proceedings were dropped, vide order dated 21.3.2019, as none of the complaints made against the petitioner was found to be true.

20. In the aforesaid conspectus, it is submitted by the learned counsel for petitioner that in view of the above noted facts, the reason recorded by the then District Judge for awarding an adverse entry to the petitioner (several complaints

were made) has since vanished as the enquiry initiated against the petitioner on the basis of the alleged complaints has resulted in favour of petitioner. As such, there was no truth in the complaints so made against the petitioner. He thus contended by submitting that when the very basis of the adverse entry has vanished, the adverse entry so awarded to the petitioner cannot be sustained.

21. According to the learned counsel for petitioner, on account of the adverse entry awarded to petitioner for the year, 2013-14, which otherwise is manifestly illegal, petitioner was denied promotion in HJS Cadre for the year UPHJS 2015, UPHJS 2016, UPSJS 2017, UPHJS 2018 and UPHJS 2018(II). Ultimately, the petitioner was promoted in UPHJS 2018. On the above premise, it is contended by learned counsel for applicant that the adverse entry awarded to petitioner for the year, 2013-14 is subsequent to the circular dated 19.5.2007 but neither the relevant facts nor the supporting material has been referred to nor any reason to withhold the integrity of the petitioner on the basis of the said material has been reported by reporting officer i.e the then District Judge, Ghaziabad in the Annual Confidential Roll, as such, the adverse entry was awarded to the petitioner in complete derogation of the procedure provided for awarding an adverse entry in the circular dated 19.05.2007 by this Court. Consequently, the same is illegal and therefore, liable to be quashed.

22. Learned counsel for petitioner also invited the attention of Court to the resolution dated 1.10.1997 passed by the Administrative Committee in its meeting held on 1.10.1997. Since the said resolution has material bearing in the present case,

accordingly, the same is extracted herein under:

AGENDA	RESOLUTIONS
1. Confirmation of the minutes of the meeting of the Administrative Committee held on 21.9.1997	1. Considered the minutes of the meeting of the Administrative Committee held on 21.9.1997 resolved that the minutes be confirmed subject to the following modification (I) In item no. 12 the resolution shall read. “Resolved that in such a case the entry in the character roll be recorded by the Hon’ble Judge who was the District Judge of the concerned District during the relevant period and the said entry will also be entry of the Court if any. Representation is received against such an entry then the matter will be placed before the Administrative Committee for consideration”

23. With reference to the record, the learned counsel for petitioner submits that since the Reporting Officer i.e the then District Judge, Ghaziabad was subsequently appointed as a Judge of this Court, therefore the adverse entry awarded to the petitioner for the year 2013–14 was not referred to the Administrative Judge for his Approval. Administrative Committee has simply concurred with the report of the Committee without recording any finding in its resolution in the light of the circular dated 19.05.2007. Learned counsel for petitioner has also placed before the Court, the chart appended along with the written arguments supplied by the learned counsel for opposite party- 2 along with his written statement in respect of the fact that most of the complaints made against the petitioner, were found to be untruthful and ultimately, they were consigned to the record. For ready reference, the aforesaid chart is reproduced hereinunder:-

**“Senior Registrar (Jud.)
(Confidential)”**

May kindly see the status of the complaints, received against Sri Sunil Kumar Singh-III, while posted as Additional Chief Judicial Magistrate-III, Ghaziabad in the period of 2013-2014 in reference to requisition dated 11.05.2023 of Joint Registrar (litigation), placed below.

Sr. No.	File Number	Particulars	Status
1.	S-394/1, 1A/2013	Complaint dated 13.11.2013 alongwith its enclosures made by Sri Bhagwan Gaud, R/o Shahbad Mohammadpur, New Delhi, Sri Jitendra Kumar Shah, R/o C-403, Aditya Garden City, Sector-6, Vashudhara, Ghaziabad, and Ms. Saroj Devi, R/o - House No. 281, Village Shahbaj. Mohammadpur, New Delhi, against Sri Sunil Kumar ACIM-III, Ghaziabad.	Complaint dated 13.11.2013 alongwith its enclosures made by Sri Bhagwan Gaud, R/o Shahbad Mohammadpur, New Delhi, Sri Jitendra Kumar Shah, R/o C-403, Aditya Garden City, Sector-6, Vashudhara, Ghaziabad, and Ms. Saroj Devi, R/o - House No. 281, Village Shahbaj. Mohammadpur, New Delhi, against Sri Sunil Kumar ACIM-III, Ghaziabad.
2.	X-23/43, 43A, 43B/2014	Letter No.1/E.A./D.J./2014 dated 16.04.2014 and Letter No. 1655/1 dated 26.04.2015 sent by the District Judge, Ghaziabad and Letter dated 19.04.2014 endorsed by the District Judge,	Vide order dated 30.04.2014 of Hon'ble the Chief Justice entrusted Vigilance Enquiry to Special Officer (vigilance). All the file (In original were sent to Special Office (vigilance) on 12.05.2014, 17.05.2014 and 31.07.2014.

		Ghaziabad vide endorsement no.1526 XV dated 19.04.2014 regarding incident of road raze occurred 13.04.2014 lodged by Sri Sunil Kumar Singh-III, A.C.J.M. Court No.-III, Ghaziabad, against Sri Surendra Kumar, ASI of Delhi Police and Sarita Bihar, DCP of Delhi.	
3.	S-394/1, 1A/2014	Counter complaint dated 18.04.2014 (with enclosures) moved by Smt. Deep Mala Bakshi, wife of Sri Surender Bakshi, R/o 2/250. Upper Jatwara, Mehrauli, New Delhi, against Sri Sunil Kumar Singh-III, A.C.J.M.-III, Ghaziabad, regarding criminal misuse of judicial powers.	
4.	X-23/71/2014	Representation dated 11.6.2014 (with enclosures) sent by Sri Sunil Kumar Singh-III, Civil Judge (S.D.), Pilibhit duly endorsed	

		by the District Judge, Pilibhit, vide endorsement no. 1146/1 dated 12.06.2014, addressed to Registrar General and with subject representation to expunge the F.I.R.	
5.	S-394/2, 2A,2B/2014	Complaint dated 13.09.2014 made by Sri Ravindra Singh Verma Verma, R/o 195 Chipiyana, Ghautambuddh Nagar, against Sri Sunil Kumar Singh-III, the then AC'M-III, Ghaziabad, in connection with case no. 2547/2012 under section 156 (3) Cr.P.C to registered an F.I.R. against his wife Smt. Suneeta Singh.	Consigned/close d vide order dated nil of Hono'ble the Administrative Judge, Ghaziabad. (The complaint file has been weeded out in the light of order dated 10.4.2014 of Hon'ble the Chief Justice--the copy of the said order is enclosed herewith)
6.	S-394/3/2014	Letter No. 3788/XV dated 11.08.2014 of District judge, Ghaziabad, regarding conduct of Sri Sunil Kumar Singh-III, the then ACIM-III, Ghaziabad, reflecting against him in judicial proceedings of case no. 511/2010 (crime	Consigned to record vide order dated 25.03.2021 of Hon'ble the Administrative Judge, Ghaziabad..

		1906/2009)- State vs. Rajeev Gupta & others, u/s 420, 409, 506 I.P.C., P.S. Sihani Gate, disposed off by him on 21.01.2014.	
7.	S-394/4/2014	Complaint dated 02.07.2014 moved by Sri Mehtaab S/o Sri Haji Shipedar of Islampur, Thana Bhawan, Muzaffarnagar, against the Sri Sunil Kumar Singh-III, then A.C.J.M.-III, Ghaziabad and against Sri Arun Kuamr Tyagi, Chmaber no. 28, Meerut, regarding allegedly extorting rupees 7,20,000/ from his family for releasing complainant from Jail in case crime no. 898/13, case no. 3818/13-state vs. mehtab, u/s 25 Arms Act, P.S. Sihani Gate, Ghaziabad.	Consigned to record vide order dated 19.9.2016 of Hon'ble the Administrative Judge, Ghaziabad. (The complaint file has been weeded out in the light of order dated 10.04.2014 of Hon'ble the Chief Justice--the copy of the said order is enclosed herewith)
8.	S-394/6/2014	Unsigned complaint dated 20.09.2014 and 04.10.2014, jointly moved by Sri Ramesh Kumar, Sri Narendra Yadav and Sri Kishan Pal	Consigned to record vide order dated 10.03.2015 of Hon'ble the Administrative Judge, Ghaziabad. (The complaint file has been weeded out in

		Arya, against Sri Sunil Kumar Singh- III, the the then A.C.J.M.- III, Ghaziabad, regarding corruption.	the light of order dated 10.04.2014 of Hon'ble the Chief Justice-- the copy of the said order is enclosed herewith)

Report is accordingly submitted.

Therefore, may if approved by your goodself, the aforesaid status alongwith the relevant documents may be sent to Joint Registrar (Litigation) for onward necessary action.”

24. It is thus urged by learned counsel for petitioner that surprisingly, the Administrative committee of High Court while considering the representation of petitioner has not adverted to aforesaid aspect of the matter, which has vitiated the decision taken by Administrative Committee as most of the complaints made against petitioner had already been consigned to record. Consequently, decision taken by the Administrative Committee is not the outcome of diligent exercise of discretion with reference to the material on record. The Administrative Committee is a casual and cavalier fashion has rejected the representation of the petitioner. As such, the same is wholly arbitrary, therefore, the same can not be sustained, hence liable to be quashed by this Court.

25. The claim of petitioner has, however, been vehemently opposed by Mr Ashish Mishra, the learned counsel for respondent-2. He submits that it is true that the mandate of the circular dated 19.5.200 was not complied with by the then District Judge, concerned inasmuch as the relevant facts and supporting material have neither been referred to in the Annual Confidential

Roll of the petitioner nor they were disclosed to the petitioner nor any reason in the light of the same has been recorded. However, the fact remains that the decision was taken by the immediate superior of the petitioner i.e. Reporting Officer/the then District Judge, Ghaziabad. The opinion formed by Reporting Officer cannot be impugned and castigated in the light of the submissions urged by learned counsel for petitioner. He being the immediate superior of the petitioner and others can form opinion against his subordinates on the basis of other material also which may come to his knowledge. Therefore, the impugned adverse entry awarded to the petitioner cannot be faulted on the submission urged by the learned counsel for petitioner as noted above. To buttress his submission, he has placed reliance upon the judgement of Supreme Court in **Rajendra Singh Verma (dead) through and Others vs. Lieutenant Governor (NCT of DELHI), (2011) 10 SCC 1**. Much emphasis has been laid on paragraphs 190 to 193 of the report, which are, accordingly, extracted herein below:

190. As observed by this Court in R.L. Butail v. Union of India [(1970) 2 SCC 876] it is not necessary that an opportunity of being heard before recording adverse entry should be afforded to the officer concerned. In the said case, the contention that an inquiry would be necessary before an adverse entry is made was rejected as suffering from a misapprehension that such an entry amounts to the penalty of censure. It is explained by this Court in the said decision that: (SCC p. 876)

"(ii) ... Making of an adverse entry is not equivalent to imposition of a penalty which would necessitate an enquiry or the giving of a reasonable

opportunity of being heard to the government servant concerned."

191. Further, in case where the Full Court of the High Court recommends compulsory retirement of an officer, the High Court on the judicial side has to exercise great caution and circumspection in setting aside that order because it is a complement of all the Judges of the High Court who go into the question and it is possible that in all cases evidence would not be forthcoming about integrity doubtful of a judicial officer. As observed by this Court in *High Court of Punjab & Haryana v. Ishwar Chand Jain* [(1999) 4 SCC 579 : 1999 SCC (L&S) 881] , at times, the Full Court has to act on the collective wisdom of all the Judges and if the general reputation of an employee is not good, though there may not be any tangible material against him, he may be given compulsory retirement in public interest and judicial review of such order is permissible only on limited grounds. The reputation of being corrupt would gather thick and unchaseable clouds around the conduct of an officer and gain notoriety much faster than the smoke. Sometimes there may not be concrete or material evidence to make it part of the record. It would, therefore, be impracticable for the reporting officer or the competent controlling officer writing the confidential report to give specific instances of shortfalls, supported by evidence.

192. Normally, the adverse entry reflecting on the integrity would be based on formulations of impressions which would be the result of multiple factors simultaneously playing in the mind. Though the perceptions may differ, in the very nature of things there is a difficulty nearing an impossibility in subjecting the entries in the confidential rolls to judicial

review. Sometimes, if the general reputation of an employee is not good though there may not be any tangible material against him, he may be compulsorily retired in public interest. The duty conferred on the appropriate authority to consider the question of continuance of a judicial officer beyond a particular age is an absolute one. If that authority bona fide forms an opinion that the integrity of a particular officer is doubtful, the correctness of that opinion cannot be challenged before courts. When such a constitutional function is exercised on the administrative side of the High Court, any judicial review thereon should be made only with great care and circumspection and it must be confined strictly to the parameters set by this Court in several reported decisions. When the appropriate authority forms bona fide opinion that compulsory retirement of a judicial officer is in public interest, the writ court under Article 226 or this Court under Article 32 would not interfere with the order.

193. Further, this Court in *M.S. Bindra case* [(1998) 7 SCC 310 : 1998 SCC (L&S) 1812] has used the phrase "preponderance of probability" to be applied before recording adverse entry regarding integrity of a judicial officer. There is no manner of doubt that the authority which is entrusted with a duty of writing ACR does not have right to tarnish the reputation of a judicial officer without any basis and without any "material" on record, but at the same time other equally important interest is also to be safeguarded i.e. ensuring that the corruption does not creep in judicial services and all possible attempts must be made to remove such a virus so that it should not spread and become infectious. When even verbal repeated complaints are

received against a judicial officer or on enquiries, discreet or otherwise, the general impression created in the minds of those making inquiries or the Full Court is that judicial officer concerned does not carry good reputation, such discreet inquiry and/or repeated verbal complaints would constitute material on the basis of which ACR indicating that the integrity of the officer is doubtful can be recorded. While undertaking judicial review, the Court in an appropriate case may still quash the decision of the Full Court on administrative side if it is found that there is no basis or material on which the ACR of the judicial officer was recorded, but while undertaking this exercise of judicial review and trying to find out whether there is any material on record or not, it is the duty of the Court to keep in mind the nature of function being discharged by the judicial officer, the delicate nature of the exercise to be performed by the High Court on administrative side while recording the ACR and the mechanism/system adopted in recording such ACR.

27. On the above premise, the learned counsel for respondent-2 contends that no illegality can be attached to the decision taken by the then District Judge, Ghaziabad in awarding adverse entry to the petitioner. As such, no interference is warranted by this Court in the present writ petition. Consequently, the present writ petition is liable to be dismissed.

28. Having heard the learned counsel for petitioner, and learned counsel representing respondent 2, upon consideration of the material on record as well as the submissions made, the solitary issue which arises for determination in this writ petition is whether in the facts and

circumstances of the case, the adverse entry awarded to the petitioner cannot be sustained in view of the note appended to column 1A of the circular dated 19.5.2007 or the same can be sustained as per the mandate of the Supreme Court expressed in the case of **Rajendra Singh Verma (Supra)**.

29. There is no dispute between the parties that the procedure regarding writing of Annual Confidential Remarks of Judicial Officers was crystallized by this Court vide circular dated 19.05.2007. The said circular is not directory but mandatory as it directs the reporting authority to write Annual Confidential Remarks of Judicial Officers as per the circular itself. It is by now well settled that where the law prescribes, a thing to be done in a particular manner, it can be done in that manner alone and not otherwise. This was held way back in 1936 in the case of **Nazir Ahmad Vs. King Emperor, AIR 1936 Privy Council 253**. The same view has been reiterated time and again and we need not burden our judgment with multiple judgments on the said issue.

30. Apart from above, there is another aspect of the matter which has been clearly omitted by the learned counsel representing respondent 2. The adverse entry was awarded to the petitioner for the year, 2013-14 by the then District Judge, Ghaziabad by writing the following remarks **“Integrity doubtful” as there are several complaints against the petitioner**. The adverse entry awarded to the petitioner has been sought to be sustained by the learned counsel representing respondent 2 that even though the adverse entry awarded to the petitioner as noted herein above is not in consonance with the mandate of note appended to column 1A of the circular dated 19.05.2007 but since the then District

Judge, Ghaziabad was the immediate superior of the petitioner and therefore, he being the reporting authority also, could have awarded adverse entry as there may be information available with him for which no material may be available. It is in the above conspectus that much emphasis was laid to the judgment of the Supreme Court in the case of **Rajendra Singh Verma (Supra)** and it is on the basis of above that a vehement effort was made to submit that irrespective of the facts noted above, the impugned adverse entry can still be maintained.

31. At the first flush, the submission urged by the learned counsel for respondent 2 may appear to be attractive but on deeper scrutiny the same is bereft of any substance and therefore, liable to be rejected.

32. It is the admitted case of respondent 2 that in respect of the complaints made against petitioner, steps were taken to find out the truthfulness of the complaints made against petitioner. As per the tabulation relied upon by learned counsel representing respondent 2, which we have already referred to in paragraph 24 of the judgment, it is evident that most of the complaints had been consigned to the record as nothing adverse was found against the petitioner. It is also the admitted case of respondent 2 that a vigilance enquiry being **Vigilance Enquiry No. 6 of 2017** was directed against the petitioner in respect of the complaints made against him. The same was converted into **Departmental Enquiry No. 06 of 2017**. The Enquiry Officer submitted his report dated 01.02.2019. Ultimately, the enquiry proceedings initiated against the petitioner were dropped, vide order dated 21.03.2019. Thus the inescapable conclusion which can be drawn on the basis of above is that none

of the complaints made against the petitioner was found to be true. Once the complaints made against the petitioner were found untruthful, the very basis for awarding adverse entry to the petitioner has vanished. It would thus be a travesty of justice to maintain the adverse entry awarded to the petitioner even when the complaints made against him were found untruthful. In the light of above, the decision relied upon by the learned counsel for respondent 2 is clearly distinguishable and cannot be relied upon to sustain the adverse entry awarded to the petitioner.

33. We may at this stage, refer to the judgment of this Court rendered in WRIT-A No. 60546 of 2015 (Khaliquzzama Vs. State of U.P. and 4 Others) decided on 22.05.2017 relied upon by the learned counsel for petitioner. The Court in aforementioned case dwelled into the facts of the case and upon deeper scrutiny recorded thus:-

"The records which have been produced do not indicate any information gathered from any source or even the name of any person having a complaint about the integrity and judicial dispatch of the petitioner. There are no complaints even by the Members of the Bar, before whom the petitioner performed judicial work during the assessment year in question. It is the solitary complaint of Mr. Naresh Gambhir alleging rude behaviour of the petitioner who is a lawyer from outside and appearing in a compliant case about which the facts have been indicated above. Thus, there is absolutely no material in the entire record to construe anything about such serious allegations of illegal gratification, partiality or being impersonal. Not only this, the entry of ACRs for the period 01.04.2013 to

31.03.2014 i.e., 2013-14 that is of the succeeding year, has been 'outstanding' and the integrity has been certified as 'beyond doubt' with adequate disposals and with a ranking as a 'good officer' by the learned District Judge.

The only material worth to be noted is the letter of the District Judge dated 29.07.2013. Apart from this, it is only the confidential note dated 11.03.2013 the contents whereof have neither been disclosed nor brought forward before this Court nor did the petitioner had any occasion to reply to the same in spite of the order passed on the previous occasion on 28.04.2017 extracted herein above.

If the Officer is to be indicted on such a serious allegation, then the real course to be adopted by the High Court could have been either to hold a vigilance enquiry or a regular enquiry in order to examine the seriousness of such allegations. This was never opted for by the High Court and which could have been the method of gathering information as indicated in the judgement of Rajendra Singh Verma (Supra) to construe that the integrity of the officer had become doubtful. The perception may not be a matter of interference by us but we have failed to gather any information worth the name to support the allegations as made in the impugned adverse remarks except the allegation of the alleged insulting behavior of the petitioner in the written complaint of Mr. Naresh Gambhir.

As far as transfer of files from the court of petitioner to another court, on the direction of Hon'ble Administrative Judge is concerned, averments have been made in paragraph Nos. 71, 72, and 73 of the Writ Petition that information was sought by the petitioner from the District Judge regarding transfer of files from his

court and he was informed by the District Judge that no such file was transferred from the court of petitioner. In paragraph No. 26 of the counter affidavit, aforesaid averments made in paragraph Nos. 71, 72 and 73 of the Writ Petition have been denied. We find from the record that the petitioner has been informed by the District Judge, Gautam Buddha Nagar vide letter dated 08.09.2015 (Annexure No. 25 to the writ petition), in reply to information sought by the petitioner, annexing the report of the readers stating therein that no file was transferred from the court of petitioner to any other court, during the year 2012-13. Hence, the inference of complaint having been made and any file or File No. K-115/1/2012 being transferred from the court of petitioner to another court, as indicated in the impugned adverse remark, does not appear to be borne out of record."

On the above premise, the Division Bench allowed the writ petition.

34. After having drawn a parallel in between the facts of the present case and that of Khaliquzzama, it is apparent that while in the case of aforesaid petitioner, no enquiry was conducted to examine the seriousness of the allegations made against aforesaid petitioner whereas in the present case, an enquiry was held but nothing adverse was found against the petitioner.

35. We may further refer to the judgment of the Lucknow Bench of this Court in SERVICE BENCH No. 6108 of 2017 (Rajvir Singh Vs. Hon'ble Allahabad High Court Alld. Thru. Registrar General & Ors) decided on 01.10.2018. The Court upon consideration of the material on record and upon evaluation of the submissions urged, ultimately, delineated its views as follows:-

"Reporting of any adverse remark should be based on some tangible material and not on any surmises. Discussion made above, lead us to the conclusion that in the facts and circumstances of the case, adverse remarks against the petitioner could not have been awarded. While saying so, we are conscious that it is impermissible for this Court to substitute its own finding in respect of the character roll entries of the petitioner in exercise of our jurisdiction under Article 226 of the Constitution of India. However, what we have noticed in the preceding paragraphs lead us to observe that the adverse remarks could not have been awarded to the petitioner on the basis of the material relied upon by the District Judge. The material cannot be said to be germane. Two complaints, which form the basis of the adverse remarks against the petitioner stood rejected by Hon'ble the Administrative Committee and the alleged critical comments made by the District Judge while deciding the revision petition filed against the order of the petitioner is not a relevant material which could form the basis of such adverse remarks.

Annual Character Roll entries in the Annual Confidential Report of an officer should be based on the overall assessment of his/her work and conduct. In this context, it is noticeable that service record of the petitioner is unblemished ever since he joined the service as a judicial officer except the adverse remarks entered in the Annual Confidential Report pertaining to the year 2011-12 which is under challenge in this petition.

For the reasons given and discussion made above, we find that the writ petition deserves to be allowed."

36. We find that the facts of the present case and that of aforementioned petitioner are in congruence inasmuch as, there is no such distinguishing feature on the basis of which, the ratio laid down in aforementioned judgment could be held to be in applicable to the facts and circumstances of the present case.

37. In view of the discussion made above, we have no hesitation to hold that the adverse entry awarded to the petitioner for the year, 2013-14 is wholly illegal. Therefore, the same cannot be sustained and is liable to be quashed. It is, accordingly, quashed. Similarly, the decision of the Administrative Committee, High Court, Allahabad as communicated to the petitioner, vide communication dated 04.07.2015 also cannot be sustained for the reasons recorded above. Accordingly, we quash the impugned decision taken by the Administrative Committee as noted above.

38. In view of above, the present petition succeeds and is allowed. Since the petitioner was not promoted to HJS Cadre in the UPHJS 2015 on account of pendency of the enquiry proceedings. Irrespective of above, the petitioner was promoted to UPHJS 2018 even though the enquiry proceedings came to be dropped against the petitioner only on 21.03.2019. We, therefore, direct to award promotion to the petitioner with retrospective effect i.e. UPHJS 2015. The necessary exercise in this regard shall be undertaken and completed within a period of 2 months from the date of presentation of a certified copy of this order before the High Court.

39. Cost made easy.

(2023) 9 ILRA 260
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.08.2023

BEFORE

THE HON'BLE SAURABH SHYAM
SHAMSHERY, J.

Writ B No. 947 of 2023
along with other connected cases

Basdev **...Petitioner**
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:

Sri Jitendra Yadav

Counsel for the Respondents:

Sri M.C. Chaturvedi (Addl. A.G.) assisted by
Sri Tejaswi Mishra (Brief Holder), Sri
Rameshwar Prasad Shukla, Sri Om Prakash
Pandey

Civil Law - U.P. Consolidation of Holdings Act, 1953 - Section 19-A(2) - U.P. Zamindari Abolition and Land Reforms Act, 1950 - Sections 117, 117-A & 132 - U.P. Consolidation of Holdings Rules, 1954 - Rule 24-A - Allotment - Public use - Land in question was earmarked as 'pasture land' during second consolidation proceedings - Under Section 19-A(2) of Act, 1953, such land, earmarked for public purposes can only be allotted upon recorded satisfaction by Assistant Consolidation Officer that such allotment is necessary or expedient in circumstances - In present case, neither any order of allotment nor any document evidencing such satisfaction has been brought on record - Process of allotment cannot be treated as mere formality, especially when large area reserved for public use has been distributed among several petitioners - In absence of compliance with statutory mandate, allotments made are vitiated due to procedural

irregularity and legal infirmity. Thus, allotment orders set aside - Authority may reconsider matter, status quo on disputed land shall continue for three months for fresh decision, if warranted. (Para 28, 31)

Writ Petitions disposed of. (E-13)

List of Cases cited:

1. Shri Ram Vs St. of U.P. & ors., 2018:AHC:148669
2. Sita Ram Vs Deputy Director of Consolidation & ors., 1982 All L.J. 76, (Para 18, 21)
3. Hari Ram Vs D.D.C., Azamgarh, 1989 RD 281
4. Gafoora Vs Deputy Director of Consolidation, Meerut, (1975) 2 SCC 568, (Para 3)
5. Ram Bahadur Vs D.D.C. & ors., AIR 1973 ALL 414, (Para 2, 3)
6. Iqbal Ahamad & ors. Vs D.D.C. & ors., 2005 (3) AWC 2423 ALL, (Para 5, 7, 8 to 10)
7. Palakdhari Vs Gaon Sabha Devara, 2011 (3) ADJ 251, (Para 8 to 11)
8. Ram Nihor Vs Additional Commissioner (Admin.) Vindhyanchal Division, 2014:AHC:183012
9. Sheo Nand & ors. Vs D.D.C., Allahabad & ors., (2000) 3 SCC 103, (Para 5, 20, 21)
10. Babu Lal Vs D.D.C., Allahabad & ors., 1985 RD 236
11. Hinchlal Tiwari Vs Kamala Devi & ors., (2001) 6 SCC 496
12. Jagpal Singh & ors. Vs St. of Punj. & ors., (2011) 11 SCC 396
13. Smriti Madan Kansagra Vs Perry Kansagra, 2021 SCC Online SC 909, (Para 23)

(Delivered by Hon'ble Saurabh Shyam
Shamshery J.)

1. The fact which is not in dispute is that nature of land in dispute, in the present case, was not on record during first consolidation proceedings. However, during second consolidation proceedings, the land in dispute was earmarked for *charagah/pasture land* (hereinafter referred to as '*pasture land*'). The second consolidation proceedings got over and a notification under Section 52(1) of U.P. Consolidation of Holdings Act, 1953 (hereinafter referred to as "Act, 1953") was issued on 04.12.1993. Later on, land in dispute was valued and allotted to petitioners on valuation and present status of land allotted to petitioners are on record i.e. some parts of land are still vacant and on some parts of land constructions of different nature are raised. Details of allotment of land in dispute to petitioners such as respective allotment orders specifying respective allotted areas, dates of such allotment are not on record.

2. Further, it is also not disputed that after 24 years of a notification being issued under Section 52 of the Act, 1953, the private contesting respondent (Raj Narayan) has submitted an application dated 17.07.2017, before the District Magistrate, Azamgarh, making a specific allegation that about 4.42 acre of land i.e. land in dispute was recorded under the category of 'pasture land' in revenue records, however, it was allotted illegally to the petitioners and at present only 3.48 acre land is available being 'pasture land' and it was also alleged that petitioners are powerful persons and officials are in hand in glove with them. The allotment was devoid of any due process and thus being illegal are obtained by fraud and, therefore, order be set aside and appropriate action be taken.

3. It appears that the said complaint was referred to Deputy Director of

Consolidation, Azamgarh, who sought a report from the Consolidation Officer by order dated 05.09.2017 and it was further directed that all concerned parties shall be put on notice. Later on, on basis of a report received, the Settlement Officer of Consolidation, Azamgarh, by a communication dated 07.01.2023, addressed to District Magistrate, has prepared a chart mentioning all details such as, new Gata numbers and old Gata Numbers and respective area thereof as well as names of tenure holders mentioned in Form 45 and present status of land in dispute with relevant *naksha-nazri (spot map)*. The details thereof have not been seriously disputed by any petitioner. A spot map was also prepared which apparently indicates that all petitioners were allotted abutting land i.e. adjacent to main road, which also indicates that land has potential value.

4. The Deputy Director of Consolidation heard the parties (petitioners in different writ petitions) and passed the impugned order dated 28.02.2023. Issue of compliance of principles of natural justice has not been seriously argued.

5. The District Magistrate/Deputy Director of Consolidation, Azamgarh, has placed reliance on report, revenue records as well as considered arguments of rival parties and held that since the land in dispute was earmarked for 'pasture land' which could not be allotted to petitioners being contrary to provisions of Section 132 of U.P. Zamindari Abolition and Land Reforms Act, 1950 and, therefore, allotments so made were cancelled and it was directed that land in dispute be restored/recorded back as 'pasture land' in revenue record. In the impugned order, Revisional Authority has taken note of

procedure, nature of land which could be valued and allotted and that if the allotment was beyond jurisdiction, it would be void and in such case, limitation would be of no consideration. It also referred judgments passed by the Supreme Court. The relevant part of impugned order is mentioned hereinafter -:

“जिला शासकीय अधिकता राजस्व द्वारा लिखित बहस प्रस्तुत कर तर्क प्रस्तुत किया गया कि पत्रावली में संलग्न आख्या व संदर्भ दिनांक 26.08.2017 व 07.01.2023 से स्पष्ट है कि चारागाह के खाते में अंकित भूमि को दौरान चकबंदी मालियत लगाकर विभिन्न चकों व मदों में प्रस्तावित व आरक्षित किया गया है, जो विधिविरुद्ध व शून्य है, क्योंकि चकबंदी अधिकारियों को केवल कास्तकारों की भूमि का ही मूल्यांकन लगाकर चकों में प्रविष्ट किये जाने व अन्य मद में आरक्षित किये जाने का अधिकार प्राप्त है, गाँवसभा भूमि तथा सार्वजनिक उपयोग में अंकित भूमि का मूल्यांकन लगाकर चकों में प्रस्तावित करने का कोई प्राविधान नहीं है। यदि ऐसा किया गया हो तो भी ऐसे आदेश को संज्ञान में आने के उपरान्त कभी भी निरस्त किया जा सकता है। इसमें कालबाधिता तथा पोषणीयता का बिन्दु बाधक नहीं है। मा० सुप्रीम कोर्ट द्वारा जगपाल सिंह व अन्य बनाम पंजाब राज्य व अन्य में दिनांक 28.01.2011 को आदेश पारित करते हुये तालाब, चारागाह, खलिहान आदि की भूमि को जो 1359 फ० के अभिलेख में अंकित हैं, को पूर्ववत कायम किये जाने का निर्देश दिया गया है। इस क्रम में आयुक्त एवं सचिव राजस्व परिषद, लखनऊ उ०प्र० द्वारा दिनांक 10.07.2020 को समस्त जिलाधिकारी, उ०प्र० को निर्देश जारी किया गया है। उक्त निर्देश के क्रम में भी पशुचर भूमि को पूर्ववत पशुचर खाते में अंकित किया जाना आवश्यक है।

उपरोक्त विवेचना से स्पष्ट है की जमींदारी विनाश अधिनियम की धारा 132 सार्वजनिक प्रयोग की वादीय भूमि के रकबे में मालियत लगाकर चक निर्माण एवं विभिन्न मदों में आरक्षण की कार्यवाही क्षेत्राधिकार से परे जाकर की गयी है। इस स्थिति में संदर्भ दिनांक 26.08.2017 स्वीकार योग्य है।

आदेश

संदर्भ दिनांक 26.08.2017 स्वीकार किया जाता है। तदनुसार अभिलेखों में संशोधन किया जाय। आदेश की प्रति संदर्भ पत्रावली के साथ उप संचालक चकबन्दी आजमगढ़ को अनुपालनार्थ प्रेषित की जाय। इस न्यायालय की पत्रावली आवश्यक कार्यवाही के उपरान्त अभिलेखागार में संचित की जाय।”

(Emphasis Supplied)

6. S/Sri Jitendra Yadav, Awadhesh Kumar Singh, Rajendra Rai and Prahlad Kumar Bhardwaj, learned counsel for their respective writ petitioners have argued at length and their arguments in brief are being culled out as follows -:

(a) The entire exercise undertaken by District Magistrate/Deputy Director of Consolidation, Azamgarh on the basis of complaint of private respondent being after the notification issued under Section 52(1) of Act, 1953 was beyond jurisdiction since it was barred by the provisions of said section. For ready reference, Section 52 is as follows -:

“52. Close of consolidation operations. - (1) As soon as may be, after fresh maps and records have been prepared [under sub-section (1) of Section 27], the State Government shall issue a notification in the Official Gazette that the consolidation operations have been closed in the [unit and the village or villages forming a part of the unit] shall then cease to be under consolidation operations :

[Provided that the issue of the notification under this section shall not affect the powers of the State Government to fix, distribute and record the cost of operations under this Act.]

[(1A) The notification issued under sub-section (1) shall be published also in a daily newspaper having circulation in the area and in such other manner as may be considered proper]

[(2) Notwithstanding anything contained in sub-section (1), any order passed by a Court of competent jurisdiction in cases of writs filed under the provisions of the Constitution of India, or in cases of proceedings pending under this Act on the date of issue of the notification under sub-section (1), shall be given effect to by such authorities, as may be prescribed and the

consolidation operation shall, for that purpose, be deemed to have not been closed.]

[(3) Where the allotment or lease of any land made before the Consolidation Scheme becomes final under Section 23, is cancelled by an order under sub-section (4) of Section 198 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 and such order becomes final, then notwithstanding anything contained in the provisions of this Act, such order shall be given effect to by such authorities, as may be prescribed, in the following manner, and the consolidation operation shall, for that purpose, be deemed to have not closed, namely -

(a) the value of the land which was the subject-matter of such allotment or lease shall first be ascertained in the manner prescribed;

(b) the value referred to in clause (a) shall be deducted from the total value of land allotted to the tenure-holder concerned during consolidation proceedings;

(c) the tenure-holder shall be entitled, during consolidation proceeding, to land equivalent in valuation to the said land.]”

(b) Section 8-A(2)(c) of the Act, 1953 provides that during consolidation proceedings, details of land to be earmarked for public purpose out of land vested in Gaon Sabha has to be prepared and Section 19-A(2) of the Act, 1953 provides that such lands which are earmarked for public purposes shall only be allotted after the Assistant Consolidation Officer has declared in writing i.e. there is no bar for allotment of a land earmarked in consolidation proceedings for ‘public purpose’, which would also include ‘pasture land’.

(c) No objection was raised at the stage when the land was earmarked as a ‘pasture land’ or it was allotted in parts to the petitioners of writ petitions many years ago. Even no objections were filed at the stage of Section 9(A)(2) of the Act, 1953, therefore, at belated stage, when much water has flown, since constructions or other activity has already been commenced/completed on land in dispute, therefore, it could not be disturbed by an order passed without jurisdiction. The Gram Sabha being the aggrieved party has not come forward, therefore, complainant has no locus to initiate any proceedings qua to land in dispute. The impugned order being passed without jurisdiction could not be interfered by the Court under writ jurisdiction. Learned counsel also referred Section 11-A of the Act, 1953 and stated that it imposes a bar for raising such dispute which could have been raised at the time of filing of objections under Section 9A(2) of the Act, 1953.

7. Learned counsel for petitioners have placed reliance upon judgments of Supreme Court and this Court passed in the cases of **Shri Ram vs. State of U.P. and 4 others, 2018:AHC:148669**; **Sita Ram vs. Deputy Director of Consolidation and others, 1982 All L.J. 76**; **Hari Ram vs. D.D.C., Azamgarh, 1989 RD 281**; **Gafoora vs. Deputy Director of Consolidation, Meerut, (1975) 2 SCC 568**. Relevant paragraphs thereof are quoted hereinafter -:

Hari Ram (supra):

“.....The position of law is well settled. The Deputy Director of Consolidation has no jurisdiction to exercise power under Section 48(3) of the Act if a de-notification has already taken place under Section 52 of the Act. The

Deputy Director of Consolidation, therefore, will first record a finding as to whether a Notification under Section 52 of the Act had, in fact, been issued on February 13, 1982. If he finds that such a notification exists and if he also finds that the land which is the subject matter of dispute is covered by the said Notification, he shall desist from exercising any power under Section 48 (3) of the Act. With this direction the petition is disposed of finally.”

Sita Ram (supra):

“18. A person cannot initiate legal proceedings on behalf of or for the benefit of another without any authority from that other. Para 128 of the Gaon Sabha Manual provides the procedure and the manner in which suits or proceedings can be filed and conducted on behalf of the Gaon Sabha and the same has got to be done in that particular manner.

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21. The Gaon Sabha is a body corporate and the Land Management Committee is an executive body of the Gaon Sabha charged with the functions to supervise and protect the property vested in the Gaon Sabha and it has to function in the manner sanctioned under law. The provisions contained in para 128 of the Gaon Sabha Manual and Rule 110A of the U. P. Zamindari Abolition and Land Reforms Rules prescribed the manner in which the litigation is to be conducted by and on behalf of the Gaon Sabha. These provisions, which are mandatory, would govern the litigation to be conducted on behalf of the Gaon Sabha in all proceedings under the provisions of the U. P. Consolidation of Holdings Act.

Gafoora (supra):

“3. The short question that arises for consideration is whether the High Court is correct in not interfering with the order of the Deputy Director (Consolidation) under Article 226 of the Constitution. Jurisdiction under Article 226 is well settled. The High Court will interfere only if some order is passed by an authority in excess of jurisdiction or there is a manifest error of law, apparent on the face of the records. The principal question that was canvassed before the Deputy Director (Consolidation) was whether failure to prefer objection within the time limit prescribed under Section 9(2) of the Act would entitle an aggrieved party to agitate the matter beyond the prescribed period without any explaining the cause of delay in preferring the objection and obtaining a proper order of condonation of delay from the appropriate authority. It is clear from the records that no objection was preferred within the prescribed time. The Deputy Director (Consolidation) refused, if we may say so, rightly to accept that the appellants had earlier lodged any objection on November 21, 1966. The being the position, there was no material whatsoever before the Settlement Officer (Consolidation) for exercising his jurisdiction to condone the delay in lodging objection under Section 9(2) of the Act. Section 11A bars all objections in respect of claim to land, partition of joint holdings and valuation of plots etc. relating to the consolidation area which have been raised under Section 9 or which might or ought to have been raised under that section but have not been so raised. These questions under Section 11A cannot be raised or heard at any subsequent stage of the consolidation proceedings. That being the position there is no error of law in the order of Deputy Director (Consolidation) nor is there any excess of jurisdiction

committed by him in disposing of the matter as he did in exercise of his revisional power under Section 48."

(Emphasis Supplied)

8. Learned counsel for petitioners on basis of above referred judgments have submitted that in certain circumstances, the Land Management Committee could grant lease with sirdari rights in respect of land preserved for public purposes including 'pasture land' and that Deputy Director of Consolidation has no jurisdiction to exercise power under Section 48(3) of the Act, 1953, if a de-notification has already taken place under Section 52 of the Act, 1953. Learned counsel prayed that impugned order, being illegal, be set aside.

9. Per contra, Sri M.C. Chaturvedi, Additional Advocate General assisted by Sri Tejaswi Mishra, Brief Holder for the State of U.P., Sri Rameshwar Prasad Shukla, learned counsel for Gaon Sabha, and Sri Om Prakash Pandey, learned counsel for respondent no. 6/complainant (in Writ B No. 947 of 2023) have vehemently urged that procedure undertaken by Revisional Authority was within its jurisdiction and since there is a specific bar under Section 132 of U.P. Zamindari Abolition and Land Reforms Act, 1950 that *bhoomidhari* right shall not accrue on certain land which includes a 'pasture land' also.

10. Learned A.A.G. for State has also referred scheme of Consolidation as prescribed under Section 3(2)(iii) i.e. for rearrangement for the purpose of consolidation, a holding shall not include land mentioned in Section 132 of U.P.Z.A.

and L.R. Act which includes the land reserved for 'pasture land'.

11. Learned A.A.G. for State has further referred Section 8(A)(c) of the Act, 1953 and submitted that when preparation of Statement of Principles is done, details of land to be earmarked for public purposes out of land vested in a Gaon Sabha or a Local Authority under Section 117 or Section 117-A of the U.P.Z.A. and L.R. Act, if any, has to be specifically mentioned therein.

12. Learned A.A.G. for State has further submitted that concerned Authority made allotment from land earmarked for 'pasture land' to private persons, which was nothing but a 'fraud on statute' and on 'statutory obligation'.

13. Learned A.A.G., to buttress his arguments, has placed reliance upon judgments of this Court as well as of Supreme Court passed in **Ram Bahadur vs. D.D.C. and others, AIR 1973 ALL 414; Iqbal Ahamad and others vs. D.D.C. and others, 2005 (3) AWC 2423 ALL; Palakdhari vs. Gaon Sabha Devara, 2011 (3) ADJ 251; Ram Nihor vs. Additional Commissioner (Admin.) Vindhyanchal Division, 2014:AHC:183012** and relevant paragraphs of above referred judgments are mentioned below :-

Ram Bahadur (supra):

"2. The issuance of the Notification does not, however affect the orders passed by the High Court or the Supreme Court under the provisions of the Constitution of India or in cases or proceedings pending under this Act on the date of issue of notification under sub-section (1) and orders passed will have to be given effect to notwithstanding anything

contained in the Notification. In Dilawar Singh's case, 1972 All WR (HC) 557: (AIR 1973 All 411) the Division Bench observed that the term "proceedings" in Section 52

(2) has been used in the comprehensive sense of proceedings commencing from the one which is initiated before the Consolidation Officer and including that taken in the appeal Court. It was held that an appeal does not initiate a fresh proceeding. On the institution of the appeal the proceedings, which had become dormant on the decision of the trial Court revive and remain pending, the only difference being that they are now pending in a different Court, namely, the Court of appeal. It was also held that the notification under Section 52 (1) does not have the effect of destroying vested rights of the litigants. For instance, if a litigant has a right of appeal against a particular order he can exercise it notwithstanding the publication of the notification under Section 52 (1) and the moment an appeal is filed the effect in law is that the original proceedings stand revived.

3. In our opinion the principle laid down in this case is applicable to an application for setting aside an ex parte order. Section 41 of the Consolidation of Holdings Act makes the provisions of Chapters IX and X of the U. P. Land Revenue Act applicable to all proceedings under the Consolidation of Holdings Act. Sections 200 and 201 of the U. P. Land Revenue Act are in Chapter IX. Section 200 provides that whenever any party to such proceeding neglects to attend on the day specified in the summons, or on any day to which the case may have been postponed, the Court may dismiss the case for default or may hear and determine it ex parte. Section 201 says that no appeal shall lie from an order passed under Section 200 ex parte or by default. That section provides

for re-hearing on proof of good cause for non-appearance. The petitioner had made an application under this provision for the re-hearing of the case on showing good cause for non-appearance. Actually his case was that he was all along present but he was informed that the case would be heard on some other date. The proceedings are thus for the re-hearing of the matter. The petitioner had a statutory right to make such an application. This right accrued to him on 23-12-1968 the date when the Consolidation Officer disposed of the objection. That right could not be extinguished by the issuance of the notification under Section 52 (1). The effect of the exercise of that right was to invoke the revival of the proceedings before the Consolidation Officer. In our opinion, such proceedings are on the same footing as an appeal because they have the effect of reviving the original proceedings."

Iqbal Ahamad and others
(supra):

"5. I duly considered arguments of learned counsel for the petitioners and I am of the view that none of the arguments pressed by the learned counsel for the petitioners could be sustained in law. Under the U.P.C.H. Act 'consolidation' is defined under Section 3 (2). Explanation (iii) of Section 3(2) of the U.P.C.H. Act makes it clear that land mentioned under Section 132 of U.P. Zamindari Abolition & Land Reforms Act (in short hereinafter referred to as the U.P.Z.A. & L.R. Act) shall not be included in consolidation Scheme.

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7. From perusal of the above provisions, it is clear that if any land is mentioned under Section 132 of the U.P.Z.A. & L.R. Act it shall not be included

in the consolidation scheme for the purposes of consolidation.

8. Section 132 of the U.P.Z.A. & L.R. Act makes it clear that notwithstanding any thing contained in this Section, but without prejudice to Section 19 of the U.P.Z.A. & L.R. Act, Bhumidhari rights shall not accrue to any land covered by water. As plot in question is Garhi it cannot be part of consolidation scheme for allotment proceeding in the unit and as such it was rightly excluded by the Deputy Director of Consolidation from the consolidation scheme.

9. From the material on record it transpires that the land in dispute was recorded as Gaen Sabha property, as mentioned under Section 132 of the U.P.Z.A. & L.R. Act and as SUC at the time of revision of Field Book, Determination of valuation etc. and preparation of Statement of Principles, as required under Sections-8 and 8-A of the U.P.C.H. Act on the date of publication of the record under Section-9 of the U.P.C.H. Act in the unit, this land was not included in the consolidation scheme, and that is why valuation of this land was not determined with the result the matter relating to valuation of the plot became final under Section-11-A of the U.P.C.H. Act, which runs as follows:-

"11-A. Bar on objection.- No question in respect of-

(i) claims to land,

(ii) partition of joint holdings, and

(iii) valuation of plots, trees, wells and other improvements, where the question is sought to be raised by a tenure-holder of the plot or the owner of the tree, well or other improvements recorded in the annual register under Section 10,

relating to the consolidation area, (which has been raised under Section 9 or which might or ought to have been

raised under that section), but has not been so raised, shall be raised or heard at any subsequent stage of the consolidation proceedings."

10. From perusal of record it is also clear that in correction proceeding, the valuation of the plot in dispute was determined and was illegally included in the consolidation Scheme and allotted in the petitioners' Chak. The Deputy Director of Consolidation rightly passed the impugned order in accordance with law. There is no illegality in the order of the Deputy Director of Consolidation and does not call for any interference."

Palakdhari (supra):

"8. The reference to section 117 and 117-A of the U.P. Zamindari Abolition & Land Reforms Act, 1950 has been specifically made in Section 8-A of the U.P. Consolidation of Holdings Act, 1953. Section 117 of the U.P. Zamindari Abolition & Land Reforms Act, 1950 clearly provides with respect to vesting of land in the State Government and its subsequent vesting in the Gaon Sabha by a declaration to be made by publication of notification by the State Government. Section 117(6) of the U.P. Zamindari Abolition & Land Reforms Act, 1950 clearly provides that the State Government may, at any time, order for resuming such land vested in Gaon Sabha back to the State Government. The aforesaid provision clearly indicates that when on the date of vesting the land is vested in the State Government and a notification under section 117(1) of the U.P. Zamindari Abolition & Land Reforms Act, 1950 has been issued by the State Government, the land would vest in Gaon Sabha. Such vesting of land in Gaon Sabha only provided the power of use of the land by the Gaon Sabha. Land which was vested in the Gaon Sabha by virtue of a notification under section 117(1) was

clearly not a complete vesting of right, title and interest. The vesting was for specified purpose as given in Section 117(1) of the U.P. Zamindari Abolition & Land Reforms Act, 1950 particularly when under section 117(6) of the Act the State could resume the land from the Gaon Sabha. Hence it was not a vesting of right, title and interest but the State continues to have power to resume it. Therefore, to state that the land so vested in Gaon Sabha was subject matter of allotment by the Consolidation Officer to a private institution, would be against the very provision of vesting such land in the Gaon Sabha by the State Government. Clearly the consolidation officer could only earmark the land for public purpose, but it could not pass order with respect to specific use of such land. It is only the Gaon Sabha which can allot the land vested in it by the State Government under section 117(1) of the U.P. Zamindari Abolition & Land Reforms Act, 1950. The consolidation authorities can only earmark such land of the Gaon Sabha for public purpose in consolidation proceedings.

9. Therefore, the first appellate court has rightly held that the consolidation officer has acted beyond his jurisdiction in directing entry in the revenue record to be made of a land earmarked for a public purpose in the name of the institution of which the appellant claims to be the manager. Such function of use of public land vested in Gaon Sabha could have been performed only by the Gaon Sabha. There is no error in the view taken by the first appellate court. The suit of the Gaon Sabha has been rightly allowed. The first substantial question of law so argued by learned counsel is decided against the appellant and in favour of the plaintiff-Gaon Sabha.

10. Insofar as submission regarding bar of Section 49 of the U.P.

Consolidation of Holdings Act, 1953 is concerned, the submission of learned counsel is that even if the consolidation officer has passed an order which is illegal or beyond jurisdiction, it cannot be interfered with in a civil suit in view of the bar under section 49 of The U.P. Consolidation of Holdings Act, 1953.

11. Such submission of learned counsel for the appellant appears to be quite mis-conceived. Section 49 relates to declaration and adjudication of rights of a tenure holder. Definitely these courts are courts which can adjudicate and declare the rights of tenure holder. Even the appellant who claims to be in possession of the land by order of the consolidation officer is not claiming rights of a tenure holder or bhumidhar of the land in question. He is claiming rights over the land as play ground on the basis of an order of the consolidation officer upon land earmarked as land for public purpose. He does not dispute that the land was earmarked by the consolidation officer for public purpose. When the appellant is not a tenure holder and has no title over the land in question his possession can, at the most, be by virtue of an allotment of public land. Since the order of the Consolidation Officer in allotting public land belonging to and earmarked for the Gaon Sabha was not within his power, clearly the Consolidation Officer had no jurisdiction to allot the land earmarked for public purpose to a private body or person. Consequently the bar under section 49 of the U.P. Consolidation of Holdings Act, 1953 does not apply. The submission is mis-conceived and is accordingly rejected.

Ram Nihor (supra):

"The U.P. Consolidation of Holdings Act, 1953 Provides that when scheme of Consolidation in a village is finalised, land shall be ear-marked for

public purpose. Under Section 8-A of the U.P. Consolidation of Holdings Act, statement of principles is required to contain details of the areas ear-marked for extension of abadi site for Harijans and landless persons in the unit, and for such other public purposes as may be prescribed. Under Rule 24-A of the U.P. Consolidation of Holdings Rules, framed under section 54 of the Act, public purposes for which the area should be earmarked are prescribed. According to this rule in addition to the reservation of land for extension of Abadi including the areas for abadi sites for Harijans and landless persons, land may be earmarked according to the local requirements for the public purposes, viz: manure pits, roads, 'pasture land' land, thrashing floor, play grounds, primary and other schools, hospitals, panchayat ghars, cremation and graveyards, water channels etc. Under section 19 of the Act, tenure holders are required to contribute land for their holdings towards the land which is earmarked for a public purpose as required by the Act and the Rules. The land so set out by the consolidation authorities for the public purposes mentioned in the Act and the Rules, vests in the Gaon Sabha under Section 29-C of the Act and such land can not be utilised for any other purpose.

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Thus from a conjoint reading of above mentioned provisions, it is evident that the land so set out for public purpose mentioned in the Consolidation of Holdings Act and the Rules, vests in the Goan Sabha under section 29-C of the Act and such land can be utilised for any other purpose set out in Rule 24-A of the U.P. Consolidation of Holdings Rules.

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In the case in hand, the allotment was not cancelled on the ground that there was any irregularity in procedure. It was found that the land which was allotted to the petitioner was a public utility land, thus allotment was void abnatio. It was a fraudulent exercise by Goan Sabha in passing the resolution proposing the change of purpose for which the land has been earmarked in consolidation. The Goan Sabha had no power to do so."

(Emphasis Supplied)

14. Sri Rameshwar Prasad Shukla, learned counsel for respondent/complainant has adopted the argument of learned A.A.G. and has placed reliance upon **Ram Bahadur (supra); Sheo Nand and others vs. D.D.C., Allahabad and others, (2000) 3 SCC 103, and Babu Lal vs. D.D.C., Allahabad and others, 1985 RD 236**, relevant paragraphs of above judgments are quoted hereinafter -:

Babu Lal (supra):

".....The statutory provisions of Section 11-C of the Act are reproduced below for the sake of convenience:-

11-C. In the course of hearing of an objection under Section 9-A or an appeal under Section 11 or in proceedings under Section 48, the Consolidation Officer, the Settlement Officer (Consolidation) or the Director of Consolidation, as the case may be, may direct that any land which vests in the State Government or the Gaon Sabha or any other local body or authority may be recorded in its name even though no objection, appeal or revision has been filed by such Government, Gaon Sabha, body or authority."

In view of the aforesaid section it is that even though in respect of the clear land of the Gaon Sabha no objection.

appeal or revision could have been filed the Court can protect the interest of the Gaon Sabha in case it has been found that the land has actually vested in the Gaon Sabha. It is thus abundantly clear that even though no appeal could have been filed on behalf of the Gaon Sabha. nor the revision could have been preferred the interest of the Gaon Sabha could have been protected. In this view of the matter, with profound respect to the view taken in the case of *Sita Ram v. Dy. Dir. of Consolidation* (supra) the case is not indistinguishable.”

Sheo Nand and others (supra):

“5. The Deputy Director of Consolidation on a consideration of the oral and documentary evidence on record had come to the conclusion that Jethu who was not heard of for more than 7 years and had consequently died a civil death, had not left any heir who could be recorded as tenure-holders of those plots in his place. The property would, therefore, vest in the Gaon Sabha by Escheat. The decision of the Deputy Director was challenged before the High Court and during the pendency of the Writ Petition, the provisions of Section 11-C were introduced in the principal Act. Consequently, it was the duty of the High Court to give effect to those provisions at the time of the final decision of the Writ Petition. As pointed out above, it is the statutory duty of all the authorities functioning under the Act to give effect to the provisions of Section 11-C of the Act and to record the property as having vested in the Gaon Sabha even if no claim was laid by the Gaon Sabha nor was any petition filed by the Gaon Sabha under the Act. Even though the provisions of Section 11-C were not available to the Deputy Director at the time of the decision of the revision filed by the appellants before him, his order that the property should be recorded in the name of the Gaon Sabha

could be sustained on the basis of the provisions of Section 11-C at the time of hearing of the writ petition and the High Court was, therefore, justified in upholding his order. There is, thus, no error in the judgment of the High Court.

20. The Section gives very wide powers to the Deputy Director. It enables him either suo motu on his own motion or on the application of any person to consider the propriety, legality, regularity and correctness of all the proceedings held under the Act and to pass appropriate orders. These powers have been conferred on the Deputy Director in the widest terms so that the claims of the parties under the Act may be effectively adjudicated upon and determined so as to confer finality to the rights of the parties and the Revenue Records may be prepared accordingly.

21. Normally, the Deputy Director, in exercise of his powers, is not expected to disturb the findings of fact recorded concurrently by the Consolidation Officer and the Settlement Officer (Consolidation), but where the findings are perverse, in the sense that they are not supported by the evidence brought on record by the parties or that they are against the weight of evidence, it would be the duty of the Deputy Director to scrutinise the whole case again so as to determine the correctness, legality or propriety of the orders passed by the authorities subordinate to him. In a case, like the present, where the entries in the Revenue record are fictitious or forged or they were recorded in contravention of the statutory provisions contained in the U.P. Land Records Manual or other allied statutory provisions, the Deputy Director would have full power under Section 48 to re-appraise or re-evaluate the evidence on record so as to finally determine the rights of the parties by excluding forged and

fictitious revenue entries or entries not made in accordance with law.”
(Emphasis Supplied)

15. In the background of above referred factual and legal aspects and rival submissions, the issue before this Court which requires consideration is, **Whether the land which is either referred as a 'pasture land' in revenue record or earmarked during consolidation proceedings as 'pasture land' i.e. for a public purpose, could be allotted to petitioners on valuation, and if the answer is in affirmative, then whether in the facts and circumstances of present case, the land was allotted after due process or not?, and whether such allotment could be scrutinized after 24 years of publication of notification issued under Section 52 of the Act, 1953?**

16. It is a case of petitioners that nature of land was not specified during first consolidation proceedings, however, admittedly during second consolidation proceedings, entire land in dispute was earmarked as "pasture land" and it is also not in dispute that it was allotted in parts to the petitioners on valuation and on some part of land certain constructions have been erected, whereas, some parts of land are still vacant and there is no dispute in regard to present status of land as provided in the Inspection Report dated 07.01.2023.

17. Further, in order to consider the rival submissions, relevant provisions of U.P. Consolidation of Holdings Act, 1953 and U.P. Zamindari Abolition and Land Reforms Act, 1950 which have been referred by learned counsel for parties are mentioned hereinafter -:

“U.P. CONSOLIDATION OF HOLDINGS ACT, 1953

Section 3(2) “Consolidation” means re-arrangement of holdings in a unit amongst several tenure-holders in such a way as to make their respective holdings more compact;

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(iii) land mentioned in Section 132 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 (U.P Act no. 1 of 1951);

8-A. Preparation of Statement of Principles. - (1) The Assistant Consolidation Officer shall, in consultation with the Consolidation Committee, prepare, in respect of each unit under consolidation operations, a statement in the prescribed form (hereinafter called the Statement of Principles) setting forth the principles to be followed in carrying out the consolidation operations in the unit.

(2) The Statement of Principles shall also contain -

(a) details of areas, as far as they can be determined at this stage, to be earmarked for extension of abadi including area for abadi site for Harijans and landless persons in the unit, and for such other public purposes as may be prescribed;

(b) the basis on which the tenure-holders will contribute land for extension of abadi and for other public purposes; and

(c) details of land to be earmarked for public purposes out of land vested in a Gaon Sabha or a Local Authority under Section 117 or Section 117-A of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (U.P. Act No. 1 of 1951).

(d) the standard plots for each unit.

(3) The standard plots referred to in clause (d) of sub-section (2) shall be

determined by the Assistant Consolidation Officer after ascertaining from the members of the Consolidation Committee and the tenure-holders of the units, the best plot or plots of the unit, regard being had to productivity, location and the existing soil class of the plot or plots.

19. Conditions to be fulfilled by a Consolidation Scheme. - (1) A Consolidation Scheme shall fulfil the following conditions, namely, -

(a) the rights and liabilities of a tenure-holders, as recorded in the annual register prepared under Section 10 are, subject to the deductions, if any, made on account of contributions to public purposes under this Act, secured in the lands allotted to him;

(b) the valuation of plots allotted to a tenure-holder, subject to deductions, if any, made on account of contributions to public purposes under this Act, is equal to the valuation of plots originally held by him;

Provided that, except with the permission of the Director of Consolidation, the area of the holding or holdings allotted to a tenure-holder shall not differ from the area of his original holding or holdings by more than twenty-five per cent of the later;

(c) the compensation determined under the provisions of this Act, or the rules framed thereunder, is awarded -

(1) to the tenure-holder -

(i) for trees, wells and other improvements, originally held by him and allotted to another tenure-holder; and (ii) for land contributed by him for public purposes;

(2) to the Gram Sabha, or any other local authority, as the case may be, for development, if any, effected by it in or over land belonging to it and allotted to a tenure-holder;

(d) the principles laid down in the Statement of Principles are followed;

(e) every tenure-holder is, as far as possible, allotted a compact area at the place where he holds the largest part of his holding :

Provided that no tenure-holder may be allotted more chaks than three, except with the approval in writing of the Deputy Director of Consolidation : Provided further that no consolidation made shall be invalid for the reason merely that the number of chaks allotted to a tenure-holder exceeds three;

(f) every tenure-holder is, as far as possible, allotted the plot on which exists his private source of irrigation or any other improvement, together with an area in the vicinity equal to the valuation of the plots, originally held by him there; and

(g) every tenure-holder is, as far as possible, allotted chaks in conformity with the process of rectangulation in rectangulation units.

(2) A Consolidation Scheme before it is made final under Section 23, shall be provisionally drawn up in accordance with the provisions of Section 19-A.

19-A. Preparation of provisional Consolidation Scheme by the Assistant Consolidation Officer. - (1) The Assistant Consolidation Office shall in consultation with the Consolidation Committee, prepare in the form prescribed a provisional Consolidation Scheme for the unit.

(2) Notwithstanding anything contained in this Act, the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950(U.P. Act No. 1 of 1951), or any other law for the time being in force, it shall be lawful for the Assistant Consolidation Officer where in his opinion it is necessary or expedient so to do, to allot

a tenure-holder, after determining its valuation, any land belonging to the State Government, or any land vested in the Gaon Sabha, or any other local authority, as a result of notification issued under Section 117 or 117-A of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (U.P. Act No. 1 of 1951):

Provided that where any such land is used for a public purpose, it shall be allotted only after the Assistant Consolidation Officer has declared in writing that it is proposed to transfer the rights of the public as well as of all individuals in or over that land to any other land specified in the declaration and earmarked for that purpose in the provisional Consolidation Scheme.

29-C. Vesting of land contributed for public purpose :- (1) The land contributed for public purposes under this Act shall, with effect from the date on which the tenure holders became entitled to enter into possession of the chaks allotted to them under the provisions of this Act as amended from time to time, vest and be always deemed to have vested in the Gaon Sabha [in an area in which Section 117 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 applies and in the State Government in any other area, and shall be utilised for the purpose for which it was earmarked in the final Consolidation Scheme, or in case of failure of that purpose, for each other purpose as may be prescribed.]

(2) The provisions of Section 117 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (U.P. Act No. 1 of 1951) shall *mutatis mutandis* apply to such land [vested in the Gaon Sabha] as if the land had vested in the Gaon Sabha by virtue of a declaration made by the State Government under sub-section (1) of that Section and as if the declarations were

made subject to the conditions respecting utilisation specified in sub-section (1) of this Section.

52. Close of consolidation operations. - (1) As soon as may be, after fresh maps and records have been prepared under sub-section (1) of Section 27, the State Government shall issue a notification in the Official Gazette that the consolidation operations have been closed in the unit and the village or villages forming a part of the unit shall then cease to be under consolidation operations :

Provided that the issue of the notification under this section shall not affect the powers of the State Government to fix, distribute and record the cost of operations under this Act.

(1-A) The notification issued under sub-section (1) shall be published also in a daily newspaper having circulation in the area and in such other manner as may be considered proper.

(2) Notwithstanding anything contained in sub-section (1), any order passed by a Court of competent jurisdiction in cases of writs filed under the provisions of the Constitution of India, or in cases of proceedings pending under this Act on the date of issue of the notification under sub-section (1), shall be given effect to by such authorities, as may be prescribed and the consolidation operation shall, for that purpose, be deemed to have not been closed.

(3) Where the allotment or lease of any land made before the Consolidation Scheme becomes final under Section 23, is cancelled by an order under sub-section (4) of Section 198 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (U.P. Act No. 1 of 1951) and such order becomes final, then notwithstanding anything contained in the provisions of this Act, such order shall be

given effect to by such authorities, as may be prescribed, in the following manner, and the consolidation operation shall, for that purpose, be deemed to have not closed, namely-

(a) the value of the land which was the subject-matter of such allotment or lease shall first be ascertained in the manner prescribed;

(b) the value referred to in clause (a) shall be deducted from the total value of land allotted to the tenure-holder concerned during consolidation proceedings;

(c) the tenure-holder shall be entitled, during consolidation proceeding, to land equivalent in valuation to the said land."

U.P. CONSOLIDATION OF HOLDINGS RULES, 1954

"Rule 24-A. Section 8-A AND 54 – (1) The "Statement of Principles" shall be prepared in his own hand in C.H. Form 21 by the Assistant Consolidation Officer in consultation with the Consolidation Committee and after making enquiries from as many tenure-holders of the unit as he may be able to collect. The statement shall contain reasons for the principles incorporated therein and shall be accompanied by a copy of the map of the unit, which shall show :

i) "Standard Plots" of the unit as determined under Rule 20-A;

(ii) the existing permanent features, such as Abadi sites, canals their distributaries along with field channels (gools) roads, groves, wells, nalas, rivers, graveyards, cremation grounds and other areas, used for public purposes;

(iii) the additions and alterations proposed in the site, alignment or dimensions of any of the items mentioned in clause (ii); and

(iv) areas to be earmarked for any other public purposes.

(2) Besides reservation of lands for extension of Abadi, including areas for Abadi sites for Harijans and landless persons in the unit for present and future needs land may also be reserved according to the needs of each unit for the following public purposes :

(i) Manure pits;

(ii) Roads, village and inter-village rastas;

(iii) Pasture lands;

(iv) Threshing-floor;

(v) Playground;

(vi) Primary and other schools;

(vii) Hospitals;

(viii) Panchayat ghars;

(ix) Plantation of trees;

(x) Cremation grounds and graveyards;

[(xi) Water channels (gools or nalis) and canals for irrigation purposes];

(xii) Flaying sites; and

(xiii) any other objects of similar nature for which reservation of land may be considered necessary in the interest of the tenure-holders of the unit.

Note. - Reservation for ail the purposes specified above, including those for Abadi sites shall be made separately for present needs and for future needs.

(3) During the course of the preparation of the Statement of Principles every specific problem of the unit having a bearing on equitable allotment of Chaks shall receive the attention of the Assistant Consolidation Officer and the Consolidation Committee. The principles on which such problems are proposed to be resolved should be in consonance with the provisions of the Act and these Rules, and must be incorporated in the statement. The statement shall also show the details of the "Standard Plots" determined under Rule 20-A.

(4) If there is a difference of opinion between the Assistant Consolidation Officer and the Consolidation Committee on any of the terms of the Statement of Principles, the Assistant Consolidation Officer shall prepare a note covering the points of differences and forward it to the Consolidation Officer.

(5) If the Consolidation Officer is unable to resolve the difference between the Assistant Consolidation Officer and the Consolidation Committee, he shall forward the record to the Settlement Officer, Consolidation, together with his opinion on each point of difference.

(6) The Settlement Officer, Consolidation, shall after hearing the Consolidation Committee, give his decision on the points referred to him under sub-rule (5)."

"U.P. ZAMINDARI ABOLITION AND LAND REFORMS ACT, 1950

117. Vesting of certain lands, etc. in Gaon Sabhas and other Local Authorities.] - (1) At any time after the publication of the notification referred to in Section 4. the State Government may [by general or special order to be published in the manner prescribed], declare that as from a date to be specified in this behalf, all or any of the following things, namely-

(i) lands, whether cultivable or otherwise, except lands for the time being comprised in any holding or grove;

(ii) forests;

(iii) trees, other than trees in a holding or on the boundary of a holding or in a grove or abadi',

(iv) fisheries;

(v) hats, bazars and melas, except hats, bazars and melas held on lands to which the provisions of Clauses (a) to (c) of sub-section (1) of Section 18 apply or on sites and areas referred to in Section 9; and

(vi) tanks, ponds, private ferries, water channels, pathways and abadi site,-

which had vested in the State under this Act, shall vest in a Gaon Sabha or any other local authority established for the whole or part of the village in which the said things are situate or partly in one such local authority (including a Gaon Sabha) and partly in another :

Provided that it shall be lawful for the State Government to make the declaration aforesaid subject to such exceptions and conditions as may be [specified in such order].

(2) Notwithstanding anything contained in this Act or in any other law for the time being in force, the State Government may, [by general or special order to be published in the manner prescribed], declare that as from a date to be specified in this behalf, all or any of the things specified in Clauses (i) to (vi) of sub-section (1) which after their vesting in the State under this Act, had been vested in a Gaon Sabha or any other local authority, either under this Act or under Section 126 of the Uttar Pradesh Nagar Mahapalika Adhiniyam, 1959, shall vest in any other local authority (including a Gaon Sabha) established for the whole or part of the village in which the said things are situate.

(3) Where any declaration has been made under sub-section (1) or subsection (2) vesting any of the things specified in Clauses (i) to (vi) of sub-section (1) in any Gaon Sabha and the village or the part of the village in which that thing is situate lies outside the circle of the Gaon Sabha, such Gaon Sabha or its Land Management Committee shall in respect of that thing perform, discharge and exercise the functions, duties and powers assigned, imposed or conferred by or under this Act or the U.P. Panchayat Raj Act, 1947, on a Gaon Sabha or a Land

Management Committee, as the case may be, as if that village or part of village also lay within that circle.

(4) Where a declaration has been made under sub-section (1) or sub-section) vesting any of the things specified in Clauses (i) to (vi) of sub-section (1) in a local authority other than a Gaon Sabha and the village or the part of village in which the thing is situate is outside the limits of such local authority or where after any declaration is made under sub-section (1) or sub-section (2), the thing vests or as the case may be, had vested in a Nagar Mahapalika under Section 126 of the Uttar Pradesh Nagar Mahapalika Adhiniyam, 1959, such local authority shall in respect of that thing perform, discharge and exercise the functions, duties and powers assigned, imposed or conferred by or under this Act or the U.P. Panchayat Raj Act, 1947, on a Gaon Sabha or Land Management Committee :

Provided that the local authority shall in the performance, discharge and exercise of its functions, duties and powers under this sub-section follow such procedure as may be prescribed.

(5) Where any of the things specified in Clauses (i) to (vi) of sub-section (1) is vested in a local authority other than a Gaon Sabha the provisions of Sections 126 and 127 shall, subject to such exceptions and modifications, if any, as the State Government may specify in this behalf [by general or special order to be published in the manner prescribed] apply, *mutatis mutandis*, to such local authority.

(6) The State Government may at any time, [by general or special order to be published in the manner prescribed], amend or cancel any [declaration, notification or order] made in respect of any of the things aforesaid, whether generally or in the case of any Gaon Sabha or other local authority

and resume such thing and whenever the State Government so resumes any such things, the Gaon Sabha or other local authority, as the case may be, shall be entitled to receive and be paid compensation on account only of the development, if any, effected by it in or over that things :

Provided that the State Government may after such resumption make a fresh declaration under sub-section (1) or sub-section (2) vesting the thing resumed in the same or any other local authority (including a Gaon Sabha), and the provisions of sub-sections (3), (4) and (5), as the case may be, shall *mutatis mutandis*, apply to such declaration.

117A. Further provision for exercise of further extra territorial jurisdiction by Gaon Sabha or other local authority. - (1) Where-

(a) any village or part of a village situated within the circle of a Gaon Sabha is included alter the 7th day of July, 1949, within the limits of any other local authority (not being a Gaon Sabha); or

(b) any village or part of a village situated within the limits of any other local authority (not being a Gaon Sabha) is, after the 7th day of July, 1949, included within the circle of a Gaon Sabha; or

(c) any of the things specified in Clauses (i) to (vi) of sub-section (1) of Section 117 is vested under that section in any Gaon Sabha or other local authority within whose local limits it does not lie,-

then the State Government, may by general or special order to be published in the manner prescribed direct that in relation to the holding area within any such village or part thereof or in the case of a Clause (c) within the remainder of the village or part thereof to which the thing referred to in that clause appertains, such Gaon Sabha or its Land Management

Committee or other local authority as may be specified in such order shall perform, discharge and exercise, subject to such exceptions, conditions and modifications if any, as may be specified in this behalf, the functions, duties and powers assigned, imposed or conferred by or under this Act or the U.P. Panchayat Raj Act, 1947 on a Gaon Sabha or Land Management Committee.

(2) Any Gaon Sabha or other local authority performing, discharging or exercising any of the functions, duties or powers of the nature referred to in subsection (1) in relation to any area or thing referred to therein on the day immediately before the commencement of the Uttar Pradesh Land Laws Amendment Act, 1965, shall continue to perform, discharge or exercise such functions, duties or powers until any modification or annulment is made in respect thereof by notification or order under the said subsection.

(3) The provisions of this section shall be in addition to and not in derogation of anything contained in sub-sections (3) to (6) of Section 117.

132. Land in which bhumidhari rights shall not accrue. - Notwithstanding anything contained in Section 131, but without prejudice to the provisions of Section 19, bhumidhari rights shall not accrue in-

(a) 'pasture' lands or lands covered by water and used for the purpose of growing singhara or other produce or land in the bed of a river and used for casual or occasional cultivation;

(b) such tracts of shifting or unstable cultivation as the State Government may specify by notification in the Gazette; and

[(c) lands declared by the State Government by notification in the Official

Gazette, to be intended or set apart for taungya plantation or grove lands of a [Gaon Sabha] or a Local Authority or land acquired or held for a public purpose and in particular and without prejudice to the generality of this clause-

(i) lands set apart for military encamping grounds;

(ii) lands included within railway or canal boundaries;

(iii) lands situate within the limits of any cantonment;

(iv) lands included in sullage farms or trenching grounds belonging as such to a local authority;

(v) lands acquired by a town improvement trust in accordance with a scheme sanctioned under Section 42 of the U.P. Town Improvement Act, 1919 (U.P. Act VII of 1919) or by a municipality for a purpose mentioned in Clause (a) or Clause (c) of Section 8 of the U.P. Municipalities Act, 1916 (U.P. Act VII of 1916); and

(vi) lands set apart for public purposes under the U.P. Consolidation of Holdings Act, 1953 (U.P. Act V of 1954).]"

18. From above referred provisions, it could conclusively be held that according to Section 132 of U.P.Z.A. and L.R. Act, no *bhoomidhari* right shall accrue on 'pasture land', a land for public utility and purpose and during consolidation proceedings, such lands shall not be included in scheme of consolidation. Section 29-C of Act of 1953 provides land contributed for public purposes shall be utilized for the said purpose as earmarked in the fixed consolidation scheme and further that Section 19-A of Act of 1953 which is an enabling Section, enables the Assistant Consolidation Officer while preparing the provisional consolidation scheme to make allotment of Gaon Sabha land after determination of its valuation but

only in compliance of due process and after due consideration of factors enumerated therein, in exceptional circumstances and not in a routine manner.

19. In a case where a land, if recorded in revenue records as a 'pasture land' i.e. a land defined in Section 132 of U.P.Z.A. and L.R. Act, that land shall not be included under the consolidation proceedings as specifically excluded by the provisions of Section 3(2) of Act of 1953, however, since in the present case, either of rival parties have not placed any document on record that land in dispute was initially recorded as 'pasture land', therefore, there was no illegality or irregularity when land in dispute was included in consolidation proceedings.

20. It has also not been seriously disputed that during first consolidation proceedings, the land in dispute was not either earmarked or entered into revenue records as 'pasture land' i.e. for public purpose. As curled out from the facts of present case, during second consolidation proceedings, the land in dispute was earmarked for a public purpose of 'pasture land' while preparation of the consolidation scheme by Assistant Consolidation Officer.

21. In **Ram Nihor (supra)**, a coordinate Bench has rightly held that land, if earmarked for public purpose during finalizing of consolidation scheme, the Gram Sabha is not empowered to allot the same for any other purpose, however, consideration of Section 19-A of Act, 1953 had skipped or probably, it was not the case before coordinate Bench, which provides that where in opinion of Assistant Consolidation Officer, it is 'necessary' or 'expedient' to allot, a tenure holder, after determining its valuation, any land vested

in Gram Sabha, as a result of a notification issued under Section 117-A of U.P.Z.A. and L.R. Act, it can be allotted and it further provides that where such land is used for a public purpose, it shall be allotted only after Assistant Consolidation Officer has declared in writing that it is proposed to transfer rights of the public as well as of all individuals in or over the land to any other land specified in the declaration and earmarked for that purpose in the provisional consolidation scheme.

22. Now the question is whether such land i.e. a land earmarked for public purpose as a 'pasture land' in present case, could be allotted on valuation under Section 19-A of the Act, 1953 and in this regard, judgments of Supreme Court in **Hinchlal Tiwari vs. Kamala Devi and others, (2001) 6 SCC 496** and **Jagpal Singh and others vs. State of Punjab and others, (2011) 11 SCC 396**, would be relevant by which a general mandamus was issued to evict unauthorized and illegal occupants on land of Gaon Sabha. It was also specifically noted in **Jagpal (supra)** that the Act of 1953 was widely misused to usurp the Gram Sabha lands either with connivance of the Consolidation Authorities, or by forging orders purported to have been passed by Consolidation Officers in the long past so that they may not be compared with original revenue record showing the land as Gaon Sabha land, as these land records have been weeded out.

23. In the present case, petitioners have not brought on record copy of orders, whereby land earmarked for public purpose ('pasture land') was allotted to them, in order to scrutinize whether the Assistant Consolidation Officer was satisfied that the allotment of such land was 'necessary' or

‘expedient’ as well as it would not be against the public purpose and after allotment, how much area of land was likely to be left with Gaon Sabha for the purpose of ‘pasture land’. There is nothing on record that in lieu of the land in dispute, some other equal area (in terms of valuation or otherwise) was earmarked as ‘pasture land’ and it becomes more relevant since it has been pointed out by learned counsel for respondent/complainant that the land in dispute is abutting to main road, thereby is having a potential value.

24. The procedure and satisfaction of being ‘necessary’ or ‘expedient’ are not empty formality but has great relevancy since the Authority is going to allot a land earmarked for public purpose, which, he could not do in normal circumstances, and in view of object of provisions of U.P.Z.A. and L.R. Act as well as provisions of Act, 1953 and Rules of 1954, the order of allotment shall necessary include ‘necessity and expediency’ in specific and considered manner and there shall be some alternative land which could be earmarked for said public purpose.

25. I have carefully perused the report of Settlement Officer of Consolidation dated 07.01.2023 addressed to District Collector, Azamgarh wherein it has been mentioned that Gata Nos. 240, 299, 301 which are not in dispute were recorded as a ‘pasture land’ in the revenue records of 1369 F and after it is now being recorded for agriculture and for other purposes and since allotment was beyond jurisdiction, therefore, entries made in revenue records were deleted and land in dispute was restored as ‘pasture land’ in revenue records.

26. I have also carefully perused the impugned order 28.02.2023 wherein on

basis of an application of respondent/complainant dated 17.07.2017, an inquiry was conducted and it was found that land earmarked for ‘pasture land’ in consolidation proceedings was allotted to the petitioners and after taking note of judgment passed by this Court in Second Appeal No. 81 of 2011 and in Public Interest Litigation No. 1474 of 2019, reported in **2011 (12) RD 595 and 1997 (58) RD 52** respectively as well as considering that in matter of public interest, the competent Authority is empowered to act suo moto in accordance with law. The Authority has also taken note of legal principles that fraud, if committed, vitiates all solemn proceedings. The Authority has also taken note of circulars issued by Government of U.P. and judgment passed by Supreme Court in the cases of **Hinchlal Tiwari (supra) and Jagpal Singh (supra)** and held that allotment of a ‘*pasture land*’ on valuation was a result of fraud and had set aside the allotment orders and restored the revenue entry of land in dispute as ‘*pasture land*’.

28. As referred above, the land in dispute was earmarked as ‘pasture land’ during second consolidation and in order to allot the same, on valuation, the procedure required to be adopted is provided under Section 19-A of the Act, 1953, and specifically in proviso to its sub-section (2) and as referred above, since no document of allotment is placed on record as well as any document or order indicating satisfaction of Assistant Consolidation Officer ‘necessity and expediency’ to allot a land earmarked for public purpose, as per the mandate of section 19-A of Act, 1953, while making allotment of land to the petitioners, is also not on record. Process of allotment cannot be an empty formality since a large chunk of land which is

admittedly earmarked for public purpose was allotted to petitioners who are in large numbers and as allotments being made in devoid of observance of due process, without noting in writing the satisfaction of its being 'necessary' or 'expedient', are irregular and illegal, therefore, allotment orders cannot be sustained.

29. The argument that Deputy Director of Consolidation has taken cognizance of application at very belated stage i.e. after more than 2 decades, may be relevant but since there is per se presence of element of 'fraud on statute' and that Assistant Consolidation Officer has allotted a public land to petitioners without any 'necessity' or 'expediency' and without any alternative land being earmarked for said public purpose ('pasture land'), therefore, as it is well settled that a 'fraud' which also includes a 'fraud on statute', if detected, can be considered even at any later stage. Legal principle that 'fraud vitiates every solemn act' which also amounts to an abuse of the process, and the court or concerned Authority has inherent power to set aside, an order obtained by fraud practised upon it or a statute also and for that few paragraphs of a judgment passed by Supreme Court in **Smriti Madan Kansagra vs. Perry Kansagra, 2021 SCC Online SC 909**, would be relevant and being quoted below - :

“49. xxxx

23. Since fraud affects the solemnity, regularity and orderliness of the proceedings of the court and also amounts to an abuse of the process of court, the courts have been held to have inherent power to set aside an order obtained by fraud practised upon that court. Similarly, where the court is misled by a party or the court itself commits a mistake which

prejudices a party, the court has the inherent power to recall its order.

xxxx

50. In *United India Insurance Co. Ltd. v. Rajendra Singh*, (2000) 3 SCC 581, this Court observed:-

"16. Therefore, we have no doubt that the remedy to move for recalling the order on the basis of the newly-discovered facts amounting to fraud of high degree, cannot be foreclosed in such a situation. No court or tribunal can be regarded as powerless to recall its own order if it is convinced that the order was wangled through fraud or misrepresentation of such a dimension as would affect the very basis of the claim."

(emphasis supplied)

30. In view of above discussion, I do not find any merit in arguments of learned counsel for petitioners and there is no illegality in the impugned order, therefore, prayers made in all writ petitions are rejected.

31. However, it is clarified that since the Court is of the opinion that even in case a land earmarked for public purpose it could be allotted, however, such allotment has to be carried out in accordance with due process prescribed under Section 19-A of the Act, 1953 with specific reasoning, i.e. necessity and expediency for allotment, and it is up to the appropriate Authority to exercise such procedure afresh, if situation so warrants and for that a *status-quo* is directed to be maintained on the land in dispute only for a period of three months from today. Meanwhile, State of Uttar Pradesh or the concerned appropriate Authority, may take an appropriate decision in terms of Section 19-A of the Act, 1953, if so warranted.

32. It is also made clear that while passing any order the State or the concerned Authority will take note of judgments passed by Supreme Court in **Hinchlal Tiwari (supra)** and **Jagpal Singh (supra)** and other judgments and provisions referred in present judgment. The observations and order of status quo for three months shall not be construed that this Court has directed to undertake any fresh exercise of allotment and if the State or Authority concerned does not initiate fresh proceedings for allotment within aforesaid period, the legal consequence of impugned order shall follow and Authority shall take necessary steps for its implementation, expeditiously within shortest time.

33. All writ petitions are **disposed of**.

34. No order as to costs.

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(2023) 9 ILRA 281

**ORIGINAL JURISDICTION
CIVIL SIDE**

DATED: ALLAHABAD 02.08.2023

BEFORE

THE HON'BLE SYED QAMAR HASAN RIZVI, J.

Writ B No. 2620 of 2023

Amritansh Pandey ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sudhanshu Pandey

Counsel for the Respondents:
C.S.C., Sri Arvind Kumar Shukla, Sri Sudhir
Bharti, Sri R.C. Singh (Sr. Advocate)

Held:

The writ petition challenging orders dated 30.06.2023, 12.04.2021, and 07.02.2020 passed by the Board of Revenue, Sub-Divisional Officer, and Nayab Tehsildar, respectively, in mutation proceedings under Section 35 of the U.P. Revenue Code, 2006, is not maintainable. Mutation proceedings are summary in nature and do not confer or extinguish title. Entries in revenue records are for fiscal purposes only and have no presumptive value on title. The petitioner's claim based on a registered Will dated 24.06.2010 requires adjudication by a competent civil court to establish title. The writ petition is disposed of with liberty to the petitioner to approach the competent civil court for adjudication of rights/title, and the mutation orders shall abide by such decision without being influenced by findings in the mutation proceedings.

Case Law Discussed:

1. Madhav Pandey Vs Board of Revenue, 2002(2) AWC 1311
2. Smt. Kalawati Vs Board of Revenue, 2022(4) ADJ 578
3. Hadisul Nisha Vs Additional Commissioner (Judicial) Faizabad, 2021(6) ADJ 176
4. Jitendra Singh Vs St. of M.P., 2021(6) Supreme 185
5. Faqrudin Vs Tajuddin, (2008) 8 SCC 12
6. Suraj Bhan Vs Financial Commissioner, (2007) 6 SCC 186
7. Bhimabai Mahadeo Kambekar (D) through L.R. Vs Arthur Import and Export Comp., MANU/SC/0112/2019
8. M/s. Godrej Sara Lee Ltd. Vs Excise and Taxation Officer, AIR 2023 SC 781

(Delivered by Hon'ble Syed Qamar Hasan
Rizvi, J.)

1. Heard Shri Sudhanshu Pandey, learned counsel for the petitioner, Shri

Sudhir Bharti, learned counsel for respondent No. 5, Shri Pankaj Kumar, learned Standing Counsel for respondents No. 1 to 4 and Shri R.C. Singh, learned Senior Advocate assisted by Shri Arvind Kumar Shukla, learned counsel for respondent No. 6.

2. The present writ petition has been filed seeking the following reliefs:

“A. Issue a writ, order or direction in the nature of certiorari quashing the impugned orders dated 30.06.2023 passed by the Board of Revenue U.P. at Lucknow in Revision No. 1063 of 2021, Order dated 12.04.2021 passed by Sub-Divisional Officer, Tahsil Kasya District Kushinagar in Case No. 00006 of 2021 and order dated 07.02.2020 passed by the Nayab Tehsildar Padrauna District Kushinagar in Case No. 3772 of 2017 (Amritansh Pandey vs. Upendra Mani) under section 35 of U.P. Revenue Code 2006.

B. Issue a writ, order or direction in the nature of Mandamus commanding the Respondent No. 4, Nayab Tehsildar Padrauna District Kushinagar to mutate/record the name of the petitioner on the basis of a registered Will dated 24.06.2010 in place of Sri Upendra Mani.

C. Issue any writ, order or direction which this Hon'ble Court may deem fit and proper in the present circumstances of the case,

D. Award the cost of the petition.”

3. The factual matrix of the case in brief is that one Shri Upendra Mani executed a Will deed dated 24.06.2010 which was registered on 23.07.2010 in favour of the Petitioner.

4. After the death of the aforesaid testator on 11.07.2017, the petitioner filed a mutation application dated 13/18.07.2017, which was registered as Case No. 3772/2017 under section 35 of the U.P. Revenue Code, 2006. It is contended by the petitioner that while the aforesaid mutation proceeding was pending, the name of respondent No. 6, on the basis of succession, was recorded/mutated in the revenue records of the property vide order dated 17.08.2017. Thereafter, the petitioner filed a recall application before the Nayab Tehsildar, who vide order dated 30.12.2019 stayed the aforesaid Order dated 17.08.2017.

5. In the aforesaid case of mutation, being Case No. 3772/2017, respondent No. 6 filed objections and raised serious objections against the genuineness of the above mentioned registered Will. The Nayab Tehsildar, Padrauna, District Kushinagar vide order dated 07.02.2020, found the aforesaid Will deed to be unacceptable and thereby affirmed the earlier order dated 17.08.2017 in favour of respondent No. 6.

6. Aggrieved by the aforesaid order dated 07.02.2020 passed by the Nayab Tehsildar-respondent No. 4, the petitioner filed an appeal before the Sub-Divisional Officer, Kasya District, Kushinagar-respondent No.3, who by a detailed order 12.04.2021 dismissed the said Appeal. Thereafter, the petitioner preferred a Revision bearing REV/1063/2021/ Kushinagar under Section 210 of the U.P. Revenue Code, 2006 before the Board of Revenue, U.P. The Board of Revenue dismissed the said Revision by passing a detailed order dated 30.06.2023.

7. Being aggrieved by the orders dated 30.6.2023, 12.4.2021 and 7.2.2020, the petitioner has preferred the present writ petition invoking the extra-ordinary jurisdiction of the Writ Court under Article 226 of the Constitution of India.

8. The main ground raised by the petitioner in the present writ petition is that the revenue authorities have exceeded their jurisdiction by disbelieving the genuineness of the registered Will deed. The contention of the learned counsel for the petitioner is that when the competent court has not cancelled the Will, the revenue authorities ought to have believed in the genuineness of the Will deed.

9. To establish the genuineness of the aforesaid Will deed, the learned counsel for the petitioner drew the attention of this Court to the copy of the plaint bearing Case No. 435/2011 as contained in Annexure No.2 to the writ petition, said to have been jointly filed by one, Upendra Nath and Smt. Geeta Devi against the son of respondent No. 6 and some other relatives, seeking the relief of permanent prohibitory injunction. In paragraphs No. 7 and 8 of the aforesaid plaint there is a mention of the aforesaid Will dated 24.10.2010. The learned counsel for the petitioner has vehemently argued that the said suit for permanent prohibitory injunction is still pending wherein the testator of the Will, namely, Shri Upendra Mani, himself has stated that he executed the said Will, and as such, the genuineness of the Will cannot be doubted. He further submits that the wishes of the testator should be given weightage over other parameters.

10. Per contra, the Shri R.C. Singh, learned Senior Advocate appearing on behalf of Respondent No. 6 contended that

mere filing of a suit, that too, for the relief of permanent prohibitory injunction against his relatives does not establish the genuineness of the Will in question. He further submitted that on the face of it, the said suit appears to be a collusive suit filed at the instance of the mother of the petitioner, namely, Smt. Geeta Devi, who is the Plaintiff No. 2 in the said suit and has verified the contents of the plaint as is evident from the verification clause mentioned at the bottom of the plaint.

11. Shri Pankaj Kumar, learned Standing Counsel appearing for State-Respondents No. 1 to 4 has raised an objection regarding the maintainability of the writ petition. He submits that the proceedings arising out of mutation are summary in nature and the writ petition against the same is not maintainable under Article 226 of the Constitution of India, since the orders under challenge in the instant writ petition, have arisen out of proceedings under Section 35 of the U.P. Revenue Code, 2006, which are admittedly summary proceeding.

12. In the case of **Madhav Pandey and others versus Board of Revenue and others**, reported in **2002(2) AWC 1311**; this Court has held that the mutation proceeding is summary in nature and writ petition against the summary proceedings is not entertainable under Article 226 of the Constitution of India. In paragraph No. 26 of the said judgement, it has been categorically held as under:-

"26. The last submission of the counsel for the Petitioner is that the revenue court cannot interfere with the finding of fact and the revisional court i.e., the Board of Revenue has wrongly exercised the jurisdiction, hence this court

may set aside the order of the board of revenue. As noticed above, there is difference between lack of jurisdiction and erroneous exercise of jurisdiction in a case. The present proceedings arising out of the mutation proceedings which is summary proceeding and the writ petitions against the summary proceedings are not entertained under Article 226 of Constitution of India. There is no need to consider the question as to whether the revisional court has committed any error in exercise of jurisdiction. Assuming for argument sake that there is some error in exercise of jurisdiction by the Board of Revenue, the said error will not make the order without jurisdiction. As held above, the writ petition arising out of the summary proceedings, can be entertained only when there is lack of jurisdiction. It being not a case of lack of jurisdiction, no interference is called for in the impugned order on the basis of the above submission of the counsel for the petitioners."

13. This Court in the case of **Smt. Kalawati vs. The Board Of Revenue And 6 Others** reported in **2022 (4) ADJ 578** has carved out certain exceptions under which this Court in exercise of its power under Article 226 of the Constitution may entertain a writ petition against the orders passed in mutation proceedings. For a ready reference paragraph No. 40 of the said judgment is reproduced below:-

"40. Having regard to the foregoing discussion the exceptions under which a writ petition may be entertained against orders passed in mutation proceedings would arise where :

(i) the order or proceedings are wholly without jurisdiction;

(ii) rights and title of the parties have already been decided by a competent

court, and that has been varied in mutation proceedings;

(iii) mutation has been directed not on the basis of possession or on the basis of some title deed, but after entering into questions relating to entitlement to succeed the property, touching the merits of the rival claims;

(iv) rights have been created which are against provisions of any statute, or the entry itself confers a title by virtue of some statutory provision;

(v) the orders have been obtained on the basis of fraud or misrepresentation of facts, or by fabricating documents;

(vi) the order suffers from some patent jurisdictional error i.e. in cases where there is a lack of jurisdiction, excess of jurisdiction or abuse of jurisdiction;

(vii) there has been a violation of principles of natural justice."

14. Almost the similar situation has been dealt with by this Court in the case of **Hadisul Nisha vs. Additional Commissioner (Judicial) Faizabad and others** reported in **2021 (6) ADJ 176**, wherein the Court has laid down the exceptions, per which a writ petition would be maintainable even against the orders passed in summary proceedings despite the said order having been affirmed/set aside by the appellate or revisional court. For the sake of convenience, paragraph No. 19 of the same is indicated below:-

"19. The Courts in the aforesaid decisions have laid down a few parametres for entertaining writs arising out of mutation proceedings. The exceptions that have been carved out being very few, for example:-

i) If the order is without jurisdiction;

ii) *If the rights and title of the parties have already been decided by the competent court, and that has been varied by the mutation courts;*

iii) *If the mutation has been directed not on the basis of possession or simply on the basis of some title deed, but after entering into a debate of entitlement to succeed the property, touching into the merits of the rival claims;*

iv) *If rights have been created which are against statutory provisions of any Statute, and the entry itself confers a title on the petitioner by virtue of the provisions of the U.P. Zamindari Abolition and Land Reforms Act;*

v) *Where the orders impugned in the writ petition have been passed on the basis of fraud or misrepresentation of facts, or by fabricating the documents by anyone of the litigants.*

vi) *Where the courts have not considered the matter on merits for example the courts have passed orders on restoration applications etc (Vijay Shankar v Addl Commissioner; 2015 (33) LCD 1073)"*

15. In the case of **Jitendra Singh versus The State of Madhya Pradesh and Ors.** reported in **2021 (6) Supreme 185**, the Hon'ble Supreme Court of India has been pleased to hold as under,

"5.... Be that as it may, as per the settled proposition of law, mutation entry does not confer any right, title or interest in favour of the person and the mutation entry in the revenue record is only for the fiscal purpose. As per the settled proposition of law, if there is any dispute with respect to the title and more particularly when the mutation entry is sought to be made on the basis of the will, the party who is claiming title/right on the basis of the will has to

approach the appropriate civil court/court and get his rights crystalised and only thereafter on the basis of the decision before the civil court necessary mutation entry can be made."

16. The Hon'ble Supreme Court in the case of **Faqraddin v. Tajuddin** reported in **(2008) 8 SCC 12** has held that the revenue authorities of the State are concerned with revenue. Mutation takes place only for certain purposes. It is well settled that an entry in revenue record is not a document of title. Revenue authorities cannot decide the question of title.

17. The Hon'ble Apex Court in the case of **Suraj Bhan v. Financial Commissioner**, reported in **(2007) 6 SCC 186**, has been pleased to hold that an entry in Revenue Records does not confer title on a person whose name appears in Record of Rights. It is the settled law that entries in the Revenue Records or Jamabandi have only 'fiscal purpose' i.e. payment of land-revenue, and no ownership is conferred on the basis of such entries. So far as the title to the property is concerned, it can only be decided by a competent Civil Court.

18. In the case of **Bhimabai Mahadeo Kambekar (D) through L.R. Vs. Arthur Import and Export Company & Ors.** MANU/SC/0112/2019, decided on 31.01.2019, the Hon'ble Apex Court has been pleased to hold that mutation in revenue records does not create or extinguish the title over the land nor it has any presumptive value on the title. Relevant paragraph Nos. 8 and 9 are extracted here as under:-

"8. This Court has consistently held that mutation of a land in the revenue records does not create or extinguish the

*title over such land nor it has any presumptive value on the title. It only enables the person in whose favour mutation is ordered to pay the land revenue in question. (See Sawarni (Smt.) vs. Inder Kaur, (1996) 6 SCC 223, **Balwant Singh & Anr. Vs. Daulat Singh(dead) by L.Rs. & Ors.**, (1997) 7 SCC 137 and **Narasamma & Ors. vs. State of Karnataka & Ors.**, (2009) 5 SCC 591).*

9. *The High Court while dismissing the writ petition placed reliance on the aforementioned law laid down by this Court and we find no good ground to differ with the reasoning and the conclusion arrived at by the High Court. It is just and proper calling for no interference."*

In view of the above, as the proceedings under Section 41 of the U.P. Land Revenue Act, which is para materia to Section 24 of the U.P. Revenue Code, 2006, are summary in nature and once the parties had availed the statutory remedy of appeal/revision before the revenue authorities, no writ petition lies before this Court as the entries in revenue records do not confer any title and it is only the competent court to declare the rights of the aggrieved party in a regular suit filed for declaration.

Thus, no interference can be made by this Court in the order passed by the revenue authorities in summary proceedings and writ petition is dismissed, accordingly. However, it is open for the petitioners to file declaratory suit claiming their right over the land in dispute."

19. It is settled law that the revenue records do not confer title and even if the entries in the revenue record of rights carry value that by itself would not confer any title upon the person claiming on the basis of the same. The mutation proceedings

being of a summary nature drawn on the basis of possession do not decide any question of title and the orders passed in such proceedings do not come in the way of a person in getting his rights adjudicated in a regular suit. Mutation in revenue records neither creates nor extinguishes title of the person nor it has any presumptive value on title. Such entries are relevant only for the purpose of collecting land revenue. In view thereof, this Court has consistently held that such writ petitions are not to be entertained in exercise of discretionary power conferred under Article 226 of the Constitution of India.

20. It would not be out of place to mention here that the power to issue prerogative writs under Article 226 is plenary in nature. It does not, in terms, impose any limitation or restraint on the exercise of the power to issue writs. It is the discretion of the Writ Court whether to entertain writ petition or not depending upon the facts and circumstances of each particular case. One of the self imposed restrictions on the exercise of the power under Article 226 of the Constitution that has evolved through judicial precedents is that the High Court should normally not entertain a writ petition, where an effective and efficacious alternative remedy is available. At the same time, it must be remembered that mere availability of an alternative remedy of appeal or revision, which the party invoking the jurisdiction of the High Court under Article 226 of the Constitution has not pursued would not oust the jurisdiction of the High Court and render a writ petition 'not maintainable'.

21. The Hon'ble Supreme Court in the case of **M/s. Godrej Sara Lee Ltd. versus Excise and Taxation Officer-cum-**

Assessing Authority and others; reported in **AIR 2023 Supreme Court 781**, has been pleased to explain the distinction between the 'entertainability' and 'maintainability' of a writ petition. The extract from paragraph 4 of the said judgment is quoted below:

".....Though elementary, it needs to be restated that "entertainability" and "maintainability" of a writ petition are distinct concepts. The fine but real distinction between the two ought not to be lost sight of. The objection as to "maintainability" goes to the root of the matter and if such objection were found to be of substance, the courts would be rendered incapable of even receiving the lis for adjudication. On the other hand, the question of "entertainability" is entirely within the realm of discretion of the high courts, writ remedy being discretionary. A writ petition despite being maintainable may not be entertained by a high court for very many reasons or relief could even be refused to the petitioner, despite setting up a sound legal point, if grant of the claimed relief would not further public interest....."

22. The reluctance of this Court to interfere with the orders under challenge in the instant petition, is primarily that the same are the outcome of the mutation proceedings and it is a settled legal position that entry in the revenue records does not confer title to a person whose name appears in the records-of-rights, which is maintained for revenue purpose and an entry therein has reference only to possession. Further, the provision of Section 39 of the U.P. Revenue Code, 2006 makes it more clear that orders passed under the provisions relating to mutation of revenue records would not act as a bar

against any person from establishing his rights in the property by way of suit for declaration. For ready reference the provision of Section 39 of the U.P. Revenue Code, 2006 is quoted below:-

"39-Certain orders of revenue officers not to debar a suit. -No order passed by a Revenue Inspector under section 33, or by a Tahsildar under sub-section (1) of section 35 or by a Sub-Divisional Officer under sub-section (3) of section 38 or by a Commissioner under sub-section (4) of section 38 shall debar any person from establishing his rights to the land by means of a suit under section 144."

23. Normally, the High Court in exercise of its plenary power does not entertain writ petition under Article 226 of the Constitution of India, against the orders passed by the Revenue Courts in mutation proceedings, except under the conditions as formulated by this Court in cases as mentioned above.

24. The fact of the present case does not attract the above mentioned exceptions as carved out by this Court under which this Court in exercise of its power under Article 226 of the Constitution may entertain a writ petition against the order passed in mutation proceedings that are admittedly summary in nature.

25. It is well settled that the orders for mutation are passed on the basis of the possession of the parties and since no substantive rights of the parties are decided in mutation proceedings, ordinarily the Writ Courts decline to entertain the writ petition as not entertainable in respect of orders passed in mutation proceedings, unless found to be totally without

jurisdiction or contrary to the title already decided by the competent court.

26. In view of the above, as no substantive rights of the parties have been decided or are likely to be decided in the mutation proceedings, no case for exercise of extra-ordinary writ jurisdiction under Article 226 of the Constitution of India is made out. Needless to say, it is always open to the petitioner to get his rights/title in respect of the land in question be crystallised by competent Civil Court.

27. Accordingly, without interfering with the merits of the impugned orders passed by the Revenue Courts, this writ petition is **disposed of** with liberty to the parties to get their rights/title in respect of the land in question, if necessary, adjudicated or declared by the competent court of jurisdiction. The order passed in the mutation proceedings would abide by the decision of the competent court, if any, and the said court would not, in any manner, be influenced by any finding or observation made in the mutation orders or during mutation proceedings.

(2023) 9 ILRA 288

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 22.09.2023

BEFORE

THE HON'BLE OM PRAKASH SHUKLA, J.

Writ C No. 4953 of 2023
with other connected cases

Committee of Management Jai Prakash Charitable Trust

...Petitioner

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioner:

Rajat Rajan Singh, Vidhu Bhushan Kalia

Counsel for the Respondents:

C.S.C., Ravi Singh

Held –

(i) **Pharmacy Act, 1948 - Special Central Legislation - Regulation of Pharmacy Education - PCI is the sole authority for approval of institutions and courses - State Government or Technical Board has no jurisdiction to cancel NOC once granted - Any deficiencies, if found, should be referred to PCI.**

(ii) **Principles of Natural Justice - Cancellation of NOC without issuance of show cause notice or opportunity of hearing - Order passed by Board under direction of St. Government - Held, violative of natural justice - Impugned cancellation letter liable to be quashed.**

(iii) **Constitution of India, 1950 - Article 226 - Writ Petition against cancellation of NOC for D. Pharma Course - PCI being the expert statutory body under Central legislation - Directions issued for Board and St. to proceed in accordance with law and PCI regulations.**

Petitions allowed.

Case Law Discussed:

1. St. of T.N. Vs Adhiyaman Educational and Research Institute, (1995) 4 SCC 104

2. St. of Mah. Vs Sant Dnyaneshwar Shikshan Shastra Mahavidyalaya, (2006) 9 SCC 1

3. Bhartia Education Society Vs St. of H.P., (2011) 4 SCC 527

4. St. Johns Teachers Training Institute Vs NCTE, (2003) 3 SCC 321

5. St. of Mah. Vs Sant Dnyaneshwar Shikshan Shastra Mahavidyalaya, (2013) 2 SCC 617

6. Umanath Pandey Vs St. of U.P., (2009) 12 SCC 40

7. New Okhla Industrial Development Authority Vs Ravindra Kumar Singhvi, 2022 SCC OnLine SC 186

Charitable Trust Vs. State of UP & Ors.) as leading writ petition for consideration.

Key Words -

Pharmacy Act, 1948 - Special legislation - NOC - PCI - St. jurisdiction - Natural justice - Surprise inspection - Technical Education Board - Cancellation of approval - Autonomous statutory body - Quashing of administrative action.

(Delivered by Hon'ble Om Prakash Shukla, J.)

A. INTRODUCTION

(1) The above captioned writ petitions under Article 226 of the Constitution of India have been filed by the petitioners/ Institutions, challenging the legality and validity of the letter dated 18.05.2023 issued by the Secretary, Board of Technical Education, Uttar Pradesh, Lucknow (hereinafter referred to as '**Board**'), whereby 'No Objection Certificate' (hereinafter referred to as '**NOC**') granted by the Board to the respective petitioners/institutions for opening of new course, namely, Diploma in Pharmacy (in short, 'D. Pharma') for the academic session 2022-23 has been cancelled with immediate effect.

(2) Since the above-captioned writ petitions arise out of a common factual matrix and impugned letter dated 18.05.2023, this Court is disposing them of by this common judgment.

B. FACTUAL MATRIX

(3) To understand the issue involved in the above-captioned writ petitions, this Court takes Writ C No. 4953 of 2023 (*Committee of Management, Jai Prakash*

(4) The record of Writ-C No. 4953 of 2023 reveals that pursuant to an interim order dated 31.05.2022 passed in Special Leave Petition (Civil) No. 4862 of 2022, the Pharmacy Council of India (hereinafter referred to as 'PCI') had issued a letter bearing reference No.14-56/22 (Approval Process for 2022-2023 as)/11621 dated 21.06.2022, whereby a portal, inviting the applications for setting up of new institutions for courses of Bachelor of Pharmacy (in short, 'B. Pharma') and D. Pharma, was opened from 03.07.2022 to

(5) In pursuance of the aforesaid letter dated 21.06.2022, the Board issued letter dated 27.06.2022 (Annexure No.1 to the counter affidavit), inviting applications for opening of new D. Pharma Courses from the Directors/Principals of the Institutions. Thereafter, on the request made by the Director Technical Education, the Secretary, Board of Technical Education, Uttar Pradesh issued order dated 14.07.2022, stating therein that due to paucity of time, the "No objection certificate" (NOC) as contemplated by PCI for starting a new institution, shall be issued on the basis of self-declaratory affidavits.

(6) In pursuant thereto, the PCI opened the portal for inviting application of second and third round from 04.08.2022 to 10.08.2022 and 01.09.2022 to 04.08.2022 and 30.08.2022, respectively. After that, the State Government issued orders dated 08.08.2022 and 05.09.2022 for issuance of NOC to the respective institutions after submitting the self-declaratory affidavits in the proforma provided along with application for issuance of NOC. In the

said proforma affidavit as well as notification of PCI, it has also been mentioned that in case any discrepancies are found, the NOC shall stand revoked with immediate effect and that appropriate action would be taken against the erring institutions in accordance with law.

(7) Petitioners/Institutions and other Institutions of the State, in pursuance of the aforesaid, applied for grant of NOC to open D.Pharma Course in their Institutions by annexing the relevant documents as well as duly filled self-declaratory proforma affidavit. Subsequently, the Board had granted NOC for setting up D. Pharma Course to the petitioners/Institutions and other Institutions for the academic session 2022-23.

(8) Subsequently, on the basis of letters dated 24.03.2023 and 03.04.2023 issued by the office of Chief Minister, the District Magistrate of each district of the State of U.P. had formed a three members Committee comprising Tehsildar, Principal of the Government Inter College and one Assistant Engineer for scrutiny and re-verification of the respective Institutions as per the documents attached at the time of granting NOC on the basis of self-declaratory affidavits. The Committee, after scrutiny and re-verification, found certain discrepancies and short comings and reported the same to the District Magistrate, who, in turn, submitted its report to the State Government. On the basis of the said recommendation of the District Magistrate and the direction issued thereto by the State Government vide order dated 17.05.2023, the Board, vide letter dated 18.05.2023, informed the petitioners/institutions that the NOC granted to them stood cancelled with immediate effect. It is this letter dated

18.05.2023, which has been challenged in the present bunch of writ petitions.

C. SUBMISSIONS

(9) Heard learned Counsel for the petitioners, Shri Nishant Shukla, learned Additional Chief Standing Counsel representing the State and Shri Ravi Singh, learned Counsel representing the PCI.

(10) Assailing the impugned letter dated 18.05.2023 issued by the Secretary of the Board, learned Counsel for the petitioners/ institutions have argued that petitioners/Institutions are imparting education in Pharmacy by conducting D.Pharma Course, which is a professional, vocational and technical training Course and is fully covered by Entry No.66 of List-1 of Schedule-VII of the Constitution of India, therefore, the State Government/Board has no jurisdiction or authority to make inspection of the petitioners/Institutions conducting D.Pharma course, which is an 'approved course of study' under the Pharmacy Act, 1948. Hence the impugned exercise cancelling the NOC of the petitioners/institutions by the State Government is wholly unconstitutional.

(11) Learned Counsel for the petitioners/institutions has submitted that Pharmacy Act, 1948 is a special Act enacted to cover a particular field of study and thus, it has precedence over other laws in relation to that field. According to him, no institution or body is empowered to grant approval to any institution under the Pharmacy Act, 1948 or any other law for the time being in force, except the PCI itself and grant of approval by the PCI is a condition precedence to grant of affiliation by the examining body to an institute.

Moreso, the requirements, which have been examined and the conditions, which have been imposed by the PCI shall prevail and cannot be altered, re-examined or infringed under the garb of the State action. The power of inspection exercisable by the Inspector appointed under Section 16 (1) (c) of the Pharmacy Act, 1948 by the Executive Committee of Pharmacy Council of India, is a statutory power which cannot at all be exercised by the State Government or by the Board. His submission is that after grant of approval by the PCI followed by the grant of affiliation by the Board and start of imparting education in the course of D.Pharm by the Institution and its continuance for a year, the State Government/Board has got no jurisdiction or authority at all to go into the question of lack of satisfaction of any parameter for running a D. Pharma Course and at the most, the State Government or the Board can communicate such shortcomings/discrepancy to the PCI and it is the PCI alone, who can examine such shortcomings/discrepancy in terms of the provisions of Pharmacy Act, 1948 and take decision according to law.

(12) Learned Counsel for the petitioners/institutions drawing attention to the impugned letter dated 18.05.2023 have contended that the impugned letter dated 18.05.2023 have been issued by the Secretary of the Board pursuant to the decision of the State Government dated 17.05.2023, without complying with the principles of natural justice as neither any show cause notice was issued to the petitioners/institutions nor any opportunity of hearing was accorded before cancelling the NOC granted for running D.Pharm Course. Moreso, no reasoning has been assigned in the impugned letter as to what is the nature of deficiency found by the Committee, which led to cancellation of

NOC. Thus, the impugned letter dated 18.05.2023 is liable to be quashed on this ground also.

(13) Per contra, learned Additional Chief Standing Counsel representing the State has supported the impugned action of the State Government cancelling the NOC granted to the petitioners/institutions and has argued that the NOC, which was issued to the institutions including petitioners/institutions, clearly indicated the fact that in case any discrepancies are found, the NOC shall stand revoked with immediate effect and that appropriate action would be taken against the erring institutions in accordance with law. According to him, during the surprise inspection conducted by the Committee constituted under the District Magistrates pursuant to the direction of the State Government, the deficiencies were found in presence of the representatives of the petitioners/institutions and the declarations were found to be false and as such, on receipt of the report of the Committee, the State Government took decision to cancel the NOC of the Institutions including the petitioners/Institutions, in pursuance of which, the impugned letter dated 18.05.2023 has been issued by the Secretary of the Board cancelling the NOC of the petitioners institutions.

(14) Learned Additional Chief Standing Counsel submits that the law has been settled by this Court as well as by the Apex Court that fraud vitiates every solemn right and evidently the petitioners/institutions have submitted false affidavits, therefore, the impugned action of the State is perfectly justified.

(15) Placing reliance upon the judgment of the Apex Court in **New Okhla Industrial Development Authority Vs.**

Ravindra Kumar Singhvi : 2022 SCC OnLine SC 186, learned Additional Chief Standing Counsel submits that mere allegation that the opportunity of hearing has not been afforded, the petitioners/institutions cannot claim benefit of their own wrong.

(16) So far as the argument that the State Government has no power to cancel the NOC granted to the petitioners/institutions is concerned, learned Additional Chief Standing Counsel drawing attention to Section 14 of the U.P. Pravidhik Shiksha Adhiniyam, 1962 to contend that a perusal of Section 14 of the U.P. Pravidhik Shiksha Adhiniyam, 1962 reveals that there is no ambiguity with respect to vast power and control which the State Government can exercise in such matters. Thus, according to him, the submission of the learned Counsel representing the petitioners/institutions have no substance and the action taken by the State Government is perfectly justified.

D. ANALYSIS

(17) Having regard to the submissions advanced by the learned Counsel for the parties and going through the record available before this Court in the above-captioned writ petitions, the following questions emerges for consideration in the above-captioned writ petitions before this Court:-

“(a) Whether the State Government or the Board has power to cancel the NOC granted earlier by them for running the D.Pharm course to the institution ? ;

(b) Whether the impugned letter dated 18.05.2023 issued by the Secretary of the Board on the decision of the State

Government dated 17.05.2023, cancelling the NOC granted to the petitioners/Institution is violative of principle of natural justice.”

(18) It is required to be noted herein that while answering the question no. (a) involved in the above-captioned writ petitions, first of all, what is required to be considered is whether the Pharmacy Act can be said to be a special Act with special provisions in the field of Pharmacy or not ?. In this regard, this Court deem it apt to reproduce the Statement of Objects and Reasons for the Pharmacy Act, which is as under:

“It is desirable that, as in most other countries, only persons who have attained a minimum standard of professional education should be permitted to practice the Profession of Pharmacy. It is accordingly proposed to establish a Central Council of Pharmacy, which will prescribe the minimum standards of education and approve courses of study and examinations for Pharmacists, and Provincial Pharmacy Councils, which will be responsible for the maintenance of provincial registers of qualified pharmacists. It is further proposed to empower Provincial Governments to prohibit the dispensing of medicine on the prescription of a medical practitioner otherwise than by, or under the direct and personal supervision of, a registered pharmacist.”

(19) As per the Preamble of the Pharmacy Act, 1948, the Pharmacy Act has been enacted to make better provision for the regulation of the profession and practice of Pharmacy and for that purpose to constitute Pharmacy Councils. This Court, on perusal of the relevant provisions of the Pharmacy Act, finds that it covers all

aspects of pharmacy education, including approval of courses, laying down course content, eligibility conditions for students as well as teachers, evaluation of standards of examination, grant of registration, entry of higher qualification, taking action for any infamous conduct etc. The relevant provisions in the Pharmacy Act, 1948 are Sections 10, 12, 13, 16, 29, 32, 35, 36 and 42.

(20) Section 10 of the Pharmacy Act empowers the PCI to frame Education Regulations prescribing the minimum standard of education required for qualification as a pharmacist. As per sub-section (2) of Section 10, such Education Regulations may prescribe : -

“a) the nature and period of study and of practical training to be undertaken before admission to an examination;

b) the equipment and facilities to be provided for students undergoing approved courses of study;

c) the subjects of examination and the standards therein to be attained;

d) any other conditions of admission to examinations.”

(21) As per Section 12 of the Pharmacy Act, any “authority” in a State that is empowered to conduct a course of study in pharmacy may apply to the Central Council for approval of the course in accordance with the Education Regulations. Likewise, any authority which conducts an examination of a State for pharmacy may apply to the PCI for approval of such examination. A student, who has passed/completed an approved course and passed an approved examination can only be registered as a pharmacist subject to meeting other requirements. Section 13 of the Pharmacy Act empowers the Central

Council to withdraw approval accorded to the ‘course of study’ and ‘examination’ for failure to comply with the prescribed norms. Section 16 of the Pharmacy Act empowers the Executive Committee to appoint inspectors to inspect any institution which provides an approved course of study or those institutions which apply for approval of course of study or examination. Section 29 deals with preparation and maintenance of a register of pharmacists. Section 35 provides for entry of additional qualifications in the register in relation to any registered pharmacist. Section 36 provides for the removal of any person from the register, either permanently or for a temporary period. As per Section 42 of the Pharmacy Act, a person may not practice the profession of pharmacy unless he or she is registered as a pharmacist in accordance with the Pharmacy Act. Sub-section (2) of Section 42 is a penal provision which states that any person who is not a registered pharmacist and contravenes subsection (1) of Section 42 shall be punishable with imprisonment for a term which may extend to six months, or with fine not exceeding one thousand rupees or with both.

(22) At this juncture, it would be apt to mention that PCI, in exercise of powers vested in the Pharmacy Act, has framed a number of Regulations for prescribing minimum standards of education as well as regulating the subject of pharmacy in India, including :-

“ a. Education Regulations, 1991;

b. Pharm. D Regulations, 2008;

c. Minimum Qualifications for Teachers in Pharmacy Institutions Regulations, 2014;

d. Bachelor of Pharmacy (B.Pharm) Course Regulations, 2014;

- e. Master of Pharmacy (M.Pharm) Course Regulations, 2014;
- f. Bachelor of Pharmacy (Practice) Regulations, 2014;
- g. Pharmacy Practice Regulations, 2015.”

(23) Thus, considering the various provisions of the Pharmacy Act, 1948 and the regulations made therein, it can be said that the Pharmacy Act is a complete Code in itself in the subject of pharmacy. The PCI has been constituted as a body empowered to regulate the education and profession of pharmacy in India. It cannot be disputed that the subject of pharmacy is a special and not a general subject.

(24) From the relevant provisions of the Pharmacy Act, more particularly, the provisions referred to hereinabove, the Pharmacy Act exclusively covers all areas inclusive of approval of courses, laying down course content, eligibility conditions for students as well as teachers, evaluation standards of examination, grant of registration, entry of higher qualifications in the same discipline, taking action for infamous conduct etc. It also contains a penal provision. Thus, the legislative intent in enacting the Pharmacy Act seems to be to ensure that there is seamless regulation of the profession.

(25) To carry out the objective and purpose for enacting the Pharmacy Act, the Legislature has established under the Statute the autonomous statutory authority i.e. Pharmacy Council of India. Thus it can be said that in the field of pharmacy, the Pharmacy Act is a special law.

(26) It would also be relevant to add herein that the Constitution and

Composition of Central Council under the Pharmacy Council of India is as under :

“3. Constitution and composition of Central Council.-The Central Government shall, as soon as may be, constitute a Central Council consisting of the following members, namely :-

(a) Six members, among whom there shall be at least one teacher of each of the subjects, pharmaceutical chemistry, pharmacy, pharmacology and pharmacognosy elected by the University Grants Commission from among persons on the teaching staff of an Indian University or college affiliated thereto which grants a degree or diploma in pharmacy ;

(b) Six members, of whom at least four shall be persons possessing a degree or diploma in, and practicing pharmacy or pharmaceutical chemistry nominated by the Central Government ;

(c) One member elected from amongst themselves by the members of the Medical Council of India.

(d) the Director General, Health Services, ex officio or if he is unable to attend any Meeting, a person authorized by him in writing to do so; The Drugs Controller, India, ex officio or if he is unable to attend any meeting, a person authorized by him in writing to do so;

(e) the Director of the Central Drugs Laboratory, ex officio ;

(f) a representative of the University Grants Commission and a representative of the all India Council for Technical Education ;

(g) one member to represent each State elected from amongst themselves by the members of each State Council, who shall be a registered pharmacist ;

(h) One member to represent each State nominated by the State Government, who shall be a registered pharmacist :”

(27) Therefore, PCI consists of experts in the field of pharmacy and related subjects connected with the education of pharmacy. Therefore, under the statute, specialized persons in the field of pharmaceutical, pharmacy etc. shall be the members of the PCI.

(28) On the other hand, so far as U.P. Pravidhik Shiksha Adhiniyam, 1962 is concerned, it reveals that the State Government has power to communicate its views to the Board on any work done or conducted by the Board or in respect of any matter with which the Board is concerned and the Board shall thereupon report to the State Government the action taken or proposed to be taken by it in regard thereto. This does not appear to mean that the Board, on the views/opinion of the State Government, can exercise the power as envisaged under Pharmacy Act, 1948 as the PCI is the body of experts connected with the subject of pharmacy and related subjects and therefore it will be in the larger interest and more particularly in the interest of education of pharmacy that PCI shall alone have the jurisdiction in the field of pharmacy, rather than State Government or the Board. Thus, this Court is of the view that PCI constituted under the provisions of the Pharmacy Act which is consisting of the experts in the field of pharmacy and/or related subjects shall prevail. Consequently, the norms and regulations set by the PCI and other specified authorities under the Pharmacy Act would have to be followed by an institution imparting education for D. Pharma. This Court finds support in the aforesaid analogy drawn from the judgment

of the Apex Court rendered in **State of Tamil Nadu vs Adhiyaman Educational and Research Institute and others** : (1995) 4 SCC 104, wherein the Apex Court was dealing with a case of an Engineering College and determining as to whether after the coming into force of the All India Council for Technical Education Act, 1987 (a “Central Act”) the State Government has power to grant and withdraw permission to start a technical institution as defined in the Central Act. The Hon’ble Supreme Court after a detailed discussion on the issue and after comparing both the prevailing Central Act and State Act as well as the provisions of Constitution of India, observed that the High Powered Committee so constituted by the State Government to inspect the Engineering College was void.

(29) Similarly, the same principle has been reiterated by the Hon’ble Supreme Court in the case of State of Maharashtra vs Sant **Dnyaneshwar Shikshan Shastra Mahavidyalaya and others**: (2006) 9 SCC 1 wherein it has been held that it is not open for the State Government to encroach upon the said field. Although, in **Sant Dnyaneshwar Shikshan Shastra Mahavidyalaya** : (2006) 9 SCC 1, the view of the Apex Court was that the State Government has no role whatsoever. However, in **Bhartia Education Society Vs. State of H.P.** : (2011) 4 SCC 527 it was observed by the Apex Court that the role of the State Government was limited to the manner of admission, eligibility criteria, etc. without interfering with the conditions of recognition prescribed by NCTE. The exercise of discretion by the State Government and affiliating body has to be within the framework of the Act, the Regulations and conditions of recognition. Even in **St. Johns Teachers Training Institute v. National Council for Teacher**

Education : (2003) 3 SCC 321, the Apex Court has observed that the State Government or the Union Territory has to necessarily confine itself to the guidelines issued by NCTE while considering the application for grant of “no-objection certificate”.

(30) Further, in **State of Maharashtra vs Sant Dnyaneshwar Shikshan Shashtra Mahavidyalaya and others** : (2013) 2 SCC 617, the Apex Court examined the power of the NCTE under the National Council of Teachers Education Act, 1993 vis-à-vis the State Government and has held at paragraph No. 78 as under :

“78. Now, we may deal with another aspect of this very facet of the case. It is a very pertinent issue as to what the role of the State should be after the affiliation is granted by the affiliating body. We have already discussed that the State opinion, as contemplated under Section 37 of the University Act, to the extent it admits to overreach, is reconcilable and its results are not in its orientation to the directives of NCTE are void and inoperative to the extent they can be resolved in which case clear precedence is to be given to the directives of NCTE during such resolution. The opinion of the State, therefore, has to be read and construed to mean that it would keep the factors determined by NCTE intact and then examine the matter for grant of affiliation. The role of the State Government is minimised at this stage which, in fact, is a second stage. It should primarily be for the university to determine the grant or refusal of affiliation and role of the State should be the bare minimum, non-interfering and non-infringing.”

(31) Thus, the State Government or the Board, at the most, can make

views/opinion/report to the PCI and in such a situation, the PCI is only the statutory authority, which can take decision on the report of the State Government or the Board. Thus, the question no.(a), referred to hereinabove, is answered in favour of the petitioners/institutions that the State Government or the Board has no power to cancel the NOC granted earlier as the power to cancel the NOC is vested with PCI.

(32) Now, so far as question no. (b) is concerned, apparently the fulcrum of the argument addressed by the learned Counsels for the petitioners/institutions, is that the impugned letter dated 18.05.2023 has been passed without complying with the principles of natural justice. It has also been argued that the petitioners were not issued any show cause notice nor any opportunity was accorded to them before cancelling the NOC granted to them by the Board. Challenging the impugned letter, the learned Counsels have further argued that the said order was absolutely bald for no reasons have been assigned in the impugned order by the Board for cancellation of NOC.

(33) It is trite law that the underlying principle of natural justice, evolved under the common law, is to check arbitrary exercise of power by the State or its functionaries. Therefore, the principle implies a duty to act fairly i.e. fair play in action. Furthermore, before affecting civil rights of a person adversely, the State is required to adhere to the principles of natural justice.

(34) As per the scheme for opening of new institution for pharmacy, NOC from the State Government is a mandatory requirement. Apparently, in the present

bunch of writ petitions, due to paucity of time, the State Government has solicited issuance of NOC on the basis of self-declaration affidavit given by the respective Institution, which was subject to its verification. Admittedly, the State Government re-verified the existing infrastructure in the first instance and did not find any discrepancy. It was only on a surprise inspection of a Committee constituted by the State Government, some discrepancy was found and NOC granted earlier to the petitioners/institutions have been cancelled with immediate effect vide impugned letter dated 18.05.2023, which reads as under :-

“प्रेषक,
सचिव,
प्राविधिक शिक्षा परिषद,
उत्तर प्रदेश लखनऊ

सेवा में,
अध्यक्ष/सचिव,
अमरनाथ महाविद्यालय समिति सीमऊ औरास उन्नाव,
संस्था का नाम- अमरनाथ कालेज ऑफ फार्मसी ग्राम
सीमऊ, औरास उन्नाव
उ०प्र०
पत्रांक:- प्राशिप/परिषद/2023/50/412
लखनऊ:- दिनांक-18-5-23
विषय:- सत्र 2022-23 हेतु संस्थान को निर्गत अनापत्ति
प्रमाण पत्र निरस्त किये जाने के संबंध में

महोदय,
उपरोक्त विषयक फार्मसी काउन्सिल ऑफ इण्डिया
(पी०सी०आई०) के पत्रांक 14-56/2022 (Approval
Process for 2022-2023 as)/11942- 46,
Online Application for 2021-2022 (DS)
Online Application for 2021-2022 (AS)
दिनांक- 03-07-2022, 14-56/2022 (Approval
Process for 2022-2023as)/(1261-63 Online
Application for 2022- 2023 (DS) Online

Application for 2022-2023 (AS) दिनांक 04-
08- 2022 एवं 14-56/2022-
PCI(B)(Moratorium)/ 13220-22,14-
56/2022 (Approval Process for 2022-23 as)
(New Insit) Online Application for 2021-
2022 (DS), Online Application for 2022-
2023 (AS) दिनांक 30 अगस्त 2022 को संदर्भित करने का
कष्ट करें, जिसके अनुक्रम में सत्र 2022-23 हेतु डिप्लोमा इन
फार्मसी पाठ्यक्रम संचालित किये जाने हेतु आप द्वारा
सहमति/अनापत्ति निर्गत किये जाने के संबंध में अनुरोध किया गया।

शासनादेश संख्या 261/सोलह-3-2022-16-
3099/9/2022 टीसी-1 दिनांक 14-07-2022, 288/
सोलह-3-2022-16-3099/9/2022 टीसी-1 दिनांक 08
अगस्त 2022 एवं 317/ सोलह-3-2022-16-
3099/9/2022 टीसी- 1 दिनांक 05 सितम्बर 2022 द्वारा
दिए गए निर्देशों एवं राज्य स्तरीय समिति द्वारा दी गयी संस्तुति के
आधार पर संस्थान को सहमति/अनापत्ति पत्र रु० 100/- का इस
आशय का शपथपत्र प्राप्त करते हुए निर्गत की गयी थी की "
आवेदक संस्थान द्वारा यदि दी गयी जानकारी एवं
अभिलेख/दस्तावेज फर्जी, कूटरचित अथवा त्रुटिपूर्ण पाए जाते हैं तो
उनके विरुद्ध परिषद द्वारा नियमानुसार कानून संगत कार्यवाही की
जाएगी। ऐसी की गयी विधिक कार्यवाही हेतु संस्थान स्वयं उत्तरदायी
होंगे।”

मा० मुख्यमंत्री कार्यालय के पत्र संख्या
647/ACS/CM/23 दिनांक 18-04-2023 द्वारा दिये गये
निर्देशों के अनुक्रम में डी०फार्मा० पाठ्यक्रम प्रारंभ करने हेतु निर्गत
की गई एन०ओ०सी० की जाँच संबंधित जनपद के जिलाधिकारी
द्वारा करायी गयी। जिलाधिकारी द्वारा उपलब्ध कराई गयी जाँच
आख्या के परीक्षणोंपरांत जिलाधिकारी स्तर से आपके संस्थान को
असंस्तुति (Not Recommended) प्रदान की गयी है।
जिलाधिकारी द्वारा उपलब्ध कराई गई जाँच आख्या एवं तत्क्रम में
शासन के पत्र संख्या 313/16-3099/9/2022- Part-(2)
दिनांक 17-05-2023 द्वारा दिए गए निर्देशों के अनुक्रम में
आपके संस्थान को सत्र 2022-23 हेतु निर्गत प्रमाण पत्र तत्काल
प्रभाव से निरस्त की जाती है।

भवदीय
(एफ०आर०खान)
सचिव”

(35) A bare reading of the aforesaid
impugned letter reveals that the manner in
which the impugned action has been taken

by the State Government/Board, is violative of principle of natural justice as the impugned letter gives rise to civil consequences for the reason that on the direction of the State Government, the district authorities have conducted a surprise inspection of these pharmacy institutions and have also submitted an inspection report of discrepancy/shortcomings arose in these institutions to the State Government and on the basis of the said report, the State Government took decision to cancel the NOC granted earlier to these institutions and thereafter on the decision of the State Government, the Board issued the impugned letter cancelling the NOC of the petitioners/ institution, however, no opportunity whatsoever has been granted to the petitioners/institutions to put forth their version in respect of the said discrepancy/shortcomings to the petitioners/ institutions before taking impugned action cancelling the NOC of these institutions.

(36) Thus, this Court is of the view that since neither any show cause notice nor any opportunity of explanation has been sought from these institutions by the the State/Board and mechanical impugned letter for cancellation of NOC has been issued by them without assigning any reasoning, the impugned order cannot be sustained in the eyes of law. The importance of a show cause notice as has been reiterated by Apex Court in the case of **Umanath Pandey v. State of U.P.**: (2009) 12 SCC 40 is as under:

“Notice is the first limb of this principle. It must be precise and unambiguous. It should appraise the party determinatively the case he has to meet. Time given for the purpose should be adequate so as to enable him to make his

representation. In the absence of a notice of the kind and such reasonable opportunity, the order passed becomes wholly vitiated. Thus, it is but essential that a party should be put on notice of the case before any adverse order is passed against him.”

(37) It is pertinent to mention here that had any show cause notice been issued to these institutions by the State/Board, the matter would have ended there and then as apparently in most of the cases, these petitioners have a plausible answer/reasoning for the deficiency pointed out by the State/Board. In any case, the law stands settled that a party to whose prejudice an order is intended to be passed is entitled to a hearing applies even to authorities, who adjudicate upon matters involving civil consequences.

(38) Before parting, this Court may observe that there could indeed be a necessity to impose certain restrictions so as to prevent mushrooming growth of pharmacy colleges. Such restrictions may be in the larger general public interest. However, if that has to be done, it has to be done strictly in accordance with law and not in the manner has purportedly been sought to be adopted by the State Government. In any case, if and when such restrictions are imposed by an authority competent to do so, the validity of the same can always be scrutinized on the touchstone of law.

(39) It is further to be noted that the applications seeking approval for D. Pharma or B. Pharma courses, as the case may be, are required to be accompanied by a “No Objection Certificate” (“NOC”) from the State Government and consent of affiliation from the affiliating bodies i.e. PCI. While scrutinizing such applications,

the Council can always take into consideration various factors, including the reservation/comment of the State Government, if any, before deciding to allow or reject such applications.

E. CONCLUSION

(40) For all the aforesaid reasons, the above-captioned writ petitions are **disposed of** with the following directions :-

i. Impugned letter dated 18.05.2023 issued by the Secretary of the Board and consequential order, if any, in reference to the impugned letter dated 18.05.2023 are hereby quashed.

ii. Liberty is granted to the State Government/Board to take action on the issue, in accordance with law, if so desires.

iii. If the State Government/Board refers any issue in respect of the petitioners/institutions to the PCI, this Court hope and trust that the PCI shall make an earnest endeavour to consider and decide the same, in accordance with law, after affording opportunity to the aggrieved person(s) expeditiously.

(41) All pending applications also stands disposed of in terms of the above final order.

(42) Needless to say, this Court has not expressed any opinion on the merits of any individual cases, which shall be guided by their own individual facts and circumstances.

(43) There shall be no order as to costs.

(2023) 9 ILRA 299

APPELLATE JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 29.08.2023

BEFORE

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

First Appeal From Order No. 22 of 2001

Navneet Nain @ Navneet Agarwal

...Appellant

Versus

The New India Assurance Co. Ltd. & Anr.

...Respondents

Counsel for the Appellant:

Sri R.K. Porwal

Counsel for the Respondents:

Sri Arvind Kumar

Civil Law – Motor Vehicles Act, 1988 - Section 161(3))(a) - claimant's appeal - arising from a judgment and award of the Motor

Accident Claims Tribunal – by which Tribunal rejected the claim petition – accident was caused by the negligent driving of the car's driver - claimant was hospitalized multiple times and suffered a permanent disability of 70%, including organic brain damage and loss of memory and causing significant financial and personal loss to him – claim petition – claiming Rs.27,89,100/- for pecuniary and general damages - the owner of the offending car, did not deny the accident but claimed it was due to claimant's negligence - the insurer company also denied the claimant's case on the ground that the claimant and the owner colluded to fabricate the accident to claim insurance benefits – the Tribunal framed several issues, including the cause of the accident and the validity of driving licenses – rejected the claim petition - Evaluation of Evidence - the court agreed with the Tribunal's findings, noting that the evidence did not support the claimant's version of events – held, there is nothing on record to show it being a case of 'hit and run' either – hence, there is no force in this appeal – accordingly, fails and is dismissed - and the records were sent back to the District Judge. (Para – 33, 34, 35)

Appeal Dismissed. (E-11)**List of Cases cited:**

1. Ravi Vs Badrinarayan & ors., (2011) 4 SCC 693,
2. Saroj & ors. Vs Het Lal & ors., (2011) 1 SCC 388.

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

1. This is a claimant's appeal, arising out of a judgment and award of the Motor Accident Claims Tribunal/ the 9th Additional District Judge, Etawah dated 31.08.2000, rejecting the claim petition.

2. On the 6th of July, 1994 at about 8:15 p.m., Navneet Nain alias Navneet Agarwal, a resident of Kanpur, went over to meet a certain Oberoi, a contractor in that city. Navneet Nain rode his motorcycle, bearing Registration No. UP-75/1227 to destination. He was returning home located at 111/155, Harsh Nagar, VIP Road, Kanpur. Nain riding his motorcycle on the VIP Road had reached the gate of a certain G.C. Colony, situate two kilometers from Police Station Cantt. towards the east. A car, bearing Registration No. DDQ-8855, appeared on the spot and hit the motorcycle head on. In consequence of the four Wheeler's impact, the rider was thrown down. He sustained serious injuries to his person, including fractures and head injury. Nain's motorcycle too was badly damaged. It is Navneet Nain's case that he was riding his motorcycle at a moderate speed, keeping to the left hand side of the road when the accident happened. The offending car was driven at a high speed, negligently and without due care and caution by its driver. In fact, it was driven negligently. The driver of the offending car hit the ill-fated motorcycle on the wrong side of the

road. The road was broad enough on the spot, where the accident happened, for both vehicles to pass safely, and there was no traffic at the time of the mis-happening. There was no occasion for the driver of the offending car to move to his right and knock down Nain's motorcycle. According to Nain, the accident happened exclusively on account of negligent driving of the offending car's driver. Had the car driver been careful and vigilant, the accident would never have happened. The driver, it is said, did not watch out on the road ahead. The driver of the offending car failed to observe the degree of care, caution and control, which were imperative in the circumstances on his part. After the accident, Nain was conveyed to the K.P.M. Hospital by Head Constable Ganesh Prasad, where he was examined and admitted.

3. Nain remained admitted to the K.P.M. Hospital until 07.07.1994. Since he was unconscious, his identity could not be established. His identity was established on 07.07.1994, whereupon he was referred to the L.L.R. Hospital, Kanpur. In order to secure better treatment, he was shifted on 07.07.1994 to Madhuraj Nursing Home (P) Ltd., 113/121-A, Swaroop Nagar, Kanpur and admitted there. He remained an indoor patient at Madhuraj Nursing Home from 07.07.1994 to 08.08.1994. Nain was then shifted to the Regency Hospital on 08.08.1994 and discharged from that Hospital on 02.09.1994. Until time when the claim petition was instituted, he was bed ridden and his condition critical. According to his case, Nain had undergone acute mental shock, pain and suffering. He has suffered a permanent disability to the extent of 70%, being a case of organic brain damage. The accident has left Nain with a permanent debilitation to his brain

resulting in the loss of memory too. The accident caused Nain to lose his capacity to work as a contractor entirely. It has resulted further in loss of memory, besides a headache and impairment of attention. He is virtually crippled. According to Nain, he is doomed forever and his future lost. It is urged to be a case of total loss of earning as Nain has been rendered unfit to work as a contractor. It is also his case that on account of deprivation of his bodily functions, he has been put to great inconvenience and disadvantage, which he would face in his daily routine all through life. The injuries sustained have caused Nain to suffer a lot in body, mind and finance.

4. It is, particularly, pleaded by Nain that being bed ridden, he cannot visit, supervise or do the work of a contractor. He has been deprived of the pleasures of life. He would be leading a miserable life all through. He has spent a substantial sum of money and would require a lot of it to secure future treatment. The ill-fated motorcycle was damaged too. According to Nain's case, prior to the accident, he was working as a contractor, carrying on his business under the name and style of Gopi Engineering and Contractors. During the assessment year 1992-93, his annual income was Rs.96,380/-, whereon income tax was paid. When the accident happened, Nain was working as a contractor at Kanpur. He had a bright future ahead of him and good future prospects. The accident resulted in pecuniary loss to him and caused deprivation of his earnings as a contractor in their entirety.

5. Nain, therefore, claimed damages in the total sum of Rs.27,89,100/- setting forth in the claim petition damages,

separately under the principal heads of pecuniary and general damages.

6. At the time of institution of the claim petition, Nain was residing in House No.14/4, Mohalla Shah Qamar, City and District Etawah. He was aged 37 years. Nain's business, as a contractor, would yield him income to the tune of Rs.9000/- per month. His wife was aged 31 years. He has two sons, one aged 10 years and the other approximately 9. Another dependent of his was Smt. Pushpa Devi, his mother aged 55 years.

7. A written statement was filed by Anil Kumar, the owner of the offending car. He was arrayed as opposite party No.1 to the claim petition and respondent No.2 to this appeal. He will hereinafter be referred to as 'the owner'. In his written statement, the owner has not denied the factum of accident involving the offending car, but set up a plea of confession and avoidance. He has said that the accident occurred due to the motorcyclist's mistake because he lost balance, tripping on his vehicle. In consequence, the driver of the offending car did his best to avert the accident, but could not save Nain from receiving injuries. It is the owner's case that the compensation claimed is excessive. Navneet Nain, who shall hereinafter be called the claimant, is not self-employed as a contractor and never earned Rs.9000/- per month as claimed. The driver of the offending car has not been impleaded as a party, rendering the claim petition bad for non-joinder. He has also pleaded that when the accident happened, the driver of the offending car was driving the car according to rule of the road, following the traffic rules. He was moving on the road giving side to other vehicles and traffic, and sounding the horn where necessary. It is the

owner's case in the alternative that in case the offending car be found answerable for the injury, the liability would fall on the shoulders of the New India Assurance Company Ltd., with whom the offending car was insured on the date of the accident.

8. The New India Assurance Company Ltd., Branch Office, Railway Station Road, Etawah through its Branch Manager, the insurer of the offending car, has been arrayed as opposite party No.2 to the claim petition and respondent No.1 to this appeal. The aforesaid Insurance Company shall hereinafter be referred to as 'the Insurer'. The Insurer filed a separate written statement on 09.05.1995, which was twice amended. The Insurer has generally denied the claimant's case and averred that the accident did not happen in the manner pleaded by the claimant. It is the Insurer's case that the owner and the claimant are close relatives and they have colluded to set up a case of bogus accident in order to enforce a baseless claim against the Insurer. It is also pleaded in the alternative that the motorcycle was being ridden by the claimant negligently, which led to the accident. The mishap, therefore, does not entitle the claimant to any compensation. The monthly income of the claimant has also been denied.

9. On the pleadings of parties, the Tribunal framed the following issues (translated into English from Hindi):

"1. Whether on 06.07.1994 at about 8:15 in the evening at the VIP Road in front of the G.C. Colony Gate, within the local limits of Police Station Cantt., City and District Kanpur Nagar, the driver of car bearing Registration No. DDQ-8855, driving it at a high speed and negligently,

caused Navneet Agarwal to suffer grievous injuries?

2. Whether at the time of the accident, the driver of the car bearing No. DDQ-8855 and the rider of the motorcycle held valid driving licences? If not, its effect?

3. Whether the accident led Navneet Agarwal to sustain injuries, that have caused him a permanent handicap?

4. Whether at the time of the accident, Car No. DDQ-8855 was insured with opposite party No.2?

5. How much is the claimant entitled to in compensation and from which opposite party?"

10. In support of his case, the claimant examined himself as PW-1, Himanshu Awasthi as PW-2, Vineet Agarwal as PW-3, Dr. S.C. Gupta, Senior Orthopaedic Surgeon, District Hospital, Etawah as PW-4 and Smt. Susma Agarwal as PW-5. In addition, documentary evidence was also led on behalf of the claimant, both relating to the accident as well as the certification of the injury sustained, the ensuing handicap, the proof of the claimant's income and the expenses incurred in the treatment.

11. On behalf of the owner, no witness was produced. The Insurer produced in the witness-box, Ravindra Pandey, DW-1, a private investigator and Dinesh Chandra Tiwari, a record keeper in the office of the S.S.P., Kanpur Nagar, as DW-2. Documentary evidence was also produced on behalf of the Insurer, that includes the G.D. Entry about the accident dated 06.07.1994 made at the Police Station. This bears Paper No.82-Kha.

12. Heard Mr. R.K. Porwal, learned Counsel for the claimant in support of the appeal and Mr. Arvind Kumar, learned

Counsel appearing on behalf of the Insurer. No one appears on behalf of the owner.

13. Mr. Porwal has criticised the award in regard to findings on Issues Nos. 1 and 2. He submits that there is no evidence on record for the Tribunal to have concluded that the accident did not take place involving the offending car. Rather, it is established from the evidence of two eye-witnesses, to wit, PW-1 and PW-2 that the accident was caused by the offending car owing to its rash and negligent driving. It is, particularly, emphasized that the owner of the offending car has admitted the factum of the accident in the written statement, which according to Mr. Porwal, is the best evidence on the issue. The Tribunal could not have gone against the owner's admission to conclude that his vehicle was not involved. It is submitted that the owner has admitted the factum of accident, but attempted to avoid his liability, saying that it was the claimant, who was negligent in riding his vehicle that led the offending car to hit the ill-fated motorcycle, despite the driver doing his best to avert the accident. It is also argued that the owner of the offending car has not been produced by the Insurer to substantiate their defence.

14. The testimony of DW-2 has been criticised by the learned Counsel for the claimant on the ground that he is a Record Keeper in the S.S.P. Office and has proved the extract of the G.D. written by another person at the police station. DW-2 is not an eye-witness of the accident or the man, who has taken the claimant to the hospital from the site of the accident. It is urged that the Tribunal's finding that the injured dashed against a Sheesam tree in an inebriated state, based on the G.D. Entry alone, is mere conjecture.

15. Mr. Arvind Kumar, on the other hand, has supported the Tribunal's finding on Issue No.1 and submits that the Tribunal has drawn a natural and sound conclusion on the totality of evidence on record. He, particularly, submits that if the Constable, who got the G.D. Entry made at the police station on 06.07.1994, had seen the accident himself or informed about it, there is no reason why he would not have mentioned the fact while getting the Entry recorded in the G.D. The Constable is a public functionary and not inimical or favourably disposed to either party. The G.D. Entry, being closest in point of time to the occurrence, should be believed for every word of it. It is argued that the stand of the owner in admitting the factum of accident shows that there is collusion between the owner and the claimant. According to Mr. Arvind Kumar, the fact that the claimant got an FIR lodged as late as on 1st September, 1994 shows that the entire case set up therein, is the result of an afterthought – a planned strategy to defraud the Insurer in collusion with the owner.

16. This Court has carefully considered the submissions advanced by learned Counsel for the parties and perused the record. Here, this Court has considered the Tribunal's finding, vis-a-vis Issue No.1. The moot question is if the accident, which led to grievous and debilitating injuries to the claimant, was caused by the offending car, or it was the result of the motorcycle dashing against a Sheesam tree. There is no denying the fact that there are two eye-witnesses of the accident, nominating the offending car as the causal agent. They are PW-1, the claimant himself, and, the other, Himanshu Awasthi, PW-2. Both the witnesses have consistently spoken about the time, place and manner of the accident and the fact that the accident was caused by

the offending car resulting in injury to the claimant. The testimony of the two eye-witnesses, notwithstanding its consistency, has to be judged for its worth in the background of circumstances, which may lend support to it or erode its credibility. It is true that both the eye-witnesses consistently mention the presence of one of them, to wit, Himanshu Awasthi, PW-2, as an eye-witness. The witness PW-2 has also been mentioned in the FIR lodged a month and a three quarters after the accident happened.

17. In the cross-examination of the witnesses too, the claimant as well as PW-2 have not squarely been confronted with the questions, if indeed the accident happened on account of the motorcycle dashing against the Sheesam tree, or the fact why PW-2, Himanshu Awasthi has not been mentioned in the earliest record of the accident. But, the fact remains that the G.D. Entry, which is the earliest account of the accident, recorded with the police station soon after the accident, clearly mentions the cause of the accident being the motorcycle dashing against the Sheesam tree. The G.D. Entry, Paper No. 82-Kha, dated 06.07.1994 reads:

"इस समय C/- 1198 CP अमर नाथ यादव मुतैना थाना चकेरी OP जाजमऊ ने थाना आकर एक व्यक्ति व हालत मजरूब बेहोश दोहरा वक्ष श्याम का रंग पेन्ट शर्ट पहने दाखिल किया तथा तहरीर कराया कि मैं अपने आवास आ रहा था तो वापस आने पर VIPरोड, जी०सी० कालोनी गेट के सामने यह बेहोश हालत में थे सड़क के किनारे खड़े एक शीशम के पेड़ के पास पड़ा था तथा एक मोटर साईकिल शीशम के पेड़ से टकराई पड़ी है। इस आदमी का एक्सीडेंट लगता है कि अचानक मोटर साईकिल के शीशम से टकराने के कारण हुआ है। इसके पास शराब सी बू भी आ रही है। मैं वास्ते उपचार व आ०का० फोन पर सूचना दे रहा हूँ। एवं शीघ्र ही चिट्ठी मजरूबी बनाकर वास्ते इलाज द्वारा HG 3278 गणेश प्रसाद K.P.M. अस्पताल खाना किया गया।"

18. This Entry has neither been proved by the Record Keeper with the office of the S.S.P. nor by its author, who entered it in the G.D. at the police station concerned, or by the Constable Amarnath Yadav, at whose instance it was made. The extract of the G.D. Entry, bearing Paper No. 82-Kha, is part of an official record maintained at the police station in the ordinary course of business. It is maintained in the course of State business. It is maintained like a clock-work record of facts, all through 24 hours about the happenings at the station and the business there. There is no reason to disbelieve, at least what is apparently recorded therein, the document being a public document, maintained in the manner indicated above, even in the absence of Constable Amarnath Yadav, who got the Entry made and one who ought to have been ideally produced by the Insurer. What cannot be ignored is the fact that it does not mention a word about the accident involving a car or the presence of any other person, besides the Constable himself. It appears to record facts that the witness noticed post event, that is to say, after the accident. How much afterwards, cannot be said or inferred from the G.D. Entry. PW-1, the claimant, in his cross-examination by the Insurer has said:

"टक्कर के बाद मैं बेहोश हो गया था व बीच-बीच में होश आ जाता था। मौके पर सोनू व हिमांशु अवस्थी आ गये थे जिन्होंने घटना देखी थी मुझे मौके से दोनो गवाह व कांस्टेबल मुझे अस्पताल ले गये थे।"

19. The owner has not asked anything material in the cross-examination, which may have bearing on the factum of the other witness's presence at the time of the accident or about the possibility of the claimant informing the Police, how the accident happened. PW-2, in his

examination-in-chief, has supported the factum of accident involving the offending car, as already said, and asserted the fact that he went along with the Police to the K.P.M. Hospital to get the injured admitted. He has testified in his examination-in-chief to the following effect:

"दि. 6.7.94 की बात है मैं कानपुर कैण्ट एरिया में जी०सी० कालोनी के सामने गेट के पास शाम करीब 8 बजे खड़ा था। मैंने देखा कि एक कार जिसका नम्बर D.D.Q./8855 बड़ी तेजी व लापरवाही से दक्षिण से उत्तर तरफ मेरी तरफ आ रही थी उसी समय एक मोटर साईकिल चालक उत्तर से दक्षिण तरफ जा रहा था। इतने में करीब 8.15 बजे शाम कार चालक ने मोटर साईकिल में टक्कर मारी जिससे मोटर साईकिल चालक कार की टक्कर से गिर पड़ा। कार की टक्कर से गंभीर चोटों के कारण, पैर में फ्रैक्चर व सिर व शरीर में भी चोट आई। इस घटना को मेरे अलावा मेरे साथ खड़े सोनू S/O S. H. तिवारी नि० कल्यानपुर जि० कानपुर एवं अन्य लोगों ने देखा है। दुर्घटना के समय पुलिस कर्मी आ गये जिनकी मदद से मैंने एवं अन्य लोगों ने घायल को K.P.M. हास्पिटल कानपुर में भर्ती कराया। यह घटना कार चालक DDQ/8855 की गलती तेजी व लापरवाही के कारण हुई है।"

20. In his cross-examination, relevant on the point, PW-2 has testified:

"कार व मोटर साईकिल में आमने-सामने से टक्कर हुई थी कार मोटर साईकिल के पास आने पर लापरवाही से पूर्वी पटरी की ओर चली आई एवं उसने मोटर साईकिल में टक्कर मार दी। कार 8-10 सेकेण्ड के लिये रुकी होगी हम लोगों ने घायल को उठाने का प्रयास किया जब तक घायल को उठाया तब तक कार उत्तर की ओर भाग गई।"

मैंने व सोनू का नाम घायल को बता दिया था लिखकर पर्ची नाम पता दे दी थी। मैंने घायल का नाम पता नोट कर लिया था। दुर्घटना के करीब 2 माह बाद थाना कैण्ट के सबइन्स्पेक्टर ने मेरे व सोनू के ब्यान लिये थे मैंने यही ब्यान दर्ोगा को दिये थे। पुलिस केस में कानपुर न्याया. में अभी तक मेरा कोई ब्यान नहीं हुआ है।"

मेरी घायल से कोई रिश्ता व व्यवहार नहीं है। आज की तारीख की सूचना मुझे सम्मन द्वारा प्राप्त हुई है इसलिये गवाही देने आया हूँ।"

21. Notwithstanding the consistency in the two witnesses' stand about the accident, if there were any truth to it, there is no reason why Constable Amarnath Yadav, who got the Entry promptly made at the Police Station, would not have mentioned the most essential fact that the accident happened because of a collision with the offending car. The claimant himself says that he was not throughout unconscious, but intermittent between a conscious and unconscious state. If this were so, he would have informed the policemen about the cause of the accident. Assuming that the claimant, being the victim of an accident and badly injured, was too feeble or confounded to communicate, the fact would most certainly have been communicated to the Constable by PW-2 and the other man Sonu, who according to PW-2, went along with the Police to the K.P.M. Hospital to get the claimant admitted. The G.D. Entry, Paper No.82-Kha, was made at the instance of Constable Amarnath Yadav, who is, as rightly pointed out by Mr. Arvind Kumar, neither favourably nor inimically disposed towards the parties. If he had been informed about the involvement of the offending car in the accident, there is no earthly reason why he would have got it noted in the G.D. Entry that he found the claimant lying unconscious near a Sheesam tree, and saying that in his assessment the claimant had collided with the tree. The G.D. Entry, in the manner it describes, what the Constable saw, does not even remotely refer to the presence of an eye-witness of the accident, informing him about how it all happened. The Constable indulged in some guesswork, because apparently there was no one to inform him how the accident happened.

22. More than that, the earliest record in the hospital is the one from K.P.M. Hospital dated 06.07.1994, bearing Paper No.13-Ga/4. It is signed by the Medical Officer, K.P.M. Hospital, Birhana Road, Kanpur. It mentions the description of the injured in the following words:

“Examined an unknown male person aged about 40 years S/o unknown R/o unknown dated 6/7/1994 time 9.15 p.m. B/B HG 3278 Ganesh Prasad of P.S. Cantt. Distt. Kanpur Nagar.”

23. There is then a description of the mark of identification, a medicolegal description of the four injuries sustained, followed by the Doctor's opinion.

24. Nowhere in this report is there a mention of the presence of PW-2, Awasthi, or the fact that the injuries were the cause of a motor accident. If indeed PW-2 had accompanied the injured to the K.P.M. Hospital, he would have definitely mentioned the fact to the Doctor, who would have made a record of it in his report that it is a medicolegal case relating to a motor accident. In the letter of reference (Chitthi Majrubi) from Police Station Cantt., that precedes the examination of the claimant by the Medical Officer at the K.P.M. Hospital, also dated 06.07.1994, there is not a word about the injured being the victim of an accident. The Chitthi Majrubi dated 06.07.1994, in its material part, reads:

"विनय है कि एक व्यक्ति मोटर साईकिल सवार नाम पता अज्ञात व हालत मजरूब वास्ते इलाज भेजा जा रहा है। रिपोर्ट सेवा में प्रेषित है।"

25. The Medical Officer at the K.P.M. Hospital, as would appear from his opinion,

decided to refer the claimant to the L.L.R. Hospital, Kanpur. He drew up a separate letter of reference dated 07.07.1994, Paper No.13-Ga/5 addressed to the Emergency Medical Officer, L.L.R. Hospital, Kanpur. This letter mentions the name of the patient as Navneet Nain Agarwal son of Gopi Chand Agarwal, resident of 111/155, Harsh Nagar, Kanpur. It mentions that his injuries have been recorded and goes on to say that his condition is not satisfactory. The letter closes with a remark that the Emergency Medical Officer at the L.L.R. Hospital may see the patient and do the needful. Apparently, by the time that this letter was written, the patient had regained consciousness or his identity otherwise established, but there is not a word about the involvement of a motor accident. Subsequently, when the claimant was admitted to the care of Madhuraj Nursing Home (P) Limited on 07.07.1994, the consent letter for surgery signed by Akash Jain, apart from the printed proforma, which is in the English language, carries a note in Hindi-Devanagari, saying:

"मेरे मरीज को गलती से चोट लगी है। इसके लिये कानूनी कार्यवाही हो चुकी है। मुझे यहां अभी कोई कानूनी कार्यवाही नहीं करनी है। मुझे नवनीत के पूर्णरूप से होश में आ जाने के बाद कार्यवाही करनी है। मुझे सारे खतरे समझा दिये गये हैं। मैं इलाज की अनुमति देता हूँ।"

26. In the discharge ticket from the Regency Hospital dated 02.09.1994, where the claimant was last treated, there is a description of the clinical details of the injuries and the final diagnosis. It mentions the final diagnosis as Organic Brain Disease with UTI. The clinical details read:

“Patient was admitted as a case of organic brain damage with # Femur Lt. with I Tr. Lt. with UTI with drug induced

EPS. He was managed conservatively by which he improved and discharged with proper advice.”

27. In the discharge ticket also, there is not a hint about the patient being the victim of a motor accident or in any manner a medicolegal case. In fact, there is no medical record to show that the claimant was, at any time, treated as a medicolegal case, the victim of a motor accident, either in the documents that are on record or others that would have logically been produced, were it a case of a motor accident. The consistent absence of mention of the fact, that the claimant was the victim of a motor accident, in the G.D. Entry and the earliest medical records, belies the testimony of PW-1 and PW-2 in the witness-box and renders it, by the circumstances, too incredible to believe. The Tribunal has disbelieved the presence of PW-2, and in the opinion of this Court, rightly so. If PW-2 were present at the time of the accident, there is no reason why he would not have shared this fact with the Constable or the Homeguard, and, in turn, why this fact would not have figured in the G.D. Entry made at the instance of the Constable Amarnath Yadav or by the Doctors at the K.P.M. Hospital, where the Homeguard got the claimant admitted for emergency medical attention.

28. The fact that PW-2 disclosed his name to the patient and slipped a chit of paper in the victim's pocket carrying the details of his identity, which lasted with the victim long enough to mention this witness a month and a three-quarters later when the FIR was lodged, also makes the story absolutely incredible. The witness was taken to different hospitals and subjected to life-saving treatment. In the process, the witness would either have lost the slip of

paper, carrying the PW's name or someone would have found it and called the said witness, whereafter there would be mention about the motor accident as the cause of the claimant's injury in medical records, much earlier than the lodging of the FIR. The lodging of the FIR, after a month and a three-quarters, may not be a circumstance to discredit it, but in the totality of circumstances that this Court has noticed hereinbefore, we are in agreement with the Tribunal that the FIR appears to be the product of deliberate design, lodged after premeditation in order to make out a sustainable claim against the Insurer. At least, that appears to have been the attempt. The Tribunal has entirely disbelieved the case of an accident involving the offending car for valid reasons assigned and this Court for those reasons and the ones added here, is inclined to agree with the Tribunal.

29. This Court must notice here, notwithstanding our conclusion hereinabove recorded regarding the effect of the delay in lodging the FIR in the circumstances obtaining, the authority of the Supreme Court relied upon by Mr. Porwal in support of his contention that the delay in lodging the FIR, does not make the claimant's case suspect. The decision relied upon on behalf of the claimant is **Ravi v. Badrinarayan and others, (2011) 4 SCC 693**. **Ravi** (*supra*) was also an injury case, where the accident happened on 06.10.2001 at 8.30 in the morning. It was a case where the victim of the accident, Ravi, a child of 8 years, who had gone out to relieve himself in the open in front of his house, was injured by a truck, that was reversing. The FIR in the case came to be lodged on 26.01.2002, more than three and a half months after the occurrence. In **Ravi**, discounting the delay in lodging the FIR as a fact discrediting the claimant's case, it

was held by their Lordships of the Supreme Court:

“16. The cumulative effect of the aforesaid events clearly established that the accident had taken place on 7-10-2001 at about 8.30 in the morning on account of rash and negligent reversing of the truck by driver Badrinarayan, owned by Respondent 2 Prahlad Singh. Under these circumstances, it cannot be said that delay in lodging the FIR could have proved fatal to the claim case filed by Ravi. Narration of the aforesaid events would show the bona fides of Suresh. As mentioned hereinabove, a consistent stand has been taken right from the beginning till the lodging of the FIR. The chronological events narrated hereinabove inspire confidence and it does not smack of a concocted case which has been filed against the driver and the owner of the vehicle only with an intention to get compensation.

17. It is well settled that delay in lodging the FIR cannot be a ground to doubt the claimant's case. Knowing the Indian conditions as they are, we cannot expect a common man to first rush to the police station immediately after an accident. Human nature and family responsibilities occupy the mind of kith and kin to such an extent that they give more importance to get the victim treated rather than to rush to the police station. Under such circumstances, they are not expected to act mechanically with promptitude in lodging the FIR with the police. Delay in lodging the FIR thus, cannot be the ground to deny justice to the victim.

18. In cases of delay, the courts are required to examine the evidence with a closer scrutiny and in doing so the contents of the FIR should also be scrutinised more carefully. If the court finds that there is no indication of fabrication or it has not been

concocted or engineered to implicate innocent persons then, even if there is a delay in lodging the FIR, the claim case cannot be dismissed merely on that ground. The purpose of lodging the FIR in such type of cases is primarily to intimate the police to initiate investigation of criminal offences.

19. Lodging of FIR certainly proves the factum of accident so that the victim is able to lodge a case for compensation but delay in doing so cannot be the main ground for rejecting the claim petition. In other words, although lodging of FIR is vital in deciding motor accident claim cases, delay in lodging the same should not be treated as fatal for such proceedings, if claimant has been able to demonstrate satisfactory and cogent reasons for it. There could be a variety of reasons in genuine cases for delayed lodgement of FIR. Unless kith and kin of the victim are able to regain a certain level of tranquillity of mind and are composed to lodge it, even if, there is delay, the same deserves to be condoned. In such circumstances, the authenticity of the FIR assumes much more significance than delay in lodging thereof supported by cogent reasons.”

30. Now, the facts in **Ravi's** case show that soon after the accident on 07.10.2001 at 8.00 p.m., the Police had arrived at the Hospital, where the injury report had been drawn up mentioning the fact that injuries were caused on account of a motor accident. **Ravi's** case is, therefore, clearly one where the delay in lodging a formal FIR is inconsequential. The principle in Paragraph Nos.17, 18 and 19 of the report in Ravi have to be understood in the background of a very assuring circumstance that within the cognizance of the Police and on the credit of the medical records, it was surely a case of motor

accident. In the present case, the circumstances in stark contrast have been noticed, where there is no police record of the accident in the manner described in the delayed FIR prior to lodging it or anything of it mentioned in medical records. Therefore, the principle in Ravi about the delay in lodging the FIR, not being fatal to the motor accident claim, is not attracted.

31. The insistence by Mr. Porwal, that the owner's admission about the factum of accident is decisive, draws much for its strength on the principle laid down by the Supreme Court in **Saroj and others v. Het Lal and others, (2011) 1 SCC 388**. The learned Counsel for the claimant has drawn this Court's attention to the holding in Saroj (supra), where it is observed:

“18. On considering the rival arguments, it must be said that the petition could not have been dismissed in totality. Presuming it to be a hit-and-run case, the appellants were entitled to at least Rs. 25,000 as per the provisions of Section 161(3)(a) of the Motor Vehicles Act. Therefore, both the courts below have obviously failed to note this provision. But that is not the end of the matter. In our opinion, both the courts below have completely erred in giving the finding that it was a hit-and-run case and that the vehicle concerned belonging to Respondent 2 was not involved in the accident. Insofar as that finding is concerned, it was an admitted position in the pleadings of Respondent 2 that firstly, the Tata 207 vehicle bearing Registration No. HR 38 L 6592 was involved in an accident with the motorcycle bearing Registration No. HR 26 P 9413 which took place on 16-9-2005 at 3.30 p.m. and secondly, the said vehicle was being driven by Respondent 1. This admission in the pleadings which we have

quoted in the order was itself sufficient to hold that the vehicle concerned belonging to Respondent 2 was involved in the accident. This admission was never traversed by Respondent 2 and, thus, there was no occasion to hold that the said vehicle was not involved and that it was a hit-and-run case. It is surprising that not only the Tribunal but the High Court also should have ignored the vital admission on the part of Respondent 2. It was nobody's case that this admission of Respondent 2 was in collusion between Respondent 2 and the appellants. Once this position is clear, there is no occasion for holding that the vehicle was not involved in the accident and on that count exonerating the three respondents.”

32. The principle in **Saroj** cannot be relied upon by the claimant, because the facts there show that there was no case of a collusion between the owner of the offending car and the claimant. Rather, the remark there is that there was no case of collusion between parties. Here, there is an emphatic case of a collusion between the owner and the claimant pleaded by the Insurer, that has been pressed before the Tribunal as well as this Court. In the face of a case of collusion and circumstances that we have noticed to support that case by the Insurer, the admission of the owner serves more as a link to strengthen collusion rather than serving the claimant's cause.

33. Mr. Porwal has submitted, with much emphasis, that the fact, that the owner of the vehicle has not disputed the accident involving the car, clinches the issue. Before the Tribunal, it was asserted on behalf of the Insurer that the claimant and the owner are related, a fact that was denied by the owner's witness, PW-5 as well as other witnesses. The Tribunal has

not recorded a positive finding about a case of collusion between the owner and the claimant, but on the totality of evidence, has disbelieved the claimant's case about the involvement of the offending car in the accident. The stand taken by the owner in the circumstances that no one had reported the car to the Police, or spoken about his car's involvement prior to the belated FIR lodged a month and a three quarters after the accident, strongly suggests a case of collusion between the owner and the claimant. If the owner was such an honest and upright man that knowing the fact about involvement of his car in the accident, month's after it had happened through a report to the Police, admitted it before the Tribunal, there is no reason why he did not come forward at the earliest himself to disclose the accident to the Police, or may be, to the claimant and his relatives. It is not the claimant's case that the owner came forward himself and confided in him.

34. Also, the fact that though the owner contested the claim by filing a written statement, he discretely chose to stay away from the witness-box hints at his complicity. If one were to assume that the vehicle being insured, the owner was not bothered to participate in the matter beyond putting in his written statement, there is no reason why the owner who had admitted to a very material fact-in-issue, to wit, the involvement of his car in the accident, would not be produced in evidence by the claimant. The ellusiveness of the owner from the witness-box, both at his own instance and at the instance of the claimant, is suggestive of the fact that both the owner and the claimant did not want him (the owner) risk facing cross-examination in Court, or may be uncomfortable questions by the Court.

35. These circumstances suggest a cooked up story by the claimant, who no doubt has suffered the accident, may be in a case of dashing against a tree, to collude with the owner and claim compensation for himself. This Court, therefore, does not find any force in the submissions advanced on behalf of the claimant on the premise of the owner's admission about the accident. There is nothing on record to show it being a case of 'hit and run' either.

36. There is no force in this appeal. It, accordingly, fails and is **dismissed**. Costs easy.

37. Let the records of the Tribunal be sent down at once by the office through the District Judge, Etawah.

(2023) 9 ILRA 310

APPELLATE JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 17.08.2023

BEFORE

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

First Appeal From Order No. 1099 of 2001

Ahmad Ahsan & Anr. ...Appellants

Versus

Sri Suresh ...Respondent

Counsel for the Appellants:

Sri Syed Farman Ahmad Naqvi (Sr. Adv.), Sri Lal Mani Singh

Counsel for the Respondents:

Sri Bijai Prakash Tiwari

Civil Law - Employees St. Insurance Act, 1948 – Sections 51, 53 & 61 – Employees Compensation Act, 1923 - Section 30 - Appeal – challenging the Award - passed by the Workmen's Compensation Commissioner -

Accident - claimant, a Class-IV employee, suffered a severe injury while on duty, resulting in partial disablement - the respondents refused to engage the claimant into service after the accident, leading to a claim petition filed under the Employees' Compensation Act - the appellants denied the incident and the employment of the claimant - The court finds that, so called substantial Question of law framed are the questions of facts and the findings of the Commissioner on the said issues are not perverse - court discussed the scope of entertaining appeals against the award of the Workmen's Compensation Commissioner - held, the substantial questions of law raised are actually questions of facts - appeal is dismissed - the remaining amount if yet not deposited, be deposited and disbursed to the claimant accordingly. (Para -8, 12, 13)

Appeal Dismissed. (E-11)

List of Cases cited:

1. Western India Plywood Ltd. Vs Shri P. Ashokan dated 19.9.1997 - AIR 1997 SC 3883,
2. Civil Appeal No.7470 of 2009 North East Karnataka Road Transport Corporation Vs Smt. Sujatha decided on 2.11.2018,
3. Golla Rajanna Etc. Etc. Vs Divisional Manager & anr., 2017 (1) TAC 259 (SC),

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

1. Heard Mr. Lal Mani Singh, learned counsel for the appellants and Mr. Bijai Prakash Tiwari, learned counsel for the respondent.

2. By way of this appeal, the appellants have challenged the judgment and award dated 21.6.2001 passed by Workmen's Compensation Commissioner/ Additional District Magistrate (City) Kanpur Nagar in Case No. 4 of 1996.

3. This Court while admitting the appeal did not frame any substantial questions of law and, therefore, questions of law framed by the appellants are required to be decided as per the said questions of law framed herein below:-

(i) Whether the bar under Section 53 and 61 of Employees State Insurance Act, 1948 is applicable upon the impugned proceedings because the opposite party is getting pension and had already received compensation as per the Rules?

(ii) Whether in view of Section 53 and 51 of the Employees State Insurance Act, 1948 impugned proceedings were maintainable or the same are barred under Section 53 and 61 of the Act?

(iii) Whether Section 53 of the Employees State Insurance Act, 1948 itself entitles an employee who has suffered alleged employment injury from receiving or recovering the compensation and damages under the Workmen's Compensation Act or any other law for the time being imposed or otherwise?

4. The brief facts of the case culled out from the record are that the claimants had preferred a claim petition under the provisions of Employees' Compensation Act 1923 (hereinafter referred to as Act, 1923) against the appellants herein. The claimant was a Class-IV employee. The appellants are the owner of the Tenari New Light Teners. On 19.6.1995 when the claimant was on duty, at that time, at about 1:25 PM his left hand (upper limb) came in the machine and his index finger alongwith thumb and other parts got crushed and they had to be amputated, which resulted in total partial disablement to the claimant. The claimant was rushed to the hospital and from 19.6.1995 till 16.8.1995 he was under treatment (i.e. about two months).

5. The respondents refused to engage claimant into service after the accident, and therefore, the notice was given to the appellants to pay compensation despite the notice, no amount was paid rather the claimant was summoned and was humiliated by appellants. The notice was given to the appellants herein, who filed its reply on 30.1.1999 and denied the entire incident and submitted that claimant was not employed by them as a machine man and that the accident if at all had occurred was because of the negligence of claimant. It is stated that the claimant did not report for duty his name was deleted from the list. Even before the said reply, Mohd. Azmal was made a party who also filed his reply of denial and denied the employment. The Workmen Commissioner framed several issues. The stand of the appellants was that the claimant was removed after following the procedure.

6. The issue no.1 has rightly been decided by the Commissioner and it is a question of fact. As far as issue no.2 is concerned, as to whether the appellants had paid any amount to the claimant or not just because the ESI has made certain payments would it permit the appellants herein not to pay any amount. While deciding the issue for compensation, which is a question of fact. The questions is whether this Court can entertain this appeal under Section 30 of the Act on the questions of facts.

7. Learned counsel for the appellants has contended that Employees State Insurance Act 1948 has granted him pension. The judgment according to the counsel for appellants is silent and has not discussed this aspect. Learned counsel for the appellants has relied on the judgment of Hon'ble Apex Court in the case of ***Western India Plywood Ltd. Vs. Shri P. Ashokan***

dated 19.9.1997 and contended that the said judgment is relied on so as to contend that once the employee has received disablement benefit under the Employees State Insurance Act, 1948 he would not be entitled to any amount under the Employees' Compensation Act 1923, which is barred by Section 53 of Employees State Insurance Act. It is contended that the provisions of law is very clear that the claimant could not have made the claim.

8. However, looking to the injuries and the long period, which has passed by claimant and that the claimant has lost his fingers (upper limbs). The amount awarded being meagre amount cannot be interfered with and it can be considered to be medical expenses. The amount deposited would enure for the benefit of the injured who has lost his fingers, hand and job as well as crushed other three fingers.

9. The written statement nowhere mentioned the fact that the claimant had received any amount under the Workmen's Compensation Act, 1948.

10. At the outset, it is relevant to discuss the scope of this Court to entertain appeal against the award of Workmen's Compensation Commissioner. The Apex Court in **Civil Appeal No.7470 of 2009 North East Karnataka Road Transport Corporation Vs. Smt. Sujatha decided on 2.11.2018** has held as under :

"9. At the outset, we may take note of the fact, being a settled principle, that the question as to whether the employee met with an accident, whether the accident occurred during the course of employment, whether it arose out of an employment, how and in what manner the accident occurred,

who was negligent in causing the accident, whether there existed any relationship of employee and employer; what was the age and monthly salary of the employee, how many are the dependents of the deceased employee due to injuries suffered in an accident, whether there was any insurance coverage obtained by the employer to cover the incident etc. are some of the material issues which arise for the just decision of the Commissioner in a claim petition when an employee suffers any bodily injury or dies during the course of his employment and he/his LRS sue/s his employer to claim compensation under the Act.

10. The aforementioned questions are essentially the questions of fact and, therefore, they are required to be proved with the aid of evidence. Once, they are proved either way, the findings recorded thereon are regarded as findings of fact."

11. The Apex Court further went on to hold as under :

"15. Such appeal is then heard on the question of admission with a view to find out as to whether it involves any substantial question of law or not. Whether the appeal involves a substantial question of law or not depends upon the facts of each case and needs an examination by the High Court. If the substantial question of law arises, the High Court would admit the appeal for final hearing on merit else would dismiss in limini with reasons that it does not involve any substantial question/s of law.

16. Now coming to the facts of this case, we find that the appeal before the High Court did not involve any substantial question of law on the material questions set out above. In other words, in our view, the Commissioner decided all the material questions arising in the case properly on

the basis of evidence adduced by the parties and rightly determined the compensation payable to the respondent. It was, therefore, rightly affirmed by the High Court on facts.

17. In this view of the matter, the findings being concurrent findings of fact of the two courts below are binding on this Court. Even otherwise, we find no good ground to call for any interference on any of the factual findings. None of the factual findings are found to be either perverse or arbitrary or based on no evidence or against any provision of law. We accordingly uphold these findings."

12. As far as present appeal is concerned, the so called substantial questions of law framed are the questions of facts and the findings of the Commissioner on the said issues are not perverse. As far as interest is concerned, the same is answered against the Insurance Company in view of the decision of the Apex Court in **North East Karnataka Road Transport Corporation Case (Supra). In Golla Rajanna Etc. Etc. Vs. Divisional Manager and Another, 2017 (1) TAC 259 (SC)** also it has been held that under Section 30, the High Court cannot enter into the arena of facts unless they are proved to be perverse.

13. In view of the special facts and circumstances, this appeal is dismissed. The remaining amount if yet not deposited, be deposited and disbursed to the claimants. The so called questions of law framed by the appellants are answered against it. In fact the substantial questions of law raised are the questions of fact.

14. Interim relief, if any, shall stand vacated forthwith. The amount be disbursed to the claimant forthwith.

maintainability of the appeal, are, therefore, held to be legally unsustainable – list the appeal for admission as fresh. (Para -8, 12, 13)

Preliminary objection rejected, but, Appeal is pending. (E-11)

List of Cases cited:

1. Kanakaya Vs Lakshmayya – AIR 1951 Mad 218,

2. Kanhaiyalal Vs Tribeni Sahai – AIR 1914 All 380

3. Ramien Vs Veerappudian – AIR 1914 Mad 473(2)

4. Gokul Kalwar Vs Chandar Sekhar – AIR 1926 All 665

5. Madhu Sudan Vs Chhalimaddin Ahammad –
AIR 1928 Cal 167

6. Gurmukh Singh Vs Shiv Ram – AIR 1935 Lah 482

7. Basawant Mallappa Vs Kallappa Virbhadrappa
– AIR 1938 Bom 222

8. Madhorao Paikaji Vs Ekanathrao Balappa –
AIR 1948 Nag 56

9. Uppala Subbaiah Vs Chitrula Narsimloo – AIR 1956 Hyd 161.

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

1. Heard Shri Devansh Mishra, learned counsel for the appellant and Shri Pankaj Agarwal, learned counsel for the respondents.

2. The present appeal is directed against the order dated 08.05.2023 passed in Civil Appeal No. 22 of 2022, arising out of the judgment and decree dated 31.03.2022, passed in Original Suit No. 649 of 2016.

3. By order dated 31.03.2023, the trial court had disposed of the suit upon a preliminary point, and the decree was reversed in appeal in terms of the order dated 08.05.2023, and the case was remanded to the trial Judge.

4. Counsel appearing for the respondents has raised a preliminary objection to the hearing of the present appeal by pointing out that the order of remand has been carried out and the trial court has passed an order dated 18.08.2023 disposing of 'Issue no. 9', as directed in terms of the order dated 08.05.2023 passed in the civil appeal. It is accordingly submitted that the remedy open to the appellant would be to file an appeal against the subsequent order passed by the trial court, and the present appeal against the order of remand is now without any purpose.

5. It is further sought to be argued that in the absence of an appeal being filed against the later order passed by the trial court deciding the issue on which the remand had been made, the said order would remain in force even if the earlier order is set aside, and therefore, it would be an exercise in futility in reversing the earlier order by entertaining the present appeal.

6. Counsel for the appellant has controverted the aforesaid objection by submitting that an appeal against an order of remand, cannot be held to have become redundant with the passing of the consequential order by the trial court in pursuance of the order of remand. It is contended that the right of appeal granted by Order XLIII, Rule 1(u) against an order of remand cannot be taken away or nullified with the passing of the

consequential order pursuant to the order of remand. Learned counsel has placed reliance upon the decision in **Kanakaya Vs. Lakshmayya**¹.

7. The preliminary issue on which submissions have been made by the counsel for the parties, raises a legal question as to whether the passing of a final order pursuant to the remand would constitute a bar either to the institution or the hearing of appeal under Order XLIII Rule 1(u) against the remand order.

8. The Civil Procedure Code, 1908² gives a right of appeal to a party aggrieved against an order of remand in a case where the decree of the appellate court would be open to appeal and also imposes serious disability in terms of Section 105(2) precluding an appellant from taking in an appeal from the final decree any objection that might have been urged by way of an appeal from an order of remand.

9. There is no provision in the Code, express or otherwise, that may be held to have an effect of taking away the right of a party to appeal from an order of remand, in case the preliminary point on which the remand had been made, stood disposed of before the appeal against the order of remand was presented or heard and disposed of.

10. Under Order XLIII Rule 1(u), an appeal lies from an order remanding a case, where an appeal would lie from the decree of the appellate court. This would mean that the order of remand would be appealable only in a case in which an appeal would lie from the decree which would have been passed by the appellate court had that court decided the case without remand.

11. In a case where no appeal is preferred from the order of remand, the party aggrieved by the order cannot afterwards dispute its correctness in an appeal from the final decree in view of the provision contained under Section 105(2).

12. Section 104, read with Order XLIII, Rule 1, expressly authorizes and creates a forum for appeal against orders falling under various clauses of Order XLIII, Rule 1. The right of appeal, thus conferred by the statute, is a substantial right, and in the absence of any express provision to the contrary, it would not be legitimate to read into the statutory provision granting a right of appeal, any limitation or disability which the legislature did not deem it appropriate to insert. The abrogation of a statutory right of appeal is not to be readily inferred, particularly in a situation where non-filing of such an appeal has the effect of imposing a serious disability on the right of the party concerned from disputing the correctness of the order at a subsequent stage.

13. Order XLIII, Rule 1(u) does not contain any express bar by providing any condition that an order of remand would be appealable only if the case had not been finally determined by the trial court before filing of the appeal or during its pendency. There is also no provision which may lead to an inference that an appeal filed against an order of remand would be rendered infructuous in case the preliminary point on which the remand had been made was disposed of during the pendency of the appeal.

14. The right of appeal and the jurisdiction for the purpose, having been conferred expressly by the statute, cannot be taken away except by express words, or

by necessary implication. The Code does not say, in express terms or otherwise, that the appeal against the order of remand would lie only if the point on which the remand had been made, had not been finally determined by the court of first instance, before the appeal is preferred or is heard.

15. The reason why the legislature, in its wisdom, did not provide any such exclusionary clause, in express terms, would stem from the fact that in the event, a party, for any reason, is unable to appeal against the order of remand before an order is passed consequent to a remand, it would lose all opportunity of objecting to that order in view of Section 105(2), and simultaneously, it would also be deprived of the right of appeal expressly conferred by Section 104(1) read with Order XLIII Rule 1(u).

16. The fallacy in taking a position to the contrary would be manifest by taking the illustration of a situation where the first appellate court passes an order of remand, and before it is subjected to appeal under Order XLIII Rule 1(u), the trial court passes an order on merits pursuant to the remand order, and the order so passed is unassailable. If a view is taken that in such a situation, the only remedy available to the party concerned would be to challenge the consequential order passed by the trial judge pursuant to the remand order, the party concerned would be forced to file an appeal against the order of trial court even though the said order may be unimpeachable, and by virtue of the bar under Section 105(2), he would not be entitled in that appeal to attack the remand order. This would, obviously, create a serious prejudice to the rights of the party and any such exclusion in the absence of

any express provision to the said effect having been provided by the legislature, cannot be readily inferred.

17. It would be seen that under the scheme of the Code, an order of remand has an independent existence, with an independent right of appeal having been provided against such an order. The disability created in terms of Section 105(2), in a case where the party concerned fails to exercise its right of appeal against an order of remand, makes the right of appeal provided under Order XLIII, Rule 1 Clause (u), even more valuable.

18. The order of remand under the statutory scheme would, therefore, be seen to have independent existence and cannot be held to have been nullified merely for the reason that the remand order has subsequently been given effect and the point on which the remand had been made, has been decided. This is more so for the reason that a separate right to appeal is provided against such an order under Order XIII, Rule 1(u), and under Section 105(2), an obligation is cast on a person aggrieved with the order of remand to appeal from it, and in the absence of doing so, he would be precluded from raising any objection with regard to propriety or correctness of the order at a subsequent stage of litigation. It would, therefore, not be possible to read into the Code any provision to the effect that the passing of a final order pursuant to the remand would constitute a bar either to the institution or the hearing of any appeal against the remand order.

19. An analogy may be drawn with Section 97 of the Code, which provides that where any party aggrieved by a preliminary decree does not appeal from such decree, he shall be precluded from disputing its

correctness in any appeal which may be preferred from the final decree. Although, the provisions of Section 97 would have no applicability to the facts of the present case, the analogy would be apt for the reason that the position of an appeal from the order of remand and an appeal from a preliminary decree would be very similar as in both the situations, if the appeal which is provided by the statute, is not preferred, the order or the decree, as the case may be, cannot be challenged at a subsequent stage.

20. The question whether the passing of a final decree would affect the maintainability of the appeal, already filed, from the preliminary decree, has been the subject matter of consideration before various High Courts, and it has been held that the passing of a final decree subsequent to the institution of an appeal would not affect the maintainability of the appeal. Reference in this regard may be made to the decisions in **Kanhaiyalal v. Tribeni Sahai³, Ramien v. Veerappudian⁴, Gokul Kalwar v. Chandar Sekhar⁵, Madhu Sudan v. Chhalimaddin Ahammad⁶, Gurmukh Singh v. Shiv Ram⁷, Basawant Mallappa v. Kallappa Virbhadrappa⁸, Madhorao Paikaji v. Ekanathrao Balappa⁹, and Uppala Subbaiah v. Chitralla Narsimloo¹⁰.**

21. The common reasoning taken to come to the aforesaid conclusion, is twofold: firstly, that the preliminary decree has an independent existence and it cannot be assailed in an appeal from the final decree; and secondly, if the preliminary decree was set aside, the final decree would fall on its own. It was also held that the preliminary decree having an independent existence and the person aggrieved being bound to appeal from it, that right could not

be taken away by a final order being passed either before or after the presentation of an appeal from the preliminary decree.

22. An order of remand made under Order XLI Rule 23, is also having an analogous position, being appealable under Order XLIII, Rule 1(u), with a condition that if no appeal is filed therefrom, it cannot be challenged in view of the bar under Section 105(2). Thus, the order of remand would have an independent existence and if any person is aggrieved thereby, he would have no other alternative but to appeal from it, otherwise, he would be precluded from disputing its correctness later on.

23. The law gives to the person aggrieved by the order of remand, a right to appeal, and that right cannot be taken away only for the reason that a final order has been passed consequent to the remand, either before or after a person files an appeal against the remand order. So long as his appeal is otherwise in order, he would have a right to be heard, and such an appeal cannot be dismissed on the mere ground that another appeal has not been filed from the final order passed by the trial court consequent to the remand. This would be so also for the reason that the final order which is passed by the trial court after the order of remand is in its nature dependent and subordinate to the order of remand, since it would be consequential to the same and is to be controlled by the terms of the remand order. It would, therefore, follow that if the remand order is set aside, the order passed by the trial court, consequent thereto, would also fall on the ground.

24. As regards the contention sought to be raised by the respondents that the later order passed by the trial court

consequent to the remand order having not been appealed against, would remain in force even if the earlier order were to be reversed, and therefore, the present appeal would be of no consequence, it may be observed that the later order passed by the trial court merely carries out the directions of the remand made by the first appellate court, and it cannot in any way be held to have the effect of superseding the said order. The validity of the later order passed by the trial judge would, therefore, depend upon the validity of the earlier order passed by the first appellate court. The trial court's jurisdiction to hear the case being dependent upon the remand order, if the remand order is held to be invalid, the proceedings consequent to the remand order would be rendered non est.

25. The effect of reversal of the order of remand under Order XLI, Rule 23, would be that anything done in pursuance of such an order would ipso facto cease to have any effect and the trial court would have no jurisdiction to pass any further order in the case. The contention raised by the respondent that the final order passed by the trial court, which is the result of the remand made by the first appellate court, would survive the reversal of the remand order, would, therefore, lead to an apparent logical inconsistency, and the argument would be unsupportable.

26. This may also be viewed from another perspective. It may very well be possible that a person has no objection to the final order passed by the trial court, provided the order of remand was correct, and his only objection may be to the order of remand itself. The final order being consequential upon or having the effect of merely carrying out the directions contained in the order of remand, there is

no reason why the party concerned should be forced into filing an appeal against the said final order, when he has a statutory right of appeal under Order XLIII, Rule 1(u), against the order of remand, especially, when in the appeal against the final order it would not be open to him to impugn the correctness of the order of remand by virtue of the bar imposed by Section 105(2).

27. The appeal filed against an order of remand, if allowed, would render the appeal to be filed against the final order on the same grounds, unnecessary and without purpose. The jurisdiction of the trial court to carry on with the proceedings after the remand being dependent on the validity of the order of remand, if that order is set aside of an appeal, the final order passed consequent to the same, and all proceedings taken under the remand order, would fall with it.

28. The final order passed in pursuance of the order of remand in the same suit, would be dependent and subordinate to the order of remand. The appellate court, as long as it is in seisin of the appeal against the order of remand, would have the power to reverse or modify the remand order, and to this extent, would also have the power to resultantly affect the operation of the final order passed in pursuance of the remand order.

29. It may also be taken note of that the litigant has a statutory right of appeal against the order of remand, and he also has a right to contest the proceedings before the trial court pursuant to the order of remand. The two rights being independent, the exercise of one such right would not constitute a bar to the exercise of the other. It would not be a question of a choice between two alternative rights; rather, it would be the same right that

the party concerned may agitate both in the appeal against the remand order and at further stages of the trial consequent to the remand.

30. The right to appeal against the order of remand would not be lost merely because the party concerned has contested the proceedings in the trial court after the remand. It goes without saying that if the order of remand is ultimately reversed on the appeal against it, the subsequent order passed by the trial court, which depends for its validity on the earlier order of remand, would ipso facto cease to have effect. The subsequent proceedings conducted in pursuance of an order of remand would be subordinate and dependent, and would be liable to be superseded by the reversal of the order of remand, which is subject matter of appeal before a higher forum.

31. The final order, in its nature, being dependent and subordinate, as it has been passed as a consequence of the proceedings directed and controlled by the remand order, when the said order is set aside, the final order stands superseded automatically. The order passed by the trial court consequent to the order of remand, therefore, cannot remain in force if the remand order on which it is dependent, is reversed in appeal.

32. Having regard to the foregoing discussion, it would follow that an appeal against an order of remand, properly presented, and otherwise in order, would not be rendered defunct or inconsequential by the passing of a final order giving effect to the terms of the remand order.

33. The appealability of the remand order passed under Order XLI, Rule 23, would in no manner be affected by the passing of a final order consequent to the remand.

34. The objections raised to the maintainability of the appeal, are, therefore, held to be legally unsustainable.

35. As prayed by learned counsel for the parties, list for admission on 27.09.2023, as fresh.

(2023) 9 ILRA 320
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.09.2023

BEFORE

THE HON'BLE JASPREET SINGH, J.

First Appeal No. 30 of 1977

Noor Ahmad		...Appellant
	Versus	
Mohd. Ahmad		...Respondent

Counsel for the Appellant:

Smt. S. Rahman, A.A. Siddiqui, Mohammad Aslam Khan, Mohd. Aslam Khan. Z. Jilani

Counsel for the Respondents:

K.B. Sinha, Alok Sinha, Durgesh Kumar Pathak, P.K. Khare, Shashwat Srivastava, Umesh Kumar Srivastava, V. Mishra

A. Civil Law -Civil Procedure Code, 1908-Section 96 - Order 41 Rule 27- suit for eviction and damages for use and occupation has been decreed in favour of the plaintiffs/respondents-The case of the plaintiffs was that their father Quadir Mian had gifted the property in question to the plaintiffs by means of registered gift deed dated 20.04.1967. In terms of the said gift deed the plaintiffs have the title to the same and since the defendants who are their step brothers (sons of Quadir Mian from his first wife) who requested the plaintiffs to permit them to continue with their occupation in the disputed property for sometime and they promised to vacate the same and later as they refused to do so, hence the plaintiffs treating the defendants as licencees

terminated their licence and issued a notice for vacation of the premises which was not complied with and thus instituted the suit seeking decree of eviction as well as damages for wrongful use and occupation. The defendants filed their written statement and contested the suit on the premise that the property in question belonged to Barati Mian, the grand father of the defendants (father of Quadir Mian). As Barati Mian was aware of the fact that after Quadir Mian had remarried, his relations with his children from the first marriage was not cordial, hence in order to protect and secure the rights of the children from the first marriage of Quadir Mian, Barati Mian had gifted the property to the defendants and as such they claimed their title over the same and that for the said reason the plaintiffs could not seek their eviction nor could seek damages for wrongful use and occupation. Even after the death of Barati Mian in the year 1950, the said document was never handed over nor there is any reference to it in the pleadings of the defendants. Saffi-ul-laha being the son of Barati Mian and real brother of Quadir Mian and father-in-law of the defendants could very well throw light on the aforesaid aspect as well that is to say that whether any division was made by Barati Mian during his lifetime and that each of the sibling of Saffi-ul-laha got the property which is in their possession, as divided by Barati Mian and what portion was gifted to the defendants from amongst the properties of Barati Mian. He was also an important witness to depose whether the house in Kazipur was purchased by Quadir Mian to settle his son from his first wife or it was actually purchased by the uncle (Mama) of the defendants. The defendants also did not lead any evidence in this regard nor filed the deed of the property of Kazipura on record. In light of whatever evidence was on record including the deposition of Sirajuddin this Court has no hesitation to concur with the reasons given by the trial Court and the Court finds that the alleged gift set up by the defendants could not be cogently proved whereas the gift made by

the Quadir Mian in favour of the plaintiffs which was reduced in writing and duly registered before the office of Sub-Registrar on 20.04.1967 has been proved and that it is not bad as the gift of undivided 'Musha'. Hence, this Court finds that there is no error in the judgment and decree passed by the trial Court dated 06.04.1977 passed in Regular Suit No.14/1973 and it is affirmed.(Para 1 to 78)

B. 'Under the Mohammedan law the three essential requisites to make a gift valid are: (1) declaration of the gift by the donor, (2) acceptance of the gift by the donee expressly or impliedly, and (3) delivery of possession to and taking possession thereof by the donee actually or constructively. No written document is required in such a case. Section 129 of the Transfer of Property Act excludes the rule of Mahomedan Law from the purview of Section 123 which mandates that the gift of immovable property must be effected by a registered instrument as stated therein. But it cannot be taken as a sine qua non in all cases that whenever there is a writing about a Mahomedan gift of immovable property there must be registration thereof. Whether the writing requires registration or not depends on the facts and circumstances of case. a gift under the Muhammadan law can be an oral gift and need not be registered; that a written instrument does not, under all circumstances require registration; that to be a valid gift under the Muhammadan law three essential features, namely, (i) declaration of the gift by the donor, (ii) acceptance of the gift by the donee expressly or impliedly, and (iii) delivery of possession either actually or constructively to the donee, are to be satisfied; that solely because the writing is contemporaneous of the making of the gift deed, it does not warrant registration under Section 17 of the Registration Act.(Para 48)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Nafees Ahmad Vs Gulam Mohammad. Second Appeal No.77 of 2016
2. Hafeeza Bibi Vs Sk. Farid (2011) 5 SCC 654 : (2011) 3 SCC (Civ) 103
3. Mahboob Sahab Vs Syed Ismail (1995) 3 SCC 693
4. Nasib Ali Vs Wajid Ali (1927) AIR Cal 197
5. Kamar-un-Nissa Bibi Vs Hussaini Bibi (1881) ILR 3 All 266
6. Karam Ilahi Vs Sharfuddin (1916) AIR All 351
7. Rasheed Khatoon Vs Ashiq Ali (2014) 32 LCD 2188
8. Kairum Bi & ors. Vs Mariam BI & anr.. (1959) SCC Online Madras 281
9. Sk. Mohd. Mumtaz Ahmad Vs Zubaida Jan (1889) 16 Ind App 205 (PC)
10. S. K. Aftab Husain & anr. Vs Smt. Tayabba Begam & anr. (1972) SCC OnLine All 373
11. Sheikh Md. Mumtaz Ahmad Vs Zubaida Jan (1888-1889) 16 Ind APP 205 PC
12. Hamid Ullah Vs Ahmad Ullah (1936) AIR All 473
13. Hayatuddin Vs Abdul Gani & ors. (1974) SCC OnLine Bompay 35

(Delivered by Hon'ble Jaspreet Singh, J.)

1. The instant first appeal has been filed by the defendants/appellant under Section 96 CPC against the judgment and decree dated 06.04.1977 passed by the Ist Additional District Judge, Bahraich in Regular Suit No.14 of 1973 whereby the suit for eviction and damages for use and occupation has been decreed in favour of the plaintiffs/respondents. For the sake of

convenience this Court shall refer to the parties as impleaded in the trial court.

2. The brief facts giving rise to the instant appeal are being noticed herein after:-

3. The plaintiffs [respondents herein] instituted a suit against the defendants Noor Ahmad and Shamshuddin [appellant before this Court] for eviction from a shop, godown and upper portion of the disputed house in question and also for a decree of damages for wrongful use and occupation.

4. The case of the plaintiffs was that their father Quadir Mian had gifted the property in question to the plaintiffs by means of registered gift deed dated 20.04.1967. In terms of the said gift deed the plaintiffs have the title to the same and since the defendants who are their step brothers (sons of Quadir Mian from his first wife) who requested the plaintiffs to permit them to continue with their occupation in the disputed property for sometime and they promised to vacate the same and later as they refused to do so, hence the plaintiffs treating the defendants as licencees terminated their licence and issued a notice for vacation of the premises which was not complied with and thus instituted the suit seeking decree of eviction as well as damages for wrongful use and occupation. Significantly, the plaint also contained a map indicating the portion which was in the possession of the plaintiffs and the defendants respectively.

5. The defendants filed their written statement and contested the suit on the premise that the property in question belonged to Barati Mian, the grand father of the defendants (father of Quadir Mian). As Barati Mian was aware of the fact that

after Quadir Mian had re-married, his relations with his children from the first marriage was not cordial, hence in order to protect and secure the rights of the children from the first marriage of Quadir Mian, Barati Mian had gifted the property to the defendants and as such they claimed their title over the same and that for the said reason the plaintiffs could not seek their eviction nor could seek damages for wrongful use and occupation.

6. The trial court on the exchange of the pleadings framed five issues which read as under:-

(1) Whether the property in suit belonged to Mohd. Quadir Mian as alleged by the plaintiffs if so did he make a gift of the property to the plaintiffs?

(2) Whether the property in suit belonged to the father of Quadir Mian and he made a gift in favour of the defendants and his brother Badruddin as pleaded in para-17 of the written statement?

(3) Whether the suit is bad for non-joinder of Badruddin?

(4) Whether the suit is not within time?

(5) Whether the defendants have become owners by adverse possession?

7. The trial court considering oral as well as documentary evidence, by means of its judgment and decree dated 06.04.1977, decreed the suit against the defendants awarding possession to the plaintiffs over the disputed portion shown by blue colour in the map annexed with the plaint and also permitted the plaintiffs to recover a sum of Rs.2700/- as damages for the wrongful use and occupation of the premises from the defendants, at the rate of Rs.75/- per month. The same rate was also granted for pendente lite and future damages. It is in

the aforesaid backdrop that the defendants/appellants have filed this first appeal.

8. Shri Mohd. Arif Khan, learned Senior Counsel assisted by Shri Mohd. Sadab Khan and Shri Mohd. Aslam Khan for the defendants-appellants has raised the following submissions:-

(i) It is urged that the trial court has erred in failing to frame an issue on the point of licence; inasmuch as it was the plaintiffs' case that the defendants were the licensee and their licence was terminated. However, neither any such evidence was led and even other wise in absence of any proper pleading and issue on the said point, the evidence in this regard could not have been appreciated which has resulted in sheer miscarriage of justice.

(ii) It is also urged that the controversy revolved around the alleged gift which is said to have been made by Quadir Mian in respect of the disputed property in question. It is stated that Quadir Mian could not have executed the gift for the reason that he had no exclusive title to the same. The property in question was purchased by Barati Mian and Quadir Mian and unless there was a partition or a division by metes and bounds the gift could not have been made in respect of an undivided portion as a gift of Musha (undivided) is bad in law. It is further urged that one of the essential ingredients of a gift is the acceptance by the donee as well as the handing over the possession. It is urged that the evidence would suggest and as admitted to the plaintiffs the possession remained with the defendants and since possession was not handed over to the plaintiffs, hence the gift was void and against the principle as enunciated in Muslim Law relating to a valid gift.

9. Shri Durgesh Pathak and Shri Sarashwat Srivastava, learned counsel for the plaintiff/respondents have vehemently opposed the aforesaid submissions and have argued as under:-

(i) The issue of licence is not material in the sense that the plaintiffs had claimed title to the property on the basis of a gift deed executed and registered by Quadir Mian in their favour. Once Quadir Mian had divested himself of all his rights from the property and handed over the same to the plaintiffs-respondents, who accepted the same being its owner, the defendants-appellants who were residing in the premises, being the step brothers of the plaintiffs, thus their occupation in the premises was merely permissive and it is in this context that their licence to remain was terminated and a decree of eviction and damages has been sought. The parties had gone to trial knowing the case of each other with full knowledge and led the evidence in support of their respective case and it was primarily a battle of title between the parties.

(ii) Issues no.1 and 2 which were framed by the trial court were seminal to the entire dispute and the consideration of licence was in-built in the issues already framed. Even otherwise, no effort was made by the defendant at any stage of the proceedings, during trial, to get an additional issue framed and as such only to delay the proceedings and the execution of the decree the aforesaid issues has been raised during arguments as no application under Order 14 Rule 5 CPC was made before the court through the appeal is pending since 1977.

(iii) It is also urged that the property in question was that of Quadir Mian who had got the same in a family division which took place between Quadir Mian, his

brother Saffi-ul-laha and sister Mst. Momkoma. One other portion of the property in dispute was purchased by a registered sale deed by Quadir Mian exclusively and it is thereafter that the entire property which was got in terms of the division as well as the one portion purchased, was gifted to the plaintiffs by means of the registered gift deed and the plaintiffs being its exclusive owners and in possession of large portion have a right to seek the eviction of the defendants as well as claim damages for wrongful use and occupation of a limited portion shown by blue coloured lines in the map forming parting of the plaint.

(iv) It is urged that the ground raised for assailing the gift of the plaintiffs is not quite valid; inasmuch as the possession was with the plaintiffs and merely because in some portion the defendants were having their permissive possession, it would not mean that the gift gets void on account of mere permissive occupation of the defendants and gift being in the nature of Musha of an undivided portion would be void.

(v) It is also urged that the defendants were in the premises in question as permissive occupants and not in their own property rights, hence their possession even during the time of Quadir Mian was with the permission of Quadir Mian who gifted the property to the plaintiffs and thus the title of the plaintiffs on the basis of the gift does not get affected in any manner.

(vi) It is further urged that the defendants were not able to establish the alleged gift said to have been made by Barati Mian as they were various discrepancies in the testimony of the witnesses who sought to explain and establish the said gift. The defendants could not even give a date on which the gift was made nor there was any overt act which

could indicate that the defendants had accepted the gift and they were put in exclusive possession. Even otherwise, if the reason for which the defendants are assailing the validity of the gift of the plaintiffs then for the same reason, the gift of the defendants also gets fouled and apart from the above the defendants have not been able to prove their gift by any cogent evidence and thus the appeal deserves to be dismissed.

10. In the aforesaid backdrop, the primordial controversy and the issue important for deciding the instant first appeal, is dependent on the outcome of the two rival gifts, which have been set up by the appellants and the respondents. The core issue is that in case if the gift said to have been made by Barati Mian is found to be established, then apparently it will impact the right of Quadir Mian to have executed the registered gift deed in respect of the entire property.

11. Significantly, both the appellants and the respondents, who are step brothers, have set up rival claims based on gift and one denies the gift of the other and in the aforesaid context, the original memorandum which is said to have been executed by Barati Mian referring and acknowledging the gift said to have been made by him in favour of the defendants assumes significance .

12. The instant appeal was nominated to this Court and the hearing on the appeal was commenced on 27.04.2023. The matter was heard on various dates and the judgment was reserved on 11.05.2023. However, at the time of dictating the judgment the Court found that there were number of applications which were pending in terms of Order 41 Rule 27 CPC. The

Court further noticed that some of the applications had already been allowed by the Court and the impact of allowing the applications was that the documents which were filed in terms of Order 41 Rule 27 CPC also had to be examined and therefore this Court after noticing the previous orders passed by the Court on 04.03.2005, 08.02.2007, 18.04.2007, 02.11.2007 and 11.12.2017 summarised the effect of the said orders passed vis a vis the applications under Order 41 Rule 27 CPC and passed a detailed order dated 22.05.2023. The relevant portion of the order dated 22.05.2023 is being re-produced herein after for ready reference:

"20. It is in the aforesaid backdrop where both the appellants and the respondents, who are step brothers, have set up rival claims based on gift and one denies the gift of the other and in the aforesaid context, the original memorandum which is said to have been executed by Barati Mian referring and acknowledging to the gift said to have been made by him in favour of the defendants becomes a vital document which is of immense importance for deciding the controversy completely between the parties. A set of 21 documents have also been filed by the appellants in order to buttress their contentions regarding their rights to retain the property on the basis of the gift executed by Barati Mian.

21. In the aforesaid backdrop as well as noticing that this Court is exercising its powers under Section 96 CPC where this Court has to adjudicate decide the appeal with powers almost co-extensive as that of a trial court where all issues of fact and law which arises between the parties are open to be agitated and decided. This Court is also conscious of the wide power it yields coupled with the fact that this Court

is extremely pained to notice that the instant first appeal has been engaging the attention of this Court since 1977 and though orders had been passed from time to time which have been reproduced herein above, relating to taking the documents on record, but unfortunately the same were not taken to its logical conclusion at the appropriate time.

22. It is for the aforesaid reasons that the Court has heard the learned counsel for the parties on various dates at length to ascertain whether the said documents would be relevant and after having considered this Court is of the opinion that to decide and clearly opine regarding the respective claims of the parties based on the two rival gifts, it will be necessary for the Court to permit the parties to lead evidence and prove their documents which have been placed and taken on record.

*23. This Court in exercise of powers under Order 41 Rule 23-A can remand the matter permitting the parties to lead evidence on the documents which have been taken on record but considering the lapse of time and that 40 years have gone by without any effective adjudication, therefore, this Court keeps the instant appeal pending. However, this Court in exercise of its powers under **Order 41 Rule 25 read with Section 151 CPC** remits the matter to the District Judge, Bahraich for the limited purpose to permit the parties to lead evidence only in respect of the documents which were filed alongwith the **C. M. Application No.256 of 1984** and were permitted to be taken on record in terms of the order passed by the Court on **04.03.2005** and on the memorandum which was taken on record by the Court in terms of order dated **11.12.2017**. The appellants shall not be permitted to introduce any other new evidence except as provided in this order.*

24. Since the matter is being remitted for the limited purpose as mentioned above, accordingly a limited opportunity is granted to the respondents that in case if they so choose, they may file their documents in rebuttal upto but not later than 3rd July, 2023 and if they so do, they shall be permitted to lead evidence to that limited extent only and nothing beyond that and subject to the objections of admissibility of any such document."

13. It is in the aforesaid factual backdrop that the District Judge Bahraich before whom the evidence was led has remitted the record back and it was placed before the Court after the evidence was recorded. Thereafter this Court once again heard the matter on 16.08.2023 and 17.08.2023 where after the judgment was reserved.

14. In light of the facts as well as the submissions made by the learned counsel for the parties, the Court frames the following points for determination:-

(i) Whether the defendant/appellant were prejudiced while contesting the case before the trial court merely on account of non-framing of an issue on licence and was unable to lead evidence which has vitiated the judgment under challenge?

(ii) Whether the alleged gift said to have been made by Barati Mian is valid and has been proved in accordance with law?

(iii) Whether the gift deed executed by Quadir Mian dated 20.04.1967 and a supplementary deed dated 17.08.1967 are valid and have been proved in accordance with law and its effect?

15. The Court has heard the learned counsel for the parties and also perused the record.

Point No.1

16. This point of determination is in view of the submissions made by the learned Senior Counsel for the appellants that the plaintiffs in their pleading had stated in paragraph-6 that the plaintiffs had cancelled the licence of the defendants in respect of a shop, godown and a portion on the first floor by means of notice dated 12.01.1968. It is further urged that the theory of licence was specifically denied by the defendants by filing their written statement. It is urged that since the case of a licence was set up by the plaintiffs which was denied by the defendants, consequently the trial court ought to have framed an issue on licence. Since no such issue was framed, the defendants were unable to lead appropriate evidence and further the defendants were prejudiced to establish that the defendants were the owners and not the licensee of the premises in question.

17. Controverting the aforesaid submissions, it is urged by the counsel for the respondents that the plaintiffs became the owners of the property in question by virtue of a gift deed executed by their father, namely, Quadir Mian and since they were in possession and the defendants did not have right over the same but they continued to remain in occupation and in permissive occupation, hence the appellants were only a licensee and thus for the said reason there can be no prejudice for the defendants and as such the aforesaid plea has no legs to stand and must fail.

18. In so far as the instant issue raised by the appellant is concerned, the Court has

considered the submissions and from the perusal of the record, it would indicate that the case of the plaintiffs was very clear that the property in question belonged to Quadir Mian who had got some part from his father, namely Barati Mian and another part of the property in question was purchased by Quadir Mian by means of registered sale deed from Laxmi Narain and Saligram. It was thus stated that Quadir Mian had executed registered gift deed in favour of the plaintiffs/respondents on 20.04.1967 and since then they are the owner in possession of the property in suit. The plaintiffs further stated that since the defendants were the step brothers of the plaintiffs and after the gift being made in favour of the plaintiffs, the status of the defendants was that of a licensee so they were in possession at the pleasure of the plaintiffs on licence and since the plaintiff did not want the defendants to continue, accordingly the licence was cancelled and they were required to hand over the possession to the plaintiffs.

19. The defendants on the other hand while refuting the aforesaid contention has specifically stated that they are the owner in respect of the property in question, as Barati Mian who was the grand father of the parties, had made an oral gift in favour of the defendants and thus on the basis of the said oral gift which was prior to the gift deed made by the Quadir Mian, hence the defendants were in possession as owner and not as the licensee.

20. If the question, raised by the appellants, regarding non-framing of an issue regarding licence is seen in context with the pleadings of the parties as noticed above, it would indicate that apparently the property in question as per the plaintiffs was of Quadir Mian whereas as per the

defendants it belonged to both Barati Mian and also Quadir Mian.

21. The plaintiffs claim ownership on the basis of gift deed executed by Quadir Mian dated 20.04.1967 and on the other hand, the defendant claim ownership on the basis of an oral gift made by Barati Mian. Thus, both the parties are claiming title over the property on the basis of the gift deed as mentioned above. In case if the gift deed of the plaintiff is upheld and the gift made in favour of the defendants is not proved the ultimate effect would be that since the ownership of the defendants would be negated and since they were occupying the same since the time of their father Quadir Mian, hence their occupation therein would be permissive in nature which is akin to a licence and it is in this context that the pleadings of the respective parties indicated how the plea of licence was understood by them.

22. The parties were primarily engaged in the litigation claiming their respective title on the basis of the two gift deeds. They had led their evidence on the basis of issues which were framed by the trial court and it would be seen that the issue nos.1 and 2 which encapsulated the entire controversy hence non-framing of the issue of licence has no meaning; inasmuch as it is squarely dependent on the issue as to whether the plaintiffs were successful in proving their gift or the defendant succeeded in proving their gift as it was a contest of title between the parties. Once the parties had led evidence knowing fully well the case they had to meet and especially in light of the dispute involved between the parties, the issue of licence, really speaking was not of much importance, rather upon decision rendered on title, the status of the defendants would

be then considered as that of a co-owner or that of a permissive occupant/licencee.

23. Be that as it may, the defendant if aggrieved by non-framing of the issue could have moved an application before the trial court to get an additional issue framed. However, the same was not done even before this Court once the hearing had commenced in the month of April, 2023 and lot of emphasis was laid on the applications under Order 41 Rule 27 CPC but at no point of time, during the pendency of the instant first appeal since 1977 the defendant-appellant made any effort to get an additional issue framed and explain how the defendant were prejudiced by non-framing of the said issue and even before this Court, learned Senior Counsel for the appellant could not convince the Court as to how the issue of licence was germane so much so that its non-framing would impact the trial and the rights of the parties especially when both parties were claiming their respective title.

24. Apparently, what this Court finds is that both the parties i.e. the plaintiff as well as the defendant are the sons of Quadir Mian. The plaintiffs are the sons of Quadir Mian from the second wife whereas the defendants are the sons of Quadir Mian from his first wife. The relationship between the plaintiffs and the defendants is that of step brothers and both of them have been occupying the disputed premises including were doing their business since the time of Quadir Mian. Thus, the occupation of both the plaintiffs and defendants during the life time of Quadir Mian was permissive and the status only changed once the plaintiffs claimed title over the property on the basis of gift deed executed by Quadir Mian in favour of the plaintiffs on 20.04.1967 and on the other

hand, the defendants claimed title on the basis of gift deed made by Barati Mian in their favour. Thus, the issue of licence was not significant at all and its non-framing had no impact and thus for the aforesaid reasons this Court does not find that there is any substance in the submissions of the learned Senior Counsel for the appellant and is accordingly turned down.

Points No.2 and 3

25. The core issue is the title to the property as claimed by both rival parties on the basis of their respective gift. The actual controversy hinges around the aforesaid two questions i.e. to say whether the gift deed executed by Quadir Mian in favour of the plaintiffs would prevail then the plaintiffs would be the owner in possession of the premises and on the basis of title, they would be entitled to seek the possession from the portion occupied by the defendants. On the other hand, in case if the gift deed executed by Quadir Mian in favour of the plaintiffs failed and without anything more or less then necessarily the property would have to devolve on the basis of the succession as applicable to the parties as per their personal law. The other aspect is that in case if the defendants are able to prove their gift then the impact would be that they would be the title holder of the premises only in respect of the portion which was gifted by Barati Mian to them and for the remaining part the parties would be governed by succession. It is in this context, that the issue of gift set up by the plaintiffs and the defendants assume significance.

26. This Court has to ascertain whether the gift executed by Quadir Mian was valid or whether the gift in favour of the defendants made by Barati Mian is

valid and duly proved. In order to answer the aforesaid issue, the basic pleadings and the evidence led by the respective parties would necessarily have to be perused.

27. The record indicates that the plaintiffs in paragraph-3 laid the foundation of the gift deed in their favour and in paragraph-5, it was stated that with the consent of the plaintiffs, the defendants continued to work in the premises and one portion on the first floor was utilized by them for residential purposes. It was further pleaded that the plaintiffs revoked the licence by means of notice dated 12.01.1968 and since the defendant did not comply, hence they filed the suit alongwith the site-plan annexed indicating the areas which were in the occupation of the defendants from which they were to be evicted.

28. In the written statement, the defendants denied the allegation and stated that the father the plaintiff, namely, Quadir Mian did not have the right to execute the gift deed. It was also stated that Barati Mian the grand father of the parties had also made a gift in favour of the defendants and as such they were the owner. This was specifically stated in paragraph-17 of the written statement. The defendant also feebly raised a plea of adverse possession.

29. The plaintiffs filed their replication wherein it was stated that Quadir Mian was the exclusive owner of the property having purchased the same from Laxmi Narain and some part of the property was inherited from Barati Mian. The father of the plaintiffs had full right to execute the gift deed. It was also stated that Quadir Mian after obtaining the necessary permission from the Municipal Board had made renovation and it was the fund

belonging to Quadir Mian which were utilized in the property in question.

30. In order to prove its case, the plaintiffs examined five witnesses, namely, Jang Mohammad, Uma Shankar (these two were the witnesses of the gift deed) P.W.3 the plaintiff no.2 examined himself. P.W.4 was Maqsood Ali who was examined to establish the possession of the plaintiffs and P.W.5 Aziz Ahmad who was produced to identify the signature of Munsi Niyamat Ali.

31. On the other hand, the defendants in order to prove their case examined Noor Ahmad as D.W.1, Sajjad as D.W.2 who was the witness of the gift made by the Barati Mian. Ramjan Ali was examined as D.W.3 to corroborate the factum of gift made by Barati Mian in favour of the defendants and Mohammad Ali was examined as D.W.4.

32. The parties also filed documentary evidence to prove their respective case.

33. The learned Senior Counsel for the appellant attacked the gift executed by Quadir Mian in favour of the plaintiffs on the following counts:-

(i) Quadir Mian was not the exclusive owner of the property, hence he could not execute the gift deed in favour of the plaintiffs in respect of undivided property. It was also submitted that it was incorrectly alleged by the plaintiffs that Quadir Mian was exclusive owner of the property; inasmuch as from the perusal of the sale deed executed by Laxmi Narain and Saligram in favour of the Quadir Mian dated 16.07.1954 it would indicate that it was executed jointly in the names of Baratai Mian and Quadir Mian.

(ii) It is further stated that the basic ingredients of gift as per the Muslim Law was not satisfied; inasmuch as there ought to be first a declaration of gift by the donor which is followed by the acceptance made by the donee and the third crucial ingredient was the delivery of possession.

(iii) It is further urged by the learned Senior Counsel that there was no delivery of possession nor the same could be satisfied by evidence on record and most importantly the gift of an undivided property cannot be made as there are certain restrictions in respect of gift of an undivided/indivisible property and such a gift of 'Musha' is not recognized as valid in the Muslim Law and for all the aforesaid reasons, the gift deed as set by the plaintiff was not proved and the findings returned by the trial court does not take note of the concept of Musha which rendered the gift void and thus in view thereof the gift deed as sought to be relied upon by the plaintiff was not proved nor any right could be conferred upon the plaintiffs, hence the same was liable to be ignored and since the suit of the plaintiff was based on title derived from gift deed which was void, hence the suit was liable to fail and this aspect has not been considered by the trial court.

34. Taking his submissions forward, learned Senior Counsel has pointed out that on the contrary it was clearly established that Quadir Mian who after the death of his first wife had re-married and thereafter the plaintiffs were the children of Quadir Mian from his second wife and the defendants, who are the children from the first wife, their relations were not cordial and since Barati Mian being the grand father wanted to secure the future of his grand sons who were being neglected by Quadir Mian and his second wife, hence he made a gift of his

share in the property in favour of the defendants and as such this aspect has not been appropriately considered by the trial court despite the fact that various documents were also filed by the defendants to indicate that the property in question was joint between Quadir Mian and Barati Mian. The defendants had examined Noor Ahmad as D.W.1 who was the defendant no.1 himself. D.W.2 Sajjad who was the witness of the gift and Ramzan Ali as D.W.3 also to corroborate the factum of the gift and Mohammad Ali was examined as D.W.4 to establish that in pursuance of the gift the defendants were in possession.

35. It has also pointed out that in pursuance of the order passed by this Court dated 23.05.2023 the defendants also led evidence to prove the memorandum of the gift deed which was reduced in writing by Barati Mian and it was proved through the evidence of Sirajuddin. In light of the aforesaid evidence, the gift of the defendant stood proved while the gift of the plaintiff was void being in respect of an undivided property, where possession was not transferred to the plaintiff exclusively hence the suit could not have been decreed and was liable to be dismissed.

36. In light of the aforesaid submissions and in order to test the veracity of the submissions of the rival parties, it will be necessary to first notice the concept of a gift under the Muslim Law. A gift under the Muslim Law is known as Hiba. All muslim men and women to which ever school they belong, they can gift the whole of their property to whosoever they want. The essential condition for a valid gift are that there must be a declaration made by the donor that he is making a gift, this is followed by formal acceptance by the

donee and the most crucial aspect is the delivery of possession to the donee.

37. It will also be relevant to notice that under the Muslim Law, a gift can also be made orally and in such a case it is not required to be reduced in writing. However, in order to prove such a gift, delivery of possession assumes great significance. Certain overt acts must be proved in respect of an oral gift which could reasonably lead to a conclusion that the donor had divested himself from the property gifted and that the donee having accepted the same dealt with the property as his own. As a matter of rule, the delivery of possession is necessary in case of a gifted property. However, there may be a certain situation where the delivery of possession can be symbolic or constructive. Illustratively in a case where the property in question is tenanted though the actual possession may not be handed over to the donee but by handing over the title deeds with instructions of attornment of the tenancy, information conveyed to the tenant that the rent would henceforth be collected by the donee would suffice and in such a situation, it cannot be said that the gift is bad for want of delivery of possession. There are certain other circumstances where the actual delivery of possession may be diluted especially where the gift is between the spouse inter se, gift made by the parents to the children amongst others. In so far as a gift to a minor is concerned, it will suffice if the guardian of a minor accepts the gift on behalf of the minor.

38. Since the learned Senior Counsel has urged that the gift in respect of an undivided property is void and has submitted that such a gift of Musha is not valid. Hence, in order to understand the aforesaid concept, it will be relevant to

examine and ascertain what is a gift of 'Musha'.

39. "The term '**Musha**' has been derived from the Arabic word which refers to Shuyua which actually means 'confusion'. It means, Musha the 'undivided part' or share, which could also be a common building or land. As a gift of a part of a thing which is capable of division is not valid unless that particular part is divided off and separated from the property of the donor, however, the gift of an indivisible thing is absolutely valid.

40. In Muslim law, Musha signifies an undivided share in joint property. Musha is thus, a co-owned which is also the joint property. Moreover, if one of the several owners of that particular property makes a gift of their own share, there may be a confusion regarding the matter that which part of the property has to be given to the donee. In other words, there could be a real difficulty in delivering the possession of the gift if it is of a joint property which is made by a donor without partition of that gifted share.

41. In order to avoid such confusions and difficulties in the stage of delivery of possession, the jurists pertaining to the Hanafi law have evolved the principle of Musha where the matter of a gift is co-owned or joint property, the doctrine of Musha becomes applicable for examining the validity of that particular gift. The doctrine is strictly confined to the rules by the interpretation made through judicial precedents and has been cut down in a considerable manner.

Musha which is indivisible:

42. The Gift of Musha indivisible is valid. There are some of the properties which are by its very nature indivisible. The physical partition or the division of those properties is not practical. Moreover, if it is against the nature of such properties, their partition or division is affected at all and hence their identity is lost entirely, they do not remain the same properties which they were before the partition. For instance; a staircase cannot be divided as Musha properties. Where a staircase is jointly owned by, for instance, two persons, then each being the owner of half of the stair-case, is entirely entitled to make a gift of his or her share, but, if the stair-case is divided into two parts, it would either be too narrow to be used by anyone, or the upper half may come in the share of one and the other lower half is in the other's share hence, in both the cases the staircase would become useless for both of them and also for the donee as well.

Musha which is divisible:

43. In the Hanafi law, the gift of Musha of the divisible property is termed to be irregular that is fasid if made without partition, however, a co-owned piece of land, house or a garden, is Musha which is divisible. The land can be divided and the specific share can be separated by a visible mark of identification. Similarly, a house which is jointly owned may be divided by a partition wall without changing its entire identity. However, under the Hanafi doctrine of Musha, the gift without partition and the actual delivery of possession is not void ab initio; it is merely irregular which means fasid. The result is that where such a gift has been made, it may be regularized by the successive partition and by giving to the donee the actual possession of the specified share of

the property. It is clearly evident that the doctrine of Musha is limited, both in its application as well as in its effects.

44. Having considered the aforesaid concept of the gift of Musha at this juncture, it will also be relevant to notice certain decisions which throw light on the aforesaid issue. In ***Hayatuddin Vs. Abdul Gani and others 1974 SCC OnLine Bompay 35***. The issue posed for consideration was whether the gift deed in favour of Hayatuddin was valid as the property in question was enjoyed by tenants in common and the property which was gifted to Hayatuddin, the possession not having been delivered whether such a gift would be valid. Learned Single Judge of Bombay High Court considered the aforesaid question and in paragraph 97, it considered the law relating to the gift of an undivided property under the Muslim Law and thereafter held as under:-

3..... *Questions posed for consideration by the lower appellate Court was whether the gift deed in favour of Hayatuddin was valid. It, however, took the view that since delivery Of possession was one of the two pre requisites of a valid gift and properties which were enjoyed by tenants-in-com mon were incapable of being placed in possession and it held that the property which was gifted to Hayatuddin not having been divided at the time when the gift was made it could not be valid. The Question whether the present gift could be considered as one of undivided share was disposed of by the learned Judge by observing:*

“A portion of an undivided property may be gifted to a co-owner also under certain circumstances but that is not the case here.”

4. It is therefore, apparent from the judgment that the validity of the gift considered by the lower appellate Court was only with reference to the fact that the property not having been partitioned prior to the suit of 1955 there could not be delivery of possession by Rashidbi and Amnabi in favour of Hayatuddin. The present appeal has been filed by the plaintiff challenging the judgment of the lower appellate Court. Now, the learned counsel appearing on behalf of the defendants was not in a position to dispute the fact that there was no finding by the Court which decided the earlier suit with regard to the validity of the gift. When it was contended on behalf of the appellant that the gift made by the two donors in favour of the present plaintiff was in respect of an undivided portion i.e. 7/8ths share owned by Rashidbi and Amnabi, it was urged on behalf of the defendants that the trial Court had in the earlier suit found that there was no partition at which the property was divided into two shares, one belonging jointly to Rashidbi and Amnabi and the other to Makboolbi, and that the trial Court had also found that possession was not given and the logical inference from these two findings, therefore, would be that the gift was invalid and even though expressly no finding was arrived at by the learned Judge of the trial Court in the earlier suit, such a finding must be read in the judgment with the result that the validity of the gift deed could not again be adjudicated upon in the present suit. It is difficult to accept the contention that though no finding has been reached by the trial Court in the earlier suit that the gift was invalid, the judgment in that suit must be read as leading to that inference and it must be assumed that that finding was given and consequently the validity of the gift could not be put in issue in the present suit. Such

a course would be contrary to the established principles under Section 11 of the CPC which contemplates primarily an issue which is decided in the earlier suit and an issue on which Parties have gone to trial putting certain matters directly and substantially in issue. A reference to Explanation IV to Section 11 would also not be of any assistance to the defendants because Explanation IV refers to a plea which might or ought to have been taken as a ground of defence or attack in the former suit and which has not been raised. What the learned counsel, however, wants to be done is that the finding is to be read as having been given because that is the natural inference which, according to him, follows from the two findings recorded with regard to partition and possession.

"7..... The law relating to the gift of undivided property under Mohammedan Law is put in two Parts in paragraphs 159 and 160 of the Principles of Mahammedan Law by Mulla 17th Edition. It is stated:

"159. Gift of mushaa where property indivisible. A valid gift may be made of an undivided share (mushaa) in property which is not capable of partition.

160. Gift of mushaa where property divisible. A gift of an undivided share (mushaa) in property which is capable of division is irregular (fasid) but not void (batil). The gift being irregular, and not void, it may be perfected and rendered valid by subsequent partition and delivery to the donee of the share given to him. If possession is once taken the gift is validated."

8. How delivery of possession of immovable property can be given is explained in paragraph 152. It contemplates three kinds of cases (1) where donor is in possession (2) where property is in the occupation of tenants; and (3) where

donor and donee both reside in the property. There is evidence in this case to show that part of the property was in the occupation of tenants and plaintiff Hayat uddin was already residing in a part of the property. A gift of immovable property which is in the occupation of tenants may be completed by a request by the donor to the tenants to attorn to the donee; and where the donor and the donees both reside in the property no physical departure or formal entry is necessary in the case of a gift of immovable property in which the donor and the donee are both residing at the time of the gift and in such a case according to Mulla, the gift may be completed by some overt act by the donor indicating a clear intention on his part to transfer possession and to divest himself of all control over the subject of the gift. "

45. Bombay High Court also relied upon a Division Bench of the Allahabad High Court in ***Hamidulla Vs. Amat Ulla AIR 1936 Allahabad 473*** and it further went on to consider the decision of the Privy Council in ***Sheikh Muhammad Mumtaz Ahmad Vs. Zubaida Jan 16 Indian APP 205*** Privy Council this was noticed as under:-

8. a Division Bench of the Allahabad High Court in *Hamid Ullah v. Ahmad Ullah*. (AIR 1936 All 473). In that case the property consisted of six houses and three parcels of land and the donor who was not in physical but constructive possession of the property, executed a deed of gift and got it registered. The document recited that the donor was in proprietary possession of the property and was conveying to the donee the same sort of possession which she possessed, that she had given UP all proprietary rights in the subject-matter of the gift and that the donee

was at liberty to make transfers of the property in any way he chose. The Division Bench held that the gift was valid as the donor had done practically all that she was able to do in the way of divesting herself of possession and giving to the donees the same possession as she had herself. In view of the speaking conduct of the donors it is difficult to hold in this case that possession of undivided share of the donors was not transferred by them to the present plaintiff.

9. I might refer with advantage to the observations made by the Privy Council indicating how the doctrine relating to invalidity of gift of *musha'as* was adapted to a progressive state of society. In *Sheikh Muhammad Mumtaz Ahmad v. Zubaida Jan*, ((1888-1889) 16 Ind APP 205) (PC) Sir Barnes Peacock, speaking on behalf of the Board, has observed:

"The authorities relating to gifts of musha'as have been collected and commented upon with great ability by Syed Ameer Ali in his Tagore Lectures of 1884. Their Lordships do not refer to those lectures as an authority but the authorities refer to show that possession taken under an invalid gift of musha'as transfers the property according to the doctrine of both the Shiah and Soonee Schools, see pages 79 and 85. The doctrine relating to the invalidity of gifts of musha'as is wholly unadapted to a progressive state of society and ought to be confined within the strictest rules."

46. This Court in ***S. K. Aftab Husain and another Vs. Smt. Tayabba Begam and another 1972 SCC OnLine All 373*** also had the occasion to consider the issue of a gift made with constructive possession. In the said case while considering the principles of Mahomedan Law by Mulla. The Court held as under:-

6.....Now Mulla in his *Principles of Mahomedan Law*, 16th Edition at page 142 in Section 150 Says down the law on the subject as follows:

“It is essential to the validity of a gift that there should be a delivery of such possession as the subject of the gift is susceptible of.”

7. In the present case since the donor Smt. Najafi Begam was not in actual but in constructive possession over the gifted property it is plain that the property subject of the gift was susceptible only of delivery of constructive possession and it is well settled by the highest authority that if there has been a gift of undivided share in the property and the donor has divested himself or herself of possession at the time of making the gift and delivered constructive possession to the donee then the gift is not hit by the doctrine of Mushaa and must be found to be valid in law. The leading case on the subject is *Sk. Mohd. Mumtaz Ahmad v. Zubaida Jan*, (1889) 16 Ind App 205 (PC). In that case a Muslim lady had gifted her undivided share to her daughter. The validity of this gift was questioned on the ground that since actual possession of the property was not delivered the gift was hit by the doctrine of Mushaa and was invalid. In rejecting this contention their Lordships observed that the lady had merely proprietary, not actual, possession of the greater portion of the property having been merely in receipt of the rents and profits and that she had made the donee possessor of all properties given by the deed, and had abandoned all connection with them and further provided that the donee was to have complete control of every kind in respect thereof. Having found these facts their Lordships concluded:

“Their Lordships have no doubt that sufficient possession was taken on behalf

of the daughter to render the gift effectual. If possession were once taken and the deed of gift took effect no subsequent change of possession would invalidate it.”

8. In that case also, as here, upon the facts the donor was not in actual possession but in constructive possession and as it was found from the terms of the gift deed itself that she had abandoned all connection with the gifted property and had transferred complete control of every kind in respect thereof to the donee, it was held that constructive possession of the property had been delivered to the donee and the same was held to render the gift effectual and valid. This authority was relied upon in a case of this Court: *Hamid Ullah v. Ahmad Ullah*, 1936 All LJ 292 : (AIR 1936 All 473) which is almost a direct authority of this Court on a question of the present kind. In that case the subject-matter of the gift was 7/32nd share in six houses and three pieces of land. The gift deed was challenged on the ground that since there had been non-delivery it was hit by the doctrine of Mushaa. While rejecting this plea and upholding the Validity of the gift deed it was observed at p. 295 that the donor admittedly had no physical possession but was in constructive possession through plaintiff and “it seems to us that there was as complete a transfer of the gifted property as the circumstances permitted” A perusal of the terms of the gift deed shows that it contains the recital that the donor was in possession of the gifted property along with other co-sharers and that the donee was being put into possession of the same in the same manner in which the donor was in possession and that neither she nor her heirs and successors would have anything to do with the property thereof. In this case therefore it is clear from the terms of the gift deed that the donor had completely

divested herself not only of the proprietary right but also of possession or control over the gifted property. That being so, having regard to the view taken in the above authorities it is a necessary inference of law that constructive possession which the donor possessed in the property was delivered to the donee Smt. Sajjad Bano.

47. A similar issue was also considered by the **Madras High Court in *Kairum Bi and others Vs. Mariam BI and another, 1959 SCC Online Madras 281*** and the Madras High Court considered the said issue as under:-

".....In dealing with these arguments it is well to bear in mind the following observations of the Privy Council in *Muhammad Mumtaz Ahmed v. Zubaida Jan(2)*,

"The doctrine relating to the invalidity of gifts of musha is wholly unadopted to a progressive state of society, and ought to be confined within the strictest rules."

The question whether a gift to two donees jointly is bad was considered in *Ebrahim v. Bai Asi(3)*. We quote the relevant passage:

"There was a second argument placed before me, to the effect that 'A gift of property, which is capable of division, to two or more persons without dividing it, is invalid; but it may be rendered valid if separate possession is taken by each donee of the portion of the property given to him.....I cannot accept this argument. The authority of the *Fatawa Alamgiri* and *Hidaya* is directly against it."

This view was adopted in *Kaniz Fatima v. Jai Narain(4)*. On page 221 and 222 *Manoher Lall J.* observed,

"In the case of *Ebrahaim Aikbhai Akuji v. Bai Ashi(5)*, *Tyabji J.* has examined the subject at great length and I

respectfully agree with his observations. I do see why a donee of musha who has taken joint possession of the subject of a gift, and who finds it convenient and practicable to continue to hold that property without partition, should not be allowed to do so. All that the law is concerned to find is that before the validity of such a gift is declared, the donor must have parted with complete possession in favour of the donee, and then it is the lookout of the donee as to whether he wants a partition or not. If the donor had partitioned the property and given it to a donee in a definite share, the donee could still hold the property as a tenant in common with his co-sharers and no question could have been raised regarding the validity of the gift. The same result, in my opinion, should follow provided the donee has been found to be in possession."

In *Kalu Beg v. Gulser Beg(6)* it was held,

"When there is delivery of possession under a gift made jointly to persons and the donee at some subsequent date either divide the property among themselves or arrange that one should have the entire gifted property, the doctrine of musha ceases to operate and that which was irregular in the beginning becomes valid,"

So far as we are aware there is no decision of this Court directly in point. We find ourselves in respectful agreement with the views of *Tyabji J.* in *Ebrahim v. Bai Asi(5)*, and of *Manoher Lall J.* in *Kaniz Fatima v. Jai Narain(4)*.

We would best observe that the rules of Mahomedan law do not require that to make a gift valid the donor must have physical possession of the property and must hand over that physical possession to the donee. It is enough if he has got legal possession of the property and transfers to the donee such possession as the matter is

susceptible of. In the present case when Abdul Razack died Katheeje Bi became a co-heir along with the widow and children of Abdul Razack. Similarly when Abdul Subhan died Katheeja Bi became a co-heir along with the widow and children of Abdul Subhan. The possession of one co-heir is ordinarily possession on behalf of all. It must also be emphasised that in June 1948 when Katheeja Bi executed Ex. A.1 her claim to be

the heir of her soils Abdul Razack and Abdul Subhan had not been challenged or called in question by any one. The possession of the other heirs was possession on her behalf also. And, we may properly say that she was actually in possession of the estate. It was explained in Kaniz Fatima v. Jai Narain(1).

“Possession of a co-owner or a co-tenant is a possession which has to be recognised by the law.”

.....The case in Hamidullah v. Amadulla(5) is also in point. The subject-matter of the gift there was an undivided 7/32 share in six houses and three parcels of land. The donor was not in physical possession but only in constructive possession of the property. She executed a deed of gift and had it registered. The document recited that the donor was conveying to the donee the same sort of possession which she had. The gift was upheld. The Court observed:

“She admittedly had no physical possession but was in constructive possession through the plaintiff.....She however put the donee in a position to obtain possession and it is fact as stated in the plaint that the defendant donee instituted a suit for his share of the rents on the basis of this deed of gift.....Mst. Haliman did practically all that she was able to do in a way of divesting herself of possession and giving to the

donee.....defendant the same possession as she had herself.”

48. The Apex Court in ***Rasheed Khatoon Vs. Ashiq Ali, 2014 (32) LCD 2188***, had the occasion to deal with the ingredients of a valid oral gift and it held as under:-

"8. ... In this context Sections 123 and 129 of the Transfer of Property Act have to be taken note of. Section 123 of the Act stipulates that for the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses. Section 129 provides for savings of donations mortis causa and the gifts made under the Muhammadan law. It is clear from the said provision that the Chapter relating to gifts including registration would not affect any rule of Muhammadan law.

9. In *Karam Ilahi [Karam Ilahi v. Sharfuddin, AIR 1916 All 351]* it has been held as follows:

"It is admitted that a Muhammadan may make an oral gift provided that possession follows. It seems to us quite clear that the provisions of Section 123 are inapplicable to gifts made by Muhammadans and valid according to their law. It is quite clear that the legislature had in its mind the provisions of Section 123 when enacting Section 129. Section 123 is specifically referred to in Section 129. The deed of gift is admissible to prove that a gift was made."

10. In *Nasib Ali [Nasib Ali v. Wajid Ali, AIR 1927 Cal 197]* Suhrawardy, J. referred to *Kamar-un-Nissa Bibi v. Hussaini Bibi [ILR (1881) 3 All 266]* and *Karam Ilahi [Karam Ilahi v. Sharfuddin, AIR 1916 All 351]* and came to hold that the essentials of a gift under the Muhammadan

law are a declaration of "hiba" by the donor, an acceptance, express or implied, of the gift by the donee, and delivery of possession of the property, the subject-matter of the gift, according to its nature. A simple gift can only be made by going through the above formalities and no written instrument is required. In fact no writing is necessary to validate a gift and if a gift is made by a written instrument without delivery of possession, it is invalid, in law. Thereafter, the learned Judge stated thus:

"The position under the Mohammadan law is this: that a gift in order to be valid must be made in accordance with the forms stated above; and even if it is evidenced by writing, unless all the essential forms are observed, it is not valid according to law. That being so, a deed of gift executed by a Mohammadan is not the instrument effecting, creating or making the gift but a mere piece of evidence. It may so happen after a lapse of time that the evidence of the observance of the above forms might not be forthcoming, so it is sometimes thought prudent to reduce the fact that a gift has been made into writing. Such writing is not a document of title but is a piece of evidence."

11. In Mahboob Sahab v. Syed Ismail [(1995) 3 SCC 693] a two-Judge Bench referred to Section 147 of the Principles of Mahomedan Law by Mulla wherein the essentials of valid gift under the Muhammadan law have been elucidated and proceeded to explicate the principle. We think the reproduction of the relevant passage would be seemly: (SCC pp. 696-97, para 5)

"5. Under Section 147 of the Principles of Mahomedan Law by Mulla, 19th Edn., edited by Chief Justice M. Hidayatullah, envisages that writing is not essential to the validity of a gift either of

movable or of immovable property. Section 148 requires that it is essential to the validity of a gift that the donor should divest himself completely of all ownership and dominion over the subject of the gift. Under Section 149, three essentials to the validity of the gift should be, (i) a declaration of gift by the donor, (ii) acceptance of the gift, express or implied, by or on behalf of the donee, and (iii) delivery of possession of the subject of the gift by the donor to the donee as mentioned in Section 150. If these conditions are complied with, the gift is complete. Section 150 specifically mentions that for a valid gift there should be delivery of possession of the subject of the gift and taking of possession of the gift by the donee, actually or constructively. Then only the gift is complete. Section 152 envisages that where the donor is in possession, a gift of immovable property of which the donor is in actual possession is not complete unless the donor physically departs from the premises with all his goods and chattels, and the donee formally enters into possession. It would, thus, be clear that though gift by a Mohammedan is not required to be in writing and consequently need not be registered under the Registration Act; for a gift to be complete, there should be a declaration of the gift by the donor; acceptance of the gift, expressed or implied, by or on behalf of the donee, and delivery of possession of the property, the subject-matter of the gift by the donor to the donee. The donee should take delivery of the possession of that property either actually or constructively. On proof of these essential conditions, the gift becomes complete and valid. In case of immovable property in the possession of the donor, he should completely divest himself physically of the subject of the gift."

(emphasis supplied)

12. Recently in *Hafeeza Bibi v. Sk. Farid* [*Hafeeza Bibi v. Sk. Farid*, (2011) 5 SCC 654 : (2011) 3 SCC (Civ) 103] a two-Judge Bench referred to the authority in *Mohd. Abdul Ghaniv. Fakhr Jahan Begam* [(1921-22) 49 LA 195 : AIR 1922 PC 281] wherein the Privy Council had made a reference to *Muhammedan Law* by Syed Ameer Ali and approved the statement as regards the essential three conditions for a valid gift. Thereafter, the learned Judges referred to *Nasib Ali v. Wajid Ali*, AIR 1927 Cal 197], *Assan Ravther v. Manahapara Charayil* [AIR 1972 Ker 27] and *Jabeda Khatun v. Moksed Ali* [AIR 1973 Gau 105] and stated the position of law thus: (*Hafeeza Bibi case* [*Hafeeza Bibi v. Sk. Farid*, (2011) 5 SCC 654 : (2011) 3 SCC (Civ) 103], SCC p. 665, para 24)

"24. The position is well settled, which has been stated and restated time and again, that the three essentials of a gift under Mohammadan law are: (1) declaration of the gift by the donor; (2) acceptance of the gift by the donee; and (3) delivery of possession. Though, the rules of Mohammadan law do not make writing essential to the validity of a gift; an oral gift fulfilling all the three essentials makes the gift complete and irrevocable. However, the donor may record the transaction of gift in writing."

13. After so stating the Court referred to *Asaf A.A. Fyzee* in *Outlines of Muhammadan Law* [Tahir Mahmood (Ed. & revised) (5th Edn., Oxford University Press) 182.] and *Mulla, Principles of Mahomedan Law* [(19th Edn.), p. 120.] and eventually ruled thus: (*Hafeeza Bibi case* [*Hafeeza Bibi v. Sk. Farid*, (2011) 5 SCC 654 : (2011) 3 SCC (Civ) 103], SCC p. 666, para 27)

"27. In our opinion, merely because the gift is reduced to writing by a Mohammadan instead of it having been

made orally, such writing does not become a formal document or instrument of gift. When a gift could be made by a Mohammadan orally, its nature and character is not changed because of it having been made by a written document. What is important for a valid gift under Mohammadan law is that three essential requisites must be fulfilled. The form is immaterial. If all the three essential requisites are satisfied constituting a valid gift, the transaction of gift would not be rendered invalid because it has been written on a plain piece of paper. The distinction that if a written deed of gift recites the factum of prior gift then such deed is not required to be registered but when the writing is contemporaneous with the making of the gift, it must be registered, is inappropriate and does not seem to us to be in conformity with the rule of gifts in Mohammadan law."

(emphasis supplied)

14. For a clear understanding of the conception of the valid gift under the Muhammadan law we think it apposite to reproduce the passage from *Mulla, Principles of Mahomedan Law* [(19th Edn.), p. 120.] that has been quoted and approved in *Hafeeza Bibi* [*Hafeeza Bibi v. Sk. Farid*, (2011) 5 SCC 654 : (2011) 3 SCC (Civ) 103] : (SCC p. 666, para 26)

"26. ... "Under the Mahomedan law the three essential requisites to make a gift valid are: (1) declaration of the gift by the donor, (2) acceptance of the gift by the donee expressly or impliedly, and (3) delivery of possession to and taking possession thereof by the donee actually or constructively. No written document is required in such a case. Section 129 of the Transfer of Property Act excludes the rule of Mahomedan Law from the purview of Section 123 which mandates that the gift of immovable property must be effected by a

registered instrument as stated therein. But it cannot be taken as a sine qua non in all cases that whenever there is a writing about a Mahomedan gift of immovable property there must be registration thereof. Whether the writing requires registration or not depends on the facts and circumstances of each case.'

16. From the aforesaid discussion of the propositions of law it is discernible that a gift under the Muhammadan law can be an oral gift and need not be registered; that a written instrument does not, under all circumstances require registration; that to be a valid gift under the Muhammadan law three essential features, namely, (i) declaration of the gift by the donor; (ii) acceptance of the gift by the donee expressly or impliedly, and (iii) delivery of possession either actually or constructively to the donee, are to be satisfied; that solely because the writing is contemporaneous of the making of the gift deed, it does not warrant registration under Section 17 of the Registration Act."

49. This proposition was also followed by this Court in Second Appeal No.77 of 2016 decided on 16.04.2022, **Nafees Ahmad Vs. Gulam Mohammad.**

50. Having considered the propositions regarding the ingredients of a gift and also noticing the concept of gift of Musha and applying the aforesaid principles to the instant case in light of the evidence available on record, this Court finds that per-se merely because a gift of an undivided property has been made, it cannot be said that it is void.

51. It is also to be noticed that the gift deed made by Quadir Mian will also not be hit by the doctrine of Musha for the reason that Quadir Mian was the exclusive owner

and he gifted the entire property to his sons from his second wife. This issue will only have an impact if it is first found that the property belonged to Quadir Mian and Barati Mian and after the death of Barati Mian, there were other co-sharers and each would have a separate share, if the same is proved, then it can be said to some extent that the gift made by Quadir Mian was not of any specific portion but that does not seem to be the case here.

52. As already noticed above, a gift of Musha may be irregular but not void. In the given facts and circumstances of the instant case, it would be appreciated that the transaction of gift which has been made between the father and son, this relates to the gift of Quadir Mian made in favour of the plaintiffs and even in the case of the gift made by the Barati Mian in favour of the defendants, the same would also indicate that it is by the grand father in favour of his grand sons.

53. It is also to be noticed that both Barati Mian and Quadir Mian were residing in the same premises and the record indicates that Barati Mian expired sometime in the year 1950 and Quadir Mian was living in the property and in his life time he has already got a business opened for both his set of children i.e. the plaintiffs from the second wife and the defendants being children from the first wife. It would be seen that the gift was made by the father to his sons who were residing therein and doing business and even if constructive possession was handed over it would be good enough to make the deed of gift valid.

54. In so far as gift of Quadir Mian is concerned, it was duly reduced in writing in shape of deed which was duly attested

and registered before the office of Sub Registrar. In so far as the said deed is concerned it clearly amounts to a declaration and the plaintiffs being the sons accepted the same. The deed was proved by examining the witnesses and other material on record was brought by the plaintiffs to indicate that they were running the business under the name and style of Indian Lime Store whereas the defendants were doing the business from the same premises under the name and style of Bahraich Lime Store. The deposition of the plaintiffs witnesses indicate that after executing the said gift deed Quadir Mian used to visit the shop in question and used to sit sometime either with the plaintiffs and sometime with the defendants. His conduct was such that he he had withdrawn from the property and while visiting the property as he was the father, he did not take any active participation in the affairs. Though he being the elder the parties did not get their name mutated but the plaintiffs continued to pay the taxes of the property with the Municipal Authority in the name of Quadir Mian. Thus, from the above, the contention of the learned Senior Counsel that the gift of the property in question was not valid being the gift of Musha does not impress this Court as by the evidence it was amply proved that the plaintiffs were dealing with the property in their own rights without any control of the donor namely Quadir Mian.

55. Another objection was raised by the learned Senior Counsel to suggest that the property in question was not of Quadir Mian but was the joint property of Barati Mian and Quadir Mian. In this regard, learned Senior Counsel has drawn the attention of the Court to the sale deed executed by Laxmi Narain and Saligram bearing paper No.Ga.55 marked as exhibit 20. It is stated that in the said sale deed it

was clearly mentioned that Laxmi Narain and Saligram had executed the sale deed in favour of Quadir Mian and Barati Mian, thus, the property was joint. Accordingly, this goes on to show that the property in question was joint between Quadir Mian and Barati Mian and there has been no partition, consequently the gift in respect of a joint property without any division was not valid and moreover Quadir Mian could not have gifted the entire property beyond his share.

56. This submission of the learned Senior Counsel is refuted by the learned counsel for the respondents who have submitted that this interpretation made by the appellant is incorrect. It has been pointed out that from the evidence led by the parties it was admitted that Barati Mian expired in the year 1950. From the evidence, it has also been borne out that Laxmi Narain and Saligram executed the sale-deed dated 16.07.1954.

57. In this view of the matter, it is submitted that the sale-deed could not include the name of Barati Mian as he had already expired. Hence, the contention of the appellants is bad and the property in question was exclusively purchased by Quadir Mian and he gifted the property to the plaintiff by means of the gift-deed dated 20.04.1967.

58. This Court has also noticed the aforesaid arguments and has meticulously perused Exhibit-20. There is no dispute to the fact that the said property is adjacent to the property which was earlier in the names of Barati Mian and Quadir Mian, however, the sale-deed dated 16.07.1954 indicates that it was executed by Laxmi Narain and Saligram. It is to be noticed that perhaps the appellants have misread the contents of

the said deed inasmuch as it reads as under:-

"बदस्त कादीरमीया व बरातीमीया"

59. This alphabet 'ब' in Hindi is interpreted by the learned counsel for the appellants to notify that Kadir Mian and Barati Mian were the vendees/purchasers of the property whereas the submission of the learned counsel for the plaintiff-respondents is that alphabet 'ब' was taken as an abbreviation for 'Waldiyat' (son of).

60. This Court finds that the submissions of the learned counsel for the respondents appears to be more reasonable and of substance. It is not disputed that Barati Mian expired in 1950. If that was so then there was no occasion for the name of Barati Mian to be included in the sale-deed in the year 1954. At this stage, the abbreviation 'ब' would mean 'Waldiyat' (son of) and if it is read in this context it would make sense that Laxmi Narain and Saligram had executed the sale-deed in favour of Kadir Mian son of Barati Mian.

61. In light of the aforesaid, at least, this property is concerned, it cannot be said that it was a joint property of Barati Mian and Kadir Mian. This Court has no hesitation to hold that the said sale-deed dated 16.07.1954 was in favour of Quadir Mian alone and it is also for the reason that admittedly Barati Mian had expired in the year 1950 and Quadir Mian had the right to gift the same exclusively.

62. The other issue relating to the properties belonged to Barati Mian is concerned, there were pleadings to the effect that Barati Mian in his lifetime had already divided his property amongst his

two sons and a daughter namely Quadir Mian, Saffi-ul-laha and Mst. Mamkoma.

63. Another interesting fact, which is relevant, is that two daughters of Saffi-ul-laha were married to Noor Ahmad and Samshuddin who are the appellants before the Court. Also the sister of Noor Ahmad and Samshuddin was married to the son of Safi-ul-laha. Thus, it would indicate that there is a delicate relationship between Saffi-ul-laha and the defendants as he was their father-in-law as well as Saffi-ul-laha was also the father-in-law of the sister of the defendants. This can be elicited from the statement of P.W.5 and this relationship is not disputed by the parties.

64. It would also be relevant to notice that the fact as stated in the replication that Barati Mian had divided his property amongst his heirs and in pursuance whereof, the disputed property fell in the share of Quadir Mian who along with the property purchased from Laxmi Narain and Saligram on 16.07.1954 thereafter went ahead to gift the same in favour of the plaintiffs (sons from his second wife), despite the aforesaid pleadings which was also reiterated in the deposition of the PW-3 Mohd. Abad, yet there was no evidence led worth its name on behalf of the defendants to show that no such division had taken place or that the property in dispute was joint with the other heirs of Barati Mian.

65. It was open for the defendants to have examined his father-in-law Saffi-ul-laha, who was the real brother of Quadir Mian to contradict the fact or he could have examined Mst. Mamkoma thier (Bua), yet none of the family members entered into the witness-box to contradict the fact that Barati Mian had divided the properties

amongst his heirs in his lifetime nor they came forward to state that the property was joint as after the death of Barati Mian and Quadir Mian, the property remained in the name of the plaintiffs. This also gives credence to the fact that Saffi-ul-laha and Mst. Mamkoma were already in possession of their respective shares which they received from Barati Mian in division made by him in his lifetime. Therefore, the contention of the defendants that the property was joint is not made out by any cogent evidence on record.

66. In the given facts and the evidence on record, the conclusion drawn by this Court matches with the reasons and the conclusion of the trial Court to the effect that the property in question belonged to Barati Mian and Quadir Mian. One part of the property was purchased exclusively by Quadir Mian vide sale-deed dated 16.07.1954 which is marked as Exhibit-20 and he also had the right to execute the gift-deed which he did by making a declaration. The gift was accepted by the plaintiffs and since there was an affinity being father and sons who were already in possession of the property, hence, by constructive possession, the same was also handed over and this can be ascertained also from the tenor and texture of the statements of the witnesses examined by the plaintiffs. Thus, the gift of the plaintiff stands adequately proved and it cannot be said that it is void being a gift of undivided 'Musha', for the reasons already recorded hereinabove.

67. Lastly, the issue of validity of the gift in favour of the defendants if examined would reveal that the defendants had filed their written statement on 28.05.1973. In Para-17 of the written statement, it was stated that Barati Mian had made a gift in favour of the defendants about 30 years

ago. Noticing that the written statement is of the year 1973, 30 years prior thereto would relate to a period around the year 1943. Surprisingly, the defendants, who all along claimed to be the owners in terms of the gift made by Barati Mian in the year 1943 remained in possession and did not make any overt act to get their names mutated in any record or to assent their independent rights even after Barati Mian expired in 1950 and knowing fully well that their relation with the plaintiffs and also with their father Quadir Mian was not cordial.

68. The record also goes on to show that during the pendency of the instant first appeal, the defendants had moved an application under Order XLI Rule 27 CPC seeking to bring on record a memorandum said to have been executed by Barati Mian on 21.08.1948 which is marked as Exhibit-A-12 and the same was proved by examining Shri Shirajuddin son of Shamshuddin, in pursuance of the order passed by the Court dated 22.05.2023.

69. What is more alarming is the fact is that the defendants had pleaded that the original of the said memorandum dated 21.08.1948 was with Saffi-ul-laha, who first had given him a photocopy and then later the original was handed over which was brought on record with an application under Order XLI Rule 27 CPC.

70. As already noticed above, the two daughters of Saffi-ul-laha were married to Noor Ahmad and Samshuddin i.e. the defendants no.1 and 2 and the sister of the defendants was married to the son of Saffi-ul-laha. In this view, Saffi-ul-laha (real brother of Quadir Mian) was the father-in-law of the defendants as well as the sister of the defendants and in such situation

though it is stated that the memorandum of the gift was with Saffi-ul-laha yet he did not hand over the same to the defendants and only at a later stage the same was placed on record in terms of Order 41 Rule 27 CPC. This memorandum was connected and proved by the testimony of Sirajuddin which was recorded on 18.07.2023 in pursuance of the order passed by this Court dated 23.05.23 yet there has been no explanation as to why Saffi-ul-laha who was the son of Barati Mian, brother of Quadir Mian and the father-in-law of the defendants did not hand over the said document which was of prime importance and was the sheet anchor of the case of the defendants. If the said memorandum was available with him since 1948 why it was brought on record after about 49 years from the date of its execution has not been explained. This raises serious doubt regarding the said document. In the aforesaid backdrop of the facts and the relationship between the parties.

71. The record further goes on to suggest and which can be culled out from the testimony of the defendants' witnesses that during the period of litigation before the trial Court, the defendants had already stopped residing in the premise and they were residing in another house in Kazipura. The plaintiffs and the other witnesses suggested that after the execution of the gift-deed in favour of the plaintiffs by Quadir Mian, the defendants were asked to leave and though they had shifted their residence. They had sought time to vacate the shop in question. The defendants on the other hand claimed that the house situate in Kazipur belonged to their uncle (Mama) but they did not deny that they were residing in Kazipura. There is categorical statement of the plaintiff to state that this house was purchased by Quadir Mian to

settle the defendants. It was also admitted to the defendants that the sale-deed of the said house was with their uncle (Mama) but the same was never brought on record by the defendants. In case, if the house was in the name of the uncle of the defendants, the sale-deed could have been placed on record to substantiate this fact but it has not been done. Moreover, on behalf of the defendants none of the family members including the uncle and aunt (Bua) were examined as a witness to suggest that the defendants were already seized of the property in their own rights on the basis of the oral gift made by the Barati Mian nor there was any evidence to substantiate the plea that the house and the properties left behind by Barati Mian were not divided in the lifetime of Barati Mian. None came forward including Saffi-ul-laha to deny that Barati Mian had not divided his properties and that the heirs were still co-owners. Nor it was stated and proved which specific part of the property was gifted by Barati Mian in favour of the defendants.

72. Another interesting feature is that the plaintiff have been paying taxes to the Municipal Authorities throughout and the said receipts have also been brought on record as Paper No.G-43 and G-48. There is no explanation from the side of the defendants to the effect if they had got the oral gift from Barati Mian and why they did not get their names mutated or why they did not pay the Municipal Taxes. It was neither explained which specific part of the disputed property was given to them by gift.

73. The evidence of the defendants' witnesses namely Noor Ahmad, Ramjan Ali, Mohd. Ali and Sajjad if seen, it would give a clear indication that each of the witnesses has given a different date relating

to making of the oral gift by Barati Mian. It is also seen in context with the fact that the defendants while filing their written statement did not disclose any date of the gift rather it was stated that the gift was made about 30 years ago. This is to be seen in context of certain timelines inasmuch as admittedly Barati Mian expired in the year 1950. Thus, if the gift had to be made it would relate prior to that period. The record also indicates that Barati Mian had also gone for Haj in the year 1948. As per the timeline as referable to the written statement, the gift was made in the year 1943 whereas the defendant No.1 Noor Ahmad. in his cross-examination stated that Barati Mian had made an oral gift in the month of April, 1945. He also stated that at the time of making the oral gift, the then Manager, Fazal Haq Siddiqui, Mohd. Shah, Imam Ali, Sajjad Ali, Shri Ram and Moti Lal along with 22-25 other persons were present. It was also stated that Mohd. Shah and Fazal Haq Siddiqui were called by Barati Mian while the other had come to their own. He further deposed that he never made an attempt to get his name mutated or to pay the house or water tax. The other witness Sajjad who was examined as DW-2 stated that the gift was made by Barati Mian in the month of August or September 1945 in the afternoon and about 10-15 persons apart from Sajjad were present. He also named few persons, who were said to be present at the time when the gift was made but surprisingly there is no explanation as to why any of those persons who were present, were not examined as a witness. Even from the testimony of DW-2, the essential ingredients of a gift which has already been noticed in the previous paragraph was not made out. DW-3 Ramjan is merely a witness who attempted to indicate that the defendants were in possession while the DW-4 Mohd. Ali in

his deposition stated that about 30 years from today (the date when he was deposing i.e. 31.01.1977), Barati Mian prior to going for Haj had made the gift in favour of his three grand-sons namely Noor Mohd., Shamsuddin and Baduruddin. If this is to be taken into account then it would indicate that the gift-deed would have been made in the year 1947. Thus, it would be seen that all the witnesses of the defendants have stated different timelines regarding the date of making of the oral gift by Barati Mian.

74. It is also pertinent to notice that once the defendants were aware of the fact that the plaintiffs were claiming title on the basis of the gift-deed executed by Quadir Mian and the defendants had set up their case on the basis of an oral gift said to have been made by Barati Mian yet the defendants did not introduce any counter claim seeking declaration of their rights or partition as even in case the defendants succeeded then they could not be the exclusive owners of the entire property but only to the extent of share of Barati Mian and then as facts reveal they ought to have got their share partitioned or separated as one part of the property was purchased by Quadir Mian by a sale deed after death of Barati Mian.

75. Now only the document which has been relied upon by the defendants is the memorandum dated 21.08.1948 which is said to be executed by Barati Mian acknowledging that he had already made an oral gift but in order to prove the same that the memorandum was executed and had the signatures of Barati Mian and it was witnessed by Mirza Husan Mahendi and Razzab Ali. As already noticed above that the said document does not inspire much confidence for the reason that though it is said to be in the custody of Saffi-ul-laha,

the real brother of Quadir Mian and also the father-in-law of the defendants yet there is no explanation as to why the said memorandum since 1948 till 2007 did not see the light of the day. The said document is said to be proved by Sirajuddin who is the son of the defendant No.2 Shri Shamsuddin. No attempt was made by the defendants to prove the writing of Barati Mian with his signature/thumb impression on the memorandum dated 21.08.1948.

76. At the relevant time where two daughters of Saffi-ul-laha were married with the defendants No.1 and 2 and both of them were litigating since 1973 yet it was never thought that the said memorandum be handed over to the defendants who were the son-in-law of Saffi-ul-laha.

77. Significantly, as already noticed, Saffi-ul-laha was neither summoned nor he entered into the witness-box as he would have been a very crucial witness to substantiate that Barati Mian had executed the said memorandum and had handed over the same to Saffi-ul-laha for safe custody to be handed over to the defendants at the appropriate time. Even after the death of Barati Mian in the year 1950, the said document was never handed over nor there is any reference to it in the pleadings of the defendants. Saffi-ul-laha being the son of Barati Mian and real brother of Quadir Mian and father-in-law of the defendants could very well throw light on the aforesaid aspect as well that is to say that whether any division was made by Barati Mian during his lifetime and that each of the sibling of Saffi-ul-laha got the property which is in their possession, as divided by Barati Mian and what portion was gifted to the defendants from amongst the properties of Barati Mian. He was also an important witness to depose whether the house in Kazipur was purchased by Quadir

Mian to settle his son from his first wife or it was actually purchased by the uncle (Mama) of the defendants. The defendants also did not lead any evidence in this regard nor filed the deed of the property of Kazipura on record.

78. In light of the aforesaid discussions and in light of whatever evidence was on record including the deposition of Sirajuddin this Court has no hesitation to concur with the reasons given by the trial Court and the Court finds that the alleged gift set up by the defendants could not be cogently proved whereas the gift made by the Quadir Mian in favour of the plaintiffs which was reduced in writing and duly registered before the office of Sub-Registrar on 20.04.1967 has been proved and that it is not bad as the gift of undivided 'Musha'. Hence, this Court finds that there is no error in the judgment and decree passed by the trial Court dated 06.04.1977 passed in Regular Suit No.14/1973 and it is affirmed.

79. From the aforesaid discussions, this Court finds that the appeal is devoid of merits and is accordingly dismissed. In the facts and circumstances, there shall be no order as to costs. The record of the trial Court shall be returned forthwith.

(2023) 9 ILRA 346

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 08.08.2023

BEFORE

THE HON'BLE MANJIVE SHUKLA, J.

Writ-A No. 2134 of 2023

Uday Pratap Singh

...Petitioner

Versus

**District Basic Education Officer, Basti &
Ors.**

...Respondents

Counsel for the Petitioner:

Sri Indra Raj Singh, Sri Adarsh Singh, Sri Babban Singh, Satya Prakash Singh, Sri Ashok Khare (Sr. Advocate)

Counsel for the Respondents:

C.S.C., Sri Ashok Kumar Singh, Sri Awadhesh Kumar

A. Service Law – Compassionate Appointment – Re-opening the issue of validity after 19 years – Permissibility – Surviving spouse of deceased was in Govt. service – No suppression of fact in obtaining the appointment – Surviving spouse filed his affidavit disclosing the facts of his being in service – Effect – Termination order was passed after 19 years – Validity challenged – Held, once there was no concealment of facts on the part of petitioner at the time of initial appointment, now after elapse of about 19 years, the respondents cannot reopen the issue on the ground that while appointing the petitioner on the compassionate ground, the District Basic Education Officer did not follow the provisions of the GO dated 04.09.2000. (Para 8, 9, 10, 31, and 46)

B. Service Law – UP Government Servant (Discipline and Appeal) Rules, 1999 – Rules 7 and 8 – Termination – Compassionate appointment on the post of Assistant Teacher was made, though surviving spouse of deceased was in Govt. service – Departmental enquiry was initiated on IInd time complaint made through I.G.R.S. – Charge-sheet was issued – After submission of the reply by the petitioner, no oral inquiry was conducted i.e. no date, time and place for holding inquiry was fixed – No enquiry report was submitted – Effect – Termination order was passed after 19 years – Validity challenged – Held, once disciplinary proceedings have been initiated by issuing a charge-sheet then the procedure prescribed for holding disciplinary inquiry as provided under Rules 7 and 9 of the Rules of 1999 has to be followed – High Court quashed the

impugned termination order. (Para 13, 49 and 50)

Writ petition allowed. (E-1)

List of Cases cited:

1. Mohd. Zamil Ahmed Vs St. of Bihar & ors.; 2016 (2) ESC 242 (SC)
2. Jainendra Singh Vs St. of U.P. & ors.; 2012 (8) SCC 748
3. U.O.I.& anr. Vs Shashank Goswami and another; 2012 (11) SCC 307
4. Writ Petition No. 19919 of 1993; Ramu Vs Executive Officer, Nagar Palika, Mirzapur decided on 31.8.2000
5. Writ A No. 5721 of 2020; Laxmikant Vs St. of U.P. & ors. decided on 01.10.2021
6. Writ A No. 7768 of 2022; Raghav Paliwal Vs St. of U.P. & ors. decided on 20.09.2022
7. Special Appeal No. 1601 of 2012; Narendra Kumar Upadhyay Vs St. of UP & ors. decided on 22.10.2021
8. Special Appeal No. 356 of 2012; Shiv Kumar Dubey & ors. Vs St. of U.P. & ors. decided on 06.02.2014

(Delivered by Hon'ble Manjive Shukla, J.)

1. Heard Sri Ashok Khare, learned Senior Advocate assisted by Sri Adarsh Singh, learned counsel appearing for the petitioner and Sri Ashok Kumar, Advocate holding brief of Sri Awadhesh Kumar, learned counsel appearing for the Respondents No.1 & 2 as well as learned Standing Counsel appearing for the Respondent No.3.

2. Petitioner through present writ petition has assailed the order dated 30.12.2022 passed by the District Basic

Education Officer, Basti, whereby services of the petitioner have been terminated.

3. Facts of the case, in brief, are that mother of the petitioner Smt. Tilakraji Devi, while working on the post of Head Mistress in Junior Basic School Jagdishpur, Block Harraiya, District Basti, died in harness on 18.10.2000. Petitioner, after death of his mother, submitted an application for his compassionate appointment and along with the application, he also submitted affidavits given by his father and brother. In the affidavit given by the petitioner's father, it was categorically mentioned that he was working as Head Master in Primary School Khamariya Sujat, Block Harraiya, District Basti.

4. The Selection Committee headed by the District Basic Education Officer, Basti considered the application for compassionate appointment filed by the petitioner and after scrutinizing the documents filed along with the application, the District Basic Education Officer, Basti issued an order on 21.7.2003, whereby petitioner was appointed as Assistant Teacher (untrained grade) in Primary School Hahi, Block Harraiya, District Basti.

5. Petitioner pursuant to his appointment order dated 21.7.2003 submitted joining in the primary school on 22.7.2003 and started discharging duties attached to his post. Petitioner also started getting salary from the State exchequer with effect from 22.7.2003. Later on, petitioner completed his in-service B.T.C. Training Course in the year 2005 and thereafter, the District Basic Education Officer, Basti passed an order on 27.9.2005, whereby petitioner was granted

pay-scale of the post of the trained Assistant Teacher.

6. Petitioner since the date of his initial appointment i.e. since 22.7.2003 continued to perform duties of his post and since his work and conduct was excellent, as such, the District Basic Education Officer, Basti vide order dated 30.12.2010 promoted the petitioner to the post of Head Master of Junior Basic School, Revradas II, Block Harraiya, District Basti.

7. On 28.2.2013 one Mr. Sudesh Bhaskar, resident of village Khamariya Sujat, Block Harraiya, District Basti lodged a complaint to the District Magistrate, Basti whereby allegation was levelled that compassionate appointment of the petitioner is against the provisions made in the Government Order dated 4.9.2000, wherein it is provided that if the surviving spouse of the deceased teacher is in government service, then his dependent will not be entitled for compassionate appointment, whereas at the time of compassionate appointment of the petitioner, his father was working on the post of Head Master in a primary school at District Basti. Mr. Sudesh Bhaskar through the aforesaid complaint requested the District Magistrate, Basti to cancel the compassionate appointment of the petitioner. The District Magistrate, Basti on the aforesaid complaint of Mr. Sudesh Bhaskar, directed the District Basic Education Officer, Basti to submit a report. The District Basic Education Officer, Basti vide his letter dated 18.5.2013 submitted a report to the District Magistrate, Basti, wherein it was categorically mentioned that at the time of compassionate appointment of the petitioner, disclosure was made by his father that he was working on the post of the Head Master in Primary School

Khamariya Sujat, Block Harraiya, District Basti and only after considering all the facts and circumstances, the petitioner was offered compassionate appointment and further petitioner has also been promoted to the post of the Head Master and therefore, after lapse of more than 10 years, now there is no justification to entertain the complaint of Mr. Sudeshh Bhaskar in respect of validity of the compassionate appointment of the petitioner. The District Basic Education Officer, Basti in his letter dated 18.5.2013 also categorically mentioned that the complaint lodged by Mr. Sudesh Bhaskar may be rejected.

8. Thereafter, it appears that the District Magistrate Basti was satisfied with the aforesaid report submitted by the District Basic Education Officer, Basti, as such, no further action was taken against the petitioner and for all practical purposes, the complaint lodged by Mr. Sudesh Bhaskar was found to be baseless.

9. Since compassionate appointment of the petitioner on the complaint lodged by Mr. Sudesh Bhaskar was not disturbed by the District Magistrate, Basti, as such, Mr. Sudesh Bhaskar filed a Public Interest Litigation (P.I.L.) No.26470 of 2014 and the said PIL was dismissed by the Division Bench of this Court vide order dated 13.5.2014 on two grounds, firstly that appointment of the petitioner was made nearly 10 years ago and secondly that Public Interest Litigation is not maintainable in respect of a service matter and petitioner has not disclosed his locus satisfactorily.

10. The aforesaid Mr. Sudesh Bhaskar did not challenge the order dated 13.5.2014 passed by the Division Bench of this Court in Public Interest Litigation (P.I.L.)

No.26470 of 2014 and in the year 2021, he lodged a complaint on I.G.R.S. Portal of the State Government and on the basis of said complaint, the District Basic Education Officer, Basti wrote a letter dated 7.9.2021 to the Secretary, U.P. Basic Education Board, Prayagraj, wherein he mentioned that the fact in respect of employment of the father of the petitioner was disclosed at the time of compassionate appointment of the petitioner and the compassionate appointment was made by the then District Basic Education Officer, Basti and therefore, it is not proper that the officer of the same rank may take decision in the matter, as such, guidance be given in the matter. The District Basic Education Officer, Basti thereafter passed an order on 28.9.2022 whereby payment of salary to the petitioner was stopped till further orders. The Secretary, U.P. Basic Education Board, Prayagraj vide his letter dated 8.10.2022 directed the District Basic Education Officer, Basti that since appointment of the petitioner is contrary to the provisions made in the Government Order dated 4.9.2000, therefore action may be taken by the District Basic Education Office, Basti in accordance with law.

11. Petitioner challenged the aforesaid orders dated 28.9.2022 and 8.10.2022 by filing Writ-A No.17099 of 2022 and this Court after considering the entire material available on record, set aside the order dated 28.9.2022 whereby payment of salary to the petitioner was stopped and further directed the petitioner to co-operate in the proceedings initiated against him.

12. The District Basic Education Officer, Basti issued a charge-sheet against the petitioner containing five charges in respect of his compassionate appointment and petitioner was required to furnish his reply

to the charges levelled in the charge-sheet within a period of 15 days. In the charge-sheet dated 28.10.2022, it was mentioned that the said charge-sheet has been issued as per the procedure prescribed under the U.P. Government Servant (Discipline and Appeal) Rules, 1999 and further the main charge against the petitioner was that his compassionate appointment was contrary to the provisions of the Government Order dated 4.9.2000 as on the date of his compassionate appointment, his father was working on the post of Head Master in a primary school at District Basti. Petitioner immediately after receiving the charge-sheet submitted his detailed reply on 14.11.2022 wherein he categorically pointed out that at the time of compassionate appointment of the petitioner, it was properly disclosed before the concerned authority that father of the petitioner was working as Head Master in a primary school at District Basti as father of the petitioner at the time of compassionate appointment of the petitioner filed an affidavit before the authorities of the department wherein the said fact was categorically disclosed. Petitioner in his reply categorically mentioned that the complaint lodged by Mr. Sudesh Bhaskar was earlier enquired into by the District Basic Education Officer, Basti and he submitted a report to the District Magistrate, Basti wherein he categorically pointed out that there was no concealment of facts by the petitioner rather it was disclosed to the concerned authorities that the father of the petitioner was working as Head Master in a primary school and therefore, the compassionate appointment of the petitioner, after elapse of about 10 years cannot be faulted.

13. Though the charge-sheet against the petitioner was issued as per the

procedure prescribed under the U.P. Government Servant (Discipline and Appeal) Rules, 1999 but after submission of the reply by the petitioner, no oral inquiry has been conducted i.e. no date, time and place for holding inquiry was fixed and even no inquiry report was prepared.

14. The District Basic Education Officer, Basti on 22.11.2022 issued a show cause notice, wherein charge-sheet dated 28.10.2022 and reply of the petitioner dated 15.11.2022 have been discussed but in respect of petitioner's reply dated 15.11.2022 only this much has been said that reply has not been found admissible in the light of the departmental rules and therefore, the show cause notice is being issued. The District Basic Education Officer, Basti in the aforesaid show cause notice dated 22.11.2022 has considered the fact finding report submitted by a two-member Committee prior to issuance of charge-sheet on 28.10.2022 and on that basis, has required the petitioner to show cause as to why the services of the petitioner may not be terminated and legal action may not be initiated against the petitioner. Petitioner submitted a detailed reply to the aforesaid show cause notice dated 22.11.2022 on 12.12.2022.

15. The District Basic Education Officer, Basti has passed the final order on 30.12.2022 wherein past history of the case has been recorded and it has been stated that the petitioner has submitted reply to the charge-sheet dated 28.10.2022 on 14.11.2022 but since his reply was not found admissible, as such under the provisions of the U.P. Government Servant (Discipline and Appeal) Rules, 1999, show cause notice was issued to the petitioner on 22.11.2022 and further the reply given by

the petitioner to the show cause notice has not been found satisfactory, therefore the charge that petitioner's compassionate appointment is contrary to the provisions of the Government order dated 4.9.2000 is found proved and thereby services of the petitioner have been terminated by cancelling his compassionate appointment.

16. Learned Senior Advocate appearing for the petitioner has submitted that at the time of initial appointment of the petitioner, affidavit of the petitioner's father was filed in which he categorically stated that he was working on the post of Head Master in Primary School Khamariya Sujat, Block Harraiya, District Basti and therefore, it is apparent that there was no suppression of facts on the part of the petitioner at the time of his compassionate appointment, as such, even if some provisions of the Government Order dated 4.9.2000 were not taken into account and competent authority offered compassionate appointment to the petitioner, the same cannot be nullified after elapse of about 20 years.

17. Learned Senior Advocate appearing for the petitioner has also argued that the complaint lodged by Mr. Sudesh Bhaskar was considered and a detailed reply was submitted by the District Basic Education Officer, Basti vide his letter dated 18.5.2013 to the District Magistrate, Basti, wherein a categorical finding was recorded that petitioner did not suppress any material fact at the time of his compassionate appointment rather his father in the affidavit candidly disclosed that he was working as Head Master in a primary school and thereby the District Basic Education Officer, Basti in his letter dated 18.5.2023 said that since there was no fault attributable to the petitioner in his

compassionate appointment, therefore after elapse of about 10 years, there is no occasion for disturbing the petitioner's appointment. The District Magistrate, Basti pursuant to the aforesaid report submitted by the District Basic Education Officer, Basti vide his letter dated 18.5.2013 did not take any action and thereby it can easily be inferred that the departmental authorities did not find any illegality committed by the petitioner and therefore, his compassionate appointment was not disturbed but now the District Basic Education Officer, Basti has taken complete U-turn and has passed order dated 30.12.2022 whereby services of the petitioner have been terminated by cancelling his compassionate appointment, as such, the impugned order dated 30.12.2022 cannot sustain in the eyes of law.

18. Learned Senior Advocate appearing for the petitioner has also vehemently argued that complainant Mr. Sudesh Bhaskar when failed to disturb the compassionate appointment of the petitioner, filed a Public Interest Litigation (PIL) No.26470 of 2014 and the Division Bench of this Court, while taking note of fact that petitioner's appointment was made 10 years ago and Public Interest Litigation in respect of service matter is not maintainable, dismissed the petition vide order dated 13.5.2014, then now after elapse of 20 years the District Basic Education Officer, Basti, while passing the impugned order dated 30.12.2022 has in fact ignored the said order dated 13.5.2014 passed by the Division Bench of this Court and therefore, the impugned order dated 30.12.2022 is unsustainable in the eyes of law.

19. Learned Senior Advocate appearing for the petitioner has also invited

attention of this Court that the District Basic Education Officer, Basti started disciplinary proceedings against the petitioner as per the procedure prescribed under the U.P. Government Servants (Discipline and Appeal) Rules, 1999 and issued a charge-sheet on 28.10.2022 and the petitioner also submitted his reply to the said charge sheet but thereafter, no procedure prescribed under the Rules of 1999 for holding inquiry and passing the punishment order, has been followed and the District Basic Education Officer, Basti has straightaway passed the impugned order dated 30.12.2022 wherein only this much has been said that the reply submitted by the petitioner to the show cause notice, has not been found satisfactory and thereby has terminated services of the petitioner by cancelling his compassionate appointment. Learned Senior Advocate appearing for the petitioner has further submitted that it is well settled proposition of law through catena of judgments of this court as well as of the Hon'ble Supreme Court that once the disciplinary proceedings have been initiated, then the procedure prescribed under the Rules in respect of disciplinary inquiry and punishment order ought to be followed *stricto sensu*, whereas in the present case, no inquiry has been held by fixing date, time and place for holding inquiry, no evidence has been recorded during the inquiry and further even inquiry report has not been submitted, as such it is apparent that the procedure prescribed under Rule 7 and Rule 9 of the U.P. Government Servants (Discipline and Appeal) Rules, 1999 has not been followed at all, therefore, the impugned order dated 30.12.2022 cannot sustain in the eyes of law.

20. Learned Senior Advocate appearing for the petitioner has invited

attention of this Court towards the judgment rendered by the Hon'ble Supreme Court in the case of **Mohd. Zamil Ahmed vs. State of Bihar and others**, reported in **2016 (2) ESC 242 (SC)** and has argued that the Hon'ble Supreme Court in the aforesaid judgment has held that once there was no concealment of facts on the part of government servant at the time of his initial appointment, then after 20 years of his appointment, the same cannot be nullified only on the ground that as per the State policy, the said appointment could not have been made.

21. Learned Senior Advocate appearing for the petitioner has emphatically argued that essence of time is vital in those cases where it is admitted that the candidate did not play any fraud or concealed the facts for securing his appointment, therefore after a elapse of long time, the said appointment cannot be nullified only on the ground that the authorities of the department, while making appointment, were not vigilant to see that the said appointment under the provisions of the relevant Government Order could not have been made and in the present case, it is admitted by the department that petitioner has neither suppressed any fact nor played any fraud to secure his compassionate appointment rather all the relevant facts were disclosed, therefore after elapse of 20 years from the date of initial appointment of the petitioner, his appointment cannot be nullified on the ground that he was not entitled for compassionate appointment as his father at that point of time was working as Head Master in a primary school, therefore the impugned order dated 30.12.2022 is absolutely unsustainable in the eyes of law. It has further been submitted by the learned Senior Advocate appearing for the

petitioner that it has also to be seen by this court that department of Basic Education did not take any objection to the appointment of the petitioner and it was only a private person who lodged a complaint and when the said complaint did not find favour of the departmental authorities, he filed a Public Interest Litigation (PIL), that too was dismissed taking into note of the fact that petitioner's appointment was made 10 years back, then there is no occasion for the District Basic Education Officer, Basti to cancel the appointment of the petitioner on behest of the private complainant.

22. Learned Senior Advocate appearing for the petitioner has thus concluded his arguments and has submitted that the impugned order dated 30.12.2022 passed by the District Basic Education Officer, Basti, whereby petitioner's services have been terminated by cancelling his appointment, is unsustainable in the eyes of law and therefore, is liable to be quashed by this Court.

23. Per contra, learned counsels appearing for the respondents have submitted that the State Government has issued a Government Order on 4.9.2000, wherein it has categorically been provided that if the surviving spouse of the deceased teacher is in government service, then dependent of the deceased teacher is not entitled for compassionate appointment. Since on the date of death of petitioner's mother, his father was working as Head Master in Primary School Khamariya Sujat, Block Harraiya, District Basti, therefore in view of the provisions of the aforesaid Government Order dated 4.9.2000, petitioner was not entitled for compassionate appointment and, as such, the appointment of the petitioner made in

the year 2003 is *void ab initio* and his services have rightly been terminated by the District Basic Education Officer, Basti by cancelling his appointment.

24. Learned counsels appearing for the respondents have further submitted that appointment of the petitioner was dehors to the provisions of the Government Order dated 4.9.2000, therefore the District Basic Education Officer, Basti issued a charge-sheet to the petitioner and after taking his reply, he issued a show cause notice to the petitioner to which he submitted reply and thereafter, the District Basic Education Officer, Basti has passed the order dated 30.12.2022 whereby petitioner's services have been terminated by cancelling his appointment, therefore there is neither any illegality nor infirmity in the impugned order dated 30.12.2022.

25. Learned counsels appearing for the respondents have vehemently argued that the issue involved in this writ petition has already been dealt with by this court as well as by the Hon'ble Supreme Court in number of cases and it has been held that if initial appointment was made contrary to the provisions made in the rules, then the said appointment is void ab initio and same can be nullified even after elapse of considerable length of time.

26. Learned counsels appearing for the respondents have relied upon following judgments:-

(i) *Judgment rendered by the Hon'ble Supreme Court in the case of Jainendra Singh vs. State of U.P. and others, reported in 2012 (8) SCC 748.*

(ii) *Judgment rendered by the Hon'ble Supreme Court in the case of Union of India and another vs. Shashank Goswami*

and another, reported in 2012 (11) SCC 307.

(iii) Judgment and order dated 31.8.2000 passed by High Court in Writ Petition No.19919 of 1993 (Ramu vs. Executive Officer, Nagar Palika, Mirzapur).

(iv) Judgment and order dated 1.10.2021 passed by High Court in Writ-A No.5721 of 2020 (Laxmikant vs. State of U.P. and others).

(v) Judgment and order dated 20.9.2022 passed by the Division Bench of High Court in Writ-A No.7768 of 2022 (Raghav Paliwal vs. State of U.P. and others).

(vi) Judgment and order dated 22.10.2021 passed by the Division Bench of High Court in Special Appeal No.1601 of 2012 (Narendra Kumar Upadhyay vs. State of UP and others).

(vii) Judgment and order dated 6.2.2014 passed by the Division Bench of High Court in Special Appeal No.356 of 2012 (Shiv Kumar Dubey and others vs. State of U.P. and others).

27. Learned counsels appearing for the respondents on the basis of the law laid down in the aforementioned cases have concluded their arguments by submitting that there is neither any illegality nor infirmity in the impugned order dated 30.12.2022 passed by the District Basic Education Officer, Basti and therefore, the writ petition filed by the petitioner deserves to be dismissed.

28. I have considered the submissions advanced by the learned counsels appearing for the parties.

29. I find that after the death of mother of the petitioner, he applied for compassionate appointment. Petitioner

along with his application also filed affidavits given by his father and brother. Father of the petitioner in his affidavit categorically stated that he was working on the post of Headmaster in Primary School, Khamariya Shujat, Block, Harraiya, District Basti. I also find that the then District Basic Education Officer, Basti after considering the entire material available before him issued appointment order dated 21.07.2003 whereby petitioner was appointed as untrained Assistant Teacher on compassionate ground. State Government has issued a Government Order on 04.09.2000 wherein it has been provided that if the surviving spouse of the deceased teacher is in government service then dependent of the deceased teacher is not entitled for compassionate appointment.

30. The aforesaid government order was very well available at the time of compassionate appointment of the petitioner and the then District Basic Education Officer after considering the entire material available on record appointed petitioner on the post of untrained Assistant Teacher on compassionate ground.

31. Now after elapse of 19 years, petitioner's services have been terminated by cancelling his appointment from the date of his initial appointment.

32. Learned counsel appearing for the respondents has relied upon judgement rendered by the Hon'ble Supreme Court in the case of **Jainendra Singh Vs. State of U.P. and others 2012 (8) SCC 748** and has submitted that in the said judgment, Hon'ble Supreme Court has laid down the law that if the material facts have been concealed at the time of initial appointment, then on disclosure of the said

facts, the appointment can be cancelled. The relevant portion of the judgment of the Hon'ble Supreme Court is extracted as under:

“29. As noted by us, all the above decisions were rendered by a Division Bench of this Court consisting of two Judges and having bestowed our serious consideration to the issue, we consider that while dealing with such an issue, the Court will have to bear in mind the various cardinal principals before granting any relief to the aggrieved party, namely:

29.1. Fraudulently obtained orders of appointment could be legitimately treated as voidable at the option of the employer or could be recalled by the employer and in such cases merely because the respondent employee has continued in service for a number of years, on the basis of such fraudulently obtained employment, cannot get any equity in his favour or any estoppel against the employer.

29.2. Verification of the character and antecedents is one of the important criteria to test whether the selected candidate is suitable to the post under the State and on account of his antecedents the appointing authority if finds it not desirable to appoint a person to a disciplined force can it be said to be unwarranted.

29.3. When appointment was procured by a person on the basis of forged documents, it would amount to misrepresentation and fraud on the employer and, therefore, it would create no equity in his favour or any estoppel against the employer while resorting to termination without holding any inquiry.

29.4. A candidate having suppressed material information and/or giving false information cannot claim right to continue in service and the employer, having regard to the nature of employment as well as

other aspects, has the discretion to terminate his services.

29.5. The purpose of calling for information regarding involvement in any criminal case or detention or conviction is for the purpose of verification of the character/antecedents at the time of recruitment and suppression of such material information will has a clear bearing on the character and antecedents of the candidate in relation to his continuity in service.

29.6. The person who suppressed the material information and/or gives false information cannot claim any right for appointment or continuity in service.

29.7. The standard expected of a person intended to serve in uniformed service is quite distinct from other services and, therefore, any deliberate statement or omission regarding a vital information can be seriously viewed and the ultimate decision of the appointing authority cannot be faulted.

29.8. An employee on probation can be discharged from service or may be refused employment on the ground of suppression of material information or making false statement relating to his involvement in the criminal case, conviction or detention, even if ultimately he was acquitted of the said case, inasmuch as such a situation would make a person undesirable or unsuitable for the post.

29.9. An employee in the uniformed service presupposes a higher level of integrity as such a person is expected to uphold the law and on the contrary such a service born in deceit and subterfuge cannot be tolerated.

29.10. The authorities entrusted with the responsibility of appointing constables, are under duty to verify the antecedents of a candidate to find out whether he is suitable for the post of a constable and so

long as the candidate has not been acquitted in the criminal case, he cannot be held to be suitable for appointment to the post of constable."

33. I find that the aforesaid judgement relied on by the learned counsel appearing for the respondents is of no help to the respondents as in the case of petitioner, it is admitted fact on the part of the respondents that there was no suppression of relevant facts by the petitioner at the time of his compassionate appointment.

34. Learned counsels appearing for the respondents have relied upon judgement rendered by the Hon'ble Supreme Court in the case of *Union of India and another vs. Shashank Goswami and another* 2012 (11) SCC 307 and have submitted that Hon'ble Supreme Court has laid down the law that appointment on compassionate basis should be made strictly in accordance with the prevailing compassionate scheme and since petitioner's compassionate appointment is contrary to the provisions of Government Order dated 04.09.2000, therefore, said appointment has rightly been cancelled.

35. I find that in the aforesaid case before the Hon'ble Supreme Court, candidate was denied compassionate appointment and candidate challenged the order whereby his candidature for compassionate appointment was rejected and then Hon'ble Supreme Court in its judgement has recorded a finding that the compassionate appointment can be offered only in accordance with the rules, regulations and administrative instructions whereas in the present case, petitioner was appointed on compassionate basis in the year 2003 and he has been allowed to continue in service for about 19 years and thereafter his compassionate appointment

has been cancelled, as such on the facts of the present case, the aforesaid judgement rendered by the Hon'ble Supreme Court is not applicable.

36. Learned counsels appearing for the respondents have relied upon judgment and order dated 31.08.2000 rendered by this court in ***Writ Petition No. 19919 of 1993 (Ramu Vs. Executive Officer, Nagar Palika, Mirzapur)*** and have submitted that in the said judgement, this Court has recorded a finding that even if any person has illegally been appointed by the respondents under the Dying in Harness Rules, such appointment cannot confer any right on the candidate to claim appointment or to continue in service. I find that petitioner of the aforesaid case was appointed on 10.10.1991 on compassionate ground and his services were terminated on 12.05.1993 i.e. in less than two years whereas in the present writ petition, there was no suppression of material facts on the part of petitioner and he has been allowed to continue his service for about 19 years, therefore, facts of the present case are entirely different, as such, in the given facts and circumstances, judgement and order dated 31.08.2000 rendered by this Court is inapplicable.

37. Learned counsel appearing for the respondents have relied upon judgement and order dated 1.10.2021 rendered by this Court in ***Writ-A No. 5721 of 2020 (Laxmikant vs. State of U.P. and others)***. I find that in the aforesaid writ petition, petitioner challenged the order by which his claim for compassionate appointment was rejected whereas petitioner of the present writ petition was appointed on compassionate ground in the year 2003 and has continued in service for about 19 years, therefore, on the facts of the present case,

aforesaid judgement and order dated 1.10.2021 is inapplicable.

38. Learned counsels appearing for the respondents have relied upon judgement and order dated 20.09.2022 rendered by this Court in ***Writ-A No. 7768 of 2022 (Raghav Paliwal vs. State of U.P. and others)***. I find that the petitioner in the aforesaid writ petition challenged the order whereby his case for appointment on compassionate ground was rejected whereas in the case of petitioner, his compassionate appointment has been cancelled after about 19 years of his appointment, as such on the facts, aforesaid judgement and order dated 20.09.2022 is inapplicable.

39. Learned counsels appearing for the respondents have relied upon judgement rendered by Division Bench of this Court on 22.10.2021 in ***Special Appeal No. 1601 of 2012 (Narendra Kumar Upadhyay vs. State of UP and others)***. I find that in the case before Division Bench of this court, teacher died in harness on 07.07.1991 and by concealment of material fact, compassionate appointment was obtained on 31.03.2010 and thereafter the said appointment was cancelled on 14.04.2012, as such, in the facts and circumstances of that case, Division Bench of this court has laid down law that where compassionate appointment has been obtained after 19 years from the date of death by concealing material fact, the same can be cancelled, whereas in the present case, petitioner has not suppressed any material facts and he was appointed on compassionate ground in the year 2003 and he continued to work for 19 years, as such in the facts and circumstances of the present case, the aforesaid judgement and order dated 22.10.2021 passed by the

Division Bench of this Court is inapplicable.

40. Lastly learned counsels appearing for the respondents have relied upon the Full Bench judgement of this Court rendered in the ***Special Appeal No. 356 of 2012 (Shiv Kumar Dubey and others vs. State of U.P. and others)***. I find that the Full Bench of this Court in the aforesaid case was considering as to in what manner, appointment under the Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 should be made. The relevant portion of the aforesaid judgement rendered by the Division Bench of this court is extracted as under:

29. We now proceed to formulate the principles which must govern compassionate appointment in pursuance of Dying in Harness Rules:

(i) A provision for compassionate appointment is an exception to the principle that there must be an equality of opportunity in matters of public employment. The exception to be constitutionally valid has to be carefully structured and implemented in order to confine compassionate appointment to only those situations which subserve the basic object and purpose which is sought to be achieved;

(ii) There is no general or vested right to compassionate appointment. Compassionate appointment can be claimed only where a scheme or rules provide for such appointment. Where such a provision is made in an administrative scheme or statutory rules, compassionate appointment must fall strictly within the scheme or, as the case may be, the rules;

(iii) The object and purpose of providing compassionate appointment is to

enable the dependent members of the family of a deceased employee to tide over the immediate financial crisis caused by the death of the bread-earner;

(iv) In determining as to whether the family is in financial crisis, all relevant aspects must be borne in mind including the income of the family; its liabilities, the terminal benefits received by the family; the age, dependency and marital status of its members, together with the income from any other sources of employment;

(v) Where a long lapse of time has occurred since the date of death of the deceased employee, the sense of immediacy for seeking compassionate appointment would cease to exist and this would be a relevant circumstance which must weigh with the authorities in determining as to whether a case for the grant of compassionate appointment has been made out;

(vi) Rule 5 mandates that ordinarily, an application for compassionate appointment must be made within five years of the date of death of the deceased employee. The power conferred by the first proviso is a discretion to relax the period in a case of undue hardship and for dealing with the case in a just and equitable manner;

(vii) The burden lies on the applicant, where there is a delay in making an application within the period of five years to establish a case on the basis of reasons and a justification supported by documentary and other evidence. It is for the State Government after considering all the facts to take an appropriate decision. The power to relax is in the nature of an exception and is conditioned by the existence of objective considerations to the satisfaction of the government;

(viii) Provisions for the grant of compassionate appointment do not

constitute a reservation of a post in favour of a member of the family of the deceased employee. Hence, there is no general right which can be asserted to the effect that a member of the family who was a minor at the time of death would be entitled to claim compassionate appointment upon attaining majority. Where the rules provide for a period of time within which an application has to be made, the operation of the rule is not suspended during the minority of a member of the family.

41. The aforesaid judgement rendered by Full Bench of this Court is of no help to the respondents in the facts and circumstances of the present case as in the present case, petitioner was appointed on compassionate ground in the year 2003 and after 19 years, his appointment has been cancelled.

42. Learned counsel appearing for the petitioner has relied upon the judgement rendered by the Hon'ble Supreme Court in the case of **Md. Zamil Ahmed v. State of Bihar, (2016) 12 SCC 342** and has submitted that facts of the aforesaid case before Hon'ble Supreme Court are identical to that of the facts of the present case before this Court.

43. Md. Jamil Ahmed, appellant before the Hon'ble Supreme Court was appointed on 02.05.1991 on compassionate ground and after elapse of 15 years, his appointment was cancelled on the ground that in view of the rules applicable for compassionate appointment, he could not have been appointed on compassionate basis.

44. Hon'ble Supreme Court after considering entire facts and circumstances of the case has categorically held that such

appointments cannot be cancelled after elapse of 15 years. The relevant portion of the judgement rendered by the Hon'ble Supreme Court in the case of **Md. Zamil Ahmed (Supra)** is extracted as under:-

“10. We have heard the learned counsel for the parties.

11. Keeping in view the peculiar undisputed facts of the case and having regard to the totality of the circumstances, we are of the considered view that the State was not justified in terminating the appellant's services. In other words, the ground on which the appellant's services were terminated by the State after a period of 15 years of the appellant's appointment does not appear to be well founded. This we say for the following reasons:

11.1. Firstly, the appellant and wife of the deceased at the time of seeking compassionate appointment did not conceal any fact nor filed any false or incorrect document/declaration. On the other hand, both of them disclosed their true family relations and conditions prevailing in the deceased's family on affidavit.

11.2. Secondly, the appellant, who is the brother of the deceased, undertook to maintain the family of the deceased in the event of his securing the compassionate appointment and he accordingly also gave such undertaking to the State.

11.3. Thirdly, there was no one in the family of the deceased to claim compassionate appointment except the appellant who, as mentioned above, was the close relative of the deceased, i.e. real younger brother and used to live with the deceased. He was otherwise eligible to claim such appointment being major, educated and only male member in the family.

11.4. Fourthly, the appellant after securing the employment throughout maintained the family of the deceased in all respects for the last more than 15 years and he is continuing to do so.

12. In the light of aforementioned reasons, which rightly persuaded the State to grant compassionate appointment to the appellant, we do not find any justification on the part of the State to dig out the appellant's case after 15 years of his appointment and terminate his services on the ground that as per the State policy, the appellant did not fall within the definition of the expression “dependant of deceased” to claim compassionate appointment.

13. The fact that the appellant was the younger brother of the deceased was within the knowledge of the State. Similarly, the State was aware that the brother does not fall within the definition of “dependant” at the relevant time and still the State authorities obtained the undertaking from the appellant that he would maintain the family of the deceased once given the appointment.

14. In our considered view, the aforesaid facts would clearly show that it was a conscious decision taken by the State for giving an appointment to the appellant for the benefit of the family members of the deceased who were facing financial hardship due to sudden demise of their breadearner. The appellant being the only close relative of the deceased could be given the appointment in the circumstances prevailing in the family. In our view, it was a right decision taken by the State as a welfare State to help the family of the deceased at the time of need of the family.

15. In these circumstances, we are of the view that there was no justification on the part of the State to wake up after the lapse of 15 years and terminate the services of the appellant on such ground. In any

case, we are of the view that whether it was a conscious decision of the State to give appointment to the appellant as we have held above or a case of mistake on the part of the State in giving appointment to the appellant which now as per the State was contrary to the policy as held by the learned Single Judge, the State by their own conduct having condoned their lapse due to passage of time of 15 years, it was too late on the part of the State to have raised such ground for cancelling the appellant's appointment and terminating his services. It was more so because the appellant was not responsible for making any false declaration nor he suppressed any material fact for securing the appointment. The State was, therefore, not entitled to take advantage of their own mistake if they felt it to be so. The position would have been different if the appellant had committed some kind of fraud or manipulation or suppression of material fact for securing the appointment. As mentioned above such was not the case of the State.

16. It is for this reason, we are of the view that action on the part of welfare State in terminating the appellant's service on such ground cannot be countenanced. We, therefore, disapprove the action taken by the State.

17. In the light of foregoing discussion, we allow the appeal, set aside the impugned orders and in consequence allow the writ petition filed by the appellant (writ petitioner) and quash the appellant's termination order dated 23-6-2005 (Annexure P-4 of SLP).

18. As a consequence thereof, the respondent State is directed to reinstate the appellant in service with all consequential benefits such as payment of full back wages payable from the date of termination (23-6-2005) till the date of reinstatement in

service. The appellant is also entitled to claim his seniority and notional promotions as per the rules. It be fixed accordingly.

19. Let the appellant be reinstated in service within a month as an outer limit and the arrears of back wages, as directed, be paid to the appellant within three months by the respondent State.

20. Cost of this appeal is quantified at Rs. 5000/- and the same be paid to the appellant by the respondent State along with the arrears of back wages."

45. I have considered the submissions advanced by the learned counsels appearing for the parties in the light of the aforesaid law laid down by Hon'ble Supreme Court in the case of **Md. Zamil Ahmed (Supra)**.

46. I find that the petitioner at the time of submitting application for compassionate appointment also filed an affidavit given by his father in which it was categorically stated that he was working on the post of Headmaster in Primary School Khamariya Sujat, Block Harraiya, District Basti. The District Basic Education Officer after considering the entire material available before him, issued order for compassionate appointment of the petitioner. There was no concealment of facts on the part of the petitioner. Once there was no concealment of facts on the part of petitioner at the time of initial appointment, now after elapse of about 19 years, the respondents cannot reopen the issue on the ground that while appointing the petitioner on the compassionate ground, the District Basic Education Officer did not follow the provisions of the Government Order dated 04.09.2000. It is also of utmost importance to take note of the fact that appointment of the petitioner has been cancelled on a complaint made by a private person alleging therein that petitioner's

appointment was contrary to the provisions of Government Order dated 04.09.2000. It is also noteworthy that the complaint made by the complainant was initially considered by the District Magistrate who directed the District Basic Education Officer to submit his report and the District Basic Education Officer in his report categorically submitted that since considerable time has elapsed and there was no concealment of fact on the part of petitioner, therefore, at this stage, it cannot be seen that initial compassionate appointment was in violation of the provisions of Government Order dated 04.09.2000. Complainant also filed a Public Interest Litigation (P.I.L.) No. 26470 of 2014 which was dismissed by the Division Bench of this Court vide order dated 13.05.2014. Division Bench of this Court, while dismissing the Public Interest Litigation, has also taken note of the fact that appointment of the petitioner on compassionate ground was made way back.

47. Once the complaint made by Mr. Sudesh Bhaskar was considered by the departmental authorities and no action was taken in the matter and further Public Interest Litigation filed by the complainant was dismissed by the Division Bench of this court, there was no occasion for the District Basic Education Officer to reinstate the proceedings for cancellation of appointment of the petitioner and thereby to cancel compassionate appointment of the petitioner after elapse of 19 years.

48. Essence of the time and length of service is of paramount importance in the matters of cancellation of appointment on the ground that the initial appointment is contrary to the provisions of rules or government orders. If immediately after the appointment, authorities would have acted

upon and the appointment of the petitioner was cancelled, then definitely no interference by this Court was warranted but where initial compassionate appointment was made 19 years back and there was no concealment of facts at the time of the said appointment, the same cannot be cancelled after elapse of 19 years on the ground that the initial appointment was made in violation of some provision of government order. Even further, in the present case departmental authorities, at no point of time, ever noticed that petitioner's appointment on compassionate ground was made contrary to the provisions of Government Order dated 04.09.2000 rather the exercise of cancellation of the petitioner's appointment has been done after elapse of 19 years on the behest of private complainant, therefore, in the given facts and circumstances of the case, the order dated 30.12.2022 whereby appointment of the petitioner has been cancelled, cannot sustain in the eyes of law.

49. The order dated 30.12.2022 whereby services of the petitioner have been terminated by cancelling his appointment from the date of his initial appointment is also not sustainable on another ground as regular disciplinary proceedings were initiated against the petitioner by issuing him a charge-sheet to which he submitted reply but thereafter neither the procedure for conducting disciplinary inquiry was adopted nor inquiry report was submitted. It is well settled proposition of law that once disciplinary proceedings have been initiated by issuing a charge-sheet then the procedure prescribed for holding disciplinary inquiry has to be followed and on the basis of the inquiry report, disciplinary authority will issue a show cause notice and after taking reply, the final

order in the disciplinary proceedings will be passed whereas in the present case though charge-sheet was issued to the petitioner and his reply was taken but thereafter procedure as provided under Rule 7 and Rule 9 of The Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999 has not been followed, therefore, the final order passed by the District Basic Education Officer on 30.12.2022 cannot sustain in the eyes of law.

50. In view of the aforesaid reasons, this writ petition is *allowed*. The order dated 30.12.2022 passed by the District Basic Education Officer, Basti is quashed. Respondent No. 1 i.e. District Basic Education Officer, Basti is directed to reinstate the petitioner in service forthwith and to pay his salary along with arrears.

(2023) 9 ILRA 362
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 28.08.2023

BEFORE

THE HON'BLE IRSHAD ALI, J.

Writ-A No. 3032 of 2006

Krishna Kumar **...Petitioner**
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:

Rajesh Kumar Katiyar, Ajay Pratap Singh, Amitabh Kumar Rai, Avdhesh Shukla, B.K. Katiyar, Dinesh Kumar, Pramod Kumar Verma

Counsel for the Respondents:

C.S.C., A. M. Tripathi, Prashant Arora, Rahul Shukla, Sarvesh Kumar Dubey, V.K. Bajpai

A. Service Law – District Primary Education Program – Contract basis

appointment – Circular dated 29.09.2006 – Absorption on the post of Peon in Sarva Shiksha Abhyas was claimed – In the absence of sanctioned post, how far the Court can direct for creation of post – Held, in absence of any sanctioned post, no direction can be issued for absorption of an employee of the government – *Ilmo Devi's case* relied upon. (Para 17)

Writ petition dismissed. (E-1)

List of Cases cited:

1. The Government of T. N. & anr. Vs T. N. Makkal Nala Paniyalargal & ors.; 2023 LiveLaw (SC) 294
2. U.O.I.& ors. Vs Ilmo Devi & anr.; 2021 SCC OnLine SC 899

(Delivered by Hon'ble Irshad Ali, J.)

1. Heard Sri Avdhesh Shukla, learned counsel for the petitioners, Sri Pankaj Patel, learned Standing Counsel for the State-respondent, Sri Sarvesh Kumar Dubey, learned counsel for respondent No.2 and Sri Udai Veer Singh, learned counsel for respondent Nos.4 and 5.

2. By means of the present writ petition, the petitioner has challenged the impugned order dated 31.3.2006, contained in Annexures-5 and 6 to the writ petition. It has been prayed for issuance of writ, order or direction in the nature of mandamus, commanding the respondents to allow the petitioners to work on the post of Peon and make payment of salary to them on the said post as and when it becomes due.

3. Factual matrix of the case is that the petitioner No.1 was appointed on 16.2.2000 and petitioner No.2 was appointed on 15.2.2000, on contract basis in District Primary Education Program. Copy of the appointment letter dated

17.12.2001 was issued by the respondent No.4. The petitioners continued to work under the respondent No.4 with sincerity. A circular was issued on 29.9.2006 by the respondent No.2, indicating that District Primary Education Program scheme will come to an end on 31.3.2006 and the employees will be absorbed in Sarva Shiksha Abhyan.

4. Service of both the petitioners was terminated by the impugned order dated 31.3.2006.

5. Learned counsel for the petitioners placed reliance upon certain orders passed in similar Writ Petitions No.5018 (S/S) of 2003 and 5334 (S/S) of 2003, whereby order was passed directing the respondents to allow the petitioners of the aforesaid writ petitions to continue in Sarva Shiksha Abhyan scheme.

6. By means of the present writ petition, the petitioners are also claiming parity of the orders passed in the aforesaid writ petitions.

7. Submission of learned counsel for the petitioners is that once the scheme was converted into Sarva Shiksha Abhyan with the permission to permit the employees working in District Primary Education Program to continue in Sarva Shiksha Abhyan scheme, there is no justification on the part of the respondents not to permit the petitioners to continue in Sarva Shiksha Abhyan scheme. Next submission is that one post was sanctioned in Sarva Shiksha Abhyan, therefore, the petitioners are entitled to continue against the said post. Next submission is that the impugned order passed by the respondent No.4 is not justifiable in law and is liable to be set aside.

8. Last submission of learned counsel for the petitioners is that the impugned order has been passed in violation of principles of natural justice, without affording an opportunity of hearing to the petitioners.

9. On the other hand, learned counsel for respondent No.4 invited attention of this Court on page 21 of the counter affidavit filed by the respondent No.4, wherein it has been shown that at district level, one post of Peon was sanctioned by the Sarva Shiksha Abhyan and the statement of fact has been made in paragraphs 7 and 8 of the counter affidavit that one Kamlesh Kumar was granted appointment on the basis of seniority by giving preference over others.

10. In paragraph 3 of the counter affidavit filed by the respondent No.2, it has been stated that due to non-availability of sanctioned post, service of the employees shall come to an end and in paragraph 4 thereof, it has been stated that due to non-availability of sanctioned post, no rightful claim of the employees who are granted appointment in District Primary Education Program scheme, shall be available. This fact has been repeated in paragraph 12 thereof.

11. In support of the submission advanced that in absence of sanctioned post, the State cannot be compelled to create a post and absorb the persons who are continuing in service of the State, the direction issued by the High Court to reinstate the employees after creating the posts and absorb them on their qualification, is not sustainable in law, Sri Sarvesh Dubey, Advocate placed reliance upon a judgment in the case of **The Government of Tamil Nadu & another Vs. Tamil Nadu Makkal Nala**

Paniyalargal & Others [2023 LiveLaw (SC) 294].

12. It is submitted that similar view has been taken in the case of **Union of India & Others Vs. Ilmo Devi & another [2021 SCC OnLine SC 899]**.

13. After having heard the rival contention of learned counsel for the parties, I perused the material on record as well as the judgments relied upon.

14. On perusal of the material on record, it is evident that there is one sanctioned post of Peon in Sarva Shiksha Abhyan at district level. In view of the judgments relied upon by Sri Dubey, Advocate, it is crystal clear that no direction can be issued for creation of post to absorb the person who is working in the government department. It is admitted case of the parties that there is one sanctioned post of Peon.

15. Relevant paragraphs 54 to 57 of the judgment in the case of **The Government of Tamil Nadu** (Supra) are being quoted as under :-

"54. At the same time, this Court further observed that in absence of sanctioned post, the State cannot be compelled to create the post and absorb the persons who are continuing in service of the State.

55. In Nihal Singh and Others (supra) on which heavy reliance has been placed, it was a case where appointments were made by the State Government under Section 17 of the Police Act, 1861. Since their appointments were under the Act, 1861 and were allowed to continue for sufficient long time, which was not considered to be illegal or irregular

appointment, this Court considered it appropriate to observe that as they are allowed to continue for such a long term, they deserve regularization of service. In the instant case, the respondents were never appointed in the establishment of the Government against a regular sanctioned post, in the absence whereof, judgment may be of no assistance.

56. The later judgment in Malathi Das (Retired) Now P.B. Mahishy (supra) which has been relied upon, it was a case where the employees were working on daily wage basis serving in different departments which are indeed Government establishments. At one stage, the employees approached the High Court claiming regularization of service and the High Court of Karnataka came to their rescue and directed the State Government to regularize service of such employees who are serving on a daily wage basis in Government departments and finally the SLP was dismissed by this Court. Thereafter, contempt petitions were filed before the High Court and in two phases, the employees were regularized, in the first and second phase of filing contempt petition by the incumbents concerned. But few of the incumbents filed contempt petition which appears to be the third phase, they were not considered for regularization despite the order of the High Court being confirmed by this Court on dismissal of the special leave petition on the premise of the judgment of this Court in Secretary, State of Karnataka and Others Vs. Umadevi (3) and Others (supra). This Court was of the view that once the judgment of the High Court has been affirmed and in two phases on filing contempt petitions, employees have been regularized, there appears no reason to deviate and take away the claim of rest of the employees who are covered by the

*judgment of the High Court, may be the reason that there was a change in law on the subject after passing of the judgment of this Court in **Secretary, State of Karnataka and Others Vs. Umadevi (3) and Others** (supra) and this is not the factual matrix in the instant case.*

57. We are of the considered view that the direction of the High Court to reinstate after creating the posts and absorb the respondents based on their qualification is not sustainable in law and deserves outright rejection."

16. Relevant paragraphs 27 and 28 of the judgment in the case of **Union of India & Others Vs. Ilmo Devi & another** (Supra), are quoted below :-

"27. In the case of Daya Lal & Ors. (supra) in paragraph 12, it is observed and held as under:-

?12. We may at the outset refer to the following well settled principles relating to regularisation and parity in

pay, relevant in the context of these appeals:

(i) The High Courts, in exercising power under Article 226 of the Constitution will not issue directions for regularisation, absorption or permanent continuance, unless the employees claiming regularisation had been

appointed in pursuance of a regular recruitment in accordance with relevant rules in an open competitive process, against sanctioned vacant posts. The equality clause contained in Articles 14 and 16 should be scrupulously followed and Courts should not issue a direction for regularisation of services of an employee which would be violative of the constitutional scheme. While something that is irregular for want of compliance with

one of the elements in the process of selection which does not go to the root of the process, can be regularised, back door entries, appointments contrary to the constitutional scheme and/or appointment of ineligible candidates cannot be regularised.

(ii) Mere continuation of service by a temporary or ad hoc or daily-wage employee, under cover of some interim orders of the court, would not confer upon him any right to be absorbed into service, as such service

would be ?litigious employment?. Even temporary, ad hoc or daily-wage service for a long number of years, let alone service for one or two years, will not entitle such employee to claim regularisation, if he is not working

against a sanctioned post. Sympathy and sentiment cannot be grounds for passing any order of regularisation in the absence of a legal right.

(iii) Even where a scheme is formulated for regularisation with a cut-off date (that is a scheme providing that persons who had put in a specified number of years of service and continuing in employment as on the cut-off

date), it is not possible to others who were appointed subsequent to the cut-off date, to claim or contend that the scheme should be applied to them by extending the cut-off date or seek a direction for framing of fresh schemes providing for successive cut-off dates.

(iv) Part-time employees are not entitled to seek regularisation as they are not working against any sanctioned posts. There cannot be a direction for absorption, regularisation or permanent continuance of part-time temporary employees.

(v) Part-time temporary employees in government-run institutions cannot claim parity in salary with regular employees of

the Government on the principle of equal pay for equal work. Nor can employees in private

employment, even if serving full time, seek parity in salary with government employees. The right to claim a particular salary against the State must arise under a contract or under a statute.

[See State of Karnataka v. Umadevi (3) [(2006) 4 SCC 1], M. Raja v. CEERI Educational Society [(2006) 12 SCC

636], S.C. Chandra v. State of Jharkhand [(2007) 8 SCC 279], Kurukshetra Central Coop. Bank Ltd. v. Mehar Chand [(2007) 15 SCC 680] and Official Liquidator v. Dayanand [(2008) 10 SCC 1.]

28. Thus, as per the law laid down by this Court in the aforesaid decisions part-time employees are not entitled to seek regularization as they are not working against any sanctioned post and there cannot be any permanent continuance of part-time temporary employees as held. Part-time temporary employees in a Government run institution cannot claim parity in salary with regular employees of the Government on the principle of equal pay for equal work."

17. The judgments relied upon by learned counsel for the respondent fully cover the case of the respondents that in absence of any sanctioned post, no direction can be issued for absorption of an employee of the government.

18. In view of the reasons recorded, this writ petition fails and is hereby dismissed.

19. It is however made clear that as and when vacancy will be created, the claim of the petitioners shall be taken into consideration by the respondents.

(2023) 9 ILRA 366

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 18.09.2023

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Writ-A No. 4422 of 2015

Vishwanath Vishwakarma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Arvind Kumar Vishwakarma, Ramesh Kumar Srivastava

Counsel for the Respondents:

C.S.C., Savitra Vardhan Singh

A. Service Law – Constitution of India – Article 311 (4) – Dismissal from service – Conviction of life imprisonment u/s 302 and 149 IPC – Conduct of the employee – Relevancy – Held, the impugned order has been passed only on the ground of conviction without having any discussion or application of mind over the conduct of the petitioner, which is mandatory requirement in light interpretation of Article 311(2)(a) of Constitution of India – *Tulsiram Patel's case* relied upon – High Court set aside the termination order. (Para 24 and 25)

B. Service Law – Constitution of India – Article 300-A – Right to property – Post retiral benefits – One day before the retirement, the employee was dismissed – He was also refused the post retiral benefit on the ground of conviction order – Legality challenged – Held, under Article 300(A) of Constitution of India, pension and other post retiral benefits are not bounty, but a property and cannot be taken away without provision of law – High Court directed to pay the post retiral benefit including pension within three months. (Para 26 and 31)

Writ petition allowed. (E-1)**List of Cases cited:**

1. U.O.I.& anr. Vs Tulsiram Patel; AIR 1985 SCC 1416
2. Shyam Narain Shukla Vs St. of U.P.; 1988 6 LCD 530
3. Ratan Singh Vs St. of U.P. & ors.; (2013) 11 ADJ 352
4. Udai Pratap Singh Vs St. of U.P.; 2014 (32) LCD 779
5. Shambhu Nath Yadav Vs St. of U.P.; 2016(4) ADJ 276
6. Rajesh Dwivedi Vs St. of U.P.; 2018(36) LCD 1047
7. Ram Kishan Vs St. of U.P.; (2020) 1 ADJ 862
8. Murari Lal Rathore Vs St. of U.P.; 2021(6) ALJ 622
9. St. of Jharkhand & ors. Vs Jitendra Kumar Srivastava & anr.; AIR 2013 Sc 3383
10. Civil Appeal No. 1804 of 2020; L.I.C. of India Vs Mukesh Poonamchand Shah

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

1. Heard learned counsel for the petitioner and Sri Savitra Vardhan Singh, learned Additional Chief Standing Counsel for the State-respondents.

2. Present petition has been filed seeking the following relief:

I. Issue a writ or direction in the nature of certiorary commanding the opposite parties to quashing the Impugned rejection order dated 30.08.2014 and appellate order dated 13.05.2015 except decision with regard to amount of provident fund.

II. Issue a writ or direction in the nature of mandamus commanding the opposite parties to treat the petitioner as retire from service subsequently to pay the retiral dues namely as pension, amount of gratuity, amount of leave encashment, amount of group insurance, arrear of pension and other dues.

III. Issue a writ or direction in the nature of mandamus commanding the opposite parties to pay the interest towards the release of amount of provident fund and to pay the arrear of salary for the period of suspension.

3. Since, pleadings have been exchanged between the parties, therefore, with the consent of the parties, the petition is being decided at the admission stage itself.

4. Brief facts of the case are that, petitioner was appointed as Lekhpal w.e.f. 08.03.1975 in District-Sultanpur. He was given his first promotional pay scale in the year 1994 and second in the year 2000. The petitioner was working as Lekhpal at Tehsil Sadar, District Sultanpur. Unfortunately an accident took place on 11.07.1992, upon which FIR dated 11.07.1992 has been lodged at Police Station Kurwar, District-Sultanpur against 16 persons including petitioner, which was registered as case crime no. 198 of 1992, under Section- 148, 302, 149 and 324. Ultimately, the charge sheet was submitted and case crime was converted into session trial No. 124 of 1994. After completion of trial, petitioner was convicted for life imprisonment under Section-302 and 149 vide judgment and order dated 24.08.2009. Petitioner was taken under custody on 22.08.2009. Against the judgment and order dated 24.08.2009, petitioner has filed a criminal appeal, which was registered as criminal

appeal no. 1987 of 2009. Petitioner was released on bail by the High Court on 10.01.2017. Petitioner has attained the age of superannuation on 31.08.2014. Order of dismissal from service was passed on 30.08.2014 only on the ground of conviction and the same was served upon the petitioner on 02.09.2014. Apart from dismissal from service, petitioner was also denied the post retiral benefits.

5. Against the order dated 30.8.2014, petitioner has preferred departmental appeal dated 17.10.2014 before the District Magistrate, Amethi. During the pendency of the appeal, he has also challenged the order dated 30.08.2014 before this Court by filing S.S. No. 42 of 2015, which disposed of vide order dated 20.02.2015 directing the appellate authority to decide the appeal of the petitioner within three months. Said appeal of the petitioner was decided vide appellate order dated 13.05.2015, issuing the direction for payment of GPF amount to petitioner only and for remaining post retiral benefits, it is held in the appellate order that decision shall be taken after final disposal of criminal appeal no. 1987 of 2009 filed by the petitioner.

6. Petitioner has challenged both the orders, i.e. order dated 30.08.2014 and 13.05.2015 in present petition. So far as first order is concerned, learned counsel for the petitioner firmly submitted that in light of Article 311(2)(a) of Constitution of India, mere conviction cannot be a ground for removal of an employee from service, but conduct of the employee has also to be seen while passing the order of dismissal. He next submitted that after conviction, petitioner was issued charge sheet on 17.04.2014 having only one charge that he has never informed about the conviction and incarceration thereafter, which he duly

replied vide reply dated 20.06.2014 with the averment that he has given due information. He next submitted that from perusal of the impugned order dated 30.08.2014, it is apparently clear that, neither any fact submitted in reply has been considered, nor there is any application of mind about the conduct of the petitioner as required under Article 311(2)(a) of Constitution of India. Though the order is having two paragraphs about some facts, but it is only one line about the dismissal of the petitioner in light of judgment and order of conviction dated 24.08.2009. He firmly submitted that even in case of conviction, it is required on the part of the disciplinary authority to apply its mind and consider the conduct of the petitioner, which is absolutely missing in the present case. Therefore, order dated 30.08.2014 is bad and liable to be set aside.

7. In support of his contention, learned counsel for the petitioner has placed reliance upon the judgment of Apex Court in the matter of *Union of India and another Vs. Tulsiram Patel: AIR 1985 SCC 1416* as well as of this Court in *Shyam Narain Shukla Vs. State of U.P., 1988 6 LCD 530, Ratan Singh Vs. State of U.P. and Others: (2013) 11 ADJ 352, Udai Pratap Singh Vs. State of U.P. 2014 (32) LCD 779, Shambhu Nath Yadav Vs. State of U.P.: 2016(4) ADJ 276, Rajesh Dwivedi Vs. State of U.P. 2018(36) LCD 1047, Ram Kishan Vs. State of U.P. (2020) 1 ADJ 862, Murari Lal Rathore Vs. State of U.P.: 2021(6) ALJ 622.*

8. He has also assailed appellate order dated 13.05.2015 on the ground that pension and post retiral benefits are not bounty, but a property under Article 300(A) of the Constitution of India, therefore, the same cannot be taken away without any

provision of law. In support of his contention, he placed reliance upon the judgment of Apex Court in the matter of ***State of Jharkhand & Ors. Vs. Jitendra Kumar Srivastava & Anr.: AIR 2013 Supreme Court 3383.***

9. Learned Additional Chief Standing Counsel has vehemently opposed the submission of learned counsel for the petitioner and submitted that once the petitioner is convicted, it is always open for the disciplinary authority to dismiss the petitioner from service in light of Article 311(2)(a) of Constitution of India. In support of his contention, he placed reliance on the judgment of Apex Court in ***Civil Appeal No. 1804 of 2020: of Life Insurance Corporation of India Vs. Mukesh Poonamchand Shah.***

10. I have considered the rival submissions advanced by learned counsel for the parties, perused Article 311(2)(a) of Constitution of India as well as judgments relied upon.

11. The issue before the Court is that as to whether in case of conviction, service of petitioner may be terminated straightway without providing any opportunity to him in light of Article 311(2)(a) of Constitution of India or not?

12. As Article 311 of Constitution of India is relevant for the present case, the same is being quoted hereinbelow:

“Article 311. Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State.—(1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall

be dismissed or removed by an authority subordinate to that by which he was appointed.

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges:

Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed:

Provided further that this clause shall not apply:—

(a) Where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) Where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or”

(c) Where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.

(3) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final.”

13. From the perusal of Article 311(2)(a) of Constitution of India, it appears that in case a person is dismissed

from the service on the ground of conduct, which has led to conviction on a criminal charge, a fledged inquiry is not required.

14. This issue was before the Apex Court for consideration in the matter of **Tulsiram Patel (Supra)**, relevant paragraph of the said judgment is quoted hereinbelow:

“The second proviso will apply only where the conduct of a government servant is such as he deserves the punishment of dismissal, removal or reduction in rank. If the conduct is such as to deserve a punishment different from those mentioned above, the second proviso cannot come into play at all, because Article 311 (2) is itself confined only to these three penalties. Therefore, before denying a government servant his constitutional right to an inquiry, the first consideration would be whether the conduct of the concerned government servant is such as justifies the penalty of dismissal, removal or reduction in rank. Once that conclusion is reached and the condition specified in the relevant clause of the second proviso is satisfied, that proviso becomes applicable and the government servant is not entitled to an inquiry.”

15. Again this issue came for consideration before this Court in the matter of **Shyam Narain Shukla (Supra)**. This Court after considering the matter has held as under:

“In view of the above decision of the Supreme Court, it has to be held that whenever a Government servant is convicted of an offence, he cannot be dismissed from service merely on the ground of conviction but the appropriate authority has to consider the conduct of such employee leading to his conviction and then to decide what punishment is to be inflicted upon him. In the matter of

consideration of conduct as also the quantum of punishment the employee has not to be joined and the decision has to be taken by the appropriate authority independently of the employee who, as laid down by the Supreme Court, is not to be given an opportunity of hearing at that stage.”

16. This Court has considered the very same issue in the matter of **Ratan Singh (Supra)** also. This Court after consideration has taken the very same view. Relevant paragraph of the said judgment is quoted hereinbelow:

“ In view of the finding in favour of petitioner on second issue, as above, that, the impugned order of dismissal has not been passed by competent authority after considering "conduct led to conviction" but only in a mechanical way on the basis of mere conviction, the writ petition deserves to be allowed. The writ petition is accordingly allowed. Impugned orders dated 28.4.2011, 28.1.2012 and 11.9.2012 are hereby set aside. The petitioner shall be entitled to all consequential benefits. However, this order shall not preclude the respondents from passing a fresh order in accordance with law. ”

17. This issue was again before this Court for consideration in the matter of **Udai Pratap Singh (Supra)**. This Court after considering the judgements of **Tulsiram Patel (Supra)** and **Shyam Narain Shukla (Supra)** has taken the very same view. Relevant paragraphs of the said judgment are being quoted hereinbelow:

“13. In view of the above law laid down by the Apex Court and by this Court before passing the dismissal order the competent authority ought to have

considered "Conduct led to conviction" and should not pass the order mechanically on the basis of mere conviction.

14. *In the present case, no such exercise has been done. The conduct of the petitioner, which led to conviction has not been examined and the petitioner has been dismissed mechanically only on the ground that he has been convicted by the criminal Court. Perusal of the order of this Court passed in Criminal Appeal No. 1017 of 1981, by which the petitioner has been acquitted reveals that the petitioner has been acquitted on merit*

on consideration of the evidences on record. Admittedly, no departmental enquiry has been made and no reason has been given for not conducting the disciplinary proceeding. In this view of the matter, the termination order is not sustainable.

15. *The impugned order is also not sustainable as it has been passed in violation of principle of natural justice without giving any opportunity to the petitioner. The petitioner has now been retired. He can only be reinstated notionally and entitled for other post retiral benefits."*

18. Division Bench of this Court has also considered this issue in the matter of **Sadanand Mishra Vs. State of U.P.: 1993 LCD 70** and has taken the very same view. Relevant paragraph of the said judgment is being quoted hereinbelow:

"on conviction of an employee of a criminal charge, the order of punishment cannot be passed unless the conduct which has led to his conviction, is also considered. It was further held that the scrutiny or exercise of conduct of an employee leading to his conviction is to be done ex parte and an opportunity of

hearing is not to be provided for this purpose to the employee concerned"

19. Again this issue came up before this Court in the matter of **Shambhu Nath Yadav(Supra)** in which petitioner was convicted under Section 498A and 304B IPC and this Court after considering many judgments occupying the field has held as under:

"In the present case, respondents have failed to consider the conduct of the petitioner which has led to his conviction before imposing punishment of dismissal by means of impugned order. The impugned order ex-facie does show that disciplinary authority has not applied its mind at all to the conduct led to conviction and quantum of punishment but proceeding ahead to impose punishment as an automatic and natural consequence of conviction, and it cannot be said to be a valid exercise of power under Rule 8(2)(a) of 1991 Rules and therefore, the orders impugned in the writ petition are unsustainable. "

20. In the matter of **Rajesh Dwivedi(Supra)**, issue before the Court was same as in the present controversy and the petitioner in said case was convicted under Sections 147, 148 and 302 IPC. The Court after considering many judgments has taken the very same view. Relevant paragraphs of the said judgment are quoted hereinbelow:

"10. In view of the settled proposition of law, as discussed above, a government employee cannot be dismissed, removed or reduced in rank merely on the ground that he has been convicted by a Court of law. Thus, conviction alone is not enough to punish a government employee, but it is conduct of the employee concerned, which

had led to is conviction on the basis of which, the government employee can be punished. Hence, it is necessary for disciplinary authorities to consider the conduct of convict government servant, which had led to his conviction. In the absence of the same, the order of the punishment would be bad. Further the consideration by the disciplinary authority is required to be recorded in writing.

11. The learned Standing Counsel has argued that proviso-2 to the Article 311 of the Constitution of India provides that where a person is dismissed on the ground of conduct, which has led to his conviction on a criminal charge or where the appointing authority is satisfied that it is not reasonably practicable to hold such an enquiry, there is no requirement of the observance of the principles of natural justice. He has further argued that this provision is akin to Rule-7 of the U.P. Government Servant (Discipline & Appeal) Rules 1999 which also provides that where any major penalty is imposed on a person on the ground of conduct which has led to his conviction on a criminal charge or where the disciplinary authority is satisfied, that for the reason to be recorded in writing, it is not reasonably practicable to hold an enquiry as per the Rules the order becomes final. He has also argued that an employee who has been in Jail for more than 48 hours, his services are terminated in accordance with the rules.

12. The argument of the learned Standing Counsel is patently illegal since Article 311 of the Constitution of India and also Rule-7 of the U.P. Government Servant (Discipline & Appeal) Rules, 1999 clearly provide that the authority passing the order of the major punishment, on the ground of conviction of the employee on a criminal charge, will have to record his satisfaction in writing that he is satisfied, after

consideration of the conduct of the employee which has led to conviction on the ground of criminal charge, that he deserves major penalty. Further argument of the learned Standing Counsel that mere imprisonment exceeding 48 hours, an employee becomes liable for termination of his services as per the Rules is absurd. As per Rule-4(3) of the U.P. Government Servant (Discipline & Appeal) 1999, such a Government deemed to be placed under suspension w.e.f., the date of his detention.

13. Therefore, it is clear from the above decisions and the relevant provisions of law that it is incumbent upon the authorities to consider the conduct of the employee which has led to his conviction in the criminal charge before imposing any punishment. In the present case, the impugned order passed by the respondent No. 2 only states that since the petitioner has been convicted in the criminal case, he should be dismissed from service from the date of the order of conviction. The respondent No. 2 was required to examine the conduct of the petitioner which led to his conviction before imposing the major punishment upon him. The order suffers from non application of mind and shows arbitrary exercise of discretion vested in the respondent No. 2 by law.”

21. Again a similar issue came up before this Court in the matter of **Ram Kishan(Supra)**, in which an employee was convicted under Section 302 and 134 I.P.C. and this Court after considering many judgments has taken the very same view. Relevant paragraphs of the said judgment are being quoted hereinbelow:

“12. In *Shankar Das v. Union of India*, MANU/SC/0369/1985 :1985 (2) SCR 358, Hon'ble Supreme Court while referring to power under Clause (a) of second proviso

of Article 311(2) of the Constitution of India, has observed as under:-

"Be that power like every other power has to be exercised fairly, justly and reasonably.""

13. Proviso (a) to Article 311 of the Constitution of India, is an exception to clause (2) of Article 311, which is applicable where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge. In case of Divisional Personnel Officer, Southern Railway Vs. T.R. Chellappan, MANU/SC/0488/1975 : 1976 (3) SCC 190 (para-21), Hon'ble Supreme Court considered Article 311(2), Proviso (a) and held that this provision confers power upon the disciplinary authority to decide whether in the facts of a particular case, what penalty, if at all, should be imposed on the delinquent employee, after taking into account the entire conduct of the delinquent employee, the gravity of the misconduct committed by him, the impact which his misconduct is likely to have on the administration and other extenuating circumstances or redeeming features, if any, present in the case and so on and so forth. The conviction of the delinquent employee would be taken as sufficient proof of misconduct and then the authority will have to embark upon a summary inquiry as to the nature and extent of the penalty to be imposed on the delinquent employee and in the course of the inquiry, if the authority is of the opinion that the offence is too trivial or of a technical nature it may refuse to impose any penalty in spite of the conviction. The disciplinary authority has the undoubted power after hearing the delinquent employee and considering the circumstances of the case to inflict any major penalty on the delinquent employee without any further departmental inquiry, if

the authority is of the opinion that the employee has been guilty of a serious offence involving moral turpitude and, therefore, it is not desirable or conducive in the interests of administration to retain such a person in service. In Sushil Kumar Singhal vs. Regional Manager, Punjab National Bank, MANU/SC/0578/2010 : 2010 (8) SCC 573 (Paras-24 and 25), Hon'ble Supreme Court explained the meaning of the words 'moral turpitude' to mean anything contrary to honesty, modesty or good morals.

14. Thus, in view of the law laid down by Hon'ble Supreme Court in the cases of Tulsiram Patel (supra), T.R. Chellapan (supra) and Shankar Das (supra), and two Division Bench judgments of this court in Shyam Narain Shukla (supra) and Sadanand Mishra (supra), it can safely be concluded that while removing the petitioner from service, the respondents were bound to consider the conduct of the petitioner, which has led to his conviction in the session trial. This was the condition precedent for the competent authority to acquire jurisdiction to impose punishment of removal from service. However, the impugned order is unfortunately silent and does not show consideration of conduct of the petitioner which has led to his conviction in the S.T. No. 178 of 2005. It was necessary for the respondents, while passing the impugned order, to consider the conduct of the petitioner leading to his conviction and then to decide what punishment is to be inflicted upon him. This has not been done by the respondent No. 2 while removing the petitioner from service. Therefore, the impugned order cannot be sustained and is hereby quashed.

*22. Again one more similar issue was before this Court in the matter of **Murari Lal Rathore(Supra)** in which conviction*

was made under Section 302, 120 B and 149 IPC and petitioner was dismissed from the service on the very same ground. This Court after considering in detail has taken the very same view. Relevant paragraphs of the said judgment are being quoted hereinbelow:

“10. The order of dismissal merely records that petitioner has been convicted to imprisonment of life in S.T. No. 455 of 208 and is incarcerated in jail therefore in view of the Government Order dated 12.10.1979, the petitioner is being dismissed from service from the date of his incarceration in jail i.e. 31.10.2015.

14. The authoritative pronouncement of law by Supreme Court in Tulsi Ram Patel (supra) is consistently followed and it is by now well settled that mere conviction in a criminal case would not lead to automatic dismissal from service of the government servant. Since clause (a) to the second proviso to Article 311(2) of the Constitution of India as also first proviso to rule-7(xii) of the Rules of 1991 are exception to the normal rule of holding inquiry against the government servant and even opportunity of hearing is not required to be given to him, therefore, the disciplinary authority has to scrupulously examine the conduct of the government servant which led to his conviction before exercising such jurisdiction. The nature of guilt established as also the possible defence available to the government servant are aspects which requires consideration at the level of the disciplinary authority. In the event these aspects are omitted from consideration, the order of dismissal itself would be rendered without jurisdiction.

18. Since the conduct of the petitioner leading to his conviction has not been examined by the disciplinary authority

within the laid down parameter as such the order of dismissal, as affirmed in appeal and revision cannot be sustained. Orders impugned dated 1.12.2016, 21.12.2016 and 18.3.2016 accordingly are liable to be quashed.”

23. Now, I am coming to the issue involved in the present case.

24. From the perusal of the impugned order dated 30.08.2014, it is apparently clear that it has been passed only on the ground of conviction without having any discussion or application of mind over the conduct of the petitioner, which is mandatory requirement in light interpretation of Article 311(2)(a) of Constitution of India by the Apex Court as well as by this Court. Now this issue is no res integra. Apex Court from the judgement of **Tulsiram Patel(Supra)** to many other judgments has considered this issue repeatedly and has held that even after conviction of an employee, while passing the removal or dismissal order, there must have been consideration of conduct of the employee and without that, any order of dismissal is bad.

25. In the present case, there is no consideration of the conduct of the petitioner, therefore, impugned dismissal order dated 30.08.2014 is bad and liable to be set aside.

26. He has also challenged appellate order dated 13.05.2015, by which he was denied other post retiral benefits except GPF. The Apex Court has taken a firm view in the matter of **State of Jharkhand(Supra)** that under Article 300(A) of Constitution of India, pension and other post retiral benefits are not bounty, but a property and cannot be taken away without provision of

law. Once, the first impugned order dated 30.08.2014 is not sustainable, order of Appellate Authority dated 13.05.2015 is also having no force in light of observation made earlier and is liable to be set aside.

27. Learned chief standing counsel has placed reliance upon the judgment of the Apex Court in the matter of ***Life Insurance Corporation of India(Supra)***. In the said judgment, the issue was as to whether, in case, arising out of same accident, where an employee has been convicted on a criminal charge and in case of conviction, termination order may be passed or not. It was argued by the learned counsel for the private respondents that such punishment amounts to double jeopardy and the Apex Court after considering many judgments said that it cannot be said to be double jeopardy and under such circumstances, even after punishment, on conviction order or dismissal, removal may be passed, therefore, this case is not relevant to decide the present controversy.

28. Under such facts and circumstances of the case, law laid down by the Apex Court as well as this Court from time to time, orders dated 30.08.2014 and 13.05.2015 are hereby set aside.

29. Now, the next issue before the Court is about the relief which may be granted to petitioner after quashing the impugned orders for the payment of post retiral dues. In usual course, it is required to remand the matter for passing fresh orders. So far as present case is concerned, as on date, petitioner would be aged about 70 years in light of the fact that he was superannuated from the service on 30.08.2014, whereas, impugned order of dismissal has been passed on 30.08.2014

and the same was served upon him on 02.09.2014.

30. In the matter of ***Murari Lal Rathore(Supra)*** the Court after considering this issue has also held as under:

“19. Ordinarily, when such orders are quashed a liberty ought to be granted to the disciplinary authority to pass a fresh order while considering relevant factors i.e. conduct of the employee, gravity of charges and the materials available against him etc. This course, however, would not be desirable or even permissible in the facts of the present case since the petitioner has attained the age of superannuation on 31.12.2018 and the contract of employment has come to an end.

24. A conspectus of above observations made by the Supreme Court would clearly reveal that unless there exists an enabling provision either in the applicable service rules or any other provision of law it would not be open for the disciplinary authority to pass an order in respect of contract of service after the employee has attained the age of superannuation.

25. This Court in Bhagirathi Singh Vs. State of U.P. and others, MANU/UP/3076/2018 : 2018 (8) ADJ 538 has also observed as under in Para-18:-

“18. It is settled legal position that the employer and employee relationship is dependant only upon the contract of employment. The moment, the contract comes to end as the person is retired from service on attaining certain age under the rules, the relationship comes to an end. In the event of employer of employee relationship coming to an end, the rules have to specifically provide for continuation of proceedings in the first instance and that too with the sanction of higher authorities in the second instance

because it will be seen as exceptional circumstance where disciplinary authority would record that for reasons genuine and convincing the disciplinary proceedings could not be concluded and, therefore, it is required that the proceedings be continued even after retirement, but there is no such provision under the rules governing the disciplinary proceedings. In this context, learned counsel for the respondent could not point out any rule, circular or executive instructions even, which may provide for continuance of disciplinary proceedings even after the retirement of the petitioner or any other employee of the corporation. Then again, the question will be that how a punishment is to be imposed as the punishment is awarded only against an employee unless and until employer and employee relationship exists, the order of punishment upon a retired employee cannot be imposed except otherwise provided under the rules. Even in matters of recovery, it is not open for the department to deduct any amount from retiral dues in absence of any rules giving any such authorization.

26. From the above discussions, it is apparent that since the petitioner has attained the age of superannuation and no provision in law is shown which permits the disciplinary authority to examine the conduct of an employee, now, so as to pass an order of punishment, there would be no purpose in remitting back the matter to the disciplinary authority for a fresh consideration of petitioner's conduct leading to his conviction. Such a course would be legally impermissible.

27. The relief to be granted to the petitioner in such circumstances will have to be determined by this Court in view of what has been observed in para-127 of the Constitution Bench judgment in *Tulsiram Patel (supra)*. The Court will have the jurisdiction to pass necessary order in respect of the penalty, which in its opinion would be just and proper in the circumstances of the case.

28. In the facts of the present case the petitioner has been dismissed from service on 18.3.2016 and has attained the age of superannuation on 31.12.2018. He has admittedly not worked during this period. The proceedings against the petitioner; consequent upon his conviction in an offence under Section 307 I.P.C. cannot be said to be without jurisdiction or arbitrary, on facts. The order of dismissal has been found wanting on account of non-consideration of petitioner's conduct leading to his conviction and has been set aside, for such reasons. The petitioner would be entitled to all service and retiral benefits including continuity excluding salary between 18.3.2016 to 31.12.2018 by applying the principles of 'no work no pay'. It is however reiterated that the period between 18.3.2016 to 31.12.2018 shall be counted for payment of retiral benefits."

31. Therefore, in light of facts of this case and legal proposition set by the Courts, respondents are directed to pay the post retiral dues to petitioner including pension and other dues permissible under the law within three months from the date of production of certified copy of this order.

32. Accordingly Writ Petition is allowed.

33. No order as to costs.

(2023) 9 ILRA 376
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.08.2023

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ-A No. 6176 of 2023

Ramesh Chandra Pal	...Petitioner
Versus	
State of U.P. & Ors.	...Respondents

Counsel for the Petitioner:

Girsh Chandra Verma, Pawan Kumar Pandey

Counsel for the Respondents:

C.S.C., Ghanshyam Verma

A. Service Law – UP Secondary Education (Services Selection Boards) Act, 1982 – Sections 18(1) & 18(2) – Regulations – Ch. II, Reg. 3 – Officiating Principal – Seniority – Power of DIOS, when can be exercised – No failure on the part of Committee of Management in promoting senior most teacher – Effect – Held, the impugned order is erroneous as the power under sub-Section (2) of Section 18 can be exercised only when the Management fails to promote the senior most teacher – Further held, the order is bad in law, inasmuch as, while deciding the seniority, the principle as laid down in Regulation 3(bb) read with Regulation 3(g) have been completely overlooked by the DIOS. (Para 19)

Writ petition allowed. (E-1)

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. The Vakalatnama filed by Sri R.D. Shahi on behalf of the respondent no.7 is taken on record. The short counter affidavit filed on behalf of the respondent no.7 is also taken on record.

2. Heard Sri G.C. Verma and Sri Pawan Kumar Pandey, learned Counsel for the petitioner as well as Sri Ran Vijay Singh, learned Standing Counsel and Sri R.D. Shahi and Sri Ghanshyam Verma, learned Counsel appearing on behalf of respondent no.7.

3. The respondent no.6 has been added without any basis, as such, he is scrolled off from the array of parties and in view of the documents submitted, there is no need to hear the respondent no.5.

4. The present petition has been filed challenging the order dated 25/28.07.2023 (Annexure No.1 to the petition), whereby the respondent no.7 has been given the charge of officiating Principal superseding the claim of the petitioner, as claimed by him.

5. The facts in brief are that the petitioner was appointed as an L.T. Grade Teacher on 03.02.2004 whereas the respondent no.7 was appointed as an L.T. Grade Teacher on 07.12.2004. Subsequently, both the petitioner as well as the respondent no.7 was promoted on 13.03.2012 to the post of Lecturer, however, the respondent no.7 took the charge as a Lecturer on 13.03.2012 whereas the petitioner took the charge on 14.03.2012. The date of birth of the petitioner is 09.09.1970 and that of the respondent no.7 is 05.08.1971.

6. The contention of the Counsel for the petitioner is that in the institution in question, one Rajendra Prasad Sharma, the lecturer, was officiating as Principal and subsequently, on having expressed his inability to continue any further, a dispute arose in between the petitioner and the respondent no.7 with regard to the claim for the post of officiating Principal in the institution in question. It is argued by the Counsel for the petitioner that the petitioner being senior to the respondent no.7, was eligible for being recommended by the Committee of Management for appointment to the post of officiating Principal, which was done by the Committee of Management and on the recommendation so made, an order came to be passed on 30.09.2011 appointing the petitioner as an officiating Principal. The said order passed by the Committee of Management is on record (Annexure-18 to

the writ petition). It is argued that in pursuance to the said recommendations made in favour of the petitioner, the signatures of the petitioner were attested as is clear from the letter dated 18.10.2019 (Annexure-20 to the writ petition).

7. It is argued that an order issued by the respondent no.4 on 25.09.2019 directing the Management for appointment of the senior most lecturer as an ad hoc Principal and in pursuance thereof, the consequential order passed by the respondent no.5, Committee of Management to the effect that as per seniority, the petitioner was appointed as an officiating Principal, came up for challenge in Writ Petition No.28823 (SS) of 2019. In the said writ petition, directions were issued for filing of the counter affidavit initially and subsequently on 06.11.2019, certain directions were issued in the said writ petition. The order dated 06.11.2019 is annexed as Annexure-22 to the writ petition. Later on, the said writ petition came to be dismissed as withdrawn on 11.01.2023.

8. It is argued that in the meanwhile, Sri Rajendra Prasad Sharma, who had earlier expressed his inability to function as an officiating Principal, was appointed as a regular Principal by the Commission and probably because of the said, the writ petition was dismissed as withdrawn. It is admitted in between the parties that subsequently, Sri Rajendra Prasad Sharma only continued for a period of two months and thereafter, once again a vacancy arose in the office of the Principal of the institution in question and once again the claim of the petitioner arose in view of the seniority list issued by the Committee of Management once again indicating that the petitioner was the senior most to the

respondent no.7. He further argues that the request was also made by the Committee of Management for attesting the signatures of the petitioner. Without considering the said request, the impugned order came to be passed holding that as the respondent no.7 had taken charge on 13.03.2012 as a lecturer, he was senior to the petitioner and accordingly issued order appointing the respondent no.7 as an ad hoc Principal of the institution in question, the said order is impugned herein.

9. In respect to the challenge to the order impugned, Sri G.C. Verma, learned Counsel appearing on behalf of the petitioner argues that in terms of the mandate of Section 18 of the U.P. Secondary Education (Services Selection Boards) Act, 1982 (in short "the 1982 Act"), it is incumbent upon the Management to notify a vacancy to the Board for filling the post of the Principal or the Headmaster and in case, the said vacancy is not filled up for a period of two months, the Management is empowered to fill up such vacancy on ad hoc basis by promoting to the senior most teacher.

10. The Section 18(2) of the 1982 Act provides that in the event, the Management fails to promote the senior most teacher under sub-Section (1), the Inspector is authorized to issue an order of promotion of such teacher and the teacher concerned shall be entitled to get salary as the Principal or the Headmaster.

11. For the sake of remedy, Section 18(1) and (2) of the 1982 Act are quoted below:

"18. Ad hoc Principals or Headmasters. (1) Where the Management has notified a vacancy to the Board, in

accordance with sub- section (1) of Section 10 and the post of the Principal or the Headmaster actually remained vacant for more than two months, the management shall fill such vacancy on purely ad hoc basis by promoting the senior- most teacher.

(a) in the lecturer's grade in respect of a vacancy in the post of the Principal.

(b) in the trained graduate's grade in respect of a vacancy in the post of the Headmaster.

(2) Where the Management fails to promote the seniormost teacher under sub-section (1) the inspector shall himself issue the order of pro- motion of such teacher and the teacher concerned shall be entitled to get his salary as the Principal or the Headmaster, as the case may be, from the date he joins such post is pursuance of such order of promotion."

12. Sri G.C. Verma, learned Counsel appearing on behalf of the petitioner further argues that for the purpose of determination of seniority, the provisions are contained in Chapter-II of the Regulation framed under the 1982 Act. He places reliance on Regulation 3 of the Chapter-II, which is quoted herein below:

"3 (1) The Committee of Management of every institution shall cause a seniority list of teachers to be prepared in accordance with the following provisions-

(a) The seniority list shall be prepared separately for each grade of teachers whether permanent or temporary, on any substantive post;

(b) Seniority of teachers in a grade shall be determined on the basis of their substantive appointment in that grade. If two or more teachers were so appointed on the same date, seniority shall be determined on the basis of age;

(bb) Where two or more teachers working in a grade are promoted to the next higher grade on the same date, their seniority inter se shall be determined on the basis of the length of their service to be reckoned from the date of their substantive appointment in the grade from which they are promoted:

Provided that if such length of service is equal, seniority shall be determined on the basis of age.

(c) A teacher in a higher grade shall be deemed to be senior to a teacher in the lower grade irrespective of the length of service;

(d) If a teacher who is placed under suspension is reinstated on his original post his original seniority in the grade shall not be affected;

e) Every dispute about the seniority of the teacher shall be referred to the Committee of Management which shall decide the same giving reasons for the decision;

(f) उपखण्ड (ड) के अधीन प्रबन्ध समिति के विनिश्चय से व्यथित कोई अध्यापक ऐसा विनिश्चय ऐसे अध्यापक को सूचित किये जाने के दिनांक से 15 दिन के भीतर सम्बन्धित क्षेत्रीय उप शिक्षा निदेशक को अपील कर सकता है, और अपील पर सम्बन्धित पक्षों को सुनवाई का अवसर देने के उपरान्त उप शिक्षा निदेशक अपना निर्णय कारण सहित देगा, जो अन्तिम होगा और प्रबन्ध समिति द्वारा कार्यान्वित किया जायेगा ।

(g) यदि एक ग्रेड में कार्यरत दो या अधिक अध्यापक किसी एक ही तिथि पर पदोन्नति किए जाएँ तो उनकी ज्येष्ठता का आधार उस ग्रेड का सेवाकाल होगा, जिसमें वे कार्यरत थे, परन्तु यदि सेवाकाल बराबर है, तो पदोन्नति को दशा में आयु के आधार पर ज्येष्ठता निर्धारित की जायेगी ।

(2) The seniority list shall be revised every year and the provisions of Clause (1) shall mutatis mutandis apply to such revision."

13. In the light of the said two provisions, in nutshell, the argument of the

learned Counsel for the petitioner is that there was no occasion for the respondents to pass an order as the situation contemplated under Section 18(2) did not arise. He argues that the Committee of Management had recommended the name of the petitioner in terms of the powers conferred upon the Management under Section 18(1) of the 1982 Act and the powers under Section 18(2) could only be exercised, if the Management failed to exercise power under Section 18(1) and therefore, the order impugned deserves to quash on that ground alone.

14. In addition to the said arguments, the Counsel for the petitioner Sri G.C. Verma argues that the Regulation 3 (bb) and the Regulation 3(g) specifically provide for the manner for determining seniority, where there are two or more teachers working in a same grade and are promoted on the same date. It also provides the manner in which the seniority shall be determined inter se in between two or more teachers. In the light of the said, he argues that admittedly both the petitioner and the respondent no.7 were promoted on 13.03.2012 and admittedly, the length of service of the petitioner from the date of the substantive appointment was more than that of the respondent no.7 and in that case, the claim of the petitioner was rightly acknowledged by the Management and duly recommended. He further argues that in the impugned order, the date of taking charge has been referred to for the purpose of determining the seniority, which is contrary to the mandate of Regulation 3(bb) and Regulation 3 (g) of the Chapter-II. He also argues that although there is a dispute with regard to taking charge, however, even for the sake of argument, the same is treated to be correct, the same would have no relevance in view of the crystal clear provisions contained

in Regulation 3(bb) and the Regulation 3(g) of the Chapter-II.

15. In sum and substance, on the basis of the submissions recorded above, he argues that it is the petitioner, who is the senior most teacher and should be permitted to continue as an ad hoc Principal and the order impugned is contrary to the mandatory scheme and thus, is liable to be quashed. He also argues that the petitioner was senior in age to the respondent no.7, which is also relevant in view of the proviso to Regulation 3(bb) of the Chapter-II.

16. Sri R.D. Shahi, learned Counsel appearing on behalf of the respondent no.7, on the other hand, has filed a short counter affidavit and places on record, a copy of the seniority list allegedly sent by the Committee of Management on 10.05.2016 wherein the respondent no.7 is shown to be senior to the petitioner on the basis of the date of promotion, which in the case of respondent no.7 is recorded as 13.03.2012 whereas in the case of the petitioner, it is recorded as 14.03.2012. It is also argued that on the basis of the said seniority list, the claim of the respondent no.7 for the appointment to the post of ad hoc Principal was wholly justified and the impugned order does not require any interference as substantive justice has been done. He further argues that the impugned order itself records that no seniority list was submitted by the Committee of Management, thus, the respondent was well within his right to exercise the power as are vested by virtue of Section 18(2) of the 1982 Act. He thus argues that the writ petition is liable to be dismissed.

17. Sri Ran Vijay Singh, learned Counsel appearing on behalf of the DIOS, on the basis of the instructions, which has been handed over across the bar, argues

that the Committee of Management did not furnish any seniority list, despite repeated requests. He further argues that against the same impugned order, the petitioner has already approached the Joint Director of Education through his representation dated 05.08.2023, as such, the petitioner cannot be permitted to avail simultaneous remedies before two different forums and accordingly, the writ petition should be dismissed on that ground also. In short, he tries to justify the order by arguing that the Committee of Management failed to fulfill the requirement which are stipulated in Section 18(1) and thus, the exercise of powers under Section 18(2) is justified.

18. Sri G.C. Verma, in rejoinder to the arguments raised by the Counsel for the respondents, argues that in terms of the provisions of Section 18 of the 1982 Act as well as the provisions as contained in Chapter-II, although an appeal is provided with regard to the determination of seniority, the same is confined to any order of determination of seniority passed by the Committee of Management and no appeal or representation or any other remedy is provided either in the Act or in the Regulations in respect of the passing of the order of the nature impugned as has been done in the present case. He argues that the communication dated 05.08.2023 can at best be treated as complaint against the action of the DIOS and cannot be equated with the remedy available under law in respect of an order passed under the statutory provisions. He further argues that remedy of appeal is a creation of the statutes and unless specifically provided for cannot be termed as a remedy against an order and thus, the writ petition would lie and has been rightly filed by the petitioner.

19. Considering the submissions made at the bar and recorded above and

after going through the pleadings including the writ petition, the short counter affidavit as well as the instructions handed over by Shri Ran Vijay Singh, what emerges is that the DIOS has exercised the power vested in him under Section 18(2) of the 1982 Act without recording that any request or appointment was made by the Committee of Management which is required under Section 18(1). The impugned order merely records that the seniority list despite repeated requests has not been furnished by the Committee of Management. The same is erroneous as the power under sub-Section (2) of Section 18 can be exercised only when the Management fails to promote the senior most teacher, which is not the case in the present scenario where the Management had sent a request for attestation of signatures of the petitioner. The order is further bad in law, inasmuch as, while deciding the seniority, the principle as laid down in Regulation 3(bb) read with Regulation 3(g) have been completely overlooked by the DIOS as he has determined the seniority based upon the date of taking charge, which is neither contemplated nor provided for either under Regulation 3 (bb) or the Regulation 3(g). Admittedly the petitioner is senior to the respondent no.7 in terms of the age, the appointment of the petitioner in the L.T. Grade being prior in point of time than the respondent no.7 and both the petitioner and the respondent no.7 were promoted on the same date to the post of lecturer i.e. on 13.03.2012, thus, these aspects ought to have been considered, even if, for the sake of argument, it is presumed that the DIOS has passed the order under Section 18(2) which clearly has not been done. The order being contrary to the mandate of Section 18(1), 18(2) and in complete violation of the mandate of provisions of Regulation 3

(bb) and Regulation 3 (g) of Chapter-II cannot be sustained and is quashed.

20. The matter is remitted to the DIOS to pass an order on the request made by the Committee of Management with regard to the attestation of signatures.

21. The respondent no.7 would be at liberty to challenge any seniority list sent by the Management in terms of the powers of appeal conferred under Regulation 3(f) of the Chapter-II, if he is so advised.

22. Needless to say that the final order passed on a challenge in appeal, if any, shall govern the issue with regard to the appointment of the ad hoc Principal in future. The DIOS shall pass fresh orders as directed above within a period of two weeks.

23. In the meanwhile, the petitioner, who is prima facie senior to the respondent no.7 shall continue to work as officiating Principal till the fresh order is passed as directed above.

24. In view above, the writ petition stands *allowed*.

(2023) 9 ILRA 382
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.08.2023

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE SYED QAMAR HASAN RIZVI, J.

Writ-C No. 6637 of 2019

Anil Kumar Sharma & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
 Sri Atul Srivastava

Counsel for the Respondents:
 C.S.C.

Held –

Where the report of illegal soil excavation was made ex parte without presence of the petitioner or independent witnesses and where the excavation was admittedly less than two meters in depth, no offence of illegal mining was made out in light of the Government Order dated 24.12.2012. The said G.O. clarifies that manual digging not exceeding two meters in depth does not amount to mining operation. Further, petitioner being a farmer had only levelled the field for irrigation purposes. Authorities acted arbitrarily and in violation of natural justice. Orders of District Magistrate and Commissioner as well as the Revisional Authority quashed.

Case Law Discussed:

Ramvir Singh Vs St. of U.P. & ors., 2016 (132) RD 121

Key Words –

Illegal excavation - Soil levelling by farmer - Government Order dated 24.12.2012 - No excavation beyond two meters - Natural justice - Inspection without notice or witnesses - Penalty - Arbitrary action - Quashing of proceedings.

Law Point –

Manual soil digging for agricultural land levelling not exceeding two meters in depth is not mining under U.P. Minor Minerals Rules, in view of G.O. dated 24.12.2012. Action without proper inspection in presence of affected party or independent witnesses violates principles of natural justice.

(Delivered by Hon'ble Syed Qamar Hasan Rizvi, J.)

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

2. Upon an inspection being done by the Lekhpal on 27.03.2017 a report was submitted by him to the Sub-Divisional Magistrate, who in his turn forwarded the same to the Mining Authorities by a communication dated 06.04.2017. Thereafter, the prescribed authority (Mines) on behalf of the District Magistrate, Shamli issued a show cause notice to the petitioners to show cause as to why royalty and fine totalling Rs. 3,94,000/- may not be charged from them, for excavating 2050 cubic metre of soil illegally, .

3. The petitioners replied to the show cause notice on 22.04.2017 stating therein that the petitioners, who were the owners of the plot in question namely Plot No. 520 of Village Kaidi, Tehsil & District Shamli had never excavated any soil from the plot in question and that they had only tried to level their plot of land for irrigation purposes and they had further submitted through the said reply that someone had maliciously made a complaint against the petitioners and therefore, had prayed that the notice be withdrawn.

4. However, on 20.05.2017, the District Magistrate- Shamli concluded that the soil had been excavated and fastened the liability of Rs. 3,94,000/- on the petitioners.

5. Aggrieved by the order of the District Magistrate (respondent no. 3) dated 20.05.2017, the petitioners preferred an appeal under Section 77 of the U.P. Miner Minerals (Concession) Rules, 1963 before the Commissioner (respondent no. 2) which was partly allowed vide order dated 5.10.2017 to the extent that the penalty of Rs. 25,000/- was reduced to 10,000/-. The petitioners preferred an application for the recall of the aforesaid order dated

5.10.2017 which was rejected by the respondent no. 2 vide order dated 10.12.2017. Not being satisfied with the aforesaid orders, the petitioners preferred a revision before the State Government which was finally decided vide order dated 18.12.2018.

6. It may be noted that at the appellate stage the penalty which was earlier imposed by the District Magistrate was reduced from Rs. 25,000/- to Rs. 10,000/-. Further when the petitioners had filed a revision, the penalty portion had been done away with.

7. However, since the petitioners were aggrieved by the order by which it was found that the petitioners had illegally excavated, they filed the instant writ petition.

8. Learned counsel for the petitioners states that the report of the Lekhpal, which was the foundation of the case and on the basis of which the notice was issued, was an absolutely ex-parte report. Neither were the petitioners present at the time of the preparation of the report nor was any independent witness present.

9. Learned counsel for the petitioners relying upon a Government Order dated 24.12.2012 has further stated that if the digging of the soil is not more than two meters in depth then it would not be said that there was any mining operation done.

10. Learned counsel for the petitioner has submitted that when the Government Order had provided that digging had to be of more than two meters deep for the purposes of bricklin then definitely it would hold good for the ordinary farmers and therefore the Government Order would

apply to the petitioners who were only found digging soil / earth just to level the field for irrigation purpose.

इस संबंध में मुझे यह कहने का निर्देश हुआ है की ईट भट्टों के संचालन के संबंध में उपर्युक्तानुसार आवश्यक कार्यवाही करने का कष्ट करें।

11. Since the learned counsel for the petitioner has relied upon the Government Order dated 24.12.2012, the same is being reproduced herein under:

भवदीय,
विवेक वार्णोय
विशेष सचिव

"प्रेषक
संख्या 3514/86-2012.235/2010

विवेक वार्णोय
विशेष सचिव
उत्तर प्रदेश शासना
सेवा में,

1. निदेशक भूतत्व एवं खनिकर्म, 30 प्र 0 लखनऊ।
2. समस्त जिलाधिकारी।
3. समस्त मण्डलायुक्त।

भूतत्व एवं खनिकर्म अनुभाग: लखनऊ दिनांक 24 दिसम्बर, 2012

विषय: उत्तर प्रदेश खनिज परिहार पैटीसर्वाँ संशोधन नियमावली, 2012 के समबन्ध में

महोदय,

अवगत कराना है कि उपर्युक्त संशोधन के अंतर्गत ईट भट्टों के संचालन में पर्यावरण स्वच्छता प्रमाण पत्र की बाध्यता को समाप्त किये जाने के दृष्टिगत संशोधन नियमावली के नियम -3 में स्पष्टीकरण तथा नियम 21-1 के बाद उप नियम-1-क निम्नवत जोड़ दिया गया है।

1. स्पष्टीकरण:- ईट बनाने हेतु हस्तचालन से खुदाई द्वारा अथवा हस्तचालन से सामान्य मिट्टी को निकालने की क्रिया खनन संक्रियाओं के अंतर्गत नहीं आयेगी जब तक की खनन स्थल की गहराई ०२ मीटर से अधिक न हो।

2. 1-क नियम-3 में किसी बात के प्रतिकूल होते हुए भी ईट भट्टा मालिकों को नियमावली की प्रथम अनुसूची में तत्समय विनिर्दिष्ट दरों पर स्वामित्व का भुगतान होगा।

12. In support of his case, learned counsel for the petitioners has also relied upon a judgment passed by this Court in the case of **Ramvir Singh Vs. State of U.P. & 2 others**, reported in **2016 (132) RD 121**.

13. Learned counsel for the petitioners has stated that in his reply to the notice the petitioner had stated that the petitioners had never dug any mineral and infact they had only levelled their plots of land bearing Khasra No. 520 measuring area 0.738 hectare situated in village Kaidi, District Shamli for the purposes of proper irrigation.

14. Learned standing counsel in reply however has submitted that since the authorities had found that there was digging of minerals the only option with them was to take the price of the minerals; royalty and the penalty.

15. Learned standing counsel has stated that the Government Order dated 24.12.2012 was with regard to the digging for the purposes of a bricklin and the petitioners would not draw any benefits from it.

16. Learned standing counsel has also relied upon a Government Order dated 18.12.2020 and has stated that before the mineral 'mud' was being removed the petitioner ought to have applied online.

17. Having heard the learned counsel for the petitioners and learned Standing Counsel, Sri Ankur Tandon, the Court is of the view that at the time when the inspection was done, the petitioners ought to have been informed and if the petitioners were not available then the inspection ought to have been done in the presence of two independent witnesses. Further, we conclude that the petitioners would also be benefited by the Government Order dated 24.12.2012. Though it applies vis-a-vis bricklin owners but we are of the view that when the intention of the government was to see that charge for digging of soil had to be imposed if the digging was more than two meters deep then definitely the petitioners would be given the benefit of Government Order dated 24.12.2012. Never mind if they were farmers.

18. We find that the petitioners get support from this Government Order as the petitioners definitely had not dug below two meters.

19. We also find that the case of the petitioners is covered by the law as has been laid down in the case of *Ramvir Singh* (supra). The petitioners at the time of the inspection were not informed about the same and also the petitioners had not dug anything below two meters. The writ petition thus deserves to be allowed.

20. Facts culled out from the pleadings are that the petitioner being a poor farmer has been unnecessarily harassed and the action to hold the petitioners guilty of doing unlawful excavation is arbitrary and unwarranted.

21. Having regard to the facts and circumstances of the case, the order dated 20.5.2017 passed by District Magistrate,

Shamli (respondent no. 3), the orders dated 5.10.2017, 18.12.2017 passed by Commissioner, Saharanpur Division, Saharanpur (respondent no. 2) and the order dated 11.12.2018 passed by Special Secretary, Mines and Minerals, Lucknow (respondent no. 1) are quashed and are set aside.

22. For the reasons aforesaid, the writ petition is allowed.

(2023) 9 ILRA 385

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 24.08.2023

BEFORE

THE HON'BLE RAJAN ROY, J.

THE HON'BLE SAURABH LAVANIA, J.

Writ-A No. 8329 of 2019

Ajai Kumar Singh ...Petitioner
Versus
State Public Services Tribunal, Lko. & Ors.
...Respondents

Counsel for the Petitioner:

Rama Kant Dixit, Anand Mani Tripathi, Rekha Srivastava

Counsel for the Respondents:

C.S.C.

A. Service Law – UP Government Servant (Discipline and Appeal) Rules, 1999 – Rule 11 – Censure entry – Statutory appeal was filed beyond period of 90 days as prescribed under R. 11 – No provision of condonation of delay to file appeal – Effect – Appeal was summarily rejected – Validity challenged – Held, Appellate authority rightly rejected the appeal summarily being barred by limitation because the Appellate Authority u/R 11 has no power to condone the delay. (Para 21)

B. Service Law – UP Public Service (Tribunal) Act, 1976 – Sections 4, 5 & 6 – UP Government Servant (Discipline and Appeal) Rules, 1999 – Rule 11 – Censure entry – Claim petition against the punishment was filed before Tribunal – Limitation of one years is prescribed – Before it, the statutory appeal was summarily rejected for being barred by limitation u/R 11 – Computation of limitation – Held, it was a case where the appeal was not filed within the limitation prescribed under Rule 11 thus it was not in accordance with Rules, consequently, the period of pendency of appeal would neither stop nor extend the limitation and it will not be excluded from such computation and limitation will have to be calculated from the date of the punishment order i.e. 20.03.2015 – Held further, the claim petition filed in the year 2017 was clearly barred by limitation which was one year from 20.03.2015. [Para 22 (iv) and 23]

Writ petition dismissed. (E-1)

(Delivered by Hon'ble Rajan Roy, J. &
Hon'ble Saurabh Lavania, J.)

(C.M.Application No.54552 of 2019)

1. Heard.

2. Present review application has been filed by review-applicant under Rule 12, Chapter V of Allahabad High Court Rules, 1952 read with Section 114/151 of C.P.C. in regard to judgment and order dated 28.03.2019, whereby this Court dismissed the petition challenging the order dated 27.02.2019 passed by the U.P. State Public Services Tribunal, U.P., Lucknow, (hereinafter referred to "Tribunal"), constituted under U.P. Public Service (Tribunal) Act, 1976 (hereinafter referred to "Act of 1976").

3. The submission of learned counsel for the review-applicant is that from the date of order dated 25.01.2017 passed by the Appellate authority on an appeal filed by the petitioner-applicant under Rule 11 of U.P. Government Servant (Discipline and Appeal) Rules, 1999 (hereinafter referred to "Rules of 1999") challenging the order of punishment dated 20.03.2015, the claim petition was within time, as such, it ought to have been decided on merits and the order of Tribunal dated 27.02.2019 was liable to be interfered with by this Court but this Court dismissed the writ petition, as such, the instant review application is liable to be allowed.

4. In support of his contentions, Sri Tripathi has placed before this Court the relevant provisions of Rules of 1999 and the Act of 1976 including Rule 11 of the Rules of 1999 and Sections 4, 5 and 6 of the Act of 1976. Except this, nothing has been argued.

5. By the order dated 27.02.2019, Tribunal dismissed the petition finding it to be barred by limitation under Section 5 of the Act of 1976.

6. Considered the submissions made by the learned counsel for the review-applicant and perused the record.

7. Brief facts, which are required for final disposal of present review application are that admittedly, disciplinary proceedings were initiated against the review-applicant in terms of the Rules of 1999 and the procedure, which was adopted in the disciplinary proceedings, as appears from the record, was as provided under Rule 7 of the Rules of 1999.

8. By the punishment order dated 20.03.2015, review-applicant was awarded censure entry and his integrity was doubted. Being aggrieved, he preferred an appeal dated 11.04.2016, which was rejected being barred by limitation vide order dated 25.01.2017.

9. Present matter revolves around the Rules of 1999 particularly Rule 11 and Section(s) 4, 5 and 6 of the Act of 1976, as the counsel for the review-applicant did not place any other Act or Rules before this Court in support of his case.

10. It would be apt to refer here that Rule 11 of the Rules of 1999 provides remedy of appeal, which being relevant on reproduction reads as under:-

"11. Appeal.-(1) Except the orders passed under these rules by the Governor, the Government servant shall be entitled to appeal to the next higher authority from an order passed by the Disciplinary Authority.

(2) The appeal shall be addressed and submitted to the Appellate Authority. A Government servant shall preferring to an appeal shall do so in his own name. The appeal shall contain all material statements and argument relied upon by the appellant.

(3) The appeal shall not contain any intemperate language. Any appeal, which contains such language may be liable to be summarily dismissed.

(4) The appeal shall be preferred within 90 days from the date of communication of impugned order. An appeal preferred after the said period shall be dismissed summarily."

11. A perusal of Sub-Rule 4 of Rule 11 of the Rules of 1999 shows that the appeal should be preferred within a period

of 90 days' from the date of communication of an order and it further, shows that the appeal preferred after the said period shall be dismissed summarily. The power to condone the delay in filing the appeal to the Appellate authority has not been indicated in the Rule, quoted above. On the other hand, it provides that an appeal preferred after the prescribed period of limitation shall be dismissed summarily. Moreover, no provision has been brought to the notice of this Court under which the Appellate authority has power to condone the delay in preferring the appeal.

12. Section 5 of the Act of 1976 was taken note of by this Court while passing the judgment dated 28.03.2019, under review. The said part of judgment, under review, reads as under:-

""Section 5 (1) (b) of the U.P. Public Services (Tribunal) Act, 1976 provides the period of limitation for filing a claim petition before the Tribunal, which reads as under:

"(1) (b). The provisions of the Limitation Act, 1963 (Act 36 of 1963) shall mutatis mutandis apply to reference under Section 4 as if a reference were a suit filed in civil court so, however, that --

(i) notwithstanding the period of limitation prescribed in the Schedule to the said. Act, the period of limitation for such reference shall be one year;

(ii) in computing the period of limitation, the period beginning with the date on which the public servant makes a representation or prefers an appeal, revision or any other petition (not being a memorial to the Governor) in accordance with the rules or orders regulating his conditions of service, and ending with the date on which such public servant has knowledge of the final order passed on such

representation, appeal, revision or petition, as the case may be, shall be excluded."

*In the case of **Karan Kumar Yadav Vs. U.P. State Public Services Tribunal and others** reported in 2008 (2) AWC 1987 All, it has been held by the Division Bench of this Court that the application for condonation of delay in filing a claim petition would not be maintainable nor entertainable. Relevant portion of the it is reproduced below:*

"Section 5(1)(b) aforesaid lays down the applicability of Limitation Act and confines it to the reference under Section 4 of the Act, 1976 as if a reference was a suit filed in the Civil Court . This leaves no doubt that a claim petition is just like a suit filed in the Civil Court and in the suit the period of limitation cannot be extended by applying the provisions of Section 5 of the Limitation Act. Sub clause (i) of Section 5 of the Tribunal's Act, specifically provide limitation for filing the claim petition i.e. one year and in sub clause (ii) the manner in which the period of limitation is to be computed has also been provided.

Section 5 of the Limitation Act reads as under:-

Extension of prescribed period in certain cases. -- Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure 1908 (5 of 1908), may be admitted after the prescribed period, if the appellant or the applicant satisfies the court that he had sufficient case for not preferring the appeal or making the application within such period.

Explanation:- The fact that the appellant or the applicant was misled by any order, practice or judgement of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this Section.

Its applicability is limited only to application/appeals and revision. It hardly requires any argument that section 5 does not apply to original suit, consequently it would not apply in the claim petition. Had the legislature intended to provide any extended period of limitation in filing the claim petition, it would not have described the claim petition as a suit filed in the Civil Court under section 5(1)(b) and/or it would have made a provision in the Act giving power to the Tribunal, to condone delay, with respect to the claim petition also.

In view of the aforesaid provision of the Act and the legal provision in respect to the applicability of Section 5 of the Act, it can safely be held that the application for condonation of delay in filing a claim petition would not be maintainable nor entertainable.""

13. Section 5(1)(b)(ii), which form part of above quoted portion of the judgment dated 28.03.2019, says that for computing the period of limitation provided under the Act of 1976 challenging the order(s) of punishment passed in the disciplinary proceedings, which is 'one year', the period beginning with the date on which the public servant makes a representation or prefers an appeal, revision or any other petition (not being a memorial to the Governor), in accordance with the rules or orders regulating his conditions of service, and ending with the date on which such public servant has knowledge of the final order passed on such representation, appeal, revision or petition, as the case may be, shall be excluded.

14. The expression "in accordance with rules or orders regulating his conditions of service" in the context of present case is relevant. In view of this expression, a representation/appeal/revision

or any other petition for the purposes of seeking benefit of Section 5(1)(b)(ii) ought to have been filed strictly in terms of Rules or Orders, as the case may be, applicable, which in the instant case are the Rules of 1999.

15. To the view of this Court, Sub-section(s) 5 and 6 of Section 4 of the Act of 1976 are also relevant and being so the same are extracted hereinunder:-

"(5) The Tribunal shall not ordinarily admit a reference unless it is satisfied that the public servant has availed of all the remedies available to him under the relevant service rules, regulations or contract as to redressal of grievances.

(6) For the purpose of sub-section (5) a public servant shall be deemed to have availed of all the remedies available to him if a final order has been made by the State Government, an authority or officer thereof or other person competent to pass such order under such rules or regulations or contract rejecting any appeal preferred or representation made by such public servant in connection with the grievance:

Provided that where no final order is made by the State Government, authority officer or other person competent to pass such order with regard to the appeal preferred or representation made by such public servant within six months from the date on which such appeal was preferred or representation was made, the public servant may, by a written notice by registered post, require such competent authority to pass the order and if the order is not passed within one month of the service of such notice, the public servant shall be deemed to have availed of all the remedies available to him."

16. Sub-section 6 of Section 4 of the Act of 1976 provides that where no final order is made by the State Government, authority, officer or other person competent to pass such order with regard to the appeal preferred or representation made by such public servant within six months from the date on which such appeal was preferred or representation was made, the public servant may, by a written notice by registered post, require such competent authority to pass the order and if the order is not passed within one month of the service of such notice, the public servant shall be deemed to have availed of all the remedies available to him.

17. Thus, if the appeal is not decided in terms of Sub-section 6 of Section 4 of the Act of 1976 challenging the order of punishment then the concerned public servant can approach the Tribunal challenging the punishment 'order' passed by Disciplinary Authority regarding which an appeal was filed, which in the instant case was not filed strictly as per Rule 11.

18. From a conjoint reading of Section 4 and 5 and Sub-section(s) 5 & 6 of Section 4, it appears that an order of punishment passed by Disciplinary Authority can be challenged directly before the Tribunal, if statutory appeal or representation filed within time is not decided within a period of six months. However, for approaching the Tribunal in such a situation, there is a condition according to which a written notice to competent/Appellate Authority is required to pass the order and if the order is not passed within one month of service of notice, then only aggrieved person can approach the Tribunal. In this case, the appeal itself was filed beyond period of 90

days prescribed under Rule 11 of the Rules of 1999.

19. Now, the first question is as to whether the appeal was rightly rejected by the Appellate Authority vide order dated 25.01.2017.

20. In the instant case, the appeal was not filed strictly in terms of Rule 11 of the Act of 1999 by the review-applicant. In other words, the appeal was filed by the review-applicant after expiry of prescribed period of limitation i.e. 90 days and the same was summarily dismissed in terms of Rule 11. At the cost of repetition, it needs to be mentioned that in the Rules there is no provision under which the Appellate Authority can condone the delay in preferring the appeal.

21. This Court finds that the Appellate Authority rightly rejected the appeal summarily being barred by limitation because the Appellate Authority under Rule 11 of the Rules of 1999, as observed hereinabove, has no power to condone the delay in preferring the appeal, which should be filed within the prescribed period of limitation i.e. 90 days.

22. The next question to be dealt with by this Court is whether the Tribunal, despite the claim petition being filed within limitation from the date of order of Appellate Authority dated 25.01.2017, rightly rejected the claim petition being barred by limitation. In this regard, this Court is of the view that the Tribunal has rightly rejected the claim petition being barred by limitation for the following reasons:-

(i) In this case, the appeal was filed after about more than one year from the

date of order of Disciplinary Authority dated 20.03.2015 i.e. on 11.04.2016 which was in violation of Rule 11 of Rules of 1999. Appellate authority does not have any power to condone such delay.

(ii) Vide order dated 25.01.2017, the appeal was rejected being barred by limitation, rightly so.

(iii) According to Section 5(1)(b)(ii) of the Act of 1976, if a statutory representation or appeal or revision or any other petition is preferred strictly in accordance with the applicable Rules/Government Orders, then in that eventuality alone, the period during which the said representation/appeal/revision was pending can be excluded for the purposes of computing the limitation to approach the Tribunal, which as per Section 5(1)(b)(i) is one year and the Division Bench of this Court has already observed that no application for condonation of delay would be maintainable to condone the delay in approaching the Tribunal challenging the order of punishment passed by the Disciplinary Authority or Revisional Authority under the Rules and as such, in view of limitation i.e. one year provided under Section 5(1)(b)(i), the claim petition challenging the main order dated 20.03.2015 which was not affirmed on merits by the appellate order dated 25.01.2017 was neither entertainable nor maintainable in the year 2017 before the Tribunal.

(iv) It is trite that once the limitation period starts it cannot be stopped by any force except by the force of law. In the instant case, the limitation to approach the Appellate authority concerned started on 20.03.2015 (date of order passed by the Disciplinary Authority) and the appeal under the law (Rule 11) was filed after about more than one year, beyond the prescribed period i.e. 90 days from the date

of order which was dismissed on 25.01.2017 being barred by limitation, as such, the period between 20.03.2015 and 25.01.2017 cannot be considered excluded in terms of Section 5(1)(b)(ii) for approaching the Tribunal so far as challenge to the punishment order dated 23.03.2015 is concerned. Thus the claim petition so far as it challenged the punishment order dated 20.03.2015 was clearly barred by limitation. It is not a case where the punishment order on being challenged in appeal under Rule 11 of the Rules of 1999 was affirmed partially or wholly in which case the period of pendency of appeal would have to be excluded for computing limitation for fresh claim petition, but, it was a case where the appeal was not filed within the limitation prescribed under Rule 11 thus it was not in accordance with Rules, consequently, the period of pendency of appeal would neither stop nor extend the limitation and it will not be excluded from such computation and limitation will have to be calculated from the date of the punishment order i.e. 20.03.2015.

23. So far as challenge to the said order is concerned. It being so the claim petition filed in the year 2017 was clearly barred by limitation which was one year from 20.03.2015, so far as challenge to the appellate order dated 25.01.2017 is concerned the claim petition was within limitation but its scope was confined only to the validity of the appellate order which was not on merits but only on the point of limitation. Thus, the Tribunal at best could have gone into the question as to whether the appeal was rightly dismissed as barred by limitation or not, nothing more.

24. We have already held that the appellate order did not suffer from any

error and the tribunal rightly held the appeal to be barred by limitation. Thus, it rightly did not interfere with the appellate order.

25. Thus, the Tribunal, in the opinion of this Court, upon due consideration rightly declined to entertain the claim petition preferred by review-applicant so far as challenge to order dated 20.03.2015 is concerned and thereafter, this Court dismissed the petition upholding the view of the Tribunal. Now, this review application has been filed, which, to the view of this Court, for the reasons aforesaid, is completely mis-conceived as there is no error apparent on the face of the record nor any valid ground for review of judgment dated 28.03.2019 and it is accordingly **dismissed**. Costs made easy.

(2023) 9 ILRA 391

**ORIGINAL JURISDICTION
CIVIL SIDE**

DATED: LUCKNOW 24.08.2023

BEFORE

THE HON'BLE IRSHAD ALI, J.

Writ-A No. 8466 of 1989

Ashok Singh & Ors.	...Petitioners
Versus	
D.I.O.S.	...Respondent

Counsel for the Petitioners:

H.S. Sahai, Girish Chandra Verma, H.G.S. Parihar, M.S. Rathore, Priti Saxena. U.S. Sahai

Counsel for the Respondents:

C.S.C., I.P. Shukla, O.P.M. Tripathi

Service Law - U.P. Secondary Education Service Commission (Removal of Difficulties) Order, 1991 - Section 2 - U.P Secondary Education Services Selection Boards Act, 1982 - Sections 18, 33-A(1-C) - Termination of ad hoc appointment -

Two posts of Assistant Teachers (L.T. Grade) fallen vacant in institution and Manager of College informed DIOS with request to fill up vacancies or to issue directions, however, DIOS neither appointed any reserve pool teacher nor took any steps, Committee of Management made ad hoc appointments, issued notification and after considering merit of applicants, found petitioner No.1 suitable, one post was filled up by candidate of Scheduled Caste Category, petitioner No.2 selected for said post, resolution passed, DIOS accorded approval - After receiving complaints, DIOS issued direction to Accounts Officer and Manager of Committee of Management to stop payment of salary, no information was given to Committee of Management by DIOS - No opportunity of hearing given to person in whose favour earlier order passed - Held, no fraud or misrepresentation proved against petitioners, order stopping salary appears to be arbitrary, without jurisdiction, liable to be quashed. (Para 19, 20, 21)

Writ Petition allowed. (E-13)

List of Cases cited:

1. Tarlochan Dev Sharma Vs St. of Punj. & ors.; (2001) 6 SCC 260
2. Gauri Shankar Rai & ors. Vs Dr. Ram Lakhan Pandey, DIOS, Ballia & ors.; 1984 UPLBEC 166
3. Prabhu Dayal & ors. Vs District Inspector of Schools, Firozabad & ors.; Special Appeal No.461 of 1993 decided on 11.08.1994
4. Manohar Lal (Dead) by LRs, Vs Ugrasen (Dead) By LRs & ors.; Civil Appeal No.973 of 2007 (with Civil Appeal No.794 of 2007) decided on 03.06.2010

(Delivered by Hon'ble Irshad Ali, J.)

1. Heard Sri G.C. Verma, learned counsel for the petitioners and learned Standing Counsel for the respondent No.1

and Sri Diwakar Singh Kaushik, learned counsel for respondent No.2.

2. The present writ petition has been preferred before this Court seeking a writ, order or direction in the nature of certiorari quashing the impugned orders dated 22.07.1988 (Annexure-9) as well as order dated 19.09.1989 (Annexure-11) with a further prayer to issue a writ, order or direction in the nature of mandamus commanding the respondents to pay salary to the petitioners since the date of their joining. A further prayer has been made to treat the petitioners to be substantively appointed on the post of Assistant Teacher (L.T. Grade) with all consequential benefits.

3. Brief facts giving rise to the present writ petition are as under:

a.	The Rashtriya Intermediate College, Tinduwai Kala, District Faizabad (for short, 'College') is a recognized and added institution and the provisions of U.P. Intermediate Education Act, 1921 and the allied acts applies to the services of teachers and other employees of the College.
b.	One Sri Ram Dutt Singh, Lecturer in the College on attaining the age of superannuation retired from service on 30.06.1987 resulting a post of Lecturer fallen vacant in the College.
c.	Another Teacher (L.T. Grade), namely, Sri Shanker Tripathi also retired from service on attaining the age of superannuation on 30.06.1986 resulting a post of Assistant Teacher (L.T. Grade) fallen vacant in the College.
d.	Upon retirement of Sri Ram Dutt

	Singh, an Assistant Teacher (L.T. Grade), namely, Sri Arjun Prasad Pandey being eligible was promoted in Lecturer grade and as such, another post in Assistant Teacher (L.T. Grade) fallen vacant in the College.
e.	Accordingly, two vacancies occurred in L.T. Grade in the College and ad hoc appointments were to be made to fill up the vacancies.
f.	The Manager of the College wrote letter dated 24.07.1987 to the District Inspector of Schools (DIOS) apprising him the affairs with a request to fill up the vacancies or to issue directions for filling up the said posts.
g.	The DIOS neither appointed any reserve pool teacher nor took any steps for filling up those two vacancies in L.T. Grade and as such, looking to the interest of the students, the Committee of Management proceeded to make ad hoc appointments to fill up those vacancies.
h.	The Committee of Management notified two posts for filling up two vacancies of Assistant Teachers (L.T. Grade) vide notification dated 20.05.1988 and after considering the merit of the applicants, the Committee of Management found petitioner No.1, namely, Ashok Singh at first place and since one post was to be filled up by the candidate of Scheduled Caste Category, petitioner No.2, namely, Subhash Chand, who was sole candidate belonging to Scheduled Caste Category, was selected for the said post. A resolution in this regard was passed on 12.06.1988.
i.	Vide order dated 04.07.1988, the

	DIOS accorded approval to the ad hoc appointment of the petitioners.
j.	After grant of approval from the DIOS, the Committee of Management issued appointment letters to the petitioners on 07.08.1988 and in pursuance thereof, the petitioners joined their duties as Assistant Teachers (L.T. Grade) in the College on 08.07.1988 and submitted their joining. Since then, they are regularly functioning as Assistant Teachers (L.T. Grade).
k.	Vide letter dated 22.07.1988, the DIOS issued direction to the Accounts Officer and Manager of Committee of Management that since some complaints were received against the petitioners, therefore, payment of salary could not be made to them and the same requires investigation.
l.	Since passing of aforesaid impugned order, one year and two months have lapsed but no inquiry has been made in the matter.
m.	For redressal of their grievances in regard to payment of salary, the petitioners made a representation on 23.09.1989, which is lying pending consideration and no order whatsoever has been passed till date.
n.	Hence, the present writ petition has been preferred before this Court.

4. Submission of learned counsel for the petitioners is that while passing the impugned order, no opportunity of hearing was afforded to the petitioners. He submitted that once the approval was accorded to appointment of the petitioners and they are continuing on their respective posts, respondent No.1 could not stop

payment of salary to them till conclusion of the inquiry.

5. He next submitted that Section 33-A(1-c) was inserted by U.P. Act No.25 of 1991 w.e.f. 06.04.1991, which provides that the teachers appointed either by promotion or by direct recruitment before 31.07.1988 on ad hoc basis against substantive vacancy in accordance with Section 18 possessing requisite qualification or is exempted from such qualification, shall, with effect from date of commencement of U.P. Secondary Education Service Commission Selection Board (Amendment) Act, 1991 shall be deemed to have been appointed in substantive capacity providing that such teachers should be continuously serving in the institution from the date of commencement of the Act. The petitioners were appointed prior to 31.07.1988 and were continuously working on the date of commencement of U.P. Act No.26 of 1991 w.e.f. 06.04.1991, therefore, they are deemed to have been substantively appointed on the post of Assistant Teachers (L.T. Grade).

6. He further submitted that there has been no power vested in the DIOS to revoke / review its own order, therefore, the impugned order dated 19.09.1989 is illegal and without jurisdiction. He submitted that while passing the said order, no opportunity of hearing was provided to the petitioner, therefore, the order is violative of principles of natural justice.

7. He lastly submitted that Regional Level Committee has considered the matter of appointment of petitioner No.1 on 15.12.2022 and regularized his service under Section 33-A(1-C) of Act of 1982 and in pursuance thereof, the Joint Director

of Education issued an order on 17.12.2022 in regard to same. However, the matter of regularization of service of petitioner No.2 is pending consideration before the Regional Level Committee and no decision has been taken till date. In support of his submissions, he placed reliance upon following judgments:

a) Tarlochan Dev Sharma Vs. State of Punjab and others; (2001) 6 SCC 260.

b) Gauri Shankar Rai and others Vs. Dr. Ram Lakhnan Pandey, DIOS, Ballia and others; 1984 UPLBEC 166.

c) Prabhu Dayal and others Vs. District Inspector of Schools, Firozabad and others; Special Appeal No.461 of 1993 decided on 11.08.1994.

d) Manohar Lal (Dead) by LRs, Vs. Ugrasen (Dead) By LRs and others; Civil Appeal No.973 of 2007 (with Civil Appeal No.794 of 2007) decided on 03.06.2010.

8. On the other hand, learned Standing Counsel for the respondent No.1 submitted that as the ad hoc appointment of the petitioners was against the rules and regulations, therefore, it is incumbent upon the respondent to stop salary of the petitioner. He submitted that no requisition to U.P. Secondary Education Service Commission was submitted for so called vacancies in L.T. Grade, therefore, there was no occasion for the DIOS to take any action regarding filling up the posts and the action taken by the respondent No.2 - Committee of Management was illegal.

9. He next submitted that the inquiry so called has been completed and as a result, rejecting the approval to the said ad hoc appointments of petitioners has been communicated to respondent No.2.

10. He further submitted that appointment of the petitioners was not made in accordance with law, therefore, there was no occasion to afford any opportunity of hearing to them before passing the impugned order.

11. He submitted that, as the vacancies were not communicated to the Commission before making the ad hoc appointments of the petitioners, the provisions of Section 2 of U.P. Secondary Education Service Commission (Removal of Difficulties) Order, 1991 and Section 18 of Act of 1982 are not attracted to present facts and circumstances of the case.

12. He next submitted that only the selection for ad hoc appointment of the petitioners was approved by respondent No.1 and once the ad hoc appointment was found illegal, there is no question for payment of salary and requested that the writ petition being misconceived, is liable to be dismissed.

13. However, learned counsel for respondent No.2 submitted that previous Manager of the Committee of Management of the Institution, namely, Sri Tej Pratap Singh expired on 20.12.1988 and present Manager, namely, Sri Ram Lakhan Misra was appointed in his place vide resolution dated 29.12.1988. One Sri Jeet Bahadur Singh, previous Principal of the institution retired on 30.06.1988 and the present Principal, namely, Sri Sheo Kumar Misra took over the charge as officiating Principal on 30.06.1988. However, at the time of handing over the charge, the then Principal has not handed over the agenda register and proceedings of register of Committee of Management of the institution, therefore, there is no record of proceedings of committee of management available with the institution.

14. However, on the basis of statement of fact made in paragraph 15, 16, 21, 23, 25, 28 & 34, he submitted that the petitioners are teaching on the post of ad hoc Lecturer since 08.07.1988 on the basis of approval granted by the DIOS on 04.07.1988. He submitted that the salary of the petitioners has been stopped vide order dated 22.07.1988 passed by the DIOS and no prior information in this regard was given to the respondent No.2. He further submitted that respondent No.2 vide letter dated 19.10.1989 has informed respondent No.1 in regard to order dated 06.10.1989 passed by this Hon'ble Court, whereby direction was issued for payment of salary to the petitioners on the post, which they are working.

15. I have considered the submissions advanced by learned counsel for the parties and perused the material on record as well as the judgments relied upon by learned counsel for the petitioners.

16. To resolve the controversy involved in the matter, relevant paragraphs of the judgments relied upon by learned counsel for the petitioners are being extracted herein below:

a) Tarlochan Dev Sharma (Supra):

"16. In the system of Indian Democratic Governance as contemplated by the Constitution senior officers occupying key positions such as Secretaries are not supposed to mortgage their own discretion, volition and decision making authority and be prepared to give way or being pushed back or pressed ahead at the behest of politicians for carrying out commands having no sanctity in law. The Conduct Rules of Central Government Services command the civil servants to maintain at all times absolute integrity and

devotion to duty and do nothing which is unbecoming of a Government servant. No Government servant shall in the performance of his official duties, or in the exercise of power conferred on him, act otherwise than in his best judgment except when he is acting under the direction of his official superior. In Anirudhsinhji Jadeja (1995) 5 SCC 302, this court has held that a statutory authority vested with jurisdiction must exercise it according to its own discretion; discretion exercised under the direction or instruction of some higher authority is failure to exercise discretion altogether. Observations of this court in The Purtabpur Company Ltd., AIR 1970 SC 1896, are instructive and apposite. Executive officers may in exercise of their statutory discretions take into account considerations of public policy and in some context policy of Minister or the Government as a whole when it is a relevant factor in weighing the policy but they are not absolved from their duty to exercise their personal judgment in individual cases unless explicit statutory provision has been made for instructions by a superior to bind them. As already stated we are not recording, for want of adequate material, any positive finding that the impugned order was passed at the behest of or dictated by someone else than its author. Yet we have no hesitation in holding that the impugned order betrays utter non-application of mind to the facts of the case and the relevant law. The manner in which the power under Section 22 has been exercised by the competent authority is suggestive of betrayal of the confidence which the State Government reposed in the Principal Secretary in conferring upon him the exercise of drastic power like removal of President of a Municipality under Section 22 of the Act. To say the least what has been done is not what is expected to be

done by a senior official like the Principal Secretary of a wing of the State Government. We leave at that and say no more on this issue."

b) Gauri Shankar Rai and others (Supra):

"10. Both these points are being dealt with together. The legal position seems indisputable namely that the District Inspector of Schools was not invested either under the U.P. Intermediate Education Act or the Regulations framed thereunder to review an order passed on merits recognising a Managing Committee as a body which is for the time being in effective control of the management of the Institution. As an administrative authority, the District Inspector of Schools, could exercise only such powers and functions as were specifically conferred upon him by the applicable statutes. It is thus apparent that the District Inspector of Schools had no jurisdiction to review the order dated 13-6-1980. The same view has been taken in the case of Jaswant Singh v. The District Inspector of Schools report in 1980 U.P. Local Bodies and Educations Cases 43, in which a Division Bench of this Court held that the District Inspector of Schools after having once passed an order on merits for the limited purpose of performing duties and functions cast upon him under the relevant statutes, recognising any group of individuals as being in effective control of the management, has no jurisdiction to review his order later, unless it is established that the said order was obtained by fraud or misrepresentation. The Division Bench further held that even in cases of fraud or misrepresentation, the District Inspector of Schools must not recall his earlier order without giving opportunity of hearing to the persons in

whose favour the earlier order was passed."

c) Prabhu Dayal and others (Supra):

"3. Under Section 18(1) (b) the appointment can be made if the post of a teacher, which has been notified to the Commission, has remained vacant for more than two months. What is required to be done after two months is the appointment issuing advertisement inviting applications for such appointment within the period of two months, is not prohibited. As the process of selection on the basis of which the appointment is to be made, is likely to take time, there is no prohibition in the law against inviting applications for such appointment even before expiry of two months."

d) Manohar Lal (Dead) by LRs (Supra):

21. In Tarlochan Dev Sharma Vs. State of Punjab & Ors. (2001) 6 SCC 260, this Court, after placing reliance upon a large number of its earlier judgments, observed as under:

"In the system of Indian democratic governance as contemplated by the Constitution, senior officers occupying key positions such as Secretaries are not supposed to mortgage their own discretion, volition and decision-making authority and be prepared to give way or being pushed back or pressed ahead at the behest of politicians for carrying out commands having no sanctity in law. The Conduct Rules of Central Government Services command the civil servants to maintain at all times absolute integrity and devotion to duty and do nothing which is unbecoming

of a government servant. No government servant shall in the performance of his official duties, or in the exercise of power conferred on him, act otherwise than in his best judgment except when he is acting under the direction of his official superior." (Emphasis added)

22. Therefore, the law on the question can be summarised to the effect that no higher authority in the hierarchy or an appellate or revisional authority can exercise the power of the statutory authority nor the superior authority can mortgage its wisdom and direct the statutory authority to act in a particular manner. If the appellate or revisional Authority takes upon itself the task of the statutory authority and passes an order, it remains unenforceable for the reason that it cannot be termed to be an order passed under the Act."

17. On perusal of aforesaid judgment in the case of Gauri Shankar Rai and others (Supra), it is evident that the DIOS was not invested either under the U.P. Intermediate Education Act or the Regulations framed thereunder to review an order passed on merit and notice has been taken of the case of Jaswant Singh v. The D.I.O.S., in which a Division Bench of this Court has held that the DIOS after having once passed an order on merits for the limited purpose of performing duties and functions cast upon him under the relevant statutes, recognizing any group of individuals as being in effective control of the management, has no jurisdiction to review his order later, unless it is established that the said order was obtained by fraud or misrepresentation. It has further been held that in case of fraud or misrepresentation, the DIOS must not recall his earlier order without giving opportunity of hearing to the person in whose favour the earlier order was passed.

18. In the case of **Prabhu Dayal and others (Supra)**, the Court has held that under Section 18(1)(b) the appointment can be made if the post of a teacher, which has been notified to the Commission, has remained vacant for more than two months, what is required to be done after two months is the appointment issuing advertisement inviting applications for such appointment within the period of two months, is not prohibited. As the process of selection on the basis of which the appointment is to be made, is likely to take time, there is no prohibition in the law against inviting applications for such appointment even before expiry of two months.

19. In the case in hand, two posts of Assistant Teachers (L.T. Grade) fallen vacant in the institution and Manager of the College informed the DIOS vide letter dated 24.07.1987 with request to fill up the vacancies or to issue directions for filling up the said posts, however, The DIOS neither appointed any reserve pool teacher nor took any steps for filling up those two vacancies in L.T. Grade and as such, looking to the interest of the students, the Committee of Management proceeded to make ad hoc appointments to fill up those vacancies.

20. The Committee of Management notified two vacancies for the post of Assistant Teachers (L.T. Grade) vide notification dated 20.05.1988 and after considering the merit of the applicants, found petitioner No.1, namely, Ashok Singh at first place and since one post was to be filled up by the candidate of Scheduled Caste Category, petitioner No.2, namely, Subhash Chand, who was sole candidate belonging to Scheduled Caste Category, was selected for the said post and

a resolution in this regard was passed on 12.06.1988 and vide order dated 04.07.1988, the DIOS accorded approval to the ad hoc appointments.

21. After grant of approval by the DIOS, the Committee of Management issued appointment letters to the petitioners on 07.08.1988 and in pursuance thereof, they joined duties as Assistant Teachers (L.T. Grade) in the College on 08.07.1988 and since then, they are regularly functioning as Assistant Teachers (L.T. Grade). However, vide letter dated 22.07.1988, the DIOS issued direction to the Accounts Officer and Manager of Committee of Management that since some complaints were received against the petitioners, therefore, payment of salary could not be made to them as the same requires investigation.

22. However, the Regional Level Committee has considered the matter of appointment of petitioner No.1 on 15.12.2022 and regularized his service under Section 33-A(1-C) of Act of 1982 and in pursuance thereof, the Joint Director of Education issued an order on 17.12.2022, but matter of regularization of service of petitioner No.2 is pending consideration before the Regional Level Committee and no decision has been taken till date.

23. In view of submission advanced by learned counsel for respondent No.2 that no prior information was given to the respondent No.2 by respondent No.1 for stoppage of salary of the petitioners and in view of judgments relied upon by learned counsel for the petitioners in the case of **Gauri Shankar Rai and others (Supra)** and **Prabhu Dayal and others (Supra)**, that the DIOS has no jurisdiction to review

his order later, unless it is established that the said order was obtained by fraud or misrepresentation and in case of fraud or misrepresentation, the DIOS must not recall his earlier order without giving opportunity of hearing to the person in whose favour the earlier order was passed.

24. In the present case, no such fraud or misrepresentation has been proved against the petitioners, therefore, the order stopping salary of the petitioners appears to be arbitrary and without jurisdiction and is liable to be quashed.

25. For the reasons recorded above, the writ petition succeeds and is **allowed**.

26. The impugned orders dated 22.08.1988 & 19.08.1989 are hereby quashed.

27. However, the petitioners are entitled to get salary w.e.f. their date of joining i.e. 08.07.1988, therefore, direction is issued to ensure payment of salary to the petitioners w.e.f. 08.07.1988.

28. It is further directed that the Chairman, Regional Level Committee will pass orders on the matter of regularization of petitioner No.2 pending before him within a period of three months from the date of production of a certified copy of this order.

(2023) 9 ILRA 399
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.07.2023

BEFORE

THE HON'BLE MANJIVE SHUKLA, J.

Writ-A No. 8741 of 2023

Subhash Chand ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Kamal Kumar Keshewani

Counsel for the Respondents:
C.S.C., Sri Ashutosh Mishra, Sri Rajesh Yadav

A. Service Law – Compassionate appointment – Class III/Class IV post – GO dated 04.09.2000 – Time limit for submission of application fixed is five years – Earlier, petitioner's appointment as Assistant Teacher was terminated as he did not passed Teachers Eligibility Test (TET) – Writ against it was dismissed in the light of Hari Shankar's case leaving it open to the petitioner to claim for existing Class III/Class IV post – However, claim of the petitioner for Class III/Class IV post was rejected on the ground of delay of 11 years – Validity challenged – Held, once petitioner submitted application for compassionate appointment immediately after the death of his father, it was obligatory on the part of the authority to offer him a legal appointment – Even he was issued appointment order but later on, it was found that the said appointment of the petitioner was dehors the rules, therefore, it was incumbent on the authority to offer compassionate appointment to the petitioner on Class-III/Class-IV post. (Para 29, 33 and 34)

Writ petition allowed. (E-1)

List of Cases cited:

1. Civil Misc. Writ Petition No. 33828 of 2012;
Hari Shankar & ors. Vs St. of U.P. & ors. decided
on 25.07.2012

(Delivered by Hon'ble Manjive Shukla, J.)

1. Heard learned counsel appearing for the petitioner, Sri Ashish Kumar Nagwanshi, learned Additional Chief Standing Counsel appearing for the State

and Sri Ashutosh Mishra, learned counsel appearing for the Respondents No. 3 and 4.

2. Petitioner through this Writ Petition has challenged the order dated 20.02.2023 passed by the Respondent No. 3 i.e. Secretary, U.P. Basic Education Board, Prayagraj whereby his case for compassionate appointment has been rejected on the ground that petitioner's father, while working as Headmaster, died on 02.08.2008 and, therefore after elapse of about 11 years, there is no justification to provide compassionate appointment to the petitioner on Class III/Class IV post and further petitioner has also not submitted his application for compassionate appointment on the format prescribed by the State Government.

3. The facts of the case, in brief, are that father of the petitioner, while working on the post of Headmaster in a primary school run under U.P. Basic Education Board in District Baghpat, died in harness on 02.08.2008.

4. State Government has issued a Government Order on 04.09.2000 whereby it has been provided that if any dependent of a teacher who has died in harness applies for compassionate appointment on the post of Assistant Teacher and if he does not possesses training qualification required for such appointment then he will be appointed as untrained teacher and after such appointment, the appointee shall be sent to the District Institute for Education and Training for requisite training and after completing training, he will be given appointment on the regular post of Assistant Teacher. The aforesaid Government Order dated 04.09.2000 further provides that if the dependent of the government servant possess minimum

educational qualification of Intermediate then he can be given compassionate appointment on the posts of clerical cadre in the offices run under Basic Education Board. The relevant portion of the Government Order dated 04.09.2000 is extracted as under:

“4- ऐसे मृतक आश्रित जो सेवायोजन हेतु आवेदन पत्र प्रस्तुत करने की तिथि को सहायक अध्यापक के पद हेतु सेवा नियमों में विहित शैक्षिक अर्हता रखते हों, परन्तु प्रशिक्षण अर्हता नहीं रखते/पूरी नहीं करते, को अप्रशिक्षित अध्यापक के रूप में सेवायोजन हेतु आवेदन करने पर यथा सम्भव तीन माह के अन्दर सेवायोजन की सुविधा प्रदान की जायेगी। ऐसे मृतक आश्रित को सेवायोजन के बाद सम्बन्धित जनपद के जिला शिक्षा एवं प्रशिक्षण संस्थान में प्रारम्भ होने वाले बैसिक अध्यापक प्रमाण पत्र (बी०टी०सी०) प्रशिक्षण पाठ्यक्रम के आगामी पहले बैच में प्रशिक्षण हेतु प्रवेश दिया जायेगा। मृतक आश्रित के रूप में प्राथमिक विद्यालय में सहायक अध्यापक/अध्यापिका के पद पर नियमित नियुक्ति प्रदान करने के लिए उनको (बी०टी०सी०) प्रशिक्षण पाठ्यक्रम सफलतापूर्वक पूर्ण करना अनिवार्य होगा। प्रशिक्षण अवधि में उन्हें अप्रशिक्षित अध्यापक के रूप में नियत वेतन, जैसा कि शासन द्वारा समय-समय पर निर्धारित किया गया हो, देय होगा। बैसिक अध्यापक प्रशिक्षण पाठ्यक्रम में उत्तीर्ण होने के बाद ही प्राथमिक विद्यालय में सहायक अध्यापक के पद पर नियमित नियुक्ति प्रदान की जायेगी।

नियुक्त प्राधिकारी एवं जिला शिक्षा एवं प्रशिक्षण संस्थान का यह दायित्व होगा कि वह अप्रशिक्षित अध्यापक के रूप में सेवायोजित मृतक आश्रित अभ्यर्थियों के सेवारत प्रशिक्षण की व्यवस्था उनके सेवायोजन के बाद प्रारम्भ होने वाले पहले प्रशिक्षण सत्र में सुनिश्चित करेंगे।

ऐसे मृतक आश्रित को जो उपर्युक्त सेवारत प्रशिक्षण को निर्धारित अवधि में सफलतापूर्वक पूर्ण करने में असफल रहते हैं, के लिए यह विकल्प उपलब्ध रहेगा कि वह चतुर्थ श्रेणी के पद के सोपेक्ष्य नियुक्ति हेतु आवेदन करें अथवा प्रशिक्षण उत्तीर्ण करने तक अप्रशिक्षित अध्यापक के रूप में नियत वेतन पर बने रहें, किन्तु प्रतिबन्ध है कि ऐसे सेवारत बी०टी०सी० प्रशिक्षणार्थियों को सामान्य बी०टी०सी० पाठ्यक्रम के प्रशिक्षणार्थी की भाँति ही बी०टी०सी० पाठ्यक्रम की अनुपूरक परीक्षा हेतु विहित नियमों के अनुसार अवसर अनुमन्य होंगे, किन्तु यदि अभ्यर्थी तब भी बी०टी०सी० के अंतिम परीक्षा उत्तीर्ण करने में विफल रहते हैं, तो ऐसे अभ्यर्थी के लिए चतुर्थ

श्रेणी के पद के सापेक्ष नियमित नियुक्ति के अतिरिक्त अन्य कोई विकल्प शेष नहीं रहेगा। अतः ऐसे अभ्यर्थी जो बी०टी०सी० परीक्षा में अंतिम रूप से विफल रहते हैं, को सहायक अध्यापक पद के लिए अभ्यर्थन स्वतः निरस्त समझा जायेगा और बी०टी०सी० परीक्षा में अंतिम रूप से असफल होने के माह के अंतिम कार्य दिवस से अप्रशिक्षित अध्यापक के रूप में भी उनकी नियुक्ति स्वतः समाप्त समझी जायेगी, किन्तु ऐसे अभ्यर्थी यदि चतुर्थ श्रेणी के रिक्त/अधिसंख्य पद के सापेक्ष सेवायोजन की प्रार्थना करते हैं तो उस पर विचार किया जा सकेगा।

5- ऐसे मृतक आश्रित जो सम्बन्धित कर्मचारी की मृत्यु के दिनांक को मृतक आश्रित के रूप में सेवायोजन के लिए न्यूनतम शैक्षिक अर्हता इण्टरमीडिएट अथवा उससे अधिक रखते हों और बेसिक शिक्षा परिषद के अधीन अधीनस्थ स्तरों पर लिपिक के सम्बर्ग के सबसे नीचे के पद पर सेवायोजन के लिए अन्यथा अर्ह हों, को सम्बन्धित जनपद में लिपिक के रिक्त पद के सापेक्ष सम्बर्ग में सबसे नीचे के पद पर सेवायोजन प्रदान किया जायेगा।"

5. Petitioner, after death of his father, applied for compassionate appointment on the post of Assistant Teacher in terms of the aforesaid Government Order dated 04.09.2000 and the District Basic Education Officer, Baghpat issued appointment letter on 30.07.2011 whereby petitioner was appointed as untrained Assistant Teacher in Primary School, Suroorpur-Ist, Block-Baghpat, District Baghpat. Petitioner pursuant to aforesaid appointment letter submitted joining in the primary school in District Baghpat and started discharging duties attached to his post.

6. Later on, the District Basic Education Officer, Baghpat passed an order on 28.08.2012 whereby services of the petitioner were terminated with effect from the date of his initial compassionate appointment. The District Basic Education Officer, Baghpat while passing termination order dated 28.08.2012 has said that since on 27.07.2011 U.P. Right of Children to

Free and Compulsory Education Rules, 2011 have been enforced and, therefore with effect from 27.07.2011, no one can be appointed as teacher in the primary school run by U.P. Basic Education Board unless he has passed out Teachers Eligibility Test (T.E.T.) and since petitioner was given compassionate appointment and he has not passed out Teachers Eligibility Test, therefore, his services are liable to be terminated with effect from the date of initial compassionate appointment.

7. At this juncture, it is noteworthy that the aforesaid Government Order dated 04.09.2000 provides that a person seeking compassionate appointment must submit his application within a period of five years from the date of death of the employee and if the said application is submitted after the aforesaid period of five years then the same will be referred to the Secretary, U.P. Basic Education Board, Prayagraj and in turn, the said application will be further referred to the State Government and if the State Government finds justifiable reasons for the delay in submission of application for compassionate appointment then it will condone the delay and will permit the concerned District Basic Education Officer to appoint the said candidate on compassionate ground.

8. In the case of the petitioner, his father died on 02.08.2008 and immediately thereafter petitioner submitted application for compassionate appointment and that application was acted upon and petitioner was appointed on the post of untrained Assistant Teacher. It appears that at the time of compassionate appointment of the petitioner, the District Basic Education Officer was ignorant of the fact that after 27.07.2011, no one could have been appointed as teacher unless he has passed

out Teachers Eligibility Test and the said mistake was realised by the District Basic Education Officer, Baghpat and he passed an order on 28.08.2012, thereby services of the petitioner were terminated with effect from the date of his initial appointment.

9. From the aforesaid, it is patently manifest that the petitioner submitted his application for compassionate appointment within five years from the date of death of his father and the said application was acted upon but due to some legal issue, petitioner's appointment on the post of untrained Assistant Teacher could not sustain.

10. Petitioner challenged the order dated 28.08.2012 whereby his services were terminated, by filing Writ-A No. 59648 of 2012 (Neha Sharma and others Vs. State of U.P. and others). This court vide order dated 9.11.2012 dismissed the writ petition filed by the petitioner in terms of judgement and order dated 25.07.2012 passed in Civil Misc. Writ Petition No. 33828 of 2012 (Hari Shankar and Others Vs. State of U.P. and Others).

11. This court in the aforesaid judgement dated 25.07.2012 passed in Civil Misc. Writ Petition No. 33828 of 2012 considered the issue in detail in respect of the fact as to whether after enforcement of U.P. Right of Children to Free and Compulsory Education Rules, 2011 on 27.07.2011, any person can be given compassionate appointment as untrained Assistant Teacher. This court vide judgement dated 25.07.2012 decided the issue and held that after 27.07.2011, nobody could have been appointed on the post of teacher unless he has passed out Teachers Eligibility Test, therefore, the order by which petitioner's services have

been terminated with effect from the date of his initial appointment is perfectly in accordance with law.

12. This court vide judgement and order dated 25.07.2012 further provided that the claim of the petitioners for compassionate appointment be considered against existing Class-III/Class-IV vacancies except qua Class III vacancies which are to be filled up by way of promotion, preferably within next two months. The relevant portion of the judgement and order dated 25.07.2012 is extracted as under:

"In the present case each one of the petitioners had been offered appointment after the said notification had been published by the N.C.T.E. followed by U.P. Right of Children to Free and Compulsory Education Rules, 2011 enforceable with effect from 27.07.2011. Rule 10 of the U.P. Basic Education (Teachers Service Rules, 1981 cannot be read in isolation rather it has to be read in the context, it has been provided for. It gives right of relaxation to ex-servicemen and certain other categories, which is inclusive of compassionate appointment as well, but the same has to be in accordance with the general rules and orders of the Government in this behalf in force at the time of recruitment. At the relevant time, N.C.T.E. had already declared educational qualification for teacher to be appointed in school defined under clause (n) of Section 2, which was required along with T.E.T. and it was mandatory requirement. No person could have been treated to be eligible for being appointed as teacher without passing the aforesaid requisite qualification as was prescribed by the N.C.T.E. The 2009 Act and the Rules framed thereunder were clear and categorical. The appointments,

which had been made prior to enforcement of the Act, were saved, as the incumbents appointed were required to fulfill the eligibility criteria within five years from the enforcement of the Act and in other cases, there has to be specific order by the Central Government on the request of the State Government, and in the present case accepted position is that after enforcement of the Act, N.C.T.E. Norms and U.P. Right of Children to Free and Compulsory Education Rules, 2011, petitioners had been appointed and in view of this relaxation as has been provided for, could not have been accorded. The Government Order in regard to compassionate appointment has been pressed in flagrant violation of statutory provisions, and in view of this Secretary of the Board on being apprised of this factual situation has proceeded to remedy the situation by annulling such appointments which were dehors the statutory provisions. Once appointment of the petitioners was totally contrary to law not at all subscribed by law, none of the petitioners were legally eligible and entitled to be appointed as concept of untrained assistant teacher, is violative of Article 21A of the Constitution as untrained teacher cannot be recruited, as proper training of teacher is integral aspect in right of education being effectuated. In view of this, the Secretary of the Board has acted well within his right to direct cancellation of such appointments, which were contrary to law in force on the date when they had been recruited. Principle of natural justice has no role to play in such matters, when appointments made are dehors the statutory provisions, on admitted position, and it would be nothing more but exercise in futility, as result would be one and the same, and quashing of the order on this ground would be nothing but perpetuating the illegality,

i.e. permitting untrained teachers to continue.

Petitioners have tried to submit that amongst untrained Assistant Teachers, two classes have been created, as service of only those untrained Assistant Teachers have been terminated, who have been appointed after 27.07.2011, i.e., after enforcement of U.P. Right of Children to Free and Compulsory Education Rules, 2011, and the services of untrained teachers appointed prior to it have not been terminated. Negative equality cannot be claimed, and said class of teachers are not before this Court, either individually or collectively, as such this Court is not touching this question and deciding and deciding the said question, and this issue is left open to be decided in appropriate proceedings.

In view of what has been discussed above, all the writ petitions are dismissed. The claim of the petitioners be considered against existing class III/IV vacancies except qua class III vacancies which are to be filled up by way of promotion, preferably within next two months."

13. From bare perusal of the judgement and order dated 25.07.2012 passed in Civil Misc. Writ Petition No. 33828 of 2012, it is patently manifest that this court found that the compassionate appointment given to the petitioner as untrained Assistant Teacher was not in accordance with law, therefore, the order terminating services of the petitioner was not interfered with but at the same time this court issued direction to the respondents to consider the claim of the petitioner for compassionate appointment against existing Class-III/Class-IV vacancies, as such, it was obligatory on the respondents to consider the claim of petitioner against existing Class-III/Class-IV vacancies but

respondents did not consider petitioner's claim for compassionate appointment as directed by this court.

14. Petitioner, thereafter challenged the aforesaid judgement and order dated 09.11.2012 passed in Writ-A No. 59648 of 2012 by filing Special Appeal No. 2074 of 2012 (Neha Sharma and others Vs. State of U.P. and others). Bunch of Special Appeals filed against judgement and order dated 25.07.2012 passed in Civil Misc. Writ Petition No. 33828 of 2012 including petitioner's Special Appeal No. 2074 of 2012 was dismissed by Division Bench of this court vide judgement and order dated 9.09.2021 whereby the aforesaid judgement and order dated 25.07.2012 passed in Civil Misc. Writ Petition No. 33828 of 2012 has been upheld.

15. Special Leave Petitions were filed challenging the judgement and order dated 25.07.2012 passed in Civil Misc. Writ Petition No. 33828 of 2012 and the judgement and order dated 9.09.2021 passed in Special Appeal No. 1467 of 2012 and other connected Special Appeals but later on, the said Special Leave Petitions were withdrawn with a liberty to file review before the High Court.

16. Petitioner on 23.09.2019 submitted a representation to the District Basic Education Officer, Baghpat wherein he mentioned that pursuant to his application for compassionate appointment, he was appointed on the post of untrained Assistant Teacher but later on due to some legal issue, petitioner's services were terminated. Writ Petition filed against the termination order has been dismissed but the High Court, while dismissing the writ petition, directed that claim of the petitioner for compassionate appointment

be considered for appointment against Class-III and Class-IV posts but till date, petitioner has not been offered appointment on Class-III/Class-IV post, therefore, in compliance of judgement and order dated 25.07.2012 passed in Civil Misc. Writ Petition No. 33828 of 2012, petitioner may be given compassionate appointment on Class-III/Class-IV post.

17. Petitioner again submitted a representation on 20.10.2021 whereby he again requested that the order dated 9.11.2012 passed in Writ-A No. 59648 of 2012 be complied with and petitioner be given appointment on Class-III/Class-IV post. The relevant portion of the representation dated 20.10.2021 is extracted as under:

"महोदय,

सूचनार्थना निवेदन है कि प्रार्थी के पिता स्व० श्री रामपाल सिंह प्राथमिक विद्यालय शिकोहपुर-2 विकास खण्ड. बागपत जिला बागपत में प्रधानाध्यापक के पद पर कार्यरत थे। जिनकी सेवा में रहते हुए दिनांक 08.06.2008 में मृत्यु हो गई थी। प्रार्थी

द्वारा मृतक आश्रित कोटे में योग्यतानुसार नियुक्ति हेतु आवेदन दिया गया जिसके उपरान्त प्रार्थी को दिनांक 30.07.2011 में अप्रशिक्षित सहायक अध्यापक के पद पर नियुक्ति दी गई जिसकी छायाप्रति पत्र के साथ संलग्न है (संलग्नक-1)।

महोदय इसके उपरान्त सचिव ए बेसिक शिक्षा परिषद के 12 जून 2012 के आदेश का हवाला देते हुए तत्कालीन बेसिक शिक्षा अधिकारी द्वारा प्रार्थी को 28.8.2012 को बर्खास्त कर दिया गया, जिसकी छायाप्रति पत्र के साथ संलग्न है (संलग्नक-2)। जिस कारण प्रार्थी को माननीय उच्च न्यायालय इलाहाबाद की शरण लेनी पड़ी। प्रार्थी की रिट याचिका संख्या.59648/2012 में सुनवाई करते हुए माननीय उच्च न्यायालय इलाहाबाद द्वारा खारिज कर दिया गया लेकिन योग्यतानुसार उपलब्ध तृतीय/चतुर्थ श्रेणी के पद पर नियुक्ति देने के आदेश दिये गये जिसकी छायाप्रति पत्र के साथ संलग्न है (संलग्नक-3)।

महोदय माननीय उच्च न्यायालय के आदेश के अनुक्रम में आपकी सेवा में मृतक आश्रित कोटे के अंतर्गत उपलब्ध तृतीय श्रेणी/चतुर्थ श्रेणी के पद पर नियुक्ति हेतु दिनांक 23.09.2019 में सर्टिफाइड प्रति के साथ पत्रावली प्रेषित की गई थी। किन्तु महोदय दो वर्ष से अधिक का समय बीत जाने के बाद भी प्रार्थी को न तो नियुक्ति नहीं दी गई और न ही कोई जवाब दिया गया, जबकि अन्य जनपदों में सामान प्रकरण में नियुक्ति दी जा चुकी है जिनकी छायाप्रति भी पत्र के साथ संलग्न है।

अतः आपसे अनुरोध है कि प्रार्थी को माननीय उच्च न्यायालय के आदेश का पालन करते हुए उपलब्ध तृतीय श्रेणी/चतुर्थ श्रेणी में यथाशीघ्र नियुक्ति देने की कृपा करें। प्रार्थी आपका आभारी रहेगा।

सादर धन्यवाद।"

18. The District Basic Education Officer on the aforesaid representation submitted by the petitioner, vide his letter dated 06.01.2022 sought guidance from the Secretary, U.P. Basic Education Board, Prayagraj in respect of petitioner's compassionate appointment on a Class-IV post.

19. When the respondents, in spite of best efforts of the petitioner and repeated representations made by him, did not appoint him on compassionate ground on Class-III/Class-IV post as directed by this court vide judgement and order dated 09.11.2012 passed in Writ-A No. 59648 of 2012, petitioner filed Writ-A No. 11879 of 2022 and this court vide order dated 1.09.2022 directed the Secretary, Uttar Pradesh Basic Education Board, Prayagraj to decide the representation of the petitioner by speaking and reasoned order. Operative portion of the order dated 1.09.2022 is extracted as under:

"Considering innocuous prayer being made by learned counsel for petitioner and without entering into the merits of the case, respondent No.2 i.e. Secretary, Uttar

Pradesh Basic Education Board, Prayagraj is directed to decide representation by reasoned and speaking order within a period of six weeks from the date a copy of this order is produced before him ignoring the fact of the date of death of petitioner's father since cause of action to petitioner is very much surviving considering the Special Leave Petition of petitioner has been dismissed in January, 2022 itself and particularly in view of order dated 01.10.2012 passed in Writ A No. 50727 of 2012 filed earlier by petitioner whereby his claim was required to be considered against existing Class III or Class IV vacancies except those vacancies which were required to be filled up by promotion.

*With the aforesaid observations, the writ petition stands **disposed of.**"*

20. In compliance of the order dated 1.09.2022 passed by this Court in Writ-A No. 11879 of 2022, Secretary, U.P. Basic Education Board, Prayagraj has passed an order on 20.02.2023 whereby petitioner's case for compassionate appointment has been rejected on the ground that petitioner cannot be offered compassionate appointment after about 11 years from the date of death of his father. Another reason given in the order dated 20.02.2023 is that petitioner has not submitted application on the prescribed format.

21. Learned counsel appearing for the petitioner has vehemently argued that the petitioner immediately after the death of his father submitted application for compassionate appointment and that application was acted upon and petitioner was given compassionate appointment on the post of untrained Assistant Teacher but later on, the District Basic Education Officer, Baghpat realized his mistake that the petitioner, in absence of T.E.T.

qualification, could not have been appointed as untrained Assistant Teacher, therefore, he passed an order whereby petitioner's services were terminated with effect from the date of his initial appointment. Learned counsel appearing for the petitioner has further argued that once petitioner submitted an application for compassionate appointment immediately after the date of death of his father and the compassionate appointment offered to the petitioner was not found as per law and was cancelled then it was obligatory on the District Basic Education Officer, Baghpat to process the petitioner's claim for compassionate appointment on Class-III/Class-IV post on the initial application submitted by the petitioner for compassionate appointment.

22. Learned counsel appearing for the petitioner has vehemently argued that when petitioner challenged the order whereby his services were terminated, this court, though dismissed the writ petition, but directed the respondents to consider the claim of the petitioner for appointment on Class-III/Class-IV post. It was obligatory on the respondents to comply with the direction issued by this Court vide judgement and order dated 9.11.2012 passed in Writ-A No. 59648 of 2012 but the District Basic Education Officer, Baghpat did not comply the said direction and kept the matter pending. Learned counsel appearing for the petitioner has vehemently argued that the Respondent No. 3 while passing the impugned order dated 20.02.2023, under misconception, has treated the petitioner's claim for compassionate appointment as fresh claim and thus has rejected the same by saying that petitioner cannot be given compassionate appointment after elapse of 11 years from the date of death of his father whereas petitioner immediately after the

death of his father raised his claim for compassionate appointment and in-fact the said claim was acted upon but due to legal issue, the appointment of the petitioner was cancelled, as such, after cancellation of the appointment of the petitioner, it was obligatory on the respondents to offer appointment to the petitioner on Class-III/Class-IV post.

23. Learned counsel appearing for the petitioner, in the last, has emphatically argued that on the one hand due to ignorance of the District Basic Education Officer regarding legal provisions, compassionate appointment granted to the petitioner on the post of untrained teacher has been cancelled and on the other hand Respondent No. 4 has rejected the claim of the petitioner for compassionate appointment on Class-III/Class-IV post on the ground that application for compassionate appointment has not been submitted within the time limit prescribed under the Government Order whereas petitioner has submitted application for compassionate appointment immediately after the date of death of his father. It has been further argued that once this Court vide judgement and order dated 25.07.2012 directed the respondents to consider the claim of the petitioner for compassionate appointment against Class-III/Class-IV post within two months, then it is not open for the District Basic Education Officer, Baghpat to reject the claim of the petitioner for compassionate appointment on the ground that the compassionate appointment cannot be given after elapse of about 11 years from the date of death of his father.

24. Learned counsel appearing for the petitioner has concluded his arguments by submitting that the order dated 20.02.2023 passed by the Secretary, U.P. Basic

Education Board, Prayagraj cannot sustain in the eyes of law and, therefore, is liable to be quashed by this Court.

25. Per-contra, learned counsel appearing for Respondents No. 3 and 4 has submitted that father of the petitioner died on 2.08.2008, therefore, claim of the petitioner for compassionate appointment on Class-III/Class-IV post, cannot be allowed after elapse of 15 years, as such, the Secretary, U.P. Basic Education Board, Prayagraj while rejecting the case of the petitioner for compassionate appointment vide order dated 20.02.2023 has not committed any illegality.

26. Learned counsel appearing for Respondents No. 3 and 4 has further argued that after the death of petitioner's father, he was given compassionate appointment as untrained Assistant Teacher on 30.07.2011 but later on, it was found that the said appointment was not in accordance with law, as such, the District Basic Education Officer, Baghpat vide his order dated 28.08.2012 cancelled the said appointment. Petitioner challenged the cancellation order dated 28.08.2012 and this Court vide order dated 9.11.2012 passed in Writ-A No. 59648 of 2012 dismissed the writ petition in terms of order dated 25.07.2012 passed in Civil Misc. Writ Petition 33828 of 2012, Hari Shankar and others vs. State of U.P. and others and thereby upheld the validity of the order dated 28.08.2012 and directed the respondents to consider claim of the petitioner for a compassionate appointment against Class-III/Class-IV post but since petitioner in compliance of the said order has not submitted his application for compassionate appointment on Class-III/Class-IV post, as such, his case for compassionate appointment was not considered and now after elapse of 15

years, there is no occasion for considering the case of the petitioner for compassionate appointment, therefore, order dated 20.02.2023 passed by the Secretary, U.P. Basic Education Board, Prayagraj does suffer from any infirmity or illegality.

27. Learned counsel appearing for the Respondents No. 3 and 4 has concluded arguments by submitting that the order dated 20.02.2023 passed by the Secretary, U.P. Basic Education Board, Prayagraj does not suffer from any infirmity or illegality, therefore, writ petition filed by the petitioner, being absolutely misconceived, is liable to be dismissed by this Court.

28. I have considered submissions advanced by learned counsels appearing for the parties.

29. I find that father of the petitioner, while working on the post of Headmaster, died in harness on 02.08.2008 and immediately thereafter, petitioner submitted an application for his compassionate appointment. The application submitted by the petitioner, was acted upon and the District Basic Education Officer, Baghpat issued appointment order dated 30.07.2011 whereby petitioner was appointed as untrained Assistant Teacher. I further find that aforesaid compassionate appointment of the petitioner on the post of untrained Assistant Teacher was later on cancelled by the District Basic Education Officer, Baghpat vide order dated 28.08.2012 on the ground that U.P. Right of Children to Free and Compulsory Education Rules, 2011 have been enforced with effect from 27.07.2011 wherein it has been provided that no one can be appointed on the post of teacher unless he has passed out Teachers Eligibility Test and petitioner

admittedly was not having T.E.T. Certificate.

30. Petitioner challenged order dated 28.08.2012 by filing Writ-A No. 59648 of 2012 which was dismissed by this court in terms of judgement and order dated 25.07.2012 passed in Writ-A No. 33828 of 2012 (Hari Shankar and others Vs. State of U.P. and others). This Court vide judgement and order dated 25.07.2012 upheld the validity of the order dated 28.08.2012 whereby petitioner's appointment was cancelled but also issued direction to the respondents to consider the claim of petitioner against existing Class-III/Class-IV vacancy preferably within next two months. The relevant portion of the judgement and order dated 25.07.2012 is extracted as under:

"In view of what has been discussed above, all the writ petitions are dismissed. The claim of the petitioners be considered against existing class III/IV vacancies except qua class III vacancies which are to be filled up by way of promotion, preferably within next two months."

31. Once this Court upheld the validity of order dated 28.08.2012 whereby compassionate appointment of the petitioner on the post of untrained Assistant Teacher was cancelled and direction was issued to the respondents to consider claim of the petitioner against Class-III/Class-IV vacancies then it was obligatory upon the respondents to consider the claim of the petitioner for compassionate appointment on Class-III/Class IV post within a period of two months but respondents utterly failed to carry out directions issued by this Court vide judgement and order dated 25.07.2012 passed in Civil Misc. Writ Petition No. 33828 of 2012.

32. The Secretary, U.P. Basic Education Board, Prayagraj while passing order dated 20.02.2023 thereby rejecting the claim of the petitioner for his compassionate appointment on a Class-III/Class-IV post on the ground that compassionate appointment cannot be offered after elapse of about 11 years, has not only acted illegally but in-fact has also violated the direction issued by this Court vide judgement and order dated 25.07.2012 passed in Civil Misc. Writ Petition No. 33828 of 2012.

33. This Court is of the view that the District Basic Education Officer, Baghpat cannot blow hot and cold together i.e. on the one hand, he has not complied with the direction issued by this Court vide judgement and order dated 25.07.2012 passed in Civil Misc. Writ Petition No. 33828 of 2012 and on the other hand, he has rejected the claim of the petitioner for compassionate appointment on the ground the petitioner cannot be offered compassionate appointment after elapse of 11 years. Once petitioner submitted application for compassionate appointment immediately after the death of his father, it was obligatory on the part of the District Basic Education Officer, Baghpat to offer him a legal appointment but in the case of petitioner, the District Basic Education Officer, Baghpat appointed him on the post of untrained Assistant Teacher, though as per law, said appointment could not have been made, therefore, after cancellation of the said appointment, it was the duty of the District Basic Education Officer to consider the claim of compassionate appointment of the petitioner on Class-III/Class-IV post but he utterly failed to do so, therefore, now it is not open for him to take excuse that 11 years have elapsed and, therefore, petitioner cannot be offered compassionate appointment.

34. So far as the issue as to whether compassionate appointment can be offered after elapse of 11 years from the date of death of the government servant, is concerned, I find that in normal circumstances when the application for the compassionate appointment is filed with considerable delay then the law in that regard is very clear that the compassionate appointment is offered to meet out instant financial crisis faced by the family of deceased government servant, therefore, where the application for compassionate appointment has been submitted with considerable delay, the compassionate appointment cannot be offered but case of the petitioner stands on entirely different footing as petitioner applied for compassionate appointment immediately after the death of his father and even he was issued appointment order but later on, it was found that the said appointment of the petitioner was dehors the rules, therefore, it was incumbent on the District Basic Education Officer to offer compassionate appointment to the petitioner on Class-III/Class-IV post.

35. The District Basic Education Officer, Baghpur even has not complied with the direction issued by this Court vide judgement and order dated 25.07.2012 passed in Civil Misc. Writ Petition No. 33828 of 2012, therefore, this plea is not available to him that case of the petitioner for compassionate appointment on Class-III/Class-IV post cannot be considered after elapse of 11 years.

36. I am also of the considered view that in-fact after passing of the judgement and order dated 25.07.2012 passed in Civil Misc. Writ Petition No. 33828 of 2012, there is no requirement for the petitioner to file fresh application for compassionate appointment as petitioner after the death of his father has

already filed application for compassionate appointment, therefore, the District Basic Education Officer was under mandate of the Court to consider claim of the petitioner against existing Class-III/Class IV vacancy but instead of complying the said order, the Secretary, U.P. Basic Education Board, Prayagraj deliberately kept the matter pending and, therefore, the order dated 20.02.2023 thereby rejecting the claim of the petitioner for compassionate appointment on the ground that 11 years have elapsed, is not sustainable in the eyes of law and, thus is liable to be quashed by this Court.

37. In view of the aforesaid reasons, this Writ Petition is **allowed** and order dated 20.02.2023 passed by the Secretary, U.P. Basic Education Board, Prayagraj is quashed.

38. Matter is remanded to the Secretary, U.P. Basic Education Board, Prayagraj to consider the case of the petitioner for compassionate appointment on Class-III/Class-IV post in accordance with the observations made in this order and the directions issued by this Court vide judgement and order dated 25.07.2012 rendered in Civil Misc. Writ Petition No. 33828 of 2012 within two months from the date of service of certified copy of this order.

(2023) 9 ILRA 409
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.08.2023

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ-A No. 13210 of 2023

Mohd. Ismail & Ors.	...Petitioners
Versus	
State of U.P. & Anr.	...Respondents

Counsel for the Petitioners:

Sri Syed Wajid Ali

Counsel for the Respondents:

C.S.C.

A. Service Law – UP Collection Amin Service Rules, 1974 – Rules 4 & 5 – Collection Amin – Pension – Initial appointment was made as Seasonal Amin, but subsequently regularized against available vacancy – Pension, being granted under Old Pension Scheme – Period of service spent prior to regularization was not counted – Validity challenged – Held, once the petitioner has availed the benefit of relevant provisions of the Rules that contemplate regular appointment/regularization against the available substantive vacancy only, such persons cannot be treated to be regularized from the date they entered into service on temporary basis, therefore, for want of vacancy – A person can have berth in cadre upon the condition that berth is available. (Para 6)

Writ petition dismissed. (E-1)

List of Cases cited:

1. Uday Pratap Thakur & anr. Vs St. of Bihar; AIR 2023 SC 2971

2. Prem Singh Vs St. of U.P.; (2019) 10 SCC 516

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

1. Heard Sri Syed Wazid Ali, learned counsel for the petitioner and Sri R.S. Umrao, learned Standing Counsel for the State respondents.

2. The petitioners who were initially appointed as Seasonal Collection Amin in the revenue department on temporary basis, their services came to be regularized under U.P. Collection Amin Service Rules, 1974 between the years 1992 to 1995 and they all attained the age of superannuation

between 2013 to 2022. Upon attaining the age of superannuation they have been conferred upon the benefit of pension as admissible under the old pension scheme and petitioners are individually getting the pension. Now they have approached this Court for direction to the authority to count period spent in service by petitioners prior to their regularization, towards qualifying period of pension.

3. *Per contra*, learned Standing Counsel submits that U.P. Collection Amin Service Rules, 1974 rules provide regular appointment against substantive vacancies and for this purpose there is a quota fixed for those who are working on temporary basis in the department as Seasonal Collection Amin. He submits that rule do not contemplate regularization being offered from the date when the vacancies were not in existence. A confirm/ regular appointment offered to the Seasonal Collection Amin against available substantive vacancies . He submits that relevant provisions of rule have never been challenged rather petitioners have availed the benefit of the same. He has also placed the reliance upon the judgment of the Supreme Court in the case of **Uday Pratap Thakur & Another v. State of Bihar: AIR 2023 SC 2971** in which principle laid down in the judgment of **Prem Singh v. State of U.P.: (2019) 10 SCC 516** has been further explained and clarified whereby observations are made to the effect that Prem Singh's judgment (*supra*) which offers benefit to those employees who have rendered their services on dailywage basis/ temporary basis/ work charge basis only for the purposes of giving them benefit of pension under the old pension scheme. The reason being that they were being offered appointment on regular basis for the service rendered by them on ad hoc basis / temporary basis/ work charge basis.

4. Having heard learned counsel for the respective parties and having perused the records and having gone through the relevant service rules, I find that rules do contemplate confirmed appointment of the Seasonal Collection Amins only on the basis of availability of vacancy applying 35 per cent quota under the rules. It is not disputed by the petitioners that they were offered confirmed / permanent appointment in the regular cadre of the Collection Amin upon availability of vacancy as per rules as they fell within 35 per cent quota as has been fixed under the service rules. They have never questioned regular appointment from the date they were offered the same upon availability of substantive vacancies. Now, thereafter they continued in service and they also availed benefit under the old pension scheme taking, therefore, period from the date of initial ad hoc/ temporary towards qualifying service period for pension. So, now they have approached this Court with this request that their period already rendered as Seasonal Collection Amin should be taken into consideration for the purpose of computing qualifying period for pension.

5. In a nutshell the argument is if the period in question, is taken into account towards qualifying period for pension , their pension will get increased.

6. In my considered view, this argument of the petitioner is misplaced for the simple reason that no Collection Amin can avail the benefit of regular appointment from the date of initial appointment as the regular appointment is done under the rules against available vacancies and rules have never been challenged. Once the petitioner has availed the benefit of relevant provisions of the Rules that contemplate regular appointment/regularization against the available substantive vacancy only,

such persons cannot be treated to be regularized from the date they entered into service on temporary basis, therefore, for want of vacancy. A person can have berth in cadre upon the condition that berth is available.

7. I have also considered the judgment of Supreme Court in the case of Prem Singh (supra), in which it has been categorically held that those persons who have rendered their service on ad hoc / work charge basis cannot be denied the benefit of pension. This judgment discusses the provisions as was then existing under the Civil Service Regulations for denying benefit of old pension scheme to those who have earlier rendered service as work charge employee though such employees subsequently got placement under regular cadre. The principle and ratio for awarding pensionary benefits has been discussed in the case of Uday Pratap Thakur (supra) in which vide paragraph 6 it has been categorically held that ratio of the judgment is to be considered for giving benefit of old pension scheme by taking into account such period of ad hoc / workcharge service which will make good the short fall towards qualifying period for making pension admissible. If the argument as is advanced that earlier period rendered as work charge temporary basis is to be reckoned with for the purpose of qualifying service in its entirety is accepted, the effect would be that regular appointment stands offered to such person/ employee from the date of his initial temporary/ ad hoc/ work charge appointment in service. This is neither the object of the rules, nor spirit of the judgment in Prem Singh's case.

8. For appreciating the above Rules 4 and 5 of U.P. Collection Amin Service Rules, 1974 are reproduced hereunder:

"Strength of the service- (1) The strength of the service shall be such as may be determined by the Governor from time to time.

(2) The permanent strength of the service shall, until orders varying the same have been passed under sub-rule (1), be as given below:

Collection Amins (Ordinary grade) 5341.

Collection Amins (Selection grade) 593:

provided that-

(a) that Collector may leave unfilled or the Governor may hold in abeyance any vacant post without thereby entitling any person to compensation; and

(b) the Governor create such additional permanent or temporary posts as may be considered necessary.

Part III- RECRUITMENT

5. Source of recruitment-(i) Recruitment to posts in the ordinary grade of the service shall be made on the result of a competitive examination as provided in part V of these rules:

Provided that subject to availability of suitable candidates, up to fifteen per cent of the vacancies shall be filled by promotion from amongst such substantively appointed collection peons:-

(a) who have passed at least High School Examination of the Board of High Schools and Intermediate Education, Uttar Pradesh or an Examination recognized by the Government as equivalent thereto, and

(b) who have worked in the Collection Organization of the Revenue Department for a period of at least six Fasals:

Provided further that thirty-five per cent vacancies shall be filled by selection from amongst such Seasonal Collection Amins-

(a) who have worked satisfactorily for at least four Fasals:

(b) Whose age on the first day of July of the year in which selection is made does not exceed 45 years:

Provided also that if suitable candidates are not available, remaining vacancies shall be filled by general candidates through direct recruitment.

Explanation- Satisfactory work shall mean at least seventy per cent realisation as per prescribed standard during the last four Fasals including good conduct throughout."

9. Upon bare reading of the aforesaid rules, I find that the rules do talk of regular appointment upon vacant posts. Posts are created in the cadre as per rule 4 and it refers to only a duly sanctioned post. Rules do not contemplate ad hoc or temporary appointment on substantive vacancies duly created under Rule 4. Thus it is clear that substantive appointments are given/made only against substantive vacancies either by promotion or by selection. Fifteen per cent posts are to be filled up by way of promotion from Seasonal Collection Peons and thirty five percent from amongst Seasonal Collection Amins working on temporary/casual/ ad hoc basis subjection to conditions given under the proviso to Section 5. So the very selection and appointment is referably to the existing substantive vacancy in the recruitment year. The very selection and appointment means, such appointment is done in real time by initiation of proceeding but one must meet the requirements as on 1st July of the year of selection. Thus, there is no concept of regularization back date. As a matter of fact there is no regularization as such. It is rather a selection against available vacancies in the year of recruitment by adopting a procedure prescribed for merit list to be prepared on the basis of work performance and period

of working. Seniority list of Seasonal Collection Amin may not be adopted as a merit list to give substantive appointment to Seasonal Collection Amins/Peons as merit list would involve those persons only who fulfil the criteria laid down/prescribed for. Thus there is no automatic regularization.

10. In Prem Singh's case (supra) the rules as were the existing since did not include work charge period of service for qualifying service for pension the same was set aside. The ratio has been that one should not be denied pension for period falling short even though such an employee has been in service, may be temporarily or on work charge basis, for a longer period. In the case of Uday Pratap Thakur (supra) vide paragraph 6, it has been held thus:

"6. It is required to be noted that the respective Appellants were working as work charged under the work charged establishment in the State. Their services have been regularized under the Rules, 2013 and the follow up notification of the Finance Department vide Circular No. 10710 dated 17.10.2013. Rule 5(v) of the Circular reads as under:

5(v) Old pension Rules shall be applied on these employees. The benefit pension & gratuity shall be counted by giving one year advantage against the five years services as work-charged employee. Even then if the minimum requirement of 10 years of service for pension is not met under the old rules, then minimum service shall be added to give advantage thereof.

6.1. Rule 5(v) of the Rules, 2013 as such can be said to be beneficial to such work charged employees, whose services have been regularized subsequently. As per Rule 5(v), even if the minimum requirement of 10 years of service (qualifying service)

for pension is not met, in that case also, the service rendered as a work charged to be added for qualifying service for pension. Therefore, the efforts have been made by the State Government to see that after rendering services for number of years as work charged, and thereafter, their services have been regularized, they may not be denied the pension on the ground that they have not completed the qualifying service for pension. It also further provides that the benefits like pension & gratuity shall be counted by giving one year advantage against the five years services as work-charged employee. Therefore, Rule 5(v) as observed hereinabove, is beneficial also in favour of such work charged employees, whose services have been regularized subsequently, and they may not be deprived of the pension on the ground that they have not completed the qualifying service for pension. The denying of pension after rendering service as work charged for number of years on the ground that they have not completed the qualifying service can be said to be unfair and illegal and can be said to be exploitation. Therefore, to make such work charged employees eligible for pension, Rule 5(v) provides that if any work charged employee, whose services have been regularized under the Rules, 2013, is short of qualifying service, to the extent of such shortage of qualifying service, the services rendered as work charged to be counted for the purpose of qualifying service for pension. Under the circumstances, the Larger Bench of the High Court has rightly observed and held that for the purpose of pension, only such period from the work charged tenure would be added for making the service of an employee, who has been regularized to qualify him for pension.

6.2 Insofar as the submission on behalf of the Appellants that their entire

6.3. Now, insofar as the reliance placed upon the decision of this Court in the case of Prem Singh (supra) by the learned Counsel appearing on behalf of the Appellants is concerned, the reliance placed upon the said decision is absolutely misplaced. In the said case, this Court was considering the validity of Rule 3(8) of the U.P. Retirement Benefit Rules, 1961, under which the entire service rendered as work charged was not to be counted for qualifying service for pension. To that, this Court has observed and held that after

(emphasis added)

11. In view of above, I do not find force in the argument advanced by learned counsel for the petitioner. The petition lacks merit and is accordingly dismissed.

(2023) 9 ILRA 414
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.08.2023

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Writ-A No. 18972 of 2022

Priyadarshini Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Durga Prasad Singh, Sri Ashok Khare (Sr.
Advocate)

Counsel for the Respondents:
C.S.C., Sri M.N. Singh

A. Service Law – UP Subordinate Education (Associate District Inspector of Schools) Service Rules, 1992 – Rule 15(3) – Post of Block Education Officer – Appointment – Number of vacancy – Selection list – Waiting list consisting of more selected candidates was not prepared – Validity challenged – No provision in the Rule of 1992 stipulating the preparation of the waiting list – Effect – Held, a reading of Rule 15(3) of the Rules, 1992 unequivocally suggests that the select list to be forwarded by the Commission to the appointing authority shall comprise of names more than the number of vacancies but not more than 25% thereof, which signifies that select list should contain more number of candidates than the number of vacancy advertised – Further held, the action of the respondents in not preparing waiting list in compliance with R. 15(3) is arbitrary and against the spirit of the said Rule. (Para 26 and 44)

Writ petition allowed. (E-1)

List of Cases cited:

1. S.K. Nausad Rahman & ors. Vs U.O.I.& ors.; (2022) 12 SCC 1
2. Jata Shankar Vs St. of U.P. & ors.; 2013 SCC Online All 3526
3. Nadeem Anwar Vs St. of U.P. through Secretary, Department of Govt. U.P. Lucknow & anr.; 2016 SCC Online All 3001
4. Writ A No. 22128 of 2018; Sanjay Kumar & ors. Vs St. of U.P. & ors.
5. Sheo Shyam Vs St. of U.P.; 2005 (10) SCC 314
6. St. of U.P. Vs Karunesh Kumar & ors.; 2023 (1) ADJ 389 SC

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

1. Heard Sri Ashok Khare, learned Senior Counsel assisted by Sri Durga

Prasad Singh, learned counsel for the petitioner, Sri Shrawan Kumar Dubey, learned Additional Chief Standing Counsel for the State-respondent nos.1 & 2 and Sri M.N. Singh, learned counsel for the respondent no.3.

2. The petitioner through the present writ petition has prayed for a writ of mandamus directing the respondent no.1- Additional Chief Secretary (Basic Education), U.P. Government, Lucknow to publish a waiting list for the post of Block Education Officer (Khand Shiksha Adhikari) and further direction to select the petitioner on the post which remains vacant on account of non-joining of selected candidates.

3. The facts in brief of the case are that U.P. Public Service Commission, Prayagraj (hereinafter referred to as 'Commission') published a Notification No.A-4/E-1/2019 dated 13.12.2019 for 309 posts of Block Education Officer. The petitioner possessing the requisite qualifications, applied to be considered for the said post. The petitioner was issued an admit card bearing Roll No.012946. She appeared in the preliminary examination conducted by the Commission, which she qualified. Thereafter, the petitioner appeared in the main examination held on 06.11.2020. The Commission on 30.01.2021 declared the list of 309 candidates qualified for the said posts. However, the petitioner did not qualify as according to the petitioner, she appeared as a general category candidate and secured 207 marks whereas the last selected candidate in the general category secured 208 marks.

4. Further case of the petitioner is that respondent no.2-Additional Director of

Education (Basic), Prayagraj issued letters to 271 candidates for appointment to the post of Block Education Officer against 309 successful candidates, therefore, 38 posts of Block Education Officer are vacant as per the appointment list dated 12.03.2021.

5. The petitioner further claims that in an identical controversy State of U.P. has given appointment to one Radha Kulshrestha, who appeared in the examination for the post of Civil Judge (Junior Division) conducted by the Commission and claimed appointment on two vacancies which remained vacant after joining of successful candidates. When the Commission did not pay any heed to her request, she preferred Writ-A No.2008 of 2022 and during the pendency of the said writ petition, a statement was made by the counsel for the Commission that her name has been recommended for appointment as Civil Judge (Junior Division), and therefore, the petitioner is also entitled to parity with petitioner-Radha Kulshrestha in Writ-A No.2008 of 2022.

6. A short counter affidavit dated 11.04.2023 was filed on behalf of respondents nos.1 & 2, stating therein that in the selection under Notification No.A-4/E-1/2019 dated 13.12.2019, 309 candidates were declared provisionally successful/selected for appointment against the 309 posts of Block Education Officer by the Commission out of which selection against 159 posts of general category were made.

7. The State Government in paragraphs nos.6 to 11 of the short counter affidavit has given details of recommendation by the Commission and

date of appointment letters issued to the candidates which are as follows:

<i>Sl. No.</i>	<i>Date of Recommendation by the Commission</i>	<i>No. of Candidates recommended by the Commission</i>	<i>Date of Appointment Letters</i>	<i>No. of candidates whom appointment letters were issued</i>
1.	03.03.2021	271	12.03.2021	271
2.	19.04.2021	24	25.05.2021	23
3.	24.06.2021	3	24.08.2021	4
4.	09.11.2021	6	10.12.2021	5
5.	21.01.2021	1	10.02.2021	5
6.	24.11.2022	3	23.03.2023	3

8. It is further stated that in pursuance to the recommendation received by the Commission, the Directorate issued appointment letters to 159 candidates for general category posts, out of which 156 candidates have joined, but 03 candidates have not submitted their joining so far.

9. A detailed counter affidavit has also been filed by the respondent nos.1 & 2 reiterating the facts which have been stated in the short counter affidavit dated 11.04.2023. Another short counter affidavit has also been filed on 03.05.2023 wherein

it has been stated that selection on the post of Block Education Officer is governed by U.P. Subordinate Education (Associate District Inspector of Schools) Service Rules, 1992 (hereinafter referred to as 'Rules, 1992'). It is further stated that under Government Order No.28/5/80-Ka-4-1999 dated 15.11.1999, no waiting list shall be prepared in combined services and other selections except on a selection of single cadre post. It is further stated that the Directorate by letter dated 25.02.2022 sent a requisition for 34 vacant posts of Block Education Officer to the Commission. Accordingly, it is stated that the petitioner cannot be selected for the post of Block Education Officer, and the writ petition lacks merit and deserves to be dismissed.

10. The Commission has also filed a counter affidavit stating therein that after completing the selection process, the final result of the selection in question was declared on 30.01.2021. It is further stated that so far as the unreserved/general category vacancies are concerned, there is no vacancy pending at the level of the Commission. It is also stated that the waiting list is considered to be valid only for one year, and if the department does not send any proposal to the Commission to send names within the specified period, the remaining vacancies, if any, will be considered as carry forward for the next year as per provisions contained in paragraph no.5 & 6 of the Government Order dated 31.01.1994.

11. In the rejoinder affidavit filed by the petitioner, it is stated that Rule 15 (3) of Rules, 1992 clearly stipulates that after receiving the result of the written examination, the Commission shall prepare the merit list based on marks obtained by the selected candidates in written

examination against notified vacancy. The select list recommended by the Commission should contain more candidates than the vacancies advertised, but not exceeding 25% more than the advertised vacancy. It is further stated that Rules, 1992 would prevail over the Government Order dated 15.11.1999, and therefore, the Commission ought to have prepared the merit list in compliance with Rule 15 (3) of the Rules, 1992.

12. Sri Ashok Khare, learned Senior Counsel for the petitioner has contended that it is admitted on record that selection for the post of Block Education Officer is governed and regulated by Rules, 1992. He submits that Rule 15(3) of Rules, 1992 stipulates that after the declaration of the result of the written examination, the Commission shall prepare the merit list based on marks obtained by the candidates and shall recommend the number of candidates as the Commission may deem fit. It further stipulates that if two or more candidates secure equal marks, the Commission shall place them in the merit list as per their merit. The list of selected candidates should contain more number of candidates than the vacancies advertised, but not larger than 25% of the vacancies advertised. Accordingly, it is submitted that Rules, 1992 prescribes that the select list should be of larger candidates than the total number of vacancies advertised subject to a maximum of 25% over and above it, therefore, the action of the Commission in not publishing a waiting list is arbitrary and de hors the Rules, 1992.

13. It is further submitted that it is admitted on record that three vacancies are still lying vacant, and if the Commission had prepared the waiting list of selected candidates, the petitioner, who had secured

one mark less than the last selected candidate in the general category would have been selected on the said post. He submits that the stand of the respondent that Rules, 1992 does not prescribe the preparation of a waiting list is incorrect. He further contends that the Government Order dated 15.11.1999 prohibits the preparation of a waiting list only in cases where combined selection is made to various posts, but said rider would not be applicable in cases where selection is in respect to post in a single cadre, and as in the instant case, the selection is concerning the post of Block Education Officer which is a single cadre post, therefore, the said Government Order is not applicable.

14. He further submits that the stand of the respondents that under the Government Order dated 15.11.1999, a waiting list can be prepared only in cases where selection is made for one post in a single cadre is incorrect as the reading of Government Order dated 15.11.1999 suggests that the word "एकल संवर्गों के पदों को छोड़कर" mentioned in the Government Order dated 15.11.1999 refers to a selection to the post in a single cadre. He, in the alternative, submits that once Rule 15(3) of the Rules, 1992 specifically provides for the preparation of a waiting list, Government Order 15.11.1999 cannot prevail over the Rules, 1992, and therefore, the Commission ought to have prepared the waiting list. Accordingly, it is contended that the petitioner is entitled to the relief as prayed for in the present writ petition.

15. In support of the aforesaid contention, learned counsel for the petitioner has placed reliance upon the following judgements:-

i. *S.K. Nausad Rahman and Others Vs. Union of India and Others* (2022) 12 SCC 1;

ii. *Jata Shankar Vs. State of U.P. and others* 2013 SCC Online All 3526;

iii. *Nadeem Anwar Vs. State of U.P. through Secretary, Department of Govt. U.P. Lucknow and Another* 2016 SCC Online All 3001;

iv. *Sanjay Kumar and Others Vs. State of U.P. and Others passed in Writ-A No.22128 of 2018*;

v. *Sheo Shyam Vs. State of U.P.* 2005 (10) SCC 314.

16. Per contra, learned Additional Chief Standing Counsel would contend that the selection on all advertised posts has been made, and as the petitioner did not obtain minimum cut-off marks, therefore, she was not selected. He submits that there is no provision in Rules, 1992 which mandates the preparation of a waiting list by the Commission. He further contends that the Government Order dated 15.11.1999 is specific and clear and provides that a waiting list shall not be prepared with respect to all selections except where the selection is made on one post in a single cadre. In support of his aforesaid contention, he has placed reliance upon the judgement of the Apex Court in the case of *State of U.P. Vs. Karunesh Kumar and Others* 2023 (1) ADJ 389 SC.

17. Sri M.N. Singh, learned Counsel for the Commission submits that the validity period of the waiting list is one year, and as the result of selection was declared on 30.01.2021 and one year period has expired, therefore, no direction as sought by the petitioner can be issued by this Court.

18. To the aforesaid submission, Sri Ashok Khare, learned Senior Counsel for the petitioner has contended that the validity of the waiting list should be computed from the date of last requisition and not from the date of first requisition.

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

20. The facts as emerge from the record are that under Advertisement No.A-4/E-1/2019 dated 13.12.2019, the petitioner applied for being considered for appointment to the post of Block Education Officer. The petitioner qualified for the preliminary examination, and she appeared in the main examination in which she secured 207 marks, whereas the last selected candidate in the general category secured 208 marks. According to the petitioner, as against 309 vacancies, only 271 candidates have been issued appointment letters, and 38 posts are still lying vacant therefore, the petitioner is liable to be adjusted on the vacant posts.

21. In the short counter affidavit dated 11.04.2023 filed on behalf of respondents nos.1 & 2, it is stated in paragraph no.13 that three general candidates have not submitted their joining so far, meaning thereby even as per the case of the respondents, three posts of general category have not been filled-up against the advertisement No.A-4/E-1/2019.

22. Now, before proceeding with the matter, it would be appropriate to reproduce Rule 15 of the Rules, 1992:-

“15 - आयोग के माध्यम से सीधी भर्ती की प्रक्रिया

15. (1) प्रतियोगिता परीक्षा में सम्मिलित होने की अनुमति के लिए आवेदन के लिए आवेदन पत्र आयोग द्वारा जारी विज्ञापन में प्रकाशित प्रपत्र में आमन्त्रित किये जायेंगे।

(2) किसी भी अभ्यर्थी को परीक्षा में सम्मिलित नहीं किया जायेगा जब तक कि उसके पास आयोग द्वारा जारी किया गया प्रवेश पत्र न हो।

(3) लिखित परीक्षा के परिणाम प्राप्त हो जाने और सारणीबद्ध कर लिए जाने के पश्चात आयोग अभ्यर्थियों की उनकी प्रवीणता क्रम में जैसा कि लिखित परीक्षा में प्रत्येक अभ्यर्थी द्वारा प्राप्त कुल अंकों से प्रकट हो, एक सूची तैयार करेगा और उतनी संख्या में अभ्यर्थियों को जितनी वह नियुक्ति के लिए उचित समझे, संस्तुत करेगा। यदि दो या अधिक अभ्यर्थी बराबर-बराबर अंक प्राप्त करें तो आयोग उनके नाम, सेवा के लिए उनकी सामान्य उपयुक्तता के आधार पर, योग्यता क्रम में रखेगा। सूची में नामों की संख्या रिक्तियों की संख्या से अधिक (किन्तु पच्चीस प्रतिशत से अनाधिक) होगी। आयोग सूची नियुक्ति प्राधिकारी को अग्रसारित करेगा।”

23. Rule 15(1) of the Rules, 1992 provides that an admit card shall be issued by the Commission permitting the candidates to appear in the examination.

24. Rule 15(2) of the Rules, 1992 provides that a candidate shall not be allowed to appear in the examination unless he possesses an admit card issued by the Commission.

25. Rule 15 (3) of the Rules, 1992, which is relevant in the instant case, provides that after the declaration of the result, the Commission shall prepare a waiting list based on marks obtained by the candidates and shall recommend as many number of candidates as the Commission may deem fit. In case two or more candidates secure equal marks, then they shall be placed on the merit list according to their merit and suitability. It further provides that the select list shall contain larger number of candidates than the number of vacancies advertised, but not

larger than 25% of the number of vacancies for which selection has been made.

26. Though according to the stand of the respondents, there is no provision in Rules, 1992 which stipulates the preparation of a waiting list in the selection for the post of Block Education Officer since Rule 15(3) of the Rules, 1992 does not embody the specific word 'preparation of waiting list'. However, a reading of Rule 15(3) of the Rules, 1992 unequivocally suggests that the select list to be forwarded by the Commission to the appointing authority shall comprise of names more than the number of vacancies but not more than 25% thereof, which signifies that select list should contain more number of candidates as per Rule 15(3) of the Rules, 1992 than the number of vacancy advertised.

27. This Court in the case of **Jata Shanker (supra)** interpreted the identical provision in U.P. Group-D Employees Service Rules, 1985, and held that once Rules stipulates for preparation of a waiting list, the selection body is obliged to prepare a waiting list as per Rules. The relevant extract of the aforesaid judgement is reproduced herein-below:-

"At the point of time when selection process has been undertaken as per U.P. Group D Employees Service Rules 1985, there has been specific provision, which provide for as follows:

"(4) The number of the candidates to be selected will be larger (but not larger by more than 25 percent) that the number of vacancies for which the selection has been made. The names in the select list shall be arranged according to the marks awarded at the interview."

A bare perusal of the aforementioned provision quoted above would go to show that number of candidates to be selected will be larger but not larger by more than 25 percent that the number of vacancies for which the selection has been made. This provision in question clearly gives a cue that a waiting-list has to be there but it should not be larger i.e. more than 25 percent of the total vacancies. The said provision has been done away with when amendment in question has been introduced under the Group 'D' Employees Service (5th Amendment) Rules 1985 but before enforcement of the same, the selection process has already commenced and, in view of this, the selection in question would be covered and governed by unamended U.P. Group D Employees Service Rules 1985 and as per the same there is a provision to prepare a list, which would be a larger list but not larger by more than 25 percent than the number of vacancies for which selection is to be made. Apex Court in the case of P. Mahendran and others Vs. State of Karnataka 1990 (1) SCC 411 has clearly explained that selection process once it has commenced, then selection would be governed by the Rules as it existed on the date of commencement of Rules, and amended Rules would apply prospectively unless it is expressly or by necessary implication to have retrospective effect. Here the amendment introduced, does not reflect either expressly or by necessary implication to have retrospective effect. In view of this, to say that there is no provision of waiting-list cannot be accepted by this Court.

The purpose of waiting-list is to see and ensure that after selected candidates have failed to join for whatever the reasons there may be, then the candidates of waiting-list can be offered appointment as per their merit status. A candidate of

waiting-list cannot, however, claim appointment qua the vacancies, which have fallen vacant, after the selected candidates have joined. Apex Court time and again has explained as to what is the object of preparation of waiting list. In the case of Surendra Singh Vs. State of Punjab 1997 (8) SCC 478, it has been ruled that a waiting list prepared in an examination does not furnish a source of recruitment. It is only operative in contingency that if any selected candidate does not join, then the candidate from waiting list can be pushed up. View to the similar effect has been reiterated in the case of Sri Kant Tripathi Vs. State of U.P. and others 2001 (10) SCC 237, by mentioning that wait list candidate has no vested right to be appointed except when selected candidate does not join while the waiting list is still operative.”

28. Similarly, in the case of **Nadeem Anwar (supra)**, this Court held that once The Uttar Pradesh Judicial Service (Second Amendment) Rules, 2012 mandates for the preparation of a waiting list, the Commission is obliged to prepare a waiting list. Paragraphs 12 to 14 of the said judgement are reproduced herein below:-

“12. On the parameters of the Rules in question and in the light of the Government Orders the claim of petitioner is being adverted to. Under The Uttar Pradesh Judicial Service (Second Amendment) Rules, 2012, the Commission is obliged to prepare a final list of selected candidates alongwith wait-list of 10% of existing vacancies in order of their proficiency as disclosed by aggregate of marks finally awarded to each candidate in the written examination and the interview. The Commission, in the present case, has not at all proceeded to prepare the wait-list in consonance with the Rules in question,

whereas, requisition has been sent of 125 posts for U.P. Civil Judge (Junior Division) for being appointed as Civil Judge (Junior Division) under U.P. Nyayik Sewa, in this background, after the final selection has been made, then Commission ought to have prepared final list of 125 selected candidates alongwith wait-list of 10% of existing vacancies, in order of their proficiency as disclosed by aggregate of marks finally awarded to each candidate in the written examination and the interview. Law on the subject is clear that wait-listed candidates have no vested right to be appointed except when a selected candidate does not join while the select-list is still operative. See Sri Kant Tripathi Vs. State of U.P. & Others, 2001 (10) SCC 337. A waiting list prepared by the Commission is to be operative only for the contingency that if any of the selected candidate does not join then the persons from the waiting list could be pushed up and be appointed against the vacancies requisitioned and against which recommendation has already been made by the Commission. The U.P. Judicial Service Rules, 2001 has a peculiar characteristic, inasmuch as, Sub-rule (2) of Rule 21 clearly proceeds to make a mandate that the select list prepared under Sub-rule (3) of Rule 20 shall lapse after all the vacancies advertised or varied after due notification, are filled up, in view of this, the life span of select list has been provided for by the Rules under Sub-rule (2) of Rule 21 and the said select list prepared under Sub-rule (3) of Rule 20 will lapse after all the vacancies advertised or varied after due notification, are filled up and not at all beyond the same. The life of the select list stands determined by the Rules and, in view of this, once the life span of select list stands determined by the Rules, then any executive instructions or policy decision taken by the Commission in

the shape of Government Orders dated 31.1.1994 and 15.11.1999 would be of no avail.

13. These Government Orders in question would not at all be applicable in reference of the life span of the select list in question. Once the Rules in question are specific and the law on the subject is clear that in case any executive instructions are running counter to the statutory Rules, then executive instructions should give way to the statutory Rules in question. Apex Court in the case of Ram Ganesh Triapthi Vs. State of U.P. & Others, AIR 1997 SC 1446 has taken the view that any Government Order contrary to rules cannot be enforced rather requires to be ignored. The factual situation, that is emerging in the present case, is that life span of select list will continue to remain in operation till all the vacancies advertised or varied after due notification, are filled up and here accepted position is that three vacancies still remain unfilled up as candidates, who have been placed at serial nos. 17, 26 and 52 have not joined the posts in question and as far as candidates at serial nos. 17 and 52 are concerned, their candidature in question has already been cancelled by the State Government and even in reference of candidate placed at serial no. 26, decision is awaited. Even this much fact has been accepted before us that fresh requisition has been sent by the State Government and pursuant to the same fresh advertisement has been issued, but the vacancies referred to in the judgment have been left out and have not been included. Once such is the factual situation and such is the language of the Rules in question, then inevitable conclusion is that in reference of selection and appointment to be made under the U.P. Judicial Service Rules, 2001, as amended up to the date, as against the recommendations, that have been so made,

the Commission is under statutory obligation not only to make recommendations of total number of vacancies, that have been requisitioned, but to also prepare 10% of the additional wait-list that would be utilized in the contingency when recommended candidates fail to join their respective posts.

14. Consequently, in the facts of the case, keeping in view the spirit of the Rules in question, as accepted position is that candidates placed at serial nos. 17, 26 and 52 have not joined their respective posts and posts are still lying vacant and in reference of two candidates already decision has been taken by the State Government to cancel their candidature. We are conscious of this fact that even in the case of select-list candidates, what to say of a wait-listed candidate the law is well settled that such a candidate has no indefeasible right to claim appointment merely for the reason that his name is included in the select-list as the State is under no legal duty to fill up all or any of the vacancy and it can always be left vacant or unfilled for valid reasons. State Government, in the present case, in the affidavit filed before us has not at all come up with the case, that State Government intends to leave the vacancies requisitioned/advertised vacant. The Commission has also submitted in affidavit filed before this Court that the moment requisition is received from the State Government, needful would be done. Accordingly, in the peculiar characteristic of the case and the Rules holding the field, we proceed to pass an order directing the State Government to forthwith forward the requisite requisition to the Commission and the Commission, thereafter, in its turn, would make necessary recommendations in favour of candidates, who stand in merit, subject to fulfilment of other terms and

conditions. The entire exercise be undertaken within next three months from the date of receipt of certified copy of this order."

29. The Co-ordinate Bench of this Court in the case of **Sanjay Kumar (supra)** while interpreting the provisions contained in Rule 12 (8) of U.P. Secondary Education Services Selection Board Rules, 1998 held as under:-

"The issue raised lies in a narrow ambit. The conduct of recruitment by the Board is regulated by the provisions of the U.P. Secondary Education Services Selection Board Act, 1982 read with Rules 1998. Rule 11 regulates determination of vacancy while Rule 12 provides for procedure for direct recruitment. Sub-Rule 8 of Rule 12 clearly provides that in the case of vacancy on the post of lecturer or teacher L.T. Grade. The select panel shall be larger (but not larger than 25%) of the number of vacancies. Rule 12(8) of the Rules 1998 is reproduced hereinafter:-

"The Board then, for each category of post, prepare panel of those found most suitable for appointment in order of merit as disclosed by the marks obtained by the after adding the marks obtained under sub-clause (4) or sub-clause (5) above, as the case may be, with the marks obtained in the interview. The panel for the post of Principal or Headmaster shall be prepared institution-wise after giving due regard to the preference given by a candidate, if any, for appointment in a particular institution whereas for the posts in the lecturers and trained graduates grade, it shall be prepared subject-wise and group-wise respectively. If two or more candidates obtain equal marks, the name of the candidate who has higher quality points shall be placed higher in the panel and if

the marks obtained in the quality points are also equal, then the name of the candidate who is older in age shall be placed higher. In the panel for the post of Principal or Headmaster, the number of names shall be three times of the number of the vacancy and for the post of teachers in the Lecturers and Trained graduate grade, it shall be larger (but not larger than twenty-five per cent) than the number of vacancies.

Practical exigencies like non-availability of notified vacancies would not justify the Board from adopting a procedure which is in derogation of what is laid down by the statutory scheme itself.

There is no discretion vested in the commission to provide a panel on the post of teachers in lecturer and L.T. Grade, which may be less than the number of vacancies. Vacancy itself has been defined under Rule 2(e) of the Rules 1998 in following words:-

"Vacancy" means a vacancy arising out as a result of death, retirement, resignation, termination, dismissal or removal of a teacher or creation of new post or appointment or promotion of the incumbent to any higher post in a substantive capacity."

Once the vacancy gets notified to the Board it would be possible for the Board not to draw a panel of candidates which is below the number of posts notified to it. The extent of discretion available to the Board is only to increase the number by making it larger than the notified vacancies up to the maximum limit of 25%. It is only to this extent that discretion can be exercised by the Board. However, the vacancy which have already been advertised cannot be reduced by the Board so as to prepare a panel which may be less than the number of notified vacancies."

30. In view of the interpretation given by this Court in various precedents referred to above with respect to identical Rules, this Court is of the view that Rule 15(3) of Rules, 1992 clearly stipulates that the Commission is obliged to draw select panel consisting of names larger than the requisition sent, but not more than 25% of the total post for which requisition had been sent. In such circumstances, the Commission was expected to draw a panel consisting of names above 309 by up to 25% more.

31. Now, so far as the judgement of Apex Court in the case of **Karunesh Kumar (supra)** is concerned, this Court may note that said judgement is of no help to the respondents since in the said case, the dispute was about selection held on 22.06.2015 on Group-C posts of Gram Panchayat Adhikari. In the said case, the Uttar Pradesh Gram Panchayat Adhikari Service Rules, 1978 (hereinafter referred to as 'Rules, 1978') exclusively dealt with the appointment to the post of Gram Panchayat Adhikari framed under proviso to Article 309 of the Constitution of India. Rule 15(4) of the Rules, 1978 is almost para-materia to Rule 15(3) of Rules, 1992. In the said case, Karunesh Kumar (original petitioner) approached this Court praying for a direction for being considered on the vacancies arising due to the non-joining of the selected candidates on the post of Gram Panchayat Adhikari single cadre Group-C. The said writ petition was dismissed by a learned Single Judge. However, the judgement of the learned Single Judge dismissing the writ petition was set aside by the Division Bench by placing reliance upon Rule 15(4) of Rules, 1978.

32. The Apex Court while setting aside the judgement of this Court held that

after the promulgation of the Uttar Pradesh Subordinate Services Selection Commission Act, 2014 (hereinafter referred to as 'Act, 2014') and The Uttar Pradesh Direct Recruitment to Group 'C' Posts (Mode and Procedure) Rules, 2015 (hereinafter referred to as 'Rules, 2015'), Rules, 1978 have no application in the said selection as the selection was held by the Uttar Pradesh Subordinate Services Selection Commission. It considered the effect of Rule 8(2) of Rules, 2015 which provides that all Group-C posts would come under its purview except those specifically excluded by the Government by way of a notification. The Rules 2015 lay down the procedure for direct recruitment by way of written examination followed by an interview. The Apex Court held that as the selection had been conducted under Rules, 2015 and the petitioner had participated in the same, the petitioner is estopped in law in questioning it. It further held that there is no provision under Rules, 2015 for the preparation of a waiting list, therefore, the Division Bench has erred in allowing the writ petition.

33. In the present case, the post in question does not come under the purview of Act, 2014 and Rules, 2015 since the selection has been made by the U.P. Public Service Commission, and further it is not disputed by the respondents that Rules 1992 regulates the selection in the instant case and Rule 15(3) provides for preparation of a waiting list, therefore, the judgement of Apex Court in the case of **Karunesh Kumar (supra)** is distinguishable on facts and is not applicable in the present case.

34. Now so far as the stand of the respondents that Government Order dated 15.11.1999 prohibits the publication of

waiting list in all selections except in cases where selection is made on one post in a single cadre, though it is urged by Sri Ashok Khare, learned Senior Counsel for the petitioner that word 'एकल संवर्गों के पदों को छोड़कर' refers to a selection on the post of one cadre which means that prohibition would not apply in cases where selection is made on the number of posts in one cadre, but said submission of Sri Ashok Khare runs counter to the judgement of Apex Court in the case of **Kamlesh Kumar (supra)** wherein Apex Court in paragraph 28 while interpreting the Government Order dated 15.11.1999 held as under:-

“28. Much reliance has been made on the Government Order passed on 15.11.1999. The said order is very clear on two counts. It speaks of the role being played by the Public Service Commission, and dispensing with the waiting-list except in case of selection to a single post. What is important to be noted is the selection and that too for a single post. It would only mean that selection of an individual to a post, which cannot be interpreted to mean a particular category of post or a single cadre post, as contended by the counsel for the Respondents. The object is very clear that the exercise done in selecting a suitable candidate shall not go waste if that person is not actually selected for any reason, in which case the next in line would get in. Otherwise, the entire process would go to waste, making the recruiting agency to redo it all over for a single post.”

35. Therefore, said submission Sri Ashok Khare is devoid of merit. However, this Court finds substance in the submission of Sri Ashok Khare that Government Order cannot override the Rules, 1992, and as Rule 15(3) stipulates for publication of a waiting list, the

Commission should have complied with the Rule 15(3) while drawing panel of selected candidates.

36. In this respect, it would be apt to reproduce paragraph 29 of the judgement of the Apex Court in the case of **S.K. Nausad Rahman:-**

29. Fifth, where there is a conflict between executive instructions and Rules framed under Article 309, the rules must prevail. In the event of a conflict between the Rules framed under Article 309 and a law made by the appropriate legislature, the law prevails. Where the rules are skeletal or in a situation when there is a gap in the rules, executive instructions can supplement what is stated in the rules.”

37. Reference may also be had to paragraph 12 of the judgement of this Court in the case of **Nadeem Anwar (supra)** wherein this court has held that a Government Order contrary to Rules cannot be enforced and has to be ignored.

38. Now, coming to the last submission of learned counsel for the respondents as the period of the select list is one year and one year period has expired, therefore, no such direction as sought by the petitioner can be issued. In this respect, it has been pointed out by Sri Ashok Khare that the period of one year shall be reckoned from the date of the last requisition. He further submits that the contingency to appoint from the waiting list will arise only after the candidates to whom offer of appointment was made did not join. In the instant case, the last appointment order is dated 21.04.2022 and the writ petition has been filed before the expiry of one year from the last appointment order dated 21.04.2022.

39. The Apex Court in the case of *Sheo Shyam (supra)* held that the validity of the period of the waiting list should be computed from the date of the last requisition sent and not from the date of the first requisition. In the instant case, the appointment letters were issued on 21.04.2022, and the last appointment letter was dated 23.03.2023, which is on page 57 of the short counter affidavit dated 11.04.2023, therefore, the contention of respondents with regard to the lapse of select list is also misconceived in view of the judgement of Apex Court in the case of *Sheo Shyam (supra)*.

40. It is also pertinent to note that as per the averment made in paragraph 8 of the short counter affidavit dated 03.05.2023, the requisition has been sent for 34 vacant posts of Block Education Officer to the Commission by Director's letter dated 25.02.2022. The record reveals that appointment letters have been issued to the candidates in reference to selection under advertisement No.A-4/E-1/2019 on 21.04.2022 and 23.03.2023 after the requisition letter dated 25.02.2022 has been sent by the Director for 34 posts. So the stand of the respondent that the petitioner can not be adjusted on any vacant post since requisition has been sent for vacant posts is belied in view of the fact that the appointment letters have been issued after the requisition letter dated 25.02.2022 has been sent by the Director to the commission. It is also pertinent to note that the stand of the respondents that selection has been made on all posts is contrary to the record when it is admitted in paragraph 13 of the short counter affidavit dated 11.04.2023 that three general candidates have not submitted joining meaning thereby three posts are lying vacant.

41. This Court is also conscious of the fact that the law is well settled that a selected candidate has no indefeasible right to claim appointment merely for the reason that his/her name is included in the select list as the State is under no legal duty to fill up all vacancies and State can decide for valid reasons not to fill up the said vacancies.

42. In the present case, it is evident from the facts, detailed above, that the Commission had made recommendations in piecemeal and the last appointment letter with respect to recommendations was made on 23.03.2023. In the present case, the result of selection was declared on 30.01.2021. The respondents are issuing appointment letters to the candidates even after more than two years from the date of declaration of the result.

43. The State-respondent is expected to act fairly and in the spirit of relevant rules. In the counter affidavit, the respondents have not disclosed any valid reason or its intent for not filling up the three vacancies that remained vacant due to the non-joining of selected candidates.

44. Therefore, for the reasons given above, this court is of the view that the action of the respondents in not preparing waiting list in compliance with Rule 15(3) of Rules 1992 is arbitrary and against the spirit of the said Rule. Consequently, the writ petition is *allowed* and a writ of mandamus is issued to the Commission to prepare a waiting list in compliance with Rule 15(3) of Rules, 1992, and if the petitioner is found eligible and comes within the merit list, she may be considered for appointment, if she otherwise fulfills all other conditions for appointment. There shall be no order as to cost.

(2023) 9 ILRA 427
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.08.2023

BEFORE

THE HON'BLE SAUMITRA DAYAL SINGH, J.
THE HON'BLE RAJENDRA KUMAR -IV, J.

Writ-A No. 33686 of 2017

U.O.I. & Anr. ...Petitioners
Versus
Mohd. Yunush & Ors. ...Respondents

Counsel for the Petitioners:

Sri Saurabh Srivastava, Sri Krishna Agarwal, Sri
Manoj Kumar Singh, Sri Vijay Kumar Singh

Counsel for the Respondents:

Sri Santosh Kumar Mishra

A. Practice and Procedure – Constitution of India – Article 226 – Writ – First time the objection regarding the delay in filing the proceeding before the Tribunal was raised in High Court – Permissibility – No objection regarding delay was pressed before Tribunal during oral hearing – No pleading regarding delay was raised in writ petition – Effect – Held, the issue of delay and laches that may have been available to the Union of India, though raised before the learned Tribunal, was not pressed at the stage of oral hearing. Consequently, the Tribunal has not dealt with this – Once the U.O.I. had thus waived its right to press the objection as to limitation before the Tribunal, it may not be allowed to resurrect the ground of delay, in the present proceedings that arise by way of judicial review of the order of the Tribunal. (Para 7 and 8)

B. Service Law – Excess payment of salary was alleged to be made – Deduction from retiral dues – Permissibility – No notice during the service was ever issued – No case of excess payment against the undertaking that it may be reversed in

future was there – Effect – Small amount of alleged excess payment, how far warrant interfere in writ jurisdiction – Held, excess amount of Rs. 2,16,947/- was not paid in lump-sum. Rather it came to be wrongly paid out to the applicant-respondent by way of excess payment of salary, paid month to month – Further held, the total amount paid is too small and not deserving to warrant any interference by this Court, in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India. (Para 6, 17, 18 and 20)

Writ petition dismissed. (E-1)

List of Cases cited:

1. St. of Punjab Vs Madan Singh; (1974) 3 SCC 90
2. Dayal Singh Vs U.O.I.; (2003) 2 SCC 593
3. Director of Inspection of Income Tax (Investigation) Vs Pooran mal & Sons; (1975) 4SCC 568
4. High Court of Punjab and Haryana & ors. Vs Jagdev Singh; (2016) 14 SCC 267
5. St. of Pun. & ors. Vs Rafiq Masih (White Washer) & anr.; (2015) 4 SCC 334)

(Delivered by Hon'ble Saumitra Dayal
Singh, J. & Hon'ble Rajendra Kumar-IV, J.)

1. Heard Sri Krishna Agarawal, learned counsel for respondents-petitioners and Sri S.K. Mishra, learned counsel for applicant-respondent.
2. The writ petition is directed against the final order dated 31.03.2017 passed by the Central Administrative Tribunal, Allahabad Bench, Allahabad in Original Application No. 330 of 00079 of 2015, Mohd. Yunush v. Union of India and Another. By that order, the Tribunal has allowed the original application and

directed the respondents-petitioners for payment of Rs. 2,16,947/- to the applicant-respondent that had been deducted at the time of payment of retiral dues to the applicant-respondent consequent to his retirement on attaining the age of superannuation on 31.07.2010.

3. The undisputed facts of the case are, the applicant-respondent retired on the post of J.E.-II, from the East Central Railway, Mughalsarai. During his years in service, the applicant-respondent suffered a medical condition, for which, he was hospitalized at the Railway Hospital, Mughalsarai and thereafter referred to higher medical centre. Consequent to his recovery, he was categorized in the lower medical category C-1 grade on 29.07.2010, just three days before his attaining the age of superannuation. While preparing his pension papers, the Central Railway Authorities realised, excess payment had been made to the applicant-respondent month to month, totaling Rs. 2,16,947/-. That was deducted.

4. Being aggrieved, the applicant-respondent first approached the departmental authority, who rejected his claim. Being aggrieved, the private-respondents filed the Original Application, giving rise to the present petition. It is true that a counter affidavit had been filed by the Union of India and plea of delay had been raised therein. However, on perusal of the order of the Tribunal, it appears that no such plea was pressed at the stage of hearing. Paragraph 3 of the order of the Tribunal contains the contentions raised by the Union of India, which reads as below :-

"Per contra, the respondent's counsel stated that the letter dated 07.07.2014 cannot be an impugned order as this is an

information, received by the applicant, through Right to Information Act hence on this account only the O.A. deserves to be dismissed. Counsel for the respondents stated that the respondents have constituted the medical board, which found the applicant unfit in B-1 and B-2 category and fit in C-1 category and below with glass for D.V/NV. Counsel for the respondent stated that the applicant has no leave balance in his account hence the question of leave salary does not arise."

5. Consequently, the Tribunal has not dealt with the issue of delay.

6. On the merit issue, the Tribunal has found that no show cause notice was ever issued to the applicant-respondent during his years in service, seeking to reverse the alleged excess payment made to the applicant-petitioner. Considering the loss suffered, calling for sympathetic consideration of his case, the Tribunal has allowed the Original Application and provided for refund of the wrongly deducted amount Rs. 2,16,947/-.

7. Having heard the learned counsel for the parties and having perused the record, we find no good ground to interfere in the facts of the present case. In the first place, the issue of delay and laches that may have been available to the Union of India, though raised before the learned Tribunal, was not pressed at the stage of oral hearing. Consequently, the Tribunal has not dealt with this.

8. Once the Union of India had thus waived its right to press the objection as to limitation before the Tribunal, it may not be allowed to resurrect the ground of delay, in the present proceedings that arise by way of judicial review of the order of the Tribunal.

9. In **State of Punjab v. Madan Singh, (1974) 3 SCC 90**, where, issue of delay and laches had not been raised before the High Court, the issue was not allowed to be raised before the Supreme Court. It was observed :-

"5. It was urged on behalf of the State that the High Court should not have granted any relief in the writ petitions as the petitioners were guilty of laches inasmuch as they approached the Court after a long delay. This contention does not appear to have been urged before the High Court. The High Court having exercised its discretion in granting the reliefs asked for, we see no reason to interfere with its discretion. "

10. In the context of writ jurisdiction of the High Court (where delayed writ proceeding had been entertained on merits), the Supreme Court in **Dayal Singh v. Union of India, (2003) 2 SCC 593**, observed as below :-

"41. It was submitted that the respondents having filed a writ petition after a period of eight years, the same ought not to have been entertained. Primarily a question of delay and laches is a matter which is required to be considered by the writ court. Once the writ court has exercised its jurisdiction despite delay and laches on the part of the respondents, it is not for us at this stage to set aside the order of the High Court on that ground alone particularly when we find that the impugned judgment is legally sustainable."

11. Also, we see no fact pleaded by the Union of India and therefore, we find no error was committed by the Tribunal in not considering the issue of delay. The ground of delay or laches may be a ground

available to oppose a judicial proceeding before any Court of law or Tribunal. However, it remains an objection to the remedy sought. It may be waived by the party in whose favour it may work, either explicitly or impliedly.

12. Even, in the context of a rigid period of limitation prescribed under Section 132(5) of the Income Tax Act, 1961, in **Director of Inspection of Income Tax (Investigation) v. Pooran mal & Sons, (1975) 4SCC 568**, it was found to be waived by the party / assessee to whose benefit, it otherwise applied. It was observed :-

"10. But the most important principle on the basis of which the order of the Income-tax Officer should be upheld is that it is in pursuance of an agreement between the parties which has obtained the imprimatur of the Court that this order has been made. The period of limitation is one intended for the benefit of the person whose property has been seized. It is open to him to waive it. We consider that to hold that the period of ninety days which is mentioned in 132(5) is an immutable one would cause more injury to the citizen than to Revenue. It is, therefore, open to the aggrieved person, as happened in this case, to agree to a fresh disposal of the case by the Income-tax Officer and thereby waive the period of limitation."

13. Since in the present case, the objection as to limitation was raised in the counter affidavit filed before the Tribunal but was not pressed at the stage of oral hearing, the same is treated to have been waived, by necessary implication. Even in the present writ petition, no pleading has been raised to assert that the ground of delay, though pressed at the stage of oral

hearing before the Tribunal, was not considered by it.

14. Therefore, we cannot accept the contentions of the learned counsel for the respondent-petitioner that there was gross delay on the part of the applicant-respondent in approaching the Tribunal.

15. As to merits, no reliance may be placed on the decision of the Supreme Court in **High Court of Punjab and Haryana and Others v. Jagdev Singh, (2016) 14 SCC 267**, inasmuch as the distinction drawn by the Supreme Court, in that case (from the pre-existing ratio in **State of Punjab and Others v. Rafiq Masih (White Washer) and Another, (2015) 4 SCC 334**), is wholly inapplicable to the present facts. That distinction arose on the own undertaking given by the employee at the stage of the disputed excess payment being paid out to him, first i.e. when it was disbursed.

16. Seen in that light, in **High Court of Punjab and Haryana and Others v. Jagdev Singh, (2016) 14 SCC 267**, it was observed :

"10. In State of Punjab & Ors etc. vs. Rafiq Masih (White Washer) etc. this Court held that while it is not possible to postulate all situations of hardship where payments have mistakenly been made by an employer, in the following situations, a recovery by the employer would be impermissible in law:

"(i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).

(ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover." (emphasis supplied).

11. The principle enunciated in proposition (ii) above cannot apply to a situation such as in the present case. In the present case, the officer to whom the payment was made in the first instance was clearly placed on notice that any payment found to have been made in excess would be required to be refunded. The officer furnished an undertaking while opting for the revised pay scale. He is bound by the undertaking."

(emphasis supplied)

17. Any amount that may have been thus paid out in excess against such an undertaking - that it may be reversed in future would, remain provisional and/or a conditional payment that may remain contingent to an event, in future. Such is not the case here.

18. In the present case, according to the respondent-petitioner, the excess amount of Rs. 2,16,947/- was not paid in lump-sum. Rather it came to be wrongly paid out to the applicant-respondent by way of excess payment of salary, paid month to month from 17.06.2009 to 31.07.2010.

19. Seen in that light, there is absolutely no pleading or allegation that the petitioner, who was recovering from his medical condition, had played any role in obtaining such excess payment. Therefore, only this much may be concluded in the present facts that excess payment came to be made to the applicant-respondent owing to the mistake committed by the employer.

20. Then it may also not lost sight, the employee is not claiming any payment from this Court. That relief was claimed before the Tribunal. It has been granted. The total amount paid to the applicant-respondent is not more than Rs. 2,16,947/-. It is too small and not deserving to warrant any interference by this Court, in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India. No patent error of law shown to have been committed by the Tribunal as may require that interference to be made.

21. For the reasons given above and the order of Tribunal being based on facts and law, we decline to exercise our jurisdiction.

22. In view of above, the present petition is dismissed. No order as to cost.

(2023) 9 ILRA 431

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 15.09.2023

BEFORE

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

Writ-A No. 36773 of 2011

Dr. B.K. Gupta

...Petitioner

Versus

Judge Small Cause Court, Agra & Anr.

...Respondents

Counsel for the Petitioner:

Mr. Swapnil Kumar

Counsel for the Respondents:

C.S.C., Sri Manoj Goswami

A. Tenancy Law – Constitution of India, 1950 – Article 226 – Writ – Mandamus – Scope – Can writ of mandamus be issued to execute a decree – Explained – Eviction – Landlord's suit for evicting the Government-tenant u/s 20 of UP Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 was decreed ex parte – Delivery of possession sought – Application under O. IX R. 13 CPC was rejected, which was confirmed by the revisional court – Objection u/s 47 CPC of the St. was also rejected, which was confirmed upto High Court – Effect – In Execution case, writ of possession was issued, against which the SCC Revision of St. was also dismissed – The learned Judge has mentioned the fact that the police personnel have refused to comply with the writ of possession, saying that they would vacate only if the higher officials of the Police order them to do so – Non-delivery of possession compelled the petitioner to file writ petition – Held, respondents are bent upon obstructing the decree, utilizing the brute force of the St. at their command to flout it – Execution is a self-sufficient and effective process to implement a decree and a writ of mandamus invariably to execute it ought not issue – In a rare situation to abate injustice, writ of mandamus can be issued to execute a decree of the Civil Court – A mandamus can be viewed as a panacea to undo all wrongs, where there is a right, but no mode of redress or one that is effectual. (Para 5, 16, 70, 71, 72, 73, 77, 87, 90 and 96)

B. Constitution of India – Article 300-A – Right to property – Depriving the property's right without authority of law – Misuse of St. machinery – Held, the St. of U.P. or the police officers, who are occupying the suit property on behalf of the St., are prima facie not the owners, as they say they are, and which, so far they

have not been able to prove or establish in any proceeding. What they are doing by forcibly holding on to possession of the suit property is nothing short of depriving the petitioner of his right under Article 300-A of the Constitution. (Para 95)

Writ petition allowed. (E-1)

List of Cases cited:

1. Secretary, Cannanore District Muslim Educational Association, Karimbam Vs St. of Kerala & ors.; (2010) 6 SCC 373
2. K. Seetharama Dass Vs Sikile Moses & ors.; 1999 (1) A.P.L.J. 406
3. Kasani Subbamma Vs The Government of A.P. & ors.; 1994 (1) A.P.L.J. 117

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

1. Heard Mr. Swapnil Kumar, learned Counsel for the petitioner and Mr. Neeraj Tripathi, learned Additional Advocate General assisted by Sri A.K. Trivedi, learned Standing Counsel appearing on behalf of the State.

2. This writ petition under Article 226 of the Constitution has engaged the attention of this Court regularly during the past twelve years. The transaction, out of which this writ petition has arisen, the cause of action involved and the relief claimed, are all very unusual and unconventional; but not without good reason.

3. The petitioner, who has prayed for the issue of a writ of mandamus, directing the Judge, Small Cause Court to ensure handing over of actual physical possession of the suit property, subject matter of the decree dated 14.11.1991 passed by the said Judge in SCC Suit No.108 of 1989, has not chosen this very unusual course without a

most astounding situation he is confronted with. He has further prayed that a mandamus be issued to the respondents, by which apparently he means respondent No.2, the State of Uttar Pradesh through the Collector, Agra, directing them to pay damages to the petitioner @ Rs.10,000/- per month, with effect from the date of the decree dated 14.11.1991 up to the date of delivery of actual possession. It may sound like an ill-advised relief to be asked by a decree-holder in a writ petition, but that too has some background to it, as the facts of the case here would show.

4. The petitioner is the plaintiff of SCC Suit No.108 of 1989, instituted in the Court of the Judge, Small Causes, Agra on 14th March, 1989. The suit aforesaid was instituted by the present petitioner's father, Mr. R.B.L. Gupta, Advocate. Pending proceedings at the stage of execution, the plaintiff-decree-holder, R.B.L. Gupta died and his son, the petitioner, Dr. B.K. Gupta was substituted. Thus, for all intents and purposes, now Dr. B.K. Gupta son of the late R.B.L. Gupta, the original plaintiff, shall be called 'the petitioner'.

5. Reverting in time, when the suit was instituted, it was the petitioner's case that the State Government of Uttar Pradesh was a tenant of the petitioner in the property bearing Municipal No.6/336, situate at Khandari Road, Hari Parwat Ward, Agra, with details mentioned at the foot of the plaint and shown in red colour in the map annexed to the plaint. The State Government were his tenants, who are respondent No.2 here, at a monthly rent of Rs.15/- per month, the tenancy commencing on the 1st day of every English calendar month. The aforesaid premises, let out by the petitioner to the State Government, shall hereinafter be

called 'the suit property'. It comprised two pucca rooms with a door between them, oriented towards Khandari Road in the north and behind the said room, there was a gate and a tin shed, attached to it towards the south. Thereafter, there was an open land further to the south. The suit property, as already said, is detailed in the plaint map. The suit property is said to be bound on all sides by a boundary wall, approximately 10 feet high on the east and 12 feet in the south.

6. It is the petitioner's case, pleaded in the plaint giving rise to the suit, that the State have not paid rent since 1st March, 1988, despite repeated requests. It is the petitioner's case further pleaded in the plaint that the then S.H.O., Hari Parwat, one Albel Singh, Chowki In-charge Chowki Khandari, Omveer Singh Pundir and Constables Vansraj Singh and Nawab Singh, within knowledge of the Senior Superintendent of Police, Agra and conspiring amongst themselves, without the petitioner's consent or permission, completely damaged the rooms, gate, tin shed and boundary wall standing on the land comprising the suit property and misappropriated the materials.

7. It is asserted that the State Government had full knowledge of the aforesaid act. The petitioner, upon receiving information that the suit property is being demolished, reached the spot along with Mr. Surendra Kumar Gupta, Advocate on 17.03.1988 at about 8:00 p.m. and found the Station House Officer, Hari Parwat, the Chowki In-charge, Khandari, besides some constables, present at the suit property along with 15-20 labourers, who were demolishing the existing building. The petitioner asked the policemen present not to cause further damage to the property.

The men present there are said to have threatened the petitioner with death and detention in police custody. The petitioner along with Surendra Kumar Gupta, Advocate went to Police Station Hari Parwat to lodge an FIR, where he was mistreated and asked to go away. Mr. Surendra Kumar Gupta then sent a telegraphic report of the incident to the defendant.

8. It is then pleaded that the defendant illegally, unauthorizedly and forcefully, without the petitioner's consent, constructed one room and a verandah in front of it, on the open land towards the south of the original premises, let out to the State Government. There existed no construction at the spot, where it has been erected. The said act, according to the petitioner, constitutes, structural alteration that has led to diminishment in the utility and value of the suit property and further disfigured it.

9. In face of these facts, the plaintiff served a notice upon the defendant, determining the tenancy of the State of Uttar Pradesh and requiring them to vacate the property, delivering its vacant possession, after removing the unauthorized construction put up, within 30 days of receipt of the notice. The defendant was also called upon to pay arrears of rent. The petitioner also claimed in damages a sum of Rs.50,000/- from the date of receipt of notice towards costs of the demolished constructions as per details averred in paragraph No.10 of the plaint. It was mentioned in the notice that it be treated also as one under Section 80 of the Code of Civil Procedure, 1908 (for short, 'the Code').

10. It was also averred that the plaintiff would file a suit separately for damages, as the learned Judge, Small

Cause Court may not have jurisdiction to grant that relief. The composite notice under Section 106 of the Transfer of Property Act, 1882 and Section 80 of the Code was duly served.

11. The petitioner, therefore, instituted the suit for eviction, arrears of rent and mesne profits, including future mesne profits till delivery of possession as per particulars mentioned in relief clauses A, B and C to the plaint. The suit was apparently instituted on ground of actionable default and structural alteration leading to substantial damage, in consequence of which the suit property suffered a diminishment in its value and disfigurement. These grounds were pleaded to make out a case for eviction under Section 20 of the Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (U.P. Act No.13 of 1972) (for short, 'the Act of 1972').

12. The plaint as originally framed carried the following array of defendants:

(1) U.P. State summons to be served upon the Collector, Agra

(2) Senior Superintendent of Police, Agra,

(3) Sri R.K. Singh Rathore, serving as Circle Officer, Hari Parwat, Agra,

(4) Sri Albel Singh, serving as Station Officer, P.S. Hari Parwat, Agra,

(5) Sri Omveer Singh Pundir, In-charge Police Outpost Khandari, Agra

(6) Sri Vansraj Singh / both serving as Constables

(7) Sri Nawab Singh / Police Outpost Khandari,

P.S. Hari Parwat, Agra.

13. Later on, it appears that the petitioner moved an application to delete

defendant Nos.2 to 7 from the array, that is to say, the Police Authorities, who were in occupation of the suit property. The application was allowed by the Court vide an order dated 08.08.1991. The police functionaries, who were in occupation of the suit, were, therefore, asserted by the petitioner to be holding the suit property on behalf of the State of U.P. represented by the Collector as the petitioner's tenant.

14. Summons of the suit was issued to the defendant, that is to say, State of U.P. through the Collector, Agra arrayed as respondent No.2 to the writ petition. The defendant-respondent No.2 was duly served and the Trial Court held service sufficient. The suit proceeded ex parte, with the petitioner filing his affidavit to prove the plaint case being paper No. 15-Ga. Along with the list of documents, a carbon copy of the notice, the registered postal receipt and the AD card in original were filed.

15. The Trial Court held that the suit, being one for eviction from a building against a tenant, whether an officer of the Government or a private person, is maintainable before the Judge, Small Cause Court. He looked into the affidavit, the copy of the notice, the registered postal receipt and the AD card. On the basis of the evidence offered by the petitioner, the Trial Court decreed the suit for eviction, besides Rs.96/- towards arrears of rent, Rs.75/- in mesne profits and Rs.200/- as costs of the notice. The suit was decreed in the aforesaid terms ex parte. It was also decreed that the plaintiff would be entitled to recover pendente lite and future mesne profits at the rate of Rs.15/- per month, upon deposit of necessary court-fee in the execution department. This decree was passed on 14.11.1991.

16. Based on the aforesaid decree, Execution Case No.20 of 1999 was

instituted in the Court of the Judge, Small Cause on 06.12.1999. A writ of possession was issued by the Executing Court to the Amin ordering him to deliver possession of the suit property to the petitioner. The Amin, in order to enforce the writ, went over to the suit property, where he found, according to the petitioner, a police official, who was informed about the Court's decree and asked to vacate the suit property. The police officer present refused to vacate and handover possession 'unless a direction came from the D.I.G. of Police'. The Court Amin submitted his report on 20.12.2010 before the Executing Court, informing the Court that he had proceeded to the suit property to handover possession and informed the Police official there to vacate it, but the policeman said that he would not deliver possession unless the D.I.G. directed him to do so.

17. According to the petitioner, the Executing Court took into consideration the report of the Amin dated 20.12.2010, and on 09.03.2011, again issued a writ of possession. The Court further directed the Amin to get the suit property vacated after contacting the competent authorities. The order dated 09.03.2011, that was passed by the Executing Court, reads:

"दिनांक- 09-03-2011

वाद पुकारा गया। डिक्रीदार मय विद्वान अधिवक्ता हाजिर है। विपक्षी की तरफ से कोई हाजिर नहीं है। पूर्व में दखल परवाना जारी किया गया था। अमीन की आख्या दिनांकित 20.12.2010 पत्रावली पर उपलब्ध है। जिसके अनुसार अमीन ने न्यायालय द्वारा प्रशंगत भवन में मौजूद पुलिस कर्मचारियों को न्यायालय के आदेश से अवगत कराते हुए पुलिस चौकी भवन को खाली करके कब्जा व दखल डिक्रीदार को देने के लिए कहा तो उन्होंने कब्जा - दखल देने से इंकार कर दिया कि हमारे पास डी0आई0जी0 का कोई आदेश नहीं है तथा भवन खाली करने से इंकार कर दिया। अतः पुनः परवाना दखल जारी हो अमीन इस सम्बन्ध में सक्षम अधिकारियों से

सम्पर्क कर दखल की कार्यवाही सम्पन्न करें। आख्या दिनांक 22.3.2011 को पेश हो।"

ह0/ अ0

लघुवाद न्यायाधीश,
आगरा।"

18. The Amin again went to the suit property to enforce the writ of possession on 15.03.2011 after informing the D.I.G. of Police and the Collector, Agra. However, the policeman present there refused to vacate the premises as he had not received any orders either from the D.I.G. or the Collector, Agra. The report was submitted again by the Amin before the Executing Court, informing the learned Judge of these facts. A copy of the said report is on record as Annexure No.4 to the writ petition. After the aforesaid report was submitted by the Amin, the Executing Court directed on 26.03.2011 that a letter be issued to the Collector, Agra to vacate the suit property. In pursuance of the Court's order, a letter dated 02.04.2011 was addressed by the Court to the Senior Superintendent of Police and D.I.G., Agra Range, Agra requesting the two officers that in execution of the decree dated 14.11.1991 passed in the SCC Suit, actual physical possession of the suit property, mentioning its details, be handed over to the petitioner within a week and a compliance report submitted in Court. Despite the aforesaid demi-official letter issued by the Court, the decree was not executed nor possession handed over to the petitioner by the State or the Police officials occupying it.

19. It is the petitioner's case that the decree dated 14.11.1991 has become final and there is no legal impediment to its execution, but the Police are unlawfully occupying the suit property. It is also urged on behalf of the petitioner that in order to

circumvent the Court's decree, the State and the Police Authorities have resisted execution of the decree unlawfully. It is pleaded that the practice has been deprecated by the Supreme Court in terms that the decree-holder should reap the fruits of the decree.

20. There is an assertion in paragraph No.18 of the writ petition that the Executing Court is unable to execute the decree as the suit property is in possession of the Police. The petitioner has asserted that he is denied possession of the suit property and no rent is being paid to him since 1st March, 1988, whereas respondent No.2 and the Police Authorities, who are occupying the suit property on the said respondent's behalf, have taken the law into their hands, obstructing execution of the decree. It is urged that on account of the dishonest stand of respondent No.2, the petitioner has not been able to secure possession of the suit property despite a decree in his favour. The petitioner says that this is a violation of his right under Articles 21 and 300-A of the Constitution. It is claimed by the petitioner that due to continuing illegal possession of the respondent, he is suffering loss by being deprived of the enjoyment of his property. The area of the suit property is said to be quite large, and if let out, would fetch rent in the sum of Rs.10,000/- per month. The petitioner has, therefore, in the face of the Executing Court turning helpless to execute its own decree, taken resort to the extraordinary jurisdiction of this Court under Article 226 of the Constitution. In substance, the petitioner seeks a direction to the State, represented by the Collector, and the Police Authorities holding the suit property on behalf of the second respondent to vacate the same in compliance with the decree dated

14.11.1991 passed by the Judge, Small Cause Court, Agra, which that Court is unable to execute, owing to the brazen abuse of public office by the Police Authorities in occupation of the suit property on behalf of the State.

21. As said earlier by this Court, the relief sought in this petition is very unusual and the circumstances necessitating it are equally so. When this petition came up before the Court the first time on 08.07.2011, the learned Counsel for the respondents was granted three weeks' time to file a counter affidavit. When the case came up before the Court the next time, it was 01.08.2011 and the following order was passed by my esteemed Brother Shashi Kant Gupta:

“This writ petition has been filed for issuance of a direction in the nature of mandamus to the respondent no. 1 Judge, Small Cause Court, Agra to ensure the handing over the actual physical possession of the property in pursuance to eviction decree dated 14.11.1991 passed by Judge, Small Cause Court, Agra in S.C.C. Case No. 108 of 1989. It has been further prayed that the respondents be directed to pay damages at the rate of Rs.10,000/- per month w.e.f. the date of the decree i.e. 14.11.1991 up to the actual date of vacation of the premises in dispute.

Learned counsel for the petitioner has submitted that father of the petitioner filed S.C.C. Case No. 108 of 1989 (R.B.L. Gupta Vs. U.P. State) in the Court of J.S.C.C. Agra for rent and eviction as rent was not paid since 01.03.1988 as well as without permission certain illegal construction was raised by the defendants. Police Chowki is being run in the premises in dispute. The aforesaid suit was decreed by Additional J.S.C.C. Agra vide Order

dated 14.11.1991. The said order was not challenged by the respondent no. 2, as such, the Order dated 14.11.1991 attained finality. Subsequent thereto an Execution Case No. 20 of 1999 (R.B.L. Gupta Vs. U.P. State) was filed for executing the decree.

It was further submitted by the learned counsel for the petitioner that a writ of possession was issued by the executing Court to the Amin for handing over the possession of the premises to the petitioner decree holder. The Amin in pursuance to the writ of possession went to the disputed premises for handing over the possession, where he met police officials and informed them about the order of the executing court and requested them to vacate the premises but they refused to vacate and give possession unless a direction comes from the D.I.G. Police.

The court Amin has submitted its report dated 20.12.2010 before the executing Court informing that when he went to hand over the possession of the disputed premises to the petitioner and informed the police officials to vacate the disputed premises (police chowki) they refused to vacate the disputed premises (police chowki).

The Executing Court considering the report of the Amin, on 09.03.2011 again issued a writ of possession and further directed to Amin to get the premises vacated after contacting the appropriate authorities. For ready reference, the order dated 09.03.2011 passed by the Executing court is quoted below:-

"दिनांक- 09.03.2011

वाद पुकारा गया। डिफ्रीदार मय विद्वान अधिवक्ता हाजिर है। विपक्षी की तरफ से कोई हाजिर नहीं है। पूर्व में दखल परवाना जारी किया गया था। अमीन की आख्या दिनांकित 20.12.2010 पत्रावली पर उपलब्ध है। जिसके अनुसार अमीन ने न्यायालय द्वारा प्रश्रुत भवन में मौजूद पुलिस कर्मचारियों को न्यायालय के आदेश से अवगत कराते हुए पुलिस चौकी भवन को खाली करके कब्जा व

दखल डिफ्रीदार को देने के लिए कहा तो उन्होंने कब्जा - दखल देने से इंकार कर दिया कि हमारे पास डी0आई0जी0 का कोई आदेश नहीं है तथा भवन खाली करने से इंकार कर दिया। अतः पुनः परवाना दखल जारी हो अमीन इस सम्बन्ध में सक्षम अधिकारियों से सम्पर्क कर दखल की कार्यवाही सम्पन्न करें। आख्या दिनांक 22.3.2011 को पेश हो।"

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लघुवाद न्यायाधीश,
आगरा।"

Learned counsel for the petitioner has further submitted that the Amin again went to the disputed premises for handing over the possession to the petitioner on 25.03.2011 after giving information to the D.I.G. Police and Collector, Agra. However, again police officials refused to vacate the premises on the pretext that they have not received any orders either from the D.I.G. Or Collector, Agra. A report dated 25.03.2011 has again been submitted by the Amin before the executing Court informing about the aforesaid fact.

It is further submitted that despite the best efforts, the petitioner has not been handed over the possession of the property in dispute and is unnecessarily being harassed, therefore an appropriate direction is required to be issued by this Court to the concerned authorities.

From the bare perusal of the record, it appears that the decree of eviction dated 14.11.1991 has become final, as such, there is no legal impediment in execution of the decree in its true spirit but because the premises in dispute is occupied by the police for the purpose of Police Chowki, the petitioner is not able to get the possession of the premises.

this Court by order dated 08.07.2011 had issued the notice to the respondents for filing counter affidavit, but till date neither

counter affidavit has been filed nor the disputed premises has been vacated.

In view of the above, let the matter be listed on 23rd August, 2011.

On the said date i.e. 23.08.2011, the District Magistrate, Agra and D.I.G. (Agra) shall remain present in person before this Court to explain as to why the said premises No. 6/336 situated at Khadari Road, Hari Parwat Ward, Agra has not been vacated despite the decree passed by the Court below.

The certified copy of this Order may be given to the learned Standing Counsel Sri R.K. Singh free of cost.

Office is directed to inform about this Order to the District Magistrate, Agra and D.I.G. Agra forthwith."

22. On 06.09.2011, when the matter appeared again before his Lordship, the following order was made:

"this Court by orders dated 1.8.2011 and 23.8.2011 had passed the following orders:

1.8.2011

This writ petition has been filed for issuance of a direction in the nature of mandamus to the respondent no. 1 Judge, Small Cause Court, Agra to ensure the handing over the actual physical possession of the property in pursuance to eviction decree dated 14.11.1991 passed by Judge, Small Cause Court, Agra in S.C.C. Case No. 108 of 1989. It has been further prayed that the respondents be directed to pay damages at the rate of Rs.10,000/- per month w.e.f. the date of the decree i.e. 14.11.1991 up to the actual date of vacation of the premises in dispute. Learned counsel for the petitioner has submitted that father of the petitioner filed S.C.C. Case No. 108 of 1989 (R.B.L.Gupta Vs. U.P. State) in the Court of J.S.C.C. Agra for rent and eviction

as rent was not paid since 01.03.1988 as well as without permission certain illegal construction was raised by the defendants. Police Chowki is being run in the premises in dispute. The aforesaid suit was decreed by Additional J.S.C.C. Agra vide Order dated 14.11.1991. The said order was not challenged by the respondent no. 2, as such, the Order dated 14.11.1991 attained finality. Subsequent thereto an Execution Case No. 20 of 1999 (R.B.L. Gupta Vs. U.P. State) was filed for executing the decree.

It was further submitted by the learned counsel for the petitioner that a writ of possession was issued by the executing Court to the Amin for handing over the possession of the premises to the petitioner decree holder. The Amin in pursuance to the writ of possession went to the disputed premises for handing over the possession, where he met police officials and informed them about the order of the executing court and requested them to vacate the premises but they refused to vacate and give possession unless a direction comes from the D.I.G. Police.

The court Amin has submitted its report dated 20.12.2010 before the executing Court informing that when he went to hand over the possession of the disputed premises to the petitioner and informed the police officials to vacate the disputed premises (police chowki) they refused to vacate the disputed premises (police chowki).

The Executing Court considering the report of the Amin, on 09.03.2011 again issued a writ of possession and further directed to Amin to get the premises vacated after contacting the appropriate authorities. For ready reference, the order dated 09.03.2011 passed by the Executing court is quoted below:-

"दिनांक- 09.03.2011

वाद पुकारा गया। डिक्रीदार मय विद्वान अधिवक्ता हाजिर है। विपक्षी की तरफ से कोई हाजिर नहीं है। पूर्व में दखल परवाना जारी किया गया था। अमीन की आख्या दिनांकित 20.12.2010 पत्रावली पर उपलब्ध है। जिसके अनुसार अमीन ने न्यायालय द्वारा प्रश्रुत भवन में मौजूद पुलिस कर्मचारियों को न्यायालय के आदेश से अवगत कराते हुए पुलिस चौकी भवन को खाली करके कब्जा व दखल डिक्रीदार को देने के लिए कहा तो उन्होंने कब्जा - दखल देने से इंकार कर दिया कि हमारे पास डी0आई0जी0 का कोई आदेश नहीं है तथा भवन खाली करने से इंकार कर दिया। अतः पुनः परवाना दखल जारी हो अमीन इस सम्बन्ध में सक्षम अधिकारियों से सम्पर्क कर दखल की कार्यवाही सम्पन्न करें। आख्या दिनांक 22.3.2011 को पेश हो।"

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लघुवाद न्यायाधीश,
आगरा।"

Learned counsel for the petitioner has further submitted that the Amin again went to the disputed premises for handing over the possession to the petitioner on 25.03.2011 after giving information to the D.I.G. Police and Collector, Agra. However, again police officials refused to vacate the premises on the pretext that they have not received any orders either from the D.I.G. Or Collector, Agra. A report dated 25.03.2011 has again been submitted by the Amin before the executing Court informing about the aforesaid fact.

It is further submitted that despite the best efforts, the petitioner has not been handed over the possession of the property in dispute and is unnecessarily being harassed, therefore an appropriate direction is required to be issued by this Court to the concerned authorities.

From the bare perusal of the record, it appears that the decree of eviction dated 14.11.1991 has become final, as such, there is no legal impediment in execution of the decree in its true spirit but because the premises in dispute is occupied by the police for the purpose of Police Chowki,

the petitioner is not able to get the possession of the premises.

this Court by order dated 08.07.2011 had issued the notice to the respondents for filing counter affidavit, but till date neither counter affidavit has been filed nor the disputed premises has been vacated.

In view of the above, let the matter be listed on 23rd August, 2011.

On the said date i.e. 23.08.2011, the District Magistrate, Agra and D.I.G. (Agra) shall remain present in person before this Court to explain as to why the said premises No. 6/336 situated at Khadari Road, Hari Parwat Ward, Agra has not been vacated despite the decree passed by the Court below.

The certified copy of this Order may be given to the learned Standing Counsel Sri R.K. Singh free of cost.

Office is directed to inform about this Order to the District Magistrate, Agra and D.I.G. Agra forthwith."

23.8.2011

Exemption applications have been filed today on behalf of the District Magistrate, Agra and D.I.G. Agra, wherein it has been stated that on account of Janmashtami Festival on 22nd August, 2011, it is very difficult to leave the station because of the tense law and order situation on 22nd/23rd night as there is mass movement of pilgrims to the various temples and fairs between Agra and Mathura, the birth place of Lord Krishna. It was requested that the personal appearance of the aforesaid officials may be exempted for today by this Court.

Cause shown is sufficient. Personal appearance of the aforesaid officials is exempted for today. Exemption applications are allowed.

List the matter peremptorily on 6th September, 2011.

On the said date i.e. 6th September, 2011, the District Magistrate, Agra and D.I.G. Agra shall remain present in person before this Court to explain as to why the disputed Premises No. 6/336 situated at Khadari Road, Hari Parwat Ward, Agra (wherein the Police Chowki has been established) has not been vacated despite the decree passed by the Court below way back in November, 1991 and nearly 20 years have expired since then.

This order has been passed by this Court in the presence of the Learned Additional Government Advocate Sri Jafar Nayyar.

Office is directed to inform about this order to the District Magistrate, Agra and D.I.G. Agra forthwith."

Pursuant to the above order Mr. Asim Arun, Deputy Inspector General of Police, Agra and Mr. Ajay Chauhan, District Magistrate, Agra are present before the court and three supplementary affidavits, out of which, two on their behalf and one on behalf of Mr. Aseem Chaudhary, Circle Officer Hari Parvat, Agra have been filed which are taken on record. Apart from the said supplementary affidavit, an affidavit and one short counter affidavit have also been filed on behalf of the District Magistrate, Agra which forms part of the record.

As prayed by the learned counsel for the petitioner, three weeks' time is granted to file reply to the averments made in the aforementioned affidavits and supplementary counter affidavits.

List the matter for further hearing on 13.10.2011.

The District Magistrate, Agra, who is present today, shall remain present in person before this Court on that date. However, until further orders of this Court, the personal appearance of the D.I.G., Agra

, who is present today, shall remain exempted."

23. On 13.10.2011, the matter again appeared before his Lordship, when the following order was passed:

"this Court by order dated 6.9.2011 had passed the following order:

"this Court by orders dated 1.8.2011 and 23.8.2011 had passed the following orders:

1.8.2011

This writ petition has been filed for issuance of a direction in the nature of mandamus to the respondent no. 1 Judge, Small Cause Court, Agra to ensure the handing over the actual physical possession of the property in pursuance to eviction decree dated 14.11.1991 passed by Judge, Small Cause Court, Agra in S.C.C. Case No. 108 of 1989. It has been further prayed that the respondents be directed to pay damages at the rate of Rs.10,000/- per month w.e.f. the date of the decree i.e. 14.11.1991 up to the actual date of vacation of the premises in dispute. Learned counsel for the petitioner has submitted that father of the petitioner filed S.C.C. Case No. 108 of 1989 (R.B.L.Gupta Vs. U.P. State) in the Court of J.S.C.C. Agra for rent and eviction as rent was not paid since 01.03.1988 as well as without permission certain illegal construction was raised by the defendants. Police Chowki is being run in the premises in dispute. The aforesaid suit was decreed by Additional J.S.C.C. Agra vide Order dated 14.11.1991. The said order was not challenged by the respondent no. 2, as such, the Order dated 14.11.1991 attained finality. Subsequent thereto an Execution Case No. 20 of 1999 (R.B.L. Gupta Vs. U.P. State) was filed for executing the decree.

It was further submitted by the learned counsel for the petitioner that a writ of possession was issued by the executing Court to the Amin for handing over the possession of the premises to the petitioner decree holder. The Amin in pursuance to the writ of possession went to the disputed premises for handing over the possession, where he met police officials and informed them about the order of the executing court and requested them to vacate the premises but they refused to vacate and give possession unless a direction comes from the D.I.G. Police.

The court Amin has submitted its report dated 20.12.2010 before the executing Court informing that when he went to hand over the possession of the disputed premises to the petitioner and informed the police officials to vacate the disputed premises (police chowki) they refused to vacate the disputed premises (police chowki).

The Executing Court considering the report of the Amin, on 09.03.2011 again issued a writ of possession and further directed to Amin to get the premises vacated after contacting the appropriate authorities. For ready reference, the order dated 09.03.2011 passed by the Executing court is quoted below:-

"दिनांक- 09.03.2011

वाद पुकारा गया। डिफ्रीदार मय विद्वान अधिवक्ता हाजिर है। विपक्षी की तरफ से कोई हाजिर नहीं है। पूर्व में दखल परवाना जारी किया गया था। अमीन की आख्या दिनांकित 20.12.2010 पत्रावली पर उपलब्ध है। जिसके अनुसार अमीन ने न्यायालय द्वारा प्रश्रुत भवन में मौजूद पुलिस कर्मचारियों को न्यायालय के आदेश से अवगत कराते हुए पुलिस चौकी भवन को खाली करके कब्जा व दखल डिफ्रीदार को देने के लिए कहा तो उन्होंने कब्जा - दखल देने से इंकार कर दिया कि हमारे पास डी0आई0जी0 का कोई आदेश नहीं है तथा भवन खाली करने से इंकार कर दिया। अतः पुनः परवाना दखल जारी हो अमीन इस सम्बन्ध में सक्षम अधिकारियों से सम्पर्क कर दखल की कार्यवाही सम्पन्न करें। आख्या दिनांक 22.3.2011 को पेश हो।"

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लघुवाद न्यायाधीश,
आगरा"

Learned counsel for the petitioner has further submitted that the Amin again went to the disputed premises for handing over the possession to the petitioner on 25.03.2011 after giving information to the D.I.G. Police and Collector, Agra. However, again police officials refused to vacate the premises on the pretext that they have not received any orders either from the D.I.G. Or Collector, Agra. A report dated 25.03.2011 has again been submitted by the Amin before the executing Court informing about the aforesaid fact.

It is further submitted that despite the best efforts, the petitioner has not been handed over the possession of the property in dispute and is unnecessarily being harassed, therefore an appropriate direction is required to be issued by this Court to the concerned authorities.

From the bare perusal of the record, it appears that the decree of eviction dated 14.11.1991 has become final, as such, there is no legal impediment in execution of the decree in its true spirit but because the premises in dispute is occupied by the police for the purpose of Police Chowki, the petitioner is not able to get the possession of the premises.

this Court by order dated 08.07.2011 had issued the notice to the respondents for filing counter affidavit, but till date neither counter affidavit has been filed nor the disputed premises has been vacated.

In view of the above, let the matter be listed on 23rd August, 2011.

On the said date i.e. 23.08.2011, the District Magistrate, Agra and D.I.G. (Agra) shall remain present in person before this Court to explain as to why the said

premises No. 6/336 situated at Khadari Road, Hari Parwat Ward, Agra has not been vacated despite the decree passed by the Court below.

The certified copy of this Order may be given to the learned Standing Counsel Sri R.K. Singh free of cost.

Office is directed to inform about this Order to the District Magistrate, Agra and D.I.G. Agra forthwith."

23.8.2011

Exemption applications have been filed today on behalf of the District Magistrate, Agra and D.I.G. Agra, wherein it has been stated that on account of Janmashtami Festival on 22nd August, 2011, it is very difficult to leave the station because of the tense law and order situation on 22nd/23rd night as there is mass movement of pilgrims to the various temples and fairs between Agra and Mathura, the birth place of Lord Krishna. It was requested that the personal appearance of the aforesaid officials may be exempted for today by this Court.

Cause shown is sufficient. Personal appearance of the aforesaid officials is exempted for today. Exemption applications are allowed.

List the matter peremptorily on 6th September, 2011.

On the said date i.e. 6th September, 2011, the District Magistrate, Agra and D.I.G. Agra shall remain present in person before this Court to explain as to why the disputed Premises No. 6/336 situated at Khadari Road, Hari Parwat Ward, Agra (wherein the Police Chowki has been established) has not been vacated despite the decree passed by the Court below way back in November, 1991 and nearly 20 years have expired since then.

This order has been passed by this Court in the presence of the Learned

Additional Government Advocate Sri Jafar Nayyar.

Office is directed to inform about this order to the District Magistrate, Agra and D.I.G. Agra forthwith."

Pursuant to the above order Mr. Asim Arun, Deputy Inspector General of Police, Agra and Mr. Ajay Chauhan, District Magistrate, Agra are present before the court and three supplementary affidavits, out of which, two on their behalf and one on behalf of Mr. Aseem Chaudhary, Circle Officer Hari Parvat, Agra have been filed which are taken on record. Apart from the said supplementary affidavit, an affidavit and one short counter affidavit have also been filed on behalf of the District Magistrate, Agra which forms part of the record.

As prayed by the learned counsel for the petitioner, three weeks' time is granted to file reply to the averments made in the aforementioned affidavits and supplementary counter affidavits.

List the matter for further hearing on 13.10.2011.

The District Magistrate, Agra, who is present today, shall remain present in person before this Court on that date. However, until further orders of this Court, the personal appearance of the D.I.G., Agra, who is present today, shall remain exempted."

Today an exemption application supported by an affidavit sworn by Mr. Ajay Chauhan, District Magistrate, Agra has been filed wherein it has been stated that on 12. 10.2010 a fax message was received from the Governor House, Lucknow in respect of visit of Hon'ble Governor at Agra and since the presence of the deponent is immensely necessary during the visit of Hon'ble Governor on

13.10.2011 and 14.10.2011, he is unable to appear before this Court today.

Cause shown is sufficient. Exemption application is allowed. Personal appearance of the said Officer is exempted today.

Today a second supplementary counter affidavit has been filed on behalf of the respondent no. 2 wherein it has been stated that a restoration application under Order IX Rule 13 C.P.C. for setting aside the decree as well as an objection under Section 47 C. P. C. have been filed in the execution proceedings and 18. 10.2011 is fixed in the matter before the court below.

Considering the facts and circumstances of the case, the court below is directed to dispose of the aforementioned objections filed under Section 47 C.P.C. in the execution proceedings by the respondent no. 2, if possible, on the date fixed i.e . 18.10.2011. Learned counsel for both the parties have stated that they will not seek any adjournment before the court below on that date. It is made clear that this Court has not expressed any opinion on the merits of the case and it will be independent exercise of the court concerned to pass appropriate order in accordance with law.

List the matter on 3.11.2011. On that date the District Magistrate, Agra, shall remain present in person before this Court.”

24. On 03.11.2011, the Court passed the following order, adjourning the matter to 22.11.2011:

“Today third supplementary counter affidavit has been filed by the respondent no.2 which is taken on record.

Learned counsel for the petitioner has submitted that the matter has been fixed tomorrow before the Trial Court for hearing of the execution case.

Considering the facts and circumstances of the case, court below is directed to decide the objection of the respondent no.2 filed against the execution of the decree within 10 days positively from the date of receipt of the certified copy of this order.

Learned counsel for the parties undertakes not to seek any adjournment in the matter.

In the meantime learned counsel for the petitioner may also file supplementary rejoinder affidavit to the third supplementary counter affidavit filed today.

List the matter on 22.11.2011.

On the said date, respondent no.2, District Magistrate, Agra shall remain present before this Court.”

25. It appears that on 22.11.2011, the District Magistrate again did not appear and made an exemption application, which was allowed, adjourning the matter to 30.11.2011. On 01.12.2011, the learned Additional Advocate General appeared before the Court and stated that the objections under Section 47 of the Code filed by the State Government in the execution case had been dismissed, whereagainst a revision has been filed, which is pending. The petition was, accordingly, adjourned to 23.01.2012. The order dated 01.12.2011 reads:

“It is stated by the learned Additional Advocate General that after the dismissal of the objections filed by the State Government in the Execution Case, a Revision has been filed which is pending.

List this petition on 23rd January, 2012.”

26. The next time the Court heard the matter was as late as on 28.07.2014, when the following order was passed:

“Supplementary rejoinder affidavit filed is taken on record.

On the request of learned Standing Counsel, list peremptorily on Tuesday 5th August, 2014 by which time he may seek instructions from the parties why the premises in dispute has not been vacated despite rejection of objection under Section 47 C.P.C.”

27. Again, on 05.08.2014, the following order was made:

“Petitioner is a owner and landlord of the premises in dispute which is in occupation of the police authorities as tenant. Despite the decree of eviction against the tenant which has attained finality, the petitioner is unable to obtain its possession probably for the reason that the police authorities are in possession of the same.

In execution, respondent No.2 had filed objections under Section 47 C.P.C. and the same have been rejected vide order dated 25.11.2011. It is said that against the said order SCC revision No.103/11 has been filed and is pending before the District Judge/ Additional District Judge, Agra.

The District Judge is directed to ensure that the aforesaid revision is decided within a period of six weeks from the submission of the certified copy of this order before him and that no adjournment to either of the parties are allowed unless it becomes inevitable that too by imposing cost not less than Rs.1000/- per adjournment.

The decision of the revision shall be submitted by the District Judge before this Court immediately.

Learned Standing Counsel in the meantime may file an affidavit clearly stating if there is any stay order still operating in the said revision or not and in

case there is no stay to file an affidavit of the Collector as to why the possession was raised and not given to the petitioner so far.

List this petition on 15th September, 2014.”

28. On 15.09.2014, this Court passed the following order:

“Sri Manoj Goswami, learned standing counsel again seeks time on the ground that pursuant to the direction of this Court, the revision has been decided on 9.9.2014 which has to be challenged by means of a writ petition.

The decree of eviction was passed as far as back as on 14.11.1991. It has attained finality. Objections of the tenants under Section 47 have been rejected and so is the revision. Thus there appears to be no justification for the tenant to continue in possession.

The Collector was required to file affidavit as to why since 1991, the possession could not be delivered as there was no stay against the decree of eviction from any higher court. The Collector has filed his affidavit stating that against rejection of the objections under Section 47 when the revision was filed an undertaking was given that the eviction procedure would not take place till the disposal of the stay application. He has cleverly avoided to point out as to whether the said undertaking was for a limited period or was extended and as to what happened to the stay application in the revision.

The affidavit filed by the Collector is only an eye wash. Previously also this Court was compelled to summon the Collector and the D.I.G. concerned vide order dated 1.1.2011. In spite of this, the officers are sitting mum and unable to explain why the decree of eviction passed in 1991 is not being allowed to be

implemented . It appears that simply for the reason that the police authorities are in possession of the disputed premises, no action is being taken to put the landlord in possession of it making a mockery of the the decree of eviction.

In view of the above facts and circumstances, the court reluctantly adjourns the matter in the interest of justice to let the respondents exhaust all their remedies subject to payment of Rs. 5000/- (five thousand) as cost be paid to the other side.

Accordingly, list this writ petition on 23.9.2014.”

29. The matter was again heard on 24.09.2014 and the Court passed the following order:

“A counter affidavit has been filed by respondent No.2 today to which a rejoinder affidavit has also been filed.

The counter affidavit filed is totally confusing and at several places refers to supplementary counter affidavits filed earlier. It is difficult to comprehend the defence set up by the respondent No.2 without referring to the earlier supplementary counter affidavits.

A party to a litigation cannot be permitted to file affidavits after affidavits in response to a petition. The entire defence with all supportive documents has to be filed together.

In *Ishwar Singh and others Vs. Surinder Bajaj and others 2014(7) ADJ 544* the practice of filing successive counter affidavits in opposition to a petition by the same party has been deprecated.

In view of above, all the counter affidavits and supplementary counter affidavits filed by respondent No.2 and the affidavits filed in rejoinder affidavit to the same are discarded. The respondent No.2 is

directed to file one comprehensive counter affidavit giving full facts in a chronological order with all necessary documents within a period of two weeks and no more.

List on 10.10.2014.”

30. On 10.10.2014, the case was adjourned in order to comply with the orders of the Court dated 24.09.2014, rejecting the piecemeal counter affidavits with the direction to file a comprehensive one instead. On 17.10.2014, the office report shows that a consolidated counter affidavit was filed and placed on record bearing No. 335916-2014 dated 10.10.2014.

31. On 13.11.2019, the petition was adjourned on the petitioner's request. On 04.12.2019, the Court made the following order:

“Shri Swapnil Kumar, learned counsel for the petitioner when asked as to how this writ petition is maintainable for the alleged failure of the executing court to execute its own judgment and decree, he prays for time to bring on record the documents showing that applications which were filed by the instrumentalities of the State seeking quashment of such exparte judgment and decree have all been rejected and yet the executing court is not in a position to execute the order.

This case is pending since 2011 and the basic issue of locus of the petitioner to file this writ petition has not been adverted to and is not being answered.

In the interest of justice, 7 days time is granted to the learned counsel for the petitioner, subject to payment of cost of Rs. 5000/- to be deposited in the High Court Legal Services Authority which amount is to be used for the needy litigant.

List this case on 18.12.2019.

It is made clear that depositing the cost will be a pre condition for hearing of the matter on 18.12.2019, otherwise the petition will be dismissed without any further indulgence.”

32. In compliance with the order dated 04.12.2019, the petitioner deposited costs of Rs.5000/- with the office of the High Court Legal Services Committee, Allahabad on 17.12.2019.

33. On 29.07.2021, this writ petition came up before me for the first time, when I made the following orders:

“The Deputy Inspector General of Police, Agra Range Agra, and the Senior Superintendent of Police, Agra, who had earlier been summoned by this Court in person for the simple reason that they have refused to comply with a decree of eviction passed by the Judge, Small Cause Courts, Agra that has attained finality are now reported to be continuing with their disobedience. The writ of possession issued by the executing Court has been physically resisted by the judgment-debtor respondents misusing the brute force of the armed police available at their command. There is an elaborate record of the orders passed by this Court endeavouring to cause the eviction decree passed by the Judge, Small Cause Courts to be executed against the respondents, who are occupying the demised premises illegally for housing their police Chowki.

The Deputy Inspector General of Police, Agra Range Agra, and the Senior Superintendent of Police, Agra, shall file their personal affidavits by tomorrow at 02:00 pm showing cause why the writ of possession issued by the executing Court has been resisted and the demised premises not vacated. In the event cause is not shown

on personal affidavits by the Deputy Inspector General of Police, Agra Range Agra, and the Senior Superintendent of Police, Agra, both the Officers shall appear in person tomorrow at 02:00 pm.

List this matter tomorrow at 02:00 pm in the additional cause list.

Let this order be communicated to the Deputy Inspector General of Police, Agra Range Agra, and the Senior Superintendent of Police, Agra, by the Registrar (Compliance) forthwith.

Let a copy of this order be also furnished forthwith to Mr. Vinod Kant, Additional Advocate General, U.P.”

34. On 30.07.2021, the following orders were passed:

“Muniraj G., the Senior Superintendent of Police, Agra has appeared in person because he has not filed his personal affidavit according to our order dated 29.07.2021. The direction in our last mentioned order requiring the Deputy Inspector General of Police, Agra Range Agra also, to file a personal affidavit and in default to appear personally requires to be recalled because this Court is informed by Mr. Manish Goyal, the learned Additional Advocate General, on instructions received, that there is no post of a Deputy Inspector General of Police at Agra and there are no Range Headquarters, there.

Mr. Goyal seeks time until Wednesday to come up with the respondent's stand specifically on the point whether there is any order of stay or order of setting aside the decree of eviction passed against the judgment-debtor respondents.

List this matter in the additional cause list on 04.08.2021 at 02:00 pm.

By that time the stand of the respondents shall be disclosed on a

personal affidavit sworn by Muniraj G., the Senior Superintendent of Police, Agra, failing which he will appear in person again. However, in case the required personal affidavit is filed, the Officer need not appear.”

35. On 04.08.2021, I admitted the petition to hearing in terms of the following orders:

“In compliance with the order dated 30.07.2021, the Senior Superintendent of Police, Agra has filed his personal affidavit dated 04.08.2021, raising allegations about the title of the landlord. The affidavit is in the nature of a counter affidavit. It is taken on record.

A supplementary affidavit has been filed on behalf of the petitioner, which is also taken on record.

Admit.

Heard Mr. Swapnil Kumar, learned counsel for the petitioner and Mr. J.N. Maurya, learned Chief Standing Counsel along with Mr. L.K. Tripathi, learned Additional Chief Standing Counsel for the respondent-State at length.

Put up tomorrow in the additional cause list for further hearing at 02:00 p.m.”

36. The hearing continued on 05.08.2021, 09.08.2021 and then on 10.08.2021, when orders were reserved.

37. In view of the defence taken in the counter affidavit, where the title of the petitioner as also the relationship of landlord and tenant were denied, besides respondent No.2, the State of U.P. pleading fraud against the petitioner, this Court wanted to know if there was any order passed by a Court of competent jurisdiction staying the execution of the decree. Therefore, the matter was posted for further

hearing on 26.04.2022, 28.04.2022, 05.05.2022 and 12.05.2022. The matter again came up on 19.05.2022, when I passed the following order:

“This case has a history of disobedience to the ex parte decree passed by the Judge, Small Cause Court, Agra in SCC Suit No.108 of 1989. The decree was passed albeit ex parte on 14.11.1999. A very detailed order was passed on 13.10.2011. The substance of the dispute and the issue that has led to the unusual step of the petitioners approaching this Court under Article 226 of the Constitution is that the ex parte decree passed by the Judge, Small Cause Court, Agra in SCC Suit No.108 of 1989 has remained unexecuted for the past thirty years or more. The reason for the due process of the Executing Court failing is that the judgment-debtor is none other than the Police Establishment at Agra, and they have obstructed the Court Amin and the writ of possession from being executed by employment of the Police Force at their command.

When the ordinary processes of execution have been bogged down to an extent that a decree that is still in force and not set aside or stayed by any Court of competent jurisdiction, is no more than a piece of paper, the petitioner has approached this Court. this Court had passed a very detailed order way back on 13.10.2011, after summoning some Senior Police Officers, including the then D.I.G. Agra, Range Agra and the District Magistrate of Agra, besides the Circle Officer to show-cause in the matter and file their personal affidavits. It appears that thereafter an application under Order IX Rule 13 CPC was made. An objection under Section 47 of the Code was also filed. The motion under Order IX Rule 13

CPC and the objection under Section 47 have both failed right upto this Court and those orders have attained finality. There does not appear to be any quarrel over the said fact. this Court also summoned on 29.01.2021 the D.I.G. Agra Range Agra. Instead, Muni Raj G, the then Senior Superintendent of Police, Agra appeared in person and informed the Court that there is no D.I.G. stationed at Agra. He was asked to disclose on a personal affidavit the fact whether there is any order of stay or one setting aside the decree of eviction passed against the judgment-debtor-respondent. He disclosed that it has neither been stayed nor set aside. During the long course of proceedings of this petition, the respondents have been repeatedly asked to inform the Court whether the decree of eviction has been stayed or set aside by any Court of competent jurisdiction and the information is in the negative. Yet, the decree continues to be disobeyed.

Mr. Neeraj Tripathi, learned Additional Advocate General has appeared in Court today along with Mr. L.K. Tripathi, learned Additional Chief Standing Counsel. He informs the Court that the execution has been adjourned and posted to 22.07.2022. Mr. Tripathi, has further informed the Court that the third party objection under Order XXI Rule 97 CPC on behalf of the Senior Superintendent of Police, Agra are part of the said execution proceedings, and consequently, these also stand adjourned to that day.

In the circumstances, the District Judge, Agra shall make a report to this Court on or before 24.05.2022, whether the decree passed in S.C.C. Suit No.108 of 1989 dated 14.11.1999 has been stayed or set aside by any Court of competent jurisdiction in any proceedings; until date of his report, he will cause all proceedings including the suit and the third party

objection, as well as the execution to be suitably rescheduled, advanced and posted before the Court/Court's concerned for orders on this side of the summer vacations with sufficient time to the Court to pass appropriate orders.

List this petition in the additional cause list on 24.05.2022 together with the report of the learned District Judge, Agra.

Let this order be communicated to the learned District Judge, Agra by the Registrar (Compliance) within 24 hours.”

38. After some adjournment, the matter was heard again and judgment reserved on 08.07.2022. There was still some clarification required about the status of proceedings under Order XXI Rule 97 of the Code and the independent suit filed by respondent No.2, the State, asserting their claim to the suit property. The matter was, therefore, heard further on 04.01.2023, 09.01.2023, 04.02.2023, 21.02.2023, 01.03.2023 and 16.03.2023, when judgment was again reserved.

39. Across all this period of time, it was the endeavour of this Court to find out if respondent No.2, who say that the petitioner is nobody and not their landlord, but one who has secured an ex parte decree against them by playing fraud upon the Court, have succeeded before a Court of competent jurisdiction in proceedings brought to establish their right and nullify the decree. Till the judgment was reserved on 16.03.2023, spreading across numerous hearings and the judgment being reserved on more than one occasion, respondent No.2 could not show even an interim order granted by any Court of competent jurisdiction staying the execution of the ex parte decree dated 14.11.1991. To the contrary, as already remarked, in the orders of this Court dated 19.05.2022 and the

earlier ones too, the application by respondent No.2 under Order IX Rule 13 of the Code, seeking to set aside the ex parte decree as also the objection under Section 47 of the Code, have been noticed as rejected. The challenge to those orders have failed up to this Court, with the said orders attaining finality.

40. When the matter was heard on 19.05.2022, Muniraj G., Senior Superintendent of Police, Agra, who appeared in person, was asked to disclose on a personal affidavit if there is any order of stay of eviction passed in favour of respondent No.2 or an order setting aside the eviction decree. He disclosed that the ex parte decree has neither been stayed nor set aside. When the matter was heard again in the month of March, 2023, the position remained unchanged. The two challenges laid to the decree, under Order IX Rule 13 of the Code and Section 47 of the Code, respectively, have both failed. What is pending still is an objection under Order XXI Rule 97 of the Code, and, the other, an independent suit filed by the State of Uttar Pradesh through the Collector, Agra against the petitioner, arrayed as defendant No.5, besides six other defendants, including the Nagar Nigam, Agra represented by the Nagar Ayukt.

41. The said suit is a title suit and seeks reliefs of declaration, cancellation, prohibitory and mandatory injunction. The reliefs claimed and the case in the suit instituted by the State of U.P. would be elucidated in further detail a little later in this judgment.

42. The objection under Order XXI Rule 97 of the Code has been filed by the Senior Superintendent of Police, rather queerly represented through one Ajay

Kaushal, S.H.O., Hari Parwat. The aforesaid objections are numbered as Misc. Case No.16 of 2021 in pending Execution Case No.20 of 1999. The objections under Order XXI Rule 97 of the Code have apparently not been decided so far nor any interim order granted.

43. This Court also notices that there is another miscellaneous case registered at the instance of respondent No.2, the State of U.P. through Collector, Agra being an application under Order XXI Rule 29 of the Code. The aforesaid provision relates to the entitlement of a judgment-debtor against a decree-holder, where a suit is pending between the decree-holder and the judgment-debtor to seek stay of execution of the decree, which the Court may grant, subject to such terms as to security or otherwise as it thinks fit until decision of the suit. Though a copy of the application giving rise to Misc. Case No. 213 of 2022 has not been brought to this Court's notice, going by the nature of power and the scope of an application under Rule 29 of Order XXI of the Code, this Court can only assume that the said application has been made in pending Suit No.1040 of 2011, instituted by respondent No.2 against the petitioner and the six other defendants there. In the said proceedings also, it has not been brought to this Court's notice that any stay order interdicting execution of the decree has been passed so far.

44. Here, note is to be taken of the case pleaded by respondent No.2 in the counter affidavit bearing No. 335916-2014 dated 10.10.2014, filed in compliance with the order dated 24.09.2014. In the said counter affidavit, the State, respondent No.2, have endeavoured to show that indeed the petitioner is not the owner of the suit property nor the State, the petitioner's

tenant. There is a reference to the judgment of an old suit bearing No. 289 of 1941, instituted by the Government of United Provinces against one Rajjak Ali, for ejectment and arrears of rent, which was decreed. It is said that the land subject matter of dispute is nazul and not freehold.

45. It is the State's case that the petitioner's father, Mr. R.B.L. Gupta, Advocate, had also filed O.S. No. 279 of 1988 in the Court of the Munsif, Agra for a permanent injunction to restrain the State and some police officials from damaging and demolishing the suit property and also restraining them from raising a new construction. The suit was decreed *ex parte* on 07.08.1991 by the Court of the Munsif, Agra. The allegation is that summons of the suit were never served upon the State or any of the police officials.

46. It is the case of the State that the only document produced by the petitioner to establish his title is a sale deed and some rent receipts, where it is clearly mentioned that the land is nazul. The vendor, Chhotey Lal, who sold the land to Mr. R.B.L. Gupta, the plaintiff's father, did not have a right to transfer the same. The rent receipts in the name of U.P. State Police Department, annexed on behalf of respondent No.2, are said to be forged. There is an averment in paragraph No.11 of the counter affidavit, where it is said, "*the inquiry was set up by the D.I.G. Police Agra related from verification of the rent receipts and as per inquiry report the rent receipts are forged. For kind perusal of this Hon'ble Court, the photocopy of the Inquiry report is being filed herewith and is marked as Annexure No.C.A.6 to this affidavit.*"

47. It is next averred in paragraph No.12 that as per paragraph No.139 of the

Uttar Pradesh Police Office Rules, the matter relating to rent has been explained and the paragraph reveals the proper criteria of deposit of rent. In paragraph No.13 of the counter affidavit, it is averred that the State of U.P. has not taken the property on rent and there is no question of damaging the building. It is also urged that the SCC Suit has been brought on vague allegations without any material on record. There is a reference to another suit filed by the petitioner's father initially as Defective Suit No.42 of 1989, and, later on, numbered as Original Suit No.821 of 1992, for damages. The said suit too was decreed on 26.02.1996 by the Court of the Additional Civil Judge (Sr. Div.), Agra.

48. In paragraph No.23 of this counter affidavit, much has been blamed on the fact that the petitioner's brother, Mr. Surendra Kumar Gupta was a District Government Counsel (Civil) from the year 1998 to 2011, who is said to have manipulated the process of Court and brought an execution eight years after the *ex parte* decree was passed. It is also mentioned that the title suit brought by the State, being Suit No.1040 of 2011, State of U.P. vs. Tejpal and others for declaration etc. is still pending and execution cannot proceed till the said suit is decided.

49. Notice here must be taken of the contents of the personal affidavit filed by the then Senior Superintendent of Police, Muniraj G., where he has come up with the particulars of the case why the State deny the petitioner's title and the State's relationship with the petitioner as a tenant. This has been done mostly with reference to the allegations in O.S. No.1040 of 2011 that the State have instituted before the Civil Judge (Sr. Div.), Agra to declare the *ex parte* decree dated 14.11.1991 passed in

SCC Suit No.108 of 1989 null and void, as also the ex parte decree dated 07.08.1991 passed in O.S. No.279 of 1988 and the ex parte decree dated 26.10.1996 passed in O.S. No.821 of 1992. The basis pleaded is that the State is the owner of nazul land under the management of the Collector, bearing Khasra No. 1165, admeasuring 22 bigha 2 biswa, situate at Khandari, Tehsil and District Agra. According to the State, respondent No.2, the said property is recorded as 'Milkiyat Hakumat Sube Jaat (1) Nazul under the management of the Collector in the last settlement record i.e. khewat of the year 1331 fasli.

50. In due course of time, Khandari Road was constructed through the property, of which some area was encroached and residential houses constructed by encroachers. It is for the said reason that the suit property came to be recorded as abadi, road, houses etc. in the revenue record. It is pleaded that over an area of 165.44 square meters, the Police Chowki 'Police Outpost, Khandari, Agra', that is to say, the suit property has existed since before the year 1940 and continues to be there till date. This Police Chowki or Outpost was constructed during the British Rule, which remains in possession and occupation of the Police Department.

51. There are averments to the effect that the father of defendant Nos.1 to 4 to O.S. No.1040 of 2011, to wit, the late Chhotey Lal was an employee of the Nazul Department. He was a Peon. He encroached a sizeable portion of the suit property, claiming to be a lease holder, though no lease was ever executed in his favour. He got a building plan sanctioned by the Municipal Authorities, Agra in collusion with them. The plan was submitted with the signature of Chhotey

Lal, Peon Nazul Department, Agra. Chhotey Lal and his wife Raj Devi had taken a loan of Rs.500/- from one Indrakanta wife of Mr. R.B.L. Gupta and executed a registered mortgage deed dated 04.10.1948 in Indrakanta's favour.

52. It is on the basis of the aforesaid fake building plan and the mortgage deed executed that defendant No.1 Tej Pal, his brother Panna Lal (the fourth defendant Hira Lal's father) (defendants to O.S. No.1040 of 2011) and Raj Devi wife of Chhotey Lal executed a sale deed dated 31.07.1958 in favour of Smt. Indrakanta, the petitioner's mother, describing the suit property, numbered as 3346/ 2910. It is stated that till the assessment years 1954-59 and 1959-64, there is no property recorded as one bearing No.6/336, that is to say, the suit property. It is asserted that the mother and the father of the petitioner, Smt. Indrakanta and Mr. R.B.L. Gupta were not the lawful owners of the suit property as they never purchased it from the rightful owner. It is also asserted that no lease deed has ever been executed in favour of the executants of the sale deed dated 31.07.1958 nor any lease deed executed relating to the suit property in favour of Smt. Indrakanta or Mr. R.B.L. Gupta.

53. It is averred in paragraph No.7 of the personal affidavit that the Police Chowki, Khandari was never in the ownership of the petitioner nor his predecessors-in-interest. It is also averred in paragraph No.8 that the petitioner's father, the late R.B.L. Gupta, who instituted SCC Suit, giving rise to the ex parte eviction decree, subject matter of this writ petition, "*was the practicing Advocate at the Civil Court Agra and thereafter his son Sri Surendra Kumar Gupta the defendant no.6 in O.S. No.1040 of 2011, who is also*

*the D.H. No.1/2 in execution case no.20 of 1999, was appointed as DGC (Civil) from 02.12.1998 to 28.04.2011 and as such both the father of the petitioner being as **practicing Advocate** at Civil Court Agra and the brother, Sri Surendra Kumar Gupta being as **practicing lawyer** and DGC got managed the exparte decrees in his favour and against the state in the suits as stated hereinbefore and as such such from 02.12.1998 to 28.04.2011, during continuation as DGC (Civil) by Surendra Kumar Gupta being as D.H. No.1/2, the state has got defeated in several civil proceedings filed for and against the state.”*

54. It is then said on behalf of the State that in Execution Case No.20 of 1999, the Police Department have filed objections under Order XXI Rule 97 read with Rule 101 of the Code, wherein they have made an application for grant of an ad interim stay of execution. The dates fixed in the said case are mentioned, but there is nothing said about an interim stay being granted. It is nevertheless said that the case is being adjourned on account of dilatory tactics in the disposal of the stay matter by the petitioner.

55. There is then a very clear statement in paragraph No.12 of the personal affidavit under reference, where it is averred:

“12. That however, it is respectfully submitted that till the date neither the exparte decree dated 14.11.1991 has been set-aside nor it has been stayed by any order passed by the superior court or any other court, except an application for granting the stay order against the exparte decree dated 14.11.1991 is pending before

the court as stated above, for its disposal on 05.08.2021.”

56. A supplementary counter affidavit has also been filed on behalf of the second respondent, sworn by one Rajeev Sirohi, an Assistant Commissioner of Police, posted at Agra. This supplementary counter affidavit has been filed in compliance with this Court's order dated 9th January, 2023. In paragraph Nos.8 and 9 of this supplementary counter affidavit, it is averred:

“8. That in reply to the contents of paragraph no. 4 of the affidavit, it is submitted that on 13.07.2022 the plaintiff has filed an application under Order 22 Rule 4(4) Cr.P.C. in the court of 1st A.C.J. (S.D.), Agra in O.S. No. 1040 of 2011 (State of U.P. vs. Tejpal and others). A true copy of application dated 13.07.2022 is being filed herewith and marked as **Annexure No. SCA-1** to this supplementary counter affidavit.

9. That in reply to the contents of paragraph no. 5 of the affidavit, it is submitted that in Misc. Case No. 16 of 2021 the counsel for the petitioner, B.K. Gupta has requested repeatedly for grant of time. A true copy of order-sheet in Misc. Case No. 16 of 2021 (S.S.P. vs. R.B.L. Gupta) is being filed herewith and marked as **Annexure No. SCA-2** to this affidavit.”

57. A perusal of the order-sheet does show that the petitioner has sought adjournment in proceedings of Misc. Case No.16 of 2021, that is to say, the application made under Order XXI Rule 97 of the Code on behalf of the S.S.P., Agra. The last order, of course, shows that both parties have sought adjournment. It must be observed that all these adjournments were

sought because the present writ petition was engaging the attention of this Court.

58. This Court has given an anxious consideration to the very vexed state of litigation that this writ petition has brought before us for relief of a very extraordinary kind. This Court too has not shirked from entertaining the petition or passing orders to remedy the wrong alleged by the petitioner from time to time.

59. There are a few things which must be noticed and these do not meet our approval. The foremost is the fact that the State, represented either by the Collector or the actual occupants of the suit property, to wit, the Police at Agra, have been most nonchalant about the process of Court leading to the SCC Suit in this case being decreed *ex parte*. What is most exceptionable is the fact that when the writ of possession was served upon the Police Chowki concerned, the police personnel present, instead of vacating the same, or immediately contacting through higher officials their Counsel, to take steps to get the *ex parte* decree set aside, told the Amin that they would not vacate the premises unless they have orders from the D.I.G. This fact is recorded in the order dated 09.03.2011 passed by the Judge, Small Cause Court in the execution case, of which due note has been taken in the order of this Court dated 01.08.2011.

60. If not earlier, as soon as the Amin arrived at the Police Chowki, it was time for the State represented by the Collector, and, in any case, the Police, who are in actual physical occupation of the suit property, to have moved the Court and taken steps to get the order set aside. Instead, the police personnel had the audacity to tell the Amin that they would

vacate the suit property only if the D.I.G. ordered them to do. This Court makes it bold to say that the D.I.G. is not a Judge and the entire State in the pending litigation is no more than a litigant. This Court is inclined to think, in view of the subsequent conduct of the respondents, that the lower police personnel present at the Chowki told the Amin in the terms recorded in the order dated 09.03.2011 passed by the learned Judge, Small Cause Court, not without instructions from the higher officials in the establishment.

61. The words were spoken, not without inspiration, if not express permission by the D.I.G. or whoever was the superior officer at the Station. It was kind of the learned Judge, Small Cause Court, at that stage, not to have put the police personnel concerned, including the D.I.G., then posted at the Station, to a show cause notice, indicating why a reference for criminal contempt be not made. The learned Judge did not do that, though he could have very conveniently made a contempt reference after the police personnel posted at the Chowki obstructed the process of Court, which cannot be tolerated in any event. These execution proceedings lingered on after the said order was passed and neither the Police nor the State of U.P. represented by the Collector, Agra, took any steps to get the order set aside. It is the unpleasant duty of this Court to call a spade a spade.

62. The State and the police officials at Agra have exhibited an attitude of extreme arrogance, besides nonchalance and negligence in the matter of defending proceedings before the Judge, Small Cause Court. Perhaps, they have considered themselves to be too powerful to bother about the process of Court. The execution,

when it landed at the premises where it had to be executed, was turned away by the police officials present, telling the Amin that they would act only if the D.I.G. directs them to comply with the decree. The execution of a decree of the Court can never be permitted to depend upon the whims of a party, be it private or official. The D.I.G. of Police or the Collector or the State as defendants or judgment-debtors before the Court, are no more than litigants. There are three successive reports by the Amin dated 20.12.2010, 25.03.2011 and 27.11.2019, copies of two of which, that is to say, reports dated 20.12.2010 and 25.03.2011, both submitted by Devaki Nandan, Amin, Civil Court, Agra, are on record at Pages Nos.33 and 35 of the paper-book (P.B. of the writ petition). These reports have been taken note of by the learned Judge, Small Cause Court.

63. What the learned Judge, Small Cause Court has done thereafter, is also not appreciable. He has written a demi-official letter to the S.S.P./ D.I.G. of Police, Agra Range, Agra, requesting that the decree dated 14.11.1991, regarding the suit property, be carried out. It is not the way of the Court to write letters, official or demi-official, to litigants before it, whatever be their station or rank; nor is it the way of the Court to request a litigant to comply. The Court is supposed to pass decrees, orders and issue processes for their execution, if litigants are in breach. It is not for the Court to go about requesting litigants merely because they happen to be officers of the State.

64. That all these reports by the Amin, entrusted with execution of the writ of possession, are true and the behaviour of the policeman at the Police Chowki was one with the instructions of their superior

officers, is well proven by the contents of the counter affidavit dated 10.10.2014 filed on behalf of the State, already referred to in much detail. Of particular relevance in this connection are the averments towards the close of paragraph No.23 of the said affidavit, where it is said, "*the Amin report which has been manipulated by the petitioner is not sustainable in the eye of law as the property which belongs to the Police authorities the Amin must first approach the S.S.P. concerned and after direction of the S.S.P. the C.O. of the concerning Police Station takes action and previously the judgment was taken by this Hon'ble Court after concealing the material facts which has required for the proper adjudication of the case.*"

65. This Court places on record our extreme displeasure about the fact that the second respondent, the State or the police officials, who are in occupation of the suit property, have had temerity to say that it was the duty of the Amin, carrying out the Court's process, to first approach the S.S.P. and after a direction of the S.S.P. and the C.O. of the concerned police station, take action to execute. The Amin is absolutely under no obligation to take any orders from the S.S.P. In fact, if the Amin had enough force of any kind available at his disposal, he would be within his rights to dispossess the judgment-debtor by force. After all, a decree for eviction, if not obeyed, is to be carried out by force. A decree is to be carried out against the judgment-debtor by the Amin and not the Police. If the judgment-debtor resists, it is the duty of the Amin to forcibly carry out the decree and police aid in such matters is only granted to maintain law and order; not to execute the decree by force. That enforcement by physical force is to be done by the Amin. Here, since the judgment-debtors, who are

the Police themselves or the State, whom they represent, unlawfully employed physical force available at their command to obstruct the lawful execution of a decree passed by the Court, the decree could not be executed.

66. In the normal course, this Court would have taken cognizance of these facts prima facie to initiate proceedings for criminal contempt or directed the registration of a crime for obstructing the execution of a decree or a public servant in the discharge of his duties etc. under the Penal Code, but bearing in mind other factors, of which notice shall be taken hereinafter, this Court desists from doing so. Nevertheless, the I.G./ D.I.G., Agra Range, Agra and the S.S.P., Agra (now the Commissioner of Police, Agra) are cautioned in the matter, not personally, but by virtue of the office they hold, to strictly avoid repetition of such an act by themselves or their subordinates.

67. This Court must also remark that the State and the police officials, represented by the Senior Superintendent of Police, Agra, have wholesomely blamed the petitioner's brother Surendra Kumar Gupta for misusing his position as a District Government Counsel (Civil), Agra and also his father for like misuse of position as a senior member of the Bar at the District Court, Agra. Without judging issues involved in this case, this Court must say that it has become a fashion to blame members of the Bar by members of the society, to which State officials are no exception, when it comes to litigation involving lawyers. After all, a lawyer is also a citizen and has every right to seek legal redress in a Court of law. He cannot be stigmatized for every 'win' in Court to a presumed undue influence that he can

exercise or might have exercised as a member of the Bar. An allegation, such as this also has the tendency to undermine the authority of the Court as an impartial arbiter.

68. Here, there are wholesome pleadings that say that the State and the Police were kept in the dark and ex parte decrees passed against them. Not only in the present case, this Court is constrained to observe that in two other suits as well, ex parte decrees have been passed. It is difficult to believe that the State, with all its machinery, would never have come to know about the institution of proceedings and the progress of suits in Courts against them. One could have thought that there might be some truth about the background of a manipulated service, but the conduct of respondent No.2, in particular, the Police, does not show that they have at all been concerned about the litigation instituted against them by the petitioner.

69. After the process of execution reached the Police Chowki in the hands of the Amin, no action was taken in the matter. The letter of request to comply with the decree, which the Court has addressed to the Collector, Agra on 02.04.2011, ought to have certainly moved the respondents, including the Police in the matter, but they did not take any steps to get the ex parte decree set aside. It was only after this Court summoned the District Magistrate, Agra and the D.I.G., Agra Range, Agra have vide order dated 01.08.2011 that the respondents showed some movement. It was after this Court had passed order dated 01.08.2011, as aforesaid, and the subsequent order dated 23.08.2011, summoning these officials to Court, that the State filed objections under Section 47 of the Code on 15.09.2011 for the first time.

Before 15.09.2011, the State represented by the Collector and the Police, who are sitting in the suit property, were not at all bothered about the ex parte decree for eviction dated 14.11.1991 passed against them.

70. The objections under Section 47 of the Code were rejected by the Executing Court on 25.11.2011. The State then moved the learned District Judge under Section 25 of the Provincial Small Cause Courts Act, 1887 in revision. Revision No.103 of 2011, preferred by the State, was dismissed by the Revisional Court vide judgment and order dated 09.09.2014.

71. Aggrieved by the said order, the State of U.P. filed a petition, being Matters under Article 227 No. 3222 of 2016, State of U.P. v. Sri R.B.L. Gupta and two others, before this Court, which was dismissed vide judgment and order dated 12.07.2016. Speaking for this Court, while dismissing the petition brought by the State of Uttar Pradesh, Hon'ble Pankaj Mithal, J. (as His Lordship then was of the High Court) repelled all those contentions that the respondents have now raised before this Court, relating to the petitioner's title and their status as tenants in the suit property, observing:

“The respondents moved an application for the execution of the above decree. Accordingly, Execution Case No.20 of 1999 was registered. In the said execution case petitioner filed objections under Section 47 C.P.C. and the same have been rejected vide order dated 25.11.2011. The revision preferred against it has been dismissed on 09.09.2014.

The above two orders passed by the Executing Court rejecting the objections of the petitioner have been impugned by

means of this petition under Article 227 of the Constitution of India.

The above orders have been passed way-back on 25.11.2011 and 09.09.2014. This petition has been filed on 05.05.2016 after about two years. The petition, therefore, suffers from delay and latches. The petitioner has tried to explain the delay in filing the petition by stating that it had filed Original Suits No.103 of 2011 and 1040 of 2011 and was waiting for the decision of the above suits.

One of the aforesaid suit No.1040 of 2011 is still pending and has not been decided. The other suit has been decided on 19.01.2016.

In this view of the matter, the explanation that the petitioner was waiting for the decision of the above suits is not acceptable.

On merits the argument of learned Standing Counsel is that the decree put in execution is without jurisdiction and a nullity for the reason that the property is a Nazul property and the Small Causes Court had no jurisdiction to hear and decide the suit. The Executing Court has not considered the above objection.

The Executing Court as well as Revisional Court have both observed that one of the objections of the petitioner under Order 47 C.P.C. was that the decree passed by the Small Causes Court on 14.11.1991 is without jurisdiction but has repelled the said argument by noting that the suit was for the eviction of a tenant by the landlord after determination of tenancy and as such it was cognizable by the Small Causes Court and therefore, the decree is not without jurisdiction.

The courts below further records that the respondents have filed two other suits namely civil suit No.279 of 1988 and 831 of 1992 against the petitioner, one for decree of permanent injunction restraining

the petitioner from demolishing the construction situate over the land in dispute and the other for damages.

Both the above suits have been decreed and in respect of one of them an application under Order 9 Rule 13 C.P.C. was filed by the petitioner which was also rejected. In both the suits, the respondents have claimed themselves to be the owners and landlords of the property as was claimed by them in the suit giving rise to the present executing proceedings.

Thus, the consistent case of the respondents had been that they are the owners and landlords of the property in dispute and that the petitioner tenant thereof. The suit was essentially based upon the relationship of landlord and tenant between the parties and the decree passed therein is not without jurisdiction.

The petitioner in paragraph 27 of the petition has stated that it has filed original suit No.1040 of 2011, State of U.P. Vs. Tej Pal and others before the Civil Judge, (Sr. Division) Agra, for the cancellation of the sale deed dated 31.07.1958 (by which the property was purchased by the respondents/their predecessor in interest); for declaring the ex-parte decree dated 07.08.1991 passed in original suit No.279 of 1988, R.B.L. Gupta Vs. State of U.P. and others, ex parte decree dated 14.11.1991 passed in S.C.C. Suit No.108 of 1989, R.B.L.Gupta Vs. State of U.P., the ex parte decree dated 26.02.1996 passed in original suit No.881 of 1992 as illegal null and void; to restrain the respondents from interfering in its possession use and enjoyment of the suit property; to restrain the respondents from executing of the ex parte dated 14.11.1991 passed in S.C.C. Suit No.108 of 1989; and to declare the petitioner to be the owner in possession of the aforesaid property.

The reliefs claimed by the petitioner in the above suit clearly demonstrates that the relief claimed by the petitioner by filing objections in the execution proceedings had already been claimed by it by means of the aforesaid suit.

In view of the institution of the above suit and its pendency the petitioner can get the desired relief therein irrespective of the objection taken to the said effect in the execution proceedings.

The aforesaid decree which has been put in execution is final as on date as the application of the petitioner filed under Order 9 Rule 13 C.P.C. for setting aside the same stand rejected.

The argument of the learned Standing Counsel that the decree is without jurisdiction ex facie has no force for the reason that the suit was for eviction of a lessee on determination of lease and was squarely within the jurisdiction of the Small Causes Court as per Section 15 of the Provincial Small Cause Courts Act, 1887.

The said suit was dependent upon the relationship of landlord and tenant between the parties and the question of title or the nature of the land were completely foreign to the cause adjudicated therein.

The submission that there was no relationship of landlord and tenant between the parties and therefore also the decree was without jurisdiction is without substance.

The Small Causes Court has decreed the suit in view of the relationship of landlord and tenant between the parties. The said view taken by the Small Causes Court may not be correct but that would not render the decree to be without jurisdiction.”

(emphasis by Court)

72. As a matter of abundant caution, it is required to be noticed that the ex parte decree, in regard to which the current execution has been levied, was also sought to be set aside by moving the Trial Court under Order IX Rule 13 of the Code on 01.09.2011 vide Misc. Case No. 103 of 2011. This application under Order IX Rule 13 of the Code was dismissed vide order dated 19.01.2016. What is noteworthy is that this application was moved on 01.09.2011, after this Court had passed orders dated 01.08.2011 and 23.08.2011, summoning the District Magistrate and the D.I.G. in person. Apparently, for good reasons assigned, the application under Order IX Rule 13 of the Code was rejected, as already said, against which the State of U.P. carried a revision being Revision No. 6 of 2016 before the learned District Judge, Agra. The aforesaid revision, came up before the learned Additional District/Special Judge (E.C. Act) for hearing on 17.05.2017 and was dismissed.

73. The Executing Court, that is to say, the Additional Judge, Small Cause Court, Agra vide order dated 26.04.2013 allowed the execution application and issued a writ of possession to the City Amin. Against the order of the Trial Judge, allowing the execution application and issuing the writ of possession, the State of Uttar Pradesh through the Collector, Agra preferred an SCC Revision before the learned District Judge, Agra, where it was numbered as SCC Revision No. 101 of 2013. This revision, upon assignment, came up for hearing on 26.10.2018 before the 10th Additional District Judge, Agra, who dismissed the revision and affirmed the order of the Trial Court, directing the issue of a writ of possession.

74. After dismissal of SCC Revision No. 101 of 2013, a writ of possession was again issued to the Amin by the Judge, Small Cause Court, Agra in Execution Case No. 20 of 1999. The Amin made his report dated 27.11.2019, reporting his inability to execute the decree, because the policemen present in the suit property said that they will not vacate unless ordered by their higher officials. The aforesaid report is annexed as Annexure No.5 to the supplementary affidavit dated 17th December, 2019 filed by the petitioner. The report of the Amin dated 27.11.2019 reads:

"अमीन आख्या

श्रीमान जी,

मा0 न्यायालय के आदेशानुसार डिक्रीदार अधिवक्ता महोदय को नियत तारीख 27.11.2019 की पूर्व सूचना देने के बाद बगर्ज दखल दिलाने जायजाद नम्बरी 6/336 बाकै स्थित खन्दारी थाना-हरीपर्वत तहसील व जिला आगरा मौके पर पहुँचा। मौके पर डिक्रीदार उपस्थित मिले। मैंने उनको अपना परिचय दिया तथा न्यायालय के आदेश से अवगत कराते हुए अपने आने का आशय बताया तथा दखल-तलब जायजाद की निशानदेही करने को कहा, तो उन्होंने पुलिस चौकी खंदारी के रूप में दखल तलब जायजाद की निशानदेही की जिसकी पुष्टि मैंने दखल तलब जायजाद की हदऊद परवाना हाजा से मिलायी जो सही पायी गयी। तत्पश्चात मैंने चौकी प्रभारी खन्दारी को माननीय न्यायालय के आदेश से अवगत कराया तथा दखल तलब जायजाद को खाली करने को कहा साथ ही साथ संलग्न पत्र की मूल प्रति मय दखल आदेश की छाया प्रति उनको दी जो उन्होंने प्राप्त की, परन्तु अपने हस्ताक्षर करने से मना कर दिया साथ ही यह भी कहा कि यह जायजाद हम जब तक खाली नहीं करेंगे जब तक कि हमारे उच्च अधिकारी हमें आदेशित नहीं करेंगे। इस कारण दखल की कार्यवाही सम्पन्न नहीं हो सके।

अतः परवाना बिना तामील वास्ते अग्रिम आदेश श्रीमान जी की सेवा में सादर प्रेषित है।

दिनांक:- 27.11.2019

ह0 अपठित
जितेन्द्र कुमार सक्सेना
अमीन
सिविल कोर्ट, आगरा"

75. This Court must remark that this was a repeat of the same misdemeanour, which the Police had committed on 20.12.2010, when a writ of possession was issued by the Executing Court, leading to an identical report by Devki Nandan, Amin (Civil Court), Agra, that finds mention in the order of the learned Judge, Small Cause Court, Agra dated 09.03.2011, referred to earlier in this judgment. On that occasion, the Police had obstructed the execution of the Court's decree, saying that they would not vacate the suit property because they had no orders from the D.I.G.

76. It is profitable repetition that shows that the matters came a full circle, when more than nine years later, on 27.11.2019, the Amin, holding a similar writ of possession, made an identical report, saying that the Police have refused to obey the Court's decree on the pretext that they would obey it only if ordered by their higher officials. Between these obstructed writs lie the entire proceedings of this writ petition, which was instituted on 05.07.2011, faced with the helplessness of the Judge, Small Cause Court in executing the decree, manifest in his order dated 09.03.2011, quoted in the earlier part of this judgment.

77. It is evident from the conduct of the respondents that they are bent upon obstructing the decree, utilizing the brute force of the State at their command to flout it. Their conduct also shows that they have moved the Court only to postpone execution at all relevant points of time. The application under Order XXI Rule 97 of the Code was filed by the S.S.P., Agra on 04.03.2021. This application was made as a third party objection, quite late in the day after the State of U.P. through the Collector, Agra, who had been defending

the execution through objections under Section 47 of the Code and the application under Order IX Rule 13 of the Code, lost the applications and revisions, including remedies before this Court under Article 227 of the Constitution.

78. As we have noticed, a suit at the instance of the State of U.P., seeking to nullify the petitioner's title to the suit property and denying the second respondent's character as a tenant, being O.S. No. 1040 of 2011, is pending since that year. One of the reliefs sought in the said suit is cancellation of the sale deed in favour of the petitioner relating to the suit property dated 31.07.1958. A declaration has also been sought that the State of U.P. is the owner of the suit property and the petitioner, including his transferors, had no right, title or interest therein, nor were they the State's landlord. The ex parte decree, of which the present execution is the subject matter, was also sought to be declared fraudulent and passed without jurisdiction.

79. Very startling facts were brought to this Court's notice, questioning the petitioner's title to the suit property, of which we have taken due note earlier in this judgment. It was also brought to our notice that according to the State's case, the vendor of the petitioner's father did not have a right to transfer the suit property to him, because it is all nazul land. The rent receipts have been claimed by the D.I.G. in paragraph No. 11 of the counter affidavit dated 10.10.2014 to be forged, because the D.I.G. says that he has got an inquiry done about it.

80. The least this Court can say is that at this stage of the proceeding, where in the execution of the eviction decree, the respondents have lost before all fora, their

only hope to succeed is in the suit or the objections under Order XXI Rule 97 of the Code. Both these proceedings are title proceedings. As remarked earlier also, in none of these proceedings, the Courts, where these are pending, have granted any interim protection from eviction to respondent No.2. This Court cannot, in the least, go into all these disputed questions relating to the validity of the sale deed dated 31.07.1958, or the validity of the rent receipts.

81. It must be remarked that the assertions on the credit of the D.I.G. that he had got an inquiry done and found the rent receipts forged, do not carry any more weight than the pleadings or the case of a litigant. The D.I.G. here is not acting as a police official investigating a case, but occupies the position of a member of the house of judgment-debtors. His inquiry has, therefore, to be regarded as self-serving and of no worth. Unfortunately, for the respondents, no Court has so far accepted their case of fraud practiced by the petitioner on the State of U.P. or the Police.

82. In fact, we think that we cannot go behind the remarks of this Court in the judgment and order dated 12.07.2016 passed in Matters under Article 227 No. 3222 of 2016, where for the purpose of execution of the eviction decree, the entire case set up by the respondents, calling in question the petitioner's title, has been rejected by this Court. All that this Court can provide to protect the interest of the State at this juncture is that the suit property should be preserved, maintained in good repair, saved from alienation and dissipation, pending the decision of the State of U.P.'s suit and the S.S.P.'s objection under Order XXI Rule 97 of the Code. This ought to be done on the clear

understanding that should the State of U.P. succeed, or for that matter the S.S.P. as a functionary of the State, in establishing their right to the suit property at any stage, the petitioner shall hold the property well preserved, without alienating it to a third party, so that it may be delivered back to respondent No.2.

83. The invocation of this Court's writ jurisdiction by the petitioner, who is the decree-holder in SCC Suit No. 108 of 1989, praying that a mandamus be issued to the Judge, Small Cause Court to ensure handing over actual physical possession of the suit property in execution of the decree, may be a misdirection of the writ. The resort to this Court's writ jurisdiction for the execution of a decree, execution being a far more stable and dependable process to give effect to the relief that the Court has granted, is a very unusual thing for the petitioner to do, but across the period of twelve years, this petition has been entertained and dealt with by this Court, mindful of the fact that the State of U.P. represented by the Collector, Agra and the Police at Agra, under the stewardship of the Senior S.P., have frustrated with impunity, all processes of the Executing Court.

84. In theory, this Court could always have sent back the petitioner with advice about his alternative remedies, but it has not been done in these twelve years that this writ petition has engaged the attention of different Benches of this Court. The reason is that the action of the State Authorities, in particular, the Police, who hold the suit property on behalf of the State of U.P., is, to say the least, most unseemly. A State Authority, after losing a litigation, may be on account of its own negligence, or the other side's resourcefulness, ought to gracefully bow out of the contest and seek

remedies that the law permits. But, till it succeeds in one or the other remedy, it cannot disobey a decree or order by resort to its official machinery, overreaching the judicial process.

85. The petitioner here has found himself staring at a situation more than once, where he has established a right in his favour against the State and the Police to recover possession and also succeeded in his remedy before the Executing Court, but the remedy has been repeatedly rendered ineffectual by the Police telling the Court Amin that it is not the Court's writ which matters, but the D.I.G.'s permission. The D.I.G. here is a litigant and it is preposterous to think that a litigant, who is behaving in this fashion, would grant permission to his subordinates to vacate the suit property. The process of the Executing Court has been reduced to a mockery by the Police as the judgment-debtor or the party claiming under the judgment-debtor, the State of U.P., if one were to peruse the order dated 09.03.2011 passed by the Executing Court, after the Amin submitted his report dated 20.12.2020. The same situation came about more than nine years later, when the State of U.P., failing in all its remedies before all Courts, including this Court, took the same stand, with the Court Amin being told on 27.11.2019 by the policemen posted at the suit property, that they would not vacate till their higher officials permit them. The writ of possession had to be returned unexecuted to the Executing Court.

86. In this Court's opinion, therefore, the relief sought by the petitioner has to be slightly moulded. It is one of those rare cases where, in the face of the process of execution being completely immobilized and rendered ineffectual by respondent

No.2, in particular, the Police Authorities at Agra, misusing their official power, that this Court has to step in and issue a mandamus to the State of U.P. represented by the Collector to the effect that whoever be found in possession of the suit property on behalf of the State of U.P. represented by the Collector, Agra, including the Police, must deliver possession of the suit property to the petitioner in terms of the decree and in the manner and within schedule ordered by this Court, without any let and hindrance. Of course, the rights of the State and the Police, who are said to occupy on their behalf, would be safeguarded in the manner already indicated hereinbefore.

87. Now, the question is that can this Court issue a writ of mandamus to execute a decree passed on the regular side of the Civil Court, or for that matter the Small Cause Court. Normally and invariably, it ought not to be done. Execution is a self-sufficient and effective process to implement a decree and a writ of mandamus invariably to execute it ought not issue. If in a situation like the present one, the judgment-debtor had not been the State and the actual occupants an armed force of the State like the Police, the Executing Court could have easily directed the grant of police aid. We too could think why that course of action has not been adopted by the Executing Court. But, the hard reality is that the Executing Court, after the second occasion of its writ of possession being skirted by the policemen at the suit property, which has been returned unexecuted by the Amin through his report dated 27.11.2019, has again addressed a memo dated 09.12.2019 to the Senior S.P., Agra with a copy to the Collector, Agra, the judgment-debtor here, asking the actual occupants, the S.S.P.,

Agra, to vacate the suit property in execution of the decree, which the learned Judge in the Executing Court has described as ancient. The learned Judge has mentioned the fact that the police personnel have refused to comply with the writ of possession, saying that they would vacate only if the higher officials of the Police order them to do so, resulting in the decree remaining unexecuted. Nothing has happened till date after 09.12.2019 and this letter by the Judge, Small Cause Court addressed to the S.S.P., Agra.

88. This Court has said earlier also in this judgment that a Court ought not write letters to litigants, whoever they are. It neither serves any purpose nor does it augur well for the system of justice. The writing of a letter of this kind after the return of a writ of possession is no process of the Court issued in aid of execution. It is an expression of utter helplessness by the learned Judge in the Executing Court to give effect to his decree.

89. It is in the face of this impossibility and helplessness that the petitioner has turned to this Court, praying for the issue of a writ of mandamus. But, the mandamus that he seeks is directed to the wrong addressee, to wit, the Judge. We think that the mandamus ought to issue to the State of U.P. through the Collector, Agra and anyone holding the suit property on their behalf, including the Police represented by the S.S.P., Agra or the I.G. Police/ D.I.G., Agra Range, Agra, or for the present, the Commissioner of Police, Agra, whosoever it may be.

90. A little earlier in the judgment, this Court had posed a question unto itself, if a writ of mandamus can be issued to execute a decree of the Civil Court. We

think that in a rare situation of this kind to abate injustice, it must be. Dwelling upon the scope of the writ of mandamus, the Supreme Court in **Secretary, Cannanore District Muslim Educational Association, Karimbam v. State of Kerala and others, (2010) 6 SCC 373** held:

“29. While dismissing the writ petition the Hon'ble High Court with respect, had taken a rather restricted view of the writ of mandamus. The writ of mandamus was originally a common law remedy, based on Royal Authority. In England, the writ is widely used in public law to prevent failure of justice in a wide variety of cases. In England this writ was and still remains a prerogative writ. In America it is a writ of right. (Law of Mandamus by S.S. Merrill, Chicago, T.H. Flood and Company, 1892, Para 62, p. 71.)

30. About this writ, SA de Smith in Judicial Review of Administrative Action, 2nd Edn., pp. 378 and 379 said that this writ was devised to prevent disorder from a failure of justice and defect of police and was used to compel the performance of a specific duty. About this writ in 1762 Lord Mansfield observed that “within the past century it had been liberally interposed for the benefit of the subject and advancement of justice”.

31. The exact observations of Lord Mansfield about this writ have been quoted in Wade's Administrative Law, 10th Edn. and those observations are still relevant in understanding the scope of mandamus. Those observations are quoted below:

“It was introduced, to prevent disorder from a failure of justice, and defect of police. Therefore it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one.... The value of the matter, or the

degree of its importance to the public police, is not scrupulously weighed. If there be a right, and no other specific remedy, this should not be denied. Writs of mandamus have been granted, to admit lecturers, clerks, sextons, and scavengers & c., to restore an alderman to precedence, an attorney to practice in an inferior court, & c.” (H.W.R. Wade & C.F. Forsyth: Administrative Law, 10th Edn., pp. 522-23.)

32. De Smith in Judicial Review, 6th Edn. has also acknowledged the contribution of Lord Mansfield which led to the development of law on writ of mandamus. The speech of Lord Mansfield in *R. v. Bloor* [(1760) 2 Burr 1043 : 97 ER 697] runs as under:

“a prerogative writ flowing from the King himself, sitting in his court, superintending the police and preserving the peace of this country”. (See de Smith's Judicial Review, 6th Edn., Sweet and Maxwell p. 795, paras 15-36.)

33. Almost a century ago, Darling, J. quoted the observations in *R. v. Denbighshire (Justices of)* [(1803) 4 East 142 : 102 ER 784], in *R. v. Revising Barrister for the Borough of Hanley* [(1912) 3 KB 518] which explains the wide sweep of mandamus. The relevant observations are: (Revising Barrister case [(1912) 3 KB 518], KB p. 529)

“... Instead of being astute to discover reasons for not applying this great constitutional remedy for error and misgovernment, we think it our duty to be vigilant to apply it in every case to which, by any reasonable construction, it can be made applicable.”

34. At KB p. 531 of the report, Channell, J. said about mandamus: (Revising Barrister case [(1912) 3 KB 518])

“... It is a most useful jurisdiction which enables this Court to set right mistakes.”

35. In *Dwarka Nath v. ITO* [AIR 1966 SC 81] a three-Judge Bench of this Court commenting on the High Court's jurisdiction under Article 226 opined that this article is deliberately couched in comprehensive language so that it confers wide power on the High Court to “reach injustice wherever it is found”. Delivering the judgment Justice Subba Rao (as His Lordship then was) held that the Constitution designedly used such wide language in describing the nature of the power. The learned Judge further held that the High Court can issue writs in the nature of prerogative writs as understood in England; but the learned Judge added that the scope of these writs in India has been widened by the use of the expression “nature”.

36. The learned Judge in *Dwarka Nath* [AIR 1966 SC 81] made it very clear that the said expression does not equate the writs that can be issued in India with those in England but only draws an analogy from them. The learned Judge then clarifies the entire position as follows: (AIR p. 85, para 4)

“4. ... It enables the High Courts to mould the reliefs to meet the peculiar and complicated requirements of this country. Any attempt to equate the scope of the power of the High Court under Article 226 of the Constitution with that of the English courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small country like England with a unitary form of Government to a vast country like India functioning under a federal structure. Such a construction defeats the purpose of the article itself.”

39. this Court has also taken a very broad view of the writ of mandamus in several decisions. In *Comptroller and Auditor General of India v. K.S. Jagannathan* [(1986) 2 SCC 679 : 1986 SCC (L&S) 345 : (1986) 1 ATC 1 : AIR 1987 SC 537] a three-Judge Bench of this Court referred to Halsbury's Laws of England, 4th Edn., Vol. I, para 89 to illustrate the range of this remedy and quoted with approval the following passage from Halsbury about the efficacy of mandamus:

“89. Nature of mandamus.— ... is to remedy defects of justice; and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy, for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.” (See SCC p. 692, para 19 of the report)

In SCC para 20, in the same page of the report, this Court further held: (*K.S. Jagannathan* case [(1986) 2 SCC 679 : 1986 SCC (L&S) 345 : (1986) 1 ATC 1 : AIR 1987 SC 537], p. 693)

“20. ... and in a proper case, in order to prevent injustice resulting to the parties concerned, the court may itself pass an order or give directions which the Government or the public authority should have passed or given had it properly and lawfully exercised its discretion.”

40. In a subsequent judgment also in *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani* [(1989) 2 SCC 691 : AIR 1989 SC 1607] this Court examined the development of the law of mandamus and held as under: (SCC p. 701, para 22)

“22. ... mandamus cannot be denied on the ground that the duty to be enforced is not imposed by the statute. Commenting on the development of this law, Professor de Smith states: ‘To be enforceable by mandamus a public duty does not necessarily have to be one imposed by statute. It may be sufficient for the duty to have been imposed by charter, common law, custom or even contract.’ (Judicial Review of Administrative Action, 4th Edn., p. 540). We share this view. The judicial control over the fast expanding maze of bodies affecting the rights of the people should not be put into watertight compartment. It should remain flexible to meet the requirements of variable circumstances. Mandamus is a very wide remedy which must be easily available ‘to reach injustice wherever it is found’. Technicalities should not come in the way of granting that relief under Article 226. We, therefore, reject the contention urged for the appellants on the maintainability of the writ petition.” (emphasis supplied) (See AIR p. 1613, para 21.)”

91. The question engaged the attention of the Andhra Pradesh High Court in **K. Seetharama Dass v. Sikile Moses & others, 1999 (1) A.P.L.J. 406 (HC)**. In **K. Seetharama Dass** (supra), the Court was concerned with the helplessness of an Executing Court in executing a money decree against an extraordinarily elusive judgment-debtor, who could not be arrested and brought before the Court to execute the decree by any means. The disillusioned decree-holder, as a last resort, turned to the High Court's jurisdiction under Article 226 of the Constitution and applied for a writ of mandamus, or any other appropriate writ, to cause the judgment-debtor to be arrested and produced before the learned Civil Judge, Narsapur, West Godavari, who was

the Executing Court. The objection, that was taken to the Court's exercise of its jurisdiction in aid of execution, may be best understood the way it is described in paragraph No.8 of the report in **K. Seetharama Dass**:

"8. Sri M.R.K. Choudary, learned senior Counsel appearing on behalf of the first respondent does not dispute the jurisdiction of this Court under Article 226 of the Constitution of India to issue an appropriate writ or direction whenever interest of justice requires to do so. But the learned senior Counsel would submit that the remedies available in civil law are also superior in nature compared to the remedies that may be available before the Tribunals with limited jurisdiction and the civil Courts are capable of enforcing their own orders. This Court cannot entertain a writ petition by way of parallel proceeding. This Court should not exercise its discretion in such matters where adequate remedies are available under the Code of Civil Procedure."

92. The enormity of resistance that was offered by the judgment-debtor and the way it had rendered the process of execution illusory and of no avail, is described in paragraph No.12 of the report in **K. Seetharama Dass** thus:

"12. Learned senior Civil Judge referred to the entire history of the case and the tactics and methods adopted by the first respondent to avoid the execution of the decree. Learned Judge observed that the first respondent herein had flouted the orders of the trial Court, as well as this Court and failed to comply with the order of this Court: dated 19-4-1993 to deposit half of the decretal amount, till this date. It is observed by the learned Judge that the first respondent has

misused the provisions of the Code of Civil Procedure by prolonging and dragging the proceedings. The orders passed by the Courts are frustrated. The learned trial Judge was disposing of the application filed by the petitioner pursuant to the directions of this Court in CMP No. 19151 of 1997 issued by a Division Bench of this Court to consider the request of the petitioner for issuing necessary directions to the police to apprehend the first respondent in connection with the execution of the decree. The learned trial Judge observed that Warrant of arrest was issued by the Court of number of occasions. Neither the Bailiff, nor the Advocate-Commissioner could even enter into the premises to know whether the first respondent was available or not. The learned trial Judge expressed his anguish and concern as to the dilatory tactics adopted by the first respondent in obstructing the judicial process. But, even the said order passed by the trial Court directing the Sub-Divisional Police Officer, Narsapur to provide sufficient and adequate police protection and aid the Advocate-Commissioner for due execution of the arrest warrant remained on paper. It is a sad commentary that so far more than thirty times the trial Court issued warrants during the last six years to apprehend the first respondent-judgment debtor and cause his production in the Court to proceed further in the matter."

93. In answering the issue in **K. Seetharama Dass**, B. Sudershan Reddy, J. (as His Lordship then was of the High Court) observed:

"13. Is it a case where this Court should silently watch this spectacle and refuse to interfere on the ground that there is adequate alternative remedy available to the petitioner?"

14. It is true that this Court in exercise of its extraordinary jurisdiction under

Article 226 of the Constitution of India will not ordinarily issue a writ in favour of a person, who has adequate alternative remedy. Alternative remedy can never be said to be an adequate alternative remedy unless it is equally convenient, beneficial and effective. The Rule which requires exhaustion of alternative remedy is a Rule of convenience and discretion rather than a rule of law. In other words, it does not bar the jurisdiction of the Court. See: *State of U.P. v. Mohd. Nooh* (1) AIR 1958 SC 86. May be the existence of adequate alternative remedy is always a factor to be taken into account.

15. In *B. Govinda Reddy v. Revenue Divisional Officer-cum-LAO, Kurnool* (2) 1997 (5) ALD 748, this Court had an occasion to consider the very same question as to whether this Court would entertain a writ petition to implement and execute any and every order and decree passed by a Court of competent civil jurisdiction and accordingly held that the decree holders have to necessarily resort to execution proceedings and get the decrees executed in accordance with law and the Court would normally insist the decree holders to adopt the alternative efficacious remedy available under the Code of Civil Procedure. It is, however, made clear in the said judgment that existence of alternative and efficacious remedy does not operate as a bar in whatsoever manner and effect the jurisdiction of this Court in the matter of exercising its power under Article 226 of the Constitution of India. The Court can always issue appropriate directions whenever and wherever interest of Justice require issuance of such directions. The fact that the petitioners had already availed the remedy available to them in law by initiating execution proceedings may not effect the jurisdiction of this Court under

Article 226 of the Constitution of India to issue necessary directions.

22. The law on the subject is well settled. The matter would be one of discretion. The question to be asked being whether the remedy provided was adequate remedy. The jurisdiction of this Court to issue appropriate writs whenever interest of Justice requires is not limited in any manner whatsoever, except by the Constitutional scheme itself and the self-imposed limitations in exercise of the jurisdiction.

23. A Division Bench of this Court in *Satyanarayana Tiwari v. SHO, PS., Santhoshnagar* (11) 1982 (2) ALT 161 : 1983 (1) An. W.R. 114 : AIR 1982 AP 394, while dealing with the question as to whether the High Court can issue a writ or direction to the concerned authorities to enforce the orders of a civil Court observed:

“Section 151 CPC reserves the inherent power of the Court. Article 226 of the Constitution goes a step further and vests extraordinary jurisdiction in the High Court of a State to issue not only a writ of mandamus but also appropriate writs, directions or orders for the enforcement of any of the right conferred by Part III and for any other purpose. As held by the Supreme Court in *Calcutta Gas Company (Prop) Ltd. v. State of W.B.*, AIR 1962 SC 1044, ‘any other purpose’ means ‘the enforcement of any legal right and the performance of any legal duty’. A legal right, of course, means any legally enforceable right. Nothing more can be a higher purpose than the enforcement of the orders of the Civil Court and that of the High Court which confirms or recognises the rights of a party. By any interpretation of the provisions of CPC the power of the High Court under Art. 226 of the Constitution of India to enforce its own

orders or the orders of the Civil Court cannot be curtailed.

(emphasis supplied)

24. The petitioner herein made all possible efforts to get the decree obtained by him executed against the first respondent. The trial Court after exhausting the alternative modes available for execution of the decree, finally thought it fit to order arrest of the first respondent. Innumerable warrants were issued for arrest and cause production of the first respondent in the Court to give finality to the execution proceedings. All such attempts proved futile. The first respondent challenged more or less every order passed by the trial Court in the process of execution of the decree. The attempts made by the first respondent to temporarily move or shift from the territorial jurisdiction of the trial Court to avoid execution of the warrant, as observed by the trial Court, highlights the conduct of the first respondent. We are concerned with the dignity and majesty of law. No judicial system can survive unless it commands confidence and respect of the people. The first respondent brings the whole judicial process to a farcical level by successfully avoiding execution of the warrant of arrest issued against him for a period of more than four and half years. It is nothing but subversion of judicial process. In such a situation this Court can never remain to be a silent spectator.

25. What confidence the subordinate Courts command, if the decrees passed by them are put in a cold storage by the mighty, powerful or unscrupulous litigants?

26. It is the duty of this Court to protect the judicial process and legitimacy of the subordinate Courts. Otherwise there will be utter chaos and confusion. It is the bounden duty of this Court to uphold and enforce the Rule of law. The High Court exercises control over the subordinate judiciary and

superintendence over all the Courts throughout the territories in relation to which it exercises jurisdiction. The power of superintendence over the Courts is coupled with the duty to protect the legitimacy of the judicial process at the grassroot level. The subordinate judiciary is not only under the control of the High Court; but also is under the care and custody of the High Court. The High Court has not only the power to enforce the discipline in the subordinate judiciary, but also to protect the dignity and honour of the Subordinate Judiciary. This Court has the necessary power to issue appropriate directions to protect the integrity of judicial process and even to enforce an order passed by the subordinate Courts, if the ordinary mechanism fails to provide the relief and meet the challenge.

27. The decree obtained by the petitioner perhaps would remain unexecuted for ever, as is evident from the record. It is under those circumstances, the petitioner knocks the door of this Court seeking justice, it is not as if the petitioner failed to avail the remedies provided under the Code of Civil Procedure. The inadequacy of the remedies availed by the petitioner is obvious. It is a clear case where the petitioner is left with no other effective and adequate remedy. In fact, the petitioner invoked the jurisdiction of this Court only after exhausting all the remedies. It is evidently a fit case requiring interference by this Court and interest of justice do require interference. This is one of those rarest of rare cases requiring interference of this Court to protect the dignity, majesty and purity of the judicial process.”

94. In **Kasani Subbamma v. The Government of A.P. and others, 1994 (1) A.P.L.J. 117 (H.C.)**, the issue arose before

the Andhra Pradesh High Court, where a decree of the subordinate Judge, Kowur was found difficult to execute by the Executing Court. The decree was for the payment of compensation relating to land acquired by the State and had become final. The process of execution brought to recover the compensation appears to have failed before the might of the State, who were the acquiring authority and liable to pay. When the High Court was petitioned for a mandamus to execute the decree that had become final, a mandamus was issued to deposit the compensation finally determined, in the Court of the Subordinate Judge, within a period of two months from the date of the order. In reaching that conclusion, it was observed in **Kasani Subbamma** (supra):

“3. There are no constitutional fetters placed on the High Court in exercise of jurisdiction under Article 226 of the Constitution of India that merely because an alternative remedy exists, the writ jurisdiction should not be exercised. The exercise of writ jurisdiction is a constituent power conferred under the Constitution to a constitutional court like High Court to issue writs or directions under Article 226 of the Constitution of India. There cannot be any hard and fast rule that in each and every case where there is an alternative remedy, that the writ petition should not be entertained. In appropriate cases, the High Court, being the constitutional court should rise to the occasion to provide effective and speedy remedy, more so, in cases of deprivation of property of a person.....
..... Be it under Article 31 or 300-A of the Indian Constitution, no person can be deprived of his property, save by authority of law and the authority of law being the Land Acquisition Act, there is a duty cast on the land acquisition authorities to pay,

the compensation speedily so that the party aggrieved should be able to recompensate his loss of property by proper means, but he will be deprived of the same, if the compensation is paid after a prolonged time by which certainly, there is a deprivation of property unjustly, thus, violating the very object and intendment of the Land Acquisition Act which aims at not only acquiring the property of a person for public purpose, but also compensating the deprived person in a very reasonable time. By not doing so, the authorities in the instant case have certainly violated the fundamental right of the petitioner under Article 31 of the Constitution which is available to her in the instant case as her land was acquired when the fundamental right was in the book of Constitution at the relevant point of time. Even if it is Article 300-A of the Constitution, then also the same measure is applicable. As such, this court is not debarred from issuing appropriate writ or direction for payment of the compensation which the petitioner has fought for and got determined and which determination attained finality. Coming to execution proceedings, even the same are pending for more than 3 years and could not be executed. The reasons are obvious. The executing courts are very lenient in executing the decrees against the Government. This is often the experience and in fact this is the general trend while there may be very few exceptions. When the execution is carried out, what is available are rickety furniture in the office of the Land Acquisition Officer like chairs, tables, almarahs, which will already be subjected for several attachments in several executions. What useful purpose will be served, if the execution proceedings go on like that and the executing court is not able to realise the decretal amount and pay it over to the decreeholder thereby frustrating

the very effect of the decree. More often, the decrees pertaining to the land acquisition proceedings have found to be not efficacious because of the prolonged process and lenient view taken by the court depending upon the mercy of the judgment-debtor to deposit the amounts for which again, there will be a scramble by pairavikars to get the priority from the Government in depositing the decretal amounts. I do not think that the Constitution makers have visualised this situation. As such, I hold that as and when it is brought to the notice of this court that any decree passed against the Government or governmental authorities or any authority which is a State under Article 12 of the Constitution is not honoured and if it is found that execution under civil procedure code is inefficacious because of the delay involved, nothing prohibits this court to exercise its jurisdiction under Article 226 of the Constitution of India for enforcement of the decree to be in consonance of the fundamental right or the constitutional guarantee as the case may be.”

95. In the case here, the position is not much different. The State of U.P. or the police officers, who are occupying the suit property on behalf of the State, are *prima facie* not the owners, as they say they are, and which, so far they have not been able to prove or establish in any proceeding. What they are doing by forcibly holding on to possession of the suit property is nothing short of depriving the petitioner of his right under Article 300-A of the Constitution. This they are able to do because they are an arm of the State, and that too, one that is armed.

96. Thus seen, a mandamus can be viewed as a panacea to undo all wrongs,

where there is a right, but no mode of redress or one that is effectual. Normally, remedies provided by the law, particularly, before Courts of established jurisdiction, are effective. Nevertheless, in a given case, even the very stable remedy of execution, may become a toothless tiger, faced with a recalcitrant Authority of the State, that is desperate to obstruct the process of execution by employing its statutory power and physical might. This Court has said that it is only in a very rare case that a mandamus may be issued to give effect to a decree. One of those rare species of cases where a mandamus ought be issued in aid of execution is the one that this case presents.

97. This Court takes judicial notice of the fact that pending hearing of this petition, towards the end of the year 2022, the State Government have altered the existing police setup in the District of Agra from a divided establishment of Executive Magistracy and the Police into the Commissionerate system. Therefore, in the District of Agra, it is the Commissioner of Police, who would step into the shoes of the quondam office of the S.S.P., Agra. The Range or the Zone level officers, like the Deputy Inspector General of Police or the Inspector General, would have no local jurisdiction within the city limits of Agra. In the opinion of this Court, therefore, apart from the writ being issued to the State of Uttar Pradesh represented by the Collector, Agra, who is the judgment-debtor and behind whom the police officials, who are occupants of the suit property stand, it is the Commissioner of Police, Agra, the Station House Officer, P.S. Hari Parwat and the Chowki Incharge, Police Chowki Khandari, P.S. Hari Parwat, District Agra, who must also be commanded, though not formally parties to this petition. In any

case, the Police Authorities have been sufficiently heard, even personally. They have filed affidavits too and defended their position before this Court.

98. In the result, this petition succeeds and is **allowed**. A mandamus is issued to the State of Uttar Pradesh represented by the Collector, Agra and also to anyone sitting in the suit property on behalf of the Collector or otherwise, including the Commissioner of Police, Agra, the S.H.O., P.S. Hari Parwat, Agra, the Chowki In-charge, Police Chowki Khandari, P.S. Hari Parwat, Agra and their subordinate officials in occupation of the suit property, to deliver vacant possession thereof to the petitioner between sunrise and sunset on **10th October, 2023**, in the presence of the Court Amin, who shall be present on the spot and record proceedings of the day. The petitioner shall remain present at the suit property to take possession of the same. After delivery of possession, the Collector, Agra will submit a report of compliance to the Registrar General of this Court on or before the **12th October, 2023**, which shall be placed on record. The Amin shall make his report to the Executing Court, who shall dispose of Execution Case No.20 of 1999 in accordance with law, taking into account the Amin's report. It is further ordered that until judgments are passed in O.S. No.1040 of 2011, Misc. Case Nos.16 of 2021 and 213 of 2022, instituted by the State of U.P. or the S.S.P., Agra (now his successor, the Commissioner of Police, Agra), the suit property shall not be alienated by the petitioner in favour of any third party, nor its nature or character changed in any manner whatsoever, and further that it shall be maintained in good repair by the petitioner. In the event of the second respondent or the S.S.P., Agra (now his successor, the Commissioner of Police,

Agra) being successful in establishing their right, title and interest to the suit property, as against the petitioner, the petitioner would be bound by the orders passed by the Court in the aforesaid matters, and restitute possession of the suit property to respondent No.2, if so ordered.

99. Let a copy of this order be communicated to the Collector, Agra, the Commissioner of Police, Agra, the S.H.O., P.S. Hari Parwat, Agra, the Chowki In-charge, Police Chowki Khandari, Agra and the Judge, Small Cause Court, Agra or wherever Execution Case No.20 of 1999 be pending, all through the learned District Judge, Agra by the Registrar (Compliance).

(2023) 9 ILRA 470

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 27.07.2023

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

Writ-A No. 40695 of 2005

Ajay Kumar		...Petitioner
	Versus	
State of U.P. & Ors.		...Respondents

Counsel for the Petitioner:

Sri Anil Tiwari, Sri Dharmendra Shukla, Sri Ramesh

Counsel for the Respondents:

C.S.C., Sri Ashok Khare, Sri Hitesh Pachori, Sri M.A. Qadeer, Sri Nisheeth Yadav, Sri R.B. Saxena, Sri Rohit Upadhyay

A. Service Law – Constitution of India – Article 226 – Writ – Scope –Post of Assistant Registrar – Selection of respondent nos. 4 & 5 was alleged to be wrongly made – The respondent nos. 4 & 5 were appointed pursuant to the modification of the interim order of High

Court and after completing their entire tenure of service, they have superannuated – Effect – Held, so far as appointment of respondent nos. 4 and 5 is concerned, the same cannot be quashed nor can any order be passed in this writ petition to the detriment of the interest of the respondent nos. 4 and 5. (Para 12 and 13)

B. Constitutional Law – Principle of Prospective overruling – Applicability – Superseding of earlier decision – Retrospective operation of law declared by Supreme Court – Scope – Held, the word 'prospective overruling' implies an earlier judicial decision on the same issue which was otherwise final. That is how it was understood in Golak Nath. However, the Supreme Court has used the power even when deciding on an issue for the first time – It is well settled that declaration of law can be made prospective i.e. operative from the date of the judgment – *Somaiya Organics's case* relied upon. (Para 23, 24 and 26)

C. Maxim of equity – *lex non cogit ad impossibilia* – Meaning – The law does not compel a man to do what he cannot possibly perform. (Para 25)

D. Maxim of equity – *Actus Curiae Neminem Gravabit* – Meaning – Nobody should be allowed to suffer for the fault of the court. (Para 32)

E. Service Law – Constitution of India – Article 226 – Writ – Scope – Delay in disposal of writ, how far fatal in granting relief – Selection was made in 2014, of which validity was challenged through writ petition filed in 2015, in which pleadings were exchanged – Reference made to larger Bench was decided in 2019, which was also confirmed by Apex Court in 2021 and thereafter writ petition was heard in 2023 – Effect – Held, if, merely delay in disposal of the writ petition, is taken as a ground to deny relief to the petitioner, that would be a mockery of the legal system and the

institution of justice for which it has been established. (Para 30 and 33)

F. Service Law – Selection – Reservation – Horizontal reservation to women candidates – Admissibility – Only 01 post could have been filled up by woman candidate, however the second post was erroneously filled up by according reservation to another woman candidate who was not entitled for the same – The petitioner being next candidate in the order of merit was denied due to wrong application of reservation – Validity challenged – Held, the Commission was not justified in filling up two posts by according horizontal reservation to women candidates but it could fill up only a single post and, therefore, the petitioner, being next in the order of merit, should have been appointed on the vacant post – *Saurav Yadav's case* relied upon. (Para 2, 15, 33 and 36)

Writ petition partly allowed. (E-1)

List of Cases cited:

1. Saurav Yadav & ors. Vs St. of U.P. & ors. (2021) 4 SCC 542.
2. Tamannaben Ashokbhai Desai Vs Shital Amrutlal Nishar; (2020) SCC OnLine Guj 2592
3. St. of U.P. and Anr. Vs Pawan Kumar Tiwari & ors.; (2005) 2 SCC 10
4. Ashika Prasad Shukla Vs Dist. Inspector of Schools, Allahabad & ors.; (1998) 3 AWC 2150
5. Somaiya Organics (India) Ltd. & Anr. Vs St. of U.P. & anr.; (2001) 5 SCC 519.
6. Kailash Chand Sharma Vs St. of Rajasthan & ors.; (2002) 6 SCC 562.
7. Employees' St. Insurance Corpn. & ors. Vs Jardine Henderson Staff Association & Ors.; (2006) 6 SCC 581.
8. U.O.I.& ors. Vs Chaman Rana with U.O.I.& ors. Vs Gulshan Kumar Sharma; (2018) 5 SCC 798

9. Keshwanand Bharti Vs St. of Kerala; (1973) 4 SCC 225 : AIR 1973 SC 1461

10. Managing Director E.C.I.L., Hyderabad Vs B. Karunakar; JT 1993 (6) SC 1 at p. 46 para 73 : ((1993) 4 SCC 727 : AIR 1994 SC 1074

11. Harsh Dhingra Vs St. of Har.; (2001) 9 SCC 550

12. Inderchand Jain (Dead) through LRs. Vs Motilal (Dead) through LRs.; (2009) 14 SCC 663

(Delivered by Hon'ble Kshitij Shailendra, J.)

1. Heard Shri Anil Tiwari, learned Senior Counsel assisted by Shri Ramesh and Sri Dharmendra Shukla, learned counsel for the petitioner, Shri Bharat Pratap Singh, the Additional Chief Standing Counsel along with Shri Neeraj Tripathi, Additional Advocate General on behalf of respondent no. 1 and Shri Nisheeth Yadav, learned counsel representing the respondent - U.P. Public Service Commission and perused the records.

2. After hearing the learned counsel for the parties, I find that the controversy involved in this matter with regard to horizontal reservation admissible to women candidates is covered in terms of the judgment of the Apex Court in the case of ***Saurav Yadav and Others Vs. State of U.P. and Others (2021) 4 SCC 542***. Relevant portions of the said judgment shall be referred at appropriate place in this judgment.

3. The present writ petition has been filed by one Ajay Kumar challenging the impugned selection list published on 22.07.2004 insofar as it recommended selection in favour of Smt. Archana Jauhary and Km. Anshu Lata Sarkar, respondent

nos. 4 and 5, respectively to the writ petition. Further prayer has been made for commanding the respondents to arrange the select list afresh strictly in accordance with the eligibility criteria and without giving any reservation to the women as a class and with further mandamus commanding the respondents not to make any appointment pursuant to the recommendations made by the respondent - Commission on the post of Assistant Registrar pursuant to the advertisement in question.

4. The submission of Shri Anil Tiwari is to the effect that the U.P. Public Service Commission advertised 14 vacancies of Assistant Registrars in the year 2000 and insofar as horizontal reservation is concerned, it was provided that two posts shall remain reserved for women category candidates as per the Government Orders applicable which provided 20% reservation in that regard. He submits that out of 14 posts, 7 posts were of open category candidates and, therefore, if 20% reservation is applied for women, the said calculation would go to 1.4 which, when rounded off, would go to 1 (one). He further submits that only one post out of 7 could have been filled up by offering selection / appointment to a single woman whereas, the respondents have finalized selection in favour of respondent nos. 4 and 5, i.e., 2 women by making wrong calculation of 20% of 14 vacancies, i.e., 2.8 which would come to 2 (two) and, therefore, instead of applying reservation on the basis of compartmentalization, two posts have been wrongly filled up.

5. In support of his contention, reference to various authorities has been made by Sri Anil Tiwari and it has been contended that after the Full Bench of this Court decided the issue of reservation vide

its judgement dated 16.07.2019 in this very petition, the matter reached up to Supreme Court where, not only the judgment rendered by the Full Bench of this Court was considered but also the judgments on the same issue pronounced by the High Courts of Rajasthan, Bombay, Uttarakhand and Gujarat were discussed at length and final judgment was passed in the case of **Saurav Yadav (supra)**.

6. Shri Anil Tiwari has placed reliance upon paragraph nos. 24, 27, 28, 40 and 43 of the said judgment which are reproduced herein below:-

"24. The view taken by the High Courts of Rajasthan, Bombay, Uttarakhand and Gujarat is thus contrary to the one that weighed with the High Court of Allahabad. Apart from the orders referred to in paras 11 to 13 hereinabove, the Full Bench of the High Court of Allahabad in Ajay Kumar v. State of U.P. held:-

"94. For the aforesaid, to our mind, inter se merit of women has no role to play in the implementation of horizontal reservation as the socially reserved candidate (SC, ST, & OBC) seeking benefit of reservation of special category (women) cannot claim adjustment in open category."

27. The High Courts of Rajasthan, Bombay, Uttarakhand, and Gujarat have adopted the same principle while dealing with horizontal reservation whereas the High Court of Allahabad and Madhya Pradesh have taken a contrary view. These two views, for facility, are referred to as the "first view" and the "second view" respectively. The second view that weighed with the High Courts of Allahabad and Madhya Pradesh is essentially based on the premise that after the first two steps as detailed in para 18 of the decision in Anil Kumar Gupta and after vertical

reservations are provided for, at the stage of accommodating candidates for effecting horizontal reservation, the candidates from reserved categories can be adjusted only against their own categories under the vertical reservation concerned and not against the "Open or General Category".

28. Thus, according to the second view, different principles must be adopted at two stages; in that:

(I) At the initial stage when the "Open or General Category" seats are to be filled, the claim of all reserved category candidates based on merit must be considered and if any candidates from such reserved categories, on their own merit, are entitled to be selected against Open or General Category seats, such placement of the reserved category candidate is not to affect in any manner the quota reserved for such categories in vertical reservation.

(II) However, when it comes to adjustment at the stage of horizontal reservation, even if, such reserved category candidates are entitled, on merit, to be considered and accommodated against Open or General seats, at that stage the candidates from any reserved category can be adjusted only and only if there is scope for their adjustment in their own vertical column of reservation.

Such exercise would be premised on following postulates:

(A) After the initial allocation of Open General Category seats is completed, the claim or right of reserved category candidates to be admitted in Open General Category seats on the basis of their own merit stands exhausted and they can only be considered against their respective column of vertical reservation.

(B) If there be any resultant adjustment on account of horizontal reservation in Open General Category, only those candidates who are not in any of

the categories for whom vertical reservations is provided, alone are to be considered.

(C) In other words, at the stage of horizontal reservation, Open General Category is to be construed as category meant for candidates other than those coming from any of the categories for whom vertical reservation is provided.

40. We, therefore, do not approve the second view and reject it. The first view which weighed with the High Courts of Rajasthan, Bombay, Uttarakhand and Gujarat is correct and rational.

43. Finally, we must say that the steps indicated by the High Court of Gujarat in para 69 of its judgment in Tamannaben Ashokbhai Desai contemplate the correct and appropriate procedure for considering and giving effect to both vertical and horizontal reservations. The illustration given by us deals with only one possible dimension. There could be multiple such possibilities. Even going by the present illustration, the first female candidate allocated in the vertical column for Scheduled Tribes may have secured higher position than the candidate at Serial No. 64. In that event said candidate must be shifted from the category of Scheduled Tribes to Open / General category causing a resultant vacancy in the vertical column of Scheduled Tribes. Such vacancy must then enure to the benefit of the candidate in the waiting list for Scheduled Tribes – Female. The steps indicated by the Gujarat High Court will take care of every such possibility. It is true that the exercise of laying down a procedure must necessarily be left to the authorities concerned but we may observe that one set out in said judgment will certainly satisfy all claims and will not lead to any incongruity as highlighted by us in the preceding paragraphs."

7. By referring to the aforesaid paragraphs, it has been argued that the Supreme Court has approved the view taken by the Gujarat High Court and, insofar as calculation part is concerned, method of calculation described in paragraph no. 69 of the judgment of the Gujarat High Court in the case of ***Tamannaben Ashokbhai Desai vs. Shital Amrutlal Nishar (2020) SCC OnLine Guj 2592*** has been approved. The said paragraph no. 69 has been reproduced by the Supreme Court in Paragraph No. 23.11 of the judgment in the case of ***Saurav Yadav (supra)*** which reads as follows :-

"69. For the future guidance of the State Government, we would like to explain the proper and correct method of implementing horizontal reservation for women in a more lucid manner.

'PROPER AND CORRECT METHOD OF IMPLEMENTING HORIZONTAL RESERVATION FOR WOMEN.

No. of posts available for recruitment.
..... 100

Social Reservation Quota (49%)

Open Competition (OC) 51

Scheduled Castes (SC) 12

Scheduled Tribes (ST) 17

Socially and Educationally Backward Classes (SEBC) ... 20

Horizontal Reservation for Women (33% in each of the above categories)

OC 17

SC 04

ST 06

SEBC ... 07

Step 1: Draw up a list of at least 100 candidates (usually a list of more than 100 candidates is prepared so that there is no shortfall of appointees when some

candidates don't join after offer) qualified to be selected in the order of merit. This list will contain the candidates belonging to all the aforesaid categories.

Step 2: From the aforesaid Step 1 List, draw up a list of the first 51 candidates to fill up the OC quota (51) on the basis of merit. This list of 51 candidates may include the candidates belonging to SC, ST and SEBC.

Step 3: Do a check for horizontal reservation in OC quota. In the Step 2 List of OC category, if there are 17 women (category does not matter), women's quota of 33% is fulfilled. Nothing more is to be done. If there is a shortfall of women (say, only 10 women are available in the Step 2 List of OC category), 7 more women have to be added. The way to do this is to, first, delete the last 7 male candidates of the Step 2 List. Thereafter, go down the Step 1 List after Item 51, and pick the first 7 women (category does not matter). As soon as 7 such women from Step 1 List are found, they are to be brought up and added to the Step 2 List to make up for the shortfall of 7 women. Now, the 33% quota for OC women is fulfilled. List of OC category is to be locked. Step 2 List becomes final.

Step 4: Move over to SCs. From the Step 1 List, after Item 51, draw up a list of 12 SC candidates (male or female). These 12 would also include all male SC candidates who got deleted from the Step 2 List to make up for the shortfall of women.

Step 5: Do a check for horizontal reservation in the Step 4 List of SCs. If there are 4 SC women, the quota of 33% is complete. Nothing more is to be done. If there is a shortfall of SC women (say, only 2 women are available), 2 more women have to be added. The way to do this is to, first, delete the last 2 male SC candidates of the Step 4 List and then to go down the Step 1 List after Item 51, and pick the first

2 SC women. As soon as 2 such SC women in Step 1 List are found, they are to be brought up and added to the Step 4 List of SCs to make up for the shortfall of SC women. Now, the 33% quota for SC women is fulfilled. List of SCs is to be locked. Step 4 List becomes final. If 2 SC women cannot be found till the last number in the Step 1 List, these 2 vacancies are to be filled up by SC men. If in case, SC men are also wanting, the social reservation quota of SC is to be carried forward to the next recruitment unless there is a rule which permits conversion of SC quota to OC.

Step 6: Repeat steps 4 and 5 for preparing list of STs.

Step 7: Repeat steps 4 and 5 for preparing list of SEBCs."

8. While explaining the calculation, it has been argued that before the Gujarat High Court, 33% horizontal reservation was applicable for women candidates and it was calculated on the basis of compartmentalization, that is to say that out of 100 posts available, upon computation, Open Competition category posts were described as 51 and, accordingly, 17 posts (33% of 51) were calculated for women category candidates. Identical calculations for remaining categories, i.e., Scheduled Castes and Scheduled Tribes and Socially and Educationally Backward Classes category candidates were also made.

9. Further, it has been argued that in the present case, 20% horizontal reservation would be calculated in respect of 07 posts in open category, and that would work out to be 01 post only and, therefore, filling up of 02 posts of women category candidates is contrary to the decision of the Apex Court.

10. Shri Nisheeth Yadav and Shri Neeraj Tripathi, learned counsel for the respondents side have argued that the concerned advertisement was issued in the year 2000 and horizontal reservation was to be applied as per the law applicable at that time and the Commission had rightly applied the same in the present case also. It has been submitted that the calculation of horizontal reservation as laid down by the Apex Court in paragraph no. 23.11 of judgment of *Saurav Yadav (supra)* is correct position of law.

11. This Court had, by interim order dated 24.05.2005, initially restrained joining of posts by the respondent nos. 4 and 5. However, later on, by way of order dated 27.05.2009, the interim order dated 24.05.2005 was modified and it was directed as follows :
-

"To protect interest of the petitioner and to balance equities during the period the writ petition is pending, we modify the interim order dated 24.05.2005 and we direct that if the respondent nos. 4 and 5 are appointed, their appointment would be the subject to the result of the writ petition."

12. It is contented that the respondent nos. 4 and 5 were appointed pursuant to the modification of the interim order and after completing their entire tenure of service, they have superannuated.

13. In view of the above discussions, in so far as appointment of respondent nos. 4 and 5 is concerned, the same cannot be quashed nor can any order be passed in this writ petition to the detriment of the interest of the respondent nos. 4 and 5.

14. The issue which remains to be decided in the present case is as to what kind of relief, the petitioner would get in the present set of facts and circumstances, particularly when this Court is taking a view in consonance with the law laid down by Apex Court in *Saurav Yadav (supra)*.

15 Admittedly, the petitioner is working in the office of Accountants Comptroller General of India. While Shri Anil Tiwari submits that once it is held that only 01 post could have been filled up by woman candidate, the petitioner being next candidate in the order of merit, was entitled for filling up the second post which was erroneously filled up by according reservation to another woman candidate who was not entitled for the same. He, therefore, submits that the petitioner should be offered appointment on any vacancy in the said cadre as he could not have been removed and, therefore, was entitled to get the appointment at that very time.

16. In support of his contention, in this regard, Shri Anil Tiwari has referred to paragraph no. 44 of the judgment of *Saurav Yadav (supra)* which reads as under : -

"44. Having come to the conclusion that Appellant 1 and similarly situated candidates had secured more marks than the last candidates selected in "Open / General Category", the logical consequence must be to annul said selection and direct the authorities to do the exercise de novo in the light of conclusions arrived at by us. However, considering the facts that those selected candidates have actually undergone training and are presently in employment and that there are adequate number of vacancies available, **we mould the relief and direct as under :**

44.1. *All candidates coming from "OBC Female Category" who had secured more marks than 274.8928 i.e. the marks secured by the last candidate appointed in "General Category-Female" **must be offered employment as Constables in Uttar Pradesh Police.***

44.2. ***Appropriate letters in that behalf shall be sent to the candidates concerned within four weeks.***

44.3. ***If the candidates concerned exercise their option and accept the offer of employment, communications in that behalf shall be sent by the candidates concerned within two weeks.***

44.4. *On receipt of such acceptance, the codal and other formalities shall be completed within three weeks.*

44.5. *Letters of appointment shall thereafter be issued within a week and the candidates concerned shall be given appropriate postings.*

44.6. ***For all purposes, including seniority, pay fixation and other issues, the employment of such candidates shall be reckoned from the date the appointment orders are issued."***

17. Shri Anil Tiwari has further placed reliance upon a Division Bench judgement of this Court in case of Pawan Kumar Tiwari Vs. Hon'ble High Court of Judicature at Allahabad reported in 2003 (4) ESC 2097 and has argued that by clearly applying the principle of rounding off, the Division Bench had decided the said case in almost identical circumstances and held that the petitioner shall not be entitled to back wages etc. However, he will be treated notionally appointed w.e.f. the date his batch mates had been given appointment and the notional period would count for the purposes of fixing salary, annual increments etc., and post retiral benefits in favour. He further submits that

the said judgment of the Division Bench has been upheld by the Supreme Court in the case of *State of U.P. and Anr. Vs. Pawan Kumar Tiwari and others, (2005) 2 SCC 10*. He further submitted that even in the subsequent round of litigation initiated by the said Pawan Kumar Tiwari, reliefs were granted to him by Division Bench of this Court in its order dated 22.01.2021 passed in Writ A No. 6981 of 2020 (Pawan Kumar Tiwari Vs. State of U.P. and 4 Ors.) in which a direction was issued to the State to take appropriate steps for correct placement of the said petitioner in the list of selectees.

18. On the other hand, the contention of Shri Neeraj Tripathi and Shri Nisheeth Yadav is that once the Supreme Court in the case of *Saurav Yadav (supra)* declined to issue any mandamus in favour of the concerned petitioners who had claimed absorption against unfilled vacancies, no relief can be granted to the petitioner, even if it is held that instead of one post, two posts were filled up by horizontal reservation accorded to the women category candidates.

19. Shri Nisheeth Yadav and Shri Neeraj Tiwari have also relied upon paragraph no. 49 of the judgment which reads as under:-

"49. If there are unfilled vacancies, it is up to the authorities to act purely in terms of the statutory provisions concerned. Neither any case for issuance of mandamus, as prayed for, has been made out nor do we think it appropriate to pass any orders directing the authorities concerned to absorb the petitioners against unfilled vacancies.

20. Shri Nisheeth Yadav has vehemently argued that as on today, despite the aforesaid legal position settled by the Apex Court in the case of Saurav Yadav (*supra*), the petitioner cannot get any relief. He has argued that it is a case where the legal position was not clear at the time when the writ petition was filed and the matter was ultimately referred to the larger Bench in the year 2015 and the larger Bench (Full Bench) decided this writ petition on 16.07.2019, but even thereafter, the matter went to the Apex Court and, ultimately, has been settled in terms of the judgment rendered in the case of **Saurav Yadav (*supra*)**. Elaborating his arguments based upon the concept of "prospective overruling", Shri Nisheeth Yadav has placed reliance upon following authorities -

i. **Ashika Prasad Shukla vs. Dist. Inspector of Schools, Allahabad & Ors. (1998) 3 AWC 2150.**

ii. **Somaiya Organics (India) Ltd. & Anr. vs. State of U.P. & Anr. (2001) 5 SCC 519.**

iii. **Kailash Chand Sharma vs. State of Rajasthan & Ors. (2002) 6 SCC 562.**

iv. **Employees' State Insurance Corpn. & Ors. vs. Jardine Henderson Staff Association & Ors. (2006) 6 SCC 581.**

v. **Union of India & Ors. vs. Chaman Rana with Union of India & Ors. vs. Gulshan Kumar Sharma (2018) 5 SCC 798.**

21. After carefully examining the authorities cited by Shri Nisheeth Yadav, it would be pertinent to observe that Golak Nath was overruled in Keshwanand Bharti v. State of Kerala, (1973) 4 SCC 225 : AIR 1973 SC 1461, but the principle laid down in Golak Nath in respect of prospective overruling has not been touched in

Keshwanand Bharti rather in its subsequent decisions, the Supreme Court has reiterated the principle of prospective overruling as laid down in Golak Nath. In Managing Director E.C.I.L., Hyderabad v. B. Karunakar, JT 1993 (6) SC 1 at p. 46 para 73 : ((1993) 4 SCC 727 : AIR 1994 SC 1074), it was held as under :

"As a matter of constitutional law retrospective operation of overruling decision is neither required nor prohibited by the Constitution but is one of judicial attitude depending on the facts and circumstances in each case, the nature and purpose of the particular overruling decision seeks to serve. The Court would look into the justifiable reliance on the overruled case by the administration ; ability to effectuate the new rule adopted in the overruling case without doing injustice ; likelihood of its operation whether substantially burdens the administration of justice or retard the purpose..... This Court would adopt retroactive or non-retroactive effect of a decision not as a matter of policy determined in each case after evaluating the merits and demerits of the particular case by looking to the prior history of the rule in question, its purpose and effect and whether retroactive operation will accelerate or retard its operation. The reliance on the old rule and the cost of the burden of the administration are equally germane to give effect to prospective or retrospective operation."

22. When the Apex Court decided in Golak Nath case that the power of amendment under Article 368 of the Constitution did not allow Parliament to abridge the fundamental rights in Part III of the Constitution, it made the decision operative with prospective effect. This was done in recognition of the fact that between

the coming into force of the Constitution on 26-1-1950 and the date of the judgment, Parliament had in fact exercised the power of amendment in a way which, according to the decision in *Golak Nath* was void. If retrospectivity were to be given to the decision, "it would introduce chaos and unsettled conditions in our country". On the other hand it also recognised that such possibility of chaos might be preferable to the alternative of a totalitarian rule. The Court, therefore, sought to evolve "some reasonable principle to meet this extraordinary situation". The reasonable principle which was evolved was the doctrine of prospective overruling.

23. Although the doctrine of "prospective overruling" was drawn from American jurisprudence, it has/had, of necessity, to develop indigenous characteristics, the parameters of the power, as far as this country is concerned, were sought to be laid down in *Golak Nath* itself when it was said: (SCR p. 814 B-D)

"As this Court for the first time has been called upon to apply the doctrine evolved in a different country under different circumstances, we would like to move warily in the beginning. We would lay down the following propositions: (1) The doctrine of prospective overruling can be invoked only in matters arising under our Constitution; (2) it can be applied only by the highest court of the country, i.e., the Supreme Court as it has the constitutional jurisdiction to declare law binding on all the courts in India; (3) the scope of the retroactive operation of the law declared by the Supreme Court superseding its earlier decisions is left to its discretion to be moulded in accordance with the justice of the cause or matter before it."

The parameters have not been adhered to in practice.

24. The word "prospective overruling" implies an earlier judicial decision on the same issue which was otherwise final. That is how it was understood in *Golak Nath*. However, the Supreme Court has used the power even when deciding on an issue for the first time. Thus in *India Cement Ltd. v. State of T.N.* when Apex Court held that the cess sought to be levied under Section 115 of the Madras Panchayats Act, 1958 as amended by Madras Act 18 of 1964, was unconstitutional, not only did it restrain the State of Tamil Nadu from enforcing the same any further, it also directed that the State would not be liable for any refund of cess already paid or collected.

25. The maxim of equity which is founded upon justice and good sense was applied as well as other maxim *lex non cogit ad impossibilia* - the law does not compel a man to do what he cannot possibly perform. The applicability of the aforesaid maxim has been approved by this Court in *Raj Kumar Dey v. Tarapada Dey* and *Gursharan Singh v. New Delhi Municipal Committee*.

26. It is well settled that declaration of law can be made prospective i.e. operative from the date of the judgment. Apex Court in several decisions has laid down the law and declared it to be operative only prospectively. The Constitution Bench of Supreme Court in *Somaiya Organics (India) Ltd. v. State of U.P.* has discussed at length the principles of prospective overruling.

27. Ultimately, it is a question of Court's discretion and is, for this reason,

relatable directly to the words of the Court granting the relief."

28. In **Harsh Dhingra v. State of Harayana (2001) 9 SCC 550**, the Supreme Court held that Prospective declaration of law is a device innovated by this Court to avoid reopening of settled issues and to prevent multiplicity of proceedings. It is also a device adopted to avoid uncertainty and avoidable litigation. By the very object of prospective declaration of law it is deemed that all actions taken contrary to the declaration of law, prior to the date of the declaration are validated. This is done in larger public interest.

29. In the case of **Union of India & Ors. vs. Chaman Rana (supra)**, the Supreme Court was dealing with a case where belated claim was made by the concerned employee seeking promotion and the Apex Court held that direction for retrospective consideration for promotion after 17 to 20 years in the light of belated claim was wholly untenable.

30. There is no dispute regarding the law laid down as explained by the Supreme Court in the aforesaid authorities. However, in the present case, the concept of prospective overruling or granting any relief to the petitioner has to be examined in light of the fact that the impugned selection was made in 2004, the writ petition was immediately filed in 2005, affidavits were exchanged during the course of time and the matter was referred to the larger Bench in 2015. The larger Bench, i.e., the Full Bench, decided the case in 2019 and the Apex Court settled the controversy in 2021 and, thereafter, this writ petition has been heard in the year 2023.

31. Further, an interim order was passed in the present case in 2005 which was modified in 2009 protecting the services of the respondent nos. 4 and 5 who have already retired after getting benefits of the interim order. This Court in order to balance equities during the pendency of the writ petition passed in the modification order dated 27.05.2009.

32. The Maxim "Actus Curiae Neminem Gravabit" means that **nobody should be allowed to suffer for the fault of the court**. This is an important Latin Maxim of Equity, which has wide application in the subordinate as well as higher judiciary of India. It would be relevant to refer to **Inderchand Jain (Dead) through LRs. Vs. Motilal (Dead) through LRs.**, (2009) 14 SCC 663, wherein the Apex Court observed that the said maxim is founded upon equity & justice and helpful in the administration of law.

33. In the aforesaid factual background of the case, if, merely delay in disposal of the writ petition for the aforesaid reasons, is taken as a ground to deny relief to the petitioner, that would be a mockery of the legal system and the institution of justice for which it has been established. In the considered opinion of this Court, particularly taking light from the paragraph no. 44 and its various subparagraphs in the judgment of Saurav Yadav (supra), I proceed to consider the question on grant of relief to the petitioner and I find that different category candidates were petitioners before the Apex Court and denying relief to one set of petitioners in paragraph no. 49 and granting some relief to other set of petitioners in paragraph no. 44 is a matter of concern in the present set of facts and circumstances.

34. The Supreme Court, in paragraph no. 42, had ordered for issuance of letter of appointment to the concerned candidates and it was made clear in paragraph no. 44.6 that for all purpose, including seniority, pay-fixation and other issues, employment of such candidates shall be reckoned from the date of appointment orders are issued.

35. In this regard, Anil Tiwari submits that the petitioner is entitled not only for appointment on any post lying vacant, his seniority and other benefits should also be computed and adjusted according to the seniority which the petitioner would have got, had the impugned action not been taken to the detriment of his interest. The learned counsel for the respondents however submit that the petitioner being candidate of a different cadre, cannot be accorded any benefit of seniority or otherwise as the issue involved relates to a different cadre altogether.

36. While concluding the judgment, I find that the Commission was not justified in filling up two posts by according horizontal reservation to women candidates but it could fill up only a single post and, therefore, the petitioner, being next in the order of merit, should have been appointed on the vacant post.

37. In view of the above, the writ petition succeeds and is *partly allowed*.

38. Without disturbing any aspect of the services rendered by respondent nos. 4 and 5 during the pendency of the writ petition, a direction is issued to the respondent nos. 1 and 2 to offer appointment to the petitioner on any vacant post in the cadre. In case, the petitioner accepts the offer of appointment, the respondents shall be at liberty to take a

decision in accordance with law with regard to the benefits that petitioner would be entitled to as per para 44.6 of the judgment of *Saurav Yadav (supra)*.

(2023) 9 ILRA 481

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 10.08.2023

BEFORE

THE HON'BLE SAURABH LAVANIA, J.

Writ-C No. 2610 of 2023

Raza Hussain @ Raja Miyan ...Petitioner
Versus
Addl. Commissioner Lko. & Ors.
...Respondents

Counsel for the Petitioner:

Mahendra Pratap Singh, Ashutosh Mishra

Counsel for the Respondents:

C.S.C., Dilip Kumar Pandey

Civil Law - Enemy Property Act, 1968 - Sections 18B & 22A - U.P. Zamindari Abolition and Land Reforms Act, 1950 - Section 229-B - Revenue suit for declaration of rights - Land recorded as 'enemy property' - Jurisdiction of civil court and revenue authorities excluded by Section 18B of 1968 Act - Effect of retrospective validation under Section 22A - No civil suit maintainable - Entry in Khatauni not open to judicial scrutiny by writ court - Remedy lies under 1968 Act - Petition misconceived and dismissed.

Held: The entry in revenue record showing land as enemy property managed by the Custodian bars the jurisdiction of civil courts or authorities to adjudicate any suit or proceedings, in view of Section 18B of the Enemy Property Act, 1968, as amended by the 2017 Amendment Act. Section 22A validates the retrospective applicability of Section 18B. The remedy lies before the Authority under the 1968 Act and not through writ jurisdiction under Article 226 or by

invoking Section 229-B of the U.P. Z.A. & L.R. Act, 1950.

Petition is thus not maintainable and dismissed accordingly.

Citations:

Raza Hussain @ Raja Miyan Vs Addl. Commissioner, Lucknow & ors.

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

1. Supplementary affidavit filed by the learned counsel for the petitioner in the Court today is taken on record.

2. Heard Sri Mahendra Pratap Singh, learned counsel appearing for the petitioner, Sri Hemant Kumar Pandey, learned State counsel appearing for the respondent Nos. 1 & 2 and Sri Dilip Kumar Pandey, learned counsel appearing for the respondent No. 3/Gram Sabha concerned.

3. By means of this petition, the petitioner has challenged the order dated 12.01.2023 passed by the respondent No. 1/Additional Commissioner, Lucknow Mandal, Lucknow in a revision filed under Section 333 U.P. Zamindari Abolition and Land Reforms Act, 1950 (in short "Act of 1950") registered as Case No. 1319 of 2016, Computerized Case No. C20161000001319 (Raza Hussain @ Raja Miyan vs. State of U.P.), whereby, the respondent No. 1 dismissed the revision preferred by the petitioner and affirmed the order dated 08.06.2016, which is also in issue in this petition, passed by the respondent No. 2/Assistant Collector First, Additional Court, Sitapur in Case No. D2013106400123 (Raza Hussain @ Raja Miyan vs. State of U.P.) filed under Section 229-B of the Act of 1950.

4. By the order dated 08.06.2016, the respondent No. 2 dismissed the suit/case preferred by the petitioner for declaration of rights under Section 229-B of the Act of 1950.

5. The suit/case, indicated above, was filed in relation to Khata No. 123, Gata Nos. 87/3, 428, 193/1.250, 835/0.304, 891/0.170, 892/0.174, 893/0.174, 905Ka/0.158, 907/0.235, 908Ka/0.089, 910/0.113, 911/0.166, 913/0.166, 1002/0.231, 1003/0.275, 1004/0.214, 1008/0.138, 1009/0.304, 1012/0.267, 1053/0.300, 1056/0.235, 1057/0.255, 1059/0.352, 1063/0.300, 1148/0.275, 1208/0.138, 1209/0.437, 1210Ka/0.295, 1212/0.223, 1213/0.368, 1214/0.251, 1215/0.375, 1218/1.41, 1260/0.016, 1383/0.089, 1410/0.328, 1412/0.267, 1491/0.336, 1011/1497/0.206.

6. It would be apt to notice that it is an admitted case of the petitioner that the entry in revenue record (Khatauni) of the property in dispute of the Fasli Year 1360 (revenue record of 1950th year of the Common Era) indicates that the property is being managed by Custodian (Jere Intijam Custodian Sahab Bahadur Zila Sitapur).

7. The land, in issue in suit was recorded as 'enemy property' in the revenue records and taking note of the said entry in revenue records, the suit/case was dismissed on the ground that in view of Section 18-B of Enemy Property Act, 1968 (in short "Act of 1968"), the same is not maintainable, as would appear from the operative portion of the order dated 08.06.2016, which on reproduction reads as under:-

"उभयपक्षों के विद्वान अधिवक्तागण के तर्कों का सुना तथा पत्रावली का विधिवत परिशीलन किया गया। अधिकृत

प्राधिकारी, मुख्य पर्यवेक्षक कार्यालय शत्रु सम्पत्ति अभिरक्षक लखनऊ की ओर से उपस्थित विद्वान अधिवक्ता ने बहस के समय शत्रु सम्पत्ति ,संशोधन और विधिमान्यकरण) विधेयक, 2016 प्रस्तुत कर उसकर धारा 18 ख की ओर ध्यान आकर्षित कराया और यह कहा कि इस धारा के अन्तर्गत यह वाद न्यायालय में नहीं चल सकता है, क्योंकि शत्रु सम्पत्ति (संशोधन और विधिमान्यकरण) अध्यादेश 2016 के प्रभाव से शत्रु सम्पत्ति अधिनियम की धारा 18 क उपरान्त धारा 18 ख मूल अधिनियम के प्रारम्भ की तारीख से अतः स्थापित रूप से की जायेगी। धारा 18ख इस प्रकार है कि "कोई भी सिविल न्यायालय या अन्य प्राधिकरण शत्रु सम्पत्ति ,संशोधन और विधिमान्यकरण) अध्यादेश द्वारा यथा संशोधित इस अधिनियम की विषयवस्तु वाली किसी सम्पत्ति या इस बाबत केन्द्रीय सरकार या अभिरक्षक द्वारा की गयी उभयपक्षों के विद्वान अधिवक्तागण के तर्कों का सुना तथा पत्रावली का विधिवत परिशीलन किया गया। अधिकृत प्राधिकारी, मुख्य पर्यवेक्षक कार्यालय शत्रु सम्पत्ति अभिरक्षक लखनऊ की ओर से उपस्थित विद्वान अधिवक्ता ने बहस के समय शत्रु सम्पत्ति ,संशोधन और विधिमान्यकरण) विधेयक, 2016 प्रस्तुत कर उसकर धारा 18 ख की ओर ध्यान आकर्षित कराया और यह कहा कि इस धारा के अन्तर्गत यह वाद न्यायालय में नहीं चल सकता है, क्योंकि शत्रु सम्पत्ति ,संशोधन और विधिमान्यकरण) अध्यादेश 2016 के प्रभाव से शत्रु सम्पत्ति अधिनियम की धारा 18 क उपरान्त धारा 18 ख मूल अधिनियम के प्रारम्भ की तारीख से अतः स्थापित रूप से की जायेगी। धारा 18ख इस प्रकार है कि "कोई भी सिविल न्यायालय किसी कार्यवाही के सम्बन्ध में कोई भी वाद या अन्य कार्यवाही ग्रहण नहीं करेगा।"

वादीय विषयवस्तु स्वीकारतः राजस्व अभिलेखों में जेरे इन्तजाम कस्टोडियन काफी लम्बे अर्से से दर्ज है। उक्त प्रतिस्थापित धारा 18ख के प्रभाव से इस सम्पत्ति के सम्बन्ध में किसी भी न्यायालय में ग्रहण की गयी प्रक्रिया/कार्यवाही तथा अवधारणा विधानतः निष्प्रयोज्य हो गयी है और वादीय विषयवस्तु पर न्यायालय में विचारण करना विधिक रूप से वर्जन की श्रेणी में आता है।

आदेश

अतः उपरोक्त विवेचना के आधार पर वादी द्वारा प्रस्तुत घोषणात्मक वाद निरस्त किया जाता है। पत्रावली वाद आवश्यक कार्यवाही अभिलेखागार में संचित हो।"

8. The Revisional Authority/respondent No. 1 also affirmed the order dated 08.06.2016 passed by the

respondent No. 2 vide order impugned dated 12.01.2023.

9. In the aforesaid background of the case, the present petition has been filed before this Court under Article 226 of the Constitution of India.

10. Assailing the impugned orders dated 08.06.2016 and 12.01.2023, learned counsel for the petitioner says that in the instant case, Section 18-B of the Act of 1968 is not attracted, as such, the suit/case, in issue, was maintainable and being so, the same ought to have been decided on merits and in dismissing the same vide order dated 08.06.2016 on the ground of maintainability taking note of Section 18-B of the Act of 1968, the Court/Authority concerned committed error in law and fact both and the order of affirmation passed by the Revisional Authority/respondent No. 1 dated 12.01.2023, without deciding the issue of maintainability of suit in its true spirit, is also unsustainable in the eye of law.

11. He further submitted that the entry made in revenue record appears to be without there being any order by the competent Authority in this regard. In fact, there is no order of any Authority under the Act of 1968 in compliance of which, entry was made in revenue records and before the Custodian, only an 'order' can be challenged, as such also, the orders impugned are unsustainable in the eye of law.

12. In addition, he submitted that earlier the suit, in issue, was dismissed vide order dated 12.01.1997 and thereafter the case was remanded back vide order passed in the appeal dated 26.04.1999. Second time again, the suit, in issue, was dismissed

vide order dated 30.05.2003 and thereafter, the Appellate Authority passed the order dated 19.07.2004 and remanded the matter back before the Court concerned for deciding the same afresh. The order dated 19.07.2004 was modified vide order dated 21.12.2004, wherein, it has been observed that if any order passed under the Act of 1968 or record of the said case is produced then the same shall also be considered while taking decision in terms of the order of remand. However, neither any order passed under the Act of 1968 was produced nor the record of any case under the Act of 1968 was produced and despite this, the impugned orders have been passed. In these circumstances of the case, indulgence of this Court is required in the matter. The prayer is to allow this petition with cost.

13. Opposing the present petition, Sri Hemant Kumar Pandey, learned State counsel says that so far as the remand order is concerned, a perusal of record including the order dated 19.07.2004 modified vide order dated 21.12.2004 would show that the Appellate Authority remanded the matter back only on the ground that the trial Court, while dismissing the case, failed to take note of documentary evidence placed by the petitioner and in modification order dated 21.12.2004, the competent Authority has been directed to consider the record or order related to the Act of 1968, if placed before him, but at this time as also on earlier occasion when the matter was remanded back, the Act of 1968 was not amended. The Act of 1968 was amended vide Act No. 3 of 2017 namely Enemy Property (Amendment and Validation) Act, 2017. In this case, relevant provisions of the Act of 1968 are Section 18-B and Section 22-A. As per Section 22-A, Section 18-B would have a retrospective effect i.e. it would be applicable from the date from

which the Act of 1968 was promulgated and came into force. As such, the trial Court was under obligation, before entering into the merits of the case, to consider the issue pertaining to Section 18-B of the Act of 1968 and upon due consideration, the trial Court dismissed the suit and thereafter, the Revisional Authority/respondent No. 1 affirmed the order of trial Court/respondent No. 2 dated 08.06.2016 vide order impugned dated 12.01.2023. As such, the submission of petitioner's counsel based upon the order(s) of remand has no force.

14. It is further stated that the language couched under Section 18-B does not say that the Custodian has to approach only against an 'order' passed. It says that otherwise provided in this Act, no civil court or authority shall have jurisdiction to entertain any suit or proceedings in respect of any property, subject matter of this Act, as amended by the Enemy Property (Amendment and Validation) Act, 2017, or any action taken by the Central Government or the Custodian in this regard. Thus, an 'order' is not required for approaching the Custodian related to dispute of the property recorded as 'enemy property' including the declaration of rights or expunging the said entry from the revenue records.

15. At this stage, learned counsel for the petitioner based upon Section 18-C of the Act of 1968, which provides appeal to High Court, says that in this Section, expression "order" has been indicated, as such, only an 'order' can be challenged before Custodian.

16. The aforesaid submission based upon Section 18-C of the learned counsel for the petitioner is completely fallacious because this Section relates to approaching

this Court by means of appeal, if any person is aggrieved by any order passed by the Custodian and in this regard, expression "order" has been indicated in Section 18-C. At this stage, petitioner's counsel, for the purposes of interfering in the impugned orders also referred Section 3 of the Act of 1968, which relates to appointment of Custodian. This aspect is not liable to be considered by this Court, as in this petition based upon Section 3 of the Act of 1968, no ground has been taken. Moreover, in view of Section 18-B of the Act of 1968, the Civil Court or Authority is not empowered to enter into the merits of the case on the fact pertaining to appointment of Custodian and record a finding.

17. Considered the submissions advanced by the learned counsel for the parties and perused the record.

18. The issue before this Court relates to jurisdiction of Revenue Court and being so, this Court is not taking note of factual aspects of the case, as any observation on the facts/merits of the case would affect the rights of the parties before appropriate forum/court.

19. In order to examine the issue of maintainability of the suit filed by the petitioner for declaration of rights over the property, indicated above, under Section 229-B of the Act of 1950, it would be appropriate to reproduce Section(s) 18, 18B, 18C and 22A of the Act of 1968.

"[18. Transfer of property vested as enemy property in certain cases.—The Central Government may, on receipt of a representation from a person, aggrieved by an order vesting a property as enemy property in the Custodian within a period of thirty days from the date of receipt of such

order or from the date of its publication in the Official Gazette, whichever is earlier and after giving a reasonable opportunity of being heard, if it is of the opinion that any enemy property vested in the Custodian under this Act and remaining with him was not an enemy property, it may by general or special order, direct the Custodian that such property vested as enemy property in the Custodian may be transferred to the person from whom such property was acquired and vested in the Custodian.]

18B. Exclusion of jurisdiction of civil courts.—Save as otherwise provided in this Act, no civil court or authority shall have jurisdiction to entertain any suit or proceedings in respect of any property, subject matter of this Act, as amended by the Enemy Property (Amendment and Validation) Act, 2017, or any action taken by the Central Government or the Custodian in this regard.

18C. Appeal to High Court.—Any person aggrieved by an order of the Central Government under section 18 of this Act, may, within a period of sixty days from the date of communication or receipt of the order, file an appeal to the High Court on any question of fact or law arising out of such orders, and upon such appeal the High Court may, after hearing the parties, pass such orders thereon as it thinks proper:

Provided that the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing an appeal within the said period, allow it to be filed within a further period not exceeding sixty days.

*Explanation.—*In this section, "High Court" means the High Court of a State or Union territory in which the property referred to in section 18 is situated.]

[22A. Validation.—Notwithstanding anything contained in any judgment, decree

or order of any court, tribunal or other authority,—

(a) the provisions of this Act, as amended by the Enemy Property (Amendment and Validation) Act, 2017, shall have and shall always be deemed to have effect for all purposes as if the provisions of this Act, as amended by the said Act, had been in force at all material times;

(b) any enemy property divested from the Custodian to any person under the provisions of this Act, as it stood immediately before the commencement of the Enemy Property (Amendment and Validation) Act, 2017, shall stand transferred to and vest or continue to vest, free from all encumbrances, in the Custodian in the same manner as it was vested in the Custodian before such divesting of enemy property under the provisions of this Act, as if the provisions of this Act, as amended by the aforesaid Act, were in force at all material times;

(c) no suit or other proceedings shall, without prejudice to the generality of the foregoing provisions, be maintained or continued in any court or tribunal or authority for the enforcement of any decree or order or direction given by such court or tribunal or authority directing divestment of enemy property from the Custodian vested in him under section 5 of this Act, as it stood before the commencement of the Enemy Property (Amendment and Validation) Act, 2017, and such enemy property shall continue to vest in the Custodian under section 5 of this Act, as amended by the aforesaid Act, as the said section, as amended by the aforesaid Act was in force at all material times;

(d) any transfer of any enemy property, vested in the Custodian, by virtue of any order of attachment, seizure or sale in execution of decree of a civil court or

orders of any tribunal or other authority in respect of enemy property vested in the Custodian which is contrary to the provisions of this Act, as amended by the Enemy Property (Amendment and Validation) Act, 2017, shall be deemed to be null and void and notwithstanding such transfer, continue to vest in the Custodian under this Act.]"

20. As per Section 18B, no Civil Court or Authority shall have jurisdiction to entertain any suit or proceedings in respect of any property recorded as 'enemy property'.

21. Section 22A, provides retrospective effect and accordingly Section 18B inserted vide Act No. 3 of 2017 would be applicable to the suit, in issue, instituted by the petitioner.

22. Needless to say that Act of 1968 is an special Act and being so, the same would have an overriding effect on any other statute or provision including Section 229-B of the Act of 1950, which provides remedy to an aggrieved person for instituting a suit for declaration of rights over an agricultural land.

23. After considering the remedy of Appeal before the High Court, as provided under Section 18C and the scheme of the Act of 1968, which was enacted to provide for the continued vesting of enemy property vested in the Custodian of Enemy Property for India under the Defence of India Rules, 1962 and for the matter connected therewith and came into force w.e.f. 10.07.1968, as also that it is an admitted case of the petitioner that the entry in revenue record (Khatauni) of the property in dispute of the Fasli Year 1360 (revenue record of 1950th year of the

Common Era) indicates that the property is being managed by Custodian (Jere Intijam Custodian Sahab Bahadur Zila Sitapur) and also the provisions of unamended/original Act of 1968, including Section 2(b), 2(c) and Section 18, this Court is of the opinion that in the instant case the expression(s) 'an order vesting a property as enemy property in the Custodian'; and 'receipt of such order' or 'from the date of publication in the Official Gazette' mentioned in Section 18 as also the word 'order' mentioned in other sections of the Act of 1968 inserved vide Act No.3 of 2017, would not empower the Civil Court or Authority to adjudicate the issue related to the revenue entry in favour of the Custodian in view of Section 18B, as this section specifically excludes the jurisdiction of the Civil Court or Authority.

24. Accordingly, in the view of this Court, the question related to validity of the entry in revenue records including the question as to whether the entry in revenue record is based upon the order vesting a property as enemy property in favour of Custodian has to be decided by the Authority under the Act of 1968.

25. For the foregoing reasons, this Court finds that the petition has no force. It is misconceived and *dismissed* accordingly.

(2023) 9 ILRA 487

**ORIGINAL JURISDICTION
CIVIL SIDE**

DATED: LUCKNOW 15.09.2023

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ-C No. 7663 of 2023

**M/S Ramkali Balika Inter College,
Sultanpur & Anr. ...Petitioners
Versus**

State of U.P. & Ors.

...Respondents

Counsel for the Petitioners:

Ashish Verma, Ashish Kumar Pandey

Counsel for the Respondents:

C.S.C., D.K. Singh Chauhan

Civil Law - U.P. High Schools & Intermediate Colleges (Payment of Salaries of Teachers and Other Employees) Act, 1971 - Sections 4, 5 & 6 -

Power under Section 4(1) restricted to inspection and issuance of directions for ensuring proper payment of salaries and observance of financial propriety - In absence of any irregularity relating to salary payment, Inspector lacked jurisdiction to recommend appointment of Authorized Controller - Report forming basis of such appointment found arbitrary, speculative and outside the scope of the Act - Exercise of power held to be colourable and violative of Article 14 of the Constitution.

Impugned orders quashed.

Case Law Discussed:

Whirlpool Corp. Vs Registrar of Trade Marks, Mumbai & ors.; (1998) 8 SCC 1

(Delivered by Hon'ble Pankaj Bhatia, J.)

1. Heard learned Counsel for the petitioners and learned Standing Counsel.

2. The present petition has been filed challenging the order dated 13.02.2023, whereby the Authorized Controller was appointed in purported exercise of power under Section 5 of the Uttar Pradesh High Schools and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1971 (in short 'the 1971 Act') as well as the order dated 09.08.2023, whereby the appeal preferred by the petitioner was rejected.

3. The contention of the Counsel for the petitioners in brief is that an order came to be passed appointing the Authorized Controller over the instructions vide order dated 13.02.2023 as contained in Annexure-2 to the writ petition. On perusal of the said order, it is revealed that the said order has been passed observing that in a report dated 17.01.2023, grave financial irregularity were observed and in exercise of powers under Section 4(1) and Section 6(1) of the 1971 Act, recommendation was made for appointment of Authorized Controller and based upon the said report and the recommendation, the Authorized Controller was appointed.

4. The petitioners had initially preferred an appeal against the order dated 13.02.2023 which was rejected. Aggrieved against the said order, the petitioner had approached this Court by filing Writ-C No.3977 of 2023, which was decided on 17.05.2023. In terms of the said order, the appellate order dated 19.04.2023 dismissing the appeal was set aside and the matter was remanded for decision afresh. In the light of the said remedy, the impugned order came to be passed dismissing the appeal on 24.07.2023.

5. The net contention of the Counsel for the petitioners is that assuming the report dated 17.01.2023, to be a gospel truth, no power vests, either under Section 4(1) or under Section 6(1) of the 1971 Act, to recommend the appointment of an Authorized Controller as there is no allegation with regard to any irregularity or non-payment of salary. He argues that the 1971 Act was enacted to regulate the payment of salary to teachers and other employees of the High Schools and Intermediate Colleges receiving aid out of the State fund and to provide for matters

connected therewith. He draws my attention to Section 4(1) of the 1971 Act, which is as under:

"4. Power to inspect etc. - (1) The Inspector may at any time, for the purposes of this Act, inspect or cause to be inspected any institution or call for such information and records (including registers, book of account and vouchers) from its management with regard to the payment of salaries to its teachers or employees or give to its management any direction for the observance of such canons of financial propriety (including any direction for retrenchment of any teacher or employee or for prohibition of any wasteful expenditure) as he thinks fit."

6. The object of the Act, Sections 5 and 6 which are relevant are as under:

"Purpose/ Object of the Act

An Act to regulate the payment of salaries to teachers and other employees of High Schools and Intermediate Colleges receiving aid out of the State funds and to provide for matters connected therewith.

"5. Procedure for payment of salary in the case of certain institutions. - (1) The management of every institution shall, for the purpose of disbursement of salaries to its teachers and employees, open [in a Scheduled Bank or a Cooperative Bank] a separate account to be opened jointly by a representative of the management and by the Inspector or such other officer as may be authorised by the Inspector in that behalf:

Provided that after the account is opened, the Inspector may, if he is, subject to any rules made under this Act, satisfied that it is expedient in the public interest so to do, instruct the bank that the account shall be operated by the representative as

the management alone, and may at any time revoke such instruction:

Provided further that in the case referred to in the provision to subsection (2), or where a difficulty arises in the disbursement of salaries due to any default of the management, the Inspector may instruct the Bank that the account shall be operated only by himself or by such other officer as may be authorised by him in that behalf and may at any time revoke such instruction.

(2) The management shall deposit in the said amount by such date as may be specified by general or special orders by the Inspector, eighty per cent or where the State Government or an officer authorised by the State Government having regard to the money required to be disbursed directs a higher percentage, then such higher percentage as it or he may direct, of the amount received from students as fees which in accordance with the general or special orders of the State Government in that behalf [and for so long as such orders are not made in accordance with the direction of the Inspector] form part of the maintenance fund:

Provided that where the said percentage of fees is not deposited as aforesaid the Inspector may by order prohibit the management from making any realization of fees from the students, and thereupon the Inspector may recover the fees (either through the teachers of the institution or in such other manner as the thinks fit) directly from the students and shall deposit the fees so recovered in the said account.

(3) The entire amount of the maintenance grant and the amount of eighty per cent or such higher percentage as the State Government or an officer authorised by the State Government, may be general or special order in that behalf

determine, of the grants for reimbursement of freeships and other similar concessions shall also be paid by the State Government into the said account.

(4) No money credited to the said account shall be applied for any purpose except the following, namely:

(a) payment of the said salaries falling due for any period after March 31, 1971;

(b) credit of the institution's contribution, if any, to the provident fund accounts of the teachers and employees;

(c) such other expenditure for the purposes of the institution as may be directed by the State Government in that behalf;

and such portion of the balance in the accounts at the end of the month of July each year as exceeds the aggregate of one month's salary of the teachers and employees of the institution after meeting the liability for payment of their salaries for the period for which fees have been realised from the students shall be made over to the management for expenditure on the institution;

(5) The salary of a teacher or employee shall be paid by transfer of the amount from the said account to his account, if any, in the same bank, or if he has no account in that bank, then by cheque.

(6) In respect of a place where there is no Scheduled Bank or a Cooperative Bank, the provisions of this section shall apply with such modifications as the State Government may, by notification in the Gazette specify, and the reference in this section to bank shall in that case be construed as references to a post office savings bank.

6. Enforcement of provisions and directions. - *(1) Where the Inspector, on the basis of an inspection of an institution or its records or otherwise, is satisfied that its management has committed default in*

complying with any direction given under Section 4 or with any provisions of Section 3 or Section 5, he may recommend to the Regional Deputy Director of Education, that action be taken against the institution under sub-section (2).

(2) On receipt of a recommendation under sub-section (1) the Regional Deputy Director of Education, may call upon the management to comply with the said direction or provisions or to show cause with a weeks why the management should not be suspended.

(3) Where the management fails to comply as aforesaid or to show cause, or the Regional Deputy Director of Education considers the cause shown to be insufficient, he may by order supersede the management for such period not exceeding one year as may be specified in the Order; and authorise any person (hereinafter referred to as Authorised Controller) to take over the management of the institution for the said period:

Provided that the Regional Deputy Director of Education, may where he considers it necessary or expedient so to do, -

(i) extend the said period, from time to time, so however, that the period so extended does not exceed five years in the aggregate; or

(ii) revoke the order at any time :

Provided further that nothing in clause (ii) of the preceding proviso shall bar the passing of a fresh order under this section.

(4) On an order being made under sub-section (3) the Authorised Controller shall, to the exclusion of the management and subject only to the Directions, if any, of the Regional Deputy Director of Education, the Director or the State Government, exercise all the powers and perform all the functions of the management, including management of the property belonging to

or vested in the institution and in particular, operate singly the bank account referred to in Section 5:

Provided that nothing in this section shall be construed to confer on the Authorised Controller the power to transfer any such property (except by way of letting from month to month in the ordinary course of management) or to create any charge thereon (except as a condition of receipt of any grant-in-aid of the institution from the State Government).

(5) Any order made or direction given under this Section shall have effect notwithstanding anything inconsistent therewith contained in any other enactment or instrument relating to the management and control of the institution (including any scheme of administration) or relating to the property belonging to or vested in the institution."

7. In the light of the said, it is argued that the Section 4(1), vests a power of inspection and for summoning of information and records from the management with regard to the payment of salaries or to give its Management any direction for the observance of such canons of financial propriety including any direction for retrenchment of any teacher or employee or for prohibition of any wasteful expenditure, as he thinks fit.

8. The Counsel for the petitioners argues that on a plain reading of the said provisions, the power of inspection or calling for record, can be only for the purpose, for which, the Act was enacted and not for any other purpose. He argues that in the entire report, which is the foundation for passing the order under Section 5, there is no allegation whatsoever with regard to any irregular payment or non-payment of salary to either the teachers

or the employees, as such, the Inspector, at the first instance, did not even have any jurisdiction to record any finding over and above the issues, which do not fall within the scope and purpose of this Act.

9. The Counsel for the petitioners further argues that the second limb of the power under Section 4(1) with regard to the summoning of information and records, empowers the Inspector to give directions for maintaining the financial propriety and to avoid any wasteful expenditure and the said power also can be exercised only for the purpose of the Act. He argues that in the garb of power under Section 4(1), the Inspector, as acted, as if he is in the control of the entire affairs of the Institution, which is neither authorized under the Act nor otherwise.

10. Learned Standing Counsel, on the other hand, argues that the power was rightly exercised as no reply was given to the show cause notice and the appeal has also been rightly rejected. It is further argued that a revision lies against the appellate order before the State Government under Section 8 of the 1971 Act, as such, the petitioner should be relegated to avail the remedy of revision.

11. In rejoinder, the Counsel for the petitioners argues that as the order passed is beyond the scope of powers conferred upon the Inspector and thus without jurisdiction, the argument of relegating to avail alternative remedy is futile exercise. He relies upon the judgment of the Hon'ble Supreme Court in the case of *Whirlpool Corporation vs Registrar of Trade Marks, Mumbai and others; (1998) 8 SCC 1*.

12. Considering the submissions made at the bar and recorded above, prima

facie, on a plain reading of the purpose of the Act and Section 4(1), as quoted above, it is clear that Inspector is empowered to inspect or cause to be inspected any institution for the 'purpose of this Act' and similarly can call for information and record only for 'the purpose of this Act'. The purpose of the Act, as extracted is only to ensure the payment of salary. The said interpretation is fortified by the mandate of Section 5, which empowers the Inspector to carry out the single operation of the account, which is opened strictly for disbursement of the salaries to the teachers and the employees. Sections 4 and 5, are the powers, which are prima facie, ex-proprietary in nature and have the effect of impinging upon the rights of the Management to carry out the functioning of the Institution, when exercised for purposes other than for 'the purpose of the Act'. It is well settled that an ex-proprietary power has to be exercised strictly in accordance with law and if the same is exercised for consideration and purpose other than for which, the power is vested, the same would follow short of test of Article 14 of the Constitution of India.

13. In the present case, on a plain reading of the report, assuming the same to be correct, for the sake of argument, does not record any shortcoming falling within the 'purpose of this Act'. The report, on the face of it, is arbitrary as for example, a conclusion has been draw that as the loss of Rs.14/- lakhs was shown in the year 2012-13, a similar loss is to be presumed in the subsequent years upto 2022-23 without there being any finding or material to form that view. The said view expressed in the report is only a fiction of the mind of the author of the report.

14. I have no hesitation in holding that the Inspector has clearly misused his

power in making a recommendation for appointment of Authorized Controller, based upon the materials and purposes, which are other than 'the payment of salary to the teachers and the other employees'. I am constrained to observe that the Inspector has clearly erred in making the recommendation de hors the provisions of the 1971 Act and for the reasons, which are not prescribed under Section 4(1). As the very foundation is found to be arbitrary, the orders passed on the said foundation also do not have any legs to stand, as such, the impugned order dated 13.02.2023 as well as the subsequent appellate order dated 24.07.2023 are wholly arbitrary and illegal and are quashed merely on the ground of lack of jurisdiction and arbitrary exercise of power. The consequential order dated 09.08.2023 is also quashed.

15. The writ petition stands *allowed* on the aforesaid observations.

(2023) 9 ILRA 492
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.08.2023

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE SYED QAMAR HASAN RIZVI, J.

Writ-C No. 10049 of 2014

Gauri Garg **...Petitioner**
Versus
I.O.C. & Ors. **...Respondents**

Counsel for the Petitioner:
 Sri Rakesh Kumar, Sri Tarun Agrawal

Counsel for the Respondents:
 Sri Prakash Padia, Sri Anand Tiwari, Sri Rajiv Gupta, S.C.

Held:

As per the brochure issued by Indian Oil Corporation, the evaluation of financial soundness - particularly under the head of fixed and movable assets - must be based on a valuation report duly certified by a Government Approved Valuer. In the absence of such a report from either party, awarding marks under that head was impermissible. The word "necessary" used in the brochure is to be construed as "mandatory", and any deviation renders the evaluation flawed. Hence, the selection process undertaken without adhering to this requirement was vitiated.

Case Law Discussed:

None cited directly in the judgment.

(Delivered by Hon'ble Syed Qamar Hasan Rizvi, J.)

Order of Chief Manager (Retail Sales) dated 31.01.2014 quashed - Matter remanded for fresh evaluation strictly in accordance with the brochure guidelines after obtaining valuation reports from Government Approved Valuers.

Petition partly allowed.

(Delivered by Hon'ble Syed Qamar Hasan Rizvi, J.)

1. Heard learned counsel for the petitioner, the learned Standing Counsel for the State respondents and the counsel for the Indian Oil Corporation.

2. Indian Oil Corporation issued an advertisement in the daily newspaper, namely Amar Ujala on 17.12.2010 and invited applications for the dealership of retail outlets in various places in Eastern U.P. The location in question was on the State Highway No. 51 between Kilometers stone 119 and 124. The category was an "open women" category. The petitioner and the respondent no. 4 submitted the duly completed application forms on 31.1.2011 at the relevant office of the IOC. The

petitioner and the respondent no. 4 both expected that their applications would be evaluated as per the standards given in the brochure. The brochure envisage evaluation on two grounds, one was with regard to the suitability of the land for the retail outlet and the other was with regard to financial soundness. The controversy revolves around the financial soundness. In the financial soundness column twenty marks were to be awarded. Out of these twenty marks liquid cash was to be assessed on the scale of twelve; fixed and movable assets were to be assessed at the scale of four and income from business, interest, rent, royalty etc, to be assessed on the scale of four.

3. Initially the petitioner and the respondent no. 4 out of all the applicants were considered to be the best candidates and were given 90.90 marks and 91.53 marks respectively on an overall assessment. Under the financial soundness category the petitioner was given four marks for fixed and movable assets and the respondent no. 4 was given 2.95 marks. So far as the income column was concerned, the petitioner was given 1.08 marks whereas the respondent no. 4 was given full marks i.e. 4 marks.

4. The petitioner, aggrieved by the fact that she was given lesser marks than she deserved under the column of income i.e. income from business, interest, rent, royalty etc, filed a grievance petition before the respondent no. 2 ? Chief Manager (Retail Sales). Upon evaluating the case of the petitioner and the respondent no. 4, the Chief Manager (Retail Sales) who was looking into the grievance of the petitioner found that the petitioner was wrongly awarded only 1.08 marks and infact she ought to have been awarded four marks

under that head. In the result, the evaluation as was done on 30.11.2012 was set aside and the matter was remanded to be reconsidered afresh.

5. We find that the matter was again considered afresh on 18.11.2013 and on that day both the petitioner and the respondent no. 4 were given full marks i.e. four marks under the income clause. However, the petitioner was given only 1.25 marks for fixed and movable assets whereas the respondent no. 4 was given full four marks for the fixed and movable assets. In this manner, the petitioner again came second with 91.07 marks and the respondent no. 4 came first with 92.58 marks. The petitioner again challenged the markings by filing a grievance petition before the Chief Manager (Retail Sales) and the Chief Manager on 31.1.2014 after finding that both the petitioner and the respondent no. 4 had not given any report of any Government Approved Valuer with regard to their fixed and movable assets evaluated their assets himself and concluded that the respondent no. 4 was rightly given 4 marks on the basis of a sale deed submitted by her and the petitioner was correctly given 1.25 marks on the basis of sale deed submitted by the petitioner.

6. Learned counsel for the petitioner has assailed the order of Chief Manager (Retail Sales) dated 31.1.2014 on the ground that the provision with regard to the assessment of marks vis-a-vis the fixed and movable assets provided in the brochure had not been considered in its rights perspective. He has submitted that if one went by the provisions of the brochure, the Chief Manager (Retail Sales) ought to have strictly adhered to the directions given in the brochure, which provided that the fixed and movable assets would be marked only

on the basis of an approved valuer's valuation report and the valuer had to be a Government Approved Valuer. He further submits that the sale deed submitted independently by candidates ought not to have been considered without the government valuers report.

7. In the alternative, learned counsel for the petitioner has also submitted that a particular sale deed dated 26.10.1998 which had been placed by the petitioner had also not been considered. He further submits that either both the applicants be given 'zero' for not having provided the Government Approved Valuers report or the correct marks be given on the basis of sale deed submitted. Further, grievance of the petitioner is that the commercial vehicle of the petitioner was also not considered for evaluating her movable assets.

8. Learned counsel for the Indian Oil Corporation has however opposed the contentions of the learned counsel for the petitioner and has submitted that when there was no Government Approved Valuer's report then definitely the Chief Manager (Retail Sales) who was looking into the grievance petition could have looked into the movable and immovable assets of the parties and he further submits that valuation had to be taken for the fixed and movable assets to know as to whether a particular applicant was financially sound.

9. Having heard the learned counsel for the petitioner and the learned counsel for the Indian Oil Corporation, this Court is of the view that a bare perusal of the brochure shows that the fixed and movable assets had to be looked into only as per the valuation report which had to be duly certified by a Government Approved Valuer and we find that the brochure says that the Government

Approved Valuers Report was a necessary input. We do find that financial soundness had to be assessed as per the method given in the brochure. The brochure has specifically stated that financial soundness had to be based on "valuation report duly certified by Government Approved Valuers in support of assets". It further goes to say that the report was "necessary".

10. We are thus of the view that the word 'necessary' ought to be interpreted as mandatory. In the instant case when there was no Government Approved Valuer's report for the petitioner and also for the respondent no. 4, then the only inevitable conclusion would be that neither the petitioner nor the respondent no. 4 ought to have been given any marks under the fixed and movable assets category and infact the IOC should have insisted on the parties to have got a Government Approved Valuer's Reports. This having not been done, we are of the considered view that the whole exercise undergone by the Chief Manager, Retails Sales was an exercise in futility. He should have insisted upon the report from Government Approved Valuers and thereafter should have allotted the marks under the heading "fixed and movable assets".

11. Having regard to the facts and circumstances as mentioned above, the order dated 31.1.2014 passed by the respondent no. 2 is quashed and is hereby set aside. The matter is remitted back to the respondent no. 2, who would now get reports from the Government Approved Valuers and thereafter proceed to allot marks to the petitioners and the respondent no. 4.

12. For the reasons stated above, the writ petition stands partly allowed.

(2023) 9 ILRA 495
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.08.2023

BEFORE

**THE HON'BLE DR. YOGENDRA KUMAR
SRIVASTAVA, J.**

Writ-C No. 10192 of 2023

Paltoo Ram Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sri Hemant Kumar Rai, Sri Arvind Kumar Rai, Sri S.B. Singh

Counsel for the Respondents:

C.S.C., Sri Mayank Krishna S Chandel, Sri Ram Niwas Singh, Sri Rameshwar Prasad Shukla, Sri Vinod Kumar Chandel

Civil Law - U.P. Revenue Code, 2006 – Sections 207, 209 & 210 – Suit for division of holding – Appeal against final decree allowed – Case remanded for fresh decision – Whether remedy of revision lies under Section 210 – Scope and meaning of “proceeding decided” –

Held:

Order of remand passed by appellate authority containing observations on merits and findings regarding rights of parties cannot be treated as 'remand simpliciter' or an interlocutory order – Such order held to be a “proceeding decided” under Section 210 – Revision maintainable – Writ petition not maintainable in view of alternative efficacious statutory remedy.

Held: The remand order passed by the Commissioner while deciding three appeals under Section 207 of the U.P. Revenue Code, 2006, contained a detailed consideration on merits, including findings on the nature of property and possession based on registered sale deeds, and directions for fresh adjudication after affording opportunity to the parties – Such an order cannot be treated as a

'remand simpliciter' – The expression 'proceeding decided' under Section 210 includes such appellate orders – Therefore, remedy of revision under Section 210 is available – Petition dismissed on ground of availability of alternative remedy.

Petition Dismissed.

Case Law Discussed:

1. Ram Bhajan & ors. Vs Deputy Director of Consolidation, Allahabad & anr.
2. Mahendra Singh & ors. Vs Board of Revenue, U.P. & ors.
3. Jhinka Devi Vs St. of U.P. & ors.
4. Deena Nath & ors. Vs Deputy Director of Consolidation

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

1. Heard Sri S.B. Singh, along with Sri Hemant Kumar Rai, learned counsel for the petitioner, Sri Kunal Ravi Singh, learned Chief Standing Counsel along with Sri Abhishek Shukla, learned Additional Chief Standing Counsel appearing for the State-respondents and also Sri Vinod Kumar Chandel, learned counsel appearing for the respondent Nos. 4 and 5.
2. The present petition seeks to raise an issue with regard to availability of the statutory remedy of a revision under Section 210 of the U.P. Revenue Code, 2006 against an order of remand passed in an appeal.
3. The admitted facts between the parties are that land bearing plot no. 89 measuring an area of 0.150 hectares situate at Village Harakhpur, Pargana and Tehsil Sagri, District Azamgarh was jointly held

by two real brothers namely Rajdeo and Hardeo having equal share. One half of the undivided share of the aforestated plot was purchased by the respondent no.6 and the predecessor-in-interest of the respondent nos. 4 and 5 by means of a registered sale deed dated 20.05.2003 executed by one of the co-owners namely, Hardeo. The remaining half of the share was purchased by the petitioner on 01.10.2004 through a registered sale deed from the other co-owner namely Rajdeo. The names of the petitioners as well as contesting respondents were mutated in the revenue records as co-sharers of the plot in question.

4. The petitioner filed a suit under Section 116 of the Uttar Pradesh Revenue Code, 2006 for division of the holding in the Court of Sub-Divisional Officer, Sagri, Azamgarh.

5. The private respondents, though parties in the suit, did not file their written statements, and a preliminary decree was passed on 23.01.2019.

6. Thereafter, a Kurra report and map showing the proportionate shares of the parties were prepared by the concerned Lekhpal, which were consequently affirmed and an order dated 26.10.2019 was passed for making the final decree.

7. The respondent no. 6, at this stage, filed a restoration application dated 13.12.2019 seeking recall of the order dated 26.10.2019. It was contended that the concerned respondent got no notice with regard to passing of the order in the suit for the division of holdings.

8. The restoration application filed by respondent no. 6 was rejected by the Sub-

Divisional Magistrate in terms of an order dated 27.12.2021. The Court concerned, while rejecting the restoration application, also made certain observations on merits to the effect that in a joint holding in the absence of any partition, the sale deed could not be held valid and no claim for division of holding could be made on the basis thereof.

9. Assailing the aforestated final order dated 26.10.2019 passed in the suit under Section 116, respondent no. 6 preferred an appeal under Section 207 of the Revenue Code. The respondent no. 5 also preferred an appeal against the said order.

10. The respondent no. 6 further raised a challenge to the order dated 27.12.2021, whereby the restoration application filed by the said respondent had been rejected, in an appeal under Section 207 of the U.P. Revenue Code, 2006.

11. The aforestated three appeals were heard and decided by a common order dated 18.11.2022, passed by respondent no.2/Commissioner Azamgarh Region, Azamgarh. The respondent no.2 while exercising its appellate powers took notice of the fact that the Court below had rejected the restoration application filed by respondent no. 6 by making an observation on merits. In this regard, the appellate Court took notice of the fact that the registered sale deed which was available on the record of the case was indicative of the fact that the plot in question was not the ancestral property of the parties but the same had been purchased by both the parties from the original tenure holder on the basis of registered sale deeds executed in the years 2003 and 2004, respectively, showing separate boundaries. It was also noticed that on the basis of aforestated sale

deeds the parties concerned had got their names mutated in the revenue records and were in possession of their respective portions.

12. The appellate Court also noticed that the suit for division of holding was instituted after about 14 years from the date of execution of the sale deed. Taking into consideration the fact that it was only on the basis of the boundaries described in the registered sale deed that the vendee could claim a right of possession and it was not a case where the parties were claiming division on the basis of their respective shares in an ancestral property, it was held that the observations made by the Court below in so far as merits of the case were concerned, were legally untenable. In addition, since the Court below had decreed the suit ex-parte without granting opportunity of hearing and of adducing evidence to the appellant (respondent no. 6 herein), and thereafter rejected the restoration application cursorily in terms of the order dated 27.12.2021, it had committed a manifest error.

13. The appellate Court, having come to the aforestated conclusion, held that it would be appropriate for the Court below to pass a fresh order after giving due opportunity to the parties concerned to adduce evidence and to present their case on merits. Accordingly, the orders dated 26.10.2019 and 27.12.2019 have been set aside and the case has been remanded to the Court below for grant of an opportunity of hearing and for adducing evidence and for deciding the case afresh on the basis of merits.

14. An objection has been raised by the counsel appearing for the State-respondents and also the counsel appearing

for the private respondents with regard to the entertainability of the present writ petition, which seeks to assail the order dated 18.11.2022 passed in the appeals by the respondent no. 2, by pointing out that the petitioner would have an efficacious statutory remedy of filing a revision against the said order, before the Board of Revenue.

15. Counsel for the petitioner has sought to refute the aforestated preliminary objection raised on behalf of the respondents by submitting that since the appellate Court had remanded the matter to the Court below without any observation on merits of the case and without setting aside the findings recorded by the Court below, it was a case of a 'remand simpliciter' and, therefore, the remedy of the revision would not be available. In this regard, reliance was placed on a decision of this Court in **Ram Bhajan and Others vs. Deputy Director of Consolidation, Allahabad and another**¹ to submit that an order of a 'remand simpliciter' would be of an interlocutory nature, and a revision against the said order would not be maintainable.

16. Counsel appearing for the private respondents has controverted the aforestated submissions by drawing attention of the Court to the observations made by the appellate Court on merits of the case, to point out that the Court while deciding the appeal has considered the reasoning assigned by the Court below and remanded the matter with observations on merits; therefore, the order cannot be said to be a 'remand simpliciter', which can be held to be of an interlocutory nature and not amenable to the remedy of statutory revision. Learned counsel has referred to the decisions of this Court rendered in

Mahendra Singh and Others Vs. Board of Revenue U.P. and Others² and Jhinka Devi Vs. State of U.P. and others³, on the scope of the revisional powers under the Revenue Code.

17. Learned Chief Standing Counsel appearing for the State-respondents has also referred to the order passed by the respondent no. 2 while deciding the appeal, to point out that the appellate order contains a detailed consideration of the case on its merits and the remand having been made with specific directions, the said order can in no manner be held to be a 'remand simpliciter' and therefore not amenable to the remedy of a revision. It is submitted that the appellate court has recorded a categorical finding that the land is not ancestral in nature and that the parties were in possession according to the boundaries described in their respective sale deeds and would continue in possession in accordance with the same.

18. It is further pointed out that the decision in the case of **Ram Bhajan (supra)**, which is sought to be relied upon on behalf of the petitioner, cannot be held to be good law in the light of a subsequent Division Bench decision of this Court in **Deena Nath and Ors. vs. Deputy Director of Consolidation²**, wherein while deciding a reference, on the point, it was held that the order of the Settlement Officer of Consolidation, which had finally decided the appeal by setting aside the order of the Consolidation Officer and remanding the matter to the Consolidation Officer, was an order finally deciding the appeal and thus could not be termed to be an interlocutory order.

19. Learned State Counsel submits that the remand having been made with

findings regarding rights of the parties, the order would be appealable as per Schedule III and the writ petition would not be maintainable. Alternatively, it is submitted that even in case the remedy of appeal is held to be not available, the remedy of revision under Section 210 of the Code can be availed of.

20. In order to appreciate the rival contentions, the relevant statutory provisions would be required to be adverted to, which are as follows:

“Section 116. Suit for division of holding.-(1) A Bhumidhar may sue for the division of the holding of which he is a co-sharer.

[(2) In every such suit, the Court may also divide the trees, wells and other improvements existing on such holding but where such division is not possible, the trees, wells and other improvements aforesaid and valuation thereof shall be divided and adjusted in the manner prescribed.]

(3) One suit may be instituted for the division of more holdings than one where all the parties to the suit other than the Gram Panchayat are, jointly interested in each of the holdings.

(4) To every suit under this section, the Gram Panchayat concerned shall be made a party.

Section 207. First appeal.-(1) Any party aggrieved by a final order or decree passed in any suit, application or proceeding specified in Column 2 of the Third Schedule, may prefer a first appeal to the Court or officer specified against it in Column 4, where such order or decree was passed by a Court or officer specified against it in Column 3 thereof.

(2) A first appeal shall also lie against an order of the nature specified-

(a) in Section 47 of the Code of Civil Procedure, 1908; or

(b) in Section 104 of the said Code; or

(c) in Order XLIII, Rule 1 of the First Schedule to the said Code.

(3) The period of limitation for filing a first appeal under this section shall be thirty days from the date of the order or decree appealed against.

Section 209. Bar against certain appeals.—Notwithstanding anything contained in Sections 207 and 208, no appeal shall lie against any order or decree—

(a) made under Chapter XI of this Code;

(b) granting or rejecting an application for condonation of delay under Section 5 of the Limitation Act, 1963;

(c) rejecting an application for revision;

(d) granting or rejection an application for stay;

(e) remanding the case to any subordinate Court;

(f) where such order or decree is of an interim nature;

(g) passed by Court or officer with the consent of parties; or

(h) where order has been passed ex-parte or by default:

Provided that any party aggrieved by order passed ex-parte or by default, may move application for setting aside such order within a period of thirty days from the date of the order:

Provided further that no such order shall be reversed or altered without previously summoning the party in whose favour order has been passed to appear and be heard in support of it.

Section 210. Power to call for the records.—(1) The Board or the Commissioner may call for the record of any suit or proceeding decided by any subordinate Revenue Court in which no

appeal lies, for the purpose of satisfying itself or himself as to the legality or propriety of any order passed in such suit or proceeding; and if such subordinate court appears to have—

(a) exercised a jurisdiction not vested in it by law; or

(b) failed to exercise a jurisdiction of vested; or

(c) acted in the exercise of such jurisdiction illegally or with material irregularity;

the Board, or the Commissioner, as the case may be may pass such order in the case as it or he thinks fit.

(2) If an application under this section has been moved by any person either to the Board or to the Commissioner, no further application by the same person shall be entertained by the other of them.

Explanation.—For the removal of doubt it is, hereby, declared that when an application under this section has been moved either to the Board or to the Commissioner, the application shall not be permitted to be withdrawn for the purpose of filing the application against the same order to the other of them.

(3) No application under this section shall be entertained after the expiry of a period of sixty days from the date of the order sought to be revised or from the date of commencement of this Code, whichever is later.”

21. For ease of reference, the relevant rules under the U.P. Revenue Code Rules 2016, corresponding to the statutory provisions relating to division of holdings, are also being extracted below:

“Rule 108. Suit for division for several holdings (Section 116).— Where the suit relates to the division of more than one holding, the particulars specified in Rule

107 shall be mentioned in the plaint in respect of all such holdings.

Rule 109. Preliminary and Final decrees (Section 117).- (1) If the plaint referred to in Rule 107 or Rule 108 is in order, it shall be registered as a suit and the defendants shall be called upon to file their written statements. The suit shall then be decided according to the provisions of the Code of Civil Procedure, 1908.

(2) Before making a division the Court shall-

(a) determine separately the share of the plaintiff and each of the other co-tenure holders;

(b) record which, if any, of the co-tenure holders wish to remain joint; and

(c) make valuation of the holding (or holdings) in accordance with the circle rate fixed by the Collector applicable to each plot in the holding.

(3) If the suit is decreed, the Court shall pass a preliminary decree declaring the share of the plaintiff.

(4) After the preparation of preliminary decree the Sub Divisional Officer shall get the Kurra prepared through the Lekhpal.

(5) The Lekhpal shall submit the Kurra report within a period of one month from the date of receiving the order in this regard and at the time of preparation of Kurra he shall observe the following principles-

(a) the plot or plots shall be allotted to each party in proportionate to his share in the holding;

(b) the portion allotted to each party shall be as compact as possible;

(c) as far as possible no party shall be given all the inferior or all the superior classes of land;

(d) as far as possible existing fields shall not be split up;

(e) Plots which are in the separate possession of a tenure holder shall, as far as possible, be allotted to such tenure holder if they are not in access of his share;

(f) If the plot or any part thereof is of commercial value or is adjacent to road, abadi or any other land of commercial value, the same shall be allotted to each tenure holder proportionately and in the case of second condition the same shall be allotted proportionately adjacent to road, abadi or other land of commercial value; and

(g) If the co-tenure holders are in separate possession on the basis of mutual consent or family settlement, the Kurra shall, as far as possible, be fixed accordingly.

(6) When the report regarding Kurra is submitted by the Lekhpal, the objection shall be invited thereon and thereafter the appropriate order shall be passed by the Sub-Divisional Officer after affording opportunity of hearing to the parties and considering the objection, if any, filed against the report submitted by the Lekhpal.

(7) If the report and Kurra is confirmed by the Sub-Divisional Officer, the final decree shall follow it.]

(8) At the stage of the final decree, the Court shall:

(a) Separate the share of the plaintiff from that of the defendant by metes and bounds.

(b) Place on record a map showing in different colours the properties given to plaintiff as distinct from those given to the defendant.

(c) Apportion the land revenue payable by the parties.

(d) Direct the record of rights and map to be corrected accordingly.

(9) If, for adjusting the equities between the parties, payment of

compensation regarding trees, wells or other improvements becomes necessary, the Revenue Court concerned may also pass necessary orders at the stage of final decree.

(10) The Sub-Divisional Officer shall make an endeavour to decide the suit within the period of six months and if the suit is not decided within such period, the reason shall be recorded.”

22. The facts of the case regarding which there appears to be no dispute between the contesting parties is that one-half of the undivided share of a plot of land jointly held by two brothers, was purchased by respondent no. 6 by means of a registered sale-deed executed by one of the co-owners. The remaining half of the share was purchased by the petitioner through another sale deed by the other co-sharer. The petitioners as well as the contesting respondents got their names mutated in the revenue records as co-sharers of the plot in question.]

23. Thereafter, the petitioner preferred a suit under Section 116 of the Revenue Code for division of the holding in the Court of the Sub-Divisional Officer. The private respondents, though parties in the suit did not file their written statements, and a preliminary decree was made in terms of the order dated 23.01.2019, and thereafter, the suit was finally decreed by an order dated 26.10.2019. A restoration application dated 13.12.2019, filed by respondent no. 6 seeking recall of the aforestated order, was rejected by the Sub-Divisional Magistrate by an order dated 27.12.2021. The Court while rejecting the restoration application, also made certain observations on merits.

24. The aforestated final order dated 26.10.2019, in terms of which the suit had been decreed, was subjected to an appeal filed by respondent no. 6 under Section 207 of the Revenue Code. An appeal against the said order was also filed by respondent no. 5. The respondent no. 6 also preferred an appeal under Section 207 of the Revenue Code against the order dated 27.12.2021 in terms of which the restoration application filed by the said respondent had been rejected.

25. The three appeals were heard and decided by a common order dated 18.11.2022 passed by the Commissioner, Azamgarh. The orders dated 26.10.2019 and 27.12.2019 were set aside and the case was remanded to the Court below to grant an opportunity of hearing to the parties concerned to decide the case afresh on merits.

26. It is against the aforestated order dated 18.11.2022 passed by the Commissioner that the present petition has been filed, wherein an objection has been raised on behalf of the private respondents with regard to entertainability of the petition by pointing out that against the order passed in appeal, the petitioner would have an efficacious statutory remedy of filing a revision.

27. The argument sought to be raised on behalf of the petitioner to refute the aforestated preliminary objection is that the remand order is without any observation on merits, and therefore, the same is a 'remand simpliciter', and the order being of an interlocutory nature, a revision thereagainst would not be maintainable.

28. In order to test the aforesaid argument the order passed in appeal would

be required to be examined. The order passed by the Commissioner while exercising appellate powers takes notice of the fact that the court below has rejected the restoration application filed by respondent no. 6 by making observations on merits. The appellate court has also taken notice of the fact that the registered sale deed which was available on the record of the case was indicative of the fact that the land in question was not the ancestral property of the parties, but the same had been purchased by both the parties from the original tenure holder by means of registered sale deeds, showing separate boundaries. The appellate court, after discussing the findings returned by the court below, has held the same to be legally unsustainable. Further, since the court below had decreed the suit *ex parte* without granting opportunity of hearing and adducing evidence to the parties, the case has been remanded with a direction to the court below to pass a fresh order after giving due opportunity of hearing to the parties concerned. The remand order passed by the Commissioner, thus, containing a detailed consideration on merits of the case and thereafter recording a conclusion that the findings returned by the court below, were legally unsustainable, cannot be held to be 'remand simpliciter'.

29. The decision in the case of **Ram Bhajan and Others (supra)**, which is sought to be relied upon on behalf of the petitioner, thus, would not be applicable in the facts of the case. Moreover, the said judgment cannot be held to be good law in light of the subsequent Division Bench decision of this Court in **Deena Nath and Ors. (supra)**, wherein while deciding the reference on the point, it was held that an order passed in appeal under Section 11 of the U.P. Consolidation of Holdings Act,

1953, by the Settlement Officer (Consolidation) deciding the appeal finally by setting aside the order of the Consolidation Officer and remanding the matter would not be an interlocutory order and the revision against the said order would not be barred.

30. The order of remand, in the present case, in terms of which the case has been remanded after making certain observations on the merits of the case, and issuing directions to the court below to grant the parties opportunity of hearing and of adducing evidence, cannot be held to be a 'remand simpliciter' or an order of an 'interlocutory nature'. This is more so since the order passed by the Commissioner has a finality attached to it in the sense that it has the effect of disposing of the appeal.

31. The order passed by the Commissioner while exercising powers of the first Appellate Court under Section 207 of the Revenue Code, having resulted in a remand, the bar contained under Clause (e) of Section 209 would be attracted and the remedy of a further statutory appeal would not be available.

32. The bar under Section 209 against filing of an appeal, having been attracted, it would be required to be seen as to whether the revisional jurisdiction under Section 210, can be invoked against the order passed by the Commissioner in appeal. The language of Section 210 indicates that the powers of revision may be exercised in respect of any order passed in a suit or 'proceeding decided'.

33. The word 'proceeding' though not defined under the Revenue Code, when applied to a suit, is generally used, to

express the separate steps taken in the course of a suit.

34. The word 'proceeding' has been defined in the **Webster's Third International Dictionary**³ as meaning a particular step or series of steps adopted for doing or accomplishing something.

35. **Black's Law Dictionary**⁴ defines 'proceedings' as the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment.

36. **Shorter Oxford English Dictionary**⁵ defines the word 'proceeding' as 'the fact or manner of taking legal action; a legal action; an act done by authority of a court of law; a step taken by a party in a case'.

37. **The Law of Pleading Under the Codes of Civil Procedure**⁶ describes 'proceeding' in the following terms:

“‘Proceeding’ is a word much used to express the business done in Courts. A proceeding in court is an act done by the authority or direction of the court, express or implied. It is more comprehensive than the word 'action,' but it may include in its general sense all the steps taken or measures adopted in the prosecution or defence of an action, including the pleadings and judgment. As applied to actions, the term 'proceeding' may include- (1) the institution of the action; (2) the appearance of the defendant; (3) all ancillary or provisional steps, such as arrest, attachment of property, garnishment, injunction, writ of ne exeat; (4) the pleadings; (5) the taking of testimony before trial; (6) all motions made in direction; (7) the trial; (8) the judgment; (9)

the execution; (10) proceedings supplementary to execution, in court practice; (11) the taking of the appeal or writ of error; (12) the remittitur, or sending back of the record to the lower Court from the appellate or reviewing Court; (13) the enforcement of the judgment, or a new trial, as may be directed by the Court of last resort.”

38. The word 'proceeding' has been described in **Words and Phrases, Permanent Edition**⁷, as a comprehensive term meaning a prescribed course of action for enforcing a legal right and hence embracing the requisite steps by which a judicial action is invoked.

39. The foregoing discussion is indicative that the word 'proceeding' ordinarily relates to the modes in which judicial transactions are conducted. The word has to be understood as a comprehensive term and would generally mean a prescribed course of action for enforcing a legal right. It would also be held to embrace the requisite steps by which a judicial action is invoked and would include the form and the manner of conducting judicial business before a Court of law. The word 'proceeding' would thus be seen to be wider than the word 'case'.

40. Section 210 of the Revenue Code which provides the remedy of a revision empowers the Board or the Commissioner to call for the record of 'any suit or proceeding decided' by any subordinate Revenue Court in which no appeal lies for the purpose of satisfying itself as to the legality or propriety of any order passed in suit or proceeding.

41. A plain reading of Section 210 of the Revenue Code indicates that a revision

would be entertainable on the cumulative satisfaction of the following circumstances:

I. (i) impugned order amounts to a 'suit or proceeding decided';

(ii) such an order must have been passed by any Revenue Court subordinate to the Board of Revenue or Commissioner;

(iii) such an order must not be appealable.

II. there must be an assertion with regard to jurisdictional error by the subordinate revenue court, i.e. to say:

(i) exercise of jurisdiction not vested in it by law, or

(ii) failure to exercise a jurisdiction so vested, or

(iii) acting in the exercise of such jurisdiction illegally or with material irregularity.

42. The section comprises **two parts**, the first prescribes the condition under which jurisdiction of the Board or the Commissioner arises, i.e. there is a 'suit or proceeding decided' by a subordinate Revenue Court in which no appeal lies, the **second** sets out the circumstances in which the jurisdiction may be exercised.

43. The question regarding maintainability of the revision by the Board or the Commissioner would be distinct and independent of the question as to when the Board or the Commissioner would, in exercise of revisional jurisdiction, interfere with the orders passed by the courts subordinate thereto. The former concerns the power to call for records of courts subordinate to it by the Board or the Commissioner and relates to existence of condition precedent on the basis of which such exercise of jurisdiction under Section 210 depends. The latter relates to spelling out the circumstances under which the

jurisdiction under Section 210 may be exercised.

44. The **maintainability of a revision** would therefore depend on **two conditions**; **first**, that it must relate to a suit or proceeding decided by any Revenue Court subordinate to the Board or Commissioner and **second**, it must be in connection with any 'suit or proceeding decided', against which no appeal lies. Once these twin conditions are satisfied, it cannot be said that the revision would not be maintainable. The question, whether in a given case, the Court chooses to exercise the jurisdiction to interfere with the orders passed by the subordinate Revenue Court in a suit or proceeding decided would depend upon the facts and circumstances indicative of jurisdictional error in a particular case.

45. It is well settled that an appeal is a continuation of the suit. Whenever an appeal lies against any decree and when an appeal is filed, the finality of the decree of the trial court ceases. Thereafter, it is the judgment and decree of the appellate court which would replace the decree and judgment of the trial court.

46. It can therefore be said that the word 'proceeding' would also include the 'proceedings' at the appellate stage. This would be more so for the reason that the pursuit of a legal remedy, suit, appeal or second appeal are steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.

47. The meaning to be attributed to the word 'proceeding' thus would depend upon the scope of the enactment wherein the expression is used and with reference to the particular context wherein it occurs. In

general sense, the word 'proceeding' is to be held to mean the form and manner of conducting judicial business before a court. It can be seen as a stage in the journey of a litigation – a step in the ladder of the judicial process.

48. The word 'proceeding', in the expression 'proceeding decided' occurring in Section 210 of the Revenue Code would therefore have to be construed as being wide enough to comprehend within its ambit a proceeding initiated pursuant to an appellate order also. It would, in fact, include any suit, appeal or application. The expression 'proceeding' with reference to a party vis-a-vis a court of law would have to be held to include each and every step or action taken before or during the course of the progress of the suit, including the appellate stage.

49. The condition precedent in order to invoke the revisional jurisdiction under Section 210 has been seen to include within its ambit 'proceeding decided' other than a 'suit decided'. It cannot be restricted to the entirety of proceedings in the journey of a suit. To interpret 'proceeding decided' as entire proceedings and not a part of a proceeding would amount to restricting the exercise of revisional jurisdiction which is not as contemplated under Section 210.

50. The revisional court has the power to rectify an order of a subordinate revenue court at any stage of the suit or proceedings, even if, the order does not finally dispose of the suit or the proceeding. The expression 'proceeding decided' would include a part of a proceeding and an interlocutory order directly affecting the rights and obligation of parties would also have to be held to be included within its scope.

51. The order passed by the Commissioner having decided the appeal finally, the same would have to be held to be within the ambit of the expression 'proceeding decided', occurring in Section 210 of the U.P. Revenue Code, and therefore the remedy of a revision thereagainst cannot be said to be excluded.

52. The order dated 18.11.2022 passed by the Commissioner while deciding the appeals having been held to be amenable to the statutory remedy of revision under Section 210 of the U.P. Revenue Code, this Court would not be inclined to entertain the writ petition in view of the availability of an efficacious statutory legal remedy.

53. The writ petition stands accordingly **dismissed**.

(2023) 9 ILRA 505
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.07.2023

BEFORE

THE HON'BLE DR. YOGENDRA KUMAR SRIVASTAVA, J.

Writ-C No. 13852 of 2023

Tarkeshwar & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
 Sri Madan Ji Pandey, Sri Sudhanshu Pandey

Counsel for the Respondents:
 C.S.C., Sri Sudhir Bharti

Civil Law - U.P. Revenue Code, 2006 – Sections 24 (1), 24(4), 206, 207 & 209(h) - U.P. Revenue Code Rules, 2016 - Rule 22 - Recall application against an ex parte

order passed under Section 24 of Revenue Code, 2006, cannot be held non-maintainable, particularly when sought by person who, under scheme of Act and Rules framed there under, is a necessary party to proceedings - This is relevant where ex parte order is rendered non-appealable by virtue of bar contained in Section 209(h) of Code - Private respondents, being tenure holders of adjoining and contiguous plots, were necessary parties under Rules, 2016 - Since order under Revenue Code, 2006, was passed ex parte against them, they cannot be precluded from invoking inherent jurisdiction of concerned court to seek recall of said order - Challenge to maintainability of recall application as filed by private respondents lacks merit and unsustainable. (Para 37 to 40)

Writ Petition dismissed. (E-13)

List of Cases cited:

1. Grindlays Bank Ltd. Vs Central Government Industrial Tribunal & ors., 1980 Supp SCC 420, (Para 6, 10, 13)
2. J.K. Synthetics Ltd. Vs Collector of Central Excise, (1996) 6 SCC 92
3. Kapra Mazdoor Ekta Union Vs Birla Cotton Spinning and Weaving
4. Mills Ltd. & anr., (2005) 13 SCC 777
5. Asit Kumar Kar Vs St. of W.B. & ors., (2009) 2 SCC 703

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

1. Heard Sri Sudhanshu Pandey, learned counsel appearing along with Sri Madan Ji Pandey, learned counsel for the petitioners, Sri Ajit Kumar Singh, learned Additional Advocate General appearing along with Sri Abhishek Shukla and Sri Amit Manohar, learned Additional Chief

Standing Counsel and Sri Amit Verma, learned Standing Counsel for the State respondents.

2. The present petition seeks to put forth a proposition that against an ex parte order passed in proceedings under Section 24 of U.P. Revenue Code, 2006, the remedy of a statutory appeal being available, a recall application would not be maintainable at the behest of a non-party.

3. The facts of the case, as reflected from the pleadings in the writ petition, indicate that an application filed by the petitioner under Section 24 of U.P. Revenue Code, 2006, registered as Case No. 994 of 2022, computerized case no. T202205200400994 (Tarkeshwar and others vs. Kishor and others) for demarcation of boundaries was allowed by means of an ex parte order dated 22.07.2022.

4. Thereafter, the private respondent nos. 3 to 5, asserting themselves to be tenure holders of the adjoining plots and necessary parties in the proceedings under Section 24 of Code, 2006 preferred an application dated 13.09.2022 seeking recall of the ex parte order dated 23.07.2022.

5. The said application was taken up by respondent no.2, and after hearing the counsel for the parties on the stay application, an order was passed staying the effect of the earlier order dated 22.07.2022.

6. Counsel for the petitioner has sought to assail the order dated 12.01.2023 by raising the following contentions:

6.1 The order dated 22.07.2022 passed in proceedings under Section 24 of

the Code, 2006, being appealable in terms of sub-section (4) thereof at the behest of 'any person' it was open to the private respondents to have availed the statutory remedy of appeal, and in view of the same, the recall application was not maintainable.

6.2 Section 209(h), which bars an appeal against an order passed ex parte or by default, is subject to the condition contained under the proviso, in terms of which it is open to 'any party aggrieved' by the order passed ex parte or by default, to move an application for setting aside the said order. The private respondents being 'non-parties', the order dated 22.02.2022 could neither be said to be an order passed ex parte nor by default, and accordingly, the remedy of seeking recall of the order under the proviso to Section 209 would not be available to the said respondents.

6.3 The private respondents having not chosen to get themselves impleaded at the stage of pendency of proceedings under Section 24, it is not open to them to seek recall of the order subsequently.

7. Learned Additional Advocate General appearing for the State respondents has controverted the assertions made by the learned counsel for the petitioner by submitting as under:-

7.1 The right to file a statutory appeal under Section 24(4) of Code, 2006, can in no manner be understood to take away the right of the private respondents to seek recall of an order passed ex parte. This would be more so in a case where as per the provisions contained under Rule 22 of the U.P. Revenue Code Rules, 20162, the private respondents being tenure holders of contiguous plots, would be necessary parties in the proceedings.

7.2 Rule 22 mandates that the application filed under Section 24(1) Code, 2006, is to specify the details of the contiguous plots, and also, the concerned tenure holders are to be made parties in the case having a right to be heard; accordingly, the private respondents being necessary parties, and the order having been passed ex parte without impleading them, it would be open to them to seek recall of the order.

7.3 The expression 'any party' aggrieved under the proviso of Rule 209, which gives the remedy of filing of recall application against the order passed ex parte, would include within its ambit the private respondents who, as per the relevant statutory rules, are necessary parties in the proceedings and the mere fact that they were not impleaded, would not take away the rights so conferred.

7.4 The right to recall any order ex debito justitiae inheres in every Court or Tribunal which has passed the order, irrespective of the fact whether such right has been expressly conferred by the statute. In this regard, the distinction between the 'procedural review' and 'substantive review' is well known.

8. In order to consider the rival contentions, the relevant statutory provisions as contained under the Code, 2006, are being extracted below:

"Section 24: Disputes regarding boundaries. (1) The Sub-Divisional Officer may, on his own motion or on an application made in this behalf by a person interested, decide, by summary inquiry, any dispute regarding boundaries on the basis of existing survey maps or, where they have been revised in accordance with the

provisions of the Uttar Pradesh Consolidation of Holdings Act, 1953, on the basis of such maps, but if this is not possible, the boundaries shall be fixed on the basis of actual possession.

(2) If in the course of an inquiry into a dispute under sub-section (1), the Sub-Divisional Officer is unable to satisfy himself as to which party is in possession or if it is shown that possession has been obtained by wrongful dispossession of the lawful occupant, the Sub-Divisional Officer shall-

(a) in the first case, ascertain by summary inquiry who is the person best entitled to the property, and shall put such person in possession;

(b) in the second case, put the person so dispossessed in possession, and for that purpose use or cause to be used such force as may be necessary and shall then fix the boundary accordingly.

(3) Every proceeding under this section shall, as far as possible, be concluded by the Sub-Divisional Officer within [three months] from the date of the application.

(4) Any person aggrieved by the order of the Sub-Divisional Officer may prefer an appeal before the Commissioner within thirty days of the date of such order. The order of the Commissioner shall be final.

Section 206: Jurisdiction of civil Courts and revenue courts.

(1) Notwithstanding anything contained in any law for the time being in force, but subject to the provisions of this Code, no Civil Court shall entertain any suit, application or proceeding to obtain a decision or order on any matter which the State Government, the Board, any Revenue Court or revenue Officer is, by or under this Code, empowered to determine, decide or dispose of.

(2) Without prejudice to the generality of the provisions of sub-section (1), and save as otherwise expressly provided by or under this Code-

(a) no Civil Court shall exercise jurisdiction over any of the matters specified in the Second Schedule; and

(b) no Court other than the revenue Court or the revenue officer specified in [Column 3] of the Third Schedule shall entertain any suit, application or proceeding specified in [Column 2] thereof.

(3) Notwithstanding anything contained in this Code, an objection that a Court or officer mentioned in sub-section (2)(b) had or had no jurisdiction with respect to any suit, application or proceeding, shall not be entertained by any appellate, revisional or executing Court, unless the objection was taken before the Court or officer of the first instance, at the earliest opportunity, and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice.

Section 207: First appeal. - (1) Any party aggrieved by a final order or decree passed in any suit, application or proceeding specified in Column 2 of the Third Schedule, may prefer a first appeal to the court or officer specified against it in Column 4, where such order or decree was passed by a Court or officer specified against it in Column 3 thereof.

(2) A first appeal shall also lie against an order of the nature specified-

(a) in section 47 of the Code of Civil Procedure, 1908; or

(b) in section 104 of the said Code; or

(c) in Order XLIII, Rule 1 of the First Schedule to the said Code.

(3) The period of limitation for filing a first appeal under this section shall be thirty days from the date of the order or decree appealed against.

Section 209: Bar against certain appeals.-

Notwithstanding anything contained in Sections 207 and 208, no appeal shall lie against any order or decree-

(a) made under Chapter XI of this Code;

(b) granting or rejecting an application for condonation of delay under section 5 of the Limitation Act, 1963;

(c) rejecting an application for [revision];

(d) granting or rejecting an application for stay;

(e) remanding the case to any subordinate Court;

(f) where such order or decree is of an interim nature;

(g) passed by Court or officer with the consent of parties; or

(h) where has been passed ex parte or by default:

Provided that any party aggrieved by order passed ex parte or by default, may move application for setting aside such order within a period of thirty days from the date of the order:

Provided further that no such order shall be reversed or altered without previously summoning the party in whose favour order has been passed to appear and be heard in support of it.]"

9. The statutory rule corresponding to the provisions contained under Section 24, is Rule 22 of Rules, 2016, and the same is extracted below:

“22. Settlement of boundary dispute

(Section 24)- (1) Under Section 24(1) of the Code of tenure holder shall submit two copies of the application for settlement of boundary dispute to the Sub-Divisional Officer for one or more than one contiguous gatas, and it shall contain the following particulars-

(a) *Details of Gata*--Gata number, name of tenure holder. father/husband's name of village/tehsil. If the tenure holders are more than one, then particulars of all shall be mentioned; current updated khatauni shall also be to be attached to the application.

(b) *Details of contiguous Gata*--Gata number, name of tenure holder, father/husband's name, name of village/tehsil. If the tenure holders are more than one, then particulars of all shall be mentioned. Current updated khatauni shall also be attached to the application.

(2) If the khata is different in khatauni, but sub-division is not done in sazra-map, then sub-division in sazra-map shall be necessary.

(3) If boundary of any property of Gram Panchayat/State Government is adjacent to gata/gatas to be demarcated, then the Chairman, Land Management Committee/Gram Pradhan and the State Government shall be made a party in the case.

(4) Only the outer boundary shall be demarcated for an application made for boundary demarcation of contiguous gatas.

(5) The applicant shall deposit a fee of Rs. 1000/- in Government treasury for the demarcation of gata/attached gatas. A copy of challan receipt shall also be attached with the application form.

(6) On receipt of an application for demarcation, on the same or next working day, the Sub-Divisional Officer shall register the case in Revenue Court Computerised Management System (RCCMS). Three copies of notices shall be issued from the computerized system and will be delivered to the Revenue Inspector through Tehsildar.

(7) The Revenue Inspector shall serve notice to the concerned tenure holder/tenure holders as mentioned in sub-

rule (1), through the Lekhpal or through any other mode. In absence of the tenure holders, notice will be served to the adult family member of the tenure holder/tenure holders. The information of demarcation shall also be given to the Chairman. Land Management Committee.

(8) At the time of sending the information or before the demarcation on site, if the Revenue Inspector wants to make any other affected person, a party to the case he can do so.

(9) After fixing the date of demarcation and intimation to all the concerned tenure holders, the Revenue Inspector or any other revenue official will demarcate the land parcel or parcels, as the case may be. During demarcation if any affected tenure holder is not a party to the case, such tenure holder shall be made a party to the case by the Revenue Inspector on the spot and he will mention the same in his demarcation report. Demarcation shall be completed within a month from the date of order for the same by the Sub-Divisional Officer.

(10) The Revenue Inspector or other revenue officials shall prepare the demarcation report alongwith the site memo. If there are no objections to the same, then after getting the consent and signature of all the concerned parties on the demarcation report, the same shall be sent it to the Sub-Divisional Officer through Tehsildar in a week. On receipt of the aforesaid report of the Revenue Inspector, the Sub-Divisional Officer will pass the order confirming the demarcation report.

(11) If the affected parties to the demarcation have not given their consent to the demarcation, or if there is any objection to the demarcation report, notice(s) will be issued by the Sub-Divisional Officer to all the parties, fixing a date of hearing which

shall not be beyond 15 days from the date of issuance of notice.

(12) The Sub-Divisional Officer shall pass an order on the matter of boundary demarcation after hearing all the concerned parties. The Revenue Inspector shall comply with such order within two weeks from the date of order, and shall submit his report to the Sub-Divisional Officer.

(13) Where the boundary of gata/survey number is not recognizable due to alluvion or diluvion of land, or heavy rain, or due to damage caused by any other reason, then on the application of the Chairman of Village Revenue Committee of that village, or on the report of the Revenue Inspector or Lekhpal, or on the joint application signed by all the concerned parties, the Sub-Divisional Officer shall instruct the Revenue Inspector or Lekhpal by a general or special order in writing, that the demarcate the boundary on ground on the basis of current survey map or, where it is possible, on the basis of possession, and if there is any complaint, then on the advise of Village Revenue Committee, resolve the same on the basis of mutual consent. The Revenue Inspector or Lekhpal shall comply with such order within two weeks from the date of order, and will submit his report to the Sub-Divisional Officer.

(14) At the time of passing order for demarcation under sub-rules (10), (13) or (14), the Sub-Divisional Officer can direct the SHO of the concerned police station to make police force available on the spot at the time of demarcation of land, in order to maintain law and order.

(15) The Sub-Divisional Officer, will try to complete the process within the stipulated time as mentioned in Section 24(3) of the Code and if the process is not completed within such time then the reason for the same shall be recorded.]”

10. Section 24 of the U.P. Revenue Code, 2006, relates to disputes regarding boundaries. The procedure with regard to the settlement of boundary disputes is provided under Rule 22 of Rules, 2016.

11. As per terms of sub-rule (1) of Rule 22, the tenure holder is required to submit two copies of the application for settlement of boundary disputes to the Sub-Divisional Officer for one or more than one contiguous gata, containing particulars with regard to; (a) details of Gata, and (b) details of contiguous Gata. Sub-rule (6) provides that on receipt of an application for demarcation, the Sub-Divisional Officer shall register a case from the Revenue Court Computerized Management System (RCCMS), and three copies of the notices shall be issued from the computerized system and will be delivered to the Revenue Inspector through Tehsildar. The Revenue Inspector shall, in terms of sub-rule (7), serve notice to the concerned tenure holder/tenure holders as mentioned in sub-rule (1), through the Lekhpal or through any other mode. At the time of sending the information on or before the demarcation on site, the Revenue Inspector is empowered under sub-rule (8), to make any other affected person/a party to the case. After fixing the date of demarcation and intimation to all the concerned tenure holders, the Revenue Inspector or any other revenue official, under sub-rule (9), is to demarcate the land parcel or parcels, and during demarcation, if any affected tenure holder is not a party to the case, such tenure holder shall be made a party to the case by the Revenue Inspector on the spot and the same would also be mentioned in the demarcation report. The demarcation report, along with the site memo, is to be prepared under sub-rule (10) by the Revenue Inspector or any other revenue

official, and if there are no objections to the same, then after getting the consent and signature of all the concerned parties on the demarcation report, the same shall be sent to the Sub-Divisional Officer through the Tehsildar. Upon receipt of the aforesaid report, the Sub-Divisional Officer is to pass an order confirming the demarcation report. In the event, the affected parties to the demarcation have not given their consent, or if there is any objection to the demarcation report, it is provided under sub-rule (11) that the Sub-Divisional Officer would issue notices to all the concerned parties, fixing a date for hearing. The Sub-Divisional Officer shall, thereafter, pass an order, as envisaged under sub-rule (12), on the matter of boundary demarcation after hearing all the concerned parties.

12. Rule 22 of Rules 2016, as referred to above, describes in detail the procedure to be followed by the revenue officials in respect of matters related to settlement of boundary disputes under Section 24. It would be relevant to notice that the application to be filed under sub-rule (1) is to contain particulars with regard to the Gata, including the details of the contiguous Gata. Upon receipt of the application, the Revenue Inspector, under sub-rule (7), is required to serve notice to the concerned tenure holders, as mentioned in sub-rule (1). Sub-rule (8) mandates that at the time of sending information or before the demarcation on site, the Revenue Inspector is empowered to make any other affected person a party to the case. Further, after fixing the date of demarcation and intimation to all the concerned tenure holders, sub-rule (9) mandates that the Revenue Inspector would demarcate the land parcels, and during demarcation, if any affected tenure holder is not a party to

the case, such tenure holder shall be made a party by the Revenue Inspector on the spot and the same would be mentioned in the demarcation report. The Revenue Inspector shall, thereafter, prepare the demarcation report along with the site memo, under sub-rule (10), and if there are no objections to the same, then after getting the consent and signature of all the concerned parties to the demarcation report, the same is to be sent to the Sub-Divisional Officer through the Tehsildar whereupon the Sub-Divisional Officer is to pass an order confirming the report. If the affected parties have not given their consent to the demarcation report or if there are any objections to the demarcation report, the Sub-Divisional Officer is required, under sub-rule (11) to issue notices to all the parties fixing a date for hearing and thereafter an order is to be passed after hearing all the concerned parties, as required under sub-rule (12).

13. The foregoing discussion with regard to the procedure to be followed in matters of demarcation, which has been delineated in detail under Rule 22 of Rules 2016, would show that the details of the contiguous Gata are required to be provided in the application seeking settlement of boundary disputes, and thereafter notices are required to be served upon the concerned tenure holders including tenure holders of the contiguous Gata. The revenue authorities are empowered to make any affected person a party to the case at the time of sending a notice or before the demarcation on site. Also, at the stage of demarcation, if any affected tenure holder is not a party to the case, such tenure holder is required to be made a party on the spot and this is required to be mentioned in the demarcation report to be prepared by the Revenue Inspector. Further, after

preparation of the demarcation report along with the site memo, the consent and signature of all the concerned parties are to be obtained, whereupon, the Sub-Divisional Officer is to pass an order confirming the report. However, if the affected parties have not given their consent or if there is any objection to the demarcation report, notices would be issued to all the parties, fixing a date for a hearing, and the Sub-Divisional Officer shall thereafter pass an order on the matter of boundary demarcation only after hearing all the concerned parties.

14. The aforesaid scheme of the Act with regard to the settlement of boundary disputes, as would be seen from the procedure specified under Rule 22, indicates in unambiguous terms that a tenure holder of the contiguous plot would be a necessary party in the proceedings having a right to submit objections and also a right to be heard before an order is passed, confirming the demarcation report and concluding the proceedings.

15. Section 209 contains a bar against certain appeals, and in terms of clause (h) thereof, an order passed ex parte has been made non-appealable. The proviso to Section 209 gives a remedy to any party aggrieved by an order passed ex parte to move an application for setting aside such an order.

16. The private respondents, in the instant case, being tenure holders of the adjoining contiguous plots, would be necessary parties as per the scheme of the Act and the procedure specified under Rule 22, and therefore, in the event the order relating to demarcation has been passed ex parte against the said tenure holders, they would necessarily have to be held, to be

covered within the expression 'party aggrieved', under the proviso to Section 209, and would be entitled to move an application for setting aside of such ex parte order.

17. The contention sought to be raised on behalf of the petitioners that the private respondents being 'non-parties', for the reason that they were not impleaded in the proceedings, would not be entitled to seek recall of the ex parte order under the proviso to Section 209, cannot be accepted for the reason that the procedure prescribed under Rule 22, does not give a choice to the party applying for demarcation not to make the tenure holder of the contiguous Gata a party to the proceedings; rather the scheme of the Act and the Rules mandates that a tenure holder of adjoining contiguous Gata or any other such affected person, would necessarily have to be made party to the proceedings.

18. The other argument sought to be put forward that it was for the private respondents to get themselves impleaded, also cannot be accepted for the reason that under the scheme of statute, it was a duty cast on the party applying for demarcation to have impleaded all the affected parties, including tenure holders of contiguous plots.

19. Therefore, merely for the reason that the private respondents were not made a party to the proceedings despite being tenure holders of the adjoining plots, cannot lead to the conclusion that they would not be 'affected parties' or would not be covered within the meaning of the expression 'party aggrieved', so as to seek recall of the order passed ex parte.

20. It may also be noted that quite apart from the statutory power of recall of

an ex parte order conferred under the first proviso to Section 209, every court or Tribunal would have an inherent power to recall an ex parte order to secure the ends of justice.

21. Taking note of the distinction between a 'procedural review' and a 'review on merits', in **Grindlays Bank Ltd. vs. Central Government Industrial Tribunal and others**³, it was held that even though there may be no express provision under the statute giving jurisdiction to set aside an ex parte order, the Court or Tribunal would be considered as endowed with such incidental or ancillary powers as are necessary to discharge its functions effectively for the purpose of doing justice between the parties. The relevant observations made in the judgment in this regard are as follows:

"6... It is true that there is no express provision in the Act or the rules framed thereunder giving the Tribunal jurisdiction to do so. But it is a well known rule of statutory construction that a Tribunal or body should be considered to be endowed with such ancillary or incidental powers as are necessary to discharge its functions effectively for the purpose of doing justice between the parties. In a case of this nature, we are of the view that the Tribunal should be considered as invested with such incidental or ancillary powers unless there is any indication in the statute to the contrary...

10... We are inclined to the view that where a party is prevented from appearing at the hearing due to a sufficient cause, and is faced with an ex parte award, it is as if the party is visited with an award without a notice of the proceedings. It is needless to stress that where the Tribunal proceeds to make an award without notice to a party,

the award is nothing but a nullity. In such circumstances, the Tribunal has not only the power but also the duty to set aside the ex parte award and to direct the matter to be heard afresh.

13. The expression 'review' is used in the to distinct senses, namely (1) a procedural review which is either inherent or implied in a court or Tribunal to set aside a palpably erroneous order passed under a mis-apprehension by it, and (2) a review on merits when the error sought to be corrected is one of law and is apparent on the face of the record. It is in the latter sense that the court in *Patel Narshi Thakershi Case*⁴ held that no review lies on merits unless a statute specifically provides for it. Obviously when a review is sought due to a procedural defect, the inadvertent error committed by the Tribunal must be corrected *ex debito justitiae* to prevent the abuse of its process, and such power inheres in every court or Tribunal."

22. The same view was taken in **J.K. Synthetics Ltd. vs. Collector of Central Excise**⁵, wherein it was held that in a given case if it was established that the respondent was unable to appear for no fault of his own, the ends of justice would clearly require that the ex parte order against him should be set aside, and the power to do so is inherent in every Tribunal.

23. The distinction between a 'review on merits' and a 'procedural review' was reiterated in **Kapra Mazdoor Ekta Union vs. Birla Cotton Spinning and Weaving Mills Ltd. and another**,⁶ and it was held that a 'review on merits' is permissible only in case the forum in question is vested with the power of review by the statute; however, the power to grant 'procedural review' is inherent.

24. It is a fundamental principle of natural justice and a basic canon of jurisprudence that no adverse orders should be passed against a party without grant of an opportunity of hearing and against an order passed ex parte, the person concerned would have a right to seek recall. The distinction between a review and a recall petition is well established.

25. In **Asit Kumar Kar vs. State of West Bengal & others**⁷, the aforesaid distinction was pointed out by stating that while in a review petition, the court considers on merits whether there is an error apparent on the face of the record, in a recall petition the court does not go into the merits but simply recalls an order which was passed without giving an opportunity of hearing to an affected party.

26. In the case at hand, Rule 22 of Rules 2016, contains a specific mandate that a tenure holder of adjoining contiguous plots would be a necessary party in the proceedings for division of holdings under Section 24. It further enjoins upon the revenue authorities to ensure that notice is to be issued to such party prior to initiation of proceedings for demarcation, and further, upon any objection being raised, the said tenure holder is to be granted an opportunity of hearing before a final order is passed.

27. It would, therefore, follow as a corollary that in case the revenue authorities have proceeded to pass an order ex parte without grant of notice or opportunity to the affected party, the concerned revenue authority would not be precluded from exercising the power to recall its order to correct the procedural defect, *ex debito justitiae* in order for doing justice between the parties.

28. The power to review an order on merits though may be held to have been vested in a court or a Tribunal only in terms of express statutory provision or by necessary implication, the power of 'procedural review' would stand entirely on a different footing and would be referable to the inherent power vested in every court or Tribunal to correct procedural illegality which goes to the root of the matter and invalidates the proceedings itself and consequently the order passed therein.

29. The power to set aside an ex parte order would amount to a 'procedural review', which is inherent or implicit in every court or Tribunal and is distinct from the power to grant a 'review on merits'.

30. In the facts in the present case where the scheme of the Act and the Rules made thereunder specifically mandate giving notice to the tenure holders of adjoining contiguous plots, and the order passed by the concerned revenue authority is without notice or opportunity, the parties affected i.e the private respondents herein would not be precluded from invoking the power of procedural review. .

31. The party seeking review or recall of the order for procedural reasons may not be required to substantiate that the order passed suffers from an error apparent on the face of the record or any other ground which may justify a review. It would only be required to establish that the procedure followed by the court or the Tribunal suffered from a procedural error or illegality which has the effect of vitiating the proceedings, thereby invalidating the order passed therein, inasmuch as the party concerned was not heard for no fault on its part.

32. In such cases, the matter would be required to be reheard in accordance with law without going into its merits, and the order passed would be liable to be recalled not for the reason that it was erroneous but because it was passed in a proceeding which was vitiated by an error of procedure or mistake which went to the root of the matter and had the effect of invalidating the entire proceedings.

33. The contention sought to be raised on behalf of the petitioner that the order passed in proceedings under Section 24 being appealable in terms of sub-section (4) thereof, it was open to the private respondents to have availed the statutory remedy of appeal, would not be tenable for the reason that clause (h) of Section 209 contains a specific bar by providing that the order passed ex parte would not be amenable to remedy of an appeal.

34. It has been held to be an established rule of statutory construction that express grant of power under statute carries with it by necessary implication all powers and duties incidental and necessary to make the exercise of these powers fully effective. In this regard, reference may be had to the exposition of the law in **Sutherland Statutory Construction**⁸, wherein it has been stated as follows:

“Where a statute confers powers or duties in general terms, all powers and duties incidental and necessary to make such legislation effective are included by implication... An express statutory grant of power or the imposition of a definite duty carries with it by implication, in the absence of a limitation, authority to employ all the means that are usually employed and that are necessary to the exercise of the power or the performance of the duty....

That which is clearly implied is as much a part of a law as that which is expressed.”

35. It would also be apt to refer to **Domat’s Civil Law**⁹ wherein it has been observed as follows:-

“It is the duty of the judges to apply the laws, not only to what appears to be regulated by their express dispositions but to all the cases where a just application of them may be made, and which appear to be comprehended either within the consequences that may be gathered from it.”

36. **Maxwell on Interpretation of Statutes**¹⁰, also contains a statement that "where an act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution. *Cui jurisdictio data est, ea quoque concessa esse videntur, sine quibus jurisdictio explicari non potuit.*"

37. A necessary conclusion which flows from the foregoing discussion would be that against ex parte order passed in a proceeding under Section 24 of U.P. Revenue Code, 2006, a recall application cannot be held to be not maintainable, particularly when the recall is being sought by a person, who as per the scheme of the Act and the Rules made thereunder, would be a necessary party to the proceeding. This would be more so in a case where an ex parte order has been made non-appealable by virtue of the bar contained under clause (h) of Section 209 of the Code, 2006.

38. The private respondents in the instant case being tenure holders of adjoining contiguous plots and, therefore, necessary parties as per Rule 22 of Rules

2016, and the order in proceedings under Section 24 having been passed ex parte against them, the said respondents cannot therefore be precluded from invoking the inherent power of the court concerned to seek recall of the order passed in proceeding under Section 24 of Code, 2006.

39. The challenge, which is sought to be raised against the order passed by the respondent no.2 upon the recall application filed by the private respondents on the ground that the application seeking recall was not maintainable, thus, cannot be sustained.

40. The writ petition, therefore, fails and is accordingly **dismissed**.

(2023) 9 ILRA 516
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.08.2023

BEFORE

THE HON’BLE PRAKASH PADIA, J.

Writ-C No. 39355 of 2015

Ajay Bahadur	...Petitioner
	Versus
State of U.P. & Ors.	...Respondents

Counsel for the Petitioner:

Sri Ramandna Gupta, Sri Ram Kishore Pandey,
Sri Rama Nand Gupta

Counsel for the Respondents:

C.S.C.

Civil Law - Stamp Act, 1899 - Section 33/47-A & 56 - U.P. Stamp (Valuation of Property) Rules, 1997 - U.P. Zamindari Abolition and Land Reforms Act, 1950 - Sale deed of agricultural land with existing rooms - No declaration under Section 143 of U.P.Z.A. & L.R. Act - Audit

objection formed basis for proceedings - Order imposing deficiency of stamp duty and penalty passed without spot inspection - Held: In absence of declaration under Section 143, land retains agricultural character - Spot inspection mandatory under Rule 7(3)(c) - Burden lies on St. to prove concealment or change in user - Mens rea absent - Penalty unsustainable - Remand rejected as sale deed executed in 2010 - Present inspection irrelevant - Orders set aside - Amount deposited to be refunded with 6% interest.

Held: Non-declaration under Section 143 of U.P.Z.A. & L.R. Act makes it evident that the land retained its agricultural character on the date of sale deed. Mere construction of six rooms does not alter its nature. Authorities acted solely on ex parte audit report without mandatory spot inspection. Burden of proof lies on the St. to establish concealment or fraud, which is lacking. Imposition of penalty without mens rea is illegal. Remand would serve no purpose as chargeability is determined on the date of execution of the instrument.

Petition Allowed.

Case Laws Discussed:

1. Aniruddha Kumar & Ashwini Kumar Vs Chief Controlling Revenue Authority, 2000 (3) AWC 2587
2. Smt. Sushila Verma Vs St. of U.P., 2006 (2) AWC 1492
3. Sudama Vs Chief Controlling Authority, 2013 (4) AWC 3571
4. Ajay Agarwal Vs Commissioner, 2023 (2) ADJ 561 (LB)
5. Ram Khelawan @ Bachcha Vs St. of U.P., 2005 (2) AWC 1087
6. Smt. Asha Kapoor Vs Addl. Collector (F&R), 2008 (72) ALR 125
7. Shahid Ali Vs Commissioner Bareilly, 2013 (6) ADJ 425

8. Har Charan Lal Ice & Cold Storage Pvt. Ltd. Vs St. of U.P., 2013 (2) AWC 1731

9. Raj Kumar Vs St. of U.P., Writ-C No. 19644 of 2016, decided on 13.04.2023

(Delivered by Hon'ble Prakash Padia, J.)

1. The petitioner has preferred the present petition inter alia with the following prayer:-

"i- issue a writ order or direction in the nature of certiorari calling the records of the case and quash the orders dated 29-05-2015 passed by Chief Revenue Controlling Authority, Allahabad passed in Stamp Appeal No. 46 of 2012-13 and order dated 31-10-2012 passed in case no. 45/2012-13 State Vs. Shri Ajay Bahadur Prasad by learned Additional Collector finance and revenue/stamp collector Jhansi District- Jhansi (Annexed as Annexure no. 1 & 2 to the writ petition)."

2. The facts of the present case are that by means of the registered sale deed dated 02.06.2010, the petitioner has purchased a land, having total area 2.492 hectare (equivalent to 24290 sq.meters) of plot no. 537/5(MIN) of khata no. 00065,00190,00011, situated at village Pali, Pahari block Babina, District- Jhansi. On the said land, a construction was existing i.e. six rooms. The total covered area was 95-62 sq meters. The plots in dispute were recorded as agricultural land and no declaration u/s 143 of the U.P. Z.A. & L.R. Act have been made.

3. An audit objection was made by the Accountant General Uttar Pradesh on 30.11.2010, copy of the audit report dated 30.11.2010 had not been served upon the petitioner.

4. In pursuance of the audit objection, a notice was issued to the petitioner on 27.04.2011 for initiating the proceeding u/s 33/47-A of the Indian Stamp Act 1899, of which the petitioner has filed his objection dated 22.06.2011 with the copy of khasra mention therein that the land in dispute is agricultural land.

5. The respondent no.2- Additional Collector Finance and Revenue, Jhansi passed an order dated 31.10.2012 imposing the deficiency of the stamp duty of Rs. 17,84,500/- and penalty of Rs. 17,84,500/- along with 1.5% of simple interest from the execution of the sale deed.

6. Aggrieved by the order dated 31.10.2012 passed by the respondent no.2- Additional Collector Finance and Revenue, Jhansi, the appellant/petitioner decided to prefer stamp appeal u/s 56 of the Indian Stamp Act, 1899 before the court of Chief Controlling Authority, Board of Revenue U.P. at Allahabad (respondent no. 3). The same was numbered as Stamp Appeal No. 46/2012-13. While filing the appeal 1/3rd amount i.e. Rs. 14,57,342/-, was deposited by the petitioner as per mandatory provisions of the Act.

7. The said appeal has been dismissed by the appellate authority by the order dated 29.05.2015. Aggrieved against the aforesaid, the petitioner has preferred the present petition.

8. It is argued by learned counsel for the petitioner that the land in dispute was recorded as agricultural holding on the date of execution of sale-deed, which is clear from khasra as well as sale-deed dated 2.6.2010 annexed as Annexure No. (1) to the supplementary affidavit. It is further argued that the declaration under Section

143 of U.P. Z.A. & L.R. Act was not made on the date of execution of the sale-deed and the land was recorded as agricultural land, therefore, the stamp duty only be charged according to rate applicable for agricultural holdings. It is next argued that it is mentioned in the sale-deed itself that separate stamp duty for the construction existing over the plot in dispute has been paid for executing the sale-deed. It is also argued that no spot inspection has been made by the authorities and the entire judgment is based on ex parte audit report. It is further argued that wholly illegally, without giving any specific reason, excessive amount of penalty has been imposed upon the petitioner. Learned counsel for the petitioner has placed reliance upon several judgments of this Court.

9. On the other hand, learned Standing counsel appearing on behalf of the State submits that the impugned orders passed by the concerned authorities are absolutely perfect and valid orders, the provisions of Section 143 of U.P. Zamindari Abolition & Land Reforms Act, 1950 are irrelevant for the purposes of deciding the chargeability of stamp duty at this point of time. Learned Standing Counsel, therefore, submits that the orders impugned do not require any interference.

10. Heard Sri Ram Kishore Pandey, learned counsel for the petitioner, Sri Vijay Shankar, learned Chief Standing counsel appearing on behalf of the State, I find that non-declaration of land as Abadi under Section 143 of U.P. Zamindari Abolition & Land Reforms Act, 1950 is an admitted fact. The contention of the State to the effect that the said non-declaration is not relevant in the proceedings under the Indian Stamp Act cannot be accepted for

the reason that in exercise of statutory powers under the Indian Stamp Act, as applicable in the State of U.P., Uttar Pradesh Stamp (Valuation of Property) Rules, 1997 have been framed. Rule 3(1)(a) of the Rules, provide as follows:

"Facts to be set forth in an instrument.-In case of an instrument relating to immovable property chargeable with an ad valorem duty, the following particulars shall also be fully and truly stated in the instrument in addition to the market value of the property-

(1) In case of land-

(a) included in the holding of a tenure-holder, as defined in the law relating to land tenures-

(i) the Khasra number and area of each plot forming part of the subject-matter of the instrument;

(ii) whether irrigated or unirrigated and if irrigated, the source of irrigation;

(iii) if under cultivation whether do-fasali or otherwise;

(iv) land revenue or rent whether exempted or not and payable by such tenure-holder;

(v) classification of soil, supported in case of instruments exceeding twenty thousand rupees in value, by the certified copies, or extracts from the relevant revenue records issued in accordance with law;

(vi) location (whether lies in an urban area, semi-urban area, or countryside); and

(vii) minimum value fixed by the Collector of the district."

11. Admittedly, on the date of execution of the sale-deed, the provisions of U.P. Zamindari Abolition & Land Reforms Act, 1950 were applicable. The

definition of "land" as contained under section 3(14) of the U.P. Zamindari Abolition & Land Reforms Act, 1950, reads as follows:

(14) "Land"[except in Sections 109, 143 and 144 and Chapter VII] means land held or occupied for purposes connected with agriculture, horticulture or animal husbandry which includes pisciculture and poultry farming;

12. In view of the definition of land contained in the law relating to land tenures, i.e. U.P. Zamindari Abolition & Land Reforms Act, 1950, the fact that the land was not declared as Abadi under Section 143 of U.P. Zamindari Abolition & Land Reforms Act, 1950 as explained under Section 3(14) of the said Act, is itself becomes a relevant factor for determining the nature of land that was subject matter of instrument. This Court in various authorities has held that when the land is purchased for agricultural purposes and declaration under section 143 of the U.P. Z.A. & L.R. Act, 1950 has not been made and merely because there is some construction i.e. six rooms over the land, the same would not lose its character as the agricultural land for the purposes of levy of stamp duty. Reference can be made to few authorities of this Court in the case of **Aniruddha Kumar and Ashwini Kumar vs Chief Controlling Revenue Authority, U.P. Allahabad and another**, reported in 2000 (3) AWC 2587; **Smt. Sushila Verma vs State of U.P. and others reported in 2006 (2) AWC 1492 and Sudama vs Chief Controlling Authority and others**, reported in 2013 (4) AWC 3571.

13. Moreover, had the allegation of the State been to the effect that though the land was purchased for agricultural

purposes, but its user was immediately changed and on the date of sale deed, it was being used for any other purpose like, industrial, commercial or even residential, the situation would have been different. Even in those situations, spot inspection at the relevant point of time was a necessity, but, admittedly, in the present case, no spot inspection has been carried out. Necessity of spot inspection and its mandatory nature, with reference to Rule 7 (3) (c) of the aforesaid Rules of 1997, has been reiterated, time and again by this Court in various authorities including *Ajay Agarwal and others vs Commissioner Lucknow and others*, reported in **2023 (2) ADJ 561 (LB)**, and *Ram Khelawan alias Bachcha vs State of U.P. and another*, reported in **2005 (2) AWC 1087**.

14. The observations/findings recorded in the orders impugned are also contrary to principles of burden of proof particularly, in a case where proceedings arise out of a fiscal statute. Once the State was proceeding to impose deficient stamp duty upon the petitioner, the entire burden lay upon the State to establish beyond reasonable doubt that the petitioner made some concealment at the time of getting the sale-deed executed in his favour or that within a close proximity of dates, the user of the land in dispute was changed so as to levy additional stamp duty. Nothing to this effect has been brought on record, rather, not only the findings recorded in the orders impugned are contrary to the provisions of the Indian Stamp Act, 1899, as applicable in the State of U.P. as well as U.P. Stamp (Valuation of Property) Rules, 1997, but certainly contrary to the law consistently laid down by this Court.

15. Insofar as the imposing one time penalty is concerned, it is well settled that

unless "mens rea" is established on the part of the purchaser, no penalty can be imposed, even if the provision of penalty is a creation of statute. Regarding imposition of penalty, reference can be made to a judgment of this Court in the case of *Smt. Asha Kapoor vs Additional Collector (Finance & Revenue), Ghaziabad and others*, reported in **2008 (72) ALR 125**, where this Court has held that penalty can be imposed if there is an attempt to evade the stamp duty and penalty presupposes culpability and an intention to conceal or to play fraud with the authorities. I do not find any finding on record, whereunder any opinion has been formed by the respondent-Authorities that the petitioner defrauded the Government having mens rea at the time of getting the sale-deed executed. Even the annexures of the writ petition disclosing the nature of land have not been disputed by the State in the counter affidavit. I also find that the sale-deed in question conforms to the statutory requirements of disclosure of necessary particulars as per rule 3(1)(a) of the Rules of 1997. Therefore, imposition of penalty is also contrary to law of the land.

16. Learned Standing Counsel submits that in case, non-conduct of the spot inspection is treated as an illegality behind passing of the orders impugned, the matter may be remanded to the authorities for conducting or getting conducted spot inspection and then pass a fresh order.

17. However I find that no fruitful purpose would be served in remanding the matter to the Authorities and infact remand in this case would be a futile exercise for the reason that the instrument in question was executed on 02.06.2010 and it is well settled that chargeability of the stamp duty has to be examined with reference to the

date of execution of instrument. Proposition to this effect has been consistently laid down by this Court in various authorities including *Shahid Ali vs Commissioner Bareilly Division Bareilly and others*, reported in *2013 (6) ADJ 425 and Har Charan Lal Ice & Cold Storage Pvt. Ltd. Vs State of U.P. and others*, reported in *2013 (2) AWC 1731*. Therefore, the insistence of learned Standing Counsel regarding remand is liable to be rejected, also for the reason that if inspection is carried out today, i.e. in the year 2023 that would be wholly irrelevant for the purposes of determination of stamp duty on the date of execution of sale deed i.e. 2010. Therefore, such spot inspection would neither be of any significance nor relevant for the purposes of deciding the matter.

18. The same view was also taken by the co-ordinate Bench of this Court in its judgment and order 13.4.2023 in Writ-C No. 19644 of 2016 (Raj Kumar vs. State Of U.P. and 2 Others).

19. In view of above, the writ petition succeeds and is allowed.

20. The order dated 29.5.2015 passed by respondent No.3- Chief Revenue Controlling Authority, Prayagraj in Stamp Appeal No.46 of 2012-13 and order dated 31.10.2012 passed by respondent no.2- Additional Collector Finance and Revenue/Stamp Collector, Jhansi are hereby quashed by issuing a writ of Certiorari.

21. A writ of Mandamus is also issued to the effect that any amount deposited by the petitioner either prior to filing of this writ petition or in pursuance of any interim order passed in the present case, shall be refunded to the petitioner along with simple

interest at the rate of 6% per annum from the date of its deposit till the date of actual payment, within a period of three months, on moving appropriate application by the petitioner along with certified copy of this order before the authority concerned.

(2023) 9 ILRA 521
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.08.2023

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ-C No. 1001865 of 2013

M/S Anjali Exim Pvt. Ltd. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
 Phool Chandra Mishra, Sachin Garg

Counsel for the Respondents:
 C.S.C.

Civil Law - Stamp Act, 1899 - Sections 9 & 47-A - Stamp-duty exemption granted under Govt. Notification dt. 19.01.2005 for setting up Agro/Food Park - Sale-deed registered on 20.06.2006 pursuant to exemption - Industrial unit not established by petitioner - Proceedings initiated under Section 47-A after lapse of 6 years - Held: Demand for stamp-duty based on subsequent Govt. policy (G.O. dt. 21.08.2009) unsustainable - Duty payable to be determined with reference to law as on date of execution - No infirmity in exemption - Invocation of Section 47-A illegal and de hors the Act - Impugned order quashed.

Held: Stamp duty liability is determined on date of execution of instrument; subsequent change in policy cannot retrospectively revoke a valid exemption granted under Section 9 of the Act - No authority under Section 47-A to reopen exemption-based registrations.

Petition Allowed.**Case law discussed:**

1. Shanti Bhushan (D) thr. Lrs. & ors. Vs St. of U.P. & ors., 2023 SCC OnLine SC 489
2. Swedish Match AB Vs SEBI, (2004) 11 SCC 641
3. CIT Vs Ajax Products Ltd., 55 ITR 741

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

1. Heard Sri Sachin Garg, learned counsel appearing on behalf of the petitioner as also the learned Standing Counsel for the respondents, and perused the records.

2. The petitioner in the present writ petition has assailed the order dated 26.11.2012 of the Prescribed Authority/Asstt. Commissioner (Stamp), Raebareli, under the Indian Stamps Act, 1899 (hereinafter referred as 'Act of 1899'), whereby in exercise of powers under section 47-A he has determined the stamp-duty payable on the sale-deed executed by the petitioner on 20.06.2006 to be deficit in stamps and thereby directed the petitioner to pay an amount of Rs. 16,65,100.00 alongwith penalty of Rs. 3,67,330.00 and interest @ 1.5% per month from 20.06.2006.

3. The question which has been raised by the petitioner in the present writ petition is as to whether once on the basis of the exemption Notification issued under Section 9 of the Act of 1899, stamp-duty has been exempted and the instrument registered, can by subsequent change in the Government Policy, provision of section 47-A be invoked requiring the person to

pay stamp duty on the market value of the property?

4. Brief facts of the case, as submitted by the petitioner are that the Government of India through Ministry of Food Processing Industry had launched a scheme for establishment of Green Field Agro Food Park in the country during the 10th Five-Year-Plan with the object of providing adequate infrastructure for Food Processing Industry. The Government of Uttar Pradesh also adopted the aforesaid policy and had passed a notification dated 19.01.2005, whereby they had decided to grant exemption from stamp-duty as well as exemption from registration-fees in respect of purchase of land for setting up Information Technology, Bio Technology Business Process Outsourcing Unit, Call Centers, Agriculture Processing Unit etc., which were being set up taking advantage of the Green Field Agro Food Park Policy.

5. The petitioner being interested in setting up Agro Food Park/Mega Food Park, moved an application before the Inspector General (Registration), U.P., seeking exemption from stamp-duty and registration fees for purchase of the said land. The application of the petitioner was duly processed and the General Manager, District Industry Centre, Raebareli, by means of his letter dated 18.04.2006 directed the Sub Registrar, Maharajganj, Raebareli, to grant of stamp-duty exemption in respect of land areas purchased by the petitioner for setting up the Agro Food Park/Mega Food Park.

6. In pursuance of the aforesaid exemption from stamp duty granted to the petitioner, sale deed was registered on 20.06.2006.

7. After execution of the sale deed the petitioner did not proceed to utilise the said land for setting up of the Agro-based industry for which the concessions were granted to him. The collector initiated proceedings under section 47A of the Indian Stamp Act 1899 on the ground that the petitioner had failed to set up the industrial undertaking. The exemption from stamp duty was granted as per the policy of the State government, and the petitioner not having complied with his part of the commitment, he would be liable to pay the amount of stamp duty which was leviable on registering of the said sale deed.

8. It has been submitted by the counsel for the petitioner that the State Government has subsequently issued a Government Order dated 21.08.2009 incorporating certain new conditions in the implementation of the scheme related to setting up of new Food Processing Industries, where in order to seek the benefits. The applicants will now have to give a bank guarantee or fixed deposit for the amount equivalent to stamp duty which would be leviable had the applicants not been given the benefit of exemption under the said policy. The purpose of requiring the applicants to give the bank guarantee or fixed deposit is to ensure that the applicants after purchasing the land, proceed to set up the industrial unit, failing which the said bank guarantee or fixed deposit was liable to be encashed. The said change in policy ensured that the applicants after availing of the concession in stamp duty with regard to the registration of land, granted by the State government would proceed to set up the industrial unit.

9. The said Government Order is in the form of a clarification to the previous Government order dated 19.01.2005. It seems

that after selection of the prospective persons seeking to avail the benefit of the Policy for setting up of new industries, various benefits and concessions were granted to them by the State Government, but later on a number of applicants who had shown keen interest and even purchased land, taking advantage of Policy of the State Government, never established the industrial undertaking, necessitating re-looking into entire policy by the Government and consequently passing of the Government Order dated 21.08.2009. In the said government order, it was provided that whenever such a matter comes up before the State Government where a person wants to take benefit of the Policy of the Government of India as well as the State of Uttar Pradesh for setting up of the Agro Food Park/Mega Food Park etc., the said application would be duly scrutinized by the Industries Department and such applicants would also be directed to give a performance-guarantee to ensure that apart from seeking benefits made available by the State Government, they would also implement and establish their Units in the State of Uttar Pradesh. It was further provided that wherever exemption in the stamp-duty is given, a bank-guarantee would also be obtained for the same amount and in case there is any violation of the terms and conditions of the Policy, the State Government would be at liberty to invoke the said bank-guarantee.

10. In change in Government policy was brought about to ensure setting up of a new undertaking and in case they are not established after purchase of the land, the State Government would be at liberty to encash the fixed deposit made available by the prospective applicant seeking to set up the new Industry.

11. In pursuance of the aforesaid Government Orders a notice under section 47-A of the Stamps Act was sent to the petitioner by the Assistant Commissioner

(Stamps), Raebareli, directing him to show-cause as to why deficiency in stamp-fees be not recovered from him with regard to the registration of sale-deed on 20.06.2006. The petitioner duly responded to the said show-cause notice and filed his objections. He stated that the said sale-deed was registered on the basis of the exemption granted by the State Government in pursuance of the Notification dated 19.01.2005 in terms of the letter dated 28.03.2006.

12. It was further submitted by him that there is no infirmity in the exemption of stamp-duty granted to the petitioner as on the basis of the subsequent notification neither has the initial Notification dated 19.01.2005 been superseded or taken back nor any conditions exist for invocation of the proceedings under section 47-A of the Stamps Act 1899 and, consequently, the order as proposed to be passed in the show-cause notice could not be passed.

13. The Assistant Commissioner (Stamps) duly considered and rejected the objections raised by the petitioner and by means of the impugned order 26.11.2012 directed the petitioner to deposit the amount, equivalent to the valuation as per the market-value of the land. In the said order, it has been stated that the said land was given to the petitioner in pursuance of the Policy of the Government wherein the petitioner was to set up a new undertaking and only such undertakings were given benefits of exemption of the stamp-duty, who had agreed to set up new Industries in pursuance of the Policy of the State Government. The petitioner having not complied with the directions of the State Government and despite repeated letters no Industrial Unit was established by him and consequently by means of the impugned

order the petitioner was directed to pay the full Stamp-duty, which he was liable to liable to pay as if the exemption was not granted to him.

14. Learned counsel for the petitioner has submitted that the impugned order is illegal and arbitrary and is without jurisdiction as such an order could not have been passed in exercise of its powers under section 47-A of the Act of 1899. It has further been submitted that the Rules and conditions and provisions existing on the date of execution of the document are the only relevant factors, which could have been taken into consideration while levying stamp-duty on the instrument. Subsequent changes and considerations occurring after the execution of the said instrument cannot be taken into account while passing an order under section 47-A of the act of 1899 and hence the order is illegal and deserves to be set aside.

15. In the present case it is stated that on the date when the instrument was registered, i.e. on 20.06.2006, there was a valid order for exemption passed in favour of the petitioner in pursuance of the Government Notification dated 19.01.2005. It is stated that neither the exemption granted to the petitioner, nor the Policy of the State Government dated 19.01.2005 has been revoked and, consequently, the impugned order is illegal and arbitrary. He further submits that a bare reading of section 47-A of the Act of 1899 would indicate that the determination of the stamp-duty has to be only with reference to the provisions existing on the date of execution of the said instrument, and further there was no deficiency in the stamp-duty paid by the petitioner on the date of execution of the said document, as the State Government had exempted the

stamp-duty in case of the petitioner, and, consequently, even if there is a variation in Government Policy subsequently, that shall have no bearing or influence on the duty paid by the petitioner at the time of execution of the sale-deed.

16. Learned counsel for the petitioner has also relied on the judgment of the Supreme Court in the case of *Shanti Bhushan (D) thr. Lr. and ors. v. State of U.P. & ors., 2023 SCC Online SC 489*, wherein it is stated that Registering Authority has to ascertain the correct market-value on the date of execution of the document. It is stated that on the date of execution of the said document the petitioner having a valid exemption letter, which was duly honoured and accepted by the respondents and consequently no variation in the same is permissible and consequently assailed the impugned order. Lastly it was submitted that a perusal of the subsequent Government order would also indicate that provision has been made for recovery of the amount, equivalent to the stamp-duty, payable by the person seeking benefit of the Policy of the Government for setting up of a new Unit. The subsequent Policy provides for submission of a Bank Guarantee as a Fixed Deposit and in case such a person does not fulfill the conditions of the Policy and does not set up the Fresh Unit, it was open for the Government to invoke the bank-guarantee and encash the Fixed Deposit, so as to reconstitute themselves as if the stamp-duty has in fact been paid. Even in the subsequent Policies and Notifications dated 21.08.2009 or 22.11.2007 it has not been provided that resort can be had to provisions of section 47-A of the Indian Stamps Act 1899 to recover the deficit stamp-duty paid on execution of such instrument.

17. Learned Standing Counsel, on the other hand, has opposed the writ petition. He has submitted that the petitioner has taken benefit of the Policy of the State Government and obtained exemption from stamp-duty while registering the said land, which were for the object of setting up of a new Unit. The petitioner himself has violated the Policy of the State Government and despite repeated reminders has not set up a Unit and consequently it was open for the State Government to withdraw the benefit granted to him and, hence, he supported the impugned order.

18. I have heard the counsels of the parties and perused the record. From a perusal of the Notification dated 19.01.2005 it is clear that all such persons who intended to set up an Agriculture/Food related business with regard to Food Processing etc. were given the benefit of exemption from stamp-duty to as to enable them to purchase land at a lower cost, which policy was framed to promote Industrialization in the State of U.P. The petitioner intending to take benefit of the policy of the State Government also made an application, and after scrutinizing his application and finding the same to be in order exemption from stamp-duty was granted by means of order dated 28.03.2006. It is after a lapse of nearly six years that the State Government realized that the petitioner has not fulfilled his commitment and has not set up the industrial Unit, consequently, proceedings under section 47-A of the Indian Stamps Act, 1899 were initiated and a notice was issued to the petitioner on 01.06.2012 asking him to pay the market-value of the stamp-duty with regard to the sale-deed executed by him on 20.06.2006.

19. The petitioner has questioned the very initiation of proceedings under section 47-A of the act of 1899 in the facts of the

present case. To answer the question as raised in the present petition it is noticed that as per section 47-A of the Act of 1899 power has been vested upon the Prescribed Authority to require the person executing the instrument for paying full stamp-duty on the market-value of the property, as set forth in the said instrument. The exercise can be done immediately after presentation of the said instrument for registration. It is not the case of the respondents that on the date of execution of the said instrument the petitioner had not paid adequate stamp-duty. It is admitted that the petitioner was exempted from payment of stamp-duty in accordance to notification issued by the State government in exercise of powers under section 9 of the Indian Stamps Act 1899, where power has been reserved to the Government to reduce or remit, whether prospectively or retrospectively, in the whole or any part of the territories under its administration, the duties with which any instruments or any particular class of instruments, or any of the instruments belonging to such class, or any instruments when executed by or in favour of any particular class of persons or by or in favour of any members of such class, are chargeable. The power accordingly is vested with the State Government to reduce or remit the stamp-duty as per section 9 of the Act of 1899. The State Government had invoked the provision of Section 9 of the Act of 1899 while issuing the exemption-notification dated 19.01.2005.

20. It is evident that the power of the State Government under section 9-A is only with regard to "reduce or remit" the stamp-duty, which was accordingly done when it notified its intentions to reduce and exempt the stamp-duty by means of Notification dated 19.01.2005. There is no other order which has been brought on record either by

the petitioner or by the respondents cancelling, revoking or modifying the remission of stamp-duty on the Units established in pursuance of the Policy of the State Government.

21. Considering the fact that the State government had issued an order dated 28/03/2006 exempted the levying of Stamp duty in case of the petitioner was setting up the industrial unit in pursuance of the policy of the State government, there was no infirmity or deficiency in the stamp duty paid by the petitioner on the date of its registration. The Supreme Court in number of cases has held that the relevant date for the purposes of determining the stamp duty payable on the instrument, is the date of its execution. In the present case the sale deed was executed on 20/06/2006 a valid exemption order passed by the State government was in existence. The Supreme Court in the case of **Shanti Bhushan(D) Thr. Lr. and Others vs State of U.P. and Others 2023 SCC OnLine SC 489** have observed:-

?23.Hence, when a sale deed is presented for registration, the registering authority must ascertain the correct market value of the property subject matter of the document on the date of execution of the document. The stamp duty is payable on the basis of such market value and not on the consideration mentioned in the document. If the consideration mentioned is more than the market value, the stamp duty will be payable on the consideration shown. Moreover, the market value mentioned in the agreement for sale or the market value prevailing on the date of the agreement or the market value prevailing on the date on which the bargain was struck is of no relevance for deciding the stamp duty. The relevant market value is the one which

prevails on the date of execution of the conveyance. Therefore, we have no manner of doubt that the appellants were under an obligation to pay stamp duty calculated on the market value of the sale deed property on the date of execution of the sale deed.?

22. Considering the above facts and arguments of the learned counsel for the parties, I find force with the contention raised by the petitioner that such an exercise of power, as has been done in the present case under section 47-A, could not have been invoked against the petitioner, as there was no infirmity with regard to the stamp-duty leviable on the instrument on the dates of its registration. The relevant date to be considered for exercise of powers under section 47-A is the date of execution of instrument. The respondents have also not demonstrated any infirmity in exemption of the stamp-duty payable on the sale-deed, which was registered on 20.06.2006. The cause of action, even according to the respondents, arose only subsequent to 20.06.2006, when after lapse of a considerable period of time the petitioner did not establish the Unit in pursuance of the Policy of the State Government.

23. The State Government, when faced with the situation that intending entrepreneurs who have taken benefit of the Policy of the Food Processing Industry, have purchased land, but subsequently failed to set up the Industry, issued a clarification by means of Notification dated 21.08.2009 and 12.11.2007 and introduced strict guidelines for setting up of new Industries by persons, who have taken benefit of the Policy. The clarification is clearly prospective in nature, as it is silent about the action which would be taken against person who has already taken

advantage of exemption-Notification, but failed to set up the Industrial Unit.

24. The relevant fact in this case is, as already provided by the State Government in its Notification dated 21.08.2009 and 12.11.2007, where it is provided that in case such persons have deposited Fixed Deposit or Bank Guarantee, it was open for the State Government to encash the same. We do not find any provision by which the stamp-duty, which was in fact leviable by Notification dated 19.01.2005, but stood exempted by a valid exemption notification, can be recovered subsequently. The exercise of power, as has been done in the present case, is clearly de hors the provisions of the Act and the Rules as well as the Notification issued by the respondents itself.

25. Indian Stamps Act, 1989, being a fiscal statute, the provisions thereof have to be strictly interpreted. Supreme Court in the case of ***Swedish Natch AB Vs. SEBI, 2004 (11) SCC 641 and CIT Vs. Ajax Products Ltd., 55 ITR 741*** has held that while interpreting the provisions of fiscal legislation courts should neither add nor subtract a word from the provisions of instant meaning of the sections. It may be mentioned that the foremost principle of interpretation of fiscal statutes in every system of interpretation is the rule of strict interpretation which provides that where the words of the statute are absolutely clear and unambiguous, recourse cannot be had to the principles of interpretation other than the literal rule.

26. Accordingly, while interpreting such a statute, equitable considerations cannot be applied. A taxing statute has to be interpreted in accordance with what is clearly expressed therein. While

interpreting such a statute and determining the liability to pay tax, the provisions are required to be construed strictly. In other words, the rule of literal construction must be applied while interpreting a taxing statute. It must be interpreted in terms of the natural construction of the words used. There is no scope to imply anything which is not expressly provided. There is no scope for application of equitable principles while deciding levy of stamp duty. Present case cannot be decided on the basis of equity and this Court is of the considered view that the provisions of Section 47-A of the Stamp Act do not provide for levy of stamp on the instruments which have previously been exempted by valid notification of the State Government under Section 9 of the Act of 1989. Accordingly, the impugned order is clearly illegal and arbitrary and deserves to be set aside.

27. In the light of the above, the impugned order dated 26.11.2012 is illegal and arbitrary and, consequently, is set aside. The writ petition is, accordingly, allowed.

(2023) 9 ILRA 528

**ORIGINAL JURISDICTION
CIVIL SIDE**

DATED: LUCKNOW 24.08.2023

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ-C No. 1002134 of 2013

M/S Anjali Exim Pvt. Ltd. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
P.C. Mishra, Sachin Garg

Counsel for the Respondents:

C.S.C.

Held:

Civil Law – Indian Stamp Act, 1899 - Section 47-A - Stamp duty liability under Section 47-A of the Indian Stamp Act, 1899 must be assessed with reference to the date of execution of the instrument. Where valid exemption from stamp duty was granted under a Government Notification in force at the time of registration, subsequent policy changes cannot retrospectively impose liability. The Prescribed Authority acted without jurisdiction in invoking Section 47-A years after execution, based solely on the petitioner's failure to set up the proposed industrial unit. Recovery could only be pursued through the mechanism (e.g., bank guarantee) provided in the subsequent policy, not by reassessing stamp duty already exempted.

Writ petition allowed.

Case Law Discussed:

1. Shanti Bhushan (D) through L.Rs. & ors. Vs St. of U.P. & ors., 2023 SCC OnLine SC 489
2. Swedish Match AB Vs SEBI, (2004) 11 SCC 641
3. CIT Vs Ajax Products Ltd., (1969) 55 ITR 741 (SC)

Key Legal Propositions:

- Section 9 of the Indian Stamp Act empowers the Government to grant exemption from stamp duty, which is binding unless specifically revoked.
- Section 47-A cannot be invoked retrospectively to recover stamp duty from exempted transactions based on later policy clarifications.
- Fiscal statutes must be interpreted strictly - there is no scope for equitable considerations or retrospective impositions unless clearly legislated.

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

1. Heard Sri Sachin Garg, learned counsel appearing on behalf of the petitioner as also the learned Standing Counsel for the respondents, and perused the records.

2. The petitioner in the present writ petition has assailed the order dated 26.11.2012 of the Prescribed Authority/Asstt. Commissioner (Stamp), Raebareli, under the Indian Stamps Act, 1899 (hereinafter referred as 'Act of 1899'), whereby in exercise of powers under section 47-A he has determined the stamp-duty payable on the sale-deed executed by the petitioner on 20.06.2006 to be deficit in stamps and thereby directed the petitioner to pay an amount of Rs. 12,14,940.00 alongwith penalty of Rs. 13,580.00 alongwith 1.5% per month interest from 20.06.2006.

3. The question which has been raised by the petitioner in the present writ petition is as to whether once on the basis of the exemption Notification issued under Section 9 of the Act of 1899, stamp-duty has been exempted and the instrument registered, can by subsequent change in the Government Policy, provision of section 47-A be invoked requiring the person to pay stamp duty on the market value of the property?

4. Brief facts of the case, as submitted by the petitioner are that the Government of India through Ministry of Food Processing Industry had launched a scheme for establishment of Green Field Agro Food Park in the country during the 10th Five-Year-Plan with the object of providing adequate infrastructure for Food Processing Industry. The Government of Uttar Pradesh also adopted the aforesaid policy and had passed a notification dated 19.01.2005, whereby they

had decided to grant exemption from stamp-duty as well as exemption from registration-fees in respect of purchase of land for setting up Information Technology, Bio Technology Business Process Outsourcing Unit, Call Centers, Agriculture Processing Unit etc., which were being set up taking advantage of the Green Field Agro Food Park Policy.

5. The petitioner being interested in setting up Agro Food Park/Mega Food Park, moved an application before the Inspector General (Registration), U.P., seeking exemption from stamp-duty and registration fees for purchase of the said land. The application of the petitioner was duly processed and the General Manager, District Industry Centre, Raebareli, by means of his letter dated 18.04.2006 directed the Sub Registrar, Maharajganj, Raebareli, to grant of stamp-duty exemption in respect of land areas purchased by the petitioner for setting up the Agro Food Park/Mega Food Park.

6. In pursuance of the aforesaid exemption from stamp duty granted to the petitioner, sale deed was registered on 20.06.2006.

7. After execution of the sale deed the petitioner did not proceed to utilise the said land for setting up of the Agro-based industry for which the concessions were granted to him. The collector initiated proceedings under section 47A of the Indian Stamp Act 1899 on the ground that the petitioner had failed to set up the industrial undertaking. The exemption from stamp duty was granted as per the policy of the State government, and the petitioner not having complied with his part of the commitment, he would be liable to pay the amount of stamp duty which was leviable on registering of the said sale deed.

8. It has been submitted by the counsel for the petitioner that the State Government has subsequently issued a Government Order dated 21.08.2009 incorporating certain new conditions in the implementation of the scheme related to setting up of new Food Processing Industries, where in order to seek the benefits. The applicants will now have to give a bank guarantee or fixed deposit for the amount equivalent to stamp duty which would have been leviable had the applicants not been given the benefit of exemption under the said policy. The purpose of requiring the applicants to give the bank guarantee or fixed deposit is to ensure that the applicants after purchasing the land, proceed to set up the industrial unit, failing which the said bank guarantee or fixed deposit was liable to be encashed. The said change in policy ensured that the applicants after availing of the concession in stamp duty with regard to the registration of land, granted by the State government would proceed to set up the industrial unit.

9. The said Government Order is in the form of a clarification to the previous Government order dated 19.01.2005. It seems that after selection of the prospective persons seeking to avail the benefit of the Policy for setting up of new industries, various benefits and concessions were granted to them by the State Government, but later on a number of applicants who had shown keen interest and even purchased land, taking advantage of Policy of the State Government, never established the industrial undertaking, necessitating re-looking into entire policy by the Government and consequently passing of the Government Order dated 21.08.2009. In the said government order, it was provided that whenever such a matter comes up before the State Government where a

person wants to take benefit of the Policy of the Government of India as well as the State of Uttar Pradesh for setting up of the Agro Food Park/Mega Food Park etc., the said application would be duly scrutinized by the Industries Department and such applicants would also be directed to give a performance-guarantee to ensure that apart from seeking benefits made available by the State Government, they would also implement and establish their Units in the State of Uttar Pradesh. It was further provided that wherever exemption in the stamp-duty is given, a bank-guarantee would also be obtained for the same amount and in case there is any violation of the terms and conditions of the Policy, the State Government would be at liberty to invoke the said bank-guarantee.

10. In change in Government policy was brought about to ensure setting up of a new undertaking and in case they are not established after purchase of the land, the State Government would be at liberty to encash the fixed deposit made available by the prospective applicant seeking to set up the new Industry.

11. In pursuance of the aforesaid Government Orders a notice under section 47-A of the Stamps Act was sent to the petitioner by the Assistant Commissioner (Stamps), Raebareli, directing him to show-cause as to why deficiency in stamp-fees be not recovered from him with regard to the registration of sale-deed on 20.06.2006. The petitioner duly responded to the said show-cause notice and filed his objections. He stated that the said sale-deed was registered on the basis of the exemption granted by the State Government in pursuance of the Notification dated 19.01.2005 in terms of the letter dated 28.03.2006.

12. It was further submitted by him that there is no infirmity in the exemption of stamp-duty granted to the petitioner as on the basis of the subsequent notification neither has the initial Notification dated 19.01.2005 been superseded or taken back nor any conditions exist for invocation of the proceedings under section 47-A of the Stamps Act 1899 and, consequently, the order as proposed to be passed in the show-cause notice could not be passed.

13. The Assistant Commissioner (Stamps) duly considered and rejected the objections raised by the petitioner and by means of the impugned order 26.11.2012 directed the petitioner to deposit the amount, equivalent to the valuation as per the market-value of the land. In the said order, it has been stated that the said land was given to the petitioner in pursuance of the Policy of the Government wherein the petitioner was to set up a new undertaking and only such undertakings were given benefits of exemption of the stamp-duty, who had agreed to set up new Industries in pursuance of the Policy of the State Government. The petitioner having not complied with the directions of the State Government and despite repeated letters no Industrial Unit was established by him and consequently by means of the impugned order the petitioner was directed to pay the full Stamp-duty, which he was liable to liable to pay as if the exemption was not granted to him.

14. Learned counsel for the petitioner has submitted that the impugned order is illegal and arbitrary and is without jurisdiction as such an order could not have been passed in exercise of its powers under section 47-A of the Act of 1899. It has further been submitted that the Rules and conditions and provisions existing on the

date of execution of the document are the only relevant factors, which could have been taken into consideration while levying stamp-duty on the instrument. Subsequent changes and considerations occurring after the execution of the said instrument cannot be taken into account while passing an order under section 47-A of the act of 1899 and hence the order is illegal and deserves to be set aside.

15. In the present case it is stated that on the date when the instrument was registered, i.e. on 20.06.2006, there was a valid order for exemption passed in favour of the petitioner in pursuance of the Government Notification dated 19.01.2005. It is stated that neither the exemption granted to the petitioner, nor the Policy of the State Government dated 19.01.2005 has been revoked and, consequently, the impugned order is illegal and arbitrary. He further submits that a bare reading of section 47-A of the Act of 1899 would indicate that the determination of the stamp-duty has to be only with reference to the provisions existing on the date of execution of the said instrument, and further there was no deficiency in the stamp-duty paid by the petitioner on the date of execution of the said document, as the State Government had exempted the stamp-duty in case of the petitioner, and, consequently, even if there is a variation in Government Policy subsequently, that shall have no bearing or influence on the duty paid by the petitioner at the time of execution of the sale-deed.

16. Learned counsel for the petitioner has also relied on the judgment of the Supreme Court in the case of *Shanti Bhushan (D) thr. Lr. and ors. v. State of U.P. & ors.*, 2023 SCC Online SC 489, wherein it is stated that Registering

Authority has to ascertain the correct market-value on the date of execution of the document. It is stated that on the date of execution of the said document the petitioner having a valid exemption letter, which was duly honoured and accepted by the respondents and consequently no variation in the same is permissible and consequently assailed the impugned order. Lastly it was submitted that a perusal of the subsequent Government order would also indicate that provision has been made for recovery of the amount, equivalent to the stamp-duty, payable by the person seeking benefit of the Policy of the Government for setting up of a new Unit. The subsequent Policy provides for submission of a Bank Guarantee as a Fixed Deposit and in case such a person does not fulfill the conditions of the Policy and does not set up the Fresh Unit, it was open for the Government to invoke the bank-guarantee and encash the Fixed Deposit, so as to reconstitute themselves as if the stamp-duty has in fact been paid. Even in the subsequent Policies and Notifications dated 21.08.2009 or 22.11.2007 it has not been provided that resort can be had to provisions of section 47-A of the Indian Stamps Act 1899 to recover the deficit stamp-duty paid on execution of such instrument.

17. Learned Standing Counsel, on the other hand, has opposed the writ petition. He has submitted that the petitioner has taken benefit of the Policy of the State Government and obtained exemption from stamp-duty while registering the said land, which were for the object of setting up of a new Unit. The petitioner himself has violated the Policy of the State Government and despite repeated reminders has not set up a Unit and consequently it was open for the State Government to withdraw the benefit granted to him and, hence, he supported the impugned order.

18. I have heard the counsels of the parties and perused the record. From a perusal of the Notification dated 19.01.2005 it is clear that all such persons who intended to set up an Agriculture/Food related business with regard to Food Processing etc. were given the benefit of exemption from stamp-duty to as to enable them to purchase land at a lower cost, which policy was framed to promote Industrialization in the State of U.P. The petitioner intending to take benefit of the policy of the State Government also made an application, and after scrutinizing his application and finding the same to be in order exemption from stamp-duty was granted by means of order dated 28.03.2006. It is after a lapse of nearly six years that the State Government realized that the petitioner has not fulfilled his commitment and has not set up the industrial Unit, consequently, proceedings under section 47-A of the Indian Stamps Act, 1899 were initiated and a notice was issued to the petitioner on 01.06.2012 asking him to pay the market-value of the stamp-duty with regard to the sale-deed executed by him on 20.06.2006.

19. The petitioner has questioned the very initiation of proceedings under section 47-A of the act of 1899 in the facts of the present case. To answer the question as raised in the present petition it is noticed that as per section 47-A of the Act of 1899 power has been vested upon the Prescribed Authority to require the person executing the instrument for paying full stamp-duty on the market-value of the property, as set forth in the said instrument. The exercise can be done immediately after presentation of the said instrument for registration. It is not the case of the respondents that on the date of execution of the said instrument the petitioner had not paid adequate stamp-

duty. It is admitted that the petitioner was exempted from payment of stamp-duty in accordance to notification issued by the State government in exercise of powers under section 9 of the Indian Stamps Act 1899, where power has been reserved to the Government to reduce or remit, whether prospectively or retrospectively, in the whole or any part of the territories under its administration, the duties with which any instruments or any particular class of instruments, or any of the instruments belonging to such class, or any instruments when executed by or in favour of any particular class of persons or by or in favour of any members of such class, are chargeable. The power accordingly is vested with the State Government to reduce or remit the stamp-duty as per section 9 of the Act of 1899. The State Government had invoked the provision of Section 9 of the Act of 1899 while issuing the exemption-notification dated 19.01.2005.

20. It is evident that the power of the State Government under section 9-A is only with regard to "reduce or remit" the stamp-duty, which was accordingly done when it notified its intentions to reduce and exempt the stamp-duty by means of Notification dated 19.01.2005. There is no other order which has been brought on record either by the petitioner or by the respondents cancelling, revoking or modifying the remission of stamp-duty on the Units established in pursuance of the Policy of the State Government.

21. Considering the fact that the State government had issued an order dated 28/03/2006 exempted the levying of Stamp duty in case of the petitioner was setting up the industrial unit in pursuance of the policy of the State government, there was no infirmity or deficiency in the stamp duty

paid by the petitioner on the date of its registration. The Supreme Court in number of cases has held that the relevant date for the purposes of determining the stamp duty payable on the instrument, is the date of its execution. In the present case the sale deed was executed on 20/06/2006 a valid exemption order passed by the State government was in existence. The Supreme Court in the case of **Shanti Bhushan(D) Thr. Lr. and Others vs State of U.P. and Others 2023 SCC OnLine SC 489** have observed:-

23.Hence, when a sale deed is presented for registration, the registering authority must ascertain the correct market value of the property subject matter of the document on the date of execution of the document. The stamp duty is payable on the basis of such market value and not on the consideration mentioned in the document. If the consideration mentioned is more than the market value, the stamp duty will be payable on the consideration shown. Moreover, the market value mentioned in the agreement for sale or the market value prevailing on the date of the agreement or the market value prevailing on the date on which the bargain was struck is of no relevance for deciding the stamp duty. The relevant market value is the one which prevails on the date of execution of the conveyance. Therefore, we have no manner of doubt that the appellants were under an obligation to pay stamp duty calculated on the market value of the sale deed property on the date of execution of the sale deed.?

22. Considering the above facts and arguments of the learned counsel for the parties, I find force with the contention raised by the petitioner that such an exercise of power, as has been done in the present case under section 47-A, could not

have been invoked against the petitioner, as there was no infirmity with regard to the stamp-duty leviable on the instrument on the dates of its registration. The relevant date to be considered for exercise of powers under section 47-A is the date of execution of instrument. The respondents have also not demonstrated any infirmity in exemption of the stamp-duty payable on the sale-deed, which was registered on 20.06.2006. The cause of action, even according to the respondents, arose only subsequent to 20.06.2006, when after lapse of a considerable period of time the petitioner did not establish the Unit in pursuance of the Policy of the State Government.

23. The State Government, when faced with the situation that intending entrepreneurs who have taken benefit of the Policy of the Food Processing Industry, have purchased land, but subsequently failed to set up the Industry, issued a clarification by means of Notification dated 21.08.2009 and 12.11.2007 and introduced strict guidelines for setting up of new Industries by persons, who have taken benefit of the Policy. The clarification is clearly prospective in nature, as it is silent about the action which would be taken against person who has already taken advantage of exemption-Notification, but failed to set up the Industrial Unit.

24. The relevant fact in this case is, as already provided by the State Government in its Notification dated 21.08.2009 and 12.11.2007, where it is provided that in case such persons have deposited Fixed Deposit or Bank Guarantee, it was open for the State Government to encash the same. We do not find any provision by which the stamp-duty, which was in fact leviable by Notification dated 19.01.2005, but stood

exempted by a valid exemption notification, can be recovered subsequently. The exercise of power, as has been done in the present case, is clearly *de hors* the provisions of the Act and the Rules as well as the Notification issued by the respondents itself.

25. Indian Stamps Act, 1989, being a fiscal statute, the provisions thereof have to be strictly interpreted. Supreme Court in the case of *Swedish Natch AB Vs. SEBI, 2004 (11) SCC 641 and CIT Vs. Ajax Products Ltd., 55 ITR 741* has held that while interpreting the provisions of fiscal legislation courts should neither add nor subtract a word from the provisions of instant meaning of the sections. It may be mentioned that the foremost principle of interpretation of fiscal statutes in every system of interpretation is the rule of strict interpretation which provides that where the words of the statute are absolutely clear and unambiguous, recourse cannot be had to the principles of interpretation other than the literal rule.

26. Accordingly, while interpreting such a statute, equitable considerations cannot be applied. A taxing statute has to be interpreted in accordance with what is clearly expressed therein. While interpreting such a statute and determining the liability to pay tax, the provisions are required to be construed strictly. In other words, the rule of literal construction must be applied while interpreting a taxing statute. It must be interpreted in terms of the natural construction of the words used. There is no scope to imply anything which is not expressly provided. There is no scope for application of equitable principles while deciding levy of stamp duty. Present case cannot be decided on the basis of equity and this Court is of the considered view

that the provisions of Section 47-A of the Stamp Act do not provide for levy of stamp on the instruments which have previously been exempted by valid notification of the State Government under Section 9 of the Act of 1989. Accordingly, the impugned order is clearly illegal and arbitrary and deserves to be set aside.

27. In the light of the above, the impugned order dated 26.11.2012 is illegal and arbitrary and, consequently, is set aside. The writ petition is, accordingly, allowed.

(2023) 9 ILRA 535
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.08.2023

BEFORE
THE HON'BLE ALOK MATHUR, J.

Writ-C No. 1002142 of 2013

M/S Anjali Exim Pvt. Ltd. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
P.C. Mishra, Sachin Garg

Counsel for the Respondents:
C.S.C.

Held –

Where the petitioner purchased land for establishing an Agro Food Park under the 10th Five-Year Plan and was granted exemption from stamp duty vide Government Notification dated 19.01.2005, the subsequent failure to establish the industrial unit did not empower the authorities to invoke Section 47-A of the Indian Stamp Act, 1899. The exemption granted under Section 9 of the Act was never revoked, and stamp duty had been lawfully exempted at the time of execution of the sale deed dated 20.06.2006. The subsequent policy changes introduced via Government Orders dated

21.08.2009 and 12.11.2007 were prospective and did not authorize retrospective recovery of stamp duty through Section 47-A. The impugned order demanding deficiency in stamp duty and penalty was held to be arbitrary, without jurisdiction, and liable to be set aside.

Case Law Discussed:

1. Shanti Bhushan (D) thr. Lrs. Vs St. of U.P. & ors., 2023 SCC OnLine SC 489
2. Swedish Match AB Vs SEBI, (2004) 11 SCC 641
3. CIT Vs Ajax Products Ltd., 55 ITR 741

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

1. Heard Sri Sachin Garg, learned counsel appearing on behalf of the petitioner as also the learned Standing Counsel for the respondents, and perused the records.

2. The petitioner in the present writ petition has assailed the order dated 26.11.2012 of the Prescribed Authority/Asstt. Commissioner (Stamp), Raebareli, under the Indian Stamps Act, 1899 (hereinafter referred as 'Act of 1899'), whereby in exercise of powers under section 47-A he has determined the stamp-duty payable on the sale-deed executed by the petitioner on 20.06.2006 to be deficit in stamps and thereby directed the petitioner to pay an amount of Rs. 94,940.00 alongwith penalty of Rs. 43,980.00 alongwith 1.5% per month interest from 20.06.2006.

3. The question which has been raised by the petitioner in the present writ petition is as to whether once on the basis of the exemption Notification issued under Section 9 of the Act of 1899, stamp-duty has been exempted and the instrument

registered, can by subsequent change in the Government Policy, provision of section 47-A be invoked requiring the person to pay stamp duty on the market value of the property?

4. Brief facts of the case, as submitted by the petitioner are that the Government of India through Ministry of Food Processing Industry had launched a scheme for establishment of Green Field Agro Food Park in the country during the 10th Five-Year-Plan with the object of providing adequate infrastructure for Food Processing Industry. The Government of Uttar Pradesh also adopted the aforesaid policy and had passed a notification dated 19.01.2005, whereby they had decided to grant exemption from stamp-duty as well as exemption from registration-fees in respect of purchase of land for setting up Information Technology, Bio Technology Business Process Outsourcing Unit, Call Centers, Agriculture Processing Unit etc., which were being set up taking advantage of the Green Field Agro Food Park Policy.

5. The petitioner being interested in setting up Agro Food Park/Mega Food Park, moved an application before the Inspector General (Registration), U.P., seeking exemption from stamp-duty and registration fees for purchase of the said land. The application of the petitioner was duly processed and the General Manager, District Industry Centre, Raebareli, by means of his letter dated 18.04.2006 directed the Sub Registrar, Maharajganj, Raebareli, to grant of stamp-duty exemption in respect of land areas purchased by the petitioner for setting up the Agro Food Park/Mega Food Park.

6. In pursuance of the aforesaid exemption from stamp duty granted to the

petitioner, sale deed was registered on 20.06.2006.

7. After execution of the sale deed the petitioner did not proceed to utilise the said land for setting up of the Agro-based industry for which the concessions were granted to him. The collector initiated proceedings under section 47A of the Indian Stamp Act 1899 on the ground that the petitioner had failed to set up the industrial undertaking. The exemption from stamp duty was granted as per the policy of the State government, and the petitioner not having complied with his part of the commitment, he would be liable to pay the amount of stamp duty which was leviable on registering of the said sale deed.

8. It has been submitted by the counsel for the petitioner that the State Government has subsequently issued a Government Order dated 21.08.2009 incorporating certain new conditions in the implementation of the scheme related to setting up of new Food Processing Industries, where in order to seek the benefits. The applicants will now have to give a bank guarantee or fixed deposit for the amount equivalent to stamp duty which would be leviable had the applicants not been given the benefit of exemption under the said policy. The purpose of requiring the applicants to give the bank guarantee or fixed deposit is to ensure that the applicants after purchasing the land, proceed to set up the industrial unit, failing which the said bank guarantee or fixed deposit was liable to be encashed. The said change in policy ensured that the applicants after availing of the concession in stamp duty with regard to the registration of land, granted by the State government would proceed to set up the industrial unit.

9. The said Government Order is in the form of a clarification to the previous

Government order dated 19.01.2005. It seems that after selection of the prospective persons seeking to avail the benefit of the Policy for setting up of new industries, various benefits and concessions were granted to them by the State Government, but later on a number of applicants who had shown keen interest and even purchased land, taking advantage of Policy of the State Government, never established the industrial undertaking, necessitating re-looking into entire policy by the Government and consequently passing of the Government Order dated 21.08.2009. In the said government order, it was provided that whenever such a matter comes up before the State Government where a person wants to take benefit of the Policy of the Government of India as well as the State of Uttar Pradesh for setting up of the Agro Food Park/Mega Food Park etc., the said application would be duly scrutinized by the Industries Department and such applicants would also be directed to give a performance-guarantee to ensure that apart from seeking benefits made available by the State Government, they would also implement and establish their Units in the State of Uttar Pradesh. It was further provided that wherever exemption in the stamp-duty is given, a bank-guarantee would also be obtained for the same amount and in case there is any violation of the terms and conditions of the Policy, the State Government would be at liberty to invoke the said bank-guarantee.

10. In change in Government policy was brought about to ensure setting up of a new undertaking and in case they are not established after purchase of the land, the State Government would be at liberty to encash the fixed deposit made available by the prospective applicant seeking to set up the new Industry.

11. In pursuance of the aforesaid Government Orders a notice under section 47-A of the Stamps Act was sent to the petitioner by the Assistant Commissioner (Stamps), Raebareli, directing him to show-cause as to why deficiency in stamp-fees be not recovered from him with regard to the registration of sale-deed on 20.06.2006. The petitioner duly responded to the said show-cause notice and filed his objections. He stated that the said sale-deed was registered on the basis of the exemption granted by the State Government in pursuance of the Notification dated 19.01.2005 in terms of the letter dated 28.03.2006.

12. It was further submitted by him that there is no infirmity in the exemption of stamp-duty granted to the petitioner as on the basis of the subsequent notification neither has the initial Notification dated 19.01.2005 been superseded or taken back nor any conditions exist for invocation of the proceedings under section 47-A of the Stamps Act 1899 and, consequently, the order as proposed to be passed in the show-cause notice could not be passed.

13. The Assistant Commissioner (Stamps) duly considered and rejected the objections raised by the petitioner and by means of the impugned order 26.11.2012 directed the petitioner to deposit the amount, equivalent to the valuation as per the market-value of the land. In the said order, it has been stated that the said land was given to the petitioner in pursuance of the Policy of the Government wherein the petitioner was to set up a new undertaking and only such undertakings were given benefits of exemption of the stamp-duty, who had agreed to set up new Industries in pursuance of the Policy of the State Government. The petitioner having not

complied with the directions of the State Government and despite repeated letters no Industrial Unit was established by him and consequently by means of the impugned order the petitioner was directed to pay the full Stamp-duty, which he was liable to liable to pay as if the exemption was not granted to him.

14. Learned counsel for the petitioner has submitted that the impugned order is illegal and arbitrary and is without jurisdiction as such an order could not have been passed in exercise of its powers under section 47-A of the Act of 1899. It has further been submitted that the Rules and conditions and provisions existing on the date of execution of the document are the only relevant factors, which could have been taken into consideration while levying stamp-duty on the instrument. Subsequent changes and considerations occurring after the execution of the said instrument cannot be taken into account while passing an order under section 47-A of the act of 1899 and hence the order is illegal and deserves to be set aside.

15. In the present case it is stated that on the date when the instrument was registered, i.e. on 20.06.2006, there was a valid order for exemption passed in favour of the petitioner in pursuance of the Government Notification dated 19.01.2005. It is stated that neither the exemption granted to the petitioner, nor the Policy of the State Government dated 19.01.2005 has been revoked and, consequently, the impugned order is illegal and arbitrary. He further submits that a bare reading of section 47-A of the Act of 1899 would indicate that the determination of the stamp-duty has to be only with reference to the provisions existing on the date of execution of the said instrument, and

further there was no deficiency in the stamp-duty paid by the petitioner on the date of execution of the said document, as the State Government had exempted the stamp-duty in case of the petitioner, and, consequently, even if there is a variation in Government Policy subsequently, that shall have no bearing or influence on the duty paid by the petitioner at the time of execution of the sale-deed.

16. Learned counsel for the petitioner has also relied on the judgment of the Supreme Court in the case of *Shanti Bhushan (D) thr. Lr. and ors. v. State of U.P. & ors., 2023 SCC Online SC 489*, wherein it is stated that Registering Authority has to ascertain the correct market-value on the date of execution of the document. It is stated that on the date of execution of the said document the petitioner having a valid exemption letter, which was duly honoured and accepted by the respondents and consequently no variation in the same is permissible and consequently assailed the impugned order. Lastly it was submitted that a perusal of the subsequent Government order would also indicate that provision has been made for recovery of the amount, equivalent to the stamp-duty, payable by the person seeking benefit of the Policy of the Government for setting up of a new Unit. The subsequent Policy provides for submission of a Bank Guarantee as a Fixed Deposit and in case such a person does not fulfill the conditions of the Policy and does not set up the Fresh Unit, it was open for the Government to invoke the bank-guarantee and encash the Fixed Deposit, so as to restitute themselves as if the stamp-duty has in fact been paid. Even in the subsequent Policies and Notifications dated 21.08.2009 or 22.11.2007 it has not been provided that resort can be had to provisions of section

47-A of the Indian Stamps Act 1899 to recover the deficit stamp-duty paid on execution of such instrument.

17. Learned Standing Counsel, on the other hand, has opposed the writ petition. He has submitted that the petitioner has taken benefit of the Policy of the State Government and obtained exemption from stamp-duty while registering the said land, which were for the object of setting up of a new Unit. The petitioner himself has violated the Policy of the State Government and despite repeated reminders has not set up a Unit and consequently it was open for the State Government to withdraw the benefit granted to him and, hence, he supported the impugned order.

18. I have heard the counsels of the parties and perused the record. From a perusal of the Notification dated 19.01.2005 it is clear that all such persons who intended to set up an Agriculture/Food related business with regard to Food Processing etc. were given the benefit of exemption from stamp-duty to as to enable them to purchase land at a lower cost, which policy was framed to promote Industrialization in the State of U.P. The petitioner intending to take benefit of the policy of the State Government also made an application, and after scrutinizing his application and finding the same to be in order exemption from stamp-duty was granted by means of order dated 28.03.2006. It is after a lapse of nearly six years that the State Government realized that the petitioner has not fulfilled his commitment and has not set up the industrial Unit, consequently, proceedings under section 47-A of the Indian Stamps Act, 1899 were initiated and a notice was issued to the petitioner on 01.06.2012 asking him to pay the market-value of the

stamp-duty with regard to the sale-deed executed by him on 20.06.2006.

19. The petitioner has questioned the very initiation of proceedings under section 47-A of the act of 1899 in the facts of the present case. To answer the question as raised in the present petition it is noticed that as per section 47-A of the Act of 1899 power has been vested upon the Prescribed Authority to require the person executing the instrument for paying full stamp-duty on the market-value of the property, as set forth in the said instrument. The exercise can be done immediately after presentation of the said instrument for registration. It is not the case of the respondents that on the date of execution of the said instrument the petitioner had not paid adequate stamp-duty. It is admitted that the petitioner was exempted from payment of stamp-duty in accordance to notification issued by the State government in exercise of powers under section 9 of the Indian Stamps Act 1899, where power has been reserved to the Government to reduce or remit, whether prospectively or retrospectively, in the whole or any part of the territories under its administration, the duties with which any instruments or any particular class of instruments, or any of the instruments belonging to such class, or any instruments when executed by or in favour of any particular class of persons or by or in favour of any members of such class, are chargeable. The power accordingly is vested with the State Government to reduce or remit the stamp-duty as per section 9 of the Act of 1899. The State Government had invoked the provision of Section 9 of the Act of 1899 while issuing the exemption-notification dated 19.01.2005.

20. It is evident that the power of the State Government under section 9-A is only

with regard to "reduce or remit" the stamp-duty, which was accordingly done when it notified its intentions to reduce and exempt the stamp-duty by means of Notification dated 19.01.2005. There is no other order which has been brought on record either by the petitioner or by the respondents cancelling, revoking or modifying the remission of stamp-duty on the Units established in pursuance of the Policy of the State Government.

21. Considering the fact that the State government had issued an order dated 28/03/2006 exempted the levying of Stamp duty in case of the petitioner was setting up the industrial unit in pursuance of the policy of the State government, there was no infirmity or deficiency in the stamp duty paid by the petitioner on the date of its registration. The Supreme Court in number of cases has held that the relevant date for the purposes of determining the stamp duty payable on the instrument, is the date of its execution. In the present case the sale deed was executed on 20/06/2006 a valid exemption order passed by the State government was in existence. The Supreme Court in the case of **Shanti Bhushan(D) Thr. Lr. and Others vs State of U.P. and Others 2023 SCC OnLine SC 489** have observed:-

?23.Hence, when a sale deed is presented for registration, the registering authority must ascertain the correct market value of the property subject matter of the document on the date of execution of the document. The stamp duty is payable on the basis of such market value and not on the consideration mentioned in the document. If the consideration mentioned is more than the market value, the stamp duty will be payable on the consideration shown. Moreover, the market value mentioned in

the agreement for sale or the market value prevailing on the date of the agreement or the market value prevailing on the date on which the bargain was struck is of no relevance for deciding the stamp duty. The relevant market value is the one which prevails on the date of execution of the conveyance. Therefore, we have no manner of doubt that the appellants were under an obligation to pay stamp duty calculated on the market value of the sale deed property on the date of execution of the sale deed.?

22. Considering the above facts and arguments of the learned counsel for the parties, I find force with the contention raised by the petitioner that such an exercise of power, as has been done in the present case under section 47-A, could not have been invoked against the petitioner, as there was no infirmity with regard to the stamp-duty leviable on the instrument on the dates of its registration. The relevant date to be considered for exercise of powers under section 47-A is the date of execution of instrument. The respondents have also not demonstrated any infirmity in exemption of the stamp-duty payable on the sale-deed, which was registered on 20.06.2006. The cause of action, even according to the respondents, arose only subsequent to 20.06.2006, when after lapse of a considerable period of time the petitioner did not establish the Unit in pursuance of the Policy of the State Government.

23. The State Government, when faced with the situation that intending entrepreneurs who have taken benefit of the Policy of the Food Processing Industry, have purchased land, but subsequently failed to set up the Industry, issued a clarification by means of Notification dated 21.08.2009 and 12.11.2007 and introduced

strict guidelines for setting up of new Industries by persons, who have taken benefit of the Policy. The clarification is clearly prospective in nature, as it is silent about the action which would be taken against person who has already taken advantage of exemption-Notification, but failed to set up the Industrial Unit.

24. The relevant fact in this case is, as already provided by the State Government in its Notification dated 21.08.2009 and 12.11.2007, where it is provided that in case such persons have deposited Fixed Deposit or Bank Guarantee, it was open for the State Government to encash the same. We do not find any provision by which the stamp-duty, which was in fact leviable by Notification dated 19.01.2005, but stood exempted by a valid exemption notification, can be recovered subsequently. The exercise of power, as has been done in the present case, is clearly de hors the provisions of the Act and the Rules as well as the Notification issued by the respondents itself.

25. Indian Stamps Act, 1989, being a fiscal statute, the provisions thereof have to be strictly interpreted. Supreme Court in the case of *Swedish Natch AB Vs. SEBI, 2004 (11) SCC 641 and CIT Vs. Ajax Products Ltd., 55 ITR 741* has held that while interpreting the provisions of fiscal legislation courts should neither add nor subtract a word from the provisions of instant meaning of the sections. It may be mentioned that the foremost principle of interpretation of fiscal statutes in every system of interpretation is the rule of strict interpretation which provides that where the words of the statute are absolutely clear and unambiguous, recourse cannot be had to the principles of interpretation other than the literal rule.

26. Accordingly, while interpreting such a statute, equitable considerations cannot be applied. A taxing statute has to be interpreted in accordance with what is clearly expressed therein. While interpreting such a statute and determining the liability to pay tax, the provisions are required to be construed strictly. In other words, the rule of literal construction must be applied while interpreting a taxing statute. It must be interpreted in terms of the natural construction of the words used. There is no scope to imply anything which is not expressly provided. There is no scope for application of equitable principles while deciding levy of stamp duty. Present case cannot be decided on the basis of equity and this Court is of the considered view that the provisions of Section 47-A of the Stamp Act do not provide for levy of stamp on the instruments which have previously been exempted by valid notification of the State Government under Section 9 of the Act of 1989. Accordingly, the impugned order is clearly illegal and arbitrary and deserves to be set aside.

27. In the light of the above, the impugned order dated 26.11.2012 is illegal and arbitrary and, consequently, is set aside. The writ petition is, accordingly, allowed.

(2023) 9 ILRA 541
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.08.2023

BEFORE
THE HON'BLE ALOK MATHUR, J.

Writ-C No. 1002143 of 2013

M/S Anjali Exim Pvt. Ltd. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

P.C. Mishra, Sachin Garg

Counsel for the Respondents:

C.S.C.

Civil Law - Stamp Act, 1899 - Section 47-A - Exemption from Stamp Duty - Petitioner granted exemption vide Notification dated 19.01.2005 for setting up Agro Food Park - Sale deed registered on 20.06.2006 accordingly - No industrial unit set up - Authorities initiated recovery under Section 47-A citing breach of policy - Held: Exemption valid on date of execution - No deficiency in stamp duty at that time - Section 47-A not applicable retrospectively based on later policy changes - Recovery action dehors the Act - Impugned order quashed.

The relevant date for determination of stamp duty is the date of execution of instrument - Subsequent policy changes cannot affect exemption already granted under valid notification issued u/S 9 of the Act - Fiscal statutes must be interpreted strictly.

Case law discussed:

1. Shanti Bhushan (D) through LR's & ors. Vs St. of U.P. & ors., 2023 SCC OnLine SC 489
2. Swedish Match AB Vs SEBI, (2004) 11 SCC 641
3. CIT Vs Ajax Products Ltd., 55 ITR 741

Petition Allowed.

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

1. Heard Sri Sachin Garg, learned counsel appearing on behalf of the petitioner as also the learned Standing Counsel for the respondents, and perused the records.

2. The petitioner in the present writ petition has assailed the order dated

26.11.2012 of the Prescribed Authority/Asstt. Commissioner (Stamp), Raebareli, under the Indian Stamps Act, 1899 (hereinafter referred as 'Act of 1899'), whereby in exercise of powers under section 47-A he has determined the stamp-duty payable on the sale-deed executed by the petitioner on 20.06.2006 to be deficit in stamps and thereby directed the petitioner to pay an amount of Rs. 6,32,220.00 alongwith penalty of Rs. 28,082.00 alongwith 1.5% per month interest from 20.06.2006.

3. The question which has been raised by the petitioner in the present writ petition is as to whether once on the basis of the exemption Notification issued under Section 9 of the Act of 1899, stamp-duty has been exempted and the instrument registered, can by subsequent change in the Government Policy, provision of section 47-A be invoked requiring the person to pay stamp duty on the market value of the property?

4. Brief facts of the case, as submitted by the petitioner are that the Government of India through Ministry of Food Processing Industry had launched a scheme for establishment of Green Field Agro Food Park in the country during the 10th Five-Year-Plan with the object of providing adequate infrastructure for Food Processing Industry. The Government of Uttar Pradesh also adopted the aforesaid policy and had passed a notification dated 19.01.2005, whereby they had decided to grant exemption from stamp-duty as well as exemption from registration-fees in respect of purchase of land for setting up Information Technology, Bio Technology Business Process Outsourcing Unit, Call Centers, Agriculture Processing Unit etc.,

which were being set up taking advantage of the Green Field Agro Food Park Policy.

5. The petitioner being interested in setting up Agro Food Park/Mega Food Park, moved an application before the Inspector General (Registration), U.P., seeking exemption from stamp-duty and registration fees for purchase of the said land. The application of the petitioner was duly processed and the General Manager, District Industry Centre, Raebareli, by means of his letter dated 18.04.2006 directed the Sub Registrar, Maharajganj, Raebareli, to grant of stamp-duty exemption in respect of land areas purchased by the petitioner for setting up the Agro Food Park/Mega Food Park.

6. In pursuance of the aforesaid exemption from stamp duty granted to the petitioner, sale deed was registered on 20.06.2006.

7. After execution of the sale deed the petitioner did not proceed to utilise the said land for setting up of the Agro-based industry for which the concessions were granted to him. The collector initiated proceedings under section 47A of the Indian Stamp Act 1899 on the ground that the petitioner had failed to set up the industrial undertaking. The exemption from stamp duty was granted as per the policy of the State government, and the petitioner not having complied with his part of the commitment, he would be liable to pay the amount of stamp duty which was leviable on registering of the said sale deed.

8. It has been submitted by the counsel for the petitioner that the State Government has subsequently issued a Government Order dated 21.08.2009 incorporating certain new conditions in the

implementation of the scheme related to setting up of new Food Processing Industries, where in order to seek the benefits. The applicants will now have to give a bank guarantee or fixed deposit for the amount equivalent to stamp duty which would been leviable had the applicants not been given the benefit of exemption under the said policy. The purpose of requiring the applicants to give the bank guarantee or fixed deposit is to ensure that the applicants after purchasing the land, proceed to set up the industrial unit, failing which the said bank guarantee or fixed deposit was liable to be encashed. The said change in policy ensured that the applicants after availing of the concession in stamp duty with regard to the registration of land, granted by the State government would proceed to set up the industrial unit.

9. The said Government Order is in the form of a clarification to the previous Government order dated 19.01.2005. It seems that after selection of the prospective persons seeking to avail the benefit of the Policy for setting up of new industries, various benefits and concessions were granted to them by the State Government, but later on a number of applicants who had shown keen interest and even purchased land, taking advantage of Policy of the State Government, never established the industrial undertaking, necessitating re-looking into entire policy by the Government and consequently passing of the Government Order dated 21.08.2009. In the said government order, it was provided that whenever such a matter comes up before the State Government where a person wants to take benefit of the Policy of the Government of India as well as the State of Uttar Pradesh for setting up of the Agro Food Park/Mega Food Park etc., the said application would be duly

scrutinized by the Industries Department and such applicants would also be directed to give a performance-guarantee to ensure that apart from seeking benefits made available by the State Government, they would also implement and establish their Units in the State of Uttar Pradesh. It was further provided that wherever exemption in the stamp-duty is given, a bank-guarantee would also be obtained for the same amount and in case there is any violation of the terms and conditions of the Policy, the State Government would be at liberty to invoke the said bank-guarantee.

10. In change in Government policy was brought about to ensure setting up of a new undertaking and in case they are not established after purchase of the land, the State Government would be at liberty to encash the fixed deposit made available by the prospective applicant seeking to set up the new Industry.

11. In pursuance of the aforesaid Government Orders a notice under section 47-A of the Stamps Act was sent to the petitioner by the Assistant Commissioner (Stamps), Raebareli, directing him to show-cause as to why deficiency in stamp-fees be not recovered from him with regard to the registration of sale-deed on 20.06.2006. The petitioner duly responded to the said show-cause notice and filed his objections. He stated that the said sale-deed was registered on the basis of the exemption granted by the State Government in pursuance of the Notification dated 19.01.2005 in terms of the letter dated 28.03.2006.

12. It was further submitted by him that there is no infirmity in the exemption of stamp-duty granted to the petitioner as on the basis of the subsequent notification

neither has the initial Notification dated 19.01.2005 been superseded or taken back nor any conditions exist for invocation of the proceedings under section 47-A of the Stamps Act 1899 and, consequently, the order as proposed to be passed in the show-cause notice could not be passed.

13. The Assistant Commissioner (Stamps) duly considered and rejected the objections raised by the petitioner and by means of the impugned order 26.11.2012 directed the petitioner to deposit the amount, equivalent to the valuation as per the market-value of the land. In the said order, it has been stated that the said land was given to the petitioner in pursuance of the Policy of the Government wherein the petitioner was to set up a new undertaking and only such undertakings were given benefits of exemption of the stamp-duty, who had agreed to set up new Industries in pursuance of the Policy of the State Government. The petitioner having not complied with the directions of the State Government and despite repeated letters no Industrial Unit was established by him and consequently by means of the impugned order the petitioner was directed to pay the full Stamp-duty, which he was liable to liable to pay as if the exemption was not granted to him.

14. Learned counsel for the petitioner has submitted that the impugned order is illegal and arbitrary and is without jurisdiction as such an order could not have been passed in exercise of its powers under section 47-A of the Act of 1899. It has further been submitted that the Rules and conditions and provisions existing on the date of execution of the document are the only relevant factors, which could have been taken into consideration while levying stamp-duty on the instrument. Subsequent

changes and considerations occurring after the execution of the said instrument cannot be taken into account while passing an order under section 47-A of the act of 1899 and hence the order is illegal and deserves to be set aside.

15. In the present case it is stated that on the date when the instrument was registered, i.e. on 20.06.2006, there was a valid order for exemption passed in favour of the petitioner in pursuance of the Government Notification dated 19.01.2005. It is stated that neither the exemption granted to the petitioner, nor the Policy of the State Government dated 19.01.2005 has been revoked and, consequently, the impugned order is illegal and arbitrary. He further submits that a bare reading of section 47-A of the Act of 1899 would indicate that the determination of the stamp-duty has to be only with reference to the provisions existing on the date of execution of the said instrument, and further there was no deficiency in the stamp-duty paid by the petitioner on the date of execution of the said document, as the State Government had exempted the stamp-duty in case of the petitioner, and, consequently, even if there is a variation in Government Policy subsequently, that shall have no bearing or influence on the duty paid by the petitioner at the time of execution of the sale-deed.

16. Learned counsel for the petitioner has also relied on the judgment of the Supreme Court in the case of **Shanti Bhushan (D) thr. Lr. and ors. v. State of U.P. & ors., 2023 SCC Online SC 489**, wherein it is stated that Registering Authority has to ascertain the correct market-value on the date of execution of the document. It is stated that on the date of execution of the said document the

petitioner having a valid exemption letter, which was duly honoured and accepted by the respondents and consequently no variation in the same is permissible and consequently assailed the impugned order. Lastly it was submitted that a perusal of the subsequent Government order would also indicate that provision has been made for recovery of the amount, equivalent to the stamp-duty, payable by the person seeking benefit of the Policy of the Government for setting up of a new Unit. The subsequent Policy provides for submission of a Bank Guarantee as a Fixed Deposit and in case such a person does not fulfill the conditions of the Policy and does not set up the Fresh Unit, it was open for the Government to invoke the bank-guarantee and encash the Fixed Deposit, so as to reconstitute themselves as if the stamp-duty has in fact been paid. Even in the subsequent Policies and Notifications dated 21.08.2009 or 22.11.2007 it has not been provided that resort can be had to provisions of section 47-A of the Indian Stamps Act 1899 to recover the deficit stamp-duty paid on execution of such instrument.

17. Learned Standing Counsel, on the other hand, has opposed the writ petition. He has submitted that the petitioner has taken benefit of the Policy of the State Government and obtained exemption from stamp-duty while registering the said land, which were for the object of setting up of a new Unit. The petitioner himself has violated the Policy of the State Government and despite repeated reminders has not set up a Unit and consequently it was open for the State Government to withdraw the benefit granted to him and, hence, he supported the impugned order.

18. I have heard the counsels of the parties and perused the record. From a

perusal of the Notification dated 19.01.2005 it is clear that all such persons who intended to set up an Agriculture/Food related business with regard to Food Processing etc. were given the benefit of exemption from stamp-duty to as to enable them to purchase land at a lower cost, which policy was framed to promote Industrialization in the State of U.P. The petitioner intending to take benefit of the policy of the State Government also made an application, and after scrutinizing his application and finding the same to be in order exemption from stamp-duty was granted by means of order dated 28.03.2006. It is after a lapse of nearly six years that the State Government realized that the petitioner has not fulfilled his commitment and has not set up the industrial Unit, consequently, proceedings under section 47-A of the Indian Stamps Act, 1899 were initiated and a notice was issued to the petitioner on 01.06.2012 asking him to pay the market-value of the stamp-duty with regard to the sale-deed executed by him on 20.06.2006.

19. The petitioner has questioned the very initiation of proceedings under section 47-A of the act of 1899 in the facts of the present case. To answer the question as raised in the present petition it is noticed that as per section 47-A of the Act of 1899 power has been vested upon the Prescribed Authority to require the person executing the instrument for paying full stamp-duty on the market-value of the property, as set forth in the said instrument. The exercise can be done immediately after presentation of the said instrument for registration. It is not the case of the respondents that on the date of execution of the said instrument the petitioner had not paid adequate stamp-duty. It is admitted that the petitioner was exempted from payment of stamp-duty in

accordance to notification issued by the State government in exercise of powers under section 9 of the Indian Stamps Act 1899, where power has been reserved to the Government to reduce or remit, whether prospectively or retrospectively, in the whole or any part of the territories under its administration, the duties with which any instruments or any particular class of instruments, or any of the instruments belonging to such class, or any instruments when executed by or in favour of any particular class of persons or by or in favour of any members of such class, are chargeable. The power accordingly is vested with the State Government to reduce or remit the stamp-duty as per section 9 of the Act of 1899. The State Government had invoked the provision of Section 9 of the Act of 1899 while issuing the exemption-notification dated 19.01.2005.

20. It is evident that the power of the State Government under section 9-A is only with regard to "reduce or remit" the stamp-duty, which was accordingly done when it notified its intentions to reduce and exempt the stamp-duty by means of Notification dated 19.01.2005. There is no other order which has been brought on record either by the petitioner or by the respondents cancelling, revoking or modifying the remission of stamp-duty on the Units established in pursuance of the Policy of the State Government.

21. Considering the fact that the State government had issued an order dated 28/03/2006 exempted the levying of Stamp duty in case of the petitioner was setting up the industrial unit in pursuance of the policy of the State government, there was no infirmity or deficiency in the stamp duty paid by the petitioner on the date of its registration. The Supreme Court in number

of cases has held that the relevant date for the purposes of determining the stamp duty payable on the instrument, is the date of its execution. In the present case the sale deed was executed on 20/06/2006 a valid exemption order passed by the State government was in existence. The Supreme Court in the case of **Shanti Bhushan(D) Thr. Lr. and Others vs State of U.P. and Others 2023 SCC OnLine SC 489** have observed:-

23. Hence, when a sale deed is presented for registration, the registering authority must ascertain the correct market value of the property subject matter of the document on the date of execution of the document. The stamp duty is payable on the basis of such market value and not on the consideration mentioned in the document. If the consideration mentioned is more than the market value, the stamp duty will be payable on the consideration shown. Moreover, the market value mentioned in the agreement for sale or the market value prevailing on the date of the agreement or the market value prevailing on the date on which the bargain was struck is of no relevance for deciding the stamp duty. The relevant market value is the one which prevails on the date of execution of the conveyance. Therefore, we have no manner of doubt that the appellants were under an obligation to pay stamp duty calculated on the market value of the sale deed property on the date of execution of the sale deed.?

22. Considering the above facts and arguments of the learned counsel for the parties, I find force with the contention raised by the petitioner that such an exercise of power, as has been done in the present case under section 47-A, could not have been invoked against the petitioner, as there was no infirmity with regard to the

stamp-duty leviable on the instrument on the dates of its registration. The relevant date to be considered for exercise of powers under section 47-A is the date of execution of instrument. The respondents have also not demonstrated any infirmity in exemption of the stamp-duty payable on the sale-deed, which was registered on 20.06.2006. The cause of action, even according to the respondents, arose only subsequent to 20.06.2006, when after lapse of a considerable period of time the petitioner did not establish the Unit in pursuance of the Policy of the State Government.

23. The State Government, when faced with the situation that intending entrepreneurs who have taken benefit of the Policy of the Food Processing Industry, have purchased land, but subsequently failed to set up the Industry, issued a clarification by means of Notification dated 21.08.2009 and 12.11.2007 and introduced strict guidelines for setting up of new Industries by persons, who have taken benefit of the Policy. The clarification is clearly prospective in nature, as it is silent about the action which would be taken against person who has already taken advantage of exemption-Notification, but failed to set up the Industrial Unit.

24. The relevant fact in this case is, as already provided by the State Government in its Notification dated 21.08.2009 and 12.11.2007, where it is provided that in case such persons have deposited Fixed Deposit or Bank Guarantee, it was open for the State Government to encash the same. We do not find any provision by which the stamp-duty, which was in fact leviable by Notification dated 19.01.2005, but stood exempted by a valid exemption notification, can be recovered subsequently.

The exercise of power, as has been done in the present case, is clearly de hors the provisions of the Act and the Rules as well as the Notification issued by the respondents itself.

25. Indian Stamps Act, 1989, being a fiscal statute, the provisions thereof have to be strictly interpreted. Supreme Court in the case of *Swedish Natch AB Vs. SEBI, 2004 (11) SCC 641 and CIT Vs. Ajax Products Ltd., 55 ITR 741* has held that while interpreting the provisions of fiscal legislation courts should neither add nor subtract a word from the provisions of instant meaning of the sections. It may be mentioned that the foremost principle of interpretation of fiscal statutes in every system of interpretation is the rule of strict interpretation which provides that where the words of the statute are absolutely clear and unambiguous, recourse cannot be had to the principles of interpretation other than the literal rule.

26. Accordingly, while interpreting such a statute, equitable considerations cannot be applied. A taxing statute has to be interpreted in accordance with what is clearly expressed therein. While interpreting such a statute and determining the liability to pay tax, the provisions are required to be construed strictly. In other words, the rule of literal construction must be applied while interpreting a taxing statute. It must be interpreted in terms of the natural construction of the words used. There is no scope to imply anything which is not expressly provided. There is no scope for application of equitable principles while deciding levy of stamp duty. Present case cannot be decided on the basis of equity and this Court is of the considered view that the provisions of Section 47-A of the Stamp Act do not provide for levy of stamp

on the instruments which have previously been exempted by valid notification of the State Government under Section 9 of the Act of 1989. Accordingly, the impugned order is clearly illegal and arbitrary and deserves to be set aside.

27. In the light of the above, the impugned order dated 26.11.2012 is illegal and arbitrary and, consequently, is set aside. The writ petition is, accordingly, allowed.

(2023) 9 ILRA 548
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.08.2023

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ-C No. 1005717 of 2009

Ram Bachani	...Petitioner
	Versus
A.D.J. Lucknow	...Respondent

Counsel for the Petitioner:

Brijesh Kumar Saxena, Pritish Kumar, Utkarsh Srivastava

Counsel for the Respondents:

C.S.C., V.K. Srivastava, Vijay Krishna

Civil Law - Public Premises (Eviction of Unauthorised Occupants) Act, 1971 - Sections 4 & 7 - Code of Civil Procedure, 1908 - Order 22 Rule 6 - Tenant was duly represented by petitioner before prescribed authority - Petitioner appeared on 03.04.2002 and signed order-sheet - Written submissions on behalf of tenant were filed on 04.08.2002 - Respondent's death on 06.08.2002 did not abate proceedings, as judgment was based on written submissions and delivered on 03.10.2002 - Petitioner contended that Prescribed Authority lacked jurisdiction as tenancy predated Act, 1971 - Said issue

was not raised before Prescribed Authority or Appellate Court - Question as to when tenancy was created or when petitioner or his predecessor in interest became tenant is a mixed questions of fact and law, it cannot be raised for first time in writ proceedings - Appeal was also dismissed for lack of locus, as no leave to appeal was sought or granted - No ground has been taken to challenge this finding, nor was any argument advanced - Sale letter transferred only business of M/s A. James & Co., not tenancy rights - It specifically allowed petitioner to obtain fresh lease from owners - Petitioner neither informed nor obtained consent from respondent-bank before occupying tenanted premises - Unauthorized possession does not confer tenancy rights or status as legal representative of original tenant - Petitioner had no locus standi to file appeal - As no arguments made on this issue, appellate court's findings require no interference. (Para 23, 25, 26)

Writ Petition dismissed. (E-13)

List of Cases cited:

1. Gurman Singh (dead) through legal representations & ors. Vs Gur Bachan Karu (Dead), 2007 (13) SCC 414, (Para 18)
2. N.P. Thirugnanam Vs R. Jagan Mohan Rao (Dr), (1995) 5 SCC 115 at page 116
3. Chetan Charan Das Vs Balbhadra Das, 1899 SCC OnLine All 66, ILR (1899) 21 All 314 at page 910
4. Suhas H. Pophale Vs Oriental insurance Co Ltd and its St. officer (2014) 4 SCC 657

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

1. By means of the present writ petition, the petitioner has challenged the order dated 13.10.2009 passed by Additional District Judge, Lucknow thereby dismissing the appeal against the order passed by the prescribed authority

under the Public Premises Act, 1971 (herein after referred to as the 'Act of 1971') and also the order dated 03.10.2002 passed by the Prescribed Authority/Estate Officer, Central Bank of India, Zonal Officer, Bhopal.

2. The facts necessary for deciding present controversy shown any unnecessary details are that the respondent, Central Bank of India, is the landlord of the premises situated at 73, Hazratganj, Lucknow and Jawahar Lal Bhargawa, predecessor in interest of the petitioner was the tenant of the north eastern portion of the ground floor of the said premises. In 1976, the respondent Bank had moved an application for release of the premises in the tenancy of Jawahar Lal Bhargawa before the prescribed authority under the Uttar Pradesh Urban Building (Regulation and Letting and Rent and Eviction) Act, 1972 being in urgent need of the premises. The said application was dismissed by order dated 01.09.1976.

3. Aggrieved by the said order, an appeal was preferred by the respondent-bank. During the pendency of the appeal, certain amendments came into effect in the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 and an application was moved on behalf of Jawahar Lal Bhargava that the remedy for eviction lay before the prescribed authority under the said Act and consequently on the said assertion, the appeal was dismissed. The suit for eviction was also filed in the Court of Small Causes Act, Lucknow wherein SCC Suit No. 583/1980 was registered, the same was also dismissed on 31.03.1982.

4. Subsequently, Jawahar Lal Bhargava shifted to Delhi and also transferred the said premises to the

petitioner without knowledge and consent of the respondent-bank. It is also the claim of the respondent that the tenant was in arrears of rent from 01.04.1997 to 06.07.1999 and had also terminated the tenancy by giving a notice dated 03.06.1999, but the tenant did not vacate the said premises on the expiry of the period provided for in notice and accordingly moved an application under the Public Premises Eviction Act for eviction of the tenant on the ground that the tenants have become unauthorized occupants as defined in the Act.

5. The prescribed authority while allowing the application filed by the respondent-bank has considered the fact that the respondents have terminated the tenancy by giving a notice dated 03.06.1999 and after expiry of 30 days from the said notice the tenants have become unauthorised occupants.

6. Contesting the aforesaid claim of the bank, the tenants on the other hand had stated that they had already paid the rent in advance by means of cheque and also that respondent bank is not in urgent or bonafide need of the said premises and prayed to prescribed authority to discharge the notice issued by the Estate Officer. The respondent bank on the other hand had stated that it had not accepted or encashed the cheque and it has no intention of receiving the amount towards rent of the disputed premises and mere receiving of the cheque/pay orders does not amount to acceptance of the rent and consequently prayed that the tenants be declared unauthorised occupants and evicted from the tenanted premises.

7. The prescribed authority also did not accept the contention of the tenants that notice

in the present case had not been given by the Estate Officer to Mr. Ram Bachani (petitioner) who is running the business in the name of M/S A. James & Company. He held that Mr. Ram Bachani had not claimed the interest in the premises even after having knowledge of the proceedings as he has remained present on 03.08.2002 i.e. the date of arguments and also signed the order-sheet and no objection were raised by him with regard to issuance of notices under Section 4 & 7 of the Public Premises and Eviction Act, 1971.

8. It is in the aforesaid circumstances that the application for eviction was allowed and the respondents therein was directed to pay Rs. 2428/65 being the arrears of rent from 01.04.1997 to 06.07.1999 @ Rs. 89/95 per month and damages @ 1000/- to the applicant from 07.07.1999 to the date of possession.

9. Against the order of prescribed authority, the appeal was filed before the District Judge, Lucknow by the petitioner. It is for the first time in the appeal it was disclosed that Sri Jawahar Lal Bhargava by means of sale letter dated 03.04.1999 had sold the goods well stock in trade, furniture, fixtures and fittings and articles associated thereto of the business running in the name and style of M/S A. James and Company to the petitioner – Sri Ram Bachani. The said sale letter also stated that Sri Ram Bachani would be free to take lease directly from the owner and till then he shall pay rent and other dues to the owner. In the said appeal it was also stated that the erstwhile tenant Jawahar Lal Bhargava had died on 06.08.2002 and the order of the prescribed authority dated 02.10.2002 is illegal and arbitrary inasmuch as it was rendered after the death of the defendant therein and the said order would be a nullity.

10. The District Judge duly considered the arguments of the petitioner

as well as respondent bank. The first aspect he considered was as to whether the petitioner had any right to file the present appeal inasmuch as he was not the legal heir of Jawaharlal Bhargava nor a party before the prescribed authority. In this regard, he has discussed the contents and effect of the sale letter dated 03.04.1999 and has held that the said letter being an unregistered document cannot transfer any rights in the immovable property and consequently the petitioner cannot inherit the rights of the tenant Sri Jawaharlal Bhargava. The contents of the said letter was further duly considered, according to which there is a clear stipulation that the petitioner would be free to take lease directly from the owner. In this regard, it was considered that neither the sale letter was ever disclosed to the respondent bank nor any prior permission taken from the landlord of the said premises before entering into the said premises and hence the status of the petitioner would be nothing more than mere trespasser.

11. It has been submitted that Jawaharlal Bhargava had died during the pendency of the proceedings before the prescribed authority and the decree has been passed against a dead person would be a nullity. Repelling the said contention, it was submitted that firstly the petitioner had all along contested the matter before the prescribed authority on behalf of the Jawahar Lal Bhargava. The case was listed on 03.08.2002 on which date the petitioner had appeared and also signed the order-sheet on 30.08.2022 and the case was adjourned to 14.08.2002 for filing of the written arguments by the respondent and the bank had declined to file the written submissions. The order-sheet of 24.08.2002 records that written arguments have been filed and the judgment was pronounced on

03.10.2002. It is also on record that written arguments on behalf of the Jawaharlal Bhargava was filed on 04.08.2002 two days prior to his death and the judgment was delivered on the basis of the written arguments and no hearing took place subsequent to 04.08.2002.

12. It is in the aforesaid facts and circumstances of the case that the appellate Court held that as per the provisions contained in Order 22 Rule 6 CPC the death had occurred after hearing of the case and before delivering of the judgment and accordingly the proceedings of the appeal did not abate and hence rejected the contention made by the petitioner.

13. Sri B.K. Saxena, learned counsel for petitioner has vehemently urged that the order of the prescribed authority was illegal and arbitrary as the same has been passed against a dead person and the appellate Court has not appreciated the fact and law in its correct perspective and accordingly the application itself deserves to be rejected.

14. In support of his submissions, he has relied upon the judgment of the Supreme Court in the case of **Gurman Singh (dead) through legal representations and others Vs. Gur Bachan Karu (Dead)**, 2007 (13) SCC 414, wherein it has been held as under:-

“18) The law on the point is well settled. On the death of a party to the appeal, if no application is made by the party concerned to the appeal or by the legal representatives of the deceased on whom the right to sue has devolved for substitution of their names in place of the deceased party within 90 days from the date of death of the party, such appeal

abates automatically on expiry of 90 days from the date of death of the party. In other words, on 91st day, there is no appeal pending before the Court. It is "dismissed as abated".

19) Order 22 Rule 3(2) which applies in the case of the death of plaintiff/appellant and Order 22 Rule 4(3) which applies in the case of defendant/respondent provides the consequences for not filing the application for substitution of legal representatives by the parties concerned within the time prescribed. These provisions read as under:-

Order 22 Rule 3(2) "Where within the time limited by law no application is made under sub-rule (1) the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff." Order 22 Rule 4(3) "Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant."

20) In the case at hand, both the aforementioned provisions came in operation because the appellant and the two respondents expired during the pendency of second appeal and no application was filed to bring their legal representatives on record. As held above, the legal effect of the non-compliance of Rules 3(2) and 4(3) of Order 22, therefore, came into operation resulting in dismissal of second appeal as abated on the expiry of 90 days from 10.05.1994, i.e., on 10.08.1994. The High Court, therefore, ceased to have jurisdiction to decide the second appeal which stood already dismissed on 10.08.1994. Indeed, there was no pending appeal on and after 10.08.1994.

21) In our considered view, the appeal could be revived for hearing only when firstly, the proposed legal representatives of the deceased persons had filed an application for substitution of their names and secondly, they had applied for setting aside of the abatement under Order 22 Rule 9 of the Code and making out therein a sufficient cause for setting aside of an abatement and lastly, had filed an application under Section 5 of the Limitation Act seeking condonation of delay in filing the substitution application under Order 22 Rules 3 and 4 of the Code beyond the statutory period of 90 days. If these applications had been allowed by the High Court, the second appeal could have been revived for final hearing but not otherwise. Such was not the case here because no such applications had been filed.

22) It is a fundamental principle of law laid down by this Court in *Kiran Singh's case (supra)* that a decree passed by the Court, if it is a nullity, its validity can be questioned in any proceeding including in execution proceedings or even in collateral proceedings whenever such decree is sought to be enforced by the decree holder. The reason is that the defect of this nature affects the very authority of the Court in passing such decree and goes to the root of the case. This principle, in our considered opinion, squarely applies to this case because it is a settled principle of law that the decree passed by a Court for or against a dead person is a "nullity" (See-*N. Jayaram Reddy & Anr. Vs. Revenue Divisional Officer & Land Acquisition Officer, Kurnool*, (1979) 3 SCC 578, *Ashok Transport Agency vs. Awadhesh Kumar & Anr.*, (1998) 5 SCC 567 and *Amba Bai & Ors. Vs. Gopal & Ors.*, (2001) 5 SCC 570).

23) The appellants are the legal representatives of defendant Nos. 2 and 4

on whom the right to sue has devolved. They had, therefore, right to question the legality of the impugned order inter alia on the ground of it being a nullity. Such objection, in our opinion, could be raised in appeal or even in execution proceedings arising out of such decree. In our view, the objection, therefore, deserves to be upheld. It is, accordingly, upheld.

24) In the light of foregoing discussion, we allow the appeal and set aside the impugned judgment/decreed. “

15. Sri V.K.Srivastava learned counsel for the respondent on the other hand has opposed the writ petition and supported the impugned orders. He has contented that at the time of death of the original respondent the pleadings had been completed and even the written arguments had been filed. The evidence had also been recorded and written arguments had been submitted. The parties had agreed that the matter be decided on the basis of written arguments and no oral submissions to place after filing of the written arguments. The death of the original respondent having occurred after filing of the written arguments and before the delivery of the judgment provisions of orders 22 rule 6 would come into operation, and in the present facts of the case the proceedings did not abate. He further submitted that the petitioner did not have any locus to maintain the appeal against the order of the prescribed authority, as he had not disclosed about the sale letter through which he had purchased the business of the original respondent and also entered into the tenanted premises. He further submitted that no leave to appeal was sought by the petitioner and therefore the same was not maintainable at his behest, and there is no infirmity in the impugned orders.

16. It was further submitted on behalf of the respondent that the petitioner had

participated in the proceedings, which is evidenced by the fact that he had signed on the order sheet on 03.08.2002, as representing the interest of the original respondent (Jawaharlal Bhargava) but never disclosed that in fact he has entered into the tenanted premises and in case any decree of eviction is passed, the same would have to be enforced against him, and therefore he deliberately concealed relevant and material facts from the prescribed authority and has therefore not come with clean hands before this court. It was submitted that the appellate court had rightly held that the petitioner did not have any locus to maintain the appeal as he was not a party before the prescribed authority, and that he does not step into the shoes of the original tenant that is Jawaharlal Bhargava, as the said letter was on unregistered stamps paper, and as such no rights in immovable property can flow into the hands vendee.

17. I have heard the learned Counsel for the parties and perused the record. With regard to the argument raised by the petitioner that the proceedings before the prescribed authority ought to have abated it is noticed that according to provisions of Order 22 CPC provisions have been made for procedure to be adopted in case either the plaintiff or the defendant dies during the pendency of the proceeding. According to the Order 22 Rule 3(2) CPC where one of the several plaintiffs or a sole plaintiff dies and no application is made for substitution during the period of limitation, the suit shall abate so far as the deceased plaintiff is concerned, while according to Rule 4 where in case death of defendants or the sole defendant where within the time limited by law no application is made, the suit shall abate against the deceased-defendant.

18. Order 22 Rule 6 of CPC provides that notwithstanding anything contained in the aforesaid rules where the cause of action survives or not there shall be no abatement by reason of death of either party between the conclusion of hearing and pronouncement of judgment, and the judgment may in such case be pronounced notwithstanding the death and shall have the same force and effect.

19. A bare reading of the aforesaid provisions clearly indicates that the purpose behind substituting the deceased plaintiff or defendant is that the party to the case should have full opportunity to contest and participate in the said proceedings and in case any of the parties dies during the proceeding and the right to sue survives then it is incumbent upon his or her legal representative to be made parties before proceeding further in the matter. But order 22 Rule 6 CPC envisages a situation where all that is required to be done during the proceedings by the parties is complete and where even the arguments have concluded and only the judgment has to be delivered, then if the plaintiff or defendant dies the proceedings will not abate and shall have the same force as the judgment was pronounced prior to the death of said deceased, plaintiff or defendant.

20. It is evident that after hearing takes place, no further steps are required to be taken by any of the parties as by that time all the pleadings, evidences and filing of documents and oral submissions are complete and the court only has to pronounce its judgment. A death of a party during such period would not have the effect of abatement of the proceedings.

21. In the case of **N.P. Thirugnanam v. R. Jagan Mohan Rao (Dr)**, (1995) 5

SCC 115at page 116 the Hon'ble Supreme Court while dealing with the said issue observed:-

3. Rule 6 of Order 22 provides that:

"6. No abatement by reason of death after hearing.— Notwithstanding anything contained in the foregoing rules, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing of the judgment, but judgment may in such case be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place." In the face of the explicit language in Rule 6 of Order 22, there can be no abatement by reason of the death of any party between the conclusion of the hearing and the pronouncement of the judgment. It may be pronounced, notwithstanding the death, and shall have the same force and effect as if the judgment had been pronounced before the death took place. Therefore, the contention that the judgment and decree of the appellate court is a nullity is devoid of substance.

22. The learned regard law has been settled by this court and is being uniformly followed since 1899. In the case of **Chetan Charan Das v. Balbhadra Das**, 1899 SCC OnLine All 66, ILR (1899) 21 All 314at page 910

[315]BlairandBurkitt, JJ.:— *The first of the long list of the grounds of appeal in this case which was argued before us was the 11th. It is couched in the following words:—"Because the decree in the suit was illegally passed after the death of the plaintiff without any person being brought on the record as his*

representative.” The facts are, that the trial was concluded, arguments were heard, and the judgment was reserved on the 5th of September 1896. The plaintiff died on the 9th of September 1896. He was then absent in Orissa, and his death was unknown to any of the parties or to the Court. Judgment was delivered, and the decree was passed on the 15th of September 1896. It was argued on behalf of the appellants that the suit abated from the moment of the death of the plaintiff, and that the Court was incompetent to pass a decree, no representative of the deceased having been out on the record. This is a matter which has long been disposed of in England by the application of a large general principle of law actus curia nemini facit injuriam. That principle was applied in the leading case of Cumber v. Wane [1 Smith L.C. 10th Ed. 325.] . A defendant in error died after the time when the Court took time to consider. It was prayed that the judgment might be entered nunc pro tunc; in other words, that the judgment should be dated as of the day when the Court reserved its decision, and to that prayer the Court acceded. Such has been the invariable practice in England; and that practice finds expression in the rules framed under the Judicature Act of 1875. It seems to us that the decision to which we have referred and the subsequent practice of the Courts are consistent with justice and good sense. Nothing was left to be done by the parties from the moment the judgment was reserved. Any delay which took place was the delay of the Court, and we are not surprised to find that the English practice has been followed by the Courts in this country, notably in the case of Ramacharya v. Anantacharya [21 B. 314.] . No case to the contrary has been cited before us. A similar view has been taken by the [316] Privy Council in the case of

Surendro Keshub Roy v. Doorgasoondery Dossee [19 C. 513.] . We think that decision amounts to an authority which this Court is bound to follow. We follow it accordingly. Our ruling in this case must be taken to be strictly limited to its facts, namely, that everything to be done by the parties had been done, and nothing remained except the delivery of judgment, which had been reserved by the Court. We, therefore, overrule this ground of appeal.

Appeal dismissed.”

23. Applying the dictum of the aforesaid Judgment to the facts of the instant case, it is noticed that the interest of Jawahar Lal Bhargava who was the tenant was duly represented at all times before the prescribed authority by the petitioner. Even from the undisputed facts, the case was listed on 03.04.2002 on which date the petitioner duly appeared and signed the order-sheet before the prescribed authority. The case was adjourned for filing of the written arguments on behalf of the tenant which was filed on 04.08.2002 and accordingly the hearing stood completed on the filing of the written submissions and the judgment was delivered on 03.10.2002. The death of the respondent on 06/08/2002 would not have the effect of abatement of the proceedings in as much as the written submissions have been filed, and the judgement was delivered on the basis of the written submissions.

24. From the aforesaid, it is clear that provision of Order 22 Rule 6 applied with full force to the facts of the present case and accordingly the proceedings did not abate on the death of Jawaharlal Bhargava- the original tenant. The judgment of the Supreme Court in the case of **Gurman Singh (dead) through legal representations and others Vs. Gur**

Bachan Karu (Dead) does not deal with the facts akin to the facts of the present case and therefore is distinguishable.

25. It was also contented on behalf of the petitioner that the proceedings before the prescribed authority were without jurisdiction inasmuch as the tenancy was created prior to coming into force the provisions of Public Premises and Eviction Act, 1971. In support of his contention is he relied upon the judgment of the Supreme Court in the case of **Suhas H. Pophale vs Oriental insurance Co Ltd and its estate officer (2014) 4 SCC 657**. A perusal of the impugned judgement discloses that the said issue was never raised either before the prescribed authority or either in the appeal before the District Judge. The question as to when the tenancy was created or when the petitioner or his predecessor in interest became a tenant, is not merely a question of law but a mixed question of fact and law. The petitioner having not raised this question before either the Prescribed authority or the appellate Court is precluded for raising the same for the first time in the present writ proceedings. It is further noticed that the appeal preferred by the petitioner has also been dismissed on the ground that he did not have any right to file the appeal against the order of the prescribed authority before the District Judge. No leave to appeal was sought nor granted by the District Judge. No ground has been taken in the present writ petition to assailed the said findings, nor any arguments has been advanced in this regard by the counsel for the petitioner, and accordingly no interference is required with the said findings.

26. From the perusal of the sale letter it is clear that no tenancy rights were transferred to the petitioner and merely the

business in the name and style of M/S A. James and Company was transferred along with the goodwill stock in trade, furniture etc. There is a clear stipulation in the said sale letter that the petitioner would be free to obtain lease from the owners. It is not disputed that petitioner never informed or took consent from the respondent-bank prior to entering into the tenanted premises and merely by unauthorisedly occupying the tenanted premises did not ipso facto become the tenant and certainly not the legal representatives of the original tenant and accordingly did not have any locus standi to challenge the order of the prescribed authority in appeal before the District Judge. No arguments were advanced by the Counsel the petitioner in this regard, and therefore the findings by the appellate court do not merit any interference.

27. In light of the above, this Court does not find any ground to interfere with the concurrent findings of fact recorded by both the courts below. The writ petition is devoid of merits and is accordingly **dismissed**.

(2023) 9 ILRA 556
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED:LUCKNOW 11.09.2023

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Application U/S 482. No. 7795 of 2018

Mohd. Ayub Rizvi & Ors. ...Applicants
Versus
Smt. Salma Khan & Anr. ...Opposite Parties

Counsel for the Applicants:
 Jageshwari Prasad Mathur

Counsel for the Opposite Parties:

G.A., Manish Singh Chauhan, Sayyed Farooq Ahmad

Criminal Law - Indian Penal Code, 1860 - Sections 498-A & 323 - Dowry Prohibition Act, 1961 - Section 4 - Code of Criminal Procedure, 1973 - Section 173 - Summoning order - Quashing of - Opposite Party No. 2 filed complaint on 31.01.2018, later lodged FIR on 16.02.2018, both alleging dowry harassment by applicants - Trial court, in violation of Section 210 Cr.P.C., proceeded to summon applicants under above mentioned Sections without staying proceedings or seeking a police report - Statements of complainant and witness recorded under Sections 200 and 202 Cr.P.C. do not disclose genuineness or address of applicants, resulting in non-compliance of Section 202(1) Cr.P.C. - Absence of reasons in summoning order vitiates the same in eyes of law, thus impugned order, set aside - Matter remitted back. (Para 10, 11, 12, 17)

Application allowed. (E-13)

List of Cases cited:

1. Geeta Mehrotra Vs St. of U.P. & ors., 2012 (10) ADJ 464
2. Kahkashan Kausar @ Sonam & ors. Vs St. of Bihar & ors., (2022) 6 SCC 599
3. Abhijit Pawar Vs Hemant Madhukar Nimbalkar & anr., (2017) 3 SCC 528
4. Anil Kumar & ors. Vs M.K.Aiyappa & anr., reported in (2013)10 Supreme Court Cases 705 (Para 11)
5. Maksud Saiyed Vs St. of Gujarat & ors., reported in (2008)5 Supreme Court Cases, 668 (Para 13)

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

1 . Heard Sri Jageshwari Prasad Mathur, learned counsel for the applicants, Sri Sayyed Farooq Ahmad, learned counsel for the opposite party no.2, Sri Aniruddh Kumar Singh, learned A.G.A.-I and Sri Sanjay Kumar Yadav, learned A.G.A. for the State and perused the material placed on record.

2. Instant application has been filed with the prayer to stay the entire proceedings in Complaint Case No.942/18 (Smt. Salma Khan Vs. Mohammad Aizaz), under Section 498-A, 323 I.P.C. and Section 4 D.P. Act by the court of Civil Judge (Junior Division) FTC/Judicial Magistrate, Unnao alongwith the summoning order dated 13.9.2018.

3. Factual matrix of the case is that on 11.3.2012, the opposite party no.1 got married with Aayaz @ Babu son of applicant no.1 at Lucknow, and as Aayaz was working at Saudi Arabia, therefore, the opposite party no.1 is willing to live with him at Saudi Arabia. When Aayaz, while leaving the opposite party no.1 in India, went to Saudi Arabia on 20.4.2015 then she started creating trouble in the entire family and went to live separately at Balaganj and then to her parents' home at Unnao. Thereafter, a complaint was filed on 31.1.2018. Further an F.I.R. was also lodged on 16.2.2018. The trial court passed the order on 13.9.2018 and summoned the present applicant under Section 498A, 323 I.P.C. and Section 4 of the Dowry Prohibition Act which is under challenge in the instant application.

4. Contention of the learned counsel for the applicants is that two criminal proceedings were initiated simultaneously - one by way of lodging F.I.R. on 16.2.2018 and another by way of instituting a

complaint on 13.1.2018 wherein the present applicant has been summoned. He submits that the trial court has violated mandate of Section 202 (1) of Cr.P.C. He further added that admittedly, the applicants reside outside the territorial jurisdiction of the Magistrate concerned as the applicants reside at Lucknow and summons have been issued by the trial court at Unnao. He added that neither any enquiry nor any investigation has been done prior to proceeding in the matter, which is apparent from the order itself. Adding his arguments, he further submits that there is also violation of Section 210 of Cr.P.C. as once the Magistrate is proceeding in the complaint case and, during the course of hearing, if it comes in the knowledge of the Magistrate that an investigation by the police is in progress in relation to the offence, which is the subject matter of enquiry or trial by him, the Magistrate shall stay proceedings of such enquiry or trial and shall call for a report in the matter from the police officer conducting the investigation. It is further prayed that if a report is made under Section 173 Cr.P.C., such Magistrate shall enquire into or try together the complaint case and the case arising out of the police report as if both the cases were instituted on the police report. He added that so far as the present case is concerned, the F.I.R. was also lodged on 16.2.2018 for the same offence and without calling any report from the Investigating officer, the trial court proceeded in the complaint case which is against the provisions of Section 210 Cr.P.C. He further argued that the summoning order dated 13.9.2018 is unreasoned and have been passed in a cavalier manner. He submits that it has been a settled law that while proceeding in the matter arising out of complaint case if a Magistrate is of the view that summon be issued to the accused

persons, the reason must be recorded which is missing in the impugned order dated 13.9.2018 and, in this view also, the order dated 13.9.2018 is not sustainable.

5. Further contention of the learned counsel for the applicants is that the applicants are in-laws, husband and brother in law of the opposite party no.1. There are general allegations against the applicants for committing torture for the dowry though the applicants are residing separately and since long back the opposite party no.2 is not residing with them and, therefore, the question does not arise for demand of dowry or torture of the opposite party no.2. He added that after the husband of the opposite party no.2 alone went to Saudi Arabia, she is annoyed as she was not taken by him and, therefore, the applicants being the soft target are being harassed as criminal proceedings have been initiated against them.

6. Learned counsel for the applicants placed reliance on the Judgments of the Apex Court rendered in the cases of **Geeta Mehrotra Vs. State of U.P. and others, 2012 (10) ADJ 464 and Kahkashan Kausar @ Sonam and others Vs. State of Bihar and others, (2022) 6 SCC 599** and submits that the case of the applicants are fully covered under the ratio of the judgments.

7. Concluding his arguments, he submits that the dispute, if any, may be in between the husband and wife and the present applicants being in-laws, have nothing to do with any kind of offence as has been mentioned in the complaint by the opposite party no.2. He submits that there is no cogent piece of evidence against the applicants so as to connect them in committing offence under which the

present applicants have been summoned by way of impugned order dated 13.9.2018. Therefore, the submission is that the order dated 13.9.2018 may be set aside and criminal proceedings against the applicants may be dropped.

8. Per contra, learned counsel for the State and the opposite party no.2 vehemently opposed the contention aforesaid and has categorically replied the contention raised by the learned counsel for the applicants and submit that so far as the question with respect to violation of mandate of Section 202 Cr.P.C. is concerned, the Magistrate has recorded the statements of complainant and the witness, wherein the witness, in his statement, has stated the name of the present applicants, which clearly shows that the applicants are the persons, who have committed the offence and, therefore, the procedure prescribed under Section 202 Cr.P.C. has not been violated.

9. It is submitted that the applicants are admittedly the in-laws but the opposite party no.2 is residing in the same house where the present applicants are living and, therefore, merely saying that the opposite party no.2 is residing at Unnao, is not correct. Further submitted that there is no erroneousness in the summoning order as the fact as well as the reasons have very well been mentioned in the same, which are apparent from the bare perusal of the order dated 13.9.2018. He added that truth is being belied by the applicants though the complaint is supported by the statement of the complainant under Section 200 and the statement of witness under Section 202 of Cr.P.C. which is the prima facie statutory requirement for proceeding in the matter and the applicants would have all opportunity to say before the trial court,

therefore, submission is that there is no perversity or unlawfulness in the order passed by the trial court.

10. Having heard learned counsel for the parties and after perusal of the records, it transpires that a complaint was instituted by the opposite party no.2 on 31.1.2018, whereby, it has been stated that the applicants have tortured the opposite party no.2 for dowry and, on the other hand, an F.I.R. was also lodged on 16.2.2018, with same allegations.

11. When this court examined the contention raised by the learned counsels for the applicants that whether there is any violation of mandate of Section 210 of Cr.P.C., it reveals from the record that after lodging the complaint on 31.1.2018, an F.I.R. was lodged at 16.2.2018, for the same incident, whereas the procedure prescribed under Section 210 of Cr.P.C. is very specific that if the case is instituted otherwise than the police report and it appears to the Magistrate during the course of enquiry or trial that an investigation by the police is in progress which is the subject matter of the enquiry or trial held by him, the Magistrate shall stay proceeding of such enquiry or trial and call for a report from the police conducting such investigation but so far as the present case is concerned, the learned trial court ignoring the provisions of Section 210 Cr.P.C., proceeded in the matter and has summoned the present applicants under Sections 498A, 323 I.P.C. and Section 4 of the Dowry Prohibition Act.

12. Further, so far the plea is raised that the provisions of Section 202 (1) Cr.P.C. has been violated, it reveals from the record that the statement of the complainant and the witness under Sections

200 and 202 Cr.P.C., respectively, have been recorded, wherein there is no whisper regarding the genuineness of the applicants/accused persons and their address as the provision prescribed under Section 202 (1) clearly speaks that if the proposed accused are living outside territorial jurisdiction of Magistrate concerned, he shall make an enquiry or investigation though if the statement of the witnesses or complainant are enough to show the genuineness of such proposed accused persons, no further investigation or enquiry is required.

13. In case of *Abhijit Pawar Vs. Hemant Madhukar Nimbalkar* and another, (2017) 3 SCC 528, it has been held that requirement of conducting enquiry or directing investigation before issuing process is not an empty formality and, therefore, the Magistrate or court is to follow the 'enquiry' other than the trial under the Code, though it is not prescribed in Section 202 Cr.P.C. that what would be specific mode or manner of enquiry.

14. The Apex Court in the case of **Anil Kumar and Others Versus M.K.Aiyappa and Another**, reported in (2013)10 Supreme Court Cases 705 in paragraph no. 11 of the said Judgment held as under :-

"11. The scope of Section 156(3) CrPC came up for consideration before this Court in several cases. This Court in *Maksud Saiyed* case examined the requirement of the application of mind by the Magistrate before exercising jurisdiction under Section 156(3) and held that where jurisdiction is exercised on a complaint filed in terms of Section 156(3) or Section 200 CrPC, the Magistrate is required to apply his mind, in such a case,

the Special Judge/Magistrate cannot refer the matter under Section 156(3) against a public servant without a valid sanction order. The application of mind by the Magistrate should be reflected in the order. The mere statement that he has gone through the complaint, documents and heard the complainant, as such, as reflected in the order, will not be sufficient. After going through the complaint, documents and hearing the complainant, what weighed with the Magistrate to order investigation under Section 156(3) CrPC, should be reflected in the order, though a detailed expression of his views is neither required nor warranted. We have already extracted the order passed by the learned Special Judge which, in our view, has stated no reasons for ordering investigation".

15. Hon'ble Apex Court has held that the Magistrate is required to apply it's mind and the application of mind by the Magistrate must be reflected in the order and the mere statement that he has gone through the complaint, documents and heard the complainant, will not be sufficient.

16. Further the Hon'ble Supreme Court in case of **Maksud Saiyed Versus State of Gujarat and Others**, reported in (2008)5 Supreme Court Cases, 668 has held in paragraph no. 13 which is quoted hereinunder :-

"13. Where a jurisdiction is exercised on a complaint petition filed in terms of Section 156(3) or Section 200 of the Code of Criminal Procedure, the Magistrate is required to apply his mind. The Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company when the accused is the Company. The learned

Magistrate failed to pose unto himself the correct question viz. as to whether the complaint petition, even if given face value and taken to be correct in its entirety, would lead to the conclusion that the respondents herein were personally liable for any offence. The Bank is a body corporate. Vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. Statutes indisputably must contain provision fixing such vicarious liabilities. Even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability."

17. Now, it emerges that reasons essentially be recorded in the summoning order, if the matter is arising out of complaint case. Apparently from perusal of the impugned summoning order, it transpires that the reasons have not been recorded and, therefore, the same vitiates in the eyes of law.

18. In view of the aforesaid submissions and discussions, this Court is of the considered opinion that the impugned summoning order dated 13.9.2018, passed by the trial court is against the settled proposition of law.

19. Consequently, impugned summoning order dated 13.9.2018 passed by the trial court is hereby set aside.

20. The matter is remitted back to the trial court concerned to pass fresh order within a period of 45 days from the date of this order, in accordance with law.

21. The office shall communicate this order to the trial court forthwith.

22. With the aforesaid observations, instant application is hereby **allowed**.

(2023) 9 ILRA 561

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: LUCKNOW 12.09.2023

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Crl. Misc. Anticipatory Bail Application No. 1518
of 2023

(Under Section 438 Cr.P.C.)

And other cases

Ramji Singh

...Applicant

Versus

Directorate of Enforcement Alld. Sub-Zonal Office

...Respondent

Counsel for the Applicant:

Purnendu Chakravarty, Anuj Taandon, Rishabh Chauhan

Counsel for the Respondent:

Rohit Tripathi

A. Criminal Law – Prevention of Money Laundering Act, 2002 – Section 45 – Anticipatory Bail – Restrictions on bail under Section 45 not applicable to Constitutional Courts due to Section 44(2) – Special powers of High Courts under Section 439 Cr.P.C. preserved.

B. Criminal Law – Anticipatory Bail – Economic Offences – Allegations of illegal coal diversion – No proceeds of crime recovered from applicants – Applicants cooperated with investigation – Complaints filed after 7-12 years delay – Interim anticipatory bail granted and confirmed.

Held:

The court held that the restrictions on granting bail under Section 45 of the PMLA do not apply to Constitutional Courts due to the provision in Section 44(2), which preserves the special

powers of High Courts under Section 439 Cr.P.C. The applicants, accused of abetting money laundering and illegal coal diversion, were granted anticipatory bail considering: (i) no recovery of proceeds of crime, (ii) cooperation with investigation, (iii) significant delay in filing complaints (7-12 years), (iv) the applicant Ramji Singh's age (72 years) and medical conditions, and (v) no violation of interim bail conditions. The court distinguished the scope of Section 482 Cr.P.C. proceedings from bail applications, emphasizing that rejection of quashing applications does not preclude bail. The interim anticipatory bail orders were confirmed, and the applications were allowed without requiring fresh bail bonds. (Paras 46-52, 64-74)

Case Law Discussed:

1. Vijay Madanlal Choudhary Vs U.O.I., 2022 SCC OnLine SC 929
2. Directorate of Enforcement Vs M. Gopal Reddy, 2022 SCC OnLine SC 1862
3. Y.S. Jagan Mohan Reddy Vs CBI, (2013) 7 SCC 439
4. St. of Bihar Vs Amit Kumar, (2017) 13 SCC 751
5. Rohit Tandon Vs Directorate of Enforcement, (2018) 11 SCC 46
6. P. Chidambaram Vs CBI, (2020) 13 SCC 337
7. P. Chidambaram Vs Directorate of Enforcement, (2020) 13 SCC 791
8. Satender Kumar Antil Vs CBI, (2022) 10 SCC 51
9. Sushila Aggarwal Vs State (NCT of Delhi), (2020) 5 SCC 1
10. Kamlesh Vs St. of Raj., 2019 SCC OnLine SC 1822
11. St. of Har. Vs Bhajan Lal, 1992 Supp (1) SCC 335

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

1. Heard Sri Ajit Kumar Sinha Senior Advocate assisted by Sri Himanshu Hemant Gupta, Sri Aishwarya Sinha and Sri Raghav Tiberwal Advocates appearing on behalf of the applicants in Anticipatory Bail Application Nos. 1611 of 2023, 1617 of 2023, 1636 of 2023, 1638 of 2023 and 1639 of 2023, Sri. Purnendu Chakravarty Advocate for the applicants in Anticipatory Bail Application Nos. 1518 of 2023, 1523 of 2023 and 1602 of 2023, and Sri Rohit Tripathi Advocate, the learned counsel for the respondent - Directorate of Enforcement and perused the records.

2. All the aforesaid applications seek anticipatory bail for different accused persons in different cases, but on similar set of allegations arising out of a joint surprise check carried out on 25.03.2011 by some officers of Railways and Northern Coalfields Ltd. (NCL) at the factory premises of (1) M/s Swastik Cement Products Ltd., (2) M/s Fertico Marketing and Investments Pvt. Ltd., (3) M/s Jai Durga Industries, (4) M/s Sri Ram Fuels Pvt. Ltd. and (5) M/s Drolia Coke Industries Pvt. Ltd. It was found that the aforesaid companies used to receive coal from Northern Coal Fields Ltd. (NCL) for manufacture of Special Smokeless Fuel (SSF) and instead of processing the coal, the companies sold it in black market at a high premium causing wrongful loss to the government and wrongful gain to the accused persons.

3. On 13.04.2011, the C.B.I/ACB Lucknow filed 5 F.I.Rs. under Sections 120-B, 420 of I.P.C. and Section 13(2) read with 13(1)(d) of Prevention of Corruption Act, 1988 for causing wrongful gain to the companies by diverting the coal received from NCL to open market without processing to SSF. RC 4(A) 2011 was filed

against M/s Swastik Products Ltd., RC 5 (A) 2011 against M/s Fertico Marketing & Investment Pvt. Ltd., RC 6(A) 2011 against M/s Jai Durga Industries, RC 7 (A) 2011 against M/s Sri Ram Fuels and RC 8 (A) against Ms Drolia Code Industries Pvt. Ltd. Unknown officials of District Industries Centre (DIC) and unknown officials of NCL have also been made accused in all the F.I.Rs. The C.B.I. filed five different charge-sheets dated 31.05.2012 in respect of the aforesaid 5 F.I.Rs.

4. The particulars of the cases in respect of which the aforesaid 8 applications have been filed, are being mentioned below: -

Sl.no.	ABAIL No.	FIR No.	ECIR No.	Complaint No.	Date of Complaint	Session Case No.
1	1518	05	02	02/2019	03.06.2019	51/2/2023
2	1523	06 & 08	01 & 03 Merged in 01	08/2022	24.06.2023	12/4/2023
3	1602	04	04	06/2018	12.07.2018	49/2/2023
4	1611	07	05	02/2016	April 2016	51/3/2023

5	1617	06 & 08	01 & 03 Merged in 01	08/2022	24.06.2023	12/4/2023
6	1636	04	04	06/2018	12.07.2018	49/2/2023
7	1638	05	02	02/2019	03.06.2019	51/2/2023
8	1639	05	02	02/2019	03.06.2019	51/2/2023

5. ECIR/03/VSI/LZO/2012 was merged with ECIR/01/VSI/LZO/2012 on 29.03.2016.

6. The charge-sheets filed by CBI state that up to the year 2000, coal was a controlled commodity and industrial units used to get coal upon recommendation and sponsoring by the Directorate of Industries. In the Year 2000, the Government of India notified the Colliery Decontrol Order and thereafter no recommendation of the Directorate of Industries was required for allotment of coal to industrial units and the sponsoring of coal from Directorate of Industries was stopped in the year 2003. The Government announced the New Coal Distribution Policy (NCDP) in October 2007 under which coal was to be supplied to non-core Small Scale Industrial consumers through Fuel Supply Agreements (FSA) directly from Coal India Ltd. / subsidiary coal companies.

7. Clause 4.4 of FSA provides that the purchaser would not sell/divert or transfer the coal for any other purpose whatsoever and it would be treated as a material breach of the agreement. In the event of the purchaser engaging or planning to engage in any resale of coal, the seller (NCL/CIL) would terminate the agreement forthwith without any liability or damages whatsoever payable to the purchaser.

8. Upon joint inspection of the factories, it was found that the factories were non-functional and they had sold away the coal in breach of the condition contained in clause 4.4 of the FSA, without processing the same into SSF.

9. Regarding Ramji Singh - the applicant in Anticipatory Bail Application Nos. 1518 of 2023, 1523 of 2023 and 1602 of 2023, it is stated in the complaints filed by E.D. that he and Yogendra Nath Pandey - another officer of the DIC, had misused their official positions by certifying falls/fabricated reports prepared by the companies regarding proper utilization of coal received from NCL and about functioning of SSF manufacturing units without proper physical inspection. Their act facilitated continuous supply of coal from NCL, which resulted in generation of wrongful gain. The applicant Ramji Singh and Yogendra Nath Pandey were indirectly involved in the activity of abetment with regard to generation of proceeds of crime and thereby they committed the offence of money-laundering.

10. The complaint further states that three summons were issued to the applicant Ramji Singh and in reply to the last summon, he sought exemption from appearance due to his medical conditions.

11. In the affidavits filed in support of the anticipatory bail applications of the applicant Ramji Singh, it has been stated that no coal was supplied at a notified price on the basis of status report submitted by the applicant, because the coal was supplied under FSA and as per clause 4.4 of the agreement, it was the duty of NCL to inspect/call for any documents from the purchaser and physically verify the end use of coal and satisfy itself about its correctness. The applicant Ramji Singh has not received any money as a result of any criminal activity.

12. It has been stated that the applicant Ramji Singh is a 72 years old person, who is infirm and sick and he is suffering from numerous old age related ailments. Several documents indicating continuing treatment of the applicant from Medanta Hospital, Gurugram, have been annexed which indicate that the applicant is suffering from Hypertension, Diabetes, Lacunar Stroke, Depression and some cardiac problems and he has been a patient of T.B.

13. Regarding Ravindra Aggarwal, the applicant in Anticipatory Bail Application Nos. 1611 of 2023 and 1617 of 2023, it is alleged that he is the owner of M/s S.B.C. Minerals Pvt. Ltd. which had purchased undersized coal from M/s Sri Ram Fuels Pvt. Ltd., M/s Jai Durga Industries and M/s Drolia Coke Industries during year 2010-11 and the transaction was proved to be false. Ravindra Aggarwal has been charged for involvement in criminal conspiracy of illegal diversion of coal by showing fake purchase of undersized coal. The complaint records the statement of Ravindra Aggarwal that the coal so purchased from Shri Ram Fuels Pvt. Ltd., M/s Jai Durga Industries and M/s

Drolia Coke Industries was further sold to M/s Dalmia Cement Bharat Ltd. and other purchasers. Rupees ten lacs were paid to the seller through bank transfer and the balance payment was made in cash.

14. Jai Narayan Agarwal, the applicant in Criminal Miscellaneous Anticipatory Bail Application No. 1639 of 2023, is the Proprietor of Ananda Coal Movers, M/s Shivam Coal Movers and M/s Trishul Industries, which had purchased coal from M/s Fertico Marketing and Investment Pvt. Ltd., without the same having been processed into SSF. The complaint records the statement of the applicant that the coal so purchased from M/s Fertico Marketing and Investment Pvt. Ltd. was further sold to other purchasers. The entire amount towards purchase of coal was paid through cheques and bank transfers, except an amount of Rs.1,00,000/- which was paid in cash.

15. Subhash Chandra Tulsian, the applicant in Anticipatory Bail Application Nos. 1636 of 2023 and 1638 of 2023, is the owner of M/s Tulsian Coal Syndicate and M/s Purnagiri Holding Pvt. Ltd. The allegation against him is that during year 2010-11 M/s Swastik Cement Products and M/s Fertico Marketing and Investments Pvt. Ltd. had purchased the coal from NCL under FSA for processing and converting it into special smokeless fuel (SSF) but they wrongfully sold the coal in open market without processing the same to M/s Tulsian Coal Syndicate and M/s Purnagiri Holding Pvt. Ltd. It is alleged that some sale transactions appeared to be fake. Subhash Chandra Tulsian has been charged as being involved in criminal conspiracy of illegal diversion of coal by showing fake purchase of SSF. The complaints record the statement of the applicant that the coal so

purchased from M/s Swastik Cement Products and M/s Fertico Marketing and Investments Pvt. Ltd. was further sold to other purchasers. The entire consideration for the coal was paid through cheques only.

16. The learned counsel for the applicants in ABAIL Nos. 1611, 1617, 1636, 1638 and 1639 of 2023, namely Ravindra Aggarwal, Jai Narayan Agarwal and Subhash Chandra Tulsian, has submitted that the applicants have not committed any offence by purchasing the coal from Sri Ram Fuels Pvt. Ltd., M/s Jai Durga Industries, M/s Drolia Coke Industries, M/s Fertico Marketing and Investment Pvt. Ltd. and M/s Swastik Cement Products. At the most, the aforesaid companies are guilty of breach of agreement with NCL, which prohibited sale of coal in open market and under which the companies were obliged to process the coal, convert it into SSF and thereafter sell it in the open market. The applicants or their concerns were not parties to the contract between the NCL and the aforesaid three companies. No proceeds of crime have been recovered from any of the aforesaid applicants and none of their properties has been attached.

17. Considering the aforesaid facts, all the applicants have been granted anticipatory bail in the scheduled offences.

18. Besides the aforesaid cases arising out of allegations regarding illegal sale of coal leveled in furtherance of the joint inspection carried out on 25.03.2011, none of the applicants is involved in any other case.

19. The applicant Ramji Singh has been granted bail in Complaint Case No. 02 of 2016 under Section 3/4 of PMLA by

means of an order dated 31.10.2017 passed by this Court sitting at Allahabad in Criminal Misc. Bail Application No. 32061 of 2017.

20. Keeping in view the facts that the applicant Ramji Singh has retired from the position of General Manager of the DIC and presently he is aged about 72 years; that he is suffering from various ailments; that there is no allegation of recovery of any proceeds of crime from the applicant, he was granted interim order anticipatory bail on the following conditions and subject to any other conditions that may be fixed by the Trial Court:-

(i). That the applicant shall appear before the trial court on each date fixed unless personal presence is exempted;

(ii). That the applicant shall not, directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to any police officer or tamper with the evidence;

(iii). That the applicant shall not leave India without the previous permission of the court;

(iv). That the applicant shall not pressurize/ intimidate the prosecution witness.

21. The other applicants have also been granted interim anticipatory bail on similar terms.

22. The respondent – E.D. has filed counter affidavits in ABAIL Nos. 1518 of

2023, 1523 of 2023, 1602 of 2023, 1617 of 2023 & 1636 of 2023. It has not been disputed in the counter affidavits that the applicants have cooperated with the investigation and they were not arrested during investigation, but it has been stated that these facts are hardly relevant for deciding the application. The counter affidavits state that the proceeds of crime need not be relatable or traceable to any particular accused so long as the same is identifiable and can be related with the case.

23 . The counter affidavits refers to the law laid down by the Hon'ble Supreme Court in the cases of **Vijay Madanlal Choudhary versus Union of India** 2022 SCC OnLine SC 929, **Directorate of Enforcement versus M. Gopal Reddy and another** 2022 SCC OnLine SC 1862, **Y. S. Jagan Mohan Reddy versus Central Bureau of Investigation**, (2013) 7 SCC 439, **State of Bihar and another versus Amit Kumar**, (2017) 13 SCC 751 and **Rohit Tandon versus Directorate of Enforcement**, (2018) 11 SCC 46.

24. In **Directorate of Enforcement versus M. Gopal Reddy and another and Vijay Madanlal Chaudhary versus Directorate of Enforcement** (Supra), the Hon'ble Supreme Court held that the rigors of Section 45 of PMLA apply to the applications under Section 438 Cr.P.C.

25. In **Y.S. Jagan Mohan Reddy v. CBI**, (2013) 7 SCC 439, the Hon'ble Supreme Court had held that: -

“34. Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offences having deep-rooted conspiracies and

involving huge loss of public funds need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country.”

26. In **State of Bihar v. Amit Kumar**, (2017) 13 SCC 751, the students of one College were successful in occupying first ten places in the merit list of Intermediate Examination conducted by Bihar Intermediate Education Council. An FIR was registered under Sections 420, 465, 468, 471, 120-B I.P.C. Investigation revealed fraudulent practices prevailing in Bihar Intermediate Examination involving students and management of the College resulting in the arrest of the respondent. The High Court had granted bail to the respondent. In appeal the Hon’ble Supreme Court held that: -

“8. A bare reading of the order impugned discloses that the High Court has not given any reasoning while granting bail. In a mechanical way, the High Court granted bail more on the fact that the accused is already in custody for a long time. When the seriousness of the offence is such the mere fact that he was in jail for however long time should not be the concern of the courts. We are not able to appreciate such a casual approach while granting bail in a case which has the effect of undermining the trust of people in the integrity of the education system in the State of Bihar.”

(Emphasis supplied)

27. In **Rohit Tandon v. Directorate of Enforcement**, (2018) 11 SCC 46, during a raid conducted jointly by the Crime Branch and the Income Tax Department at the office premises of the appellant

sometime after demonetization, currency of Rs 13.62 crores was recovered, including new currency in the denomination of Rs 2,000/- amounting to Rs 2.62 crores. In addition, the appellant had surrendered Rs 128 crores during the raids conducted by the Income Tax Department in his office and residential premises. The bail application of the appellant was rejected by the High Court. The appellant preferred second bail application before the High Court of Delhi and he filed an application for his interim release on the assertion that his mother was seriously ill and she required immediate medical attention. The Second Bail Application was dismissed as withdrawn on the request of the applicant, yet the High Court granted interim bail to the appellant for 3 weeks, taking into account the period of incarceration of the petitioner, submission of the charge-sheet in the main case and the illness of the mother of the petitioner. In the aforesaid factual background, the Hon’ble Supreme Court held that: -

“21. The consistent view taken by this Court is that economic offences having deep-rooted conspiracies and involving huge loss of public funds need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country. Further, when attempt is made to project the proceeds of crime as untainted money and also that the allegations may not ultimately be established, but having been made, the burden of proof that the monies were not the proceeds of crime and were not, therefore, tainted shifts on the accused persons under Section 24 of the 2002 Act.”

28. The counter affidavit also makes a reference to the following passage from a

judgment dated 12.03.2001 passed by the Hon'ble Supreme Court in the case of **Rakesh Kumar Pandey versus Munni Singh @ Mata Bux Singh**, S.L.P. No. 4059 of 2000: -

“The High Court on being moved, has considered the application for bail and without bearing in mind the relevant materials on record as well as the gravity of offence released the accused-respondent on bail, since the accused, who had been ascribed similar role, had been granted bail earlier.”

29. The counter affidavit has been verified by an Assistant Director of ED, who has disclosed his qualification to be graduation, and all the averments made in the counter affidavit regarding various judgments of the Hon'ble Supreme Court have been verified on the basis of personal knowledge of the deponent. The reference made to the order passed by the Hon'ble Supreme Court in **Rakesh Kumar Pandey (Supra)** indicates an unfounded and unwarranted misapprehension in the mind of the deponent that this court will decide the bail application without bearing in mind the relevant materials on record or the gravity of the offence.

30. Section 45 of PMLA provides the following conditions for grant of bail to an accused person: -

“45. Offences to be cognizable and non-bailable.—

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence under this Act shall be released on bail or on his own bond unless—

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail:

Provided that a person, who, is under the age of sixteen years, or is a woman or is sick or infirm or is accused either on his own or along with other co-accused of money-laundering a sum of less than one crore rupees, may be released on bail, if the Special Court so directs:

Provided further that ...

* * *

(2) The limitation on granting of bail specified in sub-section (1) is in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail.

* * *

(Emphasis supplied)

31. It is relevant to note that Section 44 of the PMLA contains the following provision: -

“44. Offences triable by Special Courts.—*(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—*

(a) an offence punishable under Section 4 and any scheduled offence

connected to the offence under that section shall be triable by the Special Court constituted for the area in which the offence has been committed:

Provided that the Special Court, trying a scheduled offence before the commencement of this Act, shall continue to try such scheduled offence; or

(b) a Special Court may, upon a complaint made by an authority authorised in this behalf under this Act take cognizance of offence under Section 3, without the accused being committed to it for trial.

Provided that after conclusion of investigation, if no offence of money-laundering is made out requiring filing of such complaint, the said authority shall submit a closure report before the Special Court; or

(c) if the court which has taken cognizance of the scheduled offence is other than the Special Court which has taken cognizance of the complaint of the offence of money-laundering under sub-clause (b), it shall, on an application by the authority authorised to file a complaint under this Act, commit the case relating to the scheduled offence to the Special Court and the Special Court shall, on receipt of such case proceed to deal with it from the stage at which it is committed.

(d) a Special Court while trying the scheduled offence or the offence of money-laundering shall hold trial in accordance with the provisions of the Code of Criminal Procedure, 1973 (2 of 1974), as it applies to a trial before a Court of Session.

Explanation.—For the removal of doubts, it is clarified that,—

(i) the jurisdiction of the Special Court while dealing with the offence under this Act, during investigation, enquiry or trial under this Act, shall not be dependent upon any orders passed in respect of the scheduled offence, and the trial of both sets of offences by the same court shall not be construed as joint trial;

(ii) the complaint shall be deemed to include any subsequent complaint in respect of further investigation that may be conducted to bring any further evidence, oral or documentary, against any accused person involved in respect of the offence, for which complaint has already been filed, whether named in the original complaint or not.]

(2) Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under Section 439 of the Code of Criminal Procedure, 1973 (2 of 1974) and the High Court may exercise such powers including the power under clause (b) of sub-section (1) of that section as if the reference to “Magistrate” in that section includes also a reference to a “Special Court” designated under Section 43.”

(Emphasis supplied)

32. Surprisingly, Section 45 of the PMLA, which contains certain restrictions on the Courts' power to grant bail, does not contain any provision saving the special powers to grant bail conferred upon the High Courts by Section 439 Cr.P.C., whereas Section 44 of the PMLA, which confers jurisdiction for trial of offences

under the Act upon Special Courts and which does not contain any provision which may affect the powers of any Court regarding grant of bail, provides that nothing contained in Section 44 shall affect the High Court's special powers regarding bail under Section 439 Cr.P.C.

33. It appears that the provision contained in Section 44 (2) of PMLA saving special powers of the High Courts regarding grant of bail was meant to be incorporated in Section 45 of the Act, but it has erroneously been placed just above Section 45. This conclusion is supported by a study of similar provisions contained in other Statutes which are being referred to in the following paragraphs.

34. Section 12 (1) and 12 (2) of the **Anti-Hijacking Act, 2016** contains a provision similar to Section 45 (1) and 45 (2) of PMLA, but a provision similar to Section 44(2) of PMLA is also contained Section 12(3) of the **Anti-Hijacking Act**. The aforesaid section reads thus: -

"12. Provision as to bail.—(1) *Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence punishable under this Act shall, if in custody, be released on bail or on his own bond, unless,—*

(a) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

(b) where Public Prosecutor opposes the application, the Designated Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail as specified in sub-section (1) are in addition to the limitation under the Code of Criminal Procedure, 1973 (2 of 1974), or any other law for the time being in force, on granting bail.

(3) Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under Section 439 of the Code of Criminal Procedure, 1973 (2 of 1974)." (Emphasis Supplied)

35. The High Courts' special powers for grant of bail under Section 439 Cr.P.C. have been saved even when the punishment for the offence of hijacking provided in Section 4 is upto death.

36. Similarly, the offences under the Suppression of Unlawful Acts Against Safety of Civil Aviation Act, 1982 carry a punishment of imprisonment for life and Section 6A of the Act provides that: -

"6-A. Provision as to bail.—(1) *Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence punishable under this Act shall, if in custody, be released on bail or on his own bond unless—*

(a) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

(b) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974), or any other law for the time being in force on granting of bail.

(3) Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under Section 439 of the Code of Criminal Procedure, 1973 (2 of 1974)."

37. Section 3 of the **Maritime Anti-Piracy Act, 2022** provides that the offence of piracy will carry a maximum punishment of imprisonment upto life and in case the person committing piracy cause death of any person or attempts to cause death, he may be punished with death. Section 12 of the aforesaid Act provides that: -

"12. Provisions as to bail.—*(1) Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act shall, if in custody, be released on bail or on his own bond unless—*

(a) the Public Prosecutor has been given a reasonable opportunity to oppose the application for such release; and

(b) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) Nothing contained in this section shall be deemed to affect the special

powers of the High Court regarding grant of bail under section 439 of the Code."

38. Offences under **Suppression of Unlawful Acts Against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002** carry punishment upto death and Section 8 of the aforesaid Act provides that: -

"8. Provision as to bail.—*(1) Notwithstanding anything in the Code, no person accused of an offence punishable under this Act shall, if in custody, be released on bail or on his own bond unless—*

(a) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

(b) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in sub-section (1) are in addition to the limitations under the Code or any other law for the time being in force on granting of bail.

(3) Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under Section 439 of the Code."

39. Offences under the **Drugs and Cosmetics Act, 1940** carry a punishment of imprisonment upto life and Section 36 AC of the **Drugs and Cosmetics Act, 1940** provides that: -

“36-AC. Offences to be cognizable and non-bailable in certain cases.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—

(a) every offence, relating to adulterated or spurious drug and punishable under clauses (a) and (c) of sub-section (1) of Section 13, clause (a) of sub-section (2) of Section 13, sub-section (3) of Section 22, clauses (a) and (c) of Section 27, Section 28, Section 28-A, Section 28-B and sub-sections (1) and (2) of Section 30 and other offences relating to adulterated drugs or spurious drugs, shall be cognizable.

(b) no person accused, of an offence punishable under clauses (a) and (c) of sub-section (1) of Section 13, clause (a) of sub-section (2) of Section 13, sub-section (3) of Section 22, clauses (a) and (c) of Section 27, Section 28, Section 28-A, Section 28-B and sub-sections (1) and (2) of Section 30 and other offences relating to adulterated drugs or spurious drugs, shall be released on bail or on his own bond unless—

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail:

Provided that a person, who, is under the age of sixteen years, or is a woman or is sick or infirm, may be released on bail, if the Special Court so directs.

(2) The limitation on granting of bail specified in clause (b) of sub-section (1) is in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail.

(3) **Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under Section 439 of the Code of Criminal Procedure, 1973 (2 of 1974) and the High Court may exercise such powers including the power under clause (b) of sub-section (1) of that section as if the reference to “Magistrate” in that section includes also a reference to a “Special Court” designated under Section 36-AB.”**

40. The aforesaid Acts deal with heinous offences like hijacking of aero planes, unlawful acts against safety of civil aviation, maritime piracy, unlawful acts against safety of maritime navigation and fixed platforms on continental shelf, and offences relating to manufacture and sale of adulterated or spurious drugs, which would affect a very large number of population, and the offences carry punishment upto death. All the Acts contain restrictions of Courts’ power to grant bail to an accused person, which are similar to the restriction provided in Section 45 (1) and (2) of PMLA. All the acts provide that the aforesaid restrictions can be waved by the Special Courts in case of a person, who, is under the age of sixteen years, or is a woman or is sick or infirm, like the provision contained in the proviso appended to Section 45 (1) of PMLA.

41. Although the High Courts’ discretion in the matter of grant of bail has been saved in respect of offences as serious

as hijacking of aero planes and piracy on ships or manufacture or sale of adulterated or spurious drugs, by inserting a sub-section in the particular Section which contains restrictions against grant of bail, in PMLA, the clause saving the special powers of High Courts has been placed at a wrong place in Section 44, as noted above.

42. A similar error appears to have crept in **Narcotic Drugs and Psychotropic Substances Act, 1985**. Section 36-A of the Act provides for jurisdiction of Special Courts for trial of offences under the Act and it provides that: -

“36-A. Offences triable by Special Courts.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973—

(a) all offences under this Act which are punishable with imprisonment for a term of more than three years shall be triable only by the Special Court constituted for the area in which the offence has been committed or where there are more Special Courts than one for such area, by such one of them as may be specified in this behalf by the Government;

(b) where a person accused of or suspected of the commission of an offence under this Act is forwarded to a Magistrate under sub-section (2) or sub-section (2A) of Section 167 of the Code of Criminal Procedure, 1973, such Magistrate may authorise the detention of such person in such custody as he thinks fit for a period not exceeding fifteen days in the whole where such Magistrate is a Judicial Magistrate and seven days in the whole where such Magistrate is an Executive Magistrate:

Provided that in cases which are triable by the Special Court where such Magistrate considers—

(i) when such person is forwarded to him as aforesaid; or

(ii) upon or at any time before the expiry of the period of detention authorised by him;

that the detention of such person is unnecessary, he shall order such person to be forwarded to the Special Court having jurisdiction;

(c) the Special Court may exercise, in relation to the person forwarded to it under clause (b), the same power which a Magistrate having jurisdiction to try a case may exercise under Section 167 of the Code of Criminal Procedure, 1973, in relation to an accused person in such case who has been forwarded to him under that section;

(d) a Special Court may, upon perusal of police report of the facts constituting an offence under this Act or upon complaint made by an officer of the Central Government or a State Government authorised in his behalf, take cognizance of that offence without the accused being committed to it for trial.

(2) When trying an offence under this Act, a Special Court may also try an offence other than an offence under this Act with which the accused may, under the Code of Criminal Procedure, 1973, be charged at the same trial.

(3) Nothing contained in this section shall be deemed to affect the

special powers of the High Court regarding bail under Section 439 of the Code of Criminal Procedure, 1973, and the High Court may exercise such powers including the power under clause (b) of sub-section (1) of that section as if the reference to "Magistrate" in that section included also a reference to a "Special Court" constituted under Section 36.

* * *

43. Section 37 of NDPS Act contains restrictions against grant of bail, which are similar to the restrictions provided in PMLA and other Acts referred to above and it provides that: -

"37. Offences to be cognizable and non-bailable.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for offences under Section 19 or Section 24 or Section 27-A and also for offences involving commercial quantity shall be released on bail or on his own bond unless—

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor oppose the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section

(1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974), or any other law for the time being in force on granting of bail."

44. Section 37 of the NDPS Act, which contains the restrictions on the Courts' power to grant of bail, does not contain any provision saving the special powers to grant bail conferred upon the High Courts by Section 439 Cr.P.C., whereas Section 36-A of the NDPS Act, which confers jurisdiction for trial of offences under the Act upon Special Courts and which does not contain any provision which may affect the powers of any Court regarding grant of bail, provides that nothing contained in Section 36-A shall affect the High Court's special powers regarding bail under Section 439 Cr.P.C.

45. It appears that the provision contained in Section 36-A(3) of NDPS Act regarding special powers of the High Courts regarding grant of bail was meant to be incorporated in Section 37 of the Act, but it has erroneously been placed just above Section 37.

46. From the aforesaid study of pari materia provisions contained in several Statutes dealing with heinous offences carrying punishment upto death, the only irresistible conclusion that can be drawn is that the provision contained in Section 44 (2) of PMLA saving special powers of the High Courts regarding grant of bail was meant to be incorporated in Section 45 of the Act, but it has erroneously been placed just above Section 45. In present times of use of computers, such errors are commonly referred to as the "copy-paste errors".

47. In paragraph 274 of the judgment in the case of **Vijay Madanlal Chaudhary** (Supra), the Hon'ble Supreme Court referred to a King's Bench judgment in the case of *Seaford Court Estates Ltd.*, which is as follows: -

"274. We may profitably advert to the judgment in Seaford Court Estates Ltd. [1949] 2 K.B. 481, which states:

"...A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give "force and life" to the intention of the legislature. That was clearly laid down by the resolution of the judges in Heydon's case, (1584) 3 Co. Rep. 7a, and it is the safest guide today. Good practical advice on the subject was given about the same time by Plowden in his second volume Eyston v. Studd (1574) 2 Plowden 465. Put into homely metaphor it is this : A judge should ask himself the question : If the makers of the Act had themselves come across this ruck in the texture of it, how would they have straightened it out? He must then do as they would have done. A judge must not

alter the material of which it is woven, but he can and should iron out the creases."

48. In **Rajendra Prasad Yadav v. State of M.P.**, (1997) 6 SCC 678, the Hon'ble Supreme Court reiterated the well established principle of interpretation of Statutes that "all the provisions should be harmoniously interpreted to give effect to all the provisions and no part thereof rendered surplusage or otiose."

49. In case we look at the bare language of Sections 44 and 45 of PMLA, the defect of misplacement of the provision contained in Section 44(2) becomes manifest. Section 44 does not contain any restriction on the powers of any Court regarding grant of bail, yet Section 44(2) provides that nothing contained in this section shall affect the Special powers of the High Courts under Section 439 Cr.P.C. reading Section 44(2) with Section 44(1) only would render Section 44(2) of PMLA redundant and otiose, but this Court cannot choose an interpretation which will render the provision contained in Section 44 (2) of the PMLA redundant or otiose.

50. Apparently, Section 44(2) was inserted by the Parliament with the intention to save the special power of the High Courts under Section 439 Cr.P.C., which intention cannot be fulfilled due to an erroneous placement of the provision as pointed above. This Court has to interpret the provisions contained in Sections 44 and 45 of PMLA collectively so as to give "force and life" to the intention of the legislature behind inserting Section 44(2) in the Act. Undoubtedly, if the makers of the Act had themselves come across this jumbling of the provisions in Sections 44 and 45 due to a copy-paste error, they have surely have straightened it out by reading

Section 44(2) and Section 45 in conjunction with each other. Therefore, in order to correct the defect without altering the provisions of the Statute, the provisions of Sections 44 and 45 have to be read together and interpreted harmoniously so that Section 44(2) does not become redundant or otiose.

51. The only irresistible conclusion that can be drawn from the foregoing discussion, is that the intention of the Legislature was clear and unambiguous while making the provisions contained in Sections 44 and 45 of PMLA and it was that the Special Courts will have jurisdiction to try the offences under the Act and no Court shall grant bail to an accused person unless : -

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail:

Provided that a person, who, is under the age of sixteen years, or is a woman or is sick or infirm or is accused either on his own or along with other co-accused of money-laundering a sum of less than one crore rupees, may be released on bail, if the Special Court so directs:

(2) The limitation on granting of bail specified in sub-section (1) is in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail.

Nothing contained in sections 44 or 45 shall be deemed to affect the special powers of the High Court regarding bail under Section 439 of the Code of Criminal Procedure, 1973 (2 of 1974) and the High Court may exercise such powers including the power under clause (b) of sub-section (1) of that section as if the reference to "Magistrate" in that section includes also a reference to a "Special Court" designated under Section 43.

52. In view of the aforesaid discussion, I am of the considered view that the restrictions contained in Section 45 of the PMLA were meant to be applicable to Courts other than the Constitutional Courts and in view of the provision contained in Section 44 (2) of PMLA, those restrictions do not apply to the Constitutional Courts.

53. Sri. Rohit Tripathi, the learned Counsel for the respondent has next submitted that the C.B.I. has already submitted charge-sheets in respect of the scheduled offences and 23 applications filed under Section 482 Cr.P.C. challenging the validity of the charge-sheets have been dismissed by means of a common judgment and order dated 17.03.2021 passed by a coordinate Bench of this Court, the leading application being Application Under Section 482 No. 4253 of 2012. Sri. Tripathi has submitted that the dismissal of applications under Section 482 Cr.P.C. establishes prima facie involvement of the applicants in commission of the scheduled offence and this Court cannot go into the question whether the applicants are prima facie guilty of commission of the scheduled offence.

54. *As has already been held in the preceding paragraphs, the restriction contained in Section 45 of PMLA that bail*

cannot be granted to a person accused of an offence under the PMLA without recording a prima facie satisfaction of innocence of the applicant, is not applicable to the Constitutional Courts in view of the harmonious interpretation of Sections 44 and 45 of PMLA and, therefore, irrespective of the fate of the applications under Section 482 Cr.P.C., this Court need not record a prima facie satisfaction of innocence of the applicants. However, I proceed to consider the submission regarding effect of rejection of the applications under Section 482 Cr.P.C. on the anticipatory bail application.

55. The scope of scrutiny required for deciding an application under Section 482 Cr.P.C. and the scope of scrutiny required for deciding an application for anticipatory bail, are entirely different.

56. In **State of Haryana v. Bhajan Lal**, 1992 Supp (1) SCC 335, the Hon'ble Supreme Court had explained the scope of jurisdiction under Section 482 Cr.P.C. by holding that the inherent powers under Section 482 Cr.P.C. could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused, or where the allegations in the first information report and other materials accompanying the FIR do not disclose a cognizable offence, or where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused, or

where there is an express legal bar engrafted in the Cr.P.C. or any Act to the institution and continuance of the proceedings or where a criminal proceeding is manifestly attended with mala fide or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge. The Hon'ble Supreme Court gave the following note of caution in this regard: -

"103. We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice."

57. The factors to be taken into consideration while considering an application for bail are entirely different from those to be taken while deciding an application for quashing of the proceedings and those have been reiterated in paragraph 21 of the judgment in **P. Chidambaram v. CBI**, (2020) 13 SCC 337, which is being reproduced below: -

"21. The jurisdiction to grant bail has to be exercised on the basis of the well-settled principles having regard to the facts and circumstances of each case. The following factors are to be taken into consideration while considering an application for bail:

(i) the nature of accusation and the severity of the punishment in the case of conviction and the nature of the materials relied upon by the prosecution;

(ii) reasonable apprehension of tampering with the witnesses or apprehension of threat to the complainant or the witnesses;

(iii) reasonable possibility of securing the presence of the accused at the time of trial or the likelihood of his abscondence;

(iv) character, behaviour and standing of the accused and the circumstances which are peculiar to the accused;

(v) larger interest of the public or the State and similar other considerations.”

58. In **P. Chidambaram v. Directorate of Enforcement**, (2020) 13 SCC 791, the Hon’ble Supreme Court stated in the context of economic offences that: -

“23. Thus, from cumulative perusal of the judgments cited on either side including the one rendered by the Constitution Bench of this Court, it could be deduced that **the basic jurisprudence relating to bail remains the same inasmuch as the grant of bail is the rule and refusal is the exception so as to ensure that the accused has the opportunity of securing fair trial. However, while considering the same the gravity of the offence is an aspect which is required to be kept in view by the Court. The gravity for the said purpose will have**

to be gathered from the facts and circumstances arising in each case. Keeping in view the consequences that would befall on the society in cases of financial irregularities, it has been held that even economic offences would fall under the category of “grave offence” and in such circumstance while considering the application for bail in such matters, the Court will have to deal with the same, being sensitive to the nature of allegation made against the accused. One of the circumstances to consider the gravity of the offence is also the term of sentence that is prescribed for the offence the accused is alleged to have committed. Such consideration with regard to the gravity of offence is a factor which is in addition to the triple test or the tripod test that would be normally applied. **In that regard what is also to be kept in perspective is that even if the allegation is one of grave economic offence, it is not a rule that bail should be denied in every case since there is no such bar created in the relevant enactment passed by the legislature nor does the bail jurisprudence provide so.** Therefore, the underlining conclusion is that irrespective of the nature and gravity of charge, the precedent of another case alone will not be the basis for either grant or refusal of bail though it may have a bearing on principle. But ultimately the consideration will have to be on case-to-case basis on the facts involved therein and securing the presence of the accused to stand trial.”

(Emphasis Supplied)

59. In **Satender Kumar Antil v. CBI**, (2022) 10 SCC 51, the Hon’ble Supreme Court has quoted with approval the above quoted passage from **P. Chidambaram** (Supra) and has reiterated that “The principle that bail is the rule and jail is the exception has been well recognized through

the repetitive pronouncements of this Court.”

60. In **Sushila Aggarwal v. State (NCT of Delhi)**, (2020) 5 SCC 1, the Hon’ble Supreme Court held that: -

“7.1. ...there is no distinction or difference between the pre-arrest bail order under Section 438 and the bail order under Sections 437 and 439 CrPC. The only difference between the pre-arrest bail order under Section 438 and the bail order under Sections 437 and 439 is the stages at which the bail order is passed. The bail order under Section 438 CrPC is prior to his arrest and in anticipation of his arrest and the order of bail under Sections 437 and 439 is after a person is arrested.”

61. After taking into consideration various precedents on the point of grant of anticipatory bail in economic offences, in **Sushila Aggarwal** (Supra), the Hon’ble Supreme Court held that: -

75. For the above reasons, the answer to the first question in the reference made to this Bench is that **there is no offence, per se, which stands excluded from the purview of Section 438, except the offences mentioned in Section 438(4). In other words, anticipatory bail can be granted, having regard to all the circumstances, in respect of all offences. At the same time, if there are indications in any special law or statute, which exclude relief under Section 438(1) they would have to be duly considered. Also, whether anticipatory bail should be granted, in the given facts and circumstances of any case, where the allegations relating to the commission of offences of a serious nature, with certain special conditions, is a matter of discretion to be exercised, having regard**

to the nature of the offences, the facts shown, the background of the applicant, the likelihood of his fleeing justice (or not fleeing justice), likelihood of cooperation or non-cooperation with the investigating agency or police, etc. There can be no inflexible time-frame for which an order of anticipatory bail can continue.

76. Therefore, **this Court holds that the view expressed in Salauddin Abdulsamad Shaikh v. State of Maharashtra, (1996) 1 SCC 667, K. L. Verma v. State, (1998) 9 SCC 348, Nirmal Jeet Kaur v. State of M.P., (2004) 7 SCC 558, Satpal Singh v. State of Punjab, (2018) 13 SCC 813, Adri Dharan Das v. State of W.B., (2005) 4 SCC 303, HDFC Bank Ltd. v. J.J. Mannan, (2010) 1 SCC 679 and Naresh Kumar Yadav v. Ravindra Kumar, (2008) 1 SCC 632 about the Court of Session, or the High Court, being obliged to grant anticipatory bail, for a limited duration, or to await the course of investigation, so as the “normal court” not being “bypassed” or that in certain kinds of serious offences, anticipatory bail should not be granted normally — including in economic offences, etc.—are not good law.”**

(Emphasis supplied)

62. In **Kamlesh and another versus State of Rajasthan and another**, 2019 SCC OnLine SC 1822, the High Court of Rajasthan had rejected the application for anticipatory bail only on the ground that petition under Section 482 Cr.P.C., praying for quashing of FIR, had already been rejected. The Hon’ble Supreme Court allowed the appeal filed against the order of the High Court by holding that: -

“5. We are of the view that the order of the High Court cannot be

sustained. High Court ought to have considered the application on merits. The fact that petition under Section 482 Cr.P.C. was dismissed for quashing was not conclusive and could not be the reason for rejecting the application.”

63. In view of the foregoing discussion, I find no force in the aforesaid submission of Sri. Tripathi that the rejection of the application under Section 482 establishes prima facie involvement of the applicants in commission of the scheduled offence and it would lead to rejection of the anticipatory bail application. This Court has to decide the application for anticipatory bail on its own merits, without being influenced by rejection of the application under Section 482 Cr.P.C. Accordingly, I proceed to consider the facts of the case.

64. In the present case, the joint surprise check was carried out on 25.03.2011. The C.B.I./ACB Lucknow filed 5 F.I.Rs. on 13.04.2011 and it submitted 5 charge-sheets on 31.05.2012. The E.D. has filed the complaints on 12.07.2018, 03.06.2019 and 24.06.2013, i.e. after more than 7 to 12 years since lodging of the F.I.Rs. and after more than 6 to 11 years since submission of the charge-sheets by the C.B.I. The Special Court has registered the complaints as a Session Cases in the year 2023.

65. The applicants claim that the allegations made in the FIRs. make out a case of merely breach of the conditions of FSAs, which was a bilateral commercial agreement between two parties. The consequence of such a breach can only be cancellation of the agreements, as provided in Clause 4.4 of the agreement. The coal was supplied at the notified rates and no

subsidy was paid in response to information sought under the Right to Information Act, the Coal India Ltd. has admitted that no subsidy or financial support is given by any Government and the price of Coal was fixed and notified by the Coal India Ltd. Therefore, prima facie it appears that no loss was occasioned to the Government and no offence of cheating is made out against any accused person.

66. No proceeds of crime have been recovered from the applicant Ramji Singh and the only allegation against the applicant is that he was indirectly involved in the activity of abetment with regard to generation of proceeds of crime, and even as per the complaint, there is no allegation of his direct involvement in commission of any offence. Meanwhile the applicant Ramji Singh has attained the age of 72 years and obviously he has retired long ago and he does not appear to be in a position to influence the witnesses or tamper with the evidence. Having retired, there appears no reasonable apprehension of the applicant Ramji Singh indulging in commission of a similar offence after grant of anticipatory bail to him.

67. Ravindra Aggarwal the applicant in ABAIL Nos. 1611 of 2023 and 1617 of 2023 is proprietor of M/s SBC Minerals Pvt. Ltd., which had purchased coal from M/s Shree Ram Fuels Pvt. Ltd., M/s Jai Durga Industries and M/s Drolia Coke Industries during year 2010-11. Ravindra Aggarwal has been charged for involvement in criminal conspiracy of illegal diversion of coal in violation of conditions of FSA and showing fake purchase of undersized coal. The complaint records the statement of Ravindra Aggarwal that the coal so purchased was further sold to other purchasers. M/s S.B.C.

Minerals Pvt. Ltd. was not a party to the contract between the NCL and the aforesaid three companies. No proceeds of crime have been recovered from Ravindra Aggarwal and none of his properties has been attached.

68. Jai Narayan Agarwal, the applicant in ABAIL No. 1639 of 2023, is the proprietor of M/s Ananda Coal Movers, M/s Shivam Coal Movers and M/s Trishul Industries, which had purchased coal from M/s Fertico Marketing and Investment Pvt. Ltd., without the same having been processed into SSF. The complaint records the statement of the applicant that the coal so purchased from M/s Fertico Marketing and Investment Pvt. Ltd. was further sold to other purchasers. The entire amount towards purchase of coal was paid through cheques and bank transfers, except an amount of Rs.1,00,000/-, which was paid in cash. Jai Narayan Agarwal or his firms were not a party to the contract between the NCL and M/s Fertico Marketing and Investment Pvt. Ltd. No proceeds of crime have been recovered from the applicant Jai Narayan Agarwal and none of his properties has been attached.

69. Subhash Chandra Tulsian, the applicant in Anticipatory Bail Application Nos. 1636 of 2023 and 1638 of 2023, is the owner of M/s Tulsian Coal Syndicate and M/s Purnagiri Holding Pvt. Ltd. The allegation against him is that M/s Swastik Cement Product and M/s Fertico Marketing and Investments Pvt. Ltd. had sold coal to M/s Tulsian Coal Syndicate and M/s Purnagiri Holding Pvt. Ltd. during year 2010-11, and some sale transactions appeared to be fake. He has been charged as being involved in criminal conspiracy of illegal diversion of coal by showing fake purchase of SSF. M/s Swastik Cement

Products and M/s Fertico Marketing and Investments Pvt. Ltd. had purchased the coal under FSA from NCL for processing and converting it into special smokeless fuel (SSF) but they wrongfully sold the coal in open market without processing the same. The coal so purchased was further sold to other purchasers. The entire consideration for the coal was paid through cheques only. Neither any proceeds of crime have been recovered from the applicant Subhash Chandra Tulsian nor any of his properties has been attached.

70. All the applicants have cooperated with the investigation and they have got their statements recorded. Investigations stand complete and the E.D. has filed complaints after completion of investigation.

71. If the Statute provides for stringent provisions for prosecution and punishment and restrictions on grant of bail, it is the bounden duty of the State to ensure that such trials get precedence and are concluded within a reasonable time, but in the present case even the complaints have been lodged after an inordinate delay of 7 to 12 years.

72. All the applicants have already submitted bail bonds in furtherance of the interim orders passed by this Court granting interim anticipatory bail to them. No violation of any 3of the conditions of interim anticipatory bail granted to any of the applicants has been pointed out in any of the counter affidavits filed by the E.D.

73. In view of the aforesaid discussion, I am of the view that all the orders granted interim anticipatory bail to the applicants deserve to be confirmed and the applications deserve to be allowed.

74. Accordingly, the Civil Miscellaneous Anticipatory Bail Application Numbers 1518 of 2023, 1523 of 2023, 1602 of 2023, 1611 of 2023, 1617 of 2023, 1636 of 2023, 1638 of 2023 and 1639 of 2023 are allowed. As the applicants have already furnished bail bonds in furtherance of the interim orders passed in their favour, they need not furnish any fresh bail bonds. The conditions of bail imposed in the interim orders shall continue to bind the applicants.

(2023) 9 ILRA 582
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 06.09.2023

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Crl. Misc. Anticipatory Bail Application No. 1981
of 2023
(Under Section 438 Cr.P.C.)

Khalid Anwar @ Anwar Khalid ...Applicant
Versus

C.B.I. ...Respondent

Counsel for the Applicant:

Shitla Prasad Tripathi, Amresh Singh

Counsel for the Respondent:

Anurag Kumar Singh

(A) Criminal Law - Indian Penal Code, 1860 - Sections 120-B, r. w. 419 & 420- Prevention of Corruption Act, 1988 - Section 7 (c), 13(1)(a) r. w. 13(2) - The Code of Criminal Procedure, 1973 - Section 82 - Proclamation for person absconding, The Customs Act, 1962 - Section 104 , 110 , 135(1) .(Para -)

Proclamation under Section 82 Cr.P.C issued against applicant - carrying 400 gms. foreign origin gold worth Rs.15,48,000/- - seized under Customs Act - not declared proclaimed offender - recovery made on 19.12.2019 - F.I.R lodged

on 10.08.2022 - no explanation for delay in lodging F.I.R. - non-cognizable, bailable - maximum punishment up to 3 years - not a public servant - no other criminal history - co-accused granted bail. **(Para - 18)**

HELD:-Facts sufficient for making out a case for granting anticipatory bail to applicant. **(Para - 18)**

Anticipatory bail application allowed. (E-7)

List of Cases cited:

1. Lavesh Vs St. (NCT of Delhi), (2012) 8 SCC 730

2. Sanatan Pandey Vs St. of U.P. & anr., 2021 (4) Criminal CC 512

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

1. Heard Sri. Arpit Chaudhary Advocate, holding brief of Sri. Shitla Prasad Tripathi Advocate, the learned Counsel for the applicant and the learned Counsel for the respondent – C.B.I. and perused the record.

2. The instant application has been filed by the applicant seeking anticipatory bail in F.I.R. bearing R.C. No. 220/2022/E0011-CBI/EO-11/ND, under Sections 120-B, read with 419, 420 I.P.C. and Section 7 (c), 13(1)(a) read with 13(2) of Prevention of Corruption Act, 1988, registered at Police Station CBI/EO-II/New Delhi, District New Delhi.

3. The aforesaid case has been registered on the basis of an F.I.R. lodged on 10.08.2022 against 19 named persons, including the applicant, and some unknown public servants and private persons, stating that a written complaint dated 01.07.2022 had been received from the Assistant Commissioner, Directorate General of Vigilance, Indirect Taxes and Customs of

Lucknow Zonal Unit regarding smuggling of contraband goods of foreign origin like gold (5501.99 grams), reputed foreign brand cigarettes (434400 sticks) and saffron (30 kgs.).

4. The learned counsel for the respondent-C.B.I has raised a preliminary objection that a proclamation under Section 82 Cr.P.C has been issued against the applicant and, therefore, in view of the law laid down by the Hon'ble Supreme Court in **Lavesh v. State (NCT of Delhi)**, (2012) 8 SCC 730, the applicant is not entitled to be granted anticipatory bail.

5. Section 82 Cr.P.C. reads as follows:

82. Proclamation for person absconding.—*(1) If any Court has reason to believe (whether after taking evidence or not) that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed, such Court may publish a written proclamation requiring him to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation.*

(2) The proclamation shall be published as follows:—

(a) it shall be publicly read in some conspicuous place of the town or village in which such person ordinarily resides;

(b) it shall be affixed to some conspicuous part of the house or homestead in which such person ordinarily resides or to some conspicuous place of such town or village;

(c) a copy thereof shall be affixed to some conspicuous part of the Court house;

(ii) the Court may also, if it thinks fit, direct a copy of the proclamation to be published in a daily newspaper circulating in the place in which such person ordinarily resides.

(3) A statement in writing by the Court issuing the proclamation to the effect that the proclamation was duly published on a specified day, in the manner specified in clause (i) of sub-section (2), shall be conclusive evidence that the requirements of this section have been complied with, and that the proclamation was published on such day.

(4) Where a proclamation published under sub-section (1) is in respect of a person accused of an offence punishable under Section 302, 304, 364, 367, 382, 392, 393, 394, 395, 396, 397, 398, 399, 400, 402, 436, 449, 459 or 460 of the Indian Penal Code (45 of 1860), and such person fails to appear at the specified place and time required by the proclamation, the Court may, after making such inquiry as it thinks fit, pronounce him a proclaimed offender and make a declaration to that effect.

(5) The provisions of sub-sections (2) and (3) shall apply to a declaration made by the Court under sub-section (4) as they apply to the proclamation published under sub-section (1)."

6. In the present case, a proclamation under Section 82 (1) Cr.P.C has been issued on 01.08.2023 requiring the applicant to appear before the Court on 02.09.2023. However, there is nothing on record to

indicate that the proclamation has been 'published' as provided under Sub-section (1) of Section 82 Cr.P.C., as there is no material to indicate that the proclamation was publicly read in some conspicuous place of the town or village in which the applicant ordinarily resides or that it has been affixed to some conspicuous part of the house or homestead in which the applicant ordinarily resides or to some conspicuous place of such town or village or a copy of the proclamation has been affixed to some conspicuous part of the Court house or that it has been published in a daily newspaper circulating in the place in which the applicant ordinarily resides, which are the modes of publication mandated in Sub-section (2) of Section 82 Cr.P.C.

7. The Court issuing the proclamation has not made any statement in writing as provided in Sub-section (3) of Section 82 Cr.P.C. to the effect that the proclamation was duly published in the manner specified in clause (i) of sub-section (2).

8. When the proclamation has not even been published as per the law, the occasion for the applicant being "**declared**" a proclaimed offender under Sub-section (4) of Section 82 Cr.P.C has not yet arisen.

9. In **Lavesh** (Supra) the applicant had been declared a proclaimed offender and in these circumstances, the Hon'ble Supreme Court had held that:-

"Normally, when the accused is 'absconding' and declared as a 'proclaimed offender', there is no question of granting anticipatory bail. We reiterate that when a person against whom a warrant had been issued and is absconding or concealing himself in order to avoid

execution of warrant and declared as a proclaimed offender in terms of Section 82 of the Code he is not entitled to the relief of anticipatory bail."

10. Therefore, as the applicant has not been declared to be a proclaimed offender as yet, the bar created by the principle of law laid down by the Hon'ble Supreme Court in **Lavesh** (supra) would not apply to the present case.

11. The learned counsel for the respondent has relied upon another judgment passed by the Hon'ble Supreme Court in **Sanatan Pandey Vs. State of Uttar Pradesh and Another**, 2021 (4) CriminalCC 512. In that case, the petitioner was charged for the offences punishable under sections 147, 148, 323, 324, 307, 308, 504, 452 I.P.C. The incident took place on 05.03.2017. A charge-sheet was filed on 20.11.2018. The petitioner had filed an application under Section 482 Cr.P.C seeking quashing of the charge-sheet and this application was dismissed by the High Court by means of an order dated 10.12.2019. While dismissing the application under Section 482 Cr.P.C, the High Court had directed that in case the petitioner appears and surrenders before the court within 30 days and applies for bail, his prayer for bail shall be considered and during that period, no coercive steps shall be taken against the applicant. Despite having taken the benefit of the order dated 10.12.2019, the petitioner did not surrender and apply for grant of bail. Thereafter, a non-bailable warrant was issued against him and proceedings under Section 82 Cr.P.C. were initiated. In this factual background, the Hon'ble Supreme Court held that a prima facie case was found against the petitioner for the aforesaid offences, charge-sheet has been filed

against him and he was absconding. Therefore, it was not a fit case to grant anticipatory bail to the petitioner.

12. While dismissing the S.L.P on the aforesaid grounds, the Hon'ble Supreme Court observed in **Sanatan Pandey** (Supra) that *"the court shall not come to rescue or help of the accused who is not cooperating the investigating agency and absconding and against whom not only non-bailable warrant has been issued but also the proclamation under Section 82 Cr.P.C has been issued."*

13. It is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its ratio decidendi and not some conclusion based upon facts, more particularly when the facts are not even remotely similar. As the applicant has not been declared to be a proclaimed offender as yet and the bar created by the principle of law laid down by the Hon'ble Supreme Court in Lavesb (supra) does not apply to the present case, I reject the preliminary objection raised by the learned Counsel for the respondent. Sanatan Pandey (Supra) was decided after taking into the facts of the case and I also proceed to examine the merits of the application.

14. The allegation against the applicant is that he was carrying 400 gms. foreign origin gold worth Rs.15,48,000/- and the same was seized under Section 110 of the Customs Act, 1962.

15. On the same set of allegations, the Directorate of Revenue Intelligence has filed a complaint against the applicant. Section 135(1) of the Customs Act, 1962 provides that in such cases, the accused shall be punishable with imprisonment for

a term which may extend to three years or with fine or with both and Section 104 of the Customs Act, 1962, provides that the offence will be non-cognizable and bailable.

16. The C.B.I. has registered F.I.R. on the basis of allegations, which are already the subject matter of a complaint filed by the Directorate of Revenue Intelligence. The C.B.I. inter alia alleges commission of offence under the Prevention of Corruption Act, 1988 and the applicant is not a public servant.

17. A co-accused Ajeet Tiwari, from whom 22,000 sticks of imported cigarettes were recovered has been granted anticipatory bail by means of an order dated 24.07.2023 passed by this court in Criminal Misc. Anticipatory Bail Application No. 664 of 2023.

18. Having considered the aforesaid facts and circumstances of the case and keeping in view the fact that the alleged recovery was made on 19.12.2019 but the F.I.R. has been lodged on 10.08.2022 and there is no explanation for the delay in lodging the F.I.R.; that the substantive offence allegedly committed by the applicant is non-cognizable, bailable and carries a maximum punishment of imprisonment upto 3 years; that although the C.B.I. has alleged commission of offences under the Prevention of Corruption Act, 1988, the applicant is not a public servant; that the applicant has no other criminal history and that a co-accused person Ajeet Kumar has already been granted bail and without making any observations which may affect the outcome of the case, I am of the view that the aforesaid facts are sufficient for making out a case for granting anticipatory bail to the applicant.

19. In view of the above, the anticipatory bail application of the applicants is allowed. In the event of arrest / appearance of applicant- **Khalid Anwar Alias Anwar Khalid** before the learned Trial Court in the aforesaid case crime, he shall be released on bail on his furnishing personal bond and two solvent sureties, each in the like amount, to the satisfaction of Officer/Court concerned on the following conditions and subject to any other conditions that may be fixed by the Trial Court: -

(i). That the applicant shall appear before the trial court on each date fixed, unless personal presence is exempted;

(ii). That the applicant shall not, directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to any police officer or tamper with the evidence;

(iii). That the applicant shall not pressurize/ intimidate the prosecution witness

(2023) 9 ILRA 586

**APPELLATE JURISDICTION
CRIMINAL SIDE**

DATED: LUCKNOW 06.09.2023

BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Criminal Appeal No. 107 of 2000

**Om Prakash @ Prakash & Anr....Appellants
Versus**

The State of U.P. ...Opposite Party

Counsel for the Appellants:

Sri J.P. Awasthi, Sri Anuj Pandey, Sri Sheikh Wali-Uz Zaman

Counsel for the Opposite Party:
G.A.

A. Criminal Law-Criminal Procedure Code,1973-Section 374(2) - Indian Penal Code, 1860-Section 306-Challenge to Conviction-PW2-Raj Kumar has been declared hostile- PW5 who first informed the brother of the deceased regarding this incident, too has not supported the prosecution case-he has demolished the theory that the deceased was not good looking and therefore was being maltreated by her husband- he has not been cross examined by the prosecution-The third witness , in his chief examination merely said that deceased was maltreated because she was not good looking but he has not stuck to this version in his cross examination-In the instant matter, the case of the prosecution is that the accused instigated the commission of crime- There is not much substance in the rhetoric of PW1 that accused persons used to exhort deceased's husband to marry again-The evidence on such theory is quite inadequate to brand it as truthful-Moreover there is no evidence to show that just before the deceased took this extreme step of taking of her life, there was some immediate provocation from the side of the accused person which propelled her to commit suicide- the prosecution has failed to prove any proximity between the act of suicide with the act or conduct or treatment meted out to the deceased by the accused- Thus, the prosecution has failed to prove that in fact she was maltreated or harassed to such an extent which shall essentially fall within the term of 'instigation' to commit suicide.(Para 1 to 26)

B. To convict a person under Section 306 IPC, there has to be clear mens rea to commit offence. It also requires an active act or direct act which leads deceased to commit suicide finding no other option

and the act must be such reflecting intention of the accused to push deceased into such a position that he commits suicide. The prosecution has to establish beyond reasonable doubt that the deceased committed suicide. In the present case, both the elements are absent. (Para 21)

The appeal is allowed. (E-6)

List of Cases cited:

1. Mariano Anto Bruno & anr. Vs The Insp. of Police CRLA No. 1628 of 2022
2. M. Arjunan Vs St. rep. by its Insp. of Police (2019) 3 SCC 315
3. Ude Singh & ors. Vs St. of Har. (2019) 17 SCC 301

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

1. Heard Sri Sheikh Wali-Uz Zaman, learned counsel for the appellants and Sri Ajay Kumar Srivastava, learned AGA for the State.

2. This criminal appeal has been filed by the appellants-Om Prakash @ Prakash and Naresh @ Ram Naresh challenging the order of conviction and sentence dated 08.02.2000 passed by the VIIth Additional Sessions Judge, Hardoi in ST No. 652 of 1995 whereby the appellant has been convicted under section 306 IPC and sentenced to undergo imprisonment of 5 years.

3. A number of legal and factual points have been raised by the appellants which shall be dealt with at appropriate stages in the body of the judgment.

4. Relevant facts in nutshell are as below:-

(i) *The first informant Asharfi Lal gave a type written report before the police station concerned with the allegations that his real sister-Ramladaiti was married to Prakash about 7 years ago; she had two daughters from this marriage alliance; the members of her family used to harass her because she was not good looking; the accused persons used to threaten first informant's sister saying that her husband Prakash shall perform second marriage; his sister had disclosed all the facts to the first informant and he counseled his sister and sent her to her matrimonial house again; in the month of 'agahan' when he went for 'vidah' of his sister, the accused persons first refused to send her but when he persisted, they sent her after physically assaulting her. In the morning of 10.07.1995 the first informant's brother in-law (chachera behnoi)-Braj Mohan came and informed him that his sister has hanged herself the previous night; the first informant went to the place of occurrence and found her hanging with a plastic rope; her sister was maltreated and put to misbehavior to such an extent by Prakash and other members of his family that she was compelled to take her life.*

(ii) *As per prosecution case on the basis of earlier written information dated 10.07.1995 given by the first informant-Asharfi Lal, the inquest on dead body of the deceased was conducted on 10.07.1995 from 1pm onwards and postmortem was conducted on 11.07.1995 at 3.30 pm.*

(iii) *On the basis of another type written report case crime no. 174 of 1995 under section 306 IPC was registered on 11.08.1995 at 12.30 and investigated upon.*

5. The investigating officer proceeded to inspect the site of the occurrence collected the documentary evidence, recorded the oral evidence of the witness and submitted a chargesheet against all the accused persons under section 306 IPC. The case proceeded and the Sessions court framed charges under section 306 IPC against both the accused persons.

6. The prosecution examined PW1-Asharfi Lal (the informant), PW2-Raj Kumar, PW3- Dr S.K. Rastogi, PW4-ASI Dal Bahadur, PW5-Braj Mohan, PW6-Ramkhelawan, PW7-SI Ram Sahai.

7. Following documentary evidence was produced (i) Typed written tehrir dated 11.07.1995 (Exhibit Ka-1), (ii) Typed written tehrir dated 09.08.1995 (Exhibit Ka-2), (iii) Copy of GD dated 11.07.1995 (Exhibit Ka-6), (iv) Chik (Exhibit Ka-5), (v) Copy of GD No. 14 dated 10.07.1995, (vi) Copy of GD No. 32 dated 10.07.1995, (vii) Memo seizure rope (Exhibit Ka-13), (viii) Site Map (Exhibit Ka-14), (ix) Postmortem (Exhibit Ka-4), (x) Inquest (Exhibit Ka-3), (xi) Copy of GD No. 14 dated 10.07.1995 (Exhibit Ka-16), (xii) Chargesheet (Exhibit Ka-15), (xiii) Hand written tehrir of Asharfi Lal dated 10.07.1995 (Exhibit Ka-10).

8. In the statement recorded under section 313 Cr.P.C., the accused persons claimed to be innocent and denied having any involvement in the offence. No evidence has been produced in defence.

9. All the accused persons namely, Om Prakash @ Prakash, Naresh @ Ram Naresh, Ram Saran, Roop Rani and Smt. Jaidevi were put to trial. Only two of them were convicted by the trial court who are now before this court in this appeal.

10. Before proceeding to evaluate the evidence given on behalf of the prosecution, it shall be useful to briefly refer to the oral evidence given by the witnesses:-

(i) **PW1-Asharfi Lal**, the first informant has stated that his sister was not good looking, therefore the accused persons used to beat her frequently and used to commit physical and mental atrocities on her; they demanded a 'buffalo' from her; it is alleged by him that they wanted his sister to leave the house so that Om Prakash @ Prakash can remarry; he has further stated that when he went to receive his sister for her 'vida' to 'maika', she was beaten by the accused persons in his presence on two occasions.

(ii) **PW2-Raj Kumar** is essentially a witness of inquest and has no useful thing to say in support of prosecution story; he has in fact been declared hostile and has declined to support the prosecution case by saying that he never gave a statement under section 161 Cr.P.C. that her husband, devar and saas used to harass the deceased.

(iii) **PW3-Dr. S.K. Rastogi** conducted the postmortem and found ligature mark on her neck and a lacerated wound on the base of her right thumb and a contusion on left heel.

(iv) **PW4- ASI Dal Bahadur**, a formal witness who has proved the chik and the copy of G.D of different dates, which shall be referred to at appropriate places in this judgment.

(v) **PW5-Braj Mohan**, the witness who gave the information about death of Ramladaiti to her brother, has said

in his statement that the deceased was, though not very beautiful but was not bad either; he has said that the accused persons never threatened her by saying that Prakash will remarry some other woman.

(vi) **PW6-Ram Khelawan** has supported the prosecution case in his chief-examination saying that the accused Om Prakash and Naresh (devar) and other members of the family used to maltreat and humiliate her saying that she was not beautiful enough.

(vii) **PW7-SI Ram Sahai**, the investigating officer who has, besides proving the inquest report, related papers, the site map, the chargesheet etc. has also stated about the evidence of the witnesses recorded by him.

11. In his testimony PW1, who is the first informant as well as the real brother of the deceased, has alleged that the deceased was being harassed by her husband Prakash and other accused persons to attain an objective that she leaves the house so that her husband can remarry; it is added that she was not good looking, therefore he wanted to marry some other woman; Secondly, the accused were demanding a 'buffalo' from her. In his testimony, he said that two times it happened that his sister was physically assaulted by her in-laws in his presence.

This is all the witness has to say regarding the facts preceding the commission of suicide.

12. As regards filing of an FIR, PW1 has said that he reached the place of occurrence, the 'chappar'/house of her sister at about 9.30 in the morning; they reached at the Police Station-Beniganj at about 12 in the

afternoon and told everything to the police officer there; the written report regarding the incident was prepared with the help of one Lalaji (the scribe of the tehir); he has denied the suggestion that he never went to the police station concerned on that day. He has stated that copy of the chik FIR was handed over to him the same day and he delivered that paper to a lawyer on 3rd day after the incident; he gave a written report to the District Magistrate; he received the copy of that report after a month. This witness has given divergent statements as regard reporting the matter to the police. The PW1 has stated as below:-

"मैं इसके बाद मुल्जिम ओम प्रकाश के घर के अन्दर जाकर देखा तो मुल्जिमा जय देवी के अलावा घर में अन्य कोई सदस्य मौजूद नहीं था। आधा घन्टा तक रुकने के पश्चात मैं थाना बेनीगंज रिपोर्ट करने गया। थाना बेनीगंज में मुंशी को मैंने घटना का जबानी हाल बताया था परन्तु मुंशीजी ने जैसा मैंने बताया था वैसा हाल मुंशीजी ने नहीं लिखा था। इसके बाद मैं दरोगा रामसहाय से मिला। तो उन्होंने मुझे डांट-फटकार कर भगा दिया। मैं लौटकर ग्राम खेरवा लौट आया। इसके बाद पोस्टमार्टम होने के दूसरे दिन एक प्रा०पत्र जिला मजिस्ट्रेट, कप्तान तथा ङ को दिए थे। मैंने यह प्रा० पत्र रजिस्ट्री किए थे। कोई कार्यवाही न होने पर मैंने एक महीने बाद एक प्रा०पत्र ङ सण्डीला को दिया था। मैं आज रजिस्ट्री रशीद तारीखी 11.7.95 अन्डरपोस्टिंग सर्टीफिकेट चिकित्साधिकारी हरदोई दिनांक 11.7.95 तथा अपने दस्तखती प्रा०पत्र की प्रति जिस पर मेरे हस्ताक्षर हैं।"

The witness has proved the type written reports dated 11.07.1995 and 09.08.1995 Exhibit Ka-1 and Ka-2. In his cross examination he has given inconsistent statements as is evident from his cross examination on page nos. 7 and 8 of his testimony.

13. Admittedly, this FIR was registered on the basis of a type written

report which is Exhibit Ka-2 and proved by PW1; this type written report dated 09.08.1995 was addressed to Additional Superintendent of Police, Sandila, Hardoi and it named five persons. The first informant in this written report has mentioned that the accused persons used to harass her because she was not good looking and used to exhort Prakash to marry a second time. There is one more written report which again has been proved by the prosecution Exhibit Ka-1 which mentions not 5 persons but merely 4 persons; Nothing of this sort has been mentioned in this written report. Exhibit Ka-1 dated 11.07.1995 does not say anything about threats of remarriage because of the reason that his sister was not good looking; Instead in type written report dated 11.07.1995, it is alleged that because the demand for 'buffalo' etc could not be fulfilled, therefore they had killed his sister.

14. There is yet another hand written report dated 10.07.1995 admittedly signed by the first informant-Asharfi Lal, and proved by the prosecution witness PW7 in which simply an information to police station has been given stating that at about 5 in the morning his brother in-law Braj Mohan (chachera behnoi) came to his house and informed him that the first informant's sister had died and her dead body was hanging inside her house; there is none in her house except her mother in-law; on receiving such information, the first informant immediately rushed to his sister's place taking with himself the co-villagers Suraj Prasad Pal, Chandra Bhal, Shiv Raj Pal and Majir Ali; he found that she was hanging by a rope inside the chappar.

I perused this paper. Importantly, this report bears date 10.07.1995 i.e., just a day before Exhibit Ka-1 was type written

and this paper does not mention anything about illegal demand for 'buffalo' or maltreatment or threats of remarriage.

15. On the basis of the above facts, it has been vehemently argued that the prosecution has gradually improved and developed a story to convert an unfortunate incident into an offence under section 306 IPC; it is argued that there is no truth in the allegations; the most important witness PW1, who is the first informant and on whose instance three reports were prepared, has not, in his testimony denied having prepared these three reports as aforesaid. In his cross examination, he could not give any satisfactory explanation regarding insertion of newer allegations in the reports which were subsequent to previous one; at this juncture, it may be noted that in this case on the basis the report dated 10.07.1995, the inquest and the postmortem was conducted. In this case the FIR has been registered almost a month after conduct of postmortem and inquest etc. The prior reports which have been proved by the prosecution cannot be ignored altogether. Though reports dated 10.07.1995 and 11.07.1995 are not being treated as a first information but they are definitely relevant and admissible in evidence.

16. In the background of facts as mentioned above, the evidence of PW1 needs to be evaluated. It is more than evident that there has not been any whisper of the fact that she was being maltreated for not being so good looking, in earlier information which the deceased's brother tried to give to the police station. Later on, the case was registered on the basis of Exhibit Ka-2 which contained a fact of demand for buffalo as well as illtreatment for deceased being not good looking.

In my view the intermediate period afforded an opportunity to the first informant to insert embellished and false facts; The factors which motivated him to file an FIR may include anger, dissatisfaction or to take revenge for untimely death of his sister or any other fact of like nature.

17. Before I draw any conclusion on the basis of most important witnesses and the prosecution papers, it may be noted that PW2-Raj Kumar has not supported the prosecution case and has been declared hostile; PW5-Braj Mohan who, as per prosecution story, first informed the brother of the deceased regarding this incident, too has not supported the prosecution case; he has demolished the theory that the deceased was not good looking and therefore was being maltreated by her husband; this is quite surprising that despite not supporting the prosecution case he has not been cross examined by the prosecution.

18. The third witness of fact Ram Khelawan has, in his chief examination merely said that Om Prakash and another used to maltreat deceased Ramladaiti because she was not good looking; he has not stuck to this version in his cross examination.

19. Before proceeding to draw a conclusion, it will be useful to first examine the scope of section 306 IPC, the abetment to commit suicide and to examine broadly what kinds of acts can be construed as bringing the matter within the confines of section 306 IPC.

Section 306 IPC is as below:-

"306. Abetment of suicide: - If any person commits suicide, whoever abets

the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

Abetment is defined under Section 107 of IPC which reads as under:-

"107. Abetment of a thing:- A person abets the doing of a thing, who -

First- Instigates any person to do that thing; or Secondly- Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or Thirdly- Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1- A person who by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Explanation 2- Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitate the commission thereof, is said to aid the doing of that act."

20. For the application of section 306 IPC, the law requires that there should be a proximity between the act of suicide with the acts and conduct or treatment meted out by the accused to the victim or acts which would amount to intentionally aiding or instigating or abetting the deceased to take his/her life.

21. A two Judges Bench of the Supreme Court in ***Ude Singh and Ors. vs. State of Haryana, (2019) 17 SCC 301*** observed as below:-

“16. In cases of alleged abetment of suicide, there must be a proof of direct or indirect act/s of incitement to the commission of suicide. It could hardly be disputed that the question of cause of a suicide, particularly in the context of an offence of abetment of suicide, remains a vexed one, involving multifaceted and complex attributes of human behavior and responses/reactions. In the case of accusation for abetment of suicide, the Court would be looking for cogent and convincing proof of the act/s of incitement to the commission of suicide. In the case of suicide, mere allegation of harassment of the deceased by another person would not suffice unless there be such action on the part of the accused which compels the person to commit suicide; and such an offending action ought to be proximate to the time of occurrence. Whether a person has abetted in the commission of suicide by another or not, could only be gathered from the facts and circumstances of each case.

16.1. For the purpose of finding out if a person has abetted commission of suicide by another; the consideration would be if the accused is guilty of the act of instigation of the act of suicide. As explained and reiterated by this Court in the decisions above-

referred, instigation means to goad, urge forward, provoke, incite or encourage to do an act. If the persons who committed suicide had been hypersensitive and the action of accused is otherwise not ordinarily expected to induce a similarly

*circumstanced person to commit suicide, it may not be safe to hold the accused guilty of abetment of suicide. But, on the other hand, if the accused by his acts and by his continuous course of conduct creates a situation which leads the deceased perceiving no other option except to commit suicide, the case may fall within the four-corners of Section 306 IPC. If the accused plays an active role in tarnishing the self-esteem and self-respect of the victim, which eventually draws the victim to commit suicide, the accused may be held guilty of abetment of suicide. **The question of mens rea on the part of the accused in such cases would be examined with reference to the actual acts and deeds of the accused and if the acts and deeds are only of such nature where the accused intended nothing more than harassment or snap show of anger, a particular case may fall short of the offence of abetment of suicide. However, if the accused kept on irritating or annoying the deceased by words or deeds until the deceased reacted or was provoked, a particular case may be that of abetment of suicide. Such being the matter of delicate analysis of human behaviour, each case is required to be examined on its own facts, while taking note of all the surrounding factors having bearing on the actions and psyche of the accused and the deceased.**”*

*The Supreme Court in **Mariano Anto Bruno and Another vs. The Inspector of Police passed in Criminal Appeal No. 1628 of 2022 dated 12.10.2022** observed as below:-*

*“25. The ingredients of Section 306 IPC have been extensively laid out in **M. Arjunan Vs. State, represented by its Inspector of Police; (2019) 3 SCC 315** which are as under: -*

"The essential ingredients of the offence under Section 306 I.P.C. are: (i) the abetment; (ii) the intention of the accused to aid or instigate or abet the deceased to commit suicide. The act of the accused, however, insulting the deceased by using abusive language will not, by itself, constitute the abetment of suicide. There should be evidence capable of suggesting that the accused intended by such act to instigate the deceased to commit suicide. Unless the ingredients of instigation/abetment to commit suicide are satisfied, accused cannot be convicted under Section 306 I.P.C."

In the same judgment the Supreme Court observed in Para nos. 36 and 38 as below:-

"36. To convict a person under Section 306 IPC, there has to be clear mens rea to commit offence. It also requires an active act or direct act which leads deceased to commit suicide finding no other option and the act must be such reflecting intention of the accused to push deceased into such a position that he commits suicide. The prosecution has to establish beyond reasonable doubt that the deceased committed suicide and Appellant No. 1 abetted the commission of suicide of the deceased. In the present case, both the elements are absent.

37.

38. This Court has time and again reiterated that before convicting an accused under Section 306 IPC, the Court must scrupulously examine the facts and circumstances of the case and also assess the evidence adduced before it in order to find out whether cruelty and harassment meted out to the victim had left the victim

with no other alternative but to put an end to her life. It is also to be borne in mind that in cases of alleged abetment of suicide, there must be proof of direct or indirect acts of incitement to the commission of suicide. Merely on the allegation of harassment without their being any positive action proximate to the time of occurrence on the part of the accused which led or compelled the person to commit suicide, conviction in terms of Section 306 IPC is not sustainable."

22. The Supreme Court cautioned by observing that each suicide is a personal tragedy that prematurely takes the life of an individual and has a continuing ripple effect, dramatically affecting the lives of families, friends and communities, however, the court of law while adjudicating is not to be guided by emotions or sentiments but the dictum is required to be based on analysis of facts and evidence on record.

23. In the instant matter, the case of the prosecution is that the accused instigated the commission of crime. As has been held by the Supreme Court, the 'instigation' means to goad, urge forward, provoke, incite or encourage to do "an act". Obviously the intention is to be gathered on the basis of peculiar facts and circumstances of each and every case. No formula for general application can be laid down.

24. There are ample indicators in the evidence produced by the prosecution to give an impression that the prosecution story has been developed later on. Had there been truth in the allegations that the deceased was being harassed for being not so good looking, this fact would certainly have been mentioned in the previous

application/written reports admittedly prepared by her real brother. Lack of any whimper in Exhibit Ka-1 and tehrir dated 10.07.1995 creates reasonable doubts. For the sake of arguments, if it is presumed that whatever has been said in the FIR or in the evidence given by PW1 is reasonably true, even then this will not amount to an act of instigation to commit suicide. There is not much substance in the rhetoric of PW1 that accused persons used to exhort deceased's husband to marry again. The evidence on such theory is quite inadequate to brand it as truthful. Moreover there is no evidence to show that just before the deceased took this extreme step of taking of her life, there was some immediate provocation from the side of the accused person which propelled her to commit suicide. In my firm opinion, the prosecution has failed to prove any proximity between the act of suicide with the act or conduct or treatment meted out to the deceased by the accused. In my opinion the prosecution has failed to prove that in fact she was maltreated or harassed to such an extent which shall essentially fall within the term of 'instigation' to commit suicide.

25. The judgment and sentence order dated 08.02.2000 passed by the VIIth Additional Sessions Judge, Hardoi in ST No. 652 of 1995, is hereby set aside and the accused persons are acquitted.

26. Accordingly, this criminal appeal is **allowed**.

27. Let copy of the judgment be immediately sent to the court concerned for necessary action.

28. The appellant shall before the court concerned, within a period of next four weeks, execute bail bonds with two sureties and personal bond of the same

amount, to the satisfaction of the court concerned, to ensure his appearance before the higher court as and when such court issues notice in respect of this case. Such bail bonds shall be in force for a period of six months from the date of execution thereof.

(2023) 9 ILRA 594
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 28.08.2023

BEFORE

THE HON'BLE KARUNESH SINGH PAWAR, J.

Criminal Appeal No. 193 of 2020

Sameer Singh		...Appellant
	Versus	
State of U.P.		...Opposite Party

Counsel for the Appellant:

Purnendu Chakravarty, Abhineet Jaiswal,
Anuj Tandon, Gaurav Mehrotra

Counsel for the Opposite Party:

G.A.

A. Criminal Law-Criminal Procedure Code, 1973-Section 374(2) - Prevention of Corruption Act, 1988 - Sections 27 & 13 (1) (d) r/w section 13 (2)-Challenge to Conviction- the appellant was appointed on the post of Village Development Officer on 22.06.1999. He submits that there are inconsistencies and variations in the statements of the eye witnesses i.e. PW-1 and PW-2. The statement of PW-5 and PW-7 are also inconsistent who are husband and wife. PW-7 is the beneficiary. He also submits that there are also inconsistencies in the statements of PW-1, PW-8 (IO) and PW-9. The demand and acceptance of bribe is not proved beyond reasonable doubt-The place of occurrence has been made doubtful in view of the testimony of PW-1 and PW-2- there are serious inconsistencies between

the statements of PW-1 and PW-2 regarding the site of recovery -The evidence of PW-5 and PW-7 who are the husband and wife is also contradictory for proving the foundational facts i.e. the demand and acceptance of illegal gratification by a public servant- The demand of illegal gratification, from the four beneficiaries could not be said to have been proved by the prosecution, in view of the inconsistent statements of PW-1 and PW-2 and also in the inconsistent statements of PW-1, PW-8 and PW-9- The Fard baramadgi also becomes doubtful in view the contradictory statement between PW-1 and PW-8 and PW-9-Two out of four beneficiaries have not deposed in the trial, thus, foundational fact of demand of bribe and payment of such bribe has not been proved, neither exception which is carved out for deposition of such witnesses to prove the fact in the judgment of Neeraj Dutta applies in this case and no reason has been assigned by the prosecution for withholding such important witnesses-More so, the second independent witness who was part of the second trap team has not been examined by the prosecution in the Court as independent witnesses-He was a very important witness to depose as to the chain of events that occurred at the time of the arrest- Failure to examine the independent witness before the learned trial court drawing adverse inference to be taken in view of the illustration (g) to Section 114 of the Indian Evidence Act, coupled with the fact that proper procedure has not been followed by the trap team- Hence, non-production of the independent witnesses only gives rise to the presumption that if they had been produced, their evidence would have been favourable to the appellant. Therefore, non-production of independent witnesses by the prosecution attracts adverse inference against the prosecution.(Para 1 to 15)

B. Section 114 Court may presume existence of certain facts. —The Court may presume the existence of any fact which it thinks likely to have happened, regard

being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. Illustrations The Court may presume

(a) That a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;

(b) That an accomplice is unworthy of credit, unless he is corroborated in material particulars;

(c) That a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration;

(d) That a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or state of things usually cease to exist, is still in existence;

(e) That judicial and official acts have been regularly performed;

(f) That the common course of business has been followed in particular cases;

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

(h) That if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him;

(i) That when a document creating an obligation is in the hands of the obligor, the obligation has been discharged". (Para 12, 13)

The appeal is allowed. (E-6)

List of Cases cited:

1. Tomaso Bruno & Anr Vs St. of U.P. (2015) 7 SCC 178

2. Krishnegowda & ors. Vs St. of Karn. by Arkalgud Police (2017) 13 SCC 98

3. Raveen Kumar Vs St. of H.P. (2021) 12 SCC 557

4. Ramesh Bhavan Rathod Vs Vishanbhai Hirabhai Makwana (Koli) & anr. (2021) 6 SCC 230

5. Neeraj Dutta Vs St. (Govt. of NCT of Delhi) (2023) 4 SCC 731

6. N. Sunkanna Vs St. of A.P. (2016) 1 SCC 713.

7. Devi Lal Vs St. of Raj. (2019) 19 SCC 447.

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

1. The present criminal appeal has been filed under section 374 (2) of Criminal Procedure Code read with section 27 of Prevention of Corruption Act, 1988 against the judgment dated 23.01.2020 and order of conviction dated 24.01.2020 passed in criminal case no. 58/2003 (The State of UP Vs. Sameer Singh) passed by Special Judge, Anti Corruption, Court no. 5, Lucknow convicting the appellant for three years rigorous imprisonment and a fine of Rs. 2,000/- imposed under section 7 of Prevention of Corruption Act, 1988 and four years rigorous imprisonment and a fine of Rs. 3,000/- under section 13 (1) (d) r/w section 13 (2) PC Act, 1988, with default provision in each of the offences.

2. Heard Shri Gaurav Mehrotra, learned counsel for the appellant as well as Shri Jayant Singh Tomar, learned A.G.A. for the State.

3. Prosecution case is that a complaint was made by the complainant Kishan

against appellant Sameer Singh that for the purpose of constructing house under Indira Awas Yojna, out of the Government approved grant of Rs. 10,000/- each to the complainant, wife of Mahadev of the village, Rs. 20,000/- each to the wife of Teji and wife of Avatar, an amount of Rs. 3000/- cheque is due which is to be given to all the four beneficiaries from block Mohanlal Ganj through Secretary Sameer Singh and for this purpose, on 13.03.2002, the complainant, Avataar and Mahadev went to the photostat shop of Village Pradhan Bachha Babu at Mohanlal Ganj where Sameer Singh, Secretary Gram Pradhan came around 11'O clock and told them that if they want the remaining cheque of Rs. 3000/- each, then by noon of 15.03.2002, they will have to bring Rs. 200/- each and collectively pay him as a bribe, thereafter, he will provide them the cheques. He further said that he has been transferred and if they have to take the remaining amount, then come with Rs. 800/- in the office; otherwise he does not know and they will not be given cheques. Thus, the secretary deliberately with a view to obtain bribe is delaying the cheques of the complainant and other beneficiaries.

It is further alleged that he and his companions (other beneficiaries) do not want to give bribe to Sameer Singh, but want to get him caught red handed. The complainant asked each one of them to bring Rs. 200/- and collect Rs. 800/- along with them. A complaint to that effect was given by the complainant to the Superintendent of Police, UP Vigilance Department, Lucknow, Sector Lucknow, consequent to which, Superintendent of Police, Vigilance, Lucknow recommended for trap action and thereafter a trap team was constituted. Thereafter, the complainant was sent to block Mohanlal

Ganj where after seeing the complainant, the Secretary Sameer Singh slowed his Hero Puch vehicle and stopped it after entering into the gate. He asked the complainant whether he has brought the agreed amount as told by him, whereupon he said that as told by him, he has brought Rs. 800/- from all the beneficiaries. While sitting on Hero Puch, he demanded the amount, upon this, the complainant Shri Kishan took money from the left pocket of his shirt which was taken by him by his left hand and started counting by both hands. After seeing, listening and hearing the conversation, giving and taking bribe, the trap team arrested accused Sameer Singh with Rs. 800/-.

The recovery memo was prepared on the basis of recovered notes from the arrested accused and an FIR was registered by the constable moharrir at fourteen hours. Entry in the general diary was also made at rapat no. 13 at the same time i.e. 1400 hours. Gulam Akbar was appointed as investigating officer who took the statements of the prosecution witnesses and the complainant, and prepared the site plan and after finding prima facie offence against the accused/appellant Sameer Singh, he filed charge sheet against the appellant under Section 7 read with Section 3(1)(d) and 13(2) of Prevention of Corruption Act, 1988.

4. The prosecution in support of its case has produced the following witnesses:-

- (i) PW- Ramker Singh (complainant).
- (ii) PW-2 Krishn (Informant)
- (iii) PW-3 Piyush Mohan Srivastava (BDO)
- (iv) PW-4 Akhilesh Kumar Singh
- (v) PW-5 Mahadev

- (vi) PW-6 SI Ajendra Kumar
- (vii) PW-7 Smt. Sundara (wife of Mahadev)
- (viii) PW-8 Gulam Akbar, Deputy Superintendent of Police(retired), I.O.
- (ix) PW-9 Om Prakash Srivastava (independent witness).

The FSL report dated 19.04.2002 was also produced by the prosecution.

PW-1 is Ramker Singh, Deputy Superintendent of Police, UP Vigilance Department who constituted the trap team on the application of PW-2 Kishan. He proved supurdagi nama as exhibit Ka-1 and Fard Baramadgi Rishwati Note and arrest of the accused as exhibit Ka-2. The dhowan of the hand of the accused Sameer Singh which was taken on the spot found proved by him as exhibit 1 to 6. He also proved exhibit 7 to 15 which is an envelope in which the case details, date was mentioned and eight notes of Rs. 100/-.

PW-2 complainant Kishan has proved his thumb impression which is on exhibit Ka-1 and Ka-2 which is fard baramadagi and verified it.

PW-3 Piyush Mohan Srivastava was the Block Development Officer from August 2001 to June 2002. He stated the procedure of approving the beneficiaries for Indira Awas Yojna and disbursement of the amount into their account. He proved register A15/60 and also photocopy of the register dated 19.03.2002 as exhibit Ka-4. He has also proved exhibit Ka-5 Ka-6. He further proved the application for second installment as Ex. Ka-7 and Ka-8 and also proved Ex. Ka-9 to Ka-17 which is the application given by PW-2 Kishan and the

details of the payment which was signed by him along with others.

PW-4 Akhilesh Kumar Singh was posted as District Development Officer, Lucknow on 09.10.2003. He has given sanction for prosecution and proved it as Ex. Ka-18.

PW-5 is the husband of beneficiary Smt. Sundara and has supported the prosecution case.

PW-6 SI Ajendra Kumar has proved chik report No. 35/02 crime No. 81/2002 under Section 7/13(1)(d) read with Section 13(2) of Prevention of Corruption Act and confirmed that it is in his writing and signature, and proved it as Ex.-K-19. He also proved Ex.Ka-20 which is recording in general diary as rapat No. 30 at 1400 hours prepared by him and has said that it is in his writing and signature.

PW-7 Smt. Sundara is the beneficiary and has supported the prosecution case.

PW-8 Gulam Akbar is the investigating officer who has proved exhibit Ka-5. He prepared the site plan after inspection and proved it as Ex.Ka-21. He also proved the report of forensic science laboratory as report Nos. 1 to 6 in which Sodium and phenolphthalein was found present in the notes. Report has been proved as Ex. Ka-22 by him. He has proved the charge sheet dated 13.10.2003 against the appellant as Ex. Ka-23. He was posted in Vigilance Department of Uttar Pradesh. He has verified his signature on Ex.-Ka-2 and Ex. Ka-3.

PW-9 Om Prakash Shrivatava is the independent witness. He confirmed his

signature on Ex. Ka-2. He further confirmed the action based on Ex.Ka-3, his presence at the spot and his signatures upon Ex.Ka-3.

5. Statement of the accused under Section 313 Cr.P.C. was recorded, in which he has denied the prosecution case. He has taken the defence that the complainant, beneficiaries' husband and Pradhan Anil Tripathi were annoyed with him because he has refused to do their illegal acts. He pleaded innocence. He stated that he has never demanded any amount from any person of the village, neither demanded bribe on 15.03.2002. Nothing was recovered from him and his hands were not washed on the spot and the entire incident is false.

6. Learned counsel for the appellant submits that the appellant was appointed on the post of Village Development Officer on 22.06.1999. He submits that there are inconsistencies and variations in the statements of the eye witnesses i.e. PW-1 and PW-2. The statement of PW-5 and PW-7 are also inconsistent who are husband and wife. PW-7 is the beneficiary. He also submits that there are also inconsistencies in the statements of PW-1, PW-8 (IO) and PW-9. The demand and acceptance of bribe is not proved beyond reasonable doubt. The place of occurrence has been made doubtful in view of the testimony of PW-1 and PW-2.

He further submits that conviction of the appellant is based on the basis of the averments made in the bail application of the appellant-convict. Demand of bribe and payment of the said bribe as alleged has not been proved as two out of four beneficiaries were not deposed in the trial. He submits that bribe was

demand by the appellant according to the prosecution case from all the four beneficiaries. It is, thus, submitted that foundational facts in respect of demand and payment of bribe could not be proved by the prosecution. The independent witness, namely Babu Ram Pal who was taken with the trap team has not been examined, rather has been withheld. Hence, it is submitted that adverse inference against the prosecution under Section 114 of Indian Evidence Act illustration (g), should be drawn.

It is submitted on behalf of the appellant that findings recorded in the judgment are based on conjectures and surmises. The proper procedure of trap has not been followed by the vigilance team. Lastly, it is submitted that as per the deposition of PW-9 who is an independent witness of the recovery memo, he has not signed upon it. In support of his contention, Learned counsel has relied on the following judgments:-

(i) Tomaso Bruno and Another Vs. State of Uttar Pradesh, (2015) 7 SCC 178 (emphasis is on para 39)

(ii) Krishnegowda and others Vs. State of Karnataka by Arkalgud Police, (2017) 13 SCC 98.

(iii) Raveen Kumar Vs. State of Himachal Pradesh, (2021) 12 SCC 557.

(iv) Ramesh Bhavan Rathod Vs. Vishanbhai Hirabhai Makwana (Koli) and another, (2021) 6 SCC 230. (emphasis is on para 13).

(v) Neeraj Dutta Vs. State (Government of NCT of Delhi), (2023) 4 SCC 731.

(vi) N. Sunkanna Vs. State of Andhra Pradesh, (2016) 1 SCC 713.

(vii) Devi Lal Vs. State of Rajasthan, (2019) 19 SCC 447.

7. Learned A.G.A., on the other hand, has opposed the appeal submitting that the demand and acceptance of the bribe is duly proved by the prosecution. The appellant has been caught red handed by the trap team. There is eye witness account. He also submits that minor variations and infirmities in the investigation will not vitiate the trial. Learned A.G.A. placed reliance on the following judgments:-

(i) Neeraj Dutta Vs. State (Government of NCT of Delhi), reported in (2023) 4 SCC 731.

(ii) State of Gujarat v. Navinbhai Chandrakant Joshi, (2018) 9 SCC 242

8. Having heard learned counsel for the parties, perusal of the record and also in order to re-appreciate the prosecution evidence it would be appropriate to address the following issues for adjudication of the case:-

(Place of Occurrence)

9. The statements of PW-1 Deputy Superintendent of Police and PW-2 complainant Kishan are contrary so far as the site of recovery/place of occurrence is concerned.

PW-1, being the eye witness has deposed that the accused Sameer Singh came on motorcycle and after seeing the complainant Kishan, he slowed down his motorcycle and asked him whether he brought the money, whereupon, the Kishan

(informant) from the right pocket of his shirt, gave Rs. 800/- and said that please give his check today. The accused was sitting on the motorcycle and was talking to the complainant when the notes in the hand of the accused were recovered. After the incident, he did not go inside the block office.

PW-2, who is the complainant and also the eye witness stated that the accused Sameer Singh went inside the block and after demand of the bribe, he gave the bribe. He further stated that after meeting the accused outside room, he went with Sameer Singh inside the block office. When he and the accused Sameer Singh went inside the room, then no other person came. The Trap team caught Sameer Singh inside the room. Thus, the exact place of occurrence/site of recovery of the alleged offence as stated by PW-1 has been totally contradicted by PW-2. This is a major contradiction regarding the place of the occurrence/recovery. The prosecution has not been able to prove the place of occurrence/recovery. This part of the testimony of the alleged eye witnesses i.e. PW-1 and PW-2 does not inspire confidence.

***Inconsistencies between
statements of prosecution witnesses.***

10. PW-5 Mahadev, who is the husband of one of the beneficiaries namely Smt Sundara (PW-7), in statement has deposed that the appellant/convict had demanded bribe of Rs. 200/- for payment of the last installment of grant whereas Sundara PW-7 in her statement had deposed that appellant/convict demanded bribe of Rs. 200/- from PW-2 Kishan Gupta (the other beneficiary). PW-7 despite being the wife of PW-5 has not referred to

any demand made from her husband by the appellant as deposed by PW-5. The inconsistencies in the statements of PW-5 and PW-7 have been ignored by the learned trial court while passing the judgment impugned.

There are also inconsistencies in the statements of PW-1, PW-8 and PW-9. As per the statement of PW-1, the whole trap team was divided into three groups, where both PW-8 and PW-9 stated that PW-9 Om Prakash who is the independent witness, was part of the first group of trap team along with PW-1 and other persons.

PW-9 who is the independent witness does not corroborate the version which has been presented by PW-1. PW-9 has stated that he did not see any exchange of notes between PW-2 and the appellant, nor had he heard any conversation between them. PW-9 further stated that he cannot testify that the hands of PW-2, PW-1 and appellant were washed at the place of arrest.

Likewise, the inconsistency is also in the statement of PW-8 and PW-9. PW-8 stated that independent witnesses were nearby at the time of trap and were seeing and listening to the proceedings, PW-9, however, has refused that he has heard or saw any exchange between the appellant and PW-2.

PW-1 in his statement has deposed that recovery memo was made at the place of arrest and signatures of all the witnesses were taken on the spot. The recovery memo also notes that the signatures of the witnesses are being taken on the fard, however, PW-9 in his cross examination has deposed that he signed the fard baramadgi at the station and not at the

place of arrest. The contradiction between the statement of the other prosecution witness vis-a-vis between PW-9 who is the independent witness regarding recovery, makes the recovery doubtful. The argument of learned counsel for the appellant that findings recorded in the impugned judgment and order dated 23.01.2020 are on the basis of the averments made in the bail application of the convict seems to have force.

(Demand of bribe and payment of such bribe).

11. PW-2 in his examination-in-chief has deposed that appellant has demanded bribe of Rs. 200/- from four beneficiaries, Kishan (informant), wife of Mahadev, wife of Teji and wife of Avatar who were to receive the grant of Rs. 10,000/-, Rs. 10,000/-, Rs. 20,000/- and Rs. 20,000/- respectively. The same has been deposed by PW 5 Mahadev as well, however, only one beneficiary i.e. Sundara wife of Mahadev has deposed that the amount of Rs 200/- was given to the appellant at the behest of Kishan (informant).

In so far as the demand of bribe of Rs. 200/- from the wife of Teji and the wife of Avatar is concerned, both persons have not been produced as witnesses by the prosecution in the trial. No reason has been assigned by the prosecution in the entire trial for withholding such important witnesses.

Supreme Court in the case of Neeraj Dutta (supra) while deciding the reference has held that foundational facts in respect of demand and payment of bribe are required to be proved by the prosecution. Three exceptions have been carved out for deposition of witnesses to prove the fact,

that (a) in the event of death of the witnesses (b) in the event of witnesses turning hostile and (c) on account of unavailability of the witness. None of these grounds have been taken by the prosecution for withholding the two important witnesses, neither any reason has been assigned nor any finding has been recorded by the learned trial court as to for what reasons these two important prosecution witnesses have been withheld.

The finding of the trial court that multiple witnesses are not required to prove same fact is faulted as there were 4 different foundational facts related to four transactions of payment of grant of Rs 10000/-, 10,000/-, 20,000/- and 20,000/- to four different beneficiaries. As per the prosecution case, a demand was made from four different beneficiaries by the appellant of Rs. 200/- each which was allegedly paid as a bribe to the appellant. Thus, the four transactions of payment of the grant of beneficiaries and alleged demand of Rs. 200/- each and also alleged payment of bribe constitute four different acts and not one which was required to be independently proved from four beneficiaries from whom the alleged payment of bribe was made.

The Supreme Court in the case of Neeraj Dutta's case (supra), has held as under:-

88. What emerges from the aforesaid discussion is summarised as under:

88.1. (a) Proof of demand and acceptance of illegal gratification by a public servant as a fact in issue by the prosecution is a sine qua non in order to establish the guilt of the accused public

servant under Sections 7 and 13(1)(d) (i) and (ii) of the Act.

88.2. (b) *In order to bring home the guilt of the accused, the prosecution has to first prove the demand of illegal gratification and the subsequent acceptance as a matter of fact. This fact in issue can be proved either by direct evidence which can be in the nature of oral evidence or documentary evidence.*

88.3. (c) *Further, the fact in issue, namely, the proof of demand and acceptance of illegal gratification can also be proved by circumstantial evidence in the absence of direct oral and documentary evidence.*

88.4. (d) *In order to prove the fact in issue, namely, the demand and acceptance of illegal gratification by the public servant, the following aspects have to be borne in mind:*

(i) *if there is an offer to pay by the bribe-giver without there being any demand from the public servant and the latter simply accepts the offer and receives the illegal gratification, it is a case of acceptance as per Section 7 of the Act. In such a case, there need not be a prior demand by the public servant.*

(ii) *On the other hand, if the public servant makes a demand and the bribe-giver accepts the demand and tenders the demanded gratification which in turn is received by the public servant, it is a case of obtainment. In the case of obtainment, the prior demand for illegal gratification emanates from the public servant. This is an offence under Sections 13(1)(d)(i) and (ii) of the Act.*

(iii) *In both cases of (i) and (ii) above, the offer by the bribe-giver and the demand by the public servant respectively have to be proved by the prosecution as a fact in issue. In other words, mere acceptance or receipt of an illegal gratification without anything more would not make it an offence under Section 7 or Sections 13(1)(d)(i) and (ii), respectively of the Act. Therefore, under Section 7 of the Act, in order to bring home the offence, there must be an offer which emanates from the bribe-giver which is accepted by the public servant which would make it an offence. Similarly, a prior demand by the public servant when accepted by the bribe-giver and in turn there is a payment made which is received by the public servant, would be an offence of obtainment under Sections 13(1)(d)(i) and (ii) of the Act.*

88.5. (e) *The presumption of fact with regard to the demand and acceptance or obtainment of an illegal gratification may be made by a court of law by way of an inference only when the foundational facts have been proved by relevant oral and documentary evidence and not in the absence thereof. On the basis of the material on record, the court has the discretion to raise a presumption of fact while considering whether the fact of demand has been proved by the prosecution or not. Of course, a presumption of fact is subject to rebuttal by the accused and in the absence of rebuttal presumption stands.*

88.6. (f) *In the event the complainant turns "hostile", or has died or is unavailable to let in his evidence during trial, demand of illegal gratification can be proved by letting in the evidence of any other witness who can again let in evidence, either orally or by documentary*

evidence or the prosecution can prove the case by circumstantial evidence. The trial does not abate nor does it result in an order of acquittal of the accused public servant.

88.7. (g) Insofar as Section 7 of the Act is concerned, on the proof of the facts in issue, Section 20 mandates the court to raise a presumption that the illegal gratification was for the purpose of a motive or reward as mentioned in the said Section. The said presumption has to be raised by the court as a legal presumption or a presumption in law. Of course, the said presumption is also subject to rebuttal. Section 20 does not apply to Sections 13(1)(d)(i) and (ii) of the Act.

88.8. (h) We clarify that the presumption in law under Section 20 of the Act is distinct from presumption of fact referred to above in sub-para 88.5(e), above, as the former is a mandatory presumption while the latter is discretionary in nature.

The finding recorded in the impugned judgment and order dated 23.01.2020 is on conjectures and surmises. In para 30 at internal page 11 of the impugned judgment, the learned special judge has given a finding that in Indian administrative arrangements, it is very unnatural, some work which is pending for so many days is done in one day at every officer level. Another finding given by the learned Special Judge is that the report prepared by the appellant appears to be different from the ink used to sanction report in para 30 of internal page no. 12 of the judgment. Again, this finding has been given without seeking any expert opinion regarding the ink.

Upon arguments advanced by the defence that amount of Rs. 200/- even in the year 2002 was a meagre amount for being demanded as a bribe and is thus, unbelievable was rejected by the learned trial court while recording a finding that such amount would constitute about six percent of the amount of Rs. 3000/- i.e. last the installment. The figure of six percent appears to have been arrived on erroneous presumption taking into account the last installment and ignoring the total amount of Rs. 10,000/-, Rs. 20,000/-. Thus, an impression is sought to be given that huge amount was demanded as a bribe on erroneous presumption. This again is only on the basis of suspicion and this finding can only be said to be on the basis of conjectures and surmises as there was no material before the learned trial court to record such findings.

The Supreme Court in *Devi Lal's* case (*supra*), held as under:-

"18. On an analysis of the overall fact situation in the instant case, and considering the chain of circumstantial evidence relied upon by the prosecution and noticed by the High Court in the impugned judgment, to prove the charge is visibly incomplete and incoherent to permit conviction of the appellants on the basis thereof without any trace of doubt. Though the materials on record hold some suspicion towards them, but the prosecution has failed to elevate its case from the realm of "may be true" to the plane of "must be true" as is indispensably required in law for conviction on a criminal charge. It is trite to state that in a criminal trial, suspicion, howsoever grave, cannot substitute proof."

Failure to follow the procedure by the trap team

12. PW-1 in his cross-examination has stated that while setting up the trap team, powder was applied to the notes brought by the complainant PW-2, then the hands of PW-1 was washed and dhowan was collected in a bottle labeled as bottle 1. After notes were handed to the complainant PW-2, his hands were also washed and dhowan was stored in a bottle labeled as bottle No. 2. The shirt of the complainant PW-2 was also washed as the money was kept in the left shirt pocket and dhowan of the shirt is labeled as bottle No. 3. Dhowan of the complainant was allegedly stored in a bottle labelled as bottle No. 4. The hands of the appellant/convict were allegedly washed at the place of the arrest and a liquid turned pink, a bottle with dhowan of the hands of the appellant/convict was labeled as bottle No. 5. The hands of PW-1 were allegedly again washed at the place of arrest and the dhowan was stored in a bottle labeled as bottle No. 6. However, when these bottles were produced at the time of cross examination, bottle nos. 4, 5 and 6 which contained the dhowan collected at the time of arrest were empty. The remaining bottle containing the dhowan are intact and only the bottles which contained the dhowan allegedly collected at the place of arrest are empty. The empty bottles of the dhowan which are related to the arrest of the appellant raises suspicion on the truthfulness of the prosecution case. There are no signatures of the appellant on the bottles. The currency notes which were collected and brought by PW-2 on which powder was applied and were handed over to the appellant/convict were allegedly stored in the envelope by PW-1 at the time of arrest. However, as per the deposition of PW-1 himself, the envelope was not sealed

nor has the signature of the appellant been taken on the same. This again makes the prosecution case, so far as the currency notes recovered from the appellant doubtful.

The phenolphthalein powder which was allegedly applied to the notes has also not been stored in a sealed envelop with the signature of the appellant according to the procedure, coupled with the statement of PW-1 where he stated that fard recovery was not signed at the place of arrest, rather PW-9 stated that he signed it at police station which again makes the recovery doubtful.

It is significant to note that three trap teams were constituted by PW-1 and independent witness Babu Ram Pal who was part of the second trap team has also been withheld and no reason has been assigned by the prosecution for withholding the said important witness.

The prosecution in this case has withheld two beneficiaries and Babu Ram Pal, the independent witness of the second trap team. It has not produced Gram Pradhan on whose Photostat shop, the bribe was demanded. It is not the case of the prosecution that any of these witnesses have turned hostile, or died or are unavailable. No reason has been assigned by the prosecution for withholding such important witnesses. Non-production of the independent witness has to be evaluated in the Court under Section 114 of Evidence Act which provides as under:-

"114 Court may presume existence of certain facts. —The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural

events, human conduct and public and private business, in their relation to the facts of the particular case. Illustrations The Court may presume

(a) That a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;

(b) That an accomplice is unworthy of credit, unless he is corroborated in material particulars;

(c) That a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration;

(d) That a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or state of things usually cease to exist, is still in existence;

(e) That judicial and official acts have been regularly performed;

(f) That the common course of business has been followed in particular cases;

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

(h) That if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him;

(i) That when a document creating an obligation is in the hands of the obligor, the obligation has been discharged".

13. Hence, non-production of the independent witnesses only gives rise to the presumption that if they had been produced, their evidence would have been favourable to the appellant. Therefore, non-production of independent witnesses by the prosecution attracts adverse inference against the prosecution.

14. Thus, from the discussion made hereinabove, it is evident that there are serious inconsistencies between the statements of PW-1 and PW-2 regarding the site of recovery or the site of occurrence. The evidence of PW-5 and PW-7 who are the husband and wife is also contradictory for proving the foundational facts i.e. the demand and acceptance of illegal gratification by a public servant. The demand of illegal gratification, from the four beneficiaries could not be said to have been proved by the prosecution, in view of the inconsistent statements of PW-1 and PW-2 and also in the inconsistent statements of PW-1, PW-8 and PW-9. The Fard baramadgi also becomes doubtful in view the contradictory statement between PW-1 and PW-8 and PW-9. Two out of four beneficiaries have not deposed in the trial, thus, foundational fact of demand of bribe and payment of such bribe has not been proved, neither exception which is carved out for deposition of such witnesses to prove the fact in the judgment of Neeraj Dutta (supra) applies in this case and no reason has been assigned by the prosecution for withholding such important witnesses.

Babu Ram Pal is the second independent witness. He was part of the second trap team, however, he has not been examined by the prosecution in the Court as independent witnesses. He was a very important witness to depose as to the chain

of events that occurred at the time of the arrest. Failure to examine Babu Ram Pal before the learned trial court drawing adverse inference to be taken in view of the illustration (g) to Section 114 of the Indian Evidence Act, coupled with the fact that proper procedure has not been followed by the trap team.

The site of the recovery i.e. place of occurrence is disputed in view of the testimony of the witnesses i.e. PW-1 and PW-2. Demand or acceptance of bribe has not been proved by the prosecution and the contradictory statements of the prosecution witnesses particularly PW-1, PW-8 and PW-9 make the recovery doubtful. Thus, I am not inclined to uphold the judgment under challenge.

15. The appeal is allowed. The impugned judgment and order dated 23.01.2020 and order of conviction dated 24.01.2020 passed in criminal case no. 58/2003 (The State of UP Vs. Sameer Singh) passed by Special Judge, Anti Corruption, Court no. 5, Lucknow is set aside. The appellant Sameer Singh is acquitted of the offences punishable under Section 7, 13(d) read with Section 13(2) of the Prevention of Corruption Act. Appellant is on bail. His bail bonds are cancelled and sureties discharged.

Let a copy of this judgment be sent to the District Court concerned along with the lower court record.

(2023) 9 ILRA 606
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.08.2023

BEFORE

THE HON'BLE RAHUL CHATURVEDI, J.

THE HON'BLE MOHD. AZHAR HUSAIN
IDRISI, J.

Criminal Appeal No. 234 of 2023

Chhotai & Ors. ...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:

Sri Sati Shanker Tripathi, Sri A.K. Mishra.
 Sri Mohd. Haider

Counsel for the Opposite Party:

G.A.

A. Criminal Law-Criminal Procedure Code, 1973-Section 374(2) - Indian Penal Code, 1860-Sections 147, 302 & 306-alternative charge-de novo trial-In the present case the farming of charge have been done on 12.10.2022, testimonies of those witnesses were over much prior to that date-Not only this, accused person have got their statement recorded under Section 313 Cr.P.C.-It hardly needs to be demonstrated, that the provision under Section 216 & 217 Cr.P.C. are mandatory in nature, as they not only subserve the requirement of the principles of natural justice but guarantee and important right which is given to the accused persons to defend themselves appropriately by giving them full opportunity-Cross examination of the witnesses in the process is an important facet of this right- Credibility of any witness can establish only after the said witness put to the cross examination by the accused person-No amount of concession or discount by the learned trial judge would replace this valuable right of the accused appellants- In the instant case, there is no cross examination so far as the alternative charge under Section 302 IPC was ever done -addition and/or substitution of such charge would bound to create a prejudice to the appellants-Such a charge has to be treated as original charge- In order to take care of the said prejudice, it was incumbent upon the prosecution to recall the witnesses,

examined them in the context of the newly framed charge under Section 302 IPC and allow the accused persons to cross examine those witnesses-Nothing of that sort has ever happened- thus there could not have been any conviction under Section 302 IPC could be passed by learned trial judge while passing the judgment, thus liable to be set aside.(Para 1 to 38)

B. The appellate court hearing a criminal appeal from a judgment of conviction has power to order the retrial of the accused under Section 386 of the Code. That is clear from the bare language of Section 386(b). Though such power exists, it should not be exercised in a routine manner. A 'de novo trial' or retrial is not the second trial; it is continuation of the same trial and same prosecution. The guiding factor for retrial must always be demand of justice. Obviously, the exercise of power of retrial under Section 386(b) of the Code, will depend on the facts and circumstances of each case for which no strait jacket formula can be formulated but the appeal court must closely keep in view that while protecting the right of an accused to fair trial and due process, the people who seek protection of law do not lose hope in legal system and the interests of the society are not altogether overlooked.(Para 28 to 33)

C. An order for retrial of a criminal case is made in exceptional cases, and not unless the appellate Court is satisfied that the Court trying the proceeding had no jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that the Prosecutor or an accused was, for reasons over which he had no control, prevented from leading or tendering evidence material to the charge, and in the interests of justice the appellate Court deems it appropriate, having regard to the circumstances of the case, that the accused should be put on his trial again.

An order of re-trial wipes out from the record the earlier proceeding, and exposes the person accused to another trial which affords the prosecutor an opportunity to rectify the infirmities disclosed in the earlier trial, and will not ordinarily be countenanced when it is made merely to enable the prosecutor to lead evidence which he could but has not cared to lead either on account of insufficient appreciation of the nature of the case or for other reasons.(Para 31)

The appeal is allowed. (E-6)

List of Cases cited:

1. Ajay Kumar Ghoshal & ors. Vs St. of Bih. & anr. (2017)12 SCC 699
2. R.Rachaiah Vs Home Secy. Bangalore (2017)3SCC(Crl.)710=2016 12SCC172
3. Shamnsaheb M. Multtani Vs St. of Karn.(2001) 1 SCC (Crl.) 358
4. Ukha Kolhe Vs St. of Mah. (1963) AIR SC 1531
5. St. of M.P. Vs Bhooraji (2001) SCC (Crl.) 1373
6. Zahira Habibullah H. Sheikh Vs St. of Guj. (2004) SCC (Crl.) 999
7. Mohd. Hussain Vs St. of NCT Delhi (2012) 3 SCC (Crl.) 1139

(Delivered by Hon'ble Rahul Chaturvedi, J.
&

Hon'ble Mohd. Azhar Husain Idrisi, J.)

1. Heard Sri A.K. Mishra, Sri Sati Shanker Tripathi, learned counsel for the appellants and learned A.G.A. for the State and perused the record.

2. Learned AGA submits that he has filed counter affidavit on 30.01.2023.

3. Learned counsel for the appellants candidly declined to file any rejoinder

affidavit to the counter affidavit filed by the State and requested the Court to decide the case on merits.

4. This appeal is preferred by the appellants, namely, (i) **Chhotai son of Panchu**, (ii) **Yogesh Kumar son of Rajendra Prasad**, (iii) **Shivdhari Pasi son of Panchu**, (iv) **Budhani son of Panchu**, and (v) **Rajendra Prasad son of Panchu**, all resident of village Akorha, P.S. Oonjh, District Bhadohi, who are languishing in jail since 19.11.2022 pursuant to the judgment and order passed by Additional Sessions Judge/ Special Judge (SC/ST Act), Court No.II, Bhadohi, Gyanpur while deciding the S.T. No. 118 of 2017 (State Vs. Chhotai and others) arising out of case crime no.43 of 2016, under Section 302 IPC, Police Station-Oonjh, District-Bhadohi (Gyanpur), convicting and sentencing the appellants under Section 302 IPC for life imprisonment and a fine of Rs. 25,000/ each and in case of default, one year additional rigorous imprisonment were awarded to the appellants.

5. Learned counsel for the appellants has raised a purely question of law challenging the legality and authenticity of the impugned judgment & conviction order passed by the learned trial court. Responding to the submissions advanced by learned counsel for the appellant that, the learned trial judge has given complete go by to the established principles of law and the procedure, resulting into a grave miscarriage and failure of justice to the appellants. The procedure adopted by the learned trial judge is not only fallacious and contains number of pit falls, against the principles of natural justice, which is against cardinal principles of Code of Criminal Procedure.

6. Before scrutinizing the legality and validity of the impugned judgment, it is

imperative to give a bird's eye view to the factual aspect of the issue to appreciate the controversy involved in its correct perspective.

FACTUAL MATRIX OF THE CASE

7. The aforesaid trial started rolling after submission of charge sheet by the police in case crime no. 43 of 2016 under Section 306 IPC, P.S. Oonjh, District Bhadohi.

8. Submission advanced by the learned counsel for the appellants is that, one Behari Pasi son of Dev Saran Pasi of P.S. Oonjh, Bhadohi on 20.03.2016 along with his brother Lalloo were going to irrigate his field around 11.00 in the night, all of sudden under the mango tree they heard some unusual noise and in the light of the torch, they have seen that their son Jai Prakash after killing him were trying to hang his dead body over the tree. In this Yogesh Kumar, Rajendra Prasad, Budhani, Chhotai, Shivdhari all are sons Panchu were involved in this transaction. When inquired from them then they told that the deceased was in the love with their daughter Mala and that is why, they have eliminated him. After the incident all of them fled away from the sight. The informant and his brother went to the spot and have seen that Jai Prakash was died and his dead body was taken down from the tree.

9. On this written tehrir, on 21.03.2016 a case crime no. 43 of 2016 was registered under Section 147 and 302 IPC against aforesaid named accused appellants but the police after conducting the thorough probe have submitted a report under

Section 173(2) Cr.P.C. in Section 306 IPC against accused-appellants.

10. On 07.07.2017, the learned trial court after committal of the case have framed the charges under Section 306 IPC only. Thereafter inordinate delay of almost more than five years of the trial on 12.10.2022 prosecution woke up and moved an application for amending the charge. An alternative charge under Section 302 IPC was framed against named accused appellants.

It is urged by the learned counsel for the appellants that the entire trial was conducted, keeping in view Section 306 IPC but at the fag end of the trial, Section 302 IPC was inserted among array of the Sections. Surprisingly, the appellants were eventually convicted without adhering the mandatory provision under Sections 216 & 217 Cr.P.C. by the learned trial judge, causing grave miscarriage of justice to the appellants.

11. From the judgement impugned, as many as eight witnesses and eleven documents were produced, which were exhibited to establish the case of the prosecution. From the judgement, it was urged that the accused appellants that in 'furtherance of the common object' they have eliminated the deceased and hanged his dead body over the tree with the intent to give colour of suicide. This incident was witnessed by the informant Behari Pasi and his brother Lalloo, who have given ocular testimony that the deceased was nurturing a tender relationship with the daughter of Chhotai, namely, Mala and in order to save the dignity and honour of his family, all the accused appellants wiped off the deceased in the name of "honour killing".

12. The post mortem was conducted by Dr. Abhay Singh but on account of his demise during trial, the post mortem report was proved by PW-5 Udai Narain Verma, Pharmacist who identified the post mortem report, its contents and the signature of late Dr. Abhay Singh. As per the post mortem report, there is a "ligature mark around upper neck around whole anterior neck and upto left mastoid process and right side towards posterior side of neck up to mid jaw".

However, the doctor has opined the immediate cause of the death of the deceased is as asphyxia on account of ante mortem (HANGING).

13. Fact remains, that the charge sheet was submitted under Section 306 IPC and the original charge were framed on 07.07.2017. The entire trial too was conducted keeping in view section 306 IPC upto the stage of recording of statement under Section 313 Cr.P.C., but all of sudden, an application was moved by the prosecution, resultantly, Section 302 IPC was added as alternative charge, as surprise to the accused-appellants.

14. Though, the case history of the case is quite lengthy, having regard to the aspect which, we intent to focus on and the fact that on that aspect only, this appeal warrants to succeeds, it is not necessary to burden the judgment with unnecessary factual details, we would therefore, be eschewing those facts, which are irrelevant for our purpose and would be taking record of such facts which would be relevant to the issue, which we intent to focus.

LEGAL ASPECT OF THE ISSUE

15. (I) The basic and moot question of law is for the determination in the present case is that altered or added charges if causing prejudice to the accused, trial has to proceed by terming the altered or added charges as original charge. If altered or added charges altogether new one the new trial is insisted in order to take care of such anticipated prejudice to the appellants, it is incumbent upon the prosecution to recall witnesses, examine them in the context of charge under Section 302 IPC and allow accused person to cross examine those witnesses.

(II) If the charges is altered by new charge prejudicing the accused and the de-novo trial is not conducted denying the opportunity of cross examination to the accused, the entire proceeding including the conviction would be vitiated.

(III) Charges under Section 306 and 302 IPC cannot stand together.

16. The prosecution has laid his evidence keeping in view to establish the guilt of the accused appellants under Section 306 IPC and when the matter was ripe for final arguments, after recording the statement of the accused appellants under Section 313 Cr.P.C., an application 86Kha was filed by the prosecution and its objection 89Kha was moved by the defense. On 01.10.2022, learned Sessions Judge, SC/ST Act, Court No.2 Bhadohi Gyanpur in S.T. No. 118 of 2017 (State Vs. Chhotai and others) under Section 306 IPC on 01.10.2022 have allowed the application 86Kha directing to add/alter the charge to Section 302 IPC. The Court has occasion to go through the aforesaid interlocutory order 01.10.2022 in which it has been clearly mentioned that PW-1 and PW-2 in their statement and in their cross examination

they have not even whispered that the deceased Jai Prakash committed suicide. However, the I.O. of the case, mainly relying upon the opinion of the doctor that the cause of death is on account of asphyxia as a result of ante mortem hanging and have submitted charge sheet under Section 306 IPC.

The prosecution at no stage has ever protested on the said charge sheet and the accused appellants were bailed from the Hon'ble High Court under Section 306 IPC. Even at this stage, there was no objection or protest by the prosecution that it is not a case of Section 306 IPC but Section 302 IPC. Not only this as mentioned above on 07.07.2017 charges under Section 306 IPC were framed and explained to appellants. Virtually, during the entire trial the prosecution has maintained its stoic silence and participated to prove the charge against accused-appellants only under Section 306 IPC.

In the order dated 01.10.2022 it has been clearly mentioned that, the record of the case is fixed for final arguments on the merit of the case and at the fag end the aforesaid application 86Kha has been moved by the prosecution for altering the charge and vide order dated 01.10.2022 the application no. 86Kha stands allowed, with the direction to frame an alternative charge under Section 302 IPC. Consequently, on 12.10.2022, the Special Judge, SC/ST Act, Court No.2 Bhadohi Gyanpur has framed the charge under Section 302 IPC for the incident said to have been taken place on 20.03.2016.

17. Interestingly on the same day i.e. on 12.10.2022 yet another order was passed framing an alternative charge of Section 302 IPC and accordingly, same was done.

While passing the aforesaid order, it has been mentioned by the learned trial judge that since all the prosecution witnesses has been examined, even statements under Section 313 Cr.P.C. were recorded and the case is fixed for final arguments, if the accused appellants want to cross examine the witnesses on the newly framed charge, they may do so.

18. The relevant extract of order dated 12.10.2022 passed by Special Judge, SC/ST Act/ Additional Sessions Judge, Court No.2, Bhadohi, Gyanpur is quoted herein below:-

“जैसा कि अभियोजन की ओर समस्त साक्षियों को परीक्षित कराया जा चुका है और अभियुक्तगण का बयान अंतर्गत धारा ३१३ द० प० सं० अंकित हो चुका है। पत्रावली बहस में चल रही है। अभियुक्तगण यदि किसी साक्षी से नवीन वैकल्पिक आरोप के सन्दर्भ में जिरह करना चाहे तो उक्त हेतु स्वतंत्र है। पत्रावली वास्ते बहस हेतु दिनांक १९.१०. २०२२ को पेश हो। ”

From the reading of the above extract, it is urged by the learned counsel that it seems certain amount of concession & discount was given by the learned trial judge to complete certain formality of cross examination from few of the witnesses. In this regard, it is asserted that the provision of Section 216 & 217 Cr.P.C. are not simply formality but mandate of law, which has to complied with in its letter & spirit.

19. At this juncture, it is imperative to spell out Section 216 & 217 Cr.P.C., which are herein under for ready reference :-

“ 216. Court may alter charge-

(1) Any Court may alter or add to any charge at any time before judgment is pronounced.

(2) Every such alteration or addition shall be read and explained to the accused.

(3) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge.

(4) If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.

(5) If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded.

217. Recall of witnesses when charge altered. Whenever a charge is altered or added to by the Court after the commencement of the trial, the prosecutor and the accused shall be allowed-

(a) to recall or re- summon, and examine with reference to such alteration or addition, any witness who may have

been examined, unless the Court, for reasons to be recorded in writing, considers that the prosecutor or the accused, as the case may be, desires to recall or re-examine such witness for the purpose of vexation or delay or for defeating the ends of justice;

(b) also to call any further witness whom the Court may think to be material.”

20. As mentioned above that at the fag end of the trial the learned trial have brushed aside the objection of the defense and have framed **ALTERNATIVE CHARGE** under Section 302 IPC. At this juncture all the prosecution witnesses were already examined, statement under Section 313 Cr.P.C. were recorded and matter was fixed for final submission. It is submitted that eventually all the five accused persons named above were convicted under Section 302 IPC i.e. alternative charge without following above mentioned mandatory mandate of law.

21 . The appellants filed this appeal against the said conviction order, taking the specific plea to the effect that they could not have been any conviction under Section 302 IPC. In this regard, it has been pleaded that the alternative charge under Section 302 IPC was wrongly framed and appellants can not be convicted without adhering the procedure under Sections 216 & 217 Cr.P.C. and therefore, the entire trial in so far as the conviction under Section 302 IPC is concerned stood vitiated.

22. Hon’ble Apex Court in its judgement in the case of **R.Rachaiah Vs. Home Secretary, Banglore** reported in **(2017)3SCC(CrL.)710=2016 12SCC172,**

while dealing with the exact proposition of law have opined :-

“The bare reading of Section 216 reveals that though it is permissible for any Court to alter or add to any charge at any time before judgment is pronounced, certain safeguards, looking into the interest of the accused person who is charged with the additional charge or with the alteration of the additional charge, are also provided specifically under sub-sections (3) and 4 of Section 216 of the Code. Sub-section(3), in no uncertain term, stipulates that with the alteration or addition to a charge if any prejudice is going to be caused to the accused in his defence or the prosecutor in the conduct of the case, the Court has to proceed with the trial as if it altered or added the original charge by terming the additional or alternative charge as original charge. The clear message is that it is to be treated as charge made for the first time and trial has to proceed from that stage. This position becomes further clear from the bare reading of sub-section(4) of Section 216 of the Code which empowers the Court, in such a situation, to either direct a new trial or adjourn the trial for such period as may be necessary. A new trial is insisted if the charge is altogether different and distinct.”

Even if the charge may be of same species, the provision for adjourning the trial is made to give sufficient opportunity to the accused to prepare and defend himself. It is, in the same process, Section 217 of the Code provides that whenever a charge is altered or added by the Court after the commencement of the trial, the prosecutor as well as the accused shall be allowed to recall or re-summon or

examine any witnesses who have already been examined with reference to such alteration or addition. In such circumstances, the Court is to even allow any further witness which the Court thinks to be material in regard to the altered or additional charge.”

23. The accused persons were initially charged for the offence under Section 306 IPC, that is abetting the suicide. Prosecution at no point of time, raised their finger on the charge sheet. The post mortem report of the deceased reveals that that the cause of death asphyxia as a result of hanging. It seems that this was the factor prevail upon the police to file charge sheet under Section 306 IPC. The appellants said to have been aided and abetted the deceased to take this extreme step. Not only this, specific learned trial judge have charged under Section 306 IPC for abetting the suicide were farmed and all the prosecution witnesses were examined and cross examined by the appellants under Section 306 IPC. Obviously when the appellants were charged for an offence under Section 306 IPC, i.e. abetting the suicide, the focus as well as stress in cross examine shall be on that charge alone. But at the fag end of the trial, if the charges were altered with alternative charge with the framing of charge under Section 302 IPC, this gives altogether different complexion and dimension to the prosecution case. Entire texture of the trial gets changed up side down.

24. In a case like present, addition and/or substitution of such charge would bound to create a prejudice to the appellants. Such a charge has to be treated as original charge. In order to take care of the said prejudice, it was incumbent upon the prosecution to recall the witnesses,

examined them in the context of the newly framed charge under Section 302 IPC and allow the accused persons to cross examine those witnesses. Nothing of that sort has ever happened.

25. If, we refer the impugned order dated 12.10.2022 in which the learned trial judge have mentioned “abhiyuktgan vadi kisi sakshi se naveen vaikalpik aaroop ke sandarbh me jirah karna chahe to ukt hetu swatantra hai”. From this it is evident, that the learned trial judge has tried to give a concession and a discount to the accused appellants, if they want to cross examine any prosecution witnesses of their choice, they can do so. This is not the mandate of the law. When the prosecution is changing the tone, texture and tenure of the case substantially upside down, these concessions and discount won’t do. Such type of concession/discount is not contemplated under Section 217 Cr.P.C..

In the present case the farming of charge have been done on 12.10.2022, testimonies of those witnesses were over much prior to that date. Not only this, accused person have got their statement recorded under Section 313 Cr.P.C.. It hardly needs to be demonstrated, that the provision under Section 216 & 217 Cr.P.C. are mandatory in nature, as they not only subserve the requirement of the principles of natural justice but guarantee and important right which is given to the accused persons to defend themselves appropriately by giving them full opportunity. Cross examination of the witnesses in the process is an important facet of this right. Credibility of any witness can establish only after the said witness put to the cross examination by the accused person. No amount of concession or discount by the learned trial judge would

replace this valuable right of the accused appellants. The learned trial court is under the legal obligation to open the 'chess board' once again to achieve the object of fair trial. In the instant case, there is no cross examination so far as the alternative charge under Section 302 IPC was ever done and thus we are of the considered opinion that there could not have been any conviction under Section 302 IPC could be passed by learned trial judge while passing the impugned judgment and order of conviction dated 19/22.11.2022 and thus liable to be set aside.

26. Setting aside of a judgment too, is not a remedy in the interest of justice. The accused appellants are charge sheeted accused of an offence and the justice demands, that they must be put to re-trial from the stage of framing of alternative charges under Section 302 IPC. The earlier conviction order is set aside on the technical grounds but in all fairness the accused appellants must face the trial on the alternative charge. This is mandate of law and has to be carried out in its letter and spirit. In this regard, the remedy is under Section 386 Cr.P.C. which empowers to the appellate court to direct/de-novo trial. Before coming to that Section 386 Cr.P.C., which reads thus:-

“386. Power of the Appellate Court. After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may-

(a) in an appeal from an order or acquittal, reverse such order and direct

that further inquiry be made, or that the accused be re- tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction-

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re- tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or

(ii) alter the finding, maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the Same;

(c) in an appeal for enhancement of sentence-

(i) reverse the finding and sentence and acquit or discharge the accused or order him to be re- tried by a Court competent to try the offence, or

(ii) alter the finding maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same;

(d) in an appeal from any other order, alter or reverse such order;

(e) make any amendment or any consequential or incidental order that may be just or proper; Provided that the

sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement: Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal.”

27. Since, we have already quashed and set aside the impugned judgment and order of conviction keeping in view the serious procedural flaw and fallacy necessitating re-trial of charge sheeted accused appellants. Such fallacy as pointed above, have resulted into serious miscarriage of justice for appellants and therefore, we are of the considered opinion that the matter should be remanded back for re-trial. The High Court being the first appellate court is duty bound to examine the evidence and arrive at an independent finding based on appraisal of such evidence and examine whether such lapses actually affected the prosecution case or such lapses have actually resulted into failure of justice. The circumstances that are existing, warrants the re-trial of the accused-appellants. The trial undertaken by the court, having no jurisdiction or trial was vitiated by serious illegality or irregularity on account of misconception of nature of proceedings or that irregularity has resulted into miscarriage of justice to the accused-appellants.

28. In Section 386 Cr.P.C. deals with the powers of appellate court. As per Section 386(b) Cr.P.C. in an appeal from conviction the appellate court may; (i) reverse the finding and sentence and acquit or discharge the accused or order him to re-tried by the court of competent jurisdiction subordinate to such appellate court or

committed for trial or (ii) alter the finding, maintaining the sentence or (iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence but not so as to enhance the same.

Learned counsel for the appellants has relied upon the judgement of Hon'ble Apex Court in the case of Ajay Kumar Ghoshal and others Vs. State of Bihar and another reported in (2017)12 SCC 699.

29. The word “RE-TRIAL” is used under Section 386(b)(i) Cr.P.C., the power confers by this clause is to be exercise only in the exceptional cases, where the appellate court is satisfied that omission or irregularity has occasioned ‘*failure of justice*’. The circumstances that should exist for warranting for re-trial must be such that the trial was undertaken by court having no jurisdiction or the trial was vitiated by serious illegality or irregularity on account of misconception of the nature of proceeding or such trial have resulted into serious failure of justice to the appellant. An order for re-trial may be passed in cases where the original trial is not satisfactory for some serious procedural lapses resulted miscarriage of justice to appellants such as wrong admission or wrong rejection of the evidences or the court has refused to hear certain witnesses who were suppose to be heard or adding or substituting the ‘charge’ in this regard to graver section of the offences, without adhering the mandatory procedure.

30. We have used the phrase a ‘failure of justice’ what is meant by ‘failure of justice’ occasion on account of such error, omission or irregularity? Hon'ble Apex Court Shamnsaheb M. Multtani Vs. State

of Kanataka reported in 2001(1)SCC (Crl.) 358 opined that:-

“We often hear about ‘failure of justice’ and quite often submission in the criminal court is accentuated with the said expression. Perhaps it is true pliable or facile and expression which could be fitted in any situation of the case. The criminal court particularly a superior court should make those examination to ascertain whether there was a failure of justice or whether it is only a camouflage.”

Adding graver section of the offence at the fag end of the trial but not providing reasonable opportunity as contemplated under Section 216 & 217 Cr.P.C. would bound to lead ‘failure of justice to the accused appellants. Facts of the present case, the appellants would be faced with serious prejudice, if the entire trial is not re-opened and they were given a fair amount of opportunity to cross examine the witnesses of prosecution. This is not a camouflage but the need of the time.

31. De-novo trial means “new trial” ordered by appellate court in exceptional cases when the original trial court failed to make a determination in a manner dictated by law. The trial court is required to conduct a fresh by court, as if there had not been a trial at first instance. Undoubtedly, the appellate court has power to direct the lower court to hold a “de-novo” trial. But the question is when such power should be exercise. As stated in the judgement of Ukha Kolhe Vs. State of Maharashtra reported in AIR 1963 (SC) 1531 held that :-

“An order for retrial of a criminal case is made in exceptional

cases, and not unless the appellate Court is satisfied that the Court trying the proceeding had no jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that the Prosecutor or an accused was, for reasons over which he had no control, prevented from leading or tendering evidence material to the charge, and in the interests of justice the appellate Court deems it appropriate, having regard to the circumstances of the case, that the accused should be put on his trial again. An order of re-trial wipes out from the record the earlier proceeding, and exposes the person accused to another trial which affords the prosecutor an opportunity to rectify the infirmities disclosed in the earlier trial, and will not ordinarily be countenanced when it is made merely to enable the prosecutor to lead evidence which he could but has not cared to lead either on account of insufficient appreciation of the nature of the case or for other reasons.”

32. In yet another case State of M.P. Vs. Bhooraji reported in 2001 SCC (Crl.) 1373 :-

“While dealing with question whether the High Court should have quash the proceeding only on account of declaration of a legal position made by the Supreme Court concerning the procedural aspect about the cases involving offences under SC/ST Act, Hon’ble Apex Court has stated that a de-novo trial should be a last resort and that too only when such court become desperately indispensable. It should be a limited to extreme exigency to avert failure of justice.”

33. In Zahira Habibullah H. Sheikh Vs. State of Gujrat (Best Bakery Case) reported in 2004 SCC (Crl.) 999, the Supreme Court was convinced that the witnesses were threatened to keep themselves away from court and in such circumstances of the case, not only the court directed to have a de-novo trial but made further directions for appointment of a new prosecutor and retrial was directed to be held out of the State of Gujrat. Though it was an exceptional case under the extra ordinary circumstances.

34. We are faced with yet another very common phrases “the ‘speedy trial’ and ‘fair trial’ to a person accused of a crime and after referring a catena of decisions an observations that are guiding factor for re-trial must be a demand of justice.” In the case of Mohd. Hussain Vs. State of NCT Delhi reported in 2012 (3) SCC (Crl.) 1139, the Hon’ble opined in paragraph 41 and 42 of the judgement which is quoted herein below :-

“ 41.-‘Speedy trial’ and ‘fair trial’ to a person accused of a crime are integral part of Article 21. There is, however, qualitative difference between the right to speedy trial and the accused’s right of fair trial. Unlike the accused’s right of fair trial, deprivation of the right to speedy trial does not per se prejudice the accused in defending himself. The right to speedy trial is in its very nature relative. It depends upon diverse circumstances. Each case of delay in conclusion of a criminal trial has to be seen in the facts and circumstances of such case. Mere lapse of several years since the commencement of prosecution by itself may not justify the discontinuance of prosecution or dismissal of indictment. The factors concerning the accused’s right to speedy

trial have to be weighed vis-à-vis the impact of the crime on society and the confidence of the people in judicial system. Speedy trial secures rights to an accused but it does not preclude the rights of public justice. The nature and gravity of crime, persons involved, social impact and societal needs must be weighed along with the right of an accused to speedy trial and if the balance tilts in favour of the former the long delay in conclusion of criminal trial should not operate against the continuation of prosecution and if the right of accused in the facts and circumstances of the case and exigencies of situation tilts the balance in his favour, the prosecution may be brought to an end. These principles must apply as well when the appeal court is confronted with the question whether or not retrial of an accused should be ordered.

42. The appellate court hearing a criminal appeal from a judgment of conviction has power to order the retrial of the accused under Section 386 of the Code. That is clear from the bare language of Section 386(b). Though such power exists, it should not be exercised in a routine manner. A ‘de novo trial’ or retrial is not the second trial; it is continuation of the same trial and same prosecution. The guiding factor for retrial must always be demand of justice. Obviously, the exercise of power of retrial under Section 386(b) of the Code, will depend on the facts and circumstances of each case for which no strait jacket formula can be formulated but the appeal court must closely keep in view that while protecting the right of an accused to fair trial and due process, the people who seek protection of law do not lose hope in legal system and the interests of the society are not altogether overlooked.”

35. The language used under Section 386 (b) Cr.P.C. permits for re-trial of an accused though should not be exercise in a routine manner, it should be ordered in the exceptional and extraordinary circumstances only when that as per the appellate court's opinion that such course becomes indispensable to avert the failure of justice. A "re-trial" is not a second trial, it is continuation of the same trial and same prosecution. But as mentioned above, the guiding factor of re-trial must always be for the demand of justice. Obviously, the exercise of power for 're-trial' under Section 386(b) Cr.P.C. of the court which depends upon the facts and circumstances of each case which no steal jacketed formulae can be formulated but the appellate court must closely keep in view that while protecting the right of an accused to fair trial and due process, the people who seeks protection of law do not loose hope in the legal system and the interest of society are not altogether over looked, meaning thereby fair trial and speedy trial must go hand-in-hand for an orderly society.

36. As we have already set aside and quashed the impugned order and judgment of conviction, under challenge, in the earlier part of the judgment by giving a detailed reasons, i.e. by not adhering the mandatory procedure lay down in Sections 216 and 217 Cr.P.C. the accused appellants have suffered has caused a serious prejudice. They were taken by surprise by altering/substituting Section 302 IPC in place of Section 306 IPC and thereafter a concession and discount was granted by learned trial court, that defense may cross examine any of the witnesses, if they so chooses. This concession or discount is an eye wash and a false pretext so as to justify the order of conviction under Section 302

IPC. They have taken a back by pasting a fresh charge under Section 302 IPC in place of Section 306 IPC, such an hide and seek practice is unknown and oblivion to the criminal justice dispensation system. No accused should be taken by surprise or giving a certain concession or discount to carry out the cross examination, if any. But at the same time the accused appellants who are the charge sheeted accused cannot be let loose without being put to trial.

37. For the foregoing reasons the instant criminal appeal is allowed, the impugned judgment and order dated 19/22.11.2022 passed by Additional Sessions Judge/ Special Judge, SC/ST Act, Court No.2, Bhadohi, Gyanpur while deciding the S.T. No. 118 of 2017 (State Vs. Chhotai and others) arising out of case crime no. 43 of 2016, P.S. Oonjh, District Bhadohi, Gyanpur is hereby **quashed** and **set aside** with the following directions:-

(i) The matter is remanded back to the trial court to start a fresh trial from the stage of framing the additional charge under Section 302 IPC in view of the observation made above. The accused appellants after the recording the depositions of the witnesses of the prosecution, the accused appellants are required to cross examined them and the trial court is directed to make all sincere effort and to have a day to day hearing (if possible) strictly adhering the provision of Section 309 Cr.P.C. and make all sincere efforts to conclude the trial by 31.03.2024.

(ii) Since the appellants are in jail since 19.11.2022, they are hereby directed to be released on bail in S.T. No. 118 of 2017 (State Vs. Chhotai and others) arising out of case crime no.43 of 2016, under Section 302 IPC, Police Station-Oonjh,

District-Bhadohi (Gyanpur), on their furnishing a personal bond and two sureties (one should be family member) each in the like amount to the satisfaction of the court concerned.

(iii) In addition to this, all the accused appellants would give a written undertaking to learned trial court within a week from their release on bail that they would remain present in the court on the framing and explaining those 'charges' to them by the learned trial court. The trial court would re-visit the entire material on record once again so as to satisfied them that there is sufficient material on record to charge the accused appellants under Section 302 IPC. The accused appellants are under the legal obligation to remain present in the court on the framing of charge, at the stage of Section 313 Cr.P.C. and in addition to this, as and when their presence is required by learned trial judge during trial. Any lapses on the part of the accused appellants while adhering above mentioned conditions would warrant serious repercussion including the cancellation of their bail bonds and taking them into custody by the trial court itself after recording its reasons.

38.. Consequently, the present criminal appeal stands **allowed** and the judgment and order is hereby **quashed** and the matter is remanded back to the court concerned for re-trial under the 'proposed' alternative charge.

(2023) 9 ILRA 619

**APPELLATE JURISDICTION
CRIMINAL SIDE**

DATED: LUCKNOW 23.08.2023

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Appeal No. 335 of 1999

Itwari & Ors.

...Appellants

Versus

State of U.P.

...Opposite Party

Counsel for the Appellants:

A.R. Khan, Vimal Kishore Singh, Vishwa Nath Singh

Counsel for the Opposite Party:

G.A.

A. Criminal Law-Criminal Procedure Code,1973-Section 374(2) - Indian Penal Code, 1860- Sections 323/34, 504, 506 & 308/34- Challenge to-Conviction statement of P.W.-1 as well as P.W.-2 show that they have supported the prosecution case while their statements were recorded under Section 161 Cr.P.C. by the Investigating Officer, however, at the time of their examination-in-chief, they had totally denied the prosecution story, therefore, they were declared hostile- No proper explanation of injuries on the person of injured witnesses have been given. Mere suggestion is not sufficient. Moreover it itself indicates a false case. All the witnesses being the close relatives, it is beyond apprehension that they instead of naming out real culprit, they would falsely implicate the accused persons knowing them innocent- Looking into the totality of statement of witnesses, the conclusion drawn by the trial court cannot be said to be reasonable-It is established principle of law of evidence that statement of witness is to be read as a whole and conclusion should not be drawn only by picking up a single sentence of the statement of a witness. Thus the trial court has overlooked the material evidence available on record with regard to guilt of accused and to that extent conclusion drawn by the trial Court suffers with patent infirmity and perversity and therefore, liable to be reversed and set aside.(Para 1 to 41)

B. The principle of “falsus in uno falsus in omnibus” (false in one thing, false in everything) has no application in India. It is duty of Court to separate grain from chaff. even if major portion of the evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, it is the duty of the court to separate grain from chaff. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim falsus in uno falsus in omnibus (false in one thing, false in everything) has no application in India and the witness cannot be branded as a liar. In case this maxim is applied in all the cases it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however, truth is the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of credence, and merely because in some respects the court considers the same to be insufficient or unworthy of reliance, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well.(Para 25, 26)

The appeal is allowed. (E-6)

List of Cases cited:

1. Paramjeet Singh Vs St. of UK (2011) AIR SC 200
2. Sucha Singh Vs St. of Punj. (2003) AIR SC 3617
3. Khujji @ Surendra Tiwari Vs St. of M.P. (1991) AIR SC pg 1853

(Delivered by Hon’ble Shamin Ahmed, J.)

1 . List of cases has been revised and the case is being taken up in the revised call for hearing.

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

3. As per report of the Chief Judicial Magistrate, Bahraich dated 11.12.2018, the appellant no.1 Itwari had already expired during pendency of this appeal, as such, the appeal on his behalf stands abated. This Court is proceeding in respect of appellant no.2 Nabi Ullaha, appellant no.3 Rafi Ullaha and appellant no.4 Mulzim.

4. The instant Criminal Appeal under Section 374(2) Cr.P.C. has been moved on behalf of the appellants against the order dated 30.07.1999 passed by learned Additional Sessions Judge, Bahraich in Sessions Trial No.327 of 1994, under Sections 323/34, 504, 506, 308/34 I.P.C., Police Station Risiya, District Bahraich, whereby appellants have been convicted and sentenced for six months rigorous imprisonment under Section 323/34 I.P.C., two years rigorous imprisonment under Section 506 I.P.C. and two years rigorous imprisonment under Section 308/34 I.P.C. All the sentenced were directed to be run concurrently.

5. The prosecution case in brief is that on 04.05.1993, the complainant, Abdul Mannan had given a written report in Police Station Risiya, District Bahraich wherein it had been stated that accused Itwari was fixing his son’s (Nabi Ullaha) marriage in the complainant’s family. The complainant’s relative asked the Itwari about his land and property, therefore, he told the truth. As such, the complainant’s relative denied for the marriage and due to this, Itwari got angry with relatives of the complainant. On the date of incident at about 07:00 A.M., when the uncle (Ashraf Ali) and brother (Ibrahim) of the complainant were coming from market, the accused persons caught them and abused them in filthy languages and even assaulted them with lathi and danda, as such, Ashraf

Ali and Ibrahim got severely injured. Due to injury, Ibrahim got unconscious. On seeing the incident, the nearby villagers Aliullaha and Sabder Ali rescued the injured persons.

6. On the basis of written report, submitted by the first informant, Abdul Mannan, the first information report was lodged as Case Crime No.43 of 1993, under Sections 308, 323, 504, 506 I.P.C. at Police Station Risiya, District Bahraich.

7. The case was handed over to Investigating Officer, who visited the place of occurrence, recorded the statement of the witnesses and prepared the site plan and after completing the investigation, submitted the charge sheet against the appellants under Sections 308, 323 I.P.C.

8. On the basis of Charge-sheet appellant-accused were summoned by the Court and charges were framed against them under Sections 323/34, 504, 506, 308/34 I.P.C. The appellants-accused denied the charges and claimed to be tried.

9. Prosecution in order to substantiate the charges against appellants-accused examined P.W.-1 Ali Ullaha, an eye witness, P.W.-2 Safder Ali, an eye witness, P.W.-3 Abdul Mannan, the complainant, PW-4 Head Moharrir Chhavi Lal, who had scribed the written complaint, PW-5 Ibrahim, the injured, P.W.-6 Ashraf Ali, the injured, P.W.-7 Dr. Dharmvir Kumar, who medically examined the injured, P.W.-8 Sub Inspector Satya Narain Tiwari, who investigated the case.

10. Apart from above oral evidences, the following documentary evidences were also marked as follows. Written report as Ex. Ka-1, Chik F.I.R. as Ex. Ka-3, Nakal

G.D. as Ex. Ka-4, Injury Report of Ibrahim as Ex. Ka-5, Injury Report of Ashraf as Ex. Ka-6, Site Plan as Ex. Ka-7 and Charge Sheet as Ex. Ka-8.

11. After closing of the evidence, statement of accused / appellants under section 313 Cr.P.C. was recorded by the trial court explaining the entire evidence and other circumstances, in which the appellants denied the prosecution story and the entire prosecution story was said to be wrong and concocted.

12. In order to substantiate the defence case, accused appellants examined Mohley as D.W.-1 before the trial court.

13. After having heard the rival submissions of parties, the Trial Court found appellants-accused guilty, therefore, convicted and sentenced them for six months rigorous imprisonment under Section 323/34 I.P.C., two years rigorous imprisonment under Section 506 I.P.C. and two years rigorous imprisonment under Section 308/34 I.P.C.

14. Feeling aggrieved by the judgment of conviction and sentence passed by Trial Court, the appellants-accused have preferred this appeal.

15. Learned Counsel for the appellants has contended that the judgment and order passed by the Trial Court is wrong both on facts and law. The learned trial court had misread and misconstrued the statements of prosecution witnesses. The learned trial court had wrongly held that the complainant Abdul Mannan, who lodged the F.I.R., was a witness, had been declared hostile and in the cross-examination he admitted that the parties had compromised the matter, thus, a part of

his statement could be relied upon. Other witnesses have also not supported the prosecution case.

16. Learned counsel for the appellants has further contended that the learned trial court had wrongly relied upon that when a witness has been declared hostile, his statement could be relied upon with some extent. As such, he submits that the learned trial court has erred in law and passed the impugned order, therefore, the same is liable to be set aside and the instant appeal is liable to be allowed.

17. Opposing the contention of learned Counsel for the appellant-accused, the learned A.G.A. has contended that sufficient evidence was given by the prosecution to prove the factum of assaulting the injured by the accused persons. The F.I.R. was also immediately lodged and the prosecution witnesses have also proved the commission of offence, as such, the impugned order does not require any interference by this Court and the appeal is liable to be dismissed.

18. Through out the web of the Criminal Jurisprudence, one golden thread is always seen that it is the duty of the prosecution to prove the guilt of the accused. This burden of proof on prosecution to prove guilt is also known as presumption of innocence. The presumption of innocence, sometimes refer to by the latin expression "ei incumbit probatio qui dicit, non qui negat" (the burden of proof is on one who declares, not to one who denies) is the principle that one is considered innocence unless proven guilt. In criminal jurisprudence every accused is presumed to be innocent unless the guilt is proved. The presumption of innocence is a human right. The

prosecution may obtain a criminal conviction only when the evidence proves the guilt of accused beyond reasonable doubt.

19. In the present case, almost all the prosecution witnesses have turned hostile. It is based on testimony of hostile prosecution witnesses from which guilt of accused may be inferred.

20. Witnesses may be categorized into three distinct categories. They may be wholly reliable. Similarly there may be witnesses who can be considered wholly unreliable. There is no difficulty in placing reliance or disbelieving his evidence when an evidence is wholly reliable or wholly un-reliable, but difficulty arises in case of third category i.e. where witness is neither wholly reliable nor wholly unreliable. Hostile witness ordinarily falls in category of those witnesses who are neither wholly reliable nor wholly un-reliable. Hon'ble Apex Court in **Khujji @ Surendra Tiwari Vs. State of M.P. AIR 1991 SC page 1853** was pleased to observe as under :-

"The evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether, but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof."

21. The term "hostile witness" does not find place in Evidence Act 1872 (here-in-after referred as Act of 1872 for brevity). It is a term borrowed from English Law. Though in English Law to allow a party to contradict its own witness was not acceptable view. The theory of

contradicting its own witness was resisted on the ground that party should be permitted to discard or contradict his own witness, which turns unfavorable to party calling him, however, this rigidity of rule was sought to be relaxed by evolving a term “hostile” or “un-favourable witness” in common law.

22. It is relevant to quote Section 154 (1) of the Act of 1872, which reads as under:-

“the Court may, in its discretion, permit the person who calls a witness to put any question to him, which might be put in cross examination by the adverse party”.

23. Sub-Section (2) of Section 154 of Act of 1872, further provides that :-

“Nothing in this section shall disentitle the person so permitted under sub-section (1), to rely on any part of evidence of such witness”.

24. Thus discretion is vested in Court to permit a person to put such question, which may be put by adverse party, if Court deems it appropriate. Thus the term “hostile witness” has been borrowed from English Law and developed in through case Laws.

25. The principle of “**falsus in uno falsus in omnibus**” (false in one thing, false in everything) has no application in India. It is duty of Court to separate grain from chaff. Keeping in view the above principles Hon'ble Apex Court in the case of **Sucha Singh v. State of Punjab, AIR 2003 SC 3617** was pleased to observe as under :-

“even if major portion of the evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, it is the duty of the court to separate grain from chaff. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim falsus in uno falsus in omnibus (false in one thing, false in everything) has no application in India and the witness cannot be branded as a liar. In case this maxim is applied in all the cases it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however, truth is the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of credence, and merely because in some respects the court considers the same to be insufficient or unworthy of reliance, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well.”

26 . Similarly in **Paramjeet Singh v. State of Uttarakhand; AIR 2011 SC 200** also Hon'ble Apex Court was pleased to observe as under:-

“When the witness was declared hostile at the instance of the public prosecutor and he was allowed to cross examine the witness furnishes no justification for rejecting embloc the evidence of the witness. However, the court has to be very careful, as prima facie, a witness who makes different statements at different times, has no regard for the truth. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to it. The court should be slow to act on the testimony of such a witness; normally, it

should look for corroboration to his testimony”.

27. Perusal of the statement of eye witness P.W.-1 Ali Ullaha reveals that he clearly stated during his examination in chief that the complainant had lodged the F.I.R. about 3 – 4 years ago, wherein he was kept as an eye witness but he don't know why the complainant made him an eye witness as he had not seen the incident nor he was present at the time of incident.

28. Similarly P.W.-2 Safder Ali, an eye witness also reiterated the same as P.W.-1 Ali Ullaha. He also stated that he don't know why the complainant made him an eye witness as he had also not seen the incident in question.

29. Further P.W.-3 Abdul Mannan is the complainant and in his testimony in examination in chief, he has totally reiterated the version of F.I.R. and had supported the prosecution story, whereas he was not the eye witness of the alleged incident.

30. PW-4 Head Moharrir Chhavi Lal had stated in his testimony before the learned trial court that he has scribed the written report into first information report and at the time of scribing, Ibrahim and Ashraf were present.

31. P.W.-5 Ibrahim, the injured had also reiterated the version of F.I.R. and had supported the prosecution case. He also stated that he was sent to Bahraich for his medical examination.

32. P.W.-6 Ashraf Ali, the injured had also reiterated the version of F.I.R. and had supported the prosecution case.

33. P.W.-7 Dr. Dharmveer Dubey, Orthopedic Surgeon, District Hospital, Kanpur had stated in his examination-in-chief that he had examined the injured Ibrahim and injured Ashraf Ali on 04.05.1993 at about 08:30 A.M. The injured persons were brought by Constable CP 218 Ramesh Kumar Yadav. He had also prepared medical report of the injured Ibrahim as well as Ashraf Ali.

34. P.W.-8 Sub Inspector Satya Narain Tiwari, Reader Superintendent of Police, Allahabad had stated in his examination of chief that on 04.05.1993 he was posted as Station House Officer of Police Station Risiya, District Bahraich. He was entrusted with the investigation of present case, thereafter, he concluded the investigation.

35. D.W.-1 Mohley had stated in his testimony before the trial court that he knew the accused persons as well as the injured persons and he further stated that no such incident as alleged by the prosecution took place.

36. Perusal of statement of P.W.-1 Ali Ullaha as well as P.W.-2 Safder Ali show that they have supported the prosecution case while their statements were recorded under Section 161 Cr.P.C. by the Investigating Officer, however, at the time of their examination-in-chief, they had totally denied the prosecution story. There can be no two opinion that these witness turned hostile on account of pressure exerted upon them by the accused persons. They refused to state truth about the occurrence, and therefore, they were declared hostile. They were required to submit their explanation regarding their previous statement given under Section 161 Cr.P.C. supporting the prosecution case.

37. It feels pain to observe that in our present system of trial despite having sufficient power to the judge to ask questions to the witnesses in order to find out truth, most of them do not ask questions to the witnesses to shift the grain from the chaff. Practice of leaving witnesses to the Advocates, when a witness becomes hostile, is not un-common in the trial Courts. Time and again Hon'ble Apex Court has reminded that a Judge does not preside over a criminal trial merely to see that no innocent man is punished, but a Judge also presides to see that a guilty man does not escape. Both are public duties, which the Judge has to perform. Therefore, the trial Court must shed their inertia and must intervene in all those cases where intervention is necessary for the ends of justice.

38. No proper explanation of injuries on the person of injured witnesses have been given. Mere suggestion is not sufficient. Moreover it itself indicates a false case. All the witnesses being the close relatives, it is beyond apprehension that they instead of naming out real culprit, they would falsely implicate the accused persons knowing them innocent.

39. This Court has gone through the impugned judgment and evidence on record. The trial court relying on the testimony of witnesses, even though who were declared hostile, has concluded that the accused had assaulted the injured persons. Looking into the totality of statement of witnesses, the conclusion drawn by the trial court cannot be said to be reasonable.

40. It is established principle of law of evidence that statement of witness is to be read as a whole and conclusion should not

be drawn only by picking up a single sentence of the statement of a witness. Thus the trial court has overlooked the material evidence available on record with regard to guilt of accused and to that extent conclusion drawn by the trial Court suffers with patent infirmity and perversity and therefore, liable to be reversed and set aside.

41. Thus in view of above, after analysis of circumstances of present case in the light of aforesaid settled legal principles, I come to the conclusion that the trial court has erred passing the impugned judgment and order, therefore, this appeal succeeds and is **allowed**. The judgment and order dated 30.07.1999 passed by learned Additional Sessions Judge, Bahraich in Sessions Trial No.327 of 1994, under Sections 323/34, 504, 506, 308/34 I.P.C., Police Station Risiya, District Bahraich is **set aside** and **reversed**. The appellants, namely, appellant no.2 Nabi Ullaha, appellant no.3 Rafi Ullaha and appellant no.4 Mulzim are **acquitted** of charges under Sections 323/34, 506, 308/34 I.P.C. Their personal bonds and surety bonds are canceled and sureties are discharged.

42. Let record of lower Court be sent back to Court concerned along with copy of judgment and order for information.

(2023) 9 ILRA 625

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: LUCKNOW 06.09.2023

BEFORE

THE HON'BLE UMESH CHANDRA SHARMA, J.

Criminal Appeal No. 520 of 1999

Prem & Ors.

State of U.P.

Versus

...Appellants

...Opposite Party

Counsel for the Appellants:

Diwakar Singh, Ajeet Kumar, P.K. Rai,
Upendra Prakash Pathak, Vishwa Nath
Singh

Counsel for the Opposite Party:

G.A.

Criminal Law - Criminal Procedure Code, 1973 - Sections 156(3), 161 & 164 - Indian Penal Code, 1860 - Sections 34, 376 & 376(2)(g) - Indian Evidence Act, 1872 - Section - 114(g) - Appeal - against conviction & sentence - appeal survives only in respect of appellant no. 2 since appellant no. 1 and 3 are died - application u/s 156(3) - FIR - offence of rape - victim alleged that, she was raped accused-appellant no. 1, while other appellant nos. 2 & 3 were hold of her - appellant argued that, Sessions Judge made several errors, including not considering Défense evidence, delay in filing the application, lack of public witnesses, and contradictions in the prosecution's evidence - and there was a property dispute between the victim and the accused, leading to false implications - Evaluation of **Evidences - court finds that**

- **the** prosecution presented several witnesses, including the victim, her husband, and her daughter - further, in the medical examination no any injuries was found on the victim - several discrepancies in the prosecution's case, including the source of light during the incident, the place where the victim was sleeping, and the roles of the accused - held, the court concluded that the prosecution failed to establish the guilt of the accused beyond a reasonable doubt - hence, appeal is liable to be allowed and the impugned order of conviction and sentenced is quashed. (Para - 39, 53, 55)

Appeal allowed. (E-11)

List of Cases cited:

1. Santosh Prasad @ Santosh Kumar Vs St. of Bihar, (2020) 3 SCC 443,

2. Lalta Prasad Vs St. of M.P., AIR 1979 SC 1276,

3. Charan Singh Vs St. of Har., (1988) 3 Crimes 85 (P&H),

4. Zahoor Ali Vs St. of U.P., 1989 CrLJ 1177 (All),

5. Sakariya Vs St. of M.P., 1991 CrLJ 1925 (MP),

6. Maharashtra Vs Abdul Hafees Faroki, 1998 CrLJ 3603 (SC),

7. Joseph Vs St. of Kerala, 2000 CrLJ 2467 (SC),

8. Sampad Vs St. of Orissa, 2001 CrLJ 793 (Ori),

9. St. of St. of Orissa Vs Rama Swain & ors., 2007 CrLJ 714 (Ori),

10. Goverdhan Vs St. of M.P., 2006 CrLJ 4118,

11. Mansingh Vs St. of M.P., 2007 CrLJ 201 (MP),

12. St. of Maharashtra Vs Rameshwar Sridhar Jaware, 2008 CrLJ 675 (Bom),

13. Suresh Govinda Nagdeve Vs St. of Mah., 2008 CrLJ 2943 (Bom).

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

1. As per order dated 17.02.2014, this appeal in respect of appellant no.3, Mohan, after his death, has been abated and this appeal has also been abated vide order dated 29.11.2016 in respect of appellant no.1, Prem. Hence, this appeal survives only in respect of appellant no.2, Nand Kishor.

2. Heard Sri Ajeet Kumar, learned counsel for the surviving appellant, Sri Arvind Kumar Singh, learned AGA for the State and perused the record.

3. This appeal has been preferred against the judgment and order dated 01.10.1999 passed by Special Judge (EC Act)/Additional Sessions Judge, Barabanki

in ST No.99 of 1994 (State Vs. Prem and others) arising out of Case Crime No.98 of 1992, under Section 376(2)(g) IPC, Police Station Tikait Nagar, District Barabanki to undergo ten years rigorous imprisonment and fine of Rs.2,500/- to each and in default of payment of fine four months rigorous imprisonment to each of the convicts.

(I) Grounds of appeal-

4. The appellants had taken grounds that the learned Sessions Judge had committed manifest error in not considering the defence evidence; there was inordinate delay of about 9 days in filing the application before the Judicial Magistrate; no FIR was lodged regarding the alleged incident; the Sessions Judge has committed manifest error of law in not considering the delay and in convicting the appellants without application of mind; there was no public witness of the alleged crime; the appellants have been falsely implicated in the case due to previous enmity; the prosecution witnesses have not supported the prosecution version; there was vital discrepancy in the evidence of prosecutrix and the prosecution witnesses; the eye-witnesses have contradicted the prosecutrix which falsifies the entire prosecution case; there was material contradiction in the statement recorded under Section 161 CrPC and the evidence; the clothes of the prosecutrix were not sent for chemical examination; appellants (Prem and Nand Kishor) both are devar and Mohan is father-in-law of the prosecutrix; the trial court has erred in not appreciating the contradictions in the evidence of all the witnesses; no spermatozoa was found in the private part of the prosecutrix; there was family dispute between the prosecutrix and the appellants; no injury was found on the

private part or on the body of the prosecutrix; PW-6, medical officer has deposed that no opinion of rape can be given; the delay in filing the application before the Judicial Magistrate is not explained which creates doubt on the entire prosecution story; the alleged witnesses Chhotka, Bahadur and others who allegedly had seen the occurrence were not examined as a witness deliberately, therefore, the conviction and sentencing passed by the trial court be set aside and the appellant be acquitted.

(II) Brief facts of the case-

5. According to the prosecution story, the victim moved an application under Section 156(3) CrPC before the concerned Magistrate that in the night of 09/10.06.1992 at about 12 o'clock when she was sleeping at her door and lantern was lighting and her husband Sohan Lal had gone to the kinship, the accused Prem reached on the spot and started raping with her. She kicked and pushed him, by then Nand Kishor and Mohan caught hold of her. On her noise neighbours reached there and accused persons escaped. She could not go to the police station as her husband was not present, when her husband came, she had gone to the police station. It is, therefore, requested to kindly direct the police station Tikait Nagar to lodge the FIR and investigate the matter.

6. The aforesaid application was moved on 18.06.1992 after eight days of the alleged incident. The case was lodged at Crime No.98 of 1992, under Section 376 IPC. The investigating officer (for short 'IO') investigated the matter, prepared site plan Ex.Ka-6 and after recording the statements of the witnesses, the charge-sheet under Section 376 IPC was submitted

to the court. The case was committed to the court of sessions which was transferred to the court of Additional Sessions Judge-IV, Barabanki who framed the charge on 07.06.1995 against the accused Prem under Section 376 IPC and against the accused Nand Kishor and Mohan under Section 376 read with Section 34 IPC and an alternative charge against all the accused persons was framed under Section 376(2)(g) IPC. Accused persons denied the charge and sought trial.

7. The prosecution examined following witnesses:-

1	PW-1	The victim
2	PW-2	Sohan Lal, husband of the victim
3	PW-3	Mantora, daughter of the victim
4	PW-4	Arvind Pratap Singh
5	PW-5	Giridhar Prasad Gupta
6	PW-6	Dr. Chandra Lekha

8. The prosecution has produced following documentary evidences:-

1	Ex.Ka-1	Written complaint
2	Ex.Ka-2	Fard (dhibri/lantern)
3	Ex.Ka-3	Chik FIR
4	Ex.Ka-4	Kaymi case GD carbon copy
5	Ex.Ka-5	Weeding report of original GD
6	Ex.Ka-6	Map
7	Ex.Ka-7	Charge-sheet
8	Ex.Ka-8	Medical report

(III) Brief discussion on the evidence/statements of the prosecution witnesses-

9. PW-1, victim has deposed that about 6 years ago at about 12 o'clock on a summer night she was sleeping on a cot in the sahan, her daughter and son were also sleeping on another nearby cot. The dhibri (country-made lamp) was on, accused Prem came and lifted her saree and started raping her, she woke up and kicked him thereafter accused Nand Kishor and Mohan who had come with Prem, had caught hold of her and Prem forcibly committed rape with her. She started crying on which all the three accused ran away. On her crying her son and daughter had also woke up who saw and recognised the accused persons. The witness recognised the accused persons in the court and pointing on the accused Prem, deposed that he had committed rape with her and Nand Kishor and Mohan had caught hold of her. She had recognised them well at the time of the incident. Her husband was out of the house and had gone to the kinship. After few days when he returned, she narrated the whole story who came to Barabanki and moved an application before the Magistrate to lodge the FIR. The witness recognised her thumb impression on the application Ex.Ka-1 and rectified that due to typing mistake in place of dhibri she had written it to be lantern. On the basis of the said application a report was lodged, IO had recorded her statement. She had pointed out the place of occurrence, IO had taken her to the district hospital where she was medically examined. Dhibri was inspected and was given in the custody of her husband. Upon her noise, witnesses Smt. Chhotka, Bahadur (blind person) and others had also reached on the spot and had seen the occurrence.

10. In the cross-examination, this witness accepted that she had not gone to the police station for lodging the FIR. She had come to the court and had not gone to any other place. *In the court premises she had met to the counsel and instructed him to prepare such a case in which accused persons must go to the jail and must be convicted.* The said counsel had typed the paper and had got her thumb impression. *The application was not read over to her.* She had shown the cot to the IO. On the day of occurrence she was sleeping and had woken up at 05:00 a.m. She had slept at 08:00 p.m. She further deposed that she often used to sleep out of the house.

11. In further cross-examination this witness deposed that the lantern was lighted under the hut. She was sleeping on the cot at a distance of 20 steps from her door. *It is true that she was sleeping underneath the hut. It is wrong to say that she was sleeping in the sahan. She further deposed that she had not named any witness, none had come on the spot.* This witness denied that any case with the accused Prem was going on. According to this witness, the IO had conducted her medical examination just after two days of the incident. She had gone there with her husband and after the medical examination she had gone to the court premises. This witness further deposed that since before the death of her father-in-law all were living separately. The land had also been separated. Her father-in-law had taken possession of the land of his share. The land of Barsati had been divided. *The land of Barsati had been cultivated by Prem and Nand Kishor. She was claiming share in it and they were not providing the share to her in the property of her father-in-law.* The witness denied that she had instituted the case and has also implicated Mohan as

he was the friend and helper of the rest of the accused persons.

12. PW-2, Sohan Lal, husband of the victim has deposed that on the day of occurrence he had gone to the kinship and after 4-5 days when he returned, his wife had narrated the story. His wife came to the court premises, narrated the application and produced the same in the court. Dhibri lighted at the time of the incident was shown to the IO. A recovery memo of dhibri was prepared and thereafter it was returned to him. The witness recognised his thumb impression on the recovery memo Ex.Ka-2. The witness denied that since the accused persons were not providing the share in the property of Barsati, therefore, he had lodged a false FIR against the accused persons through his wife.

13. PW-3, Mantora daughter of the victim has deposed that at the time of alleged occurrence she was about 12-13 years old. She was lying at the door near her mother, dhibari was lighted. Her father Sohan Lal had gone to the kinship. By that time accused Prem, Nand Kishor and Mohan reached, Mohan caught hold of hands of her mother and accused Prem started bad deed with her mother. Her mother cried on which she woke up and saw that accused Mohan had caught hold of hands of her mother and Prem was doing bad deeds with her mother without her consent. Nand Kishor was standing away. When she cried, accused persons ran away. Accused Prem had done bad deed and had run away and two other accused persons also ran away. Bahadur and Chhotka had cried from their houses and had not come on the spot. After three days of the incident her father came to the house and her mother had narrated the whole story. The IO had interrogated her. After three days of

the incident when her father had come, he gone to lodge the FIR with her mother. Her mother had slept 2-4 steps away from her. Barsati was her grandfather. His father were four brothers. His elder brother has died. When IO had visited her house, her mother has shown the lantern which was returned by him after seeing the same. Accused Mohan was her grandfather in relation. His father was aged about 60-65 years. Mohan is elder to her father. The witness denied that as the accused persons had occupied the land of her uncle Sundar and were not intended to give share, therefore, false FIR had been lodged.

14. PW-4, constable Arvind Kumar Singh has proved chik FIR Ex.Ka-3 and kaymi case GD Ex.Ka-5. According to him he had lodged the FIR and had prepared the kaymi case GD on 15.07.1992. In cross-examination this witness explained that there was no order regarding lodging the FIR. There was an order to investigate and inform about the incident. He had lodged the FIR on the order of the SO.

15. PW-5, Girdhar Prasad Gupta, IO has deposed that on 15.07.1992 this case had been lodged and he was entrusted the investigation of the case after which he visited the spot and prepared map Ex.Ka-5 on the pointing of the informant in his own hand writing and signature. After taking dhibari in possession he had returned it and a memo Ex.Ka-2 was prepared in his hand writing and signature. He had recorded the statement of witnesses Mantora, Smt. Chhotka, Smt. Kunwar, Bahadur, Ganga Ram and had arrested the accused persons on 24.07.1992. Medical examination of the victim was conducted and her statement under Section 164 CrPC was recorded and after completion of investigation, he had submitted charge-sheet Ex.Ka-7.

16. During the cross-examination this witness accepted that he has not mentioned the distance of the places as shown in the map. The witness could not say the length and width of the hut. He could not say the distance of the cot of the prosecutrix from the door and the hut. He could not say the distance of the house of the accused persons from the house of the victim. He further deposed that he had found dhibari at place-C made on the wall which was 4 feet above from the earth. Nothing has been said about the lantern. This witness has admitted that IO had sent a report to the court on 07.07.1992 stating therein based on the statement of the husband of the victim that his father Barsati had died one and a half month ago. On the day of terhi he wanted share in the property of Barsati, Prem and Nand Kishor had not provided the same and had possessed the plot, therefore, the victim on account of enmity wants to implicate Prem and Nand Kishor as accused. The witness further deposed that the petticoat and saree of the victim were not taken into possession and were not sent for the chemical examination. The witness denied that under the connivance with the informant, he had submitted false and forged charge-sheet.

17. PW-6, Dr. Chandra Lekha has deposed that on 29.07.1992 she had medically examined the witness. There was no injury on the person of the victim. The hymen was already old torn and healed and two fingers were easily entering into her private part. The witness has already opined that no opinion regarding rape can be given as the victim was habitual to the intercourse.

18. In cross-examination this witness deposed that considering the age of the victim she was not referred to the X-Ray,

examination for ascertaining her age. She further deposed that neither she had prepared any supplementary medical report nor any report for semen test is on record. At the time of incident no internal or external injury was found on the person of the victim and also no sign of rape was found.

19. After conclusion of the prosecution evidence the statement of the witnesses were recorded in which accused Prem and Nand Kishor denied the allegations, charge and oral and documentary evidence produced by the prosecution and have stated that the informant and her husband were claiming share in the property of his father. On account of such enmity they were falsely implicated.

20. The accused Mohan has also denied the allegations, charge, oral and documentary evidence and has further stated that he used to sit and move with accused Nand Kishor and Prem, therefore, he was falsely implicated.

21. After considering the evidence and after hearing the argument, the accused persons were convicted under Section 376(2)(g) IPC and were awarded rigorous imprisonment of ten years and fine of Rs.25,000/- to each accused with default stipulation.

22. Being aggrieved this appeal has been preferred.

23. According to learned counsel for the appellant there is undue delay in lodging the FIR. After a delay of five days, the FIR has been lodged and no plausible explanation has been given. The prosecution has an explanation that as the

husband of the victim namely Sohan Lal was out of the house and had gone to the kinship, therefore, the FIR could not be lodged. It is noteworthy that the victim was not alone in the house. Her daughter and son were also present there, therefore, she was able to lodge the FIR without any undue delay after visiting the concerned police station with her children. However, it has not been proved that in which kinship her husband had gone. If virtually he had gone to the relatives, the relative concerned could have been examined to prove the presence of her husband at his house.

(IV) Enmity-

24. The witnesses of fact PWs-1, 2 and 3 have admitted that there was property dispute between both the parties. PW-1, victim has admitted that her father-in-law Barsati had also taken share in the property and after his death, it was occupied by the accused persons. She was claiming her share but accused persons were not giving the share and its possession.

25. PW-2, Sohan Lal has admitted that there was dispute regarding the land of his father though he has denied that on account of enmity accused persons had been falsely implicated.

26. PW-3, Mantora daughter of the victim has also admitted that accused Mohan is her grandfather in relation and he was aged about 60-65 years. This witness has also denied that there was property dispute. The enmity is double edged weapon. On account of enmity an offence can be caused and an innocent person may also be falsely implicated in a false and concocted case. In this case considering the facts, circumstances, medical and oral evidences and improvements from the

original case, during the course of trial, it can safely be concluded that on account of enmity the accused persons had falsely been implicated as the victim was claiming share of land of her father-in-law, Barsati which was under the possession of the two accused persons.

(V) Source of light-

27. It is the prosecution case that the victim and the witnesses recognized the accused persons in the light of dhibri or lantern. Whether dhibri was on or lantern was lighted, there is difference in the evidence of the witnesses. PW-1 has deposed at page-1 and 3 and that dhibri was lighted and she recognized accused persons in the light of dhibri which was kept on the wall of the hut but the same witness deposed at page-7 that lantern was lighted there under the hut.

28. PW-2 Sohan Lal husband of the victim was not present on the spot but according to him dhibri was lighted at the time of commission of crime.

29. PW-3, Mantora daughter of the victim has deposed at page-1 that dhibri was lighted while the same witness has deposed at page-3 that lantern was lighted and when IO had visited the spot, her mother had shown the lantern to him. It is noteworthy that according to the IO dhibri was shown to him and he had prepared a fard regarding dhibri and the dhibri was returned to the victim.

30. According to PW-5, IO, he was informed that dhibri was lighted at the time of commission of crime. This witness denied that any lantern was shown to him. Thus, what was the source of light, is not free from doubt.

(VI) Place of sleeping-

31. According to the charge, the victim was sleeping at the door of her house but PW-1, the victim has deposed at page-1 that she was sleeping in sahan on an independent cot nearby the cots of her daughter and son on which they were sleeping. According to the victim the offence was committed with her at about 12 o'clock but this witness has deposed at page-5 that on the day of occurrence she had slept at 08:00 p.m. and woke up at 05:00 a.m. According to this Court, if such occurrence would be caused with a lady, she would hardly sleep after such incident and would wake up at 05:00 a.m. *The victim PW-1 has deposed at page-7 that she was sleeping under the chhappar. It is wrong to say that she was sleeping in sahan. PW-3 Mantora has deposed that she was sleeping on another cot near her mother at the door. According to the IO, PW-5, the victim was sleeping in sahan and he has also shown the cot of the victim in the sahan.* Thus, on the basis of difference in the evidence of the witnesses of fact, it is concluded that the prosecution has miserably failed in establishing the place of occurrence and that where the victim was sleeping at the time of commission of the alleged crime.

32 . *Manner of occurrence* does not inspire confidence in the mind of the court that in such circumstances such offence can be committed with the victim. According to the witnesses of fact, the children of the victim were sleeping at a distance of 2-4 steps away from the victim. In such a case how one would dare to commit such offence. On the face of record this incident appears to be false and the whole story does not inspires confidence in the mind of the Court.

33. *It has also been proved that out of three accused persons two accused persons are real brother.* According to this Court two real brothers cannot commit such crime together. On this score also the prosecution story appears to be doubtful.

(VII) Role of Nand Kishor, the sole surviving accused-

34. It has been proved that accused Mohan and Prem have died. Accused Prem had been assigned role of committing rape on the victim and the role of catching hold of the victim has been assigned to the accused Mohan. As per FIR, Nand Kishor and Mohan had caught hold of the victim and Prem raped her while as per site plan prepared on the pointing of the victim, the alleged offence had been committed at place-A and her children were sleeping at some steps away at place-B and two accused persons were standing around four steps away at place-D.

35. In this regard it would be proper to consider the evidence of the witnesses of fact. PW-1, the victim has deposed that Nand Kishor and Mohan had caught hold of her and Prem had committed rape with her whereas according to PW-3, daughter of the victim, accused Mohan had caught hold of hands of the victim and the accused Prem had raped her mother. This witness has not assigned any role to the accused Nand Kishor. She deposed at page-2 that Nand Kishor was standing at some distance and after doing bad deeds with her mother, both the accused persons ran away.

36. According to this Court, there is gross variation in the evidence of PW-1 and PW-3. If three accused persons would have been there, all the three accused persons would have run away and not only two.

37. In this case two independent eye-witnesses Chhotka and Bahadur have been shown but they have not been examined, thus the evidence of the victim does not find support from any independent evidence. Even her son has also not been examined. In this regard it would be proper to refer Section 114(g) of the Indian Evidence Act, 1872:-

“114. Court may presume existence of certain facts.— The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

x x x x x

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

38. It is also noteworthy that the victim PW-1 has deposed at page-4 in the evidence that she directed her counsel to prepare such a case so that accused be sent to jail and be punished. Thereafter the counsel typed a paper and got her thumb impression. The contents of the application was not read over to her. Thus, it is proved that the contents of FIR are not the contents and facts of the victim but after undue delay an FIR had been prepared after undue consultation with legal assistance. Therefore, such delay causes injustice to the accused persons. It has been proved that the accused persons were not criminal in nature, they were gentlemen and they were falsely implicated on account of enmity regarding property and share of Barsati and Sundar.

(VIII) Conclusion-

39. In **Santosh Prasad @ Santosh Kumar Vs. State of Bihar, (2020) 3 SCC 443** it was alleged that after committing an offence of house trespass accused committed rape with a married lady. There were material contradictions in deposition of the prosecutrix. Neither the indecent witness nor the medical witness was supporting the prosecution case. FSL report was also not supporting prosecution case. There was variation in prosecutrix's version about the given complaint. Prosecutrix failed to pass test of becoming "sterling witness". There is also delay in lodging the FIR. There was also enmity/dispute between both the parties with respect to land. Any other supportive evidence and the accused was given benefit of doubt and conviction was reversed.

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

41. In **Charan Singh Vs. State of Haryana, (1988) 3 Crimes 85 (P&H)** it was case of a girl above 16 years who was allegedly raped. In this case also the question was whether when she admitted of having suffered some injuries on her back during the incident and when the same were not found then what had to be done. The lady doctor, however, who examined her did not find any injury on her private

parts or on her body during the medico legal examination. No tenderness, swelling or blood was found in the vagina. She further found that two fingers could easily be admitted into the vagina. During the cross-examination, she rightly admitted that the prosecutrix would have suffered tenderness and swelling of the vagina if she was subjected to rape by two young boys. The gap between the occurrence and her medico legal examination ruled out any possibility of any abrasion being healed. Giving the benefit of doubt the accused were acquitted.

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

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

44. In **Maharashtra Vs. Abdul Hafees Faroki, 1998 CrLJ 3603 (SC)**, eight persons were accused for raping a girl twice by turns and pushing the girl out of the running train. However, when no serious injury was found on the person of the girl and evidence showed that there was possibility of prosecutrix going with the accused willingly, the acquittal of the accused was held proper.

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

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

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

48. In **Goverdhan Vs. State of MP, 2006 CrLJ 4118**, the parties were not keeping good relations in the past and had

lodged FIRs against each other. Medical report did not corroborate the version given by the prosecutrix. It was held that guilt was not proved and conviction was improper.

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

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

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

52. All the above judicial pronouncements are applying in favour of the surviving appellant and against the prosecution.

53. On the basis of above discussion, this Court is of the considered view that the Sessions Judge has not properly evaluated the evidence and treating the evidence of the victim as gospel truth, he convicted and

List of Cases cited:

1. Sampat Tatiya Shinde Vs St. of Mah. (1974) SCC Cri 382

2. Surendra Narayan @ Munna Pandey Vs St. of U.P. (1998) SC Cri. Rul. 508

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

1. Heard Smt. Nisha Srivastava, learned counsel for the appellant, Sri Yugal Kishore, learned A.G.A. for the State and perused the material brought on record.

2. By means of this criminal appeal, the **sole appellant- Daya Ram Pasi** has challenged the order dated 22.03.2008 passed by learned Additional Sessions Judge, Court No.29, Barabanki in S.T. No.192 of 1993 arising out of Case Crime No.10 of 1991, under sections- 395/397 I.P.C., Police Station- Ram Nagar, District- Barabanki, whereby the accused-appellant has been convicted and sentenced for seven years rigorous imprisonment with fine of Rs.10,000/-.

3. The facts relating to this appeal are as below:-

** As per prosecution case, the first informant- Bhai Lal, on the basis of hand written tehrir, got lodged an F.I.R. The tehrir said that the previous night at about 1:00 a.m., some burglars, with the help of a bamboo climbed over his roof and intruded inside to commit theft. Hearing some noise, his wife woke up and raised alarm. The first informant tried to catch hold of them, but they roughed him up with the danda held by them; they were seven persons. The first informant could see their faces in the light of lantern; they also thrashed his father-in-law, who was lying*

in the veranda. They took away a number of items made up of gold and silver (as detailed in the tehrir). After committing dacoity in his house, they entered in the house of Maya Ram and Satguru, who resided in his immediate neighbourhood. The first informant, Maya Ram, Satguru, Muneshwar Prasad, Hinsit Lal and a number of co-villagers collected on their raising alarm; all of them saw the dacoits taking away their belongings. When the villagers tried to follow them, they threw grenades on them.

** On the basis of this written report, an F.I.R. being Case Crime No.10 of 1991, under section- 459 I.P.C. was registered and investigated upon; one of the accused Daya Ram Pasi was charge-sheeted by submitting a supplementary charge-sheet under sections- 395 and 397 I.P.C.*

** The Investigating Officer visited the spot and prepared the site map, separate seizure memos of taking into possession the lantern, the torch, the bamboo; collected the medical examination reports of Ishwardeen, Bhai Lal and Arvind Kumar; the suspected accused persons were put to identification test in District Jail, Barabanki and instant accused Daya Ram Pasi was identified by the witnesses and charge-sheeted.*

** The accused was put to trial and was convicted for the offence under sections- 395 read with 397 I.P.C. and was sentenced to seven years rigorous imprisonment and a fine of Rs.10,000/-. Now, the convict-appellant is before this Court in this appeal.*

4. Besides producing the prosecution papers viz. photocopy of tehrir, copy of

identification test, chik F.I.R., charge-sheet, site-map, the X-ray reports and the injury reports, the prosecution examined P.W.1- Rama Devi @ Phoolmati, P.W.2- Arvind Kumar and P.W.4- Maya Ram as the eye-witnesses; P.W.3- Bhai Lal (the first informant and the eye-witness), P.W.5- S.I. Om Prakash (the Investigating Officer), P.W.6- S.I. Raghunandan Prasad (the Investigating Officer) and P.W.7- Dr. Madan Lal.

5. Before I proceed to take the contentions of the defence, it shall be useful to briefly mention the oral testimony given by the prosecution witnesses.

* **P.W.1- Ram Devi @ Phoolmati** has stated that she with her children was sleeping on the roof. The dacoits climbed over and asked her to open the door. She refused to budge. They broke upon the door and tried to manhandle and drag her inside. She managed to extricate herself and jumped on the ground. They were five in all. They opened the main door from inside. The dacoits who were standing outside intruded. They assaulted her husband; took away cash of Rs.800/-, the silver and gold jewellery worth Rs.1 lakh; initially his husband refused to tell them about the place where jewellery etc. was kept safe, but when they threatened to put him on fire after pouring kerosene, her husband disclosed the place and they removed the jewellery. They were having fire arms and hand grenades; she could not recognize them because they were throwing light on her face directly.

* **P.W.2- Arvind Kumar** has said that he saw the dacoits committing dacoity. He was spotted by them and they threw hand grenades at him and he

sustained injuries by their explosion. He could not recognize any of them.

* **P.W.3- Bhai Lal (the first informant)** has supported the prosecution story and the evidence given by his wife as P.W.1, stating that the dacoits, after climbing over his roof intruded inside. They opened the main door and took him as hostage. 5 or 6 persons were inside and a few were outside. They physically assaulted him and caused him injuries on his head. They had threatened him to set him ablaze by pouring kerosene and putting him on fire. They looted jewellery worth Rs.1 lakh, Rs.800/- cash and some other things like quilt, mattress, blanket etc.

Most important evidence regarding identification of the culprit has been given by this witness. He said that a test identification parade of suspect accused persons was conducted. He identified one of them Daya Ram Pasi correctly. This witness identified accused Daya Ram Pasi in open court and said that he was the person who had committed dacoity and had physically assaulted him causing him injuries. That day three houses were looted. The witness has also given evidence regarding his medical examination and hand written report of the incident given by him.

* **P.W.4- Maya Ram** has said that after committing dacoity in the house of Bhai Lal, the dacoits entered his house. By that time, he had whisked away women and the children of the house to a safer place. The witness has further stated that the dacoits looted property from his and his brother Satguru's house. He could see their faces in the light of torch.

This witness has identified his signatures on the identification test report (Exhibit ka-1); he could identify one of the culprits, who is present in the Court.

This witness most importantly identified the accused in open court and said that he was the same who committed dacoity in his house. He with his companions had looted jewellery, clothes and cash from his house.

*** P.W.5- S.I. Om Prakash Tripathi** (the Investigating Officer) has proved the charge-sheet.

*** P.W.6- S.I. Raghunandan Prasad Kannaujia** (the Investigating Officer) has proved the prosecution papers namely site map (Exhibit ka-4), the seizure memo of lantern (Exhibit ka-5), the seizure memo of bamboo (Exhibit ka-6); he has stated that after conduct of test identification parade, he submitted charge-sheet against certain accused persons, thereafter the investigation was taken over by S.I. Om Prakash Tripathi.

*** P.W.7- Dr. Madan Lal** has proved the injury reports of injured namely Ishwardeen, Bhai Lal and Arvind Kumar. The doctor found that some of the injuries were caused by some explosive substance and some by blunt objects.

6. The accused-appellant Daya Ram Pasi, in his statement recorded under section- 313 Cr.P.C., denied his involvement in the incident; he stated that the police had filed a wrong challan against him. He, in answer to specific query raised in the statement under section 313 Cr.P.C., stated that the witness Bhai Lal could identify him in the test identification parade because he was shown to the witness by the

police. He did not give any evidence in defence.

7. From the papers on record, it appears that a supplementary charge-sheet was filed against the present accused/appellant and that at that time the investigation against a number of other accused persons was still going on as they could not be apprehended. Besides two accused namely Keshan Yadav and Ram Suresh Pasi were charge-sheeted earlier.

8. As far as the occurrence is concerned, P.W.1- Ram Devi, P.W.2- Arvind Kumar, P.W.3- Bhai Lal and P.W.4- Maya Rama, who are witnesses of the fact have given consistent statements that on that day, after 12:00 midnight, a number of dacoits first committed dacoity in the house of Bhai Lal; they managed to climb over the wall and reach the roof of his house with the help of a bamboo pole; they opened the door and looted the property; they resorted to violence. It has come in the evidence that they threatened to set the first informant- Bhai Lal on fire. He has stated that not only Bhai Lal was beaten but his wife was also pulled by her hand to facilitate opening of the door of her house. The injury reports and the F.I.R. sufficiently corroborate the fact that an incident of dacoity took place. The bandits were having fire arms and hand grenades; they actually exploded the hand grenades to deter the inmates of the house from offering any resistance.

9. In my view, the prosecution has been able to prove that an incident of dacoity took place in the house of Bhai Lal, Maya Ram and Satguru. The most important question which remains to be decided by this Court is whether the instant appellant was one of the dacoits?

10. I perused the evidence given by the witnesses in this regard; P.W.1 and P.W.2 have not said anything with regard to the involvement of the instant appellant in the commission of dacoity. P.W.3 Bhai Lal has identified the accused in the open Court and said that he was the person who committed dacoity in his house; likewise P.W.4- Maya Ram has specifically said that the accused, who is present in the Court, was the person who had committed dacoity in Bhai Lal and his own house.

11. In this case a test identification parade was conducted in District Jail, Barabanki on 02.12.1991 as per rules, which is Exhibit ka-1. Witnesses Bhai Lal and Maya Ram both correctly identified the accused. Both had stated before the officer concerned, at the test identification parade, that he was one of the accused persons who committed dacoity in their houses.

12. It is contended on behalf of the defence that the identification parade has been carried out after a gap of a number of months and that it is not possible to retain the memory of face for such a long period. It has been further argued that the accused was shown to the witnesses at the police station itself, therefore the evidence of the prosecution cannot be relied upon.

13. I do not find any substance in the aforesaid arguments for the reasons as below:-

(i) Firstly, there were sources of light to sufficiently see their faces.

(ii) It is a fact of common knowledge when some incident of intense nature takes place, the victim may retain its vivid memory life long.

(iii) In his statement recorded under section- 313 Cr.P.C., the accused has claimed that his face was shown to first informant Bhai Lal. No such claim has been made as regards testimony given by witness Maya Ram. It may be noted herein that two specific questions were asked to the accused in this regard during recording of statement under section 313 Cr.P.C.; the accused has not said that his face was shown to P.W.4- Maya Ram as well. Both the witnesses have said that he was the person who committed dacoity in their houses; they emphatically identified the accused in the open court. The relevant portion of the oral testimony is as below.

* P.W.3 has said that "वही डकैत इस समय न्यायालय में उपस्थित दयाराम पासी है। इसी ने मुझे मारा पीटा और मेरे घर में डकैती डाली थी। इसने मेरे घर से माल लूटा था।"

* P.W.4 has said that "वही डकैत न्यायालय में उपस्थित दयाराम है। इसी ने डकैती डाली थी। अभिज्ञान परीक्षण के स्मरण पत्र प्रदर्श क-1 पर मेरा हस्ताक्षर है।"

(iv) Both the witnesses have denied having been shown the face of the accused before test identification parade was carried out; the evidence given by both the witnesses on this count is quite emphatic and convincing.

14. The identification of the accused in the open Court is a substantive evidence. The conduct of identification parade during the investigation, though a very important piece of evidence has, at the most, a corroborative value. There is nothing to suggest that there was any cause for them to falsely implicate the accused. The accused was not named in the F.I.R. It may be noted that the accused is a resident of another village. There is not even a suggestion of having any previous enmity

or any reason which could have prompted the witnesses to identify falsely the accused as one of the dacoits or to doubt the identification evidence given by the prosecution.

15. The evidence produced by prosecution proves the fact that there were more than five persons who committed the dacoity. What was the fate of other persons, whether they were apprehended, whether they were put to trial, whether they were acquitted has no bearing in the instant case. The important thing is that there were more than five persons who conjointly committed the dacoity.

16. The learned trial court has elaborately dealt with the evidence produced by the prosecution and took up all the arguments advanced on behalf of the defence systematically and found the charges as having been proved beyond reasonable doubt. The learned trial court relied upon the judgments of Supreme Court given in *Sampat Tatiya Shinde vs. State of Maharashtra, 1974 SCC (Criminal) 382 and Surendra Narayan @ Munna Pandey vs. State of U.P., 1998, SC CrI. Rul. 508* to support the finding that the identification of the accused during the recording of evidence is substantive one and the conclusions drawn or the result of identification proceeding has a corroborative value only.

17. I agree with the opinion of the trial court; the learned trial court has also tested the regularity of identification proceedings and found that it was carried out as per the rules and regulations and retained its corroborative value.

18. I do not find any infirmity in the inference drawn by the trial court. The judgment of the trial court is sound on facts

as well as law and there is no merit in appeal.

19. Accordingly, this criminal appeal is **dismissed**. Accused-appellant shall immediately surrender before the court concerned to undergo remaining portion of the sentence. The sureties are hereby discharged from their liability.

20. Copy of this order shall be immediately transmitted to the court concerned for compliance.

21. A copy of the judgment be also handed over to the accused/his counsel free of cost immediately.

22. The court concerned shall transmit a copy of the judgment to concerned Superintendent of District Jail for handing over the same to the accused when he is taken into custody and is lodged therein.

(2023) 9 ILRA 641
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 06.09.2023

BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Criminal Appeal No. 677 of 2002

Kallu & Ors.	...Appellants
	Versus
State of U.P.	...Opposite Party

Counsel for the Appellants:
 Prem Shanker, R.N.S. Chauhan

Counsel for the Opposite Party:
 G.A.

A. Criminal Law-Criminal Procedure Code, 1973-Section 374(2) - Indian Penal

Code, 1860-Sections 307, 325, 324, 323, 504 & 506-Challenge to-Conviction-Enmity between two sides is an admitted fact- the accused persons, in a well-planned manner attacked two persons of the complainant side and caused them injuries from fire arms, a banka and a laathi- The nature of the weapon used, the manner in which it was used, the motive, the nature of the injuries caused, the parts of the body where the injury was inflicted, may be some of the factors which give definite indications towards the presence or lack of intention or knowledge-there is no evidence to show that the accused persons tried to shoot the injured on some vital part of the body, but somehow it hit his lower limbs- The accused persons were having a banka which is a sharp-edged weapon and dangerous too, but only one blow was caused to injured causing injury on his iliac spine area which was subcutaneous deep- The other injured sustained three injuries subcutaneous deep, all below knee, not a single incised wound has been caused to him on any vital part of his body, this injured sustained two injuries caused by blunt weapon on his hands, except one caused by blunt object on right upper limb, rest all the injuries were simple in nature-The Court cannot give any conclusion on the basis of surmises and conjunctures-if all the injuries are cumulatively considered, it is not safe to convict the accused persons for offence under section- 307/34 I.P.C.-there was definitely an intention to cause hurt and grievous hurt by using such weapons like banka, fire arm and laathi-The prosecution has proved the offence of section- 323/34, 324/34 and 325/34 I.P.C. against the accused persons beyond reasonable doubt by producing trustworthy, ocular and documentary evidence-Hence, the impugned judgment is hereby modified and the accused-appellants are acquitted of the charges under section- 307/34 I.P.C. Rest of the judgment and sentence is affirmed.(Para 1 to 23)

B. The evidence of an injured witness has to be appreciated keeping in view that

ordinarily a person who has been assaulted by someone would not allow him to go scot free and falsely implicate persons other 14 than those who actually assaulted him. The evidence of injured witness stand on different pedestal as compared to any other witness cited by the prosecution as eyewitness who claims to have seen the incident. (Para 15)

The appeal is partly allowed. (E-6)

List of Cases cited:

Ramkrishna Vs St. of Har. (2004) AIR SC 4678

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

1 . During the course of hearing of this appeal, the appellant no.1- Kallu died, hence the appeal as regards him has abated.

2. Heard Sri R.N.S.Chauhan, learned counsel for the appellant, Sri Rajesh Kumar Shukla, learned A.G.A. for the State and perused the material brought on record.

3. By means of this criminal appeal, the **appellant nos.2, 3 and 4-Shamsuddin, Sarfuddin and Jamaluddin** have challenged the judgment and order dated 16.05.2002 passed by the learned Additional Sessions Judge (Court No.1), Sitapur in S.T. No. 971 of 1997 "State vs. Kallu and Others" arising out of Case Crime No.79 of 1997, under sections- 307, 325, 324, 323, 504, 506 I.P.C., Police Station- Rampur Kalan, District- Sitapur, by which the appellants have been convicted and sentenced for one year rigorous imprisonment each under section 323 read with section 34 I.P.C., three years of rigorous imprisonment each under section 324 read with section 34 I.P.C., four years of rigorous imprisonment and fine of Rs.2,000/- each under section 325

read with section 34 I.P.C. and seven years of rigorous imprisonment and fine of Rs.3,000/- each under section 307 read with section 34 I.P.C.

4. The facts relevant for the purpose of this criminal appeal are as below:-

** The first informant Farukh son of Munir submitted a written report alleging therein that his father Munir and his uncle Abdul Karim had gone near a pond to relieve themselves at 6:00 in the morning of 12.04.1997; the accused persons namely Kallu, Shamsuddin, Sarfuddin and Jamaluddin resident of the same village, were lying in wait; they suddenly came out and attacked his father and uncle; Shamsuddin and Jamaluddin fired at them from a country-made fire arms; Kallu and Sarfuddin gave them blows from laathi and banka; first informant's father and uncle raised alarm; accused persons fled away. Both of them sustained serious injuries; they wanted to take their life; the incident was witnessed by Shamsher Ali and Mehndi Hasan.*

** On the basis of the above written report, an F.I.R. being Case Crime No.79 of 1997 was registered and investigated upon.*

** The injured persons were examined at Emergency of District Hospital, Sitapur. The Investigating Officer proceeded to inspect the spot. He took the statements of the witnesses, collected the medical reports and after completing the investigation submitted a charge-sheet against all the four named accused persons under sections- 307, 323, 324, 325, 504, 506 I.P.C.*

** The case was committed to the court of Sessions; all of them were put to trial.*

5. The prosecution produced following documentary evidence i.e. the written tehrir, two X-ray reports, two injury reports, chik F.I.R., copy of GD, the site map, seizure of the soil sample, the charge-sheet (Exhibit ka-1 to Exhibit ka-10 respectively).

6. The prosecution examined following witnesses:-

P.W.1- Farukh (the first informant)

P.W.2- Abdul Karim (the injured witness)

P.W.3- Munir (second injured witness)

P.W.4- Dr. A.K. Nigam (the Radiologist)

P.W.5- Dr. A.K. Agrawal (the doctor who examined the injuries sustained by the injured witnesses)

P.W.6- Shri Krishna Verma (Constable)

P.W.7- Raghav Ram Yadav (the Investigating Officer)

7. The statements of the accused persons were recorded and after hearing both the sides, the learned Sessions Court convicted all the accused persons under sections- 323 read with 34, 324 read with 34, 325 read with 34 and 307 read with 34 I.P.C. All of them were acquitted of the charges under sections- 504 and 506 I.P.C.

8. Before taking up the contentions of the appellants as well as the State, it shall be useful to briefly reproduce the

statements given by the prosecution witnesses.

* **P.W.1- Farukh** who lodged the F.I.R. in this case, stated on oath that all the accused persons belonged to his village; accused Kallu wanted to buy a house which was purchased by the first informant's uncle Abdul Karim about 15-20 years before this incident; accused Kallu had filed a civil case in this regard; the case was won by his uncle Abdul Karim. Thereafter they had an altercation between them, culminating into physical fight. One of the accused Sarfuddin had lodged a report of that incident in the local police station; the criminal case lodged by Sarfuddin is pending; the accused persons nurtured enmity against them. On the date of the occurrence, his father and uncle had gone to attend nature's call early in the morning. When they were returning, Kallu exhorted his sons to kill them; Kallu, Shamsuddin and Jamaluddin suddenly came out from wheat field and Sarfuddin came out of thickets. Accused- Kallu was holding a laathi, accused- Shamsuddin a desi fire arm, accused- Sarfuddin a banka and accused- Jamaluddin was holding a desi gun; all of them attacked them.

Giving details of the incident, the witness has said that Shamsuddin and Jamaluddin opened fire upon his father; Kallu and Sarfuddin gave him blows from laathi and banka respectively. His uncle Abdul Karim was given blows by Kallu with laathi and by Sarfuddin with banka. Hearing the noise, a number of people from the village came in and the accused persons escaped. The witness has identified his signature on the written report and has proved that he got lodged the F.I.R.

* **P.W.2- Abdul Karim** has supported the prosecution case and has said that all the four accused persons suddenly attacked him when he was coming back after attending the nature's call. Shamsuddin and Jamaluddin fired open his brother Munir, while Kallu and Sarfuddin gave his brother blows from laathi and banka. He too was given blows by Kallu and Sarfuddin. The accused persons escaped when the co-villagers came in to rescue them. He has added that Kallu wanted to purchase the same house which was purchased by him at least 15-20 years before the occurrence and that Kallu wanted to illegally occupy the "sehen part" of his house and they had a brawl over this issue. A case regarding this dispute is still pending.

* **P.W.3- Munir** has supported the prosecution case and has told the same story as told by P.W.2 in his testimony.

* **P.W.4- Dr. A.K. Nigam** has prepared the X-ray reports and has proved them.

* **P.W.5- Dr. A.K. Agrawal** has stated that he examined the injuries sustained by Munir on 12.04.1997 at 2:00 p.m. at District Hospital, Sitapur and found two injuries of fire arm on his right and left thighs; one incised injury on iliac spine; two lacerations on his left side of the skull.

The witness has said that same day at about 2:10 p.m., he examined the injuries of injured Abdul Karim and found swelling on right upper limb, contused swelling on left upper limb, two incised wound on right knee and one incised wound near left ankle.

* **P.W.6- Constable, Shri Krishna Verma** is a formal witness who has proved the Chik F.I.R. and the GD Report No.11 at 8:30 p.m. of 12.04.1997.

* **P.W.7- The Investigating Officer** who has, apart from proving papers like charge-sheet and site-map etc., given evidence regarding the investigation done by him. The relevant portions shall be referred to as and when required.

9. As per prosecution case, the incident occurred at about 6:00 a.m. in the morning on 12.04.1997 when father and uncle of the first informant were returning after relieving themselves from near a pond on the southern side of the village. The witnesses of fact P.W.2 and P.W.3, who are the injured themselves, have given the evidence in this regard and also about the fact that the matter was reported to the police station at about 8:30 a.m. i.e. within two and a half hours from the incident. This has come in evidence that the first informant took both of the injured persons on a handcart after arranging it from the co-villagers. The distance of the police station is about 3 kms. from the village. There is consistent evidence that the injured were also taken to the police station before they were sent for medical examination.

10. Exhibit ka-7 G.D. in which the entry regarding lodging of F.I.R. has been made corroborates this part of the prosecution version that the injured persons accompanied the first informant when the F.I.R. was being lodged. The Exhibit ka-7 mentions those facts. Most importantly this paper also mentions same kind of injuries on the person of the injured as were found in medical examinations. The F.I.R. in this case has been lodged with reasonable promptness ruling out any chances of

embellishments, introduction of colored facts or false implication.

11. As far as the background in which the incident took place is concerned, this has clearly come in the evidence that both the sides had long standing enmity over a house and its "Sahan". It has come in the evidence of P.W.1, P.W.2 and P.W.3 that the accused Kallu (who is since been dead and whose appeal has abated) wanted to purchase the same house which was purchased by the complainant side; this has further come in the evidence that both were neighbours and that there was also dispute regarding possession over adjoining space "Sahan"; a civil case regarding disputed property was filed and was pending between the two sides when this incident occurred. A certified copy of the judgment pronounced in Civil Appeal No.19 of 1993 dated 29.07.2014 (Kallu vs. Abdul Karim) has been produced by the prosecution to show that both the sides were engaged in litigation over immovable property. The witnesses have given evidence that before the incident of the instant case took place, there occurred one more criminal incident for which an F.I.R. being Case Crime No.23 of 1995, under sections- 324, 323, 504 I.P.C. was lodged against the complainant side who included Abdul Karim (P.W.2), Munir (P.W.3) and Farukh (the first informant herein). All the aforesaid facts and circumstances demonstrate that undisputedly both the sides nurtured enmity against each other over certain issues and were engaged in civil as well as criminal litigations since quite sometime before this occurrence.

12. The injured witnesses P.W.2 and P.W.3 have given testimonies supporting the prosecution case, proving that the four accused persons lay in wait and were

hiding themselves in the wheat field and behind thickets, before they found a chance to pounce upon Abdul Karim and Munir. This has clearly come in the evidence that Jamaluddin and Shamsuddin were holding fire arm each, Sarfuddin was holding a banka (a sharp edged weapon) and Kallu was holding a laathi. The prosecution has been able to show that after the lodgement of the F.I.R., the injured persons were sent for medical examination and they were examined at the District Hospital, Sitapur between 2:00 p.m. and 2:10 p.m. Munir sustained multiple fire arm wounds; first on the interior and lateral aspect of left thigh covering an area of 25cm x 10cm; second on the interior and lateral aspect of right thigh covering an area of 15cm x 10cm; blackening was found present. This has come in the evidence that accused Jamaluddin and Shamsuddin had fired on Munir with the desi fire arms they were having. The P.W.3 Munir has added that after he was hit by fire arms, he tried to flee towards the fields, then Sarfuddin and Kallu chased him and caused him injuries with banka and laathi. The medical report shows that Munir sustained one incised wound on his iliac spine area of the size of 5cm x 1cm and two lacerated wounds of the size of 5cm x 0.5cm and of the size of 3cm x 0.5cm; both scalp deep and both on left side of head. The doctor has proved that the injuries were fresh. The injury report further consolidates statements given by the witnesses.

13. Second injured witness P.W.2- Abdul Karim too has supported the prosecution case and has given sufficient details as regards the occurrence. Like P.W.3 Munir, his evidence appears to be credible and convincing. There appears no discrepancies or any ground to doubt their oral testimony.

14. The defence has contended that P.W.1 the first informant did not see the occurrence and that he was not an eye-witness, therefore his testimony is nothing but hearsay. Another contention of the defence is that no independent witness has come out to support the prosecution case.

I went through the evidence on record; the P.W.1 has said that when his uncle and father were coming back after attending nature's call he was going to same place for the same purpose and he with his own eyes saw the accused persons assaulting and causing injuries to his father and uncle. It has been argued that had he been on the spot, he would have certainly tried to intervene and to save the members of his family, however he made no such attempt which is unnatural. No doubt the P.W.1 has said he just kept on making noise and that he made no attempt to save them however. In my view, this isolated statement is not enough to presume that he was not on the spot. Naturally, his conduct or overtures were certainly guided by a number of factors like whether he had enough time to react and save his family members or whether he was near enough to actually rescue them etc. Even if for the sake of arguments, it is presumed that he was not an eye-witness and his evidence is discarded for this reason alone, the evidence of P.W.2 and P.W.3, who are injured persons and who have given a credible, consistent and convincing account of the incident are sufficient enough to prove the prosecution case. The prompt F.I.R., the G.D., the medical evidence, the presence of motive are corroborative evidence which fully prove the prosecution case. Lack of independent witness is immaterial.

15. The Supreme Court in **Ramkrishna vs. State of Haryana, AIR 2004 SC 4678**, observed as below:-

"The evidence of an injured witness has to be appreciated keeping in view that ordinarily a person who has been assaulted by someone would not allow him to go scot free and falsely implicate persons other than those who actually assaulted him. The evidence of injured witness stand on different pedestal as compared to any other witness cited by the prosecution as eyewitness who claims to have seen the incident."

16. Enmity between two sides is an admitted fact. Enmity can act as catalyst to falsely implicate the accused persons; at the same time enmity can motivate the accused side to commit a crime. My view is that in this case, the accused persons were motivated to commit the crime because of them being inimical to complainant's side.

17. The learned trial court considered the prosecution evidence and evaluated the same in the right perspective; I agree with the opinion of the learned trial court with regard to the prosecution case that, motivated over inimical relations between the two sides, the accused persons, in a well-planned manner attacked two persons of the complainant side and caused them injuries from fire arms, a banka (a sharp-edged weapon) and a laathi (a blunt weapon). Now, the only question which remains to be considered is whether the accused person assaulted the complainant side with such intention or knowledge and under such circumstances that, if they by that act caused death, they would be guilty of murder?

18. There cannot be two views that whether the accused persons had requisite intention or knowledge and additionally whether there were circumstances to cause death of the injured by their act, can only

be gathered from all the facts and circumstances of that particular incident. The nature of the weapon used, the manner in which it was used, the motive, the nature of the injuries caused, the parts of the body where the injury was inflicted, may be some of the factors which give definite indications towards the presence or lack of intention or knowledge. When the Court proceeds upon to determine the presence or absence of such intention or knowledge, it has to tread with caution. It should be kept in mind that none of the factors as elaborated above, may be sufficient in itself, to conclusively prove such intention, however all the factors cumulatively may throw sufficient light and assist the Court in arriving at a certain definite conclusion. All said and done, the burden remains on the prosecution to establish that there was indeed an attempt to murder.

19. The learned trial court has considered the matter in this regard and gave an opinion that when a person is attacked most likely he will run away and shall not remain static at one place, hence such a person is bound to receive injuries on various parts of the body. The learned trial court gave further opinion that cumulative effect of the injuries was sufficient to show the intention to kill.

20. I went through the prosecution evidence in this regard; it has come in evidence that first of all Shamsuddin and Jamaluddin fired at Muneer; thereafter rest of the two accused persons namely Kallu and Sarfuddin thrashed him with laathi and banka. Abdul Karim was the next person who was attacked with laathi and banka; there is no evidence to show that the accused persons made any attempt to fire upon Muneer a second time. There is no evidence to show that they made any

attempt to fire upon first informant's uncle Abdul Karim; there is no evidence to show that the accused persons tried to shoot the injured on some vital part of the body, but somehow it hit his lower limbs. The accused persons were having a banka which is a sharp-edged weapon and dangerous too, but only one blow was caused to injured Muneer causing injury on his iliac spine area which was subcutaneous deep. The other injured Abdul Karim sustained three injuries subcutaneous deep; all below knee; not a single incised wound has been caused to him on any vital part of his body; this injured sustained two injuries caused by blunt weapon on his hands; except one caused by blunt object on right upper limb, rest all the injuries were simple in nature. The Court cannot give any conclusion on the basis of surmises and conjunctures. It cannot presume that infact the accused persons wanted to hit the injured at some vital part of the body but because of some intervening circumstance, the bullet hit him below waist. In my view, even if all the injuries are cumulatively considered, I do not find it safe to convict the accused persons for offence under section- 307/34 I.P.C. In my view, there was definitely an intention to cause hurt and grievous hurt by using such weapons like banka, fire arm and laathi. The prosecution has proved the offence of section- 323/34, 324/34 and 325/34 I.P.C. against the accused persons beyond reasonable doubt by producing trustworthy, ocular and documentary evidence. I do not find any reason to interfere in that part of the judgment and sentence.

21. An argument by the side of defence has been advanced for releasing the accused persons on probation. I do not find this case as fit for giving them benefit of probation for the reasons that the complainant's side was

attacked in a well-planned manner; the accused persons were hiding in a wheat field and behind thickets before they attacked the complainant's father and uncle; this is not a case where incident took place in a sudden fight or provocation; both the sides are having long standing enmity. The aim and object of releasing the accused on probation is to reform a criminal and to provide them an opportunity to mend their ways. In my view, the Courts of law and justice should not show indulgence where no feelers are forthcoming to support the chances of genuine reformation. The planned manner of attack indicates to opposite direction. Moreover, the law should not be applied in a manner so as to embolden culprits in committing the crime and move freely. The sensitivities of a victim should also be considered when the Court decides to give the accused persons benefit of probation. Undue sympathy to the accused persons would do more harm to the public confidence and may not serve the ends of justice. And it is the duty of the Court to keep in mind the larger goal of law. The law is only respected when it becomes visible. Therefore, the sentencing part of the order with regard to offence under sections- 323/34, 324/34 and 325/34 I.P.C. is not interfered at.

22. The judgment and order dated 16.05.2002 passed by the learned Additional Sessions Judge (Court No.1), Sitapur in S.T. No. 971 of 1997 is hereby **modified** and the accused-appellants are acquitted of the charges under section- 307/34 I.P.C. Rest of the judgment and sentence is affirmed.

23. Accordingly, this criminal appeal is **partly allowed**.

24. The accused-appellants shall immediately surrender before the court

concerned and undergo remaining part of sentence.

25. Let copy of the judgment be immediately notified to the court concerned for compliance.

26. Lower court record be returned immediately.

(2023) 9 ILRA 649
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.08.2023

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Criminal Appeal No. 4894 of 2005
 Connected With
 Criminal Appeal No. 5303 of 2005
 And
 Criminal Appeal No. 5068 of 2005
 And
 Government Appeal No. 983 of 2006

Anil Kumar Ahirwar **...Appellant**
Versus
State of U.P. **...Opposite Party**

Counsel for the Appellant:

Sri S.N. Gupta, Sri Bhole Ram, Sri Mithilesh Kumar Mishra, Sri Mohd. Farooq, Sri N.I. Jafri, Sri Sharad Chandra Singh, Sri Sukhvair Singh

Counsel for the Opposite Party:

G.A., Sri M.C. Chaturvedi, Sri M.D. Mishra

A. Criminal Law-Criminal Procedure Code, 1973-Section 374(2) - Indian Penal Code, 1860-Sections 302/34, 302/114 & 120 - Arms Act, 1878 - Section 25 - Challenge to-Conviction-the prosecution witnesses have been consistent on the point that he had fired on the deceased with his half-barrel gun and he was apprehended at

the spot. The testimony of P.W.-1 and P.W.5 is specific in that regard-The non-holding of test identification parade although is challenged on behalf of the first accused-appellant but no substance- The records reveal that an unknown person was in fact produced before the PHC who was around 25 years of age and had been brought by the police in their jeep- The prosecution witnesses of fact who undisputedly were present on the spot have clearly described the manner in which the first accused had fired from his half-barrel gun from a close distance on account of which the deceased died- The second accused has no criminal history-He was admittedly not apprehended on the spot. No recovery has been made from him either of the fire-arm from which he is alleged to have fired on the injured nor any recovery has been made from him which may connect him to the offence-The Investigating Officer in his testimony has admitted that identity of the second accused was ascertained itself- This ascertainment of identity of accused is based upon the disclosure made by the prime accused -Once the identity of accused was known to the police, it was expected that either an attempt would be made to arrest him or the police at least tried to interrogate the alleged accused-There is, however, nothing on record to show that any attempt was made either to interrogate the accused or to verify his role in commissioning of the offence-The prosecution case on this aspect is somewhat unusual. As per the prosecution case, the informant P.W.-1 visited the railway station and found the accused sitting there on a bench- P.W.-1 then informed the police, whereafter, the accused allegedly was arrested on from the railway station-The prosecution case in the form of testimony of P.W.-8 as well as statements of P.W.-3 and P.W.-4 do not appear to be natural and convincing-Their testimony appears to have been introduced later only with the intent of implicating the two sons-therefore, trial court has not erred in coming to the conclusion that prosecution has not succeeded in establishing the guilt of the two accused and thereby acquit them-Hence, first accused appeal is

dismissed while second accused appeal is allowed.

The appeals are partly allowed. (E-6)

List of cases cited:

1. Mohinder Singh Vs St. (1953) AIR SC 415
2. Ram Narayan Singh Vs St. of Punj. (1975) 4 SCC 497
3. Shivendra Singh @ Bhola Vs St. of U.P. CRLA NO. 2641 of 2012
4. Jagat Pal & ors. Vs St. of U.P. CRLA No. 612 of 1996
5. Sarvesh Diwakar Vs St. of U.P. CRLA No. 5735 of 2009

(Delivered by Hon'ble Ashwani Kumar
Mishra, J.
&
Hon'ble Syed Aftab Husain Rizvi, J.)

1. These four appeals are listed together, as they arise out of a composite judgment and order dated 27.10.2005, passed by Special Judge (E.C. Act), Jalaun at Orai, in Sessions Trial No.199 of 2004 (State Vs. Anil Kumar Ahirwar and others), arising out of Case Crime No.166 of 2004, Police Station Konch, District Jalaun, and in Sessions Trial No. 200 of 2004 (State Vs. Anil Kumar Ahirwar), arising out of Case Crime No.167 of 2004, under Section 27 of the Arms Act, Police Station Konch, District Jalaun, whereby the accused appellant Anil Kumar Ahirwar has been convicted and sentenced to life imprisonment and fine of Rs.5,000/- under Section 302 IPC; seven years rigorous imprisonment under Section 307 read with Section 34 IPC; three years rigorous imprisonment under Section 27 of Arms Act; whereby accused appellant Chhotu Pilot alias Deepak Nai has been convicted

and sentenced to life imprisonment and fine of Rs.5,000/- under Section 302 read with Section 34 IPC; seven years rigorous imprisonment under Section 307 IPC; and whereby accused appellant Satya Narain Shukla has been convicted and sentenced to life imprisonment and fine of Rs.5,00,000/- under Section 302 read with Section 114 IPC; three years rigorous imprisonment under Section 120 IPC. All punishments are to run concurrently. On failure to deposit the fine to undergo additional imprisonment for six months each accused.

2. Criminal Appeal No.4894 of 2005 has been filed by accused appellant Anil Kumar Ahirwar, whereas the connected Criminal Appeal No.5303 of 2005 has been instituted by Chhotu Pilot @ Deepak Nai. State has also preferred Government Appeal No.983 of 2006, insofar as two accused namely Sonu Shukla alias Abhishek and Paplu @ Avanish Shukla have been acquitted by the trial court. Criminal Appeal No.5068 of 2005 was filed by accused Satya Narain Shukla, who has already died and, consequently, his appeal has already abated.

3. The prosecution case is based upon a written report made by Pramod Kumar Shukla (PW-1), scribed by Vipin Shukla, as per which on 19.5.2004 the informant and his elder brother Ashok Kumar Shukla, Chairman, Nagar Palika Parishad Konch and his cousin brother Santosh Kumar Shukla had gone to take part in the last rites of their neighbour Amar Chandra Agrawal. After the cremation was over, they were returning at about 10.30 in the morning and when they reached near Kanchad Baba Mandir at Tilak Nagar, Konch, an unknown person came from behind and took out a half barrel gun and shot Ashok Shukla on his head from behind. The assailant was

apprehended on the spot by the cousin of informant, namely Santosh Shukla, and other persons present on the spot pounced on him and he was assaulted. Gun of the unknown assailant was snatched. It was only then that the second accused fired with an intent to kill and in the process Vinod Agrawal son of Babulal, Santosh Shukla son of Uma Shankar and Laxmi Narain Tiwari son of Mathura Prasad sustained firearm injuries. The companion of the main assailant tried to free the apprehended accused and when members of public chased him, the second assailant fled from the spot, and that the informant can recognize him. The dead body of Ashok Shukla was lying on the spot. The main assailant has also been apprehended alongwith his half barrel gun. It was alleged that deceased has been done to death through contract killers by paying them money. On the basis of such written report (Ex.Ka-1), the first information report came to be lodged in Case Crime No.166 of 2004, under Section 302, 307 IPC at about 11.20 am on 19.5.2004. The place of incident from the police station was about two kilometres. The police came on the spot and prepared a recovery memo of half barrel 12 bore damaged gun, which has been exhibited as Ex.Ka-2. The investigating officer also collected plain earth and bloodstained earth from the place of occurrence (Ex.Ka-19). The inquest commenced on the same day at 11.50 and concluded at 12.50. There is apparently an overwriting in the inquest on recording of Section 307 while referring to the case crime number. As per the inquest witnesses the deceased died due to gunshot injury and for ascertaining the correct cause of death the postmortem was required to be conducted. Consequently, postmortem has been conducted of the deceased at 2.00 pm on 19.5.2004. The deceased was around 50

years old and the time since death is determined as 6 hours. The deceased was of average built body and the cause of death is shock and haemorrhage on account of following ante-mortem firearm injuries:-

“(1) Entry firearm wound of 3 cm x 2.5 cm present on the left side of skull 4cm lateral to left eye brow. Temporal bone broken. Tattooing and ragged tear seen. Blackening is also present.

(2) Exit firearm wound of 16cm x 9 cm present on left temporo-occipital area of skull and left postero-lateral area of face and neck, brain matter and blood coming out. Temporal bone broken and left mandible break. Left ear completely missing and separately brought with dead body. Meninges ruptured wound is 9cm deep.

(3) Abrasion red colour 2.5 cm x 1cm present on right side of forehead 2.5 cm above from right eye brow.”

4. It transpires that the injured Vinod Kumar Agrawal, aged about 35 years, was examined at District Hospital, Jalaun on 19.5.2004 itself and following injury has been found on him:-

“LW 1 cm x .5 cm x skin deep on the Rt. side of neck 9 cm below the Rt. ear. Margins inverted. Abraded collar present on anterior aspect. Injury u.o. advise X-ray.”

5. Similarly, Santosh Kumar Shukla has also been examined at 2.00 pm on 19.5.2004 at District Hospital and following injury has been found on him:-

“1. Fire arm injury .75 cm x .75 cm x contusion deep on the medial site of

Rt. knee. Margins inverted, abraded collar present. Tatooing present on the thigh & calf area. Kept u.o. advise X-ray.”

6. Injuries of Laxmi Narain have also been examined at 2.10 pm on 19.5.2004 at the District Hospital, which is extracted hereinafter:-

“Abraded contusion 1.5 cm x .5 cm on the back of Lt. side chest. 7 cm below the crest Lt. Shoulder jt. lower margin shows eversion with abraded collar while rest shows everted margins. Kept u.o. advise X-ray localise any pellet.”

7. All the three injured were examined by the emergency medical officer at Community Health Centre, Konch at Jalaun and the report, in that regard, has been exhibited as 99Kha. The report records that unknown assailant apprehended at the spot has been brought by the police in a Jeep. The injured assailant was later referred to District Hospital, Jhansi, where he was admitted in the Medical College, Jhansi and was ultimately discharged on 23.5.2004. The assailant was formally arrested thereafter.

8. The investigation proceeded further and ultimately a chargesheet came to be submitted on 28.6.2004, under Section 302, 307, 34 and 120-B IPC in Case Crime No.166 of 2004 against 5 accused, namely Anil Kumar Ahirwar, Chhotu Pilot @ Deepak Nai, Sonu Shukla alias Abhishek, Paplu @ Avanish Shukla and Satya Narain Shukla. Chargesheet also came to be submitted in Case Crime No.167 of 2004, under Section 25/27 of the Arms Act against Anil Kumar Ahirwar. The Magistrate took cognizance of the aforesaid two chargesheets and committed the case to the court of sessions, where two session

trials were registered i.e. Sessions Trial No.199 of 2004 and Sessions Trial No.200 of 2004 in respect of offence under the Arms Act.

9. It is worth noticing, at this stage, that after submission of chargesheets against the accused, PW-3 and PW-4 submitted their affidavits before the Investigating Officer stating that on the date of incident accused Anil Kumar Ahirwar and Chhotu Pilot had come to the house of Satya Narain Shukla in the morning where a conspiracy was hatched to eliminate Ashok Shukla taking advantage of rush and crowd during cremation ceremony. PW-3 is Ram Babu Verma, who apparently was looking after the cattle of accused Satya Narain Shukla, whereas PW-4, Smt. Vimla Devi, used to attend to the domestic work in the house of Satya Narain Shukla. The statement of these two witnesses was then recorded by the Investigating Officer under Section 161 Cr.P.C. and they have been produced as witnesses in support of the prosecution case.

10. Charges were framed by the court of sessions separately against the accused on 18.9.2004. Accused Satya Narain Shukla, Sonu Shukla and Paplu Shukla have been charged of offence under Section 120-B IPC as well as Section 302 read with section 114 IPC in Sessions Trial No.199 of 2004, whereas accused Anil Kumar Ahirwar has been charged of offence under Section 27 of the Arms Act in Sessions Trial No.200 of 2004. Accused Anil Kumar Ahirwar has also been charged under Section 302 IPC as well as Section 307(34) IPC and accused Chhotu Pilot has been charged of committing offence under Section 307 IPC as well as Section 302(34) IPC, both, in Sessions Trial No.199 of

2004. Charges were read out to all the accused, who denied their implication and demanded trial.

11. In addition to above, the prosecution in order to establish the guilt of the accused adduced documentary evidence in the form of FIR as Ex.Ka-4; written report as Ex.Ka-1; recovery memo of half barrel Gun as Ex.Ka-2; recovery memo of bloodstained and plain earth as Ex.Ka-19; injury report of Vinod Kumar Agrawal as Ex.Ka-15; injury report of Santosh Kumar Shukla as Ex.Ka-16; injury report of Laxmi Narain as Ex.Ka-17; postmortem report as Ex.Ka-14; report of forensic science laboratory dated 3.1.2005 as Ex.Ka-23; report of forensic science laboratory dated 21.2.2005 as Ex.Ka-24; panchayatnama as Ex.Ka-6; charge-sheet in Case Crime No.166 of 2004 as Ex.Ka-20; charge-sheet in Case Crime No.167 of 2004 as Ex.Ka-21; and site plan with Index as Ex.Ka-18.

12. PW-1 is Pramod Kumar Shukla, who is the informant and has supported the prosecution case, according to which accused Anil Kumar Ahirwar fired on the deceased from behind by his half barrel gun, whereas the other accused namely Chhotu Pilot fired in defence of Anil Kumar Ahirwar and the bullet hit the three injured. This witness has also supported the prosecution case, as per which there was a property dispute between the deceased and Satya Narain Shukla, which is required to be elaborated, at this stage. As per the prosecution, PW-2 Brijmohan owned 8 bigha fertile land in the village. This land surreptitiously was got exchanged by accused Satya Narain Shukla in favour of his wife Smt. Sita Devi. The deceased came to the aid of Brijmohan and got an agreement to sale executed in favour of Pradeep Shukla and Awadh Kishor

Niranjan in respect of the property, which has been obtained by the main accused Satya Narain Shukla. This apparently was the cause of discord between Satya Narain Shukla and the deceased Ashok Kumar Shukla. According to prosecution it is for this reason that Satya Narain Shukla arranged for contract killers, namely Anil Kumar Ahirwar and Chhotu Pilot and it was Anil Kumar Ahirwar, who in pursuance of such conspiracy shot dead the deceased. Though this witness has been elaborately cross-examined but he has remained firm in his deposition.

13. Brijmohan has appeared as PW-2 and has supported the prosecution case with regard to conspiracy being the cause of the killing of deceased.

14. Ram Babu Verma has been produced as PW-3. His testimony is also in support of the prosecution plea of conspiracy. PW-3 was engaged by the accused Satya Narain Shukla for looking after his cattle and he claims to have heard the accused Satya Narain Shukla talking to the two main accused Anil Kumar Ahirwar and Chhotu Pilot early in the morning hours of the date of incident. The witness apparently was arranging fodder for cattle when he overheard the accused Satya Narain Shukla that this is a good opportunity to eliminate the deceased as there would be a lot of rush during cremation. The witness also alleges that the gun and certain money were provided to the contract killers by Satya Narain Shukla as well as his sons. Similar stand has been taken by the PW-4 Smt. Vimla Devi, who also was working as domestic help with the accused Satya Narain Shukla. It is worth noticing, at this stage, that both PW-3 and PW-4 were introduced by the prosecution almost two and a half months after the

filing of the chargesheets. As per the prosecution these two witnesses gave affidavits stating that they had heard the above conversation on the date of incident and it is thereafter that their statement was recorded under Section 161 Cr.P.C. PW-3 and PW-4 have been cross-examined, particularly on the aspect of delayed disclosure made to the investigating officer with regard to the incident in question. The two prosecution witnesses have explained the delay on the ground that Satya Narain Shukla had threatened them as PW-3 had heard him talking to the main contract killers and a threat was extended that he would be eliminated if he would disclose such facts to anybody. It is for this reason that these witnesses left the village for almost two and a half months and it is only thereafter when they came to know that Satya Narain Shukla and his two sons have been arrested that they could muster enough courage to come to the police what they have heard. In the cross-examination these two witnesses, however, could not disclose as to when they came to know through newspaper about the arrest of the accused. In reply to specific question posed by the defence, PW-3 has stated as under:-

“इनका पहले से डर है यह बदमास किस्म के है इसलिये मैंने किसी से इस षडयन्त्र के बारे में नहीं बताया। मैं यह अक्सर सुनता था कि अशोक शुकला से सत्यनारायण का जमीन-अमीन का विवाद चलता है। इस घटना के सभी मुलजिम कितने दिन में गिरफ्तार हो गये थे यह मुझे जानकारी नहीं है। अखबार जिससे मुझे यह जानकारी हुयी कि सब मुल्जिम पकड गये मैंने स्वयं पढा था। पढने के दूसरे दिन हम कोंच चले आये। यह घटना मई की है। मैं नहीं बता सकता कि 5 जून को पप्लू व सोनू गिरफ्तार हुये थे या नहीं यह समाचार 6 जून को निकला या नहीं मैं नहीं जानता था। कौन-कब गिरफ्तार हुआ मैं नहीं बता सकता। वह अखबार जिसको पढकर मैं कोंच आया किस महीने में मैंने पढा याद नहीं। सत्यनारायण के यहां मैं नौकरी करता था इसका कोई लिखित प्रमाण मेरे पास नहीं है। यह कहना गलत है कि मैंने झूठ बयान दिया है और प्रमोद शुकला ने लालच देकर गवाही दिलवायी। ”

15. Trial court has doubted the credibility of PW-3 and PW-4, primarily on the ground that their delayed disclosure is not explained. Adverse inference has also been drawn of the fact that affidavit etc. at their instance were got prepared much later and their version is exactly in accord with the prosecution case.

16 . PW-5 is Mahendra Singh Yadav, who claims to be a witness of the incident. PW-5, however, is not referred to in the FIR and his statement has been recorded under Section 161 Cr.P.C. after about two months of the incident. This witness has supported the prosecution case. PW 5 has identified the accused in Court. He has explained the delay occurred in recording of his statement on the ground that accused were not arrested. He has further stated that the incident has not been narrated by him to anyone except his wife. In cross-examination PW 5 has been confronted with his previous statement under Section 161 Cr.P.C. wherein contradictions were shown with regard to the manner in which he has seen the incident. He had, however, not disclosed the factum of recovery of weapon of offence to the I.O. PW 5 has admitted that he works as a labourer. A suggestion has been given to him that he works in transport company of Pramod Shukla who was inimical to the accused which he denied. He has also been confronted with the fact that statement of PW 5 was recorded along with Ram Babu and Vimla on the same day. He has also admitted that clothes worn by the deceased have not been disclosed to the I.O. by him, unlike his statement made in the Court. He has also stated that the I.O. has not recorded his statement at his house, but he has himself gone to the police station for recording of his statement. As per him, the deceased had sustained firearm injury

caused to him by accused Anil Kumar Ahirwar. He has also stated that the firing was made from a close distance. This witness has implicated two sons of Satya Narain Shukla on the ground that when they started assaulting the deceased, he retorted as to why he is being beaten by them, but this statement has not been given by him to the police under Section 161 Cr.P.C.

17. PW 6 Laxmi Narain Tiwari is the injured witness who has supported the prosecution case. He has identified accused Anil Kumar Ahirwar, as a person, who had fired on the deceased, due to which he died. He has further stated that after the deceased was fired, his companion with an intent to kill them fired on account of which bullet injuries were caused to Santosh Shukla. When the public tried to apprehend other accused, he fired again which hit Vinod Kumar Agrawal. Thereafter, the other companion fled away. The other companion Chhotu Pilot has also been identified by the victim. He has further stated that his treatment was not properly done at Konch. Therefore, he was sent to District Hospital where he was medically examined. He claims to have sustained firearm injuries on his shoulders. In the cross-examination, this witness has stated that neither he has gone to Jhansi nor has he got his X-ray conducted at Konch. He continued to take medicines and got injections. No report was made to the police station. This witness has been examined by the I.O. after almost 40 days of the incident. He has further stated that he did not identify the accused on the spot nor any disclosure was made by him to the police about it. He has also admitted that the name of unknown accused had been published in newspaper 2-3 days later and then he came to know his identity. He has also stated that in his

statement to the police, he has informed that the accused fired from the east. He has not stated that other accused was carrying double barrel gun and had fired twice from it. He has denied the suggestion that the injuries sustained by him had been manipulated and, in fact he had not sustained any injury. He has also stated the face of the accused was not muffled.

18. PW 7 is the other injured witness. He has also supported the prosecution case. He, too, has stated that though he was referred to Jhansi for treatment but he had not visited Jhansi and his X-ray was done at Orai at Jalaun itself. He denied the suggestion that no X-ray was conducted and it was merely advised. He has denied the suggestion that injuries had been manipulated on him. This witness has also identified two accused in the Court. His statement under Section 161 Cr.P.C. was recorded after one and half months of the incident.

19. PW 8 is Kamal Ahmad who alleges that extra-judicial confession was made by the accused before him but subsequently has stated that Satya Narain Shukla has made extra judicial confession of his involvement before him on 24.05.2004 at about 5.30 in the evening. Two sons of Satya Narain Shukla, namely, Abhishek alias Sonu and Paplu were also with him. In cross-examination PW 8 has disclosed that he knew the deceased for last 8 1/2-9 years and he is a political person. Satya Narain Shukla has been visited 4-5 times before but he could not disclose the dates of his visits. Though this witness has been elaborately cross-examined at various aspects, including the fact that name of the accused had been published in Dainik Jagran, Jhansi on 24.05.2004, but he claimed ignorance.

20. PW 9 Prem Sagar is Head Constable who has proved chik/F.I.R. PW 10 Rajeev Kumar Mishra has proved the inquest. PW 11 Dr Mani Ram is the autopsy surgeon who has proved the post mortem report, as per which, the deceased was around 80 years of age and he would have died about six hours prior to the holding of the post mortem at 2.00 p.m. on the day of the incident. He has also explained that the deceased had eaten food 4-5 hours prior to the incident. The deceased died homicidal death. In the cross-examination, the doctor has stated that it was possible that the deceased has eaten food at 12 in the night and the incident could have occurred around 6.00 in the morning. He has also found blackening but no foreign body was found.

21. Dr J.P. Bhattacharya has appeared as PW 12 and has proved the injuries of Vinod Kumar Agrawal who was brought to him by the police constable. As per him, the injuries caused to Vinod Kumar Agrawal was of firearm and was fresh in nature. He has also proved the injuries caused to Laxmi Narain. In the cross-examination, he has admitted that no supplementary medical report on the basis of X-ray was given by him.

22. PW 13 is Constable Ram Charan who had taken the body of the deceased for post mortem examination. PW 14 is SI Jai Narain Verma who was first I.O. in the present case. He has proved recovery of firearm from the accused. He has proved the site-plan and has also taken blood-stained and plain earth, etc. He has explained various steps taken during the investigation by him. As per him, half barrel gun was given to him by Pramod Shukla and he had not found the accused Anil Kumar Ahirwar on the spot at that

time. By then, accused Anil Kumar Ahirwar had already been taken by Constables Amrit Lal and Sohan Lal to C.H.C. Konch. This witness has been elaborately cross-examined. In his cross-examination, he has stated that the statement of Pramod Shukla was recorded on 28th May, 2004. He has proved the recovery of firearm. About other accused Chhotu Pilot, the witness had stated that his name figured on 23.05.2023 during investigation and he came to know of parentage and address of the accused on that date itself. However, he made no attempt to visit his house at Lalitpur or to secure his arrest. No permission was sought from the police authorities for his arrest. He has also admitted that he has not visited the house of Satya Narain Shukla nor had he visited the site of the incident as per deposition made by PW 4. This witness has denied the suggestion that the version of accused having been fainted or being kept in hospital have been subsequently manipulated.

23. PW 15 is Constable Amrit Lal who took the injured accused to the hospital. PW 16 is Radhey Shyam Trivedi who is the second I.O. and has proved charge-sheet. He was posted at Kotwali Konch as officiating Inspector on 26.05.2004. This witness has stated that informant Pramod Kumar Shukla met him near railway crossing on 28.05.2004 at about 4 p.m. On his pointing out the other accused Chhotu Pilot has been arrested at 04.10 p.m. The second statement of the informant was recorded on 29.05.2004. Satya Narain Shukla, accused was arrested on 11.06.2004. He has also recorded statement of accused Sonu alias Abhishek and Paplu Shukla on 16.06.2004. In the cross-examination, this witness has stated that he was informed by Pramod Shukla

that he saw the other accused at quarter to four at Police Station Konch, sitting on the bench. The witness has denied the suggestion that in fact Chhotu Pilot was arrested on 27.5.2004 itself and that he was fraudulently shown to have been arrested on 28.05.2004.

24. PW 17 is Dr Rajendra Nath who was Professor and Orthopaedic Surgeon at Medical College, Kanpur. In his examination-in-chief, he has stated that while posted at Medical College, Kanpur as Medical Officer, he examined Santosh Kumar Shukla who had sustained gun-shot injury in his right knee. He had operated him and that the injuries could have been caused to him at 10.30 on 19.05.2004. In the cross-examination, the witness has stated that no reference regarding it being medico-legal case was received. The accused, however, was treated as medico-legal case. The bullet extracted from the injured was kept in an envelop and sent to Superintendent of Police, Kanpur. He has also stated that the nearest police station Swaroop Nagar was informed.

25. On the basis of above evidence led by the prosecution the statement of all the accused have been recorded under Section 313 Cr.P.C. Accused Anil Kumar Ahirwar has denied his implication. As per him, he has been falsely implicated under the pressure of first informant due to enmity. He has lastly stated that he is resident of Village Salaiya and used to come to Konch for doing marketing while his father was in service at Lalitpur. He has alleged that he was returning to his village when police along with some public persons forcibly apprehended him; assaulted him and kept in illegal confinement for 3-4 days; and thereafter, implicated him falsely in this case. Accused

Chhotu Pilot has also denied his implication and that he was arrested on 27.05.2004 at 10.00 a.m. from Lalitpur and was handed over to Konch police. His father has also sent a telegram in that regard. Accused Satya Narain Shukla has already died, therefore, there is no need to refer his statement under Section 313 Cr.P.C. Abhishek alias Sonu has stated that there was no enmity between his father and the deceased on account of agricultural land. He has denied that PW 3 was working for his father or that PW 4 was domestic aide in his house. He has stated that with an intent to grab his property, his brother and father have been falsely implicated.

26. On behalf of defence, Ram Gulam Sen has been produced as DW 1 who is father of accused Chhotu Pilot. He claims that on 27.05.2004 at 10 two constables came and apprehended his son. He claims that he visited the police station at 11 a.m., again at 6 p.m. and thereafter at 11 p.m. when he was informed that his son was taken by the Konch police. In the cross-examination, the witness has disclosed that he works as peon at Nagar Palika, Lalitpur. He denied the suggestion that his son is involved in criminal activities. The defence has produced Devi Prasad as DW 2 who has also proved the factum of arrest of accused, Chhotu Pilot on 27.05.2004. Dr Mani Ram has been produced as DW 3 who claims that an unknown person was brought to him by the police station. He was not conscious and he referred him to higher medical centre. This witness has identified Anil Kumar Ahirwar, as the person, who had been examined by him on 19.05.2004 itself. Shailendra Tiwari has been produced as DW 4 who is record keeper in the office of Superintendent of Police, Lalitpur. This witness has turned hostile. DW 5, Tayyab Ali is Junior Assistant in the office of

Commissioner, Jhansi who has acknowledged the receipt of telegram in the office of Commissioner, Jhansi on 28.05.2004 about the applicant's son being harassed by the police.

27. On the basis of evidence so led during course of trial, the court below has come to the conclusion that on account of enmity about landed property, the deceased has been done to death, pursuant to the planned conspiracy hatched up by Satya Narain Shukla and his two sons, wherein two accused Anil Kumar Ahirwar and Chhotu Pilot have been engaged as contract killers, and Anil Kumar Ahirwar not only killed the deceased, Ashok Kumar Shukla but his companion also caused firearm injuries to other three injured. A finding has been returned that the prosecution has established its case beyond reasonable doubt and consequently accused appellants have been convicted and sentenced. Thus aggrieved, appeals are before this Court, challenging the impugned judgement and order passed in Sessions Trial Nos. 199 of 2004 and 200 of 2004.

28. The trial court, however, has acquitted the accused Abhishek @ Sonu and Paplu Shukla as the version of their involvement on the basis of testimony of P.W.-3 and P.W.-4 was not found credible and reliable to the extent of their acquittal by the trial court, the State in its appeal challenged such findings.

29. On behalf of the accused-appellant Anil Kumar Ahirwar, it is submitted that the accused-appellant has been falsely implicated in this case and neither the prosecution has succeeded in proving his arrest at the spot nor his role has otherwise been established on the basis of alleged recovery of fire-arm from him. It

is further submitted that the prosecution witnesses have been examined after inordinate delay. It is also argued that the accused-appellant has otherwise no criminal history and the plea of is being contract killer, is not substantiated. Learned counsel for the accused-appellant further argued he has absolutely no motive or concern with the commissioning of the offence and therefore, his conviction and sentence is impermissible.

30. On behalf of accused-appellant Anil Kumar Ahirwar, it is stated that the injuries of the deceased Ashok Shukla do not match with the weapon assigned to the accused and therefore, the implication of accused-appellant Anil Kumar Ahirwar cannot be sustained. In support of such contention, learned counsel for the accused-appellant has placed reliance upon the judgment of Supreme Court in **Mohinder Singh Vs. State; AIR 1953 SC 415; Ram Narayan Singh Vs. State of Punjab 1975 (4) SCC 497; Criminal Appeal No.2641 of 2012 (Shivendra Singh @ Bhola Vs. State of U.P.), Criminal Appeal No.612 of 1996 (Jagat Pal & Others Vs. State of U.P.)** as also a recent decision of this Court in **Criminal Appeal No.5735 of 2009 (Sarvesh Diwakar Vs. State of U.P.)**.

31. On behalf of the accused-appellant Chhotu Pilot, it is argued that the accused-appellant has been falsely implicated and that there exists no material on record to implicate him in the present occurrence. Learned counsel for the accused-appellant submits that though it is alleged that he was seen at the spot but his identity was not ascertained and his arrest at the railway station Konch on 28.05.2004 is not credible or reliable. Learned counsel for the accused-appellant also argued that

for the identity of accused-appellant Chhotu Pilot was ascertained on 23.05.2004 itself and the plea that he was picked up from the railway station Konch is an imaginary incident. It is also argued that the accused-appellant was in fact arrested from his house on 27.04.2004 itself and the prosecution case that he was identified by the prosecution witnesses at the railway station Konch is not reliable. It is also submitted that the accused-appellant Chhotu Pilot otherwise has no criminal history and no incriminating material has otherwise been collected from him so as to implicate him in the present case.

32. Learned A.G.A. has submitted that the testimony of P.W.3 and P.W.-4 are reliable and as the property dispute between the father of the acquitted accused with the deceased is well established on record, the trial court has erred in acquitting the two accused.

33. On behalf of the two acquitted accused, it is stated that the testimony of P.W.-3 and P.W.-4 are not reliable and their implication several months after filing of the charge-sheet is nothing but an imaginary case set up by the police on the strength of conjectures.

34. It is also submitted that the testimony of P.W.-8 with regard to their extra judicial confession is an extremely weak piece of evidence, which is not reliable and has been engineered only for falsely implicating the two accused.

35. We have heard Shri Sukhvir Singh, learned counsel for the accused-appellant Anil Kumar Ahirwar, Shri Kamal Kishor Mishra, learned counsel for the accused-appellant Chhotu Pilot, Ms. Archana Singh, learned A.G.A. for the

State and Shri Apul Mishra, learned counsel for the acquitted accused Abhishek @ Sonu and Paplu Shukla and perused the materials available on records of the present criminal appeals, including the records of the trial proceedings.

36. The First Information Report in the present case has been lodged in less than an hour from the incident, which allegedly occurred at 10:30 a.m. on 19.05.2004. The written report has been scribed by Vipin Shukla and its contents has been proved by the informant Pramod Kumar Shukla. As per the FIR, the deceased was returning from the cremation of the neighbour of deceased namely; Amar Chandra Agarwal when an unknown person took out a half-barrel gun and shot him on his head from behind instantaneously killing him. According to the prosecution, the unknown accused was apprehended on the spot itself and he was also assaulted by members of public. The half-barrel gun used by the accused was also recovered and the recovery has been proved as Ext. Ka-2. According to the prosecution, it is at that stage that the other accused-appellant Chhotu Pilot fired with an intent to save his colleague Anil Kumar Ahirwar. The bullet hit one Vinod Kumar Agarwal whereafter, the second accused Chhotu Pilot again fired and this time injury was caused to injured Laxmi Narayan Tiwari and Santosh Shukla. The second accused fled away from the spot and could be arrested only on 28.05.2004.

37. On behalf of the accused-appellant Anil Kumar Ahirwar, the incident leading to his arrest is questioned primarily on the ground that neither his arrest has been proved on the spot nor any motive is shown to exist on account of which there was an occasion for him to commit the

offence. Shri Sukhvir Singh, learned counsel for the accused-appellant Anil Kumar Ahirwar has strenuously urged that the accused-appellant has been arrested only on 24.05.2004 and the prosecution case that he was arrested on the spot is not substantiated. He further argues that the prosecution case of assault on the accused Anil Kumar Ahirwar is also not fully substantiated, inasmuch as his injuries, etc. have not been proved. His implication on the strength of fire-arm recovered from him is also questioned in view of the F.S.L. Report, which has not matched with the fire-arm recovered from the accused with the injury caused to the deceased.

38. So far as the accused-appellant Anil Kumar Ahirwar is concerned, the prosecution witnesses have been consistent on the point that he had fired on the deceased with his half-barrel gun and he was apprehended at the spot. The testimony of P.W.-1 and P.W.5 is specific in that regard. The non-holding of test identification parade although is challenged on behalf of the accused-appellant but we do not find much substance in such challenge. The records reveal that an unknown person was in fact produced before the Medical Superintendent, Primary Health Centre, Konch (Jalaun), who was around 25 years of age and had been brought by the police in their jeep. The medication offered to the injured on 19.05.2004 has been produced as 'Paper No.99 Kha'. The contents of the prescription have extracted hereinafter:-

Name – Unknown
Age/Sex – about 25 years/M
R/o – Unknown
Brought By – Police - Kamesh –
Jeep
B.P. 110/76 mmhg

Pulse 80 /minute
Injection R.L. II
Injection 10% Dextrose I
Injection Decadron 2 CC I.M.
Stat
Injection Gentamycin 80 mg. I.M.
Stat
Injection Voveron 1 Amp. I.M.
Stat
Injection Cefazole 500 mg I.M.
Referred to Hospital, Orai for X-ray and further treatment and medico legal report.”

39. The first Investigating Officer namely; Jay Narayan Verma, P.W.-14 in his testimony has categorically stated that the accused-appellant Anil Kumar Ahirwar had been taken by the police constables for medical examination to the Community Health Centre, Konch (Jalaun) whereafter he was referred to District Hospital, Jhansi. This witness has also categorically stated that the apprehended unknown accused was admitted in the Medical College, Jhansi and was ultimately discharged on 23.05.2004 whereafter, he was formally arrested on 24.05.2004. The evidence on record, therefore, clearly reveals that the accused-appellant Anil Kumar Ahirwar was apprehended on the spot and was sent for medical examination at Primary Health Centre, Konch (Jalaun) and thereafter he was admitted at Medical College, Jhansi from where, he was discharged on 23.04.2004. Though specific treatment card of the accused Anil Kumar Ahirwar has not been produced by the prosecution, yet the overwhelming weight of evidence on record in the form of oral testimony of witnesses, who have seen the incident persuades the courts to accept the prosecution case that it was in fact the accused Anil Kumar Ahirwar, who had fired on the deceased and was apprehended

by members of public on the spot. It may also be noticed at this juncture that Dr. Maniram has also been produced as D.W.-3, who had examined the accused Anil Kumar Ahirwar at the C.H.C., Konch (Jalaun) and has clearly stated that the accused was brought by the police in their jeep and he had actually examined him as unknown. The injured accused was not conscious and he had referred him for further medical examination. Though this witness has been declared hostile but he has clearly recognized the accused as being the person who was actually brought before him as unknown and had been examined by him. There is otherwise no reason put forth by the defence citing any plausible cause of false implication of the accused either. It is otherwise not in dispute that the deceased had sustained a fire-arm injury from a close range on account of which he died. The prosecution witnesses of fact who undisputedly were present on the spot have clearly described the manner in which the accused Anil Kumar Ahirwar had fired from his half-barrel gun from a close distance on account of which the deceased died. Defence argument that Anil Kumar Ahirwar was not apprehended on the spot or that his identity at the point of time of the incident was not verified or established, is, therefore, rejected.

40. Coming to the other accused-appellant Chhotu Pilot, we find that the prosecution case clearly refers to the presence of a second accused at the place of incident, who allegedly had fired twice causing injury to Vinod Kumar Agarwal, Laxmi Narayan Tiwari and Santosh Shukla. It is then the prosecution case that the second accused fled from the spot and he could not be arrested. According to the prosecution, the second accused, who fired twice and had fled away from the spot is in fact Chhotu Pilot.

41. On behalf of the defence, it is emphatically argued that neither the identity of accused Chhotu Pilot has been established nor any test identification parade was conducted and, therefore, his identity remains unascertained. It is also argued that in fact the accused Chhotu Pilot had been arrested from his house on 27.05.2004 and his identification and arrest at the police station on 28.05.2004, is not reliable.

42. We have examined the evidence on record in order to appreciate the argument advanced on behalf of the accused Chhotu Pilot, which remains undisputed that the accused Chhotu Pilot is a resident of District Lalitpur and has no criminal history. He was admittedly not apprehended on the spot. No recovery has been made from him either of the fire-arm from which he is alleged to have fired on the injured nor any recovery has been made from him which may connect him to the offence, etc. The Investigating Officer in his testimony has admitted that identity of the second accused Chhotu Pilot was ascertained on 24.05.2004 itself. This ascertainment of identity of accused Chhotu Pilot is based upon the disclosure made by the prime accused Anil Kumar Ahirwar. Once the identity of accused Chhotu Pilot was known to the police, it was expected that either an attempt would be made to arrest him or the police at least tried to interrogate the alleged accused. There is, however, nothing on record to show that any attempt was made either to interrogate the accused Chhotu Pilot or to verify his role in commissioning of the offence. The prosecution case on this aspect is somewhat unusual. As per the prosecution case, the informant i.e. P.W.-1 visited the railway station Konch on 28.05.2004 and found the accused sitting

there on a bench. P.W.-1 then informed the police, whereafter, the accused allegedly was arrested on 28.05.2004 from the railway station Konch.

43. On the point of arrest of accused Chhotu Pilot, the defence has led evidence of the father of the accused Chhotu Pilot as D.W.-1 and as per whom, the accused Chhotu Pilot was taken from his house on 27.05.2004 itself. A telegram was sent by the father of accused Chhotu Pilot to the Chief Minister on 27.05.2004 itself. Original records have been produced and duly proved by the defence, according to which, the telegram has been sent at 11:52 p.m. on 27.05.2004 itself with regard to arrest of the accused Chhotu Pilot. The defence witnesses have not been specifically controverted on their specific assertion with regard to arrest of the accused Chhotu Pilot on 27.05.2004 and sending a telegram, etc. The defence has, therefore, established on record that accused Chhotu Pilot was arrested from his house on 27.05.2004 itself. Once that be so, we do not find the prosecution case of arrest of accused Chhotu Pilot from the railway station Konch in the evening hours of 28.05.2004 reliable. The entire narration of witnesses on the point of arrest of the accused Chhotu Pilot from the railway station Konch is found doubtful. It appears that the police came up with the case of arrest of accused Chhotu Pilot from the railway station Konch on pointing out of the informant only in order to get over with the lacuna of not conducting the test identification parade of accused Chhotu Pilot. How exactly the identity of accused Chhotu Pilot was established remains unknown. The prosecution case in that regard is found not convincing. There is otherwise no material on record to implicate the accused Chhotu Pilot,

inasmuch as, neither the physical attributes of the accused have been recorded in the statement of any of the witnesses prior to 24.05.2004 nor any other distinctive mark of identity have been specified during the course of investigation, which may legitimately lead to the identification of accused Chhotu Pilot. In that view of the matter, we find that the prosecution has not been able to establish the guilt of accused Chhotu Pilot beyond reasonable doubt.

44. So far as the Government Appeal with regard to acquittal of accused Abhishek @ Sonu and Paplu Shukla is concerned, we find the reasoning assigned by the trial court for their acquittal to be well founded. The implication of these two accused is primarily based upon the testimony of P.W.-3, P.W.-4 and P.W.-8. P.W.-3 and P.W.-4 allegedly were working in the house of Satya Narayan Shukla and as per the prosecution, they over heard Satya Narayan Shukla talking to the two accused with regard to conspiracy to eliminate the deceased. P.W.-3 and P.W.-4, however, never made any such disclosure to the police immediately after the incident or even within a reasonable period. Till the filing of the charge-sheet also P.W.-3 and P.W.-4 have not surfaced on record. An affidavit has been given by P.W.-3 and P.W.-4 to the police authorities on 24.08.2004, which is nearly after two months of filing of the charge-sheet dated 28.06.2004. As per the prosecution, P.W.-3 and P.W.-4 were servants, domestic aides in the house of Satya Narayan Shukla. P.W.-3 was looking after the cattle whereas, P.W.-4 was sweeping the floor, etc. It is not clear, as to how these two persons suddenly became aware of the entire matter and decided to submit their affidavits to the higher police authorities, who persuaded them to get their affidavits

prepared and filed before authorities. The version of P.W.-3 and P.W.-4 in their affidavits is exactly the one, which supports the prosecution. P.W.-3 has stated that after he over heard the conversation of Satya Narayan Shukla with the two accused, he was warned by Satya Narayan Shukla not to inform of facts in that regard to anyone. According to these two witnesses, they immediately left the village and gave their affidavits only after Satya Narayan Shukla and his two sons were arrested. The two witnesses have been cross-examined with regard to the knowledge about arrest of Satya Narayan Shukla and his two sons. No specific details in that regard have been disclosed. It is admitted that Satya Narayan Shukla and his two sons were arrested in June, 2004 itself and facts in that regard had also published in the newspapers. If that was so, it is difficult to understand that as to why the affidavit was given by these two after nearly two months. P.W.-8, who is the other witness of conspiracy, has also come out with a case of extra judicial confession made to P.W.-8. The evidence of P.W.-8 has been examined by us, which is not found to be very inspiring. P.W.-8 is a political person. He alleges that the accused were known to him from before but it has not been able explain as to when the accused have met him and in what context. Extra judicial confession by its very nature is otherwise a very weak piece of evidence. The prosecution case in the form of testimony of P.W.-8 as well as statements of P.W.-3 and P.W.-4 do not appear to be natural and convincing. Their testimony appears to have been introduced later only with the intent of implicating the two sons of Satya Narayan Shukla. We are, therefore, of the view that the trial court has not erred in coming to the conclusion that prosecution has not succeeded in establishing the guilt of the

two accused and thereby acquit them. We do not find any force in the Government Appeal No.983 of 2006, which is consequently dismissed and consigned to the records.

45. In view of the deliberations and discussions held above, Criminal Appeal No.4894 of 2005 filed on behalf of the accused-appellant Anil Kumar Ahirwar fails and is **dismissed**. He is on bail. He shall surrender before the trial court within a period of 15 days to serve out the remaining sentence.

46. Criminal Appeal No.5303 of 2005 Chhotu Pilot @ Deepak Nai succeeds and is allowed. Accused-appellant Chhotu Pilot @ Deepak, who is on bail, therefore, his bail bonds shall be discharged. He need not surrender. He shall file personal bond and surety bonds in compliance of Section 437A Cr.P.C. to the satisfaction of trial court within a period of four weeks.

47. The office is directed to transmit the lower court record along with a copy of the judgement to the trial court which shall ensure the compliance.

(2023) 9 ILRA 663
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 25.08.2023

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Criminal Revision No. 259 of 2004

Mahesh Chandra	...Revisionist
Versus	
State of U.P. & Anr.	...Respondents

Counsel for the Revisionist:

Sharad Pathak

Counsel for the Respondents:

G.A., Sri B.B. Singh

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 397 r. w. Section 401 - revision - Indian Penal Code, 1860 - Sections 302 & 304 Part II - rehabilitary & reformatory aspects in sentencing - 'principle of proportionality' - Sentence should be based on facts of a given case - Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account - Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically - sentence should not be either excessively harsh or ridiculously low.(Para - 8,9)

Respondent no. -2 convicted under Section 304 Part II I.P.C. - instead of Section 302 I.P.C. - no direct evidence - sentenced for five years imprisonment and fine - hence revision.**(Para - 2)**

HELD:-No accused person is incapable of being reformed and therefore, all measures should be applied to give them an opportunity of reformation in order to bring them in the social stream. Court's view was based on valid reasons and was considered probable and logical. Judgment of court below cannot be said to be illegal, illogical and improbable and not based on material on record or is based on erroneous views and is against the settled position of law. No interference required.**(Para - 11,13)**

Revision dismissed. (E-7)

List of Cases cited:

1. Mohd. Giasuddin Vs St. of A.P., AIR 1977 SC 1926
2. Deo Narain Mandal Vs St. of U.P. , (2004) 7 SCC 257
3. Ravada Sasikala Vs St. of A.P. , AIR 2017 SC 1166

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

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

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

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

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

9. Jagriti Devi Vs St. of H.P. ,(2009) 14 SCC 771

10. Bhagwan Singh Vs St. of Uttarakhand , (2020) 14 SCC 184

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

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

2. This revision has been preferred by the revisionist under Section 397 read with section 401 Cr.P.C. against the judgment and order dated 18.03.2004 passed by the Additional District Sessions Judge/ F.T.C.- II, Sultanpur in Session Trial No. 192 of 2002: State Vs Raja Ram, whereby the respondent no. -2 was convicted under Section 304 Part II I.P.C. instead of Section 302 I.P.C. and was sentenced for five years imprisonment and fine of Rs.1000/-.

3. Learned counsel for the revisionist submits that the court below did not appreciate the evidence on record. He further submits that prosecution has successfully proved the offence against the accused/ opposite party No.2 on the basis of evidence. The judgement was passed without considering the statement of witnesses and the case was set up by the prosecution upon surmises and conjectures.

4. Learned A.G.A. submits that there appears no illegality or infirmity in the

impugned order passed by the court below, therefore, this revision may be dismissed.

5. I have heard the learned counsel for the parties and considered the ground as well as the learned A.G.A. and gone through the judgment passed by the court below.

6. In the present case from the statements given by the witnesses/evidence produced by the prosecution, the court below after going through the material placed on record, has given its finding that the opposite party No.2 has not committed offence under Section 302 I.P.C. rather the court below has framed charges under Section 304 (II) I.P.C. and sentenced him to undergo five years rigorous imprisonment and fine of Rs.1000/-. Thus, it appears that the prosecution has failed to establish that the crime/offence under Section 302 I.P.C. has been committed by the accused / opposite party No.2 and there was no direct evidence produced by the prosecution regarding involvement of the opposite party No.2 in the crime/offence under Section 302 I.P.C.

7. Further, learned counsel for the revisionist could not point out any illegality or infirmity in the impugned order passed in favor of opposite parties which is before this Court.

8. Further, Hon'ble Apex Court in case of Mohd. Giasuddin Vs. State of AP, [AIR 1977 SC 1926], had observed the rehabilitary & reformatory aspects in sentencing :

"Crime is a pathological aberration. The criminal can ordinarily be redeemed and the state has to rehabilitate rather than avenge. The sub-culture that

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

9. It is also noteworthy that while determining the quantum of sentence, the court should bear in mind the 'principle of proportionality'. Sentence should be based on facts of a given case. Gravity of offence, manner of commission of crime, age and sex of accused should be taken into account. Discretion of Court in awarding sentence cannot be exercised arbitrarily or whimsically. The sentence should not be either excessively harsh or ridiculously low as observed in case of Deo Narain Mandal Vs State of U.P. [(2004) 7 SCC 257]

10. Further in **Ravada Sasikala vs. State of A.P.** AIR 2017 SC 1166, the Supreme Court referred the judgments in **Jameel vs State of UP** [(2010) 12 SCC 532], **Guru Basavraj vs State of Karnataka**, [(2012) 8 SCC 734], **Sumer Singh vs Surajbhan Singh**, [(2014) 7 SCC 323], **State of Punjab vs Bawa Singh**, [(2015) 3 SCC 441], **Raj Bala vs State of Haryana**,

[(2016) 1 SCC 463], **Jagriti Devi Vs State of H.P.** (2009) 14 SCC 771 and in **Bhagwan Singh Vs State of Uttarakhand** (2020) 14 SCC 184 and has reiterated that, in operating the sentencing system, law should adopt corrective machinery or deterrence based on factual matrix. Facts and given circumstances in each case, nature of crime, manner in which it was planned and committed, motive for commission of crime, conduct of accused, nature of weapons used and all other attending circumstances are relevant facts which would enter into area of consideration. Further, undue sympathy in sentencing would do more harm to justice dispensations and would undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to nature of offence and manner of its commission. The supreme court further said that courts must not only keep in view the right of victim of crime but also society at large. While considering imposition of appropriate punishment, the impact of crime on the society as a whole and rule of law needs to be balanced. The judicial trend in the country has been towards striking a balance between reform and punishment. The protection of society and stamping out criminal proclivity must be the object of law which can be achieved by imposing appropriate sentence on criminals and wrongdoers. Law, as a tool to maintain order and peace, should effectively meet challenges confronting the society, as society could not long endure and develop under serious threats of crime and disharmony. It is therefore, necessary to avoid undue leniency in imposition of sentence. Thus, the criminal justice jurisprudence adopted in the country is not retributive but reformatory and corrective. At the same time, undue harshness should

also be avoided keeping in view the reformatory approach underlying in our criminal justice system.

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

12 . In the light of the aforesaid guidelines, the impugned judgment has to be considered from the point of view whether the view taken by the court below was a probable view based on the material on record or it is an absolutely erroneous judgment devoid of merits.

13. Keeping in view the aforesaid weakness of the prosecution case, as noted by the court below, I am of the view that the view taken by the court below was a probable and logical view, which is based on valid reasons. The judgment of the court below cannot be said to be illegal, illogical and improbable and not based on material on record or is based on erroneous views and is against the settled position of law. So, this Court is satisfied that there is absolutely no hope of success in this revision and accordingly, no interference is called for.

14. Accordingly, the present revision is *dismissed*.

15. No order as to costs.

16. Copy of this judgment be sent to the court below for its compliance.

**FACTS AS CROPPED UP FROM
THE RECORDS**

3. A first information report has been lodged by the informant, namely, Devendra Bansal on 09.02.2021 at 0634 hrs. against the revisionist and 5 others, which was registered as Case Crime No-0106 of 2021, under Sections 420, 467, 468, 471, 406 & 120-B IPC, Police Station- Surajpur, District-Central Commissionerate Gautam Budh Nagar for the alleged incident in which no date and time of the incident were mentioned. In the first information report, it has been alleged that the revisionist, his wife Dharna Garg in collusion with four others have taken total Rs. 1.96 crores from the informant and his wife for business by making a forged company and they have not returned the same to the informant and cheated them also.

4. The revisionist is also accused in FIR No. 838 of 2021, Police Station-Noida Sector-58, dated 20th September, 2021. Both the aforesaid cases have been investigated by Special Investigating Team (SIT) headed by Inspector Ravinder Gautam.

5. In Case Crime No. 0106 of 2021 dated 9th February, 2021, under Sections 420, 467, 468, 471, 406 & 120-B IPC, Police Station- Surajpur, District-Central Commissionerate Gautam Budh Nagar, the revisionist has moved an application under Section 438 Cr.P.C. (Transit Anticipatory Bail) before the Rohini Courts, Delhi, which has been granted vide order dated 2nd November, 2022, a copy of which has been enclosed as Annexure-8 to the affidavit accompanying the present criminal revision.

6. On 3rd November, 2022, the revisionist was produced before the Additional Chief Judicial Magistrate-II, Gautam Budh Nagar whereby his oral prayer that since he has already been granted transit anticipatory bail by the Additional Sessions Judge, Rohini Court, Delhi for a period of eight days, he may be granted some protection from that Court for the said period, has been rejected the concerned Magistrate after observing that the Rohini Court in granting transit anticipatory bail to the revisionist has no jurisdiction. It is against this order that the present revision has been filed.

7. It is pertinent to mention here that the revisionist had approached the Hon'ble Apex Court by filing Writ Petition (Crl) No. 505 of 2022 (Mohit Kumar Goyal vs. State of U.P. and others), where he had challenged the order dated 03.11.2022 and the Apex Court had directed to avail the remedies in accordance with law.

CASE OF THE REVISIONIST

8. The revisionist Mohit Kumar Goyal is Ex-Director of M/s. Family of Dry Fruits India Private Limited, having its office at U-25/A, DLF Phase-3, Near Pink Town, House Market, Sector-24, Gurugram (Haryana). The revisionist had never formed the company namely M/s. R.D. Dry Fruits Pvt. Ltd. and M/s. Seth Ji Dry Fruits Pvt. Ltd. The revisionist is not the director/share holder/beneficiary or signatory in M/s. R.D. Dry Fruits Pvt. Ltd. and M/s. Seth Ji Dry Fruits Pvt. Ltd. The revisionist's company and Shree Shyam Trading Company are distinct company and Proprietor of Shree Shyam Trading Co. is nowhere concerned with the affairs of M/s. Family of Dry Fruits India Pvt. Ltd. The revisionist had not transferred any fund in

their own personal account nor the single amount had been transferred in the account of M/s. Family of Dry Fruits India Pvt. Ltd. by the informant. It is merely an allegation that he had transferred the same. The real fact is that the revisionist is being cheated by the informant, regarding which a first information report of Case Crime No. 1851 of 2019, under Sections 406, 420, 467, 468, 471, 384, 388, 389, 504, 506 & 120-B IPC, Police Station-Surajpur, District-Gautam Budh Nagar was lodged against the informant and others, but no action had been taken by the police nor the statement of the revisionist is recorded till date. The intention of the informant can be seen that when he was not able to achieve his illegal goals then he lodged the present first information report after the delay of about 1 year and 7 months, for which no plausible explanation was given by the respondent. The office of the M/s. Family of Dry Fruits India Pvt. Ltd. is situated at Noida and Ghaziabad.

9. SUBMISSION OF THE LEARNED COUNSEL FOR THE REVISIONIST

(I) In the first information report being Case Crime No. 106 of 2021, not even a single word has been mentioned that the supply was made at Noida. When as a matter of fact all the supplies was made in Gurugram/Gurgaon. As such the U.P. Police has no jurisdiction to lodge the present first information report at Noida.

(II) The revisionist had filed a case against the informant namely Devendra Bansal, which was registered as Case Crime No. 1851 of 2019, under Sections 406, 420, 467, 468, 471, 384, 388, 389, 504, 506 & 120-B IPC, Police Station-Surajpur, District-Gautam Budh Nagar.

The said first information report was registered in compliance of the order of the learned Civil Judge (S.D.) FTC, Gautam Budh Nagar passed in the application u/s. 156(3) Cr.PC. The informant is being arrayed as accused no.9 in the first information report of Case Crime No. 1851 of 2019, under Sections 406, 420, 467, 468, 471, 384, 388, 389, 504, 506 & 120-B IPC, Police Station-Surajpur, District-Gautam Budh Nagar. He had taken the advantage of the dispute between M/s. Family of Dry Fruits and M/s. Shree Shyam Trading Company. The informant in order to gain illegal benefits had made Aadhar Card and Driving License in the name of Pradeep Singh Nirwan, which are the forged one. The informant was arrested by the police, but was released on same date on the basis of his ill-health. The revisionist had approached the S.S.P., Gautam Budh Nagar, who had assured that the informant will be arrested soon, but he was not arrested. In fact, he was released by the Investigating Officer. On 18.03.2020 a complaint was made by the revisionist before the ACJM-II, Gautam Budh Nagar bearing Complaint Case No. 147 of 2020 (State vs. Devendra and others). On the basis of the aforesaid complaint, the Additional Chief Judicial Magistrate-II, Gautam Budh Nagar vide order dated 17.07.2020, after considering the entire materials on record had directed the Commissioner of Police, Gautam Budh Nagar to look into the matter and inquire the same and also directed SHO, P.S.-Surajpur, to arrest the informant within one month and to produce the same before him. Till date, the informant is not yet arrested nor the order dated 17.07.2020 of the 2nd ACJM, Gautam Budh Nagar is complied. In fact, the police authorities are demanding Rs. 5 lakhs from the revisionist in order to get the matter investigated.

(III) The present case is a counter blast of the earlier case lodged by the revisionist against the informant as Case Crime No. 1851 of 2019, under Sections 406, 420, 467, 468, 471, 384, 388, 389, 504, 506 & 120-B IPC, Police Station-Surajpur, District-Gautam Budh Nagar.

(IV) The dispute between both the parties is civil in nature than the criminal, therefore, the informant should be asked to avail appropriate remedy as may be permissible under law before appropriate court of law/forum, which he has not opted.

(V) The company in the name and style of M/s. Family of Dry Fruits India Pvt. Ltd. has not been made an accused in the present criminal proceedings, which is mandatory as per law. The present case comes under the ambit of the Sales of Goods Act, 1930 and Section 55 of the said Act will apply in the facts of the present case. There is no exchange of sale of goods nor any goods had been sold by the parties. The revisionist had no concern with any of the firm and company mentioned in the first information report except M/s. Family of Dry Fruits, which is still in operation and the revisionist is the Ex-Director of the said company.

(VI) In paragraph no. 37, the revisionist has detailed as many as 33 criminal cases, which have been initiated against him and he has also satisfactorily explained about the said cases.

(VII) The concerned Magistrate has erred in entertaining the transit anticipatory bail and had exceeded his jurisdiction by observing that the Rohini Court, Delhi has no jurisdiction while passing the impugned order dated 3rd November, 2022. In the similar matter, this Court in

Criminal Misc. Anticipatory Bail Application No. 5284 of 2022 (Amita Garg and 6 others vs. State of U.P. and 3 others) vide order dated 16.07.2022 had allowed the petition. In the present case, there is a violation of fundamental rights of Article 21 of the Constitution of India. The revisionist is in illegal custody and the same is evident from the order dated 03.11.2022. At the time of hearing in the Supreme Court, the Court had orally directed the revisionist to file the case before proper forum as the custody is illegal and the Hon'ble Supreme Court is not the correct forum.

(VIII) The informant had not mentioned in what manner, the revisionist is involved in the aforesaid firm and company neither any specific averment had been made that the revisionist is responsible for the day-to-day affairs of the company, which is necessary for the adjudication of the case. The revisionist is not the beneficiary/share holder/signatory in any of the company mentioned in the first information report except M/s. Family of Dry Fruits India Pvt. Ltd.

(IX) The revisionist had not prepared any forged document nor anything incriminating has been recovered from his possession or his pointing out so as to connect him with the present criminal case.

(X) The revisionist has been implicated in the present case due to the fact that he had business rivalry with one Devendra Bansal against whom, the revisionist had lodged the first information report but since the Police in connivance with Devendra Bansal had implicated the revisionist in the present case.

(XI) No offence is made out against the revisionists under Section 406

IPC as there is no entrustment of any property nor the revisionist had any dominion property nor the revisionist had dishonestly misappropriated or converted that property to his own use or disposed of that property in violation of any law prescribed. Further no offence is made out against the revisionists under Section 420 IPC as there is no intention of cheating from inception. Again, no offence is made out against the revisionist under Sections 467, 468, 471 IPC as the revisionist has not fabricated or made any document. Further no offence is made out against the revisionist under Section 506 IPC as the revisionist had not threatened or intimidated by any means. Lastly, no offence is made out against the revisionists under Section 120-B IPC as no conspiracy had been hatched by the revisionists nor they had entered into any type of conspiracy.

(XII) Regarding the illegal custody of the accused-revisionist, the judgment and order of this Court dated 18.06.1992, a copy of which has been enclosed as Annexure No. 11 to the affidavit accompanying the present criminal revision, has been referred to on behalf of the revisionist.

(XIII) As per Section 15 of the Code of Criminal Procedure, the Additional Chief Judicial Magistrate-II, Gautam Budh Nagar has no power to pass the order impugned, even when an order granting transit anticipatory bail to the revisionist has been passed by the Additional Sessions Judge, Rohini Court, Delhi dated 2nd November, 2023. The concerned Magistrate has misread and ignored the hierarchy while passing the order impugned.

On the cumulative strength of the aforesaid, learned counsel for the revisionist submits that since the revisionist has no motive whatsoever to commit the aforesaid offence and he is totally innocent of the charges levelled against him in the first information report, this Court while exercising its powers under Section 397/401 Cr.P.C. may quash the impugned order dated 03.11.2022 passed by the Second Additional Chief Judicial Magistrate, Gautam Budh Nagar in Case Crime No.-106 of 2021, under Sections 406, 420, 467, 468, 471 & 120-B IPC, Police Station-Surajpur, District-Gautam Budh Nagar.

10. Per contra, before considering the case on merit, Mr. Vinay Saran, learned Senior Advocate appearing on behalf of opposite party no.2 and the learned A.G.A. have made preliminary objection to the maintainability of the present instant criminal revision by contending that since the order impugned is an interim/interlocutory order, the present revision under Section 397/401 Cr.P.C. is not maintainable. On merits of the order impugned, they have also have opposed all the submissions made by the learned counsel for the revisionist by contending that there is no illegality or infirmity in the impugned order passed by the concerned Magistrate issuing "B" warrant and directing the accused-revisionist to appear before the Court of Additional Chief Judicial Magistrate-II, Noida, District Gautam Budh Nagar.

11. Mr. Saran also contends that the anticipatory bail would not lie and would not be maintainable if a person is already arrested and is in custody of police or judicial custody in relation to another criminal case, which may be for similar

offence or for different offences. In support of his plea, Mr. Saran has referred to the judgment of a learned Single Judge of the Rajasthan High Court dated 25th October, 2021 passed in S.B. Criminal Misc. Bail Application No. 9155 of 2019 (Sunil Kallani Vs. State of Rajasthan Through Public Prosecutor). Mr. Saran has also relied upon the judgment of a learned Single Judge of this Court dated 9th December, 2022 passed in Criminal Misc. Anticipatory Bail Application Under Section 438 Cr.P.C. No.-4633 of 2022 (Rajesh Kumar Sharma Vs. Central Bureau of Investigation).

12. This Court has considered the submissions made by the learned counsel for the parties and has gone through the records of the present criminal revision including the order impugned passed by the concerned Magistrate.

13. Firstly, this Court may record that all the submissions made by the learned counsel for the revisionist qua the legality, illegality or otherwise of the present criminal proceedings which have been initiated by opposite party no.2 against the revisionist cannot be examined by this Court while exercising its revisional power under Section 397/401 of Code of Criminal Procedure. The said submissions can only be examined by the Bench exercising its extraordinary power under Sections 482 Cr.P.C. This Court can only examine the correctness, legality, illegality or otherwise of the order which is under challenge in the present criminal revision.

14. The Apex Court in the case of **Amit Kapoor Vs. Ramesh Chander & Another** reported in (2012) 9 SCC 460 has opined that the jurisdiction of the court under Section 397 Cr.P.C. can be exercised

so as to examine the correctness, legality or propriety of an order passed by the trial court or the inferior court, as the case may be, whereas Section 482 Cr.P.C. confers a very wide power on the Court to do justice and to ensure that the process of the court is not permitted to be abused.

15. Paragraph nos. 12, 13, 18, 20 and 21 of the judgment in the case of **Amit Kapoor (Supra)**, which are relevant on the aforesaid issue, are being quoted herein below:

“12. Section 397 of the Code vests the court with the power to call for and examine the records of an inferior court for the purposes of satisfying itself as to the legality and regularity of any proceedings or order made in a case. The object of this provision is to set right a patent defect or an error of jurisdiction or law. There.M. 4th has to be a well- founded error and it may not be appropriate for the court to scrutinize the orders, which upon the face of it bears a token of careful consideration and appear to be in accordance with law. If one looks into the various judgments of this Court, it emerges that the revisional jurisdiction can be invoked where the decisions under challenge are grossly erroneous, there is no compliance with the provisions of law, the finding recorded is based on no evidence, material evidence is ignored or judicial discretion is exercised arbitrarily or perversely. These are not exhaustive classes, but are merely indicative. Each case would have to be determined on its own merits.

13. Another well-accepted norm is that the revisional jurisdiction of the higher court is a very limited one and cannot be exercised in a routine manner.

One of the inbuilt restrictions is that it should not be against an interim or interlocutory order. The Court has to keep in mind that the exercise of revisional jurisdiction itself should not lead to injustice ex facie. Where the Court is dealing with the question as to whether the charge has been framed properly and in accordance with law in a given case, it may be reluctant to interfere in exercise of its revisional jurisdiction unless the case substantially falls within the categories aforesaid. Even framing of charge is a much advanced stage in the proceedings under the Cr.P.C.

....

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

....

20. The jurisdiction of the Court under Section 397 can be exercised so as to examine the correctness, legality or propriety of an order passed by the trial court or the inferior court, as the case may be. Though the section does not specifically use the expression 'prevent abuse of

process of any court or otherwise to secure the ends of justice', the jurisdiction under Section 397 is a very limited one. The legality, propriety or correctness of an order passed by a court is the very foundation of exercise of jurisdiction under Section 397 but ultimately it also requires justice to be done. The jurisdiction could be exercised where there is palpable error, non-compliance with the provisions of law, the decision is completely erroneous or where the judicial discretion is exercised arbitrarily. On the other hand, Section 482 is based upon the maxim quando lex liquid alicuiconcedit, conceder videtur id quo res ipsa esse non protest, i.e., when the law gives anything to anyone, it also gives all those things without which the thing itself would be unavoidable. The Section confers very wide power on the Court to do justice and to ensure that the process of the Court is not permitted to be abused.

21. It may be somewhat necessary to have a comparative examination of the powers exercisable by the Court under these two provisions. There may be some overlapping between these two powers because both are aimed at securing the ends of justice and both have an element of discretion. But, at the same time, inherent power under Section 482 of the Code being an extraordinary and residuary power, it is inapplicable in regard to matters which are specifically provided for under other provisions of the Code. To put it simply, normally the court may not invoke its power under Section 482 of the Code where a party could have availed of the remedy available under Section 397 of the Code itself. The inherent powers under Section 482 of the Code are of a wide magnitude and are not as limited as the power under Section 397. Section 482 can be invoked where the order in question is neither an

interlocutory order within the meaning of Section 397 (2) nor a final order in the strict sense. Reference in this regard can be made to Raj Kapoor & Ors. Vs. State of Punjab & Ors. [AIR 1980 SC 258 : (1980) 1 SCC 43]}. In this very case, this Court has observed that inherent power under Section 482 may not be exercised if the bar under Sections 397 (2) and 397 (3) applies, except in extraordinary situations, to prevent abuse of the process of the Court. This itself shows the fine distinction between the powers exercisable by the Court under these two provisions. In this very case, the Court also considered as to whether the inherent powers of the High Court under Section 482 stand repelled when the revisional power under Section 397 overlaps. Rejecting the argument, the Court said that the opening words of Section 482 contradict this contention because nothing in the Code, not even Section 397, can affect the amplitude of the inherent powers preserved in so many terms by the language of Section 482. There is no total ban on the exercise of inherent powers where abuse of the process of the Court or any other extraordinary situation invites the court's jurisdiction. The limitation is self-restraint, nothing more. The distinction between a final and interlocutory order is well known in law. The orders which will be free from the bar of Section 397 (2) would be the orders which are not purely interlocutory but, at the same time, are less than a final disposal. They should be the orders which do determine some right and still are not finally rendering the Court functus officio of the lis. The provisions of Section 482 are pervasive. It should not subvert legal interdicts written into the same Code but, however, inherent powers of the Court unquestionably have to be read and construed as free of restriction."

16. Before coming to the merits of the order impugned, it would be worthwhile to reproduce the relevant portion of the order passed by the Rohini Court, Delhi dated 2nd November, 2022, which reads as follows:

"Findings:

Considering the submissions and without going into the merits of the case, I am of the opinion that applicant/accused deserves limited opportunity to avail his legal remedies as permissible under Law Therefore, in the event of arrest the applicant/accused Mohit Goel shall be released on bail on furnishing a personal bond in the sum of Rs. 50,000/- with one surety in the like amount to the satisfaction of the arresting officer. This order shall operate for a period of 8 days during, which period the applicant/accused may move an appropriate application before the Court concerned at Noida, UP or before the Hon'ble High Court of .M. 4thJudicature at Allahabad, UP. During the said period the following conditions are being imposed upon the accused:-

"(1) Applicant/accused shall not leave the country without permission from the court concerned.

(2) Applicant/accused shall immediately provide his address and mobile number to the Investigating Officer and shall also share his location with the IO.

(3) The applicant/accused shall not threaten or contact the complainant and shall not tamper with the evidence.

This order of Protection shall stands automatically be vacated on

11.11.2022. No further extension shall be given to the applicant/accused.

Needless to say that the accused shall surrender after the expiry of the said period in case no further protection is granted to him, while availing his legal remedies.

It is clarified that nothing mentioned herein shall tantamount to expression of opinion on the merits of the case.

With these observations, bail application stands disposed of.

Copy of this order be given dasti to the Ld. Counsel for applicant/accused."

17. Now coming on the merits of the order impugned. Before the concerned Magistrate, it has been stated by the Public Prosecuting Officer that a summons warrant/"B" warrant dated 19-10-2022 has been sent by the court against the accused to Tihar District Jail, due to which the accused has been in custody. It has also been stated by the Public Prosecuting Officer that the jurisdiction to grant transit remand to the accused under Section 177 Cr.P.C. read with Chapter-XXXIII is not within the jurisdiction of ASJ (Electricity) (N-W) Rohini Court, Delhi. It has also been stated by the Public Prosecuting Officer that since the concerned prison was ordered to present the accused in the Court of concerned Magistrate vide B-warrant dated 19-10-2022 against the accused and the accused was directly/indirectly in the custody of the court so in that case the accused cannot be given the benefit of anticipatory bail.

18. After considering the submissions made by the learned counsel for the

accused-revisionist and the Public Prosecuting Officer, the concerned Magistrate has recorded its finding that in the present case, the accused presented in the court in custody and no application for regular bail has been made on his behalf. The concerned Magistrate has further recorded that the ASJ (Electricity) (N-W) Rohini Court, Delhi has passed an order directing the Investigating Officer. On the basis of aforesaid finding the concerned Magistrate vide order impugned has come to the conclusion that the basis for accepting the remand application submitted by the Investigating Officer is sufficient. The remand of the accused is accepted till 16-11-2022. The accused should be summoned to Tihar Jail on 16-11-2022 after taking the warrant "B" under Section 167 Cr.P.C.

19. On overall assessment and evaluation of the facts as cropped up before this Court, there are two legal issues, which need deeper scrutiny by this Court while deciding the present criminal revision and examining the order impugned:

(i) Whether the order impugned is legally passed by the Additional Chief Judicial Magistrate-II, Gautam Budh Nagar dated 3rd November, 2022, and

(ii) Whether the present criminal revision against the order impugned is legally maintainable or not?

20. Before coming on the first issue, this Court may record that there is no legislation or law which defines "transit anticipatory bail" in definitive or specific terms. The 41st Law Commission Report in 1969 recommended the provision of Anticipatory bail to safeguard the right to life and personal liberty of a person under

Article 21 of the Constitution of India. In the Code of Criminal Procedure 1973, on such recommendation, provision of Anticipatory Bail was inserted in Section 438. The term "transit" means the act of being moved from one place to another while the word "anticipatory bail" means a temporary release of any accused person who is anticipating arrest, therefore, transit anticipatory bail refers to bail granted to any person who is apprehending arrest by police of a State other than the State he is presently located in.

21. Section 438 of the Code of Criminal Procedure specifies direction for grant of bail to a person apprehending arrest and moreover confers power only upon the High Court and the Court of Sessions to grant anticipatory or transit bail if they deem fit. At the point when an individual has the motivation to accept that he might be arrested on an allegation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a grant of anticipatory bail. The Court may, as it thinks fit, direct that in case of such arrest, he will be released on anticipatory bail.

22. Nonetheless, transit anticipatory bail is different from ordinary bail. Ordinary bail is granted after arrest, releasing the accused from custody while anticipatory bail is granted in the anticipation of arrest i.e., it precedes detention of the accused and is effective immediately at the time of the arrest. In plain words, when an accused is arrested in accordance with the order of the court and whereas .M. 4th the accused needs to be tried in some other competent court having jurisdiction in the aforementioned matter, the accused is given bail for the transitory period i.e., the time period required for the

accused to reach that competent court from the place he is arrested in.

23. This may further record that transit anticipatory bail is protection from arrest for a definite period as granted by the Court granting such transit anticipatory bail. The mere fact that an accused has been granted transit anticipatory bail, does not mean that the regular court, under whose jurisdiction the case would fall, would extend such transit anticipatory bail and would convert such transit anticipatory bail into anticipatory bail. Upon the grant of transit anticipatory bail, the accused person, who has been granted such transit anticipatory bail, has to apply for anticipatory bail or regular bail before the regular court.

24. This Court has no room to doubt that the order dated 2nd November, 2022 granting transit anticipatory bail to the revisionist, who was already in jail in another case passed by Additional Sessions Judge, Rohini Court, Delhi is superior/higher Court than the court of Additional Chief Judicial Magistrate-II, Gautam Budh Nagar, which has passed the order impugned issuing "B" warrant against the revisionist and also directed him to appear in jail. However, in the order granting transit anticipatory bail to the revisionist, it has specifically been provided that the said order shall operate for a period of 8 days during which period the accused-revisionist may move an appropriate application before the concerned Court at Noida, U.P. or before the Hon'ble High Court of Judicature at Allahabad, U.P., meaning thereby that as and when the accused-revisionist appears/surrenders before the concerned Court of Magistrate at Noida or he is produced by the Police from the Tihar Jail,

Delhi before the said Court, the order granting transit anticipatory bail to the revisionist by the Additional Sessions Judge, Rohini Court, Delhi would come to an end automatically. The said protection had been given to the revisionist for a limited place i.e. Tihar Jail, Delhi to reach Court of concerned Magistrate at Noida. Therefore, the concerned Magistrate while passing the order impugned has not committed any illegality or infirmity as also he has not mislead/overlooked or ignored the order of the Additional Sessions Judge, Rohini Court, Delhi dated 2nd November, 2022. As such, the submission of the learned counsel for the revisionist that as per Section 15 of the Code of Criminal Procedure, the concerned Magistrate has no power to pass the order impugned issuing "B" warrant against the revisionist, has no legs to stand, as Section 15 is not applicable in the facts of the present case.

25. In view of the aforesaid, this Court finds that the issue no.1 goes against the revisionist, as there is no illegality or infirmity in the impugned order passed by the concerned Magistrate.

26. Apart from the above, this Court also finds substance in the submission made by the learned counsel for opposite party no.2 that any application filed on behalf of an accused who is already in jail in another criminal case for grant of anticipatory bail is not maintainable.

27. This Court is of the considered opinion that anticipatory bail under Section 438 Cr.P.C. on behalf of a person who is already in custody with the Police or is already in jail in another criminal case would not lie and would be nothing but travesty of justice in allowing the

anticipatory bail to such an accused (Ref. **Narinderjit Singh Sahni & Another Vs. Union of India** reported in (2002) 2 SCC 210).

28. It is also to be noted that in the order impugned itself it has been recorded that the accused-revisionist has not made any application for grant of anticipatory bail before the concerned Magistrate.

Now this Court comes on the second issue.

29. This Court further finds substance in the submission made by the learned counsel for opposite party no.2 and the learned A.G.A. that the present criminal revision under Section 397/401 Cr.P.C. is not maintainable against the order impugned which is an interim/interlocutory order, whereby the concerned Magistrate has only issued "B" warrant against the revisionist and also directed him to appear before the Court of Additional Chief Judicial Magistrate-II, Noida, District Gautam Budh Nagar on the application made by the Investigating Officer. On this aspect of the matter, when the Court made pointed query to the learned counsel for the revisionist as to under which provision of law, the present criminal revision against an interlocutory/interim order is maintainable, he could not answer the same.

30. The Apex Court in the case of **Amar Nath & Others Vs. State of Haryana & Others** reported in 1977 0 AIR (SC) 2185 has held as follows:

"Thus, for instance, orders summoning witnesses, adjourning cases, passing orders for bail, calling for reports and such other steps in aid of the pending

proceeding, may no doubt amount to interlocutory orders against which no revision would lie under Section 397 (2) of the Code of Criminal Procedure."

(Emphasis supplied)

31. The said judgment of the Apex Court has recently been followed by another Division Bench of the Apex Court in the case of **Honnaiah T.H. Vs. State of Karnataka & Others** reported in 2022 SCC OnLine SC 1001. The Apex Court in the case of Honnaiah T.H. (Supra) has opined as follows:

"13. There would be a serious miscarriage of justice in the course of the criminal trial if the statement were not to be marked as an exhibit since that forms the basis of the registration of the FIR. The order of the trial judge cannot in these circumstances be treated as merely procedural or of an interlocutory in nature since it has the potential to affect the substantive course of the prosecution. The revisional jurisdiction under Section 397 CrPC can be exercised where the interest of public justice requires interference for correction of manifest illegality or the prevention of gross miscarriage of justice. A court can exercise its revisional jurisdiction against a final order of acquittal or conviction, or an intermediate order not being interlocutory in nature. In the decision in Amar Nath v State of Haryana, this Court explained the meaning of the term "interlocutory order" in Section 397 (2) CrPC. This Court held that the expression "interlocutory order" denotes orders of a purely interim or temporary nature which do not decide or touch upon the important rights or liabilities of parties. Hence, any order which substantially affects the right of the

parties cannot be said to be an "interlocutory order". Speaking for a two-Judge Bench, Justice Murtaza Fazal Ali observed:

*"6. [...] It seems to us that the term "interlocutory order" in Section 397 (2) of the 1973 Code has been used in a restricted sense and not in any broad or artistic sense. It merely denotes orders of a purely interim or temporary nature which do not decide or touch the important rights or the liabilities of the parties. Any order which substantially affects the right of the accused, or decides certain rights of the parties cannot be said to be an interlocutory order so as to bar a revision to the High Court against that order, because that would be against the very object which formed the basis for insertion of this particular provision in Section 397 of the 1973 Code. Thus, for instance, **orders summoning witnesses, adjourning cases, passing orders for bail, calling for reports and such other steps in aid of the pending proceeding, may no doubt amount to interlocutory orders against which no revision would lie under Section 397 (2) of the 1973 Code.** But orders which are matters of moment and which affect or adjudicate the rights of the accused or a particular aspect of the trial cannot be said to be interlocutory order so *Amit Kapoor v Ramesh Chander*, (2012) 9 SCC 460; *Sheetala Prasad v Sri Kant*, (2010) 2 SCC 190 6 (1977) 4 SCC 137 as to be outside the purview of the revisional jurisdiction of the High Court."*

(Emphasis supplied)

14. Explaining the historical reason for the enactment of Section 397 (2) CrPC, this Court observed in *Amar Nath* (supra) that the wide power of revision of

Court, Court No. 2, Bulandshahr in Maintenance Case No. 174 of 2017 (Km. Huma Vs. Mohd. Arif) under Section 125 Cr.P.C.

3. The factual matrix of the case relevant from criminal revision are that applicant Km. Huma moved an application for maintenance under Section 125 Cr.P.C before Principal Judge, Family Court through their natural guardian mother Smt. Madina, wife of Mohd. Arif (present revisionist), seeking maintenance to the tune of Rs. 5,000/- per month. The applicant stated that marriage of Smt. Madina and opposite party No.2 took place around year 2000. Smt. Madina, the natural guardian of the applicant was subjected to matrimonial cruelty by opposite party, her husband (Mhd. Arif) and her in-laws due to non-fulfilment of demand of dowry. Four children were born out of their wedlock of which one male child died instantly after birth of three female child namely, Km. Uzma,

Km. Rehma and Km. Huma (present applicant) survived. The husband and in-laws of Smt. Madina assaulted her badly and tried to kill her on 19.12.2014 and left her near Busstand, Anupshahr when she was pregnant. She took shelter at her parental place and gave birth to female child on 10.07.2015, her name was christened as Huma. The opposite party (Mhd. Arif) works in a primary school as a teacher and was getting salary around Rs. 45,000/- at the time of filing of application in the year 2017. Initially, Smt. Madina, the mother and guardian of respondent No. 2 filed an application for maintenance against her husband which was registered as Maintenance Case No.155 of 2015, wherein she sought maintenance for herself as well as for her two minor daughters

Uzma and Rehnuma from her husband as she was deserted by her husband. The present applicant was not born at that time. The Principal Judge, Family Court Bulandshahr allowed the said application partly vide judgement and order dated 10.03.2017 and awarded monthly maintenance to the applicants Smt. Madina to the tune of Rs. 4,500/- and her minor daughters Uzma and Rehnuma to the tune of Rs. 1,500/-. Thus, the Court have awarded monthly maintenance to the tune of total Rs. 7,500/- to Smt. Madina and her two daughters. Subsequently, Smt. Madina filed an application for various protection order including monetary relief under Section 12 of Protection of Women from Domestic Violence Act before Court of A.C.J.M. Bulandshahr, which was dismissed by order dated 29.10.2020 passed by learned A.C.J.M. Bulandshahr. The applicants filed a Criminal appeal under Section 29 of Protection of Women from Domestic Violence Act, which was decided ex-parte vide order dated 20.07.2022 passed by learned Additional Sessions Judge, F.T.C., Court No.2 Bulandshahr, whereby the appellate court allowed the appeal of Smt. Madina and others and set aside the order dated 20.10.2020 passed by learned Magistrate, apart from permitting the applicants to live in one room in the house of opposite party Mhd. Arif and others, the court awarded maintenance to the tune of Rs.5,000/- and Rs. 3,000/- total to Rs. 8,000/- per month from the date of order of Rs. 1 lakh lump-sum payment was also awarded as compensation as one time payment to the applicants Smt. Madina and her three minor daughters. The said order was challenged by present revisionist and his family members who were respondents in the case of Domestic Violence Act. In an application under Section 482 Cr.P.C. No.

25268 of 2022 Mhd. Arif and 7 others Vs. State of U.P. and 4 others, wherein a co-ordinate Bench of this Court considered the entire issue in the light of judgment of Hon'ble Apex Court in **Rajnesh Vs. Neha and another (2021) 2 SCC 324** and affirmed impugned order dated 20.07.2022 passed by learned Additional Sessions Judge and dismissed the application filed by present revisionist and his family members. In that order, it was also observed that admittedly, no application has been moved by the applicants to set aside the ex-parte judgment dated 20.07.2022 in Application under Section 482 Cr.P.C. A prayer was made to quash the order dated 20.07.2022 passed in Criminal Appeal No. 33 of 2020 directed against order dated 20.10.2020 passed in Misc. Criminal Case No. 55 of 2016 (Arif and others Vs. Smt. Madina and others) under Section 12,18,19,20,22 of Protection of Women from Domestic Violence Act, P.S.- Anupshahar, District- Bulandhshar, whereby the appellants were directed to pay Rs. 8,000/- per month and maintenance to the applicants along with Rs. 1 lakh as one time payment to them. In that case, this Court in order dated 16.05.2023, an application under Section 482 Cr.P.C., this Court did not sustain the contention of learned counsel for the appellants that the judgment of 20.07.2022 passed in aforesaid criminal appeal No. 33 of 2020 was having overlapping effect as by order dated 10.03.2017 in proceeding under Section 125 Cr.P.C., the trial Court awarded Rs. 4,500/- to Smt. Madina and Rs. 1,500/- each to her minor daughters, thus the total amount of Rs. 7,500/- per month was awarded as maintenance, which was payable by the husband of opposite party No. 2. This Court also observed that later on, on the birth of third daughter Huma an application under Section 125 Cr.P.C. was

moved on behalf of her by her mother (Smt. Madina) and a further maintenance amount of Rs. 4,000/- was also awarded to her from the date of order and at the rate of Rs. 1,500/- from the date of filing of application to date of order dated 20.12.2022. Thus, total maintenance awarded against the present revisionist and payable to present respondent No. 2, her mother and siblings comes to Rs. 19,500/- per month. This Court placed reliance on contention of opposite party Nos. 2 to 5 that the applicant Mohd. Arif was getting salary of Rs. 59,800/- per month in the year 2019 and this amount must have increased by now and the maintenance of Rs. 11,500/- awarded vide order under Section 125 Cr.P.C. and Rs. 8,000/- as the ex-parte judgment dated 20.07.2022 passed by learned Additional Sessions Judge in appeal under Section 29 of Domestic Violence Act.

4. Learned counsel for the revisionist submitted that revisionist is paying Rs. 8,000/- to his wife and his daughters in compliance of order dated 20.07.2022 in criminal appeal No. 33 of 2020 filed against order dated 29.10.2020, passed in Criminal Appeal No. 55 of 2016 under the proceedings of Domestic Violence Act. Opposite Party No. 2 has filed present maintenance Case No. 174 of 2017 under Section 125 Cr.P.C. which was dismissed by the court of first instance but in criminal appeal against said order, the Additional Principal Judge Family Court vide impugned order dated 20.12.2022 awarded her maintenance as cited above. In initial maintenance case under Section 125 Cr.P.C. No. 155 of 2015, the Maintenance was awarded to the tune of Rs. 7,500/- per month to Smt. Madina for maintenance for herself and her two minor daughters. The case of wife of revisionist Smt. Madina is

that her daughter was born on 10.07.2015 in her parental home as she had left her matrimonial home on 19.12.2014. The revisionist had filed a reply in said case in Maintenance Case No. 174 of 2017, wherein he stated that Km. Huma was born out of the wedlock of revisionist and his wife and she was born more than after 280 days of their separation. From perusal of ultrasound of Smt. Madina dated 23.01.2015, it reveals that pregnancy of Madina was about 8 weeks, the ultrasound of 07.04.2015, her pregnancy was about 18 weeks 4 days and from ultrasound report dated 22.06.2015, it reveals that pregnancy was 28 weeks 2 days and the tentative delivery date is shown as 2/3.09.2015. Thus, delivery of third daughter of Smt. Madina was not possible on 10.07.2015 as her third ultrasound was conducted on 22.06.2015, wherein her pregnancy was only 28 weeks 2 days. He further submitted that Smt. Madina has produced her ultrasound report, but not produced birth certificate of her third child before trial court which creates serious doubt regarding date of birth of respondent No. 2 Km. Huma as propounded by her mother in as much as Smt. Madina had lodged an F.I.R. against the revisionist, wherein she has stated that her pregnancy was near about 50 days and in adjournment application, she said that her daughter is born on 03.09.2015. Therefore, Smt. Madina herself stated two conflicting dates regarding birth of respondent No.2. The Trial Court has given wrong finding that from perusal of medical report, it is proved that she was born on 10.07.2015. wherein on file there is no such document as on record where date of birth of Km. Huma is mentioned. He lastly submitted that learned trial court has directed the revisionist to pay the maintenance to respondent No. 2 from date of filing of application without assigning

any reason, while it is very clear that revisionist has appeared before the trial Court at a very early stage and he has not committed fault in delayed adjudication of the matter. Therefore, he is not responsible for delay caused in decision of the case. Respondent no. 2 is not legitimate child of revisionist and he has wrongly made liable to pay maintenance to her separately. The impugned order dated 20.12.2022, is ex-facie illegal and contrary to the law, therefore, it is liable to be quashed by this Hon'ble Court.

5. Per contra, learned A.G.A. and learned counsel appearing for respondent No. 2 also submitted that there is no factual or legal error in impugned order passed by learned court below. The learned court below has affirmed a specific issue in this regard to the effect "whether Km. Huma is daughter of opposite party Mhd. Arift and decided this issue in affirmative after considering all the submissions made by learned counsel for parties and documents referred by the learned counsel for opposite party, who is present revisionist." The learned court below observed in impugned order that the tentative date of delivery of child is shown as 03.09.2015 in third ultrasound report, is tentative date and it cannot be regarded as conclusive. The date of delivery depends on many factors which affects the growth of foetus in the womb of the mother and tentative date of delivery given by doctor may get changed on basis of other medical standards. This court also observed that as the birth of respondent No. 2 Kumari Huma took place within 280 days of the final departure of mother of respondent No. 2 from her matrimonial house, the presumption of legitimacy is in favour of respondent No. 2. Therefore, on the basis of above submissions, learned counsel for respondent prayed that there is

no illegality in impugned order passed by court below and same deserves to be affirmed.

6. If we go through the ultrasound reports regarding pregnancy of Smt. Madina, the mother of respondent No. 2 filed as Annexure No. 5 to the present revision memo, we find that in third ultrasound of Smt. Madina dated 22.06.2015, the gestation was found to be 28 weeks 2 days and expected delivery date was shown as 02.09.2015. Whereas this is case of respondent side that third child born on 10.07.2005. The delivery of a child after 7 months of pregnancy is quite natural although, the normal period of delivery is considered as 9 months from the date of conception. The doctor has shown the delivery date as 02.09.2015 is said estimated date and that may not be treated conclusive. This is also case of respondent No. 2 that the delivery of respondent No. 2 took place at the place of her mother and not in hospital. No hospital record has been placed on record by either side in this respect. The statement in adjournment application moved by the counsel for the mother of respondent No. 2, before court below that the child was born on 03.09.2015 can also not be taken as conclusive proof of the fact that the respondent No. 2 was born on 03.09.2015 as this is a statement of party in her adjournment application filed through her counsel. Inasmuch as if we calculate admitted date of departure of Smt. Madina from place of revisionist to her parental place i.e. 19.12.2014 and for a sake of moment suppose that the child was born on 03.09.2015 as stated by revisionist even then the period of 257 days intervenes in between these two dates and thus, even in that situation also the birth of child is within 280 days. Section 112 of Evidence Act provides as under:-

Section 112 in The Indian Evidence Act, 1872

112. Birth during marriage, conclusive proof of legitimacy.—The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

7. In absence of any scientific proof of parenthood of respondent No. 2, there will be a presumption of legitimacy in her favour. In view of above statutory provision as she was born during the continuance of marriage between her mother and the revisionist and that too within 280 days after their separation and this is no case of revisionist that mother of respondent No. 2 has contracted marriage with some other person after getting separated from her husband.

8. So far as quantum of maintenance is concerned, learned trial court below has awarded maintenance to the tune of Rs. 1,500/- only from the date of filing of application to date of order and Rs. 4,000/- from the date of order to respondent No.2, who is admittedly third daughter of Smt. Madina, who claim that the daughter was born out of her wedlock with the revisionist. This Court in Application under Section 482 Cr.P.C. No. 25268 of 2022 also considered the payment capacity of the revisionist of the amount of maintenance awarded in different proceedings to different amount of maintenance awarded

to his wife Smt. Madina, her two minor daughters as well as her third daughter Km. Huma and if total amount of maintenance which is awarded against the revisionist in different proceedings is considered that comes to Rs. 19,500/-. This amount comes around 1/3 of the salary of the revisionist who is engaged in Government service and is a teacher in basic primary school. Therefore, the amount awarded by the court below to the respondent No. 2 cannot be considered as excessive, keeping in view the totality of facts and circumstances related to the case.

9. On the foregoing discussions, I find that there is no illegality, irregularity, perversity in the impugned order passed by court below. Present revision is devoid of merits and therefore, it is **dismissed** accordingly.

(2023) 9 ILRA 684
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.07.2023 &
16.08.2023

BEFORE

THE HON'BLE RAM MANOHAR NARAYAN
MISHRA, J.

Criminal Revision No. 800 of 2023

Karan Singh & Ors. ...Revisionists
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Revisionists:
 Sri Vijay Kumar Rai, Sri Tej Bahadur Rai

Counsel for the Respondents:
 G.A., Sri Anup Kumar, Sri Ram Das Yadav,
 Sri Santosh Kumar Dubey

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 397/401 -

revision – Section 239 – when accused may be discharged , Section 240 – framing of charge - Indian Penal Code, 1860 - Sections 420, 406 - revisional jurisdiction of the higher court is a very limited one and cannot be exercised in a routine manner - inbuilt restrictions - should not be against an interim or interlocutory order - revisional jurisdiction should be exercised on a question of law - when factual appreciation is involved, then it must find place in the class of cases resulting in a perverse finding - power is required to be exercised so that justice is done and there is no abuse of power by the court - Merely an apprehension or suspicion of the same would not be a sufficient ground for interference. (Para - 17,18)

Trial court rejected discharge application of accused-revisionists - deceived into executing a sale deed in favor of revisionist no. 2 - informant, who owned the plot, was intoxicated on day of deed's execution - accused were given an opportunity to prove their transactions and refute allegations - court noted that revisionists' documents couldn't be considered during hearing - hence revision. **(Para - 19)**

HELD:-Court below rightly observed in impugned order that documents filed by revisionist in support of their claim for discharge cannot be taken into account at the stage of hearing and disposal of discharge application. Court finds no reason to interfere with impugned order, as it is not irregular, illegal, or proprietary, and the charges against the accused revisionist are not groundless. **(Para - 19,20)**

Revision dismissed. (E-7)

List of Cases cited:

1. Mitesh Kumar J. Sha Vs The St. of Karn. & ors., 2021 0 Supreme (SC) 628
2. Sau. Kamal Shivaji Pokarnekar Vs The St. of Maha. & ors., 2019 0 Supreme (SC) 145
3. Amit Kapoor Vs Ramesh Chandra, (2012) 9 SCC 460

4. Sushila Agarwal Vs St. (NCT of Delhi) & anr.
, 2020 5 SCC 1

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

1. Counter affidavit has been filed and the same is taken on record.

2. Heard learned counsel for the revisionists, learned counsel for the opposite party no. 2 and learned A.G.A. for the State are present.

3. Instant criminal revision has been preferred against judgment and order dated 3.1.2023 passed by learned Judicial Magistrate-Ist, Hapur in Crl. Case No. 670 of 2022 (State Vs. Karan Singh and others), arising out of Case Crime No. 29 of 2022, under Sections 420, 406 IPC, P.S. Babugarh, District Hapur, whereby discharge application moved by the revisionist accused has been dismissed.

4. Factual matrix of the case are that opposite party no. 2 lodged an F.I.R. with P.S. concerned on 20.1.2022 against revisionists with averment that informant is a senior citizen and physically disabled person. He is Bhumidhar of Khasra No. 955, Area 0.2530 hectare agricultural land which he had purchased for earning livelihood for his family. His co-villager Karan Singh s/o Chhidda Singh asked him to be a witness in a gift deed which was to be executed by him in favour of his daughter-in-law Monika Tyagi and the informant conceded to be a witness of proposed gift deed, however, on 21.8.2019 when he reached at Sub-Registrar Officer, Hapur, accused persons had got him intoxicated by administering him liquor and made him to sign a sale deed with regard to said agricultural land in collusion with

Amarpal (revisionist no. 3). Informant came to know about this fraudulent deed when he got a copy of the same from Sub-Registrar Office. No consideration passed in respect of said sale deed and cheques which were described at the foot of sale deed belong to account of Karan Singh but the amount of cheques was not deposited in said account. In fact, no consideration passed between the vendor and vendee in respect of said sale deed.

5. Police investigated the case and filed charge sheet against accused revisionists after finding the complicity of accused persons in said offence. Accused persons were enlarged on anticipatory bail by the order of Court of Session.

6. Learned counsel for the revisionists submitted that the revisionists were enlarged on anticipatory bail vide order dated 20.1.2023. Dispute is essentially of civil nature, inasmuch as the informant/opposite party no. 2 has filed a civil suit in Court of Civil Judge, J.D.-Ist Hapur cited as Case No. 148 of 2019 (Husanchand Vs. Monika Tyagi) on 20.10.2019 in which he has sought relief of cancellation of alleged sale deed. Opposite party no. 2 never presented the cheques before his banker for encashment with mala fide intention. Revisionists are still prepared to pay the amount of Rs. 7,60,000/-. The present F.I.R. was lodged after two and half years of the incident with mala fide intention as the rate of land escalated; with a view to deprive the revisionist no. 2 for purchasing land. The F.I.R. was lodged on 20.1.2022 subsequent to filing of civil suit.

7. Learned counsel for the revisionist cited a judgment of Hon'ble Apex Court in the case of **Mitesh Kumar J. Sha Vs. The**

State of Karnataka and Ors., 2021 0 Supreme (SC) 628, wherein Hon'ble Apex Court in paragraph no. 44 has observed as under:-

44. Furthermore, in the landmark judgment of State of Haryana & Ors. Vs. Ch. Bhajan Lal and Ors. 9 regarding exercise of inherent powers under section 482 of CrPC, this Court has laid down following categories of instances wherein inherent powers of the can be exercised in order to secure the ends of justice. These are:-

"(1) where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused;

(2) where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code;

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

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

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

(6) where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party; (7) where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

8. Learned court below has dismissed the application for discharge moved by the revisionist against the weight of evidence on record. Out of total consideration of Rs. 7,60,000/- Rs. 10,000/- was paid by the revisionist in cash and for remaining amount, two post dated cheques bearing date 15.1.2020 for Rs. 6,00,000/- and other cheque bearing date 15.10.2019 of Rs. 1,60,000/- were given to the vendor (opposite party no. 2).

9. It is further submitted that it is settled law that while one civil proceeding is pending, criminal proceedings on the same cause of action is not maintainable but this fact has not been considered by the court below, in fact no offence has been committed by the revisionist and they have falsely been implicated in the present case due to mala fide intention, therefore

revision should be allowed and the impugned order may be set aside.

complaint, the criminal proceeding shall not be interdicted."

10. Per contra, learned counsel for the opposite party no. 2 and learned A.G.A. for the State submitted that in counter affidavit, photocopy of the disputed cheques has been filed at page nos. 30 to 31, which reveals that the date mentioned in cheques is not identical to that mentioned in disputed sale deed, as the cheque of Rs. 1,60,000/- bears date 15.10.2019 and the cheque amounting to Rs. 6,00,000/- bears the date of 15.1.2020 whereas in sale deed date of cheques is mentioned as 15.1.2020 and 15.10.2020 respectively.

11. Learned counsel for the respondent also cited a judgment of Hon'ble Apex Court in the case of *Sau. Kamal Shivaji Pokarnekar Vs. The Stat of Maharashtra and Ors.*, 2019 0 Supreme (SC) 145, wherein Hon'ble Apex Court in paragraph no. 9 has observed as under:-

"9. Having heard the learned Senior Counsel and examined the material on record, we are of the considered view that the High Court ought not to have set aside the order passed by the Trial Court issuing summons to the Respondents. A perusal of the complaint discloses that prima facie, offences that are alleged against the Respondents. The correctness or otherwise of the said allegations has to be decided only in the Trial. At the initial stage of issuance of process it is not open to the Courts to stifle the proceedings by entering into the merits of the contentions made on behalf of the accused. Criminal complaints cannot be quashed only on the ground that the allegations made therein appear to be of a civil nature. If the ingredients of the offence alleged against the accused are prima facie made out in the

12. It is settled law that on same set of facts civil and criminal liability both may occur and there is no prohibition of initiating criminal proceedings where on the basis of similar facts, criminal liability is also made out against accused persons. In disputed cheques, name of drawee is not mentioned which also shows mala fide intention of revisionist from the very beginning. Revisionist no. 1 never deposited the amount covered in said cheques in his account to get said cheques encashed by drawee. In fact, opposite party no. 2 never intended to execute a sale deed of land and he was defrauded by the revisionist regarding nature of instrument and he was made to execute sale deed in manipulation of a gift deed.

13. Investigating officer recorded statements of bank officer, Ravish Kumar under Section 161 Cr.P.C. who stated that maximum balance lying in the account of Karan Singh (revisionist no. 1) between August, 2019 to February, 2022 was only Rs. and said cheques were issued by his bank but the amount thereof has not been debited from the bank as yet.

14. He lastly submitted that this is admitted fact that possession of respondent no. 2 is still continuing on the land shown to have been sold to revisionist no. 2. There is no infirmity or illegality in impugned order passed by learned court below, therefore, the revision is liable to be dismissed. Accused revisionist is a man of criminal antecedent and his criminal history is mentioned in counter affidavit.

15. Discharge application was filed by the revisionist pursuant to order of this

Court passed in Application under Section 482 Cr.P.C. No. 32456 of 2022, wherein this Court while dismissing the prayer made by the present revisionist, for quashing the charge sheet, non bailable warrant issued by the court as well as entire proceedings in present Case Crime No. 29 of 2022, under Sections 420, 406 IPC, P.S. Babugarh, District Hapur in the court of Judicial Magistrate, Hapur, gave an opportunity to accused persons to appear before court concerned within one month and move an application for discharge and the same shall be considered and disposed of by the court concerned in accordance with law after affording opportunity of hearing to both the parties. It was also directed that for a period of one month and till disposal of application for discharge, no coercive action shall be taken against the applicants. The accused persons moved an application under Section 239 Cr.P.C. praying for discharge which was dismissed by impugned order by the trial court and it is also observed that therein that as accused persons are not enlarged on bail till date and they are having every knowledge of the case, therefore, let non bailable warrant be issued against them.

16. Section 239 Cr.P.C. and Section 240 Cr.P.C. read as under:-

"239. When accused shall be discharged. If, upon considering the police report and the documents sent with it under section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing.

240. Framing of charge.

(1) If, upon such consideration, examination, if any, and hearing, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused.

(2) The charge shall then be read and explained to the accused, and he shall be asked whether he pleads guilty of the offence charged or claims to be tried."

17. From perusal of above provisions, it is obvious that magistrate can only discharge an accused where it is found that discharge is groundless and while discharging the accused in such case he will record the reasons for so doing. Hon'ble Apex Court in **Amit Kapoor Vs. Ramesh Chandra (2012) 9 SCC 460**, considered scope of provisions of Section 397, 482 Cr.P.C. at length in a case where High Court had quashed the charge framed against respondent under Section 306 IPC in a criminal revision while exercising its jurisdiction under Section 397 Cr.P.C. and 482 Cr.P.C. Hon'ble Apex Court held that well-accepted norm is that the revisional jurisdiction of the higher court is a very limited one and cannot be exercised in a routine manner. One of the inbuilt restrictions is that it should not be against an interim or interlocutory order. The Court has to keep in mind that the exercise of revisional jurisdiction itself should not lead to injustice ex facie. Where the Court is dealing with the question as to whether the charge has been framed properly and in accordance with law in a given case, it may

be reluctant to interfere in exercise of its revisional jurisdiction unless the case substantially falls within the categories aforesaid. Even framing of charge is a much advanced stage in the proceedings under the Cr.P.C. Right from the case of State of West Bengal & Ors. v. Swapan Kumar Guha & Ors. [(1982) 1 SCC 561], which was reiterated with approval in the case of State of Haryana & Ors. v. Bhajan Lal & Ors. [1992 Supp. (1) SCC 335], the courts have stated the principle that if the FIR does not disclose the commission of a cognizable offence, the Court would be justified in quashing the investigation on the basis of the information as laid or received. It is further stated that the legal position appears to be that if an offence is disclosed, the court will not normally interfere with an investigation into the case and will permit investigation into the offence alleged to have been committed; if, however, the materials do not disclose an offence, no investigation should normally be permitted. Whether an offence has been disclosed or not, must necessarily depend on the facts and circumstances of each case. If on consideration of the relevant materials, the Court is satisfied that an offence is disclosed, it will normally not interfere with the investigation into the offence and will generally allow the investigation into the offence to be completed in order to collect materials for proving the offence. In Bhajan Lal's case (supra), the Court also stated that though it may not be possible to lay down any precise, clearly defined, sufficiently channelized and inflexible guidelines or rigid formulae or to give an exhaustive list of myriad kinds of cases wherein power under Section 482 of the Code for quashing of an FIR should be exercised, there are circumstances where the Court may be justified in exercising such jurisdiction.

These are, where the FIR does not prima facie constitute any offence, does not disclose a cognizable offence justifying investigation by the police; where the allegations are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused; where there is an expressed legal bar engrafted in any of the provisions of the Code; and where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge. Despite stating these grounds, the Court unambiguously uttered a note of caution to the effect that power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too, in the rarest of rare cases; the Court also warned that the Court would not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice.

18. The above-stated principles clearly show that inherent as well as revisional jurisdiction should be exercised cautiously. If the jurisdiction under Section 482 of the Code in relation to quashing of an FIR is circumscribed by the factum and caution afore-noticed, in that event, the revisional jurisdiction, particularly while dealing with framing of a charge, has to be even more limited. Framing of a charge is an exercise of jurisdiction by the trial court in terms of Section 228 of the Code, unless the accused is discharged under Section

227 of the Code. Under both these provisions, the court is required to consider the 'record of the case' and documents submitted therewith and, after hearing the parties, may either discharge the accused or where it appears to the court and in its opinion there is ground for presuming that the accused has committed an offence, it shall frame the charge. Once the facts and ingredients of the Section exists, then the Court would be right in presuming that there is ground to proceed against the accused and frame the charge accordingly. This presumption is not a presumption of law as such. The satisfaction of the court in relation to the existence of constituents of an offence and the facts leading to that offence is a sine qua non for exercise of such jurisdiction. It may even be weaker than a prima facie case. There is a fine distinction between the language of Sections 227 and 228 of the Code. Section 227 is expression of a definite opinion and judgment of the Court while Section 228 is tentative. Thus, to say that at the stage of framing of charge, the Court should form an opinion that the accused is certainly guilty of committing an offence, is an approach which is impermissible in terms of Section 228 of the Code. It may also be noticed that the revisional jurisdiction exercised by the High Court is in a way final and no inter court remedy is available in such cases. Of course, it may be subject to jurisdiction of this court under Article 136 of the Constitution of India. Normally, a revisional jurisdiction should be exercised on a question of law. However, when factual appreciation is involved, then it must find place in the class of cases resulting in a perverse finding. Basically, the power is required to be exercised so that justice is done and there is no abuse of power by the court. Merely an apprehension or suspicion of the same

would not be a sufficient ground for interference in such cases.

19. In present case, learned trial court has rejected the discharge application moved by accused-revisionist while passing a reasoned order and discussing the facts of the case at length. This is admitted case that accused persons belong to one family. The allegation is that accused persons got a sale deed executed in the favour of Monika by playing deception on the informant who was owner of plot in question. It is also alleged that said sale deed was got executed by the informant at the instance of accused persons by keeping him in dark regarding nature of instrument which he was going to execute. The informant executed the said sale deed in the impression that he was to be witness of gift deed to be executed by accused Karan in favour of his daughter-in-law Monika Tyagi regarding his own land and on the date of execution of sale deed he was intoxicated by accused persons. Even cheques which were mentioned at the foot of disputed sale deed, were not drawn on bank account of accused Karan and not on account of purchaser Smt. Monika Tyagi. The cheques were bearing the name of payee (vendor). Even the fund was insufficient to encash the said cheques. All these facts cannot be ignored at this stage and accused persons will get opportunity to establish their bona fide alleged transaction and refute the allegations made in F.I.R. as well as in statement of witnesses recorded under Section 161 Cr.P.C. Learned court below has rightly observed in impugned order that the documents filed by the revisionist in support of their claim for discharge cannot be taken into account at the stage of hearing and disposal of discharge application.

20. On facts of the case a prima facie case is made out against accused persons to

put them on trial for the charges levelled against them and it cannot be held that the charge against accused revisionist is groundless, therefore, I find no good reason to interfere in impugned order passed by learned court below as it does not suffer from irregularity, illegality or any proprietary. Revision is devoid of merit and is liable to be dismissed. Revision stands dismissed, however, as offence is punishable with maximum term of seven years of imprisonment, it is directed that the revisionists shall surrender before the concerned court below within one month from today and in case a regular bail application is filed, the same be decided in view of the law laid down by the Supreme Court in case of *Satender Kumar Antil vs. Central Bureau of Investigation and another* reported in 2022 SCC OnLine SC 825.

21. For the period of one month from today or till the time of surrender of the revisionists before the concerned court below, whichever is earlier, no coercive action shall be taken against the revisionists, in the above case.

22. With the above observations and directions, this application is disposed of.

Heard learned counsel for the revisionists, learned counsel for the respondent no. 2 and learned A.G.A. for the State-respondents.

2. This is correction application of the order dated 20.7.2023.

3. Learned counsel for the revisionists submitted that while dismissing the present criminal revision, this Court observed in last page of the order dated 20.7.2023 as follows:-

".....however, as offence is punishable with maximum term of seven years of imprisonment, it is directed that the revisionists shall surrender before the concerned court below within one month from today and in case a regular bail application is filed, the same be decided in view of the law laid down by the Supreme Court in case of Satender Kumar Antil vs. Central Bureau of Investigation and another reported in 2022 SCC OnLine SC 825.

For the period of one month from today or till the time of surrender of the revisionists before the concerned court below, whichever is earlier, no coercive action shall be taken against the revisionists, in the above case."

4. It is further submitted that as above direction is in conflict with the order passed by Additional Session Court/F.T.C., Court No. 2 in Second Anticipatory Bail Application No. 131 of 2023 (Karan Singh and two others Vs. State), whereby the court below vide order dated 20.1.2023 allowed the second anticipatory bail application of the revisionist and enlarged them on anticipatory bail subject to certain conditions without fixing any time limit and the anticipatory bail order will be treated to be applicable till conclusion of trial in pursuance of directions of Apex Court in the case of ***Sushila Agarwal Vs. State (NCT of Delhi) and Another, 2020 5 SCC 1***, and hence there is no need to issue any directions regarding surrender of the accused before court below and seeking regular bail.

5. Per contra, learned counsel for the private respondent submitted that conduct of the accused deserves no leniency but he did not dispute the fact that accused

revisionists were enlarged on anticipatory bail by orders of Additional Session Court and same order has not been set aside by any competent court.

6. Correction application is hereby **allowed**.

7. Aforesaid cited observations of this Court stand expunged in final order dated 20.7.2023.

8. This order shall be treated as part of the order dated 20.7.2023.

(2023) 9 ILRA 692

**REVISIONAL JURISDICTION
CRIMINAL SIDE**

DATED: ALLAHABAD 20.07.2023

BEFORE

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

Criminal Revision No. 1026 of 2023

Dev Narain	...Revisionist
Versus	
State of U.P. & Anr.	...Respondents

Counsel for the Revisionist:
Sri Abhay Raj Yadav, Sri V.K. Ojha

Counsel for the Respondents:
G.A.

(A) Criminal Law - Revision - Indian Penal Code, 1860 - Sections 498-A, 304-B & 323- Dowry prohibition Act, 1961 - Section 3/4 , The Code of Criminal Procedure, 1973 - Section 216 - Court may alter charge - Court may alter or add to any charge at any time before judgment is pronounced but alteration of charge and deletion of charge hold different field and these two cannot be intermingled, otherwise it will cause miscarriage of justice - trial court in

exercise of its powers under Section 216 Cr.P.C. cannot delete the charges framed by it. (Para - 9,11)

Petitioner seeks deletion of a charge of conspiracy - application moved under Section 216 Cr.P.C. by revisionist - for alteration of charges framed against him - rejected by court below - hence revision. **(Para - 4)**

HELD:-Deletion of a charge not permissible under Section 216 of the Code. Charge once framed must lead to either acquittal or conviction at the conclusion of trial. No illegality, irregularity or impropriety in the impugned order passed by trial court. **(Para - 14,16)**

Revision dismissed. (E-7)

List of Cases cited:

1. Nanhey Bhaiya @ Nanhan Singh & ors. Vs St. Of U.P. Thru. Prin. Secy. , U/S 482 No.2556 of 2023

2. P. Kartikalakshmi Vs Sri Ganesh & anr. , (2017) 3 SCC 347

3. Vibhuti Narayan Chaubey @. Vs St. Of U.P, 2003 CrLJ 196

4. Verghese Stephen Vs C.B.I. , 2007 Cr.L.J. 4080

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

1. Heard Sri V.K. Ojha, Advocate, holding brief of Sri Abhay Raj Yadav, learned counsel for the revisionist, Sri Deepak Kapoor, learned AGA for the State and perused the material placed on record.

2. As per the office report, service report is still awaited.

3. Keeping in view the fact that the present revision is pending since 2.2.2023 and service of notice could not be affected by learned CJM on opposite party No.2.

With a view to avoid further delay in trial of the case, which is progressing before the court below, this Court is of the opinion that there is no need to wait for service of notice on opposite party No.2 and the matter may be decided on merits after hearing learned counsel for the revisionist as well as learned AGA for the State, as this is a case based on police report.

4. Instant criminal revision has been preferred against the impugned judgement and order dated 30.1.2023, passed by learned Additinal District and Sessions Judge (FTC), Chitrakoot in Sessions trial No.117 of 2016, "State vs. Dev Narain", arising out of Case Crime No.479 of 2016, under Sections 498-A, 304-B, 323 IPC & 3/4 of D.P. Act, 1961, Police Station Karwi Kotwali Nagar, District Chitrakoot, whereby the court below rejected the application 29-Kha moved under Section 216 Cr.P.C. by the revisionist for alteration of charges framed against him.

5. The brief facts of the case are that in present case FIR was lodged at the instance of opposite party No.2 Vibhuti Bhushan Garg with averment that his sister Rashmi was married to Kamal Kishore @ Satyanarayan on 22.2.2016, in which they have given sufficient cash and gifts to accused side but nonetheless the husband of his sister and his family members kept on demanding a four wheeler and washing machine and due to non-fulfilment of demand of dowry, they were subjecting her to cruelty and also would threaten her. Prior to four days of lodging of FIR, he visited the place of in-laws of his sister and her husband and her in-laws again made demand of dowry and refused to sent her with him without fulfilment of demand of dowry. He went back to home and apprised his father by telephone about the act of

accused persons. On 25.5.2016, Sri Narayan, who is elder brother of the husband of his sister, informed him that the house of his sister was locked from the outside. He rushed to the place and got the lock broken in presence of police and found the dead body of his sister and there were injuries on her person. In the FIR, the husband, Sri Narain (jeth), Dev Narain (dewar) and three relatives of her husband were named. The post mortem examination of the deceased was conducted on 26.5.2016, in which six antemortem injuries were found on her person and cause of death was found by the Doctor as coma and shock due to antemortem injuries. The death was instantaneous. Satya Narain, the husband of the deceased was found missing from the date of incident and subsequently, it was known that his dead body was found between railway track. A Nokia mobile phone (twin SIM) was also recovered near the dead body and when Sub-Inspector inserted SIM in his own mobile phone and dialled a number, one Ashok Kumar Dwivedi replied the call and stated that the said number belongs to his brother-in-law (wife's brother) Satya Narain, who came and identified the body of Satya Narain. In his postmortem report also, injuries were found on his person and cause of death was recorded as antemortem injuries leading to asphyxia, which led to cardio respiratory failure and immediate cause was found strangulation. The police investigated the case and filed charge-sheet against present revisionist and name of other accused persons barring deceased Satya Narain was dropped during investigation, as their complicity was not found in the offence of dowry death of deceased Rashmi. Accused Dev Narain, who is brother-in-law of the deceased moved an application for discharge before trial court, which was

rejected by order dated 28.7.2017 and case was fixed for prosecution evidence. The accused Dev Narain, who filed a petition under Section 482 Cr.P.C. against rejection of his discharge application before this Court, which was dismissed by this Court with observation that "it is open to the applicant to move an application for alteration of charge under Section 216 Cr.P.C. before trial court". Pursuant to the observation of this Court, the sole accused Dev Narain, who is debar of deceased has filed an application under Section 216 Cr.P.C., wherein he has stated that he has moved this application pursuant to the observation of Hon'ble High Court vide order dated 9.6.2017. The factum of death of husband of deceased Kamal Kishor @ Satyanarain and recovery of his dead body from railway track was entered in GD Entry No.21, time 15:10 hours on 26.5.2016, police station Manikpur. There is no specific allegation of demand of dowry or subjecting the deceased to matrimonial cruelty is made by any witness examined by the Investigating Officer against the applicant. On the basis evidence collected during investigation. This appears that deceased Rashmi and her husband were residing in separate house and he was working in railway and they used to pick up quarrel on some issue. The key of house where dead body of deceased was lying was recovered from the pocket of cloths worn by the Kamal Kishore on recovery of his dead body. The deceased and her husband were residing separately from the revisionist and other family members and they were not concerned with daily affairs of each other. The revisionist could not be beneficiary of any demand of dowry allegedly made by husband of the deceased from deceased and her family members. There is no evidence that she was subjected to matrimonial cruelty soon or before her

death. The ingredients of charges under Sections 498-A, 304-B and 323 IPC and Section 3/4 DP Act are not made out against the applicant. Therefore, the said charges are liable to be quashed and the applicant may be discharged from the charges. This application has been dismissed by the court below. Learned court below while rejecting the application has observed that on the basis of evidence on record, no error is found in charges made against the applicant on 6.9.2016, therefore, there is no question of alteration of charge. The evidence of PW-1- the informant has been recorded during trial in which he has supported his FIR version and he has stated in cross-examination also that in matter of killing of his sister, the complicity of her husband (late) and brothers-in-law Sri Narain, Dev Narain and other relatives is involved and these persons killed her.

6. Learned counsel for the revisionist while placing reliance on grounds taken in application under Section 216 Cr.P.C. moved before the court below submitted that there is no evidence or material against the revisionist which can suggest that he as in any manner involved in unfortunate death of deceased Rashmi, who was sister-in-law and married to his late brother Satya Narain. The circumstances suggests that some altercation might have taken place between the husband and wife on fateful day and they would have been involved in some altercation and she might have received fatal injuries in the altercation and thereafter in disgust and guilt, her husband would have locked the door of the house from outside and committed suicide by being run over by a train. Therefore, the revisionist is not involved in death of the deceased in any manner. No specific averment has been made against the

revisionist in FIR as well as in statement of witnesses examined under Section 161 Cr.P.C. Even PW-1 in his testimony before Court has not assigned any specific role to the revisionist in his evidence. There is nothing to connect the revisionist with alleged offence. All the accused persons were exonerated in chargesheet by the Investigating Officer and the revisionist has been chargesheeted without any sufficient reason. The charges framed against the revisionist are frivolous in nature and should have been dropped by the court below but the court below has dismissed the application moved by the revisionist under Section 216 Cr.P.C. without assigning any good reason. Therefore, the impugned order is not sustainable under law and this is liable to be set aside and this Court may be pleased to alter the charges framed against him or to pass such other order as this Court deem fit in the facts and circumstances of the case.

7. Per contra, learned AGA submitted that there is no illegality or infirmity in the impugned order passed by the court below whereby the application 29-Kha moved by the revisionist for alteration of charge under Section 216 Cr.P.C. has been dismissed and the case is being fixed for prosecution evidence. The trial is in progress and there is no good ground to quash the charges framed against the revisionist as the same will be amount to discharge and this is settled law that no order for discharge can be passed by the trial court after framing of charge and case will have to lead its logical conclusion after receiving evidence of the parties.

8. Section 216 Cr.P.C. reads as under:-

"216. Court may alter charge.

(1) Any Court may alter or add to any charge at any time before judgment is pronounced.

(2) Every such alteration or addition shall be read and explained to the accused.

(3) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge.

(4) If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.

(5) If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded."

9. From perusal of above, it is apparent that the Court may alter or add to any charge at any time before judgment is pronounced but alteration of charge and deletion of charge hold different field and these two cannot be intermingled, otherwise it will cause miscarriage of justice. This is admitted fact that the

discharge application moved by the revisionist was dismissed by the trial court and the criminal revision moved by the revisionist against rejection of discharge application has been dismissed by this Court vide order dated 9.8.2017 in Criminal Revision No. 2500 of 2017, wherein this Court observed that the instant criminal revision is finally disposed of with a direction that in case, the revisionist is aggrieved with regard to the framing of the charge as on date, he may file an appropriate application at the appropriate stage when the evidence is to be produced with regard to the alteration of charge and in case, such an application is filed, the same shall be heard and decided in accordance with law after hearing all parties concerned.

10. The charge has been framed against the accused by the court below under Sections 498-A, 304-B, 323 IPC and 3/4 of D.P. Act. The evidence of PW-1 Vibhuti Bhushan Garg was recorded on 1.9.2017 to 29.5.2018 and thereafter the present application under Section 216 Cr.P.C. has been filed for alteration of charge. The case against the revisionist is that he is brother-in-law of the deceased who died inside her home on fateful day and on the same day, dead body of her husband was found near railway track and even the keys of the house in which dead body of the deceased was found was recovered from the dead body of deceased's husband in same sequence of the evidence. Post mortem examination report of deceased Satya Narayan also suggests his homicidal death.

11. From perusal of prayer made in application under Section 216 Cr.P.C., it appears in essence that this is a prayer for discharge as the revisionist has stated that

he may be discharged from charged penal sections and the charges levelled against him be quashed. The trial court in exercise of its powers under Section 216 Cr.P.C. cannot delete the charges framed by it for the said offences as the criminal procedure code does not confers such powers on the court. The trial court can only alter to a charge or to add to a charge, which has already framed. The discharge application moved by the revisionist has already been dismissed and said order has attained finality.

12. This Court in **Application U/S 482 No.2556 of 2023 (Nanhey Bhaiya @ Nanhan Singh And 2 others vs State Of U.P. Thru. Prin. Secy.)** on 31.3.2023 held that the power of the Court under Section 216 Cr.P.C. to alter or add any charge at any time before the judgment is pronounced is exclusively confined to Court and no party has any vested right to seek any addition or alteration of charge.

13. Recently, the Hon'ble Supreme Court in **P. Kartikalakshmi Versus Sri Ganesh and another reported in (2017) 3 SCC 347**, in paragraphs No.6, 7 and 8 has held as under:-

"6. Having heard the learned counsel for the respective parties, we find force in the submission of the learned Senior Counsel for Respondent 1. Section 216 CrPC empowers the Court to alter or add any charge at any time before the judgment is pronounced. It is now well settled that the power vested in the Court is exclusive to the Court and there is no right in any party to seek for such addition or alteration by filing any application as a matter of right. It may be that if there was an omission in the framing of the charge and if it comes to the knowledge of the Court trying the offence, the power is

always vested in the Court, as provided under Section 216 CrPC to either alter or add the charge and that such power is available with the Court at any time before the judgment is pronounced. It is an enabling provision for the Court to exercise its power under certain contingencies which comes to its notice or brought to its notice. In such a situation, if it comes to the knowledge of the Court that a necessity has arisen for the charge to be altered or added, it may do so on its own and no order need to be passed for that purpose. After such alteration or addition when the final decision is rendered, it will be open for the parties to work out their remedies in accordance with law.

14. This Court in the case of **Vibhuti Narayan Chaubey Alias .. vs State Of U.P., 2003 CrLJ 196** held that Section 216 of the code did not provide for deletion of a charge and that the word "delete" had intentionally not being used by the legislature. I am in agreement with this conclusion. The petitioner is seeking the deletion of a charge of conspiracy altogether that is not permissible under Section 216 of the Code. The charge once framed must lead to either acquittal or conviction at the conclusion of trial. Section 216 of the Code does not permit the deletion of the same. Subsequently, Delhi High Court in the case of **Verghese Stephen vs Central Bureau Of Investigation, 2007 Cr.L.J. 4080**, placed reliance on aforesaid judgement of this Court in the case of **Vibhuti Narayan Chaubey (supra)**.

15. Section 222 (2) of the Cr.P.C. provides that when a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.

16. On the basis of foregoing discussions based on facts of this case coupled with judicial authorities cited as above, I find that the revision is devoid of force. There is no illegality, irregularity or impropriety in the impugned order passed by the learned trial court and the revision is liable to be dismissed.

17. Accordingly, present revision is dismissed.

(2023) 9 ILRA 697
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.08.2023

BEFORE

THE HON'BLE RAM MANOHAR NARAYAN MISHRA, J.

Criminal Revision No. 1526 of 2023

Jamshed & Ors.	...Revisionists
	Versus
State of U.P. & Anr.	...Respondents

Counsel for the Revisionists:
 Sri Harish Kumar Tripathi

Counsel for the Respondents:
 G.A., Sri Ajay Kumar Srivastava, Sri Ram Raj Pandey

(A) Criminal Law - Revision - Indian Penal Code, 1860 - Sections 147, 148, 149, 452, 323, 506, 354, 354B, 324, 325 & 308 - The Code of Criminal Procedure, 1973 - Section 227- Discharge, Section 228 - Framing of Charge - truthfulness, sufficiency and acceptability of material produced, can be examined only at the stage of trial - at the stage of Section 227, the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused - a charge can be made against the accused on grave suspicion of

the commission of the offense. (Para - 16,17,19)

(B) Criminal Law - Revision - Indian Penal Code, 1860 - Section 308 - Attempt to commit culpable homicide - to secure conviction under Section 308 IPC - prosecution must prove that the accused had requisite intention or knowledge to cause culpable homicide which in turn can ascertain the actual injury as well as other surrounding circumstances. (Para -12)

Revisionist (accused) moved an application for discharge - discharge qua charge under Section 308 IPC - no case under Section 308 IPC made out - X-ray of skull of main injured - no fracture found - no statement of any doctor that any of the injury were dangerous to life - original CT Scan film not placed on record - Injury report shows an incised wound, a contusion, and two contused swellings in face - discharge application moved by accused revisionist for charge under Section 308 IPC dismissed - hence revision. **(Para -2,9,19)**

HELD:- Statement of injured and other witnesses recorded under Section 161 Cr.P.C., it cannot be held at the stage of framing of charge that there is no sufficient ground for proceeding against accused under Section 308 IPC in the light of pronouncement of Hon'ble Apex Court . Prima facie case envisaged for framing of charge is prima facie formation of opinion by trial court that there is sufficient ground to put accused on trial for said charge and not the formation of opinion that the said material collected during investigation, if proved, during trial, the same would be sufficient to convict the accused for said charge. No illegality, irregularity or perversity in order passed by court below. **(Para - 20)**

Revision dismissed. (E-7)

List of Cases cited:

1. U.O.I. Vs Prafulla Kumar Samal , (1979) 3 SCC 39
2. P. Vijayan Vs St. of Kerala & anr. , (2010) SCC 398

3. Captain Manjit Singh Viridi (Retd.) Vs Hussain Mohammed Shattaf & ors. , 2023 LiveLaw (SC) 462

4. St. of Raj. Vs Ashok Kumar Kashyap, (2021) 11 SCC 191

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

1. Heard learned counsel for the revisionists, learned counsel for the private respondent and learned A.G.A. for the State.

2. Instant criminal revision has been preferred against order dated 1.3.2023 passed by learned Additional Sessions Judge, Court No. 4, Baghpat in S.T. No. 344 of 2022 (State Vs. Jamshed and others), arising out of Case Crime No. 759 of 2021, under Sections 147, 148, 149, 452, 323, 506, 354, 354B, 324, 325, 308 IPC, P.S. Badaut, District Baghpat, whereby learned court below has dismissed the discharge application 8B filed by the revisionists.

3. Factual matrix of the case relevant for the purpose of present revision are that informant Irfan lodged an F.I.R. with P.S. concerned on 1.7.2021 at 18:06 hours by filing written report before S.H.O. concerned with averment that on 30.6.2021 at around 10:00 PM he was sitting at his home along with family members, accused persons who harbour enmity with him, prior to the incident and suddenly emerged without any reason armed with sharp edged weapons, clubs and sticks and attacked him with intention to kill. Informant, his son Danish and Amir received serious injuries in the incident. Accused persons had also torn clothes of his wife and daughter and molested them. On hearing cries of informant side, neighbours emerged and

thereupon accused persons left the place of incident after giving threat to informant and his family. Injured were examined at C.H.C., Badaut on the date of incident at around 11:00 PM and main injured Amir sustained four injuries which are described as below.

(I) Incised wound of size 4 x 0.5 cm into bone deep. Margin is clear on lateral to left Eyebrow on lt. Side of face. K.U.O. X-ray forehead (skull) Ap-Lat.

(ii) Contusion of size 2 x 1 cm on Rt. Side of face just below Rt. Eye.

(iii) Contused swelling of size 4 x 2 cm on ventral aspect of Rt. Forearm.

(iv) Contused swelling of size 05.0.5 cm on dorsal aspect of Rt. Hand. KUO X-ray Rt. Hand AP-oblique. Duration Fresh.

4. In the opinion of doctor, injury no. 1, kept under observation, which was caused by sharp edged object. Injury no. 4, kept under observation. Injury nos. 2 and 3 were found simple in nature.

4. Injured Irfan suffered three injuries out of which one injury on left shoulder joint, which was kept under observation. Injury was found to be caused by hard and blunt object.

5. Injured Danish Sustained six injuries out of which two injuries were kept under observation and rest were found simple. In X-ray of skull of injured Amir, no bone injury was seen, however, in X-ray of right hand of Amir, fracture on second and fourth of metacarpal bone seen. Doctor prepared supplementary report of injured Amir and termed the injuries of finger of

right hand as grievous. In x-ray report of left hand of Irfan, fracture on fifth metacarpal bone was seen. These injuries was found to be grievous. In x-ray report of left hand of injured Danish, fracture in distal end of second metacarpal bone was seen which was found grievous.

6. Injured persons in their statement under Section 161 Cr.P.C. and aggrieved ladies of the family of the informant Nurnisha and Sazia in their statement under Section 164 Cr.P.C. supported the F.I.R. version. Injured Amir in statement under Section 161 Cr.P.C. stated that accused persons have attacked him with sharp edged weapons, lathi and danda in which he has suffered injuries on his head and spinal cord and referred to district hospital Baghpat from C.H.C., Badaut for treatment. Independent witnesses also supported the F.I.R. version in their statements under Section 161 Cr.P.C. CT-Scan of head of injured Amir was conducted on 1.7.2021 and concerned doctor/radiologist found a linear fracture involving anterior lateral wall of left maxillary sinus, however, no abnormality was detected, parenchyma.

7. The investigating officer recorded statement of doctor Pravendra Chaurasiya, who conducted MLC of injured persons and submitted supplementary report, who has stated in his statement that no offence under Section 308 IPC is made out on the basis of supplementary report of all three injured persons including Amir and in X-ray report of Amir, no bone injury was seen. On the basis of medical evidence, investigating officer dropped charge under Section 308 IPC, however, in charge sheet, section 308 IPC was also added later on, on the basis of medical report after further investigation carried out on orders of Circle Officer.

8. Learned court below took cognizance of the offence on the basis of charge sheet and summoned the accused persons to face trial inter alia under Section 147, 148, 149, 452, 323, 324, 325, 308, 506, 354, 354B IPC.

9. Accused, who are revisionist before this Court, moved an application for discharge with prayer to discharge qua charge under Section 308 IPC stating that no case under Section 308 IPC is made out against them as in X-ray of skull of main injured Amir, no fracture was found, however, in CT Scan report of doctor Jain of Jeewan Jyoti Nursing Home, Badaut, linear fracture was only found in anterior lateral wall of left maxillary sinus and none of the injury of accused persons appears to be dangerous for life. There is also no statement of any doctor that any of the injury of Amir were dangerous to life. Inasmuch as, original CT Scan film was not placed on record.

10. There is cross case instituted on complaint of Sameena, wife of Momin on criminal complaint which is registered as Crl. Complaint Case No. 3394 of 2021 (Sameena Vs. Danish and others), P.S. Badot, District Baghpat, wherein Irfan, Gulfam, Javed, Arshad, Danish and Amir of prosecution side of present case are summoned as accused by the court below vide order dated 1.7.2022 under Sections 147, 148, 452, 323, 307, 506 IPC.

11. Section 308 IPC reads as under:-

“308. Attempt to commit culpable homicide.—Whoever does any act with such intention or knowledge and under such circumstances that, if he by that act caused death, he would be guilty of culpable homicide not amounting to

murder, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if hurt is caused to any person by such act, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both. Illustration A, on grave and sudden provocation, fires a pistol at Z, under such circumstances that if he thereby caused death he would be guilty of culpable homicide not amounting to murder. A has committed the offence defined in this section.”

12. Hon'ble Supreme Court in Crl. Appeal No. 2204 of 2010, Roop Chand @ Lala Vs. State (NCT) of Delhi considered the scope of Section 308 IPC in an appeal against conviction and held that to secure conviction under Section 308 IPC, prosecution must prove that the accused had requisite intention or knowledge to cause culpable homicide which in turn can ascertain the actual injury as well as other surrounding circumstances. Section 308 IPC necessarily requires proving intention or knowledge. It is thus, crucial to determine whether the accused had intention or knowledge that injury inflicted on the victim could cause the later death and as a result thereto the accused could be guilty of committing culpable homicide not amounting to murder.

13. In matter of plea seeking discharge under Section 227 Cr.P.C., some judicial pronouncements of Hon'ble Apex Court deserve to be mentioned.

14. Hon'ble Apex Court in the case of **Union of India Vs. Prafulla Kumar Samal (1979) 3 SCC 39**, on the question of discharge has held as follows:-

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

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

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

15. Hon'ble Apex Court in the case of **P. Vijayan vs. State of Kerala & Another (2010) SCC 398**, on the question of discharge has held as follows:-

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

16. In recent judgment, Hon'ble Supreme Court in **Captain Manjit Singh**

Virdi (Retd.) v. Hussain Mohammed Shattaf & Ors., 2023 LiveLaw (SC) 462, held that truthfulness, sufficiency and acceptability of material produced, can be examined only at the stage of trial. If the facts of the case are examined in the light of law laid down by this Court on the subject, it is evident that High Court has not even referred to the evidence collected by investigating agency produced along with charge sheet in its identity, rather there is selective reference to the statements of some of persons recorded during investigation. It shows that there was total non application of mind. The High Court had exercised the jurisdiction while discharging to murder accused persons in a manner which is not vested in it to scuttle the trial of a heinous crime. At the stage of charge, court had to satisfy that a prima facie case is made out against accused persons. Interference of the court at that stage is required only if there is strong reason to hold that in case the trial is allowed to proceed, the same would amount to abuse of process of the court.

17. In **State of Rajasthan Vs. Ashok Kumar Kashyap, (2021) 11 SCC 191**, Hon'ble Supreme Court placed reliance on its previous judgment in **P. Vijayan vs. State of Kerala (supra)**, wherein it is observed and held that at the stage of Section 227, the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. In other words, the sufficiency of ground would take within its fold the nature of the evidence recorded by the police or the documents produced before the Court which ex facie disclose that there are suspicious circumstances against the accused so as to frame a charge against him. If the Judge comes to a conclusion

that there is sufficient ground to proceed, he will frame a charge under Section 228, if not, he will discharge the accused. It is further observed that while exercising his judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution, it is not necessary for the Court to enter into the pros and cons of the matter or into a weighing and balancing of evidence and probabilities which is really the function of the Court, after the trial starts.

18. In present case although Dr. Pravendra who conducted M.L.C. of injured persons and submitted supplementary report stating that no offence under Section 308 IPC is made out on the basis of supplementary report as no bone injury was seen on the skull of injured, however, in CT scan report of injured Amir, a linear fracture involving anterior lateral wall of left maxillary sinus was detected, although there is no opinion of the doctor regarding the nature and effect of this injury, however, this injury is on vital part of the body, just below the skull. Injured Amir has also stated in his statement that accused persons had assaulted him and his father and brother Danish by clubs, sticks and inside weapons in which he received injuries on his head and spinal cord.

19. In injury report of Amir, one Incised wound of size 4 x 0.5cm into bone deep. Margin is clear on lateral to left Eyebrow on Lt. Side of face and one contusion of size 2 x 1 cm on Rt. Side of face just below Rt. Eye, were found apart from two contused swelling on right forearm and right forehead, thus keeping in view the nature of injury no. 1 of Amir, which is in the opinion of the doctor has been caused by some sharp edged object and the statement of injured and other witnesses recorded under Section 161 Cr.P.C., it cannot be held at the stage of framing of charge that there is no sufficient ground for proceeding

against accused under Section 308 IPC in the light of pronouncement of Hon'ble Apex Court as stated above as a charge can also be made against accused on grave suspicion of commission of offence. Prima facie case envisaged for framing of charge is prima facie formation of opinion by trial court that there is sufficient ground to put accused on trial for said charge and not the formation of opinion that the said material collected during investigation, if proved, during trial, the same would be sufficient to convict the accused for said charge.

20. Considering rival submissions of learned counsel for the parties, material on record and totality of the facts and circumstances of the case, I find no fault. Learned court below in passing impugned order, whereby discharge application moved by accused revisionist for charge under Section 308 IPC has been dismissed. No illegality, irregularity or perversity is found in impugned order passed by learned court below. Revision is devoid of merit and deserves to be dismissed in the light of foregoing discussions.

21. Accordingly, impugned order passed by learned court below is affirmed and revision stands **dismissed**.

(2023) 9 ILRA 702
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.08.2023

BEFORE

THE HON'BLE SHIV SHANKER PRASAD, J.

Criminal Revision No. 2941 of 2023

Krishna & Anr.	...Revisionists
	Versus
State of U.P. & Anr.	...Respondents

Counsel for the Revisionists:

Sri Pradeep Mishra, Sri Tanzeel Ahmad, Sri Vinay Saran (Sr. Adv.)

Counsel for the Respondents:

G.A., Sri Ankit Saran, Sri Anuj Srivastava

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 397/401 - revision - Indian Penal Code, 1860 - Sections 302, 504 & 506 - Indian Evidence Act, 1872 – Section 3 –fact , Section 65-B electronic evidence , Section 103 - burden of proof as to any particular fact - Plea of alibi - plea of alibi taken by the defence is required to be proved only after prosecution has proved its case against the accused - merits of the evidence have to be appreciated only during the trial, by cross examination of the witnesses and scrutiny of the Court - not to be done at the stage of Section 319 - authority/judicial precedent has to be understood in context of facts based on which the observation made therein are made - ratio of a decision is generally secundum subjectam materiam. (Para - 20,21)

Application filed by opposite party no.2 under Section 319 Cr.P.C. - summoning revisionists as accused - order impugned passed by trial court - not considered plea of alibi of revisionists - on basis of oral, electronic as well as documentary evidence collected by Investigating Officer - no finding in that regard - hence revision. **(Para -10,11,13)**

HELD:-Trial court not committed any illegality or irregularity in not considering the plea of the alibi of the revisionists while passing the order impugned allowing the application of opposite party no.2 under Section 319 Cr.P.C. and summoning the revisionists as accused.**(Para - 22)**

Criminal Revision dismissed. (E-7)

List of Cases cited:

1. Shiv Prakash Mishra Vs St. of U.P. , (2019) LawSuit (SC) 1340

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

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

4. Sugreev Kumar Vs St. of Punj., 2019 (3) Supreme 7

5. Vijaypal Vs St. (GNCT) of Delhi, 2015 0 Supreme (SC) 214

6. Manjeet Singh Vs St. of Har. & ors. (Para 38), MANU/SC/0546/2021

7. Sandeep Kumar Vs St. of Har. & ors., 2023 SCC OnLine SC 888

8. Darshan Singh Vs St. of Punj. ,2016 0 Supreme (SC) 2

9. Amit Kapoor Vs Ramesh Chander & anr. , (2012) 9 SCC 460

10. St. of Haryana Vs Sher Singh, Manu SC/0236/1981,

11. Gurcharan Singh Vs St. of Punj., Manu SC/0122/1955

12. Chandrika Prasad Singh Vs St. of Bihar, Manu SC/0084/1971

13. St. of Orissa Vs Debendra Nath Padhi, 2004(8) SCC 568

14. Quinn Vs Leathem, (1901) AC 495, Earls of Halsbury L.C.

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

1. Heard Mr. Vinay Saran, learned Senior Advocate assisted by Mr. Pradeep Kumar Mishra and Mr. Tanzeel Ahmad, learned counsel for the revisionist, Mr. Ankit Saran, learned counsel for the opposite party no.2 and Mr. R.N. Singh, learned A.G.A. for the State as well as perused the entire material available on record.

CHALLENGE TO THE PRESENT CRIMINAL REVISION

2. This revision has been filed to set aside the judgment and order dated 28.04.2023 passed by learned Additional Sessions Judge, Court no.7, Meerut in Sessions Trial No.297 of 2015, arising out of Case Crime No. 333 of 2014, under Section 302, 504, 506 I.P.C., Police Station Kankarkhera, District Meerut pending before the learned Additional Sessions Judge, Court no.7, Meerut.

GENESIS OF THE CASE

3. For the alleged incident dated 24th May, 2014 at about 11:30 a.m., a first information report has been lodged by Dinesh Kumar Singh i.e. informant/opposite party no.2 on 24th May, 2014 at 1300 hrs. (01:00 p.m.) against Krishnapal, Vikash and Praveen (Krishnapal and Vikas are revisionists herein). The said FIR came to be registered as Case Crime No. 333 of 2014 under Sections 504, 506 and 302 I.P.C., at Police Station Kankarkheda Meerut, District Meerut. In the FIR it has been alleged that on 24th May, 2014 the informant along with his sister and brother, namely, Rekha and Neeraj respectively were driving to Meerut in his Honda Amaze White Car to visit Dr. Anil Rastogi who was treating him. As they left their Lakhvaya, a White Scorpio Car overtook and stopped their car. The named accused persons got out of the Scorpio Car and threatened to kill Neeraj for helping Dharmendra Kirtal in a criminal case. They fired shots at Neeraj which resulted his death in his car. It is further alleged that the informant, his sister Rekha and Satendra and Harendra, who were coming behind his car saw the said incident.

4. After lodgement of the FIR, investigation proceeded and the Investigating Officer on 24.05.2014 recorded the statement of the first informant, Dinesh Kumar Singh under section 161 C.P.C. in which he reiterated the version of the FIR.

SPECIFIC CASE OF THE REVISIONISTS

5. On the next date of incident i.e. 25th May, 2014 statements of witnesses, namely, Satish Kumar, Sanjeev Kumar and Mehak Singh were recorded by the Investigating Officer under Sections 161 Cr.P.C. wherein they stated that the revisionists namely, Pradhan Krishnapal and Vikash were in the village on the date of incident and they have been falsely implicated in the murder of the deceased Neeraj. As such, the plea of alibi of the revisionists surfaced immediately after the incident. On 29.05.2014, the statement of sister of the deceased Smt. Rekha and one Harendra, who were mentioned as witnesses of the FIR, were recorded under Section 161 Cr.P.C. in which they did not support the version as unfolded in the FIR and statement of the first informant/opposite party no.2 rather stated that one Praveen alias Billu and one Ankit were the ones who had shot the deceased and did not name the revisionists as one of the perpetrators in the incident. Thereafter the name of the revisionists was dropped/exonerated from the investigation and one Ankit alias Guddu was added as an accused in crime in question. However, the aforesaid witnesses namely Smt. Rekha and Harendra were pressurized by the first informant and on 20.6.2014, they have filed their affidavits supporting the version of the FIR and denied their earlier statements which were recorded by the Investigating

Officer under section 161 Cr.P.C. Two more affidavits of the first informant Dinesh Kumar and Satyendra were brought on record by the investigating officer on 20.6.2014. The police recorded the statement of Sateyendra on 10.07.2014 wherein he supported the version of the FIR but has failed to answer the crucial questions about the entire incident. Thereafter on 19.7.2014 through CD No. XXI, the investigating Officer brought on record the statements of aforesaid Dinesh Kumar, Smt. Rekha, Sateyendra and Harendra recorded under Section 164 Cr.P.C. so to pressurize them not to retract from their statements in future. Thereafter the investigating officer recorded the statement of aforesaid Smt. Rekha on 2.8.2014, Dinesh Kumar on 4.8.2014. After completion of the investigation under Chapter XII Cr.P.C., the investigating officer submitted the charge sheet against the co-accused persons, namely Praveen and Ankit and kept the investigation pending against the revisionists. The investigation thereafter was transferred to Crime Branch and during the investigation vide parcha SCD-III dated 17.11.2014, Call Detail Reports (CDRs) of the revisionist No.1 and his Security Guard namely Gagan and Ankur were obtained and brought on record. The statement of the aforesaid police security guards, namely, Gagan and Ankur of the revisionist No.1 were also recorded by the investigating officer under section 161 Cr.P.C. who supported the plea of alibi of the revisionists and further denied the involvement of the revisionist in the incident in question. After completion of the investigation against the revisionists, their involvement in the alleged incident was found to be false vide parcha dated 28.1.2015. After filing of the charge sheet against the co-accused persons cognizance was taken and later on the case was

committed to the Court of Sessions and was registered as Sessions Trial No. 297 of 2015 and is pending in the court of Additional Sessions Judge, Court No. 7, Meerut. During the course of trial, the statements of PW-1 Dinesh and PW- 2 Harendra Singh were recorded in which they again reiterated the prosecution story as narrated in the FIR involving the names of the revisionists as accused. Thereafter on 25.1.2023, opposite party no.2/informant moved an application under section 319 Cr.P.C. for summoning the revisionists before the trial court and the same was numbered as Paper No. 110-Kha but vide order dated 28.2.2023 the same was not pressed without obtaining any permission to file a fresh application. No further material was brought on record thereafter and without any new ground and without seeking any liberty to file a fresh application, while not pressing the application dated 25.1.2023, another application under section 319 Cr.P.C. was moved by opposite party no.2 on 18.4.2023 by giving a lame excuse that the first application was not pressed under the threat of the revisionists, although the fact remains that the revisionist had no knowledge of the application dated 25.1.2023 as they were not attending the court and were not facing the trial.

6. The trial court vide order dated 28.4.2023 allowed the IIInd application filed by opposite party no.2 in a most mechanical manner without even properly going through the material available on record collected during the investigation. In the order dated 28th April, 2023 allowing the application of opposite party no.2 under Section 319 Cr.P.C. the trial court has not recorded any finding qua alibi of the revisionists, which were cropped up in the statements of the witnesses and the CDR

which was made part of the investigation regarding the location of the revisionists at village Kirthal Baghpat at the time of the alleged incident and also the statement of the police security guards supporting the said facts. The concerned Sessions Judge while passing the order dated 28th April, 2023, was duty bound to consider entire material available on record i.e. the material collected during the investigation as well as material brought during the course of trial by way of deposition etc. However, the Sessions Judge committed gross illegality while ignoring the material available on record collected during the course of investigation which favoured the revisionists. It is against this order of the concerned Sessions Judge dated 28th April, 2023 allowing the application of opposite party no.2 for summoning the revisionists as accused that the present criminal revision has been filed.

7. SUBMISSIONS ADVANCED ON BEHALF OF THE REVISIONISTS

(i) The revisionists are wholly innocent and have been falsely implicated in the present case due to ulterior motive and they have not committed the alleged offence. The allegations as unfolded in the FIR are wholly false and baseless.

(ii) On the alleged date and time of the incident, revisionist no.1 who was a Pradhan and political person and his security police guards, namely, Constable Ankur Kumar and Constable Gagan Pawar along with his nephew i.e. revisionist no.1 Vikash were in Village Kirthal District Baghpat which is about 100 kilometres away from the alleged place of incident i.e. Village Lokwaya District Meerut, where they were holding a Panchayat to resolve the village dispute qua a drain between two

parties. The said plea of alibi of the revisionists have been supported by the witnesses recorded under Sections 161 Cr.P.C., referred to herein above including the statements of the villagers and security guards under Section 161 Cr.P.C. Such plea of alibi of the revisionists has not been considered by the concerned Sessions Judge while passing the impugned order, which is arbitrary and per se illegal. The strong plea of alibi of the applicant is supported by cogent material collected by the investigating officer during the investigation and no new/additional/fresh material was brought on record contradicting/confronting the already available material by PW-1, therefore, the power under Section 319 Cr.P.C. should not have been exercised by the learned trial judge. Reliance in that regard has been placed upon the judgment of this Court in the case of **Shiv Prakash Mishra v. State of Uttar Pradesh**, reported in (2019) *LawSuit (SC)* 1340, (Para 10, 11, 12).

(iii) The concerned Sessions Judge, while passing the impugned order has failed to record his prima facie satisfaction for the revisionists, therefore, the same is illegal. In this regard reliance has been placed upon the judgment of the Apex Court in the case of **Hardeep Singh Vs state of Punjab** reported in (2014) 3 SCC 92.

(iv) The concerned Sessions Judge while passing the order dated 28th April, 2023 has not considered the material available on record collected during the course of investigation and committed gross illegality in summoning the revisionist. In support of this submission, reliance upon the judgment of the Apex Court in the case of **Brijendra Singh & Others Vs. State of Rajasthan** reported in (2017) 7 SCC 706 has been placed.

(v) Initially in the statements recorded under Section 161 Cr.P.C. on 29th May, 2014, the eye-witnesses, namely Rekha sister of the deceased and Harendra have denied the presence of the revisionists on the spot at the time and date of incident and they have specifically named the one Praveern alias Billu and one Ankit that they had shot the deceased. However, after being pressurized by the first informant, they have filed their respective affidavits after 22 days stating that the earlier statements given by them before the Police under Section 161 Cr.P.C. are false and they have supported the allegations made by the first informant/opposite party no.2 in the FIR as well as in his statement recorded under Section 161 Cr.P.C. On the basis of such contradictory statements of these two eye witnesses and the statements of the witnesses proving the alibi of the revisionists the Investigating Officer has exonerated the revisionists qua their involvement in the murder of the deceased Neeraj from the present case while filing the charge-sheet. However, ignoring the evidence collected by the Investigating Officer, the concerned Sessions Judge has passed the impugned order summoning the revisionists as accused in the present case.

(vi) The first informant/ P.W.-1 has again reiterated the allegations against the revisionist as alleged in the FIR which had already been tested/investigated by the investigating officer and the same was found to be false in fair and impartial investigation and he was exonerated from the charge sheet. That no application under section 319 Cr.P.C. has been moved by the state (Prosecution) and the instant application under section 319 Cr.P.C. has been moved by the first informant on his own without protesting the final report at the stage of cognizance.

(vii) The trial Judge without going through the material on record in a most mechanical manner in gross violation of the provision of law and various pronouncements of the Hon'ble Apex Court has committed gross illegality while passing the impugned order and summoned the revisionist vide order dated 28.04.2023 and without discussing a single evidence upon which he has recorded his prima facie satisfaction for summoning the revisionist under section 319 Cr.P.C. It is settled that for summoning the additional accused under Section 319 Cr.P.C. degree of satisfaction is much stricter [Reference: **Brijendra Singh (Supra)**].

(viii) The concerned Sessions Judge while passing the impugned order should have taken into consideration the standard of proof employed for summoning a person as an accused under Section 319 Cr.P.C, is higher than the standard of proof employed for framing a charge and thereby has committed gross illegality (Reference **Sugreev Kumar v. State of Panjab**, reported in 2019 (3) *Supreme* 7, Para-12).

On the cumulative strength of the aforesaid, learned counsel for the revisionists submits that the order impugned passed by the concerned Sessions Judge cannot be legally sustained and is liable to be quashed.

8. SUBMISSIONS ADVANCED ON BEHALF OF OPPOSITE PARTY NOS. 1 AND 2

Per contra, learned counsel for opposite party no.2 and the learned A.G.A. for the State have disputed the submissions made by the learned counsel for the revisionists by contending that there is no illegality or infirmity in the order passed by

the Sessions Judge allowing the application of opposite party no.2 under Section 319 Cr.P.C. for summoning the revisionists as accused in the case in hand.

9. Apart from the above, Mr. Ankit Saran, learned counsel for opposite party no.2 has contended as follows:

(i) The present dispute arose when a first information report was registered on 24.5.2014 at about 1300 hours in respect to an incident which occurred on 24.5.2014 at about 1130 hours, the present revisionists who were specifically and categorically arrayed as an accused persons in the first information report.

(ii) The first information report was prompt and the ingredients therein will go to show that first informant, Rekha sister of the deceased and Harendra were ocular witnesses who had categorically pointed fingers upon the present revisionists of their involvement in the commission of the alleged crime, directly. Once the first information report gets lodged, the investigating officer setting the procedure into motion prepared site plan, send the corpse of the deceased for autopsy, and he further proceeded to record the statement of first informant as well as other witnesses of the incident.

(iii) The Investigating Officer was being hand-in-gloves with the revisionists and manipulated the statements of sister of the deceased, namely, Rekha and the independent witness, namely, Harendra recorded u/s 161 Cr.P.C., which will go to show that the Investigating Officer from the very beginning of the investigation was inclined to exonerate the revisionists. Having gained the knowledge

regarding the aforesaid act of the Investigating Officer, the complainant/informant as well as the eye-witnesses of the incident immediately rushed to the Investigating Officer and submitted their respective versions on oath by way of affidavits in which they all demolished the entire version recorded by the Investigating Officer under Section 161 Cr.P.C., and confirmed the previous version as unfolded in the first information report. Apart from the versions made in the affidavits, the statements of first informant Dinesh, eye-witnesses, namely, Rekha, Satendra and Harendra under Sections 164 Cr.P.C., unanimously deposed against the revisionists and have categorically shown the involvement of the present revisionists in the murder of Neeraj (deceased). Not even in the statements recorded under Section 164 Cr.P.C. the first informant as well as the eye-witnesses, namely, Harendra confirmed their version when they were produced before the Court as Prosecution Witnesses Nos. 1 and 2 in the respective testimonies and have also categorically assigned the role of causing fire- arm injuries to the deceased upon the revisionists.

(iv) The submission as advanced by the learned counsel for the revisionists regarding the CDR report as well as location of the mobile phones of the revisionists were at distant place than that of the place of incident showing that they were not present at the place of incident, is incomplete, wrong and has no force, as the plea of alibi which has been raised on behalf of the revisionists, is not palpable. Mere the location of the devices (mobile phones) which the revisionists were using at the time of incident, is insufficient to establish their non-involvement in the commission of the alleged crime. The

devices (mobile phones) which the revisionists were using at the time of incident and its CDR report would not defy the versions so placed by the ocular witnesses. Moreover, the admission of such alibi would not be considered at the stage of their summoning under Section 319 Cr.P.C. for the reasons that the same is an electronic evidence which under the provisions of Section 3 of the Evidence Act, would needed to be certified by an Expert under the provisions of 65-B of the Evidence Act, which is required to be certified after the prosecution evidence is over. Hence, the plea of alibi adduced by the revisionists is sketchy. It is not a case where the accused has proven with absolute certainty so as to exclude the possibility of their presence at the place of occurrence. The evidence adduced by the revisionists is not of such quality that the court would entertain any reasonable doubt.

(v) The burden on the accused/revisionists is rather heavy and they are required to establish the plea of alibi with certitude. In the instant case, nothing has been brought on record to establish that the revisionists were not present at the scene of offence at the time of incident and they were present at another place at such time. In support of the aforesaid submission a judgment and order passed by the Hon'ble Supreme Court in the case of **Vijaypal Vs. State (GNCT) of Delhi**, reported in *2015 0 Supreme (SC) 214* has been relied upon.

(vi) The precise argument of the learned counsel for the revisionists was in regard to the recording of satisfaction before summoning the revisionists under the provision of 319 Cr.P.C. and further argument was that the court ought to have recorded the evidence so placed on the

point of alibi, which are incorrect. Such evidence cannot be accepted at the stage of consideration of application under Section 319 Cr.P.C., the merits of the evidence has to be appreciated only during the course of trial by cross-examination of the witnesses and scrutiny by the Court. This is not to be done at the stage when an application under Section 319 Cr.P.C. has to be entertained. In support of such plea, reliance has been placed upon the judgment and order of the Hon'ble Supreme Court in the case of **Manjeet Singh Vs. State of Haryana and others (Para 38)** reported in *MANU/SC/0546/2021* which has been followed in the recent judgment of the Hon'ble Supreme Court in the case of **Sandeep Kumar Vs. State of Haryana and others** reported in *2023 SCC OnLine SC 888*.

(vii) So far as the consideration of the plea of alibi at the stage of summoning of the accused under Section 319 Cr.P.C. is concerned, such consideration would be premature. The plea of alibi taken by the defence is required to be proved only after prosecution has proved its case against the accused beyond reasonable doubt. Reliance in that regard has been placed upon the judgment of the Hon'ble Supreme Court in the case of **Darshan Singh Vs. State of Punjab** reported in *2016 0 Supreme (SC) 2*.

(viii) The prosecution witnesses at every stage i.e. statements recorded under Section 164 Cr.P.C., in the affidavits given to the Investigating Officer and testimonies recorded before the Court, has categorically stated about the involvement of the revisionists in the commission of the alleged crime, directly, and would definitely have a higher evidentiary value than that of the version so placed in the statements given before the Investigating

Officer under Section 161 Cr.P.C. by the witnesses of fact, namely, Rekha sister of the deceased and the independent witness Harendra.

(ix) In catena of judgments, the Hon'ble Supreme Court has held that only prima-facie case is to be established from the evidence laid before the Court not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of their complicity. The test has to be applied in one which is more than prima-facie case as exercised at the time of framing of charge but short of satisfaction to an extent that the evidence, if goes un-rebutted would lead to conviction.

On the cumulative strength of the aforesaid, Mr. Ankit Saran, learned counsel for opposite party no.2 submits that in totality of the fact that the accused/revisionists have been rightly summoned by the learned trial court and the heavy burden is upon them to discharge. Qua the plea of alibi so raised on behalf of the revisionists, the Court has rightly overlooked the same as the same has to be dealt with after the prosecution has placed its case against the revisionists beyond all reasonable doubts. Therefore, the impugned order is just and reasonable and does not warrant any interference by this Hon'ble Court while exercising its powers under Section 397/401 Cr.P.C.

10. I have considered the submissions made by the learned counsel for the parties and have gone through the records of the present criminal revision specifically the order impugned passed by the trial court on an application filed by opposite party no.2 under Section 319 Cr.P.C. for summoning

the revisionists as accused in the present criminal proceedings.

11. Except the submissions made by the learned counsel for the revisionists that the trial court vide order impugned while allowing the application of the complainant/opposite party no.2 and summoning the revisionists as accused, has not considered the plea of the alibi of the revisionists on the basis of oral as well as evidence collected by the Investigating Officer during the course of investigation nor has recorded any finding in that regard in the impugned order, all other submissions made by the learned counsel for the revisionist qua the legality, illegality or otherwise of the present criminal proceedings which have been initiated by opposite party no.2 against the revisionists cannot be examined by this Court while exercising its revisional power under Section 397/401 of Code of Criminal Procedure. Such submissions can only be examined by the Bench having its extraordinary jurisdiction under Sections 482 Cr.P.C. This Court can only examine the correctness, legality, illegality or otherwise of the order which is under challenge in the present criminal revision on the plea of alibi raised by the learned counsel for the revisionists.

12. The Apex Court in the case of **Amit Kapoor Vs. Ramesh Chander & Another** reported in (2012) 9 SCC 460 has opined that the jurisdiction of the court under Section 397 Cr.P.C. can be exercised so as to examine the correctness, legality or propriety of an order passed by the trial court or the inferior court, as the case may be, whereas Section 482 Cr.P.C. confers a very wide power on the Court to do justice and to ensure that the process of the court is not permitted to be abused.

13. Paragraph nos. 12, 13, 18, 20 and 21 of the judgment in the case of **Amit Kapoor (Supra)**, which are relevant on the aforesaid issue, are being quoted herein below:

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

13. Another well-accepted norm is that the revisional jurisdiction of the higher court is a very limited one and cannot be exercised in a routine manner. One of the inbuilt restrictions is that it should not be against an interim or interlocutory order. The Court has to keep in mind that the exercise of revisional jurisdiction itself should not lead to injustice ex facie. Where the Court is dealing with the question as to whether the charge has been framed properly and in

accordance with law in a given case, it may be reluctant to interfere in exercise of its revisional jurisdiction unless the case substantially falls within the categories aforestated. Even framing of charge is a much advanced stage in the proceedings under the Cr.P.C.

....

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

....

20. The jurisdiction of the Court under Section 397 can be exercised so as to examine the correctness, legality or propriety of an order passed by the trial court or the inferior court, as the case may be. Though the section does not specifically use the expression ‘prevent abuse of process of any court or otherwise to secure the ends of justice’, the jurisdiction under Section 397 is a very limited one. The legality, propriety or correctness of an order passed by a court is the very foundation of exercise of jurisdiction under Section 397 but ultimately it also requires justice to be done. The jurisdiction could be

exercised where there is palpable error, non-compliance with the provisions of law, the decision is completely erroneous or where the judicial discretion is exercised arbitrarily. On the other hand, Section 482 is based upon the maxim quando lex liquid alicui concedit, conceder videtur id quo res ipsa esse non protest, i.e., when the law gives anything to anyone, it also gives all those things without which the thing itself would be unavoidable. The Section confers very wide power on the Court to do justice and to ensure that the process of the Court is not permitted to be abused.

*21. It may be somewhat necessary to have a comparative examination of the powers exercisable by the Court under these two provisions. There may be some overlapping between these two powers because both are aimed at securing the ends of justice and both have an element of discretion. But, at the same time, inherent power under Section 482 of the Code being an extraordinary and residuary power, it is inapplicable in regard to matters which are specifically provided for under other provisions of the Code. To put it simply, normally the court may not invoke its power under Section 482 of the Code where a party could have availed of the remedy available under Section 397 of the Code itself. The inherent powers under Section 482 of the Code are of a wide magnitude and are not as limited as the power under Section 397. Section 482 can be invoked where the order in question is neither an interlocutory order within the meaning of Section 397 (2) nor a final order in the strict sense. Reference in this regard can be made to *Raj Kapoor & Ors. Vs. State of Punjab & Ors.* [AIR 1980 SC 258 : (1980) 1 SCC 43]. In this very case, this Court has observed that inherent power under Section 482 may not be exercised if the bar*

under Sections 397 (2) and 397 (3) applies, except in extraordinary situations, to prevent abuse of the process of the Court. This itself shows the fine distinction between the powers exercisable by the Court under these two provisions. In this very case, the Court also considered as to whether the inherent powers of the High Court under Section 482 stand repelled when the revisional power under Section 397 overlaps. Rejecting the argument, the Court said that the opening words of Section 482 contradict this contention because nothing in the Code, not even Section 397, can affect the amplitude of the inherent powers preserved in so many terms by the language of Section 482. There is no total ban on the exercise of inherent powers where abuse of the process of the Court or any other extraordinary situation invites the court's jurisdiction. The limitation is self-restraint, nothing more. The distinction between a final and interlocutory order is well known in law. The orders which will be free from the bar of Section 397 (2) would be the orders which are not purely interlocutory but, at the same time, are less than a final disposal. They should be the orders which do determine some right and still are not finally rendering the Court functus officio of the lis. The provisions of Section 482 are pervasive. It should not subvert legal interdicts written into the same Code but, however, inherent powers of the Court unquestionably have to be read and construed as free of restriction."

13. Now this Court comes to examine the legality or otherwise of the impugned order only on the submissions made by the learned counsel for the revisionists that the trial court while passing the same has not considered the plea of alibi of the revisionists on the basis of oral, electronic

as well as documentary evidence collected by the Investigating Officer.

14. The power under Section 319 of the Code is conferred on the court to ensure that justice is done to the society by bringing to book all those, who are guilty of an offence. One of the aims and purposes of the Criminal Justice System is to maintain social order. It is necessary in that context to ensure that no one who appears to be guilty escapes a proper trial in relation to that guilt. There is also a duty to render justice to the victim of the offence. It is in recognition of this that the Code has specifically conferred a power in the court to proceed against others not arrayed as accused in the circumstances set out by this Section. It is a salutary power enabling the discharge of court's obligation to the society to bring to book all those guilty of a crime.

15. In **Hardeep Singh's case**, which has heavily been relied upon by the learned counsel for opposite party no.2 as well as the learned counsel for the revisionists, the Apex Court has observed as follows:

"12. Section 319 Cr.P.C. springs out of the doctrine judex damnatur cum nocens absolvitur (Judge is condemned when guilty is acquitted) and this doctrine must be used as a beacon light while explaining the ambit and the spirit underlying the enactment of Section 319 Cr.P.C.

It is the duty of the Court to do justice by punishing the real culprit. Where the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in calling the said accused to face trial. The question remains under what

circumstances and at what stage should the court exercise its power as contemplated in Section 319 Cr.P.C.?

The submissions that were raised before us covered a very wide canvas and the learned counsel have taken us through various provisions of Cr.P.C. and the judgments that have been relied on for the said purpose. The controversy centers around the stage at which such powers can be invoked by the court and the material on the basis whereof such powers can be exercised.

13. It would be necessary to put on record that the power conferred under Section 319 Cr.P.C. is only on the court.

This has to be understood in the context that Section 319 Cr.P.C. empowers only the court to proceed against such person. The word "court" in our hierarchy of criminal courts has been defined under Section 6 Cr.P.C., which includes the Courts of Sessions, Judicial Magistrates, Metropolitan Magistrates as well as Executive Magistrates. The Court of Sessions is defined in Section 9 Cr.P.C. and the Courts of Judicial Magistrates has been defined under Section 11 thereof. The Courts of Metropolitan Magistrates has been defined under Section 16 Cr.P.C. The courts which can try offences committed under the Indian Penal Code, 1860 or any offence under any other law, have been specified under Section 26 Cr.P.C. read with First Schedule. The explanatory note (2) under the heading of "Classification of Offences" under the First Schedule specifies the expression 'magistrate of first class' and 'any magistrate' to include Metropolitan Magistrates who are empowered to try the offences under the said Schedule but excludes Executive Magistrates.

14. *It is at this stage the comparison of the words used under Section 319 Cr.P.C. has to be understood distinctively from the word used under Section 2 (g) defining an inquiry other than the trial by a magistrate or a court. Here the legislature has used two words, namely the magistrate or court, whereas under Section 319 Cr.P.C., as indicated above, only the word "court" has been recited. This has been done by the legislature to emphasise that the power under Section 319 Cr.P.C. is exercisable only by the court and not by any officer not acting as a court. Thus, the magistrate not functioning or exercising powers as a court can make an inquiry in particular proceeding other than a trial but the material so collected would not be by a court during the course of an inquiry or a trial. The conclusion therefore, in short, is that in order to invoke the power under Section 319 Cr.P.C., it is only a Court of Sessions or a Court of Magistrate performing the duties as a court under the Cr.P.C. that can utilise the material before it for the purpose of the said Section.*

15. *Section 319 Cr.P.C. allows the court to proceed against any person who is not an accused in a case before it. Thus, the person against whom summons are issued in exercise of such powers, has to necessarily not be an accused already facing trial. He can either be a person named in Column 2 of the chargesheet filed under Section 173 Cr.P.C. or a person whose name has been disclosed in any material before the court that is to be considered for the purpose of trying the offence, but not investigated. He has to be a person whose complicity may be indicated and connected with the commission of the offence.*

16. *The legislature cannot be presumed to have imagined all the*

circumstances and, therefore, it is the duty of the court to give full effect to the words used by the legislature so as to encompass any situation which the court may have to tackle while proceeding to try an offence and not allow a person who deserves to be tried to go scot free by being not arraigned in the trial in spite of possibility of his complicity which can be gathered from the documents presented by the prosecution.

17. *The court is the sole repository of justice and a duty is cast upon it to uphold the rule of law and, therefore, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the real accused, at times, get away by manipulating the investigating and/or the prosecuting agency. The desire to avoid trial is so strong that an accused makes efforts at times to get himself absolved even at the stage of investigation or inquiry even though he may be connected with the commission of the offence."*

16. Essentially, the main thrust of the learned counsels for the revisionists is to the plea of alibi which according to them was of an impeccable quality and thus, the trial judge should have considered the same taking into consideration the statements of witnesses recorded by the Investigating Officer under Section 161 Cr.P.C. to record a positive finding that the revisionists could not have been present at the scene of commission of crime as also the trial judge should have also taken into consideration the electronic evidence i.e. Call Detail Reports of the revisionists to establish the plea of alibi of the revisionist. It is well settled that statement recorded under Section 161 Cr.P.C. is not a substantive piece of evidence. In view of proviso to

subsection (1) of Section 162 Cr.P.C., the statement can be used only with limited purpose of contradicting the maker of the statement thereof in the manner laid down in the said proviso. Therefore, the trial judge was perfectly justified in not placing reliance on wholly inadmissible evidence of alibi collected during investigation and if he had relied upon the same it would squarely be against interpretation given by Constitution Bench of Hon'ble Apex Court in **Hardeep Singh's** case being extraneous material collected during investigation and could not be treated as an evidence for the purposes of exercise of powers under Section 319 Cr.P.C. Consideration of plea of alibi while exercising powers under Section 319 Cr.P.C. may also be looked into from another angle i.e. Section 103 of Evidence Act which stipulates that burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is proved by any law that proof of that fact lies on a particular person. Second illustration to Section 103 of Evidence Act reads as under:

"B wishes the court to believe that at that time in question he was elsewhere, he must prove it."

17. This provision makes it obvious that burden of establishing plea of alibi of the revisionists before this Court lay squarely upon them. There is hardly any doubt regarding this legal proposition. Reference may be made to the cases of **State of Haryana Versus Sher Singh**, reported in *Manu SC/0236/1981*, **Gurcharan Singh Versus State of Punjab**, reported in *Manu SC/0122/1955* and **Chandrika Prasad Singh Versus State of Bihar** reported in *Manu SC/0084/1971*.

18. This could be done by leading evidence in trial court and not by relying on the material collected during investigation. In such a case the prosecution would have to be given an opportunity to cross-examine this witness to demonstrate that their testimony was not correct. The Court also in exercise of its inherent powers under Section 482 Cr.P.C. cannot consider the plea of alibi of an accused at the stage of taking cognizance, framing of charges or summoning the accused on the basis of evidence recorded during trial under Section 319 Cr.P.C. The revisionists accused will have ample opportunity to place their evidence at the appropriate stage. In this behalf the judgement of the Hon'ble Apex Court, rendered in the case of **State of Orissa Versus Debendra Nath Padhi**, reported in *2004(8) Supreme Court Cases 568* be referred to. It was held:

" Further, at the stage of framing of charge roving and fishing inquiry is impermissible. If the contention of the accused is accepted, there would be a mini trial at the stage of framing of charge. That would defeat the object of the Code. It is well-settled that at the stage of framing of charge the defence of the accused cannot be put forth. The acceptance of the contention of the learned counsel for the accused would mean permitting the accused to adduce his defence at the stage of framing of charge and for examination thereof at that stage which is against the criminal jurisprudence. By way of illustration, it may be noted that the plea of alibi taken by the accused may have to be examined at the stage of framing of charge if the contention of the accused is accepted despite the well settled proposition that it is for the accused to lead evidence at the trial to sustain such a plea. The accused would be entitled to

produce materials and documents in proof of such a plea at the stage of framing of the charge, in case we accept the contention put forth on behalf of the accused. That has never been the intention of the law well settled for over one hundred years now. It is in this light that the provision about hearing the submissions of the accused as postulated by Section 227 is to be understood. It only means hearing the submissions of the accused on the record of the case as filed by the prosecution and documents submitted therewith and nothing more. The expression 'hearing the submissions of the accused' cannot mean opportunity to file material to be granted to the accused and thereby changing the settled law. At the state of framing of charge hearing the submissions of the accused has to be confined to the material produced by the police."

19. The plea of alibi of the revisionists on the basis of Call Detail Reports of the revisionists can also not be considered at the stage of summoning under Section 319 Cr.P.C. on the ground that the same is an electronic evidence which as per Section 3 of the Evidence Act would needed to be certified by an Expert under Section 65-B of the Evidence Act, which is required to be certified after the prosecution evidence i.e. examination-in-chief and cross-examination of prosecution witnesses is over.

20. In the case of **Darshan Singh (Supra)**, which has been relied upon by the learned counsel for opposite party no.2, the Apex Court has opined as under:

"The word alibi means 'elsewhere'. The plea of alibi is not one of the General Exceptions contained in Chapter IV of IPC. It is a rule of evidence

*recognized under Section 11 of the Evidence Act. However, **plea of alibi taken by the defence is required to be proved only after prosecution has proved its case against the accused. In the present case said condition is fulfilled.**"*

("Emphasis added")

21. In the case of **Sandeep Kumar (Supra)**, which has heavily been relied upon by the learned counsel for opposite party no.2, the Apex Court has opined in paragraph 12 as follows:

*"The reasoning given by the High Court, cannot be accepted at the stage of consideration of application under Section 319 Cr.PC. **The merits of the evidence has to be appreciated only during the trial, by cross examination of the witnesses and scrutiny of the Court.** This is not to be done at the stage of Section 319, though this is precisely what the High Court has done in the present case. Moreover, the High Court did not appreciate the important fact that the charges being faced by the accused were under Sections 458, 460, 323, 285, 302, 148 and 149 I.P.C. Thus, one of the charges being Section 149, which is of being a member of an unlawful assembly, for attracting the offence under Section 149 IPC, one simply has to be a part of an unlawful assembly. Any specific individual role or act is not material. [See : 2021 SCC OnLine SC 632-Manjeet Singh Vs. State of Haryana & Ors. Para 38]."*

22. In view of the settled legal proposition of law as explained by the Apex Court in the above series of judgments, this Court finds that the trial court has not committed any illegality or irregularity in not considering the plea of the alibi of the revisionists while passing

the order impugned allowing the application of opposite party no.2 under Section 319 Cr.P.C. and summoning the revisionists as accused. This Court also finds substance in the submissions made by learned counsel for opposite party no.2 in that regard.

23. Now this Court examine the applicability of the judgment of the Apex Court in the case of **Brijendra Singh (Supra)**, which has heavily been relied upon by the learned counsel for the revisionists.

24. I would like to deal with legal aspect as to what material/evidence is to be considered under Section 319 Cr.P.C. as laid down in the judgements of the Hon'ble Apex Court in the Constitution Bench decision rendered in the case of **Hardeep Singh (supra)**. The Hon'ble Apex court in its decision of Constitution Bench in the case of **Hardeep Singh (supra)** has considered the scope, ambit and sweep of Section 319 Cr.P.C. in detail and has framed several questions including question No.(iii) which is reproduced below:-

"Question (iii) - Whether the word "evidence" used in Section 319 (1) Cr.P.C. has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial?"

25. The above said question has been answered in the following manner by the Apex Court:-

"85. In view of the discussion made and the conclusion drawn hereinabove, the answer to the aforesaid

question posed is that apart from evidence recorded during trial, any material that has been received by the court after cognizance is taken and before the trial commences, can be utilized only for corroboration and to support the evidence by the court to invoke the power under Section 319 Cr.P.C. The "evidence" is thus limited to the evidence during trial."

26. This Court, after carefully considering the Constitution Bench decision of Apex Court in the case of **Hardeep Singh (supra)** and subsequent decisions in **Brijendra Singh's case** is of the opinion that a bare perusal of two Judges's Bench decision of Apex Court in the **Brijendra Singh's case** reveals that though earlier decision of **Hardeep Singh's case** was considered, however, the scope, ambit and sweep of expression "evidence" contained under Section 319 Cr.P.C. and explained in the para 85 in the judgement was not considered in the subsequent cases to the extent that any evidence collected during investigation either in favour of the prosecution or the accused cannot be taken into account while exercising the power under Section 319 Cr.P.C. In view of unambiguous interpretation to the word 'evidence'; it is limited to the evidence recorded by the trial court".

27. With profound respect and utmost humility at my command, I may record that it is well settled that authority/judicial precedent has to be understood in context of facts based on which the observation made therein are made. The ratio of a decision is generally secundum subjectam materiam.

28. In **Quinn v. Leathem, (1901) AC 495**, Earls of Halsbury L.C. stated:

"...that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other case is only an authority for what it actually decides."

29. It is also well settled that a decision is precedent on its own facts. Each case presents its own feature. It is not everything said by a Judge while giving judgement that constitutes a precedent. The only thing in Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyze a decision and isolate from it the ratio decidendi.

30. This Court always respects any view expressed by the Apex Court like the view expressed in the case of **Brijendra Singh (Supra)** but the conflicting view appeared to exist on the same point of meaning of expression "evidence" used in Section 319 Cr.P.C., the decision of Hon'ble Apex Court in the case of **Hardeep Singh (Supra)** rendered by Bench of larger composition shall prevail upon the case of **Brijendra Singh (Supra)** and another decision. Therefore, the judgment of the Apex Court in the case of **Brijendra Singh (Supra)** does not apply in the facts of the present case.

31. This Court has also find substance in the submission made by the learned counsel for opposite party no.2 that the statements given by the eye witnesses, namely, Rekha i.e. sister of the deceased in the affidavit submitted before the Investigating Officer and given before the Magistrate under Section 164 Cr.P.C. as well as the statements given by independent eye witness, namely, Harendra in the affidavit submitted before the Investigating Officer, given before the Magistrate under Section 164 Cr.P.C. and also

given before the trial court as P.W.-2 have more evidentiary value rather than that the statements given by them before the Police under Section 161 Cr.P.C.. In the statements given in the affidavit and before the Magistrate under Section 164 Cr.P.C., eye witness Rekha has categorically stated qua the involvement of the revisionists in the commission of the alleged crime i.e. murder of the deceased. Similarly, in the affidavits submitted before the Investigating Officer, in the statements given before the Magistrate under Section 164 Cr.P.C. and in the statements given before the trial court, both the prosecution eye witnesses, namely, Dinesh Kumar (first informant/opposite party no.2) and Harendra, who is also an independent eye witness, have pin-pointed the revisionist for commission of the alleged offence.

32 . In the light of aforesaid, the present revision is bereft of merit. The impugned order passed by trial judge is perfectly justified and well within the guidelines/ parameters laid down by Constitution Bench decision of Hon'ble Apex Court in the case of **Hardeep Singh (Supra)** and the judgments on the subject of alibi referred to herein above.

33. The present criminal revision is accordingly dismissed. There shall be no order as to costs.

(2023) 9 ILRA 718
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.08.2023

BEFORE

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

Second Appeal No. 1486 of 1999

Kashi Ram

...Appellant

Versus

Ramji Lal

...Respondent

Counsel for the Appellant:

Sri P.C. Jain

Counsel for the Respondent:

Sri Kunal Shah, Sri Madhav Jain, Sri Shashank Shekhar Mishra, Sri Suvansit Kumar Jaiswal, Sri Tarun Jha

A. Civil Law - Civil Procedure Code, 1908-Section 100-Specific Relief Act. 1963-Section 9 & 10 - Indian Evidence Act, 1872- Section 91 & 92-specific performance-In this case the plaintiff not only entered into the first suit agreement, but before time under it came to an end, got the second suit agreement executed extending obligations between parties for a further period of one year-There is also evidence to show that he got a notice issued to the defendant to come forth and execute the sale deed specifying a date to appear before the Sub-Registrar-On the date indicated in the notice, the plaintiff remained present before the Sub-Registrar, but the defendant did not appear, a fact regarding which the two Courts below are unanimous- This conduct of the plaintiff in chasing the defendant to execute a sale deed is relevant, which the Courts below have taken into consideration while exercising their discretion in granting specific performance-There is an added feature about the conduct of parties. The defendant in Paragraph Nos.2 and 11 of the written statement has denied the plaintiff's case that he received a sum of Rs.60,000/- in earnest from the plaintiff, but Rs.40,000/- alone, about which it is pleaded that it was a sum of money borrowed to pay off another person. However, in his examination-in-chief, the defendant has acknowledged the fact that he borrowed a sum of Rs.60,000/- from the plaintiff, of which he needed Rs.40,000/- to pay off. In his cross-examination, he has acknowledged the fact again that he borrowed a sum of Rs.60,000/- from the plaintiff, of which Rs.20,000/- were paid before execution of the first suit agreement and Rs.40,000/- at the time of registration of the said agreement. Though, the defendant has

described in his testimony the nature of the transaction as a loan, but has acknowledged the fact that he received a sum of Rs.60,000/- from the plaintiff, Rs.20,000/- before the registration of the first suit agreement and Rs.40,000/- at the time of its registration. This is in stark contrast to his stand in Paragraph Nos. 2 and 11 of the written statement, where he says that he borrowed a sum of Rs.40,000/- from the plaintiff and not Rs.60,000/-. The nature of the transaction has been opined by the Courts below not to be a loan, which has been approved by this Court while answering Substantial Question of Law (1); but that is not relevant for the purpose of the present question. The principle, about a party who does not rely on a written document, but says that the intention of the transaction embodied therein was entirely different from the express words, is free to show that different intention, by parole or extrinsic evidence, was enunciated by their Lordships of the Supreme Court in Gangabai's Case.(Para 1 to 69)

B. What bears on the question here is the fact that the conduct of the defendant has not been fair in dealing with the plaintiff and before the Court as well. He deliberately came up with a case in his pleadings that he had borrowed a sum of Rs.40,000/- alone, denying the plaintiff's case that he had paid the defendant a sum of Rs.60,000/-. Later, in his testimony, the defendant accepted the fact that he had received from the plaintiff a sum of Rs.60,000/- until time when he executed the first suit agreement. This too is conduct relevant because it shows that the defendant had been trying to evade his obligations under the contract by misquoting the sum of money that he had received from the plaintiff relative to the transaction. A reading of the impugned judgments clearly show all these facts have weighed with the Courts below in granting specific performance, though they might not have scripted their reasons for the exercise of that discretion. As already said, it may always be desirable for the Court to give reasons why specific

performance was granted because the exercise of discretion is subject to scrutiny by the Appellate Court, but it is not imperative. It is not imperative to give reasons, howsoever desirable, for the cause that if from the evidence considered by the Courts below and on record, the relevant factors to exercise discretion the way it is done by the Court are there, holding the decree to be vitiated on the ground alone that reasons have not been mentioned, would be more of a formality than anything substantial.(Para 66, 67)

The appeal is dismissed. (E-6)

List of Cases cited:

1. Mahendra Singh Vs Ramesh Singh
2. Rajendra Singh Vs Chandra Pal
3. K. Laxmanan Vs Thekkayil Padmini & ors.
4. Mangala Waman Karandikar Vs Prakash Damodar Ranade
5. Gangabai Vs Chhabubai (1982) 1 SCC 4 : AIR 1982 SC 20
6. Ishwar Dass Jain Vs Sohan Lal (2000) 1 SCC 434 : AIR 2000 SC 426
7. V. Anantha Raju & anr.. Vs T.M. Narasimhan
8. Roop Kumar Vs Mohan ThedaniGurdial Singh & ors. Vs Raj Kumar Aneja & ors.
9. Madhukar Nivrutti Jagtap & ors. Vs Pramilaibai Chandulal Parandekar (dead) thru LRs & ors. Vimal Chand Ghevarchand Jain & ors. Vs Ramakant Eknath Jadoo
10. Placido Francisco Pinto Vs Jose Francisco Pinto

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

This is a defendant's appeal arising out of a suit for specific performance of contract.

2. Ramji Lal instituted Suit No.538 of 1986 in the Court of the Civil Judge (now Civil Judge, Senior Division), Agra against Kashi Ram, seeking a decree for specific performance of agreement to sell dated 06.07.1984 and a further agreement to sell dated 18.06.1985, together with a direction to deliver possession of the property, subject matter of the suit, within time to be stipulated by the Court; and in default, to carry out the decree through the agency of Court. A further decree for the award of pendente lite and future mesne profits at the rate of Rs.10,000/- per annum was claimed, apart from costs of the suit.

3. The plaintiff, Ramji Lal, pleaded a case to the effect that the plaintiff and Kashi Ram, the defendant, entered into a bargain for the sale of agricultural Plot No.306, admeasuring 5 *bigha* 15 *biswa* and 15 *biswansi* owned by the defendant and situate at Village Therai, Pargana Fatehabad, District Agra. The defendant agreed to sell the plot of land aforesaid in the plaintiff's favour for a total sale consideration of Rs.65,000/-. A registered agreement to sell, according to the plaintiff, was executed by the defendant in the former's favour on 06.07.1984. The agreement to sell dated 06.07.1984, executed between parties, was presented for registration to the Sub-Registrar, Tehsil Fatehabad, District Agra on 06.07.1984. The aforesaid agreement, which shall hereinafter be referred to as 'the first suit agreement', carried all terms between parties, upon which the defendant had covenanted to sell his agricultural land, above described, in favour of the plaintiff. The land, agreed to be sold and above described, shall hereinafter be called 'the suit property'.

4. Kashi Ram, the sole defendant-appellant died pending this appeal and his heirs and LRs have been brought on record

as defendant-appellant Nos.1/1, 1/2, 1/3 and 1/4 to the appeal. The deceased-defendant, Kashi Ram, now represented by his heirs and LRs as aforesaid, shall hereinafter be referred to as 'the defendant'. Ramji Lal, the sole plaintiff-respondent shall hereinafter be called 'the plaintiff'.

5. It is the plaintiff's case that the defendant received from him a sum of Rs.60,000/- as part of the agreed sale consideration and covenanted to execute a registered sale deed within one year of the first suit agreement, after securing an income tax certificate under Section 230-A of the Income Tax Act, 1961. The defendant requested extension of the period of time to perform his part of the contract, leading to the execution of another registered agreement on 18.06.1985, which enlarged the period of time for performance of obligations under the first suit agreement by one year i.e. up to 18.06.1986. The registered agreement to sell dated 18.06.1985 shall hereinafter be called 'the second suit agreement', and the first and second suit agreements, wherever referred to together, shall be called 'the suit agreements'. The plaintiff says that he asked the defendant to execute a sale deed as covenanted under the suit agreements, but the defendant evaded discharging his obligation on one pretext or the other.

6. The plaintiff served a registered notice on 29th May, 1986, calling upon the defendant to execute the sale deed on 12.06.1986. The defendant did not turn up at the Sub-Registrar's office at *Tehsil Fatehabad*, District Agra on the said date to execute a sale deed in the plaintiff's favour. Instead, he sent a reply mentioning incorrect facts. The plaintiff pleaded that he had no alternative but to institute the present suit. It is then pleaded by the

plaintiff that he has always been ready and willing to perform his part of the contract and is still ready and willing to perform his obligations under the suit agreements. It is also pleaded by the plaintiff that the defendant is liable to pay him damages for the use and occupation of the suit property @ Rs.10,000/- per year, inasmuch as the defendant failed to execute a sale deed as contracted and deliver possession of the suit property to the plaintiff, depriving the latter of beneficial use of the said property, which would yield him income. The plaintiff's money has remained blocked on account of the breach of contract committed by the defendant. It is on these facts that the suit, giving rise to this appeal, was instituted on 10.07.1986.

7. A written statement was filed on behalf of the defendant on 15.05.1992. The plaintiff's allegations were generally denied, though not the factum of execution of the suit agreements. It was pleaded that the suit agreements were not executed with the intention of conveying the suit property to the plaintiff, but as security for the sum of Rs.40,000/-, that the defendant borrowed of the plaintiff to pay off his creditor, Gyan Singh, who too held an agreement to sell in his favour executed by the defendant, also for the purpose of securing money lent. In a more detail of his defence, the defendant has pleaded that he had borrowed a sum of Rs.20,000/- from one Saudan Singh son of Sujan Singh on or about the 14th of September, 1979 and executed, by way of collateral security, an agreement to sell dated 14.09.1979, covenanting to transfer the suit property in favour of Saudan Singh for a total sale consideration of Rs.29,000/-.

8. It was the defendant's case that he could pay a very small sum out of the money borrowed from Saudan Singh until

after expiry of two years from the date of loan. Therefore, the defendant borrowed from Gyan Singh son of Betal Singh to pay off Saudan Singh. In order to secure the sum borrowed from Gyan Singh, the defendant executed in his favour a registered agreement to sell dated 23.09.1982, covenanting to convey the suit property for a sum of Rs.45,000/-, where the instrument acknowledges the defendant to have received in earnest from Gyan Singh a sum of Rs.40,000/-. This transaction was a financial arrangement to secure the loan that the defendant had taken from Gyan Singh to pay off the previous creditor. It is pleaded by the defendant that Gyan Singh demanded the money that he had lent. In order to pay off Gyan Singh, the defendant borrowed a sum of Rs.40,000/- from the plaintiff, who is the defendant's elder brother's son. This was done on 06.07.1984. The defendant paid off Gyan Singh's debt on 06.07.1984, who executed a registered instrument cancelling the agreement to sell earlier executed by the defendant in his favour. This instrument of cancellation was executed by Gyan Singh on 06.07.1984. On 06.07.1984, in order to secure the loan of Rs.40,000/- by his nephew (the plaintiff), the defendant entered into the first suit agreement with him, where the suit agreement was intended to be nothing more than a collateral security. It is pleaded that there was no intention ever to sell the suit property by the defendant in the plaintiff's favour. The purpose of the first suit agreement was to secure repayment of the sum of money borrowed by the defendant to pay off Gyan Singh.

9. The defendant has further pleaded that since he could not repay the loan of Rs.40,000/- to the plaintiff within the covenanted time of one year, he executed

another agreement to sell, the second suit agreement, also as collateral security, extending the term by one year. The second suit agreement, as already said, was executed on 18.06.1985.

10. It is the defendant's further case that at the time of renewal of obligation in terms of the second suit agreement, that is to say, on 18.06.1985, the defendant paid the plaintiff in cash a sum of Rs.15,000/- and 100 maunds of wheat, both of which, according to the defendant, have to be set off against the loan.

11. The defendant says that the antecedent transactions between him and third parties, where agreements were executed in order to secure repayment of loans raised from these parties and then paid off, have to be borne in mind in order to understand the nature of the present transaction. The true nature of the transaction would be better understood when bearing in mind earlier transactions with third parties regarding the suit property serving as a security for the repayment of loans raised, the blood relationship between the parties here is kept in mind. The present transaction embodied in the suit agreements is nothing more than a security for the repayment of money lent by the plaintiff. The suit agreements never did bind the defendant, so far as his obligation to convey the suit property on the terms therein is concerned. It is also the defendant's case that no contractual obligation binds the defendant to convey the suit property to the plaintiff.

12. It is the further case of the defendant that in the year 1984, the price of agricultural land, where the suit property is situate, was not less than Rs.30,000-35,000/- per bigha. Therefore, the worth of

the suit property would be a sum of Rs.1,75,000/- to Rs.2,00,000/-, which the defendant could not be expected to part with for a trifling. The defendant has further pleaded that except the suit property, he has no other agricultural holding. In case, the suit property goes out of his hands, it would cause him extreme hardship as the defendant has no other source of income, but the one that he derives out of exploitation of the said property. If a decree for specific performance is passed, it would cause the defendant unforeseeable hardship and, therefore, the discretion under Section 20 of the Specific Relief Act ought not to be exercised in the plaintiff's favour. The defendant's liability to pay damages for use and occupation @ Rs.10,000/- per year or at any other rate was denied.

13. On the pleadings of parties, the following issues were struck on 24.01.1995:

“(1) Whether the defendant executed the agreement for sale on 06.07.1984 in favour of the plaintiff?

(2) Whether the agreement for sale dated 06.07.1984 was extended through agreement dated 18.06.1985?

(3) Whether the plaintiff was always ready and willing to perform his part of agreement?

(4) Whether the defendant is liable to pay the damages of Rs.10,000/- per year as alleged in Paragraph No.7 of the plaint?

(5) Whether the plaintiff paid Rs.6433-20 against the recovery of the loan due from the defendant, as alleged in Paragraph No.4 of the replication, 48-Ga?

(6) Whether the alleged agreement to sell was a loan transaction as alleged in the W.S.?

(7) To what relief the plaintiff is entitled for?

14. An additional issue, numbered as Issue No.8, was framed on 20.10.1997, which reads:

“(8) Whether the defendant paid Rs.15,000/- in cash and 100 maunds wheat at the time of renewal on 18.06.1985 to the plaintiff?”

Note: The issues, set forth hereinabove, have been reproduced from the order-sheet of the Trial Court. The issues framed by the Trial Court are in the English language. The two Courts below in the judgments have done a Hindi rendition of the issues framed while writing their judgments, which bear some inconsequential differences.

15. The plaintiff filed in his documentary evidence the first suit agreement, Paper No.22-Ka, the second suit agreement, Paper No.21-Ka, the application for attendance before the Sub-Registrar, Paper No.23-Ga, a copy of the notice, Paper No.24-Ga and the reply notice, Paper No.25-Ga. The plaintiff examined in support of his case himself as PW-1, Shiv Swaroop as PW-2 and Het Singh as PW-3.

16. The defendant filed in support of his case documentary evidence, being a copy of the agreement to sell executed in favour of Saudan Singh, Paper No.29-Ga, agreement to sell in favour of Gyan Singh dated 23.09.1982, Paper No.30-Ga and the instrument of cancellation executed by

Gyan Singh in favour of Kashi Ram dated 06.07.1984, Paper No.90-Ga. In support of his case, the defendant examined himself as DW-1, Chhitariya as DW-2 and Bhimsen as DW-3.

17. The Trial Court, upon trial of the suit, decided Issue Nos.1, 2 and 6 together, answering Issue Nos.1 and 2 in favour of the plaintiff and Issue No.6 against the defendant. Issue No.3 was answered in favour of the plaintiff and against the defendant. Issue No.4 was answered against the plaintiff. Issue No.5 was declined to be decided by the Trial Court holding that it did not arise upon pleadings of parties and the defendant had no opportunity to answer it. It had been framed on the basis of a miscellaneous application. Issue No.7 was answered for the plaintiff and against the defendant holding the plaintiff entitled to relief of specific performance. Issue No.8 was decided against the defendant.

18. The Trial Court, by its judgment and decree dated 29.07.1985, decreed the suit for the relief of specific performance, but dismissed it for mesne profits.

19. The defendant appealed the decree to the District Judge, Agra, where it was registered as Civil Appeal No.294 of 1998. The appeal upon assignment came up for determination before the 8th Additional District Judge, Agra on 10.08.1999. The Lower Appellate Court dismissed the appeal with costs and affirmed the Trial Court's decree.

20. Aggrieved, this appeal has been preferred by the defendant.

21. The appeal was admitted to hearing on 04.05.2001 on the following substantial question of law:

Whether the courts below have erred in law in not considering the

agreements to sell dated 14.9.1979 and 23.9.1972 (sic 23.09.1982) executed by Kashi Ram and as such the finding on the question as to whether the transaction was a loan recorded by the courts below is vitiated?

22. When the appeal came up for hearing before this Court on 22.09.2021, the first substantial question of law was rephrased, whereas a second question was added. The appeal was, therefore, heard on the following two substantial questions of law, the first being merely a rephrasing of the question formulated on 04.05.2001:

(1) Whether the suit agreement subject matter of action, in substance, embodies a transaction that is a loan with the agreement serving as security?

(2) Whether it is imperative for the Court to express reasons why discretion to grant specific performance under Section 20 of the Specific Relief Act, 1963 has been exercised?

23. Heard Mr. P.C. Jain, learned Counsel for the defendant and Mr. Kunal Shah, learned Counsel for the plaintiff.

24. Advancing his submissions on the first substantial question of law, Mr. P.C. Jain, learned Counsel for the defendant has invited the attention of this Court to certain circumstances, which according to him lead to the inevitable conclusion that the suit agreements were executed for the purpose of security and not oblige the defendant to execute a sale deed in the plaintiff's favour as per ostensible terms. Highlighting these circumstances, it is pointed out by Mr. Jain that the two earlier agreements to sell, the first in favour of Saudan Singh, and the second, in favour of Gyan Singh, both of

which were mutually cancelled upon repayment of the earnest, show that the defendant had immediately, before the execution of the suit agreements, borrowed money from two other men and secured its repayment by executing an agreement to sell with regard to the suit property. Mr. Jain submits that the two earlier transactions show the inclination or the mind of the defendant, which was about borrowing money, creating a security on the suit property by way of an agreement to sell, but never the *animus* to transfer it.

25. According to Mr. Jain, dovetailed into the above circumstance is the fact that the day the first suit agreement was executed in the plaintiff's favour, to wit, 06.07.1984, an instrument of cancellation was executed between the defendant and the previous lender, Gyan Singh, discharging the agreement to sell in the latter's favour upon receipt of the money lent. It is also stressed by the learned Counsel for the defendant that there is an identity in figure of the part of the sale consideration, said to be received before the Sub-Registrar in the first suit agreement, and that mentioned in the instrument of cancellation executed the same day by Gyan Singh. Both instruments mention a sum of Rs.40,000/- as the consideration. It is urged by the learned Counsel for the defendant on the foot of the fact that a sum of Rs.40,000/- received by the defendant from the plaintiff, shown as part of the Rs.60,000/- earnest before the Sub-Registrar, was utilized to pay off the previous creditor, Gyan Singh, in order to secure discharge of the agreement in the latter's favour, that the suit agreements must be regarded as transactions to secure the repayment of the loan.

26. It is also pointed out by Mr. Jain that both documents were scribed by the

same man, Shiv Swaroop, who has been examined as PW-2, to prove execution of both the documents. It is particularly emphasized that DW-2, Chhitariya is a common marginal witness to the first suit agreement and the instrument of cancellation. He has said in his testimony that the first suit agreement was executed to serve as security for the loan advanced by the plaintiff to the defendant and not to create any obligation to sell the suit property. It is also emphasized that the plaintiff, while testifying as PW-1 in the witness-box, did not deny the previous agreements to sell executed by the defendant in favour of third parties and their cancellation, but said that he did not know anything about these transactions.

27. The next circumstance, to which Mr. Jain has called attention of this Court, is the fact that out of the agreed sale consideration of Rs.65,000/-, the first suit agreement acknowledges payment of Rs.60,000/- on 06.07.1984, leaving a residue of Rs.5000/-. The reason indicated for eschewing an immediate sale is the necessity of obtaining permission from the Income Tax Authorities under Section 230-A of the Income Tax Act, which according to the provisions of that statute is not required in case of sale of agricultural land. It is also emphasized that the other reason that some time was required to arrange for the balance of Rs.5000/- is highly improbable. These circumstances, according to Mr. Jain, show that there was no real transaction of sale in the contemplation of parties. The extension of time by one year in terms of the second suit agreement does not mention anything by way of consideration.

28. The attention of the Court has also been drawn by the learned Counsel for the

defendant to the testimony of DW-2, Chhitariya and DW-3, Bhimsen, where they say that Rs.15,000/-, besides 100 maunds of wheat were given by the defendant to the plaintiff at the time of execution of the second suit agreement. Learned Counsel has also pointed out that the plaintiff in his testimony in Paragraph No.8 of his cross-examination has spoken of the prior loans taken by the defendant saying that he did not know about the earlier transactions. About PW-3, it is said by the learned Counsel that this witness has been relied upon by the Lower Appellate Court as the star witness to accept the plaintiff's case, whose testimony has been accepted over other witnesses. About this witness, it is pointed out that he has said that he did not know about the previous agreements with Saudan Singh and Gyan Singh, and also did not know if an instrument of cancellation was executed the same day as the first suit agreement, written by the same scribe, Shiv Swaroop Gupta.

29. It is also emphasized by the learned Counsel for the defendant that in response to the plaintiff's notice, calling upon the defendant to execute a sale deed, the defendant specifically denied that the first suit agreement was executed to create any obligation for sale of the suit property and said that it was meant to serve as security for the loan advanced. The plaintiff never disputed this reply by further correspondence. According to the defendant, in Paragraph No.5 of the plaint, the assertion in the defendant's reply, given in answer to the plaintiff's notice, were not specifically traversed, except terming the defendant's reply as false. Similarly, in Paragraph No.7 of his examination-in-chief, the plaintiff did not deny the allegations about the transaction being a

loan, but said that the defendant gave an incorrect reply to his notice.

30. The judgment of the Lower Appellate Court has been criticized with regard to the substantial question involved on the basis that the Lower Appellate Court accepted the testimony of Het Singh, PW-3 about the fact that the suit agreements embody a transaction for sale of the suit property and not one to secure a loan. This witness's testimony has also been accepted about the fact that the intention was to retain the suit property within the family and save it from being lost to a stranger in auction. The learned Counsel for the defendant has criticized the above finding as manifestly illegal, because according to him the Courts below did not consider or record any reason to disbelieve the testimony of DW-2 and DW-3, both of whom categorically say that the transaction was one to secure the loan. The findings of the Courts below on this score have also been criticized by the learned Counsel for the defendant on basis that at the time when the suit agreements were executed, it is nobody's case that the land was under any kind of distress or the peril of auction. It is urged by the learned Counsel for the defendant that evidence extrinsic to the contract can be looked into, when the true character of the document is questioned. In support of the said submission, Mr. Jain has relied upon the decisions of the Supreme Court in **Gangabai v. Chhabubail**, **Vimal Chand Ghevarchand Jain and others v. Ramakant Eknath Jadoo**², and **Placido Francisco Pinto v. Jose Francisco Pinto**³.

31. Mr. Kunal Shah, learned Counsel appearing on behalf of the plaintiff submits that in principle, though there may be cases where on the circumstances obtaining an inference about the nature of an agreement

to sell may be drawn that it embodies a transaction of a character different than the one ostensible, but for that kind of an inference, there must be telltale facts supported by extrinsic evidence of an irresistible character that dispels the apparent tenor of the contract. Learned Counsel for the plaintiff has taken the Court through the pleadings and evidence of parties, both oral and documentary, besides findings of the Courts below to show that there are indeed no circumstances, so glaring, proving the real nature of the transaction as one different from that embodied in the suit agreements. In support of the principle that in order to show that the contract embodied in an agreement to sell, is different from what it ostensibly is, circumstances must be very glaring and supported by extrinsic evidence of an irresistible character, Mr. Shah has placed reliance upon the decision of the Supreme Court in **Gurdial Singh and others v. Raj Kumar Aneja and others**⁴ and that in **Madhukar Nivrutti Jagtap and others v. Pramilabai Chandulal Parandekar (dead) through LRs and others**⁵. He submits that in this case the defendant's pleadings and evidence are sketchy, contradictory and vague. It is not one of those cases where this Court need look behind the agreement as a case of exception to Sections 91 and 92 of the Indian Evidence Act, 18726 in order to find out the real nature of the transaction that the parties intended to enter into. It is with reference to the pleadings and evidence of parties, to which allusion would be made during the course of this judgment, that Mr. Shah submits that there is no such perversity as may necessitate this Court to disturb the concurrent findings of fact recorded by the two Courts below, going by the apparent tenor of the suit agreements.

32. This Court has considered the submissions advanced by learned Counsel for both sides on Substantial Question of Law (1). As a rule, a solemn contract regarding sale of immovable property reduced to writing and registered, the execution and contents whereof are not in dispute, is to be construed according to its apparent tenor. Parole evidence of parties, different from the written terms of the contract, is against the rule of exclusion of oral by documentary evidence. The exceptions to the rule are detailed in the six provisos to Section 92 of the Evidence Act, besides Sections 95, 96, 97, 98, 99 and 100 of the last mentioned Act.

33. The question whether the true character of a document, expressing a different intention from what it ostensibly says, can be looked into by the Court in terms of parole evidence given about it, has been the subject matter of frequent judicial attention. It is a judicially approved principle that the bar imposed by Section 92 of the Evidence Act would not apply if a party does not rely upon the terms of a document, but says that something different from the ostensible terms was intended by parties. In this connection, reference may be made to the decision of the Supreme Court in **Gangabai (supra)**. The facts in **Gangabai**, in order to appreciate the true import of the principle, are very relevant and these can be best recapitulated in the words of their Lordships. In Paragraph No.2 of the report in **Gangabai**, the facts are described thus:

“2. The respondent filed a suit in the Court of the Second Joint Civil Judge, Amravati alleging that the house situated near Sarafa Bazaar in Amravati had been purchased by her in 1950 for Rs 4000 and thereafter improvements had been effected

by her to the property. Being in need of money, she entered into an agreement with the appellant for a loan of Rs 2000 and it was decided that simultaneously she should execute a nominal document of sale and a rent note. These documents were executed on January 7, 1953. She alleged that the documents were never intended to be acted upon, and that the rent paid by her represented in fact interest at 18 per cent on the loan. She continued in possession of the house property throughout and, it is said, carried on repairs from time to time. It was stated that the appellant was attempting to enforce the document as a sale deed by filing suits in the Court of Small Causes for recovery of rent. As two suits had resulted in decrees, she considered it necessary to file the present suit for a declaration that she was, and continued to be, owner of the house property. In defence, the appellant maintained that the sale deed represented a genuine transaction, and ownership of the house property had passed to the appellant. It was pleaded that the decrees passed by the Court of Small Causes operated as *res judicata* barring the respondent from pleading that the sale deed was merely a nominal transaction. Reliance was also placed on Section 92 of the Indian Evidence Act.”

34. The principle, about a party who does not rely on a written document, but says that the intention of the transaction embodied therein was entirely different from the express words, is free to show that different intention, by parole or extrinsic evidence, was enunciated by their Lordships of the Supreme Court in **Gangabai** thus:

“11. It is clear to us that the bar imposed by sub-section (1) of Section 92 applies only when a party seeks

to rely upon the document embodying the terms of the transaction. In that event, the law declares that the nature and intent of the transaction must be gathered from the terms of the document itself and no evidence of any oral agreement or statement can be admitted as between the parties to such document for the purpose of contradicting or modifying its terms. The sub-section is not attracted when the case of a party is that the transaction recorded in the document was never intended to be acted upon at all between the parties and that the document is a sham. Such a question arises when the party asserts that there was a different transaction altogether and what is recorded in the document was intended to be of no consequence whatever. For that purpose oral evidence is admissible to show that the document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document, was entered into between the parties (*Tyagaraja Mudaliyar v. Vedathanni* [AIR 1936 PC 70 : 63 IA 126 : 1936 All LJ 136 : 40 Cal WN 353]). The trial court was right in permitting the respondent to lead parole evidence in support of her plea that the sale deed dated January 7, 1953 was a sham document and never intended to be acted upon.”

35 . The principle was acknowledged on established authority in **Vimal Chand Ghevarchand Jain (supra)** by the following remarks of their Lordships in Paragraph No.31 of the report:

“31. Indisputably when the true character of a document is questioned, extrinsic evidence by way of oral evidence is admissible. (See *R. Janakiraman v. State* [(2006) 1 SCC 697 : (2006) 1 SCC (Cri) 442] , SCC para 24; *Roop Kumar v. Mohan*

Thedani [Roop Kumar v. Mohan Thedani, (2003) 6 SCC 595], SCC para 19 and SBI v. Mula Sahakari Sakhar Karkhana Ltd. [(2006) 6 SCC 293], SCC paras 23 to 32.) We would, therefore, proceed on the premise that it was open to the respondent to adduce oral evidence in regard to the nature of the document.....”

36. The same principle was enunciated by the Supreme Court in **Gurdial Singh** (*supra*), where the lease deed, subject matter of statutory proceedings for eviction under the East Punjab Urban Rent Restriction Act, 1949, was claimed by parties in occupation of the premises, to be in fact not a lease, but a different transaction, never intended to be acted upon by parties. On the issue whether the occupants, who being not parties to the lease deed between the owner and one Goyal, the lessee, but sub-lessees from Goyal, were entitled to show the true character of the lease contrary to its apparent tenor, it was held by the Supreme Court:

“11. It is true that in spite of the availability of a registered deed of lease executed between the owners and Goyal, the occupants are not debarred from taking a plea that the transaction between the owners and Goyal was not what it apparently appears to be just by reading of the lease deed. The occupants, by raising a plea which they have taken in the written statements, are not proposing to put in issue and let in oral evidence of the terms of the lease deed. They are also not raising a plea or adducing oral evidence for the purpose of contradicting, varying, adding to or subtracting from the terms of the lease deed. They are not parties to the lease deed. Therefore, Sections 91 and 92 of the Evidence Act, 1872 are not attracted. The

occupants are impeaching the outward validity of the lease deed by submitting that what has been described on paper is not the real intention of the parties to do; the lease deed and the transaction spelled out by it was a sham or fictitious transaction not intended to be acted upon, rather intended to overcome or avoid the effect of the rent control legislation. It is permissible to take such a plea and adduce evidence to substantiate the same. The plea can be taken though the onus would lay on the shoulders of the party taking such a plea. To discharge the onus, direct evidence may or may not be available and it would be permissible to draw an inference from tell tale circumstances. However, the inference to be drawn from the circumstances should be an irresistible one and not merely a matter of conjectures and surmises.”

(emphasis by Court)

37. The most elaborate exposition of the rule regarding exclusion of oral by documentary evidence and in what circumstances the bar would not attach, is to be found in **Roop Kumar v. Mohan Thedani**⁷, where it has been observed:

“17. It is likewise a general and most inflexible rule that wherever written instruments are appointed, either by the requirement of law, or by the contract of the parties, to be the repositories and memorials of truth, any other evidence is excluded from being used either as a substitute for such instruments, or to contradict or alter them. This is a matter both of principle and policy. It is of principle because such instruments are in their own nature and origin, entitled to a much higher degree of credit than parol evidence. It is of policy because it would be attended with great mischief if those

instruments, upon which men's rights depended, were liable to be impeached by loose collateral evidence. (See Starkie on Evidence, p. 648.)

18. In Section 92 the legislature has prevented oral evidence being adduced for the purpose of varying the contract as between the parties to the contract; but, no such limitations are imposed under Section 91. Having regard to the jural position of Sections 91 and 92 and the deliberate omission from Section 91 of such words of limitation, it must be taken note of that even a third party if he wants to establish a particular contract between certain others, either when such contract has been reduced to in a document or where under the law such contract has to be in writing, can only prove such contract by the production of such writing.

19. Sections 91 and 92 apply only when the document on the face of it contains or appears to contain all the terms of the contract. Section 91 is concerned solely with the mode of proof of a document with limitation imposed by Section 92 relates only to the parties to the document. If after the document has been produced to prove its terms under Section 91, provisions of Section 92 come into operation for the purpose of excluding evidence of any oral agreement or statement for the purpose of contradicting, varying, adding or subtracting from its terms. Sections 91 and 92 in effect supplement each other. Section 91 would be inoperative without the aid of Section 92, and similarly Section 92 would be inoperative without the aid of Section 91.

20. The two sections, however, differ in some material particulars. Section 91 applies to all documents, whether they

purport to dispose of rights or not, whereas Section 92 applies to documents which can be described as dispositive. Section 91 applies to documents which are both bilateral and unilateral, unlike Section 92 the application of which is confined to only bilateral documents. (See : Bai Hira Devi v. Official Assignee of Bombay [AIR 1958 SC 448] .) Both these provisions are based on "best-evidence rule". In Bacon's Maxim Regulation 23, Lord Bacon said "The law will not couple and mingle matters of speciality, which is of the higher account, with matter of averment which is of inferior account in law." It would be inconvenient that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of parties should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory.

21. The grounds of exclusion of extrinsic evidence are : (i) to admit inferior evidence when law requires superior would amount to nullifying the law, and (ii) when parties have deliberately put their agreement into writing, it is conclusively presumed, between themselves and their privies, that they intended the writing to form a full and final statement of their intentions, and one which should be placed beyond the reach of future controversy, bad faith and treacherous memory.

22. This Court in *Gangabai v. Chhabubai* [(1982) 1 SCC 4 : AIR 1982 SC 20] and *Ishwar Dass Jain v. Sohan Lal* [(2000) 1 SCC 434 : AIR 2000 SC 426] with reference to Section 92(1) held that it is permissible to a party to a deed to contend that the deed was not intended to be acted upon, but was only a sham document. The bar arises only when the document is relied upon and its terms are

sought to be varied and contradicted. Oral evidence is admissible to show that document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document, was entered into between the parties.

23. But the question is whether on the facts of the present case, the reasons given by the defendant-appellant in his evidence for claiming the agreement as sham document can be accepted.”

38. Following **Roop Kumar** (*supra*), it was held in **Placido Francisco Pinto** (*supra*):

“27. A perusal of the above judgment would show that the oral evidence of a written agreement is excluded except when it is sought to be alleged the document as a sham transaction.

28. It is beyond dispute that a sale deed is required to be registered i.e. a document required by law to be reduced to the form of a document. Therefore, no evidence of any oral agreement or statement shall be admitted for the purpose of contradicting, varying, adding or subtracting from its terms. The proviso (1) of Section 92 of the Evidence Act on which reliance was placed is a proof of such fact which would invalidate any document such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law. Section 92 of the Evidence Act reads as under:

“92. Exclusion of evidence or oral agreement. - When the terms of any such contract, grant or other disposition of

property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:

Proviso(1).—Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law.”

29. The respondents were free to prove fraud in execution of the sale deed. However, factually, the respondents have not alleged any fraud in their suit or in the written statement in the suit filed by appellant No. 1. The feigned ignorance about the nature of document cannot be said to be an instance of fraud. In the absence of any plea or proof of fraud, respondent No. 1 is bound by the written document on which he admitted his signatures and of his wife. There is no oral evidence which could prove fraud, intimidation, illegality or failure of consideration to permit the respondents to lead oral evidence to dispute the sale deed dated 14.9.1970. Therefore, the judgments referred to by Mr. Mehta are of no help to support his arguments. Thus, the findings recorded by the First Appellate Court as affirmed by the High Court are clearly erroneous in law and are, thus, set aside.”

39. In **V. Anantha Raju and another v. T.M. Narasimhan**⁸, the question again

fell for consideration before a three Judge Bench of their Lordships of the Supreme Court, where the principles about the permissibility of showing by parole evidence that the written contract was a sham, and what was intended by parties, was something completely different, were enunciated thus:

“23. This Court has further held that Sections 91 and 92 of the Evidence Act would apply only when the document on the face of it contains or appears to contain all the terms of the contract. It has been held that after the document has been produced to prove its terms under Section 91, the provisions of Section 92 come into operation for the purpose of excluding evidence of any oral agreement or statement for the purpose of contradicting, varying, adding or subtracting from its terms. It has been held that it would be inconvenient that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of parties should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory. It has been held that when parties deliberately put their agreement into writing, it is conclusively presumed, between themselves and their privies, that they intended the writing to form a full and final statement of their intentions, and one which should be placed beyond the reach of future controversy, bad faith and treacherous memory.

24. Though referring to *Gangabai w/o Rambilas Gilda (Smt.) v. Chhabubai w/o Pukharajji Gandhi (Smt.) and Ishwar Dass Jain (Dead) Through Lrs. v. Sohan Lal (Dead) by Lrs.*, it has been held that it is permissible for a party to a deed to contend that the deed was not intended to

be acted upon, but was only a sham document, it would be necessary to lead oral evidence to show that the document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document, was entered into between the parties.

25. It could thus be seen that once the plaintiffs had specifically contended that the terms of the 1992 SC5356 Deed were amended/ modified by the 1995 Deed, and the defendants admitted about the execution of the said document, i.e., the 1995 Deed, if it was the case of the defendants that the terms mentioned in the 1995 Deed were inadvertent or a mistake in fact, then the burden to prove the same shifted upon the defendants. In view of Section 92 of the Evidence Act, any evidence with regard to oral agreement for the purpose of contradicting, varying, adding to, or subtracting from the terms of the written contract, would be excluded unless the case falls within any of the provisos provided in Section 92. The defendants have attempted to bring their case within the first proviso to Section 92 of the Evidence Act, by contending that mentioning of 25% share to each of the plaintiffs in the profits and losses of the partnership firm was a mistake in fact.”

40. Another three Judge Bench of their Lordships of the Supreme Court in **Mangala Waman Karandikar v. Prakash Damodar Ranade**⁹, which was rendered slightly earlier in point of time than *V. Anantha Raju (supra)*, there is a far more strict statement of the principle regarding exclusion of oral by documentary evidence. In **Mangala Waman Karandikar (supra)**, the question arose in the context of an agreement to transfer a running business of

stationery by the appellant to the respondent for conducting business alone on receipt by the appellant of a royalty of Rs.90/- per month. The agreement did not show that the person to whom the business was entrusted under the agreement to run, would be its lessee, because the appellant herself was a lessee in the premises and obliged to pay rent to the landlord by the express terms of the agreement. Later on, when the appellant asked the contractee to restore the business to her, the respondent took a stand that the contract was a rent agreement and not one to simply run the business. It was in the context of the aforesaid facts that in **Mangala Waman Karandikar**, it was held:

“15. It is manifest from these two sections that it is only in cases where the terms of the document leave the question in doubt, then resort could be had to the proviso. But when a document is a straightforward one and presents no difficulty in construing it, the proviso does not apply. In this regard, we may state that Section 95 only builds on Proviso (6) of Section 92.

16. If the contrary view is adopted as correct it would render Section 92 of the Evidence Act, otiose and also enlarge the ambit of Proviso (6) beyond the main section itself. Such interpretation, provided by the High Court violates basic tenets of legal interpretation. [Rohitash Kumar v. Om Prakash Sharma, (2013) 11 SCC 451 at p. 459 : (2013) 3 SCC (L&S) 368] Section 92 specifically prohibits evidence of any oral agreement or statement which would contradict, vary, add to or subtract from its terms. If, as stated by the learned Judge, oral evidence could be received to show that the terms of the document were really different from

those expressed therein, it would amount to according permission to give evidence to contradict or vary those terms and as such it comes within the inhibitions of Section 92. It could not be postulated that the legislature intended to nullify the object of Section 92 by enacting exceptions to that section.

17. In line with the law laid down, it is clear that the contract mandated continuation of the business in the name of “Karandikar Brothers” by paying royalties of Rs 90 per month. Once the parties have accepted the recitals and the contract, the respondent could not have adduced contrary extrinsic parole evidence, unless he portrayed ambiguity in the language. It may not be out of context to note that the extension of the contract was on same conditions.

18. On consideration of the matter, the High Court erred in appreciating the ambit of Section 95, which led to consideration of evidence which only indicates breach rather than ambiguity in the language of contract. The evidence also points that the licence was created for continuation of existing business, rather than licence/lease of shop premises. If the meaning provided by the High Court is accepted, then it would amount to courts substituting the bargain by the parties. The counsel for the respondent has emphasised much on the receipt of payment, which mentions the term “rent received”. However, in line with the clear unambiguous language of the contract, such evidence cannot be considered in the eye of the law.”

41. On principle, the prohibition on admitting parole evidence, where parties have entered into a solemn and written

deed or contract, is the rule. About the exceptions, a close look at authority demonstrates that the conservative view is to permit oral evidence to be admitted contrary to the terms of a written deed, agreement or document, in case one or the other exceptions, mentioned in the six provisos to Section 92 of the Evidence Act is attracted, or one of the exceptions in Sections 93, 95, 96, 97, 98, 99 and 100 of the Act last mentioned. In a case, where the statutory exceptions to the rule in Section 92 do not apply, there is this judicially evolved principle operating in a very narrow field and subject to very exacting standards of burden on the party, seeking to introduce oral evidence, which applies in those cases alone, where a party does not seek to plead anything contradicting, varying, adding to or subtracting from the terms of the written document, but show that the parties in fact intended to enter into a transaction, very different from what is ostensible. Therefore, this exception, judicially recognized, applies to cases, where the party, intending to lead oral evidence, does not rely on the document, but says that it is sham, and that the intention of parties was entirely different than the recitals.

42. A reading of the principle in **Mangala Waman Karandikar**, and, also somewhat in **Placido Francisco Pinto** shows that the Court has leaned in favour of a strict approach to admit oral evidence, where parties have a written deed or contract governing their rights with exceptions only being those enumerated in the provisos to Section 92 of the Evidence or Sections 93, 95, 96, 97, 98, 99 and 100. But, it is equally true that the holding in **Placido Francisco Pinto** also acknowledges the principle that oral evidence, contrary to a written agreement,

may be led in those cases, where the document is claimed by one party to be sham and what the parties contracted really being entirely different. At this stage, it is necessary to notice the standards by which a person, who refuses to rely on a written record of the transaction or contract between him and the other party and says that what was contracted was entirely different, must prove that fact. In this connection, reference must be made to **Gurdial Singh**, where it is said that the inference of a different intention than the written contract "*from the circumstances should be an irresistible one and not merely a matter of conjectures and surmises*", to borrow the words of their Lordships.

43. In the present case, the chief circumstance put forth by the defendant to reverse the concurrent opinion of the two Courts below is that there were two antecedent transactions by the defendant, where he entered into agreements with third parties and then got them cancelled paying off the vendee his earnest by borrowing from another man, in whose favour also an agreement to sell was executed. The last man, from whom the defendant raised a loan to pay off the earlier price contractee, was his nephew, the plaintiff. The defendant has attempted to show that this series of transactions entered into by the defendant with third parties, in each case contracting to sell the suit property, would show that on each occasion, the contract was no more than a security for the loan; and, the suit agreements are no different. A look at the terms of the suit agreements on their own do not suggest that these were meant to be anything different from what is ostensible. The case of the defendant being that the suit agreements were sham and, in fact, no more than a security to ensure repayment of

the loan, circumstances directly bearing on the said fact in issue and some parole evidence explaining those circumstances, would be decisive.

44. Of course, the Court in opining on the issue whether in fact the suit agreements are a sham and meant to serve as security, cannot undertake a wholesome review of the evidence, and answer it as an open issue in the manner of a Court of first appeal or the Trial Judge. This Court can examine the circumstances and the parole evidence explaining them to reach a different conclusion from the Courts below, if the conclusions of those Courts are perverse; not otherwise. The circumstance that there were two other similar transactions earlier done by the defendant, where the agreements were got cancelled, may give rise to a possibility of the suit agreements being collateral securities of the same kind, but that is only a possibility; not a surety. It is equally possible that the suit agreements embody a transaction of intended sale according to apparent tenor.

45. The other circumstance, that has been brought to this Court's notice, is the fact that the instrument of cancellation of the earlier registered agreement in favour of Gyan Singh was executed on 06.07.1984, that is to say, the same day as the first suit agreement was executed in the plaintiff's favour. It is urged that this circumstance suggests that the defendant did nothing more than borrow from the plaintiff to pay off Gyan Singh and secure release of the suit property. It is, particularly, emphasized that the defendant borrowed from the plaintiff, because the plaintiff is related to him by blood, and with two earlier episodes of lenders asking back their money on strict schedule, the defendant opted for the more comfortable

option of borrowing from his nephew. This, in the opinion of this Court, is again not a decisive circumstance.

46. The equally weighty alternative to look at this state of facts is that the defendant was in need of money, and wanted the best possible price for his land. He entered into two transactions for lesser sums of money and got rid of his obligations under those transactions by paying off the earlier vendees. No doubt, the fact that the earlier vendees accepted the defendant's proposal to cancel the agreements executed in their favour, does seem to suggest that those transactions were indeed loans. But, it equally suggests that after the second transaction, the defendant did not have resources generated of his own labour or means to pay off Gyan Singh. He had to depend on raising money through a transaction agreeing to sell the suit property. It is, therefore, very likely that after he could not pay off Gyan Singh, he bargained with his nephew for a higher price to sell him the suit property, pay off Gyan Singh and save some money for himself.

47. The added advantage was, as the Lower Appellate Court thought, that agreeing to sell the suit property to the plaintiff, the defendant would have the psychological satisfaction about his land not going into alien hands, but retained in his bloodline. The latter view of the matter has been accepted by the Lower Appellate Court to hold that the transaction was a sale and not a mere security for the loan, in terms of the following remarks:

“10- पक्षकारों के उपरोक्त तर्कों पर विचार विमर्श पर विचारण करने से स्पष्ट होता है कि अपीलार्थी/प्रतिवादी द्वारा विवादित इकरारनामा ऋण पत्र नहीं था बल्कि उसने अपनी जमीन को बेचने के लिये अनुबंध बिक्रय-पत्र रामजीलाल के पक्ष में

निष्पादित किया था क्योंकि स्वयं कांशीराम के भाई ने जो रामजीलाल के भी चाचा है स्पष्ट रूप से निवेदन किया है कि यह पत्र ऋण-पत्र नहीं था बल्कि घर की जमीन घर में ही रह जाये इसलिये विवादित जमीन को नीलामी से बचाने के लिये रामजीलाल ने इस जमीन को खरीदने का प्रस्ताव पेश किया और तदनुसार 65000/- रुपये में यह जमीन का सौदा करके अनुबंध बिक्रय-पत्र तैयार किया गया।.....”

48. The other feature of the matter is that the plaintiff had pleaded a specific case in Paragraph Nos.1 and 2 of the plaint that he paid in earnest for the suit agreements a sum of Rs.60,000/- out of the contracted sale consideration of Rs.65,000/-. The defendant in Paragraph No.2 of the written statement denied receipt of Rs.60,000/- and in Paragraph No.11, the defendant has averred that a sum of Rs.40,000/- was required to be paid to Gyan Singh, and that, it was this sum of money (Rs.40,000/-) that was borrowed by the defendant (from the plaintiff). Paragraph Nos.2 and 11 of the written statement filed by the defendant read:

“2. That the allegations contained in para no.2 of the plaint are false and they are denied. The defendant did not agree to execute any sale deed in favour of the plaintiff nor did the defendant receive Rs.60,000/- as falsely alleged in this paragraph nay the defendant agree to produce income tax certificate.

11. That, however, on 6-7-1984 the aforesaid Gyan Singh demanded his money which was borrowed by the defendant from him and as such Sri Gyan Singh was paid Rs.40000/- before the Sub Registrar in consideration where he executed an agreement of cancellation in respect of the agreement of sale in his favour executed by the defendant. This was done on 6-7-1984. The aforesaid money of

Rs.40,000/ which was paid to Gyan Singh was, in fact, borrowed from the plaintiff who is the real elder brother's son of the defendant and on the same day as a collateral security the defendant executed an agreement to sell (though there was no intention to sell or convey any land) in favour of the plaintiff showing therein receipt of Rs.40,000/- before the Sub Registrar, Fatehabad. The amount aforesaid borrowed by the defendant from the plaintiff and paid to said Sri Gyan Singh in the manner aforesaid.”

49. Likewise, in Paragraph No.5 of the reply notice dated 09.06.1986, Paper No.25-Ga, filed by the defendant, sent to answer the plaintiff's notice dated 29.05.1986, it is stated that the money borrowed by the defendant from the plaintiff was a sum of Rs.40,000/-. Thus, the plaintiff's case since time that he sent a notice to the defendant to execute a sale deed, and the time, when he instituted the suit is consistent. It is that, that a sum of Rs.65,000/- was settled as sale consideration between parties, of which Rs.60,000/- were paid in earnest, leaving a balance of Rs.5000/- to be paid at the time of execution of the sale deed.

50. The defendant's case up to the stage of his pleadings is that he borrowed the sum of Rs.40,000/-; nothing more. According to him, this was the sum of money required to pay off Gyan Singh and he received nothing more. The defendant while testifying in the witness-box in his examination-in-chief has deposed as follows:

“3. मैने ज्ञान सिंह से Rs. 40,000/- रू० लिये थे और बतौर जमानत इकरारनामा लिखा था। फिर रामजीलाल से 60,000/- रुपये लेकर सन् 1984 में ज्ञान सिंह को दे दिये।”

51. In his cross-examination, the defendant testifying as DW-1 has said:

“4. मैने रामजीलाल से 60,000/- रूपया कर्ज लिया था। उसमे से 20,000/- रूपये राम जी लाल ने रजिस्ट्री इकरारनामा से पहिले व 40,000/- रजिस्ट्री इकरारनामा के समय दिये थे।”

52. The defendant's case that he borrowed a sum of Rs.40,000/- and nothing more of the plaintiff to pay off Gyan Singh, is consistent in his reply to the plaintiff's notice to perform the contract and in his written statement as well. But, in his testimony, it is equally consistent that he borrowed a sum of Rs.60,000/- of the plaintiff, out of which he paid Gyan Singh Rs.40,000/-, that he owed the latter. It has to be borne in mind that the party, who pleads contrary to the apparent tenor of a deed or contract in writing, saying that something else was intended, different from the ostensible terms, bears the very heavy burden of proving the fact by unimpeachable and consistent evidence of sterling quality. The fact, therefore, that the defendant has pleaded a case that is just about borrowing a sum of Rs.40,000/-, and in his evidence, has accepted the plaintiff's case of him taking from the plaintiff a sum of Rs.60,000/-, which albeit the defendant says was a loan, commensurates with the plaintiff's case ex facie that he paid the defendant a sum of Rs.60,000/- as earnest, leaving a balance of Rs.5000/- to be paid at the time of execution of the sale deed. The figures in money that changed hands, as alleged by the plaintiff, have been acknowledged by the defendant, contrary to his pleaded case. It is true that the character of the payment is differently described by parties with the defendant calling the sum of Rs.60,000/-, a loan by the plaintiff, whereas the plaintiff calls it earnest out of

the agreed sale consideration of Rs.65,000/- .

53. On these state of pleadings and evidence, together with the circumstances, mindful of our limitations, in treading into the forbidden territory of an open and plenary evaluation of evidence, we think that we cannot disagree with the Courts below, who have not accepted the defendant's parole evidence contrary to the apparent tenor of the suit agreements. In order that this Court may take a view of evidence of any kind, different from the Courts of fact in the exercise of jurisdiction under Section 100 of the Code of Civil Procedure, 1908¹⁰, it is imperative that the Courts of fact should have drawn perverse conclusions, or conclusions, which no reasonable person can arrive at, given the state of evidence. We do not think that, that is the case here. The Courts below have refused to accept the defendant's parole evidence contrary to the suit agreements and their apparent tenor in order to accept the defendant's case that the suit agreements were not documents of their ostensible character, but merely collateral security to safeguard the plaintiff's loan. There is no reason for this Court to find for the defendant and hold the transaction embodied in the suit agreements as one creating a security; not an agreement to sell.

54. In the considered opinion of this Court, for all the reasons indicated hereinabove, Substantial Question (1) must be answered in the **negative**.

55. This Court now proceeds to answer Substantial Question of Law (2). Mr Jain has submitted that the plaintiff carries on business in the city. He has referred to the plaintiff's cross-examination,

where it is admitted that he resides in Loha Mandi, 15 to 30 km away. He has no agricultural land. His agricultural holding was sold off by his father 20 years back. PW-3, who is the plaintiff's uncle and the defendant's brother, has testified that he had sold his agricultural land 26 years back. It is also pointed out that in Paragraph No.17 of the written statement, the defendant has pleaded his hardship saying that he has no other source of livelihood, except the suit property. It is emphasized that the plaintiff in his replication, Paper No.48-Ga, has not denied or disputed the defendant's plea that he has nothing, besides the suit property for a source of livelihood. It is argued by Mr. Jain that there is no discussion by the Trial Court as to why discretion has been exercised in favour of granting specific performance. It is next submitted on behalf of the defendant that Ground Nos.16, 17 and 18 in the appeal before the Lower Appellate Court raised an issue of hardship being occasioned to the defendant, if specific performance were granted, but the Lower Appellate Court while it did record the submission in Paragraph No.9 of the judgment, never discussed what hardship would follow to the defendant. It is also emphasized that no reasons for the exercise of discretion to grant specific performance has been recorded by the Lower Appellate Court, as well.

56. Mr. Jain submits that it is imperative for the Courts of fact to have returned findings why specific performance was being granted, and in the absence of those findings, the decree impugned cannot be sustained.

57. Mr. Kunal Shah has disputed the submissions advanced by Mr. Jain. He submits that what is necessary is that the Court should have exercised discretion to

grant specific performance on settled parameters and not arbitrarily. It is not always mandatory to record specific and elaborate reasons why the Court has chosen to grant specific performance. It is emphasized that non-denial of Paragraph No.17 of the written statement, where the defendant has pleaded hardship if the suit property goes out of his hands, is in no way an admission by non-traverse.

58. Upon hearing learned Counsel for the parties and perusing the record, this Court finds that so far as non-denial of the hardship alleged by the defendant in Paragraph No.17 of the written statement is concerned, there is no basis to that case. About the replication by the plaintiff, that is on record, it must be said that it is not part of the pleadings at all. A perusal of the order-sheet of the Trial Court shows that by the order dated 01.01.1993, taking on record the plaintiff's replication, Paper No.48-Ga, all that is said is that the replication be laid before the Court on the date fixed. The order-sheet does not show that on any subsequent date, leave was granted by the Trial Court under Order VIII Rule 9 of the Code, permitting presentation of the replication by the plaintiff. The direction of the Court dated 01.01.1993, when the replication was filed that it be put up on the date fixed with no further orders, does not constitute leave under Rule 9 of Order VIII of the Code. A replication is not a part of pleadings unless the Court grants leave to present it, subject to such terms as it considers fit. That has not happened here.

59. Since, we are satisfied on a perusal of record that there is no leave by the Court to file a replication, a non-traverse by the plaintiff of Paragraph No.17 of the written statement regarding hardship pleaded by the defendant, is of no

consequence. Since this is a case, where owing to absence of leave to file the replication, Paper No. 48-Ga, it is just not to be read as part of pleadings, the question is if the plaintiff's failure to obtain leave and traverse the defendant's plea in Paragraph No.17 of the written statement about hardship, constitutes an admission on the plaintiff's part. The law is that non-denial by the plaintiff of a plea raised in the written statement cannot lead to an inference of admission by him. In this regard, reference may be made to the decision of the Supreme Court in **K. Laxmanan v. Thekkayil Padmini and others**¹¹, where it is held:

“29. Pleadings as we understand under the Code of Civil Procedure (for short “the Code”) and as is defined under the provision of Rule 1, Order 6 of the Code consist only of a plaint and a written statement. The respondent-plaintiff could have filed a replication in respect to the plea raised in the written statement, which if allowed by the court would have become the part of the pleadings, but mere non-filing of a replication does not and could not mean that there has been admission of the facts pleaded in the written statement. The specific objection in the form of denial was raised in the affidavits filed in respect of the injunction applications which were accepted on record by the trial court and moreover the acceptance on record of the said affidavit was neither challenged nor questioned by the present appellant.”

60. In view of the aforesaid legal position, there is no force in Mr. Jain's submission that Paper No. 48-Ga, which, though a replication, no doubt, but not admitted to record with the Court's leave,

constitutes admission of the defendant's case pleaded in Paragraph No.17 of the written statement by non-traverse.

61. So far as the necessity of recording reasons by the Court for the purpose of granting specific performance is concerned, this Court is of opinion that it is desirable to give reasons, but not imperative so long as it is evident to any superior Court hearing an appeal that the discretion to grant specific performance is based on relevant considerations borne out from the record. The absence of reasons would not vitiate the decree. The broad consensus of judicial authority is about principles, on the foot of which the Court must exercise its discretion to grant specific performance or the alternate relief of refund of the earnest; or award damages, if relief in that behalf is sought and a case made out.

62. One of the factors to be taken into consideration while granting relief of specific performance is the part performed by the plaintiff in relation to the whole, by time the action comes up for trial. Here two Courts of fact below have found that out of the total sale consideration settled, that is to say, the sum of Rs.65,000/-, a sum of Rs.60,000/- was paid by the plaintiff until time when the suit agreements were executed. Therefore, the plaintiff has performed almost the whole of his obligation under the suit agreements. The sale consideration received by the defendant until execution of the suit agreements is 92% of the consideration settled. In this regard, reference may be made to a decision of this Court in **Rajendra Singh v. Chandra Pal**¹², where it was held:

“11. In present case the readiness and willingness to perform his part of the

contract, as required for the grant of relief of specific performance, is proved fact. Not only the lower Courts had given such finding in favour of plaintiff-appellant, but also this fact is explicitly clear and evident from the fact that out of total agreed sale consideration of Rs. 80,000/- the plaintiff-appellant had already paid Rs. 77,000/- which is 96.25 % of the sale consideration. This amount of sale consideration was used and usurped by defendant-respondent who had also been enjoying the possession of disputed property.

12. Thus almost slightly less than total consideration was utilized and enjoyed by the defendant-respondent, who had not only been enjoying the property in question, but had already been acting in bad faith and mala fide manner when he had been taking false defences of alleged loan and refund of amount etc., which were found incorrect and false by the two lower Courts. He had been repeatedly telling lie, and misusing process of Court by giving false evidences.

13. Section 20 (2) of the Specific Relief Act had provided certain conditions, as quoted above, in which Court may properly exercise discretion not to decree specific performance. Considering those conditions in light of present case it is found that (a) the terms of the contract or the conduct of the parties at the time of entering into the contract was not such could give the plaintiff an unfair advantage over the defendant, because the plaintiff had already received more than 96% of sale consideration, and it would be the defendant who would get unfair advantage over plaintiff-appellant if no relief of specific performance is granted; (b) in present matter there appeared nothing which the defendant-respondent could not

foresee, and instead of defendant it would be the plaintiff-appellant who would suffer hardship by non-performance who had paid almost nearly whole the price of property, and when in present age of boom of property prices would get meager amount of actual price of said land, even if the money is refunded with interest; and (c) the defendant-respondent, after receiving of almost more than 96% of sale consideration, had not entered into the contract under any circumstances which makes it inequitable to enforce specific performance.”

63. I had occasion to consider this issue in **Mahendra Singh v. Ramesh Singh**¹³, where out of the settled consideration of Rs.50,000/-, the defendant had received a sum of Rs.45,000/- at the time of execution of the contract. In **Mahendra Singh** (*supra*), I held:

“70. Once this Court is assured that the Lower Appellate Court has rightly concluded that the defendant has received a sum of Rs. 45,000/-, out of the total sale consideration of Rs. 50,000/- agreed, the scales for the exercise of discretion in favour of specific performance are decisively tipped. The fact that the defendant has received a sum of Rs. 45,000/- for one part, excludes any doubt about the defendant being inequitably dealt with by the plaintiff on account of his illiteracy etc. At the same time, the fact that the defendant has received a sum, that accounts for ninety percent of the sale consideration, places the plaintiff in a position where he has done substantial acts in performance of his part of the contract. Nothing remains to be done on the plaintiff's part, except payment of the balance of Rs. 5000/- and meeting the expenses of execution and registration of

the conveyance. The doing of all substantial acts in performance of the plaintiff's part of the contract is a relevant consideration, under sub-Section (3) of Section 20 of the Specific Relief Act."

64. Since specific performance is an equitable relief, the discretion to grant it also depends in good measure on the conduct of parties. So far as the plaintiff is concerned, it is evident in this case that he not only entered into the first suit agreement, but before time under it came to an end, got the second suit agreement executed extending obligations between parties for a further period of one year. There is also evidence to show that he got a notice issued to the defendant to come forth and execute the sale deed specifying a date to appear before the Sub-Registrar. On the date indicated in the notice dated 29.05.1986, the plaintiff remained present before the Sub-Registrar on 12.06.1986, but the defendant did not appear, a fact regarding which the two Courts below are unanimous. This conduct of the plaintiff in chasing the defendant to execute a sale deed is relevant, which the Courts below have taken into consideration while exercising their discretion in granting specific performance.

65. There is an added feature about the conduct of parties. The defendant in Paragraph Nos.2 and 11 of the written statement has denied the plaintiff's case that he received a sum of Rs.60,000/- in earnest from the plaintiff, but Rs.40,000/- alone, about which it is pleaded that it was a sum of money borrowed to pay off Gyan Singh. However, in his examination-in-chief, the defendant has acknowledged the fact that he borrowed a sum of Rs.60,000/- from the plaintiff, of which he needed Rs.40,000/- to pay off Gyan Singh. In his cross-

examination, he has acknowledged the fact again that he borrowed a sum of Rs.60,000/- from the plaintiff, of which Rs.20,000/- were paid before execution of the first suit agreement and Rs.40,000/- at the time of registration of the said agreement. Though, the defendant has described in his testimony the nature of the transaction as a loan, but has acknowledged the fact that he received a sum of Rs.60,000/- from the plaintiff, Rs.20,000/- before the registration of the first suit agreement and Rs.40,000/- at the time of its registration. This is in stark contrast to his stand in Paragraph Nos. 2 and 11 of the written statement, where he says that he borrowed a sum of Rs.40,000/- from the plaintiff and not Rs.60,000/-. The nature of the transaction has been opined by the Courts below not to be a loan, which has been approved by this Court while answering Substantial Question of Law (1); but that is not relevant for the purpose of the present question.

66. What bears on the question here is the fact that the conduct of the defendant has not been fair in dealing with the plaintiff and before the Court as well. He deliberately came up with a case in his pleadings that he had borrowed a sum of Rs.40,000/- alone, denying the plaintiff's case that he had paid the defendant a sum of Rs.60,000/-. Later, in his testimony, the defendant accepted the fact that he had received from the plaintiff a sum of Rs.60,000/- until time when he executed the first suit agreement. This too is conduct relevant because it shows that the defendant had been trying to evade his obligations under the contract by misquoting the sum of money that he had received from the plaintiff relative to the transaction. A reading of the impugned judgments clearly show all these facts have

weighed with the Courts below in granting specific performance, though they might not have scripted their reasons for the exercise of that discretion. As already said, it may always be desirable for the Court to give reasons why specific performance was granted because the exercise of discretion is subject to scrutiny by the Appellate Court, but it is not imperative. It is not imperative to give reasons, howsoever desirable, for the cause that if from the evidence considered by the Courts below and on record, the relevant factors to exercise discretion the way it is done by the Court are there, holding the decree to be vitiated on the ground alone that reasons have not been mentioned, would be more of a formality than anything substantial.

67. Substantial Question of Law (2) is therefore, answered in the **negative**.

68. No other point was pressed.

69. This appeal **fails** and is **dismissed** with costs throughout. The sum of money deposited with the Trial Court by the defendant in compliance with the interim order dated 04.05.2001 shall be paid to the plaintiff forthwith, together with the accrued interest paid by the Bank, where it is invested.

70. Let a decree be drawn up, accordingly.

(2023) 9 ILRA 742

**ORIGINAL JURISDICTION
CIVIL SIDE**

DATED: ALLAHABAD 03.08.2023

BEFORE

THE HON'BLE PANKAJ BHATIA, J.

Writ-A No. 2829 of 2022

And
Writ-A No. 1527 of 2021
And
Writ-A No.1216 of 2021
And
Writ-A No. 11308 of 2021

Rajeev Singh & Ors. ...Petitioners
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioners:
Sri Sudhir Kumar Singh

Counsel for the Respondents:
C.S.C.

A. Civil Law - Constitution of India,1950 - Article 14 - Equality before law - Parity in remuneration - PRD Jawans and Home Guards - Performing similar duties as auxiliaries to police - Same mode of appointment - Differential treatment in allowances - Not justified - Violation of Article 14 established.

Petitioners, being members of Prantiya Rakshak Dal (PRD) under the U.P. Prantiya Rakshak Dal Act, 1948, claimed parity in daily remuneration with Home Guards appointed under the U.P. Home Guards Adhiniyam, 1963. It was found that both categories performed analogous duties for maintaining public order and were appointed via similar selection processes. PRD Jawans were paid Rs.395/- per day as against Rs.500/- paid to Home Guards. The St.'s defence of distinct departmental structures and fiscal limitations was held arbitrary. The Court held such discrimination to be violative of Article 14 in absence of intelligible differentia.

B. Civil Law - Constitution of India,1950 - Article 23 - Prohibition of forced labour - PRD Jawans paid below minimum wages - Held, amounts to forced labour.

The Court held that paying PRD Jawans less than the prescribed minimum wage for Class-IV employees amounted to forced labour under Article 23 of the Constitution. Relying on *People's Union for Democratic Rights Vs U.O.I.*, (1982) 3 SCC 235, it was reiterated that economic compulsion resulting in acceptance of

work for less than minimum wage constitutes forced labour.

C. Precedents - Binding effect - Applicability of Supreme Court decision - Minimum pay parity with police personnel - Directions issued accordingly.

Relying on the decision in *Grah Rakshak, Home Guards Welfare Association Vs St. of H.P.*, (2015) 6 SCC 247, the Court directed the St. to recalculate PRD Jawans' remuneration ensuring that the total monthly pay equals the minimum monthly salary of police constables. Directions were also issued to ensure parity in allowances with Home Guards.

People's Union for Democratic Rights Vs U.O.I.,

(1982) 3 SCC 235 : AIR 1982 SC 1473

Bench: Bhagwati, Pathak & Reddy, JJ.

Held: Payment of less than minimum wages amounts to "forced labour" under Article 23 of the Constitution.

Grah Rakshak, Home Guards Welfare Association Vs St. of Himachal Pradesh,

(2015) 6 SCC 247 : AIR 2015 SC 1952

Bench: T.S. Thakur & R. Banumathi, JJ.

Held: Home Guards discharging duties similar to police personnel are entitled to parity in wages; St.s cannot deny remuneration under the guise of honorary service.

(Delivered by Hon'ble Pankaj Bhatia, J.)

1 . All the above noted writ petitions are being decided by means of this common order. For the sake of convenience Writ – A No.2829 of 2022 is being taken up as a leading case.

2. The petitioner in all the writ petitions are selected and are posted in Prantiya Rakshak Dal (PRD) in several

districts and seek parity in terms of the benefits as are being paid to Home Guards appointed in a manner similar to the petitioners and under the provisions of an Act, which is similar being The Uttar Pradesh Home Guards Adhiniyam, 1963.

3. The facts, in brief, are that the petitioners were selected and posted in the Prantiya Rakshak Dal in terms of the mandate of United Provinces Rakshak Dal Act, 1948 as amended. It is argued that the said Prantiya Rakshak Dal was enacted in the year 1948 for constitution of a force known as 'U.P. Prantiya Rakshal Dal/Vikas Dal' for the preservation of public peace, training of men in the use of arms inculcate self-help and discipline and the protection of the life of community and property within the Uttar Pradesh.

4. It is argued that on the similar lines, an act known as 'Uttar Pradesh Home Guards Adhiniyam Adhiniyam, 1963' was enacted for providing for constitution of a force known as Uttar Pradesh Home Guards for utilizing their services for duties in the time of emergency and serving as an auxiliary to the police for the maintenance of land and order. It is argued that although the Act provide for creation of Rakshak Dal/Vikas Dal for preservation of public peace and training of men in arms as an auxiliary force, however, their services are availed during normal time also and during local or national emergency. It is argued that even a dress is prescribed for the members of the Dal. It is argued that the Prantiya Rakshal Dal comes under the Yuwa Welfare Department of the State Government and is called as 'Pradeshik Vikas Dal' and several government orders have been issued from time to time regarding providing the duty and payment to the members of the said Dal. Attention

has been drawn to the Government Orders issued to the District Magistrate as contained in Annexure – 2 to the writ petition.

5. The petitioners in all the petitions have undergone the required training and have obtained the certificate and are discharging their duties time to time whenever required to do so by the government. Reliance is also placed on the government orders issued regarding the duties and conduct of the members of the Dal. It is argued that the Home Guards appointed under the Uttar Pradesh Home Guards Adhiniyam as well as the once under the Prantiya Rakshak Dal were being paid daily duty allowance at the same rate at Rs.126/- per day till 2009, however, in the year 2010, the allowance payable to the Home Guards Jawans were increased to Rs.140/- per day and further to Rs.210/- in the year 2013 and subsequently, it has been further enhanced, however, the members of the Prantiya Rakshak Dal continued to get Rs.126/- till the year 2013. The petitioners approached the State Government requesting that when the nature of the work, the manner of appointment is similar, the remuneration payable to them should be similar to Home Guard volunteers, however, the same has not been done citing the problems of budgetary allocations. It is argued that the allowance payable to Home Guard Jawans was increased to Rs.500/- on 27.08.2018 from Rs.375/- being paid earlier, however, no such action was taken in respect of the Prantiya Rakshak Dal Jawans.

6. Aggrieved against the said, some of the persons similarly situated approached this Court by filing Writ – A No.17684 of 2018 (Amar Singh & 4 Ors. v. State of U.P. & Anr.). The said writ petition was

disposed off on 07.01.2019 with directions to the State Government to consider the grievances and to evaluate the same within a period of three months. As the directions given by the Court were not complied with, contempt petition was filed. In terms of the said directions, ultimately an order came to be passed on 01.05.2019 increasing the allowances payable to the Prantiya Rakshak Dal Jawan of Rs.375/- per day from earlier Rs.250/- per day. Grievances of the petitioners still continued without any rationale basis, the petitioners have been discriminated, as such, the present petitions have been filed.

7. In view of the facts as narrated and recorded in the writ petitions, the entire petitions are premised on the allegation of violation of Article 14 of the Constitution of India.

8. To test the said argument, it is essential to notice the manner in which the two Acts have been enacted. The same are as under:

The Uttar Pradesh Prantiya Rakshak Dal/Vikas Dal Act was enacted in the year 1948 with a view to constitute a force for the preservation of public peace. Functions of Prantiya Rakshak Dal were described as under: “5. A member of the Prantiya	The Uttar Pradesh Home Guards Adhiniyam was enacted in the year 1963 for constitution of a force and for utilizing its services in the times of emergency as an auxiliary to the police for maintaining law and order. Functions of Home Guards are described as under: “4. The Home Guards

Rakshal Dal/Vikas Dal when called upon to do so by the prescribed authority, shall discharge such functions in relation to the preservation of public peace and for the protection of inhabitants and the security of property in such area within the Uttar Pradesh as such prescribed authority may direct.” Powers, protection and control etc., are defined as under: 7.(1) For the enforcement of the provision of this act or any rule or regulation made thereunder every member of the Prantiya Rakshal Dal/Vikas Dal shall, when on duty or called for duty, be deemed to be a police officer and subject to any terms, conditions and restrictions as may be prescribed, to have and be subject to, in so far as it is not inconsistent with this Act, all the powers, privileges,	will have the following functions:- (a) they will serve as auxiliary to the police, and when required help in maintaining public order and internal security; (b) they will help the community in air raids, fires, floods, epidemics and other emergencies; (c) they will function as an emergency force for such special tasks as may be prescribed; (d) they will provide functional units for essential services; and (e) they will perform such other duties relating to any measure of public welfare as may be prescribed. Powers, privileges and protection of Home Guards are defined as under: 9. (1) Subject to the provisions of this Act and the rules made thereunder, a home guard when called out under section 8 to serve as auxiliary to the police or to help in	liabilities and protections, as a police officer duly appointed has or his subject to by virtue of the Police Act, 1861 (save section 29 thereof), or of any other law for the time being in force. (2) No prosecution shall be instituted against a member of the Prantiya Rakshal Dal/Vikas Dal in respect of anything done or purported to be done by him in discharge of his functions as such member, except with the previous sanction of the authority prescribed in that behalf. (3) The superintendence of the force in an area shall vest in such officer or officers as may be appointed by the State Government. Period of service and discharge are defined as under: 8. Every member of the Prantiya	maintaining public order or internal security, shall have the same powers, privileges and protection as a member of the police force appointed under any enactment for the time being in force, and shall subject to such adaptations and modifications, as may be made therein by the State Government by notification in the Gazette. be subject to the provisions of the Police Act. 1861. and the rules or regulations made thereunder in the same manner and to the same extent as he would. if such home guard held a responding rank in the police force to the one he holds for the time being in the Home Guards. (2) No prosecution shall be instituted against a home guard in respect of anything done or purporting to be done by him in the discharge of his duty as a home guard. except with the previous sanction of the District Magistrate having jurisdiction over the area in which

Rakshak Dal/Vikas Dal shall be required to serve the State Government for such period as may be prescribed. He shall thereafter be called up for duty at any time during a further period as may be prescribed. After the expiry of such further period the member shall be deemed to have been discharged from the Prantiya Rakshak Dal/Vikas Dal.	the home guard was enrolled or in which the act was committed. Liability for services is defined as under: 11. (1) Subject to any rules made in this behalf, a home guard shall be bound to serve in any unit of the Home Guards to which he is. for the time being attached. (2) The initial period during which a home guard may be required to serve shall be three years from the date of his enrolment. This period may be extended with his consent recorded in the prescribed manner. (3) Every home guard shall be liable to serve, when called out in the prescribed manner, for duty in any part of the State. No home guard shall be required to render service outside the State unless he has given his consent in the prescribed manner for such service. (4) The home guards called out for duty may be paid such

	allowances as may be prescribed. (5) The home guards will ordinarily be called out to serve in the areas of their enrolment and only for part-time duty.

9. Section 9 of the The Uttar Pradesh Prantiya Rakshak Dal/Vikas Dal Act provides for the offences and has made it an offence if a person selected does not report for duty or neglects or refuse to obey the order or deserts his duty or contravenes any provision.

“9. Any member of the Prantiya Rakshal Dal/Vikas Dal who-

(a) fails to report himself when called up for duty under Section 5, or

(b) without sufficient excuse neglects or refuses to obey the orders of this superior officer or fails to discharge his functions as a member of the Prantiya Rakshak Dal/Vikas Dal while on duty, or

(c) deserts his duty or

(d) contravenes any provision of the Rles & Regulations made under this Act,

Shall be punished with imprisonment for a term which may extend to three months, or with fine which may extend to five hundred rupees, or with both.”

10. Section 13 of the Uttar Pradesh Home Guards Adhiniyam is almost *pari materia* and provides for penalties, if the

Home Guard fail to report for duty or deserts or refuses or neglects to obey the order.

Both the Acts are silent with regard to payment of remuneration/compensation for the duties rendered by the volunteers.

11. In the light of the similarities as pointed out above, it is clear that the volunteers are appointed by the State Government. The nature of functions are almost similar, the rigours of following the orders etc., are similar. Thus, the submission of learned counsel that for all practical purposes they are similar and thus, should be paid the allowances which are similar and they claim parity with the Home Guards Jawans in respect of their employment.

12. The State Government on the other hand has filed a counter affidavit in Writ – A No.1527 of 2021, which is treated as a counter affidavit in all the cases. In Paras – 9 & 10 of the counter affidavit, the following has been submitted in rebuttal to the averments made by the petitioner:

“9. That the services of PRD personnel's are governed by PRD Act and Rules, 1948. The sanction of engagement of PRD personnel's are granted by the State government on the demand of district administration on the basis of available funds sanctioned. So far as the fixation of duty allowances of the PRD personnel's at par with the personnel's of home guards is concern, it is submitted that government of Uttar Pradesh has established two separate departments for Home Guards and Prantiya Rakshak Dal. Both the departments have separate acts and rules. Although the nature of work of both the

departments are likely be similar but as the both the departments are different and government decide the rate of both the departments as per available funds sanctioned by the government. The government has recently increased the Duty Allowances from Rs.375 to Rs. 395/- per day of PRD personnel's vide government order dated 06.01.2022.

10. That government of UP has established two separate departments for Home Guards and Prantiya Rakshak Dal. Both the departments have separate acts and rules. Although the nature of work of both the departments are likely be similar but as the both the departments are different and the government has decided the Charge of both the departments as per available funds sanctioned by the government. The government has sanctioned Rs.395/- per day as allowances for the PRD personnel's vide government order dated 06.01.2022 and according the compensation and allowances of PRD personnel's have been given.”

13. Interestingly, in Para – 11, the State Government has stated as under:

“11. That in continuation of the same, the Directorate vide his No.239/Ek-129/PRD/2019 dated 09.07.2020, referring to his earlier letters regarding enhancement of Daily Compensation and allowances of PRD personnel's as Rs.500/- per day by annexing the order passed by this Hon'ble Court, requested to the government to take decision on this policy matter and take appropriate decision and in continuation of the same, the government vide letter No.975/fifty-YU.KA./2020-102(PVD)/1988 dated 17.09.2020 informed that vide 417/Fifty-YU.KA.-2019-102(PVD)/1988 dated 08.03.2019 the rate

of compensation and allowances of PRD personnel's has been sanctioned and enchased to Rs.375/- per day from Rs.250/- per day as such after 1 year 5 months of enhancement of daily allowances of PRD personnel's does not seems to be logical. Accordingly, by the letter of directorate dated 25.09.2020, this matter has been decided."

14. Thus, from the stand taken by the State Government as reflected in the counter affidavit and quoted herein above, the stand is that although the nature of working performed by the two are similar, since they are working under different departments, the payments are as per the availability of funds sanctioned by the government.

15. It is essential to note that this Court while deciding Writ – A No.47479 of 2015 was confronted with the issue raised by the soldiers of the Home Guards who was claiming parity in terms of pay scale as was being provided to the regular police personnel, and this Court delivered the judgment on 08.07.2016 following the judgment of the Hon'ble Supreme Court in the case of **Grah Rakshak, Home Guards Welfare Association v. State of H.P. and Ors.; (2015) 6 SCC 247** although the Court did not grant the reliefs as prayed, directions were issued to the State Government for grant of duty allowance at such rates, total of which 30 days (a month) comes to minimum of the pay to which the police personnel in the State Government is entitled in terms of the directions issued by the Supreme Court in the case of **Grah Rakshak, Home Guards Welfare Association (supra)**.

16. The said judgment of this Court was challenged before the Supreme Court

in SLP (C) No.226 of 2017, which was dismissed on 30.07.2019 and in pursuance to the direction so issued, the allowance payable to the Home Guards were increased.

17. In the present case, on the basis of the scheme of the two Acts as recorded above coupled with the stand taken by the State Government in the counter affidavit, there is no distinction in the nature of duties performed by the members of both the forces and thus, apparently, there is a violation of Article 14 of the Constitution of India insofar as it denies the benefit of minimum of pay which is payable to the police personnel of the State Government.

18. In support of the contentions, the second argument of learned counsel for the petitioners that an amount of Rs.375/- is less than the minimum wages prescribed and thus, is in violation of Article 23 of the Constitution of India, he places reliance on a judgment of this Court in the case of **Madhyan Bhojan Rasoiya Mazdoor Sangh Husainganj Lucknow v. Union of India & Ors.** decided on **08.02.2023 in Writ – A No.3479 of 2015** wherein this Court had an occasion to consider the amounts being paid to the cooks employed by the State Government being less than the minimum wages, and directions were issued for payment to minimum wages prescribed to the persons who were working as cooks. This Court had also noticed the judgment of the Supreme Court in the case of **People's Union for Democratic Rights and Others v. Union of India and Others; (1982) 3 SCC 235** wherein the Supreme Court had analysed the scope of remuneration which was less than the minimum wages and they were held to be 'forced labour' within the scope of forced labour defined under Article 23 of

the Constitution of India, and held has under:

“14. Now the next question that arises for consideration is whether there is any breach of Article 23 when a person provides labour or service to the State or to any other person and is paid less than the minimum wage for it.

It is obvious that ordinarily no one would willingly supply labour or service to another for less than the minimum wage, when he knows that under the law he is entitled to get minimum wage for the labour or service provided by him. It may therefore be legitimately presumed that when a person provides labour or service to another against receipt of remuneration which is less than the minimum wage, he is acting under the force of some compulsion which drives him to work though he is paid less than what he is entitled under law to receive. What Article 23 prohibits is “forced labour” that is labour or service which a person is forced to provide and “force” which would make such labour or service “forced labour” may arise in several ways. It may be physical force which may compel a person to provide labour or service to another or it may be force exerted through a legal provision such as a provision for imprisonment or fine in case the employee fails to provide labour or service or it may even be compulsion arising from hunger and poverty, want and destitution. Any factor which deprives a person of a choice of alternatives and compels him to adopt one particular course of action may properly be regarded as “force” and if labour or service is compelled as a result of such “force”, it would be “forced labour”. Where a person is suffering from hunger or starvation, when he has no resources at all to fight disease or to feed his wife and children or even to hide their

nakedness, where utter grinding poverty has broken his back and reduced him to a state of helplessness and despair and where no other employment is available to alleviate the rigour of his poverty, he would have no choice but to accept any work that comes his way, even if the remuneration offered to him is less than the minimum wage. He would be in no position to bargain with the employer; he would have to accept what is offered to him. And in doing so he would be acting not as a free agent with a choice between alternatives but under the compulsion of economic circumstances and the labour or service provided by him would be clearly “forced labour”. There is no reason why the word “forced” should be read in a narrow and restricted manner so as to be confined only to physical or legal “force” particularly when the national charter, its fundamental document has promised to build a new socialist republic where there will be socio-economic justice for all and everyone shall have the right to work, to education and to adequate means of livelihood. The Constitution-makers have given us one of the most remarkable documents in history for ushering in a new socio-economic order and the Constitution which they have forged for us has a social purpose and an economic mission and therefore every word or phrase in the Constitution must be interpreted in a manner which would advance the socio-economic objective of the Constitution. It is not unoften that in a capitalist society economic circumstances exert much greater pressure on an individual in driving him to a particular course of action than physical compulsion or force of legislative provision. The word “force” must therefore be construed to include not only physical or legal force but also force arising from the compulsion of economic circumstances which leaves no

choice of alternatives to a person in want and compels him to provide labour or service even though the remuneration received for it is less than the minimum wage. Of course, if a person provides labour or service to another against receipt of the minimum wage, it would not be possible to say that the labour or service provided by him is “forced labour” because he gets what he is entitled under law to receive. No inference can reasonably be drawn in such a case that he is forced to provide labour or service for the simple reason that he would be providing labour or service against receipt of what is lawfully payable to him just like any other person who is not under the force of any compulsion. We are therefore of the view that where a person provides labour or service to another for remuneration which is less than the minimum wage, the labour or service provided by him clearly falls within the scope and ambit of the words “forced labour” under Article 23. Such a person would be entitled to come to the court for enforcement of his fundamental right under Article 23 by asking the court to direct payment of the minimum wage to him so that the labour or service provided by him ceases to be “forced labour” and the breach of Article 23 is remedied. It is therefore clear that when the petitioners alleged that minimum wage was not paid to the workmen employed by the contractors, the complaint was really in effect and substance a complaint against violation of the fundamental right of the workmen under Article 23.”

19. In view of the statutory provisions, the stand taken by the State Government as noted above and the fact that the payments made as remuneration are less than the minimum wages prescribed even for Class – IV employees, the action of the State

Government is clearly arbitrary, the rights of the petitioners under Article 14 of the Constitution of India have been violated and the justification given by the State Government for not paying the remuneration equivalent to that being paid to the Home Guard Jawans is clearly arbitrary and illegal. In view thereof, the writ petitions deserve to be allowed and are accordingly **allowed**.

20. Directions are issued for recomputing the remuneration/allowances payable to the Jawans of Uttar Pradesh Prantiya Rakshak Dal at such rates, total of which 30 days (a month) comes to minimum of the pay to which a police personnel in the State Government is entitled as directed by the Supreme Court in the case of **Grah Rakshak, Home Guards Welfare Association (supra)**.

The State Government shall also pass orders for paying the emoluments/remunerations to the petitioners at a rate equivalent to which is being paid to the Home Guards from time to time.

The State Government shall pass requisite orders as directed above within a period of three months from today.

(2023) 9 ILRA 750
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.08.2023

BEFORE

THE HON'BLE ATTAU RAHMAN MASOODI, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

Writ-A No. 6097 of 2023

U.O.I. & Ors.

...Petitioners

Versus

Sri Kaushalya Nandan Sharan Verma & Anr.
...Respondents

Counsel for the Petitioners:

Vinay Tripathi

Counsel for the Respondents:

Ashish Kumar Verma

Service Law - Central Administrative Tribunal (Procedure) Rules, 1987 - Rule 17 - Central Civil Services (Pension) Rules, 2021 - Rule 65 - Administrative Tribunal Act, 1985 - Section 22 (1) - Respondent No.1, appointed as Guard in 1976, had a birth date error, corrected in service records - Before his retirement in 2012, a mismatch was noticed - His explanation was rejected and verification was initiated with school - He received Rs. 3,25,535 as Provident Fund against a due of Rs. 5,65,405 - Pension was fixed for 33 years of service, though he claimed over 35 years - On seeking clarification, he was informed that calculations were based on retirement date of 31.01.2010 - Rs. 12,64,300 was ordered to recover as excess salary paid - Respondent approached Tribunal, matter was remanded with direction to pass fresh order - Challenged by petitioner, dismissed, petitioners paid ₹9,00,990 to employee in three installments - On delayed pension and gratuity, Tribunal awarded GPF interest from 01.02.2012 to 28.06.2018 - Petitioner preferred Review and delay condonation application, dismissed - Held, Tribunal proceedings were misconceived and barred by res judicata, wrongly reopened a settled issue despite final order dated 11.03.2016 - However, it had power to condone delay - Impugned order, set aside. (Para 4, 28, 29)

Writ Petition allowed. (E-13)**List of Cases cited:**

1. Daryao Vs St. of U.P., AIR 1961 SC 1457
2. Commissioner of Income Tax, Bombay Vs T.P. Kumaran, JT 1996 (8) 68

3. St. of Har. Vs St. of Punj. & anr., 2004 Supp(2) SCR 849

4. Canara Bank Vs N.G. Subbaraya Setty & anr., AIR 2018 SC 3395

5. Surendra Kumar Vs U.O.I.& ors., Writ- A No.- 5564of 2023, decided on 24.08.2023

6. Mysore St. Electricity Board Vs Bangalore Woollen, Cotton & Silk Mills & ors., AIR 1963 SC 1128

7. Arjun Singh Vs Mohindra Kumar, AIR 1964 SC 993

8. L.R. Ganapathi Thevar (dead) by his legal representatives Vs Sri Navaneethaswaraswami Devasthanam, AIR 1969 SC 764

9. Satyadhyam Ghosal & ors. Vs Smt. Deorajin Debi & anr., AIR 1969 SC 941)

10. Har Pyari Devi Vs Ghansham Singh, (1982) 2 SCC 109

11. O.N. Bhatnagar Vs Smt Rukibai Narsindas & ors., AIR 1982 SC 1097

12. P. Lal Vs U.O.I.& ors., (2003) 3 SCC 393

13. Mathura Prasad Sarjoo Jaiswal & ors. Vs Dossibai N.B.Jeejeebhoy, AIR 1971 SC 2355

14. St. of West Bengal Vs Hemant Kumar, AIR 1966 SC 1061

15. Employees Welfare Association Vs U.O.I.& ors., AIR 1990 SC 334

16. Commissioner of Income Tax Vs T.E.Kumaran , 1990 (10) SCC 567

(Delivered by Hon'ble Om Prakash Shukla, J.)

A. INTRODUCTION

(1) The challenge in the instant writ petition under Article 226 of the Constitution of India is to the judgment and order dated 14.10.2022 passed by the

Central Administrative Tribunal, Lucknow Bench, Lucknow (hereinafter referred to as “the Tribunal”), whereby Original Application No. 332/00515/2018 filed by the applicant/respondent no.1 herein was allowed and petitioners herein were directed to pay the interest of pension and gratuity due at the rate of G.P.F. from its date i.e. 01.02.2012 to 28.06.2018 within three months from the date of receipt of a certified copy of the order.

(2) Apparently, in the aforesaid Original Application No. 332/00515/2018, the applicant/respondent no.1 has sought the following reliefs :-

“The original application is being filed against the illegal, arbitrary and mala fide actions of the respondents in making payment of retiral dues without interest thereon for the period they illegally withheld the amount of retiral dues despite the decision of this Hon’ble Tribunal dated 11.3.2016 and the judgment passed by Hon’ble High Court, Lucknow, by which writ petition the order dated 11.3.2016 has been dismissed with cost Rs.5000/-.

The applicant further prayed that the respondents may be directed to make payment of interest on delayed payment of retiral dues @12% per annum from the date of retirement i.e. 31.1.2012 to the date of payment i.e. 28.6.2018.”

(3) The petitioners have also challenged the correctness of the judgment and order dated 06.07.2023 passed by the learned Tribunal, whereby Review Application No. 332/00004/2023 filed by the petitioners herein seeking review of the aforesaid judgment/order dated 14.10.2022 (supra) as well as the application seeking to condone the delay in filing the aforesaid

review application were dismissed on the ground that the review application has been filed by the petitioners herein delayed by close to five months i.e. beyond the period prescribed under Rule 17 of the Central Administrative Tribunal (Procedure) Rules, 1987, hence it cannot be entertainable.

B. FACTUAL MATRIX

(4) The following relevant facts necessary for consideration of this writ petition are broadly culled out from the record available before this Court in this writ petition :-

4.1. The respondent no.1-Sri Kaushalya Nandan Sharan Verma (hereinafter referred as “employee”) was appointed on the substantive post of Guard (Grade-C) in Northern Railway and joined his services on 13.09.1976. He had passed his High School Examination from Gandhi Vidyalaya Inter College, Maarrofpur, Maryadpur, District Mau (hereinafter referred to as “School”) in the year 1966. In the educational records, his date of birth was wrongly mentioned as 01.02.1950, whereas, as his actual date of birth was 01.02.1952, therefore, father of the employee attempted to get the same corrected. A fresh High School Certificate was issued by the Examination Board in the year 1976. In pursuance thereto, he submitted his original certificates as well as attested copies of the High School Certificate issued by the Board in the year 1976. Subsequently, his service records correctly reflected his date of birth as 01.02.1952 in place of 01.02.2050.

4.2. Apparently, the employee was due to retire on the basis of his date of birth on 31.01.2012 and as such, on 25.01.2012,

the Divisional Railway Manager (Personnel), Divisional Office, Northern Railway, Hazratganj, Lucknow, issued a letter dated 27.01.2012, stating therein that the appointment letter placed in the service records shows his date of birth as 01.02.1950, whereas first page of the service record shows his date of birth as 01.02.1952 and as such, employee was once again directed to submit the original certificate of date of birth etc. In response thereto, the employee submitted his reply dated 27.01.2012, mentioning therein that educational certificates got misplaced/lost. Thereafter, the employee was served with letter dated 31.01.2012, stating that his explanation was not satisfactory and the matter would be verified from the concerned Institute.

4.3. Thereafter, on 02.02.2012, an amount of Rs.3,25,535/- against the amount of Provident Fund was credited to the account of the employee against total due of Rs.5,65,405/-. He was served with Pension Payment Order No. 0112070079 dated 3.8.2012, showing his date of birth as 01.02.1950 and his date of retirement as 31.01.2010. His pension was sanctioned to Rs.13675/- per month showing the qualifying service as 33 years, whereas as per the employee, he had actually worked for 35 years 4 months and 8 days. Thereafter, he moved an application dated 27.02.2012 seeking details of payment made and withheld. In response thereto, the employee was provided the details of payments which were calculated as due to be deducted taking his date of retirement as 31.01.2010 vide letter dated 03.10.2012. Further, a recovery of Rs.12,64,300/- was directed as excess payment of pay w.e.f. 01.02.2010 to 31.01.2012 out of which an amount of Rs.9,78,853/- has been deducted/recovered from the amount of

DCRG and leave encashment and balance of Rs.2,85,853/- was directed to be recovered from the pension relief.

4.4. Aggrieved by the aforesaid actions, the employee preferred Original Application No. 438 of 2012 : Kaushaiya Nandan Sharan Verma Vs. Union of India and others, before the Tribunal.

4.5. The learned Tribunal, vide order dated 11.03.2016, disposed of the aforesaid original application No. 438 of 2012 with the following directions :-

(a) The applicant is entitled to salary for the period 01.02.2010 to 31.01.2012.

(b) No recovery is to be made against salary paid for the period of 01.02.2010 to 31.01.2012.

(c) Any recovery made against salary drawn between 01.02.2010 to 31.01.2012 is to be refunded.

(d) The applicant is entitled to pensionary benefits as due on his actual date of retirement i.e. 31.01.2010.

(e) All retiral dues including PPF, DCRG, commuted pension etc. are to be paid to the applicant on the basis of post/pay as held on 31.01.2010.

13. The matter is remanded to the respondents to pass fresh orders including revised PPO as per directions given above. The entire action is to be completed within four months from the date of receipt of certified copy of this order."

4.6. The aforesaid judgment/order dated 11.03.2016 passed by the learned

Tribunal was challenged by the Union of India/petitioners herein by filing Writ Petition No. 16855 of 2016 before this Court. A Co-ordinate Bench of this Court, vide judgment/order dated 25.01.2018, dismissed the writ petition with cost of Rs.5000/-. Thereafter, on 28.04.2018, the petitioners had made the payment to the employee in installments i.e. on 18.04.2018 an amount of Rs.587787/-, on 27.06.2018, an amount of Rs.285853/- and on 28.06.2018, an amount of Rs.27350/- (total amount of Rs.9,00,990/-).

4.7. Feeling aggrieved by the payment of the pension and gratuity after two years and 3 months, the employee preferred Original Application No.332/00515/2018 before the Tribunal. The learned Tribunal, on taking note of the facts that the employee's pension and gratuity fell due on 01.02.2012 but it was paid on 28.06.2018 and also taking note of Rule 65 of CCS (Pension) Rules, 2021, allowed the original application vide order dated 14.10.2022 and the petitioners herein was directed to pay the interest on pension and gratuity due at the rate of GPF from its due date i.e. 01.02.2012 to 28.06.2018 within three months from the date of receipt of a certified copy of the order.

4.8. The petitioners, thereafter, preferred Review Application No. 332/00004/2023 before the Tribunal, seeking review of the aforesaid judgment/order dated 14.10.2022, which was delayed by 5 months. The learned Tribunal, vide judgment/order dated 06.07.2023, dismissed the review application as well as application for condonation of delay in filing review application.

4.9. Feeling aggrieved by both the judgments/orders i.e. 14.10.2022 (supra)

and 06.07.2023 (supra), the petitioners have preferred the instant writ petition.

C. SUBMISSIONS

(5) Heard Shri Vinay Tripathi, learned Counsel representing the Union of India/petitioners and Shri Ashish Kumar Verma, learned Counsel representing the respondent no.1/employee.

(6) Assailing the legality of the impugned judgment/order dated 14.10.2022 passed by the learned Tribunal, learned Counsel representing the petitioners has argued that the learned Tribunal has committed a gross error of law in directing the payment of interest on the alleged delay of payment of interest on pension and gratuity due at the rate of G.P.F. from its due date i.e. 01.02.2012 to 28.06.2018 vide impugned judgment/order dated 14.10.2022. He submits that relief no.4 as sought by the employee/respondent no.4 in earlier Original Application No. 438 of 2012, which was decided by the learned Tribunal vide order dated 11.03.2016, and the sole relief sought by the employee/respondent no.1 in subsequent Original Application No. 332/00515/2018, are almost identical, therefore, subsequent Original Application No.332/00515/2018 was barred by res judicata and on this ground alone, Original Application No. 332/00515/2018 was liable to be dismissed, however, the learned Tribunal has erred in allowing the Original Application No. 332/00515/2018 vide impugned order dated 14.10.2022.

(7) To strengthen his submissions, learned Counsel representing the petitioners has placed reliance upon the judgments of the Apex Court in **Daryao Vs. State of U.P. : AIR 1961 SC 1457**,

Commissioner of Income Tax, Bombay Vs. T.P. Kumaran : JT 1996 (8) 68, State of Haryana Vs. State of Punjab and another : 2004 Supp(2) SCR 849 and Canara Bank vs. N.G. Subbaraya Setty and Anr. : AIR 2018 SC 3395.

(8) The learned Counsel representing the petitioners has next submitted that as there was apparent error in allowing the Original Application No. 332/00515/2018 vide order dated 14.10.2022 and as such, the petitioners preferred Review Application No. 332/00004/2023, seeking review of the order dated 14.10.2022, along with application for condonation of delay, however, the learned Tribunal dismissed the review application as well as application for condonation of delay vide impugned order dated 06.07.2023 only on the ground that the Tribunal has no power to condone the delay in filing review application in view of Rule 17 of the Central Administrative Tribunal (Procedure) Rules, 1987. He argued that recently, this Court, vide order dated 24.08.2023 passed in Writ- A No. - 5564 of 2023 : Surendra Kumar Vs. Union of India and others, has decided the issue as to whether the learned Tribunal has power to condone the delay in filing the review application or not and has held that the learned Tribunal has power to condone the delay. Thus, the impugned order 06.07.2023 is also liable to be dismissed.

(9) Per contra, learned Counsel for the employee/respondent no.1 supports the impugned judgments/orders and has argued that Section 22 (1) of the Administrative Tribunal Act, 1985 provides that the Code of Civil Procedure, 1908 shall not be binding in the proceedings before the Administrative Tribunals but shall be guided by principles of natural justice,

which is in favour of the respondent no.1/employee. He submits that as the Original Application No. 515 of 2018 was allowed by the learned Tribunal by means of the impugned order dated 14.10.2022 in the light of the principles of natural justice and as such, principle of res judicata has no play in the proceedings under the Administrative Tribunals Act, 1985. According to him, the plea of res judicata was not raised by the petitioners before the learned Tribunal, hence, the petitioners cannot be allowed the same before this Court in the present proceedings.

(10) Learned Counsel representing the respondent no.1/employee has further argued that though the respondent no.1/employee had claimed the interest at the rate of 18% on the due payments of pensionary benefits in the earlier Original Application no. 438 of 2012, but that was not entertained by the learned Tribunal. According to him, the petitioners have made a false presumption that the learned Tribunal denied the interest on due payment of pensionary benefits, while in the order dated 11.03.2016 passed in Original Application No. 438 of 2012, nothing has been observed by the learned Tribunal regarding the claim of the interest. Therefore, if the claim of the respondent no.1/employee was unheard, he has every right to sue through another proceeding for the same. Thus, there is no illegality or infirmity in the impugned order dated 14.10.2022 passed by the learned Tribunal.

(11) So far as impugned judgment/order dated 06.07.2023 is concerned, learned Counsel representing the respondent no.1/employee has contended that in view of Rule 17 of the Central Administrative Tribunal (Procedure) Rules, 1987, the learned Tribunal has no power to condone the delay

in filing the review application, hence the learned Tribunal has rightly dismissed the review application being time barred vide impugned order dated 06.07.2023.

D. ANALYSIS & FINDINGS

(12) Having regard to the submissions made by the parties and going through the record available before this Court in the instant writ petition, it is required to be noted that earlier the employee/ respondent no.1 preferred Original Application No. 438 of 2012 before the Tribunal, seeking the following reliefs :-

“1. Quash/set-aside the Pension Payment Order dated 03.08.2012 and direct the opposite parties to issue fresh Pension Payment Order to the applicant fixing his pension w.e.f. 01.02.2012 considering his date of retirement as 31.01.2012.

2. Quash/set-aside the letter dated 10.05.2012 issued by the opposite party No.6, the photo copy of which is contained in the annexure No.1 to the O.A.

3. Quash/set aside the order, if any, passed by the opposite party No. 2 to 5, directing for recovery of Rs.12,64,300/- from the applicant, after summoning its original from the opposite parties.

4. Direct the opposite parties to refund the amount of Rs.12,64,300/- deducted/ recovered from the settlement dues i.e. amount of Gratuity, Leave Encashment and arrears of Pension, to the applicant alongwith the interest @18% p.a. w.e.f. 01.02.2012 till the date of actual payment.

5. Pass any other order or direction which this Hon’ble Tribunal may deem fit and proper in the circumstances of the case.

6. Award the cost of the application.”

(13) Apparently, the learned Tribunal, vide order dated 11.03.2016, disposed of the aforesaid Original Application No. 438 of 2016 with the direction as reproduced in paragraphs No.4.5. hereinabove. This order dated 11.03.2016 was challenged before this Court by the Union of India in Writ Petition No. 16855 (S/B) of 2016. A Co-ordinate Bench of this Court, vide order dated 25.01.2018, dismissed the writ petition and upheld the judgment/order dated 11.03.2016 passed by the learned Tribunal.

(14) The employee/respondent no.1 has not disputed the fact that in compliance of the aforesaid judgments/orders, the employee/ respondent no.1 was paid sum of Rs.6,09,222/-, which was deducted from the DCRG vide Pay Order No. 491926 dated 28.03.2018; sum of Rs.3,69,225/-, which was deducted from Leave Encashment, vide Pay Order No. 491927 dated 28.03.2018; and Rs.2,85,853/-, which was recovered from the pension, vide pay order No. 491950 dated 12.06.2018. However, thereafter, the respondent No.1/applicant preferred Original Application No. 332/00515/2018, seeking the following reliefs :-

“(i) This Hon’ble Tribunal may kindly be pleased to direct the respondents to make payment of interest @ 12% per annum to the delayed payment of retiral dues from the date it was due i.e. 01.02.2012 to 28.6.2018.

(ii) To pass such other orders which are found just fit and proper under the circumstances of the case.

(iii) To allow the original application with cost.”

(15) The learned Tribunal, taking note of the fact that DCRG benefits was due on 01.02.2012 but it was paid to the employee/respondent no.1 on 28.06.2018 and in the light of Rule 65 of CCS (Pension) Rules, 2021, disposed of the aforesaid original application vide judgment/order dated 14.10.2022, which is impugned in the instant writ petition.

(16) The petitioners, thereafter, preferred Review Application No. 332/00004/2023 before the Tribunal, which was dismissed by the learned Tribunal vide order dated 06.07.2023, which is also impugned in the instant writ petition.

(17) In sum and substance, the question to be answered in this case is (i) whether Original Application No. 332/00515/2018 was barred by principle of res judicata; and (ii) whether the learned Tribunal has power to condone the delay in filing the review application or not ?

(18) So far as first question, as referred above, is concerned, res judicata is a doctrine of law based on equity and public policy that a party may not be permitted to harass the other party and waste court's time by re-agitating the same issue. A Constitution Bench of the Apex Court in **Mysore State Electricity Board Vs. Bangalore Woollen, Cotton & Silk Mills & Ors.** : AIR 1963 SC 1128, observed that what becomes *res judicata* is a 'matter', which is actually decided and not the reason which leads the Court to decide the 'matter'. Therefore, it is

the decision which may not legally be correct but it becomes binding and the party cannot be allowed to re-agitate the same issue.

(19) It is settled legal proposition that even an erroneous decision on a question of law is res judicata between the parties to it. The correctness or otherwise of a judicial decision has no bearing upon the question whether or not, it operates as res judicata. (Vide **Arjun Singh Vs. Mohindra Kumar** : AIR 1964 SC 993; **L.R. Ganapathi Thevar (dead) by his legal representatives Vs. Sri Navaneethaswaraswami Devasthanam** : AIR 1969 SC 764; and **Satyadhyan Ghosal & ors. Vs. Smt. Deorajin Debi & anr.** : AIR 1969 SC 941).

(20) In **Har Pyari Devi Vs. Ghansham Singh**: (1982) 2 SCC 109; **O.N.Bhatnagar Vs. Smt Rukibai Narsindas & Ors.**: AIR 1982 SC 1097; and **P. Lal Vs. Union of India & Ors.** : (2003) 3 SCC 393, the Apex Court held that it is not permissible for an authority, Tribunal or a Court to reopen the finding of fact which has attained finality in earlier proceedings.

(21) In **Mathura Prasad Sarjoo Jaiswal & Ors. Vs. Dossibai N.B.Jeejeebhoy** : AIR 1971 SC 2355, the Apex Court held that while considering the issue of res judicata, it is not open to the Court to examine as to whether the findings recorded earlier were correct or not. As it becomes binding on attaining finality, the purpose of applying this doctrine is that the rights which had already been determined should not become nugatory, therefore, parties must be precluded from reopening or re-contesting the issues which had become final. The Apex Court observed as under:-

"It is true that in determining the application of the rule of res judicata

the Court is not concerned with the correctness or otherwise of the earlier judgment. The matter in issue, if it is one purely of fact, decided in the earlier proceeding by a competent court must in a subsequent litigation between the same parties be regarded as finally decided and cannot be reopened. A mixed question of law and fact determined in the earlier, proceeding between the same parties may not, for the same reason, be questioned in a subsequent proceeding between the same parties. But, where the decision is on a question law, i.e. the interpretation of a statute, it will be res judicata in a subsequent proceedings between the same parties where the cause of action is the same, for the expression " the matter in issue" in S. 11, Code of Civil Procedure, means the right litigated between the parties, i.e., the facts on which the right is claimed or denied and the law applicable to the determination of that issue. Where, however, the question is one purely of law and it relates to the jurisdiction of the Court or a decision of the Court sanctioning something which is illegal, by resort to the rule of res judicata a party affected by the decision will not be precluded from challenging the validity of the order under the rule of res judicata, for a rule of procedure cannot supersede the law of the land."

(22) In the case of **State of West Bengal Vs. Hemant Kumar** : AIR 1966 SC 1061, the Apex Court clearly held that a wrong decision by a court having jurisdiction is as much binding between the parties as right one and may be superseded by other procedure like review, which the law provides.

(23) In **Employees Welfare Association Vs. Union of India & Ors.** : AIR 1990 SC 334, the Apex Court observed as under:-

"...if a question of law is related to the fact in issue, the erroneous decision on such question of law may operate as res judicata between the parties in subsequently that suit or proceeding if the cause of action is the same. The Delhi High Court judgment does not decide any abstract question of law and there is also no question of jurisdiction involved. Assuming that judgment of Delhi High Court are erroneous, such judgment being on the question of fact would still operate as res judicata between the same parties in the subsequent suit or proceeding over the same cause of action."

(24) In **Commissioner of Income Tax Vs. T.E.Kumaran** : 1990 (10) SCC 567, the Apex Court applying the principle of res-judicata clearly held:-

"The claim is barred by constructive res-judicata under section 11 Explanation IV of the Code of Civil Procedure which envisages that any matter which might and ought to have been made a ground of defence or attack in the former suit shall be deemed to have been matter directly substantially in issue in a subsequent suit. Hence when the claim was made on earlier occasion, he could have or might have sought and secured decree for interest. He did not seek so and, therefore, it operates as res-judicata. Even otherwise when he filed a suit and specifically did not claim the same order 2, Rule 2 of the Code of Civil Procedure prohibits the petitioner to seek remedy separately. In either event the Original Application is not sustainable."

(25) Keeping in mind the aforesaid legal proposition, what we find from perusal of the record available before this Court in the instant writ petition is that relief no.4 sought by the respondent

no.1/employee in Original Application No. 438 of 2012 (in the first round of litigation) was for refund of amount of Rs.12,64,300/- , which was deducted/ recovered from the settlement dues i.e. amount of gratuity, leave encashment and arrears of pension to him along with interest at the rate of 18% per annum w.e.f. 01.02.2012 till the date of actual payment, whereas relief sought by the respondent no.1/employee in Original Application No. 332/00515/2018 (second round of litigation) was to make the payment of interest at the rate of 12% per annum to the delayed payment of retiral dues from the date it due i.e. 01.02.2012 to 28.06.2018.

(26) Apparently, the relief no.4 sought by the respondent no.1/employee in Original Application No. 438 of 2012 was adjudicated earlier by the learned Tribunal vide judgment/order dated 11.03.2016, the learned Tribunal decided the same along with other reliefs and direction was issued as enumerated in paragraphs no. 4, 5 hereinabove. This order dated 11.03.2016 was challenged by the Union of India/petitioners in Writ Petition No. 16855 of 2016, which was dismissed by a Co-ordinate Bench of this Court vide judgment/order dated 25.01.2018, meaning thereby the judgment/order dated 11.03.2016 (supra) passed by the learned Tribunal was upheld. The respondent no.1/employee had never challenged the order dated 11.03.2016 (supra) passed by the learned Tribunal, however, it seems that when the order dated 11.03.2016 was complied with by the petitioners/Union of India while paying the retiral benefits to the respondent no.1/employee, then, the respondent no.1/employee preferred subsequent Original Application No. 332/00515/2018, seeking to pay interest at the rate of 12% per annum on delayed

payment of retiral dues from the date it due i.e. 01.02.2012 to 28.06.2018, which seems to be equated with the relief as sought in Original Application No. 438 of 2012 and decided by the learned Tribunal vide order dated 11.03.2016.

(27) Admittedly, a finding of fact having been arrived at Original Application No. 438 of 2012 was never challenged by the respondent no.1/employee, therefore, the legality or otherwise of an identical issue i.e. to grant interest on delayed payment of retiral dues, as it appears, could not have been the subject-matter of proceedings in the second round of litigation by filing the Original Application No. 332/00515/2018. This is for the reason that if the respondent no.1/employee was not entitled to receive interest on retiral dues by reason of the judgment/order dated 11.03.2016 of the learned Tribunal, the question of interest on retiral dues would not arise.

(28) The respondent/employee approached the learned Tribunal by filing Original Application No. 332/00515/2018 with full knowledge that earlier in Original Application No. 438 of 2012, though relief of interest was claimed by him, but the same was not granted by the learned Tribunal. The respondent no.1/employee, therefore, while filing Original Application No. 332/00515 of 2018 (second round of litigation) was bound to lay his claim having regard to the provisions contained in Order II Rule 2 of the Code of Civil Procedure or the principles analogous thereto. Respondent no.1/employee did not pray for and obtain any leave of the learned Tribunal to raise the contention about the legality or otherwise of the earlier order dated 11.03.2016 (supra), which attained finality. In that view of the matter, the

proceedings initiated before the learned Tribunal questioning the action of the petitioners in not granting interest on delayed payment of retiral dues by the petitioners, in our opinion, was wholly misconceived and was barred under the principle of res judicata and in any case the prayer sought by the employee in the second round of litigation before the learned Tribunal was not as per equity, good conscience and fair play. Even the learned Tribunal has failed to appreciate the said finer point and granted a relief, which ought not have been granted looking to the finality of judgment/order dated 11.03.2016. In other words, the issue of interest on the amount due after the earlier judgment/order rendered on 11.03.2016 was no more open to be re-agitated to unsettle a binding decision having attained finality.

(29) So far as the second question whether the learned Tribunal has power to condone the delay in filing the review application, is concerned, this Court has recently decided this issue in Writ-A No. 5564 of 2023 : Surendra Kumar Vs. Union of India and others, decided on 24.08.2023, holding that the learned Tribunal has power to condone the delay in filing the review application. Therefore, the plea of the respondent no.1/employee in this regard has no substance.

E. CONCLUSION

(30) For the aforesaid reasons, we are of the considered view that the impugned judgments/orders passed by the learned Tribunal are liable to be set-aside.

(31) In view of the aforesaid, the writ petition is **allowed**. The impugned judgment/order dated 14.10.2022 passed in

Original Application No. 332/00515/2018 and the impugned judgment dated 06.07.2023 passed in Review Application No. 332/00004/2023 are hereby set-aside.

(32) There shall be no order as to costs.

(2023) 9 ILRA 760
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.08.2023

BEFORE

THE HON'BLE MANJIVE SHUKLA, J.

Writ-A No. 6719 of 2023

Praveen Kumar ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
 Sri Vibhu Rai, Sri Dhananjai Rai

Counsel for the Respondents:
 C.S.C., Sri Shad Khan, Sri Suresh Kumar

Held – Compassionate appointment made under the Dying in Harness Rules is to be treated as a regular and permanent appointment from the date of initial appointment and cannot be on a consolidated pay. The impugned order passed by the District Basic Education Officer rejecting such claim on the basis of Government Orders dated 17.06.1996 and 30.01.1996 is contrary to law laid down by this Court in several binding precedents including **Ravi Karan Singh Vs St. of U.P., 1999 (3) UPLBEC 2263, Itwari Lal Vs St. of U.P., Writ Petition No. 5112 (S/S) of 2014**, and others.

The Court reiterated that appointment under Dying in Harness Rules is made to alleviate financial hardship and hence must be construed as a regular appointment from the date of entry into service. Directions issued for

reconsideration of the petitioner's claim in accordance with law.

(Delivered by Hon'ble Manjive Shukla, J.)

1. Heard learned counsel appearing for the petitioner, learned Standing Counsel appearing for the Respondent No.1 as well as Mr. Shad Khan, learned counsel appearing for the Respondents No.2 and 3.

2. Petitioner, through the present writ petition, has challenged the order dated 15.2.2023 passed by the District Basic Education Officer, Kasganj, whereby case of the petitioner for treating him to be regularly appointed with effect from the date of his initial appointment, has been rejected. Petitioner through the present writ petition has also prayed for a direction from this Court thereby commanding the respondents to treat the petitioner's appointment to be a regular appointment from the date of his initial appointment and also to pay the consequential service benefits to him.

3. Facts of the case, in brief, are that the petitioner was initially appointed as Class IV employee on a consolidated pay of Rs.2550/- per month vide appointment order dated 18.8.2004 passed by the Deputy Basic Education Officer, Etah. The petitioner, pursuant to his appointment order dated 18.8.2004 started working on his post and was paid consolidated salary.

4. Thereafter, vide order dated 8.12.2010 petitioner was granted regular pay-scale of Rs.4440-7440/- with grade pay of Rs.1300/- and since then he is receiving salary in the regular pay scale.

5. Petitioner raised his claim before the District Basic Education Officer,

Kasganj that his appointment may be treated as regular appointment with effect from the date of his initial appointment i.e. 18.8.2004 and he may be paid the consequential service benefits. Since nothing was done by the District Basic Education Officer, Kasganj, as such petitioner filed Writ-A No.12808 of 2021 and this Court vide order dated 24.9.2021 disposed of the said writ petition with direction to the District Basic Education Officer, Kasganj to consider the petitioner's claim for inclusion of his services rendered between year 2004 to 2010 keeping in view the judgment of this Court rendered in the case of **Ravi Karan Singh Vs. State of U.P and others**, reported in 1999 (3) UPLBEC 2263.

6. The District Basic Education Officer, Kasganj in compliance of the aforesaid order dated 24.9.2021 passed in Writ-A No.12808 of 2021, has passed an order on 15.2.2023, whereby the claim of the petitioner for treating his appointment on Class IV post to be a regular appointment with effect from the date of his initial appointment, has been rejected. The District Basic Education Officer, Kasganj in his order dated 15.2.2023 has recorded finding that petitioner was given compassionate appointment on 18.8.2004 on consolidated pay and he has been granted regular pay scale vide order dated 8.12.2010 with effect from the date of passing of the said order and therefore, petitioner is not entitled for treating his appointment to be a regular appointment with effect from the date of his initial appointment. The District Basic Education Officer, Kasganj in his order dated 15.2.2023 has further stated that Director, Basic Education, U.P., Lucknow has issued an order on 17.6.1996, whereby it has been provided that those Class IV employees

who were given compassionate appointment on a consolidated pay, will be entitled for regular pay-scale with effect from the date of passing of the order for payment of salary in regular pay-scale and their appointments shall not be treated as regular appointment in regular pay-scale with effect from the date of initial appointment.

7. Learned counsel appearing for the petitioner has submitted that the issue involved in this writ petition has already been decided by this court vide its judgment and order dated **18.8.2015** passed in **Writ Petition No.5112 (S/S) of 2014 (Itwari Lal Vs. State of U.P. and others)** and it has been held by this court that compassionate appointment from the date of initial appointment has to be treated a regular appointment and the concerned candidate is entitled for the payment of salary in regular pay-scale from the date of his initial appointment. It has been further submitted that this court in the aforesaid judgment and order dated 18.8.2015 passed in Writ Petition No.5112)S/S) of 2014 has relied on the judgment passed by this court in the case of **Ravi Karan Singh Vs. State of U.P and others**, reported in **1999 (3) UPLBEC 2263**. Learned counsel appearing for the petitioner has further submitted that this Court in another judgment passed on **13.12.2019** in **Writ-A No.6717 of 2018 (Pradeep Kumar and 6 others Vs. State of U.P. and others)** has decided the identical issue, which is involved in the present writ petition. Lastly, the learned counsel appearing for the petitioner has relied on the judgment of this court passed on **23.9.2022** in **Writ-A No.15205 of 2022 (Asif Khan vs. State of U.P. and others)**, wherein an identical issue, which is involved in the matter of the petitioner, has been decided.

8. On the other hand, the learned counsel appearing for the Respondents No.2 and 3 has argued that petitioner's initial appointment was made on a consolidated pay and thereafter, vide order dated 8.12.2010 he has been given appointment in a regular pay-scale, therefore petitioner is not entitled to his appointment to be treated as a regular appointment in a regular pay-scale with effect from the date of his initial appointment, i.e. with effect from 18.8.2004. Learned counsel appearing for the Respondents No.2 and 3 has further argued that the order dated 17.6.1996 issued by the Director, Basic Education, U.P., Lucknow provides that where the compassionate appointment was given on a consolidated pay and later on regular pay scale has been granted, the candidate will be entitled for payment of regular salary with effect from the date when the order for payment of salary in a regular pay-scale has been passed and further, appointment of the said candidate cannot be treated to be regular with effect from the date of his initial appointment.

9. I have considered the submissions advanced by learned counsels appearing for the parties.

10. I find that this court has already decided the issue involved in the present writ petition and it has been held by this court that compassionate appointment cannot be on a consolidated pay and it has to be a regular appointment in a regular pay-scale, therefore even if a person is appointed on compassionate ground on a consolidated pay, the said appointment will be treated to be a regular appointment in a regular pay-scale with effect from the date of his initial appointment.

11. This court vide its judgment rendered in the case of **Ravi Karan Singh** (supra) has held that appointment under Dying in Harness Rules has to be treated as a permanent appointment. The relevant portion of the aforesaid judgment passed by this Court is extracted as under:-

"This petition has come up before us on a reference made by the learned Single Judge by his order dated 19.12.1997. The point involved is very simple, that is, whether an appointment under the Dying in Harness Rules is a permanent appointment or temporary appointment. According to the learned Single Judge, this Court had earlier held that an appointment under Dying in Harness Rules is a permanent appoint vide Budhi Sagar Dubey v. D.O.I.S., (1993) 1 UPLBEC 197; Gulab Yadav v. State of U.P. and others, (1991) 2 UPLBEC 995 and Dharendra Pratap Singh v. D.I.O.S. & Others. (1991) 1 UPLBEC 427. The learned Single Judge who passed the referring order dated 19.12.1997 disagreed with the above mentioned decisions and hence has referred the matter to a larger Bench.

In our opinion, an appointment under the Dying in Harness Rules has to be treated as a permanent appointment otherwise if such appointment is treated to be a temporary appointment then it will follow that soon after the appointment the service can be terminated and this will nullify the very purpose of the Dying in Harness Rule because such appointment is intended to provide immediate relief to the family on the sudden death of the bread-earner. We, therefore, hold that the appointment under Dying in Harness Rule is a permanent appointment and not a temporary appointment and hence the

provisions of U.P. Temporary Government Servant (Termination of Services) Rules, 1975 will not apply to such appointments.

The petition is disposed of accordingly."

12. This court has again decided the case of **Itwari Lal** (supra) vide judgment and order dated 18.8.2015, wherein it has been categorically held that order dated 30.1.1996 passed by U.P. Basic Education Board, Allahabad is not applicable in the case of compassionate appointment, whereas in the present matter, case of the petitioner has been rejected relying upon the aforesaid order dated 30.1.1996. The relevant portion of the judgment and order dated 18.8.2015 is extracted as under:-

"The sole basis of passing of the impugned order dated 4.9.2014 is Government Order dated 30.1.1996 issued by Secretary, Uttar Pradesh Basic Shiksha Parishad, Allahabad. The relevant portion of the said is quoted as under:-

"मृतक आश्रितों की चतुर्थ श्रेणी के पदों पर नियुक्ति के सम्बन्ध में नवीनतम शासनादेश संख्या-४८०/१५-५-९०-३०-८२ दिनांक २३ मार्च १९९० के पैरा-६ में निम्नवत प्रावधान किया गया है।

"शासनादेश संख्या-२१३७/१५ -५-८९ -४४८/७६ दिनांक २० जनवरी १९८२ के अंतर्गत चतुर्थ श्रेणी के फालतू कर्मचारियों के समायोजन हेतु नई नियुक्तियां न किये जाने का प्रतिबन्ध मृतक आश्रितों की चतुर्थ श्रेणी के नियुक्ति में लागू न होगा।"

उक्त के आलोक में जनपद स्तर पर इकाईवार आवंटित चतुर्थ श्रेणी के पदों को सुनिश्चित करने के उपरांत सीधी भर्ती से। किसी प्रकार की कोई नियुक्ति न करने का निर्देश प्रसारित कर दें और मृतक आश्रितों की चतुर्थ श्रेणी के लिए आवंटित रिक्त पदों के प्रति ज्येष्ठा क्रम में सम्बंधित इकाई के नियुक्ति प्राधिकारी

(शिक्षा अधीक्षक/उप विद्यालय निरीक्षक प्रथम) द्वारा नियमानुसार नियुक्तियों की जा सकती है।"

The Government Order dated 30.1.1996 is not applicable in case of the persons who were appointed on compassionate ground under Dying in Harness Rules, so the action on the part of opposite party no.3 thereby rejecting the claim of the petitioner vide order dated 4.9.2014 in view of Government Order dated 30.1.1996 is void ab initio and without jurisdiction as well as on the ground that compassionate appointment cannot be given on consolidated salary because the same is of permanent nature as held by a Division Bench of this Court in the case of Ravi Karan Singh (supra).

x x x x x x x x x x x

So keeping in view of the said fact as well as the law laid down a Division Bench of this Court in the case of Ravi Karan Singh (supra), the impugned order passed by opposite party no.3 liable to be set aside.

For the foregoing reasons, the writ petition is allowed and the impugned order dated 4.9.2014 passed by opposite party no.3/ District Basic Education Officer, Sitapur is set aside. The opposite party no.3 is directed to re-examine the matter afresh in the light of the observations made herein above, expeditiously, say within a period of eight weeks from the date a certified copy of this order is produced before him."

13. This court has also decided Writ-A No.6717 of 2018 (Pradeep Kumar and 6 others Vs. State of U.P. and others) vide judgment and order dated 13.12.2019. The

relevant portion of the judgment and order dated 13.12.2019 is extracted as under:-

"In support of his submission, Shri Rai has placed reliance on the judgement passed by the Division Bench of this Court in the case of Ravi Karan Singh vs. State of U.P. 1999 (2) AWC 976, wherein, similar issue has been considered and relying on the judgement passed in Budhi Sagar Dubey vs. D.I.O.S. 1993 ESC 21; Gulab Yadav vs. State of U.P. and others 1991 (2) UPLBEC 995; and Dharendra Pratap Singh vs. D.I.O.S. and others 1991 (1) UPLBEC 427, it has been held that the appointment under the Dying-in-Harness Rules has to be treated as a permanent appointment otherwise if such appointment is treated to be a temporary appointment, then it will follow that soon after the appointment, the service can be terminated and this will nullify the purpose of Dying-in-Harness Rules because such appointment is intended to provide immediate relief to the family on the sudden death of the bread earner. Reliance has also been placed on the judgement and order dated 18.08.2015 passed in Service Single no.5112 of 2014 (Itwari Lal vs. State of U.P. through Secy. Basic Shiksha Lko and others), wherein, after placing reliance on the case of Ravi Karan Singh (supra), the writ petition was allowed and the order impugned was set aside. Further direction has been issued to the opposite party no.3 to re-examine the matter afresh in the light of observations made therein within the stipulated period. He has also relied upon the judgement passed in the case of Ravindra Nath Taigor and others vs. State of U.P. and others 2018 (3) ADJ 1641, wherein, it has been observed that the petitioners, who were appointed under Dying-in-Harness Rules in the year 2005 are entitled to be treated at par with all

other similarly appointed permanent assistant teachers in basic school, for the purpose of their pension and provident fund benefits and accordingly, the Government Order dated 15.11.2011 has been quashed.

The legal and factual position has not been disputed by learned Additional Chief Standing Counsel but at the same time, he contends that initial appointment of the petitioners were on consolidated basis and thereafter they have been regularized on the post and the admissible benefits have been provided to them as such, at this belated stage, this Court should not at all intervene in the matter.

In the present case, nothing has been brought on record to indicate or suggest that the posts on which the petitioners have been appointed were not substantively vacant. The law on the issue is settled that appointment under Dying-in-Harness Rules can only be extended against a substantive vacancy and in case there is no vacancy, supernumerary post would be created for such purpose.

In the facts and circumstances of the case and in the light of the observations so made in the case of Ravi Karan Singh (supra), Itwari Lal (supra) as well as Ravindra Nath Taigor (supra), the issue is no more res-integra and as such, the Court is of the considered opinion that the services rendered by the petitioners on consolidated salary should be counted as regular service and accordingly, the consequential benefits may also follow."

14. This court recently has considered the identical issue which is involved in the present writ petition and has decided **Writ-A No.15205 of 2022 (Asif Khan vs. State**

of U.P. and others) vide judgment and order dated 23.9.2022. The relevant portion of judgment and order dated 23.9.2022 is extracted as under:-

"The sole basis of passing of the impugned order dated 2.9.2022 is Government Order dated 30.1.1996 issued by Secretary, Uttar Pradesh Basic Shiksha Parishad, Allahabad. The relevant portion of the said is quoted as under:-

"मृतक आश्रितों की चतुर्थ श्रेणी के पदों पर नियुक्ति के सम्बन्ध में नवीनतम शासनादेश संख्या-४८०/१५-५-९०-३-८२ दिनांक २३ मार्च १९९० के पारा ६ में निम्नवत प्रावधान किया गया है

" शासनादेश संख्या-२१३७/१५/५/८९-४४८/७६ दिनांक २० जनवरी १९८२ के अंतर्गत चतुर्थ श्रेणी के फालतू कर्मचारियों के समायोजन हेतु नयी नियुक्तियां न किये जाने का प्रतिबन्ध मृतक आश्रितों की चतुर्थ श्रेणी के नियुक्ति में लागू न होगा"

उक्त के आलोक में जनपद स्तर पर इकाईवार आबंटित चतुर्थ श्रेणी के पदों को सुनिश्चित करने के उपरांत सीढ़ी भर्ती से किसी प्रकार की कोई नियुक्ति न करने का निर्देश प्रसारित कर दें और मृतक आश्रितों की चतुर्थ श्रेणी के लिए आबंटित रिक्त पदों के प्रति ज्येष्ठता क्रम में सम्बंधित इकाई के नियुक्ति प्राधिकारी (शिक्षा अधीक्षक/उप विद्यालय निरीक्षक प्रथम) द्वारा नियमानुसार नियुक्तियां की जा सकती है "

The Government Order dated 30.1.1996 is not applicable to case of the persons who were appointed on compassionate ground under Dying in Harness Rules, so the action on the part of opposite party no.3 whereby rejecting the claim of the petitioner vide order dated 4.9.2014 in view of Government Order dated 30.1.1996 is void ab initio and without jurisdiction. Compassionate appointment cannot be given on consolidated salary as the same is of permanent nature as held by a Division

Bench of this Court in the case of Ravi Karan Singh (supra) which is quoted herein below:-

"This petition has come up before us on a reference made by the learned Single Judge by his order dated 19.12.1997. The point involved is very simple, that is, whether an appointment under the Dying in Harness Rules is a permanent appointment or temporary appointment. According to the learned Single Judge, this Court had earlier held that an appointment under Dying in Harness Rules is a permanent appoint vide Budhi Sagar Dubey v. D.O.I.S., (1993) 1 UPLBEC 197; Gulab Yadav v. State of U.P. and others, (1991) 2 UPLBEC 995 and Dharendra Pratap Singh v. D.I.O.S. & Others. (1991) 1 UPLBEC 427. The learned Single Judge who passed the referring order dated 19.12.1997 disagreed with the above mentioned decisions and hence has referred the matter to a larger Bench.

In our opinion, an appointment under the Dying in Harness Rules has to be treated as a permanent appointment otherwise if such appointment is treated to be a temporary appointment then it will follow that soon after the appointment the service can be terminated and this will nullify the very purpose of the Dying in Harness Rule because such appointment is intended to provide immediate relief to the family on the sudden death of the bread-earner. We, therefore, hold that the appointment under Dying in Harness Rule is a permanent appointment and not a temporary appointment and hence the provisions of U.P. Temporary Government Servant (Termination of Services) Rules, 1975 will not apply to such appointments.

The petition is disposed of accordingly."

In view of the admitted facts as attracted to the case of the petitioner as well as the law laid down by the Division Bench of this Court in the case of Ravi Karan Singh (supra), the impugned order passed by respondent No. 3 cannot be sustained and is liable to be set aside."

15. The appointment under Dying in Harness Rules is always given to the dependent of the deceased government servant to overcome the instant financial crisis suffered by the family due to demise of the government servant and therefore, the said appointment cannot be temporary in nature. The compassionate appointment has necessarily to be permanent as if the said appointment is made temporarily, there will be a threat to the family that any time the said appointment can be cancelled or services can be terminated, therefore, the family of the deceased government servant will never be in peace.

16. This court in the aforesaid judgments has considered the issue involved in this writ petition in detail and it has been held that the compassionate appointment can never be on a consolidated pay and it is always a permanent appointment in a regular pay-scale.

17. The petitioner before this court was appointed on a consolidated pay on 18.8.2004 and later on he has been given appointment in a regular pay-scale with effect from 8.12.2010, therefore in view of the aforementioned judgments of this court, appointment of the petitioner has to be treated permanent in a regular pay-scale with effect from the date of his initial appointment i.e. with effect from

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

1. Heard Sri Shri Prakash Dwivedi, learned counsel for the petitioner and learned Standing Counsel for the State.

2. The petitioner who has been working as a jeep driver was served with a show cause notice dated 14.02.2019 requiring him to show cause as to why an enquiry may not be instituted regarding his date of birth. The basis of the show cause notice was a complaint made by the son of the employee stating therein that his uncle Rajmani Chaubey was five years younger to his father and since his uncle had already retired, how could his father be still in service as he ought to have retired before his uncle.

3. In response to the above show cause notice, petitioner submitted his reply annexing therewith the documentary evidence in the form of motor driving license, adhar card and medical certificate issued to him in the year 2002 in support of his date of birth recorded in his service record as 01.01.1963.

4. Some preliminary fact finding enquiry was got held by Assistant Consolidation Officer who submitted report on 04.09.2019 in which it was reported that in the school admission register it was found that on the back leaf there was no mention of the year and the admission role showed the name of petitioner at serial no.61 as son of Laxmi Dhar Chaubey and the date of birth recorded as 10.01.1952 but there was over writing. The report also stated that according to the headmaster of the school the original register is in a very old and shabby condition and it was on the basis of the affidavit furnished by Shesh Mani Chaubey that certificate regarding his

date of birth as 01.01.1963 had been issued. The Settlement Officer (Consolidation) found reports to be very contradictory and since the original records relating to initial appointment of the petitioner were not traceable so he dropped the proceedings vide his order dated 10.10.2019.

5. However, it transpires from the record that further third party complaints were pursued before the Commissioner (Consolidation) who directed some fresh enquiry in the matter and again on the basis of same school records and other third party records, a fresh report was prepared, according to which his date of birth already entered in service book as 01.01.1963 was not believed and was claimed to be 10.01.1952 as per early school records. The Settlement Officer (Consolidation) returned a finding that the petitioner got fraudulently his date of birth recorded in Adhar Card, Identity Case and Voter Card and therefore, the departments concerned may be directed to correct the date of birth in their own records.

6. The petitioner since was taken to have retired on 01.01.2012 as per revised date of birth as 01.01.1952, the direction was issued by the Settlement Officer (Consolidation) to make recovery of the amount of salary already paid to him after his new revised date of retirement.

7. Learned counsel for the petitioner has argued that in the light of the provisions as contained under U.P. Recruitment to Services (Determination of Date of Birth) Rules, 1974 until the date of birth recorded in the service record is sought to be altered on the basis of Class X certificate, the date of birth already recorded in the service book at the time of entry in service cannot be altered. When

this writ petition was entertained vide order dated 15.10.2020, the order passed by the Settlement Officer (Consolidation) dated 09.02.2020 was stayed.

8. A counter affidavit filed on behalf of the respondents by learned Standing Counsel had an extract of the service book annexed with the same which showed the date of birth of the petitioner to be recorded as 01.01.1963. The photocopy filed, though was legible but it appeared as if transcribed on some piece of paper pasted upon the original subsequently and so this Court vide its order dated 04.07.2023 directed the Standing Counsel to produce the original service book and the same has now been placed before this Court.

9. Upon perusal of the original service book, I find that the date of birth to be recorded as 01.01.1963 in the same hand writing in which the other entries had been made at the time of preparation of service book and transparent cello tape had been placed so that no interpolation could be made which appears to be very old, at the time of preparation of service book in the year 1989 under the signature of Settlement Officer (Consolidation), Mirzapur, Varanasi.

10. Thus, from bare perusal of the original service book it is clear that the date of birth recorded in the service book is 01.01.1963 and that too of the time when the service book was initially prepared. In the entire counter affidavit there is no averment to the effect that the petitioner ever made any application for the change of his date of birth recorded in the service book, nor the respondents have ever corrected this entry in the service book on the basis of any school records of petitioner, at any point of time. The entry

thus is liable to be presumed to have been made on the basis of record available at the time of entry into service.

11. Under the U.P. Recruitment to Services (Determination of Date of Birth) Rules, 1974, the date of birth initially recorded in the service book cannot be changed except in the case where the high school certificate is produced to get the date of birth changed. The relevant provisions of 1974 Rules are reproduced hereunder:

?3. The date of birth of a government servant as recorded in the certificate of his having passed the High School or equivalent examination, or where a government servant has not passed any such examination as aforesaid, the date of birth or the age recorded in his service book at the time of his entry into government service, shall be deemed to be his correct date of birth or age, as the case may be for all purposes in relation to his service, including eligibility for promotion, superannuation, premature retirement or retirement benefits and no application or representation shall be entertained for correction of such date or age in any circumstances whatsoever.?

12. In service jurisprudence the service/employment is defined as contract of employment between employer and employee and until the employer comes to find in any in-house enquiry that such a contract has been the result of fraud which made it to believe a false statement made as truth to offer employment, it cannot just proceed to annul the contract upon a third party complaint. In the present case there is no finding that petitioner played any fraud or suppressed a fact from his employer to seek employment, instead, the department

while dropping the enquiry in the year 2019 proceeded afresh on repeated persuasion of a third party to discharge petitioner from service. It embarked upon a fact finding enquiry and returned finding qua date of birth against the petitioner on the basis of a register that was too old and in a too shabby condition to be relied upon.

13. Still further, the documents of Adhar Card and Driving License were disbelieved without holding any enquiry and getting correct information from the issuing authorities of these documents. Direction for taking steps to get date of birth corrected in official records like driving license and Adhar Card etc. by issuing authorities, was beyond the competence of employer which can be said as the basis to hold petitioner guilty of any fraud or misrepresentation for seeking employment. What further surprises the Court is that instead of removal of petitioner from service as the respondents were much confident about the findings returned in enquiry, they made him to retire retrospectively and that too without altering or modifying the date of birth in service record. All this shows that respondents were not even sure about the correctness of findings in the departmental enquiry which they had conducted upon a repeated complaint of a third party. This approach of respondents especially when they are State is certainly not approved of. While exercising on a third party complaint, the employer must first enquire as to why such a complaint was moved by a third party at the fag end of service career of employee or after his putting substantial service in employment. Third party complaints are often guided by local village animosity and/or someone in family or relation going envious of employee, without having any stake involved at all. An employer in usual

course in matters of contract of service, as I would term it, must ignore such complaints when they are made by a third party after taking long time of his entry in employment. In cases where any stake of a third party is involved, employer must investigate the motive of complaint. Complaints made with malicious motive by close relatives of employees must be outrightly rejected and must not be investigated unless a truth is discovered which, if had been disclosed at the time of entry into employment, would have rendered an employee totally ineligible but then even in such cases, if complainant had the knowledge and he did not come early, should be discouraged for making complaint at the fag end of service career. Further in the matter of preliminary enquiry motive appears to be oblique with an intention to harass the employee, it must reject at that stage itself. A lawful contract of employment deserves to be honored so long as it is not the result of fraud committed for seeking it. Long blotless service rendered by an employee, whose work has been subject matter of appreciation, cannot suddenly be fired for such vexations complaints.

14. In the present case after going through early school records of petitioner earlier no substance was found in the complaint and so proceeding was dropped vide order dated 10.10.2019. Under the circumstances, repeated complaint by the son was sufficient to draw inference that son had the only motive to harass his father may be, for the reason he married to a woman after death of his wife.

15. In view of the above, the order impugned dated 19.02.2020 retiring the petitioner contrary to the date of birth recorded in the service book which has

of Jyoti Niketan School vide appointment order dated 1.7.2000. Petitioner pursuant to her appointment order continued to work in the school and as per her date of birth she was to attain the age of 60 years on 27.6.2023, therefore the Manager of the school issued a letter to the petitioner on 28.3.2023 thereby petitioner was informed that she after attaining the age of superannuation will retire on 27.6.2023.

5. Learned counsel appearing for the petitioner has vehemently argued that since the teachers working in the institutions of the State Government as well as teachers working in the schools of U.P. Basic Education Board are to retire at the end of academic session and further since academic session in the schools of the State Government starts from 1st of April and ends on 31st of March in the next year and since the petitioner's date of retirement falls on 27.6.2023, therefore she is entitled to continue till 31st March, 2024.

6. Learned counsel appearing for the Respondent No.1 has vehemently argued that Jyoti Niketan School, Atlas Pokhra, Azamgarh is a school run by a private society and is recognized by the Council for Indian School Certificate Examination, New Delhi, therefore the rules and regulations of the State Government applicable over the schools run by U.P. Basic Education Board and schools run by the State Government are not applicable over the school of the petitioner.

7. Learned counsel appearing for the petitioner could not point out as to how the rules of the Government of U.P. applicable to the government schools and the schools run by U.P. Basic Education Board are applicable over the school of the petitioner. Learned counsel for the petitioner has only submitted

that the schools which are recognised by the Council for Indian School Certificate Examination, New Delhi are required to take "No objection certificate" from the State Government and therefore, all the rules and regulations applicable over the schools of the State Government are applicable over the school of the petitioner.

8. Learned counsel appearing for the Respondent No.1 has submitted that merely because the State Government has given 'No objection certificate' for recognition of the school of the petitioner by the Council for Indian School Certificate Examination, New Delhi, the rules and regulations applicable over the schools of the State Government and the schools run by the U.P. Basic Education Board, Prayagraj shall not apply over the school of the petitioner.

9. Learned counsel appearing for the Respondent No.1 has submitted that even otherwise the Hon'ble Supreme Court vide its judgment rendered in the case of **St. Mary's Education Society and another vs. Rajendra Prasad Bhargav and others**, reported in (2023) 4 SCC 498 has categorically held that the service disputes of the employees working in the schools run by the private societies are not amenable to writ jurisdiction of the High Court under Article 226 of the Constitution of India. Relevant portions of the judgment rendered in the case of St. Mary's Education Society (supra) are extracted as under:-

"2. In the present appeal, two pivotal issues fall for consideration of this Court:

2.1. (a) Whether a writ petition under Article 226 of the Constitution of India is maintainable against a private unaided minority institution?

2.2. (b) *Whether a service dispute in the private realm involving a private educational institution and its employee can be adjudicated in a writ petition filed under Article 226 of the Constitution?*

3. *In other words, even if a body performing public duty is amenable to writ jurisdiction, are all its decisions subject to judicial review or only those decisions which have public element therein can be judicially reviewed under the writ jurisdiction?*

4. *The aforesaid two questions, though not vexed, nevertheless despite plethora of case laws, always give rise to a debate.*

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75. *We may sum up our final conclusions as under:*

75.1. *An application under Article 226 of the Constitution is maintainable against a person or a body discharging public duties or public functions. The public duty cast may be either statutory or otherwise and where it is otherwise, the body or the person must be shown to owe that duty or obligation to the public involving the public law element. Similarly, for ascertaining the discharge of public function, it must be established that the body or the person was seeking to achieve the same for the collective benefit of the public or a section of it and the authority to do so must be accepted by the public.*

75.2. *Even if it be assumed that an educational institution is imparting public duty, the act complained of must have a direct nexus with the discharge of public duty. It is indisputably a public law*

action which confers a right upon the aggrieved to invoke the extraordinary writ jurisdiction under Article 226 a prerogative writ. Individual wrongs or breach of mutual contracts without having any public element as its integral part cannot be rectified through a writ petition under Article 226. Wherever Courts have intervened in their exercise of jurisdiction under Article 226, either the service conditions were regulated by the statutory provisions or the employer had the status of "State" within the expansive definition under Article 12 it was found that the action complained of has public law element.

75.3. *It must be consequently held that while a body may be discharging a public function or performing a public duty and thus its actions becoming amenable to judicial review by a Constitutional Court, its employees would not have the right to invoke the powers of the High Court conferred by Article 226 in respect of matter relating to service where they are not governed or controlled by the statutory provisions. An educational institution may perform myriad functions touching various facets of public life and in the societal sphere. While such of those functions as would fall within the domain of a "public function" or "public duty" be undisputedly open to challenge and scrutiny under Article 226 of the Constitution, the actions or decisions taken solely within the confines of an ordinary contract of service, having no statutory force or backing, cannot be recognised as being amenable to challenge under Article 226 of the Constitution. In the absence of the service conditions being controlled or governed by statutory provisions, the matter would remain in the realm of an ordinary contract of service.*

75.4. Even if it be perceived that imparting education by private unaided the school is a *public duty within the expanded expression of the term, an employee or a non-teaching staff engaged by the school for the purpose of its administration or internal management is only an agency created by it. It is immaterial whether "A" or "B" is employed by school to discharge that duty. In any case, the terms of employment of contract between a school and non-teaching staff cannot and should not be construed to be an inseparable part of the obligation to impart education. This is particularly in respect to the disciplinary proceedings that may be initiated against a particular employee. It is only where the removal of an employee of non-teaching staff is regulated by some statutory provisions, its violation by the employer in contravention of law may be interfered with by the court. But such interference will be on the ground of breach of law and not on the basis of interference in discharge of public duty.*

75.5. *From the pleadings in the original writ petition, it is apparent that no element of any public law is agitated or otherwise made out. In other words, the action challenged has no public element and writ of mandamus cannot be issued as the action was essentially of a private character.*

76. *In view of the aforesaid discussion, we hold that the learned single Judge of the High Court was justified in taking the view that the original writ application filed by the respondent No. 1 herein under Article 226 of the Constitution is not maintainable. The Appeal Court could be said to have committed an error in taking a contrary view.*

9. I have considered the submissions advanced by learned counsels appearing for the parties and I find that school of the petitioner i.e. Jyoti Niketan School is being run by a private body and is recognized by the Council for Indian School Certificate Examination, New Delhi. I further find that petitioner's service conditions in Jyoti Niketan School are not governed by any statutory provisions.

10. Submission made by learned counsel appearing for the petitioner that rules and regulations made by the State Government applicable over the schools run by the State Government and the schools run by U.P. Basic Education Board are applicable over the school of the petitioner, is absolutely misconceived as admittedly the school of the petitioner is run by a private society and is recognised by the Council for Indian School Certificate Examination, New Delhi, therefore it is patently manifest that rules and regulations made by the State Government in respect of the academic session and also in respect of the teachers that if the date of retirement falls in between the academic session, they will be allowed to continue till the end of academic session, shall not be applicable over the employees of the petitioner's school.

11. Hon'ble Supreme Court vide its judgment rendered in the case of *St. Mary's Education Society* (supra) has categorically held that where service conditions of employee working in a private institution are not governed by statutory provisions, then the service dispute of the said employee is not amenable to writ jurisdiction of High Court enshrined under Article 226 of the Constitution of India.

12. Since the service conditions of the petitioner are not governed by any statutory provisions, therefore the present writ petition filed by the petitioner is not maintainable and is liable to be dismissed.

13. In view of the aforesaid law laid down by Hon'ble Supreme Court, writ petition filed by the petitioner is not maintainable and thus is dismissed.

(2023) 9 ILRA 775
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.07.2023

BEFORE

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

Writ-A No. 10459 of 2023

Uttar Pradesh Power Corp. Contract
Employees Sangh, Lko ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sri Braj Mohan Singh, Shikha Singh Gautam

Counsel for the Respondents:

C.S.C., Sri Adarsh Bhushan, Sri Devesh Vikram

Held:

Contractual employees working under outsourced agency cannot claim reinstatement upon termination, even if the termination followed participation in an illegal strike. No privity of contract exists with the Corporation in such cases. The strike in question was in violation of ESMA notification. Reinstatement relief is barred under Specific Relief Act, 1963. Judicial interference is not warranted when termination follows a strike that disrupts essential services.

Case Law Discussed:

1. Rajesh Kumar Singh Vs District Basic Education Officer & ors., 2022 (4) ADJ 535

2. Rajesh Bhardwaj Vs U.O.I. & ors., 2019 (2) ADJ 830 (DB)

3. Kailash Singh Vs The Managing Committee, Mayo College, Ajmer & ors., (2018) 10 SCALE 638

Key Legal Point:

Relief of reinstatement cannot be granted to contract employees under Article 226. Specific performance of a contract of personal service is not enforceable under the law unless governed by statutory provisions.

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

1. Heard Mr. Braj Mohan Singh, learned Counsel for the petitioner, Ms. Monika Arya, learned Additional Chief Standing Counsel on behalf of respondent Nos.1 and 2, Mr. Devesh Vikram, learned Counsel appearing on behalf of respondent Nos.3 and 5 and Mr. Adarsh Bhushan, learned Counsel appearing on behalf of respondent No.6.

2. This writ petition under Article 226 of the Constitution has been filed by the Uttar Pradesh Power Corporation Contract Employees Sangh, Lucknow through its General Secretary.

3. It is the petitioner's case that the petitioner is a registered union of contract employees, all of whom are employed with the Electricity Department in the District of Kushi Nagar, besides the entire State of Uttar Pradesh. The Managing Committee of the petitioner by a resolution dated 28.05.2023 have authorized the General Secretary of the Union, Devendra Kumar Pandey, to file this writ petition on behalf of the aggrieved members of the union. It

must be remarked at the outset that what evidently the petitioner means by saying that its members are contract employees of the Electricity Department at Kushi Nagar and all across the State, is that they are employees of the Uttar Pradesh Power Corporation Limited (for short, 'the UPPCL') and the various Regional Power Distribution Corporations functioning under the control of the UPPCL. This Court is compelled to understand it this way, because there is indeed no Electricity Department of the Government in the State of Uttar Pradesh.

4. A perusal of the averments in Paragraph No.4 of the writ petition shows that the petitioner espouses the cause of about 167 of its members, who are contract employees, serving the Purvanchal Vidyut Vitran Nigam Limited at Kushi Nagar. A list of these contract employees, numbering 167, to be precise 170, there being a discrepancy in the figure between the averment in Paragraph No.4 and the actual account in the list appended, is annexed as Annexure No.2 to the writ petition. The members of the petitioner association (for short, 'the workmen') say that they are contract employees, doing skilled and unskilled work for the last about 10 years. They have been discharging their duties under the supervision and control of a certain M/s. SMM Infratech Pvt. Ltd., represented by its Managing Director at various KV Sub-stations within Vidyut Vitran Khand, Hata and Kasya, District Kushi Nagar. M/s. SMM Infratech Pvt. Ltd has not been characterized or described much in its relationship to the Purvanchal Vidyut Vitran Nigam Limited (for short, 'the Corporation'), but the said party appears to be a work force supplier for the Corporation.

5. Admittedly, the workmen participated in a strike by powermen

serving under the UPPCL and the Corporation as well for 2-3 days between 16th March to 19th March, 2023. The fact is admitted in Paragraph No.8 of the writ petition and also in a letter dated 26.04.2023, addressed by the workmen working at Hata and Kasya, District Kushi Nagar to the Collector, Kushi Nagar. Along with the writ petition, a copy of the letter dated 1st May, 2023 by the Executive Engineer, Electricity Distribution Division, Hata, Kushi Nagar, addressed to the Collector, Kushi Nagar and the Sub-Divisional Officer, Tehsil Hata/Kaptanganj, Kushi Nagar, has been appended as Annexure No.5 to the writ petition. There is an averment in Paragraph No.9 of the writ petition that the letter by the Executive Engineer acknowledges the expertise of the workmen in their trade, but says that they were on strike for 2-3 days. A perusal of the letter shows that the Executive Engineer has said that the workmen participated in the strike on account of being misguided, leading to termination of their services by M/s. SMM Infratech Pvt. Ltd.

6. The learned Counsel for the petitioner has argued that the workmen are contractual employees and their services cannot be dispensed with in order to replace them by other contract employees. He has relied upon the decision of this Court in **Rajesh Kumar Singh v. District Basic Education Officer and others, 2022 (4) ADJ 535**.

7. On the other hand, Ms. Monika Arya, learned Chief Standing Counsel, Mr. Adarsh Bhushan and Mr. Devesh Vikram, learned Counsel for the respondents, have submitted that the workmen are merely contractual employees and cannot ask for relief, that can be in the form of

reinstatement in service. It is urged that the decision in **Rajesh Kumar Singh** (*supra*) goes directly against the workmen on the issue. Attention of this Court has also been drawn to the fact that on 4th of January, 2023, the State Government issued a notification in the exercise of powers under sub-Section (1) of Section 3 of the Uttar Pradesh Essential Services Maintenance Act, 1966 (for short, 'the ESMA') prohibiting strike for six months in all services, amongst others, in the Purvanchal Vidyut Vitran Nigam Limited, Varanasi and also the UPPCL.

8. Upon hearing learned Counsel for the parties, it is evident that the workmen struck work during the State-wide strike by employees of the UPPCL between 16th to 19th March, 2023. The strike was illegal as it was prohibited by a notification issued by the State Government under the ESMA. Apart from the fact that the strike was illegal, this Court takes judicial notice of the fact that disruption of electric supply in the contemporary world run mostly on electrical and electronic gadgets is like snuffing out oxygen. The three days' strike had a disastrous impact on the State, which cannot be trifled. The decision of the Corporation or the work force supplier to weed out striking contractual workmen, in the opinion of this Court, ought not to be interfered with by considering it what the workmen say 'a minor infraction'.

9. So far as the right of the workmen to relief of reinstatement is concerned, there is no cavil on facts that the workmen are serving the Corporation on contract. If the contract is between them and the work force supplier, there may not be much privity with the Corporation. However, for the sake of the present matter, the Court assumes that effectively the workmen are

serving the Corporation on some kind of a contract of engagement. They are not holding any kind of a post under the Corporation. A contract employee, it is by now well settled, cannot enforce his rights against the employer, even in a case of wrongful determination of his services by seeking relief that has the effect of reinstatement. Reference, in this connection, may be made to the decision of a Division Bench of this Court in **Rajesh Bhardwaj v. Union of India and others, 2019 (2) ADJ 830 (DB)**, where it has been held:

“30. Now we come to Questions-(2), (3) and (4), which, in our view, can be dealt with together. In the present case, terms and conditions of employment, applicable to petitioner are not challenged that such terms and conditions are arbitrary and violative of Article 14 of Constitution read with Section 23 of Indian Contract Act, 1872 (hereinafter referred to as "Act, 1872") being unfair, unreasonable or unconscionable, and against public policy. The order of termination is challenged on the ground that petitioner has not been given adequate opportunity of defence and termination is in violation of principles of natural justice. It is not in dispute that terms and conditions are not governed by any Statute or statutory provision or by any provision made under any authority of Statute. Petitioner being in the Cadre of Manager, his terms and conditions are also not governed by Standing Orders made by Employer with respect to employees governed by provisions of Industrial Employment (Standing Orders) Act, 1946 (hereinafter referred to as "Act, 1946"). In these circumstances, in the cases like petitioner, consistently it has been laid down that employment is simply a part of contract. If employment is terminated or

contract of service is terminated, Court shall not grant relief of reinstatement, i.e. specific performance of contract of personal service, as it is barred by the provisions of Specific Relief Act, 1963 (hereinafter referred to as "Act, 1963") and, therefore, no remedy under Article 226 shall be available since employee, if complains about wrongful termination of service, then must avail remedy in common law by claiming damages.

32. In the present case also, relationship of employment between petitioner and CUPGL is purely and simply an ordinary contract of service which is not governed by any statute or statutory provision. In such cases, a contract of service cannot be sought to be enforced by Court of law by giving relief of reinstatement or continuance in employment as this relief is barred under Act, 1963."

10. The said view has been followed by a learned Single Judge of this Court in **Rajesh Kumar Singh** (*supra*), a decision relied upon by the workmen, which hardly supports them. In **Rajesh Kumar Singh**, the petitioner was initially appointed on the post of a District Coordinator (Civil) by the District Magistrate, Deoria. His engagement was not extended and his writ petition against non-continuance of contract failed before the Single Judge and also in appeal. He was re-engaged on the post of the post of a District Coordinator (Civil) by the District Basic Education Officer, Deoria. The petitioner claimed that he joined his duties and discharged his obligations with all sincerity and devotion. He was charge-sheeted on certain allegations. He denied the allegations by submitting a reply against the charges. After considering the petitioner's reply in

that case, no inquiry was held against him. Later on, the petitioner's services were terminated by the District Magistrate, Deoria by an order dated 06.08.2021, that is described in the report of the decision as an order restraining the petitioner from functioning on the post of District Coordinator (Civil), Deoria. It was in the context of the aforesaid termination of the petitioner's contractual engagement by Authorities of the State that it was held in **Rajesh Kumar Singh** (*supra*):

"15. The Division Bench in taking the above view in **Rajesh Bhardwaj** (*supra*) case has relied on recent judgment of Apex Court in **Kailash Singh v. The Managing Committee, Mayo College, Ajmer and others**, (2018) 10 SCALE 638, where in respect of dispute related to termination of an employee of Mayo College, Court held that employment was governed by simple contract of employment and, hence, no relief of reinstatement can be granted, but employee, if wrongfully terminated, may claim damages.

16. So far as the relief with respect to reinstatement of the petitioner is concerned, if employee is terminated or contract of service is terminated, Court shall not grant relief of reinstatement, i.e. specific performance of contract of personal service, as it is barred by the provisions of Specific Relief Act, 1963, therefore, the relief as prayed cannot be granted."

11. The workmen are nothing more than employees engaged on contract. They cannot claim any relief of reinstatement.

12. In these circumstances, no case for the issue of a mandamus to the

respondents directing them to permit the workmen to work and be paid salary is made out.

13. The petition fails and is dismissed.

(2023) 9 ILRA 779
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.07.2023

BEFORE

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

Writ-A No. 10561 of 2023

Ashish Kumar Pandey & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:

Sri Ram Pravesh Pandey

Counsel for the Respondents:

C.S.C., Sri Abhishek Srivastava, Sri Siya Ram Yadav, Sri Adarsh Bhushan

Contractual Employment – Linemen engaged through outsourcing agency – Termination of contract for alleged participation in strike – ESMA notification in force – No reinstatement permissible in case of simple contract of service – Allegation of stigma not sufficient to invoke principles of natural justice –

Held: Petitioners, being contract workers engaged through a third-party outsourcing agency and not directly under the Corporation, cannot seek reinstatement. Their termination was based on the strike conducted in violation of the ESMA notification, and even assuming violation of natural justice, no relief of reinstatement is legally permissible in a non-statutory contract. Moreover, the impugned order does not disqualify the petitioners from seeking employment elsewhere and is limited to

future engagement with the respondent corporation only.

Rajesh Bhardwaj Vs U.O.I. & ors., 2019 (2) ADJ 830 (DB) and Rajesh Kumar Singh Vs District Basic Education Officer & ors., 2022 (4) ADJ 535 – relied on.

Petition dismissed.

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

1. Heard Mr. R.P. Pandey, learned Counsel for the petitioners, Mr. Girijesh Tripathi, learned Additional Chief Standing Counsel on behalf of respondent No. 1, Mr. Abhishek Srivastava, learned Counsel appearing on behalf of respondent Nos. 2 and 3 and Mr. Adarsh Bhushan, learned Counsel appearing for respondent No. 4.

2. This writ petition has been filed by thirty contract employees, who were linemen with the Purvanchal Vidyut Vitran Nigam Limited (for short, 'the Corporation') and have had their services dispensed with under orders of approval passed by the Managing Director of the Corporation. The petitioners, though thirty in number, the order terminating the contract of service in terms of an approval by the Managing Director, annexed as Annexure No.10 to the writ petition, sought to be quashed, relates to the first petitioner alone. Similar orders relating to the other petitioners are not annexed.

3. Nevertheless, there is a case urged on behalf of the petitioners that they have been dealt like the first petitioner, Ashish Kumar Pandey with the Managing Director of the Corporation, approving the termination of their contract, with a further direction that in future, their services will not be hired by the Corporation for any work. The petitioners have, therefore,

prayed for a mandamus, directing the respondents to permit the petitioners to continue working for the Corporation and further to pay them their due emoluments.

4. The petitioners, as they say, were employed on the post of Single Sign-On and lineman. The petitioners were recruited as contract workers through a certain M/s. Orient Secare Pvt. Ltd., New Delhi, an outsourcing agency. It is pleaded that subsequently, the said outsourcing agency was appointed a workforce supplier and the petitioners are Secare's employees working at various centres of the Corporation. The petitioners claim that they have been sincere, honest and dedicated workmen. There is an undertone of resentment of the kind that could have fueled the powermen's strike, of which reference shall be made a little later, pleaded in Paragraph No.6 of the writ petition. It is said there that the Corporation were treating the petitioners unfairly, particularly, with regard to their wages. There was a demand by persons retained like the petitioners on contract for the provision of a minimum salary. It is also said that similar workmen in other States, working on contract, have been favoured with their demands about the minimum salary being accepted, but not so in Uttar Pradesh. It is then said in Paragraph No.6 further on that the petitioners, despite their long standing unmet demand, never refused to discharge their duties or strike work.

5. It is the petitioners' case that the regular employees of the Corporation, represented by their union, known as the Vidyut Karmachari Sanyukt Sangharsh Samiti, Uttar Pradesh had a meeting between their office bearers and officials of the Corporation, including the Minister of the Department concerned, but despite

assurance given by the Authorities, the demands of the petitioners were not fulfilled. Hence, the employees' union gave a notice of strike to the Chairman of the Uttar Pradesh Power Corporation on 16.02.2023. Again, on 03.03.2023, an identical notice was given by the employees of the union last mentioned to the Chairman of the Corporation.

6. It is then pleaded in Paragraph No.9 that the petitioners are not members of the union aforesaid, because it is a union of regular employees working throughout Uttar Pradesh under the Uttar Pradesh Power Corporation Limited (for short, UPPCL'). It is also asserted that the petitioners are members of another union called the Uttar Pradesh Vidyut Outsourced Mazdoor Sangh, Azamgarh. The said union was registered on 8th December, 2022 with the Registrar of Trade Unions, Uttar Pradesh, Kanpur. The petitioners acknowledge the fact that on 4th January, 2023, the State Government issued a notification in the exercise of powers under sub-Section (1) of Section 3 of the Uttar Pradesh Essential Services Maintenance Act, 1966 (for short, 'the ESMA') prohibiting strike for six months in all services, amongst others, under the UPPCL. It is admitted to the petitioners that after issue of this notification, no strike was permissible by employees, regular or contractual, in the UPPCL for a period of six months. A notice of strike was nevertheless given by employees of the UPPCL, which includes those of the Corporation on 20.02.2023.

7. A memo was issued by the Managing Director of the UPPCL asking the Principal Secretary (Home), Government of U.P., Lucknow to maintain law and order. A circular was also issued by the Secretary in the Energy Department,

Government of U.P. on 12.03.2023, addressed to all Commissioners of Police, all District Collectors and all Senior Superintendents of Police/ Superintendents of Police in the State that the proposed strike is illegal and that necessary deployment of force be done to ensure maintenance of law and order. The petitioners' case, pleaded in Paragraph Nos.15, 16, 19 and 22 of the writ petition, is that when the strike was in fact resorted to from 16.03.2023 for 72 hours by powermen, the petitioners stayed on duty and did not participate. Nevertheless, the petitioners' contractual engagement has been terminated by the Managing Director of the Corporation in terms of orders like the one dated 17.03.2023 passed in the case of the first petitioner for striking work in violation of the notification issued under the ESMA, prohibiting strikes, and further, debaring their engagement in future for any work relating to the Corporation.

8. It is argued by the learned Counsel for the petitioners that the provisions of the ESMA would not be attracted to the petitioners' case because they never struck work. It is also argued that a perusal of the impugned order dated 17.03.2023 passed in the case of the first petitioner would show that it has been passed in a casual manner, granting approval to the termination of contract and further disqualifying the petitioners. It is, particularly, argued that the decision taken by the Managing Director of the Corporation is stigmatic, with disabling consequences, but has been passed without providing any opportunity of hearing to the petitioners, that causes them substantial prejudice.

9. A careful look at the impugned order shows that the order has been passed by the Managing Director upon a recommendation

by the service provider, M/s. Prime Secare Workforce Private Limited, described in the order as M/s. Primeone. The petitioners have privity of contract with the service provider and not the Corporation. There is no reason why the service provider would report the first petitioner or the others to the Managing Director, asking for their engagement to be terminated. That apart, the strike by powermen in Uttar Pradesh was all encompassing and debilitating, and judicial notice must be taken of the fact that without the total participation of all powermen, such widespread strike and disruption of power was not possible. Once a notification under the ESMA had been issued, apart from the fact that it made the strike absolutely illegal, given the importance of uninterrupted supply of electricity in modern life that runs more on electricity-driven gadgets than human effort or other resources, the decision of the Corporation to weed out striking contractual workmen, in the opinion of this Court, ought not to be interfered with on principles of violation of natural justice. There are no allegations of mala fides against the Chairman of the Corporation or the workforce supplier Secare, who reported the petitioners to the Chairman of the Corporation for action. In any event, the petitioners were engaged on contract through the workforce supplier, a nature of engagement that does not entitle the petitioners to seek reinstatement in service or restoration of their contract.

10. Reference in this connection may be made to the decision of a Division Bench of this Court in **Rajesh Bhardwaj v. Union of India and others, 2019 (2) ADJ 830 (DB)**, where it has been held:

“30. Now we come to Questions-(2), (3) and (4), which, in our view, can be dealt with together. In the present case,

terms and conditions of employment, applicable to petitioner are not challenged that such terms and conditions are arbitrary and violative of Article 14 of Constitution read with Section 23 of Indian Contract Act, 1872 (hereinafter referred to as "Act, 1872") being unfair, unreasonable or unconscionable, and against public policy. The order of termination is challenged on the ground that petitioner has not been given adequate opportunity of defence and termination is in violation of principles of natural justice. It is not in dispute that terms and conditions are not governed by any Statute or statutory provision or by any provision made under any authority of Statute. Petitioner being in the Cadre of Manager, his terms and conditions are also not governed by Standing Orders made by Employer with respect to employees governed by provisions of Industrial Employment (Standing Orders) Act, 1946 (hereinafter referred to as "Act, 1946"). In these circumstances, in the cases like petitioner, consistently it has been laid down that employment is simply a part of contract. If employment is terminated or contract of service is terminated, Court shall not grant relief of reinstatement, i.e. specific performance of contract of personal service, as it is barred by the provisions of Specific Relief Act, 1963 (hereinafter referred to as "Act, 1963") and, therefore, no remedy under Article 226 shall be available since employee, if complains about wrongful termination of service, then must avail remedy in common law by claiming damages.

32. In the present case also, relationship of employment between petitioner and CUPGL is purely and simply an ordinary contract of service which is not governed by any statute or statutory provision. In such cases, a contract of

service cannot be sought to be enforced by Court of law by giving relief of reinstatement or continuance in employment as this relief is barred under Act, 1963."

11. The decision of the Division Bench in **Rajesh Bhardwaj** (*supra*) was followed by a learned Single Judge of this Court in **Rajesh Kumar Singh v. District Basic Education Officer and others, 2022 (4) ADJ 535**, where the petitioner was initially appointed on the post of a District Coordinator (Civil) by the District Magistrate, Deoria. His engagement was not extended and his writ petition against non-continuance of the contract failed before the Single Judge and also in appeal. He was re-engaged on the post of a District Coordinator (Civil) by the District Basic Education Officer, Deoria. The petitioner claimed that he joined his duties and discharged his obligations with all sincerity and devotion. He was charge-sheeted on certain allegations. He denied the allegations by submitting a reply against the charges. After considering the petitioner's reply in that case, no inquiry was held against him. Later on, the petitioner's services were terminated by the District Magistrate, Deoria by an order dated 06.08.2021, that is described in the report of the decision as an order restraining the petitioner from functioning on the post of District Coordinator (Civil), Deoria. It was in the context of the aforesaid termination of the petitioner's contractual engagement by Authorities of the State that it was held in **Rajesh Kumar Singh** (*supra*):

"15. The Division Bench in taking the above view in **Rajesh Bhardwaj** (*supra*) case has relied on recent judgment of Apex Court in **Kailash Singh v. The**

ground that some other Assistant Teacher is also getting it – Permissibility – Non application of mind – Effect – Held, the High Court cannot endorse the view taken by the DIOS that since similar benefits have been accorded to other Assistant Teachers, the same is to be extended to the fourth respondent particularly in view of the fact that there is no concept of negative equality as the Courts of law are supposed to advance the justice in such a manner that there is no discrimination being meted out under Article 14 – Any benefit extended illegally to the similar circumstances cannot be a ground to extend the same to an incumbent who even otherwise is not entitled for the same. (Para 36)

C. Service Law – Lecturer pay scale/Lecturer post – Eligibility for entitlement – GOs dated 28.02.1990 and 25.10.2000 – In order to attain eligibility for being conferred the benefits of Lecturer pay scale/ Lecturer post, one of the necessary eligibility was that a teacher is to consistently teach Arts, Physical Training, Language, Craft etc. in intermediate classes for 10 years in Non-Governmental and Aided Secondary School – Non-fulfillment of eligibility – Effect – Held, 10 years of continuous services while teaching in an intermediate class as well as designation as a Lecturer is to be seen in the light of clause (6) of the GO dated 25.10.2000 – Clause (6) of the GO dated 25.10.2000 would come in the way of the fourth respondent making him ineligible for according of the said benefits. (Para 24 and 25)

Writ petition allowed. (E-1)

List of Cases cited:

1. Writ A No. 43794 of 2011; Vijay Bahadur Singh Vs St. of U.P. & ors. decided on 14.12.2011
2. Writ A No. 16881 of 2012; Bani Singh Vs St. of U.P. & ors. decided on 07.02.2019
3. Shiv Poojan Vs St. of U.P.; 2019 (6) ADJ 654

4. Special Appeal No. 48 of 2020; Smt. Krishna Shri Gupta Vs St. of U.P. & ors. decided on 11.02.2020

5. Writ A No. 49341 of 2008; Sangam Lal Vs St. of U.P. decided on 05.10.2012

(Delivered by Hon'ble Vikas Budhwar, J.)

1. Heard Sri R.K. Ojha, learned Senior Counsel assisted by Sri Shivendu Ojha, learned counsel for the writ petitioner, Sri Pradeep Kumar Shahi, learned Additional Chief Standing Counsel who appears for respondents No. 1 and 2, Sri R.C. Dwivedi, learned counsel who appears for respondent No. 3 and Sri Prabhakar Awasthi, learned counsel who has put in appearance on behalf of respondent No. 4.

2. Since affidavits have been exchanged between the parties and the learned counsel for the parties do not propose to file any further affidavits, thus, with the consent of the parties, the writ petition is being decided at the fresh stage.

3. The facts of this case shorn off unnecessary details as worded in the writ petition are that the third respondent, Sarswati Shiksha Sadan Intermediate College Marron, Handia, District Prayagraj (in short respondent institution) is a recognized and aided institution under the provisions of Uttar Pradesh Intermediate Education Act, 1921, the provisions of U.P. (Services Selection Board) Act, 1982 as well as Uttar Pradesh High School and Intermediate Colleges (Payment of Salaries of Teachers and Other Employees) Act, 1971 are applicable.

4. As per the writ petitioner, Jeet Lal Saroj son of Sri Ram Shiromani Saroj, he was selected and appointed as Lecturer

(Sanskrit) pursuant to the recruitment exercise undertaken by the U.P. Secondary Education Service Selection Board against the Advertisement No. 1 of 2009 and the writ petitioner was accorded placement in Maharana Pratap Inter College Ram Dayalganj, District Jaunpur by virtue of the letter dated 08.12.2010. The writ petitioner claims to have joined the post of Lecturer (Sanskrit) in Maharana Pratap Inter College, Ram Dayalganj, District Jaunpur on 04.01.2011. It is further the case of the writ petitioner that on his request, he was transferred from Maharana Pratap Inter College Ram Dayalganj, District Jaunpur to the third respondent, Sarswati Shiksha Sadan Intermediate College Marron, Handia, District Prayagraj, by virtue of the transfer order dated 28.06.2019 passed by the Additional Director of Education (Madhyamic), U.P., Prayagraj and the petitioner assumed the charge on the post of Lecturer (Sanskrit) in the third respondent institution on 04.07.2019. In para 8 of the writ petition, it has been pleaded that fourth respondent Lalmani son of Hub Lal was selected as Assistant Teacher (Physical Education) pursuant to the recommendation of the U.P. Secondary Education Service Selection Board dated 05.07.2006 and the consequential letter of the District Inspector of Schools, Etawah dated 19.08.2006. In para 9 of the writ petition, it has been further asserted that the fourth respondent was issued appointment letter on 05.10.2006 pursuant where to he joined as Assistant Teacher (Physical Education) in Zila Panchayat Inter College, Haivara, Etawah.

5. Pleadings further reveal that the fourth respondent preferred an application seeking transfer in the third respondent institution in pursuance thereof he was transferred on 07.01.2016

as Assistant Teacher (Physical Education) in the third respondent institution. In para 11 of the writ petition, further pleadings have been made that the fourth respondent was accorded joining as Assistant Teacher (Physical Education) in the third respondent institution on 01.02.2016. According to the writ petitioner, the fourth respondent preferred an application on 21.09.2018 for claiming Lecturer pay and Lecturer post in pursuance of the Government Orders dated 28.02.1990 and 25.10.2000, however, the second respondent, District Inspector of Schools, Prayagraj by order dated 26.11.2018 declined to grant Lecturer pay and Lecturer post on the premise that the fourth respondent was not fulfilling the conditions as stipulated in Government Orders in question. However, as per the writ petitioner, the second respondent, District Inspector of Schools, Prayagraj accorded selection grade pay to the fourth respondent on 18.07.2018. Aggrieved against the non-according of Lecturer pay and Lecturer post since 05.10.2016 the fourth respondent is stated to have approached the SC/ST Commission while drawing proceedings, pursuant where to the SC/ST Commission sought clarification from the Director of Education (Madhyamic), U.P., Prayagraj and thereafter by virtue of the order dated 14.05.2023 the second respondent, District Inspector of Schools, Prayagraj entitled the fourth respondent to be conferred the benefits of Lecturer pay and Lecturer post with effect from 05.10.2016.

6. Questioning the order dated 14.05.2023 passed by the District Inspector of Schools, Prayagraj, second respondent, making the fourth respondent entitled for Lecturer pay and Lecturer post in

pursuance of the Government Orders dated 28.02.1990 and 25.10.2000, the writ petitioner has filed the present writ petition.

7. While entertaining the writ petition, this Court on 11.07.2023 proceeded to pass the following orders.-

“Heard Sri R.K. Ojha, learned Senior Counsel assisted by Sri Shivendu Ojha, learned counsel for the petitioner, Sri Santosh Kumar learned Standing Counsel who appears for the respondent nos. 1 and 2 and Sri Anil Bhushan, learned Senior Counsel assisted by Sri Pradeep Srivastava, who appears for the fourth respondent.

Sri Ojha has sought to argue that the order dated 14.5.2023 passed by the second respondent, District Inspector of Schools, Prayagraj proceeds on misconception of facts and law particularly in view of the fact that admittedly in the order in question there is a recital to the effect that earlier the claim of the fourth respondent was turned down by the District Inspector of Schools, Prayagraj on 26.11.2018 according to which it was held that the fourth respondent is not entitled to be conferred with the benefit of Lecturer Pay/Lecturer Post since 5.10.2016 however without there being any power of review the order has been sought to be reviewed that too on the behest of SC/ST Commission in this regard. He further submits that as per the recital contained in the order in question the fourth respondent was appointed as Assistant Teacher (Physical Education) in Zila Panchayat Inter College Haivara, Etawah on 5.10.2006 and he on 7.1.2016 was posted in the third respondent institution and he was accorded joining on 1.2.2016 as Assistant Teacher (Physical Education). Hence in the wake of the

Government Order dated 25th October, 2000 which even in fact takes note of the earlier Government Order dated 20th February, 1990 the twin conditions stands applicable with regard to the fact that a teacher is to impart education to the students of Class-11 and 12 for a period more than 10 years and also getting the pay scale of Lecturer is only eligible to be conferred with the said benefit.

It is further submission of the learned counsel for the petitioner that the entire exercise has been tailored in order to give benefit to the fourth respondent on the dictates and the directions of the SC/ST Commission itself.

Sri Bhushan on the other hand submits that, firstly, the writ petitioner has no locus to maintain the present petition as by virtue of grant of the said benefits only re-designation /up-gradation has been done with even in fact would not at this present moment given any legal injury to cloth the writ petitioner to put legal action into motion. He has further referred to the order impugned while inviting attention towards the second last paragraph so as to contend that might be the order do not happily worded and the benefit has been given to the fourth respondent on the basis of the benefits accorded to Bacchu Lal and even in fact the said benefits have been accorded to number of incumbents and no illegality whatsoever can be pointed out.

Sri Ojha on the other hand submits that the question of legal injury so sought to be propounded by the fourth respondent is of no benefit to him as once a benefit is not to be accorded as per the Act and the Rules framed therein under and the Government Order in question then the said benefits become void ab initio from the

very inception as tomorrow on the strength of the said order now the fourth respondent shall stay his claim to become Principal and get benefits in that regard.

Matter requires consideration.

Since the third respondent Committee of Management is not before this court the learned counsel for the petitioner shall serve the third respondent by both ways within a period of three day.

Affidavit of compliance be filed before the next date.

Learned Standing Counsel as well as counsel appearing for the respondents shall file their respective responses within 10 days. Three days time is allowed to the petitioner for filing rejoinder affidavit.

Put up this case as a fresh case on 21.7.2023.

Since the matter pertains to Prayagraj itself and legal question is also involved so it is expected that the learned Standing counsel and the respondents shall file their response before the next date.

Government Order dated 22nd February, 1990 and set of documents submitted by learned counsels is retained on record as Appendix-1 and 2."

8. Pursuant to the order dated 11.07.2023, the order sheet depicts that the notices were issued to the third respondent since the first and second respondents were represented by the learned Standing Counsel and the fourth respondent by its counsel. A counter affidavit has been filed by the learned Standing Counsel who appears for the second respondent, District

Inspector of Schools, Prayagraj sworn by him on 20.07.2023. A counter affidavit has been filed by the third respondent, Committee of Management, Sarswati Shiksha Sadan Intermediate College Marron, Handia, District Prayagraj to which a rejoinder affidavit is available on record. A short counter affidavit has been filed by the fourth respondent and in reply thereto a short rejoinder affidavit has been filed by the petitioner.

9. As noticed above, the learned counsel for the rival parties do not propose to file any further affidavit, thus, the matter has been taken up for final disposal.

10. Sri R.K. Ojha, learned Senior Counsel assisted by Sri Shivendu Ojha, learned counsel for the writ petitioner while assailing the order dated 14.05.2023 has submitted that the order of the District Inspector of Schools, Prayagraj, second respondent cannot be sustained even for a moment on various counts, firstly, the Government Orders dated 28.02.1990 and 25.10.2000 is not applicable in the case of the fourth respondent as the fourth respondent became eligible and suitable for grant of Lecturer pay and Lecturer post the issuance of the said Government Orders and in view of the specific clause contained in the Government Order dated 25.10.2000 eligibility is to be obtained prior or on the date of issuance of the Government Order dated 25.10.2000 and since the fourth respondent attained eligibility post issuance of the Government Order dated 25.10.2000, thus, the fourth respondent is not entitled to the benefits. Secondly, earlier also by virtue of the order dated 26.11.2018 the second respondent, District Inspector of Schools, Prayagraj had declined to grant Lecturer pay and Lecturer post to the fourth respondent being non-eligible for the same,

thus, in view of no change in the circumstances the second respondent, District Inspector of Schools, Prayagraj had no power to review its own order, thirdly, the order impugned in the writ petition passed by the second respondent, District Inspector of Schools has been passed at the behest and the dictates of the SC/ST Commission as there has been no independent application of mind, fourthly, merely because some of the Assistant Teachers have been made entitled to the Lecturer pay and Lecturer grade in pursuance of the Government Orders dated 28.02.1990 and 25.10.2000 illegally would not be a ground to accord and extend the said benefit to the fourth respondent, fifthly, the fourth respondent even otherwise is not eligible and qualified for being appointed on the post of Assistant Teacher (Physical Education) in that regard.

11. Elaborating the said submission, learned Senior Counsel for the writ petitioner has submitted that the Government Order dated 28.02.1990 granting pay scale in the case of C.T. Grade Teacher subject to suitability and eligibility as L.T. Grade and L.T. Grade Teacher to Lecturer which stood followed in the subsequent Government Order dated 25.10.2000 does not imply that the said benefit is to be granted for the time immemorial, however, the Government Order dated 25.10.2000 contained a specific stipulation that the eligibility is to be obtained by an Assistant Teacher (Physical Education) till/on the date of issuance of the Government Order dated 25.10.2000, since the fourth respondent as per his own saying was appointed as Assistant Teacher (Physical Education) on 05.10.2006 and one of the conditions was 10 years of continuous uninterrupted

service coupled with the grant of the pay scale of Lecturer was a mandatory condition for grant of Lecturer post but as the fourth respondent obtained the said eligibility post issuance of the Government Order dated 25.10.2000 in the year 2016 i.e., 05.10.2016 the fourth respondent is not entitled to the said benefits.

12. Sri Ojha, learned Senior Counsel for the writ petitioner in order to buttress his submission that the said facility/benefit was available to the Assistant Teacher (Physical Education) as one time measure has sought to rely upon the judgment in ***Writ A No. 43794 of 2011 (Vijay Bahadur Singh Vs. State of U.P. & Others)*** decided on 14.12.2011 followed in ***Writ A No. 16881 of 2012 (Bani Singh Vs. State of U.P. & Others)*** decided on 07.02.2019. He also relies upon the judgment in the case of ***Shiv Poojan Vs. State of U.P. reported in 2019 (6) ADJ 654.***

13. Additionally, it is being sought to be argued on behalf of the writ petitioner that there is no concept of negative equality as Article 14 of the Constitution of India does not permit it but to the contrary forbids it and further it has been argued that the order passed by the second respondent, District Inspector of Schools, Prayagraj is bereft of any reasons which can be said to be within the four corners of law and according to him, the order impugned in the writ petition be set aside and the matter be remitted back to the second respondent to pass a fresh order. Though an attempt has also been made by the learned Senior Counsel for the writ petitioner questioning the appointment of the writ petitioner as Assistant Teacher (Physical Education) on the ground that the fourth respondent is not eligible and qualified for the said post but pleadings to the said effect are missing in

the writ petition and it sought to be developed in the rejoinder affidavit.

14. Countering the submission of the learned Senior Counsel for the writ petitioner, Sri Prabhakar Awasthi has sought to argue that the order passed by the District Inspector of Schools, Prayagraj dated 14.05.2023 is perfectly followed in accordance with law and no fault whatsoever can be attributed in this regard. He submits that the Government Order dated 28.02.1990 followed in the Government Order dated 25.10.2000 clearly applies in the case of the fourth respondent as according to him, the said Government Order cannot be interpreted in such a manner so as to exclude those Assistant Teacher (Physical Education) whose appointment was valid since inception but in view of the fact that no formal Government Order has been issued specifically extending the benefits, as from the conduct of the State Government, it is very much clear that the State Government is extending the said benefits while granting Lecturer pay and Lecturer post to the Assistant Teachers who have obtained eligibility even post issuance of the Government Order dated 25.10.2000. In a nutshell, the argument is that the fourth respondent is eligible in all respects as the conditions precedent in the Government Order dated 25.10.2000 stood fulfilled at the end of the fourth respondent. It has also been argued on behalf of the fourth respondent that, in case, the logic of the learned Senior Counsel for the writ petitioner is taken into face value then it would create havoc and undesired results particularly when the future of the Assistant Teachers (Physical Education) would be kept in dark and uncertainty. Submission is that once the fourth respondent qualifies the eligibility test as

provided in the Government Orders then clause 6 of the Government Order dated 25.10.2000 is to be ignored in that regard.

15. Much emphasis has been laid down by the learned counsel for the fourth respondent that the writ petitioner has even otherwise no locus to institute and to maintain the present proceedings in view of the fact that the writ petitioner sustains no legal injury as of now as mere grant of Lecturer post and Lecturer pay scale would not cause any legal injury so as to maintain the present proceedings.

16. Contention of the learned counsel for the fourth respondent is that grant of Lecturer post and Lecturer pay scale are the individual aspects confining to the benefits being bestowed to a particular teacher and the same cannot possibly cause an injury as it is not a case wherein at the present stage any seniority is being sought to be disturbed or any issue of promotion is involved particularly at a point the writ petition is being preferred by the writ petitioner. He, thus, submits that the writ petition be dismissed with cost.

17. Sri Awasthi, learned counsel who appears for the fourth respondent has placed reliance upon the judgment in ***Special Appeal No. 48 of 2020 (Smt. Krishna Shri Gupta Vs. State of U.P. & Others)*** decided on 11.02.2020 and ***Writ A No. 49341 of 2008 (Sangam Lal Vs. State of U.P.)*** decided on 05.10.2012.

18. Sri R.C. Dwivedi, learned counsel who appears for the third respondent, Committee of Management has supported the case of the fourth respondent and he adopts the submission of the learned counsel for the fourth respondent. He, however, while drawing attention towards

the counter affidavit filed by him seeks to argue that Annexure 2 at page 18 is a document which happens to be the certificate of Zila Panchayat Inter College Haivara, Etawah which shows that the fourth respondent had been teaching XI and XII class. According to Sri Dwivedi, who appears for the third respondent, the benefits which have been accorded to the fourth respondent in pursuance of the Government Orders dated 28.02.1990 and 25.10.2000 has been extended to many Assistant Teachers and he, thus, relies upon Annexure 4 at page 27 of the paper book.

19. Sri Pradeep Kumar Shahi, learned Standing Counsel who appears for the first and second respondents has argued that the order of the second respondent, District Inspector of Schools, Prayagraj cannot be faulted in any manner whatsoever as the same has been passed in furtherance to the Government Orders dated 28.02.1990 and 25.10.2000 and the fourth respondent is entitled to the benefits which has been made available to him.

20. Before embarking upon an inquiry with regard to the legality and the validity of the order passed by the second respondent, District Inspector of Schools, Prayagraj it would be apposite to notice the Government Orders governing the filed.

**Government Order dated
28.02.1990**

कक्षा, व्यायाम शिक्षकों का वेतन

प्रेषक,

श्री शरविन्दु, संयुक्त सचिव, उत्तर प्रदेश
शासना

सेवा में,

शिक्षा निदेशक, उत्तर प्रदेश, लखनऊ/इलाहाबाद

शिक्षा [8] अनुभाग
फरवरी 28, 1990

लखनऊ: दिनांक

विषय- वेतन पुनरीक्षण समिति, उत्तर प्रदेश, 1989 की संस्तुतियों पर लिये गये निर्णयानुसार अशासकीय सहायता प्राप्त उच्चतर माध्यमिक विद्यालयों/इण्टर कालेजों में शैक्षिक पदों पर पुनरीक्षित वेतनमानों की स्वीकृति

महोदय,

उपर्युक्त विषयक शासनादेश संख्या 4749/15-8-89/3087/89 दिनांक 4-अक्टूबर 1989 के पैरा-3 के अनुक्रम में मुझे यह कहने का निर्देश हुआ है कि कला, व्यायाम, भाषा, गृह विज्ञान, शिल्प, संगीत, विभाषा, पेंटिंग टंकण, आशुलिपि तथा क्राफ्ट विषयों को कक्षा 9-10 में पढ़ाने वाले सी०टी० ग्रेड में निर्धारित अर्हता के अधीन नियुक्त अध्यापकों को जब कक्षा 9-10 में पढ़ाते हुए 10 वर्ष पूरे हो जायें तो उन्हें एल०टी० ग्रेड के साधारण वेतनमान सं० 1400-40-1800-द० रो०-50-2300 दिया जाय।

2- उक्त विषयों को कक्षा 11-12 में पढ़ाने वाले एल०टी० ग्रेड के ऐसे अध्यापकों को जिनकी नियुक्ति निर्धारित अर्हता के अधीन हुई है- जब कक्षा 11-12 में पढ़ाते हुए 10 वर्ष पूरे हो जायें तो उन्हें प्रवक्ता वेतनमान रू० 1600-50-2300-द० रो०-60-2600 दिया जाय।

3- भविष्य में उपर्युक्त विषयों को पढ़ाने वाले अध्यापकों की एल०टी० एवं प्रवक्ता वेतनमान में नियुक्ति के लिए सम्बन्धित व्यवसाय की अर्हता के साथ क्रमशः स्नातक/स्नातकोत्तर अर्हता निर्धारित की जाती है।

4- ये आदेश वित्त (वेतन आयोग) अनुभाग- 2 के अशासकीय संख्या-वे०आ०(2) 55/10-90 दिनांक 28 फरवरी, 1990 में प्राप्त उनकी सहमति से जारी किये जा रहे हैं।

भवदीय

(शरविन्दु) संयुक्त सचिव

संलग्न प्राइमरी शिक्षकों का वेतन

संख्या: 1120/15-8-90/3087/89

प्रेषक,

श्री शरविन्दु, संयुक्त सचिव, उत्तर प्रदेश शासना

Government Order dated

25.10.2000

कला, व्यायाम, भाषा, शिल्प आदि अध्यापकों को प्रवक्ता पदनाम दिया जाना

संख्या-3203/15-8-2000,3287/90

प्रेषक, सेवा में,
पी०के० झा, शिक्षा निदेशक (माध्यमिक)
सचिव, उत्तर प्रदेश, लखनऊ/इलाहाबाद
उत्तर प्रदेश शासना
शिक्षा (8) अनुभाग लखनऊ दिनांक: 25
अक्टूबर, 2000

विषय:- अशासकीय सहायता प्राप्त माध्यमिक विद्यालयों के कला, व्यायाम, भाषा शिल्प आदि विषयों के अध्यापकों को प्रवक्ता पद की निर्धारित अर्हता रहने पर प्रवक्ता पद नाम दिये जाने के सम्बन्ध में।

महोदय,

उपर्युक्त विषयक निदेशालय के पत्रांक:संख्या-(1)शि०/8744/2000-2001, दिनांक 4 सितम्बर, 2000 के सन्दर्भ में मुझे यह कहने का निदेश हुआ है कि अशासकीय सहायता प्राप्त ऐसे माध्यमिक विद्यालयों (इण्टर कालेजों), जो कला, व्यायाम, भाषा, शिल्प आदि विषयों से इण्टर स्तर तक मान्यता प्राप्त है, में कार्यरत उक्त विषयों के ऐसे अध्यापकों जो निरन्तर 10 वर्ष से इण्टर में पढ़ा रहे हैं तथा प्रवक्ता वेतनमान प्राप्त कर रहे हैं, को निम्न शर्तों एवं प्रतिबन्धों के अधीन "प्रवक्ता" पद नाम दिये जाने की श्री राज्यपाल सहर्ष स्वीकृति प्रदान करते हैं।

(1) जिन अशासकीय सहायता प्राप्त माध्यमिक विद्यालयों (इण्टर कालेजों) में कला, व्यायाम, भाषा, शिल्प, संगीत आदि विषयों में प्रवक्ता के पद सृजित नहीं है, उनमें प्रवक्ता वेतनमान में कार्य करने वाले अध्यापकों को स्नातक श्रेणी के मूल पद को समाप्त करते हुए प्रवक्ता पद में उच्चिकृत किया जायेगा तथा प्रवक्ता वेतनमान प्राप्त अध्यापकों को यदि वे प्रवक्ता पद हेतु निर्धारित अर्हता रखते हो, उपर्युक्तानुसार उच्चिकृत पदों के सापेक्ष नियुक्त कर दिया जायेगा।

(2) प्रवक्ता वेतनमान प्राप्त ऐसे अध्यापक जो प्रवक्ता पद हेतु निर्धारित अर्हता नहीं रखते हैं, वे पूर्ववत् स्नातक वेतन क्रम की भांति शिक्षा प्रदान करते रहेंगे तथा उनकी सेवानिवृत्ति के उपरान्त स्नातक श्रेणी का पद उसी तिथि से समाप्त होकर प्रवक्ता पद में परिवर्तित हो जायेगा।

(3) उपर्युक्त प्रस्तर-1 एवं 2 में वर्णित सुविधा केवल उन्हीं अशासकीय सहायता प्राप्त माध्यमिक विद्यालयों के अध्यापकों को प्राप्त होगी, जिन्हें सम्बन्धित विषय में इण्टर स्तर की मान्यता प्राप्त हो।

(4) सम्बन्धित अध्यापक को शासनादेश संख्या: 1121/15-8-90/3087/89, दिनांक: 28 फरवरी, 1990 के प्रस्तर-3 के अधीन सम्बन्धित व्यवसाय की अर्हता के साथ स्नातकोत्तर उपाधि की अर्हता रखना आवश्यक है।

(5) यह सुविधा केवल उन्हीं अध्यापकों को अनुमन्य होगी, जो सम्बन्धित विषयों में कक्षा-11 एवं कक्षा 12 को पढ़ाते हुये 10 वर्ष की निरन्तर संतोषजनक सेवा पूरी करते हुए प्रवक्ता का वेतनमान 1600-2660 (पुराना) वैयक्तिक रूप से प्राप्त कर चुके हो।

(6) उक्त विषयों के केवल उन्हीं अध्यापकों को प्रवक्ता पद नाम अनुमन्य होगा, जो इस आदेश के जारी होने की तिथि तक निर्धारित अर्हता पूरी कर चुके हों।

(7) प्रवक्ता पद पर कार्यभार ग्रहण करने वाले अध्यापकों की ज्येष्ठता उक्त पद पर कार्यभार ग्रहण करने की तिथि से ही निर्धारित की जायेगी। उनकी पूर्व सेवाएँ स्नातक श्रेणी के अध्यापक के रूप में मानी जायेगी तथा प्रवक्ता पद का कार्यभार ग्रहण करने के बाद स्नातक श्रेणी की सेवाओं का कोई लाभ प्रवक्ता पद के चयन/प्रोन्नति वेतनमान दिये जाने हेतु अनुमन्य न होगा।

(8) पद नाम परिवर्तित होने के फलस्वरूप यदि किसी भी प्रकार का वित्तीय भार उत्पन्न होगा, तो उसका वहन राज्य सरकार अथवा शिक्षा विभाग के मुख्यालय द्वारा नहीं किया जायेगा और न ही इस विषय में किसी भी प्रकार का अनुदान किसी भी श्रोत से उपलब्ध कराया जायेगा।

(9) उपर्युक्तानुसार प्रवक्ता पद की अर्हता रखने वाले अध्यापकों को पद नाम दिये जाने से पूर्व उनके लिखित अपण्डर टेकिंग ले ली जायेगी, ताकि ज्येष्ठता निर्धारण आदि के सम्बन्ध में बाद में कोई विवाद उत्पन्न न हो।

2- यह आदेश (वित्त आयोग) अनुभाग-2 के अशासकीय संख्या: वे०आ०(2)/507/दस/2000, दिनांक 25 अक्टूबर, 2000 में प्राप्त उनकी सहमति से निर्गत किये जा रहे हैं।

भवदीय,
पी०के० झा,
सचिवा

21. I have heard the learned counsel for the parties and perused the record carefully.

22. Undisputedly, the third respondent institution, Sarswati Shiksha Sadan Intermediate College Marron, Handia, District Prayagraj is an Inter College governed under the provisions of U.P. Intermediate Education Act, 1921, U.P. Act No. 5 of 1982 and the U.P. Act No. 24 of 1971 stand applicable. It is also not in dispute that the writ petitioner has been appointed as Lecturer (Sanskrit) in Maharana Pratap Inter College Ram Dayalganj, District Jaunpur on 04.01.2011 and he was transferred to the third respondent institution as Lecturer (Sanskrit) and he joined on 04.07.2019. Likewise, the fourth respondent was appointed as Assistant Teacher (Physical Education) in Zila Panchayat Inter College Haivara, District Etawah on 05.10.2006 and he was transferred on 07.01.2016 and he joined on 01.02.2016 as Assistant Teacher (Physical Education) in the third respondent institution. The bone of contention between the rival parties is whether the fourth respondent is entitled to be conferred with the benefit of Lecturer pay scale and Lecturer post completion of 10 years of service in the light of Government Orders dated 28.02.1990 and 25.10.2000. Though Sri Prabhakar Awasthi, learned counsel who appears for the fourth respondent has vehemently argued that the writ petitioner has no locus standi to institute and maintain the present petition as he is not a person aggrieved in view of the fact that the fourth respondent has only been conferred that the benefit of

Lecturer pay scale and Lecturer post. The question of locus standi is to be decided at the first instance, however, in order to arrive at the conclusion as to whether the writ petitioner has any locus to maintain the present proceedings this Court in the present case is to bestow its consideration upon the backgrounds and the sequence of the facts then only a conclusion can be arrived at.

23. Basically, there are two Government Orders first, 28.02.1990 and second, 25.10.2000. So far as the Government Order dated 28.02.1990 is concerned it spelt out in the subject column that an approval has been granted pursuant to the recommendations and the acceptance of the Pay Commission by the State of Uttar Pradesh of the year 1989 with regard to Non-Governmental Aided Higher Secondary Schools/Inter Colleges with regard to the teaching post, with respect to revision of the pay scales. Thus, the said Government Order talks about revision of the pay scale. According to the said Government Order in terms of para 3 of the Government Order dated 04.10.1989 the C.T. Grade Teachers who had been teaching Arts, Physical Training, Language, Home Science, Craft, Music, Tanka, Stenography and Craft in IX-X Classes and were having required qualifications after completion of 10 years of services were made entitled to the pay scale of L.T. Grade, Rs. 1400-40-1800-DA-50-2300, the second clause of the Government Order dated 28.02.1990 further provided that those L.T. Grade Teachers who had eligibility and who have been teaching XI-XII Classes for the period of 10 years they were to be accorded Lecturer pay scale of Rs. 1600-50-2300-EB-60-2600. Clause (3) of the said Government Order further provided that in

future the qualifications with respect to the L.T. Grade and Lecturers would be graduate/post graduate. Primarily, the Government Order dated 28.02.1990 provided for pay scale, however, subsequently another Government Order was issued on 25.10.2000 providing for the grant of designation as “Lecturer” to the teachers who were teaching Arts, Physical Training, Literature, Crafts etc. in Non-Governmental Aided inter Colleges. The said Government Order was issued in context of the letter No. (1)/Shi./8744/2000-2001 dated 4th September, 2000 whereby His Excellency, The Governor was pleased to accord the designation of Lecturer subject to various terms and conditions to the teachers who have consistently been teaching Arts, Physical Training, Language, Crafts etc. in Inter College for 10 years in Non-Governmental Aided Secondary Schools (Inter Colleges) recognized upto intermediate level with the subjects and are drawing pay scale of lecturers as such. Besides the other clauses of the Government Order dated 25.10.2000, clause (6) further stipulated that the benefits with regard to the above noted subjects was confined to those teachers who were fulfilling the eligibility on the date of issuance of the Government Order dated 25.10.2000.

24. Now the principal question which falls for consideration before this Court is whether the fourth respondent was entitled to be conferred the benefit of the designation “Lecturer” or not. It is not in dispute that the fourth respondent was appointed as Assistant Teacher (Physical Education) on 05.10.2006, thus, in order to attain eligibility for being conferred the benefits of Lecturer pay scale/Lecturer post one of the necessary eligibility was that a

teacher is to consistently teach Arts, Physical Training, Language, Craft etc. in intermediate classes for 10 years in Non-Governmental and Aided Secondary School (Inter Colleges) upto the Intermediate level subjects and is drawing pay scale of Lecturers as such.

25. A conjoint reading of various provisions contained under the Government Orders dated 28.02.1990 and 25.10.2000 would clearly show that the teacher in the said subjects is to teach in the institution which is recognized at the Intermediate Level and imparting education continuously for the period of 10 years in the Intermediate Classes that too on the date of issuance of the Government Order dated 25.10.2000. In order to analyze the fact as to whether the fourth respondent satisfied the conditions or not, this Court is to remind itself to the chronology and the dates and events of the working (teaching) of the fourth respondent. Undisputed facts reveal that the fourth respondent was appointed on 05.10.2006 as Assistant Teacher (Physical Education) in Zila Panchayat Inter College Haivara, Etawah he was accorded joining in the third respondent institution on 01.02.2016 pursuant to the transfer order dated 07.01.2016 as Assistant Teacher (Physical Education). By the order impugned in the writ petition, the writ petitioner has been accorded pay scale of Lecturer and designation/post of Lecturer with effect from 05.10.2016. Apparently the 10 years of continuous services while teaching in an intermediate class as well as designation as a Lecturer is to be seen in the light of clause (6) of the Government Order dated 25.10.2000. The net logical conclusion which stands arrived is that the writ petitioner as per the impugned order attains eligibility on 05.10.2016 which is post

issuance of the Government Order dated 25.10.2000, thus, clause (6) of the Government Order dated 25.10.2000 would come in the way of the fourth respondent making him ineligible for according of the said benefits.

26. Nonetheless, the law in the background of the Government Orders dated 28.02.1990 and 25.10.2000 has been subject matter of scrutiny and interpretation by this Court in the case of Vijay Bahadur Singh (supra) wherein the following was observed:-

"16. Government Order dated 25.10.2000 states that in all those non Government aided colleges where Lecturers posts in the subject of Arts, Physical Training, Language, Music etc. has not been created(LT Grade) post shall be upgraded as Lecturer's post and those Teachers who possess requisite qualification for the post of Lecturer shall be appointed on such upgraded post. However, this benefit would be available only to such Teachers who have been imparting education in Class XI and XII for the last ten years, had completed satisfactory services and, have also been granted Lecturer's pay scale personally. Further the aforesaid benefit has been confined to only those Teachers who have completed requisite eligibility on the date of issuance of Government Order dated 25.10.2000. It also provides that seniority of such Teachers would count only from the date on which person so promoted as Lecturer joins a promoted post. His previous service shall be treated to be a service rendered as LT Grade Teacher and no benefit shall be accorded for the purpose of selection and promotional pay scale on Lecturer's post.

17. Even if what is said by respondent no.5 is treated to be correct, it is evident that on the date of issuance of Government Order dated 25.10.2000 he had not completed ten years of service even as Assistant Teacher(LT Grade) (P.T.I.) and, therefore, para 6 of Government Order dated 25.10.2000 makes him ineligible for claiming any benefit under the said Government Order . Para 6 reads as under :

*'6- उक्त विषयों के केवल उन्हीं अध्यापकों को प्रवक्ता पद नाम अनुमन्य होगा, जो इस आदेश के जारी होने की तिथि तक निर्धारित अर्हता पूरी कर चुके हों।***

" The designation of Lecturer shall be admissible only to those Teachers of the said subjects who have acquired the prescribed eligibility/qualification by the date of issuance of this Order." (English Translation by Court)

18. Para 6 refers to the subjects mentioned in Government Order , namely Arts, Physical Training, Language, Craft etc. Respondent no.5 having been appointed on 29.1.1991, even in LT Grade had not completed ten years of service, hence question of imparting education for ten years to Class XI and XII on 25.10.2000 does not arise at all. This aspect, it appears, has not at all been considered by respondents No. 3 and 4 while extending giving benefit of the said Government Order to respondent no.5. Moreover respondent no.5 was Assistant Teacher (LT Grade) and, therefore, could not have imparted education to the students of Class XI and XII. The very first paragraph of Government Order dated 25.10.2000 shows that it is applicable to those teachers who are imparting education to Intermediate students for the

last ten years and are already in Lecturer's pay scale only. They have been given the benefit of designation of Lecturer with certain conditions and restrictions mentioned therein. On the date of issuance of Government Order dated 25.10.2000 neither respondent no.5 was discharging duties as Teacher imparting education to Intermediate class students for ten years nor was working in Lecturer's pay scale. The very opening paragraph of Government Order dated 25.8.2000 reads as under :

"उपर्युक्त विषयक निदेशालय पत्रांक संख्या - (1) / शि0 /8744 / 2000-2001, दिनांक 4 सितम्बर, 2000 के सन्दर्भ में मुझे यह कहने का निर्देश हुआ है कि अशासकीय सहायता प्राप्त ऐसे माध्यमिक विद्यालयों (इण्टर कालेजों), जो कला, व्यायाम, भाषा, शिल्प आदि विषयों से इण्टर स्तर तक मान्यता प्राप्त हैं में कार्यरत उक्त विषयों के ऐसे अध्यापकों, जो निरन्तर 10 वर्ष से इण्टर में पढ़ा रहे हैं तथा प्रवक्ता वेतनमान प्राप्त कर रहे हैं, को निम्न शर्तों एवं प्रतिबन्धों के अधीन "प्रवक्ता" पद नाम दिये जाने की श्री राज्यपाल सहर्ष स्वीकृति प्रदान करते हैं ।" (emphasis added)

"In context of letter No. (1)/Shi./8744/2000-2001, dated 4th September 2000, I am directed to say that His Excellency the Governor is pleased to accord the designation of 'Lecturer', subject to the following terms and restrictions, to those Teachers who have constantly been teaching Arts, Physical Training, Language, Craft etc. in Intermediate Classes for ten years in Non-Governmental aided Secondary Schools (Inter Colleges) recognized upto Intermediate level with such subjects and are drawing pay scale of

Lecturer as such." (emphasis added) (English Translation by Court)

19. Respondent no.5 in para 10 of counter affidavit has admitted that he was

appointed as LT Grade Teacher on 29.01.1991. On 25.10.2000 he was not getting Lecturer's grade at all. This Government Order thus did not and could not have been resorted to confer any benefit on respondent no.5 i.e. to grant Lecturer's Grade at all. Hence, the entire exercise on the part of respondent authorities in granting Lecturer's scale to respondent no.5 with reference to Government Order dated 25.10.2000 vide order dated 8.7.2006 was beyond the aforesaid Government Order. Even assuming that after order dated 08.07.2006 passed by D.I.O.S. Saharanpur permitting petitioner to work in Lecturer's pay scale prospectively with effect from 29.01.2001, but for the purpose of Appendix-A Chapter II of the Regulations, the actual functioning of respondent no.5 to impart education to Intermediate Classes while getting Lecturer's pay scale would commence from the date of the said order, namely, 08.07.2006, even then he did not and could not possess experience of ten years as provided in the aforesaid Regulation so as to become eligible for officiating Principal.

20. Evidently respondents No. 3 and 4 in the present case have acted wholly illegally. It appears that they have grossly misconstrued and misapplied Government Orders aforesaid, in order to confer certain benefit on respondent no.5 which in law were not applicable to him. The action of respondents No.3 and 4, therefore, is wholly unjust, illegal and travelled in the realm of malice in law, i.e., for collateral purpose, to grant undue and illegal advantage to respondent no.5. While passing the impugned order respondent no.3 ought to have considered and looked into all these aspects of the matter. Unfortunately it has committed a patent error in simply approving officiating

promotion of respondent no.5 on the post of officiating Principal without looking into these aspects of the of the matter relating to eligibility, etc. of the incumbents concerned."

27. The judgment in the case of Vijay Bahadur Singh (supra) was also followed in the case of Bani Singh (supra).

28. The case of Shiv Poojan (supra) further throws light upon the Government Orders dated 28.02.1990 and 25.10.2000 wherein this Court in paras 5, 6, 15, 16, 17, 18, 19, 20, 22, 23 and 24 observed as under:-

5. *Learned counsel for the petitioner submits that the aforesaid two Government Orders merely grants benefit of Lecturer's pay scale and designation to the teacher concerned, which is personal to him, he does not occupy the post of Lecturer substantively nor would he be entitled to seniority on the post of Lecturer. It is also submitted that promotion in an Intermediate institution has to be necessarily granted in accordance with the provisions of the U.P. Secondary Education Services Selection Board Act, 1982 as well as the U.P. Secondary Education Service Selection Board Rules, 1998, and that any other manner of conferring appointment or promotion to the post of Lecturer in the grade would be be viod by virtue of Section 16(2) of the Act of 1982. It is submitted that since procedure contemplated under Section 12 of the Act of 1982 read with Rule 14 of the Rules 1998 have not been followed as such grant of seniority to the post of Lecturer would be hit by Section 16(2) of the Act of 1982, but this aspect of the matter has not been taken note of.*

6. *Learned counsel for the respondents, on the other hand, submits*

that the post of Lecturer in physical education was not sanctioned in the institution concerned and that it was pursuant to the Government Order dated 25th October, 2000 that the post of L.T. Grade teacher was upgraded to the post of Lecturer upon completion of 10 years working as L.T. Grade teacher. It is contended that upgradation of post was automatic and conferment of benefit thereunder is a natural consequence, once the condition enumerated therein are met. Contention is that merely for the reason that proceedings under Section 12 read with Rule 14 have not been undertaken the benefit of Lecturer's post and pay scale granted in terms of the Government Order dated 15th October, 2000 would not be denied to the respondent no. 4. Learned counsel further submits that while determining the issue of seniority, the legality of initial appointment or promotion cannot be questioned when there is no specific plea taken in that regard. In the alternative, learned counsel submits that respondent no. 4 was the only teacher of physical education in the institution who was eligible for promotion in terms of the Government Order and that the procedure contemplated under the Rules of 1998 can still be resorted to and the benefit of promotion ought to be granted from the date of entitlement as per the Government Order dated 25th October, 2000.

15. *The Government Order dated 28.2.1990 provides that teachers appointed in the specified subjects including physical education, who have been teaching for the last 10 years in Classes 9th and 10th and were appointed in C.T. Grade would be given the pay scale of L.T. Grade, if they possess such qualification. Similarly, teachers appointed on the post of L.T. Grade have been granted Lecturer's grade*

upon completion of 10 years teaching in the subject concerned provided the teacher possesses requisite qualification. This Government Order only grants benefit of higher pay scale to the teacher concerned without grant of any substantive right to the higher post itself. The subsequent Government Order of 25th October, 2000, however, grants the designation and benefit on the post of Lecturer to those teachers who have been teaching Intermediate classes for the last 10 years. Clause (1) of this Government Order provides that the post of L.T. Grade teacher, substantively held, would be upgraded to the Lecturer's post and the substantive post of L.T. Grade teacher would stand abolished. Clause (7) of the Government Order provides that benefit of seniority on the post of Lecturer would be granted only from the date such teacher joins on the upgraded post and no benefit would be granted for any period prior to it. Respondent no.4 with reference to this Government Order states that since he had been teaching students of Classes 11th and 12th for the last 10 years in the subject of physical education, as such he was entitled to benefit of seniority on Lecturer's post from 25th October, 2000 and such claim has also been accepted by the Joint Director of Education.

16. The post of Lecturer in an institution recognized under the Act of 1921 can be filled either by direct appointment through the U.P. Secondary Education Service Selection Board or by promotion in accordance with Section 12 of the Act of 1982 read with Rule 14 of the Rules of 1998. There is no other way in which a substantive appointment on the post of Lecturer could be offered in the institution concerned. There is no provision in the Act of 1982 which contemplates appointment on the post of Lecturer by way

of upgradation of post held in lower grade by the teacher concerned. The Act of 1982 also does not empower the State Government to issue any Government Order, whereby appointment on the post of Lecturer could be granted by upgrading the post held substantively in L.T. Grade.

17. The only power whereunder such a Government Order could be issued is Section 9(4) of the Act of 1921. The State Government in exercise of its power thereunder could modify, rescind or make any regulation in respect of any matter covered under the Act of 1921. The Government Order, therefore, can at best modify or rescind a regulation framed under the Act of 1921 or to frame a regulation.

18. The Government Order dated 25.10.2000 if is treated as an enabling provision for appointment on the post of Lecturer in an institution recognized under the Act of 1921 then the Government Order would introduce a new avenue of appointment which is not contemplated in the Act of 1982 and would incur wrath of Section 32 of the Act of 1982.

19. Admittedly respondent no.4 has been substantively appointed as teacher in L.T. Grade on 7.8.1993. The only way in which he can occupy the post of Lecturer would be by way of promotion by following the procedure prescribed under Section 12 read with Rule 14 of the Act of 1982 read with Rules of 1998. Respondent no.4 has not been granted promotion to the post of Lecturer in the manner so contemplated. Any other manner in which seniority in Lecturer's grade and post is offered would necessarily become void by virtue of Section 16(2) of the Act of 1982.

20. *The Government Order of 25th October, 2000 upgrades the post of L.T. Grade teacher in specified circumstances and also grants benefit of designation on the post of Lecturer as also seniority from the date a person joins on the post of Lecturer. The benefit in that regard is personal to the teacher concerned inasmuch as the post of L.T. Grade teacher would be treated to have been abolished. Such promotion cannot be treated to be a substantive promotion in the grade and cadre of Lecturer since the procedure for appointment to the post of Lecturer as per the Act of 1982 is not followed. Such promotion at best can be treated personal in nature to the teacher concerned against an ex-cadre post or else the Government Order itself would become inconsistent with the Act of 1982. The seniority of teacher who is granted the benefit of personal promotion under the Government Order dated 25th October, 2000 therefore would have to be separately maintained. The benefit of seniority in the cadre of Lecturer therefore cannot be granted under Regulation 3 framed under Chapter-II to the Act of 1921.*

22. *This Court in Bharti Roy Vs. Deputy Director of Education-II, Kanpur and others, 2008 (2) ADJ 134, has also taken the view that benefit of seniority cannot be granted unless the appointment or promotion is in accordance with the Regulations and the Act of 1982. After referring to Division Bench judgment of this Court in **Madan Gopal Agrawal and others Vs. The District Inspector of Schools, Bijnor and others, 1996 (3) ESC 202**, this Court observed as under in paras 26 to 29:-*

"26. Same view was taken by another Hon'ble Single Judge (Dr. B.S.

Chauhan, J.) in Madan Gopal Agrawal and Ors. v. The District Inspector of Schools, Bijnor and Ors. 1996 (3) ESC 202 (All). However, this Court also held that grant of LT grade under the aforesaid Government Orders is personal and it does not mean posting in LT grade, inasmuch as, when such a person would retire, it would result in a vacancy in CT grade and not in LT grade since the incumbent cannot be said to hold the post of Assistant Teacher in LT grade. The observations of this Court are as under:

*"7. ... under the different Government Orders issued from time to time the teachers working in C.T. Grade become eligible to be considered for L.T. Grade as a personal pay scale. This does not mean the posting in L.T. Grade and the post which becomes vacant after the retirement of such a teacher would not be deemed to be a vacant post in L.T. Cadre nor such a person can take benefit on the post of the L.T. Grade for promotion and seniority as he is not holding the post in Grade in L.T. Grade vide **Rashmi Srivastava v. University, Virendra Pandey v. State of U.P. 1994 (24) ALR (H) 19, Writ Petition No. 30754 of 1991 Madljuri Devi v. Regional Inspectress of Girls Schools**, decided on 20.3.1995 and **Vipin Kumar v. District Inspectress of Schools 1993(2) Educational and Service Cases 456.***

8. It is not to be treated as their promotion in L. T. Grade till they are promoted to the post in L.T. Grade strictly in accordance with law."

*27. Same view has been expressed by another Hon'ble Single Judge (Hon. Ashok Bhushan, J.) in Civil Misc. Writ Petition No. 39731 of 2000, **Ansan Lal***

Jha v. District Inspector of Schools and Ors. decided on 13.2.2006.

28. A *pari material* Government Order was issued on 28.2.1990 for grant of Lecturer Grade to those teachers who were working in L.T. Grade and had completed ten years of service and were imparting education to the students of XI and XII class continuously for ten years. The incumbent was granted Lecturer's Grade pursuant to the Government Order dated 28.2.1990 and he raised a similar contention which came up for adjudication before a Division Bench of this Court in *Vipin Kumar v. District Inspector of Schools* (1993) 3 UPLBEC 1900 and in paragraphs No. 6, 9 and 13 the Court held: "6. ...A teacher may be given lecturer's pay scale even though there is no vacancy to the post of lecturer. The grant of lecturer's pay scale is not correlated with the filling of vacancy in a particular post. In a college where teachers are appointed in L. T. grade and they are given lecturer's pay scale, then in that situation there would not occur any vacancy to the post of lecturer and on the other hand the post may not exist but the teachers are given lecturer's pay scale. The word "grade" has different connotations in the context of a particular statute."

"9. The word "grade" used in Para 4(2) of the Removal of Difficulties Order, 1981, Rule 9 of U.P. Secondary Education Service Commission Rules, 1983 and Regulation 6 of Chapter II of Intermediate Education Act, 1921 must be taken as "post" of lecturer. A teacher, who is working in L T. Grade is to be promoted to the post of lecturer's grade in the sense that he is to be promoted to the post of lecturer in an institution. A teacher may be given lecturer's pay scale but he may not be

given the post. Unless he is given a post the mere fact that he has been given lecturer's pay scale will not be taken as to have given him the post of lecturer unless he is duly promoted to the said post in accordance with the provisions of a Statute."

"13. The seniority of a teacher of a lecturer's grade is also to be considered from the date of appointment to the post in lecturer's grade and not from the date of payment of lecturer's pay scale. Regulation 3 of Chapter II of Regulations of the Intermediate Education Act contemplates seniority from the date of appointment and the same principle has to be made applicable in case of persons appointed on *ad hoc* basis. The seniority cannot be fixed on the basis of grant of pay scale given by the Government under its own orders."

29. In view of the aforesaid authorities which are binding on this Court as well and even otherwise, I am also in respectful agreement with the law laid down therein, it is evident that the first petitioner even if treated to have been granted L.T. grade w.e.f. 1.7.1992 after completion of ten years of service in C.T. Grade, that would not entitle her to claim seniority on the post of Assistant Teacher (L.T. Grade) unless she is appointed or promoted in accordance with the Regulations and 1982 Act on the said post. Neither there is any averment in any of the petitions filed by the first petitioner nor any order is available on record to show that the first petitioner was ever promoted on the post of Assistant Teacher (L.T. Grade) in accordance with 1982 Act read with Regulations framed under 1921 Act. In these circumstances, I am clearly of the view that she could not have been granted benefit of seniority on the post of Assistant Teacher (L.T. Grade) and could not have

been placed above the second petitioner who admittedly was appointed directly as Assistant Teacher (L.T. Grade) and was regularised on the said post on 27.1.1994. Thus, the entire claim and dispute raised by the first petitioner loses its ground resulting in vitiating the order dated 12.7.2006 passed by Joint Director of Education, Kanpur Region whereby she has been declared first petitioner senior to the second petitioner ignoring the exposition of law on the subject in its entirety. "

23. The respondent no.4 therefore cannot claim seniority in the grade of Lecturer nor could he be held senior to the present petitioner. The upgradation of post substantively held in L.T. Grade by respondent no.4 to the Lecturer's grade would at best be treated personal to him on an ex-cadre post. A separate seniority list would have to be drawn in respect of such teachers.

24. Even otherwise on facts it is admitted that benefit of substantive appointment on the L.T. Grade post has been granted to respondent no.4 on 7.8.1993. He could be held entitled to the benefit of the post of Lecturer only upon completion of 10 years working as such and not before that. Ten years would, therefore, be completed on 7.8.2003 and the petitioner having been appointed prior to it would have to be placed above respondent no.4 in the seniority. "

*29. Sri Prabhakar Awasthi, learned counsel who appears for the fourth respondent has relied upon the judgment in the case of **Smt. Krishna Shri Gupta** (supra) while relying upon para 31.-*

"31. The facts of the present case, as reflected from the order dated

16.05.2013 passed by the DIOS, which was under challenge in the writ petition, indicate that the appellant herein possessed a second class post graduate degree (M.A. in Sanskrit), and had been granted the Lecturer's pay scale with effect from 17.02.2001. She also had a teaching experience of 10 years in intermediate classes as on the date of occurrence of vacancy against the post of Principal on 30.06.2009. In addition, the appellant also possessed the training qualifications of C.P.Ed and D.P.Ed. "

*30. Further reliance has been placed upon the decision in the case of **Sangam Lal** (supra) while relying upon paras 4 to 7 which are quoted hereunder.-*

"4. The Standing Counsel in reply to the aforesaid arguments submitted that Lakhan Kumar Srivastava was not promoted on the post of Lecturer's grade. He was merely given promotional pay scale in view of Government order dated 28.02.1990. Accordingly, there was no post of Lecturer's grade, in which Lakhan Kumar Srivastava was working nor any vacancy in Lecturer's grade arose on his retirement.

5. In the counter affidavit, it is admitted that Lakhan Kumar Srivastava was granted pay scale of Lecturer's grade under the Government Order dated 28.02.1990 as he was regularly teaching Hindi in Intermediate section for more than 10 years but it has been stated that Lakhan Kumar Srivastava was given merely pay scale of Lecturer's grade and he was never promoted in Lecturer's grade. Thus no post of Lecturer (Hindi) has been created in the college. The respondents did not refer the Government Order dated 25.10.2000 which clearly provided that if a person is teaching in the Lecturer's grade continuously for 10

years and getting Lecturer's grade under Government Order dated 28.02.1990, then his original post of L.T. Grade be merged in the post of Lecturer's grade.

6. Accordingly, in view of Government Order dated 25.10.2000 the post of Lakhan Kumar Srivastava shall be treated as post of Lecturer grade and on his retirement on 30.06.2002, vacancy in the post of Lecturer (Hindi) arose in the college. The order of rejection of the resolution of the Committee of Management for promotion of the petitioner on the ground that there was no vacancy by the Regional Level Promotion Committee is illegal.

7. Accordingly, the writ petition succeed and is allowed. Order of Regional Level Promotion Committee (respondent-2) dated 28.07.2008 is set aside. The matter is remitted to Regional Level Promotion Committee (respondent-2) to grant approval of the resolution of Committee of Management (respondent-4) dated 19.04.2003, promoting the petitioner on the post of Lecturer (Hindi) in the college w.e.f. 01.07.2002 and give difference of arrears of salary and all other consequential benefits within a period of two months from the date of producing certified copy of the order before District Inspector of Schools, Allahabad."

31. The judgments in the case of Vijay Bahadur Singh (supra) followed in Bani Singh (supra) clinches the entire issue as it squarely applies in the present facts of the case particularly in view of the fact that the Government Orders in question have been not only being referred to but discussed in extenso. Insofar as the judgment relied upon Sri Awasthi, learned counsel who appears for the fourth

respondent are concerned they even in fact do not touch the said issues might be in the writ petition the said issue from the said perspective was not the matter before the Court.

32. Now a question arises as to whether this Court is to adjudicate upon the validity of the order impugned passed by the second respondent, District Inspector of Schools dated 14.05.2023 or not at the behest of the writ petitioner. It is the case of the fourth respondent that the writ petitioner has no locus to maintain the writ petition. In the normal circumstances, the Courts of law are not supposed to adjudicate upon an issue at the instance of a party who does not possess any locus standi to maintain the proceedings but in order to arrive at the conclusion as to whether there is any locus standi or not, various factors are to be kept in mind. Here, according to Sri Awasthi, learned counsel who appears for the fourth respondent submitted that only Lecturer pay scale and Lecturer designation (post) has been accorded to the fourth respondent which even in fact is a personal benefit to the fourth respondent causing no legal injury to the writ petitioner, thus, this Court should not exercise its extraordinary jurisdiction under Article 226. Assuming for a moment that as per the fourth respondent, the benefits are personal to the fourth respondent then to this Court has to bear in mind the fact as to how the State Authorities and its functionaries are performing their duties and function. Notably, there is a specific provision, clause (6) of the Government Order dated 25.10.2000, putting an embargo that an Assistant Teacher seeking entitlement for Lecturer grade in the concerned subject has to attain eligibility before or on the date of issuance of the Government Order dated 25.10.2000,

however, instead of the existence of the said embargo now the State and its instrumentalities are extending the said benefit, however, to those Assistant Teachers who have attained eligibility post issuance of the Government Order. The Courts of law cannot be a mute spectator while allowing the said illegality to be continued in perpetuity as the same would result to a situation whereby the Assistant Teachers who are non-deserving without there being any statutory backing would be entitled to the benefits which even otherwise they are not entitled to. Additionally, also there happens to be two judgments on the said aspects interpreting clause (6) of the Government Order dated 25.10.2000 holding that the eligibility is to be seen on the date of issuance of the Government Order dated 25.10.2000. Thus, in the opinion of the Court, the entire exercise undertaken by the respondents which is in the shape of the Order dated 14.05.2023 of the District Inspector of Schools, Prayagraj, second respondent was totally uncalled for and the order impugned cannot be sustained in the eyes of law. Sri Prabhakar Awasthi has candidly argued that at present stage of the filing of the writ petition, no legal injury whatsoever has been sustained, however, Sri Awasthi is conscious about the fact that might be according to him, injury may be sustained subsequently. Moreover, once the very basis of according designation of Lecturer itself is without any base then the very foundation gets eroded hence, any benefit which would be available to a non-deserving Assistant Teacher would be detrimental to the interest of the deserving Teacher with regard to their future prospects. The Courts of law have a solemn duty to correct the errors, if any, occurred at the time when it comes to its notice i.e., by way of the writ petition.

33 Accordingly, this Court is of the firm opinion that the objection of Sri Awasthi that the writ petition is not maintainable at the behest of the writ petitioner is liable to be rejected.

34. This Court even otherwise on 16.08.2023 proceeded to pass the following order.-

“Today, when the matter was heard, then a question arose, as to whether the Government Order dated 25.10.2000 is still in existence in view of a specific provisions contained in Clause VI of the same. Further, the learned counsel for the parties shall also apprise the Court regarding the fact as to whether any intra-court appeal has been preferred against the judgment in the case of Shiv Poojan Vs. State of U.P. and Others, reported in 2019 (6) ADJ 654.

Put up this case day after tomorrow i.e. 18.08.2023, as fresh at 02:00 p.m.”

35. The basic reason to pass the said order was to give an opportunity to the learned Additional Chief Standing Counsel to place the stand of the State Government as to whether the Government Order dated 25.10.2000 has been further explained or referred and is in existence. Sri Pradeep Kumar Shahi, learned Additional Chief Standing Counsel has made a statement at bar that 25.10.2000 is the last Government Order and after that there is no other Government Order granting benefit of designation of Lecturer/Pay Scale.

36. Coming to the order impugned in the writ petition of the District Inspector of Schools, Prayagraj, second respondent this Court finds that the said order proceeds on various shortcomings particularly in view

of the fact that there has been no independent application of mind by the author of the said order. Though the order notices that the fourth respondent was held to be not fulfilling the conditions for grant of Lecturer pay/Lecturer post on 26.11.2018 but taking clue of the fact that clarification had been sought by the SC/ST Commission and similar benefits have been accorded to other benefits the writ petitioner is entitled to the said benefits. The said logic and reason assigned in the order of the District Inspector of Schools, Prayagraj dated 14.05.2023 is not at all convincing as the author of the order appears to be swayed away of certain factors which are totally foreign to service jurisprudence and uncalled for. Nonetheless, this Court cannot endorse the view taken by the DIOS, Prayagraj that since similar benefits have been accorded to other Assistant Teachers, the same is to be extended to the fourth respondent particularly in view of the fact that there is no concept of negative equality as the Courts of law are supposed to advance the justice in such a manner that there is no discrimination being meted out under Article 14 of the Constitution of India, meaning thereby, that any benefit extended illegally to the similar circumstances cannot be a ground to extend the same to an incumbent who even otherwise is not entitled for the same. Further, Sri Ojha, learned Senior Counsel for the writ petitioner though has made a feeble attempt questioning the appointment of the fourth respondent as Assistant Teacher (Physical Education) on the ground of lack of eligibility but he did not substantiate the same. Pleadings in the writ petition are completely lacking in that regard. Further an attempt has been made somehow to a limited extent to develop it in the rejoinder affidavit but as already discussed it has not

been substantiated, thus, this Court is not going into the said issue.

37. Since the order dated 14.05.2023 impugned in the writ petition passed by the District Inspector of Schools, Prayagraj, second respondent, suffers from patent and manifest illegality and the core and fundamental issues have not been addressed, thus, in the facts and circumstances of the case, the order of the District Inspector of Schools, Prayagraj cannot be sustained in the eyes of law and it is liable to be set aside.

38. Accordingly, the writ petition is **allowed**, the order dated 14.05.2023 passed by the second respondent, District Inspector of Schools, Prayagraj is set aside. The matter is remitted back to the second respondent, District Inspector of Schools, Prayagraj to pass a fresh order in the light of the observations made hereinabove and in accordance with law within a period of two months from the date of production of certified copy of the order after affording opportunity of hearing to the concerned /affected parties.

(2023) 9 ILRA 803
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.07.2023

BEFORE

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

Writ-A No. 11797 of 2023

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

Counsel for the Petitioner:
 Sri Lavlesh Kumar Shukla

Counsel for the Respondents:
C.S.C.

Transfer - challenge to - on ground that wife of petitioner also in Govt. service posted recently at same station - impugned transfer is arbitrary and against Govt. policy mandating posting of both spouses at same place - Held: policy being executive in nature and not statutory - no enforceable right arises - violation of transfer policy alone not ground to interfere unless malafide or violation of statutory rule shown - petition disposed of with direction to decide representation if filed after joining.

Held:

Transfer is an incident of service and can only be interfered with under Article 226 of the Constitution where it is vitiated by malafides or contravenes a statutory provision. A government employee has no vested right to be posted at a particular place. Mere infraction of the executive transfer policy does not confer a legal right or ground for judicial review. Reliance on *Deepa Vashishtha* and *Ram Awadh Ram* misplaced in light of binding precedent in *S.L. Abbas* and *Gobardhan Lal*. However, liberty granted to petitioner to file representation post joining, to be decided expeditiously.

Case Law Discussed:

1. *Deepa Vashishtha Vs St. of U.P.*, 1995 SCC OnLine All 897
2. *Ram Awadh Ram Vs St. of U.P.*, 2005 (5) AWC 4379
3. *Mrs. Shilpi Bose Vs St. of Bihar*, AIR 1991 SC 532
4. *U.O.I. Vs S.L. Abbas*, (1993) 4 SCC 357
5. *St. of U.P. Vs Gobardhan Lal*, (2004) 11 SCC 402

Petition disposed of.

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

1. The petitioner has challenged his transfer order dated 30.06.2023. The petitioner is a Senior Auditor in the establishment of the Director, Co-operative Societies and Panchayat Audit, Lucknow, U.P. The transfer order has been passed in public interest.

2. The case of the petitioner is that his wife, who is an Assistant Teacher in Government Primary School, has been transferred from Bahraich to Amroha, as recently as on 26.06.2023. Her transfer has been made in accordance with the service rules and the transfer policy applicable to her employer, which attempts to post spouses at the same station.

3. It is pointed that the State Government have issued a transfer policy for the year 2022-23, where in paragraph no. 5(iv), it is provided:

"iv. यदि पति-पत्नी दोनों सरकारी सेवा में हों, तो उन्हें यथासंभव एक ही जनपद / नगर/ स्थान पर तैनात करने हेतु स्थानान्तरण किया जा सकेगा"

4. It is harping on this policy that learned Counsel for the petitioner submits that the impugned transfer order transferring him to another region located 200 k.m. away from Pilibhit, is manifestly illegal and arbitrary.

5. The submission further is that the petitioner's wife's rights under the service rules applicable to her, cannot be defeated, particularly, once she has been recently transferred to the petitioner's place of posting, wherefrom he has been shunted out. It is also argued that the respondents have followed a policy of pick and choose while ordering the impugned transfer.

6. It is submitted that transfer though an exigency of service, the power cannot be exercised in an arbitrary and mechanical manner, particularly for a punitive purpose. It is argued that an order of transfer, that is based on a policy of pick and choose, is punitive in nature and not in public interest.

7. In support of his contention, learned Counsel for the petitioner has relied upon a Bench decision of this Court in **Deepa Vashishtha v. State of U.P. and others, 1995 SCC OnLine All 897**, where it has been held:

"15. However, in a recent pronouncement of the Apex Court rendered in *Home Secretary, U.T. Chandigarh v. Darshjit Singh Grewal*, JT 1993 (4) SC 387, their Lordships have ruled that policy guidelines are relatable to the executive power of the administration, and having enunciated a policy of general application and having communicated it to all concerned, the administration is bound by it. It can, no doubt, change the policy but until that is done, it is bound to adhere to it.

16. Now, coming to the case in hand, the Government orders/guidelines/policy said to have not been adhered to, are contained in Annexures-16, 17 and 18 to this petition and they lay down thus:

1. If the couple is in education department, they both should be kept at one station at the time of appointment and transfer.

2. If one of the husband and wife belongs to education department and another to different department, even then efforts should be made to transfer one of them to that place where the other is posted.

3. Husband and wife posted at the same station should not be transferred.

4. On account of their postings to different places, husband and wife suffer difficulties, therefore, as far as possible, they should be kept at one place.

17. Thus, the guidelines in respect of couple in Government service, have taken care of that husband and wife should be placed at one station. Placing the words "as far as possible", it is couched not in negative form and accordingly the same is interpreted by the Apex Court.

18. Taking into account the human considerations and social needs, the aforesaid guidelines have been framed and the basic idea behind it is that whole set up of the family may not be disturbed notwithstanding the fact that said guidelines are not in imperative form. Thus, it needs consideration with positive approach till the policy is not changed or amended in view of the decision in *Home Secretary, U.T. Chandigarh's case*(supra), and if it is not possible to keep husband and wife at one place, cogent reasons in such cases are expected to be assigned so that transferee husband or wife, as the case may be, able to know the reasons. If any policy has been framed and still operative, the executive actions are expected to be in conformity with the same and not to negate it.

19. In other words, in the garb of public interest or administrative exigencies, it is not at the whims of the authority to disturb the family by transferring one of the husband and wife to a different place since the guidelines are not in imperative form or they have no force of law. If the administrative exigencies or public interest

so requires, certainly husband and wife may be transferred to different places but only in exceptional cases, Le., rarest of rare cases, for which no illustration can be given.

20. But now a days, it is invariably seen that for the reasons best known to the department this kind of transfers are being made disturbing the couple. In the opinion of this court, such practice needs to be deprecated.

21. What kind of perplexities and difficulties, a spouse could confront with in the event of another being posted at a different place, can easily be imagined by anyone by putting himself/herself in that situation and then it would be realised that how torturous and painful it really is, to leave husband and children at one place and to lead a solitary life at the transfer-place. Therefore, to avoid such disturbance and mental agony, the aforesaid guidelines are framed."

8. Reliance is next placed on the decision of this Court in **Ram Awadh Ram v. State of U.P. and another, 2005 (5) AWC 4379**, where it has been held:

"15. This Court (D.B.) in Vijay Kumar Chaurasia v. State of U.P. and others, (2004) 3 UPLBEC 2463 has held that ordinarily High Court cannot interfere with the order of transfer made in exigency of service as a part of conditions of services, unless the transfer was found to be made malafidely or service rules prohibits such transfer.

16. I have heard learned Counsel for the parties. I find that in view of the analysis made above, the transfer in question could not have been made in a

routine manner by a general transfer order, as the petitioner was an office bearers of an Union elected on 2.11.2003 and as provided in the Government Order dated 3.6.2004 (Annexure-3 to the writ petition) as well as in reference to the Rule 27 of the Rules, 1980 his transfer was ab-initio illegal. It is notable that there was nothing or for no specific reason or presumption transfer could not be avoided, whereas, the transfer of the petitioner was made along with others in a routine manner, which is in derogation to the rules. By the subsequent transfer order dated 9.7.2004 earlier transfer order dated 29/30.6.2004 was not cancelled, rather it is fresh transfer order, which is also under challenge. In these circumstances, the impugned order dated 29/30.6.2003 and subsequent transfer order dated 9.7.2004 are not legally sustainable, therefore, they are set aside."

9. Mr Roopesh Tiwari, learned Standing Counsel appearing on behalf of the respondents has resisted the grant of relief that the petitioner seeks. He submits that transfer is an exigency of service and for the violation of provisions of the transfer policy, a writ cannot be issued.

10. Upon hearing learned Counsel for parties, this Court is of opinion that the law by now has come to be fairly well settled. Transfer is indeed an exigency of service and interference by this Court in exercise of our writ jurisdiction under Article 226 of the Constitution of India is permissible only in the event that the transfer is actuated by malafides in fact or is vitiated by malafides in law. Still, there is one more avenue, where this Court can interfere with a transfer order, and, that is where the transfer order is in breach of a statutory rule. However, in no event a transfer order can be interfered with on the ground of

infraction of the State's transfer policy. This position of the law is well settled in view of the decision of the Supreme Court in **Mrs. Shilpi Bose and others v. State of Bihar and others**, AIR 1991 SC 532.

11. In **Mrs. Shilpi Bose** (*supra*), it was held:

"4. In our opinion, the courts should not interfere with a transfer order which are made in public interest and for administrative reasons (unless the transfer orders are made in violation of any mandatory statutory rule or on the ground of mala fide. A Government servant holding a transferable post has no vested right to remain posted at one place or the other, he is liable to be transferred from one place to the other. Transfer orders issued by the competent authority do not violate any of his legal rights. Even if a transfer order is passed in violation of executive instructions or orders, the Courts ordinarily should not interfere with the order instead affected party should approach the higher authorities in the Department. If the courts continue to interfere with day-to-day transfer orders issued by the Government and its subordinate authorities, there will be complete chaos in the Administration which would not be conducive to public interest. The High Court over looked these aspects in interfering with the transfer orders."

12. So far as the decision in **Ram Awadh Ram** (*supra*) is concerned, this Court finds that, in that case, there was a violation of a Government Order that had been issued under a certain rule of the U.P. District Offices (Collectorates) Ministerial Service Rules, 1980 and the Court found the violation of a statutory rule a valid ground to interfere with the transfer order.

The said decision is, therefore, not attracted to the facts of this case. So far as Bench decision in **Deepa Vashishtha** (*supra*) is concerned, this Court is of opinion that in view of the law laid down by the Supreme Court in **Union of India and others v. S.L. Abbas**, (1993) 4 SCC 357, the principle in **Deepa Vashishtha** must be held, confined to the facts of that case. In **S.L. Abbas** (*supra*) the question arose in the context of transfer of a husband and wife, both employees of Central Government, where the husband was resisting his transfer from Shilong to Pauri (U.P.). The ground urged was the transfer policy of the Government, amongst others, which favoured posting of spouses, if in the employ of the Central Government at the same station. The policy was referable to some executive instructions of the Government that did not have statutory force. It was in the context of the aforesaid facts that in **S.L. Abbas**, it was held by their Lordships of the Supreme Court:

"7. Who should be transferred where, is a matter for the appropriate authority to decide. Unless the order of transfer is vitiated by mala fides or is made in violation of any statutory provisions, the court cannot interfere with it. While ordering the transfer, there is no doubt, the authority must keep in mind the guidelines issued by the Government on the subject. Similarly if a person makes any representation with respect to his transfer, the appropriate authority must consider the same having regard to the exigencies of administration. The guidelines say that as far as possible, husband and wife must be posted at the same place. The said guideline however does not confer upon the Government employee a legally enforceable right.

xxxxx

9. Shri Goswami, learned counsel for the respondent relies upon the decision of this Court in *Bank of India v. Jagjit Singh Mehta* [(1992) 1 SCC 306 : 1992 SCC (L&S) 268 : (1992) 19 ATC 528] rendered by a Bench of which one of us (J.S. Verma, J.) was a member. On a perusal of the judgment, we do not think it supports the respondent in any manner. It is observed therein: (SCC pp. 308-09, para 5 : ATC pp. 530-31, para 5)

“There can be no doubt that ordinarily and as far as practicable the husband and wife who are both employed should be posted at the same station even if their employers be different. The desirability of such a course is obvious. However, this does not mean that their place of posting should invariably be one of their choice, even though their preference may be taken into account while making the decision in accordance with the administrative needs. In the case of all-India services, the hardship resulting from the two being posted at different stations may be unavoidable at times particularly when they belong to different services and one of them cannot be transferred to the place of the other's posting. While choosing the career and a particular service, the couple have to bear in mind this factor and be prepared to face such a hardship if the administrative needs and transfer policy do not permit the posting of both at one place without sacrifice of the requirements of the administration and needs of other employees. In such a case the couple have to make their choice at the threshold between career prospects and family life. After giving preference to the career prospects by accepting such a promotion or any appointment in an all-India service with the incident of transfer to any place in India, subordinating the need of the couple

living together at one station, they cannot as of right claim to be relieved of the ordinary incidents of all-India service and avoid transfer to a different place on the ground that the spouses thereby would be posted at different places No doubt the guidelines require the two spouses to be posted at one place as far as practicable, but that does not enable any spouse to claim such a posting as of right if the departmental authorities do not consider it feasible. The only thing required is that the departmental authorities should consider this aspect along with the exigencies of administration and enable the two spouses to live together at one station if it is possible without any detriment to the administrative needs and the claim of other employees.”

(emphasis added)

10. The said observations in fact tend to negative the respondent's contentions instead of supporting them. The judgment also does not support the respondents' contention that if such an order is questioned in a court or the tribunal, the authority is obliged to justify the transfer by adducing the reasons therefor. It does not also say that the court or the tribunal can quash the order of transfer, if any of the administrative instructions/guidelines are not followed, much less can it be characterised as mala fide for that reason. To reiterate, the order of transfer can be questioned in a court or tribunal only where it is passed mala fide or where it is made in violation of the statutory provisions.”

13. If there were anything about the propriety of following precedent, the Bench decision in **Deepa Vashishtha** having briefly referred to **S.L. Abbas**, the matter

stands concluded against the binding authority of **Deepa Vashishtha**, in view of a much later decision of the Supreme Court in **State of U.P. and others v. Gobardhan Lal, (2004) 11 SCC 402**. In **Gobardhan Lal (supra)**, spelling out the scope of interference by this Court, in the exercise of jurisdiction under Article 226 of the Constitution of India, with an order of transfer passed, even in violation of the transfer policy, it was observed:

"7. It is too late in the day for any government servant to contend that once appointed or posted in a particular place or position, he should continue in such place or position as long as he desires. Transfer of an employee is not only an incident inherent in the terms of appointment but also implicit as an essential condition of service in the absence of any specific indication to the contra, in the law governing or conditions of service. Unless the order of transfer is shown to be an outcome of a mala fide exercise of power or violative of any statutory provision (an Act or rule) or passed by an authority not competent to do so, an order of transfer cannot lightly be interfered with as a matter of course or routine for any or every type of grievance sought to be made. Even administrative guidelines for regulating transfers or containing transfer policies at best may afford an opportunity to the officer or servant concerned to approach their higher authorities for redress but cannot have the consequence of depriving or denying the competent authority to transfer a particular officer/servant to any place in public interest and as is found necessitated by exigencies of service as long as the official status is not affected adversely and there is no infraction of any career prospects such as seniority, scale of pay and secured emoluments. This Court

has often reiterated that the order of transfer made even in transgression of administrative guidelines cannot also be interfered with, as they do not confer any legally enforceable rights, unless, as noticed supra, shown to be vitiated by mala fides or is made in violation of any statutory provision."

14. In view of the law well settled, a violation of the notified transfer policy of the State, that is in the nature of administrative guidelines, as distinguished from statutory rules, does not afford a right to the Government Servants, when transferred in its violation, to assail the transfer on that ground. This Court does not find any good ground to interfere with the impugned order.

15. However, in case after the petitioner joins the station of transfer and represents his case, the Director, Co-operative Societies and Panchayat Audit, Lucknow, U.P is ordered to decide the petitioner's representation within 15 days of its receipt and communicate its result to the petitioner within a week thereafter.

16. This petition is **disposed of** in terms of the aforesaid orders. Costs easy.

(2023) 9 ILRA 809

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 11.08.2023

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

Writ-A No. 65946 of 2008

Prabhat Bhatnagar

...Petitioner

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioner:

Sri Sanjay Kumar Om, Sri Chandra Shekhar Sinha, Sri Dileep Kumar Srivastava, Sri Rajeev Trivedi, Sri S.K. Shukla

Counsel for the Respondents:

C.S.C.

Held:

In disciplinary proceedings, mere recital in a sale deed by a third party describing herself as wife of a government servant is insufficient to establish second marriage during subsistence of first marriage. No conclusive evidence of solemnization under the Hindu Marriage Act, 1955 was brought on record. In absence of such proof, award of major penalty of dismissal is unsustainable. Even if misconduct were established, as per Rule 29 of U.P. Government Servants Conduct Rules, 1956, only a *minor* penalty could be imposed. Orders of dismissal and appellate rejection quashed. Petitioner entitled to reinstatement with full consequential benefits.

Case Law Discussed:

1. Ram Milan Dubey Vs St. of U.P. & ors., Service Single No. 2681 of 2010
2. Shravan Kumar Pandey Vs St. of U.P. & ors., 2010 (8) ADJ 243
3. Smt. Raj Bala Sharma Vs St. of U.P. & ors., 2009 (2) LBESR 949 (All)

(Delivered by Hon'ble Kshitij Shailendra, J.)

1. Heard Shri Sanjay Kumar Om, learned counsel for the petitioner, learned Standing Counsel for the State-respondents and perused the record.

2. The petitioner was appointed on Group 'G' post as an Apprentice in the office of District Development Officer, Bareilly on 08.04.1999. There is no dispute about the fact that the petitioner married to one Anuraddha Saxena on 24.11.1999,

however, the controversy revolves around a second marriage allegedly performed by the petitioner with one Anju Khandelwal who was working with him in the same department. The allegation against the petitioner was to the effect that during the subsistence of first marriage with Anuraddha Saxena, he performed second marriage and, therefore, he committed a misconduct. A charge-sheet was issued to the petitioner raising the same charges. A reply was submitted by the petitioner, in which, factum of performance of second marriage was denied by him.

3. It is the case of the petitioner that no proper enquiry was conducted and simply after considering the reply submitted by the petitioner, alleged enquiry was completed and, later on, by the order impugned dated 04.07.2005, the petitioner was awarded major penalty in terms of dismissal from service. The petitioner preferred a departmental appeal which was also dismissed.

4. The argument of Shri Sanjay Kumar Om, learned counsel for the petitioner is to the effect that the petitioner's wife Anuradha Saxena moved complaints before the department alleging second marriage and there was no evidence on record to substantiate performance of second marriage and commission of alleged offence of bigamy or misconduct on that line, except that before the department, there was a sale deed, by which, certain property was purchased by Anju Khandelwal, in which, she had described herself as wife of the petitioner and the allegation of his wife Anuradha Saxena. It is further contended that even the said error was corrected by way of execution of supplementary deed (titamma). He further submits that departmental enquiry was

conducted against Anju Khandelwal also and she was not awarded major punishment but only censure entry was awarded to her by order dated 23.11.2011 which was passed during the pendency of the writ petition and has been brought on record alongwith amendment application. The submission is that once while awarding censure entry to Anju Khandelwal, clear finding has been recorded that no marriage was solemnized in between Anju Khandelwal and the petitioner, the issue that falls for consideration before this Court is that even accepting the fact that Anju Khandelwal had described herself as wife of the petitioner in a sale deed, whether the same itself amounts to sufficient evidence with regard to performance of second marriage by the petitioner during the subsistence of first marriage.

5. Another issue is to the effect that once Rule 29 of the U.P. Government Servants Conduct Rules, 1956 (in short 'the Rules, 1956') clearly provides that, in case, the government servant having a wife contracts another marriage without obtaining permission of the Government, only minor punishment can be awarded in the nature of withholding of increments for three years. Shri Om submits that even this punishment can be awarded only when performance of second marriage is established.

6. Learned Standing Counsel submits that once the lady had described herself as wife of the petitioner, no further evidence was required as relationship between the husband and wife can be established by placing reliance upon any oral or documentary statement made by the parties to the marriage. He further submits that order passed in case of Anju Khandelwal during the pendency of the writ petition is

irrelevant inasmuch as when the punishment was awarded to the petitioner, the said order was not in existence.

7. Having heard learned counsel for the parties, I find that conditions of a valid Hindu marriage are narrated under Section 5 of the Hindu Marriage Act, 1955 i.e. to say that, in case, anybody alleges performance of any marriage, whether first or second, it has to be established before the Court or even administrative authorities that marriage was lawfully performed as per the provisions of law, which in the present case, is the Hindu Marriage Act, 1955.

8. Before the Department, there was nothing on record to demonstrate that marriage between the petitioner and Anju Khandelwal was solemnized, except, the aforesaid sale deed and the aforesaid recital contained therein and even that was corrected later on. Though, Anju Khandelwal was also punished in terms of award of a minor penalty in the nature of censure entry, even if for the sake of argument made on behalf of the State, it is accepted that act of correction of sale deed was an after-thought on the part of Anju Khandelwal to avoid any action in the disciplinary proceedings, the question still remains as to whether, in law even if, status of Anju Khandelwal as wife of the petitioner as described in a sale deed is treated to be substantiated and subsequent correction is ignored, whether the said recital, as it is, would be sufficient to justify the order impugned.

9. In this regard, reference to **Section 50 of the Indian Evidence Act, 1872 (in short 'the Act, 1872')** is required to be made. The said provision reads as follows:-

"50. Opinion on relationship, when relevant.—When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact:

Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act, 1869 (4 of 1869) or in prosecutions under section 494, 495, 497 or 498 of the Indian Penal Code (45 of 1860)."

10. In view of the above, even if the statement made by Anju Khandelwal in the sale deed or even by the first wife of the petitioner before the department as to the relationship between Anju Khandelwal and petitioner is a fact so as to give an opinion with regard to solemnization of marriage between him and Anju Khandelwal, the proviso to Section 50 of the Act, 1872 would read contrary to this and such opinion shall not be sufficient to prove marriage in proceedings under the Indian Divorce Act or prosecution under Sections 494, 495, 497 or 498 I.P.C. Meaning thereby that whenever a question arises as to whether an offence has been committed by a person which is punishable under any of the provisions of the aforesaid Sections of I.P.C., the proviso attached to Section 50 of the Act, 1872 would save that person as regards to forming an opinion in connection with second marriage which might be an offence under I.P.C. This principle would apply in examining the aspect of misconduct also in a service matter particularly when the issue is the same, i.e., performance of second marriage during the subsistence of first marriage.

11. Considering the aforesaid factual and legal proposition, as explained in the Hindu Marriage Act, 1955 and Indian Evidence Act, 1872 and there being no other material before this Court or before the Authorities, I find that punishing the petitioner by presuming performance of second marriage during subsistence of first marriage was not according to fact and law.

12. The finding to this effect contained in the orders impugned, is therefore, unsustainable.

13. Insofar as the award of punishment to the petitioner is concerned, even when misconduct to the aforesaid effect is established on the part of the government servant, only a minor penalty can be awarded and not a major penalty.

14. Rule 29 of the Rules of 1956, in this regard is quoted as under:

"29(1): No Govt. Servant who has a wife living shall contract another marriage without fresh obtaining the permission of the Govt. notwithstanding that such subsequent marriage is permissible under the personal law for the time being applicable to him.

(2) No female Govt. Servant shall marry any person who has a wife living without first obtaining permission of the Govt.

(3) A minor punishment to be imposed in contravention of Sub Rule(1) or Sub Rule (2) shall be withholding of increments for three years."

15. Reference to the following authorities can be made in this regard:-

(a). Service Single No. 2681 of 2010 (Ram Milan Dubey Vs. State of U.P. and others);

(b). Shravan Kumar Pandey Vs. State of U.P. and others, 2010 (8) ADJ 243;

(c). 2009 (2) LBESR 949 (Allahabad) Smt. Raj Bala Sharma Vs. State of U.P. and others.

16. In view of the above discussion, once I have arrive at a conclusion that there was no evidence to establish performance of second marriage during the subsistence of first marriage, both the orders impugned are unsustainable and are liable to be quashed.

17. The writ petition succeeds and is *allowed*.

18. The orders dated **04.07.2005** and **23.08.2008** respectively passed by the District Development Officer, Bareilly and Appellate Authority are hereby **quashed**.

19. The respondents are directed to reinstate the petitioner in service **within a month after receipt of certified copy of this order**. The petitioner shall be entitled to **all financial and other consequential service benefits from the date of his dismissal from service till his reinstatement and thereafter**.

(2023) 9 ILRA 813

**ORIGINAL JURISDICTION
CIVIL SIDE**

DATED: ALLAHABAD 17.08.2023

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ-B No. 1533 of 2021

**H.K.S. Developers Pvt. Ltd. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents**

Counsel for the Petitioner:
Sri Rahul Agarwal, Poorva Agarwal

Counsel for the Respondents:
Sri Punit Kumar Gupta, Sri Abhishek Shukla, C.S.C.

Consolidation – Title Dispute – Transferee Pendente Lite – Recall Application – Sale Deed – Unregistered Deed – Finality of Order

Held: The petitioner, claiming rights through a sale deed dated 26.4.2010, executed during the pendency of consolidation proceedings and registered on 7.10.2014, after the revisional court's order dated 17.4.2013, is not entitled to seek recall of the said order. The title dispute, originating in 1988 and finalized vide the Deputy Director of Consolidation's order dated 17.4.2013, attained finality upon dismissal of related writ petitions on 11.5.2015, based on a compromise among tenure holders. The petitioner, as a transferee pendente lite, cannot reopen the settled title dispute after a prolonged delay, particularly on the basis of an unregistered sale deed at the time of the revisional court's decision. The Additional District Magistrate rightly rejected the petitioner's recall/restoration application dated 18.6.2018, as the petitioner's vendors were heard, and the order dated 17.4.2013 was not ex parte. No interference warranted under Article 226 of the Constitution.

Writ petition dismissed, interim order vacated.

Case Law Discussed:

1. Thomson Press (India) Ltd. Vs Nanak Builders & Investors P. Ltd. & ors., AIR 2013 SC 2389 – Distinguished.

2. Prayas Buildcon Pvt. Ltd. Vs St. of U.P. & ors., 2022 AIR (Ald.) 279 – Relied upon.

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

1. Heard Mr. Rahul Agarwal, learned counsel for the petitioner, Mr. Punit Kumar Gupta, learned counsel for respondent no.3 and Mr. Abhishek Shukla, learned Addl. C.S.C. for the state-respondent.

2. Brief facts of the case are that in the basic year of the consolidation operation, plots of khata no.35, was recorded in the name of Jamuna Prasad, son of Govind. At the time of verification of the khatauni, Om Kumari and Krishnawati, being widows of Jamuna Prasad, were told to be recorded. During consolidation operation, Om Kumari and Krishnawati filed their objection that their name be recorded jointly over the plots of khata no.35. The Assistant Consolidation Officer on 2.3.1988 referred the matter before the Consolidation Officer and the Consolidation Officer vide order dated 15.3.1988, ordered to record the name of Om Kumari and Krishnawati jointly, being the widows of Late Jamuna Prasad and further ordered to expunge the name of Jamuna Prasad from the plots of khata no.35. Against the order of the Consolidation Officer dated 15.3.1988, Naresh Pal and others have filed appeal along with prayer for condonation of delay before the Settlement Officer (Consolidation). The Assistant Settlement Officer (Consolidation) vide order dated 27.11.2004, set aside the order of the Consolidation Officer dated 15.3.1988 and ordered to record the names of Naresh Pal and Ved Pal, on the basis of unregistered will deed. Against the appellate order dated 27.11.2004, Om Kumari and Others filed

revision being Revision No.247 and Surendra & Others have filed revision being Revision No.290 before the Deputy Director of Consolidation. The aforementioned revisions were heard by the Deputy Director of Consolidation and vide order dated 25.1.2007, both the aforementioned revisions were allowed, setting aside the order of the Assistant Settlement Officer Consolidation dated 27.11.2004 and remanded the matter back before the appellate court to decide the appeal along with the pending appeal filed by Surendra. The Assistant Settlement Officer Consolidation vide order dated 30.7.2008 dismissed the appeal filed by Surendra for want of evidence and appeal filed by Naresh Pal and Others were allowed, remanding the matter before the Consolidation Office to decide the dispute afresh on merit. Against the order of the appellate court dated 30.7.2008, Om Kumari has filed revision being Revision No. 203 before the Deputy Director of Consolidation. The aforementioned Revision No.203 was heard by the Deputy Director of Consolidation and the same was allowed vide order dated 13.3.2009, setting aside the orders dated 30.7.2008 and 27.11.2004 and ordered to record the names of Krishnawati and Om Kumari, being widows of Jamuna Prasad. One Kalawati filed restoration application against the order of the Deputy Director of Consolidation dated 13.3.2009 and Revision No.173 against the orders dated 15.3.1988 and 7.3.2011, passed by the Consolidation Officer as well as 30.10.2012, passed by the Settlement Officer Consolidation, praying that her name be recorded being daughter of Jamuna Prasad. In the mutation proceeding under Section 34 of the U.P. Revenue Act, the Naib Tehsildar passed an order dated 23.4.2010 for recording the name of will

holder, on the basis of registered will deed dated 2.2.1992, alleged to be executed by Om Kumari and Krishnawati in favour of Meena Kumari, wife of Mulayam Singh (daughter of Om Kumari). Against the order of mutation, appeal was filed which was allowed on 30.7.2010 and the matter was remanded back before the Naib Tehsildar. The Naib Tehsildar again on 30.4.2011, ordered to record the name of Meena Kumari, on the basis of registered will deed dated 2.2.1992. Krishnawati and Meena Kumari were alleged to execute the sale deed in favour of the petitioner (H.K.S. Developers Pvt. Ltd.) on 26.4.2010. Kalawati was alleged to execute the power of attorney in favour of Surendra Singh, son of Brahm Singh on 13.4.2011 which was later on cancelled on 5.9.2012. Kalawati is alleged to execute the agreement to sale dated 15.10.2010 in favour of Rajiv Kumar.

Jamuna Prasad was a Class-IV employee in the Nagar Nigam, Bareilly. It has been alleged that Jamuna Prasad had three wives, Om Kumari, Krishnawati and Ramdeyi. From the wedlock of Jamuna Prasad and Ramdei, one daughter Kalawati was born and from wedlock of Jamuna Prasad and Om Kumari, Meena Kumar was born. The Deputy Director of Consolidation vide order dated 17.4.2013 allowed the Revision No.203, filed by Om Kumari and Revision No.173 filed by Kalawati and ordered to record the name of Krishnawati, Om Kumari and Ramdeyi, being widows of late recorded tenure holder Jamuna Prasad. The revisional court further ordered to record the name of Meena Kumari and Kalawati, daughter of Jamuna Prasad, to be recorded in place of deceased Om Kumari and Ramdeyi. The revisional court further ordered that the partition of the plots of khata except the

chak out plots shall be made 1/3rd, 1/3rd & 1/3rd in respect of Krishnawati, Meena Kumari and Kalawati, the appellate order dated 27.11.2004, passed in Appeal No.145/2004 and 30.7.2008 were accordingly set aside. Against the order dated 17.4.2013, Writ B No. 48903/2013 was filed by Smt. Kalawati, Writ B No.26659/2013 was filed by Smt. Meena Kumari and Another and Writ B No.26674/2013 was also filed by Meena Kumari and Another in the year 2013 before this Court. All the three writ petitions remained pending for about 2 years and during pendency of the aforementioned three writ petitions, parties have entered into compromise and on the basis of compromise, the parties have filed application for dismissing the writ petitions as withdrawn. This Court vide order dated 11.5.2015 dismissed the writ petitions as withdrawn, affirming the order of revisional court / Deputy Director of Consolidation dated 17.4.2013. After disposal of the aforesaid three writ petitions, petitioner filed the application dated 18.6.2018 before the revisional court to recall the order dated 17.4.2013 and restore the revision to its original number in order to afford opportunity to petitioner being the vendee of the part of the area of the plot in dispute. The revisional court / Additional district Magistrate (Finance and Revenue) vide order dated 7.6.2019 rejected the restoration / recall application dated 18.6.2018, hence this writ petition.

3. This Court vide order dated 28.9.2021 has entertained the writ petition and granted an interim protection. The order dated 28.9.2021 runs as follows:-

1. Heard Sri Rahul Agarwal, learned counsel for the petitioner, learned Standing Counsel represents

responded nos. 1 & 2 and perused the record.

2. Counsel for the petitioner submits that Jamuna Prasad was recorded tenure holder over the property in question. Names of Om Kumari (mother of respondent no.4) and Krishnawati were ordered to be mutated in place of Jamuna Prasad, being his widows vide order dated 15.03.1988 passed by Consolidation Officer. At later stage, due to intervention of Naresh Pal, Ved Pal, Surendra, matter was travelled up to revisional stage and culminated vide order dated 13.03.2009 passed by Deputy Director of Consolidation (respondent no.2) in favour of Om Kumari and Krishnawati. On the death of Om Kumari, name of her daughter Smt. Meena Kumari (respondent no.4) has been ordered to be mutated, vide order dated 23.04.2010, on the basis of registered will deed dated 02.02.1992. On appeal being filed, matter was remitted and again decided in favour of respondent no.4 vide order dated 30.04.2011 passed by Nayab Tehsildar. In the meantime respondent no.4 and Krishnawati had executed a resisted sale deed dated 26.04.2010 in favour of the petitioner.

3. At very belated stage Smt. Kalawati (respondent no.3), claiming her right and title being daughter of Ram Devi (weeded wife of Jamuna Prasad), has filed restoration application dated 31.08.2010 against the order dated 15.03.1988 passed by Consolidation Officer, which was rejected by order dated 17.10.2011 and, in appeal, same was affirmed vide order dated 30.10.2012 passed by Settlement Officer of Consolidation.

4. Having being aggrieved, respondent no.3 has filed Revision No.173 against the order dated 30.10.2012 as well as restoration application dated 22.11.2012/ 01.12.2012 against the order dated 13.03.2009 passed in Revision No.203, which had been filed by Om Kumari and Krishnawati.

5. By common order dated 17.04.2013, respondent no.3 has allowed the restoration application as well as both the revisions and directed to record the name of respondent no.3 alongwith the name of respondent no.4 and Krishnawati, having 1/3 share each. Restoration application filed by the petitioners against the order dated 17.04.2013 is rejected by impugned order dated 07.06.2019.

6. Grievance of the petitioner is as follows:-

i. Respondent no.2 has illegally allowed the restoration application, delay condonation application and revision no.203 as well as revision no.173 simultaneously by common order dated 17.04.2013 without affording opportunity of hearing to the petitioner, who is a vitally interested person in the property in question on the basis of sale deed dated 26.04.2010 and deserves to be heard in opposition to the restoration application and revision.

ii. Respondent no.2 has illegally admitted the additional evidence at the revisional stage without giving opportunity of rebuttal and has illegality recognized the right and title of respondent no.3, being a daughter of Jamuna Prasad & Ram Devi on the basis

of Photostat copy of the documents which are not admissible in evidence. Apart from that police report can not be a conclusive proof to established relationship of the daughter and father.

iii. No cogent reason has been assigned by respondent no.3 in keeping mum, since 15.03.1988 till August-2010, as to why she could not get her right and title adjudicated upon by the competent court being a daughter of Jamuna Prasad and approached the consolidation court after several years of denotification under section 52(1) of UPOCH Act.

iv. Restoration application moved by the petitioner has illegally be rejected on the ground that petitioner has purchased property during the succession/mutation case of Jamuna Prasad, whereas succession of Jamuna Prasad had already been decided vide order dated 13.03.2009 passed by respondent no.2. In the year 2010 name of respondent no.4 was mutated in place of her mother Smt. Om Kumari. Eeven otherwise, restoration application dated 31.08.2010 and another restoration application dated 22.11.2012/ 01.12.2012 were field after sale deed dated 26.04.2010.

v. Revision No.173 was arising out of rejection of the restoration application dated 31.08.2010, but the same has illegally been allowed without discussing the merits of the restoration application.

7. Matter requires consideration.

8. Issue notice to the respondent nos.3 to 5, returnable at an early date.

9. List this matter on 24.11.2021.

10. In the meantime, parties are directed to exchange their respective affidavits.

11. Until further orders of this Court, effect and operation of the orders dated 17.04.2013 and 07.06.2019, passed by the Deputy Director of Consolidations, Annexure Nos.7 and 20 respectively, shall remain stayed.

4. In pursuance of the order dated 28.9.2021 passed by this court, respondent no.3 has put in appearance and filed a recall application, recalling the order dated 28.9.2021. Respondent no.3 also filed a S.L.P. No.5881/2022 before the Hon'ble Apex Court against the interim order dated 28.9.2021, The Hon'ble Apex Court vide order dated 8.4.2022 disposed of the S.L.P., directing this Court to decide the main writ petition along with recall / stay vactaion application within 8 weeks.

5. In compliance of the order of Hon'ble Apex Court dated 8.4.2022, the matter was nominated to another court by Hon'ble Chief Justice but the same was released by earlier court, as such, Hon'ble Chief Justice vide order dated 28.3.2023 has nominated the matter to this Court for disposal in pursuance of the order of Hon'ble Apex Court. This matter was listed on several dates but on the request of counsel for the petitioner, the matter was adjourned, accordingly, the matter could not be heard and disposed of within time limit fixed by Hon'ble Apex Court

however matter has been heard finally on 2.8.2023.

6. Counsel for the petitioner submitted that petitioner, on the basis of the sale deed dated 26.4.2010, executed in his favour, is entitled to be impleaded and heard in the proceeding, under Section 48 of the U.P. C.H. Act. He further submitted that recall / restoration application filed by the petitioner, has been rejected by the Additional District Magistrate/revisional court illegally / arbitrarily. It is further submitted that the order dated 17.4.2013 passed by the Deputy Director of Consolidation in the revisions filed by Om Kumari and Kalawati is ex parte, as such, the order dated 17.4.2013 was liable to be recalled at the instance of the petitioner but the application filed by the petitioner has been rejected in arbitrary manner. He also submitted that the Addl. District Magistrate has wrongly held that the sale deed of the petitioner is during pendency of the proceeding, as such, petitioner is not entitled to be heard in the proceeding. He further placed reliance on the decision of the Apex Court reported in **AIR 2013 SC 2389, Thomson Press (India) Ltd. vs. Nanak Builders and Investors P. Ltd. and Others** in order to demonstrate that *transferee pendente lite* is entitled to be impleaded in the proceeding as the interest has been devolved upon the transferee on the basis of the sale deed, being the bonafide purchaser of the plot in dispute. He also submitted that the impugned orders be set aside and the petitioners should be afforded opportunity of hearing before passing the final order in respect to the plot in dispute.

7. On the other hand, Mr. Punit Kumar Gupta, appearing for respondent no.3 submitted that writ petition filed by

the petitioner, challenging the order dated 17.4.2013, is not maintainable in view of the provision contained under Chapter 22 Rule 1 of the Allahabad High Court Rules, 1952. He further submitted that the earlier writ petitions filed by the tenure holder against the order of the Deputy Director of Consolidation dated 17.4.2013, were dismissed as withdrawn, on the basis of compromise, taken place between the tenure holders, as such, the petitioner has no right to file recall/restoration application against the order dated 17.4.2013 before the Deputy Director of Consolidation as the order dated 17.4.2013, passed by the Deputy Director of Consolidation has attained finality due to disposal of the writ petitions filed by the tenure holders against the order dated 17.4.2013. He also submitted that answering respondent is in peaceful possession of the area and khasra no. 355 and the allegation of the petitioner that petitioner is in peaceful possession of the entire area of khasra no.355 is wrong. He further submitted that there is inter-se dispute between the predecessor-in-interest Kalawati and Meena Kumari as well as the petitioner. He also submitted that the petitioner purchased the property during the pendency of the proceeding in the year 2010 while the Deputy Director of Consolidation passed the final order dated 17.4.2013, declaring 1/3rd, 1/3rd and 1/3rd share to the tenure holders, as such, petitioner cannot claim any right and title on the basis of sale deed alleged to be executed on 26.4.2010. It is further submitted that the sale deed alleged to be executed in favour of petitioner on 26.4.2010, was not registered upto 7.10.2014, as such, there was no occasion at all by the revisional court to consider the claim of the petitioner, on the basis of unregistered sale deed. He further submitted that the revisional court has

decided the dispute finally on 17.4.2013, as such, the sale deed alleged to be registered on 7.10.2014 will not give any right to the petitioner. It is also submitted that the revisional court has rightly decided the dispute vide order dated 17.4.2013. It is further submitted that during pendency of the writ petition before this Court against the order dated 17.4.2013, an amicable settlement has taken place between Meena Kumari, Krishnawati, Kalawati, Roopram and on the basis of settlement/compromise, the writ petitions filed against the order dated 17.4.2013 were dismissed as withdrawn, affirming the order of the Deputy Director of Consolidation dated 17.4.2013. It is further submitted that the writ petition deserves to be dismissed and interim order dated 28.9.2021 is liable to be vacated. He further placed reliance upon the judgment of this Court, reported in **2022 AIR (Ald.) 279, Prayas Buildcon Pvt. Ltd. vs. State of U.P. through Principal Secretary, Housing and Urban Planning and Others**, in order to demonstrate that the subsequent writ petition on the same cause of action will not be maintainable.

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

9. There is no dispute about the fact that the title revision under Section 48 of the U.P. C.H. Act filed by parties to the title revision was decided vide order dated 17.4.2013, passed by the Additional District Magistrate/Deputy Director of Consolidation in Revision Nos. 203 & 173, by which 1/3rd, 1/3rd & 1/3rd share given to the parties. There is also no dispute about the fact that writ petitions filed against the order dated 17.4.2013, were dismissed as withdrawn, on the basis of

compromise filed in the pending writ petition. There is also no dispute about the fact that recall/restoration application filed by the petitioner on the basis of sale deed alleged to be executed on 26.4.2010 and registered on 7.10.2014, before the revisional court, against the order dated 17.4.2013, has been dismissed vide impugned order dated 7.6.2019.

10. It is material that consolidation dispute relating to title arisen in the year 1988 in respect to the holdings of Jamuna Prasad, was contested and ultimately the Deputy Director of Consolidation vide order dated 17.4.2013 decided the title dispute among the tenure holders, giving 1/3rd share each to them. It is also material that the writ petitions filed, challenging the order dated 17.4.2013, was decided by this Court 11.5.2015, on the basis of amicable settlement, took place among the tenure holders, giving the finality to the order of the Deputy Director of Consolidation dated 17.4.2013.

11. Since the order dated 17.4.2013 has been maintained by this Court, while dismissing the writ petitions as withdrawn, as such, petitioner is not entitled to file recall / restoration application after 5 years before the Deputy Director of Consolidation to recall the order and afford opportunity to the petitioner, on the basis of unregistered sale deed, alleged to be executed on 26.4.2010 and subsequently registered on 7.10.2014. The Additional District Magistrate/revisional court while rejecting the petitioner's recall/restoration application vide order dated 7.6.2019, has recorded finding that petitioner has no right to file recall application, being transferee pendente lite.

12. The finding recorded by the Addl. District Magistrate while rejecting the

petitioner's restoration application vide order dated 7.6.2019 will be relevant for perusal which is as under:-

मैंने विद्वान अधिवक्ताओं द्वारा प्रस्तुत तर्कों के परिप्रेक्ष्य में पत्रावली पर उपलब्ध अभिलेखों का परिशीलन व परीक्षण किया। विद्वान अधिवक्ताओं द्वारा प्रस्तुत तर्कों तथा पत्रावली पर उपलब्ध प्रपत्रों से यह तथ्य स्पष्ट होता है कि वादान्तर्गत भूमि गाटा संख्या 355 के मूल काश्तकार जमुना प्रसाद के उत्तराधिकार निर्धारण हेतु वाद की निरन्तरता में श्रीमती कलावती व ओमकुमारी द्वारा दिनांक 26.04.2010 को पुर्नस्थापन प्रार्थी के पक्ष में विक्रय पत्र का निष्पादन किया गया था। स्पष्टतः विक्रय पत्र Pendentelite होने की दशा में पुर्नस्थापन प्रार्थी को Pendentelite क्रेता के अधिकार ही प्राप्त होते हैं। यह भी प्रासंगिक है कि किसी भी क्रेता को अपने विक्रेता के अधिकारी से अधिक अधिकार प्राप्त नहीं हो सकते। उप संचालक चक्रबन्दी के समक्ष निगरानी के निस्तारण में पुर्नस्थापन प्रार्थी के विक्रेता श्रीमती कलावती व ओमकुमारी पक्ष थे तथा उक्त विक्रेता पक्षों को सुनवाई व साक्ष्य का अवसर दिये जाने के उपरान्त ही आदेश दिनांक 17.04.13 पारित किया गया। उक्त स्थिति में आदेश दिनांक 17.04.2013 को एक पक्षीय आदेश अवधारित नहीं किया जा सकता। तदनुसार उपरोक्त विवेचना के क्रम में पुर्नस्थापन प्रार्थना पत्र दिनांक 18.06.2018 सारहीन होने की स्थिति में निरस्त किये जाने योग्य है।

अस्तु पुर्नस्थापन पत्र दिनांक 18.06.2018 निरस्त किया जाता है।

दिनांक 07/06/2019 (मनोज कुमार पाण्डेय)
अपर जिलाधिकारी (वि०/रा०)
बरेली।

13. Considering the finding recorded by the Addl. District Magistrate/revisional court, there is no scope for interference under Article 226 of the Constitution of India at the instance of the petitioner as petitioner is claiming right on the basis of unregistered deed, alleged to be executed on 26.4.2010, which was registered in the year 2014, i.e., after

the date of decision the title dispute by the revisional court.

14. Once the title dispute under the U.P. C.H. Act, at the instance of the tenure holders claiming right from the recorded tenure holders, has attained finality, the petitioner cannot reopen the matter after such a long period, on the basis of sale-deed which was unregistered on the date of decision of revision vide order dated 17.4.2013. It is also material that dispute against the basic year entry was going on for more than 25 years and the same has attained finality in the year 2013, as such, the recall/restoration filed by the petitioner on 8.6.2018 to reopen the title proceeding further, has been rightly refused by the Addl. District Magistrate while passing the order dated 10.4.2019.

15. The case law cited by learned counsel for the petitioner is not applicable in the facts and circumstances mentioned above.

16. Considering the entire facts and circumstances of the case as well as the finding recorded by the Addl. District Magistrate, while rejecting the recall/restoration application, filed by the petitioner, no interference is required in the matter.

17. The writ petition is accordingly dismissed. Interim order granted on 28.9.2021 stands vacated.

18. All the pending applications in the writ petition stand disposed of.

**(2023) 9 ILRA 821
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.08.2023**

BEFORE

**THE HON'BLE SAURABH SHYAM
SHAMSHERY, J.**

Writ-C No. 10936 of 2014

**Arun Kumar Jain & Ors. ...Petitioners
Versus
P.O., Debts Recovery Tribunal, Allahabad
& Ors. ...Respondents**

Counsel for the Petitioners:

Sri H.N. Singh (Sr. Adv.), Sri Vineet Kumar Singh, Sri Sudeep Harkauli, Sri Shekhar Chaudhary

Counsel for the Respondents:

Standing Counsel, Sri Brijesh Kumar Kesharwani, Sri Anadi Krishna Narayana, Sri D.V. Jaiswal, Sri K.M. Asthana, Sri Manish Mehrotra, Sri Rajesh Kesarwani, Sri Sandeep Kumar Singh

Civil Law - Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 - Section 13(2), 13 (3A), 13(4) & 18(1)- Security Interest (Enforcement) Rules, 2002 - Rule (8)(1), 9(3), 9(4) - Auction held on 12.08.2010, auction purchasers paid earnest amount before auction proceedings and 25% of sale amount deposited on next working day - Remaining 75% was due by 26/27.08.2010 - Meanwhile, on 23.08.2010, DRT granted borrowers 30 days to clear dues, they failed to do so - Anticipating default, auction purchasers paid remaining amount between 21.09.2010 and 25.09.2010 - Though beyond 15 days, delay is explained, causes no prejudice to borrowers - During writ proceedings, borrowers failed to offer amount - Whether 25% sale amount includes earnest money, if deposited on

next working day, and whether amended Rule 9(3) of Rules, 2002 applies - DRT took rigid view requiring 25% deposit on auction day itself - Mandatory provisions must not be enforced in way that makes compliance impractical - Act of auction purchasers was under category of 'immediately', without any delay, prescribed procedure followed - Amendment clarified that 25% includes earnest money already deposited - In view of sale notice, bank's reply and rule clarification, DRAT erred in treating it otherwise - Impugned order erroneous, hence, set aside. (Para 20, 23, 26, 29, 33, 35)

Writ Petition allowed. (E-13)

List of Cases cited:

1. General Manager, Sri Siddheswara Coop. Bank Ltd. & anr. Vs Ikbali & ors.. (2013) 10 SCC 83 (Para 19)
2. Zile Singh Vs St. of Har. & ors., (2004) 8 SCC 1 (Para 14 to 18)
3. Varimadugu Obi Reddy Vs B.Sreenivasulu & Ors, (2023) 2 SCC 168 (Para 44 to 46)

(Delivered by Hon'ble Saurabh Shyam Shamshery, J.)

IMPUGNED ORDER

1. This writ petition is being filed by auction purchasers being aggrieved by impugned order dated 19.11.2013 passed by Debt Recovery Appellate Tribunal, Allahabad in Appeal No. R-214 of 2013 whereby said appeal filed by petitioners was dismissed. By amendment, petitioners have also challenged the order dated 23.10.2013 passed by Debts Recovery Tribunal, Allahabad in Securitization Application No. 153 of 2009.

FACTUAL MATRIX

2. M/s Firozabad Cold Storage Ltd., its Managing Director and others, who are respondents no. 4 to 8 (hereinafter referred to as “borrowers”) have availed credit facility from the respondent bank (Bank of Baroda) sanctioned on 14.10.2005 for the business of cold storage.

3. The borrowers have failed to repay the loan amount, therefore, the respondent bank has issued a notice dated 06.04.2009 under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short “SARFAESI Act”). The borrowers have submitted their reply on 01.06.2009 under Section 13 (3A) of SARFAESI Act.

4. The borrowers remained failed to repay the loan, therefore, a notice dated 13.09.2009 under Section 13(4) of SARFAESI Act and Rule (8) of Security Interest (Enforcement) Rules, 2002 (for short “Rules”) was issued by the bank. Later on, an auction notice dated 14.11.2009 was published by the respondent bank for auction of property in question.

5. The borrowers have filed a S.A. No. 153 of 2009 before the Debts Recovery Tribunal, Allahabad on 14.12.2009 challenging the notice dated 13.09.2009 i.e. a possession notice issued under Section 13(4) of SARFAESI Act and Rule 8(1) of Rules made therein.

6. The respondent bank took possession of property under auction on 23.09.2009 and auction sale was fixed on 16.12.2009, however, auction was not materialized on 16.12.2009.

7. During pendency of above referred S.A. No. 153 of 2009, the respondent bank has published a second auction notice on 05.07.2010 in newspapers, fixing 12.08.2010 for auction sale. The terms and conditions as mentioned in notice are reproduced hereinafter -:

“नियम व शर्तें:- (1) इच्छुक निविदाकर्ता सम्बन्धित सम्पत्ति क्रय करने हेतु अपने प्रस्ताव टेंडर राशि मांग ड्राफ्ट द्वारा जो प्राधिकृत अधिकारी बैंक ऑफ बड़ौदा के पक्ष में आहरित किया गया हो के साथ बंद लिफाफे में भेजें। असफल निविदाकर्ताओं को बयानों की राशि बिना किसी ब्याज के वापस कर दी जाएगी। यदि सफल बोलीदाता विक्रय की शर्तों समय का पालन नहीं करता या अन्य किसी प्रकार की चूक करता है तो बयान की राशि बिना किसी पूर्व सूचना के जब्त कर ली जाएगी। प्रस्ताव सम्बन्धित शाखा के पास दिनांक 12.8.10 को दोपहर 2 बजे तक या इससे पहले जमा कर दिए जाएँ। (2) सील बन्द निविदाएँ प्राधिकृत अधिकारी द्वारा उपस्थित निविदाकर्ताओं के समक्ष ऊपर दर्शित जगह व समय पर खोली जाएँगी। (3) निविदाएँ खुलने के बाद प्राधिकृत अधिकारी के विवेक पर इच्छुक खरीदारों को परस्पर सहमति द्वारा प्रस्तावित मूल्य को बढ़ाने का अवसर दिया जा सकता है। (4) सफल निविदादाता को विक्रय मूल्य की 25% धनराशि (बयाना राशि सहित) विक्रय तिथि को ही नकद अथवा उपरोक्तानुसार माँग ड्राफ्ट द्वारा जमा करनी होगी विक्रय मूल्य की शेष धनराशि प्राधिकृत अधिकारी अथवा सिक्योरिटी क्रेडिटर्स द्वारा विक्रय की पुष्टि के 15 दिन के भीतर अथवा दिए गये समय तक जमा करनी होगी। इसमें चूक होने पर उस समय तक जमा की गयी सम्पूर्ण रकम जब्त कर ली जाएगी। (5) सफल निविदादाता को सम्पत्ति की रजिस्ट्री कराने हेतु समस्त स्टॉम्प व रजिस्ट्रेशन शुल्क व अन्य व्यय स्वयं वहन करने होंगे। प्राधिकृत अधिकारी के पास बिना कारण बताए किसी भी निविदा को स्वीकृत/अस्वीकृत/स्थगित/रद्द करने का अधिकार और विक्रय नियमों एवं शर्तों में संशोधन करने के अधिकार सुरक्षित होंगे। (6) प्राधिकृत अधिकारी, मालिक/बोलीदाता/आम जनता को सूचना दिए बिना बिक्री को रद्द/स्थगित कर सकता है और/या किसी भी नियम व शर्तों को किसी भी समय बदल सकता है/ जोड़ सकता है/हटा सकता है। (7) इच्छुक खरीददार सम्बन्धित शाखा से किसी भी कार्य दिवस में सम्पर्क कर सम्पत्ति का मुआयना कर सकते हैं एवं अधिक जानकारी के लिए सम्पर्क कर सकते हैं।

स्थान: आगरा

दिनांक:- 5.07.10

प्राधिकृत अधिकारी”

(Emphasis supplied)

8. The petitioners were successful in auction proceedings being highest bidder for Rs. 1,05,00,000/-. They paid entire amount i.e. firstly, 25% (including earnest amount) and later on remaining 75% in different slots.

9. There is a dispute in regard to details of amount paid on different dates by the petitioners (auction purchasers), therefore, for reference, details provided by the auction purchasers are as follows -:

Date	Amount	Mode
16.08.2010	10.20 lakh	Cheque
13.08.2010	16.05 lakh	Cash
21.09.2010	15.00 lakh	RTGS
23.09.2010	12.675 lakh	Cheque
23.09.2010	21.00 lakh	RTGS
24.09.2010	2.50 lakh	Cash
25.09.2010	14.00 lakh	Cheque
25.09.2010	8.00 lakh	RTGS
25.09.2010	2.80 lakh	Cash
25.09.2010	2.775 lakh	Cash

10. Meanwhile, the Debts Recovery Tribunal, Allahabad passed following order dated 23.08.2010 in S.A. No. 153 of 2009 -:

“In support of its application, Ld. Counsel for the applicants stated that the bank published sale notice on 5.7.2010 and fixed 12.8.2010 for sale by fixing reserve price of the secured asset to Rs. 102.00 lacs. The bank had received a bid offering Rs. 105.00 lacs. Bank vide letter dt. 14.8.2010 offered the applicant for

arranging a bidder whose offer is more than Rs. 102.00 lacs within’ 10 days failing which the bank shall accept the bid of the bidder as per terms of advertisement of sale. In response to the bank's letter dt. 14.8.2010 applicant submitted a detailed proposal and submitted that applicant has a prospective buyer who has offered Rs. 108.50 lacs although it is more than the bid received by the bank.

Considered the rival contention of the parties. Seen the earlier sale notice dated 14.11.2009 showing the reserve price of the buyer who will purchase the said property in better price than the offer of Rs. 105.00 lacs received by the bank. Reportedly, they have a buyer offering Rs. 108.50 lacs. In view of this, I am of the opinion that applicant be given an opportunity of 30 days to arrange prospective buyer. If prior to 30 days, a more reasonable offer is received by the applicants, they are free to offer the said amount along with a token money of 25% of the said offer. The bank shall consider the same. Failing this the bank will be at liberty to act according to the terms and conditions of the sale notice.

Fix 27.09.2010 for further orders.”

(Emphasis supplied)

11. The respondents, despite opportunity, was unable to produce any buyer who could offer more than what petitioners have offered and before 27.09.2010 i.e. next date fixed in the SA, the auction purchasers have deposited entire amount.

12. A sale certificate dated 27.09.2010 was accordingly issued to the

petitioners, the auction purchasers and possession was also handed over to them.

13. The respondents, therefore, have approached this Court by filing a Writ C No. 74713 of 2010, however, this Court without allowing their prayer, disposed of the writ petition by an order dated 23.12.2010 with a direction to the Tribunal to decide pending matters.

14. Some other attempts of respondents were also failed, however, the Debts Recovery Tribunal by order dated 13.04.2013 allowed the S.A. No. 153 of 2009, filed by the respondents and held that process initiated by the bank under SARFAESI Act was defective and accordingly, it was set aside and status quo ante was restored. The auction sale, sale certificate and sale deed issued or executed by bank and all ancillary and subsequent steps taken by bank qua to auction of secured assets were set aside. The Debts Recovery Tribunal held that -:

(a) reply/objection of the debtor dated 01.06.2009 to demand notice dated 06.04.2009 was not disposed.

(b) auction purchasers have deposited the remaining amount (25% of bid) on the next day of auction and not on the same day as per the terms of auction.

(c) The auction purchasers have deposited remaining 75% of bid amount after 30 days' time was expired on 23.09.2010. They have started depositing the said amount on 21.09.2010 and concluded in different installments/slots on 25.09.2010.

15. The petitioners (auction purchasers) being aggrieved by above

order, preferred an Appeal No. 455 of 2013 under Section 18(1) of SARFAESI Act, which was rejected by impugned order dated 19.11.2013.

16. The Debts Recovery Appellate Tribunal has held that -:

“On the basis of the same, it is clear that the view which has been already taken by this Tribunal that towards 25% of the sale price which was deposited by the appellant immediately after the sale in that amount the earnest money cannot be included and therefore, under these circumstances, while depositing the amount there was no deposit of 25% of the amount immediately on the date by the appellant.

With reference to the balance of the amount it was deposited by the appellant by the end of 25.09.2010. The question arises for consideration is whether extension in absence time of under any the of agreement as per Rule 9 (4) of the Security Interest Enforcement Rules, 2002 whether it was a valid deposit in compliance to Rule 9 (4) of the Rules, 2002? In this regard, this is to be seen that the Tribunal passed an order on 23.08.2010 by which an opportunity was given by passing the interim order by the Tribunal to produce the prospective buyer who is ready to purchase the property for a higher amount in pursuance to the order passed by the Tribunal. The borrower failed to produce the prospective buyer who could offer the higher amount than offered by the appellant the auction purchaser. When the Tribunal passed the order, the appellant was not a party at that point of time. Thus, nothing prevented to the appellant to deposit 25% (sic 75%) of the amount within a period of 15 days from the date of the sale as per Rule 9 (4) of the Security

Interest Enforcement Rules, 2002. It is also not the case of the appellant auction purchaser that he offered the Bank to deposit the balance of the amount but the bank did not accept the same. Under these circumstances, the appellant being the auction purchaser cannot shirk from his responsibility in not complying with the provision of Rule 9 (4) of the Security Interest Enforcement Rules, 2002. The Apex Court in G. M., Sri Siddeshwara Co-operative Bank Ltd. & Anr. Vs. Ikbāl and others [2013 (2) D.R.T.C. 457] has held that the compliance of Rule 9 (3) and (4) of the Security Interest Enforcement mandatory Rules, nature 2002 but are the in mandatory condition can also be waived. The waiver of the mandatory condition is to be under an agreement between the parties. In the present case, the Bank alone can not extend the period of deposit and the appellant also has not applied for any extension of time. It may be that on 23.08.2013, the Tribunal while passing the interim order gave an opportunity to the borrower to produce some prospective buyer who is prepared to offer better price than received appellant by the Bank from who is the the auction purchaser. On the basis of the aforesaid order of the DRT, the appellant/auction purchaser was not prevented in any case either by the Tribunal or by the Bank to deposit balance of the amount and it is also not the case of the appellant auction purchaser that he offered to deposit but the same was not accepted and D.R.T. also did not order that the Bank will not accept the deposit from auction purchaser.

Under the facts and circumstances of the case, the judgment passed by the Apex Court in G. M., Sri Siddeshwara Co-operative Bank Ltd. & Anr. Vs. Ikbāl and others [2013 (2) D.R.T.C. 457] (supra) applies with full force

to the present case to hold that for the firstly there was no compliance of Rule 9 (3) as the 25% of the sale price was not deposited by the appellant immediately after the sale and the money deposited is inclusive of 10% of the amount of earnest money which cannot be adjusted towards the 25% of the sale price but it is deposited only as an earnest money to participate in the auction and as such the money is to be excluded from 25% of the sale price.

On the basis of my over all assessment, I am of the view that in the present case the Tribunal has rightly set aside the auction and the order passed by the DRT is not called for any interference.

The learned counsel for the appellant submitted that in the present case the Tribunal has committed a glaring mistake while setting aside the auction and directing to restore the possession it has not directed to refund the amount which was deposited by the appellant. This deserves to be accepted.

Under the circumstances, the Bank is directed to return the amount of auction purchaser alongwith the interest at the rate of 10% simple interest per annum and to this extent the appeal stands allowed.”

(Emphasis supplied)

SUBMISSIONS

17. Learned Senior Advocate Sri H.N. Singh assisted by Sri Vineet Kumar Singh, Advocate for petitioners has submitted that -:

(i) The petitioners/auction purchasers have paid entire auction amount

i.e. 10% earnest amount, before the bid, 25% (including 10% earnest amount) on next working day of auction and remaining 75% of the amount also within the stipulated time i.e. time granted to borrowers, whereas respondents/borrower have neither deposited the outstanding loan amount nor has come forward with any buyer who could offer more than bid price of the petitioners.

(ii) The DRAT has rejected the appeal filed by the petitioners only on ground that 25% of bid amount required to be deposited soon after auction proceedings does not include 10% amount deposited at the time of bid and has placed reliance on **General Manager, Sri Siddheswara Coop. Bank Ltd. and another vs. Ikbali and others (2013) 10 SCC 83** that Rule 9(3) and 9(4) of the Rules are mandatory except waived off expressly.

(iii) Learned Senior Advocate has further submitted that in the present case, bid were opened on 12.08.2010 at about 3.00 PM and process was finalized at about 4.30 PM and by that time, bank was closed and on very next date (i.e. 13.08.2010) Rs. 16,05,000/- was deposited in the form of draft making 25% whereas Rs. 10,20,000/- was already deposited being earnest amount.

(iv) Learned Senior Counsel referred the conditions mentioned in auction notice published in newspaper that successful bidder has to deposit 25% bid amount (including earnest money) on the day of auction.

(v) Learned Senior Counsel has further submitted that amended Rule 9(3) of the Rules (w.e.f. 04.11.2016) has clarified an ambiguity that purchaser shall on the day of auction or not later than next

working day, pay a deposit of 25% of the amount of the sale price which is to be inclusive of earnest money deposited, if any. Amended Rule 9(3) of Rules, 2002 is as follows -:

“(3) On every sale of immovable property, the purchaser shall immediately, i.e. on the same day or not later than next working day, as the case may be, pay a deposit of twenty five per cent. of the amount of the sale price, which is inclusive of earnest money deposited, if any, to the authorized officer conducting the sale and in default of such deposit, the property shall be sold again.”

(vi) Learned Senior Advocate has urged that at relevant time, unamended Rule 9 (3) of Rules was in force, but amended Rule has clarified the ambiguity, therefore, its benefit could be extended retrospectively in facts and circumstances of present case.

(vii) Learned Senior Advocate in order to buttress his argument has referred **Zile Singh vs. State of Haryana and others, (2004) 8 SCC 1** that under certain circumstances, effect and benefit of an amendment would operate retrospectively from the date of its commencement. Relevant paragraphs 14 to 18 thereof are mentioned below -:

“14. The presumption against retrospective operation is not applicable to declaratory statutes.... In determining, therefore, the nature of the Act, regard must be had to the substance rather than to the form. If a new Act is “to explain” an earlier Act, it would be without object unless construed retrospectively. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as

to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended.... An amending Act may be purely declaratory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect (*ibid.*, pp. 468-69).

15. Though retrospectivity is not to be presumed and rather there is presumption against retrospectivity, according to Craies (Statute Law, 7th Edn.), it is open for the legislature to enact laws having retrospective operation. This can be achieved by express enactment or by necessary implication from the language employed. If it is a necessary implication from the language employed that the legislature intended a particular section to have a retrospective operation, the courts will give it such an operation. In the absence of a retrospective operation having been expressly given, the courts may be called upon to construe the provisions and answer the question whether the legislature had sufficiently expressed that intention giving the statute retrospectivity. Four factors are suggested as relevant: (i) general scope and purview of the statute; (ii) the remedy sought to be applied; (iii) the former state of the law; and (iv) what it was the legislature contemplated. (p. 388) The rule against retrospectivity does not extend to protect from the effect of a repeal, a privilege which did not amount to accrued right. (p. 392)

16. Where a statute is passed for the purpose of supplying an obvious omission in a former statute or to "explain" a former statute, the subsequent statute has relation back to the time when the prior Act

was passed. The rule against retrospectivity is inapplicable to such legislations as are explanatory and declaratory in nature. A classic illustration is the case of Attorney General v. Pougett [(1816) 2 Price 381 : 146 ER 130] (Price at p. 392). By a Customs Act of 1873 (53 Geo. 3, c. 33) a duty was imposed upon hides of 9s 4d, but the Act omitted to state that it was to be 9s 4d per cwt., and to remedy this omission another Customs Act (53 Geo. 3, c. 105) was passed later in the same year. Between the passing of these two Acts some hides were exported, and it was contended that they were not liable to pay the duty of 9s 4d per cwt., but Thomson, C.B., in giving judgment for the Attorney General, said: (ER p. 134)

“The duty in this instance was, in fact, imposed by the first Act; but the gross mistake of the omission of the weight, for which the sum expressed was to have been payable, occasioned the amendment made by the subsequent Act: but that had reference to the former statute as soon as it passed, and they must be taken together as if they were one and the same Act;” (Price at p. 392)

17. Maxwell states in his work on *Interpretation of Statutes* (12th Edn.) that the rule against retrospective operation is a presumption only, and as such it “may be overcome, not only by express words in the Act but also by circumstances sufficiently strong to displace it” (p. 225). If the dominant intention of the legislature can be clearly and doubtlessly spelt out, the inhibition contained in the rule against perpetuity becomes of doubtful applicability as the “inhibition of the rule” is a matter of degree which would “vary secundum materiam” (p. 226). Sometimes, where the sense of the statute demands it or

where there has been an obvious mistake in drafting, a court will be prepared to substitute another word or phrase for that which actually appears in the text of the Act (p. 231).

18. In a recent decision of this Court in *National Agricultural Coop. Marketing Federation of India Ltd. v. Union of India* [(2003) 5 SCC 23] it has been held -:

that there is no fixed formula for the expression of legislative intent to give retrospectivity to an enactment. Every legislation whether prospective or retrospective has to be subjected to the question of legislative competence. The retrospectivity is liable to be decided on a few touchstones such as: (i) the words used must expressly provide or clearly imply retrospective operation; (ii) the retrospectivity must be reasonable and not excessive or harsh, otherwise it runs the risk of being struck down as unconstitutional; (iii) where the legislation is introduced to overcome a judicial decision, the power cannot be used to subvert the decision without removing the statutory basis of the decision. There is no fixed formula for the expression of legislative intent to give retrospectivity to an enactment. A validating clause coupled with a substantive statutory change is only one of the methods to leave actions unsustainable under the unamended statute, undisturbed. Consequently, the absence of a validating clause would not by itself affect the retrospective operation of the statutory provision, if such retrospectivity is otherwise apparent.”

(Emphasis supplied)

(viii) Learned Senior Advocate has also submitted that a registered notice

dated 01.06.2009 was sent by an Advocate of respondents/borrowers which could not be considered to be an objection to the notice dated 06.04.2009 issued by the bank under Section 13(2) of SARFAESI Act, since contents of registered notice dated 01.06.2009 did not refer that it was in reply to said notice as well as it did not refer any objection or about discharge of complete liability in terms of notice either, rather it was a notice (not a reply) and a request to waive the interest or fine and fix four installments with simple interest for repayment. This would not fall under representation or objection required to be dealt with in terms of Section 13(3A) of SARFAESI Act.

18. Per contra, Sri Brijesh Kumar Kesharwani, learned counsel for the respondents (borrowers) has referred para 19 of **General Manager, Sri Siddheshwara (supra)** that -:

“19. There is no doubt that Rule 9(1) is mandatory but this provision is definitely for the benefit of the borrower. Similarly, Rule 9(3) and Rule 9(4) are for the benefit of the secured creditor (or in any case for the benefit of the borrower). It is settled position in law that even if a provision is mandatory, it can always be waived by a party (or parties) for whose benefit such provision has been made. The provision in Rule 9(1) being for the benefit of the borrower and the provisions contained in Rule 9(3) and Rule 9(4) being for the benefit of the secured creditor (or for that matter for the benefit of the borrower), the secured creditor and the borrower can lawfully waive their right. These provisions neither expressly nor contextually indicate otherwise. Obviously, the question whether there is waiver or not depends on the facts of each case and no

hard-and-fast rule can be laid down in this regard.”

(Emphasis supplied)

(i) Learned counsel has submitted that since auction had taken place on 12.8.2010, therefore, provisions of unamended Rule 9 (3) of Rules, 2002 would govern and not amended Rule 9 (3) of Rules, 2002 which came into effect from 4.11.2016. Retrospective effect has to be mentioned specifically in the amended statute and it cannot be inferred that 25% percent of sale amount did not include earnest money.

(ii) Learned counsel also referred an order dated 23.10.2013 passed by Debts Recovery Tribunal wherein the S.A. No.153 of 2009 filed by the respondents (borrowers) was allowed and entire auction proceedings being contrary to mandatory provisions was set-aside. Learned counsel has referred following findings returned by Debts Recovery Tribunal that -:

“Non disposal of a notice dated 1.6.2009 issued by the borrower and thus Bank failed to comply the provisions of Section 13 (3A) of SARFAESI Act, which states that -:

“[(3A) If, on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate [within fifteen days] of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower:

Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under section 17 or the Court of District Judge under section 17A.]”

(iii) Learned counsel also referred that a specific reply to notice issued under section 13 (2) of SARFAESI Act, was sent on 30.12.2010, though delayed but it remained unanswered.

(iv) Auction purchasers have failed to deposit 25% of sale amount on the date of auction. The bank has failed to facilitate deposit after closure of cash amount considering the urgency. Undisputedly, remaining balance (25%) was deposited on the next day of auction, but including earnest amount which was not demand of statute.

(v) The auction purchasers have deposited remaining 75% amount in different slots which continued after 30 days of mandatory period.

(vi) There is no illegality or irregularity in the impugned order. The bank can initiate fresh proceedings of auction and money deposited by auction purchaser has been directed to be refunded with 10% interest and therefore, petitioners have no prejudice.

19. Learned counsel for the Bank has adopted the arguments of the petitioners and submitted that the appeal filed by the Bank against the order passed by Debts Recovery Tribunal is still pending before Debts Recovery Appellate Tribunal and he referred few paragraphs i.e. 17, 18, 22 and

23 of the counter affidavit filed on behalf of Bank, which are mentioned hereinafter:

“17. That, by the time i.e. 4.30 P.M. on 12-8-2010 the auction proceedings were finalized the banking hours had closed and cash counter of the Bank was closed therefore due to non - availability of the cash counter, the auction purchaser could not deposit the balance of 15% of the 25% of the bid amount on 12-8-2010 and they deposited the same on the very next working day i.e. 13-8-2010 and thus the requirement of complying with rule 9(3) was fulfilled.

18. That, under Rule 9(3) instead of having a mechanical of the word "immediately" to meaning of the mean simultaneously or synchronizing with which happens in the matter of private auction sale under the Sale of Goods Act 1930, where payment of the bid amount is required to be made by fall of the hammer and contrary to it here under clause the word "immediately" has been given contextual meaning to mean "with all reasonable quickness and within a reasonable prompt time" as the Hon'ble Apex Court has interpreted in the matter of Ram Mahmood Khan V/S Sh. Ranbir Singh and others AIR 1995 SC 2195 (2198) a similar and identical provision of the law dealing recovery and auction sale contained in Rule 285-D of the U.P. Zamindari Abolition and Land Reforms Rules, 1952.

22. That, the Tribunal itself put a restraint on the concerned branch to wait for 30 days to finalize the auction sale which the Tribunal totally misinterpreted in the final judgment that there was no stay order in this regard.

23. That, a requirement provided in an order to consider something if done within time is nothing but a stay order and after the clog in the form of the above stay order ended/ was over, the auction purchaser paid the balance 75% of the auction price between 21-9-2010 to 25-9-2010 as the borrowers were directed to approach prior to expiry of 30 days time and 21-9-2010 was 30th day from the date of the order dated 23-8-2010 and Tribunal grossly erred in law and on fact by holding that 30th day ended on 23-9-2010.”

CONSIDERATION & CONCLUSION

20. The issue of consideration is whether 25% of sale amount shall be inclusive of earnest amount or not and whether in some circumstances, said amount could be deposited on next working day also and effect of amendment carried out in Rule 9(3) of Rules, 2002 (i.e. 'Doctrine of Relation Back') has any bearing in facts and circumstances of present case?

21. In the background of undisputed facts that the petition (auction purchasers) have paid the earnest amount well before the auction proceedings and auction sale was finalized on 12.8.2010 at about 4.30 P.M. i.e. after working hours of Bank were over and remaining amount of 25% of sale amount (including earnest amount) was deposited on next working day i.e. 13.8.2010, the Court proceed to consider the rival submissions on facts and on law as well.

22. Before the amendment by substituting Rule 9 (3) of Rules 2002 words used were “purchaser shall pay immediately a deposit of twenty five

percent of the amount of its sale price". Neither the word 'immediately' nor the words 'twenty five percent' were clear and there was some ambiguity, therefore, in 2016 Rule 9 (3) of Rules, 2002 was substituted and it was clarified i.e. words 'immediately' and 'twenty five percent' were clarified that:

"3. On every sale of immovable property, the purchaser shall immediately, i.e., on the same day or not later than next working day, as the case may be, pay a deposit of twenty-five per cent. of the amount of the sale price, which is inclusive of earnest money deposited, if any, to the authorised officer conducting the sale and in default of such deposit, the property shall be sold again."

23. As referred above earlier ambiguity has now been clarified. The Debts Recovery Tribunal has taken a very technical and strict approach that auction sale purchasers has to deposit 25% of sale amount on the day of auction only and for that Bank has to facilitate deposit of amount even after working hours. Compliance of provisions are mandatory but they could not be made complexed to the extent that provisions itself become impossible to follow.

24. The word 'immediately' means stronger than expression 'within a reasonable time' and imply prompt vigorous action, without any delay. It means with all convenient speed. The word 'immediately' should not be construed so as to require something which is impossible. (Halsbury's Law of England, 4th Ed., Vol.23, para 1618, p.1178)

25. As per Black's Law Dictionary (6th Edition) word 'immediately' means

doing of a thing straight away or forthwith but when used in the context of contract, it is usually construed to mean within a reasonable time having due regard to the nature of circumstances of the case.

26. 'Immediately' means 'prompt', 'within reasonable time' or 'within stipulated period.' In the present case, admittedly, auction proceedings got over by 4.30 P.M. on 12.8.2010 when working hours of Bank were over and in normal circumstances, 25% of the sale amount at the earliest could be deposited no sooner than before next working day. The petitioners (auction purchasers), have immediately on next working day (13.8.2010) deposited the amount i.e. 25 % of sale price which includes the earnest amount. The act therefore, definitely was under the category of 'immediately', without any delay. Therefore, it could not be held that procedure prescribed was not complied.

27. Now by the amendment (by substitution) in Rule 9 (3) of Rules, 2002 (amended in 2016) has removed all ambiguity by clarification that "on the same day of not later than next working day". The approach of DRAT has, therefore, a legal flaw and the concerned finding could not be legally justified.

28. The connected issue as to whether 25% amount will be inclusive of earnest amount or not, has to be considered in the background that auction notice dated 5.7.2010 (published in newspaper), which is part of para 2 (v) of judgment, has clearly stipulates that 25% amount of sale to be deposited immediately would be inclusive of earnest amount. The specific words used are सफल निविदादाता के विक्रय मूल्य की २५% धनराशि (बयाना राशि सहित) विक्रय तिथि को ही नकद

अथवा उपरोक्तानुसार मांग ड्राफ्ट द्वारा जमा करनी होगी, however this fact has completely skipped from consideration by the DRAT. Supreme Court in **Sri Siddheshwara (supra)** has held that Rule 9 (3) and 9 (4) being for benefit of the borrower, are mandatory provisions but could be waived of. This judgment has not dealt with an issue as to whether 25% would be inclusive of earnest amount or not, where it has dealt a case where borrower has given consent that remaining amount i.e. 75 % could be accepted by the auction purchaser belatedly or not.

29. The amendment by substitution carried out in 2016 has clarified that 25% amount shall be inclusive of earnest money already deposited. Therefore, considering the condition mention in notice, reply of the respondent bank and subsequent clarifications to the Rules, according to Court's opinion 25% of sale amount will be inclusive of earnest amount already deposited. Therefore, DRAT has made a legal error on this issue also. The amendment in Rules, by way of clarification could be considered retrospectively in certain circumstances as referred in **Zile Singh (supra)** that:

“ Where a statute is passed for the purpose of supplying an obvious omission in a former statute or to “explain” a former statute, the subsequent statute has relation back to the time when the prior Act was passed.”

30. The amended Rule 9 (3) of Rules, 2002 has clearly stipulated a clarification and part of Rule begins from i.e. (“that is” or “in other words”), which is shortening of the Latin expression ‘id est’ and it is normally used to introduce a further explanation or paraphrase. As referred in

Zile Singh (supra) a clarification could be related back i.e. it could be applicable retrospectively. The amendment being explanatory, therefore, it may be construed as retrospective in nature.

31. The other issue urged is non-consideration of the alleged objections of borrowers to the notice of bank under Section 13 (4) of SARFAESI Act. I have carefully perused the legal notice dated 1.6.2009 (sent by an Advocate on behalf of the borrower and alleged to be reply to referred notice), however, contents thereof does not indicate that it was in reply to notice of bank. It does not refer about said notice either, therefore, it would not be deemed as an objection to notice issued by the Bank as per rules a belated reply, if any, was not required to be considered.

32. The counsel for respondents (borrowers) has pointed out that 75% of sale amount was deposited after 15 days and thus, violated the mandatory conditions of Section 13 (2) of the Act.

33. The auction took place on 12.8.2010 and as referred above, 25% of sale amount including earnest amount was paid by the auction purchasers (petitioners) on very next working day. According to Section 13(4) of SARFAESI Act, remaining 75% amount of sale price was to be deposited on or before 26/27-8.2010. However, during intervening period on 23.8.2010 (i.e. before 15 days), the Debts Recovery Tribunal, on an application of the borrowers, granted them a period of 30 days to deposit Rs.1.08 Crore to clear outstanding loan amount and admittedly borrower has failed to deposit said amount. It appears that when auction purchasers found that the borrower might fail to deposit said amount, he started payment of

75% remaining amount in different slots between 21.9.2010 to 25.9.2010 i.e. before the date fixed before DRT and just two days after 30 days to borrower were over. The time of 15 days is not sacrosanct since it could be extended. In above circumstances, though there was no written agreement, still delay has been explained and said delay has not prejudiced the borrowers in any manner, since even during pendency of present writ petition, borrowers have failed to offer money.

34. In similar circumstances, Supreme Court in *Varimadugu Obi Reddy Vs. B.Sreenivasulu & Ors, (2023) 2 SCC 168*, has held that delay in payment of 75% of sale amount would not be an illegality, when borrower has sought time for repayment and failed. Relevant paragraphs 44, 45 and 46, therefore, being relevant, are reproduced hereinafter -:

“44. In the instant case, although there was no written consent by all the three partner s, namely, the secured creditors, borrowers and auction-purchaser, as being referred to by this Court in Sri Siddeshwara Cooperative Bank [Sri Siddeshwara Cooperative Bank Ltd. v. Ikbal, (2013) 10 SCC 83 : (2013) 4 SCC (Civ) 638], but this fact cannot be ruled out that in the instant case, the peculiar situation has come forward when the respondent borrowers in the first instance approached the Tribunal assailing the e-auction notice issued by the respondent Bank (secured creditor) and were able to secure an interim order from the Tribunal dated 26-3-2015 permitting the auction proceedings to continue, subject to the condition that the borrower shall deposit Rs 6 lakhs directly with the respondent Bank within 15 days from the date of order, which admittedly expired on

9-4-2015 and the respondent borrowers failed to deposit the aforesaid amount.

45. On the last date when the period was to expire on 9-4-2015, IA No. 1687 of 2015 was filed seeking extension of time period by 15 days for depositing the sum of Rs 6 lakhs and as there was no stay in withholding the e-auction proceedings, the appellant deposited not only the earnest money but 25% of the bid amount in the first instance on 28-3-2015, the balance 75% of the bid amount was deposited on 15-4-2015 and the interregnum period was in incomplete phase of flux as to what will be the fate of the auction-purchaser pending proceedings before the Tribunal, more so when the application was filed by the respondent borrowers on 9-4-2015 seeking extension of time and that being the situation, 75% of the bid amount was deposited on 15-4-2015 and sale certificate was issued and still thereafter when the Tribunal granted extension of 15 days of time to the respondent borrowers by an order dated 17-4-2015 to deposit the sum of Rs 6 lakhs, the respondent borrowers failed to deposit the aforesaid amount, and as it reveals from the record, a further time was granted to the respondent borrowers to deposit a sum of Rs 6 lakhs by an order dated 1-5-2015 and much before that, the auction proceedings were finalised and even the rectification deed came to be executed on 21-4-2015.

46. In the given facts and circumstances, the four days' delay which was caused in terms of the original auction notice, in no manner, would frustrate or annul the auction proceedings and the Debts Recovery Tribunal has rightly held that because in such state of flux, particularly when the bank/secured creditor requested the auction-purchaser to wait for

some time because the borrowers are negotiating with the bank in the light of interim order dated 26-3-2015 of the Tribunal, delay in depositing 75% of the bid amount by four days in no manner would frustrate the rights of the parties inter se, more so, when the conduct of the borrowers in getting extension orders on two different occasions and still not depositing Rs 6 lakhs in terms of the order of the Tribunal would clearly reflect that the intention of the borrowers was only to frustrate the auction-sale by one reason or the other, which they could not succeed.”

(Emphasis supplied)

35. The outcome of above discussion is that impugned order dated 19.11.2013 passed by DRAT is erroneous and therefore, is liable to be set-aside, hence, set-aside.

36. The writ petition is allowed. Legal consequence thereof shall follow forthwith.

(2023) 9 ILRA 834

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 16.08.2023

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

Writ-C No. 13576 of 2023

The Committee of Management, Meerut & Anr. ...Petitioners

Versus

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

Counsel for the Petitioners:

Sri Shiivendu Ojha, Sri Shiv Prakash Gupta,
Sri Radha Kant Ojha (Sr. Adv.)

Counsel for the Respondents:

C.S.C., Sri Abhishek Pandey, Sri Rajiv Sharma

Civil Law - Societies Registration Act, 1860 - Sections 23, 2 & 25(1) - Petitioner challenges order dated 05.04.2023, by which Respondent no. 3 appointed Divisional Director as Administrator to manage its affairs until fresh elections and also order dated 09.09.2022, by which Respondent no. 4 under Section 25(2) of Act, 1860, dissolved petitioner's executive body, directed fresh elections - Under Section 25(2) of Act, 1860, any action like removing office bearer or setting aside election must be based on order under Section 25(1) - Respondents cannot act unilaterally - No proceedings initiated or order passed under Section 25(1) - If allegations regarding immovable property exist, Clause 38 of Bye-laws requires Commission to refer such matters to parent Society or Registrar for action, not to act directly against petitioners - Bye-laws do not permit Deputy Registrar to directly remove elected body or order fresh elections under Section 25(2) - Registrar could proceed under Sections 23 or 24 for audit or mismanagement - Since no such proceedings held and no order under Section 25(1) passed, Deputy Registrar had no jurisdiction - Order dated 09.09.2022 is without authority - No provision in Bye-laws that allows appointment of Administrator - Clause 38 does not give authority - Appointing Divisional Director as Administrator has no legal basis, quashed. (Para 2, 23, 24, 25, 26)

Writ Petition allowed. (E-13)

List of Cases cited:

1. Institute of Chartered Accountants of India Vs M/s Price Waterhouse & anr., AIR 1998 SC 74
2. Crawford Vs Spooner, (1846) 6 Moore PC 1
3. St. of Gujarat & ors. Vs Dilipbhai Nathjibhai Patel & anr. JT 1998 (2) SC 253

4. Stock Vs Frank Jones (Tiptan) Ltd., 1978 (1) All ER 948 (HL)

5. Vickers Sons and Maxim Ltd. Vs Evans, (1910) AC 445 (HL)

6. Jamma Masjid, Mercara Vs Kodimaniandra Deviah & ors., AIR 1962 SC 847

7. Lenigh Valley Coal Co. Vs Yensavage, 218 FR 547

8. U.O.I.& ors. Vs Filip Tiago De Gama of Vedem Vasco De Gama, AIR 1990 SC 981

9. D.R. Venkatchalam & ors. etc. Vs Dy. Transport Commissioner & ors. Etc., AIR 1977 SC 842

10. Commissioner of Sales Tax, M.P. Vs Popular Trading Company, Ujjain, 2000 (5) SCC 515

11. Grey Vs Pearson 6 H.L. Case 61

12. Abley Vs Dale 11, C.B. 378

13. The Central India Spinning and Weaving Manufacturing Comp. Vs The Municipal Committee, Wardha AIR 1958 SC 341

14. Girdhari Lal & Sons Vs Balbir Nath Mathur, 1986(2) SCC 237

15. Utkal Contractors & Joinery Pvt. Ltd. Vs St. of Orissa, 1987 (3) SCC 279

(Delivered by Hon'ble Kshitij Shailendra, J.)

1. Heard Shri Radha Kant Ojha, learned Senior Counsel, assisted by Shri Shiv Prakash Gupta, learned counsel for the petitioners, learned Standing Counsel for the State-respondent Nos. 1 and 4, Shri Rajiv Sharma, learned counsel representing respondent Nos. 2 and 3 and Shri Abhishek Pandey, learned counsel for the complainant in exercise of power under Chapter XXII Rule 5-A of Allahabad High Court Rules, 1952 inasmuch as the said complainant had filed caveat application, but has not been impleaded as respondent.

2. This writ petition has been filed challenging the order dated 05.04.2023 whereby the Director, Khadi & Village Industries Commission (respondent no.3) has communicated the Divisional Director that the Competent Authority has authorized him to act as an Administrator to take care of the day to day affairs of the Kshetriya Shri Gandhi Ashram, Meerut in anticipation of the Commission's approval till a new management is elected after following due procedure, with a view to safeguard the funds deployed by the Khadi and Village Industries Commission (KVIC) and also to protect the large number of artisans and workers associated with Khadi Industry. Another order under challenge is dated 09.09.2022 whereby the Deputy Registrar (respondent no.4) has dislodged the executive body of the petitioner Committee of Management and has directed for holding of fresh elections in purported exercise of powers under Section 25(2) of the Societies Registration Act, 1860.

3. As per the pleadings contained in the writ petition, Kshetriya Shri Gandhi Ashram, Garh Road, Meerut is a registered Society under the Societies Registration Act, 1860. Its parent body is Shri Gandhi Ashram, Lucknow, as provided in Clause-21 of the Bye-laws of the Society. It has two types of members; one is trustee and another is general member and at this moment total 11 members are alive and working, 4 are trustees and 7 are general members. The Committee consists of (1) three permanent trustees amongst the alive trustees and (2) amongst the general members for a period of 3 years, members will be elected for the Committee of Management. In Clause 6 of the Bye-laws, it is provided that (1) out of the members of the Committee of Management one will be

elected as Sabhapati (2) one or many Secretary will be appointed and there are 4 working trustees and 7 general members of the Committee of Management. A procedure has also been provided for enrollment/ election of the general members. As it is permanent body: (a) trustees are permanent members of the Committee and (b) amongst the total elected members, 1/3rd members will retire from the Committee. If Secretary/ President of the Committee is retired or a vacancy arises, then on the same post a person is elected for remaining period of 3 years. The present working President, namely, Mr. Ram Naresh Singh was elected as President in the month of August, 2021, therefore, he will continue upto the month of August, 2024. So far as the Secretary, namely, Mr. Prithvi Singh Rawat is concerned, he was elected as Secretary in the month of July, 2020, therefore, new election to the post of Secretary will be held in the month of July, 2023. Similarly, the general election of 1/3rd members of the Committee will be held in the month of July, 2023. Parent body i.e. Shri Gandhi Ashram, Lucknow has directed to the Kshetriya Shri Gandhi Ashram, Garh Road, Meerut to lease out certain property in favour of one Ranuka Ashiyana Private Limited, Resident of 239 Asoda House Western Kutchery Road, Meerut and on this instructions, the Secretary, Kshetriya Shri Gandhi Ashram, Garh Road, Meerut has executed registered sale deed in favour of Ranuka Ashiyana Private Limited, Resident of 239 Asoda House Western Kutchery Road, Meerut on rent of Rs.1,80,000/- and also advance money to a sum of Rs.5 crore was given in favour of parent body i.e. Shri Gandhi Ashram, Lucknow and after aforesaid lease was executed, certain complaints were made, on which, the District Magistrate, Meerut has

conducted an enquiry and enquiry was duly conducted by the Additional City Magistrate (Civil Lines), Meerut who has submitted its report on 29.09.2022 before the District Magistrate, Meerut and in which it was found that there is nothing contrary in executing the aforesaid sale deed.

4. The submission of Sri R.K. Ojha, learned Senior Counsel is to the effect that although execution of certain deeds was in pursuance of the directions issued by the parent body, by the orders impugned, action has been taken against the petitioners which is not warranted in the facts of the case. He has further argued that in so far as dislodging the Committee under the order dated 09.09.2022 and directing holding of elections is concerned, the order is without jurisdiction as none of the exigencies contemplated under Section 25 ever existed in the present case. He further submits that for the aforesaid reason, the subsequent order dated 05.04.2023 appointing Administrator is also illegal and is liable to be set aside.

5. A counter affidavit has been filed by the contesting respondents stating therein that the respondents no.2 and 3 are the officials of Khadi and Village Industries Commission which is an institution established by Government of India under Act of Parliament with a view to fulfill the dreams and aspirations of the father of nation – late Mahatma Gandhi about the upliftment of the poor in rural and village areas through the promotion of Khadi and Village Industries activities. The programs of KVIC are implemented mainly through societies and institutions registered under Societies Registration Act. KVIC provides all sorts of financial and other supports to the societies and institutions for

undertaking Khadi and Village Industries activities with zero interest, besides providing grants for creation of the infrastructure. All those societies and institutions which are financed by KVIC either create equitable mortgage of their properties in favour of KVIC or incorporate a condition in their Bye-laws that they will not dispose of their any immovable properties without the approval and permission of KVIC till the entire dues of KVIC are repaid together with interest. It has also been provided that if any society or institution disposes of any of its properties without the prior permission of KVIC, the respondents no.2 and 3 have to initiate legal proceedings both civil as well as criminal against the office bearers of the said society or institution. It has been clearly provided in Clauses 37, 38 and 40 of the Bye-laws of the petitioner that so long as the dues of KVIC are not repaid no moveable or immoveable property of the society will be transferred to anyone. The society will be entitled to dispose of its properties only when the entire dues of KVIC are repaid and a clearance certificate is obtained. It has further been provided that if it comes in the notice of KVIC that the office bearers of any society are not working properly then KVIC will have right to interfere in the working of the society and it will refer the matter either to the parent society or to the Registrar for removal of such office bearers. In this case, the total outstanding dues of the petitioners as against KVIC as per the balance sheet of 2021-22 is Rs.6,46,57,252.29. An information was received that the petitioners are going to create a lease deed of the property of the Society without the permission and approval of the Commission and this information was brought to the notice of the respondent no.4 who was pleased to stay vide its order

dated 08.01.2021 the sale/ transfer of this property until further orders. Despite all this, the petitioners have executed the lease deed of 3271.40 sq mtr land recorded at Nagar Nigam, Khasra No.4674 situated at Shri Gandhi Ashram, Gandhi Nagar, Garh Road, Meerut in favour of M/s Renuka Ashiyana Pvt. Ltd. This lease deed was executed by the petitioner without the permission and approval of KVIC and as such it is illegal, unjust and arbitrary on the face of it. However, the respondent no.4 vide his letter 17.12.2021 was pleased to set aside the lease deed in view of the circular dated 26.10.2007 passed by KVIC. The order dated 17.12.2021 passed by the respondent no.4 was not challenged before any court of law by the petitioners. As per the certified copy of the registry of this lease deed, it is clear that the land of the petitioners is 18 biswa 3 biswansi (2745 sq yards only) whereas the lease deed has been signed for 3271.40 sq mtr (3912.59 sq yard) which means excess land of 1167.50 sq yard has been given on lease to M/s Renuka Ashiyana Pvt. Ltd. The market value of this excess land of 1167.59 sq yard is Rs.7.59 crores as per the valuation report of adjoining land/ property of the petitioners bearing khasra No.4674 which has clearly resulted loss to the Society on account of the petitioners.

6. Various other allegations have been levelled against the petitioners and, in sum and substance, the contention of the respondents is that the petitioners being guilty of committing financial embezzlement and the officials of parent and subsidiary bodies being in hand in gloves and in collusion with each other and transactions of immovable properties having been done contrary to the Bye-laws, rightful decision has been taken in the interest of Gandhi and Village Industries.

7. The arguments on the aforesaid lines have been advanced by the learned counsel for the respondents and in this regard reference to Clauses 37, 38, 39 and 40 of the concerned Bye-laws has been made, which read as follows:-

“37. यदि कारणवण संस्था की गतिविधियां पूर्ण या आंशिक रूप से बंद हो जाती हैं और कमीशन का देय फंड शेष रह जाता है तो आयोग पहले संस्था की सभी अचल व चल सम्पत्ति पर अपना प्रथम भार रखेगा और संस्था किसी भी प्रकार अपनी चल, अचल सम्पत्ति को तब तक किसी भी व्यक्ति या व्यक्तियों या किसी दूसरी एजेंसियों को हस्तांतरित या बेच नहीं सकती जब तक कि संस्था द्वारा आयोग की सभी देयतायें पूर्णतया वापस नहीं कर दी जाती और उसको दूर नहीं कर दिया जाता।

38- यदि कभी आयोग के नोटिस में ऐसी बातें आती हैं कि संस्था का कार्य सूचारू रूप से नहीं चल रहा है या इसका प्रबन्ध ठीक नहीं है तो आयोग को संस्था के कार्य में हस्तक्षेप करने का अधिकारी होगा व ऐसे कुप्रबन्धकीय मामले के उचित समाधान हेतु मातृ संस्था या रजिस्ट्रार के पास भेजने में कमीशन सक्षम होगा व संस्था के ऐसे अधिकारियों को हटाने के लिए कहेगा, जिनके रहने से संस्था के हितों को नुकसान पहुंचता हो।

39- संस्था द्वारा आयोग से ऋण व अनुदान के रूप में प्राप्त आर्थिक सहायता संस्था द्वारा केवल उसी उद्देश्य के लिए उपयोग में लाई जायेगी जिसके लिए वह स्वीकृत की गई है और इसे किसी भी हालत में किसी दूसरे उद्देश्य के लिए हस्तांतरित नहीं किया जा सकता।

40- किसी मामले में यदि कमीशन का कोई ऋण बकाया है तो संस्था अपनी चल-अचल सम्पत्ति को बेचने की तभी पात्र होगी जब उसने कमीशन के सभी ऋणों को वापस कर दिया हो और उसके लिए आयोग से अधिकृत जानकारी या अधिकारियों से क्लीयेन्स सर्टिफिकेट ले लिया हो।”

8. Learned counsel for the respondents has argued that certain FIRs were registered against the office bearers of the petitioners and despite the fact that a final report was illegally submitted by the investigating agency, the same has not been approved so far by the court concerned. Learned counsel for the respondents has

relied upon a Division Bench decision of Lucknow Bench of this Court dated 13.05.2019 passed in Misc. Bench No.31167 of 2018 as well as order dated 22.09.2022 passed in Writ-C No.28763 of 2022 and it has been contended that once on the ground of financial embezzlement and misappropriation of properties, the authorities of Gandhi and Village Industries Commission took action of the identical nature which they have taken in the present case, no interference is warranted.

9. Having heard the learned counsel for the parties, I find it appropriate to refer the provisions under which the order impugned dated 09.09.2022 has been passed. As stated above, the Deputy Registrar has directed holding of fresh elections in purported exercise of powers under Section 25(2) of the Act, 1860. The said provision reads as follows:-

“25 (2) Where by an order made under sub-section (1), an election is set aside or an office-bearer is held no longer entitled to continue in office or where the Registrar is satisfied that any election of office-bearers of a Society has not been held within the time specified in the rules of that Society, he may call a meeting of the general body of such Society for electing such office-bearer or office-bearers, and such meeting shall be presided over and be conducted by the Registrar or by any officer authorised by him in this behalf, and the provisions in the rules of the Society relating to meetings and elections shall apply to such meeting and election with necessary modifications.”

10. The issue that falls for consideration by this Court is as to whether the Deputy Registrar had power to dislodge the existing Committee of Management and

issue a direction for holding of fresh elections in exercise of powers under Section 25(2) of the Act.

11. Sri Ojha submits that an order under sub-section (2) of Section 25 can be passed only when by an order made under sub-section (1), an election is set aside or an office bearer is held no longer entitled to continue in office or where the Registrar is satisfied that any election of office bearers of a Society has not been held within the time specified in the Rules of that Society. He submits that no order has been passed under Section 25(1) of the Act to the aforesaid effect and, therefore, the direction for dislodging the existing Committee or for holding of fresh elections is contrary to law. He also submits that the consequential order appointing Administrator is also invalid in the facts of the case.

12. Per contra, the submission of learned counsel for the respondents is that for the reasons stated in the counter affidavit and the arguments advanced, the action has been taken by invoking Clauses 37 to 40 of the Bye-laws, as already quoted in this judgment.

13. Sri Rajiv Sharma has vehemently argued that though action under sub-section (2) is dependent upon an order passed under sub-section (1), however, that is not the only contingency in law and action can be taken even in absence of an order passed under sub-section (1), where the Registrar is otherwise satisfied to direct for holding of elections and, in the present case, since there are serious grounds for taking action against the petitioners in the light of concerned Bye-laws, which empower the authorities to take over the management, the consequential action for holding fresh elections is according to law.

14. Since different interpretations in relation to Section 25(2) of the Act, 1860 are being made by learned counsel for both sides, this Court feels necessary to refer the law settled by the Apex Court with regard to interpretation of a Statute with reference to the context.

15. Words and phrases are symbols that stimulate mental references to referents. The object of interpreting a statute or any statutory provision is to ascertain the intention of the Legislature or the Authority enacting it. (See *Institute of Chartered Accountants of India v. M/s Price Waterhouse and Anr.*, AIR 1998 SC 74). The intention of the maker is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. As a consequence, a construction which requires for its support, addition or substitution of words or which results in rejection of words as meaningless has to be avoided. As observed in *Crawford v. Spooner*, (1846) 6 Moore PC 1, Courts, cannot aid the Legislatures, defective phrasing of an Act, we cannot add or mend, and by construction make up deficiencies which are left there. (Also See *State of Gujarat and Ors. v. Dilipbhai Nathjibhai Patel and Anr.*, JT 1998 (2) SC 253). It is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so. (See *Stock v. Frank Jones (Tiptan) Ltd.*, 1978 (1) All ER 948 (HL)). Rules of interpretation do not permit Courts to do so, unless the provision as it stands is meaningless or of doubtful meaning. Courts are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself. (Per Lord Loreburn L.C. in *Vickers Sons and Maxim Ltd. v. Evans*, (1910) AC 445 (HL), quoted

in *Jamma Masjid, Mercara v. Kodimaniandra Deviah and Ors.*, AIR 1962 SC 847.

16. The question is not what may be supposed and has been intended, but what has been said. "Statutes should be construed not as theorems of Euclid". Judge Learned Hand said, "but words must be construed with some imagination of the purposes which lie behind them". (See *Lenigh Valley Coal Co. v. Yensavage*, 218 FR 547). The view was re-iterated in *Union of India and Ors. v. Filip Tiago De Gama of Vedem Vasco De Gama*, AIR 1990 SC 981.

17. In ***D.R. Venkatchalam and Ors. etc. v. Dy. Transport Commissioner and Ors. Etc.***, AIR 1977 SC 842, it was observed that Courts must avoid the danger of a priori determination of the meaning of a provision based on their own pre-conceived notions of ideological structure or scheme into which the provision to be interpreted is somewhat fitted. They are not entitled to usurp legislative function under the disguise of interpretation.

18. While interpreting a provision, the Court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary. (See *Commissioner of Sales Tax, M.P. v. Popular Trading Company, Ujjain*, 2000 (5) SCC 515. The legislative casus omissus cannot be supplied by judicial interpretative process.

19. The golden rule for construing wills, statutes, and, in fact, all written instruments has been thus stated: "The grammatical and ordinary sense of the

words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further" (See *Grey v. Pearson* 6 H.L. Case 61). Words may be modified or varied where their import is doubtful or obscure. But we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to their literal meaning" (See *Abley v. Dale* 11, C.B. 378).

20. Jurisprudence of statutory interpretation has moved from literal interpretation to purposive interpretation, which advances the purpose and object of a legislation. The Supreme Court in catena of judgments has dealt with the issue of literal interpretation vis-a-vis purposive interpretation. The Apex Court in ***The Central India Spinning and Weaving Manufacturing Comp. versus The Municipal Committee, Wardha***; AIR 1958 SC 341 has held that it is also a recognised principle of construction that general words and phrases however wide and comprehensive they may be in their literal sense must usually be construed as being limited to the actual objects of the Act.

21. The Apex Court in ***Girdhari Lal & Sons versus Balbir Nath Mathur***; 1986(2) SCC 237, has held that the primary and foremost task of a Court in interpreting a statute is to ascertain the intention of the legislature, actual or imputed. Having ascertained the intention, the Court must then strive to so interpret the statute as to promote and advance the

object and purpose of the enactment. For this purpose, where necessary the Court may even depart from the rule that plain words should be interpreted according to their plain meaning. There need no meek and mute submission to the plainness of the language. To avoid patent injustice, anomaly or absurdity or to avoid invalidation of a law, the court would be well justified in departing from the so-called golden rule of construction so as to give effect to the object and purpose of the enactment by supplementing the written word if necessary. Supreme Court has generally taken the view that ascertainment of legislative intent is a basic rule of statutory construction and that a rule of construction should be preferred which advances the purpose and object of a legislation and that though a construction, according to plain language, should ordinarily be adopted, such a construction should not be adopted where it leads to anomalies, injustices, or absurdities, vide K.P. Varghese V. ITO, (1981) 4 SCC 173, State Bank of Travancore v. Mohd. M. Khan, (1981) 4 SCC 82, Som Prakash Rekhi V. Union of India, (1981) 1 SCC 449, Ravula Subba Rao V. CIT, AIR 1956 SC 604, Govindlal v. Agricultural Produce Market Committee, (1975) 2 SCC 482 and Babaji Kondaji v. Nasik Merchants Co-op Bank Ltd. (1984) 2 SCC 50.

22. Reference to similar decision of Apex Court in **Utkal Contractors & Joinery Pvt. Ltd. versus State of Orissa; 1987 (3) SCC 279** can also be made.

23. In the light of aforesaid judicial pronouncements, Section 25(2) of the Act, 1860 is to be examined by this Court. The comma (,) used after the words and figure “sub-section (1)” in the first line of sub-section (2) makes it clear that the

subsequent portion of the said sub-section (2) has to be read in connection with an order made under sub-section (1) and not separately. The words **“or an office bearer is held no longer entitled to continue in office”** used in sub-section (2) of Section 25 cannot be read separately from words immediately following Comma (,), i.e. **an election is set aside or an office bearer is held no longer entitled to continue in office** and both the said situations have to come into existence in pursuance of an order made under sub-section (1) of Section 25 and not otherwise. Therefore, even if the respondents feel that by any act of the petitioners any office bearer of the petitioner Committee/Society is held no longer entitled to continue in office, they cannot, at their own, take a decision against the petitioners by either removing any office bearer nor can they dislodge the Committee/Society of the governing body which they have done in the present case.

24. Admittedly, no proceedings were held under sub-section (1) of Section 25 nor was any order passed by any authority under that provision. I also find that even if there were certain allegations against the petitioners in relation to the transactions qua immovable properties, **Clause 38 of the Bye-laws provides that the Commission shall have a right to interfere in the management and for the purposes of appropriate solution of mismanagement, the Commission would be competent to refer the matter to the parent Society or Registrar and would ask them to take action against such officers whose presence in the Society was causing harm to the interest of the Society.**

25. I do not find anything in the Bye-laws that the Deputy Registrar can directly

order for holding elections under Section 25(2) of the Act or that he can directly dislodge an elected body and, in the opinion of the Court, if there were certain allegations against the petitioners, the Commission was competent to refer the matter to the parent body and if the allegation is against the parent body also, the matter could be referred to the Registrar. In such event, the Registrar could have initiated the procedure under Section 23 or 24 of the Act which are the provisions for conducting audit on the basis of production of financial documents by the Society and also for mismanagement of the affairs or of any breach of fiduciary or other like obligations and consequential investigation into the affairs of the society. Admittedly, no proceedings under Sections 23 and 24 of the Act have been held in the present case nor has any order been passed under Section 25(1) of the Act. In absence of any such action or proceedings, I do not find it to be within jurisdiction of the Deputy Registrar to directly dislodge the Committee and direct holding of fresh elections. Therefore, the order impugned dated 09.09.2022 is found to be without jurisdiction.

26. In so far as the order dated 05.04.2023 is concerned, I do not find any provision in the Bye-laws under which Administrator can be appointed. It appears that considering the nature of allegations against the petitioners, the Director has proceeded to appoint the Divisional Director, Meerut as Administrator. In the order dated 05.04.2023 reference to Clause 38 of the Bye-laws has been made and even after perusing the said clause, power to appoint Administrator is not inferred.

27. For all the aforesaid reasons, the impugned orders dated 09.09.2022 and

05.04.2023 do not sustain and are hereby **quashed**. The writ petition succeeds and is **allowed**.

28. However, setting aside of the orders impugned will not preclude the respondents to hold proceedings under Sections 23 and 24 or any other proceedings under the Societies Registration Act, 1860 as may be warranted in the facts of the case, keeping in view the role of the parent body also and the fact as to who actually is guilty of misappropriation etc., if at all anybody is. This order shall also not preclude the respondent Commission to make a reference as provided under Clause 38 of the Bye-laws. It is expected that in case any action is proposed under the said provisions, fullest opportunity of hearing shall be provided to the petitioners as well as parent body, keeping in view the provisions themselves and also the registered Bye-laws.

(2023) 9 ILRA 842
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.08.2023

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ-C No. 18585 of 2023

Sudheer Kumar Jain ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sri Pradeep Kumar Tripathi, Sri Mridul Tripathi

Counsel for the Respondents:

C.S.C.

Held –

Civil Law - U.P. Zamindari Abolition and Land Reforms Act, 1950 (now Section 104 of U.P. Revenue Code, 2006) - Section

166/167 - cannot be decided by the Additional Collector. Only the Assistant Collector First Class or Sub-Divisional Officer is competent to adjudicate such matters. Orders passed by the Additional Collector and revisional authority without jurisdiction are liable to be set aside.

Case Law Discussed:

Rakesh Kumar Vs St. of U.P. & ors., 2012 (116) RD 69 (All.)

Key Legal Point:

Civil Law - U.P. Revenue Code, 2006 - Section 104 - Declaration of agricultural land transfer as void - Only Sub-Divisional Officer or Assistant Collector First Class has jurisdiction - Collector or Additional Collector has no authority under Section 104 of U.P. Revenue Code, 2006 - Orders passed without jurisdiction are null and void.

Held:

The Court held that the impugned orders dated 17.02.2023 and 31.03.2023, passed by the Additional Collector and Additional Commissioner respectively, were without jurisdiction, as the competent authority to deal with such matters under Section 104 of the U.P. Revenue Code, 2006 is the Sub-Divisional Officer. Reliance was placed on the decision in *Rakesh Kumar Vs St. of U.P.* (2012), which clarified that the functions assigned to the Assistant Collector First Class under the Act cannot be exercised by the Collector or Additional Collector. Accordingly, both impugned orders were set aside and the matter was remanded to the competent authority for fresh adjudication.

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

1. Amendment application filed by learned counsel for the petitioner is taken on record.

In Re: Civil Misc. Amendment Application No.Nil of 2023

1. Office is directed to allot number to the instant application.

2. Heard learned counsel for the parties.

3. In view of the averment made in the affidavit filed in support of the application, the application is allowed.

4. Learned counsel for the petitioner is permitted to make necessary amendment in the writ petition during course of the day.

Order on Writ Petition

1. Heard Mr. Pradeep Kumar Tripathi, learned counsel for the petitioner and Mr. Abhishek Shukla, learned Additional Chief Standing Counsel for the State-respondents.

2. The writ petition is being heard and disposed of finally with the consent of the parties without inviting counter affidavit.

3. The instant petition has been filed for the following reliefs:

"i. issue a writ, order or direction in the nature of certiorari quashing the orders impugned passed in Case No.403 of 2023 dated 31.3.2023 (Annexure No.13) by Additional Commissioner, Administration, Second, Region & District- Saharanpur and also the judgment and order dated 17.2.2023 in Case No.04669 of 2019 (Annexure No.12) passed by Upar-Zila Adhikari Prasasan, Saharanpur.

ii. issue a writ, order or direction in the nature of mandamus commanding the respondents, validate the transaction / sale deed no.4578 dated 24.5.1985 pertaining to plot situated at Khasra

no.497M area 0.0195 Hectare (233-1/3) out of area 2.048 at village- Dara-kot-tala Swad Bairun Pargana, Tahsil & District-Saharanpur, on payment of required fee.

iii. issue a writ, order or direction in the nature, which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

iv. Award the cost of the petition to the petitioner."

4. Brief facts of the case are that Smt. Arun Jain purchased the plot no.497M on 20.9.1982 / 2.5.1983. Petitioner purchased the plot of Khasra No.497M area 0.0195 hectare out of 2.048 hectare from Smt. Arun Jain. On 24.5.1983, one Israr Khan son of Jameel Khan alleged to have purchased the same plot no.497M area 0.0195 hectare out of area 2.048 hectare, situated at Village- Dara-kot-tala Swad Bairun Pargana, Tahsil & District-Saharanpur on 1.12.2015 from Smt. Arun Jain. The mutation proceeding was initiated on the basis of registered sale deed executed in respect to the plot in dispute before the Tahsildar by Smt. Arun Jain, petitioner and Israr Khan, which were registered as Case Nos.T201709601012276, T201709601012278 & T20170960101630. Petitioner filed objection to the mutation application filed by Israr Khan on 6.6.2017. Naib Tahsildar vide order dated 24.8.2017 ordered to record the name of the petitioner over the land in dispute in the proceeding Section 34 of U.P. Revenue Code, 2006. Israr Khan filed an application dated 8.9.2017 recalling the order dated 24.8.2017, which was allowed vide order dated 30.10.2017. The order dated 30.10.2017 was passed without notice and opportunity to the petitioner, accordingly,

petitioner filed an application on 7.12.2017 for recalling the order dated 30.10.2017. Up-Ziladhikari, Saharanpur remanded the matter back before the Tahsildar on the ground of jurisdiction. Additional Collector, Saharanpur issued notice to Smt. Arun Jain & Shri Rajneesh Tripathi in respect to the proceeding pending pertaining to sale deed dated 20.9.1982 / 2.5.1983, petitioner moved an application in the pending proceeding that they may be impleaded and opportunity be given to contest the proceeding. Additional Collector, Saharanpur vide order dated 17.2.2023 rejected the objection filed by the petitioner. Petitioner challenged the order dated 17.2.2023 by way of revision which was heard and rejected by the Additional Commissioner vide order dated 31.3.2023, hence this writ petition.

5. Learned counsel for the petitioner submitted that the impugned order is illegal and without jurisdiction. He further submitted that Additional Collector has no jurisdiction to pass the order in the proceeding under Section 166/167 of U.P.Z.A. & L.R. Act now under Section 104 of U.P. Revenue Code, 2006. He further placed reliance upon the judgment of this Court reported in **2012 (116) R.D.69 (Rakesh Kumar Vs. State of U.P. & Others) decided on 28.2.2012**, in which it has been held that Assistant Collector First Class is the competent authority to decide any transaction of agricultural land void under Section 166 of the Act, if it is in contravention of Section 154 and 157-A of the Act or as a matter of fact of any provision of the Act. It has been further held that Collector or Additional Collector had no jurisdiction to pass the order in the proceeding under Section 166/167 of U.P.Z.A. & L.R. Act now under Section 104 of U.P. Revenue Code, 2006. He

further submitted that this Court in the case of Rakesh Kumar (supra) has considered the provision of Section 3 (4) of U.P.Z.A. & L.R. Act as well as the provision of Section 14, 14-A & 15 of U.P. Land Revenue Act while deciding the dispute regarding the jurisdiction under Section 166/167 of U.P.Z.A. & L.R. Act now under Section 104 of U.P. Revenue Code, 2006. He next submitted that in view of the ratio of law laid down in Rakesh (supra), the impugned order cannot be sustained and liable to be set aside. He further advanced argument even on the merit of the issue also in order to demonstrate that the impugned order vesting the land in State is illegal.

6. On the other hand, Mr. Abhishek Shukla, learned Additional Chief Standing Counsel for the State-respondents submitted that the transaction is void as provided under the U.P. Revenue Code, 2006 but regarding the jurisdiction, Mr. Abhishek Shukla, A.C.S.C. cannot dispute the ratio which has been laid down in the **Rakesh Kumar (supra)** by this Court. He further submitted that on the point of jurisdiction, the matter can be remanded back before the competent authority to hear and decide the dispute afresh.

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

8. There is no dispute about the fact that Additional Collector, Saharanpur has passed the order vesting the land in dispute in State Government in proceeding under Section 166/167 of U.P.Z.A. & L.R. Act now under Section 104 of U.P. Revenue Code, 2006.

9. In order to appreciate the controversy involved in the writ petition,

perusal of relevant portion of the impugned judgment dated 17.2.2023 passed by Additional Collector will be relevant, which is as follows:

“आदेश पत्रक

न्यायालय: अपर जिलाधिकारी, प्रशासन

मण्डल: सहारनपुर, जनपद: सहारनपुर, तहसील: सहारनपुर

वाद संख्या:- 04669/2019

कंप्यूटरीकृत वाद संख्या:- D201909600004669

सरकान बनाम अरूण जैन

अंतर्गत धारा:- 104/105, अधिनियम:- उत्तर प्रदेश राजस्व संहिता- 2006

जिला शासकीय अधिवक्ता (राजस्व) सहारनपुर एवं प्रतिवादीगण के विद्वान अधिवक्ता की बहस को सुना गया। पत्रावली का सम्यक अवलोकन किया गया। पत्रावली के अवलोकन एवं परिशीलन से विदित है कि उप जिलाधिकारी, सदर, सहारनपुर की जांचाख्या दिनांक 22/11/2019 में स्पष्ट किया गया है कि ग्राम दराकोटतला स्वाद बैरून परगना व तहसील व जिला सहारनपुर में स्थित ख०नं०497म क्षेत्रफल 2.048 हे० में से 0.0195 हे० के पंजीकृत लेखपत्र दिनांक 20/09/1982-02/05/1983 के निष्पादन में धारा 168ए उ०प्र०ज०वि० अधिनियम का उल्लंघन किया गया है। प्रतिवादीगण की ओर से ऐसा कोई साक्ष्य प्रस्तुत नहीं किया गया है जिससे यह स्पष्ट होता हो कि प्रश्नगत लेखपत्र 26/05/2015 के निष्पादन में धारा 168ए उ०प्र० जमींदारी विनाश अधिनियम का उल्लंघन न हुआ हो। जहां तक प्रतिवादी पक्ष का कथन है कि धारा 104/105 उ०प्र० राजस्व संहिता के अन्तर्गत कार्यवाही पोषणीय नहीं है, उचित नहीं है। उक्त वाद उ०प्र० राजस्व, 2006 के प्रभावी होने के उपरान्त प्रस्तुत होने के कारण धारा 231 उ०प्र० राजस्व संहिता में दिये गये प्राविधानों के अनुरूप उ०प्र० राजस्व संहिता की धारा 104/105 के अन्तर्गत वाद की कार्यवाही की गई है। इस प्रकार प्रश्नगत अन्तरण शून्य है। उ०प्र०ज०वि० अधिनियम व्यवस्था की धारा 168ए का उल्लंघन होने के कारण यह भूमि अन्तरण के दिनांक से सब भार आदि से मुक्त होकर राज्य पक्ष में निहित मानी जाएगी। अतः वाद ग्रस्त भूमि ख०नं०497म क्षेत्रफल 2.048 हे० में से 0.0195 हे० के पंजीकृत लेखपत्र दिनांक 20/09/1982-02/05/1983 के निष्पादन से विपक्षीगण का नाम खारिज कर सम्पत्ति राज्य सरकार दर्ज किया जाकर राज्य सरकार के पक्ष में कब्जा दिया जाना विधिनुकूल एवं न्यायोचित है।

आदेश

उपर्युक्त विवेचना के आधार पर भूमि 497म क्षेत्रफल 2.048हे० में से 0.0195हे० स्थित ग्राम दराकोटतला स्वाद बैरून परगना व तहसील व जिला सहारनपुर से विपक्षीगण के नाम की प्रविष्टि को निरस्त करते हुए इस भूमि को राज्य सरकार के नाम दर्ज किया जाए तथा भूमि का राज्य सरकार के पक्ष में दखल प्राप्त किया जाए। आदेश की प्रतिलिपि उप

जिलाधिकारी, नकुड़, सहारनपुर को अनुपालन हेतु प्रेषित की जाए
पत्रावली वाद आपूर्ति अभिलेखागार में संचित की जाए

दिनांक:- फरवरी, 17, 2023

डॉ० अर्चना द्विवेदी

अपर कलेक्टर (प्रशासन)

सहारनपुर"

10. Paragraph Nos. 21 to 25 of the judgment rendered in Rakesh Kumar (supra) will be relevant for perusal, which is as under:

"21. A plain and simple reading of Section 3(4) of the Act and Sections 14, 14-A and 15 of the U.P. Land Revenue Act makes it clear that the Collector includes Additional Collector as well as Assistant Collector and is authorised to discharge the powers and duties conferred upon him under the Act or in any other law in force. The aforesaid Acts do not confer upon the Collector the power to declare a transaction to be void under Section 166 of the Act being violative of Section 154 or 157-A of the Act. Such power is vested only in the Assistant Collector First Class who may be authorised by the State Government to discharge all or any of the functions of the Collector but converse to it is not permitted. The duties and functions assigned therein to the Assistant Collector First Class under law are not to be discharged by the Collector even though he may be the controlling authority of the Assistant Collectors First Class. He is not authorised to take over the functions assigned to the Assistant Collectors. Thus, Collector is not supposed to discharge the functions specifically assigned to the Assistant Collectors under the above two Acts including that of declaring a transfer to be void.

22. Apart from the above the initial order which was challenged in appeal before the Additional Commissioner was passed by the Assistant Collector First Class and, therefore, also on the order being set-aside in appeal, the matter ought to have been remanded to the Assistant Collector First Class.

23. Accordingly, I answer the question by holding that the Assistant Collector First Class is the competent authority to declare any transaction of agricultural land void under Section 166 of the Act, if it is in contravention of Section 154 and 157-A of the Act or as a matter of fact, of any other provision of the Act.

24. In such a situation, the Additional Commissioner committed an error of law in remanding the matter to the Collector.

25. The writ petition is accordingly allowed and the order of the Additional Commissioner dated 27.8.2010 is modified to the extent that the matter stands remanded to the Assistant Collector First Class in place of the Collector as directed."

11. Perusal of Rule 103 of the U.P. Revenue Code Rules, 2016 will be also relevant for perusal, which is as under:

"(1) If a bhumidhar or an asami has transferred his interest in any holding or part thereof which is void under section 104, the Lekhpal shall promptly submit a report to the Sub-Divisional Officer containing particulars specified in rule 97(1).

(2) On receipt of the report of the Lekhpal under sub-rule (1), or on information received otherwise, the Sub-Divisional Officer shall call upon the parties to the transfer to show cause, why action under section 104 read with section 105 should not be taken in respect of the land in question.

(3) After hearing the parties and making such inquiries as may be considered necessary, if the Sub-Divisional Officer is satisfied that the transfer in question is void under section 104, he shall declare that-

(a) the subject matter of such transfer shall vest in the State Government;

(b) the trees, crops, well and other improvements existing on the holding or part shall vest in the State Government free from all encumbrances; and

(c) the interests of the transferor as well as of the transferee stood extinguished, from the date of such transfer.

(4) The Sub-Divisional Officer shall direct that the revenue records should be corrected accordingly and where the transfer in contravention of the provisions of the Code relates to a part of the holding, he shall also fix land revenue in respect of the part left with the transferor in accordance with Chapter XI of these rules.

(5) Every order of the Sub-Divisional Officer under this rule shall be endorsed to the Samiti for necessary action.

(6) Where any property referred to in section 105 has vested in the State Government, the Collector may evict any

person in unauthorised occupation of such property and deliver possession thereof to the Gram Panchayat concerned."

12. Rule 103 of U.P. Revenue Code Rules 2016, as quoted above as well as ratio of law laid down in **Rakesh Kumar (supra)**, clearly provides that Sub-Divisional Officer shall pass the order in the proceeding under Rule 104 of U.P. Revenue Code Rules 2016, issue relating to vesting of the land in the State-Government. Admittedly, in the instant matter, the order impugned dated 17.2.2023 vesting the land in the State / Goan Sabha in the proceeding under Section 166/167 of U.P.Z.A. & L.R. Act now under Section 104 of U.P. Revenue Code, 2006 has been passed by the Additional Collector, which cannot be sustained in the eye of law.

13. Revisional Court has also failed to consider the point of jurisdiction, as such, revisional order also suffers from error of law.

14. Considering the entire facts and circumstances, the impugned orders dated 31.3.2023 passed by Additional Commissioner, Administration, Second, Region & District- Saharnpur and order dated 17.2.2023 passed by Uppar-Zila Adhikari Prasasan, Saharanpur cannot be sustained and are liable to be set aside and the same are hereby set aside.

15. The writ petition is **allowed in part**. The matter is remitted back for fresh decision of Case No.04669 of 2019, Computerized Case No.D201909600004669 by the competent authority in the light of the observation made in the body of the judgment after affording proper opportunity of hearing to the petitioner as well as other parties to the dispute in accordance with law.

the respondent authorities to evict the respondent nos.5 & 6 from unauthorized possession of the temple Thakur Ramchandraj Maharaj Virajman Mandir and hand over the management of the temple to the Gram Panchayat, Pachokhara, Tahsil- Tundala, District- Firozabad.

iv. issue any other writ, order or direction which this Hon'ble Court may deem fit and proper under the circumstances of the present case.

v. award the cost of the petition in favour of the petitioner."

3. Learned counsel for the petitioner submitted that the Tahsildar vide order dated 9.6.1993 decided the mutation matter and ordered that the parties should approach competent Court for appointment of sarvarakar and further made certain arrangement in respect to the temple in dispute. He further submitted that subsequently civil suit under Section 92 of Code of Civil Procedure has been file and the suit was decreed vide judgment dated 15.4.2014. He next submitted that the decree of civil suit was challenged in appeal and the appellate Court has allowed the appeal setting aside the judgment and decree passed in the civil suit dated 15.4.2014 and restored the suit No.1 of 2012 under section 92 CPC to its original number. He also submitted that since the civil Suit No.1 of 2012 has been restored to its original number, as such, the order passed by the Tahsildar dated 9.6.1993 be implemented. He further submitted that the petitioner has filed the representation to this effect before respondent-authorities, which is pending, as such, necessary direction be issued for deciding

the petitioner's representation in accordance with law.

4. On the other hand, Mr. Abhishek Shukla, learned Additional Chief Standing Counsel for the State-respondents submitted that since the suit, under Section 92 of C.P.C. is pending before civil court, as such, the petitioner should approach the civil Court for proper relief as claimed by the petitioner in the instant petition. He further submitted that Section 92(1)(cc) of C.P.C. provides for grant of relief during pendency of the suit under Section 92 of C.P.C., as such, representation filed by the petitioner cannot be maintained in the eye of law.

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

6. There is no dispute about the fact that suit under Section 92 of C.P.C. has been filed which is pending before the civil Court.

7. In order to appreciate the controversy the perusal of section 92 of Civil Procedure Code will be relevant which is as under:-

"92. Public Charities?(1) In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General, or two or more persons having an interest in the trust and having obtained the [leave of the Court,] may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction or in any

other Court empowered in that behalf by the State Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate to obtain a decree?

- (a) removing any trustee;*
- (b) appointing a new trustee;*
- (c) vesting any property in a trustee;*
- [(cc) directing a trustee who has been removed or a person who has ceased to be a trustee, to deliver possession of any trust property in his possession to the person entitled to the possession of such property;]*
- (d) directing accounts and inquiries;*
- (e) declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust;*
- (f) authorising the whole or any part of the trust property to be let, sold, mortgaged or exchanged;*
- (g) settling a scheme; or*
- (h) granting such further or other relief as the nature of the case may require.*

(2) Save as provided by the Religious Endowments Act, 1863 (20 of 1863), [or by any corresponding law in force in [the territories which, immediately before the 1st November, 1956, were comprised in Part B States]], no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of

any such trust as is therein referred to except in conformity with the provisions of that sub-section.

[(3) The Court may alter the original purposes of an express or constructive trust created for public purposes of a charitable or religious nature and allow the property or income of such trust or any portion thereof to be applied cypres in one or more of the following circumstances, namely:?

(a) where the original purposes of the trust, in whole or in part,?

(i) have been, as far as may be, fulfilled; or

(ii) cannot be carried out at all, or cannot be carried out according to the directions given in the instrument creating the trust or, where there is no such instrument, according to the spirit of the trust; or

(b) where the original purposes of the trust provide a use for a part only of the property available by virtue of the trust; or

(c) where the property available by virtue of the trust and other property applicable for similar purposes can be more effectively used in conjunction with, and to that end can suitably be made applicable to any other purpose, regard being had to the spirit of the trust and its applicability to common purposes; or

(d) where the original purposes, in whole or in part, were laid down by reference to an area which then was, but has since ceased to be, a unit for such purposes; or

(e) where the original purposes, in whole or in part, have, since they were laid down,?

(i) been adequately provided for by other means, or

(ii) ceased, as being useless or harmful to the community, or

(iii) ceased to be, in law, charitable, or

(iv) ceased in any other way to provide a suitable and effective method of using the property available by virtue of the trust, regard being had to the spirit of the trust.]"

8. The order which was passed by Tahsildar on 9.6.1993 in the proceeding under section 34 of U.P. Land Revenue Act is also necessary for perusal which is as under:-

“न्यायालय तहसीलदार तहसील व जिला फिरोजाबाद शिविर
न्यायालय टूण्डला

वाद सं० 213/90 सन् 1993ई०

विजयपाल बनाम मायादेवी

धारा-34 एल०आर एक्ट

मौजा० पचोखरा

नकल आदेश दिनांक 9/6/93

यह वाद विजयपालदास बाबा रामबीर वास्ते सर्वराही मायादेवी बाई निवासी अथैत पचोखरा फिरोजाबाद व बाबा बहोरीदास व रघुनाथदास निवासी श्रीनगर पचोखरा व स्वामी विवेकानन्द महाराज द्वारा पृथक पृथक दाखिल खारिज की रिपोर्ट पर प्रारम्भ हुआ है सभी में विधिवत इशतहार जारी किया गया है जो वाद तामील वापस आया है। विजयपाल दास की दाखिल खारिज रिपोर्ट में बाबा बहोरीदास व रघुनाथदास व जगतानन्द जी महाराज द्वारा अपनी आपत्ति प्रस्तुत की गई है विजयपालदास द्वारा किसी में कोई आपत्ति नहीं दी गयी है विजयपाल दास द्वारा

मौजा पचौखरा के खाता सं० 170 खसरा सं० 1251 रकबा 3-4-1 पर माया देवी बाई की मृत्यु उपरान्त फौती के आधार पर नामान्तरण चाहा गया है तथा बहोरीदास व रघुनादास द्वारा चेला के आधार पर अपना अपना नाम अंकित कराने की प्रार्थना का मौका दिया गया है साक्ष्य में श्रीराम व ज्वालासिंह व भगवान सिंह व विजयपाल स्वयं ने अपने ब्यान अंकित कराये है श्रीराम गवाह ने अपने ब्यान में विजयपाल को गांव चौगान का बताया है तथा खाते पर अंकित पूर्व सरबराकार द्वारिका प्रसाद को गांव चौगान का बताते हुए विजयपाल का बाबा बताया है तथा यह भी कहा कि यह जमीन विजयपाल को मिलनी चाहिए ज्वाला प्रसाद गवाह ने बहोरीदास को बाबा बताया है तथा विजयपाल को ग्रहस्थ जीवन यापन करते हुए कहा है कि भगवान सिंह ने कहा है कि मन्दिर से लगनी चाहिए द्वारिकाप्रसाद का कोई चेला नहीं था अन्य गवाहों ने भी भूमि को मन्दिर से लगे रहने का मत प्रकट किया है विजयपाल दास ने भी यही स्वीकार किया कि जमीन मन्दिर की ही रहे मैं अपने नाम नहीं चाहता यह भूमि मेरे बाबा श्री द्वारिका प्रसाद द्वारा खरीद कर मन्दिर के हित में लगाई गई थी। मैंने पत्रावली पर उपलब्ध साक्ष्यों का अवलोकन किया है विद्वान अधिवक्ताओं के तर्क सुने है आपत्तिकर्ता के अधिवक्ता ने कहा है कि मन्दिर की भूमि ग्राम सभा में दे दी जाये और ग्राम सभा उसकी देखभाल कर वादी पक्ष के अधिवक्ता ने राजस्व परिषद की निगरानी सं० 130/82-83 महन्त सदाशिव भारती बनाम भूपेन्द्र सिंह की निगरानी का छायाप्रति प्रस्तुत करते हुए यह तर्क दिया है कि जब तक पूर्व सरबराकार द्वारा लिखित रूप में कोई सरवराकार नियुक्ति न किया गया हो तब ऐसी दशा में सरबराकार की नियुक्ति सिविल न्यायालय द्वारा ही तय की जायेगा। न्यायालय माल को सरवराकार तय करने का अधिकार नहीं है। दोनों पक्षों के तर्कों के आधार पर मैं निष्कर्ष पर पहुंचा हूं कि पत्रावली में ऐसा कोई साक्ष्य उपलब्ध नहीं है जिससे यह स्पष्ट हो सके की पूर्व सरवराकार द्वारा कोई सरवराकार या चेला नियुक्ति किया गया है ऐसी दशा में यह मामला इस न्यायालय के अधिकार क्षेत्र के बाहर है जब तक सक्षम न्यायालय से सरवराकार नियुक्ति नहीं हो जाता तब तक खातेदार श्रीठाकुर रामचन्द्र जी महाराज ब्रजमान मन्दिर बदस्तूर खाता कायत रहेगा तथा मन्दिर की देखभाल एवं भूमि की व्यवस्था हेतु आदेश दिया जाता है कि अध्यक्ष ग्राम सभा पचोखरा अपने अपने स्तर से मन्दिर की पूजा अर्चना हेतु एवं भूमि की देखभाल अपने स्तर से करेंगे साथ ही उन्हें यह भी निर्देशित किया जाता है कि मन्दिर से लगी भूमि से होने वाली आय का ब्यौरा विधिक रूप से रखेंगे। जब तक किसी सक्षम अदालत द्वारा सरवराकार बनने का अधिकार प्राप्त नहीं नहीं जाता सभी पक्ष सरवराकार या प्रबन्धक तय कराने के लिए सक्षम

न्यायालय में वाद प्रस्तुत करे नामान्तरण प्रार्थना पत्र बतौर सरबराकार एवं विरासतन विजयपाल रस, बहोरोदास, जगतानन्द निरस्त किये जाते है। पत्रावली वाद आवश्यक कार्यवाही दखिल दफ्तर की जायें।

एस०डी०

तहसीलदार ”

9. Considering the fact of pendency of the suit under section 92 of Civil Procedure Code as well as the provisions contained under section 92 of Civil Procedure Code there is no question for implementation of the order of Tahsildar dated 9.6.1993 passed under section 34 of U.P. Land Revenue Act as complete procedure has been provided in respect to the suit under section 92 of Civil Procedure Code for maintenance of the property during pendency of the suit.

10. Since the suit under section 92 of Civil Procedure Code is pending, as such, appropriate application can be filed in the pending suit, under Section 92 of C.P.C. rather implementation of the direction passed in summary proceeding under section 34 of U.P. Land Revenue Act.

11. No interference is required in the matter.

12. The writ petition is *dismissed, accordingly.*

(2023) 9 ILRA 852
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.08.2023

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ-C No. 18993 of 2023

Mahaveer & Ors. ...**Petitioners**
Versus
State of U.P. & Ors. ...**Respondents**

Counsel for the Petitioners:

Sri Harish Yadav

Counsel for the Respondents:

C.S.C.

Held –

Civil Law - Civil Procedure Code, 1908 - Section 152 - Application under Section 152 CPC seeking correction of accidental omission in vesting order dated 07.04.1993 - Earlier sale deed declared void by Civil Court - Collector rejecting recall application as not maintainable - Collector failed to appreciate applicability of Section 152 CPC in view of Section 341 of U.P.Z.A. & L.R. Act, 1950 and Section 214 of U.P. Revenue Code, 2006 - Judgment in *Surajbhan Sharma* and *Sharma Singh* binding - Civil Suit No.18/2015 decreed; St. was party therein - Impugned order unsustainable - Matter remitted to Collector to decide application on merits.

Writ petition allowed in part.

Case Law Discussed:

1. Surajbhan Sharma Vs St. of U.P. & ors., Writ Petition No.58827 of 2011, decided on 21.10.2011
2. Sharma Singh anr. Vs St. of U.P. & ors., Writ-C No.29898 of 2014, decided on 28.05.2014
3. M.S. Ahlawat Vs St. of Har., (2000) 1 SCC 278
4. Jai Narain Vs Chhedalal, AIR 1960 All 385

Important Provisions Referred:

1. Section 152, Civil Procedure Code, 1908
2. Section 214, U.P. Revenue Code, 2006
3. Section 341, U.P. Zamindari Abolition and Land Reforms Act, 1950

Writ petition allowed in part - Impugned order dated 15.04.2023 set aside - Matter remanded to Collector, Gautam Budh Nagar to decide application under Section 152 CPC on merits within 3 months - Notice to be issued to interested parties before final decision.

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

1. Heard Mr. Harish Yadav, learned counsel for the petitioners and Mr. Abhishek Shukla, learned Additional Chief Standing Counsel for the State-respondents.

2. With the consent of learned counsel for the parties, the instant petition is being heard and disposed of finally without inviting counter affidavit.

3. The instant petition has been filed for the following reliefs:

"I. A writ, order or direction in the nature of certiorari to quash/set aside the impugned order dated 15.4.2023 passed by the respondent no.2 and may further be pleased to allow the application dated 09.05.2019 filed by the petitioners under section 152 C.P.C. under the strength of the judgment of this Hon'ble Court in the case of Surajbhan Sharma vs. State of U.P.

II. A writ, order or direction in the nature of mandamus commanding and directing the respondent concern not to interfere into the peaceful possession of the petitioners over the land in question and further not to alter the status of the land or transfer the same to any other agency.

III. Issue any other writ, order or direction, which this Hon'ble Court may deem, just and proper in the circumstances of the case.

IV. Issue the award cost of this petition petitioner."

4. Brief facts of the case are that one, Kudia, Harsharan & Kiran sons of Girohi @ Girbar were the bhumidhar of the Khasra No.197, Area 6-8-0, situated in Village- Sorkha, Zahidabad, Pargana & Tahsil- Dadari, District- Gautam Budh Nagar. Kiran son of Girohi has sold his 1/3 share through registered sale deed dated 3.6.1966 in favour of father of petitioner nos.1, 2 & 3, namely, Mahaveer, Suresh and Jatan as well as father of petitioner nos.5 & 6, who expired later on. Petitioners' father or petitioners have never executed any sale deed in favour of Pragatisheel Cooperative Society about the land in dispute. Petitioners came to know that the plot in dispute have been vested into the State in the proceeding under Section 154 (2) / 167 (2) of U.P.Z.A. & L.R. Act. One, Jagmal @ Jagram, who was co-sharer of the plot in dispute never sold his share of the aforementioned plot in dispute at any point of time but by producing an imposter registered sale deed dated 5.1.1983 / 22.1.1983 had allegedly been executed in favour of Pragatisheel Cooperative Society about his 1/9 share vide sale deed dated 5.1.1983 / 22.1.1983. Petitioner instituted a civil suit being O.S. No.18 of 2015 to declare the sale deed dated 5.1.1983 / 22.1.1983 as null and void. In the aforementioned suit, State of U.P. / Collector was impleaded as defendant no.2. Civil Court vide judgment dated 8.10.2018 decreed the suit and cancelled the sale deed dated 5.1.1983 / 22.1.1983. The judgment and decree dated 8.10.2018 attained finality, accordingly, petitioners filed an application No.7 of 2019, under Section 152 of Civil Procedure Code dated 9.5.2019 against the order dated 7.4.1993. Respondent no.2 without considering the

case setup by the petitioners in their application under Section 152 of C.P.C. has rejected the same as not maintainable vide order dated 15.4.2023, hence this writ petition to set aside the order dated 15.4.2023 passed by respondent no.2 and allowed the application dated 9.5.2019 filed by the petitioners under Section 152 of C.P.C. in the light of the judgment of this Court passed in ***Writ Petition No.58827 of 2011 (Surajbhan Sharma vs. State of U.P. & Others) decided on 21.10.2011 and Writ- C No.29898 of 2014 (Sharma Singh and Another Vs. State of U.P. and 3 Others) decided on 28.5.2014.***

5. Learned counsel for the petitioners submitted that the petitioners' father / petitoiners have not executed any sale deed in respect to the plot in question, as such, the property could not be vested in the State-Government. He further submitted that even the sale deed alleged to be executed on 5.1.1983 in respect to the plot in question that has been cancelled by the civil Court in Civil Suit No.18 of 2015 in which State of U.P. through Collector, Gautam Buddh Nagar was party, as such, dismissal of the petitioners' application filed under Section 152 of C.P.C. against the order dated 7.4.1993 is wholly illegal. He next submitted that respondent no.2 vide impugned order has held that the judgment passed in civil suit will not be applicable as State was not made party in the aforementioned suit although State through Collector Gautam Buddh Nagar was impleaded in the suit proceeding.

6. On the other hand, Mr. Abhishek Shukla, learned Additional Chief Standing Counsel for the State-respondents submitted that no interference is required against the impugned order. He further submitted that the land has been rightly vested in the State

Government as there was violation of provisions contained under U.P.Z.A. & L.R. Act. He next submitted that no interference is required in the matter and the writ petition is liable to be dismissed.

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

8. There is no dispute about the fact that the petitioners' father or petitioners have not sold the property in dispute to any society. There is also no dispute about the fact that application dated 9.5.2019 filed by the petitioners under Section 152 of C.P.C. against the order vesting the plot in State-Government has been dismissed as not maintainable.

9. In order to appreciate the controversy involved in the matter, the perusal of Section 152 of Civil Procedure Code, Section 214 of U.P. Revenue Code, 2006 & Section 341 of U.P.Z.A. & L.R. Act will be necessary for perusal, which are as follows:

Section 152 of Civil Procedure Code, 1908

"152. Amendment of judgments, decrees or orders:- Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties."

Section 214 of U.P. Revenue Code, 2006

"214. Applicability of Code of Civil Procedure, 1908 and Limitation Act, 1963-Unless otherwise expressly provided by or under this Code, the provisions of the

Code of Civil Procedure, 1908 and the Limitation Act, 1963 shall apply to every suit, application or proceedings under this Code."

Section 341 of U.P. Zamindari Abolition and Land Reforms Act, 1950

"341. Application of certain Acts to the proceeding of this Act. - Unless otherwise expressly provided by or under this Act, the provisions of the Indian Court Fees Act, the Code of Civil Procedure, 1908, and the [Limitation Act, 1963] [including Section 5 thereof] shall apply to the proceedings under this Act."

10. The perusal of relevant portion of the judgment passed in **Surajbhan Sharma (supra)** will be necessary for perusal, which is as under:

"Apart from this, the decisions, which have been relied upon by the learned counsel for the petitioner clearly lay down the law that a correction which is either clerical or an accidental slip or omission can be corrected even without the authority requiring the party to file an appeal or a review. If the mistake of the area mentioned in the order dated 7.4.1993 is attributable solely to the respondent, then the Collector being the highest authority in the district empowered under the U.P. Land Revenue Act, 1901, to correct entries was bound to exercise his powers in relation to the order dated 7.4.1993 which was a proceeding under the U.P. Zamindari Abolition & Land Reforms Act, 1950, to which the provisions of 1901 Act apply. Not only this, Section 341 of the 1950 Act applies the provisions of the Civil Procedure Code to the proceedings under the 1950 Act. Accordingly, the principles of Section 151 and Section 152 of CPC also apply which

has to be invoked by the Collector to rectify the error for disposing of the application of the petitioner. The Collector, in my opinion, failed to exercise his jurisdiction in accordance with law and in the light of the observations made herein above and hence the order dated 6.9.2011 is unsustainable on this score as well.

The argument, as contained in the Affidavit of the State that the Addl. District Magistrate is yet to proceed and decide the restoration application, needless to mention that once the order dated 6.9.2011 stands, the Addl. District Magistrate cannot proceed against the same. This stand, therefore, taken in the short-counter-affidavit cannot be appreciated and as a matter of fact the District Magistrate ought to have disposed of the entire matter himself in the background of the case and in the light of the observations made herein above. The suggestion by the respondents is as if the matter is still pending before the Addl. District Magistrate. This, in my opinion, is a mere eye-wash and the petitioner is to gain nothing by this procedural shuttling. Learned Addl. Advocate General states that the matter will be decided in accordance with law once the legal impediment as being experienced by the Officer is clarified.

In view of the conclusions drawn herein above, there is no impediment in the passage of the District Magistrate to decide the application of the petitioner and to carry out the rectification after verifying the status of the land which is claimed by the petitioner to be not a part of the transaction covered by the order dated 7.4.1993. The Collector, therefore, has to carry out this exercise in the light of the observations made herein above and pass orders objectively without allaying any

affairs in this regard. Consequently, the order dated 6.9.2011 is quashed. The Collector, Gautam Budh Nagar, will proceed to pass an order within 6 weeks of the date of presentation of a certified copy of this order before him after allowing the petitioner an opportunity in case the petitioner has to provide any information in this regard.

The writ petition is, accordingly, allowed."

11. The perusal of relevant portion of the judgment passed in **Sharma Singh (supra)** will be also necessary for perusal, which is as under:

"7. I have considered the arguments of the counsel for the parties and examined the record. By virtue of Section 341 of U.P. Act No. 1 of 1951 the provisions of Code of Civil Procedure have been applied as such application under Section 152 C.P.C. was maintainable. Section 152 C.P.C. authorizes the Court to correct the clerical or arithmetical mistake in judgments, decrees or order or errors arising therein from any accidental slip or omission at any time of its own motion or on the application of any of the parties. Thus under this section, the phrase "any time" has been used. Limitation Act, 1963 does not prescribe any limitation for the application under Section 152 C.P.C. It has been consistently held by various High Court that no limitation has been prescribed for the application under Section 152 C.P.C. See Jai Narain Vs. Chhedalal, AIR 1960 All 385 and in Civil Misc. Writ Petition No. 58827 of 2011 Surajbhan Sharma Vs. State of U.P. and others, decided on 21.10.2011. Similarly powers under Section 152 C.P.C. can be exercised on its own motion as such notice

of the mistake can be taken from the application filed by third party also. The petitioner were not party at any stage as such plea regarding finality of the order cannot be raised against the petitioner.

8. So far as merger of the order dated 07.04.1993 in the order of Supreme Court dated 28.07.2011 is concerned. The clerical or arithmetical mistake crept in the order due to accidental slip or omission can always be corrected. Supreme Court in *M.S. Ahlawat v. State of Haryana, (2000) 1 SCC 278*, held that to perpetuate an error is no virtue but to correct, it is a compulsion of judicial conscience. When a litigant complains of miscarriage of justice by exercise of powers of this Court which is without jurisdiction or not after following the due procedure resulting in his incarceration in a prison losing valuable liberty for a period with the attendant catastrophe descending on his career and life we have no option but to examine the correctness of his contentions.

9. In this case, the petitioners are complaining that their land has been illegally vested in State of U.P. treating it as purchased by Pragatisheel Samuhik Sahakari Krishi Samiti Ltd. in excess of 12.50 acre although it was never sold by them nor they were given any opportunity of hearing. In case the allegations of the petitioners are correct then it is a mistake of the nature of accidental slip and can be corrected in exercise of power under Section 152 of Code of Civil Procedure. The application has been illegally rejected.

10. In the result the writ petition succeeds and is allowed. Order of the Collector dated 06.09.2011 is set aside. The matter is remanded to the Collector to decide the application of the petitioners on

merit after hearing the parties in accordance with law. Since the matter is lingering for long time, the application be decided expeditiously preferably within a period of two months from the date of producing a certified copy of this order."

12. In respect to the order dated 7.4.1993 passed by respondent no.2 i.e. Collector, District- Gautam Buddh Nagar, several writ petitions were filed before this Court and the controversy has been settled in Civil ***Misc. Writ Petition No.58827 of 2011 (Surajbhan Sharma vs. State of U.P. & Others)*** decided on 21.10.2011 holding that application filed by the tenure holder to carry out the rectification after verifying status of the land, which is claimed by the tenure holder to be not part of the transaction covered by the order dated 7.4.1993 should be decided on merit in accordance with law as well as in ***Writ- C No.29898 of 2014 (Sharma Singh and Another Vs. State of U.P. and 3 Others)*** decided on 28.5.2014, wherein this Court has directed the Collector to decide the application filed by the petitioner, under Section 152 C.P.C. against the order dated 7.4.1993 vesting the plots in State- Government, in accordance with law on merit within stipulated period.

13. In the instant matter, the recall application filed by the petitioners' father, under Section 152 C.P.C. against the order dated 7.4.1993 has been dismissed as not maintainable, which is against the ratio of law laid down in *Surajbhan Sharma (supra)* & *Sharma Singh (supra)*.

14. Since the controversy has already been settled in respect to the

application filed against the order dated 7.4.1993, as such, the application dated 9.5.2019 filed by the petitioners was to be considered on merit in view of the ratio of law laid down in ***Surajbhan Sharma (supra)*** as well as ***Sharma Singh and Another (supra)***.

15. It is also material in the present case that civil Suit No.18 of 2015 filed for cancellation of sale-deed in question has been decreed and sale deed in question has been cancelled. It is further material fact that State through Collector was impleaded in the aforementioned Suit No.18 of 2015, as such, the finding recorded under the impugned order is wholly wrong.

16. Considering the entire facts and circumstances of the case, the impugned orders dated 15.4.2023 passed by respondent no.2 i.e. Collector, District- Gautam Buddh Nagar is liable to be set aside and the same is hereby set aside.

17. The writ petition ***stands allowed in part*** and the matter is remitted back before respondent no.2 to register the Case No.7 of 2019 on its original number and decide the same on merit considering the ratio of law laid down in ***Surajbhan Sharma (supra)*** & ***Sharma Singh (supra)***, in accordance with law, expeditiously preferably within a period of three months from the date of production of certified copy of this order before him. It is further directed that respondent no.2 shall issue notice to all the interested parties to the dispute, if any, before deciding the Case No.7 of 2019 on merit.

- (2) The present petition has been instituted for challenging the order dated 23.06.2022 passed by respondent no. 2 under the proceedings initiated under Section 104 and 105 of U.P. Revenue Code, 2006. While adjudicating the proceedings instituted by an alien person one Mr. Santosh Kumar Jaiswal who has been arrayed as respondent no. 3 in the instant petition, who is having a role as an informant before the respondent no. 2 for transfer which has been made by respondent no. 4 to 7 in favour of the petitioner, for treating it being void in terms of Section 104 and 105 of the U.P. Revenue Code of 2006, making it clear that the petitioner being purchaser of plot no. 4, 5-m, 6 and 7 situated at Gram Busanpur Tehsil Kerakat, District Jaunpur by way of lease deed instituted on 19.12.2018 executed by respondent no. 4 to 7 and as such he had never been a party

under the proceedings initiated by respondent no. 2 under Section 104 and 105 of the U.P. Revenue Code, 2006.

(3) During pendency of the proceedings in shape of case no. 2264 of 2021 (computerized case no. D202114360002264) (Santosh Kumar Jaiswal Vs. Meenu Seth and others) a report has been called for and the same was submitted by Sub-Divisional Officer, Tehsil-Kerakat, District Jaunpur, on dated 30.07.2021 which was in supplement and addition to the report submitted by Assistant Collector on dated 28.06.2021, wherein it is crystal clearly mentioned that the name of respondent no. 4 to 7 has been entered in the revenue records as a Bhumidhar having transferable rights under Section 67(1) of the U.P. Revenue Code, 2006, only on 6.7.2020 i.e. after the commencement of lease deed executed by respondent no. 4 to 7 in favour of the petitioner.

(4) While arriving over the conclusion drawn by the respondent no. 2, the vital fact which is also mentioned that the prerequisite condition for transferring the land pertaining to the person belonging to Scheduled Caste community to a person belonging to non-Scheduled caste community is the permission granted by the Collector which has not been obtained by the petitioner. Several other factual and technical grounds have been mentioned and discussed with the rival submissions submitted by the respondent no. 4, 5, 6 and 7 during adjudication of case no. 2264 of 2021 and ultimately the same was decided with the specific finding recorded in the concluding para of the order dated 23.06.2022 which impugned the present petition is quoted herein below:

"अतः उपरोक्त विवेचना के आधार पर मैं इस निष्कर्ष पर पहुँचता हूँ कि आवेदक द्वारा प्रस्तुत आवेदन पत्र दिनांक 1-2-2020 स्वीकार किया जाता है, तथा गाटा संख्या 165/0.073हे० व 166/0.077हे० स्थित ग्राम रसडा व गाटा संख्या 4/0.024हे० 5 मि०/0.020हे० व 6/0.040हे० तथा 7/0.057हे० स्थित ग्राम विशुनपुर परगना व तहसील केराकत जनपद जौनपुर की भूमि का लीज ग्रहिता मीनू सेठ पत्नी प्रभाकर वर्मा मोहल्ला मेहदी तला पो० केराकत तहसील केराकत जिला जौनपुर जो पिछड़ी जाति की है, के पक्ष में बिना कलेक्टर की अनुमति लिये किया गया लीजडीड दिनांक 19-12-2018 उ०प्र०रा०सं० 2006 की धारा 104 से बाधित होने के कारण शून्य है, जिसे उ०प्र०रा०सं० 2006 की धारा 105 के अन्तर्गत राज्य सरकार में निहित किया जाता है, तथा आराजी निजाई पर लिखित खातेदारों का नाम निरस्त करते हुए आराजी निजाई राज्य सरकार के खाते में अंकित की जाती है। आदेश के अनुपालन हेतु आदेश की प्रति तहसीलदार केराकत जौनपुर को प्रेषित किया जाया बाद आवश्यक कार्यवाही पत्रावली दाखिल दफ्तर हो।"

(5) By bare perusal of the above mentioned para of the impugned order which clearly shows that the transfer made by respondent no. 4, 5, 6 and 7 in shape of lease deed in favour of the petitioner has been declared void on the precise ground that no permission has ever been sought by the respondent no. 4, 5, 6 and 7 from the Collector before executing the transfer deed in favour of the petitioner.

(6) Learned counsel for the petitioner challenged the order dated 23.06.2022 under Article 226 of the Constitution of India on several other grounds inter alia that the proceedings initiated under Section 104 and 105 by the respondent no. 2 is without jurisdiction and as such the respondent no. 2 was not competent in pursuance to the statutory provisions contained under Section 104, 105 of U.P. Revenue Code, 2006, read with Rule 103 of U.P. Revenue Code Rules, 2016.

(7) While examining the arguments as raised by the learned counsel for the petitioner, it is necessary to quote the Section 104 and 105 of the U.P. Revenue Code, 2006 along with Rule 103 of the U.P. Revenue Code Rules, 2016 as under:

"Section 104. Transfer in contravention of this Code to be void.- Every Lease or transfer of interest in any holding or part thereof made by a bhumidhar or any asami in contravention of the provisions of this Code shall be void.

Section 105. Consequences of transfer by Bhumidhar in contravention of the Code.-(1) Where transfer of interest in any holding or part made by a Bhumidhar is void under Section 104, the following consequences shall, with effect from the date of such transfer, ensure, namely:

(a) the subject-matter of such transfer shall vest in the State Government free from all encumbrances;

(b) the tree, crops, wells and other improvements, existing on such holding or part shall vest in the State Government free from all encumbrances;

(c) the interests of the transferor and the transferee in the properties specified in Clauses (a) and (b) shall stand extinguished;

(d) the extinction of interest of the transferor under Clause (c) shall operate to extinguish the interest of any asami holding under him.

[(e) the provisions of this section shall no apply to any lease made under Section 94.]

(2) Where any land or other property has vested in the State Government under sub-section (1) it shall be lawful for the Collector to take over possession of such land and other property, and to direct that any person occupying such land or property be evicted therefrom, and for that purpose, the Collector may use or cause to be used such force as may be necessary and the provisions of Section 59 mutatis mutandis shall apply to such property.

Rule 103. Transfer in contravention of the provisions of the Code (Section 105).-

(1) If a bhumidhar or an asami has transferred his interest in any holding or part thereof which is void under Section 104, the Lekhpal shall promptly submit a report to the Sub-Divisional Officer containing particulars specified in Rule 97(1).

(2) On receipt of the report of the Lekhpal under sub-rule(1), or on information received otherwise, the Sub-Divisional Officer shall call upon the parties to the transfer to show cause, why action under Section 104 read with Section 105 should not be taken in respect of the land in question.

(3) After hearing the parties and making such inquiries as may be considered necessary, if the Sub-Divisional Officer is satisfied that the transfer in question is void under Section 104, he shall declare that:

(a) the subject matter of such transfer shall vest in the State Government;

(b) the trees, crops, well and other improvements existing on the holding

or part shall vest in the State Government free from all encumbrances; and

(c) the interests of the transferor as well as of the transferee stood extinguished, from the date of such transfer.

(4) The Sub-Divisional Officer shall direct that the revenue records should be corrected accordingly and where the transfer in contravention of the provisions of the Code relates to a part of the holding, he shall also fix land revenue in respect of the part left with the transferor in accordance with Chapter XI of these Rules.

(5) Every order of the Sub-Divisional Officer under this Rule shall be endorsed to the Samiti for necessary action.

(6) Where any property referred to in Section 105 has vested in the State Government, the Collector may evict any person in unauthorised occupation of such property and deliver possession thereof to the Gram Panchayat concerned."

(8) Sri Adya Prasad Tewari, learned counsel for petitioner sought the attention of the Court over the procedural part of the Section 104 and 105 which is clearly demonstrated under Rule 103 wherein, it is the Sub-Divisional Officer who will receive the report submitted by concerned Lekhpal or on information received otherwise will call upon the parties to the transfer, to show cause why action under Section 104 read with Section 105 of U.P. Revenue Code, 2006, should not be taken in respect of the land in question, meaning thereby if in any case transfer of any land has to be declared as void the competent authority for adjudication of the same shall be the Sub-Divisional Officer only. Moreover, for

direction to correct the revenue records in accordance with the adjudication made by the Sub-Divisional Officer, the Sub-Divisional Officer will direct that the revenue records should be corrected accordingly.

(9) The instant matter which has been pointed out by learned counsel for the petitioner that the entire adjudication initiated over the application submitted by respondent no. 3 has been initiated by the respondent no. 2 who is the Collector/District Magistrate, District Jaunpur, and as such the proceedings initiated by the respondent no. 2 is without jurisdiction and the same is liable to be set aside.

(10) Per contra, Sri Dhananjai Singh, learned Standing counsel and Sri Pankaj Kumar Gupta, learned counsel for Gaon Sabha vehemently opposed the prayer as made in the petition as well as rebutted the stand taken up by learned counsel for the petitioner on the ground that Section 104 and 105 are the provisions contained in the U.P. Revenue Code, 2006, wherein outcome of the same that there shall be no appeal lies and as such it was always the prerogative of the immediate superior authority to exercise the power so contained and vested with the subordinate authority where no appeal lies. And as such the action in shape of initiation of proceedings under Section 104 and 105 of U.P. Revenue Code, 2006, carried out by respondent no. 2 is well under its own jurisdiction and the same is justified and no writ petition is maintainable for challenging the order passed by the Collector under Section 104 and 105 of the U.P. Revenue Code, 2006. More so, both the learned counsels for the respondents argued vehemently that the writ petition is not

maintainable on the ground of alternative remedy available before the petitioner under Section 210 of the U.P. Revenue Code, 2006.

(11) Sri Dhananjai Singh, learned Standing counsel also submitted that by mere reading of the essence of Section 104 and 105 of U.P. Revenue Code, 2006, read with Rule 103 of U.P. Revenue Code Rules of 2016, it is practically not feasible that the report or the case shall be submitted by the Collector and the same shall be adjudicated by the Sub-Divisional Officer who is the subordinate authority to the Collector and thereafter if any adjudication has been made by the Sub-Divisional Officer the execution part of the order/determination drawn by the Sub-Divisional officer, the same has to be executed by the Collector is also not feasible practically. For substantiating his arguments, Sri Dhananjai Singh, learned Standing counsel referred the sub-rule (6) of Rule 103 of U.P. Revenue Code Rules, 2016 wherein it is mentioned that any property referred to in Section 105 has vested in the State Government, the Collector may evict any person in unauthorised occupation of such property and deliver possession thereof to the Gram Panchayat concerned.

(12) For supporting the stand taken up by learned Standing counsel, Sri Pankaj Kumar Gupta further added the definition clause mentioned under sub-section (8) of Section 4 of the U.P. Revenue Code of 2006 wherein Collector means an officer appointed as such by the State Government under sub-section (1) of Section 12 and shall include- (a) an Additional Collector appointed by the State Government under sub-section (2) of the said Section; and (b) an Assistant Collector of the first class

empowered by the State Government by notification to discharge all or any of the functions of a Collector under this Code; along with Section 13(3) which deals that the officers referred to in sub-section (1) or sub-section (2) shall exercise all the powers and discharge all the duties conferred and imposed upon them by or under this Code or any other law for the time being in force, subject to the control of the Collector.

(13) Sri Pankaj Kumar Gupta, learned counsel for Gaon Sabha demonstrated that it is the Collector who is all the time empowered to exercise the powers conferred with the Assistant Collector first class and the same has been exercised in the instant matter by the Collector, District Jaunpur while passing the order which impugned the present petition and as such the entire action carried out by respondent no. 2 is well under the jurisdiction defined and guarded by Section 4(8) along with Section 13(3) of the U.P. Revenue Code of 2006.

(14) For elaborating the arguments, Sri Pankaj Kumar Gupta, learned counsel for Gaon Sabha sought the attention of the Court over Section 19 and 215 of the U.P. Revenue Code, 2006 which is quoted herein below:

“Section 19. Other power of Revenue Officers.-(1) *When any power is exercisable or any duty is dischargeable by any officer or authority under this Code, such power or duty may be exercised or discharged by any superior officer or authority as well.*

(2) *The revenue officers appointed under this Code shall, subject to the control of the State Government, exercise such other powers and discharge*

such other duties as the State Government may, by any general or special order, direct.

Section 215. Orders not to be invalid on account of irregularity in procedure.- *No order passed by a revenue officer shall be reversed or altered in appeal or revision on account merely of any error, omission or irregularity in the summons, notice, proclamation, warrant or order or other proceedings before or during any inquiry or other proceedings under this Code, unless such error, omission or irregularity has in fact occasioned a failure of justice."*

By way of referring the above mentioned sections, Sri Pankaj Kumar Gupta, justified the order passed by Collector while exercising the power vest with the Sub-Divisional Officer defined under Rule 102 of U.P. Revenue Code, Rules 2016 which is quoted herein below:

"Rule 102. Grant of permission by Sub-Divisional Officer (Sections 101 and 102).-(1) *On receipt of an application under rule 100 or rule 101, the Sub-Divisional Officer shall issue notice to the bhumidhar or the Gram Panchayat concerned to show cause why the permission for exchange should not be granted.*

(2) The Sub-Divisional Officer shall also cause to be calculated the rental value of the land given or received in exchange and may also hear the lessees, mortgagees or other holders of the encumbrances, if any.

(3) If after making necessary inquiries, the Sub Divisional Officer is satisfied that the parties are agreeable to

such exchange and the required terms and conditions are fulfilled, he shall grant the requisite permission and shall direct the record of rights to be corrected accordingly.

(4) If the application is in respect of the land referred to in clause (b) of sub-section (1) and if it is reserved for planned use or is land in which bhumidhari rights do not accrue and the Sub-Divisional Officer is satisfied that the permission for exchange is in the interest of the applicant and is also in the public interest, he may refer the matter to the State Government for appropriate order and if the permission is granted by the State Government, the Sub Divisional Officer shall direct the Records of Rights (Khatauni) to be corrected accordingly."

It is the argument raised by learned counsel for Gaon Sabha that the sole ground for institution of the present petition is being defeated under Section 19 of the Code of 2006 which enables the superior authority to exercise the power conferred with the subordinate authority and as such if the application preferred by the petitioner has been denied while exercising the power under Rule 102, 103 of Rules of 2016, the same cannot be assailed on the ground of the procedural error which is barred by Section 215 of the Code of 2006.

(15) Learned Standing counsel also supported the order dated 23.06.2022 on the issue that respondent no. 2 decided the issue which is related to Section 98 of the U.P. Revenue Code, 2006 wherein it is only the Collector who is empowered to pass specific order, if any permission has been sought by the person belonging to Scheduled Caste community for seeking

permission to transfer the land over which his rights have been incurred as Bhumidhar with transferable rights. In the instant matter there was no as such permission sought by the respondent no. 4, 5, 6 and 7 to transfer their land in favour of the petitioner and as such in absence of any proper permission accorded by the respondent no.2 the transfer made by respondent no. 4, 5, 6 and 7 has been held as void under Section 104 and 105 of the U.P. Revenue Code of 2006.

(16) After having the rival submissions extended by learned counsel for the parties, certain questions have been determined for concluding the controversy as raised through the instant petition which is less in fact and more in legal aspects and the same are as under:

(i) whether Collector is empowered to adjudicate the proceedings under Section 104/105 of the U.P. Revenue Code, 2006 specifically when there is attraction of Section 98 of the U.P. Revenue Code of 2006?

(ii) if any order is passed without jurisdiction while declaring the transfer as void under Section 104/105 of U.P. Revenue Code, 2006 whether the same shall be subject to final adjudication under Section 210 of Code of 2006?

(iii) attraction of Section 4(8), Section 13(3) of U.P. Revenue Code of 2006 in reference to Rule 103 of U.P. Revenue Code Rules 2016 and the impact thereof?

(17) However, with regard to answering the first question framed above shall be dependent upon the entire proceedings whatsoever has been initiated

in shape of case no. 2264 of 2021 and the fate of the instant petition but the same is necessary to be answered at first. Considering the argument as raised by learned counsel for the petitioner, the statutory provision as defined under Rule 103 of the U.P. Revenue Code Rules 2016, there is hardly any ambiguity which has been mentioned under Rule 103(3) of the same rules, it is the Sub-Divisional Officer who is empowered to declare the transfer in question as void, if it is, under Section 104 and as such the submission made by learned Standing counsel as well as Sri Pankaj Kumar Gupta by way of taking reliance to the Section 4(8) as well as Section 13(3) is not sustainable, since the essence of the power vested with the Collector can be delegated or transferred or notified to the Assistant Collector, Sub-Divisional Officer by special notification issued by the State, but under the control of the Collector does not prevail Collector to exercise the power as codified under the Statute specifically for the Sub-Divisional Officer and as such the provisions cannot be read as a reversible theory which was tried to be demonstrated by learned Standing counsel. It is only the Sub-Divisional Officer who has been specifically mentioned under the Rule 103(3) U.P. Revenue Code Rules, 2016 for dealing with the provisions contained under Section 104 and 105 of the U.P. Revenue Code of 2006.

(18) The second issue as framed above with regard to maintainability of the outcome of the order from the proceedings of Section 104 and 105 of the U.P. Revenue Code Code of 2006 has expressly attained the finality after the proceedings under Section 210 since the order, if not passed by the authority who is having the jurisdiction the same can be apprised by

way of filing revision before the authority as defined under Section 210 of the U.P. Revenue Code Code of 2006. In the instant matter the order which impugned the present petition has been challenged, whereupon the interim protection has been granted by this Court and after exchange of pleadings and after the passage of time, plea and the ground taken up by learned Standing counsel with regard to maintainability of the instant petition on the ground of alternative remedy will now be adversely affecting the legitimate right of the petitioner which has been come up before this Court for specific consideration over the competency of the authority adjudicated upon while dealing with the Section 104 and 105 of the U.P. Revenue Code of 2006 and as such the instant petition has to be adjudicated only on the test of competency as well as on the ground of the legal provisions which enable the authority to act upon while considering the nature of transfer case under Section 104 and 105 of the U.P. Revenue Code of 2006.

(19) The third question framed hereinabove is by and large answered in the first and second question as framed and the same need not to be dealt separately since it is crystal clear with concurrent demonstration of the legal issue by learned counsel appearing for the rival parties which precisely made it clear that it is the Sub-Divisional Officer who is the competent authority to adjudicate any proceedings initiated in respect to Section 104/105 of the U.P. Revenue Code, 2006, however the arguments extended by Sri Pankaj Kumar Gupta, learned counsel for Gaon Sabha for consideration of Section 19 and 215 of Code of 2006 are concerned, it is to clarify that the power vest with the higher authority for exercising the duties as well as power defined under the Code of

2006 conferred with the subordinate authority is in special circumstances and the same cannot be exercised in a normal and usual manner, if that be so, the reasons for exercising the powers attracting Section 19 of Code of 2006 must be with plausible and satisfactory reasons recorded by the superior authority while exercising the powers of the subordinate authority. The pious intention of the legislature at the time of framing the Section 19 in U.P. Revenue Code, 2006 which is by and large a special and extraordinary powers conferred with the superior authority was not available in the U.P.Z.A. & L.R. Act, 1950 was only to ensure the dispensation of justice not for using the same in a normal and usual manner and as such while exercising the power under Section 19 of the U.P. Revenue Code, 2006, it is the the essential ingredient of the order passed by superior authority by way of recording the reasonings that under which circumstances, the power of Section 19 has been exercised by the superior authority once the same vest with the subordinate authority.

(20) In respect to the submission made by learned Standing counsel that with regard to feasibility of the practicality involved in the manner where the adjudication will be made by the Sub-Divisional Officer and the same shall be executed by the Collector, it is to clarify that Sub-Divisional Officer is the adjudicating authority in pursuance to Section 104, 105 of the U.P. Revenue Code of 2006 wherein the procedure has been defined under Rule 103 of the U.P. Revenue Code Rules of 2016. It is not the Collector who will execute the orders or the adjudication made by Sub-Divisional Officer rather the transfer of property which has been declared as void by the Sub-Divisional Officer shall be vest with

the State. There is hardly any doubt that it is the Collector who is the designated officer in the District as State and all the performance commenced under the category and nomenclature of the State empowered the District Magistrate/Collector to act accordingly and as such if the power and the property or any embodied adjudication carry the word State that directly demonstrate in the individual manner is the Collector inside the District. Once the property which has been declared by the Sub-Divisional Officer as void shall be vested with the State it is only the Collector who will take the possession of the same as under the capacity of the State itself and the same shall be further handed over in favour of the Gaon Sabha by the State that is by the Collector himself and as such the ground taken up by learned Standing counsel is hereby clarified that it is not the execution it is only the vesting the power of State into the Collector for receiving the property which has been declared during transfer as void and the same has been provided under Rule 103(6) of the U.P. Revenue Code Rules of 2016.

(21) In view of the aforementioned facts and circumstances, and the substantial arguments extended by all the three learned Advocates which provided the space to the Court and sufficient assistance to arrive over the conclusion which is as under:

(i) order dated 23.06.2022 is hereby set aside being passed and adjudicated contrary to the proceedings initiated under Section 104/105 of U.P. Revenue Code 2006 by the respondent no. 2 being not competent under the provisions mentioned under the Code of 2006 and the impact and effect of the adjudication drawn by respondent no. 2 shall also have no bearing for any purpose whatsoever.

(22) Before parting with the conclusion drawn by this Court, I personally express my gratitude to Sri Adya Prasad Tewari, learned counsel for petitioner and Sri Pankaj Kumar Gupta, learned counsel who appears on behalf of Gaon Sabha but in the instant matter he has been especially called for assistance to the Court being the expert in the matters pertaining to revenue and civil jurisdiction at the same time Sri Dhananjai Singh, learned Standing counsel also extended his able assistance for supporting the stand taken up by the State authorities which was helpful for ultimately deciding the instant petition.

(23) Writ petition stands *allowed* accordingly.

(2023) 9 ILRA 866
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.08.2023

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

Writ-C No. 21891 of 2023

Sarita Yadav **...Petitioner**
Versus
Saroj Devi & Ors. **...Respondents**

Counsel for the Petitioner:
 Sri Ram Pravesh Pandey

Counsel for the Respondents:
 C.S.C., Sri Raj Karan Yadav, Sri Vidya Dhar Yadav, Sri Yadvendra Kumar Yadav, Sri C.B. Yadav (Sr. Adv.), Sri Anand Upadhyay

Civil Law - U.P. Panchayat Raj Act, 1947 - Section 12-C - U.P. Panchayat Raj (Election of Members, Pradhans and Up-Pradhans), Rules, 1994 - Rules 96, 106,

107, 112 - Settlement of Election Disputes Rules, 1994 - Rules - 3 - Code of Civil Procedure, 1908 - Rule 4 - Petitioner contested for post of Pradhan, reserved for OBC candidates - Polling was held on 26.04.2021, counting on 02.05.2021 - Petitioner, secured 471 votes, declared elected, defeating respondent by 23 votes - Respondent filed election petition, Prescribed Authority, passed order for recounting - Impugned order - Held, election petitioner, apart from quoting unverified figures, failed to disclose their basis - His claim of receiving them from agents lacks evidentiary value - Allegations of improper rejection, counting of votes are vague and general - Election petitioner had opportunity to seek ballot paper account under Rules, 1994 but neither did so nor raised written objections regarding alleged manipulation - No plea was made alleging violation of Rule 104 during counting of votes - No prior written objection made regarding alleged cutting or overwriting in Prapatra - Records do not reflect such tampering - Tribunal should examine Prapatra - 45 & 46 before ordering recount - Allegations are baseless, as Prapatra is shown to polling agents post-counting, no objection raised then - Polling agent's evidence does not support claims of vote rejection, invalid vote acceptance, or vote mixing - No finding of irregularity by Election Officer - Recount order set aside. (Para 2, 11, 48, 49, 54, 64, 67)

Writ Petition allowed. (E-13)

List of Cases cited:

1. Mahendra Pal Vs Shri Ram Dass Malanger & ors., (2002) 3 SCC 457
2. Ram Adhar Singh Vs District Judge, Civil Misc. Writ Petition No. 11079 of 1983
3. R. Narayanan Vs S. Semmalai & ors., 1980 AIR 206 : 1980 SCR (1) 571
4. Surendra Singh Vs St. of U.P. & ors., Civil Misc. Writ Petition No. 3701 of 2011, Decided on 24.01.2011

5. Smt. Harmaya Vs St. of U.P. ors., Writ-C No. 18599 of 2017, decided on 03.05.2017
6. Om Prakash Upadhyay Vs St. of U.P. & ors., 2008 (5) ADJ 454
7. Smt. Usha Devi Vs Smt. Chandrakanta & ors., (2018) 4 UPLBEC 2706
8. F.A. Sapa etc. Vs Singora & ors., 1991 (2) JT 503
9. Mr. V. Narayanaswamy Vs Mr. C.P. Thirunavukkarasu, (2000) 2 SCC 294 (Para 23)
10. Sabarunnisha Vs Tahira & ors., 2013 (0) Supreme (Allahabad) 2251
11. Ram Sewak Yadav Vs Hussain Kamil Kidwai & ors., AIR 1964 SC 1249, (Para 8)
12. Bhabhi Vs Sheo Govind & ors., AIR 1975 SC 2117
13. Jitendra Bahadur Singh Vs Krishna Behari, AIR 1970 SC 276, (Para 8)
14. N. Narayanan Vs S. Semmalai, AIR 1980 SC 206
15. Dr. Jagjit Singh Vs Giani Kartar Singh & ors., AIR 1966 SC 773
16. Ram Singh Vs Kazi Mohiuddin & ors., AIR 1988 Allahabad 210
17. Markio Tado Vs Takam Sorang, AIR 2012 SC 993
18. S. Raghbir Singh Gill Vs S. Gurcharan Singh Tohra & ors., AIR 1980 SC 1362, (Para 22, 23)
19. Km. Shradha Devi Vs Krishna Chandra Pant & ors., AIR 1982 SC 1569 : (1982) 3 SCC 389.2
20. Suresh Prasad Yadav Vs Jai Prakash Mishra & ors., AIR 1975 SC 376, (Para 5, 6)
21. M.R. Gopalkrishnan Vs Thachady Prabhakaran & ors., 1995 Supp (2) SCC 101, (Para 16)
22. Chandrika Prasad Yadav Vs St. of Bihar & ors., (2004) 6 SCC 331

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

1. This writ petition has been filed by the petitioner with a prayer to quash an order dated 03.07.2023 passed by Sub-Divisional Officer/ Prescribed Authority, Mirzapur in Election Petition No. 7687 of 20211, whereby an order directing for recounting of votes has been passed.

2. Brief facts of the case are that elections of Panchayat in Uttar Pradesh were held in the year 2021, the petitioner was one of the candidates for the post of Pradhan of Gram Panchayat Kolahi, Development Block – Chhanbe, Tehsil Sadar, District Mirzapur². The Gram Panchayat was reserved for 'OBC Category Candidate'. The petitioner, being eligible, contested the aforesaid election, having been allotted 'Car' as election symbol. The polling was conducted on 26.04.2021 and counting took place on 02.05.2021. Petitioner secured 471 votes and was declared elected as Pradhan of the said Gram Panchayat. The respondent³ no. 1, namely, Saroja Devi secured 448 votes and thus the petitioner was declared elected by a margin of 23 votes.

3. Challenging the aforesaid election on several grounds, stating that election was not conducted in free and fair manner, respondent no.1 - the defeated candidate filed an election petition under Section 12-C of the U.P. Panchayat Raj Act, 1947⁴ inter alia on the following grounds:

3.1 Valid votes cast in favour of Saroja Devi – respondent no. 1 herein, (election petitioner), were declared invalid;

3.2 Valid votes cast in favour of respondent no. 1 – Saroja Devi were mixed

in bundles of petitioner Sarita Yadav (opposite party⁵ no. 1 in election petition) and respondent no. 7 - Neelam (opposite party no. 2 in election petition);

3.3 Number of votes, which were declared invalid, were mixed in the bundle of petitioner and were counted in her favour;

3.4 Number of votes cast in favour of the petitioner which were declared invalid were counted as valid votes in her favour.

4. The aforesaid fact regarding illegalities as done in counting was pointed out by husband of respondent no. 1 – Saroja Devi, who was present as her agent, raising objections in this regard before Counting Supervisor - Paryavekshak (i;Zos{kd) and counting agents (x.kukdehZ) but no attention was paid. It has also been alleged in the election petition that, after completion of counting, respondent no. 1 having election symbol 'Kitab' (fdrkc), the bundle of valid papers of respondent no. 1 were more than that of the petitioner. It was informed by Paryavekshak and Gadnakarmi to the counting agent, present on behalf of respondent no. 1/ election petitioner that she had secured 448 votes whereas the petitioner herein (opposite party no. 1 in election petition) having symbol 'Car' had secured 413 votes, whereas opposite party no. 2 in election petition – Neelam Devi having election symbol 'Imli' (beyh) had secured 60 votes, opposite party no. 3, namely, Anita Devi having symbol 'Anaj Osata Kisan' (vukt vkslkrk fdlku) got 2 votes, opposite party no. 4 having symbol 'Kanni' (dUuh) secured 1 vote and total 80 votes were rejected.

5. After giving the aforesaid information, Paryavekshak and Gadnakarmi asked husband of respondent no. 1, who was present as counting agent on her behalf, to call respondent no. 1, so that certificate in this respect could be given to her. It has also been alleged in paragraph-6 of the election petition that Paryavekshak and Gadnakarmi had made a chart accordingly. Receiving the aforesaid information, the counting agent left the counting hall in order to call his wife / respondent no. 1. He, standing at the door of counting centre Kanya Inter College, asked his wife to come inside the centre.

6. In paragraph-7 of the election petition, it has been alleged that as soon as the counting agent entered the aforesaid counting centre along with his wife, namely, Saroja Devi / respondent no. 1, they saw that the Paryavekshak and Gadnakarmi, without preparing the counting chart, had opened the bundle of booth nos. 158 and 159, to manipulate / do Herapheri, do some bungling which was objected by the election petitioner, but no attention was paid, ignoring the objection, they forcefully, as per their convenience made the bundle and started preparing counting chart / Parishisht. After the aforesaid, the respondent no. 1 was shown to have obtained 448 votes whereas the petitioner had secured 471 votes declaring her as winning candidate by 23 votes.

7. It has also been alleged that only 44 votes were declared invalid in place of 80 votes. The certificate was also issued to the petitioner in a hurried manner. In paragraph-8 of the election petition, it has been alleged that the voter list indicated total 1354 voters, out of which 1004 votes were cast for the election of Pradhan, Member Kshetra Panchayat, Member Zila

Panchayat but proceeding in unfair manner, manipulated, and in Prapatra, 22 extra votes have been shown. 80 invalid votes have been shown only in place of 44, rest 36 have been counted in favour of the petitioner by putting the invalid votes in her bundle and showing 471 votes on top of the petitioner's bundle.

8. Specifying the aforesaid aspect, it has been alleged in paragraph-9 of the election petition that in polling booth 158, total 573 votes were cast; whereas in polling booth no. 159, 431 votes were cast thus total 1004 votes were cast, but, 36 invalid votes were placed in the bundle of petitioner and from 413 votes which were counted earlier, 471 votes have been shown in her favour, accordingly, making Prapatra and declaring the petitioner to have won by the margin of 23 votes.

9. Emphasizing upon the bungling/ manipulation, which has been done in the elections of Pradhan, it has been alleged in paragraph-11 of the election petition that in Matgadna Chart, Gadna Parchi, Parishisht 5 Prapatra 43 and Parishisht 7 Prapatra 45, Parishisht 8 Prapatra 46, wrong entries have been made after cutting and accordingly, the result has been declared, which is illegal.

10. An affidavit of husband of respondent no. 1, who was her agent at the time of counting of votes, was submitted as an evidence to prove the allegations as made in the election petition. The petitioner cross-examined the witness produced by respondent no. 1.

11. The Prescribed Authority summoned the record of election like the counterfoil of ballot paper and also the voter list, on the basis of which the order

dated 03.07.2023 directing for recounting of votes has been passed, thus the present writ petition challenging the aforesaid order has been filed.

12. Sri R.P. Pandey, learned counsel appeared for the petitioner, Sri Vijay Prakash Mishra, learned Standing Counsel for the State, and Sri C.B. Yadav, learned Senior Advocate, assisted by Sri V.D. Yadav, learned counsel for private respondents.

13. Learned counsel for the petitioner, while challenging the impugned order whereby recounting of votes has been ordered, submits that, the election petition has been filed on the following grounds:

13.1 Improper rejection of valid votes;

13.2 Improper acceptance of invalid ballot papers, and counting the same as valid votes in favour of writ petitioner;

13.3 Gross irregularities / mistakes committed during the course of counting ballot papers;

13.4 Making wrong entries in total number of votes by cutting and overwriting in Prapatra;

13.5 Lastly, disputing the total number of votes cast on the said date for the post of Pradhan being 1004 in place of 1026.

14. Learned counsel for the petitioner submits that the Court would be justified in ordering recounting of ballot papers only where the election petition contains an adequate statement of material facts on

which the allegations of irregularity or illegality in counting are found, and on the basis of evidence adduced such allegations are prima facie established, affording a good ground for believing that there has been a mistake in counting, as also, if the court trying the petition is prima facie satisfied that the making of such an order is imperatively necessary to decide the dispute and to do complete and effectual justice between the parties. In support of his submissions, learned counsel for the petitioner has relied upon a judgement of the Supreme Court in the case of **Mahendra Pal v. Shri Ram Dass Malanger & Ors.6.**

15. Learned counsel for the petitioner next contends that an order for inspection of ballot papers cannot be granted to support vague pleas, not supported by material facts or to fish out evidence to support such pleas. The case must be set out with provision supported by averments of material facts and mere allegation that there has been an improper reception, refusal or rejection of votes will not be sufficient to support an order for inspection. Reference has been made in this regard to a judgement of Full Bench of this Court in the case of **Ram Adhar Singh v. District Judge7.**

16. Placing reliance upon a judgement of the Supreme Court in the case of **R. Narayanan v. S. Semmalai And Ors.8,** learned counsel for the petitioner submits that law on the subject regarding circumstances under which recount could be ordered has been summarized as follows:

“The Court would be justified in ordering a recount of the ballot papers only where:

(1) The election petition contains an adequate statement of all the material facts on which the allegations of irregularity or illegality in counting are founded;

(2) On the basis of evidence adduced such allegations are prima facie established, affording a good ground for believing that there has been a mistake in counting; and

(3) The court trying the petition is prima facie satisfied that the making of such an order is imperatively necessary to decide the dispute and to do complete and effectual justice between the parties.”

17. Learned counsel for the petitioner further submits that allegations which have been made, must not only be clearly made but also be proved by cogent evidence and the narrow margin of votes undoubtedly, is an important factor to be considered, but the same would not by itself vitiate the counting or justify recounting. In support of his submission, he has placed reliance on a judgement of of this Court in the case of **Surendra Singh v. State of U.P. and others**⁹.

18. Thus, such an election petition with vague and indefinite allegation, without there being any basis to prove the aforesaid situation, cannot be entertained and the order directing for recounting is liable to be aside.

19. Learned counsel for the respondent submits that there is no illegality in the order impugned, vide which recounting of votes has been directed. He submits that there is specific allegation with respect to valid votes in favour of election petitioner being declared invalid, valid votes cast in

favour of election petitioner being mixed in bundles of the petitioner Sarita Yadav and one Neelam, and invalid votes being mixed in bundle of petitioner and counted in her favour as well as invalid votes of the petitioner being counted as valid votes in her favour. The same being supported by statement of election agent, namely, Suryamani Yadav – husband of the defeated candidate. There is also a definite allegation with respect to total number of votes cast i.e. 1004, which were manipulated and total votes cast were shown 1026.

20. Learned counsel for the respondent further submits that the respondent – election petitioner has specifically made allegations regarding the aforesaid irregularities and has proved the same on the basis of statement of counting agent, thus to maintain purity of elections, the order of recounting should be passed where it has materially affected the result of election, whereby the defeated candidate is seriously prejudiced in order to do justice between the parties. In support of his submissions, he has relied upon a judgement of this Court in the case of **Smt. Harmaya v. State of U.P. And 5 Others**¹⁰.

21. Learned counsel arguing on behalf of respondent next submits that sufficient material was there in the form of statement of counting agent to clearly make out a prima facie case for the unexplained discrepancy in the number of votes cast as well as other allegations with respect to valid votes being declared invalid and votes in favour of the defeated candidate being counted in favour of the petitioner, therefore, there is no illegality in the order directing for recounting and objection was also raised by the defeated candidate for the

aforesaid, but the same has not been considered. He has relied upon a judgement of this Court in the case of **Om Prakash Upadhyay v. State of U.P. and others**¹¹, wherein, it is stated in relevant paragraphs of the election petition that, at the time of counting, on the influence of certain persons, undue pressure was exercised and void votes cast in favour of the defeated candidate were added in the bundle of winning candidate, wherein objection was made against the illegalities, the order directing for recount for the unexplained discrepancy in the total number of votes is not bad.

22. Learned Senior Counsel for the respondent also contends that the election petition contains an adequate statement of all facts on which allegations of irregularity or illegality, are found, there being specific averments made in relevant paragraphs of the election petition and the same have not been specifically denied by the petitioner, evidence being adduced in support of the same by the counting agent of respondents in support of the averments made in the election petition, prima facie establish a good ground to believe that there has been illegality and irregularity in counting, therefore, to decide the dispute and do complete and effectual justice between the parties, the order of recounting by the election tribunal on its prima facie satisfaction cannot be said to suffer from any irregularity as in the present case. In support of his submission, he has relied upon a judgement of this Court in the case of **Smt. Usha Devi v. Smt. Chandrakanta and Others**¹².

23. Mr. Yadav has also placed the provisions of U.P. Panchayat Raj (Election of Members, Pradhans and Up-Pradhans), Rules, 1994¹³, wherein provisions of from

Rules 76 to 96 indicate that the returning officer shall, at close of polling, prepare ballot papers in specified form and if the aforesaid papers are counted, the polling agents have every right to know about the actual votes cast in the polling, therefore, the aforesaid fact that the polling agents were not aware of the number of votes cast and after manipulation, Prapatra was prepared by cutting and overwriting, such allegation being fair and proper can be looked into only after directing for recount of votes, thus to know about the aforesaid as to how many votes were cast, whether 1004 or 1026, the Tribunal has rightly called for the voter list and counterfoil and seeing discrepancy in the same, the order impugned has been passed, which is not illegal, therefore, no interference is required and the writ petition is liable to be dismissed.

24. I have heard learned counsel for the parties and perused the record.

25. With the consent of learned counsel appearing for the parties, the writ petition is being heard finally, without calling counter affidavit, at this stage, in terms of Rules of the Court.

26. The only question which falls to be determined in this regard is whether the order directing for recount is justified in the facts of the present case. In considering this question, material provisions of the U.P. Panchayat Raj Act, 1947 read with Uttar Pradesh Panchayat Raj (Settlement of Election Disputes) Rules, 1994¹⁴ may first be noticed.

27. It would be apt to mention relevant part of Section 12-C of the Uttar Pradesh Panchayat Raj Act, 1947, which is as under:

“12-C. Application for questioning the elections.—(1) The election of a person as Pradhan¹⁵[* * *] or as member of a Gram Panchayat [x x x]¹⁶ shall not be called in question except by an application presented to such authority within such time and in such manner as may be prescribed on the ground that—

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

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

(i) by the improper acceptance or rejection of any nomination; or

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

28. From the aforesaid it is clear that the election petition should contain a concise statement of material fact, on which the petitioner relies, and material supporting the allegations made thereunder. It also reveals that the ground on which the election of Gram Pradhan and its members can be challenged are (a) the election has not been a free election by reason that the corrupt practice of bribery or undue influence has extensively prevailed at the election, or (b) that the result of the election has been materially affected.

29. Sub-section (3) of Section 12-C of the Act, 1947 provides the procedure for filing application under sub-section (1) of which hereinafter shall be referred to as ‘election petition’. The Statute says that election petition shall contain such particulars as may be prescribed.

30. In respect to further procedure, the Statute contemplates its prescription by Settlement of Election Disputes Rules, 1994. Rule-3 of the said Rules, 1994 is relevant to be reproduced hereunder:

“3. Election Petition.—(1) An application under sub-section (1) of Section 12-C of the Act shall be presented before the Sub-Divisional Officer, within whose jurisdiction the concerned Gram Panchayat lies, within ninety days after the day on which the result of the election questioned is announced and shall specify the ground or grounds on which the election of the respondent is questioned and contain a summary of the circumstances alleged to justify the election being questioned on such ground.”

31. Rule-4 of the Settlement of Disputes Rules, 1994 prescribes a procedure to be followed by the Tribunal while hearing the petition. It provides that subject to provisions of the Act and these Rules, every election petition shall be tried by a Sub-Divisional Officer as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908. Rule-4 is quoted herein-below:

“4. Hearing of the petition.—(1) Subject to the provisions of the Act and these rules, every election petition shall be tried by the Sub-Divisional Officer, as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908, for the trial of suits.”

32. The procedure for holding election has been prescribed under the U.P. Panchayat Raj (Election of Members, Pradhans and Up-Pradhans), Rules, 1994.

Rules 96, 104 & 112 are necessary to be mentioned below:

96. Account of ballot papers.---

The Matdan Adhyaksh shall at the close of the poll prepare a ballot paper account in the specified form.

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104. Procedure at the counting.--

--On the date and at the time and place appointed under Rule 101, the Nirvachan Adhikari shall proceed as follows:

(a) The Nirvachan Adhikari shall satisfy himself that all the ballot boxes used at the poll and which are to be counted at that place have been received and accounted for;

(b) The Nirvachan Adhikari shall then allow the candidates and their Nirvachan Abhikartas and Ganana Abhikartas present at the counting an opportunity to inspect the ballot boxes and their seals for satisfying themselves that they are in order;

(c) The Nirvachan Adhikari shall also satisfy himself that none of the boxes has in fact been tampered with. If any ballot box is found by him to have been tampered with or destroyed or lost, the Nirvachan Adhikari shall not proceed with the counting of votes and the provisions of Rule 100 shall apply.

(d) If the Nirvachan Adhikari is satisfied that all such ballot boxes which are to be counted at such place have been received and are in order, he shall take up the counting of ballot papers contained in the ballot boxes. All the ballot boxes used at a polling place shall be opened, and the

counting of the ballot papers found in those boxes proceeded with, in accordance with the instructions of the State Election Commission, at the same time;

(e) An account of the ballot papers found in the boxes of the polling place shall be recorded in a statement in the form specified by the State Election Commission;

(f) The Nirvachan Adhikari shall allow the candidates, their Nirvachan Abhikartas and Ganana Abhikartas, who may be present, reasonable opportunity to inspect all ballot papers which in the opinion of the Nirvachan Adhikari are liable to be rejected, but shall not allow them to handle those or any other ballot papers. The Nirvachan Adhikari shall on every ballot paper, which is rejected, endorse rejection thereon in Hindi. If any candidate or his Nirvachan Abhikarta questions the correctness of the rejection of any ballot paper, the Nirvachan Adhikari shall also record briefly on such ballot paper grounds for his rejection;

(g) After the counting of all ballot papers contained in the ballot boxes of the polling place has been completed the Nirvachan Adhikari shall cause all such ballot papers to be kept in a separate packet on which shall be indicated such particulars as will identify the name of the Gram Panchayat to which the ballot papers relate.

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112. Production and inspection of election papers.---

(1) While in the custody of the Assistant District Election Officer (Panchayat and Local Bodies) the packets of ballot papers whether valid, rejected or tendered, and of the marked

copy of the electoral roll shall not be inspected by or produced before any person or authority except under the order of a competent Court or of an authority hearing an election petition.

(2) Copies of the election return forwarded by the Nirvachan Adhikari under sub-rule (1) of Rule 111 shall be furnished by the Assistant District Election Officer (Panchayat and Local Bodies) on payment of a fee of rupees twelve for each copy.

(3) All other papers relating to the election shall be opened to public inspection subject to such condition and subject to the payment of such fees as may be specified by the State Election Commission.”

33. Rule-95 of the Rules, 1994 speaks about sealing of ballot boxes, etc., after poll; Rule-96 of the Rules, 1994 deals with account of ballot papers in specified form; Rule-97 says about transmission of ballot boxes, etc., to the Election Officer; Rule-103 is about person who may be present at the counting; Rule-106 envisages verification of accounts submitted by the Matdan Adhyaksh; Rule 107 enumerates election return by the Election Officer. Other provisions with respect to appointment of time, place and date for counting, Ganana Adhikari, procedure of counting, grounds for rejection of ballot papers, equality of votes, declaration of result are provided between Rules 101 to 109.

34. While deciding the election petition, it has to be kept in mind and as is well settled, that a right to elect is fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a common law right. To be more specific, right to elect,

right to be elected and right to dispute an election are statutory creations, therefore, are subject to statutory limitation. An election petition is not an action at common law, nor in equity. It is a statutory proceeding to which neither the common law nor principles of equity applies but only those Rules apply, which the Statute makes. It is a special jurisdiction and special jurisdiction has always to be exercised in accordance with the Statute creating it. Meaning thereby that in the trial of election disputes, court is put in straitjacket.

35. In the case of **F.A. Sapa etc. v. Singora and others**¹⁷, the Court said, “it is fairly well settled that “our election law being statutory in character must be strictly complied with since an election petition is not guided by ever changing common law principles of justice and notions of equity. Being statutory in character, it is essential that it must conform to the requirements of our election law. But, at the same time, the purity of election process must be maintained at all costs and those who violate the statutory norms must suffer for such violation”.

36. In another case of **Mr. V. Narayanaswamy v. Mr. C.P. Thirunavukkarasu**¹⁸, in paragraph-23 the Court observed “an election petition is based on the rights, which are purely the creature of statute, and if the statute renders any particular requirement mandatory, the court cannot exercise dispensing powers to waive non-compliance”.

37. From the above discussion, it is clear that the provisions, as narrated above, have to be kept in mind while deciding an election petition.

38. It has been held in a catena of decisions that secrecy of ballot papers is

sacrosanct and is required to be maintained at all costs and that recounting should not be allowed to be ordered on frivolous, fake and indefinite allegations. Thus, the right of defeated candidate to assail the validity of an election result and seek recounting of votes is subject to basic principle that the secrecy of ballot paper is sacrosanct and that a recount can be done only when a prima facie case is made out. Reference may be made to the judgement in the case of **Sabarunnisha v. Tahira and others**¹⁹.

39. Starting from the case of **Ram Sewak Yadav v. Hussain Kamil Kidwai and others**²⁰ to the case of **Bhabhi v. Sheo Govind and others**²¹, and several other cases it has been held that an order of inspection / recounting may not be granted as a matter of course, having regard to the insistence upon secrecy of ballot papers, the Court would be justified in granting an order of inspection / recounting provided two conditions are fulfilled: (i) that the petition for setting aside an election contains an adequate statement of material facts on which the petitioner relies in support of his case and (ii) the tribunal is prima facie satisfied that in order to decide the dispute and to do complete justice between the parties inspection of ballot papers is necessary.

40. From the aforesaid, it is clear that an order for inspection of ballot papers cannot be granted to support vague pleas as made in the writ petition, not supported by material evidence or to fish out evidence to support such pleas. The case of the election petitioner must be set out with precision supported by averments on material facts. To establish a case so pleaded an order of inspection may undoubtedly, if the interest of justice requires, be granted. But a mere allegation that the election petitioner,

suspects or believes, that there has been an improper reception, refusal or rejection of votes will not be sufficient to support an order for inspection/ recounting.

41. Thus, the question which arises is, as to what will be the material facts in the petition seeking recount. This point is not res integra, as it came up several times before the Hon'ble Supreme Court for decision. The consensus of all the decisions, is, that since an order for a recount touches upon the secrecy of ballot, it should not be made lightly or as a matter of course. In the case of **Ram Sewak Yadav** (supra), which is a leading case on the point of recount, the Supreme Court observed as:

“8. There can therefore be no doubt that at every stage in the process of scrutiny and counting of votes the candidate or his agents have an opportunity of remaining present at the counting of votes, watching the proceedings of the returning officer, inspecting any rejected votes, and to demand a re-count. Therefore a candidate who seeks to challenge an election on the ground that there has been improper reception, refusal or rejection of votes at the time of counting, has ample opportunity of acquainting himself with the manner in which the ballot boxes were scrutinized and opened, and the votes were counted. He has also opportunity of inspecting rejected ballot papers, and of demanding a re-count. It is in the light of the provisions of Section 83(1) which require a concise statement of material facts on which the petitioner relies and to the opportunity which a defeated candidate had at the time of counting, of watching and of claiming a re-count that the application for inspection must be considered.”

42. From the aforesaid discussion, it is manifest that every candidate and his agents having had sufficient opportunity to watch proceedings of counting, it must be clearly stated in the petition as, how, in whose presence and in which round of counting, the irregularity took place and how that irregularity was objected to at the time of counting. In facts of the present case, the allegations are with respect to improper rejection of valid votes, improper acceptance of invalid ballot papers and the dispute with respect to total number of votes cast being 1004 in place of 1026. The allegations, as made in various paragraphs of the election petition are not specific and are supported by the statement of polling agents wherein no dispute has been raised regarding irregularities at the time of polling. Making it more specific the allegations in the writ petition are not with respect to any irregularity at the time of polling till reaching of the ballot boxes to the place of counting. In none of the paragraphs in election, such stand has been taken that there was any manipulation at the time of polling, therefore, no question of difference of number of ballot papers could arise at the time of counting, when after the close of poll, as provided under Rule-95 of the Rules, 1994, the Matdan Adhyaksh has to close the slit of each ballot box and seal up the slit in presence of the contesting candidate or his Abhikarta (agent), who may be present to seal of the same. The aforesaid fact is also evident from the statement of polling agent, which is as follows:

“जो मतदान के पश्चात जो बाक्स सील किये थे सभी एजेन्ट मौजूद थे मतदान में किसी प्रकार की धांधली नहीं हुई थी इसकी जानकारी थी।”

43. Rule-106 provides that Election Officer shall verify the statement submitted

by Polling Officer under Rule-96 by comparing it with a number of counted votes and rejected ballot papers with the unused or spoilt ballot papers in his possession and the tendered votes list. He shall re-close and re-seal each packet which has been opened by him and shall record on each packet a description of its contents, the name of the Gram Panchayat, the date of the election to which it refers. As per Rule-107 of the Rules, 1994, Nirvachan Adhikari shall prepare and certify an election return in the specified form setting forth-

“(a) the names of the candidates for whom valid votes have been given;

(b) the number of valid votes given for each candidate;

(c) the total number of valid ballot papers;

(d) the number of rejected ballot papers;

(e) the number of tendered ballot papers; and

(f) the name of the candidate elected.

He shall also permit any contesting candidate or his Nirvachan Abhikarta or Ganana Abhikarta to take a copy of or an extract from such return”

44. Thus, as per provisions of Rule-107 of the Rules, 1994, a copy of election return as prepared by Nirvachan Adhikari is also given to the contesting candidate, or Nirvachan Abhikarta or Ganana Abhikarta / polling agent, but there is no averment in this regard as to whether there was any

difference in the number of votes as mentioned in the election return and no specific averment is there in the election petition nor any reference of same in statement of polling agent, given in support of election petition, referred about it. Therefore, the allegations as made in the election petition are not definite, precise, therefore, no such order, directing for recounting, could have been passed in such circumstances.

45. It would also be apposite to refer the judgement of the Supreme Court in the case of **Jitendra Bahadur Singh v. Krishna Behari**²², wherein the Apex Court has observed thus:

“8. ...In the instant case apart from giving certain figures whether true or imaginary, the petitioner has not disclosed in the petition the basis on which he arrived at those figures. His bald assertion that he got those figures from the counting agents of the Congress nominee cannot afford the necessary basis. He did not say in the petition who those workers were and what is the basis of their information? It is not his case that they maintained any notes or that he examined their notes, if there were any. ...”

46. Lastly, reference may be made to the judgement in the case of **N. Narayanan v. S. Semmalai**²³, in which the Supreme Court held that the relief of recounting cannot be accepted merely on the possibility of there being an error.

47. Applying the principle of the aforesaid decision of the Supreme Court, it may not be unhesitatingly stated that in a case demanding recounting, the election petitioner not only should give the figures of votes, which according to him was

improbably accepted or rejected, but the basis of allegations must also be disclosed.

48. In the instant case, apart from giving certain figures whether true or imaginary, the election petitioner has not disclosed in the election petition, the basis on which he arrived at those figures. His bald assertions that he got those figures from the counting agent, as told to him by Paryavekshak and Gadnakarmi, cannot hold the necessary basis of passing the order impugned. It would also be apt to mention that the allegations regarding improper acceptance, rejection and counting of votes after mixing the bundle as well as total number of votes cast, are general in nature, the basis of which is stated to have been told by all the agents who are present there. In support of the aforesaid assertions in the statement of the polling agent it has been said as follows:

“सभी एजेन्टों ने कहा था कि कुल 1004 मत ही पड़ा है इसी के आधार पर याचिका दायर की गयी है।”

49. There was ample opportunity to the election petitioner to make an application to get the account of ballot papers as the same is made in specified form as required under Rule-96 of the Rules, 1994, wherein the Matdaan Adhyaksh at the close of the poll prepare the ballot paper count in such a specified form. There is no mention in the election petition that the election petitioner tried to get the aforesaid account of ballot papers nor has any written objections been placed with respect to manipulation as alleged regarding improper acceptance or rejection of votes. It is also not pleaded at all in the election petition that, at any stage, during counting of votes, there was any contravention or violation of procedure prescribed under Rule-104 of the Rules, 1994.

50. In the present case, the main allegations are with respect to manipulation in valid votes, invalid votes, mixing and counting of votes in favour of other candidates. A prayer to recount the votes is justified only when the petitioner has set out his case with precision supported by material fact. Mere allegations that there has been manipulation with respect to valid votes of the election petitioner being declared invalid, or being mixed in another bundle being counted in favour of some other candidate or counting invalid votes of candidates as valid, will not be sufficient to support an order for recounting, that is to say, a candidate who seeks to challenge the elections on the aforesaid ground, in the light of provisions of relevant Act and Rules should give a concise statement of material facts on which the petitioner relies and the basis to prove the same so that the application for recounting may be considered. In case of **Dr. Jagjit Singh v. Giani Kartar Singh and others**²⁴, the averment in the election petition was with respect to a large number of votes to have been cast in favour of appellant, had been improperly rejected and that materially affected the result of election. Thus, while emphasizing on the aforesaid and placing reliance on the judgement in **Ram Sewak Yadav (supra)**, following law has been laid down by the Supreme Court in the case of **Jitendra Bahadur Singh (supra)**:

“8. ...In the instant case apart from giving certain figures whether true or imaginary, the petitioner has not disclosed in the petition the basis on which he arrived at those figures. His bald assertion that he got those figures from the counting agents of the Congress nominee cannot afford the necessary basis. He did not say in the petition who those workers were and what is the basis of their information? It is not

his case that they maintained any notes or that he examined their notes, if there were any. The material facts required to be stated are those facts which can be considered as materials supporting the allegations made. In other words they must be such facts as to afford a basis for the allegations made in the petition. The facts stated in paras 13 and 14 of the election petition and in Schedule ‘E’ are mere allegations and are not material facts supporting those allegations. This Court in insisting that the election petitioner should state in the petition the material facts was referring to a point of substance and not of mere form. ...”

51. The aforesaid authoritative pronouncement reflects that recount touches upon secrecy of ballot papers. The Court would not be justified to order for recount of votes, if all the material facts on which the allegations of irregularity or illegality in counting, are not pleaded adequately in the election petition. Where the allegations are general, vague, based on suspicion or belief of the petitioner or not precise, the relief of recounting, cannot be acceded merely on the possibility of there being an error.

52. From a perusal of the election petition as well as evidence in support thereof, it can be derived that the fact as to from where the information regarding the fact that initially the polling agent was informed about 80 invalid votes which were later said to be 36, the basis of which is neither disclosed in the election petition nor is supported in the evidence as laid, i.e., in the statement of polling agent, does not give the ground to entertain the election petition thus where in case of any manipulation, the polling agent present had ample opportunity to move an application

in writing before the competent authority, which has not been done in the present case, there was no occasion for the Tribunal to call for the voter-list or counterfoil in order to read in between the lines. The fact which has not been alleged in the election petition, thus the allegations in the present case made by election petitioner in election petition are vague and general as nothing specific is stated in that regard. The allegations as made in the election petition, taken on the face value, are not supported by adequate statement of material evidence, on which the election petitioner relies in support of cause of action, therefore, the order directing recounting is not justified.

53. A perusal of the evidence in the form of statement of polling agent shows that contradictory evidence has been given by him in several pages, like at one place the polling agent has stated that there is no illegality in the polling and in the presence of all agents the ballot boxes were sealed, whereas, he is disputing the total number of votes cast, as once the ballot boxes are sealed, how can the number of ballot papers be added or reduced, thus total votes shown as 1026 for which the Prapatra was also made, cannot be disputed, there being no supportive evidence and no basis for the allegation as made in the election petition. It has also not been averred as to whether any other agent, who witnessed the counting, has been called for or has come up by himself to give any statement in this regard.

54. The next objection was with respect to cutting and overwriting in Prapatra. There is no written application in this regard before the competent authority prior to filing of election petition and the records as placed in the present petition do

not show any such cutting or overwriting in the Prapatra. It would have been proper for the Tribunal to call for the records of Prapatra - 45 & 46 prior to directing for recount. The election petitioner should have also specifically mentioned regarding changes done after cutting and overwriting. Said allegation has no basis as when Prapatra is prepared after completion of the counting, same is shown to the polling agents, who should have raised alarm/objection at that very stage itself.

55. From the above discussion and after consideration of the aforesaid decision as has been held in the case of **Ram Singh v. Kazi Mohiuddin and others**²⁵, that since an order for recount touches upon secrecy of the ballot, it should not be made lightly or as a matter of course. The election petitioner should not only give the basis on which the allegations with respect to his valid votes being mixed with other bundles, invalid votes being counted as valid in favour of other candidates, but also the basis of allegations must be disclosed, which has not been done in the present case as there is contradiction in the statement of polling agent. The allegations which have not been made in the election petition, have been substituted by way of evidence in the form of statement of the polling agent of the defeated candidate and such an evidence cannot be read beyond pleadings as has been held in the case of **Markio Tado v. Takam Sorang**²⁶.

56. While indicating the approach to be adopted in considering the pleadings and claim of secrecy of ballots and purity of an election, the Supreme Court has held in the case of **S. Raghbir Singh Gill v. S. Gurcharan Singh Tohra & Others**²⁷ as follows:

“22. ...Secrecy of ballot was mooted to ensure free and fair elections. If the very secrecy of ballot instead of ensuring free and fair elections strikes at the root of the principle of free and fair elections this basic postulate of democracy would be utilised for undoing free and fair elections which provide life-blood to parliamentary democracy. ...”

23. ...Secrecy of ballot though undoubtedly a vital principle for ensuring free and fair elections, it was enshrined in law to subserve the larger public interest, namely, purity of election, for ensuring free and fair election. The principle of secrecy of ballot cannot stand aloof or in isolation and in confrontation to the foundation of free and fair elections viz. purity of election. They can co-exist but as stated earlier, where one is used to destroy the other, the first one must yield to principle of purity of election in larger public interest. In fact secrecy of ballot, a privilege of the voter, is not inviolable and may be waived by him as a responsible citizen of this country to ensure free and fair election and to unravel foul play.”

57. In another decision of the Supreme Court in the case of **Km. Shradha Devi v. Krishna Chandra Pant and others**²⁸, it has been held that the election petition filed with a prayer for recounting on the allegations of valid and invalid votes being counted in favour of winning candidates or other candidates as well as discrepancy in the total number of votes cast, the election petitioner has to offer prima facie proof of the errors in counting and if error in counting is prima facie established, a recount can be ordered.

58. In the case of **Suresh Prasad Yadav v. Jai Prakash Mishra &**

Others²⁹, while summarizing the principles laid down by the court from time to time in granting a prayer directing for recount, it has been observed as follows:

“5. ...this Court has repeatedly said, that an order for inspection and recount of the ballot papers cannot be made as a matter of the course. The reason is twofold. Firstly such an order affects the secrecy of the ballot which under the law is not to be lightly disturbed. Secondly, the Rules provide an elaborate procedure for counting of ballot papers. This procedure contains so many statutory checks and effective safeguards against mistakes and fraud in counting, that it can be called almost trickery foolproof. ...”

59. The Supreme Court in **Suresh Prasad Yadav (supra)** stating that no hard and fast rule can be laid down, yet broad principles, as discernible from the aforesaid discussion can be indicated as follows:

“6. The Court would be justified in ordering a recount of the ballot papers only where:

(1) the election-petition contains an adequate statement of all the material facts on which the allegations of irregularity or illegality in counting are founded;

(2) on the basis of evidence adduced such allegations are prima facie established, affording a good ground for believing that there has been a mistake in counting; and

(3) the court trying the petition is prima facie satisfied that the making of such an order is imperatively necessary to decide the dispute and to do complete and effectual justice between the parties.”

60. From the above discussion, it is clear that averments of the election petition containing the grounds of challenge, the allegations regarding illegality or irregularity in the counting of votes are not only fake, even the basic material fact as could have been made, the election tribunal's prima facie satisfaction that recount of ballots are necessary, are missing in the petition. The evidence in the form of statement of polling agent is beyond the pleadings, therefore, the same cannot be taken into consideration. Similarly, a narrow margin of votes between returning candidate and election petitioner does not give a right to say that there has been illegality or irregularity in the counting of votes.

61. It is abundantly clear that the rules provide adequate opportunity to a candidate, election agent and counting agent to have a watch over the counting process before result is declared and if they raise any objection as to its validity or otherwise about any ballot paper or if the said objection is improperly rejected, the candidate, his counting and election agent are well informed of the nature of objection that was raised with regard to ballot papers and make a concise statement of material facts in the election petition in relation thereto. It is for these reasons that the courts have repeatedly held that secrecy of ballot has to be maintained and a demand of recount should not ordinarily be granted, unless the election petitioner makes out a prima facie case.

62. As it is clear that Rules provide adequate opportunity, a candidate and his election and counting agent, at every stage, have a watch over the counting process before the result is declared, therefore, the concise statement of material facts in the

election petition should be there supported by the evidence in order to see as to whether direction for recounting would be proper or not. The same has been held by the Supreme Court in the case of **M.R. Gopalkrishnan v. Thachady Prabhakaran and others**³⁰:

“16. After a cursory glance of the relevant provisions discussed above it is thus abundantly clear that the rules provide adequate opportunity to a candidate, his election agent and counting agent to have a watch over the counting process before the result is declared and if they raise any objection as to the validity or otherwise of any ballot paper and if the said objection is improperly rejected, the candidate, his counting and election agent are well informed of the nature of the objection that was raised with regard to the ballot papers and make a concise statement of material facts in the election petition in relation thereto. It is for these reasons that this Court has repeatedly held that the secrecy of the vote has to be maintained and a demand of re-count should not ordinarily be granted unless the election petitioner makes out a prima facie case with regard to the errors in the counting and is able to show that the errors are of such magnitude that the result of the election of the returned candidate is materially affected. The election petitioner, in order to seek an order of re-count, has to place material and make out a prima facie case on the threshold and before an order of re-count is actually made. The demand of a defeated candidate for re-count of votes has to be considered keeping in view that secrecy of the ballot is sacrosanct in a democracy and, therefore, unless the election petitioner is able not only to plead and disclose the material facts but also substantiate the same by means of evidence of reliable character that there

existed a prima facie case for the re-count, no tribunal or court would be justified in directing the re-count.”

63. Taking into consideration the facts of the present case and settled position of law which has been summed up in **Bhabhi (supra)**, while dealing with the question of direction for inspection and recount of votes, and after close and careful consideration of various authorities of this Court, certain guidelines and conditions which are imperative, before the Court can grant inspection and recount of ballot papers, are as follows:

“15. ...

(1) That it is important to maintain the secrecy of the ballot which is sacrosanct and should not be allowed to be violated on frivolous, vague and indefinite allegations;

(2) That before inspection is allowed, the allegations made against the elected candidate must be clear and specific and must be supported by adequate statements of material facts;

(3) The Court must be prima facie satisfied on the materials produced before the Court regarding the truth of the allegations made for a recount;

(4) That the Court must come to the conclusion that in order to grant prayer for inspection it is necessary and imperative to do full justice between the parties;

(5) That the discretion conferred on the Court should not be exercised in such a way so as to enable the applicant to indulge in a roving inquiry with a view to

fish materials for declaring the election to be void; and

(6) That on the special facts of a given case sample inspection may be ordered to lend further assurance to the prima facie satisfaction of the Court regarding the truth of the allegations made for a recount, and not for the purpose of fishing out materials.”

64. This Court feels, that guidelines and conditions which are imperative to direct recount of ballot papers are not there in the facts of the present case. The petitioner has tried to add flavour of illegality and irregularity on the basis of vague pleadings which lack substance. The onus lies upon the person, who challenges the election of return candidate. One of the grounds for challenge of election, seeking recount, is irregularity in counting of votes, which can justify recounting to demonstrate any irregularity at the time of counting, however, pleadings in this regard are virtually silent and in any case extremely vague and cryptic. It is well settled that the pleadings play a significant role in the case of challenge to an election. In the evidence adduced by the polling agent, who was present at time of counting, no such fact has come as to from where he could support the averments of rejection of valid votes, acceptance of invalid votes, mixing of valid votes in bundle of other candidates or with respect to total number of votes cast. The tribunal has not been able to record any finding to demonstrate or even refer to any irregularity committed by the Election Officer at the time of counting. Without having any basis to call for voter-list or counterfoil and finding some discrepancy, in the two, the order of recount has been passed, which is arbitrary and unsustainable.

65. Analyzing / reading the provisions as provided under the Uttar Pradesh Panchayat Raj (Election of Members, Pradhans and Up-Pradhans) Rules, 1994, there was ample opportunity, at every stage from the time of sealing of ballot box to the count of ballot papers, procedure of counting, verification of accounts as submitted by Matdan Adhyaksh as well as election return by the Nirvachan Adhikari, to raise objection taking specific plea regarding number of votes being cast in favour of the election petitioner and other contesting candidates, but that has not been done in the present case.

66. The election rules also provide that Prapatra 45 & 46 are prepared after counting is taken place following the proper procedure as prescribed under law, and in case there was any shortcoming or irregularity at the time of counting that would have been very well known from the aforesaid Prapatra, which could have been one of the grounds, i.e., with respect to total number of votes cast, which had to be taken into account while directing for recounting, that too, in such a case, where allegations of overwriting and cutting are made in the Prapatra. The aforesaid averment in the petition is not supported by any evidence and, therefore, has no legs to stand. The tribunal has not taken into consideration the fact that as per well settled position of law in the case of **Chandrika Prasad Yadav v. State of Bihar and others**³¹, an order of recounting of votes can be passed when following conditions are fulfilled:

“(i) a prima facie case;

(ii) pleading of material facts stating irregularities in counting of votes;

(iii) a roving and fishing inquiry shall not be made while directing recounting of votes; and

(iv) an objection to the said effect has been taken recourse to.”

67. From the aforesaid discussion, this Court is of the opinion that the order directing for recounting, does sustain in the eyes of law. Accordingly, the impugned order dated 03.07.2023 passed by respondent no. 2 is set aside. A direction is issued upon respondent no. 2 to take all endeavours to decide the election petition, finally, in accordance with the procedure prescribed and relevant Act as well as Rules, expeditiously, preferably within a period of four months from the date of production of certified copy of this order, without granting any unnecessary adjournment to either of the parties and without being influenced by any of the observations made in this order.

68. The writ petition stands allowed accordingly.

69. No order as to costs.

(2023) 9 ILRA 884
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.09.2023

BEFORE

THE HON'BLE SURENDRA SINGH-I, J.

Writ-C No. 27338 of 2023

Razia & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
 Sri Sharad Chand Rai, Sri Anvir Singh

Counsel for the Respondents:
C.S.C.

partner is part of fundamental rights under Article 21.

(Delivered by Hon'ble Surendra Singh-I, J.)

Civil Law – Constitution of India, 1950 - Articles 19 & 21 - Live-in-Relationship - Protection - Petitioners, major and of different religions, voluntarily living together - Threat of honour killing from family members - Right to life and personal liberty under Articles 19 & 21 of Constitution includes right to choose partner - Held, no one including parents has right to interfere - In case of threat, police to provide immediate protection - Liberty granted to private respondent to seek legal remedy if documents found forged.

Petition disposed of with liberty to seek police protection in case of threat.

Case Law Discussed:

1. Lata Singh Vs St. of U.P., (2006) 5 SCC 475
2. Gian Devi Vs Superintendent, Nari Niketan, (1976) 3 SCC 234
3. Shafin Jahan Vs Asokan K.M., (2018) 16 SCC 368
4. Soni Gerry Vs Gerry Douglas, (2018) 2 SCC 197
5. D. Velusamy Vs D. Patchaiammal, (2010) 10 SCC 469
6. Dhanu Lal Vs Ganesh Ram, (2015) 12 SCC 301
7. Nandakumar Vs St. of Kerala, (2018) 16 SCC 602
8. Kiran Rawat Vs St. of U.P., 2023 LawSuit (All) 953 - Distinguished.

Held:

A couple who are majors and in a consensual live-in-relationship cannot be denied protection. Interference by family members on account of social, religious, or personal opposition to such relationship is impermissible. Right to choose a

1. Heard Shri Sharad Chand Rai, learned counsel for the petitioners, Shri Upendra Nath, learned Additional Chief Standing Counsel assisted by Shri Yogesh Kumar, learned Standing Counsel appearing on behalf of the State and perused the material available on record.

2. The instant writ petition has been filed seeking a direction in the nature of mandamus to the private respondent not to interfere in the peaceful living of the petitioners. Further the direction has been sought to respondent no. 2 and 3 to provide protection to the petitioners.

3. It is submitted by the learned counsel for the petitioners that both the petitioners are major. The date of birth of petitioner no. 1 as mentioned in her Pan Card & Aadhar Card, is 13.04.2001 and the date of birth of petitioner no. 2 as mentioned in his Aadhar Card and Pan Card is 01.01.1997. It is averred that both the petitioners are residing together peacefully out of their own free will in a live-in-relationship. It is further submitted that respondent no. 4, mother of the first petitioner and her family members are averse to the parties' live in relationship. She along with other family members, is harassing and disturbing the peaceful life of the petitioners. She has threatened the petitioners with dire consequences. The petitioners have apprehension of honour killing from her family members. Petitioner no. 1 has moved an application dated 04.08.2023 to the Commissioner of Police, Commissionerate Gautam Budh Nagar seeking their protection but to no avail. It is

submitted on behalf of the petitioners that both the petitioners intend to solemnize their marriage in near future. It is also stated that till date no FIR has been lodged relating to their live-in-relationship and both the petitioners are living together happily.

4. Looking to the nature of the order that this Court proposes to pass, issue of notice to the private respondent is dispensed with. However, in case the said respondent feels aggrieved by the order passed today, it shall be open to her to make an application in this decided petition.

5. Learned counsel appearing on behalf of the State has opposed the petition and submitted that both petitioner belong to different religious groups. Living in live-in-relationship is punishable as Zina (Adultery) in Muslim personal law.

6. Reliance has been placed by petitioners upon judgement of the Apex Court in **Lata Singh vs. State of Uttar Pradesh and another, (2006) 5 SCC 475**, where the Apex Court has held as under:

“17. The caste system is a curse on the nation and the sooner it is destroyed the better. In fact, it is dividing the nation at a time when We have to be united to face the challenges before the nation unitedly. Hence, inter-caste marriages are in fact in the national interest as they will result in destroying the caste system. However, disturbing news are coming from several parts of the country that young men and women who undergo inter-caste marriage, are threatened with violence, or violence is actually committed on them. In our opinion, such acts of violence or threats or harassment are wholly illegal and those

who commit them must be severely punished. This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such inter-caste or inter-religious marriage the maximum they can do is that they can cut-off social relations with the son or the daughter, but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste or inter-religious marriage. We, therefore, direct that the administration/police authorities throughout the country will see to it that if any boy or girl who is a major undergoes inter-caste or inter-religious marriage with a woman or man who is a major, the couple is not harassed by anyone nor subjected to threats or acts of violence, and anyone who gives such threats or harasses or commits acts of violence either himself or at his instigation, is taken to task by instituting criminal proceedings by the police against such persons and further stern action is taken against such persons as provided by law.

(Emphasis by Court)

18. We sometimes hear of “honour” killings of such persons who undergo inter-caste or inter-religious marriage of their own free will. There is nothing honourable in such killings, and in fact they are nothing but barbaric and shameful acts of murder committed by brutal, feudal-minded persons who deserve harsh punishment. Only in this way can we stamp out such acts of barbarism.”

7. In **Gian Devi vs. Superintendent, Nari Niketan, Delhi and others, (1976) 3 SCC 234**, the three Judge Bench of the

Apex Court has observed that where an individual is over eighteen years of age, no fetters could be placed on her choice on where to reside or about the person with whom she could stay:

“.....Whatever may be the date of birth of the petitioner, the fact remains that she is at present more than 18 years of age. As the petitioner is sui juris no fetters can be placed upon her choice of the person with whom she is to stay, nor can any restriction be imposed regarding the place where she should stay. The court or the relatives of the petitioner can also not substitute their opinion or preference for that of the petitioner in such a matter.....”

8. In ***Shafin Jahan vs. Asokan K.M. & others, (2018) 16 SCC 368***, the Apex Court emphasized due importance to the right of choice of an adult person, which the Constitution accords to an adult person. The Court held:

“52. It is obligatory to state here that expression of choice in accord with law is acceptance of individual identity. Curtailment of that expression and the ultimate action emanating therefrom on the conceptual structuralism of obeisance to the societal will destroy the individualistic entity of a person. The social values and morals have their space but they are not above the constitutionally guaranteed freedom. The said freedom is both a constitutional and a human right. Deprivation of that freedom which is ingrained in choice on the plea of faith is impermissible. Faith of a person is intrinsic to his/her meaningful existence. To have the freedom of faith is essential to his/her autonomy; and it strengthens the core norms of the Constitution. Choosing a faith is the substratum of individuality and sans

it, the right of choice becomes a shadow. It has to be remembered that the realisation of a right is more important than the conferment of the right. Such actualisation indeed ostracises any kind of societal notoriety and keeps at bay the patriarchal supremacy. It is so because the individualistic faith and expression of choice are fundamental for the fructification of the right. Thus, we would like to call it indispensable preliminary condition.”

9. A three Judge Bench of the Hon'ble Apex Court in ***Soni Gerry vs. Gerry Douglas, (2018) 2 SCC 197***, where the daughter of appellant and respondent, who had attained the age of majority, expressed her desire to reside in Kuwait with her father, where she was pursuing her education, held:

“10. It needs no special emphasis to state that attaining the age of majority in an individual's life has its own significance. She/He is entitled to make her/his choice. The courts cannot, as long as the choice remains, assume the role of parens patriae. The daughter is entitled to enjoy her freedom as the law permits and the court should not assume the role of a super guardian being moved by any kind of sentiment of the mother or the egotism of the father. We say so without any reservation.”

10. In the Case of ***D. Velusamy vs. D. Patchajammal, (2010) 10 SCC 469***, the Apex Court while considering the definitions given under Section 2 of the Domestic Violence Act, dealt with definition of “domestic relationship”, as a relationship in the nature of marriage. It laid down the following requisite criteria for a relationship in the nature of marriage:

(a) The couple must hold themselves out to society as being akin to spouses.

(b) They must be of legal age to marry.

(c) They must be otherwise qualified to enter into a legal marriage, including being unmarried.

(d) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time.

11. In **Dhanu Lal vs. Ganesh Ram, (2015) 12 SCC 301**, the Apex Court has held that couples in live in relationships will be presumed legally married. It was also held that the woman in live in relationship would be eligible to inherit the property after the death of a partner.

12. In **Nandakumar and another vs. State of Kerala, (2018) 16 SCC 602**, the Apex Court emphasized that live in relationship is now recognized by the legislature itself and it has found its place under the provisions of Protection of Women from Domestic Violence Act, 2005.

13. From the above discussion and the rulings of the Supreme Court, it is clear that a boy or girl, who have attained majority, is free to marry or live with a person of his/her choice and no one including his/her parents or anyone on their behalf can interfere in their right to freedom of choosing a partner which emanates from Right to Life and Personal Liberty guaranteed under Articles 19 and 21 of the Constitution of India.

14. Learned Counsel appearing on behalf of the State has placed reliance upon a Division Bench decision of this Court in **Kiran Rawat and another vs. State of U.P., 2023 LawSuit(All) 953** and submitted that the Court has refused to provide protection to couples residing together in a live-in-relationship.

15. From perusal of the judgment of this Court in **Kiran Rawat (supra)**, it is apparent that the Court has not held that couple residing in a live-in-relationship are not entitled to protection of the Court, but it is due to the special circumstances of that case before the Court, that the Court has denied protection to the couple staying in a live-in-relationship.

16. Having regard to the facts and circumstances of the case and the law laid down by the Apex Court in its catena of judgements, this Court is of the opinion that the petitioners are at liberty to live together and no person, including their parents or anyone acting on their behalf, shall be permitted to interfere in their peaceful live-in-relationship. In case any disturbance is caused in the peaceful living of the petitioners, the petitioners shall approach the Superintendent of Police concerned, with a copy of this order, who shall provide immediate protection to the petitioners.

17. A liberty is granted to the private respondent that if false facts are stated or the documents brought on the record are fabricated or forged, it will be open to her to file an application in this petition.

18. With the aforesaid observations, the writ petition is **disposed of**.

(2023) 9 ILRA 889
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 12.09.2023

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ-C No. 1006454 of 2011

U.P. Corp. Fed. Ltd. & Anr. ...Petitioners
Versus
P.O., Industrial Tribunal, Lko & Ors.
...Respondents

Counsel for the Petitioners:

Counsel for the Respondents:

Civil Law - U.P. Industrial Disputes Act, 1947 - Section 6F & 6H - U.P. Cooperative Societies Act, 1965 - Sections 70, 135 - Petitioner challenges U.P. Industrial Tribunal's award dated 23.04.2011, which set aside respondent's termination, directed his reinstatement from 01.01.1985, and awarded 50% back wages - Also challenges order dated 09.03.2010 rejecting its objection to Industrial Tribunal's jurisdiction over cooperative society disputes - Respondent/employee worked continuously from 16.02.1982 to 31.12.1984, completing over 240 days in a year - His termination was without notice or compliance with Section 6F of U.P. Industrial Disputes Act - No contrary evidence was presented and Tribunal's order is found proper - Workman approached Labour Court - Petitioners raised preliminary objection to its jurisdiction, wrongly rejected by order dated 09.03.2010 - As held in Ghaziabad Zila Sahkari Bank Ltd., Labour Court has no jurisdiction over disputes involving societies under Societies Act, 1965 - Impugned orders set aside. (Para 1, 2, 17, 31, 32)

Writ Petition allowed. (E-13)

List of Cases cited:

1. Ghaziabad Zila Sahkari Bank Ltd. Vs Additional Labour Commissioner & ors., 2008 (1) SCC (LNS) 90
2. Dharappa Vs Bijapur Coop. Milk Producers Societies Union Ltd., (2007) 9 SCC 109
3. K.A. Annamma Vs Secretary, Cochin Cooperative Hospital Society Ltd., 2018 (2) SCC 729
4. Ghaziabad Zila Sahkari Bank Ltd. Vs Addl. Labour Commissioner, 2007 (11) SCC 756 (Para 65)
5. Ramji Lal Tewari Vs U.P. Co-operative Sugar Federation Ltd. Lko. Special Appeal No. 524 of 2015 (decided on 02.11.2015)

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

1. The award passed by U.P. Industrial Tribunal, Lucknow dated 23.4.2011 has been questioned by the petitioner, wherein the claim of the respondent-employee has been allowed, and his order of termination has been set aside and the petitioners have been directed to reinstate him in service with effect from 1.1.1985 and he has also been held entitled to 50 per cent back wages.

2. The petitioner has also challenged the order dated 9.3.2010 whereby the preliminary objection raised by the petitioner with regard to the jurisdiction of the Industrial Tribunal to decide the dispute pertaining to the cooperative society has been rejected.

3. The facts in brief necessary for adjudication of the present controversy are that respondent No.3-employee, namely, Ajay Kumar Mishra was appointed on adhoc basis for 89 days with effect from 16.2.1982. His employment was extended from time to time till 31.12.1984 after which he was not allowed to continue in service.

4. Aggrieved by the action of the petitioner in terminating his services he moved Conciliation Officer under U.P. Industrial Tribunals Act, 1947. On failure of the conciliation proceedings the matter was referred for adjudication by the Tribunal on the question with regard to the validity of his termination with effect from 1.1.1985. Notices were issued to the petitioner who appeared before the tribunal and contested the claim of the respondent-employee. It was stated that he was initially appointed on the post of Operator and posted at Copaganj, District Azamgarh on 16.2.1982 and subsequently transferred to Cold Storage, Shahjahanpur (Jaunpur) on his own request with effect from 12.11.1983. Some disciplinary inquiry was also initiated against the employee as there was damage to the potatoes in the said cold storage due to which he was transferred from Shahjahanpur to Head Office, Lucknow where he worked till 31.12.1984. Subsequently, his name was struck off from the attendance register.

5. In the written statement filed by the petitioner it was stated that the employee was engaged only for 89 days but subsequently his services were extended from time to time considering that his services were needed in the working of the federation.

6. The employee himself gave evidence in support of his claim while Sri Lal Bahadur, Additional, Additional District Cooperative Federation Officer appeared for the employer and after hearing both the parties the Tribunal rejected the claim of the employee holding that his services had come to an end on expiry of the period prescribed in his letter of appointment and further he was not entitled to any relief vide order dated 3.4.1991.

7. The employee being aggrieved of the order of Tribunal dated 3.4.1991 filed writ petition before this Court being writ petition No.1350 (S/S) of 1994 (*Ajay Kumar Mishra Vs. Industrial Tribunal (II), Lucknow*). This Court by means of judgment and order dated 11.4.2008 quashed the award dated 3.4.1991 and remanded the matter back to the Tribunal for adjudication afresh.

8. When the matter was remanded back the petitioner submitted his written statement again and submitted that the controversy in question could not be adjudicated by the Tribunal as per the judgment of Supreme Court in the case of ***Ghaziabad Zila Sahkari Bank Limited Vs. Additional Labour Commissioner and others, 2008 (1) SCC (LNS) 90*** where it has been held that provisions of U.P. Cooperative Societies Act would apply for adjudication of dispute in the matters of employment of the society to the exclusion of other labour laws including U.P. Industrial Disputes Act, 1947.

9. The preliminary objection raised by the petitioner was rejected by means of order dated 09.03.2010 which order has also been impugned in the present writ petition.

10. Subsequent to rejection of the preliminary objection the matter was proceeded with and the statements of the employer along with one Vinod Kumar Pandey, Assistant Accountant and Accountant appeared for the employee were recorded while one Rakesh Kumar Singh, Senior Assistant posted at Lucknow appeared on behalf of the employer.

11. The Tribunal after considering the evidence adduced by both the parties was

of the considered view that the employee has worked for more than 240 days in a calendar year preceding his termination and also that his termination was illegal and arbitrary and no procedure was followed and no notice was given to him. It was also considered that even in the inquiry conducted against the petitioner no opportunity was granted to him and accordingly while allowing his claim the order of termination dated 1.1.1985 was set aside and he was directed to be reinstated in service along with 50 per cent back-wages.

12. Learned counsel for the petitioner while assailing the said award has submitted that the same is illegal and arbitrary in as much as the employee was appointed for a fixed period of time on expiry of which his services came to an end and, hence, the order is illegal and arbitrary. It has further been contended that the employee has not completed 240 days in a calendar year and on this ground also the relief as prayed by him could not have been granted.

13. Learned counsel for the respondent, on the other hand, has supported the impugned order. He submits that the Tribunal has duly considered all the material and dealt with all the objections preferred by the employer and after categorically recording that the petitioner has completed 240 days in a calendar year and his services were terminated dehors the provisions of law. The oral order of termination dated 1.1.1985 was set aside and the there is no infirmity in the same requiring interference of this Court in exercise of powers under Article 226 of the Constitution.

14. I have heard learned counsel for the parties and perused the records.

15. With regard to validity of the award dated 23.4.2011 it is noticed that the Tribunal has considered the fact that the employee was appointed on 18.1.1985 on the post of Operator after due selection wherein he also faced interview and was placed in the sale of Rs.240-380/- and was posted at Gauriganj Cold Storage, District Azamgarh. He joined on the said post on 16.2.1982 and had worked diligently on the said post till he was transferred to Cold Storage at Shahganj (Jaunpur) on 11.7.1983. He had worked at Cold Storage at Shahganj till 31.7.1984 subsequent to which he was transferred to Headquarters at Lucknow where he was allowed to work till 31.12.1984.

16. With regard to involvement of the petitioner in the destruction of potatoes stored in the cold storage, it was informed that inquiry in this regard has been held and it was found that the air conditioning plant was not working properly due to which temperature could not be lowered. It was further found that ammonia was not filled in the machine due to which temperature did not fall and accordingly four operators were found to be negligent, therefore, their tenure was not extended and new persons had already been appointed in their place. The employee had also filed additional documents including his service record, attendance register etc. according to which from 1st January, to June, 2008 he had worked for 196 days and till 13 December, 84 days, total 139 days and totaling to 308 days in 1984 and accordingly the Tribunal has duly concluded that the employee had worked for 308 days in 1984 days i.e. more than 240 days which is statutory requirement under Industrial Disputes Act and consequently held that he is entitled to be granted the benefit of Section 6F of the Act of 1947. He also considered the fact

that he had been appointed after following due procedure and he was selected by means of interview. The Tribunal did not believe the version of the employer that appointment letter was issued without jurisdiction as no material or document was filed in support of this contention. It was considered that even after the first appointment letter was issued to him his services was repeatedly extended for 89 days and also considered that he had served in more than one District and held that his appointment was not illegal and accordingly held that the order of termination was illegal and arbitrary and he was entitled to the benefits of Section 6F of the U.P. Industrial Disputes Act, 1947 and consequently direction was issued to the petitioner to reinstate him in service along with 50 percent back-wages.

17. This Court does not find any infirmity with the order of the Tribunal on the merits. It was fully established that the respondent employee has worked for more than 240 days in a calendar year and also that he had continuously worked with the petitioner from 16.2.1982 till 31.12.1984 and no procedure was followed prior to passing the order of termination and no salary in lieu of the notice was given and consequently he was entitled to the benefits of Section 6F of U.P. Industrial Disputes Act no material has been placed before him for taking contrary view than what has been taken by the Tribunal and accordingly this Court finds that there is no infirmity in the order of Industrial Tribunal.

18. The next question which has been vehemently argued by the petitioner is with regard to the validity of the order dated 9.3.2010 by which the preliminary objection regarding the maintainability of the proceedings was rejected. It has been

submitted that in a dispute between employer and employee of a Cooperative Society remedy for the employee lies under Section 70 of U.P. Cooperative Societies Act, and the matter has to be referred for arbitration either by the Registrar himself or to any other person appointed by him. It is submitted that the preliminary objection raised by the petitioner was wrongly rejected and that the award passed by the Industrial Tribunal is fully without jurisdiction. In support of his submissions he has relied upon the judgment in the case of *Ghaziabad Zila Sahkari Bank Limited Vs. Additional Labour Commissioner and others, 2008 (1) SCC (LNS) 90*.

19. Learned counsel for the respondent, on the other hand, has submitted that the judgment of the Supreme Court in the case of *Ghaziabad (supra)* is not a good law in as much as it had not taken into consideration the previous judgment of Supreme Court in the case of *Dharappa Vs. Bijapur Coop. Milk Producers Societies Union Ltd. (2007) 9 SCC 109*, where the Supreme Court has held that unless the statute specifically ousts the jurisdiction of the Labour Court, both courts would have concurrent jurisdiction and the employee of the cooperative can raise the dispute either before the Labour Court or before the Registrar under the Cooperative Societies Act.

20. Similar controversy was decided by Supreme Court dealing with the provisions of *Karnataka Cooperative Societies Act* and it was held that even after amendment of Section 17 of Karnataka Cooperative Societies Act and held that Even though Clause (d) was added in Section 70(2) with effect from 20-1-1976, Section 70(1) it did not exclude or

take away the jurisdiction of the Labour Courts and Industrial Tribunals under the ID Act to decide an industrial dispute between the society and its employees. Consequently, even after insertion of Clause (d) in Section 70(2) with effect from 20-1-1976, the Labour Courts and Industrial Tribunals under the Industrial Disputes Act, continued to have jurisdiction to decide disputes between societies and their employees.

21. It was further submitted that the judgment of Supreme Court in the case of ***Dharappa Sangappa Nandyal Vs. Bijapur Co-operative Milk Producers Societies Union Ltd*** was affirmed by the Supreme Court in the case of ***K.A. Annamma Vs. Secretary, Cochin Cooperative Hospital Society Limited, 2018(2) SCC 729*** and held that Karnataka Societies Act did not create any express bar for the Labour Court/Industrial Tribunal from deciding the service disputes arising between a Cooperative Society's Employee and his/her Employer (Co-operative Society).

Secondly, any Co-operative Society's Employee satisfying the definition of the expression "Workman", "Industrial Dispute" and the Co-operative Society to be an "Industry" as defined under the Industrial Disputes Act has the choice to select one forum out of the two forums for filing a case in relation to his service dispute,

22. It was submitted that Uttar Pradesh Cooperative Societies Act does not bar jurisdiction of Industrial Disputes Act. Section 135 of the U.P Cooperative Societies Act specifically provide for exclusion of the provisions of U.P Industrial Disputes Act, but the said section has not been given assent to by the President and consequently is not

enforceable in State of U.P. It was vehemently submitted that unless a provision is assented to by the President, it cannot be deemed to be part of the statute, and cannot be taken into account for determining the intention of the legislature. It is for the aforesaid reasons it was submitted that for deciding a dispute between the employee of cooperative society and the cooperative society judgement of Supreme Court in the case of ***Dharappa Sangappa Nandyal Vs. Bijapur Co-operative Milk Producers Societies Union Ltd*** would fully prevail over the judgment of ***Ghaziabad Zila (Supra)*** and accordingly there is no infirmity in the order passed by the Tribunal.

23. It was further submitted that in case the U.P Industrial Disputes Act is made inapplicable to the employees of the Cooperative Societies, then such a employees/workman would be unjustifiably be deprived of the benefit of provisions of 6H and other similar beneficial provisions provided for in the industrial disputes act. On the other hand in case there disputes are adjudicated by the Registrar, Cooperative Societies then the general law would apply, and the workmen would be deprived of getting an order for reinstatement in case of illegal termination. It was further submitted that such a interpretation would be discriminatory and also deprive the Workman of the cooperative societies of the beneficial piece of legislation introduced by the Industrial Disputes Act, 1947

24. We have considered the arguments of the parties and perused the records.

25. To answer the said question raised by the petitioner with regard to applicability of provisions of section 70 of Uttar Pradesh Cooperative Societies Act in

matters pertaining to resolution the disputes between the employees of cooperative society and the cooperative society and whether such disputes can be tried by labour court under the provisions of Uttar Pradesh Industrial Disputes Act, 1947, it would be relevant to consider the related provisions of both these acts in this regard.

26. The controversy involved in the present case is essentially legal in nature and it would be necessary to refer to the statutory provisions of Section 70 of U.P. Cooperative Societies Act:-

“70. Disputes which may be referred to arbitration. - (1) *Notwithstanding anything contained in any law for the time being in force, if any dispute relating to the constitution, management of the business of a co-operative society other than a dispute regarding disciplinary action taken against a paid servant of a society arises-*

(a) among members, past members and persons claiming through members, past members and deceased members; or

(b) between a member, past member or any person claiming through, a member, past member or deceased member, and the society, its committee or management of any officer, agent or employee of the society, including any past officer, agent or employee;

(c) between the society or its committee and any past committee, any officer, agent or employee or any past officer, past agent or past employee or the nominee, heir or legal representative of any deceased officer, deceased agent, or deceased employee of the society; or

(d) between a co-operative society and any other co-operative society or societies:

such dispute shall be referred to the Registrar for action in accordance with the provisions of this Act and the rules and no court shall have jurisdiction to entertain any suit or other proceeding in respect of any such dispute:

[Provided that a dispute relating to an election under the provisions of this Act or rules made thereunder shall not be referred to the Registrar until after the declaration of the result of such election]

(2) For the purpose of sub-section (1), the following shall be deemed to be included in dispute relating to the constitution, management or the business of a co-operative society, namely -

(a) claims for amounts due when demand for payment is made is either refused or not complied with whether such claims are admitted or not by the opposite party;

(b) a claim by a surety against the principal debtor where the society has recovered from the surety any amount in respect of any debt or demand due to it from the principal debtor as a result of the default of the principal debtor, whether such debt or demand is admitted or not;

(c) a claim by a society for any loss caused to it by a member, officer, agent, or employee including past or deceased member, officer, agent, or employee, whether individually or collectively and whether such loss be admitted or not; and

(d) all matters relating to the objects of the society mentioned in the bye-laws as also those relating to the election of office-bearers.

(3) If any question arises whether a dispute referred to the Registrar under this section is a dispute relating to the constitution, management or the business of co-operative society, decision thereon of the Registrar shall be final and shall not be called in question in any court.

27. The provisions of U.P. Cooperative Societies Act, 1965 (hereinafter referred to as "the Act, 1965") were duly considered by the Hon'ble Supreme Court in the case of **Ghaziabad Zila Sahkari Bank Ltd. vs. Addl. Labour Commissioner, 2007 (11) SCC 756** and in para 65 of the said order, the Apex Court held that in a matter pertaining to dispute raised by the workman, the remedy lies under Section 70 of the Act, 1965 and not before the Assistant Labour Commissioner under the provisions of U.P. Industrial Disputes Act, 1947 (hereinafter referred to as "the Act, 1947"). For ready reference para 65 of the said judgment is quoted herein below :-

"65. We are therefore of the view that the Asst. Labour Commissioner (ALC)'s jurisdiction was wrongly invoked and his order dated 15.03.2003 under section 6H, U.P. Industrial Disputes Act, 1947 is without jurisdiction and hence null and void and it can be observed that, in view of the said general legal principle, it is immaterial whether or not the government has enforced section 135 (UPCS Act) because, in any case the said provision (S.135) had been included in the Act only by way of clarification and abundant caution."

28. The other judgment relied by the workman/respondents being in the case of **K.A. Annamma Vs. The Secretary, Cochin Co-operative Hospital Society Ltd., 2018(2) SCC 729**. In the aforesaid case similar controversy had arisen before the Apex Court with regard to provisions of Kerala Cooperative Societies Act and the Apex Court held that the disputes can be adjudicated under both the Acts i.e. Kerala Cooperative Societies Act as well as the Act, 1947, as they enjoy concurrent jurisdiction to decide any service dispute arising between the Cooperative Society's employee and his/her employer (Cooperative Society).

29. In the present controversy the issue which has been raised by both the parties is as to whether an employee of the Cooperative Society can maintain an application pertaining to his service dispute taking recourse of the Act, 1965 or the Act, 1947. This Court has also considered the judgements of the Hon'ble Supreme Court as well as the statutory provisions and finds itself bound by the judgment of the Apex Court, in the case of **Ghaziabad Zila Sahkari Bank Ltd.**(supra), where the Hon'ble Supreme Court after considering the provisions of the Act, 1965, in great details along with Section 135 of the said Act, have concluded that provisions of the Act, 1947 stands excluded with regard to the employees of the Cooperative Societies.

30. The Division Bench of this Court in the case of **Ramji Lal Tewari Vs. U.P. Co-operative Sugar Federation Ltd. Lko.** Special Appeal No. 524 of 2015 (decided on 02.11.2015), has also relied upon the judgment of the Apex Court in the case of **Ghaziabad Zila Sahkari Bank Ltd.** (supra) and held that if there is any dispute between the employee and employer of a

Cooperative Society the matter has to be resolved as per provisions of U.P Cooperative Societies Act, 1965.

31. In the present case, the workman had approached the Labour Court, Lucknow and preliminary objection regarding maintainability had been raised by the petitioners but was rejected by the Labour Court by means of order dated 09.03.2010 and accordingly, the Labour Court fell in error in rejecting the preliminary objections by means of order dated 09.03.2010. A Division Bench of this Court has also relied upon the judgment in the case of *Ghaziabad Zila Sahkari Bank Ltd.* (supra) and from the above discussions, it is clear that the Labour Court had no jurisdiction to entertain and decide the said matter pertaining to a Society constituted under the Act, 1965.

32. In light of the above, the impugned award dated 23.04.2011 passed by the Presiding Officer, Industrial Tribunal (2) U.P., Lucknow in in Adjudication Case No.113/1988 as well as order dated 09.03.2010 are hereby set aside.

33. The writ petition stands **allowed**.

(2023) 9 ILRA 896

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 25.04.2022

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Writ-C No. 1006884 of 2007

Jugal Kishore Srivastava **...Petitioner**
Versus
State Of U.P. **...Respondent**

Counsel for the Petitioner:

Rajendra Nath, Km. Gitanjali Shukla,
Nirankar Singh, R.K. Kidwai, Sunil Sharma,
Vinod Kumar Srivastava

Counsel for the Respondent:

C.S.C.

Civil Law - U.P. Government Servant (Discipline and Appeal) Rules, 1999 - Rule 7 (X) - Constitution of India, 1950 - Articles 14, 16 & 311(2) - Petitioner was in government service, due to serious illness, he couldn't submit medical certificate - Department initiated enquiry and issued show cause notice - Considering his past misconduct, including absconding in 1980, and assuming no fresh enquiry needed, impugned order passed - Charged employee (petitioner) failed to respond to charges or appear before Enquiry Officer despite due notice - As per Rules, 1999, if charged government servant fails to appear despite notice, then Enquiry Officer can proceed ex parte - Enquiry Officer did not proceed ex parte, despite petitioner's non-appearance and failure to submit reply concluded enquiry in violation of Rules, 1999, thereby vitiating proceedings - Delay is immaterial, as petitioner initially approached wrong forum and never raised question of maintainability - Upon realizing Labour Court lacked jurisdiction, he withdrew and filed present petition - Enquiry stands vitiated in law, as order suffers from illegality and infirmity - Impugned order quashed - Respondent directed to release dues, including pension, for period 1991 to 2007. (Para 22, 24, 26, 31, 33, 34, 35)

Writ Petition partly allowed. (E-13)

List of Cases cited:

1. Satwati Deswal Vs St. of Har. & ors., 2010(1) SCC 126 (Para 5 to 9)
2. Mafatlal Narandas Barot Vs J.D. Rathod, AIR 996 SC 1364 (Para 12)

3. U.O.I.& ors. Vs Bishamber Das Dogra, (2009) 13 SSC 102 (Para 30, 31)

4. Tata Oil Mills Co. Ltd. Vs Their Workmen, (1963)II LLJ. 78(SC)

5. Imperial Tobacco Co. Ltd. Vs Its Workmen, AIR 1962 SC 1348

6. Uma Shanker Vs Registrar, 1992(65) FLR 674(All)

7. Subhash Chandra Sharma Vs Managing Director, U.P. Co-operative Spinning Mills Federation Ltd., Kanpur & anr. reported in 2000(1) UPLBEC 541

8. Durga Enterprises(P) Ltd. & anr. Vs Principal Secretary, Govt. of U.P. & ors., reported in (2004) 13 SCC 665

9. R.P. Pandey Vs U.P. Power Corp. Ltd. & ors., reported in 2004(22) LCD20

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

1. Heard Sri Nirankar Singh, learned counsel for the petitioner, Sri Kuldeep Singh, learned Standing Counsel for the State and perused the record.

2. By means of instant writ petition, a challenge has been made to the order dated 19.01.2007 passed by respondent no.5 as well as the order dated 30th July, 1991 passed by the respondent no.4.

3. Factual matrix of the case is that the petitioner, at the very inception, joined the services on 4th February, 1972 on the post of Panchayat Sevak and served best of the satisfaction of his superiors. On 15th June, 1990, the petitioner was posted at Vikas Khand-Masodha, and he was transferred and was relieved to serve at Sohawal Block, District Faizabad. After the transfer order was passed, the petitioner

could not join at the transferred place as he was bed ridden and petitioner was suffering with the acute mental depression and other serious diseases, therefore, he could not approach to the authorities concerned but he had sent several applications as well as medical prescription/ certificate issued by the medical officer to the department.

4. Allegedly the authorities of the department never communicated the petitioner that any departmental proceeding has been initiated against him for his alleged unauthorised absence and behind the back of the present petitioner, the aforesaid enquiry proceedings were completed and impugned order dated 30th July, 1991 was passed.

5. Further, it is also the case of the petitioner that the impugned order dated 30th July, 1991 never came into knowledge of the petitioner, prior to year 2001 as he was suffering with serious ailments and was bed ridden and as soon as order dated 30th July, 1991 came into knowledge of the petitioner, he immediately filed a case before the labour court assailing the order dated 30th July 1991. The case before the labour court was registered as Case No. 56 of 2001 (Jugal Kishore Srivastava vs Zila Panchayat Raj Adhikari, Faizabad).

The petitioner kept on persuading the aforesaid case and ultimately the same was decided on 19.01.2007. In the aforesaid matter, the District Panchayat Raj Adhikari who was representing the department, filed objection/written statement by way of submitting reply/written statement and after the aforesaid reply, the labour court decided the matter on 19.01.2007, wherein following findings have been recorded. The

operative portion of the order are extracted as follows:-

अभिनिर्णय

"उप श्रमायुक्त, फैजाबाद के आदेश सं०-825-29/एफ.आर.सी.पी. 56/2009, दिनांक 25-1-2002 द्वारा निम्नलिखित आद्यौगिक विवाद, उ०प्र० आद्यौगिक विवाद अधिनियम, 1947 की धारा - 2ए के अंतर्गत अभिनिर्णय हेतु श्रम न्यायालय, फैजाबाद को प्रेषित किया गया था जिसे अभि० विवाद सं० 02/2002 के रूप में पंजीकृत कर सुनवाई की जाती रही। तदोपरान्त उ०प्र० शासन श्रम अनुभाग-I (शाखा सचि०), कानपुर के आदेश सं० 1853-67, दिनांक 18-10-06 द्वारा इस न्यायालय को स्थानांतरित किया गया जिसे अभि०वि०सं० 313/2006 के रूप में पंजीकृत कर सुनवाई की गयी।

आद्यौगिक विवाद का विवरण

"क्या सेवायोजक द्वारा अपने श्रमिक श्री जुगल किशोर पुत्र श्री द्वारिका प्रसाद को दिनांक 7.9.2001 से सेवा से पृथक/कार्य से वंचित करना उचित एवं वैधानिक है ? यदि नहीं तो सम्बन्धित श्रमिक क्या क्षतिपूर्ति/हितलाभ पाने का अधिकारी है ? व अन्य किन विवरणों सहित ?

विवाद का संज्ञान लेकर उभय पक्षों को सम्मन भेजकर न्यायालय के समक्ष उपस्थित होने के लिए निर्देशित किया गया। श्रमिक के अधिकृत प्रतिनिधि न्यायालय के समक्ष उपस्थित हुये तथा अपना अधिकार पत्र दाखिल किया।

दिनांक 17.1.07 को वादी श्रमिक के अधिकृत प्रतिनिधि ने 21/ए (नाट प्रेस) प्रार्थना पत्र इस आशय का प्रस्तुत किया कि न्यायालय पत्रावली के अध्ययन के बाद यह जानकारी प्राप्त हुई है कि मेरा विभाग राज्य सरकार का अंग है जिस कारण यह विवाद श्रम न्यायालय में नहीं चल सकता है। इस तकनीकी त्रुटि के कारण प्रार्थी इस वाद को आगे नहीं चलाना चाह रहा है।

उक्त तकनीकी त्रुटि को ध्यान में रखते हुए वादी श्रमिक के अधिकृत प्रतिनिधि ने वाद को दाखिल दफ्तर करते हुए अभिनिर्णय दिये जाने का अनुरोध किया है। श्रमिक के हस्ताक्षर को श्रमिक के अधिकृत प्रतिनिधि ने प्रमाणित किया।

उपरोक्त वाद में सेवायोजन पक्ष को रजिस्टर्ड नोटिस 19/डी भेजा गया जो पोस्टमैन के रिकार्ड "दरियाफा सही पता नहीं, सही पता के लिए वापस" के साथ वापस प्राप्त हुआ।

उक्त तथ्यां एवं परिस्थितियों को आधार मानक, वादी श्रमिक के अधिकृत प्रतिनिधि द्वारा दाखिल प्रार्थना पत्र 21/ए (नाट प्रेस), दिनांकित 17.1.07 को एतद्वारा स्वीकार किया जाता है तथा वाद की कार्यवाही समाप्त की जाती है। वादी श्रमिक कोई हितलाभ पाने का अधिकारी नहीं है।"

6. By the aforesaid order, case filed before the labour court was consigned to record, as on 17.01.2007, the petitioner himself filed an application stating therein that he had filed the aforesaid case on wrong advice as he being the government employee can not be entertained by the labour court and as such the labour court dropped the proceedings.

7. In the year, 2007, when the matter was ultimately closed before the labour Court then the petitioner filed this writ petition assailing the order of the labour court as well as order dated 30th July 1991 passed by District Panchayat Raj Adhikari, Faizabad.

8. Learned counsel appearing for the petitioner submits that the petitioner was relieved from Amaniganj on 15-06-1990 though he was bed ridden due to acute mental depression with other ailments and therefore, he could not join at the place of his posting. Since, the petitioner was bed ridden upto the year 2001 due to his prolonged serious ailment and when he became physically fit, he sent an application and informed that due to illness, he was not able to join on the post. The reply which was submitted by the respondent department before the labour court transpires that the services of the petitioner were terminated on 30-07-1991,

though, no opportunity of hearing was accorded to the petitioner prior to passing of the order aforesaid. He next added that allegedly the departmental proceedings were initiated against the petitioner, and he was suspended though the same were never communicated to the petitioner and further the petitioner was never paid the subsistence allowance and thus, the termination order dated 30-07-1991 is void ab-initio.

9. Argument advanced by the learned counsel for the petitioner with respect to the procedure for imposing major penalty has been envisaged in **Rule 7 of the U.P. Government Servant (Discipline and Appeal) Rules, 1999** (hereinafter referred to as Rules, 1999). In the aforesaid Rules, detailed procedure has been prescribed in the case of awarding major penalties. Since, the Enquiry Officer appointed under Rules, 1999 acts as a quasi judicial authority and therefore, the principle of natural justice must have to adhere. He also added that the procedure has also been provided under Rule 7(X) of the Rules, 1999, where the charged government servant does not appear on the date fixed in the enquiry or at any stage of the proceeding inspite of the service of the notice on him. For ready reference, the provision of Rule 7(X) of the Rules, 1999 is extracted hereinunder :-

(x) Where the charged Government servant does not appear on the date fixed in the inquiry or at any stage of the proceeding inspite of the service of the notice on him or having knowledge of the date, the Inquiry Officer shall proceed with the inquiry ex-parte. In such a case the Inquiry Officer shall record the statement of witnesses mentioned in the charge-sheet, in absence of the charged Government servant."

10. Referring the aforesaid Rule, he submits that the controversy in the instant matter is that the delinquent employee did not appear before the Enquiry Officer and therefore, the Enquiry Officer has concluded the enquiry, but, the Enquiry Officer while proceeding with the alleged ex-parte enquiry, did not act in accordance with the mandate of Rule 7(X) of Rules, 1999.

11. Further submission of learned counsel for the petitioner is that despite so many applications and medical prescriptions as well as medical certificates submitted before the departmental authorities, the petitioner was neither communicated that any departmental proceeding has been initiated or they are going to consider such applications and certificates. All the departmental proceedings have been done behind the back of the petitioner and the opportunity of hearing was not accorded to the petitioner and the departmental proceedings have been concluded de horsing the Rules, 1999. He added that violating the principles of natural justice as well as the provisions prescribed under Rules, 1999, the enquiry proceedings have been concluded and the major punishment has been awarded to the petitioner, which infringes the rights of the petitioner, guaranteed under Articles 14 and 16 as well as 311(2) of the Constitution of India.

12. Explaining the delay and laches, it has been submitted by the learned counsel for the petitioner that same are not deliberate and intentional or negligent act in filing the present writ petition, as the petitioner was bed ridden due to acute mental depression and other diseases, upto the year 2001 and thereafter, as soon as he became physically fit, he preferred a case

before the Labour Commissioner, which was dismissed vide order dated 19-01-2007 and the reference too was dismissed on 23-05-2007. Since, the petitioner filed the aforesaid case on wrong advice and therefore, there was no deliberate delay or laches on the part of the petitioner.

13. He has further drawn attention of this court that even assuming that the present petitioner has avoided to appear before the Enquiry Officer in the departmental proceedings, it was incumbent upon the Enquiry Officer to proceed with the enquiry proceedings as per the provisions emanates in Rule 7(X) of the Rules, 1999. But, so far as the present matter is concerned, the procedure with respect to ex-parte enquiry has not been followed by the Enquiry Officer and directly, the order of termination has been passed.

14. He further submits that in fact the instant writ petition is maintainable before this Court even there is provision of filing an appeal before the State Government as since it is well settled law that alternative remedy would not be an absolute bar where there is violation of principle of natural justice or the order under challenge is passed without jurisdiction and the present matter is the best example of gross violation of principle of natural justice as no opportunity of hearing accorded to the petitioner

15. Adding his arguments, he submits that the matter is pending consideration before this court since year 2007 and after passing of more than fifteen years, no fruitful purpose would be subserved to remit it back to the state government for opening the door of filing an appeal.

16. Placing the aforesaid argument, learned counsel for the petitioner has relied upon a judgment reported in **2010(1) SCC 126 Satwati Deswal vs State of Haryana and others** and referred the para 5, 6, 7, 8 and 9 which are extracted as follows;

" 5. In our view, the High Court had fallen in grave error in rejecting the writ petition on the aforesaid ground. First, such an order of termination was passed without issuing any show cause notice to the appellant and without initiating any disciplinary proceedings by the authorities and without affording any opportunity of hearing. It is well settled that a writ petition can be held to be maintainable even if an alternative remedy available to an aggrieved party where the court or the tribunal lacks inherent jurisdiction or for enforcement of a fundamental right; or if there had been a violation of a principle of natural justice; or where vires of the act were in question.

6. The aforesaid exceptions recognized by this Court were taken note of by this Court in the case of A.V. Venkateswaran, Collector of Customs, Bombay v. Ramchand Sobhraj Wadhwani and another (AIR 1961 SC 1506), in which the Constitution Bench laid down the principles of the above exceptions when writ application could be entertained even if an alternative remedy was available to an aggrieved party. The same view was expressed by this Court in the case of L.K. Verma v H.M.T. Ltd. & Anr. (AIR 2006 SC 975) and M.P.State Agro Industries Development Corporation & Anr. v. Jahan Khan (AIR 2007 SC 3153).

7. Such being the position and in view of the admitted fact in this case that before termination of the services of the

appellant, no disciplinary proceeding was initiated nor any opportunity of hearing was given to the appellant. It is clear from the record that the order of termination was passed without initiating any disciplinary proceedings and without affording any opportunity of hearing to the appellant. In that view of the matter, we are of the view that the writ petition was maintainable in law and the High Court was in error in holding that in view of availability of alternative remedy to challenge the order of termination, the writ petition was not maintainable in law.

8. Apart from that, on a cursory look of the statutory provision of the Constitution of the Parishad Working Committees, it would be clear that before imposing any major penalty against an employee, namely, an order of termination of service, an inquiry must be held in the manner specified in the statutory rules by which the disciplinary authority shall frame definite charges on the basis of allegations on which an inquiry shall be proposed and opportunity must be given to the employee to submit a written statement stating therein whether he/she desires to be heard in person and no order of termination also can be passed without the approval of the Managing Committee. On this count alone, therefore, the High Court was, in our view, in grave error in dismissing the writ petition of the writ petitioner.

9. Accordingly, the impugned judgment of the High Court is set aside and the order of termination passed against the appellant is quashed and the writ petition stands allowed. However, it would be open to the authorities, if so desire, to initiate disciplinary proceedings against the appellant for her termination from service and if such disciplinary proceedings are

initiated, the authorities shall give proper opportunity of hearing and permit the parties to adduce evidence in support of their respective stands and after giving such opportunity, the disciplinary authorities thereafter shall give hearing to the appellant and then pass a final order on the question of termination of service of the appellant in compliance with the concerned statutory rules applicable to the appellant."

17. He has further placed reliance upon the case reported in **AIR 996 SC 1364, Mafatlal Narandas Barot v. J.D. Rathod**, and has referred para 12 of the abovesaid judgment, which is extracted as under;

"12. It is true that the respondent may visit the punishment of discharge or removal from service on a person who has absented himself without leave and without reasonable cause, but this cannot entail automatic removal from service without giving such person reasonable opportunity to show cause why he be not removed. The appellant is entitled to a reasonable opportunity to show caue which includes an opportunity to deny his guild and establish his innocence with he can do only when he knows what the charges levelled against him are and the allegations on which such charges are based. In our judgment, the appellant was entitled to an opportunity to show cause against the action proposed to be taken against him."

18. While referring the aforesaid judgments, he submits that in fact an employer is under obligation to conduct due enquiry, even if the delinquent employee has absented himself before the enquiry officer as there cannot be automatic removal from service, without following due process of law.

19. He also quoted the provisions of Rules, 1999 wherein, there is provision of ex parte enquiry and as such he submits that in fact even if the petitioner was not appearing before the enquiry officer, the enquiry officer was under obligation to conclude the enquiry, adhering the provisions of an ex parte enquiry, as provided under 'Rules, 1999', which has not been followed. Therefore, submission is that the writ petition may be allowed and the impugned orders dated 19-01-2007 and 30-07-1991, may be quashed.

20. Countering the aforesaid submissions, learned Standing Counsel appearing for the State has vehemently opposed the contentions aforesaid and submits that in fact the writ petition is not maintainable on the ground that the petitioner has efficacious and alternative remedy to file an appeal before the State Government. He further added that in fact so far as the assertion of the petitioner is concerned that he has given the applications annexing therein the medical prescription and medical certificate, regarding ailments that too was never received in the office of the department. He also contended that in fact the show cause notices were issued but the same was not responded and as such the enquiry proceeding was concluded and the disciplinary authority passed the order dated 30th July, 1991.

21. In support of his contentions, he has relied upon a case report in **(2009) 13 SSC 102 Union of India and others vs. Bishamber Das Dogra** and has referred paragraph 30 and 31 of the judgment which are extracted as follows:-

"30. In view of the above, it is evident that it is desirable that the

delinquent employee may be informed by the disciplinary authority that his past conduct would be taken into consideration while imposing the punishment. But in case of misconduct of grave nature or indiscipline, even in the absence of statutory rules, the authority may take into consideration the indisputable past conduct/service record on the employee for adding the weight to the decision of imposing the punishment if the facts of the case so require.

31. It is settled legal proposition that habitual absenteeism means gross violation of discipline [vide Burn & Co. Ltd. v. Workmen²⁰ (AIR p. 530, para 5) and L&T Komatsu Ltd. v. N. Udayakumar²¹ (SCC p. 226, para 6).]

22. Having heard the learned counsel for the parties and after perusal of records, it reveals that the petitioner was said to be suffering with serious ailments and as such he could not sent application to the department along with medical certificate. Further the department started enquiry and show cause notice was issued and there was past misconduct of the petitioner, as he absconded earlier in year 1980 and therefore, under impression that no fresh enquiry is required, after show cause notice issued, therefore, the order dated 30th July, 1991 was passed.

23. The petitioner was in government service, thus while having at a glance over the relevant provisions of U.P. Government (Discipline and Appeal) Rules, 1999 (hereinafter referred to as Rules, 1999), Rule 7 of the Rules, 1999, it emerges that where a charged government servant does not appear on the date fixed, in the enquiry or any of the stage of the disciplinary proceedings (even having the knowledge of

the date), despite the notice is served upon him or her, the Enquiry Officer, shall proceed with the ex-parte enquiry, wherein the statements of the witnesses mentioned in the chargesheet, shall also be recorded.

24. 'Rules 1999', clearly indicates, the exigency, where the delinquent/charged employee deliberately avoids to associate him with the enquiry, proceedings, it is open to the Enquiry Officer to proceed with ex-parte enquiry, meaning thereby that even the delinquent employee does not respond either presenting himself or by way of responding through his reply, the Enquiry Officer is duty bound to proceed with the enquiry, exparte and therefore, in all the eventualities, the enquiry proceedings will go to its logical end. In the present matter, it is apparent that the charged employee has neither filed any reply to the charges levelled against him vide the chargesheet nor he ever appeared before the Enquiry Officer, even after service of notice and the date, time and place fixed by the Enquiry Officer.

25. Now the question cropped up that whether in case, an employee is unauthorizedly absent from duty, the ex-parte departmental inquiry is required, even if there is misconduct of such employee in past also. Further, if the delinquent employee does not appear and respond in the enquiry, whether due enquiry is required in such events?

26. The procedure for conducting the disciplinary enquiry is envisaged in Rules, 1999, wherein it is mandated that in case, the charged government servant does not appear on the date fixed in the enquiry or at any stage of the proceedings, inspite the service of notice, the Enquiry Officer is duty bound to proceed with the exparte enquiry proceedings.

27. Law is settled as in the case of Tata Oil Mills Co. Ltd. Vs Their Workmen, (1963)II LLJ. 78(SC), Imperial Tobacco Co. Ltd. Vs Its Workmen, AIR 1962 SC, 1348 and Uma Shanker Vs. Registrar, 1992(65) FLR 674(All) and it has categorically been held that even if the charged employee refuses to participate in the enquiry, the employer cannot straightaway dismiss him, but, he must hold an exparte enquiry.

28. Again in the case of Subhash Chandra Sharma Vs. Managing Director, U.P. Co-operative Spinning Mills Federation Ltd., Kanpur and another reported in 2000(1) UPLBEC 541, the court has held as follows :-

"In our opinion after the petitioner replied to the charge-sheet a date should have been fixed for the enquiry and the petitioner should have been intimated the date, time and place of the enquiry and on that date the oral and documentary evidence against the petitioner should have been led in his presence and he should have been given an opportunity to cross-examine the witnesses against him and also he should have been given an opportunity to produce his own witnesses and evidence. If the petitioner in response to this intimation had failed to appear for the enquiry then an ex parte enquiry should have been held but the petitioner's service should have not been terminated without holding an enquiry. In the present case it appears that no regular enquiry was held at all. All that was done that after receipt of the petitioner's reply to the charge-sheet he was given a show-cause notice and thereafter the dismissal order was passed. In our opinion this was not the correct legal procedure and there was violation of the rules of natural justice.

Since no date for enquiry was fixed nor any enquiry held in which evidence was led in our opinion the impugned order is clearly violative of natural justice."

29. The aforesaid ratio of the Judgments are based on the principles of law that the initial burden is on the department to prove charges against the delinquent employee, where there are charges leading to major penalty and it is further borne out that the Enquiry Officer has to adduce evidence and to hold enquiry as well.

30. It is settled law that the inquiry officer discharges his duties as quasi-judicial officer and thus, his entity is different than his post or lien in the department and he has to search out the truth, being impartial and judicious. Since the major punishment awarded to an employee is profound impact therefore, the rules must be followed in strict manner and the principles of natural justice shall be taken care of.

31. Thus, admittedly, the Enquiry Officer did not proceed with the *ex parte* inquiry as it is alleged that the present petitioner deliberately did not appear before the Enquiry Officer and he did not file any response in the form of reply and therefore, charges are proved, therefore, the Enquiry Officer concluded the enquiry, ignoring the provisions envisaged under Rule 7(X) of Rules, 1999, which vitiates the enquiry proceedings.

32. Coming to the issue of alternative remedy, this court has noticed that the matter is pending before this court since the year 2007 and about more than 15 years have been passed and therefore, the alternative remedy would not come in the

way to decide the matter finally by this court while invoking jurisdiction under Article 226 of the Constitution of India. The question of maintainability on the ground of alternative remedy has been settled in the case of *Durga Enterprises(P) Ltd. And Another Vs Principal Secretary, Govt. of U.P. and Others*, reported in (2004) 13 SCC 665, by the Apex Court while holding that in the writ petitions in which, the pleadings are complete, ought to have been decided on merits, instead of relegating the parties to the other alternative forums. The analogy behind the said ratio that the rule of alternative remedy is rule of convenience and the same should not be applied in a strict manner and particularly, in the cases, which are pending before the High Courts for a long period of time. The abovesaid ratio has again been reiterated by the Division Bench of this court in the case reported in 2004(22) LCD,20, R.P. Pandey Vs. U.P. Power Corporation Ltd. and Others.

33. So far as the delay in filing the writ petition is concerned, it is evident that petitioner has chosen wrong forum, though he has filed a case before the labour court and State filed objection/written statement but never raised question of maintainability. It is the petitioner, who himself came forward and submitted an application and averred that since the petitioner is Government employee and as such, the jurisdiction of labour court would not lie and as such labour court dropped the proceeding and petitioner approached this Court by filing the instant writ petition, and as such, it is immaterial in the present case.

34. In view of the aforesaid submissions and discussions, this court is of considered opinion that the enquiry proceedings vitiate in the eyes of law as the

order dated 30-07-1991, assails illegality and infirmity.

35. Consequently, the impugned order dated 30-07-1991 is hereby quashed. Since, the delinquent employee has retired and therefore, no fruitful purpose would be sub-served to remit back the matter to proceed for a fresh enquiry, therefore, the respondent no. 4 is hereby directed to pay the dues including the pension considering the period of year 1991 to 2007.

36. It is made clear that department is not under obligation to pay back wages, under the settled proposition of law, namely of 'no work no pay.'

37. Consequently, the writ petition is *partly allowed*.

38. No order as to costs.

(2023) 9 ILRA 905
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 12.09.2023

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ-C No. 3000014 of 1991

Ram Kali Devi **...Petitioner**
Versus
State Of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:

Govind Saran Nigam, Abhisht Saran,
 Govind Saran Nigam, Nirmal Tewari, Rahul
 Kumar Kashyap, V.R. Singh

Counsel for the Respondents:

C.S.C.

**Civil Law - U.P. Imposition of Ceiling on
 Land Holdings Act, 1960 - Section 13-A -
 Scope and limitation - Recall of final order**

**passed on merits - Permissibility - Order
 dated 16.03.1991 discharging notice
 under Section 10(2), passed after due
 contest and appearance by State through
 Naib Tehsildar - Application for recall filed
 by St. under Section 13-A on ground of
 non-appearance of counsel - Held:
 Prescribed Authority becomes functus
 officio after final adjudication - Section
 13-A permits only rectification of mistake
 apparent on face of record - No such
 mistake shown - Recall not maintainable -
 Proper remedy was appeal under Section
 13 - Impugned order allowing recall
 application quashed.**

Held: Section 13-A of the Act empowers the Prescribed Authority to correct mistakes apparent on the face of the record within two years, but does not vest review jurisdiction. Where the matter had been duly contested and decided on merits, allowing recall merely on the ground that St. counsel was not present, despite participation by the Naib Tehsildar, amounts to misuse of Section 13-A. Application was in essence a review and not a correction, hence not maintainable.

J - Followed: *Jwala Prasad Singh Vs District Judge*, Writ-C No. 965 of 1978, decided on 13.11.1978

- Relied on: *Devendra Nath Singh Vs Civil Judge, Basti*, (1999) 1 SCC 71

Writ Petition Allowed - Impugned order dated 16.04.1991 set aside.

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

1. Heard Abhisht Saran, learned counsel for petitioner as well as learned Standing Counsel for respondents.

2. By means of the present writ petition the petitioner has challenged the order dated 16.04.1991 passed by Additional District Magistrate/prescribed Authority under the Ceiling Act whereby he has allowed the application preferred by

the State for recalling of his previous order dated 16.03.1991.

3. It has been submitted by learned counsel for petitioner that present dispute was initiated on issuance of a notice under Section 10 (2) of Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960 on the petitioner.

4. The petitioner had filed her objections to the said notice and had stated that the lands in issue which are sought to be declared to be surplus under the Act of 1960 were in fact previously owned by her son, namely, Shreeprakash @ Munna. It was further stated that her son Shreeprakash had executed a will in favour of his sisters on 05.01.1978 which was duly registered on 27.12.1980 and the said property having been devolved on the legacies of the said will and the said land held after the said alienation would not be subjected to Ceiling Act 1960, and cannot be clubbed with the holding of the petitioner.

5. The objections submitted by the petitioner were duly considered by the Prescribed Authority and in this regard, an order was passed on 16.03.1991 where the version of the petitioner was accepted and the notices under Section 10(2) of the Act of 1960 were discharged.

6. A month thereafter, an application for recall of the order dated 16.03.1991 was filed by the State, stating that they were not given adequate opportunity of hearing by the Prescribed Authority and consequently in exercise of powers under Section 13 (A) of Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960, the order dated 16.03.1991 deserves to be recalled and the matter to be re-heard on merits.

7. It is the application preferred by the State which has been allowed by means of impugned order dated 16.04.1991 which has been assailed in the present writ petition.

8. Learned counsel for petitioner while assailing the said order has submitted that as per provisions contained in Section 13(A) of the Act of 1960, it only provides for rectification of any mistake apparent on the fact of record.

9. It is submitted that a perusal of the order dated 16.04.1991 would indicate that though the counsel for the State was not present but the matter was duly prosecuted by the Tehsildar who was present on the occasion and has led all the submissions on behalf of the State. He further submits that entire records were perused by the Prescribed Authority and all the evidences which were adduced were duly considered before passing of the said order. He also submits that in this regard, it cannot be said that there was any mistake or any error apparent on the face of record necessitating rectification as sought by the State.

10. He further submits that in fact the application filed by the State is under the garb of review which is not permissible under Section 13(a) of the Act of 1960.

11. Learned counsel for petitioner has also relied upon the judgment of this Court in the case of **Jwala Prasad Singh Vs. District Judge passed in Writ Petition No. 965 of 1978** decided on 13.11.1978.

12. Learned Standing Counsel on the other hand has opposed the writ petition and has submitted that no adequate representation was made on behalf of the State before the Prescribed Authority and

consequently there has been miscarriage of justice inasmuch as the relevant arguments on behalf of the State could not be advanced which would be within the meaning of mistake or apparent on the face of record for which the Prescribed Authority record its previous order and there is no infirmity with the same.

13. I have heard the learned counsels for the parties and perused the record.

14. The petitioner Ram Kali is the mother of Shri Prakash. Shri Prakash was initially given the notice under section 10 (2) of the Uttar Pradesh on Ceiling on Land Holding Act, 1960, and after considering his objections, 19 Bhighas 7 Biswa, 2 biswansi land out of the agricultural plot was declared surplus. The proceedings became final and the said order was incorporated in the revenue records.

15. The proceedings which are the subject matter of the present writ petition have been initiated by issuance of a notice under section under section 10 (2) read with section 29/30 of the act of 1960 issued to the petitioner Ramkali after death of her son Shri Prakash. Shreeprakash during his lifetime had executed a will on 05/01/1978. After execution of the will he had died, but the same was got registered on 27/12/1980. By means of the said will Shreeprakash has bequeathed his property in favour of his 3 sisters, namely, Krishna Trivedi, Shakuntala Dubey and Susheela Tripathi. After his death, a probate was obtained from the court of District Judge Kanpur, and necessary entries were also incorporated in the revenue records. On the basis of the report of the Sub-Divisional Officer, Unnao, notice under section 10(2) was given to the petitioner which included the lands of Sri Prakash, which had been

transferred in favour of the sisters. The petitioner filed objections stating that the lands held by late Shri Prakash have been wrongly clubbed with the petitioner's land as Shri Prakash during his lifetime had executed a will whereby his lands devolved upon his sisters after his death, and after obtaining a probate from the court of District Judge Kanpur the said land are in possession of the sisters, and the notice given under political influence and village rivalry is illegal and arbitrary and deserves to be set aside. It was further informed that the mutation has already been carried out and the lands are no longer in the name of Shreeprakash.

16. The said case was conducted by Shri Rajesh Kumar Sirvastava, the Naib Tahsildar incharge of ceiling litigation. The said Niab-Tehsildar had also filed objections to the reply submitted by the petitioner to the notice issued to her, and contested the matter before the prescribed authority. By means of order and judgment dated 16/03/1991 accepted the contention of the petitioner and held the land have been wrongly clubbed with the holding of the petitioner, as the said land had already been alienated and devolved upon the sisters of Shreeprakash under a will executive by him in their favour, which had already been probated by the District Judge Kanpur. He further recorded that such a right vested in Shreeprakash in terms of provisions contained in section 171 of the UPZA&LR Act, and accordingly discharged the notices.

17. The state moved an application on 10/04/1991 for recall of the order dated 16/03/1991 stating that the matter had been contested by the Niab-Tehsildar on behalf of the state and no Counsel could appear. Therefore they assailed the findings of the

prescribed authority stating that the transfer of property by Shreeprakash was not legal and the same has been done only to evade the ceiling proceedings.

18. By means of the impugned order dated 16/04/1991 the application for the State was allowed and the order dated 16/03/1991 was recalled on the ground that the Naib-Tehsildar was not given an opportunity of hearing.

19. The main issue to be decided in the present case is as to whether in exercise of power under Section 13 A of the Act of 1960, an order which has been passed after duly considering the detail submissions of either parties on merits can be recalled without recording that there is any apparent on the face of record or the order requires any correction as prescribed under Section 13A of the Act of 1960.

21. The order dated 16.03.1991 was passed after hearing learned counsel for petitioner as well as Naib Tehsildar. The said order indicates that all the contentions have been dealt in detail and the Naib Tehsildar has effectively defended the State and raised all the objections. At no point of time during the said proceedings, it has been recorded that the matter was sought to be adjourned on the non-appearance for counsel for the State. Even in the application for recall the name of the counsel is not mentioned.

22. It has been informed that in all such matters the Naib Tehsildar who is well versed in all the ceiling laws appears and contest the matter on behalf of the State and in this case too he appeared and effectively argued the case on behalf of the State which is evident from the order dated 16.03.1991 itself.

23. A bare reading of Section 13(2) of the Act of 1960 indicates that once an order has been passed by the prescribed authority he becomes functus officio and the order passed by him disposing of all the objections filed by the tenure holder, the order becomes final subject to any order passed in appeal filed under section 13 of the Act of 1960.

24. The only manner in which any order under Section 13(A) can be reopened is only on account of any correction or mistake which is sought to be rectified within a time period of two years from the date of said order.

25. The said view has also been taken by this Court in case of **Jwala Prasad Singh Vs. District Judge (Writ Petition No. 965 of 1978)** decided on **13.11.1978** wherein this Court has held as under:-

“3. The petitioner No. 1 Sri Jwala Prasad Singh was issued a notice under section 10(2) of the Act and he filed objections. The notice was issued some time in 1974 and the Prescribed Authority decided the objections by his order dated 24.3.1975 and the said authority held that 7 bighas and odd land in the hand of the petitioner was surplus. It seems that the petitioner was co-sharer and, therefore, proceedings were taken against all the co-sharers also in accordance with the determination made by the Prescribed Authority in the case of the petitioner by the order dated 24th March, 1975. By the order dated 31st December, 1975, the objections of the other co-sharers were also decided. Thereafter the Prescribed Authority issued a fresh notice u/s 10(2) of the Act to the petitioner and he purported to do so in view of the provisions contained

in section 31(3) of the U.P. Act XX of 1976, namely, the U.P. Imposition of Ceiling on Land Holdings (Amendment) Act, 1976. Section 31 of the said Amending Act lays down transitory provision and sub-section (3) thereof is in the following words: "31(3) Where an order determining surplus land in relation to a tenure-holder has been made under the Principal Act before the tenth day of October, 1975, the Prescribed Authority (as defined in the Principal Act) may, at any time within a period of two years from the said date re-determine the surplus land in accordance with the Principal Act as amended by this Act, whether or not any appeal was filed against such order and notwithstanding any appeal (whether pending or decided) against the original order of determination of surplus land."

4. By this notice the petitioner was informed that 31 bighas and odd were surplus in his hand. However, when he filed objections the same were accepted and the notice was discharged by the Prescribed Authority by his order dated 31st January, 1977. By a subsequent order dated 14th February, 1977 the Prescribed Authority directed that the order dated 31st January, 1977, whereby the notice had been discharged should be given effect to. Thereafter the State Government moved two applications, one dated 23rd June, 1977 and the other dated 12th July, 1977, whereby a review was sought of the order dated 31st January, 1977, and the prayer was made that the said order should be reviewed and the subsequent order dated 14th February, 1977 should be countermanded. The said applications were purported to have been moved under section 13-A of the Act. True copies of the said applications are annexures '4' and '5', respectively. The Prescribed Authority

allowed the said applications and in the appeal the order of the Prescribed Authority was maintained.

5. Now the petitioner has come up in the instant petition and in support thereof, I have heard Sri Sankatha Rai, learned counsel for the petitioner. The learned Standing Counsel has been heard in opposition. Counsel for the petitioner contended that section 13-A was really not attracted, inasmuch as there was no mistake apparent on the face of the record. He has further contended that the Prescribed Authority and the Appellate Court below were wrong in holding that the order dated 24th March, 1975 had become final because no appeal had been filed against the said order. Counsel has placed reliance on Section 31(3) for his contention that inasmuch as the order was passed before the tenth day of October, 1975 but after January 17, 1975, therefore, it was open to the Prescribed Authority to re-determine the surplus land in accordance with the Principal Act as amended by the said Amending Act within a period of two years from the relevant date. The learned Standing Counsel, on the other hand, has contended that there was no occasion to issue a fresh notice under section 10(2) inasmuch as the amendment in the U.P. Act XX of 1976 did not in any manner affect the original determination and, therefore, there was no occasion for taking proceeding by recourse to section 31(3) of the said Amending Act. I should like to observe here that this contention of the learned Standing Counsel is nowhere to be found in the order of the Prescribed Authority and in the judgment of the lower appellate court. The real point which weighed with them was that because there was no appeal filed against the order dated 24th March, 1975, therefore, the same had become final and

no fresh notice u/s 10(2) could be issued. This is undoubtedly contrary to the requirement of section 31(3) which has been re-produced above and which clearly says that even though no appeal was filed against the first order, fresh proceedings could be initiated under the Amended Act. It has seemed to me that, therefore, the second notice under section 10(2) could not be said to be without jurisdiction. In any case, I do not think that the order dated 31.3.1977 passed by the Prescribed Authority in consequence of the second notice u/s 10(2) could be said to contain any mistake apparent on the face of the record even if there was any mistake in issuing a second notice u/s 10(2) of the Act it could not be said to be a mistake apparent on the face of the record and the same needed to be established after a long-drawn out process and by invoking in aid controversial aspects of the matter. Therefore, I accept the contention of the learned counsel for the petitioner that there was no occasion for entertaining any application under section 13-A of the Act and the subsequent order passed by the Prescribed Authority and the lower appellate court, allowing the applications of the State moved u/s 13-A should be treated to be without jurisdiction.

The writ petition is allowed and the order of the prescribed Authority and the judgment of the lower appellate court are accordingly quashed and the Prescribed Authority is directed to treat its subsequent order dated 31st January, 1977 and the following order dated 14th February, 1977 as valid and effective order and to give effect to the same. In the circumstances there will be order as to costs."

26. Hon'ble the Supreme Court in the case of **Devendra Nath Singh Vs. Civil**

Judge, Basti, (1999) 1 SCC 71, held as under:-

"3. Having examined the provisions of Section 13-A and Section 38-B of the Act, we are of the considered opinion that under Section 13-A, the prescribed authority has the power to reopen the matter within two years from the date of the notification under sub-section (4) of Section 14 to rectify any apparent mistake which was there on the face of the record. That power will certainly not include the power to entertain fresh evidence and re-examine question as to whether the two sons, namely, Hamendra and Shailendra were major or not. The power under Section 38-B merely indicates that if any finding or decision was there by any ancillary forum prior to the commencement of the said section in respect of a matter which is governed by the Ceiling Act then such findings will not operate as res judicata in a proceeding under the Act. That would not cover the case where findings have already reached their finality in the very case under the Act. In this view of the matter, we have no hesitation to come to the conclusion that the prescribed authority had no jurisdiction to reopen the question of the majority of the two sons in purported exercise of the power under Section 13-A. If the authority had no jurisdiction, question of waiver of jurisdiction does not arise. As contended by learned counsel for the respondent."

27. In the present case, just because the counsel for the State did not appear, the entire order has been sought to be recalled and in fact the application for recall further indicates that the findings recorded by the prescribed authority has already been assailed holding the said findings to be incorrect and it has been stated that the

execution of will was itself fraudulent. This indicates that the intention of the State authorities was to reopen the entire matter and reheard it on merits & re-examined all the evidences.

28. The application for recall was in fact an application for review of the order of prescribed authority dated 16.03.1991 rather than an application for correction. It is undoubtedly clear that the prescribed authority does not have any power of review as the same is not prescribed in the Act of 1960 and under the garb of review the application for recall was preferred on the ground that the State counsel did not appear to contest the matter.

29. It is further noticed that in case the State was aggrieved by the order dated 16.03.1991 passed by the prescribed authority, it was always open for them to prefer an appeal under Section 13 of the Act of 1960 before the Commissioner but instead of filing an appeal the application for recall was preferred.

30. In light of the above, this Court is of the considered view that the jurisdiction exercised by the prescribed authority purportedly exercised under Section 13(A) of the Act of 1960 is not vested in him and hence the impugned order is illegal and arbitrary and is accordingly set aside.

31. With the above observations, the writ petition stands **allowed**.

(2023) 9 ILRA 911
REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.07.2023

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Civil Revision No. 44 of 2023

Sharda Singh ...Revisionist
Vijay Kumar Rastogi ...Opposite Party

Counsel for the Revisionist:

Sri Rajesh Kumar Singh, Sri Krishna Kant
Vishwakarma

Counsel for the Opposite Party:

G.A.

Civil Law - Code of Civil Procedure, 1908 - Order 37- Rule 3(5), Rule 4 - Constitution of India, 1950 -Article 227 - Grant of Unconditional Leave to Defend - Revisionist challenged the order dated 03.03.2023, granting unconditional leave to the respondent to contest a summary suit under Order 37 C.P.C. for recovery of Rs. 68,55,000/-, allegedly lent through cheques, with only Rs. 1,20,000/- repaid. Revisionist claimed the respondent's defence was malicious and lacked bona fide triable issues, citing dishonoured cheques and relying on *B.L. Kashyap*. Respondent denied taking any loan, alleging payment of Rs. 31,80,000/- for property purchase and collusion by the revisionist's husband. Court held that the respondent raised a triable issue, denying the loan and asserting payments, which did not fall under the fourth eventuality of *B.L. Kashyap* (plausible but improbable defence requiring conditions). Neither party provided material evidence to support their claims. The defence was not frivolous or vexatious, entitling the respondent to unconditional leave under Order 37 Rule 3(5). The trial court's order was free from jurisdictional error or illegality. Revision dismissed. (Paras 12, 16-19)

Revision dismissed.

List of Cases cited:

B.L. Kashyap & Sons td. Vs JMS Steels & Power Corporation & anr., (2022) 3 SCC 294

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

1. Heard learned counsel for the revisionist.

2. The revisionist, who is plaintiff in Original Suit No.37 of 2020 under Order 37 C.P.C., has assailed the order dated 03.03.2023 passed by Civil Judge (Senior Division), Varanasi granting unconditional leave to the respondent to contest the suit instituted by the revisionist.

3. The suit has been instituted on the ground that the revisionist has lent an amount of Rs.69,75,000/- through various cheques and other modes to the respondent, but the respondent has returned only Rs.1,20,000/-.

4. In the suit, notices were issued. On appearance of respondent in the suit, the revisionist as per procedure contemplated under Order 37 Rule 4 of C.P.C. served the respondent a summon for judgment in form No.4-A in appendix B supported by the affidavit stating the details in the paragraph 4 of the affidavit regarding various payments totalling Rs.1,20,000/- paid by the respondent through various cheques. The respondent further in para 5 of the affidavit filed in support of summons of judgment have disclosed the details of cheque given by the respondent which was dishonoured by the bank due to insufficiency of fund. In para 6 of the affidavit, the revisionist has disclosed two cheques received from respondent amounting to Rs.1,20,000/- which were encashed. It is further stated that the respondent became dishonest and does not intend to pay the money given by the revisionist, and since the respondent has no defence to suit, therefore, respondent is not entitled to any opportunity as provided under Order 37 Rule 3 (5) of C.P.C. to defend the suit.

5. The respondent filed reply to the aforesaid affidavit denying the fact that they have taken any loan from the revisionist. It is further stated that the husband of the revisionist is Sub Inspector and the suit has been instituted with the collusion of her husband. It is further stated that the respondent has given an amount of Rs.31,80,000/- through various cheques details whereof has been stated in paragraph 11 of the reply of the respondent and to avoid the payment of such amount, the suit has been instituted by the revisionist. Accordingly, it is prayed that the respondent be granted unconditional leave to contest the suit.

6. Challenging the order, learned counsel for the revisionist has contended that the subordinate court has committed material irregularity and failed to exercise jurisdiction vested in it in rejecting the application. It is submitted that perusal of the reply of the respondent against the affidavit filed by the revisionist in support of summon reveals that the defence set up by the respondent is malicious and the respondent has no plausible defence to contest the suit. Thus, it is submitted that the subordinate court has erred in law in granting unconditional leave to the respondent to contest the suit. It is submitted that perusal of objection reveals that no bona fide or real triable issue is raised in the objection and in such condition, the trial court while granting leave ought to have imposed some strict condition in granting the leave.

7. I have considered the contentions of learned counsel for the revisionist and perused the record.

8. The facts as emanate from the record are that the suit has been instituted

by the revisionist under Order 37 of C.P.C. for recovery of an amount of Rs.68,55,000/- along with interest on the ground that the revisionist has given a loan of Rs.68,55,000/- through various cheques out of which respondent has paid only Rs.1,20,000/-. The further ground in the suit is that two cheques given by the respondent were dishonoured due to insufficiency of fund.

9. The subordinate court issued notice to the defendant. On appearance of the defendant, the revisionist filed summons along with affidavit in the Form 4-A of Appendix B again reiterating that the revisionist has paid Rs.68,55,000/- through various cheques the details whereof has been stated in paragraph 4 of the affidavit. The details with regard to the cheques issued by the respondents which were bounced have been stated in the paragraph 5 by the revisionist in the affidavit.

10. The respondent has denied the factum of taking any loan from respondent and has further set up a defence that they have paid amount of Rs.31,80,000/- for the purchase of property of revisionist. The respondent has further denied the issuance of any cheques which were dishonoured by the bank.

11. In the aforesaid backdrop, the trial court after considering the law laid down by the Apex Court held that the respondent has raised a triable issue and is entitled to unconditional leave to defence.

12. Learned counsel for the revisionist has placed reliance upon the judgment of Apex Court in the case of ***B.L. Kashyap and Sons Limited Vs. JMS Steels and Power Corporation and Another, 2022 (3) SCC 294***. In the context of the present case

paragraph 33.1 to 33.3 are relevant and they are reproduced hereinbelow:

"33.1. As noticed, if the defendant satisfies the Court that he has substantial defence, i.e., a defence which is likely to succeed, he is entitled to unconditional leave to defend. In the second eventuality, where the defendant raises triable issues indicating a fair or bona fide or reasonable defence, albeit not a positively good defence, he would be ordinarily entitled to unconditional leave to defend. In the third eventuality, where the defendant raises triable issues, but it remains doubtful if the defendant is raising the same in good faith or about genuineness of the issues, the trial court is expected to balance the requirements of expeditious disposal of commercial causes on one hand and of not shutting out triable issues by unduly severe orders on the other. Therefore, the trial court may impose conditions both as to time or mode of trial as well as payment into the Court or furnishing security. In the fourth eventuality, where the proposed defence appears to be plausible but improbable, heightened conditions may be imposed as to the time or mode of trial as also of payment into the Court or furnishing security or both, which may extend to the entire principal sum together with just and requisite interest.

33.2. Thus, it could be seen that in the case of substantial defence, the defendant is entitled to unconditional leave; and even in the case of a triable issue on a fair and reasonable defence, the defendant is ordinarily entitled to unconditional leave to defend. In case of doubts about the intent of the defendant or genuineness of the triable issues as also the probability of defence, the leave could yet be granted but while imposing conditions as to the time or mode of trial or payment

or furnishing security. Thus, even in such cases of doubts or reservations, denial of leave to defend is not the rule; but appropriate conditions may be imposed while granting the leave. It is only in the case where the defendant is found to be having no substantial defence and/or raising no genuine triable issues coupled with the Court's view that the defence is frivolous or vexatious that the leave to defend is to be refused and the plaintiff is entitled to judgment forthwith. Of course, in the case where any part of the amount claimed by the plaintiff is admitted by the defendant, leave to defend is not to be granted unless the amount so admitted is deposited by the defendant in the Court.

33.3. Therefore, while dealing with an application seeking leave to defend, it would not be a correct approach to proceed as if denying the leave is the rule or that the leave to defend is to be granted only in exceptional cases or only in cases where the defence would appear to be a meritorious one. Even in the case of raising of triable issues, with the defendant indicating his having a fair or reasonable defence, he is ordinarily entitled to unconditional leave to defend unless there be any strong reason to deny the leave. It gets perforce reiterated that even if there remains a reasonable doubt about the probability of defence, sterner or higher conditions as stated above could be imposed while granting leave but, denying the leave would be ordinarily countenanced only in such cases where the defendant fails to show any genuine triable issue and the Court finds the defence to be frivolous or vexatious."

13. Reading of aforesaid paragraphs reveals that the Apex Court has held that ordinarily the defendant should not be denied opportunity to contest the case

unless it is demonstrated that no substantial defence is raised or defence set up does not raise genuine triable issues coupled with the fact that the defence is frivolous or vexatious, the Court may refuse the leave to defend and the plaintiff is entitled to judgment forthwith.

14. Further, the Apex Court in paragraph 33.1 has delineated four eventualities of cases which may arise in such type of cases and has provided guidelines which the Court should follow. The Apex Court has provided that the trial court should impose condition in granting leave to the defendant in cases which fall in the fourth eventuality.

15. In the instant case, it is submitted by learned counsel for the revisionist that the present case falls in the fourth eventuality as categorised by the Apex Court in paragraph No.33.1 of the judgment which is "*In the fourth eventuality, where the proposed defence appears to be plausible but improbable, heightened conditions may be imposed as to the time or mode of trial as also of payment into the Court or furnishing security or both, which may extend to the entire principal sum together with just and requisite interest.*"

16. This Court analysed the facts of the case in the light of fourth eventuality delineated by the Apex Court in paragraph 33.1 of the judgement and finds that respondent has set up a substantive issue for grant of unconditional leave to contest the suit and the case of respondent does not fall in the category of fourth eventuality. It is further relevant to note that the averments have been made on affidavit by the revisionist without placing any material on record indicating that the payments

detailed in paragraph 4 of the affidavit have been made by the revisionist to the respondent.

17. Though it is true that the respondent has also averred in his objection with regard to payment made by him for purchase of land without placing any material on record, but this Court may note that the revisionist has made assertion of payment on affidavit without placing any material on record to establish bona fide of payment by him which has been denied by the respondent in his objection. Both the parties have failed to produce any material on record in support of their claim.

18. In such view of the fact, this Court finds that the defence set up by the respondent in his objection is triable issue which entitles the defendant to unconstitutional leave to contest the suit as contemplated under Order 37 Rule 5 of C.P.C.

19. It would also be appropriate at this stage to consider the first proviso to Order 37 Rule 3(5) of C.P.C. which mandates the Court not to refuse the leave to defend unless it is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that defence intended to be put up by the defendant is frivolous and fictitious. In the instant case, the revisionist has failed to demonstrate that the facts disclosed by the respondent in his objection do not disclose that he has substantial defence to raise. In such view of the fact, this Court finds that the subordinate Court has not committed any illegality or jurisdictional error in granting unconditional leave to the respondent.

20. In such view of the fact, the revision is ***dismissed*** without any order as to costs.

(2023) 9 ILRA 915
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.09.2023

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Matters U/A 227 No. 3002 of 2019 (Civil)

Smt. Prema Devi ...Petitioner
Versus
Devideen & Ors. ...Respondents

Counsel for the Petitioner:
Sri Arvind Kumar Yadav, Sri Nikhil Kumar

Counsel for the Respondents:
Sri Girish Singh, Sri Ashish Kumar

Civil Law - Constitution of India, 1950 - Article 227 - U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 - Sections 12(3), 14 & 16(2) - Indian Evidence Act, 1872 - Section 17 - Deemed Vacancy and Revisional Order - Petitioner challenged the revisional order dated 23.01.2019, which allowed Rent Revision No. 70 of 2011, setting aside vacancy and release orders dated 10.03.2010 and 08.06.2011, respectively, under U.P. Act No. 13 of 1972. The vacancy order was based on the respondent-tenant's admission in a written statement in Suit No. 893 of 1993, claiming ownership and residence in House No. 85/183. Petitioner argued that the revisional court erred by not addressing this admission and remanding the matter without reversing the Regulatory Authority's findings, citing *Basant Singh* and *Premalata @ Sunita*. Respondents contended that Section 12(3) requires a vacant alternative accommodation, which was under dispute, and raised issues of bonafide need under Section 16(2) and statutory tenancy under Section 14, citing *Gopal Singh*. The court held that the tenant's admission of permanent residence in another property triggered deemed vacancy under Section 12(3), and the tenant could not approbate and reprobate, as per *Basant Singh*.

and *Premrata @ Sunita*. The revisional court's failure to address the admission rendered its order unsustainable. Respondents' reliance on Sections 14 and 16(2) was inapplicable due to the deemed vacancy. Revisional order set aside, petition allowed. (Paras 15-24)

Petition allowed.

List of Cases cited:

1. Basant Singh Vs Janki Singh & ors., (1967) 1 SCR 1
2. Dr. Dinesh Chandra Vs Krishna Kumar Goel, Civil Revision No. 214 of 2013
3. Premrata @ Sunita Vs Naseeb Bee & ors., (2022) 6 SCC 585
4. Gopal Singh Vs Rent Control and Eviction Officer, Dehradun & ors., Civil Misc. Writ Petition No. 29155 of 1991
5. Chetar Sen Jain Vs A.D.J., III, Dehradun & ors., ARC 1992 (2)

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

1. Heard Sri Nikhil Kumar, learned counsel for the petitioner and Sri Ashish Kumar, learned counsel for the respondents.

2. Present petition has been filed challenging the impugned order dated 23.01.2019 passed by 9th Additional District and Sessions Judge, Kanpur Nagar in Rent Revision No. 70 of 2011.

3. Brief facts of the case are that a release application was filed, which was registered as Case No. 1 of 2009 upon which vacancy order dated 10.03.2010 has been passed and thereafter, release order dated 08.06.2011 has also been passed. Against the said orders, respondent-defendant had filed Rent Revision No. 70 of 2011, which was allowed vide order dated 23.01.2019.

4. Learned counsel for the petitioner submitted that impugned order is bad on two grounds. Firstly, without reversing the finding of Rent Control & Regulatory Officer (hereinafter referred to as "Regulatory Authority"), revision has been allowed. He next submitted that vacancy order and release order have been passed on the ground that petitioner is having her own house and residing in that also. He pointed out that Suit No. 893 of 1993 is pending between respondent-defendant and his sister in which he has filed written statement on oath with specific averment that he is living as sole owner in the said House No. 85/183. A vacancy order has been passed relying upon the admission made by the respondent-defendant in the said suit, but without reversing this finding, impugned order has been passed. Once, it is admitted in proceeding pending before another Court about the ownership of house as well as residence cannot be ignored by the Revisional Court without giving any specific finding upon that. Secondly, in paragraph 13 of the affidavit filed along with the petition, petitioner has taken specific plea that respondent-defendant is residing in House No. 85/183. This fact has also been admitted in paragraph 13 of the counter affidavit filed before this Court, but without considering the same, impugned order has been passed. In support of his contention, he has placed reliance upon the judgment of the Apex Court in the matter of *Basant Singh Vs. Janki Singh and others; [1967] ISCR1* as well as judgment of this Court in the matter of *Dr. Dinesh Chandra Vs. Krishna Kumar Goel in Civil Revision No. 214 of 2013 decided on 27.05.2013*. He has also placed reliance upon the judgment of Apex Court in the matter of *Premrata @ Sunita Vs. Naseeb Bee and others; (2022) 6 Supreme Court Cases 585*.

5. He next submitted that remand order cannot be passed in routine manner except if there is exceptional circumstances to pass such order.

6. Sri Ashish Kumar, learned counsel for the respondents- defendants (tenant) vehemently opposed and submitted that Section 12(3) of U.P. Act No.13 of 1972 provides that vacancy can only be declared in case alternative accommodation is vacant. In the present case, same is not vacant as there is dispute between the defendant and his sister upon which Court has passed the order of status quo, therefore, in light of Section 12(3), there is no illegality in the order.

7. He next submitted that as per Section 16 (2) of U.P. Act No. 13 of 1972, it is required on the part of rent authority to consider the bonafide need, which has not been considered by the SCC Court, therefore, revision has rightly been allowed. He next submitted that in light of Section 101 of Indian Evidence Act, 1872, it is required on the part of plaintiff to establish his own case and any affidavit/ statement filed in another Court cannot be read as evidence against the defendant. In support of his contention, he has placed reliance upon the judgment of this Court in the case of **Gopal Singh vs. Rent Control and Eviction Officer, Dehradun and others passed in Civil Misc. Writ Petition No. 29155 of 1991 decided on 8.2.1993.**

8. Learned counsel for the respondents further submitted that in light of Section 14 of U.P. Act No. 13 of 1972, defendant is statutory tenant, therefore, no proceeding may be initiated against him. In support of his contention, he has placed reliance upon the judgment of Apex Court in the case of **Chetar Sen Jain vs.**

Additional District Judge III, Dehradun and other reported in ARC 1992 (2)

9. In his rejoinder argument, Mr. Nikhil Agarwal, learned counsel for the petitioner submitted that the plea of bonafide as well as maintainability of release application has never been questioned in written statement filed against the release application or in revision, therefore, at this stage, same cannot be raised upon which learned counsel for the respondents submitted that it is pure legal issue, therefore, he can raise the same at any point of time.

10. I have considered the rival submissions advanced by learned counsel for the parties and perused the provisions of law as well as judgments cited above.

11. Basic fact of the present case is undisputed that Original Suit No. 893 of 1993 is pending between the respondent-defendant and his sister in which he has filed written statement on oath with specific averment that he is living as sole owner in the said House No. 85/183.

12. Now the question before the Court is that what would be sanctity of statement given by the respondent-defendant in Original Suit No. 893 of 1993 on oath and applicability of Section 12 (3) of U.P. Act 13 of 1972. For reference, Section 12 (3) of U.P. Act 13 of 1972 is being quoted below;

“(3) In the case of a residential building if the tenant or any member of his family builds or otherwise acquires in a vacant state or gets vacated a residential building in the same city, municipality, notified area or town area in which the building under tenancy is situate, he shall

be deemed to have ceased to occupy the building under his tenancy:

Provided that if the tenant or any member of his family had built any such residential building before the date of commencement of this Act, then such tenant shall be deemed to have ceased to occupy the building under his tenancy upon the expiration of a period of one year from the said date.

[Explanation— For the purposes of this sub-section :--

(a) a person shall be deemed to have otherwise acquired a building, if he is occupying a public building for residential purposes as a tenant, allottee or licensee;

(b) the expression 'any member of family' in relation to a tenant, shall not include a person who has neither been normally residing with nor is

wholly dependent on such tenant.]1”

13. The language of Section 12 of U.P. Act 13 of 1972 is very much clear that in case, tenants or his family members, have taken a residence, not being temporary, deemed vacancy shall be treated.

14. So far as written statement or admission before any other Court of law is concerned, this matter was considered time and again by the Apex Court as well as this Court.

15. Apex Court has considered this issue in the matter of **Basant Singh (Supra)** and has taken a view that admission made by a party in a pleading may be used as evidence against him in other suits. Paragraph 6 of the said judgment is quoted below;

*“Thus, even under the English law, a statement in a pleading sworn, signed or otherwise adopted by a party is admissible against him in other actions. In *Marianski v. Cairns*(1) Macq. 212., the House of Lords decided that an admission in a pleading signed by a party was evidence against him in another suit not only with regard to a different subject-matter but also against a different opponent. Moreover, we are not concerned with the technicalities of the English law. Section 17 of the Indian Evidence Act, 1872 makes no distinction between an admission made by a party in a pleading and other admissions. Under the Indian law, an admission made by a party in a plaint signed and verified by him may be used as evidence against him in other suits. In other suits, this admission cannot be regarded as conclusive, and it is open to the party to show that it is not true.”*

16. This issue was before this Court in the matter of **Dr. Dinesh Chandra (Supra)** and while considering the different judgments of Apex Court, Court has held that no one can be permitted to approbate and reprobate. Relevant paragraphs are being quoted below;

“No one can be permitted to approbate and reprobate. It is doctrine of estoppel. When petitioner obtained benefit of the agreement in his writ petition against electricity authorities, he cannot be permitted to say that the agreement is not binding upon him or is not admissible in evidence. No reservation was made in the said writ petition regarding any clause of the tenancy agreement. No one can be permitted to say that he must be given benefit of an agreement to which he is signatory but if there is anything against him in the said agreement, then the same

shall not be read against him due to the reason that the agreement is not on sufficiently stamped paper and is not registered even though required to be registered. Permitting such contradictory pleas to be raised will amount to granting premium on dishonesty. ”

17. This issue was again before the Apex Court in ***Premalata @ Sunita (Supra)*** and after considering in detail, Apex Court has taken the very same view that no one can be permitted to approbate and reprobate and to take just contrary stand taken earlier. Relevant paragraph is quoted below;

“At the outset, it is required to be noted and it is not in dispute that the plaintiff instituted the proceedings before the Revenue Authority under Section 250 of the MPLRC. These very defendants raised an objection before the Revenue Authority that the Revenue Authority has no jurisdiction to deal with the matter. The Tehsildar accepted the said objection and dismissed the application under Section 250 of the MPLRC by holding that as the dispute is with respect to title the Revenue Authority would not have any jurisdiction under MPLRC. The said order passed by the Tehsildar has been affirmed by the Appellate Authority (of course during the pendency of the revision application before the High Court). That after the Tehsildar passed an order rejecting the application under Section 250 of the MPLRC on the ground that the Revenue Authority would have no jurisdiction, which was on the objection raised by the respondents herein – original defendants, the plaintiff instituted a suit before the Civil Court. Before the Civil Court the respondents – original defendants just took a contrary stand than which was taken by them before

the Revenue Authority and before the Civil Court the respondents took the objection that the Civil Court would have no jurisdiction to entertain the suit. The respondents – original defendants cannot be permitted to take two contradictory stands before two different authorities/courts. They cannot be permitted to approbate and reprobate once the objection raised on behalf of the original defendants that the Revenue Authority would have no jurisdiction came to be accepted by the Revenue Authority/Tehsildar and the proceedings under Section 250 of the MPLRC came to be dismissed and thereafter when the plaintiff instituted a suit before the Civil Court it was not open for the respondents – original defendants thereafter to take an objection that the suit before the Civil Court would also be barred in view of Section 257 of the MPLRC. If the submission on behalf of the respondents – defendants is accepted in that case the original plaintiff would be remediless. The High Court has not at all appreciated the fact that when the appellant – original plaintiff approached the Revenue Authority/Tehsildar he was nonsuited on the ground that Revenue Authority/Tehsildar had no jurisdiction to decide the dispute with respect to title to the suit property. Thereafter when the suit was filed and the respondents -defendants took a contrary stand that even the civil suit would be barred. In that case the original plaintiff would be remediless. In any case the respondents – original defendants cannot be permitted to approbate and reprobate and to take just a contrary stand than taken before the Revenue Authority. Therefore, in the facts and circumstances of the case, the learned trial Court rightly rejected the application under Order 7 Rule 11 CPC and rightly

refused to reject the plaint. The High Court has committed a grave error in allowing the application under Order 7 Rule 11 CPC and rejecting the plaint on the ground that the suit would be barred in view of Section 257 of the MPLRC. The impugned judgment and order passed by the High Court is unsustainable and is liable to be set aside. ”

18. Argument of learned counsel for the respondents-defendants (tenant) about the applicability of Section 12(3) of U.P. Act No.13 of 1972 cannot be accepted as there is no dispute on the point that written statement filed in Original Suit No. 893 of 1993, it is admitted that respondents-defendants (tenant) is residing in House No. 85/183 in the capacity of owner. In light of judgment given by Apex Court as well as this Court, he cannot take a different stand and be permitted for approbate and reprobate. Therefore, this Court is of the view that once, written statement has been filed by the tenant in Original Suit No. 893 of 1993, it has to be treated a valid evidence and deemed vacancy has to be treated.

19. So far as Section 16 (2) of U.P. Act No. 13 of 1972 is concerned, it requires bonafide need. In the present case, this defense is not available. Once it is held that tenant is having his own residence in light of Section 12(3) of U.P. Act No. 13 of 1972, judgment of **Gopal Singh (Supra)** is of no use in the present matter only for the reasons that in the said case, facts are entirely different and in written statement, there are two factual averments contradictory to each other.

20. Learned counsel for the respondents made submission about the applicability of Section 14 of U.P. Act No.

13 of 1972 and as per the said section, defendant is statutory tenant, therefore, no proceeding can be initiated against him. This argument can also not be accepted for the very simple reason that once, in light of Section 12(3) of U.P. Act No. 13 of 1972, respondents- defendants (tenant) had occupied permanent accommodation, there is no occasion to consider the applicability of Section 14 of U.P. Act No. 13 of 1972.

21. So far as judgment of **Chetar Sen Jain (Supra)** is concerned, in that case, facts are entirely different as the issue was related to before the commencement of U.P. Act No. 13 of 1972 and also in part, tenancy was admitted. In that case, earlier tenant was residing at the place in dispute and thereafter vacated the same, but along with new oral agreement, he had retained the accommodation in question for godown purpose. Therefore, Court in light of new enactment i.e. U.P. Act No. 13 of 1972 had decided the case in favour of tenant.

22. Learned Revisional Court while remanding the matter before Regulatory Authority, has not given any finding as to why admission made in Original Suit No. 893 of 1993 by respondents-defendants (tenant) about having permanent accommodation cannot be accepted. Therefore, revisional order is bad and cannot be sustained. If Revisional Court is of the view that affidavit given in Original Suit No. 893 of 1993 cannot be accepted, there must have been specific finding to this effect along with reasons, which is missing in the impugned order.

23. Therefore, in light of Section 12(3) of U.P. Act No. 13 of 1972 as well as law laid down by the Apex Court and this Court, I am of the firm view that any affidavit given before any Court of law be

read as conclusive evidence in subsequent proceeding before any Court of law, if related to that controversy.

24. In present case, it is admitted by the respondents-defendants (tenant) in Original Suit No. 893 of 1993 that he is having permanent alternative accommodation, therefore, no case is made out to quash the order of Regulatory Authority and remand the matter for fresh consideration.

25. Therefore, in light of facts as well as law discussed herein above, impugned order dated 23.01.2019 passed by 9th Additional District and Sessions Judge, Kanpur Nagar is bad in law and is hereby set aside.

26. Accordingly, petition is **allowed**.
No order as to costs.

(2023) 9 ILRA 921
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.09.2023

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Matters U/A 227 No. 7573 of 2022 (Civil)

Indian Oil Corporation Ltd. & Anr.
...Petitioners
Versus
The Commercial Court, Varanasi & Anr.
...Respondents

Counsel for the Petitioners:
Sri Pramod Kumar Rai, Sri Anil Sharma (Sr. Advocate)

Counsel for the Respondents:
Sri Pranab Kumar Ganguli, Sri Manish Goyal (Sr. Advocate)

Civil Law - Constitution of India, 1950 - Article 227 - Arbitration and Conciliation Act, 1996 - Sections 5, 33, 34, 36 & 85(2)(a) - Arbitration Act, 1940 - Sections 3, 14 & 28 - Code of Civil Procedure, 1908 - Sections 2(2) & 47 - Arbitral Award and Execution - Petitioners challenged the order dated 08.08.2022 rejecting objections under Section 47 CPC in execution proceedings of an arbitral award and the additional award dated 21.02.2006. Arbitration began under the Arbitration Act, 1940, but continued under the Arbitration and Conciliation Act, 1996, per the arbitrator's order dated 14.04.2002, based on the arbitration clause allowing statutory re-enactments. Petitioners argued the arbitrator lacked jurisdiction under the 1996 Act absent party agreement and that the additional award was time-barred, citing *Thyssen Stahlunion GMBH*. Respondents countered that the arbitration clause permitted the 1996 Act's application, petitioners acquiesced by not objecting earlier, and an arbitral award is not a decree under Section 2(2) CPC, rendering Section 47 objections invalid, citing *Paramjeet Singh Patheja*. The court held that the arbitration clause's provision for statutory re-enactments satisfied Section 85(2)(a) of the 1996 Act, allowing proceedings under the 1996 Act, as supported by *Thyssen Stahlunion GMBH* (Rani Constructions). Petitioners' failure to challenge the 1996 Act's applicability earlier estopped them. An arbitral award, not a decree, cannot be challenged under Section 47 CPC, and objections were barred post-Section 34 stage, per *Larsen & Toubro Limited*. Petition dismissed with costs of Rs. 1,00,000. (Paras 31-48)

Petition dismissed.

List of Cases cited:

1. Thyssen Stahlunion GMBH etc. Vs Steel Authority of India Ltd., (1999) 9 SCC 334
2. N D Nayak Vs St. of Goa, (2003) 6 SCC 56
3. Neeraj Munjal Vs Atul Grover Minor, (2005) 5 SCC 404
4. Kiran Singh & ors. Vs Chaman Paswan & ors., AIR 1954 SC 340

5. Bhavan Vaja Vs Solanki Hanuji Khodaji Mansang, (1973) 2 SCC 40

6. Harsad Chiman Lal Modi Vs DLF Universal Ltd., (2005) 7 SCC 791

7. Chief Engineer Hydel Project Vs Ravinder Nath, AIR 2008 SC 1315

8. Smt. Shakuntala Devi Vs Smt. Vimla, (2005) 59 ALR 599

9. Caravel Shipping Services Pvt. Ltd. Vs Premier Sea Foods Exim Pvt. Ltd., (2019) 11 SCC 461

10. Trading Engineers International Ltd. Vs U.P. Power Transmission Corp. Ltd., 2022 (10) ADJ 176 (LB)

11. Sweta Construction Vs Chhatisgarh St. Power Generation Company Limited, 2022 SCC Online SC 1447

12. Paramjeet Singh Patheja Vs ICDS Ltd., (2006) 13 SCC 322

13. Larsen & Toubro Limited Vs Maharaji Educational Trust, 2010 SCC Online All 1866

14. Bharat Pumps & Compressors Ltd. Vs Chopra Fabricators and Manufactures Pvt. Ltd., Civil Revision No. 53 of 2022

15. Hari Shankar Lal Vs Shairtbhu Nath, AIR 1962 SC 78

16. Tribhuvandas Kalidas Vs Jiwan Chand, (1911) 35 Bom 196

17. Manilal Vs The Bharat Spinning & Weaving, (1935) Bom LR 941

18. Ramshai Vs Joylall, AIR 1928 Cal 840

19. Ghulam Hussein Vs Shahban, AIR 1938 Sind 220

20. Sidharth Srivastava Vs K.K. Modi Investment & Financial Service Pvt. Ltd., (2002) 4 Mah LJ 281

21. Reshma Constructions Vs St. of Goa, (1999) 1 MLJ 462

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

1. Heard Sri Anil Sharma, learned Senior Counsel assisted by Sri P. K. Rai, learned counsel for the petitioners and Sri Manish Goyal, learned Senior Counsel assisted by Sri Pranab Kumar Ganguli, learned counsel for the respondents.

2. Present petition has been filed challenging the order dated 08.08.2022 passed by Commercial Court, Varanasi i.e. respondent no. 1 in Execution Case No. 24 of 2020 (Old Case No. 21/2012) and additional award dated 21.02.2006 passed by Arbitrator in the matter of M/s Vidhyawati Construction Col vs. IOCL and another.

3. Since, only legal question is involved in the present petition and pleadings have been exchanged between the parties, therefore, with the consent of parties, petition is being decided at the admission stage itself.

4. Brief facts of the case are that Original Suit No. 436 of 1989 was filed on 01.07.1989 for appointment of Arbitrator in accordance with provision of Arbitration Act, 1940 (hereinafter referred to as the 'Old Act, 1940'), which was applicable at that time. Vide order dated 12.8.1991, learned Civil Court appointed Hon'ble Mr. Justice R.P. Singh (Retired) sole arbitrator to decide the dispute. Due to pending litigation proceedings, Arbitration could only commence in the year 2001 and Arbitrator has issued notice dated 07.05.2001. Statement of claim was filed by the respondent no.2 on 24.5.2001 before the Arbitrator upon which petitioner had filed a detailed objection and also counter claim. Arbitrator has passed order dated 14.04.2002 to continue the proceeding as

per provision of Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'New Act, 1996'). Ultimately, arbitration proceeding was completed and award was given on 27.04.2005 partly in favour petitioner and respondents both. After calculating the amount, it was found that respondent has to pay Rs. 7,79,871/- to the petitioner. Thereafter, Arbitrator has sent the original records to Additional District Judge,-IX, Civil Court, Varanasi on the same day i.e. 27.04.2005. Respondent had moved application under Section 33 of the New Act, 1996 for modification of award. Arbitrator has additional the award vide order dated 21.02.2006.

5. The said award was challenged before this Court by filing petition Under Article 227 No. 30461 of 2006, which was **dismissed** as withdrawn vide order dated 08.05.2012 with liberty to file application under Section 34 of Act, 1996. Application was filed under Section 34 of New Act, 1996, which was registered as Arbitration Case No. 79 of 2012 and the same was **dismissed** vide order dated 23.03.2013. Against that order, petitioner has preferred First Appeal From Order No. 1584 of 2013, which was also **dismissed** vide order dated 08.04.2016. As respondent was also aggrieved with the certain observations made in the award, therefore, he has preferred Special Leave to Appeal (C) No. 681 of 2017, which was **dismissed** vide order dated 20.01.2017 after deleting the certain observations made in the order dated 8.4.2016 passed in First Appeal From Order No. 1584 of 2013. Ultimately, award has attained finality.

6. Respondents have filed Execution Application No. 21 of 2012 (renumbered as Execution Application No. 24 of 2020), in which petitioner has filed objection under

Section 47 of CPC and same was rejected vide order dated 08.08.2022. Hence, order dated 08.08.2022 is under challenge before this Court.

7. Aforesaid facts are not disputed between the parties.

8. Sri Anil Sharma, learned Senior Counsel submitted that arbitration proceedings was initiated under Old Act, 1940 and award was given on 27.4.2005. He further submitted that as provided in Section 14 of Old Act, 1940, vide letter dated 15.5.2005, Arbitrator has sent the entire record alongwith the award in a locked and sealed box to the Court of District Judge, Varanasi and also claimed the expenses. After that, Arbitrator became functus officio and having no authority to entertain any application. He also submitted that now respondent no.2 has filed an application on 21.10.2005 under Section 33 of New Act, 1996 for modification of award beyond limitation, i.e. after 30 days from the date of receipt of award unless another period of time has been agreed upon by the parties. In the present case, there is no such agreement and it is required on the part of Arbitrator to reject the application on the ground of limitation alone, but contrary to that, application was accepted and additional award dated 21.2.2006 has been given excepting the claim of respondent. He pointed out that Arbitrator proceeded to allow the much higher amount in additional award even which was never sought in the claim petition. The additional award was also given beyond limitation without obtaining the consent of the parties as provided under Section 33 of the Act. Against the additional award, he has preferred Writ C No. 30461 of 2006, in which earlier interim order was passed on

26.05.2006, but ultimately petition was **dismissed** vide order dated 8.5.2012 with liberty to petitioner to challenge the additional award under Section 34 of New Act, 1996.

9. He next submitted that as per Section 85 of New Act, 1996, arbitrator has no jurisdiction to decide the claim in New Act, 1996, once the proceeding has been initiated under the Old Act, 1940 unless there is an agreement between the parties. In the present case, agreement has never been sought or given, therefore, any award given by the arbitrator under the New Act, 1996 is without jurisdiction. In support of his contention, learned Senior Counsel placed reliance on the judgment of Apex Court in the matter of *Thyssen Stahlunion GMBH etc. Vs. Steel Authority of India Ltd. : 1999 9 SCC 334, N D Nayak Vs. State of Goa: 2003(6) SCC 56 and Neeraj Munjal Vs. Atul Grover Minor: 2005 5 SCC 404*.

10. He next submitted that as the award is without jurisdiction, therefore, this issue can be raised even at the stage of execution and for that, there is no bar. In support of his contention, learned Senior Counsel placed reliance on the judgment of Apex Court in the matter of *Kiran Singh and others Vs. Chaman Paswan and others: AIR Supreme Court 340, Bhavan Vaja Vs. Solanki Hanuji Khodaji Mansang: 1973(2) SCC 40, Harsad Chiman Lal Modi Vs. DLF Universal Ltd. 2005(7) SCC 791 and Chief Engineer Hydel Project Vs. Ravinder Nath: AIR 2008 Supreme Court 1315*.

11. He lastly submitted that in case a judgment has been given without jurisdiction or contrary to existing law, principle of res judicata shall not be

applicable. In support of his contention he placed reliance on the judgment *Smt. Shakuntala Devi vs. Smt. Vimla reported in 2005 (59) ALR 5999*.

12. Sri Manish Goyal, learned Senior Counsel has vehemently opposed and submitted that petitioner cannot be permitted to blow hot and cold both as once order dated 14.04.2002 has been passed to proceed with the proceedings under New Act, 1996 and never challenged. He further submitted that first award dated 27.4.2005 has also been given under New Act, 1996, which was never been challenged by petitioner. Therefore, petitioner-plaintiff cannot said to be aggrieved person on the ground that additional award has been given under Section 33 of the New Act, 1996 for that Arbitrator has no authority. Petitioner has also preferred appeal under Section 34 of the New Act, 1996 in compliance of order of writ court dated 8.5.2012 rather filing appeal under Section 30 of the Old Act, 1940.

13. So far as submission of record under Section 14 of Old Act, 1940 is concerned, he firmly submitted that in case of appointment of arbitrator, record has been submitted to the Court which appointed the arbitrator. In present case, the arbitrator was appointed by the District Judge and further Section 14 of Old Act, 1940 requires issuance of notice by the Court to the parties, but in the present case, notice has never been issued, nor pressed by the petitioner-defendant. Therefore, the record has never been accepted by the Court under the provision of Old Act, 1940 as argued by learned counsel for the petitioner.

14. He next submitted that there is agreement of contract between the parties

and Section 9 of agreement of contract contains arbitration clause. Section 9.1.1.0 of Agreement of Contract Act itself provides provision of Indian Arbitration Act, 1940, all its re-enactments and modification thereof and rules made thereunder shall apply to all such arbitration, subject to certain conditions. He pointed out that Section 9.1.1.0 provides agreement of applicability of all statutory re-enactments or modification as provided in Section 85(2)(a) New Act, 1996.

15. He also submitted that in the judgment of Apex Court in the matter of **Thyssen Stahlunion GMBH (Supra)**, three issues are decided by the Court and the third issue is almost pari materia to the issue involved in the present petition. Paragraphs 9 of the said judgment is dealing with the matter of Rani Constructions having the similar language of arbitration agreement as in the case of petitioner. It was replied in paragraph 35 of the judgment, where the Court has held that New Act, 1996 shall be applicable in the matter of Rani Constructions. Therefore, the same ratio of law as laid down by the Apex court shall also be applicable in the present case. Relying upon the same, in present matter arbitrator has passed order dated 14.04.2002 to continue the proceeding. He also submitted that from the perusal of order dated 14.04.2002, it is apparently clear that while passing the said order, it was very well accepted by the petitioner-defendant and it has never been objected. Petitioner-defendant proceeded to file four affidavits to proceed with the arbitration proceeding. Therefore, ratio of law laid down in paragraph 9 of judgment of Apex Court in the matter of **Thyssen Stahlunion GMBH etc.(Supra)**, there is agreement and in light of Section 85(a)(2) of the New Act, 1996, arbitrator has rightly

proceeded to pass order dated 14.04.2002 to commence the arbitration proceeding under New Act, 1996.

16. Learned Senior Counsel next submitted that from the perusal of the impugned order, it is apparently clear that petitioner-defendant has never disputed Clause 9.1.1.0 of Clause 9 of Arbitration Agreement and further never filed any application before the arbitrator that New Act, 1996 shall not be applicable. Not only this, he has proceeded to file appeal under Section 34 of the New Act, 1996 and not taken this ground, while filing the appeal. In objection filed under Section 47 of CPC in execution proceeding, he has also concealed this fact. He firmly submitted that once there is such factual situation, petitioner-defendant cannot raise these grounds either before the Execution Court or before this Court.

17. Learned Senior Advocate submitted that there is an agreement between the parties which provides for arbitration clause and learned counsel for the petitioner is only relying upon the part of arbitration clause. He next submitted that so far it provides for arbitration as per existing Act, i.e. Act, 1940, he is having no objection. On other hand, the same agreement also provides consent for new enactment, which is objected by the petitioner. He next submitted that petitioner has no choice to accept the agreement in part, either he has to accept to complete agreement or discard the same. In support of his contention, he has placed reliance upon the judgment of the Apex Court in the case of **Caravel Shipping Services Privated Limited vs. Premier Sea Foods Exim Private Limited** reported in (2019) 11 SCC 461.

18. So far as, judgment of **NS Naik (Supra)** is concerned, he firmly submitted

that in that case, award was pronounced in the year 1991 and only execution was remaining. Therefore, the Court is of the view that Appellate proceeding may not be initiated under the provision of New Act, 1996 and while deciding the issue in the case of *NS Naik (Supra)*, it appears that Court has not considered the matter of Rani Construction referred in the judgment in the matter of *Thyssen Stahlunion GMBH etc.(Supra)*, which is similar to this case.

19. He further submitted that scope of interference by the High Court under Article 227 regarding arbitration is extremely limited. In support of his contention, he placed reliance upon the judgment of this Court in the matter of *Trading engineers Internation Ltd. Vs. U.P. power Transmission Corp. Ltd.: 2022(10) ADJ 176(LB)*.

20. He next submitted that while filing appeal under Section 34 and FAFO under Section 37, petitioner has not taken any ground, which are taken here, therefore at a belated stage, he cannot be permitted to take such ground. In support of his contention, he placed reliance upon the Judgment of Apex Court in the matter of *Sweta construction Vs. Chhatisgarh State Power Generation Company Limited: 2022 SCC Online SC 1447*.

21. He next submitted that the arbitral award is not a decree as defined under Section 2, sub-Section (e) of C.P.C and there is difference between decree and award. An award is enforceable under Section 36 of the New Act, 1996 applying the provisions of C.P.C. This issue was dealt in detail by the Apex Court in the matter of *Padmajeet Singh Patheja Vs. ICDS LTD: (2006) SCC 322*.

22. He next submitted that as the award is not a decree within the meaning of Section 2(e) of C.P.C., therefore, objection under Section 47 of C.P.C. is also not maintainable. This issue was earlier considered by this Court in the matter of *Larsen & Tubro Limited Vs. Maharaji Educational Trust: 2010 SCC Online AII 1866*, relying upon the judgment of *Padmajeet Singh Patheja (Supra)*. The judgment of *Padmajeet Singh Patheja (Supra)* was again followed by this Court in Civil revision No. 53 of 2022: *Bharat Pumps and Compressors Ltd. Vs. Chopra Fabricators and Manufactures Pvt. Ltd.* Here the Court has reiterated the law that arbitral award is not a decree within the meaning of Section 2(e) of the C.P.C. and further, objection under Section 47 of CPC is not maintainable.

23. Against the judgment of *Bharat Pumps and Compressors Ltd. (Supra)*, Opposite Party preferred SLP in the Apex court, but the Apex Court did not interfere with the ratio of law laid down by this court and only started monitoring of earlier disposal of dispute pending under Section 34. Therefore, law is on date settled that arbitral award is not a decree within the meaning of Section 2(e) and objection under Section 47 of CPC is not maintainable.

24. He lastly submitted that so far as issue of jurisdiction in arbitral proceeding is concerned, it cannot be raised at any stage of proceeding. There is specific provision for objections under Section 34 as well as 36, therefore once the objection has not been taken at the earlier stage, petitioner cannot be permitted to raise this issue before this Court.

25. In his rejoinder argument, Mr. Anil Sharma, learned Senior Counsel submitted that it is never his case that first award is valid and as arbitrator lacks jurisdiction, both the awards are nullity. In support of his contention, he has placed reliance upon the Section 3 of Act, 1940 read with Paragraph 3 of First Schedule, which provides that award has to be given within four months, whereas in the present case it has not been given within the time prescribed in aforesaid Schedule, therefore, awards are nullity. In support of his contention, he has placed reliance upon the judgment of the Apex Court in the case of *Hari Shankar Lal vs. Shairtbhu Nath reported in 1962 0 AIR (SC) 78 (Paragraph Nos. 10, 11 & 12)*. In light of aforesaid judgement, in case award is not given within the prescribed time, it is required on the part of parties to get the time extended under Section 28 of Old Act, 1940, in lack of that award would be nullity. He further submitted that with the consent of party under Section 28 of Old Act, 1940, Arbitrator may extend the time, which was never extended in present case.

26. Being confronted by the Court as to whether he has lodge his dissent after continuance of award after four months upon which he has replied that his consent or dissent has no meaning for this purpose.

27. So far as argument with regard to Section 3 of Act, 1940 read with Paragraph 3 of First Schedule as well as Section 28 of Old Act, 1940 is concerned, Mr. Manish Goyal, learned Senior Advocate submitted that counsel for petitioner neither pleaded nor argued earlier about the nullity of first award, therefore, same cannot accepted in rejoinder argument. He has occasion to raise this objection while filing application

under Section 34 of New Act, 1996 and FAFO before this Court

28. I have considered the rival submissions advanced by the learned counsel for the parties and perused the record as well as judgment relied by the learned counsel for the parties. It is undisputed that present petition has been filed against the rejection of objection under Section 47 of CPC in execution proceedings of arbitral award.

29. Mr. Anil Sharma, learned Senior Counsel for the petitioner had argued that the provisions of New Act, 1996 shall not be applicable in which arbitration award has been given, therefore, award is nullity and he can raise this objection at any stage.

30. Now, the Court is coming to the issue as to whether that in light of fact that arbitration proceedings was started under the provisions of Old Act, 1940 may continue in New Act, 1996 or not. For that purpose Section 85 (2) (a) of New Act, 1996 is relevant and same is being quoted hereinbelow:-

“85 (2)(a). Repeal and saving. –
(2) Notwithstanding such repeal,

–
(a) The provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force;”

31. From perusal of the same, there is no doubt that in case arbitral proceedings is commenced before this Act shall continue

in Old Act, 1940 unless otherwise agreed between the parties. Now the question is as to whether in the present matter, parties agreed for continuance of proceeding or not. For that I have to see the Section 9 of the Agreement of Contract, which contains arbitration clause and for present dispute Section 9.1.1.0 is very relevant and same is being quoted hereinbelow:-

Section 9.1.1.0.

“The provisions of the Indian Arbitration Act, 1940 and all statutory re-enactments and modifications thereof and the rules made thereunder shall apply to all such arbitrations, subject further to the following conditions:

(a) The Arbitrator shall give his award separately in respect of each claim”

(b) Insofar as any dispute or difference referred to arbitration shall relate to or involve any matter or thing in respect of which the decision, opinion, or determination (howsoever expressed of the Owner or General Manager or Engineer-in-Charge or Site Engineer or any other person has been expressed to be final in terms of the Contract. Such decision, opinion and/or determination as the case may be, shall be binding upon the Arbitrator.”

32. Section 9.1.1.0 of Agreement of Contract provides the provision of Indian Arbitration Act, 1940 i.e. Old Act, 1940 and all statutory re-enactments or modification thereof and rules made thereunder shall be applicable.

33. Section 9.1.1.0. itself provides an agreement not only for Old Act, 1940, but all statutory re-enactments and modification thereof and rules framed thereunder. The said agreement is undisputed between the parties, therefore, it

cannot be said that there is no agreement between the parties for applicability of New Act, 1996, in light of Section 9 of Agreement of Contract.

34. Mr. Anil Sharma, learned counsel for the petitioner has placed reliance upon the paragraph 32 of the ***Thyssen Stahlunion (supra)***. Relevant paragraph of the said judgment is quoted hereinbelow:-

“32. Principles enunciated in the judgments show as to when a right accrues to a party under the repealed Act. It is not necessary that for the right to accrue that legal proceedings must be pending when the New Act, 1996, 1996 comes into force. To have the award enforced when arbitral proceedings commenced under the Old Act, 1940 under that very Act is certainly an accrued right. Consequences for the parties against whom award is given after arbitral proceedings have been held under the Old Act, 1940 though given after the coming into force of the New Act, 1996, 1996, would be quite grave if it is debarred from challenging the award under the provisions of the Old Act, 1940. Structure of both the Acts is different. When arbitral proceedings commenced under the Old Act, 1940 it would be in the mind of everybody, i.e., arbitrators and the parties that the award given should not fall foul of Sections 30 and 32 of the Old Act, 1940. Nobody at that time could have thought that Sections 30 of the Old Act, 1940 could be substituted by Section 34 of the New Act, 1996, 1996. As a matter of fact appellant Thyssen in Civil Appeal No. 6036/98 itself understood that the Old Act, 1940 would apply when it approached the High Court under Sections 14 and 17 of the Old Act, 1940 for making the award rule of the Court. It was only later on that it changed the stand and now took the position that New Act, 1996, 1996

would apply and for that purpose filed an application for execution of the award. By that time limitation to set aside the award under the New Act, 1996, 1996 had elapsed. Appellant itself led the respondent SAIL in believing that the Old Act, 1940 would apply. SAIL had filed objections to the award under Section 30 of the Old Act, 1940 after notice for filing of the award was received by it on the application filed by the Thyssen under Sections 14 and 17 of the Old Act, 1940. We have been informed that numerous such matters are pending all over the country where the award in similar circumstances is sought to be enforced or set aside under the provisions of the Old Act, 1940. We, therefore, cannot adopt a construction which would lead to such anomalous situations where the party seeking to have the award set aside finds himself without any remedy. We are, therefore, of the opinion that it would be the provisions of the Old Act, 1940 that would apply to the enforcement of the award in the case of Civil Appeal No. 6036 of 1998. Any other construction on the Section 85(2) (a) would only lead to the confusion and hardship. This construction put by us is consistent with the wording of Section 85(2) (a) using the terms "provision" and "in relation to arbitral proceedings" which would mean that once the arbitral proceedings commenced under the Old Act, 1940 it would be the Old Act, 1940 which would apply for enforcing the award as well.

35. Mr. Manish Goyal, learned Senior Counsel has also placed reliance upon the very same judgment and submitted before this Court that there are three issues, which has to be decided. So far as issue no.3 Rani Constructions Pvt. Ltd. is concerned, the same is pari materia to the issue before this Court. Paragraph 9 of the said judgment is

dealing with the issue of Rani Constructions Pvt. Ltd. and same is being quoted hereinbelow:-

"In the case of M/s. Rani Constructions Pvt. Ltd. (CA No. 61 of 1999) under the contract which was for the construction of certain works of the Himachal Pradesh State Electricity Board, there was an arbitration agreement contained in clause 25 which, in relevant part, is as under :

"Subject to the provisions of the contract to the contrary as aforesaid, the provisions of the Indian Arbitration Act, 1940 or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to all arbitration proceedings under this clause."

36. From perusal of the same, it is apparently clear that language of Section 9.1.1.0. of Arbitration Clause is almost identical to the matter of Rani Constructions Pvt. Ltd. This issue was very well considered by the Apex Court and replied in its paragraphs 35 to 38 of the judgment of **Thyssen Stahlunion (supra)**. Relevant paragraph of the said judgment is quoted hereinbelow:-

"35. Parties can agree to the applicability of the new Act even before the new Act comes into force and when the old Act is still holding the field. There is nothing in the language of Section 85(2)(a) which bars the parties from so agreeing. There is, however, a bar that they cannot agree to the applicability of the old Act after the new Act has come into force when arbitral proceedings under the old Act have not commenced though the arbitral agreement was under the old Act. Arbitration clause in the contract in the

case of *Rani Constructions* (Civil Appeal 61 of 1999) uses the expression "for the time being in force" meaning thereby that provision of that Act would apply to the arbitration proceedings which will be in force at the relevant time when arbitration proceedings are held. We have been referred to two decisions - one of Bombay High Court and the other of Madhya Pradesh High Court on the interpretation of the expression "for the time being in force" and we agree with them that the expression aforementioned not only refers to the law in force at the time the arbitration agreement was entered into but also to any law that may be in force for the conduct of arbitration proceedings, which would also include the enforcement of the award as well. Expression "unless otherwise agreed" as appearing in Section 85(2)(a) of the new Act would clearly apply in the case of *Rani Construction* in Civil Appeal No. 61 of 1999. Parties were clear in their minds that it would be the old Act or any statutory modification or re-enactment of that Act which would govern the arbitration. We accept the submission of the appellant *Rani Construction* that parties could anticipate that the new enactment may come into operation at the time the disputes arise. We have seen Section 28 of the Contract Act. It is difficult for us to comprehend that arbitration agreement could be said to be in restraint of legal proceedings. There is no substance in the submission of respondent that parties could not have agreed to the application of the new Act till they knew the provisions thereof and that would mean that any such agreement as mentioned in the arbitration clause could be entered into only after the new Act had come into force. When the agreement uses the expressions "unless otherwise agreed" and "law in force" it does give option to the parties to agree that

new Act would apply to the pending arbitration proceedings. That agreement can be entered into even before the new Act comes into force and it cannot be said that agreement has to be entered into only after coming into force of the new Act.³⁶ Mr. Desai had referred to a decision of the Bombay High Court (Goa Bench), rendered by single Judge in *Reshma Constructions v. State of Goa*, (1999) 1 MLJ 462. In that case arbitration clause in the contract provided as under :

"Subject as aforesaid, the provisions of the Arbitration Act, 1940 or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause."

37. The Court held that these terms in the clause disclosed that the parties had agreed to be governed by the law which was in force at the time of execution of the arbitration agreement as well as by any further statutory changes that may be brought about in such law. This is how the High Court considered the issue before it :

"Considering the scheme of the Act, harmonious reading of the said provision contained in sub-section (2) of Sec. 85 thereof would disclose that the reference "otherwise agreed" necessarily refers to the intention of the parties as regards the procedure to be followed in the matter of arbitration proceedings and not to the time factor as regards execution of the agreements. It provides that though the law provides that the provisions of the old Act would continue to apply to the pending proceedings by virtue of the said saving clause in Sec. 85, it simultaneously provides that the parties can agree to the contrary. Such a provision leaving it to the discretion of the parties to the proceedings to decide about the procedure to be

followed - other in terms of the new Act or the old Act - is certainly in consonance with the scheme of the Act, whereunder most of the provisions of the new Act, the procedure regarding various stages of the arbitration proceedings is made subject to the agreement to the contrary between the parties, thereby giving ample freedom to the parties to decide about the procedure to be followed in such proceedings; being so, it is but natural that the legislature in its wisdom has left it to the option of the parties in the pending proceedings to choose the procedure for such pending proceedings. The reference "otherwise agreed by the parties" in Sec. 85(2)(c) of the new Act, therefore, would include an agreement already entered into between the parties even prior to enforcement of the new Act as also the agreement entered into after enforcement of the new Act. Such a conclusion is but natural since the expression "otherwise agreed" do not refer to the time factor but refers to the intention of the parties regarding applicability of the provisions of the new or old Act."

We agree with the High Court on interpretation put to the arbitration clause in the contract.

38. Section 28 of the Contract Act contains provision regarding agreements in the restraint of legal proceedings. Exception 1 to Section 28 of the Contract Act does not render illegal a contract by which the parties agree that any future dispute shall be referred to arbitration. That being so parties can also agree that the provisions of the arbitration law existing at that time would apply to the arbitral proceedings. It is not necessary for the parties to know what law will be in force at the time of the conduct of arbitration proceedings. They can always agree that provisions that are in force at the relevant time would apply. In this view of

the matter, if the parties have agreed that at the relevant time provisions of law as existing at that time would apply, there cannot be any objection to that. Thus construing the clause 25, in Rani Constructions (CA 61/99) new Act will apply."

37. As the language of both the matters are similar and Apex Court after considering in detail has held that an agreement can be made even before enactment of New Act, 1996 for its applicability and in arbitration clause there is such agreement already present, therefore, there is no need to have any new agreement for compliance of Section 85(2)(a) and proceedings can be continued in New Act, 1996. Therefore, submission of learned counsel for the petitioner that there is no agreement between the parties as required under Section 85(2)(a) cannot be accepted. Judgment of **Thyssen Stahlunion (supra)** is not in favour of petitioner rather in favour of respondent as the similar issue has been considered and replied.

38. Once the Court is of the view that proceedings though initiated in Old Act, 1940 may continue in New Act, 1996, therefore, there is no requirement to return the finding about the other arguments of learned counsel for the petitioner upon the applicability of New Act, 1996.

39. Now coming to the another issue as to whether arbitral award is decree or not as defined under Section 2(2) of CPC and in case it is not a decree, objection filed under Section 47 of CPC is maintainable or not. It has also to be seen as to whether arbitral award can be enforced invoking the Section 36 of New Act, 1996 with the provision of CPC in the same manner as if it is decree of Court.

40. To opine on this issue, Section 2(2) and Section 36 of New Act, 1996 of CPC are required to be seen and same is being quoted hereinbelow:-

“Decree- Section 2 (2) of CPC

“decree” means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include-

- (a) any adjudication from which an appeal lies as an appeal from an order;
- or
- (b) any order of dismissal for default.

Explanation – A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit, it may be partly preliminary and partly final;”

Section 36 of New Act, 1996

“36. (1) Where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were a decree of the court.

(2) Where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in

accordance with the provisions of sub-section (3), on a separate application made for that purpose.

(3) Upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:

Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908 (5 of 1908).]

2[Provided further that where the Court is satisfied that a prima facie case is made out,—

(a) that the arbitration agreement or contract which is the basis of the award; or

(b) the making of the award, was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under section 34 to the award.

Explanation.— For the removal of doubts, it is hereby clarified that the above proviso shall apply to all court cases arising out of or in relation to arbitral proceedings, irrespective of whether the arbitral or court proceedings were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015.]”

41. Arbitral award is decree or not in the meaning of Section 2(2) of CPC is concerned, has been considered by the Apex Court in the matter of **Paramjeet Singh Patheja (Supra)**. Relevant paragraph of the same are quoted hereinbelow:- 20 to 29

"Sections 2(2) and 2(14) of the CPC define what 'decree' and 'order' mean. For seeing whether a decision or determination is a decree or order, it must necessarily fall in the language of the definition. Section 2(2) of the CPC defines 'decree' to mean 'the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include-

(a) any adjudication from which an appeal lies as an appeal from an order; or

(b) any order of dismissal for default.

Explanation : A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final."

The words 'Court', 'adjudication' and 'suit' conclusively show that only a Court can pass a decree and that too only in suit commenced by a plaint and after adjudication of a dispute by a judgment pronounced by the Court. It is obvious that an arbitrator is not a Court, an arbitration is not an adjudication and, therefore, an award is not a decree.

Section 2(14) defines 'order' to mean 'the formal expression of any decision of a civil court which is not a decree;'"

The words 'decision' and 'Civil Court' unambiguously rule out an award by arbitrators.

The above view has been consistently taken in decisions on Section 15 of the Indian Arbitration Act, 1899 viz. Tribhuvandas Kalidas vs. Jiwan Chand 1911(35) Bombay 196, Manilal Vs. The Bharat Spinning & Weaving (35) Bom. L.R. 941, Ramshai v. Joylall, AIR 1928 Calcutta 840, Ghulam Hussein vs. Shahban AIR 1938 Sindh 220. In Ramshai v. Joylall (supra), the Calcutta High Court held as follows:

"(a) Presidency Town Insolvency Act, S.9 (e) Attachment in execution of award is not one in executive of a decree.

Attachment in execution of an award is not attachment in the execution of a decree within the meaning of S.9(e) for the purpose of creating an act of insolvency: Re. Bankruptcy Notice, (1907) 1 K.B. 478, Ref.

(b) Arbitration Act, S.15 Award, An award is a decree for the purpose of enforcing that award only."

In Ghulam Hussein vs. Shahban AIR 1938 Sindh 220, the Court observed as follows:

"Section 9(e) must be strictly construed in favour of the debtor to whom the matter of adjudication as an insolvent under the Insolvency law is one of vital importance. Any inconvenience arising out of such a construction is for the Legislature to consider and remedy if they think proper by amendment; it is not for the Court to enlarge the meaning of the words used by the Legislature. An attachment in execution of an award is not an attachment in execution of the decree of a Court within the meaning of S.9(e) for the purpose of creating an act of Insolvency: AIR 1928 Cal.840 approved and followed; 35 Bom. 196 relied on."

"The words: 'In execution of the decree of any Court for the payment of money" cannot be extended by analogy.

They must be extended, if at all, by the Legislature and we cannot hold that there has been an act of Insolvency when the definition given by the Legislature has not been complied with.

These are strong words and strong language, and as I have said above the judgment of Rankin C.J. must be treated with the greatest respect. The case of Ramsahai vs. Joylall is referred to by Sir D. Mulla in his Commentary on the Law of Insolvency at P. 94. In para 123 Sir D. Mulla states:

"An award for the payment of money filed in Court under S.11 of I.A.A. 1890 is not a 'decree' within the meaning of the present clause although it is enforceable under that Act as if it were a decree. No Insolvency petition can therefore be founded on an attachment or sale in execution of an award."

In support of this proposition Sir D. Mulla cites the case of Ramasahai v. Joylall (supra). The commentator proceeds:

It is therefore for consideration whether Cl.(e) should not be amended by adding the words 'or in execution of an award for the payment of money.' Now, it cannot be disputed that Sir D. Mulla as a commentator on the Law of Insolvency is universally regarded as an authority, and in the course of his Commentary on the Law of Insolvency Sir D. Mulla has not hesitated in several places to record his respectful dissent when he has considered that the judgment of any High Court in India is doubtful or incorrect. It is significant that in referring to the case in AIR 1928 Cal. 840, the learned commentator has not recorded any dissent, but on the contrary states that it is for consideration whether Cl.(e) should not be amended by adding the words 'or in execution of an award for the payment of money.' In this part of his commentary Sir

*D. Mulla has also referred to the case in 35 Bom 196, where it was held by a Bench of the Bombay High Court that an award filed in Court under S.11, Arbitration Act, was nothing more than an award although it was enforceable as if it were a decree. In that case an application had been made under O.21, R.29, for stay of execution of a decree. The application was **dismissed** on the following grounds set out in the judgment of Sir Basil Scott C.J.:*

Now, such an order can only be made by the Court, if there is a suit pending on the part of a person against whom a decree has been passed, against the holder of a decree of the Court. It appears to me that the petitioner is not a holder of a decree of the Court for the award, to which the applicants seek to give the force of a decree, is nothing more than an award, although it is enforceable as if it were a decree."

The same view was taken on Section 36 of the 1996 Act in Sidharth Srivastava v. K.K. Modi Investment & Financial Service P.Ltd. 2002(4) Mah. L.J. 281. It was held thus:

"Where the Award in favour of the petitioning creditor came to be passed on the basis of the consent terms and not on the basis of an adjudication, the Award which has the force of decree does not fulfil the essential conditions of decree as contemplated by Section 2(2) of the Civil Procedure Code. Even though the Award dated 5.9.1997 is enforceable as if it were a decree still it is not a decree within the meaning of the term as defined in section 2(2) of the Civil Procedure Code and, therefore, obtaining of such as Award does not fulfil the requisite conditions contemplated by clause (i) of section 9(1) of the Presidency Towns Insolvency Act. Consequently, on that basis the respondent cannot be said to have committed act of

insolvency, either under clause (i) of sub-section 9(1) or sub-section (2) of section 9 of the Act. AIR 1928 Cal.840, AIR 1938 Sind 220, AIR 1975 Cal 169 and AIR 1976 SC 1503, Ref."

It is settled by decisions of this Court that the words 'as if' in fact show the distinction between two things and such words are used for a limited purpose. They further show that a legal fiction must be limited to the purpose for which it was created.

Section 36 of the Arbitration & Conciliation Act, 1996 which is in pari materia with Section 15 of the 1899 Act, is set out hereinbelow:

"36. Enforcement Where the time for making an application to set aside the arbitral award under Section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 in the same manner as if it were a decree of the Court."

In fact, Section 36 goes further than Section 15 of the 1899 Act and makes it clear beyond doubt that enforceability is only to be under the CPC. It rules out any argument that enforceability as a decree can be sought under any other law or that initiating insolvency proceeding is a manner of enforcing a decree under the CPC.

Therefore the contention of the respondents that, an Award rendered under the Arbitration and Conciliation Act, 1996 if not challenged within the requisite period, the same becomes final and binding as provided under Section 35 and the same can be enforced as a Decree as it is as binding and conclusive as provided under Section 36 and that there is no distinction between an Award and a Decree does not hold water."

42. From perusal of the hereinabove, it is apparently clear that Apex Court has firmed view that though the arbitral award can be enforced under Section 36 of New Act alongwith the provisions of CPC, but arbitral award is not a decree under Section 2(2) of CPC. In the present case, there is no dispute on the point that execution proceeding is initiated under Section 36 of New Act, 1996 for enforcement of an award, which is not a decree in light of discussion made hereinabove.

43. Now the second issue is as to whether in execution proceedings under Section 36 of New Act, 1996, objection under Section 47 of CPC is maintainable or not. The very same issue for consideration was before the Apex Court in the matter of **Larsen & Tubro Limited (Supra)**.

44. This Court in the matter of **Larsen & Tubro Limited (Supra)** relying upon the judgment of **Padmajeet Singh Patheja (supra)** has considered this issue that once the stage of Section 34 of New Act, 1996 is over and the question that were raised or could have been raised at that stage cannot be allowed to be raised again by filing objection under Section 47 of CPC at the time of execution of award. Relevant paragraph of the judgment **Larsen & Tubro Limited (Supra)** is being quoted hereinbelow:-

"The question which arises for consideration is whether the validity of arbitral award can be challenged in proceeding for its enforcement under Section 36 of the Arbitration and Conciliation Act, 1996 (herein after referred to as the 'Act') taking recourse to section 47 C.P.C....."

The matter can be viewed from another angle. Section 47 CPC provides for

questions to be determined by the Court executing the decree. The said section reads as under :

"47. Questions to be determined by the Court executing decree.- (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

(2) Omitted by the Code of Civil Procedure (Amendment Act, 1976, S. 20 (w.e.f. 1.2.1977)

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

Explanation I.- For the purposes of this section, a plaintiff whose suit has been **dismissed** and a defendant against whom a suit has been **dismissed** are parties to the suit.

Explanation II.- (a) for the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and

(b) all questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section."

It is, thus, clear that in order to invoke section 47 CPC, there must be a decree. Section 2 (2) CPC defines the decree. For a decision or determination to be a decree, it must necessarily fall within the fore-corners of the language used in the definition. Section 2 (2) CPC defines decree to mean "formal expression of an adjudication which, so far as regards the

Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include - (a) any adjudication from which an appeal lies as an appeal from an order; or (b) any order of dismissal for default." *Explanation.* _ A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.

The use of words "adjudication" and "suit" used by Legislature clearly goes to show that it is only a court which can pass a decree in a suit commenced by plaint adjudicating the dispute between the parties by means of a judgment pronounced by the Court. The Hon'ble Apex Court in the case of *Paramjeet Singh Patheja Vs. ICDS Ltd.*, AIR 2007 SC - 168 after considering the definition of decree as contained in CPC in paragraph 29 has held that "it is obvious that an arbitrator is not a Court, an arbitration is not an adjudication and, therefore, an award is not a decree". Again in paragraph 31, it has been held that words "decision", and "Civil Court" unambiguously rule out an award by arbitrators to be a decree. In the said case, the Hon'ble Apex Court while considering the question as to whether an insolvency notice under Section 9 of the Presidency Town Insolvency Act, 1909 can be issued on the basis of an arbitration award, held that such notice cannot be issued for the reason the arbitration award is neither a decree nor an order for payment within the meaning of Section 9(2) of the Insolvency Act and it is not rendered in a suit. Thus,

the award not being covered under the definition of a decree, objection with respect to its validity can only be raised as provided under Section 34 of the Act and not by taking resort to section 47 C. P. C.

Apart from above, the extent of judicial intervention has been circumscribed by Section 5 of the Act. In other words, judicial interpretation is prohibited except as provided under the Act. Section 5 of the Act reads as under :

"Section 5. Extent of judicial intervention._ Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.

Section 5 of the Act falls under Part-I which includes within its ambit Section 2 to Section 43 of the Act. Thus, Sections 34 and 36 are also included in Part-I of the Act. The judicial intervention having been limited by the legislature, the Court cannot interfere at any and every stage on a ground other than those available in the Act itself. Thus, once stage of Section 34 is over and the award becomes final under Section 35, judicial intervention in the execution of the award under Section 36 cannot be held to be permissible on any ground, whatsoever, in view of the limitation imposed by Section 5 of the Act.

Thus, having regard to the provisions of Sections 5, 12, 13, 16, 34, 35 and 36 of the Act, the irresistible conclusion is only grounds which can be pressed into service for challenge to an award is within the ambit and scope of Section 34 of the Act. Once the stage of section 34 is over and the questions that were raised or could have been raised at that stage cannot be allowed to be raised again and again by pressing into service section 47 of the Code of Civil Procedure at

the time of execution of award under Section 36 of the Act.

*In view of the aforesaid facts and discussions, the applicant did not have any right to challenge the enforceability of the award by taking recourse to Section 47 C. P. C. and the same were liable to be **dismissed**. It is altogether different question that the objections have been **dismissed** by the court below on different grounds and reasons but since they are liable to be **dismissed**, the impugned order does not require any interference.*

*The revision accordingly stands **dismissed**.*

However, in the facts and circumstances, there shall be no order as to costs."

45. So far as present case is concerned, position is same as discussed in the matter of **Larsen & Tubro Limited (Supra)**. Petitioner had full occasions to raise all these issues while filing appeal in Section 34 of New Act, 1996 and FAFO, but the same has never been raised. Therefore, by way of objection under Section 47 of CPC, he cannot be permitted to raise this issues nullifying the provision of Section 36 of Act, 1996.

46. Again the very same issue of filing of objection under Section 47 of CPC came before this Court in the matter of **Bharat Pumps and Compressors Ltd. (supra)** and Court following the ratio of law laid down by this Court in the matter of **Larsen & Tubro Limited (Supra)** has held as follows:-

"22. The Arbitration Act, 1940 is self-contained, complete code and section 17 thereof is in pari-materia with section 36 of the Arbitration & Conciliation Act, 1996. Section 20 thereof, provides for

23. The arbitration award by way of friction is executed as decree, but it is not a decree as defined under section 2(2) of CPC and therefore, the objection under section 47 of CPC, which was filed only in execution of decree (as defined under section 2(2) CPC), is not maintainable in the proceedings seeking execution of award.”

48. To conclude this point on the basis of undisputed fact, objection under Section 47 of CPC filed against the arbitral award is not maintainable as the same is not a decree under Section 2(2) of CPC. Further, arbitral award can be executed invoking Section 36 of New Act, 1996 alongwith the provisions of CPC in the same manner as if it is decree of the Court.

49. Therefore, in light of facts of the case, provisions of law as well as pronouncements made by the Apex Court as well as this Court, I found no good reason to interfere with the impugned orders. Writ petition lacks merit and is, accordingly, **dismissed** with the cost of Rs.1,00,000/- to be paid by the petitioners to respondent no.2.

Criminal Law - Indian Penal Code, 1860 - Sections 376 & 120-B - Code of Criminal Procedure, 1973 - Sections 319 & 482 - Summoning of Additional Accused - Validity of Order - FIR lodged on 01.08.2007 by prosecutrix alleging rape by Asha @ Sanjana and two unknown persons at a hotel near Charbagh Railway Station. Chargesheet filed against Asha @ Sanjana and Sagar Sinha under Sections 376 and 120-B IPC. During trial, prosecutrix filed an application under Section 319 Cr.P.C. to summon the applicant (Vinod Kumar Gupta) & anr. as accused, alleging their involvement in the rape. Trial court allowed the application on 11.12.2008, based on an internal inquiry with the Railways Department confirming the applicant's posting as a Travelling Ticket Examiner at Charbagh Railway Station and the prosecutrix's claim that she could identify him. Applicant challenged the order, arguing no evidence supported his involvement, and the trial court exceeded its jurisdiction by relying on unauthorized correspondence and presumptions. Court held that Section 319 Cr.P.C. requires strong evidence, more than a prima facie case, to summon additional accused, as per *Hardeep Singh*. The trial court's reliance on railway

correspondence was impermissible, and the assumption that the prosecutrix could identify the applicant was conjectural. No cogent evidence linked the applicant to the offence. Impugned order dated 11.12.2008 and related criminal proceedings quashed. (Paras 6-8, 22-26, 29)

Application allowed.

List of Cases Cited:

1. Hardeep Singh Vs St.of Punjab & ors., (2014) 3 SCC 92

2. Labhuji Amratji Thakor & ors. Vs St.of Gujarat & anr., (2019) 12 SCC 644

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

1. Heard Sri Aditya Vikram Singh, learned counsel for the applicant, Sri Aniruddha Kumar Singh, learned A.G.A.-I and Sri Sanjay Kumar Yadav, A.G.A. for the State.

2. Instant application has been filed with prayer to quash the order dated 11.12.2008 passed by Additional Sessions Judge FTC(III), Lucknow, in S.T. Case No. 119 of 2008 (State Versus Smt. Asha Alias Sanjana and others), arising out of Case Crime No. 271 of 2007, under section 376, 120 B IPC, Police Station Naka, district Lucknow and further prayed that the operation, implementation and effect of the order dated 11.12.2008 passed by the Additional Sessions Judge / FTC-III, Lucknow may be stayed.

3. Factual matrix of the case is that first information report was lodged bearing case crime no. 271 of 2007, by the victim/prosecutrix at police station-Naka, District- Lucknow under section 376 of IPC, wherein, Asha @Sanjana and two

unknown persons were implicated. It has been alleged in the first information report that the prosecutrix was traveling with one Asha @ Sanjana on 27.07.2007 and while reaching at Charbagh Railway Station, she met with two other unknown persons, though were known to Asha @ Sanjana and they took away the prosecutrix along with Asha to nearby hotel and thereafter, they committed rape with her.

4. From perusal of the order sheet, it is evident that on 20.10.2022, this Court has passed the order and noted that from perusal of the report dated 22.01.2020 submitted by the Chief Metropolitan Magistrate, Kanpur Nagar reveals that the victim in this case has changed her place of residence and shifted to some other unknown place, which is not known to anyone and under the aforesaid circumstances, the notice could not be served. Now this Court is proceeding in the matter.

5. After thorough investigation in the matter, the chargesheet was filed on 08.10.2007, under section 376 and 120B of IPC, against Asha @ Sanjana and Sagar Sinha and during course of the trial, which was numbered as Sessions Trial No. 119 of 2008 (State Vs Smt Asha @ Sanjana and others), an application was instituted by the prosecutrix under section 319 of Cr.P.C., on 29.08.2008, with prayer to summon Manish Dubey and Rajesh Yadav, as accused persons, who basically said to have committed rape upon prosecutrix, on the date of the incident. The application moved by the prosecutrix was allowed by the Sessions court, vide order dated 11.12.2008, whereby, the applicant as well as one other accused, has been summoned. Therefore, the order dated 11.12.2008, which was passed in application under

section 319 of Cr.P.C., is under challenge, in the present matter.

6. Contention of learned counsel for the applicant is that the learned trial court summoned the applicant, without there being any evidence against him, as from bare perusal of order dated 11.12.2008, it reveals that learned Sessions Judge, after the application, moved by the prosecutrix under section 319 of Cr.P.C., conducted an inquiry of his own by seeking internal report from some officer of the department of the Indian Railways and on the basis of said internal communication between the learned trial court and the Railways, the applicant has been summoned.

7. Adding his arguments, he submits that learned trial court travelled beyond its jurisdiction and on the basis of presumption, has given its finding that since the applicant was working as Travelling Ticket Examiner (T.T.E.), on the date of Incident and therefore, he must be the person, who committed rape with the prosecutrix and not actually the person who are named in the first information report. Further, has also been assumed by the trial court that once the applicant would be produced before the prosecutrix, she could identify the present applicant as being involved in the offence. He submits that so far as the statement of the prosecutrix is concerned, she initially named some other accused namely, Sagar Sinha and thus, there was no reason to believe that the present applicant has committed rape, as there was no evidence except apart the statement of the prosecutrix, before the trial court, for invoking its jurisdiction under section 319 of Cr.P.C. So far as two unknown accused persons said to be involved in offence are concerned, the Investigating Officer, found two persons,

other than the present applicant, for committing rape with prosecutrix, though the prosecution, ultimately failed to prove its case beyond the reasonable doubt against them.

8. Adding his argument, he submits that learned trial court has exceeded to its powers vested under section 319 of Cr.P.C. and has erroneously passed the impugned order, on the basis of personal opinion regarding involvement of the present applicant, in the matter.

9. Section 319 of Cr.P.C. is quoted herein under:-

319. Power to proceed against other persons appearing to be guilty of offence.

(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

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

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

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

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

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

10. Referring the aforesaid, he submits that during course of inquiry or trial of an offence, any person can be summoned if appears to have committed the offence and therefore after pronouncement of the judgment, no person can be summoned under the above-said provisions.

11. In support of his contention, he has placed reliance on the judgment reported in **(2014) 3 SCC page 92 Hardeep Singh Versus State of Punjab and Others** and has referred paragraphs 78, 95 and 105.

12. Paragraphs 78, 95 and 105 of the judgment are quoted hereinunder:-

78. It is, therefore, clear that the word "evidence" in Section 319 CrPC means only such evidence as is made before the court, in relation to statements, and as produced before the court, in relation to documents. It is only such evidence that can be taken into account by the Magistrate or the court to decide whether the power under Section 319 CrPC is to be exercised and not on the basis of material collected during the investigation.

*95. At the time of taking cognizance, the court has to see whether a prima facie case is made out to proceed against the accused. Under Section 319 CrPC, though the test of prima facie case is the same, the degree of satisfaction that is required is much stricter. A two- Judge Bench of this Court in *Vikas v. State of**

Rajasthan [(2014) 3 SCC 321: (2013) 11 Scale 23]. held that on the objective satisfaction of the court a person may be "arrested" or "summoned", as the circumstances of the case may require, if it appears from the evidence that any such person not being the accused has committed an offence for which such person could be tried together with the already arraigned accused persons,

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

13. Placing reliance on above-said judgment, he submits that it has been settled that the Magistrate can invoke its power under section 319 of Cr.P.C. while summoning an accused, if there is much stronger evidence than mere possibility of its complicity. It has further been held that the test which has to be applied, is that there is more than prima facie case as it was at the time of exercising the framing of charges and if it is not so, then court should refrain to exercise its power under section 319 of Cr.PC.

14. He has further placed reliance rendered in case of **Labhuji Amratji Thakor and others Versus State of Gujarat and another** reported in (2019) 12 SSC page 644 and has referred paragraphs 8 and 13 of the above-said judgment. Paragraphs 8 and 13 of the judgment are quoted hereinunder:-

"8. The Constitution Bench in the above judgment in Hardeep Singh' has held that under Section 319 CrPC court can proceed against any person, who is not an accused in a case before it. The Constitution Bench, however, has held that the person against whom the court decides to proceed, "has to be a person whose complicity may be indicated and connected with the commission of the offence".

13. The High Court does not even record any satisfaction that the evidence on record as revealed by the statement of victim and her mother even makes out a prima facie case of offence against the appellants. The mere fact that the Court has power under Section 319 CrPC to proceed against any person who is not named in the FIR or in the charge-sheet does not mean that whenever in a statement recorded before the Court, name of any person is taken, the Court has to mechanically issue process under Section 319 CrPC. The Court has to consider substance of the evidence, which has come before it and as laid down by the Constitution Bench in Hardeep Singh' has to apply the test i.e. "more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes un rebutted, would lead to conviction."

15. The Apex Court has reiterated the principle which was laid down in Hardeep Singh's Case and the test of more than prima facie case has again been accepted, for invoking the power under section 319 of Cr.P.C. Further so far as the Sessions Trial No. 119 of 2008 (State Vs Smt Asha @ Sanjana and others) is concerned that was concluded and the judgment and order was passed on 12.05.2014, wherein the accused persons namely Asha@ Sanjana and Sagar Sinha, have been acquitted.

16. Concluding his arguments, he submits that the reasons for summoning the present applicant mentioned in the order dated 11.12.2008, goes against the settled proposition of law rendered in case of Hardeep Singh Versus State of Punjab and Others and Labhuji Amratji Thakor and others Versus State of Gujarat and another (Supra), as the same has been passed on conjuncture and surmises and that too on an internal correspondence by the trial court to the department of Railways, which is impermissible under the law. He added that except apart the aforesaid facts, there was no stronger evidence against the applicant, so as to substantiate the findings of learned trial court in the order dated 11.12.2008.

17. Except apart the aforesaid arguments, he has further submitted that the applicant is no way involved in committing the offence and he is about fifty-seven years of age and is suffering with carcinoma of advance stage, therefore, further criminal proceedings against the present applicant would amount to harassment. Thus, submission is that the impugned order dated 11.12.2008 may be set aside and criminal proceedings against the present applicant may be dropped.

18. Per contra, learned counsel for the State has vehemently opposed the submission aforesaid and argued that in fact the prosecutrix could not identify the two accused persons at the time of occurrence of the offence and once the matter proceeded then, she by way of filing an application under section 319 of Cr.P.C., prayed for summoning the accused and also prayed that the present applicant may be tried together with other accused, who is already named in the FIR. He added that in fact there was no means with prosecutrix to identify the present applicant and therefore,

the persons to whom she could identify, named him in the FIR and two unknown persons were also told for committing rape upon her.

19. He further contended that learned trial court while passing the order dated 11.12.2008, has thoroughly discussed the evidence which is evident from bare perusal of the same, as apparently, there are two grounds considered for invoking the jurisdiction under section 319 of Cr.P.C. Firstly, as discussed by the trial court that since it was informed by the department that on the date of the incident, the present applicant including the other co-accused was posted at the Charbagh Railway Station and Secondly, the prosecutrix has named the applicant including two other unknown accused persons. The evidence which have been discussed in the impugned order dated 11.12.2008, is sufficient to show more than the prima facie case against the applicant, thus, submission is that the order dated 11.12.2008 is lawful and no interference is warranted.

20. Having heard learned counsels for the parties and after perusal of material placed on record, it transpires that initially the FIR was lodged on 01.08.2007, wherein, Asha @ Sanjana and two other accused persons were named, though, the Police filed the chargesheet against Sagar Sinha, under section 376 of Cr.P.C. Thereafter, the trial was concluded and the accused persons, named in the FIR, namely Asha @ Sanjana and Sagar Sinha, were acquitted vide the judgment and order dated 12.05.2014.

21. Fact remains that the application under section 319 of Cr.P.C. was moved on 29.03.2008 before the trial court by the victim herself and thereafter, the impugned

order was passed on 11.12.2008. The order dated 11.12.2008 was challenged by the applicant by way of the present application, wherein, the interim order was passed on 16.04.2009 and since then, the matter is pending before this Court, whereas, the matter against other accused persons were concluded on 12.05.2014, whereby, those co-accused persons were acquitted.

22. From bare reading of the impugned order, it emerges that the trial court made some internal correspondence to the department of railways, wherein, it was intimated by the Railways Department that the present applicant including one other accused person, were posted at Charbagh Railway station during the period of alleged occurrence. It seems that the trial court on the presumption that since the present applicant was also posted at Charbagh Railway Station, therefore, he would have involved in committing the said offence, proceeded in the matter and invoked the jurisdiction under section 319 of Cr.P.C., and summoned the applicant.

23. Secondly, the ground of considering the victim's application under section 319 of Cr.P.C., is that, if the applicant including the other accused persons shall be brought before the prosecutrix, she would identify them, which in fact based on conjecture and surmises. The trial court has based its finding on hypothesis as the evidence which is expected to come into light in future, was considered as one of the strongest ground for summoning the present applicant.

24. When this Court examines the findings recorded by the trial court, in the impugned order dated 11.12.2008, it emerges that a letter which was sent to the

department of Railways, seeking information with respect to posting of the applicant at Charbagh Railway Station and further the response received thereof, are unlawful as there is no such procedure prescribed in Cr.P.C. or any other law for the time being in force, which could empower the trial court to exchange any internal correspondence to any of the agency or institution for reaching upon any conclusion and therefore, so far as the present matter is concerned, the trial court has wrongly proceeded, while referring the matter, vide its letter to the department of Railways thereby seeking certain informations. Further such information could not have been treated as an evidence, at any stage of the trial.

25. This Court is also of considered opinion that the provisions of criminal law are stringent and that affects and curtails the right to life and personal liberty of a person and therefore, no order can be passed on the basis of hypothesis unless there is prima facie satisfaction of being much stronger evidence. In the present matter it has categorically been recorded in the impugned order that 'if the applicant shall be brought before the prosecutrix/victim, she would identify the accused who were involved in the offence.' This clearly indicates that there is no probability that the present applicant was involved in committing offence.

26. It is trite law that nature of satisfaction which is required for invoking the power under section 319 of Cr.P.C. is analogous to the degree of satisfaction as is required for 'framing of charges' and therefore, there requires much stronger evidence than mere probability of the complicity, but so far as the present case is

concerned, the trial court has failed to follow the above-said test.

27. Further, there is un-rebutted contention of counsel for the applicant that the applicant is 57 years of age and he is suffering with Carcinoma of advanced stage. Though, the same do not have any legal consequence, but it prima facie corroborates the arguments.

28. This Court is also not unmindful to the judgment of Apex Court rendered in Hardeep Singh Versus State of Punjab and Others and Labhuji Amratji Thakor and others Versus State of Gujarat and another (Supra), which also supports the version of the applicant.

29. Consequently, the impugned order dated 11.12.2008 is hereby set aside and the criminal proceedings of Sessions Trial No. Case No. 119 of 2008 (State Versus Smt. Asha Alias Sanjana and others) arising out of Case Crime No. 271 of 2007 under section 376, 120 B IPC, Police Station Naka, District Lucknow, are hereby quashed.

30. The application is **allowed** accordingly.

(2023) 9 ILRA 944
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.09.2023

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Application U/S 482 No. 1663 of 2023

Mohan Lal Rathi **...Applicant**
Versus
U.O.I. & Anr. **...Opposite Parties**

Counsel for the Applicant:

Sunil Kumar Singh

Counsel for the Opposite Parties:

Kuldeep Srivastava, Anurag Kumar Singh

Prevention of Money Laundering Act, 2002**- Sections 3, 4 & 50 - Code of Criminal Procedure, 1973 - Sections 306, 308 & 482 - Constitution of India, 1950 - Article 226 - Effect of Pardon in Scheduled Offence on PMLA Proceedings**

- Applicant, a Chartered Accountant and approver in a CBI case for disproportionate assets under Sections 109, 120-B IPC, and Section 13(2) read with 13(1)(e) of the Prevention of Corruption Act, 1988, sought to quash PMLA proceedings, cognizance order dated 08.08.2019, and non-bailable warrant dated 04.02.2023, arguing that pardon in the scheduled offence absolved him from PMLA liability. The Enforcement Directorate contended that PMLA offences are stand-alone, and pardon under Section 306 Cr.P.C. does not extend to PMLA unless specifically granted. Relying on *Vijay Madanlal Chaudhary*, the court held that pardon does not equate to discharge, acquittal, or quashing of the scheduled offence, as it is granted to an accomplice involved in the offence, not an innocent person. PMLA proceedings can continue unless the accused seeks pardon for PMLA offences with full disclosure. The applicant's role in layering illicit funds justified the trial. No illegality found in the cognizance order or proceedings. Application dismissed. (Paras 24-25, 48-56)

Application dismissed.**List of Cases cited:**

1. Vijay Madanlal Chaudhary Vs U.O.I., 2022 SCC OnLine SC 929

2. J. Sekar Vs Directorate of Enforcement, (2022) 7 SCC 370

3. Parvathi Kollur Vs Directorate of Enforcement, 2022 SCC OnLine SC 1975

4. Adjudicating Authority Vs Shri Ajay Kumar Gupta & ors., Criminal Appeal No. 1269 of 2017

5. Directorate of Enforcement Vs M/s Obulapuram Mining Company Pvt. Ltd, Criminal Appeal No. 1269 of 2017

6. EMTA Coal Ltd. Vs The Deputy Director, Directorate of Enforcement, W.P. (C) No. 3821/2022

7. Harish Fabiani & ors. Vs Enforcement Directorate & ors., W.P. (CrI.) 408 of 2022

8. Prakash Industries Ltd. Vs U.O.I., 2023/DHC/000481

9. Naresh Goyal Vs The Directorate of Enforcement, 2023 ALLMR (Cri.) 1840

10. Debendra Kumar Panda Vs U.O.I., 2023 (243) AIC 451

11. Mainak Mehta Vs CBI, Criminal Writ Petition No. 2444 of 2022

12. St. (Delhi Administration) Vs Jagjit Singh, AIR 1989 SC 598

13. Jasbir Singh Vs Vipin Kumar Jaggi & ors., (2001) 8 SCC 289

14. A. Devendran Vs St. of T.N., (1997) 11 SCC 720

15. Chandmal Vs St. of M.P. & anr., 2023 SCC OnLine SC 127

16. Sanjay Kumar Agarwal Vs Directorate of Enforcement, 2022 SCC OnLine Jhar 1248

17. Pepsi Foods Ltd. & ors. Vs Special Judicial Magistrate & ors., (1998) 5 SCC 749

18. Bhaskar Industries Ltd. Vs M/s Bhiwani Denim & Apparels Ltd., (2001) 7 SCC 401

19. St. of Haryana Vs Bhajan Lal & ors., 1992 Supp (1) SCC 335

20. Dipesh Chandak Vs U.O.I., (2004) 8 SCC 511

21. A.J. Peiris Vs St. of Madras, AIR 1954 SC 616

22. St. of Maharashtra Vs Abu Salem Abdul Kayyum Ansari, (2010) 10 SCC 179

23. Yakub Abdul Razak Memon Vs St. of Mah., (2013) 13 SCC 1

24. CBI Vs Ashok Kumar Aggarwal, (2013) 15 SCC 222

25. Radheshyam Kejriwal Vs St. of W.B., (2011) 3 SCC 581

26. Bawa Faqir Singh Vs Emperor, AIR 1938 PC 266

27. Kenchava Kom Vs Girimallappa Channappa, AIR 1924 PC 209

28. Vellikannu Vs R. Singaperuma, (2005) 6 SCC 222

29. P. Chidambaram Vs Directorate of Enforcement, (2020) 13 SCC 791

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

1. Heard Sri Dhruv Gupta, the learned counsel for the applicant, Sri Kuldeep Srivastava, the learned counsel for the Enforcement Directorate and Sri Dharmendra Pratap Singh, holding brief of Sri Anurag Kumar Singh, the learned counsel for the respondent-C.B.I..

2. By means of this application filed under Section 482 Cr.P.C., the applicant has sought to assail the validity of the cognizance/ summoning order dated 08.08.2019 passed in Complaint Case No.121/2019 titled "Directorate of Enforcement Vs. Yadav Singh & Others" in the Court of Session Judge / Special Judge PMLA, Lucknow, summoning the applicant for trial of offences under Sections 3/4 of Prevention of Money Laundering Act, 2002, and all proceedings of the aforesaid complaint case, including the order dated 04.02.2023, whereby a non-bailable

warrant has been issued against the applicant.

3. In furtherance of the order dated 16.07.2015, passed by a Division Bench of this Court in Writ Petition No. 12396 (M/B) of 2014, the C.B.I. had registered an FIR bearing RC No. DST/2015/A/0003/CBI/ STF/DLI against five persons - (1) Yadav Singh, the then Chief Engineer Noida, (2) Smt. Kusumlata, wife of Yadav Singh, (3) Ms. Garima Bhushan, daughter of Yadav Singh, (4) Sunny Yadav, son of Yadav Singh and (5) Rajinder Manocha, as associate of Yadav Singh, for commission of offences under Section 109 read with 120- B IPC, read with Section 13(2), read with Section 13(1)(e) of Prevention of Corruption Act, 1988 on 30.07.2015.

4. The C.B.I., after investigation, submitted a charge-sheet dated 26.09.2017 against 11 persons, including the applicant. It is stated in the charge-sheet that Yadav Singh was found in possession of disproportionate assets worth ₹ 231,541,514 - 512.66% to his known sources of income, either in his own name or in the name of his family members. The applicant was the Chartered Accountant of Yadav Singh.

5. The family members of Yadav Singh had incorporated numerous companies and firms and most of the business transactions found in those entities were fake and were used to convert the ill-gotten money of Yadav Singh into white money with the help of a battery of Chartered Accountants. The Chartered Accountants helped in layering the ill-gotten money by putting the same in various other companies and by making accommodation entries in accounts.

6. On an application filed by the applicant, the Special Judge, Prevention of Corruption Act, C.B.I., Ghaziabad has passed an order in Special Case No. 08/2017 whereby the applicant has been made an approver and he has been granted pardon in the aforesaid case arising out of RC No. DST/2015/A/0003/CBI/STF/DLI regarding offences under Sections 109 read with 120- B IPC, read with Section 13(2), read with Section 13(1)(e) of Prevention of Corruption Act, 1988.

7. The order dated 25.06.2017 granting pardon to the applicant was challenged by the co-accused Yadav Singh by filing an Application under Section 482 No. 31498 of 2018, which was dismissed by a Division Bench of this Court by means of an order dated 11.09.2018. S.L.P. (Crl.) No. 9692 of 2018 filed by Yadav Singh against the aforesaid order was dismissed by the Hon'ble Supreme Court by means of an order dated 07.12.2018.

8. The recording of examination-in-chief of the applicant in C.B.I. case commenced on 18.09.2018 and it concluded on 30.10.2018 and thereafter his cross-examination was started. However, his cross-examination could not be completed because proceedings of the C.B.I. trial have been stayed by means of an order dated 07.12.2018, passed by the Hon'ble Supreme Court in Writ Petition (Criminal) No. 322 of 2018, filed by Smt. Kusumlata and another.

9. The Enforcement Directorate registered ECIR/05/PMLA/LKZO/2015 on 23.10.2015 and it filed a complaint against Yadav Singh, his wife Kusumlata and M/s PGP charitable trust on 23.12.2017.

10. On 28.12.2018 the E.D. filed a supplementary complaint against five persons, including the applicant. It is stated in the complaint that the applicant was the Chartered Accountant of Yadav Singh and he had arranged various persons, through whom the illegal money was routed to the companies owned by Yadav Singh and Kusumlata, by making accommodation entries in the form of business income, referral commission and unsecured loans, which was subsequently used for construction and purchase of properties.

11. On 29.04.2019, the E.D. issued summon under Sub-sections (2) and (3) of Section 50 of Prevention of Money Laundering Act to the applicant, directing him to appear on 13.05.2019 and another summon was issued on 27.05.2019 directing him to appear on 11.06.2019. Thereafter a non-bailable warrant was issued against the applicant.

12. On 04.02.2023, the applicant filed an application for recall of the non-bailable warrant, without appearing before the trial Court and the application was rejected on the same date.

13. The applicant has sought quashing of the proceedings under the Prevention of Money Laundering Act on the ground that he has been made an approver and has been granted pardon in the scheduled offence. Now, he is no more an accused in the scheduled offence. The proceedings under the Prevention of Money Laundering Act cannot continue only against a person who is an accused in a scheduled offence and having been granted pardon in the scheduled offence, he cannot be tried for the offence under PMLA also.

14. The affidavit filed in support of the application contains references to the judgments in the cases of *Vijay Madanlal Chaudhary versus Union of India*, 2022 SCC OnLine SC 929, *J. Sekar versus Directorate of Enforcement*, (2022) 2 SCC 370, *Parvathi Kollur versus Directorate of Enforcement*, Criminal Appeal No. 1254 of 2022 decided on 16.08.2022, *Adjudicating Authority versus Shri Ajay Kumar Gupta and others*, Criminal Appeal No. 1269 of 2017 decided on 02.12.2022, judgment of the Delhi High Court in the case of *Prakash Industries Ltd. versus Union of India*, Writ Petition (C) No. 13361 of 2018, decided on 24.01.2023, *Jasbir Singh versus Vipin Kumar Jaggi and others*, (2001) 8 SCC 289, *A. Devendran versus State of Tamil Nadu*, AIR 1988 SC 2821, *Pepsi Foods Ltd. and others versus Special Judicial Magistrate and others*, AIR 1998 SC 128, *Chandmal @ Chandanmal versus The State of Madhya Pradesh and another*, Criminal Appeal No. 359 of 2023 decided on 07.02.2023, *Bhaskar Industries Ltd. Versus M/s Bhiwani Denim & Apparels Ltd. Ltd.* (2001) 7 SCC 401, *Satender Kumar Antil versus CBI*, 2022 SCC OnLine 825 and *State of Haryana versus Bhajan Lal and others*, 1992 Supp. (1) SCC 335.

15. The E.D. has filed a counter affidavit stating that the offence under PMLA is a stand-alone offence and the applicant has not been granted pardon in respect of the aforesaid offence. The counter affidavit refers to the judgments in the cases of *Vijay Madanlal Chaudhary versus Union of India*, 2022 SCC OnLine SC 929, *Shyam Sunder Singhvi versus Union of India*, Criminal Writ Petition No. 273 of 2019 decided by Rajasthan High Court on an undisclosed date, *Neeraj*

Upadhyay versus Union of India, W.P. No. 5916 of 2019 decided by this Court on an undisclosed date, *VGN Developers versus Deputy Director*, Crl.O.P. No. 9796 of 2019 by an undisclosed Court on an undisclosed date, *Union of India versus Sushil Kumar Katiyar*, by an undisclosed Court on an undisclosed date, in all of which it has been held that the offence under PMLA is a stand-alone offence.

16. In reply to the reference to **Satender kumar Antil** (Supra) made in the affidavit filed in support of the application, it has been stated in the counter affidavit that a bail application has to be considered on case-to-case basis and in this regard, the counter affidavit also refers to *P. Chidambaram versus Directorate of Enforcement*, (2020) 13 SCC 791.

17. The counter affidavit refers to the judgments in the cases of *State of Bihar versus K. J. D. Singh and R, P. Kapoor versus State of Punjab*, regarding the scope of power under Section 482 Cr.P.C., but neither their citations have been mentioned nor has any other particulars of the judgments been disclosed and copies to these judgments have also not supplied to the Court. This casual manner of giving references of precedents cannot be appreciated by the Court.

18. Chapter IV of the Allahabad High Court Rules, 1952 deals with “Affidavits and Oath Commissioners” and Rule 8 of Chapter IV provides that “*The affidavit shall contain no statement which is in the nature of an expression of opinion or argument.*” The affidavit and the counter affidavit filed in the present case are full of arguments and case laws in support of the arguments, which certainly is in violation of Rule 8 aforesaid.

19. Further, Rule 12 of Chapter IV of the Allahabad High Court Rules provides that *“Except on interlocutory applications, an affidavit shall be confined to such fact as the deponent is able of his own knowledge to prove.”*

20. Application under Section 482 Cr.P.C. is certainly not an interlocutory application and the affidavit and the counter affidavit filed in the present case should have been confined to facts within the personal knowledge of the deponents of the respective affidavits.

21. Although the above referred Rules are being followed generally, in some cases a new emerging practice has been observed where Advocates refer to numerous case-laws in the affidavits and counter affidavits, although the same is prohibited in the High Court Rules. The case-laws should not be incorporated in the affidavits, but those should be placed by the learned Counsel while advancing submissions, with reference to the specific passage containing the *ratio decidendi* of the judgment. The practice of mentioning case-laws in the affidavits filed before the Courts, and that too in a casual manner without even mentioning the citation or other complete particulars such as the name of the Court, case number and date of decision, and the relevant paragraph containing the ratio decidendi of the judgment results in wastage of the Court's time. Such a practice is deprecated and it should stop.

22. The learned counsel for the applicant has submitted that the consequence of granting pardon to the applicant is that he stands discharged in the scheduled offence and, therefore, he cannot be tried for the offence under the PMLA.

23. Per contra, Sri Kuldeep Srivastava, learned counsel for the E.D. has submitted that since the applicant has not been discharged by the learned trial court, rather he has become an approver and he has been granted pardon on this ground, which is subject to certain conditions mentioned in Section 306 Cr.P.C., the grant of pardon in the scheduled offence will not have any effect on the proceedings under PMLA.

24. In *Vijay Madanlal Chaudhary versus Union of India*, 2022 SCC OnLine SC 929, the Hon'ble Supreme Court held that: -

“253.... in the event the person named in the criminal activity relating to a scheduled offence is finally absolved by a Court of competent jurisdiction owing to an order of discharge, acquittal or because of quashing of the criminal case (scheduled offence) against him/her, there can be no action for money-laundering against such a person or person claiming through him in relation to the property linked to the stated scheduled offence.

* * *

269. From the bare language of Section 3 of the 2002 Act, it is amply clear that the offence of money-laundering is an independent offence regarding the process or activity connected with the proceeds of crime which had been derived or obtained as a result of criminal activity relating to or in relation to a scheduled offence....”

(Emphasis supplied)

25. In the Conclusions recorded in *Vijay Madanlal Chaudhary* (Supra), the Hon'ble Supreme Court reiterated that: -

“467. In light of the above analysis, we now proceed to summarise our

conclusion on seminal points in issue in the following terms:—

* * *

(v)...

*(d) The offence under Section 3 of the 2002 Act is dependent on illegal gain of property as a result of criminal activity relating to a scheduled offence. It is concerning the process or activity connected with such property, which constitutes the offence of money-laundering. The Authorities under the 2002 Act cannot prosecute any person on notional basis or on the assumption that a scheduled offence has been committed, unless it is so registered with the jurisdictional police and/or pending enquiry/trial including by way of criminal complaint before the competent forum. **If the person is finally discharged/acquitted of the scheduled offence or the criminal case against him is quashed by the Court of competent jurisdiction, there can be no offence of money-laundering against him or any one claiming such property being the property linked to stated scheduled offence through him.***

(Emphasis supplied)

26. After closure of submissions, the learned Counsel for the applicant has submitted a compilation of photocopies of 15 judgments, and he has submitted copies to two judgments with his written submissions and I proceed to deal with those judgments in the following paragraphs: -

27. In **Dipesh Chandak v. Union of India, (2004) 8 SCC 511**, the appellant was an accused in a number of cases pertaining to the Fodder Scam in the Animal Husbandry Department of Bihar but the trial judge had passed an order dated 28.08.1998 granting him pardon, on the

condition that he makes a full and complete disclosure. On the basis of the statement made by the accused, the Income Tax Department issued a show-cause notice to him as to why prosecution should not be initiated against him, under Sections 277 and 278 of the Income Tax Act, for having filed false returns of income tax. The appellant stated that he has been granted a pardon under Section 306 of the Cr.P.C. and thus the show-cause notice was not maintainable. The Commissioner of Income Tax rejected the contention and opined that the pardon was restricted only to offences under IPC only. Accordingly, Complaint Case was registered under Sections 277 and 278 of the Income Tax Act and the Court of Economic Offences, Patna, took cognizance and issued summons. The appellant filed a petition under Section 482 Cr.P.C. for quashing this complaint. The High Court dismissed the petition, inter alia, on the ground that the terms of the pardon had not been fulfilled till then and till full evidence was given by the appellant and the trial of all cases stood concluded, he continued to be an accused and, therefore, cannot claim immunity from prosecution. The Hon'ble Supreme Court held that: -

*“13. In our view, the High Court was not correct in concluding that until evidence has been given by the appellant the pardon could not operate. However, the fact remains that under Section 306 CrPC the pardon is granted in respect of the offence for which he had been charged as an accused. Of course, a pardon need not be only in respect of an offence under the Penal Code, 1860. A person may be charged, in respect of the same transaction or act, under the Penal Code, 1860 and under some other Act e.g. the Prevention of Corruption Act. **The pardon would operate***

in respect of all offences pertaining to that transaction. However, the pardon does not operate in respect of a transaction or act entirely unconnected with the offence in respect of which pardon has been granted. In this case, the pardon has been granted for the offence of misappropriation of funds. This offence has nothing to do with filing of false returns by the appellant. The prosecution under Sections 277 and 278 is in respect of filing false return and making of false declaration. The pardon which has been granted would not cover those offences.”

(Emphasis supplied)

The Hon’ble Supreme Court did not interfere in the order of the High Court.

28. In *A.J. Peiris v. State of Madras*, AIR 1954 SC 616, it was held that the moment the pardon is tendered to the accused, he must be presumed to have been discharged, whereupon he ceases to be an accused and becomes a witness.

29. In *Prakash Industries Ltd. versus Union of India*, 2023/DHC/000481 = 298 (2023) DLT 444, the questions involved were stated in the first paragraph of the judgment thus: -

“1. These two writ petitions raise an important question relating to the powers of the Enforcement Directorate 1 to provisionally attach properties under Section 5 of the Prevention of Money Laundering Act, 2002 2 even though no proceedings relating to the predicate offense may have been initiated by the competent agency functioning under an independent statute and in terms of which the scheduled offense stands created. The ancillary and yet equally fundamental issue which the Court is called upon to answer is whether the ED could be recognised to have the jurisdiction to enforce

the measures contemplated in Section 5 of the Act solely upon it being of the opinion that the material gathered in the course of an investigation or enquiry evidences the commission of a predicate offense. The questions posited would also raise the ancillary issue of the powers that the ED could be recognised to derive from the Act while investigating an offense of money laundering.”

30. It is not the fact in the present case that the proceedings under PMLA have been initiated against the applicant without any proceedings for a scheduled offence having been initiated against him. Therefore, **Prakash Industries Ltd.** (Supra) is of no avail to the applicant.

31. In *J. Sekar v. Enforcement Directorate*, (2022) 7 SCC 370, the Income Tax Department had seized currency amounting to Rs 106,98,89,800 and 128.495 kg of gold. CBI registered an FIR for offences under Section 120-B read with Sections 409, 420 IPC and Section 13(2), read with Sections 13(1)(c) and 13(1)(d) of the Prevention of Corruption Act, 1988. The E.D. registered an ECIR. The CBI had registered 3 cases in respect of the scheduled offences on the same set of facts, but after investigation, the CBI submitted a closure report in the main case and the said report was accepted by the trial Court. The other two F.I.Rs. were quashed by the High Court. The Income Tax Department had also closed the investigation initiated on the basis of the search. In the aforesaid background, the Hon’ble Supreme Court concluded that when the CBI had filed a closure report, the appellant could not be prosecuted under PMLA.

32. In para 20 of the judgment in **J. Sekar** (Supra), the Hon’ble Supreme Court

relied upon the earlier judgment of **Radheshyam Kejriwal v. State of W.B.**, (2011) 3 SCC 581, in which it was held that: -

“(v) Adjudication proceedings by the Enforcement Directorate is not prosecution by a competent court of law to attract the provisions of Article 20(2) of the Constitution or Section 300 of the Criminal Procedure Code;

(vi) The finding in the adjudication proceedings in favour of the person facing trial for identical violation will depend upon the nature of finding. **If the exoneration in adjudication proceedings is on technical ground and not on merit, prosecution may continue; and**

(vii) In case of exoneration, however, on merits where the allegation is found to be not sustainable at all and the person held innocent, criminal prosecution on the same set of facts and circumstances cannot be allowed to continue, the underlying principle being the higher standard of proof in criminal cases.’

* * *

39. In our opinion, therefore, the yardstick would be to judge as to whether the allegation in the adjudication proceedings as well as the proceeding for prosecution is identical and the exoneration of the person concerned in the adjudication proceedings is on merits. In case it is found on merit that there is no contravention of the provisions of the Act in the adjudication proceedings, the trial of the person concerned shall be an abuse of the process of the court.’

(Emphasis supplied)

33. In **Parvathi Kollur versus Directorate of Enforcement**, 2022 SCC OnLine SC 1975, the appellant had been

acquitted in trial of the scheduled offence. The Hon’ble Supreme Court held that that having been acquitted for the scheduled offence, the appellant no more remained an accused in any scheduled offence.

34. In **Adjudicating Authority versus Shri Ajay Kumar Gupta and others**, Criminal Appeal No. 1269 of 2017 decided on 02.12.2022, **Directorate of Enforcement versus M/s Obulapuram Mining Company Pvt. Ltd.**, Criminal Appeal No. 1269 of 2017 decided on 02.12.2022, **EMTA Coal Ltd. versus The Deputy Director, Directorate of Enforcement**, W.P. (C) No. 3821/2022 decided on 10.01.2023, **Harish Fabiani and others versus Enforcement Directorate and others**, W.P. (Cri.) 408 of 2022 and other connected matters decided on 26.09.2022, **Prakash Industries Ltd. versus Union of India**, 2023/DHC/000481 = 298 (2023) DLT 444, **Naresh Goyal versus The Directorate of Enforcement** 2023 ALLMR (Cri.) 1840 and **Debendra Kumar Panda versus Union of India**, 2023 (243) AIC 451, the accused persons had been acquitted of the scheduled offence and, therefore, they were discharged of the charge of offence under PMLA.

35. The order dated 25.07.2022 passed by the Delhi High Court in **Mainak Mehta versus CBI**, Criminal Writ Petition No. 2444 of 2022, is merely an interim order and nothing has been decided by means of the aforesaid interim order and, therefore, there is absolutely no relevance of the aforesaid interim order for deciding the present case.

36. **State (Delhi Administration) versus Jagjit Singh AIR 1989 SC 598 and Jasbir Singh versus Vipin Kumar Jaggi and others** (2011) 8 SCC 279 do not deal with the point in issue.

37. In ***A. Devendran v. State of T.N.***, (1997) 11 SCC 720, the questions under consideration were (1) whether the approver's evidence can at all be relied upon to bring home the charge against the accused persons?, (2) whether non-examination of the approver as a witness after grant of pardon and thereby non-compliance of sub-section 4(a) of Section 306 vitiates the entire proceeding and (3) whether the prosecution case can be held to be proved beyond reasonable doubt excluding the evidence of the approver from consideration. There was no point in issue in ***A. Devendran*** (Supra) as would be relevant for decision of the present case.

38. In ***Chandmal Versus State of Madhya Pradesh and Another***, 2023 SCC OnLine SC 127, the issue before the Hon'ble Supreme Court was "*whether on the charge sheet having been filed and during that period the appellants having cooperated but not having appeared before the Court personally but through a counsel, the action of the trial Court to issue non-bailable warrants is something which can be sustained.*" There was no issue regarding the effect of grant of pardon in the scheduled offence, consequent to the accused having turned an approver. Therefore, the aforesaid case is of no relevance for decision of the present case.

39. In ***Sanjay Kumar Agarwal Versus Directorate of Enforcement***, 2022 SCC OnLine Jhar 1248, the High Court of Jharkhand at Ranchi was dealing with a petition filed for quashing of an order passed by the trial Court rejecting an application under Section 205 Cr.P.C. for dispensing with the personal appearance of the petitioner, and the issue regarding the effect of grant of pardon in the scheduled offence was not involved there. Therefore, the aforesaid case

also is of no relevance for decision of the present case.

40. In ***Pepsi Foods Ltd. and others versus Special Judicial Magistrate and others***, (1998) 5 SCC 749, the Hon'ble Supreme Court held that "*Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto.*"

41. ***Bhaskar Industries Ltd. Versus M/s Bhiwani Denim & Apparels Ltd. Ltd.***, (2001) 7 SCC 401, was a case arising out of a complaint under Section 138 of the Negotiable Instruments Act and the question considered by the Hon'ble Supreme Court was whether personal appearance of an accused person can be exempted by the Magistrate.

42. As noted above, several of the judgments referred in the affidavit filed in support of the application or supplied as a part of the compilation, are absolutely irrelevant and by supplying those judgments, the learned Counsel for the applicant has wasted the precious time of the Court.

43. In State of ***Haryana versus Bhajan Lal and others***, 1992 Supp. (1) SCC 335 the Hon'ble Supreme Court has explained the scope of interference under Section 482 Cr.P.C. and there is no dispute regarding this point in the present case.

44. In the numerous cases relied upon by the learned Counsel for the applicant,

including **Vijay Madanlal Chaudhary** (supra) on the issue of effect of acquittal in scheduled offence, it has been held that in the event the person named in the criminal activity relating to a scheduled offence is '*finally absolved by a Court of competent jurisdiction owing to an order of discharge, acquittal or because of quashing of the criminal case (scheduled offence) against him/her*', there can be no action for money-laundering against such a person or person claiming through him in relation to the property linked to the stated scheduled offence. The applicant in the present case has not been *finally absolved by a Court of competent jurisdiction owing to an order of discharge, acquittal or because of quashing of the scheduled offence against him*.

45. In **Vijay Madanlal Chaudhary** (Supra), the Hon'ble Supreme Court did not deal with the question of effect of grant of pardon under Section 306 Cr.P.C. in respect of the scheduled offence upon the proceedings under PMLA. It is a well established principle of the law of precedents that a decision is an authority for which it decides and not what can logically be deduced therefrom. It is also well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.

46. In light of the aforesaid principle, this Court has to consider whether grant of pardon under Section 306 Cr.P.C. would also fall within the purview of '*finally absolved by a Court of competent jurisdiction owing to an order of discharge, acquittal or because of quashing of the scheduled offence against him*'.

47. Sections 306 Cr.P.C., which deals with the issue of grant of pardon, provides as follows: -

306. Tender of pardon to accomplice.—(1) *With a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to an offence to which this section applies, the Chief Judicial Magistrate or a Metropolitan Magistrate at any stage of the investigation or inquiry into, or the trial of, the offence, and the Magistrate of the first class inquiring into or trying the offence, at any stage of the inquiry or trial, may tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof.*

* * *

(4) *Every person accepting a tender of pardon made under sub-section (1)—*

a. shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any;

(b) shall, unless he is already on bail, be detained in custody until the termination of the trial.

(Emphasis supplied)

48. An order for discharge of the accused is passed or the criminal proceedings against him are quashed when on the face of the allegations, no triable offence is made out against the accused person and an order of acquittal is passed when the accused could not be proved guilty even after facing the trial. On the other hand, pardon is granted to a person who is '*supposed to have been directly or indirectly concerned in or privy to an offence*'. Pardon is granted only to persons who were involved in commission of the offence and not to a person against whom

no case is made out or no case could be established. Therefore, a person who is granted pardon under Section 306 Cr.P.C. in a scheduled offence, would not be a person who has been 'finally absolved by a Court of competent jurisdiction owing to an order of discharge, acquittal or because of quashing of the scheduled offence against him' mentioned in **Vijay Madanlal Chaudhary** (Supra), against whom no proceedings under PMLA can continue.

49. In **State of Maharashtra v. Abu Salem Abdul Kayyum Ansari**, (2010) 10 SCC 179, the Hon'ble Supreme Court held that: -

"15. The salutary principle of tendering a pardon to an accomplice is to unravel the truth in a grave offence so that guilt of the other accused persons concerned in commission of crime could be brought home. It has been repeatedly said by this Court that the object of Section 306 is to allow pardon in cases where heinous offence is alleged to have been committed by several persons so that with the aid of the evidence of the person granted pardon, the offence may be brought home to the rest. Section 306 CrPC empowers the Chief Judicial Magistrate or a Metropolitan Magistrate to tender a pardon to a person supposed to have been directly or indirectly concerned in or privy to an offence to which the section applies, at any stage of the investigation or inquiry or trial of the offence on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence.

* * *

17. An accomplice who has been granted pardon under Section 306 or 307 CrPC gets protection from prosecution.

When he is called as a witness for the prosecution, he must comply with the condition of making a full and true disclosure of the whole of the circumstances within his knowledge concerning the offence and to every other person concerned, whether as principal or abettor, in the commission thereof and if he suppresses anything material and essential within his knowledge concerning the commission of crime or fails or refuses to comply with the condition on which the tender was made and the Public Prosecutor gives his certificate under Section 308 CrPC to that effect, the protection given to him is lifted."

(Emphasis supplied)

50. In **Yakub Abdul Razak Memon v. State of Maharashtra**, (2013) 13 SCC 1, the Hon'ble Supreme Court highlighted the legislative intent behind enactment of Section 306 Cr.P.C. as follows: -

"312. The object of Section 306 is to tender pardon in cases where a grave offence is alleged to have been committed by several persons so that the offence could be brought home with the aid of evidence of the person pardoned. The legislative intent of this provision is, therefore, to secure the evidence of an accomplice in relation to the whole of circumstances, within his knowledge, related to the offence and every other person concerned."

(Emphasis supplied)

51. The legislative intent behind laying down the policy of granting pardon to an approver was explained by the Hon'ble Supreme Court in **CBI v. Ashok Kumar Aggarwal**, (2013) 15 SCC 222, which was an appeal preferred against an order passed by the High Court of Delhi, by which it had set aside the order of the

Special Judge granting pardon to Respondent 2 under Section 306 of Cr.P.C. and making him an approver in the case wherein Respondent 1 was also an accused. The Hon'ble Supreme Court refused to interfere in the order by stating that: -

“33. In view of the above and considering the judgment of the Privy Council in Bawa Faqir Singh AIR 1938 PC 266, we are of the view that the grant of pardon by a court under Section 306 CrPC on being asked by the accused and duly supported by the State is a judicial act and while performing the said act, the Magistrate is bound to consider the consequences of grant of pardon taking into consideration the policy of the State and to certain extent compare the culpability of the person seeking pardon qua the other co-accused.

34. For illustration, we take a case where a person hires a professional criminal to kill his entire family i.e. father and brothers and succeeds in the said mission. Later on, if he turns approver, the mercenary who got paid to execute the conspiracy gets hanged while the principal accused who hired the mercenary has not only escaped the liability in criminal trial but would also succeed in inheriting the entire property of his family which otherwise is not permissible in view of the law of succession, etc. Under Section 25 of the Hindu Succession Act, 1956, the murderer stands disqualified for inheritance. The provision reads as under:

“25. Murderer disqualified.—*A person who commits murder or abets the commission of murder shall be disqualified from inheriting the property of the person murdered, or any other property in furtherance of the succession to which he or she committed or abetted the commission of the murder.”*

The section deals with the disqualification from inheritance of a person who commits murder or abets commission of murder. The provision of the section provides for a statutory recognition to the Hindu Law whereunder the rule is applied not on the basis of text but upon the principle of justice, equity and good conscience. (Vide Kenchava Kom v. Girimallappa Channappa AIR 1924 PC 209) The rule had been made applicable by all courts consistently including this Court as is evident from the judgment in Vellikannu v. R. Singaperuma (2005) 6 SCC 222.

35. Once the immunity extends to the accused and the accused is made an approver, he stands discharged whereupon he ceases to be an accused and would be examined only as a witness unless the said privilege is revoked on violation of the condition of disclosing complete truth. [See State (Delhi Admn.) v. Jagjit Singh and Jasbir Singh (Supra).]

36. Thus, the illustration cited hereinabove quoting Section 25 of the 1956 Act reflects the policy of law and the court must be alive to such situations while passing an order otherwise the consequences may be too abhorrent.”

(Emphasis supplied)

52. The words “may tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence” used in Section 306 Cr.P.C. would also include within their ambit a full and true disclosure of the whole of the circumstances regarding the processes or activities connected with proceeds of the offence, namely - (a) concealment; or (b) possession; or (c) acquisition; or (d) use; or (e) projecting as untainted property; or (f) claiming as

untainted property, as the same are also facts relative to the scheduled offence. The aforesaid interpretation of Section 306, Cr.P.C. is supported by the illustration given by the Hon'ble Supreme Court in **CBI v. Ashok Kumar Aggarwal** (Supra).

53. Moreover, Section 308, Cr.P.C. provides that: -

“308. Trial of person not complying with conditions of pardon.—(1) Where, in regard to a person who has accepted a tender of pardon made under Section 306 or Section 307, the Public Prosecutor certifies that in his opinion such person has, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made, such person may be tried for the offence in respect of which the pardon was so tendered or for any other offence of which he appears to have been guilty in connection with the same matter, and also for the offence of giving false evidence:...

(Emphasis supplied)

54. Section 46 of the Prevention of Money Laundering Act, 2002 provides that the persons conducting the prosecution before the Special Court, shall be deemed to be a Public Prosecutor. However, the public prosecutor conducting the trial of the offence under PMLA before the Special Court cannot file objections regarding concealment of facts relating the processes or activities connected with proceeds of the offence, namely - (a) concealment; or (b) possession; or (c) acquisition; or (d) use; or (e) projecting as untainted property; or (f) claiming as untainted property before the Court trying the scheduled offence.

55. An order for discharge of the accused is passed or the criminal

proceedings against him are quashed when on the face of the allegations, no triable offence is made out against the accused person and an order of acquittal is passed when the accused could not be proved guilty even after facing the trial. On the other hand, pardon is granted to a person who is *‘supposed to have been directly or indirectly concerned in or privy to an offence’*. Pardon is granted only to a person who was involved in commission of the offence and not to a person against whom no case is made out or no case could be established.

56. Grant of pardon under Section 306 Cr.P.C. would not fall within the purview of the words *‘finally absolved by a Court of competent jurisdiction owing to an order of discharge, acquittal or because of quashing of the scheduled offence against him’* used by the Hon'ble Supreme Court in **Vijay Madanlal Chaudhary** (Supra). The pardon granted under Section 306 Cr.P.C. to a person in a scheduled offence would not ipso facto result in his acquittal in the offence under the PMLA, unless, of course, the accused person seeks pardon in the case under PMLA also by making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence under PMLA also.

57. The power under Section 482 Cr.P.C. can be exercised to secure the ends of justice, as held in **State of Haryana v. Bhajan Lal**, 1992 Supp (1) SCC 335, wherein the Hon'ble Supreme Court gave a word of caution by stating that *“the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases”*. In case the contention put forth by the learned Counsel for the applicant is accepted, it would result in a

person accused of committing an offence under PMLA going scot free without facing trial and without seeking pardon in PMLA case by making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and it would defeat the ends of justice.

58. In view of the foregoing discussion, I am of the considered view that there is no illegality in the cognizance/ summoning order dated 08.08.2019 passed in Complaint Case No.121/2019 in the Court of Session Judge / Special Judge PMLA, Lucknow, and there is no ground to quash the proceedings of the complaint filed against the applicant under the PMLA. The application under Section 482 Cr.P.C. lacks merit and the same is, accordingly, dismissed.

(2023) 9 ILRA 958

**APPELLATE JURISDICTION
CRIMINAL SIDE**

DATED: ALLAHABAD 28.08.2023

BEFORE

**THE HON'BLE SURYA PRAKASH
KESARWANI, J.**

THE HON'BLE MS. NAND PRABHA SHUKLA, J.

Government Appeal No. 213 of 1984
With
Criminal Appeal No. 2419 of 1983

State of U.P. ...Appellant
Versus
Mahipal Singh ...Respondent

Counsel for the Appellant:
A.G.A.

Counsel for the Respondent:
Sri P.N. Misra, Sri Devendra Kumar Tiwari,
Sri R.S. Yadav, Sri Rajiv Lochan Shukla, Sri

Surendra Kumar Yadav, Sri Ray Sahab Yadav

Criminal Law -Indian Penal Code, 1860 - Sections 302, 304 Part-II, 34 & 300 Exception 4 - Code of Criminal Procedure, 1973 - Section 313 - Appeal Against Acquittal and Conviction - The State appealed against the acquittal of the accused under Section 302 IPC, while the accused appealed against his conviction under Section 304 Part-II read with Section 34 IPC, sentenced to five years' rigorous imprisonment, arising from a sessions trial for the stabbing death of the deceased on 13.08.1981. The prosecution proved the accused's involvement through eye-witnesses (P.W.-1, P.W.-2, P.W.-3), recovery of blood-stained clothes (Group 'O'), and post-mortem evidence of a fatal thigh injury. The accused claimed self-defense and that blood stains were from police beating, but evidence confirmed his presence and a single knife blow to a non-vital part during a sudden quarrel, as per *Mahesh Balmiki* and *State of Rajasthan*. The court held that Exception 4 of Section 300 IPC applied, justifying the trial court's conviction under Section 304 Part-II due to lack of premeditation and the non-vital nature of the injury. Self-defense was rejected as the evidence showed mutual provocation. Both appeals dismissed, conviction upheld, bail bonds cancelled, and accused directed to surrender or face arrest if the sentence is incomplete. (Paras 16-26)

Both appeals dismissed.

List of Cases cited:

1. Munshi Ram & ors. Vs Delhi Administration, AIR 1968 SC 702
2. Mahesh Balmiki @ Munna Vs St. of M.P., (2000) 1 SCC 319
3. Dhirajbhai Gorakhbhai Nayak Vs St.of Guj., (2003) 9 SCC 322
4. Pulicherla Nagarajun Vs St. of A.P., (2006) 11 SCC 444

5. St. of Raj.Vs Leela Ram @ Leela Dhar, (2019)
13 SCC 131

(Delivered by Hon'ble Surya Prakash
Kesarwani, J.

&

Hon'ble Ms. Nand Prabha Shukla, J.)

1. The **Government Appeal No. 213 of 1984** has been filed praying to set aside the acquittal of the accused/opposite party under Section 302 IPC. The **Criminal Appeal No. 2419 of 1983** has been filed praying to set aside the conviction of the appellant under Section 304 Part-II read with Section 34 IPC and to acquit the accused/appellant. Both the appeals arise from the judgment and order dated 10.10.1983 in Sessions Trial No. 156 of 1982 (State Vs. Mahipal) passed by the Sessions Judge, Jhansi convicting the accused Mahipal under Section 304, Part II IPC, read with Section 34 IPC, and sentencing him to undergo five years R.I.

2. These two appeals are connected and pending in this Court from the last about 40 years. Since, the accused/appellant was not present, therefore, this Court in the **Government Appeal No. 213 of 1984**, vide order dated 01.07.2013 directed the Chief Judicial Magistrate, Jhansi to take recourse to all the process permissible under law including issuing bailable warrant against the accused Mahipal for procuring and ensuring his presence before this Court on 05.08.2013. It was further observed that in case the accused/respondent is reported to have died then, the Chief Judicial Magistrate shall verify the fact of death of the accused/respondent. As per office report dated 06.09.2013, the respondent Mahipal Singh has left the place of his residence about 20 years ago. Thereafter, several orders were

passed from time to time and office reports were submitted. **Order dated 18.04.2015** passed by this Court reads as under:

“Heard learned Additional Government Advocate for the State of U.P.

In the present case, non-bailable warrant has been issued against the accused-respondent, Mahipal because his whereabouts were not known. It is reported that he had left his village about twenty five years back by selling the same.

The compliance report of the order dated 21.7.2014 has not been received from Chief Judicial Magistrate, Jhansi.

In such circumstance, we are directing that the compliance of the orders passed by this Court issuing non-bailable warrant against the accused person, Mahipal be made by Senior Superintendent of Police, Jhansi by way of ensuring the arrest of the accused-respondent, Mahipal. After arresting the accused-respondent, Mahipal, he shall be produced before this Court on 20th July, 2015.

List on 20th July, 2015.

Let a copy of this order be communicated to Senior Superintendent of Police, Jhansi through Chief Judicial Magistrate, Jhansi forthwith for compliance.”

3. Thereafter, Sri Ray Sahab Yadav and Sri Surendra Kumar Yadav have put in appearance on behalf of the accused-respondent, who stated on 20.07.2015 that a criminal appeal has been preferred against the conviction. Vide order dated 05.08.2015, this Court directed the office to trace out the said appeal. The office traced out the appeal filed by the accused-respondent against conviction under Section 304 Part-II read with Section 34 IPC. Vide order dated 27.08.2015 and

21.09.2015, the **Criminal Appeal No. 2419 of 1983** filed by the accused Mahipal was directed to be connected with the present **Government Appeal No. 213 of 1984**. The accused/respondent Mahipal had filed the Criminal Misc. Bail Application No. 434823 of 2015 and was released on bail by order dated 29.01.2016. Thereafter, these two appeals were listed number of times but none appeared on behalf of the accused. Consequently, non-bailable warrant was issued by order dated 27.02.2019. An order dated 15.05.2019 was passed directing the Superintendent of Police, Jhansi to ensure the arrest of the accused Mahipal Singh. It appears that thereafter based on office reports, this Court passed an order dated 09.09.2022, as under:

“No one is present on behalf of the accused respondent.

We find that on the earlier occasions also no one was present for the accused respondent.

As per office report dated 14.9.2021 accused respondent Mahipal Singh has left his house about 15 years back and residing somewhere else and for this reason non bailable warrants could not be executed.

Office is directed to send details of sureties of the accused respondent Mahipal Singh to the court below within a week so that the proceedings under Section 446 Cr.P.C. may be initiated against the sureties.

List after six weeks.”

4. From the record, it appears that the accused Mahipal Singh is economically weak person.

5. Considering the facts, this Court appointed Sri Rajeev Lochan Shukla as

Amicus Curiae to argue the appeal on behalf of the accused/opposite party in Government Appeal and the appellant in the connected **Criminal Appeal No. 2419 of 1983**. The order dated 03.07.2023 is reproduced below:

“1. From the order sheet of this appeal, it appears that the accused-opposite party/appellant of the connected Criminal Appeal No.2419 of 1983 is economically a very weak person. As per report of the Chief Judicial Magistrate, Jhansi dated 01.12.2022, presently, the accused/opposite party is residing in Brahma Nagar Colony, Lahargird, Police Station- Sirpri Bazar, Jhansi and he runs a "Mungfali Ka Thela" near Chaman Ganj Chowki, Sipri Bazar Jhansi. Twice, non-bailable warrants were issued to the accused/opposite party. He engaged counsel, however, counsel engaged by him is not appearing.

2. Under the circumstances, we find it appropriate to appoint an amicus curiae.

3. Let Shri Rajiv Lochan Shukla (learned Panel Counsel of Allahabad High Court Legal Services Committee) be appointed as amicus curiae to argue this case on behalf of the accused-opposite party/appellant of the connected Criminal Appeal No.2419 of 1983.

4. Let a copy of paper book and other relevant papers be supplied to the aforesaid amicus curiae within a week to prepare and argue the case.

5. Amicus curiae shall be paid fees, as per norms.

6. List in the month of August, 2023 before appropriate Bench alongwith aforesaid connected criminal appeal.”

6. Pursuant to the aforesaid order dated 03.07.2023, Sri Rajeev Lochan Shukla, Advocate has argued the appeal on behalf of the accused-Mahipal

Singh/opposite party in Government Appeal and the appellant in **Criminal Appeal No. 2419 of 1983**.

7. Heard Sri K.P. Pathak, learned A.G.A. for the State and Sri Rajeev Lochan Shukla, learned counsel for the accused Mahipal Singh in **Government Appeal No. 213 of 1984** and connected **Criminal Appeal No. 2419 of 1983**.

Facts:

8. Briefly stated facts of the present case are that on 13.08.1981, a First Information Report No.138/1981 under Section 302 IPC, PS- Mauranipur, District-Jhansi was registered at about 6:30 P.M. with respect to an incident of the even date, which took place at about 5:30 P.M. As per F.I.R., the accused-Mahipal Singh and Gucchan stabbed the deceased-Indal by knife on 13.08.1981 causing injuries in his abdomen and thigh, which resulted in his death. The informant is the P.W.-1, Kailash, who is the real brother of the deceased-Indal. The accused-Mahipal Singh was arrested on the same day and his blood stained clothes were recovered and sent for chemical examination. No knife could be recovered. The Investigating Officer visited the place of incident on the same day and prepared a recovery memo taking samples of blood found on the earth and 'Chabutara', which were also sent for chemical examination. Autopsy was conducted on the body of the deceased-Indal on 14.08.1981. As per post mortem report, the following ante mortem injuries were found on the body of the deceased:

"ANTE MORTEM INJURIES:

1. Stabbed wound (punctured) 1" x 1/2" x 3 1/2" oblique on lateral side and back of left thigh 3/4" above, lateral and

backwards to left lateral condyle of femur, edge of wound one is sharp and other is blunt, wound is wedge shaped. Fascia, muscle artery, vein are cut and injuries of lateral and back of thigh. Popliteal artery and vein are cut from behind. Direction of wound is left to right and slightly downwards.

2. Superficial incised wound 3/4" x linear on lateral side of left abdomen, upper part obliquely and below upwards".

9. As per post mortem report, the cause of death is shock haemorrhage as a result of injury sustained on the thigh. The Injury no.2 i.e. the injury on the abdomen was found to be superficial. The Injury no.1 i.e. the injury on the thigh resulted in cutting of muscle artery, vein and injury of lateral and back of thigh. Popliteal artery and veins were cut from behind and direction of wound was left to right and slightly downwards.

10. As per the chemical examination report, human blood was found on pyjama, shirt, underwear and kurta of the deceased. The blood group 'O' was found on blood stained clothes of the deceased-Indal i.e., pant, shirt, underwear and baniyan.

11. The prosecution examined six witnesses, namely, eye witness P.W.-1/informant (Kailash, real brother of the deceased), eye witness P.W.-2 (Puran), eye witness P.W.-3 (Ram Sarup), P.W.-4 (Hari Dayal, witness of recovery memo of blood stained clothes of accused-Mahipal Singh and also witness of arrest of accused-Mahipal Singh), P.W.-5 (Dr. D.B. Mangal, who conducted autopsy on the dead body of the deceased-Indal) and P.W.-6 (Shambhu Dayal, S.I.-Investigating Officer).

12. From the defence side, the accused-Mahipal gave his statement under

Section 313 Cr.P.C. To a question, he stated that he was caught by the police from his house at about 7:30 P.M. and was beaten, which resulted in blood stains on his clothes. To another question, he stated that the deceased-Indal was murdered by the other accused-Guchhan. The accused-Guchhan absconded and he could not be arrested. The defence also produced D.W.-1 (Dr. S.K. Khare, Private Pathologist of Shiv Pathological Laboratory, Panchkuiyan Chauraha, Jhansi), who stated in his evidence on 24.09.1983 that he took blood samples of the accused-Mahipal on 22.09.1983 to test his blood group and on testing, blood group was found to be 'O'.

13. After considering the evidences, the learned Trial Court had passed the impugned judgement dated 10.10.1983 whereby the learned Trial Court convicted the accused-Mahipal under Section 304 Part-II read with Section 34 IPC and sentenced him to undergo 5 years R.I. Aggrieved, the State has filed the above noted Government Appeal No.213 of 1984 and the accused-Mahipal has filed the Criminal Appeal No.2419 of 1983 challenging his conviction.

Submissions :

14. Shri K.P. Pathak, learned AGA for the State submits that the prosecution has proved the guilt of the accused-Mahipal beyond reasonable doubt that he has murdered the deceased-Indal and, thus, there was no occasion for the learned Trial Court to convict the accused-Mahipal Singh under Section 304 Part-II read with Section 34 IPC instead the accused-Mahipal Singh deserves to be convicted and sentenced under Section 302 IPC. Learned AGA has drawn our attention to the evidence of eye witnesses, recovery memo and chemical examiners report.

15. Shri Rajeev Lochan Shukla, learned Amicus Curiae appearing on behalf of the accused-opposite party in Government Appeal No.213 of 1984 and on behalf of the accused-appellant in Criminal Appeal No.2419 of 1983 submitted as under:

(i) Presence of eye witnesses on the spot is doubtful.

(ii) Witnesses are unreliable as they have continuously made improvements in their evidences and there are inconsistencies in their evidences.

(iii) Clothes of the accused-Mahipal recovered by the Investigating Officer containing blood stains merely contains the blood stains of the accused-Mahipal Singh, on account of beating by the police at the time of arrest. As per report of the pathologist, the blood group of the accused-Mahipal Singh is 'O' and the blood group found on the blood stained clothes of the accused-Mahipal Singh is also 'O', which proved that the blood stains appeared on the clothes of the accused-Mahipal Singh was in fact the blood of the accused-Mahipal Singh, on account of bleeding due to beating by the police. No evidence of blood group of the deceased-Indal could be filed by the prosecution to establish that the blood group of the deceased-Indal was the same as was found on the blood stained clothes of the accused-Mahipal Singh. The accused-Mahipal Singh has taken a clear stand in his defence statement under Section 313 Cr.P.C. that the blood stains on the clothes were of his blood due to beating by Daroga, which could not be disproved by the prosecution. In his defence, the accused-Mahipal Singh has also stated under Section 313 Cr.P.C. that the deceased-Indal was murdered only by the accused-Guchhan. The blood group on the clothes of the deceased were not

categorised. Hence, the blood found on the clothes of the accused-Mahipal Singh is not corroborated with the blood group of the deceased-Indal. It has not been mentioned by the chemical examiner in his report as to whether the blood group of the deceased was 'O+' or 'O-' and it simply mentioned as blood group 'O' and, thus, the blood group of the deceased found on his clothes could not be connected with the blood group of the accused-Mahipal Singh. Thus, the prosecution has completely failed to establish beyond reasonable doubt the involvement of the accused-Mahipal Singh in the incident in question and the accused-Mahipal Singh is entitled for benefit of doubt.

(iv) As per First Information Report and the evidence of P.W.-1, the deceased-Indal has threatened the accused-Mahipal Singh and in self-defence, the accused-Mahipal gave single blow on non-vital part of the body of the deceased-Indal. Thus, even if it is assumed, as per prosecution story, that the injury on the thigh of the deceased-Indal was inflicted by the accused-Mahipal Singh, still the accused-Mahipal Singh is entitled for benefit of self-defence, particularly, when the injury caused on the thigh, is on non-vital part of the body. In the case of *Munshi Ram and Others vs. Delhi Administration reported in AIR 1968 SC 702*, Hon'ble Supreme Court has settled the law that even if an accused does not take plea of self-defence, it is open to the Court to consider such a plea if the same arises from the materials on record. Therefore, the accused-Mahipal Singh is entitled for the benefit of self-defence and he could not be convicted even under Section 304 Part-II I.P.C.

Discussion and Findings :

We have carefully considered the submissions of learned counsels for the parties and perused the record.

16. The recovery memo dated 13.08.1981 of blood stained clothes of the deceased-Indal has been proved by the P.W.-6 (Investigating Officer). The recovery memo dated 13.08.1981 of the recovery of blood stained clothes of the accused-Mahipal Singh and his arrest in the presence of P.W.-4 has been proved by the P.W.-4 in his evidence. He proved that there was no bleeding from the body of the accused-Mahipal Singh at the time of his arrest. The P.W.-6 (Investigating Officer) has also stated that while arresting the accused-Mahipal, some scuffle took place. The blood group found on the blood stained clothes of the accused-Mahipal Singh and the blood group found on the blood stained clothes of the deceased-Indal are one and the same i.e., Group 'O'. Therefore, by evidence, the presence and involvement of the accused-Mahipal Singh at the date, time and place of occurrence of the incident is proved. That apart, his presence at the date, time and place of occurrence and his participation in the commission of offence has also been proved by the eye witnesses P.W.-1, P.W.-2 and P.W.-3. Although, the eye witness P.W.-2 retracted to some extent in his evidence but still he maintained that the injury was caused to the deceased-Indal by the accused-Mahipal Singh and Guchhan. Thus, the presence of the accused-Mahipal Singh in the commission of offence at the date, time and place of the incident in question is proved.

17. The P.W.-1 has stated in his evidence that when he was returning alongwith his deceased-brother at about 5 P.M., near the house of Bhoopat, the accused persons, Mahipal and Guchhan

came and when the deceased-Indal asked them that why they are harassing the P.W.-1, then they spoke to the deceased that you are taking side of your brother and we will set your mind right and suddenly they attacked with knife upon the deceased-Indal. He also stated that the accused-Mahipal Singh, at the time of incident, was wearing pant and bushirt, which has stains of the deceased's blood. Nothing adverse could be brought out by the defence in cross-examination of the P.W.-1, which may indicate that the accused-Mahipal Singh has not received the stains of blood of the deceased-Indal on his clothes in the incident in question.

18. In his evidence, the eye witness P.W.-2 has also proved that the accused-Mahipal and Guchhan have caused knife injuries to the deceased-Indal, who received injuries in his stomach and thigh. In his cross-examination, the P.W.-2 stated that he had not seen the accused-Mahipal Singh stabbing the deceased-Indal but he had seen the accused persons with knife and the deceased-Indal in injured condition and when he asked the deceased-Indal, then he told that the accused persons, Mahipal and Guchhan have attacked on him.

19. In his evidence, the eye witness P.W.-3 has stated that the accused-Mahipal had stabbed the deceased-Indal on thigh and the accused-Guchhan gave blow by knife on his abdomen. He also stated that he has seen the accused persons, Mahipal and Guchhan stabbing the deceased-Indal by knife. He also stated in his cross-examination that the deceased-Indal has also told that the accused persons have stabbed him with knife.

20. Thus, the evidence of P.W.-1, P.W.-2 and P.W.-3 when read together

leaves no manner of doubt that the accused-Mahipal Singh has given one blow (stabbing) by knife on the left thigh of the deceased-Indal. The injury on the left thigh being cause of his death is also proved by the post mortem report and the evidence of P.W.-5 (doctor, who conducted the autopsy). The P.W.-5 has also proved the report of the chemical examiner with respect to the clothes of the deceased-Indal and blood stains found thereon. He stated in his cross-examination on a suggestion that if deceased could have been treated immediately in a very good hospital, then it was possible to stop the bleeding and there could have been possibility to save the life of the deceased-Indal.

21. The D.W.-1 (a private pathologist) has given a blood group report of the accused-Mahipal Singh dated 22.09.1983 (Exhibit Ka.6) and on perusal of it from the original record, we find that it merely mentions the blood group of the accused-Mahipal Singh to be of Group 'O'. Thus, this blood test report does not help the accused-Mahipal Singh in any manner inasmuch as blood group of the blood stains found on the clothes of the deceased-Indal and the blood group of the blood found on the clothes of the accused-Mahipal are one and the same i.e., Group 'O', as per chemical examiner's report and the report of the private pathologist (D.W.-1).

22. So far as the conviction of the accused-Mahipal Singh under Section 304 Part-II read with Section 34 IPC instead of Section 302 IPC is concerned, we find that the thigh is a non-vital part of the body. The injury was caused by knife by the accused-Mahipal Singh. It appeared from the own evidence of P.W.-1 that it was at the heat of the passion that upon a sudden quarrel and

without the accused-Mahipal Singh having taken undue advantage, gave knife blow to the deceased-Indal on a non-vital part of the body of the deceased-Indal.

23. Hon'ble Supreme Court in **Mahesh Balmiki @ Munna Vs. State of M.P.(2000) 1 SCC 319** has opined that:

"9. there is no principle that in all cases of a single blow Section 302 IPC is not attracted. A single blow may, in some cases, entail conviction under Section 302 IPC, in some cases under Section 304 IPC and in some other cases under Section 326 IPC. The question with regard to the nature of offence has to be determined on the facts and in the circumstances of each case. The nature of the injury, whether it is on the vital or non-vital part of the body, the weapon used, the circumstances in which the injury is caused and the manner in which the injury is inflicted are all relevant factors which may go to determine the required intention or knowledge of the offender and the offence committed by him."

(Emphasis supplied by us)

24. In **State of Rajasthan vs. Leela Ram @ Leela Dhar (2019) 13 SCC 131** Hon'ble Supreme Court has discussed the issue where the single knife blow will fall within Section 302 or 304 Part I or 304 Part II of IPC and held as under : -

"In Dhirajbhai Gorakhbhai Nayak vs. State of Gujarat (2003) 9 SCC 322, this Court while discussing the ingredients of Exception 4 of Section 300 IPC, held thus: "The fourth exception of Section 300 IPC covers acts done in a sudden fight. The said Exception deals with a case of prosecution (sic provocation) not covered by the first exception, after

which its place would have been more appropriate. **The Exception is founded upon the same principle, for in both there is absence of premeditation.** But, while in the case of Exception 1 there is total deprivation of self-control, **in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do.** There is provocation in **Exception 4** as in Exception 1, but the injury done is not the direct consequence of that provocation. In fact, Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, **yet the subsequent conduct of both parties puts them in respect of guilt upon an equal footing.** A "sudden fight" implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor could in such cases the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. **There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed.** It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. **The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight, (c) without the offenders having taken undue advantage or acted in a cruel or unusual manner, and (d) the fight must have been with the person killed.** To bring a case within Exception 4

all the ingredients mentioned in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to make a fight. **Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties had worked themselves into fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons.** It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. **It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation.** It must be further shown that the offender has not taken undue advantage or acted in a cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage".

In *Pulicherla Nagarajun vs. State of A.P.* (2006) 11 SCC 444, this Court while deciding whether a case falls under Section 302 or 304 Part I or 304 Part II IPC, held thus: "Therefore, the Court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters - plucking of a fruit, straying of cattle, quarrel or children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no premeditation. In fact, there may not even be criminality. At the other end of the spectrum, there may

be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable under Section 302, are not converted into offences punishable under Section 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable under Section 302. **The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances:** (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) **whether the blow is aimed at a vital part of the body;** (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any premeditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner, (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention."

(Emphasis supplied by us)

25. Under the circumstances, Exception 4 of Section 300 IPC defining culpable homicide not amounting to murder is attracted on the facts of the present case.

Ghosh. Respondents contended the order was valid to correct an incompetent authority's action, citing *U.O.I. Vs Raghuwar Pal Singh*. The court held that reversion after a prolonged period, without affording an opportunity of hearing, violated natural justice principles, as established in *Shekhar Ghosh* and *P.N. Premachandran*. The impugned order was passed cursorily, without applying judicial mind, and respondents' cited cases were distinguishable. Writ petition allowed, reversion order quashed. (Paras 12-19)

Writ petition allowed.

List of Cases cited:

1. P.N. Premachandran Vs St. of Kerala & ors., (2004) 1 SCC 245
2. Shekhar Ghosh Vs U.O.I. & anr., (2007) 1 SCC 331
3. St. of W.B. & ors. Vs Aghore Nath Dey & ors., (1993) 3 SCC 371
4. Board of Secondary Education of Assam Vs Md. Sarifuz Zaman & ors., (2003) 12 SCC 408
5. U.O.I. & anr. Vs Raghuwar Pal Singh, (2018) 15 SCC 463
6. Santosh Kumar Verma & ors. Vs St. of Bihar & ors., (1997) 2 SCC 713
7. Ram Ujarey Vs U.O.I., (1999) 1 SCC 685
8. Kenchava Kom Vs Girimallappa Channappa, AIR 1924 PC 209
9. Vellikannu Vs R. Singaperuma, (2005) 6 SCC 222

(Delivered by Hon'ble Irshad Ali, J.)

1. Heard Sri Sri Satyaveer Singh, learned counsel for the petitioner and Sri Rajesh Kumar Verma, learned Standing Counsel for the State-respondent.

2. By means of the present writ petition, the petitioner is challenging the order of reversion dated 24.4.2003, contained as Annexure-1 to the writ petition. It has been prayed to issue writ, order or direction in the nature of mandamus commanding the respondent No.2 to correct the illegalities to the order of Deputy Director, Faizabad Division Faizabad and should pass the order affecting from that date to which the petitioner has automatically become entitled for promotion on the basis of seniority.

3. Factual matrix of the case is that the petitioner was appointed by the order of Deputy Director, Faizabad Division Faizabad on the post of Junior Clerk pursuant to the result of selection committee on 4.2.1985. On 27.10.1994, the petitioner was promoted to the post of Senior Clerk. He accordingly joined the office of posting i.e. District Probation Officer, Gonda. He thereafter was transferred to the office of District Probation Officer, Sultanpur, where he joined as a Senior Clerk and discharged his duties till date. He was granted increment pursuant to the government order which is applicable to the employee who continued on a particular post for a period of eight years.

4. By means of the impugned order dated 24.4.2003, the petitioner, after almost a decade, has been reverted to the post of Junior Clerk, which was subject matter of challenge in the present writ petition, wherein this Court granted interim order vide order dated 12.5.2003, operative portion is quoted below :-

"Meanwhile, operation of the order dated 24.4.2003 as contained in Annexure

No.1 to the writ petition shall remain stayed."

5. In pursuance to the interim order granted by this Court, the petitioner continued on the post of Senior Clerk till date.

6. Assailing the impugned order, submission of learned counsel for the petitioner is that the employee who is not at fault in getting the promotion, cannot be penalised after a decade by passing the impugned order of reversion. In support of his submission, he placed reliance upon a judgment in the case of **P.N. Premachandran Vs. State of Kerala & Others [(2004) 1 Supreme Court Cases 245]**.

7. Next submission is that the petitioner was not afforded an opportunity of hearing while passing the order of reversion, reverting the petitioner on the post of Junior Clerk. On the said point, he placed reliance upon a judgment in the case of **Shekhar Ghosh Vs. Union of India & Another [(2007) 1 Supreme Court Cases 331]**.

8. He further placed reliance upon a judgment in the case of **State of W.B. & Others Vs. Aghore Nath Dey & Others [(1993) 3 Supreme Court Cases 371]** and lastly, he placed reliance upon **Board of Secondary Education of Assam Vs. Md. Sarifuz Zaman & Others [(2003) 12 Supreme Court Cases 408]**.

9. On the basis of submission advanced, learned counsel for the petitioner submits that the order passed by the respondent is per se illegal and is not sustainable in law and is liable to be set aside by this Court.

10. On the other hand, learned Standing Counsel submits that the order impugned does not suffer from any infirmity or illegality and is a just and valid order. He submits that in case the order has been passed by the incompetent authority, the same can be rectified and corrected. He placed reliance upon the following two judgments :-

(i) Union of India and another Vs. Raghuwar Pal Singh [(2018) 15 Supreme Court Cases 463]

(ii) Santosh Kumar Verma and others Vs. Stte of Bihar & others [(1997) 2 Supreme Court Cases 713]

11. I have considered the rival contention of learned counsel for the parties, perused the material on record as well as the judgments relied upon by them.

12. On perusal of the record, it is crystal clear that the impugned order has been passed in a cursory manner after passing a decade of the order of promotion. It is also evident on perusal of the impugned order that the same has been passed without notice and opportunity of hearing to the petitioner.

13. Learned counsel for the petitioner has placed reliance upon a judgment in the case of **P.N. Premachandran (Supra)**. Relevant paragraph 7 is quoted below :-

"7. It is not in dispute that the posts were to be filled up by promotion. We fail to understand how the appellant, keeping in view the facts and circumstances of this case, could question the retrospective promotion granted to the private respondents herein. It is not disputed that in view of the administrative lapse, the Departmental Promotion Committee did

not hold a sitting from 1964 to 1980. The respondents cannot suffer owing to such administrative lapse on the part of the State of Kerala for no fault on their part. It is also not disputed, that in ordinary course they were entitled to be promoted to the post of Assistant Directors, in the event, a Departmental Promotion Committee had been constituted in due time. In that view of the matter, it must be held that the State of Kerala took a conscious decision to the effect that those who have been acting in a higher post for a long time, although on a temporary basis, but were qualified at the time when they were so promoted and found to be eligible by the Departmental Promotion Committee at a later date, should be promoted with retrospective effect. "

14. He placed reliance upon **Shekhar Ghosh (Supra)**. Relevant paragraphs 17 and 19 are quoted below :-

"17.. It is not denied or disputed that even when a mistake is sought to be rectified, if by reason thereof, an employee has to suffer civil consequences ordinarily the principles of natural justice are required to be complied with. It was so held in Ram Ujarey v. Union of India [(1999) 1 SCC 685] in the following terms:-

"17. There is yet another infirmity in the impugned order of reversion. The appellant had been allowed the benefit of service rendered by him as Coal Khalasi in the Loco Department from 1964 to 1972 as that period was counted towards his seniority and it was on that basis that he was called for the trade tests which the appellant had passed and was, thereafter, promoted to the posts of Semi-skilled Fitter and Skilled Fitter. If the benefit of service rendered by him from 1964 to 1972 was intended to be withdrawn and promotion

orders were to be cancelled as having been passed on account of mistake, the respondents ought to have first given an opportunity of hearing to the appellant. The appellant having earned two promotions after having passed the trade tests, could not have been legally reverted two steps below and brought back to the post of Khalasi without being informed that the period of service rendered by him from 1964 to 1972 could not be counted towards his seniority and, therefore, the promotion orders would be cancelled. In a situation of this nature, it was not open to the respondents to have made up their mind unilaterally on facts which could have been shown by the appellant to be not correct but this chance never came as the appellant, at no stage, was informed of the action which the respondents intended to take against him."

19. If a mistake is to be rectified the same should be done as expeditiously as possible. [See Board of Secondary Education, Assam v. Mohd. Sarjumba (2003) 12 SCC 408]"

15. He also placed reliance upon **State of W.B. & Others (Supra)**. Relevant paragraph 25 is being quoted as under :-

"25. In our opinion the conclusion (B) was added to cover a different kind of situation, wherein the appointments are otherwise regular, except for the deficiency of certain procedural requirements laid down by the rules. This is clear from the opening words of the conclusion (B), namely, 'if the initial appointment is not made by following the procedure laid down by the rules' and the later expression 'till the regularisation of his service in accordance with the rules'. We read conclusion (B), and it must be so read to re-council with conclusion (A), to cover the

cases where the initial appointment is made against an existing vacancy, not limited to a fixed period of time or purpose by the appointment order itself, and is made subject to the deficiency in the procedural requirements prescribed by the rules for adjudging suitability of the appointee for the post being cured at the time of regularisation, the appointee being eligible and qualified in every manner for a regular appointment on the date of initial appointment in such cases. Decision about the nature of the appointment, for determining whether it falls in this category, has to be made on the basis of the terms of the initial appointment itself and the provisions in the rules. In such cases, the deficiency in the procedural requirements laid down by the rules has to be cured at the first available opportunity, without any default of the employee, and the appointee must continue in the post uninterruptedly till the regularisation of his service, in accordance with the rules. In such cases, the appointee is not to blame for the deficiency in the procedural requirements under the rules at the time of his initial appointment, and the appointment not-being limited to a fixed period of time is intended to be a regular appointment, subject to the remaining procedural requirements of the rules being fulfilled at the earliest. In such cases also, if there be any delay in curing the defects on account of any fault of the appointee, the appointee would not get the full benefit of the earlier period on account of his default, the benefit being confined only to the period for which he is not to blame. This category of cases is different from those covered by the corollary in conclusion (A) which relates to appointment only on ad hoc basis as a stop-gap arrangement and not according to rules. It is, therefore, not correct to say,

that the present cases can fall within the ambit of conclusion (B), even though they are squarely covered by the corollary in conclusion (A)."

16. Lastly, he placed reliance upon **Board of Secondary Education of Assam** (Supra). relevant paragraphs 10 and 12 are quoted below :-

"10. Nobody can claim a right to have corrected an entry in a certificate solemnly issued by an educational institution that too the one enjoying the status of a statutory Board under the Act. The right of the applicant to have an error or mistake corrected is accompanied by a duty or obligation on the part of the Board to correct its records and the certificate issued by it. Not only it is a corresponding duty or obligation, it has also to be perceived as a power exercisable by the Board to correct an entry appearing in the certificate issued by it. People, institutions and government departments etc.- all attach a very high degree of reliability, near finality, to the entries made in the certificates issued by the Board. The frequent exercise of power to correct entries in certificates and that too without any limitation on exercise of such power would render the power itself arbitrary and may result in eroding the credibility of certificates issued by the Board. We therefore, find it difficult to uphold the contention that the applicants seeking correction of entries in such certificates have any such right or vested right.

12. Delay defeats discretion and loss of limitation destroys the remedy itself. Delay amounting to laches results in benefit of discretionary power being denied on principles of equity. Loss of limitation resulting into depriving of the remedy, is a principle based on public policy and utility

and not equity alone. There ought to be a limit of time by which human affairs stand settled and uncertainty is lost. Regulation 8 confers a right on the applicant and a power coupled with an obligation on the Board to make correction in the date of birth subject to the ground of wrong calculation or clerical error being made out. A reasonable procedure has been prescribed for processing the application through Inspector of Schools who would verify the school records and submit report to the Board so as to exclude from consideration the claims other than those permissible within the framework of Regulation 8. Power to pass order for correction is vested on a higher functionary like Secretary of the Board. An inaccuracy creeping in at the stage of writing the certificates only, though all other prior documents are correct in all respects, is capable of being corrected within a period of three years from the date of issuance of certificate."

17. Learned Standing Counsel placed reliance upon **Union of India and another** (Supra). Relevant paragraph 19 is quoted as under :-

"19. We shall now consider the efficacy of the reason so recorded in the office order. The recruitment procedure in relation to the post of Veterinary Compounder is governed by the statutory rules titled 'Central Cattle Breeding Farms (Class III and Class IV posts) Recruitment Rules, 1969, as amended from time to time and including the executive instructions issued in that behalf. As per the stated dispensation for such recruitment, the appointment letter could be issued only by an authorised officer and after grant of approval by the competent authority. Nowhere in the Original Application filed by the respondent, it has been asserted that such prior approval

is not the quintessence for issuing a letter of appointment."

18. He also placed reliance upon a judgment in the case of **Santosh Kumar Verma and others** (Supra). Relevant paragraph 5 is quoted below :-

"5. Section 6(3) of the Act only empowers the Authority to appoint the Secretary, and other officers and employees of the Authority. The power under the proviso is only a breathing elbow power given to the Authority to make temporary appointments so that the work of the Development Authority goes on pending recruitment. Therefore, when the advertisement was made for the recruitment, it was obviously in furtherance of the recruitment, it was obviously in furtherance of the power flown under the proviso for a limited period. Thereby, the appointments obviously are only temporary appointments had sought assistance of the Government for regularisation which was negated by the Public Service Commission. It is seen that these posts are within the purview of the Public Service Commission. Therefore, the Government sought the concurrence of the Public Service Commission and the Public Service Commission had not concurred and, in our view, correctly with the request made by the Government. Therefore, any regularisation in violation of the recruitment to be made by the Public Service Commission is in contravention of the law. The High Court therefore, rightly did not issue any mandamus for regularisation of the services made in contravention of the Rules to violate and no mandamus or direction would be issued to violate law. "

19. It is well settled proposition of law that the order of reversion can be passed immediately after passing of the

order of promotion and in case the order was permitted to continue for a long spell of time, then the order should be passed after affording an opportunity of hearing to the parties. In the present case, the order of reversion has been passed without affording of opportunity of hearing to the petitioner, therefore, the order is not sustainable in law.

20. On perusal of the order, it is well settled that the same has been passed without applying the mind in regard to law settled. the judgments relied upon by learned counsel for the petitioner are fully applicable to the facts and circumstances of the present case, whereas that of the learned Standing Counsel, they are distinguishable in nature and are not related to the facts and circumstances of the present case.

21. In view of the reasons recorded above, the writ petition succeeds and is **allowed**. The impugned order dated 24.4.2003 is hereby quashed. Consequences to follow.

(2023) 9 ILRA 973

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 23.08.2023

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ-C No. 6418 of 2023

M/S Aryan Group of Guard Services, Lko.

...Petitioner

Versus

U.O.I. & Ors.

...Respondents

Counsel for the Petitioner:

D.P. Dutt Tiwari, Chandra Mohan

Counsel for the Respondents:

A.S.G.I., Shishir Pradhan

Civil Law - Employees' St. Insurance Act, 1948 - Sections 44, 45, 45A, 45AA, 45C & 45E - Recovery of Contributions - Validity of Recovery Order

- Petitioner challenged recovery order dated 17.01.2020 issued by respondent No. 2 under Sections 45-C to 45-I, seeking recovery of Rs.67,33,238/- as unpaid contributions and interest for November 2018 to July 2019, alleging it was issued without determination under Section 45A. Respondents argued that petitioner's self-declared contributions on ESIC portal (C-6 compliance register) justified direct recovery, as the amount was known. Court held that under the Act's scheme, employers must file returns under Section 44, which are scrutinized under Section 45 by Social Security Officers. Determination of contributions under Section 45A is mandatory, even if returns are filed, before initiating recovery under Sections 45C to 45I. Absence of a Section 45A order renders recovery proceedings illegal, as employers cannot challenge recovery amounts under Section 45E, but can appeal a Section 45A determination under Section 45AA. No determination under Section 45A was made, making the recovery order arbitrary and contrary to law. Order dated 17.01.2020 quashed, with liberty to respondents to pass fresh orders under Section 45A. (Paras 7-9, 12-16)

Writ petition allowed.

List of Cases Cited:

Hem Kumar Gogoi Vs Employees' St. Insurance Corporation & ors., (2016) 09 Gau CK 0004

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

1. Heard Sri D.P. Dutt Tiwari, learned counsel for the petitioner as well as Sri Shishir Pradhan for respondent No.s 2 and 3.

2. The counter affidavit filed on behalf of respondent Nos. 2 and 3 is taken on record.

3. By means of the present writ petition the petitioner has sought quashing of the recovery order dated 17.1.2020 issued by opposite party No.2 under Section 45-C to 45-I of the Employees State Insurance Act, 1948 (hereinafter referred to as the Act of 1948).

4. The petitioner has challenged aforesaid recovery order on the ground that the same has been passed without carrying out any proceeding or passing any order under Section 45 A of the Act of 1948 and without passing any order of assessment as statutory required by sub-section (1) of Section 45A of ESI Act straight away directing the Recovery Officer Employees' State Insurance Corporation, Sub Regional Officer, Sarojani Nagar, Lucknow (opposite party No.3) from recovering an amount of Rs.67,33,238/- is illegal and arbitrary.

5. Sri Shishir Pradhan, on the other hand, has submitted that in the present case letter was issued on 1.1.2020 to the petitioner asking him to show cause as to why he has not deposited statutory insurance contribution amount for the workers engaged by the petitioner for which the contribution details were submitted and were available on ESIC portal. It is stated that the petitioner himself had declared contribution amount payable and numbers of workers engaged by him for the period November, 2018, December, 2018, January, 2019, February, 2019, March, 2019, April, 2019, May, 2019, June, 2019 and July, 2019 in online C-6 compliance register of ESIC and, therefore, as the amount was known, no order or determination under Section 45A with regard to the establishment and straightway recovery proceedings were initiated. He has annexed a copy of the return filed by the petitioner.

6. The petitioner has also challenged the order dated 17.1.2020 passed by Deputy Director thereby seeking to recover the amount of contribution under Section 45 C to 45 I of the Act of 1948. In the said order it is stated that the provisions of ESI Act are applicable upon the petitioner and the petitioner was required to pay Rs.61,82,611/- as contribution in respect of its employees for the period from November, 2018 to July, 2019 plus interest at the rate of 12 per cent per annum for each day and, hence, the total amount recoverable was Rs.67,33,238/-.

7. The only issue which requires to be determined by this Court is as to whether the recovery as sought to be made by the respondents by means of the impugned order could have been passed without resorting to the provisions of Section 45 A of the Act of 1948? In this regard, according to the scheme contained in the Act of 1948. Under Section 44 Employers have to furnish returns and maintain registers, in certain cases. ? *(1) Every principal and immediate employer shall submit to the Corporation or to such officer of the Corporation as it may direct such returns in such form and containing such particulars relating to persons employed by him or to any factory or establishment in respect of which he is the principal or immediate employer as may be specified in regulations made in this behalf.*

(2) Where in respect of any factory or establishment the Corporation has reason to believe that a return should have been submitted under sub-section (1) but has not been so submitted, the Corporation may require any person in charge of the factory or establishment to furnish such particulars as it may consider necessary for the purpose of enabling the Corporation to

decide whether the factory or establishment is a factory or establishment to which this Act applies.

(3) Every principal and immediate employer shall maintain such registers or records in respect of his factory or establishment as may be required by regulations made in this behalf.

8. Once the returns as provided for under Section 44 are filed the same are required to be examined by the respondent-corporation under Section 45 of the said Act where it is provided that Social Security Officers appointed by the Corporation may for the purposes of inquiring into the correctness of any of the particulars stated in any return referred to in section 44 or for the purpose of ascertaining whether any of the provisions of this Act has been complied with ?

(a) require any principal or immediate employer to furnish to him such information as he may consider necessary for the purposes of this Act ; or (b) at any reasonable time enter any office, establishment, factory or other premises occupied by such principal or immediate employer and require any person found in charge thereof to produce to such Social Security Officer] or other official and allow him to examine such accounts, books and other documents relating to the employment of persons and payment of wages or to furnish to him such information as he may consider necessary ; or (c) examine, with respect to any matter relevant to the purposes aforesaid, the principal or immediate employer, his agent or servant, or any person found in such factory, establishment, office or other premises, or any person whom the said Social Security Officer or other official has reasonable cause to believe to be or to have been an

employee;(d) make copies of, or take extracts from, any register, account book or other document maintained in such factory, establishment, office or other premises ;

(e) exercise such other powers as may be prescribed.3) [A Social Security Officer] shall exercise such functions and perform such duties as may be authorized by the Corporation or as may be specified in the regulations. [(4) Any officer of the Corporation authorized in this behalf by it may, carry out re-inspection or test inspection of the records and returns submitted under section 44 for the purpose of verifying the correctness and quality of the inspection carried out by a Social Security Officer.]

9. Section 45 A deals with determination of contributions in certain cases. ? *(1) Where in respect of a factory or establishment no returns, particulars, registers or records are submitted, furnished or maintained in accordance with the provisions of section 44 or any [Social Security Officer] or other official of the Corporation referred to in sub-section (2) of section 45 is 5[prevented in any manner] by the principal or immediate employer or any other person, in exercising his functions or discharging his duties under section 45, the Corporation may, on the basis of information available to it, by order, determine the amount of contributions payable in respect of the employees of that factory or establishment.]*

10. In case the employer is aggrieved of such determination Section 45AA provides for an appeal against such a determination. Section 45 C provides for issuance of recovery certificate by the Recovery Officer, which provides that (1) Where any amount is in arrears under this

Act, the authorized officer may issue, to the Recovery Officer, a certificate under his signature specifying the amount of arrears and the Recovery Officer, on receipt of such certificate, shall proceed to recover the amount specified therein from the factory or establishment or, as the case may be,

11. It is further provided under Section 45 E that when the authorized officer issues a certificate to a Recovery Officer under section 45-C, it shall not be open to the factory or establishment or the principal or immediate employer to dispute before the Recovery Officer the correctness of the amount, and no objection to the certificate on any other ground shall also be entertained by the Recovery Officer.

12. From the aforesaid, provisions it is clear that a mechanism for determination of the amount due upon upon the employees as its contribution under the Act of 1948 has been clearly provided. The employer is mandated to file its return under Section 44 of the Act. The said return is to be scrutinized by Social Security Officer under Section 45 of the Act and treating the return filed under Section 44 or the report submitted by Social Security Officer under Section 45 is treated as determining the outstanding by the employer under Section 45 A of the Act. Sub clause 2 of the Section 45 A clearly provides that such determination would amount to an order made by the Corporation under Section 45 A (1) and shall be sufficient proof of the claim of the Corporation under Section 75 or for recovery of the amount determined by such order as an arrears of land revenue under Section 45 B or the recovery under Section 45 C to Section 45 I.

13. From the aforesaid it is clear that under 45 A it is provided that determination for certain amount will have to be made in all cases where contribution of the employer is contested.

14. In absence of any order passed under Section 45A no recovery can be proceeded against. This also seems to be the only interpretation in as much as the employer is restrained from challenging the amount stated in the recovery notice and the order issued by the Recovery Officer while determination made under Section 45 A is appeal-able under Section 45 AA and it is only either the order under Section 45 A is finalized and in case no appeal is filed or after the appeal is filed and subsequently the order of appellate authority under Section 45 AA the amount has been finally determined and the respondents can, therefore, proceeded to recover the amount under Section 45 C.

15. In view of the above, this Court is of the considered opinion that even if the employer has not filed any return still the respondents are duty bound to make determination under Section 45 A of the Act of 1948. In the present case, it is not disputed that there is no determination under Section 45A and the respondents have directly proceeded to pass recovery notice under Section 45 E which accordingly is illegal and arbitrary and contrary to the provisions of the Act. This aspect of the matter has already been considered by the Gauhati High Court in the case of Hem Kumar Gogoi Vs. Employee's State Insurance Corporation and others reported in (2016) 09 Gau CK 0004, the relevant portion of which is quoted as under:-

"20. Unless there is an order determining the amount of contribution payable in respect of employees of the factory or establishment under Section 45 A (1), Section 45 A(2), Section 45 B and 45 C, will not come into the play. In absence of any final order passed under Section 45 A (1), as demonstrated by the materials on record, the impugned order dated 10.06.2010 has to be construed as being without jurisdiction in the eye of law. "

16. In light of the above, no determination under Section 45 A has been made by the respondents and accordingly the recovery proceedings initiated against the petitioner are illegal and arbitrary and contrary to the provisions of law. The order impugned dated 17.1.2020 issued by opposite party No.2 under Section 45-C to 45-I of the Employees State Insurance Act, 1948 is quashed and all the proceedings in pursuance of the said order are also set aside.

17. Liberty is granted to the respondents to pass fresh orders as per Section 45 A and accordingly proceed further in the matter in accordance with law.

18. The writ petition thus stand allowed.

(2023) 9 ILRA 977
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.09.2023

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

Writ-C No. 11005 of 2023
with
Writ-C No. 5992 of 2023

**Anjuman Siddiquia Jamia Noorul Oloom
Munshipur, Mubarakpur Azamgarh & Ors.**
...Petitioners

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioners:

Sri Ami Tandon, Sri Anoop Trivedi (Sr. Advocate)

Counsel for the Respondents:

C.S.C.

**Civil Law - Uttar Pradesh Board of
Madarsa Education Act, 2004 - Sections 2,
3, 9, 10 & 13 - Constitution of India, 1950
- Article 14 & 226 - Validity of S.I.T. Report
and Government Resolution - Natural Justice -
Petitioners challenged the order dated
09.01.2023 approving the Resolution dated
19.12.2022, based on the S.I.T. report dated
30.11.2022, which recommended criminal action
and withdrawal of recognition for 219 non-
existent Madaras, including petitioners', for
alleged embezzlement of funds under the
Madarsa Modernisation Scheme. Petitioners
argued that the S.I.T. investigation was ex-
parte, violating natural justice, and the
Madarsa in Writ-C No. 11005 was closed in
2017. Respondents contended that the S.I.T.
conducted thorough spot and portal-based
inspections, finding petitioners' Madaras
non-existent, with funds misappropriated in
collusion with officials. Court held that the
St.Government's power under Section 13(4)
allows immediate action without Board
reference, potentially diluting natural justice
principles. Section 10(2)(vi) ensures
opportunity for institutions to respond before
Board action. The Division Bench order dated
09.02.2023 in *Criminal Misc. Writ Petition
No. 1131 of 2023* upheld the S.I.T. report
and Resolution, finding no legal requirement
for prior notice in preliminary inquiries for
F.I.R. lodging. Interim orders in related cases
were deemed *per incuriam* for ignoring the
Division Bench ruling. Writ petitions
dismissed, with liberty to petitioners to raise
grievances before competent authorities.
Interim orders vacated. (Paras 33-36, 39-43,
52)**

Writ petitions dismissed.

List of Cases Cited:

1. UOI Vs J.N. Sinha & anr., AIR 1971 SC 40
2. Young Vs Bristol Aeroplane Co. Ltd., (1944) 2 All ER 293
3. St. of U.P. & anr. Vs Synthetics and Chemicals Ltd. & anr., (1991) 4 SCC 139
4. Nirmal Jeet Kaur Vs St.of M.P. & anr., JT 2004 (7) SC 161
5. Govt. of Andhra Pradesh & anr. Vs B. Satyanarayana Rao (Dead) by Lrs., (2000) 4 SCC 262
6. St. of Bihar Vs Kalika Kuer @ Kalika Singh & ors., JT 2003 (4) SC 489
7. Mamleshwar Prasad & anr.Vs Kanahaiya Lal (Dead), (1975) 2 SCC 232
8. Rajpur Ruda Meha & ors.Vs St.of Gujarat, AIR 1980 SC 1707
9. A.R. Antule Vs R.S. Nayak, AIR 1988 SC 1531
10. Municipal Corporation of Delhi Vs Gurnam Kaur, AIR 1989 SC 38
11. Punjab Land Development and Reclamation Corporation Ltd., Chandigarh Vs Presiding Officer, Labour Court, Chandigarh & ors., (1990) 3 SCC 682
12. Maharashtra St.Cooperative Cotton Growers Marketing Federation Ltd & anr.Vs Employees' Union & Another, 1994 Supp (3) SCC 385
13. Pawan Alloys & Casting Pvt Ltd, Meerut Vs U.P. St.Electricity Board & ors., (1997) 7 SCC 251
14. Ram Gopal Baheti Vs Girdharilal Soni & ors., (1999) 3 SCC 112
15. Sarnam Singh Vs Dy. Director of Consolidation & ors., (1999) 5 SCC 638
16. Govt. of Andhra Pradesh Vs B. Satyanarayana Rao, AIR 2000 SC 1729

17. Arnit Das Vs St.of Bihar, (2000) 5 SCC 488
18. M/s. Fuerst Day Lawson Ltd. Vs Jindal Exports Ltd., AIR 2001 SC 2293
19. A-One Granites Vs St.of U.P. & ors., (2001) 3 SCC 537
20. Suganthi Suresh Kumar Vs Jagdeeshan, AIR 2002 SC 681
21. Director of Settlements A.P. & ors.Vs M.R. Apparao & Another, (2002) 4 SCC 638
22. S. Shanmugavel Nadar Vs St.of T.N & Another, (2002) 8 SCC 361
23. St. of Bihar Vs Kalika Kuer Kalika Singh & ors., AIR 2003 SC 2443
24. Manda Jaganath Vs K.S. Rathnam & ors., (2004) 7 SCC 492

(Delivered by Hon'ble Kshitij Shailendra, J.)

1. These two writ petitions, connected with each other, were heard simultaneously and since they involve identical factual and legal controversy, both are being decided by a common judgment.

WRIT C No.11005 of 2023**THE CHALLENGE**

2. This writ petition has been filed challenging an order dated 09.01.2023 passed by the Special Secretary, Government of U.P., Lucknow insofar as it pertains to the petitioners and contains a direction for an action to be taken against them in pursuance of a report dated 30.11.2022 submitted by the Special Investigation Team (S.I.T.), as considered in the meeting held on 19.12.2022. Further prayer is for quashing the S.I.T. report itself to the extent it pertains to the petitioners and also for quashing the Resolution dated

19.12.2022 passed in a meeting headed by Chief Secretary of the State Government whereby recommendation to accept the S.I.T. report has been made. Another relief claimed is that the respondents may not harass or take coercive measures against the petitioners.

FACTS OF THE CASE

3. The petitioner No.1-Anjuman Siddiquia Jamia Noorul Oloom Munshipur, Mubarakpur, Azamgarh through its Manager Mr. Zaheen Ahmad (hereinafter referred to as 'the Society') registered under the Societies Registration Act, 1860 (hereinafter referred to as 'the Act, 1860'), established a Madarsa in the name and style of petitioner No.2- Madarsa Ashrafia Madintul Banat, Mubarakpur, Azamgarh (hereinafter referred to as 'the Madarsa') over the properties taken on lease and sale; deeds annexed. After due verification, Madarsa was registered under the provisions of the Uttar Pradesh Board of Madarsa Education Act, 2004 (hereinafter referred to as 'the Act, 2004') by a Registration Certificate dated 27.07.2011 and the State Government introduced a Scheme named "Madarsa Adhunikaran (Modernisation) Scheme" for providing teachers to the Madarsas and to provide financial assistance to them for the purposes of teaching different subjects and, under the said Scheme, the petitioner No.2-Madarsa appointed three qualified teachers, namely Kahakasha Parveen (petitioner No.3), Subi Parveen (petitioner No.4) and Mohd. Shah Faizal (petitioner No.5).

4. It is further pleaded that under the aforesaid Scheme, a total sum of Rs.1,02,000/- was released by the State Government in two strokes (Rs.30,000/- + Rs.72,000/-) by 31.01.2016 and the said

amount was directly transferred to the bank accounts of petitioner nos.3, 4 and 5, i.e. the teachers, and its details were uploaded on the Portal of Madarsa and, later on, due to various difficulties including financial crunch, a decision to close down the Madarsa was taken and, during the said course, a letter dated 31.07.2017 was written by the petitioners to the respondent No.4-District Minority Welfare Officer, Azamgarh to withdraw the Madarsa from the aforesaid Scheme and, further, by another letter dated 27.11.2017, decision to close down the Madarsa was communicated by the petitioner No.2.- Madarsa to the respondent no.4 and, consequently, the Madarsa stood finally closed in November, 2017.

THE ISSUE RAISED BY THE PETITIONERS

5. The issue raised is that the Special Investigation Team (S.I.T.), constituted to examine various complaints against Madarsa, submitted a report dated 30.11.2022 which was placed before a Committee headed by Chief Secretary of the State Government in its meeting dated 19.12.2022 and proceedings of the said meeting disclose various actions proposed to be taken against various Madarsas, including the petitioner-Madarsa, which include lodging of F.I.R. against the office bearers of the Madarsa under Sections 409, 420, 467, 468 and 471 I.P.C. The case of the petitioners is that the Madarsa-Authorities were never provided any opportunity, either to participate in the investigation conducted by the S.I.T. or before passing of the Resolution dated 19.12.2022 or before accepting the S.I.T. report and the Resolution under the impugned order dated 09.01.2023. They have alleged the entire proceedings having

been undertaken in utter violation of principles of natural justice, terming the same to be thoroughly ex-parte, arbitrary, perverse, erroneous, discriminatory, unjustified and in violation of Article 14 of the Constitution of India.

DEFENCE IN COUNTER AFFIDAVIT

6. A counter affidavit has been filed on behalf of the respondents which has been sworn by the Additional Superintendent of Police, State S.I.T., U.P., Lucknow and the defence taken is that in furtherance of a letter dated 23.10.2020 issued by the Special Secretary, Home (Police) Anubhag-3, U.P., Lucknow, on the basis of recommendations made by the Director, Minority Welfare, U.P., Lucknow dated 12.07.2017, during the course of verification of Madarsas uploaded on the concerned portal of District Azamgarh, inquiry about 313 Madarsas was conducted and, having found various unwarranted activities and anomalies, a decision to get the investigation conducted through S.I.T. was taken and, consequently, investigation was conducted by the S.I.T. and following facts came into light, as pleaded by the respondents:-

I. During verification of uploaded Madarsa on the Madarsa Portal in District-Azamgarh by the State Special Investigation Team, U.P., Lucknow, upon the investigation of 313 Madarsa being found against standards. However, out of the aforesaid 313 Madarsa, 72 Madarsas have not been found to be as per standards. Meaning thereby, they were running, but did not fulfill various conditions in respect of recognition. These Madarsas after many years, did not complete the standards to fulfill the conditions for granting

recognition, they were not having any building or land. As such, while committing grave negligence and irregularities, these Madarsas have been granted recognition by the concerned authorities. Hence a recommendation has been made to withdraw the recognition of these 72 Madarsas and to proceed with the departmental proceedings against the employee/officer, who has granted recognition.

II. During inquiry, out of 313 Madarsas, 219 Madarsas have been found to be non existent. Meaning thereby, the Madarsas are only running on papers. Actually, these Madarsas, which have been shown to be run is only for the purpose to embezzle the Government Aid. The Madarsa Modernization Scheme started in the year 1994. Under the aforesaid scheme, in the name of the abovenoted non existing Madarsas, how much fund has been sanctioned, in this regard, the Minority Welfare Department could not furnish full and satisfactory information. Out of 313 Madarsa, which were under inquiry, only for 8 Madarsas recognition file records were made available only for the year 2014-15 and 2015-16. The amount, which has been paid to it, its details have been made available.

III. The concerned departmental officer/employee in collusion with the Manager and the Teachers of Modern Subjects (in whose accounts the amount of honorarium is being paid), while committing conspiracy, fabricating and cheating, said forged Madarsas have been shown to be run on papers and the Government Fund has been embezzled. The Kendra Puronidhanit Madarsa Adhunikikaran Yojna, which is being run since about 25 years, apart from it for misuse of the Government Fund and the scholarship to be paid to the minority

students, the important Government Records are missing. Along with cancellation of withdrawal of the above-noted 219 non existing Madarsas, the employees/officers, who have granted recognition to the total 219 Madarsas and for missing of the records and embezzlement of the Government Fund, a recommendation has been made to register the prosecution against them. Along with it, for the purpose to embezzle the Government Fund, above 219 non existing Madarsas, which are shown to be run on papers only, a recommendation has been made to lodge the prosecution against the Manager and the so called Teachers (who have obtained honorarium in their bank account).

IV. To end the problems of non existing and forged Madarsas, for maintaining various process in respect of granting recognition and aid to the Madarsas, Madarsa Portal was launched in the year 2017. The Madarsas were required to upload all information on Madarsa Portal. The hardcopy of the information after uploading the information on its Portal, after countersign along with stamp was to be sent to the District Minority Welfare Officer, so that the Madarsas could be verified and after verification, the information, which has been uploaded on the Portal of the Madarsas, the same could be approved by the District Minority Welfare Officer. Either the non existing Madarsas. did not upload the information on the Portal or uploaded the part or false information. In the Physical Verification made by the District Minority Welfare Officer, Azamgarh, the forged and non existing Madarsas in a large number were found.”

7. Regarding the petitioner no.2-Madarsa, following factual position has

been pleaded by the respondents as per the S.I.T. report:-

“6. That during inquiry, with regard to Madarsa Asharfiya Madintul Banat Mubarakpur, Azmagarh (Madarsa I.D. 191200855), the following facts came into the light:-

I. On 22.06.2011, the Madarsa has been granted recognition at the level of 'Aliya'.

II. The Madarsa on its Portal had shown 3 rooms of Tahtaniya level of 300 Square Feet, 3 rooms of Fauquania of 300 Square Feet, 3 rooms of 300 Square Feet, 1 Principal Room of 150 Square Feet, 1 Library of 150 Square Feet and 1 Office Room of 150 Square Feet, while in the spot inspection, Madarsa has not been found to be run, The Madarsa is non existing.

III. The Madarsa on Madarsa Portal had shown 130 students of Tahtaniya Level, 92 students of Fauquania Level and 32 students of Aliya, while on the spot, it could not be verified. The Madarsa is non existing.

IV. Under the Modernization Staff on Madarsa Portal by the Madarsa, three names of Modern Teachers have been given i.e Kahkasha Parveen, Shah Faisal and Subi Parveen. The details of payment chart is as under:-

केन्द्रांश मानदेय भुगतान विवरण-1									
क्र०	लॉट संख्या	मदरसे का नाम व आई० डी०	शिक्षक का नाम	भुगतान की गयी धनराशि	खाता संख्या	बैंक का नाम	भुगतान दिनांक	अपलोडर का विवरण	अप्रूवरी का विवरण

90	15 06	मदरसा अशर फिया मदीनतु ल बनात मुबारक पुर 1912 0085 5	कह कशा परवी न	72 00 0	49 55 02 01 00 06 15 7	यू ० बी ० आ ई अ मि लो	28. 03. 20 17	इर शा द अ ह मद	ला ल म न
			मो० शाह फैश ल	72 00 0	49 55 02 01 10 07 46 3	यू ० बी ० आ ई अ मि लो	28. 03. 20 17	इर शा द अ ह मद	ला ल म न
			शूबी परवी न	72 00 0	49 55 02 01 10 02 78 9	यू ० बी ० आ ई अ मि लो	28. 03. 20 17	इर शा द अ ह मद	ला ल म न
			कह कशा परवी न	30 00 0	49 55 02 01 00 06 15 7	यू ० बी ० आ ई अ मि लो	28. 03. 20 17	इर शा द अ ह मद	ला ल म न
			मो० शाह फैश ल	30 00 0	49 55 02 01 10	यू ० बी ० आ	28. 03. 20 17	इर शा द अ ह	ला ल म न

					07 46 3	ई अ मि लो		मद	
			शूबी परवी न	30 00 0	49 55 02 01 10 02 78 9	यू ० बी ० आ ई अ मि लो	28. 03. 20 17	इर शा द अ ह मद	ला ल म न
		कुल योग		3,0 6,0 00					

V. The Madarsa after taking the printout of the uploaded information from the Portal of Madarsa, the Manager of the Madarsa did not make available to the District Minority Welfare Officer after signed and stamped.

VI. The Madarsa has not been locked by the District Minority Welfare Officer on its portal and along with it, the District Minority Welfare Officer did not make available the file record of recognition.

VII. On inspection, above-noted Madarsa has been found to be non existing. File-record relating to the recognition of Madarsa was also not made available by the District Minority Welfare Officer, Azamgarh. The Manager of the Madarsa has uploaded the false information on the Madarsa Portal However, as provided under the UP. Board of Madarsa Education Act and rule thereunder, the petitioners violated the conditions relating to building, number of students and other conditions relating to all recognition. Against this non existing Madarsa, the Minority Welfare Department, while 7 proceeding in the

matter as per rules At shall be appropriate to withdraw recognition granted to it.

VIII. The District Minority Welfare Officer, Azamgarh under the Kendra Puronidhanit Madarsa Adhunikikaran Madarsa Yojna, has made available the amount to the Madarsas, as per the information, for the various periods of 2014-15 and 2015- 16. Under the Kendra Puronidhanit Madarsa Adhunikikaran Madarsa Yojna, for 2016-17, Rs.3,06,000/- has been paid as honorarium to the teachers of Modern Subjects i.e. Kahkasha Parveen, Mohd. Shah Faizal and Shubi Parveen in the Bank Accounts. It has been approved by the then District Minority Welfare Officer, Sri Lalman. Regarding this non existing Madarsa, the Manager, Ahmadullah in collusion with the then District Minority Welfare Officer, Sri Lalman and the Modernization Teachers, Kahkaasha Parveen, Mohd. Shah Faizal and Shubi Parveen, embezzled the Government Aid."

8. It has further been pleaded that in view of the above report, decision to take criminal action against the erring persons has been taken and an identical challenge was made by certain teachers of some Madarsa by filing CRIMINAL MISC. WRIT PETITION NO.1131 of 2023 (SMT. NESHAT FATMA DAUDI AND OTHERS V. STATE OF U.P. THRU. ADDL. CHIEF SECY. HOME LKO. And OTHERS) before this Court which was dismissed by a Division Bench vide order dated 09.02.2023. Regarding alleged ex-parte proceedings, reliance has been placed upon Statement of Objects and Reasons of the Act, 2004 as well as various powers conferred upon the State Government including power under Section 13 of the Act, 2004. It has also been pleaded that the petitioners participated in the enquiry

proceedings but the Manager did not make available relevant records nor were details found uploaded during the course of Portal examination and also during spot inspection and overall situation reveals that the Madarsa was non-existent.

REJOINDER AFFIDAVIT

9. The petitioners' rejoinder affidavit reiterates their stand regarding proceedings being ex-parte with a further statement that in the year 2016, an Inspection Committee headed by Block Education Officer, Azamgarh was constituted which carried out spot inspection and certified the existence of Madarsa in question and, only thereafter, the salaries of petitioner nos. 3, 4 and 5 (teachers) were released. Reliance has been placed upon an Inspection Memo dated 20.07.2016, a copy whereof is said to have been served upon petitioners under the R.T.I. Act under the signatures of District Minority Welfare Officer, Azamgarh alongwith her letter dated 13.06.2023. Further reliance has been placed upon two interim orders dated 11.04.2023 and 19.05.2023, respectively passed in Application U/S 482 Cr.P.C. No.3380 of 2023 (Jawed Aslam v. State of U.P. Thru. Prin. Secy. Home U.P. Lok Bhawan Lko. And 4 others) and Application U/S 482 Cr.P.C. No.4891 of 2023 (Lalman v. State of U.P. Thru. Prin. Secy. Addl. Chief Secy. Deptt. of Home and others), whereby a Co-ordinate Bench of this Court has stayed the effect and operation of the S.I.T. report as well as further proceedings in relation to the concerned applicants.

10. I have heard Shri Anoop Trivedi, learned Senior Advocate assisted by Shri Ami Tandon on behalf of the petitioners and Shri Manish Goyal, learned Additional

Advocate General alongwith Shri I.P. Srivastava, learned Additional Chief Standing Counsel on behalf of the State-respondents.

11. During the course of arguments, this Court had taken on record a copy of letter dated 25.08.2017 alongwith its enclosures issued by the District Magistrate, Azamgarh to various Authorities which was placed before the Court by the petitioners and arguments on the same were also heard. This fact is also noted in the order dated 21.08.2023 while reserving the judgment.

CONTENTION OF PETITIONERS

12. Most of the contentions raised on behalf of the petitioners have already been noted in this judgement while referring to the pleadings and, hence, need not to be repeated. In sum and substance, the submission is that though the Madarsa was rightfully established and recognized in the year 2011 and has been closed down in the year 2017, any action taken or proposed to be taken against the Madarsa or its authorities or teachers, pursuant to the ex-parte report of S.I.T. is invalid and, hence, not only the S.I.T. report but also the consequential Resolution dated 19.12.2022 and its approval under the order dated 09.01.2023 is invalid and unsustainable. The argument is that S.I.T. has never allowed the petitioners to participate in the enquiry and spot inspection was never carried out but the decision has been taken only on the basis of portal information. Further argument is that spot inspection was once carried out in 2016 (vide Annexure RA-1 to the rejoinder affidavit) where the petitioner-Madarsa was found to be functional and, hence, the ground taken in the impugned Resolution that in 2014-

2015 and 2015-2016, the petitioner-Madarsa was not functional and financial aid provided by the State Government was obtained by manipulation is factually incorrect, and even the said spot inspection report dated 20.07.2016 has not been taken into consideration by the S.I.T.

CONTENTION OF RESPONDENTS

13. *Per contra*, it has been argued on behalf of the respondents that S.I.T. conducted thorough investigation, both based on portal information and spot inspection and found Madarsa as non-existent and that the impugned Resolution dated 19.12.2022 has been passed in the meeting held by the State Government under the Chairmanship of Chief Secretary, Ministry of Home Affairs, U.P. Government, in which, apart from him, Additional Chief Secretary of Minority Welfare and Waqf Department, U.P., Government and Director General of Police, U.P. Lucknow were also present and signed the minutes and decision of authorities of such high level cannot be lightly challenged.

14. So far as the interim orders passed in the Applications U/S 482 Cr.P.C. Nos.3380 of 2023 and 4891 of 2023 are concerned, it has been argued that they were passed when the criminal action was being taken against Registrar of the Madarsa Board and another Official and, taking note of the interim order dated 19.04.2023, passed by this Court in the present Writ C No.11005 of 2023, Resolution dated 19.12.2022 and the S.I.T. report dated 30.11.2022 as well as further consequential proceedings, insofar as the same related to the applicants of the said applications were stayed. It has further been argued that the stay order passed in

aforesaid applications under Section 482 Cr.P.C. would be of no avail as the challenge made to the S.I.T. report dated 30.11.2022 as well as impugned decision dated 09.01.2023 taken by the Government approving the Resolution dated 19.12.2022 has already been turned down by the Division Bench of this Court in the order dated 09.02.2023 passed in the Criminal Misc. Writ Petition No.1131 of 2023. Relevant portions of the S.I.T. report and conclusion drawn by the S.I.T. during the investigation and also the Resolution dated 19.12.2022 were pressed with vehemence on behalf of the State and, as regards the pleadings contained on record, it was also argued that once specific details in relation to the non-existence of the petitioner-Madarsa were spelt out in various sub-paragraphs of 'paragraph 6' of the counter affidavit, the same have not been denied in the rejoinder affidavit and, only this much has been stated in 'paragraph 10' of the rejoinder affidavit that contents of 'paragraphs 6 (I), (II), (III) and (IV) of the counter affidavit are matter of record and need no reply.

15. The submission is that Division Bench final order dated 09.02.2023 shall prevail over interim orders passed by the learned Single Judge in Applications U/S 482 Cr.P.C. Nos.3380 of 2023 and 4891 of 2023 and, even otherwise, the interim orders were only in relation to the Officials of the Madarsa Board and have no concern with the petitioners and were passed without taking into consideration the order dated 09.02.2023.

16. With regard to the power of the State Government to take action, reliance has been placed on Section 13 of the Act, 2004 and it has also been argued that the writ petition is premature as, till today,

neither the recognition granted to the petitioner-Madarsa has been withdrawn nor cancelled nor has any criminal action been taken against the petitioners and, further, the report of S.I.T., even otherwise, cannot be quashed in writ jurisdiction.

17. Rival contentions shall be dealt with by this Court after the factual matrix of connected Writ C No.5992 of 2023 (C/M Madarasa Islamiya And 12 Others v. State Of U.P. And 5 Others) is discussed.

WRIT-C No. 5992 of 2023 **THE CHALLENGE**

18. This writ petition has been filed by the Committee of Management of 13 Madarasas and prayers made therein are more or less identical to the prayers made in Writ-C No.11005 of 2023 except that there is no challenge to the S.I.T. report.

FACTS OF THE CASE

19. In this writ petition, reliance has been placed upon various documents to establish that in the years 2008, 2009, 2010, due recognition was granted to the Madarasas, teachers were appointed and were paid honorarium with the aid of State Government, and the case is that in an arbitrary manner and without providing any opportunity to the petitioners, impugned Resolution dated 19.12.2022 was passed and approved by the State Government on 09.01.2023.

COUNTER AFFIDAVIT

20. A counter affidavit has been filed which has been sworn by the Additional Superintendent of Police, State S.I.T., U.P., Lucknow, in which, validity of proceedings

undertaken by the S.I.T. has been pleaded with reference to the steps taken in respect of various Madarsas and pleadings, as they are, are reproduced below:-

“7. That during inquiry with regard to Madarsa Islamiya Niswas Samaisa Pawai, Azamgarh following facts came to light:-

I. That on 08.09.2008, said Madarsa was given temporary recognition by the then District Minority Welfare Officer, Azamgarh, Sri Prabhat Kumar along with Clerk, Waqf Om Prakash Pandey and Waqf Inspector Munnar Ram.

II. That on Madarsa Portal 3 rooms of 300 Square Feet of Tahtaniya Level and 105 students of Tahtaniya Level were shown and after receiving printout of uploaded information by Madarsa the team of District Minority Welfare Officer, Azamgarh inspected the Madarsa. Madarsa was not existing, all the information was given by the Madarsa was found to be incorrect, in fact, no Madrasa was existing.

III. The District Minority Welfare Officer did not lock the Madarsa on Portal and further he did not make available the record file of recognition.

IV. That the Manager of Madarsa uploaded false information and did not fulfill the requisite requirement of grant of recognition.

V. That for this non existing Madarsa Rs.3,45,000/- was made available under the Kendra Puramidhannit Madarsa Adhunikikaran Yojna by the District Minority Welfare Officer, Azamgarh, which was in collusion with Manager of Madarsa and was paid to the Adhunikikaran Teachers, Sadhna Yadav, Sumita and Sarita in the year 2016-17 for the period of 2014-15 and 2015-16 and thus embezzled the Government Fund.

8. That during the inquiry, the inquiry with regard to Madarsa Modern Public

School, Takiya Gulam Ali Shah Samisa, Pawai Azmagarh following facts came to light:-

I. That on 22.01.2009, the said Madarsa was given temporary recognition by the then District Minority Welfare Officer, Azamgarh, Sri Prabhat Kumar, Waqf Clerk, Om Prakash Pandey and Waqf Inspector, Munnar Ram.

II. That on Madarsa Portal 3 rooms of 300 Square feet was shown for Fauquaniya level whereas on spot 3 rooms of 200 square feet as school is running beside which Madarsa was said to have been running. For the running of Madarsa at Fauquaniya Level requirement of 6 rooms and 2 office room is necessary. Madarsa was found non existing.

III. That on Portal Zero student of Tahtaniya level and 115 students of FAuquaniya Level was shown but on inspection, it was not found and Madarsa was non existent.

IV. That in the name of Madarsa Public School was running, which showed that there was no Madarsa in existence.

V. That after getting printout of uploaded information, the District Minority Welfare Officer and his team inspected the Madarsa, but he did not lock the Madarsa on Portal and further he did not make available the file record of recognition of Madarsa.

VI. That the Madarsa was not existing, the Manager uploaded wrong information on Madarsa Potal.

VII. That for this non existent Madarsa, Rs.56,000/- was made available under the Kendra Puronidhanit Madarsa Adhunikikaran Yojna by the District Minority Welfare Officer, Azamgarh, which was in collusion with Manager Raunak and was paid to the Adhunikikaran teacher Vinod Kumar Yadav Motilal and Sangita in

the year 2016-17 for the period fo 2014-15 and 2015-16 and thus embezzled the Government Fund

9. That during inquiry with regard to Madarsa Islamiya Imam Ali Razzakpur, Pawai, Azamgarh, following facts came into light:-

I. The said Madarsa was recognized on 26.06.2009 at Fauquaniya level and on the Madarsa Portal 3 rooms 300 square meters was shown at Fauquaniya level, but on inspection there was no Madarsa instead one resident house was found under one Tin Shade. There was one car and 2 small rooms were found. No display Board was found. It was also said that 2 recognized Madarsa was running therein one house. This Madarsa was not existing.

II. That on Portal zero student of Tahtaniya Level and 102 students of Fauquaniya level was shown by it, was not verified on spot and the Madarsa was found non existent. After inspection the District Minority Welfare Officer did not lock the Madarsa on Portal.

III. That Rs.66,000/- was paid to the teachers namely, Tabassum, Mohd. Wasim and Shahanwaz Alam in collusion with District Minority Welfare Officer, Lalman Manager Kamaruddin, hence there was embezzlement of Government Fund found.

10. That during inquiry with regard to sMadarsa Amina Nishwan Razzakpur, Pawai, Azamgarh following facts came to light:-

I. That on 08.09.2008, the said Madarsa was accorded temporary recognition at Tahtaniya Level. On the Madarsa Portal, 3 rooms of 300 Square Feet of Tahtaniya Level was shown but on spot inspection no Madarsa was found. One residence was shown where a four wheeler was standing there in the garage. 2

small rooms were found. There was no display board on Madarsa.

II. That 150 students of Tahtaniya Level was shown on Portal, but on spot inspection no Madarsa with 150 students was found. The Madarsa was not existing.

III. That no record file of recognition was made available by the District Minority Welfare Officer and the Manager Kamaluddin had uploaded wrong information on the Portal.

IV. That Rs.66,000/- was made available to the Madarsa in connivance with Manager by the District Minority Welfare Officer, Azamgarh under Kendra Puronidhanit Madarsa Adhunikikaran Yojna, which was paid to teachers Amina Khatoon, Sushma and Tarul. Thus, for non existing Madarsa, Government Fund was embezzled by the Manager Kamaluddin, Teachers and District Minority Welfare Officer, Azamgarh.

11. That during the enquiry with regard to Madarsa Ashrafiya Niswan Mahul, Azamgarh following facts came into light:-

I. That the said Madarsa was given temporary recognition at Tahtaniya Level on 8th September, 2008. At Madarsa Portal 3 rooms of 300 Square Feet, one Principal room of 150 Square Feet one Office room of 150 Square Feet were shown. whereas, on spot there was no Madarsa running and the Madarsa was not existing.

II. That 130 students of Tahtaniya Level was shown on the Madarsa Portal, but on inspection, no student was found. The Madarsa was not existing.

III. That no printout of information on Portal was handed over to the District Minority Welfare Officer, Azamgarh by the Manager Ahtsham Ahmad Khan. The District Minority Welfare Officer, Azamgarh did not lock on Portal and

record of recognition was also made available.

IV. That the Manager thus uploaded wrong information on the Madarsa Portal and in collusion with District Minority Welfare Officer under Kendra Purnidhanit Madarsa Adhunikikaran Yojna in 2016-17 year for the year 2014-15 and 2015-16 receives Rs.66,000/- and paid in the Bank Account of teachers Shabana Bano, Alsha bano and Nahid Fatma. Thus, the Manager Ahtsham Ahmad Khan, District Minority Welfare Officer, Azamgarh, Sri Lalman and above- noted teachers embezzled the Government Fund.

12. That during the enquiry with regard to Madarsa Noor Islam Shikshan Sansthan, Khalispur, Azamgarh, following facts came into light:-

I. That said Madarsa was given temporary recognition of Tahtaniya Level as on the Madarsa Portal 3 rooms of 300 Square Feet, 1 office room of 150 Square Feet were shown but on the spot a public school was running. From the statement of nearby public there was no Madarsa was running, but a school other than Madarsa was running. On the spot, Dr. Ambedkar Public School was running in short VAHSS was written. The Madarsa was not existing.s

II. That on Madarsa Portal wrongfully 134 students of Tahtaniya Level was shown, but on spot Public School was running and Madarsa was not existing.

III. That by the District Minority Welfare Officer, District- Azamgarh in collusion with Manager, who uploaded wrong information on the Madarsa Portal Rs.80,000/- was paid to Madarsa for Kendra Purnidhanit Madarsa Adhunikikaran Yojna in the year 2016-17 for the year 2014-15 and 2015-16 and was paid in the Bank Account of Teacher of non

existing Madarsa Nirmala Kumar, Vimla Devi and Ram Samujh Yadav. Thus, embezzlement of Government Fund is proved.

13. That during the enquiry with regard to Madarsa Ashfaq Ullah, Dhankatiya, Azamgarh following facts came into light:-

I. That the said Madarsa was given temporary recognition of Tahtaniya Level and on the Madarsa Portal 3 rooms of 300 Square Feet was shown, but on spot Public School was running. The Madaras was not existing.

II. That on the Madarsa Portal 133 students of Tahtaniya Level was shown but on spot Public School was running. The Madarsa was not existing.

III. That on the Madarsa Portal, the District Minority Welfare Officer, Azamgarh did not lock and for Adhunikikarn Staff, who were shown on Madarsa Portal, Rs.55,000/- was paid in the Bank Account of teachers Sanjay Kumar, Vimla Devi and Rajesh Kumar Maurya. The Madarsa was not existing and thus the Manager Alim Ali in collusion with District Minority Welfare Officer, Lalman along with Adhunikikaran Teachers embezzled the Government Fund in the year 2016-17 for the years 2014-15 and 2015-16.

14. That during the enquiry with regard to Madarsa Kair Saheb, Ibrahimpur, Sathiyaon, Azamgarh, following facts came to light:-

I. That on 10.06.2008, the said Madarsa was given temporary recognition at Tahtaniya Level.

II. That on the Madarsa Portal, 3 rooms of 300 Square Feet and 127 students of Tahtaniya Level were found at the given address. The Madarsa is not existing.

III. That neither the Madarsa was locked on Portal nor recognition paper was made available by the District Minority Welfare Officer, Azamgarh.

IV. That the Manager Alim Ali in collusion with District Minority Welfare Officer, Azamgarh, Sri Lalman got payment of Rs.4,43,000/- in the year 2016-17 for the year 2014-15 and 2016-16 in the name of Kendra Puronidhaunit Madarsa Adhunikikaran Yojna and was paid in the Bank Account of non existing Madarsa Teachers Suman Lal, Ranjana Yadav, Parwati Devi and Reema Bharti and thus embezzled the Government Fund.

15. That during the enquiry with regard to Madarsa Noor Islam Niswan Shikshan Sansthan, Khalispur, Azamgarh, following facts came into light:-

I. That on 26.09.2009, the said Madarsa was granted temporary recognition at Fauquaniya Level. On the Madarsa Portal, 3 rooms of 300 Square Feet 1 room of 150 Square Feet were shown at Fauquaniya Level, whereas on spot a Public School was running. From the statements of people of locality it was informed that VAHSS named school in running. There was no Madarsa and Madarasa was nonexistent.

II. That it was stated by the Management persons that 2 Madarsas were running. On Madarsa Portal Zero student of Tahtaniya Level and 97 students of Fauquaniya Level were shown whereas on spot inspection, Public School was running. The Madarsa was not existing.

III. That on Madarsa Portal under the head of Adhunikikaran Staff 3 teachers namely Shailesh Kumar, Ravindra Kumar and Amina Khatoon were shown and Rs.1,68,000/- was paid under Kendra Puronidhanit Madarsa Adhunikikaran Yojna for the non existing Madarsa with

connivance of Manager Mozibul Gaffar with District Minority Welfare Officer, Azamgarh Sri Lalman and the said teachers. The Government Fund was embezzled.

IV. The Madarsa was also not locked on Portal of the District Minority Welfare Officer, nor recognition record file was made available.

16. That during the enquiry with regard to Madarsa Ashfaq Ullah Niswan Shikshan Sansthan, Bahkaliya, Azamgarh following facts came to light:-

I. That the said Madarsa was granted temporary recognition of Fauquaniya Level and on the Madarsa Portal 3 rooms of 300 Square Feet and 100 students of Tahtaniya Level and 85 students of Fauquaniya Level were seen.

II. That on the spot no Madarsa was found from the statement of people locality an English Medium school was running and no Madarsa was existing.

III. That under the head of Adhunikikaran Staff names of 3 teachers were shown on the Portal i.e. Azad Kumar Gautam, Ramayan Singh and Praveen Kumar, who have received Rs.2,60,000/- in their Bank Account in the year 2016-17 for the period of 2 years i.e. 2014-15 and 2015-16.

IV. That the District Minority Welfare Officer did not lock the Madarsa on Portal and in collusion with Manager Mozibol Gaffar with teachers embezzled the Government Fund.

17. That during the enquiry with regard to Madarsa Arbiya Talima) Kuran Gahni, Mirzapur, Azamgarh, following facts came into light-

I. That on 20.06.2009, the said Madarsa was granted temporary recognition of Fatuaniya Level and on the

Madarsa Portal Fauquaniya Level 2 rooms of 300 Square Feet, Tahtaniya Level 3 rooms of 300 Square Feet were found, which were not of standard of level prescribed for. In the nearby rooms, domestic goods were found. Madarsa was not existing.

II. That on the Madarsa Portal 131 students of Fauquaniya Level were shown, which not found on spot. The Madarsa was not existent.

III. That Madarsa on the Portal was locked by the District Minority Welfare Officer nor recognition record file was made available by him. The Manager has uploaded false information on Madarsa Portal.

IV. That the Manager of the alleged Madarsa Naseem Ahmad in collusion with District Minority Welfare Officer, Sri Lalman under the Kendra Purovidhanit Madarsa Adhunikikaran Yojna, received the account of Adhunik Teachers namely, Kausar, Homa Bano and Sufiya Bano to the tune of Rs.3,45,000/- in the year 2016-17 for the period of 2014-15 and 2015-16. Thus, they embezzled the Government Fund.

18. That during the enquiry with regard to Madarsa Kamarunnisha, Balaipur, Pawai, Azamgarh, following facts came into light:-

I. That on 22.01.2009, the said Madarsa was granted temporary recognition of Fauquaniya Level. On the Madarsa Portal 3 rooms of 225 Square Feet of Fauquaniya Level, 1 office room 225 Square Feet were shown whereas on spot only 3 rooms and one office room of 150 Square Feet were found, which were not upto standard prescribed for granting recognition.

II. That on the Madarsa Portal 102 students of Fauquaniya Level were shown,

but on spot it is not verified and the Madarsa was found non existing.

III. The Madaras was not locked on the Portal by the District Minority Welfare Officer, Azamgarh nor recognition record file was made available by him.

IV. That for the said Madarsa under the Kendra Purovidhanit Madarsa Adhunikikaran Yojna was given Rs.1,68,000/- in the account of teachers of Modern Subject namely Vinod Soni Isllyak Ahmad and Savita in collusion with Manager and District Minority Welfare Officer, Sri Lalman and thus embezzled the Government Fund.”

21. By taking the aforesaid stand, impugned action has been stated to be justified on the same lines on which its justification has been pleaded in the counter affidavit against Writ C No. 11005 of 2023.

REJOINDER AFFIDAVIT

22. The petitioners' rejoinder affidavit reiterates their stand taken in the writ petition and the entire thrust is upon ex-parte nature of decision.

23. I have heard Shri Ashok Khare, learned Senior Counsel assisted by Shri Rajendra Kumar Yadav on behalf of petitioners in this writ petition and Shri Manish Goyal, learned Additional Advocate General alongwith Shri I.P. Srivastava, learned Additional Chief Standing Counsel on behalf of the State-respondents.

CONTENTION OF PETITIONERS

24. The submission of Shri Ashok Khare, learned Senior Counsel, is that the

impugned decision entails serious civil consequences and, therefore, adherence to the principles of natural justice was must; that the S.I.T. report can never be treated as a substantive piece of evidence and, since the Government, in the impugned Resolution dated 19.12.2022, has already recommended for taking action against the petitioners, nothing remains for any Authority at any level, be it administrative or police, to take a different view of the matter and the S.I.T. report would always be treated as conclusive in all the proceedings and the petitioners would stand nowhere. It has further been argued that under the Scheme For Providing Education in Madaras/Minorities (S.P.E.M.M.), fixed honorarium was to be paid to the teachers teaching modern subjects in such Madaras and all the petitioners-Madaras stood identified for disbursement of honorarium; at no point of time any such aspect was properly analyzed; the petitioners were not heard in relation to the allegations made; wrong and perverse conclusion has been drawn in the impugned Resolution dated 19.12.2022 and the nature of the impugned decision is that finality has been attached to the unlawful activities of the petitioners and nothing remains for further adjudication.

CONTENTION OF THE RESPONDENTS

25. In opposition to this writ petition also, the arguments on behalf of the State-respondents are identical, as already noted in relation to Writ C No.11005 of 2023.

ANALYSIS OF RIVAL CONTENTIONS IN BOTH THE PETITIONS

26. Having heard learned counsel for the parties at length, before dealing with

the factual aspects involved in these matters, the provisions of U.P. Board of Madarsa Education Act, 2004 need a discussion. The said Act came into force on 03.12.2004. Sections 2(a), 2(d) and 2(j) define respectively, “Board”, “Head of Institution” and “recognition” in the following manner:-

“Section 2(a). “Board” means the Uttar Pradesh Board of Madarsa Education established under Section 3;

(d). “Head of institution,” in relation to and institution means the Principal or the Head Master, as the case may be, of that institution.”

(j). “Recognition” means recognition for the purpose of preparing candidates for admission to the Board’s Examination;”

27. The constitution of the Board is provided under Section 3 of the Act, 2004 which reads as follows:-

“3. Constitution of the Board.-(1) With effect from such date as the State Government may, by notification, appoint, there shall be established at Lucknow a Board to be known as the Uttar Pradesh Board of Madarsa-Education.

(2) The Board shall be a body corporate.

(3) The Board shall consist of the following members namely:

(a) a renowned Muslim educationist in the filed of traditional Madarsa-Education, nominated by the State Government who shall be the Chairperson of the Board;

(b) the Director, who shall be the Vice-Chairperson of the Board;

(c) the Principal, Government Oriental College, Rampur;

(d) one Sunni-Muslim Legislator to be elected by both houses of the State Legislature;

(e) one Shia-Muslim Legislator to be elected by both houses of the State Legislature;

(f) one representative of National Council of Educational Research and Training;

(g) two head of institution established and administered by Sunni-Muslim nominated by the State Government;

(h) one head of institution established and administered by Shia-Muslim nominated by the State Government;

(i) two teachers of institutions established and administered by Sunni-Muslim nominated by the State Government;

(j) one teacher of an institution established and administered by Shia-Muslim nominated by the State Government;

(k) one Science or Tibb teacher of an institution nominated by the State Government;

(l) the Account and Finance Officer in the Directorate of Minority Welfare, Uttar Pradesh;

(m) the Inspector;

(n) an officer not below the rank of Deputy Director nominated by the State Government, who shall be the member Registrar.”

28. The functions of the Board are defined under Section 9 of the Act, 2004 and its powers under Section 10 in the following manner:-

“9. Functions of the Board.- Subject to the other provisions of this Act, the Board shall have the following functions, namely-

(a) to prescribe course of instructions text-books, other books and instructional material, if any, for Tahtania, Fauquania,

munshi, Maulavi, Alim, Kamil, Fazil and other courses;

(b) prescribe the course books, other books and instruction material of courses of Arbi, Urdu and Pharsi for classes upto High School and Intermediate standard in accordance with the course determined there for by' the Board of High School and Intermediate Education;

(c) to prepare manuscript of the course books other books and instruction material referred to in clause (b) by excluding the matters therein wholly or partially or otherwise and to publish them;

(d) prescribe standard for the appointment of Urdu translators in the various offices of the State and ensure through the appointing authority necessary action with respect to filling up of the vacant posts;

(e) to grant Degrees, Diplomas, Certificates or other academic distinctions to persons, who-

(i) have pursued a course of study in an institution admitted to the privileges or recognition by the Board;

(ii) have studied privately under conditions laid down in the regulations and have passed an examination of the Board under like conditions;

(f) to conduct examinations of the Munshi, Maulavi, Alim and of Kamil and Fazil courses;

(g) to recognise institutions for the purposes of its examination;

(h) to admit candidates to its examination;

(i) to demand and receive such fee as may be prescribed in the regulations;

(j) to publish or withhold publication of the result of its examinations wholly or in part;

(k) to co-operate with other authorities in such manner and for such purposes as the Board may determine;

(l) to call for reports from the Director on the condition of recognised institutions or of institutions applying for recognition;

(m) to submit to the State Government its views on any matter with which it is concerned;

(n) to see the schedules of new demands proposed to be included in the budget relating to institutions recognised by it and to submit if it thinks fit, its views thereon for the consideration of the State Government;

(o) to do all such other acts and things as may be requisite in order to further the objects of the Board as a body constituted for regulating and supervising Madarsa-Education upto Fazil;

(p) to provide for research or training in any branch of Madarsa Education viz, Darul Uloom Nav Uloom, Lucknow, Madarsa Babul Ilm, Mubarakpur, Azamgarh, Darul Uloom Devband, Saharanpur, Oriental College Rampur and any other institution which the State Government may notify time to time.

(q) to constitute a committee at district level consisting of not less than three members for education upto Tahtania or Faukania standard, to delegate such committee the power of giving recognition to the educational institutions under its control it.

(r) to take all such steps as may be necessary or convenient for or as may be incidental to the exercise of any power, or the performance or discharge of any function or duty, conferred or imposed on it by this Act.

10. Powers of the Board.- (1) The Board shall subject to the provisions of this Act and the rules made thereunder, have all such powers as may be necessary' for the performance of its functions and the

discharge of its duties under this Act, or the rules or regulations made thereunder.

(2) In particular and without prejudice to the generality of the foregoing powers, the Board shall have the powers,-

(i) to cancel an examination or withhold the result of an examination of a candidate, or to disallow him from appearing at any future examination who is found by it to be guilty of,-

(a) using unfair means in the examination; or

(b) making any incorrect statement or suppressing material information or fact in the application form for admission to the examination, or

(c) fraud or impersonation at the examination: or

(d) securing admission to the examination in contravention of the rules governing admission to such examination; or

(e) any act of gross indiscipline in the course of the examination;

(ii) to cancel the result of an examination of any candidate for all or any of the acts mentioned in sub-clauses (a) to (d) of clause

(i) or for any bona fide error of the Board in the declaration of the result;

(iii) to prescribe fees for the examinations conducted by it and provide for the mode of its realisation;

(iv) to refuse recognition of an institution,-

(a) which does not fulfil, or is not in a position to fulfil, or does not come upto, the standards for staff, instructions, equipment or buildings laid down by the Board in this behalf; or

(b) which does not, or is not, willing to abide by the conditions of recognition laid down by the Board in this behalf;

(v) to withdraw recognition of an institution not able to adhere to, or make

provisions for, standards of staff, instructions, equipment or buildings laid down by the Board or on its failure to observe the conditions of recognition to the satisfaction of the Board;

(vi) to call for reports from the head of institution in respect of any act of contravention of the rules or regulations of decisions, instructions or directions of the Board and take suitable actions for the enforcement of the rules or regulations decisions, instructions or directions of the Board, in such manner as may be prescribed by regulations;

(vii) to inspect an institution for the purpose of ensuring due observance of the prescribed courses of study and that the facilities for instructions are duly provided and availed of; and

(viii) to fix the maximum number of students that may be admitted to a course of study in an institution.

(3) The decision of the Board in all matters mentioned in sub-sections (1) and (2) shall be final."

29. Insofar as the powers of State Government are concerned, the same are contained under Section 13 of the Act which reads as follows:-

"13. Power of the State Government.-
(1) The State Government shall have the right to address the Board with reference to any work conducted or done by the Board and to communicate to the Board its views on any matter with which the Board is concerned.

(2) The Board shall report to the State Government such action, if any, as it is proposed to be or has been taken upon its communication.

(3) If the Board does not, within a reasonable time take action to the

satisfaction of the State Government, the State Government may after considering any explanation furnished or representation made by the Board, issue such directions consistent with this Act, as it may think fit, and the Board shall comply with such direction.

(4) Whenever, in the opinion of the State Government, it is necessary or expedient to take immediate action, it may without making any reference to the Board under the foregoing provisions, pass such order or take such other action consistent with this Act as it deems necessary and in particular, may by such order, modify or rescind or make any regulation in respect of any matter and shall forthwith inform the Board accordingly.

(5) Any action taken by the State Government under sub-section (4) shall not be called in question in any court. "

30. A composite reading of afore-quoted sections of the Act, 2004 makes it clear that the Board, which comprises of many officers, performs various functions including a function to recognize institutions and to call for reports from the Director of Minority Welfare, U.P. on the conditions of recognized institutions or of the institutions applying for recognition. The Board also has a power to refuse recognition as per Section 10(2)(iv) of the Act, 2004 and to withdraw recognition as per Section 10(2)(v) of the Act, 2004, as per the contingencies enumerated therein. The Act further empowers the Board to call for the reports from the Heads of the Institutions and carry out requisite inspections and also to take suitable actions for enforcement of the Rules, Regulations, decisions, instructions or directions of the Board.

31. Insofar as the inter-se role of Board and State Government is concerned,

Section 13 of the Act clearly vests the State Government with a right to address the Board with reference to any work conducted or done by the Board and to communicate to the Board its views on any matter with which the Board is concerned and, thereafter, the Board is under obligation to report to the State Government about any such action taken or proposed to be taken upon communication with a further provision that the State Government may, after considering any explanation furnished or representation made by the Board, issue directions consistent with the Act, 2004 which would be complied by the Board.

32. In view of the above, neither the Board nor the State Government is powerless or functionless, in case, any illegality, irregularity, flaw, mischief, misrepresentation etc. comes to their knowledge by any means whatsoever, which may infer that either recognition was wrongfully granted to any Madarsa or, even if rightly granted, the conditions of recognition are being violated or it is not fit, either in the opinion of the Board or the State Government, that the recognition should continue for an indefinite period of time.

33. In the light of the aforesaid provisions, I find that if the State Government constituted a Special Investigation Team to carry out inspection, either through spot inspection, physical verification or even through Portal information uploaded by the Board, its action cannot be said to be unjustified.

34. The question, therefore, arises as to whether the impugned S.I.T. report or the Resolution dated 19.12.2022 or its approval dated 09.01.2023, being allegedly ex-parte,

would, in any manner, affect the interest of the petitioners or that doors of justice stand closed for them for all time to come. Insofar as the petitioners of Writ C No.11005 of 2023 are concerned, the submission that the concerned Madarsa has already been closed down in 2017 for various reasons, is not relevant as mere closure of Madarsa, either permanently or temporarily, would not mean that its recognition has lapsed or that action to withdraw recognition cannot be taken or that anything done prior to its closure loses its significance for one or the other purposes.

35. As regards adherence of principles of natural justice, though the S.I.T. has reported that it had conducted spot inspection and the concerned Madarsas were found non-existent and that the office bearers of the Madarsa could not furnish necessary details in any manner, even if, the submission advanced on behalf of the petitioners that the investigation conducted by the S.I.T. was ex-parte, is accepted for the sake of argument, the Court finds that since the issue relates to withdrawal of or taking any action against the Madarsas, such power to withdraw vests in the Board as per Section 10 of the Act, 2004 and the State Government's role is spelt out under Section 13 of the Act, 2004. Certainly, the language of said Section makes it clear that the Government has right to address the Board and to communicate to the Board its views on any matter, with which the Board is concerned and, as a matter of fact, there are provisions for intra-departmental or inter departmental communication in between the State Government and the Board.

36. Therefore, if the constitution of the Special Investigation Team or

enquiry/investigation conducted by it is examined in the light of the arguments advanced on behalf of the petitioners associated with alleged violation of principles of natural justice, the Court finds that the State Government is well empowered to take immediate action consistent with the Act, 2004 without even making any reference to the Board under certain emergent circumstances, even the principles of natural justice may be diluted, if at all the same have been allegedly violated, as contended by the petitioners. In this regard reference to a decision of the Supreme Court in the case of UOI v. J.N. Sinha and another reported in A.I.R. 1971 Supreme Court 40 can be made where the Apex Court, while dealing with the issue of alleged violation of principles of natural justice in relation to statutory provisions, observed that it is true that if a statutory provision can be read consistently with the principles of natural justice, the Courts should do so because it must be presumed that the legislatures and the statutory authorities intend to act in accordance with the principles of natural justice. **But, if on the other hand a statutory provision either specifically or by necessary implication excludes the application of any or all the rules of the principles of natural justice then the Court cannot ignore the mandate of the legislature or the statutory authority and read into the concerned provision the principles of natural justice.** Whether the exercise of a power conferred should or should not be made in accordance with any of the principles of natural justice depends upon the express words of the provision conferring the power, the nature of the power conferred, the purpose for which it is conferred and the effect of the exercise of that power.

37. Therefore, the Court also observes that if, at all, violation of principles of

natural justice, has been committed while conducting investigation by the SIT, though a contrary stand has been taken by the respondents, as already elaborately discussed, adherence/non-adherence of principles of natural justice can be understood in the light of **implied exclusion** of such provision to some extent under various subsections of Sections 13 and **express inclusion** under Section 10 (2) (vi) of the Act, 2004, and hence, if the Board proposes to take an action under Section 10 of the Act, 2004, it may call for reports from the Head of the Institution and consider the representation made by the Institution and sufficient protection has already been accorded as per the judgment/order of the Division Bench dated 09.02.2023. Further, section 10(2)(vi) of the Act, 2004 read with other provisions of the Act, 2004 contain provision for granting opportunity to Head of the Institution, if any act of contravention of the Rules or Regulations etc. is alleged and, therefore, in view of the liberty granted by the Division Bench in the judgment dated 09.02.2023 passed in Criminal Misc. Writ Petition No.1131 of 2023, I find that petitioners have ample opportunity to raise their grievances before the concerned Authorities by way of making applications/representations and taking all such pleas which may be available to them and enclosing therewith all the documents which they intend to rely on and, once such application or representation is preferred, the Competent Authority would take into consideration the same and pass appropriate orders at appropriate stages with due communication to the petitioners also.

38. As regards the action against the concerned petitioners pursuant to the impugned Resolution is concerned, while I find that the Resolution contains various tables out of which, the first table relates to

description of 219 non-existent Madarsas and the Officers granting recognition to them, in which, the petitioner no.2-Madarsa of Writ C No.11005 of 2023 is included, the second table relates to 39 non-existent Madarsas, in relation where to, allegations of mis-appropriation and embezzlement of Government fund have been levelled and petitioner no.2-Madarsa of Writ C No.11005 of 2023 is included therein with a disclosure that a sum of Rs.1,06,000/- was mis-appropriated as honorarium. Third table relates to 180 Madarsas, in relation where to, criminal prosecution has been proposed, however, description of petitioner no.2 does not find mention in the same and the fourth table refers to description of Madarsas and Officers of sub-standard Madarsas, in which, also petitioner no.2-Madarsa is not there. Insofar as the petitioners of Writ C No.5992 of 2023 are concerned, it is pleaded in 'paragraph 29' of the said writ petition that they are included in the list of 39 Madarsas and on the allegations, criminal prosecution has been recommended.

39. The Court has already referred to an order dated 09.02.2023 passed by the Division Bench of this Court in Criminal Misc. Writ Petition No.1131 of 2023 and, at this stage, the said order needs to be reproduced as such:-

"Heard learned counsel for the petitioners and learned State counsel.

By means of this writ petition filed under Article 226 of the Constitution of India, a prayer has been made to quash the Government order dated 09.01.2023, which has been enclosed as Annexure No.1 to the writ petition, whereby, the State government has required the Director General of Police (Special Investigating

*Team) to take appropriate action on the basis of a preliminary inquiry conducted by the **Special Investigating Team, which has submitted its report on 30.11.2022.***

For challenging the said Government order, submission of learned counsel for the petitioners is two fold.

Firstly he has argued that the Special Investigating Team before furnishing its report dated 30.11.2022 did not provide any opportunity of hearing to the petitioners neither were the petitioners confronted in any manner by the S.I.T. while conducting the inquiry and submission of the same, and secondly that even from a perusal of the contents of the report submitted by Special Investigating Team there does not appear to be any material which can be said to constitute any cognizable offence against the petitioners. It has also been argued by learned counsel for the petitioners that petitioners are merely teachers who were appointed in a Madarsa and they were duly appointed after following due process of law and procedure, and accordingly, subjecting the petitioners to criminal prosecution at this juncture, is not appropriate.

*So far as the first submission made by learned counsel for the petitioners is concerned, **we are of the opinion that for lodging an F.I.R. under Section 154 of the Code of Criminal Procedure, in relation to a cognizable offence, there is no of legal requirement that action of lodging of F.I.R. should necessarily precede any fact finding or preliminary inquiry. In absence of any such legal requirement, in our opinion, it was not necessary for the State authorities to have associated the petitioners in the preliminary inquiry conducted by Special Investigating Team. As a matter of fact, the purpose of conducting the preliminary inquiry is to***

gather information and material so as to form an opinion as to whether matter should be criminally preceded or not. Thus, we are unable to agree with the first submission made by learned counsel for the petitioners.

As regard the second submission that even the preliminary inquiry report submitted by the Special Investigating Team does not disclose its commission of any cognizable offence by the petitioners, we may only observe that such challenge at this juncture is premature, and if, this Court interferes in the impugned order that may result in blocking of lodging of an F.I.R. in relation to cognizable offence. As to whether offence has been committed or not is subject to investigation to be conducted once F.I.R. is lodged and thereafter it is subject to trial, if a chargesheet is filed on the basis of investigation. For the aforesaid reasons, we are not inclined to interfere in this writ petition, which is hereby dismissed.

However, notwithstanding the dismissal of the writ petition, we permit the petitioners to raise their grievances, if any, before the authority concerned by way of making an application/representation taking all the pleas which may be available to them and enclosing therewith all the documents on which they intend to rely. Once any such application/representation is preferred, the competent authority in the State Government shall take into consideration the same and pass appropriate order, which shall be communicated to the petitioners also. ”

40. A perusal of the order of Division Bench shows that challenge was made to the same decision dated 09.01.2023 which has also been impugned in both the writ petitions and, infact, it is a communication

made by the Special Secretary of the U.P. Government to the concerned Director General of Police to proceed in furtherance of Resolution dated 19.12.2022 and submit report before the Government. The Division Bench, after taking into consideration identical arguments advanced before the Court as regards ex-parte nature of investigation conducted by the S.I.T. and its report dated 30.11.2022, clearly opined that for lodging of F.I.R. under Section 154 Cr.P.C. in relation to cognizable offence, there is no legal requirement that lodging of F.I.R. should necessarily precede any fact finding or preliminary inquiry and, therefore, in absence of any such legal requirement, the Division Bench opined that it was not necessary for the said Authorities to have associated the petitioners in the preliminary inquiry conducted by the S.I.T. and, as a matter of fact, the purpose of conducting preliminary inquiry is to gather information and material so as to form an opinion as to whether matter should be criminally proceeded or not and, with this observation, the challenge made to the findings recorded in the impugned decision/S.I.T. report to propose criminal action, was turned down. The Division Bench further observed that challenge made to the inquiry report on the ground that no cognizable offence had been committed, was premature and any interference in the order impugned would result in blocking of lodging of an F.I.R. in relation to a cognizable offence and as to whether an offence has or has not been committed is always subject to investigation to be conducted once F.I.R. is lodged and, thereafter, subject to trial after a charge-sheet is filed on the basis of investigation. **The Division Bench, in so many specific words, rejected every contention and dismissed the writ petition** and, hence, this Court cannot take

a different view as far as the S.I.T. report dated 30.11.2022 or the order dated 09.01.2023 confirming the Resolution dated 19.12.2022 is concerned.

41. This Court further finds that despite dismissal of the writ petition, the Division Bench permitted the concerned petitioners to raise their grievances, if any, before the authority concerned by way of making an application/representation taking all the pleas which may be available to them and enclosing therewith all the documents on which they intend to rely. The Division Bench also observed that once any such application/representation is preferred, the competent authority in the State Government shall take into consideration the same and pass appropriate order, which shall be communicated to the petitioners also.

42. It is not disputed that the aforesaid decision of the Division Bench was **not placed** before the Single Bench that has passed interim orders dated 11.04.2023 and 19.05.2023, respectively in Application U/S 482 Cr.P.C. Nos. 3380 of 2023 and 4891 of 2023 and, probably for this reason, the said interim orders appear to have been passed **in ignorance of the Division Bench judgment/order dated 09.02.2023.** Similar is the position with respect to the interim orders dated 19.04.2023 and 28.03.2023 passed in these two writ petitions which were ex-parte and apparently in ignorance of the Division Bench judgment/order, as the order of the Division Bench was placed alongwith counter affidavit filed by the State. **I am also of the view that whereas the S.I.T. report refers to action taken against 313 Madarsas, merely on the challenge made by one Madarsa in Writ C No.11005 of 2023 and 13 Madarsas in Writ C No.5992 of 2023, the entire**

efforts made by the S.I.T. culminated into preparation of detailed report dated 30.11.2022 should not be nullified or even suspended barring further proceedings in toto or even in respect of the petitioners.

43. I am of the firm view that the interim orders passed in the aforesaid applications under Section 482 Cr.P.C. or even the interim orders passed in these writ petitions would not have a binding force for any purpose as the same were admittedly passed without taking into consideration the Division Bench order dated 09.02.2023. These interim orders, in the opinion of the Court, suffer from the defect of—**“per incuriam”**. **“Incuria”** literally means **“carelessness”**. In practice, per incuriam is taken to mean **per ignoratium**. English Courts have developed this principle in relaxation of the rule of stare decisis. The “quotable in law”, as held in **Young v. Bristol Aeroplane Co. Ltd. (1944) 2 All E.R. 293**, is avoided and ignored if it is rendered, “in ignoratium of a statute or other binding authority”. Same has been accepted, approved and adopted by the Apex Court while interpreting Article 141 of the Constitution of India, 1950 which embodies the doctrine of precedents as a matter of law. The above position was highlighted in **State of U.P. and another v. Synthetics and Chemicals Ltd. And another (1991) 4 SCC 139**. **To perpetuate an error is no heroism. To rectify it is the compulsion of the judicial conscience.** The aforesaid proposition of law has been reiterated by the Supreme Court in the case of Nirmal Jeet Kaur v. State of Madhya Pradesh and Another, JT 2004 (7) SC 161.

44. **Halsbury's Laws of England (Fourth Edition) Vol.26:** Judgment and

Orders Judicial Decisions as Authorities (pages 297-298, Para 578) observed about per incuriam stating that a decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of coordinate jurisdiction while covered the case before it, in which case it must decide which case to follow or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or rule having statutory force. Even if a decision of the court of appeal has misinterpreted a previous decision of the House of lords, the court of appeal must follow its previous decision and leave the House of Lords to rectify the mistake.

45. The Supreme Court, in **(2000) 4 S.C.C. 262, Govt. of Andhra Pradesh and Anr. v. B. Satyanarayana Rao (Dead) by Lrs.**, has held that rule of Per incuriam can be applied where a Court omits to consider a binding precedent of the same court or the superior court rendered on the same issue or where a court omits to consider any statute while deciding that issue. A decision by two judges, has a binding effect on another Co-ordinate Bench of two judges, unless it is demonstrated that the said decision by any subsequent change in law or decision, ceases to lay down a correct law. The same proposition of law has been reiterated by the Supreme Court in the case of **State of Bihar v. Kalika Kuer @ Kalika Singh and others reported in JT 2003 (4) SC 489.** The concept of "per incuriam" has been considered by the Apex Court time and again explaining that the expression means through inadvertence or a point of law is not consciously determined. If an issue is neither raised, nor argued, a decision by the Court after pondering over the issue in depth would not be precedent

binding on the Courts. (*Vide Mamleshwar Prasad & Anr. Vs. Kanahaiya Lal (Dead)*, (1975) 2 SCC 232; *Rajpur Ruda Meha & Ors. Vs. State of Gujrat*, AIR 1980 SC 1707; *A.R. Antule Vs. R.S. Nayak*, AIR 1988 SC 1531; *Municipal Corporation of Delhi Vs. Gurnam Kaur*, AIR 1989 SC 38; *Punjab Land Development and Reclamation Corporation Ltd., Chandigarh Vs. Presiding Officer, Labour Court, Chandigarh & Ors.*, (1990) 3 SCC 682; *State of West Bengal Vs. Synthetics and Chemicals Ltd.*, (1991) 1 SCC 139; *Maharashtra State Cooperative Cotton Growers Marketing Federation Ltd & Anr. Vs. Employees' Union & Anr.*, 1994 Supp (3) SCC 385; *Pawan Alloys & Casting Pvt Ltd, Meerut Vs. U.P. State Electricity Board & Ors.*, (1997) 7 SCC 251; *Ram Gopal Baheti Vs. Girdharilal Soni & Ors.*, (1999) 3 SCC 112; *Sarnam Singh Vs. Dy. Director of Consolidation & Ors.*, (1999) 5 SCC 638; *Govt. of Andhra Pradesh Vs. B. Satyanarayana Rao*, AIR 2000 SC 1729; *Arnit Das Vs. State of Bihar* (2000) 5 SCC 488; *M/s. Fuerst Day Lawson Ltd. Vs. Jindal Exports Ltd.*, AIR 2001 SC 2293; *A-One Granites Vs. State of U.P. & Ors.*, (2001) 3 SCC 537; *Suganthi Suresh Kumar Vs. Jagdeeshan*, AIR 2002 SC 681; *Director of Settlements A.P. & Ors. Vs. M.R. Apparao & Anr.*, (2002) 4 SCC 638; *S. Shanmugavel Nadar Vs. State of T.N & Anr.*, (2002) 8 SCC 361; *State of Bihar Vs. Kalika Kuer Kalika Singh & Ors.*, AIR 2003 SC 2443; and *Manda Jaganath Vs. K.S. Rathnam & Ors.*, (2004) 7 SCC 492).

46. Usually, the concept of "per incuriam" is discussed and applied in terms of final judgments, however, in the present case, while referring to the order dated 09.02.2023 passed in Criminal Misc. Writ Petition No.1131 of 2023, in connection with the interim orders passed in the

aforesaid applications under Section 482 Cr.P.C. as well as in these two writ petitions, the Court feels it apt to utilize the philosophy underlying the concept of “per incuriam” and observes that the same principle would apply while passing the interim orders also as it applies in the case of finality attached to any decision. That is to say that if interim orders in the aforesaid applications under Section 482 Cr.P.C. as well as these two writ petitions have been passed in ignorance of the decision of Division Bench of this Court dated 09.02.2023 passed in Criminal Misc. Writ Petition No.1131 of 2023, all the four interim orders would be hit by the principle of “per incuriam”.

47. There is another aspect of this matter as reflected during the course of arguments. It was argued on behalf of the petitioners that judgment/order dated 09.02.2023 was passed in a Criminal Miscellaneous Writ Petition arising out of those circumstances, under which, the concerned petitioners were facing criminal action; however, the issues involved in the present cases are much wider in nature and, therefore, the order passed by a Bench exercising criminal jurisdiction, would not be of much significance in the present cases.

48. I am unable to accept the contention so advanced. The reason is that our Constitution of India is “neither a book of civil nature nor of criminal”. When it comes to exercise of powers under Article 226 of the Constitution of India, the same are certainly for enforcement of Fundamental Rights conferred by Part III of the Constitution by means of any or more of the five prerogative writs, i.e. Habeas Corpus, Mandamus, Prohibition, Quo Warranto and Certiorari. While

practically applying Article 226 of the Constitution of India, Chapter XXII Rule 1 of the Allahabad High Court Rules, 1952 (hereinafter referred to as ‘the Rules, 1952’) may be referred to. The said Chapter does not differentiate between writs of different nature except cognizability before Single/Division Bench. Therefore, even the Rules of the Court uniformly apply for writs of every nature. The said Chapter is contained under Part IV of the Rules, 1952 titled as **“Enforcement of Fundamental Rights”**. Insofar as the Civil and Criminal jurisdictions are concerned, Civil jurisdiction is contained in Part II of the Rules, 1952 whereas criminal jurisdiction finds place under Part III of the Rules, 1952 and both parts elaborately describe nature of various proceedings, respectively of civil and criminal jurisdiction.

49. From the aforesaid discussion of Article 226 of the Constitution of India read with Parts II, III and IV of the Rules, 1952, it is clear that any judgment of Writ Court, either in a Civil Miscellaneous Writ Petition or Criminal Miscellaneous Writ Petition would have impact either way, depending upon the issues raised and decided by the concerned Writ Court. In the aforesaid Criminal Misc. Writ Petition No.1131 of 2023, the issue before the Division Bench was the same which is involved in these two writ petitions as well as in the aforesaid applications under Section 482 Cr.P.C., i.e. as to whether for alleged want of opportunity to participate during investigation process culminating into report dated 30.11.2022 submitted by the Special Investigation Team and consequential Resolution of the State Government dated 19.12.2022 and/or its approval by impugned communication dated 09.01.2023, the petitioners are entitled to any relief or not. Hence, the

judgment passed by the Division Bench in Criminal Miscellaneous Writ Petition cannot be treated as **“alien to the present proceedings”** either on facts or on law or on the categorization etc. etc.

50. Now while referring to two more documents on record, I find that even the Recognition Letter dated 27.07.2011, ‘Annexure No.5’ to Writ C No. 11005/ 2023, clearly reflects that recognition is subject to sub-clauses (v), (vi) (vii) and (viii) of Section 10 of the Act, 2004. It means that, in case, violation of the aforesaid provisions of law is found to have taken place, withdrawal of recognition can be a necessary consequence. Insofar as the letter dated 25.08.2017 issued by the District Magistrate, Azamgarh to various Authorities is concerned, I find that the concerned Committee was headed by the Sub Divisional Officers of the concerned Tehsils and its members being District Backward Class Welfare Officers, District Minority Welfare Officers and District Social Welfare Officers concerned and **even the District Magistrate observed that considering the large number of Madarsas and the fact that they did not fulfill standards, extensive inquiry is expected.** Hence, if SIT has conducted the extensive investigation, its report cannot be said to be unlawful, merely, because in 2016-2017, some inquiry at Tehsil level was conducted.

51. While concluding this judgment, another important feature associated with the power of the State Government conferred by Section 13 (4) of the Act, 2004 should not be left undiscussed as the said power speaks that whenever, in the opinion of the State Government, it is necessary or expedient to take immediate action, it may without making any reference to the Board under the foregoing provisions, pass such order or take such other action consistent with this Act as it deems necessary and, in particular, may by such order, modify or rescind or make any regulation in respect of any matter and shall

forthwith inform the Board accordingly. Hence, if the State Government constituted a Special Investigation Team to carry out inspection and it carried investigation, either through spot inspection or through Portal information uploaded by the Board or by both modes, action or steps taken by it cannot be said to be unjustified in totality of facts and circumstances of the case, as elaborately discussed.

52. In view of the above discussion, following is the end result of these writ-proceedings:-

(i) prayers to quash or set aside either the S.I.T. report dated 30.11.2022 or the Resolution of the State Government dated 19.12.2022 or the communication of the Special Secretary dated 09.01.2023 **are hereby refused and declined** and both the writ petitions are dismissed with the same liberty to the petitioners, as granted by the Division Bench of this Court in order dated 09.02.2023 passed in Criminal Misc. Writ Petition No.1131 of 2023.

(ii) Interim order dated 19.04.2023 passed in Writ C No.11005 of 2023 and dated 28.03.2023 in Writ C No.5992 of 2023 are hereby ***vacated.***

(2023) 9 ILRA 1002
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.08.2023

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

Writ-C No. 15412 of 2023
connected with
Writ-C Nos.11662 of 2023 & 21573 of 2023

**C/m Intermediate College, Babusarai,
Bhadohi ...Petitioner**

Versus

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

Counsel for the Petitioner:

Sri Ashish Kumar Singh, Sri Ajay Kumar Singh,
Sri Tejas Singh

Counsel for the Respondents:

C.S.C., Sri Sankalp Narain, Sri G.K. Singh (Sr.
Advocate)

**Civil Law - Societies Registration Act,
1860 - Section 4-B - U.P. Intermediate
Education Act, 1921 - Section 16-A(7) -
Constitution of India, 1950 - Article 226 -**

Validity of Membership List and Elections -
Petitioners in Writ-C Nos. 15412 and 11662 of
2023 challenged the order dated 16.12.2022 by
the Assistant Registrar, declaring 29 members of
the General Body valid, alleging fabrication by
Ram Rekha Shastri in 2014. Writ-C No. 21573 of
2023 challenged orders dated 02.06.2023 by the
Joint Director of Education and District Inspector
of Schools, summoning records and
referring rival election disputes to the
Regional Level Committee. Petitioners
claimed a list of 74 members was valid,
supported by prior orders, while
respondents relied on a list of 29 members,
alleging petitioners' enrollment violated
bye-laws. Court found that the petitioners'
enrollment of members in June 2014 was
invalid due to non-compliance with bye-laws
requiring Committee approval of bank
drafts, and meetings on 28.06.2014 and
29.06.2014 lacked sanctity. Allegations of
forgery required civil court adjudication
under Sections 31 and 34 of the Specific
Relief Act, 1963, and Section 45 of the
Indian Evidence Act, 1872. The order dated
16.12.2022 was upheld for 26 members,
with disputes over three members
unresolvable due to their absence as
parties. Elections on 01.06.2023, held by
the District Inspector of Schools, were valid
per prior court orders, rendering the Joint
Director's order and reference to the
Regional Level Committee unsustainable.
Writ-C Nos. 15412 and 11662 dismissed
with liberty to approach civil court; Writ-C
No. 21573 allowed, quashing orders dated
02.06.2023. (Paras 27-29, 31-34)

**Writ-C Nos. 15412 and 11662 dismissed;
Writ-C No. 21573 allowed.**

List of Cases cited:

1. Ajab Singh Vs District Inspector of Schools,
Meerut & ors., 1980 UPLBEC 308

2. Central Industrial Security Force & ors. Vs
Abrar Ali, (2017) 4 SCC 507

3. Krishna Rice and Dal Mill & anr. Vs Food
Commissioner/Food Secretary & ors., 2002 (3)
AWC 2466

4. The Secretary and Curator, Victoria Memorial
Hall Vs Howrah Ganatantrik Nagrik Samity &
ors., AIR 2010 SC 1285

5. U.O.I. & ors. Vs P. Gunasekaran, (2015) 2 SCC
610

6. S. Sreesanth Vs Board of Control for Cricket
in India & ors., (2019) 4 SCC 660

7. C/M Dayanand Inter College & anr. Vs St. of
U.P. & ors., Special Appeal Defective No. 335 of
2023

(Delivered by Hon'ble Kshitij Shailendra, J.)

1. These three writ petitions were
heard at length on 24.08.2023 and since no
time was left to dictate the judgment, the
matters were placed today for summing up
of the arguments of both the sides and also
for dictation of the judgment. Today also
the matters have been heard for about two
hours.

The Challenge

2. Writ C No. 15412 of 2023 has been filed
by the Committee of Management
Intermediate College, Babusarai, District
Bhadohi challenging the order dated
16.12.2022 whereby the Assistant
Registrar, Firms, Societies and Chits,
Varanasi has declared 29 members of the
General Body as valid under section 4-B of
the Societies Registration Act, 1860. The
same order has been assailed by certain
members by filing Writ C No. 11662 of

2023. The third writ petition No. 21573 of 2023 has been filed by the Committee of Management, which has been elected pursuant to the elections held on 01.06.2023 and the first order under challenge is dated 02.06.2023, whereby the Joint Director of Education, Bhadohi has summoned the record of the District Inspector of Schools, Bhadohi on the ground that two rival sets of elections have been asserted by the parties and, therefore, as per section 16 A (7) of the U.P. Intermediate Education Act, 1921, the District Inspector of Schools should send the entire record of rival elections with specific report so that the matter may be decided as per Government Order dated 19.12.2000. Another order under challenge is dated 02.06.2023, whereby the District Inspector of Schools, Bhadohi has referred the matter to Regional Level Committee, in furtherance of order dated 02.06.2023 passed by the Joint Director of Education.

**Case and Contention of Petitioners
of Writ C Nos. 15412 of 2023 & 11662 of
2023**

3. The submissions of Shri Ajay Kumar Singh, learned counsel appearing for the petitioners in Writ C No. 15412 of 2023 and Shri Prabhakar Awasthi, learned counsel appearing for petitioners in Writ C No. 11662 of 2023 are almost common and it has vehemently been argued by both of them that the Society was established in 1967 and in the Institution, which is run by the Society, one Daya Prasad Baranwal remained elected Manager from 1973 till 1992 and, after his death, his son, namely, Anil Kumar Baranwal became Manager in 1992 and he remained as such till 2014.

4. The case of the petitioners is that one Shri Ram Rekha Shastri, who

happened to be Principal of the Institution, was going to retire on 30.06.2014 and, just before his retirement, he manipulated certain things and submitted a list of 29 members before the Assistant Registrar for the purposes of its registration. The said list, according to the petitioners, is fabricated and also the letter dated 25.03.2014 along with which it was submitted. It has been vehemently argued that on the letter dated 25.03.2014, signatures of Anil Kumar Baranwal were fabricated and even his forged affidavit dated 29.05.2014 was submitted before the Assistant Registrar, which matter was complained of by the petitioners before the Joint Director of Education with supporting material and also before the Assistant Registrar and though the Joint Director of Education called upon Ram Rekha Shastri to answer the issues raised, the said matter is still pending and has not been settled. It is further contended that the petitioners' Committee enrolled certain members in the month of June, 2014, exact number being 74 at some places and 79 at some other places.

5. From perusal of the record, I find that on numerous occasions, the dispute regarding valid membership has engaged attention of this Court. At one stage, the District Inspector of Schools granted permission to Yogesh Chandra Mishra to hold elections but later on, by order dated 18.06.2014, the said order was recalled by the District Inspector of Schools. Consequently, Writ C No. 33694 of 2014 (Yogesh Chandra Mishra and 9 others vs State of U.P. and 3 others) was filed, which was disposed of by order dated 04.07.2014 directing the Joint Director of Education to determine the electoral college of the Institution, either himself or through an officer appointed by him.

6. It is contended that the District Inspector of Schools, by order dated 29.05.2015, determined the valid electoral college finding 74 members as valid for the purposes of holding elections and the list was finalized. Yogesh Chandra Mishra and 9 others challenged the said decision by filing Writ C No. 36602 of 2015 (Yogesh Chandra Mishra and 8 others vs State of U.P. and 4 others), which was disposed of by order dated 06.07.2015, whereby the parties were left at liberty to approach the Regional Level Committee for redressal of their grievances. Special Appeal No. 477 of 2015 (Yogesh Chandra Mishra and 8 others vs State of U.P. and 4 others) filed against the said order dated 06.07.2015 was also disposed of by the Division Bench by order dated 27.07.2015, whereby the Regional Level Committee was directed to conclude the proceedings within one month.

7. It is further contended that in pursuance of the aforesaid orders, the Regional Level Committee decided the dispute by an order dated 09.10.2015 attaching finality to the list of 74 members. Against the order dated 09.10.2015, Yogesh Chandra Mishra and 8 others filed Writ C No. 60481 of 2015, which was allowed, in part, by order dated 18.11.2015 setting aside the order of Regional Level Committee and the Committee was directed to pass a fresh order in accordance with law.

8. The case of the petitioners is that the Regional Level Committee again decided the matter in their favour on 20.05.2016, which was again assailed by Yogesh Chandra Mishra and 8 others by filing Writ C No. 24802 of 2016, in which an interim order was passed by this Court on 22.11.2016 staying the effect and operation of the decision of Regional Level

Committee until further orders and payment of salary to the teachers and employees of the Institution was directed to be made by way of single hand operation of accounts. The interim order dated 22.11.2016 was assailed before the Special Appellate Bench by filing Special Appeal No. 790 of 2016 (C/M Intermediate College, Babu Sarai vs State of U.P. and 12 others), which was disposed of by order dated 15.12.2016 with a direction to the District Magistrate or Additional District Magistrate to conduct fresh elections of the Committee of Management. A direction was also issued to the effect that these officers shall decide the question as to whether the disputed 52 new members are entitled to continue as members and could be allowed to participate in the elections. The elections were not stayed by the Division Bench and the appellant-Committee of Management, i.e. petitioners of Writ C No.15412 of 2023, were allowed to function till newly elected body takes charge. Writ C No. 24802 of 2016 was also disposed of by the Division Bench.

9. It is further contended that pursuant to the order of Special Appellate Bench, the District Magistrate passed a detailed order dated 13.02.2017 again holding 74 members as valid on the basis of proceedings relied upon by the petitioners in relation to different dates of June, 2014, particularly, the proceedings of meeting dated 28.06.2014, in which the bank drafts of the members were allegedly placed and were accepted by the concerned Committee. It is further contended that pursuant to the order dated 13.02.2017, the petitioners Committee of Management held elections on 19.03.2017, which were approved and the signatures of Anil Kumar Baranwal were also attested on 20.03.2017. The said elections and attestation of the

signatures have been challenged by the contesting-respondent by filing Writ C No. 29385 of 2017, which is pending and there is no interim order therein.

10. It has also come on record that the petitioners-Committee of Management held another elections on 17.04.2022, which were disapproved by the District Inspector of Schools on 26.04.2022 and, thereafter, an order of single hand operation was passed on 11.05.2022. By that time, the term of the elections of 2017 was admittedly over. The petitioners challenged the aforesaid elections dated 17.04.2022 and orders dated 26.04.2022 and 11.05.2022 by filing Writ C No. 16556 of 2022 (C/M of Intermediate College vs State of U.P. and 6 others), which was disposed of by order dated 25.07.2022 with the following operative portion:-

*“Now the Court is coming to the electoral college, which is required to hold the election. Earlier Division Bench has given right to aggrieved party to file objection against the list so finalized by District Magistrate, but not to wait the decision upon objection, if any filed. It is not in dispute that last election was held upon the electoral college finalized by District Magistrate vide order dated 13.02.2017, which is under challenge in Writ-C No. 29385 of 2017 having no interim order. **Therefore, considering the mandate of Division Bench, this Court further directs respondent no. 4 to hold fresh election within two months from the date of production of certified copy of this order alongwith electoral college either duly approved by respondent no. 7 or electoral college earlier finalized by District Magistrate vide order dated 13.02.2017. In all eventuality election shall take place within two months from the date***

of production of certified copy of this order.”

11. It is clear from the aforesaid order that taking into consideration the mandate of the Division Bench, the co-ordinate Bench directed the District Inspector of Schools to hold fresh elections within two months along with determination of electoral college, either duly approved by the respondent No. 7 of the writ petition or the electoral college or earlier finalized by the District Magistrate by order dated 13.02.2017.

12. **In the order dated 25.07.2022, the co-ordinate Bench also recorded that as per the Scheme of Administration, the term of Committee of Management is five years and one month, which is undisputedly over, therefore, outgoing Committee of Management cannot be permitted to hold fresh elections and it is only the District Inspector of Schools or Authorized Controller, appointed by him, who is empowered to hold fresh elections as per law.**

13. In the meantime, respondents filed Writ C No. 28466 of 2022 (Yogesh Chandra Mishra and 15 others vs State of U.P. and 5 others) seeking a direction from this Court that finality be attached to list of 29 members of General Body, however this Court, while disposing of the writ petition on 26.09.2022, observed that the proceedings under section 4-B of the Societies Registration Act, 1860 for registration of list of members were pending before the Assistant Registrar, therefore, a direction was issued to the Assistant Registrar to decide the said proceedings.

14. It is contended by learned counsel for the petitioners that regarding forgery and fabrication committed by Shri Ram

Rekha Shastri in the year 2014 when list of 29 members was fraudulently finalized, the proceedings were pending before the Assistant Registrar and the petitioners had requested the Assistant Registrar to nullify the said fabricated proceedings but till today, the same have not been finalized and, in the meantime, by order dated 29.12.2022, finality has been attached to the very list of 29 members relied upon by the respondents.

15. It has also come on record that the petitioners held elections on 18.09.2022 pursuant to some direction issued by the District Inspector of Schools. Even approval was granted by the District Inspector of Schools to such elections on 20.09.2022. The said elections were assailed by Yogesh Chandra Mishra and 15 others by filing Writ C No. 3997 of 2023, which was allowed by this Court by order dated 15.03.2023 taking note of the previous order dated 25.07.2022 passed in Writ C No. 16556 of 2022 and the approval granted by the District Inspector of Schools to the elections held by the petitioners was set aside. **The District Inspector of Schools was directed to ensure faithful compliance of the order dated 25.07.2022 passed in Writ C No. 16556 of 2022.**

16. Even thereafter, two sets of elections were held, one by the petitioners on 23.05.2023 and other by the contesting respondents on 01.06.2023. Reference has also been made to the proceedings of a civil suit being Original Suit No. 319 of 2022 (Nirbhay Kumar and others vs Assistant Registrar and others) filed by certain members against the Assistant Registrar and few others, in which District Inspector of Schools has taken a stand in his written statement that 74 members were valid.

17. In sum and substance, the submission of learned counsel for the petitioners in Writ C Nos. 15412 of 2023 and 11662 of 2023 is that at every stage of proceedings, list of 74 members has been found to be valid and, therefore, any claim made by respondents on the basis of 29 members has no legs to stand on. It has further been argued that the only finding recorded by the Assistant Registrar is that since the list of 29 members was submitted under the joint signatures of Yogesh Chandra Mishra in the capacity of President and Anil Kumar Baranwal in the capacity of Manager, the same is entitled to be approved as per section 4-B of the Societies Registration Act, 1860. It has further been argued that though certain infirmities have been recorded in relation to the proceedings relied upon by the petitioners in connection with the submission of bank drafts etc. and non-production of original records, identical findings have been recorded against the respondents also that there was no record produced in relation to enrollment of 29 members and that a register was prepared afresh and was placed before the Deputy Registrar, showing enrollment of 29 members. The entire thrust is on the aspect that the proceedings placed on the basis of fabrication and forgery, in which Ram Rekha Shastri was instrumental, have been given a seal of approval, which could not be done, particularly when the proceedings in relation to the said fabrication have not yet been finally decided.

18. It has further been argued that even the respondents do not stick to their stand and some times they press list of 29 members, but before the Deputy Registrar when the said enrollment was opposed, the respondents came up with the stand that out of 29 members only 22 members are valid

and list of such 22 valid members be registered. The submission, therefore, is that the operative portion of the order impugned is contrary to the observations recorded in the body of the order and, hence, the same is liable to be set aside. It has been additionally argued by Shri Prabhakar Awasthi that his clients were not provided any opportunity in the matter before passing the order impugned dated 16.12.2022 and that the determination is in teeth of section 4-B of the Societies Registration Act, 1860.

19. On the point that any Administrative Officer exercising quasi judicial powers or administrative power must record a cogent and valid reasoning while passing an order, and on the point of power of this Court to judicially review any such order, learned counsel for the petitioners has placed reliance upon the following authorities:

(i) ***Central Industrial Security Force and others vs Abrar Ali***, reported in 2017 (4) SCC 507;

(ii) ***Krishna Rice and Dal Mill and another vs Food Commissioner/Food Secretary and others***, reported in 2002 (3) AWC 2466;

(iii) ***The Secretary and Curator, Victoria Memorial Hall vs Howrah Ganatantrik Nagrik Samity and others***, reported in AIR 2010 SC 1285;

(iv) ***Union of India and others vs P. Gunasekaran***, reported in 2015 (2) SCC 610;

(v) ***S. Sreesanth vs Board of Control for Cricket in India and others***, reported in 2019 (4) SCC 660.

Case and Contention of Contesting Respondents

20. On the other hand, Shri G.K. Singh, learned Senior Advocate assisted by Shri Sankalp Narain, learned counsel for the contesting respondents, in opposition to both the writ petitions, has argued that any stand taken by the petitioners in support of enrollment of additional members over and above 29 members is contrary to the registered bye-laws of the Society. He has referred to clauses 3 and 6 of the bye-laws, which provide that for the purpose of membership, Bank Drafts of Rs. 11,000/- and 5100/- depending upon the categories of members, would be obtained in the name of the Manager and as per clause 6-E, such drafts shall be placed in the meeting of the Committee of Management and, once the same are accepted and approved and substantiated by the General Body, it is only thereafter that the concerned applicants can be enrolled as members. He has also referred to clause 9 of the bye-laws, which says that the term of the Committee of Management elected is five years, but the term of every office bearer elected shall remain valid until his successor takes charge. By placing reliance upon the aforesaid bye-laws, the order of District Magistrate dated 13.02.2017 has been referred to, which is based upon the stand taken by the petitioners in relation to the enrollment of some members in the meeting dated 28.06.2014.

21. A copy of counter affidavit filed in the aforesaid pending Writ C No. 29385 of 2017 (Yogesh Chandra Mishra and 9 others vs State of U.P. through Principal Secretary, Secondary Education, Govt. of U.P. Lucknow) has also been placed before the Court which is taken on record. The said counter affidavit was filed on behalf of the petitioners of Writ C No. 15412 of 2023, in paragraph No. 56 whereof, reliance was placed by the petitioners on

the minutes of meeting dated 28.06.2014 and the rest stand taken by the other side was denied. The minutes of the said meeting dated 28.06.2014 have been annexed as Annexure No. SCA-6 to the supplementary counter affidavit filed in Writ C No. 15412 of 2023, which contain proceedings for granting approval to addition of new 47 members so as to carry the membership to the number 79.

22. It has further been argued by Shri G.K. Singh that the present writ petition has been filed by placing reliance upon the minutes of meeting dated 29.06.2014, which has been shown to have been jointly conducted by the members of the General Body, Committee of the Society and Committee of the College, in which previous proceedings dated 20.05.2014 have been approved and by making reference of enrolment of certain new members, the meeting is shown to have been concluded. In this regard, reliance has been placed upon a judgment of Division Bench of this Court in the case of **Ajab Singh vs District Inspector of Schools, Meerut and others** reported in 1980 UPLBEC 308, in which this Court has held that if outsiders take part in the meeting, the meeting stands vitiated.

23. Shri G.K. Singh has, with reference to the stand of forgery pressed by the petitioners, also referred to an affidavit of Anil Kumar Baranwal forming part of Annexure No. SA-4 to the supplementary affidavit filed by the petitioners in Writ C No. 15412 of 2023, in paragraph No. 2 whereof, it has been deposed by Anil Kumar Baranwal that he had submitted a list of valid 79 members on 27.06.2014. Shri Singh, therefore, submits that on the date when Anil Kumar Baranwal claims to have submitted the list i.e. on 27.06.2014,

neither meeting of 28.06.2014 nor of 29.06.2014 had taken place and, therefore, the entire stand of the petitioners is fallacious. He has also referred to various Bank Drafts as well as receipts of making deposit of membership fees and argued that that by an advertisement published in two newspapers, period in between 21.06.2014 and 27.06.2014 was specified for making deposit of membership fees and, during the said intervening period, the said Bank Drafts were issued and the same were deposited by the petitioners in an account, which was newly opened on 20.06.2014.

24. Certain discrepancies in the receipt numbers have also been pointed out in co-relation with the dates of issuance of receipts and Bank Drafts. The submission is that once, as per the petitioners themselves, the meeting was held on 28.06.2014 and then on 29.06.2014, the submission of list by the petitioners on 27.06.2014, i.e. prior to holding of such meetings, was contrary to the bye-laws as the drafts were never placed before the Committee of Management and they were encashed by making deposit in a new bank account, which was opened on 20.06.2016. He has referred to dates of deposit of such Bank Drafts, i.e. 25.06.2014 and 27.06.2014 with few other interesting details of various Bills of 02.07.2014 describing credit of Rs. 5100/-, the same amount which is fixed as membership fees. He, therefore, submits that even if, any of the meetings held on 28.06.2014 or 29.06.2014 is taken to be a valid meeting, admittedly there were no Bank Drafts before the Committee in the said two meetings and, hence, any enrollment made contrary to the bye-laws, as already referred to herein-above, invalidates addition of members. Shri Singh further submits that paragraph 19 of the

supplementary affidavit contains an admission of the petitioners of Writ C No. 15412 of 2023 to the effect that list of 74 members includes 26 names out of 29 given by the respondent Yogesh Chandra Mishra and there is a dispute regarding only three persons, namely, Ram Rekha Shastri and his two sons, namely, Suyash Pathak and Utkarsh Pathak. The submission, therefore, is that once before this Court, **after various rounds of litigations, challenging the determination of valid membership, factum of 26 members has been admitted, no objection can be raised regarding validity of the list of at least 26 members and the dispute with regard to addition of members has to be decided on the basis of the material placed, particularly various meetings held by the petitioners.**

Case and Contention of Petitioners of Writ C No. 21573 of 2023

25. By Writ C No. 21573 of 2023, Committee of Management of the College elected pursuant to the elections dated 01.06.2023 has assailed the validity of orders dated 02.06.2023 and it has been argued that no body approached the Joint Director of Education and though, there were two sets of elections, in which on the one hand, one Ganeshji Baranwal claims to have been elected and on the other hand, Yogesh Chandra Mishra claims to have been elected, the elections relied upon by Ganeshji Baranwal were held contrary to the directions issued by the Writ Court in the order dated 15.03.2023 passed in Writ C No. 3997 of 2023 and also the order dated 25.07.2022 passed in Writ C No. 16556 of 2022, inasmuch as the ultimate direction of this Court was that elections have to be held by the District Inspector of Schools and not by outgoing Committee.

Shri G.K. Singh has referred to the election proceedings, in which Yogesh Chandra Mishra is said to have been elected and the letter dated 01.06.2023 sent by the Observer appointed by the District Inspector of Schools has been shown to the Court, as Annexure No. 18 to the writ petition and it has been argued that the only valid elections, as per the directions of the Court, are dated 01.06.2023. Regarding validity of the orders impugned dated 02.06.2023, it has been submitted that the respondents appear to have moved some application before the District Inspector of Schools, a copy whereof was addressed to the Joint Director of Education as per paragraph No. 2 of the order passed by him and, by referring to the said endorsement, Joint Director of Education has himself summoned the record of the District Inspector of Schools for deciding the dispute as per the Government Order dated 19.12.2000, although the said Government Order does not contemplate any such reverse procedure, rather the correct procedure is that once two sets of elections are produced or placed before the District Inspector of Schools, and he finds it genuinely necessary to refer the matter to the Joint Director of Education, it is the District Inspector of Schools, who shall make a reference.

26. Having heard the learned counsel for the parties in all the writ petitions, I find that the stand of the petitioners in Writ C Nos. 15412 of 2023 and 11662 of 2023 is based upon the alleged fabrication committed by Ram Rekha Shastri. There is no pleading in Writ C No. 11662 of 2023 regarding any such fabrication made by Ram Rekha Shastri. Neither Ram Rekha Shastri nor his two sons Suyash Pathak and Utkarsh Pathak are parties to any of the writ petitions. Moreover, the thrust is upon

fabrication made and reported in the year 2014 and the submission is that the said proceedings have not yet been finalized.

27. The Court, in the present proceedings, is concerned with the validity of the order dated 16.12.2022 challenged in Writ C Nos. 15412 of 2023 and 11662 of 2023 and the orders dated 02.06.2023 challenged in Writ C No. 21573 of 2023. Considering the fact that the enrollment of new members pursuant to the submission of Bank Drafts in between 21.06.2023 and 27.06.2023 and submission of list before the Deputy Registrar on 27.06.2023 as per the affidavit filed by Anil Kumar Baranwal, by which time, admittedly, none of the meetings dated 28.06.2014 and 29.06.2014 had taken place, I find that the Bank Drafts were never placed before the Committee of Management and were deposited in Bank on 25.06.2014 and 27.06.2014. Even otherwise, the term of Committee of Management was already over on 11.06.2014 and continuance of the term of any office bearer as per the bye-laws would not ipso facto mean that the Committee was functional. The contradictory stand taken by the petitioners in relation to the meetings dated 28.06.2014 and 29.06.2014 by making reference to various pleadings and record of the proceedings, persuades this Court to form an opinion that the petitioners have never stuck to their stand in relation to the fresh enrollment of members. Before the Court, there is no such proceedings to which any clear sanctity be attached insofar as fresh enrolment is concerned, and there may be some reservations with regard to enrolment of Ram Rekha Shastri and his two sons Suyash Pathak and Utkarsh Pathak and there may be some force in the stand taken by the petitioners that during the continuance of his principal-ship, Ram

Rekha Shastri was not competent to become a member in the General Body of the Committee.

28. As regards various submissions with regard to fabrication etc., I find that neither Deputy Registrar nor District Inspector of Schools nor District Magistrate nor Joint Director of Education nor Regional Level Committee has any competence to determine the factum of forgery as it is the sole prerogative of the civil court to examine it and record findings on the forgery aspects. This Court, in exercise of powers under Article 226 of the Constitution of India cannot record any finding as to whether signatures of anyone were genuinely made on any document or that the same were fabricated. There is already a civil suit being Original Suit No. 319 of 2022 said to be pending in relation to the dispute. Therefore, in view of the admission made by the petitioners in relation to 26 members as noted above, irrespective of the fact that findings recorded in the order impugned dated 16.12.2022 are contradictory in some respect, there appears to be no dispute at least regarding 26 members and enrollment of three members, i.e. Ram Rekha Shastri, Suyash Pathak and Utkarsh Pathak may be invalid but in absence of three persons as parties to the proceedings no specific finding can be recorded in this regard.

29. Once, I find that meetings of 28.06.2014 and 29.06.2014 cannot attach sanctity and validity to the enrollment of members as per the bye-laws and as per the stand taken by the petitioners themselves, and that elections of 01.06.2023 were held by the District Inspector of Schools by appointing Observer in view of the two orders passed by this Court, one dated 15.03.2023 passed in Writ C No. 3997 of

2023 and other dated 25.07.2022 passed in Writ C No. 16556 of 2022, the order of Joint Director of Education dated 02.06.2023 is clearly unsustainable.

30. Regarding making of reference by the District Inspector of Schools by the order impugned dated 02.06.2023, it has been argued that once the District Inspector of Schools himself had held elections of the petitioners by appointing Observer as per directions issued by this Court, making a reference mechanically to Joint Director of Education or the Regional Level Committee is not according to law. Reliance in this regard has been placed on a judgment of Division Bench of this Court dated 06.07.2023 in Special Appeal Defective No. 335 of 2023 (C/M Dayanand Inter College and another vs State of U.P. and 5 others) on the point that reference cannot be made mechanically but can be made only when there is some genuine dispute.

31. Once, I find that the petitioners' elections dated 01.06.2023 have been held pursuant to the directions issued by this Court on two occasions while the order of Joint Director of Education dated 02.06.2023 is found to be without jurisdiction, the reference made by the District Inspector of Schools also appears to be unjustified.

32. As regards determination of Electoral College by order impugned dated 16.12.2022, the petitioners may approach civil court as per section 9 of the Code of Civil Procedure, 1908 read with sections 31 and 34 of the Specific Relief Act, 1963 for determination of their rights, if any, as the entire case is based upon alleged fabrication and forgery in various documents and neither any administrative

officer nor this Court can adjudicate such issue as it requires dealing with oral and documentary evidence and even expert opinion as per section 45 of the Evidence Act, if need arises.

33. Section 31 of the Specific Relief Act, 1963 may be invoked before the Civil Court when any instrument, void or voidable, if left outstanding, may cause serious injury to any person and, under such circumstances, the said instrument may be adjudged as void through a decree of the Civil Court. As per section 34 of the Specific Relief Act, any person claiming any declaration as to his character may obtain a decree from the Civil Court in that regard. In any such proceedings, external aid in the form of expert opinion under section 45 of the Indian Evidence Act, 1872 can always be taken by the Court. For a ready reference, Sections 31 and 34 of the Specific Relief Act, 1963 are being quoted herein-below:

“31. When cancellation may be ordered.- (1) Any person against whom a written instrument is, void or voidable, and who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable, and the court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.

(2) If the instrument has been registered under the Indian Registration Act, 1908, the court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books of the fact of its cancellation.”

“34. Discretion of court as to declaration of status or right. -Any person

entitled to any legal character, or to any right as to any property, may institute a suit against any person denying or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.”

Section 45 of the Indian Evidence Act, 1872 is quoted herein-below:

“45. Opinions of experts.- *When the Court has to form an opinion upon a point of foreign law or of science or art, or as to identity of handwriting [or finger impressions], the opinions upon that point of persons specially skilled in such foreign law, science or art, [or in questions as to identity of handwriting] [or finger impressions] are relevant facts.*

Such persons are called experts.”

34. Writ C Nos. 15412 of 2023 and 11662 of 2023 are, accordingly, **dismissed** with the aforesaid liberty and Writ C No. 21573 of 2023 is **allowed**.

35. The orders dated 02.06.2023 passed by the Joint Director of Education, Bhadohi and the District Inspector of Schools, Bhadohi are hereby **quashed**.

(2023) 9 ILRA 1013
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.05.2023

BEFORE

THE HON'BLE SALIL KUMAR RAI, J.

**THE HON'BLE ARUN KUMAR SINGH
DESHWAL, J.**

Writ-C No. 17575 of 2023

Smt. Premlata Pandey ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sudhanshu Pandey

Counsel for the Respondents:
C.S.C.

Civil Law - Constitution of India, 1950 - Article 226 - Government Order dated 11.04.2020 - Ex Gratia Compensation for COVID-19 Death - Petitioner sought mandamus for release of Rs. 50,00,000/- ex gratia compensation for the death of her husband, Head Constable Ashok Kumar Pandey, who contracted COVID-19 while on duty at Civil Airport, Gorakhpur, and died on 20.04.2021. Petitioner contended that her husband was enforcing COVID-19 protocols, supported by duty certificates from the Superintendent of Police and Chief Medical Officer, and forwarded by the District Magistrate. Respondents argued he was posted for security, not COVID-19 prevention, protection, or treatment, and the Revenue Committee did not approve the compensation. Court found that the husband was involved in enforcing COVID-19 protocols, as verified by official reports, and the Government Order entitled dependents of employees dying of COVID-19 while on such duty to compensation. No artificial distinction can be made among employees enforcing COVID-19 protocols. Petitioner held entitled to Rs. 50,00,000/- ex gratia compensation, to be released within one month. Writ petition allowed. (Paras 6-10)

Writ petition allowed.

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

1. Heard Sri Sudhanshu Pandey,
learned counsel for the petitioner and

learned Standing Counsel for the State respondents.

2. By means of the present petition, the petitioner is seeking mandamus directing the respondents to release ex gratia compensation of Rs.50,00,000/- to petitioner in pursuance to the Government Order dated 11.4.2020 for the death of her husband Late Ashok Kumar Pandey (Head Constable, U.P. Police) due to COVID-19 while performing his duty.

3. Contention of learned counsel for the petitioner is that the husband of the petitioner, Late Ashok Kumar Pandey, was working as Head Constable in U.P. Police at Maharajganj. By order dated 12.11.2020 of Additional Director General, Gorakhpur Zone, Gorakhpur, U.P., he was posted at Civil Airport Gorakhpur. In pursuance of that order, husband of the petitioner had joined the services at Civil Airport Gorakhpur on 26.11.2020. While working on duty at Civil Airport Gorakhpur, he felt respiratory problem on 16.4.2021 and, thereafter on conducting medical examination he was found corona positive and subsequently, he died on 20.4.2021 due to COVID-19. It is further submitted that husband of the petitioner while working at Civil Airport Gorakhpur, he was enforcing COVID-19 protocol and involved in prevention, protection and treatment operation at airport for COVID-19. Therefore, as per Government Order dated 11.4.2020, the petitioner being the wife of deceased Ashok Kumar Pandey submitted an application for release of ex gratia compensation of Rs.50,00,000/-.

4. As per Government Order dated 11.4.2020, the required formalities were completed and the duty certificate of Superintendent of Police (Head of

Department) along with certificate of Chief Medical Officer were also submitted. Thereafter, the District Magistrate, Maharajganj being the competent authority by letter dated 29.9.2021 forwarded the case of the petitioner to Additional Chief Secretary, Revenue, Government of U.P. for releasing Rs.50,00,000/- to the petitioner in view of death of her husband, Late Ashok Kumar Pandey. When no action was taken then Superintendent of Police, Maharajganj again wrote a letter dated 6.10.2021 to District Magistrate, Maharajganj for ensuring release of ex gratia compensation of Rs. 50,00,000/- to the petitioner for death of her husband, on duty. The above letter dated 6.10.2021 of Superintendent of Police, Maharajganj was followed by letter dated 23.12.2021 of Additional District Magistrate (Finance and Revenue), Maharajganj to the Secretary and Relief Commissioner of Government of U.P. for releasing the ex gratia amount to the petitioner. When no action was taken then the present petition was filed.

5. This Court by the order dated 23.5.2023 directed the respondent No.1 to file his personal affidavit explaining as to why the ex gratia compensation was not released in favour of the petitioner. In compliance of the above order of this Court, personal affidavit was filed by Sudhir Garg, Additional Chief Secretary, Revenue, Government of U.P. in which the stand was taken that husband of the petitioner was posted at Civil Airport, Gorakhpur on his request for the purpose of security and not for prevention, protection and treatment of COVID-19, therefore, considering the documents and report forwarded by the District Magistrate, Maharajganj, the committee headed by Secretary, Revenue, Government of U.P. did not approve the release of ex gratia amount of Rs. 50,00,000/- to the petitioner.

6. In the report dated 28.12.2021 of Inspector, in charge Civil Airport,

Gorakhpur to Superintendent of Police, Maharajganj, it is clearly mentioned that the husband of the petitioner Late Ashok Kumar Pandey remained posted there from 29.3.2021 to 18.4.2021 with corona test team. Apart from this Superintendent of Police, Maharajganj also in his letter dated 27.5.2021 as well as letter dated 6.10.2021 has clearly mentioned that husband of the petitioner Late Ashok Kumar Pandey was posted at Civil Airport, Gorakhpur for prevention, protection and treatment of COVID-19, therefore, the petitioner is entitled for ex gratia compensation of Rs.50,00,000/- for the death of her husband Late Ashok Kumar Pandey on duty during enforcement of COVID-19 protocol.

7. Per contra, the Standing Counsel submitted that the husband of petitioner Late Ashok Kumar Pandey was deputed at Civil Airport Gorakhpur for the purpose of security and not for prevention, protection and treatment of COVID-19, therefore, the petitioner is not entitled to ex gratia compensation for the death of her husband, Head Constable Late Ashok Kumar Pandey.

8. Considering the submission of the parties and on perusal of record, we find that in the report dated 29.9.2021 which was forwarded by the District Magistrate, Maharajganj to Additional Chief Secretary, Revenue, Government of U.P., it was clearly mentioned that being the Head of Department of Head Constable Late Ashok Kumar Pandey, the Superintendent of Police, Maharajganj has duly verified his duty for COVID-19 prevention, protection and treatment. Similarly, the letter dated 28.12.2021 of Inspector, In-charge, Civil Airport Gorakhpur to Superintendent of Police, Maharajganj, clearly mentioned the posting of husband of the petitioner from 29.3.2021 to 18.4.2021 for the purpose of

enforcement of COVID-19 protocol. From the Government order dated 11.4.2020, it is clear that any employee, working for prevention, protection and treatment of COVID-19, if dies during his duty then his dependents will be entitled for ex gratia compensation. Relevant extract of Government Order dated 11.4.2020 is being quoted as below:-

"2. कोविड-१९ की रोकथाम, उपचार व बचाव के लिए कार्यरत कार्मिकों में कोविड-१९ के संक्रमण की आशंका सदैव बनी रहती है। कोविड-१९ की रोकथाम, उपचार व बचाव के लिए कार्यरत कार्मिक की कोविड-१९ के संक्रमण से मृत्यु की दशा में उसके आश्रितों को सामाजिक सुरक्षा देने के लिए राज्य सरकार द्वारा उस मृतक के आश्रितों को रु० 50.०० लाख की एकमुश्त अनुग्रह धनराशि स्वीकृति किये जाने का निर्णय लिया गया है।"

9. Husband of the petitioner, Head Constable Ashok Kumar Pandey while working at Civil Airport Gorakhpur was involved in enforcement of COVID-19 protocol by ensuring social distancing among the passengers as well as forcing them to undergo corona test. Admittedly, there is no other force or employees except the policemen at airport who are deputed for this specific purpose. The State cannot make artificial distinction among its employees to depriving one class of employees from getting ex gratia compensation on their death despite the fact that they had received corona infection on duty during COVID-19 period. Every policeman or other government employee who has been discharging his duty during COVID-19 period for enforcing COVID-19

protocol will be deemed to be performing duty for prevention and protection of COVID-19 as mentioned in Government Order dated 11.4.2020 and if he dies because of corona infection during discharge of his duty then his dependents will be entitled to receive ex gratia compensation as per Government Order dated 11.4.2020.

10. In view of the above, husband of the petitioner Late Ashok Kumar Pandey (Head Constable) while working at Civil Airport Gorakhpur was involved in the duty of prevention, protection and treatment of COVID-19, therefore, on his death, the petitioner is entitled for ex gratia compensation as per the Government order dated 11.4.2020. The respondent No.1 is directed to release the ex gratia compensation of Rs.50,00,000/- to the petitioner within a period of one month from today.

11. With the aforesaid direction, the writ petition is **allowed**.

(2023) 9 ILRA 1016
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.08.2023

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE MANOJ BAJAJ, J.

Writ-C No. 18463 of 2023

Ramveer **...Petitioner**
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:
 Sri Rajnish Kumar, Sri Sanjeev Kumar Mishra

Counsel for the Respondents:

C.S.C.

Civil Law - Constitution of India, 1950 - Article 226 - U.P. Minerals (Prevention of Illegal Mining, Transportation and Storage) Rules, 2018 - Rule 12 - Motor Vehicles Act, 1988 - Section 207 - Principles of Natural Justice - Petitioner challenged the District Magistrate's order dated 25.02.2023, imposing financial liability for royalty, penalty, and mineral price, and referring the matter to the environmental pollution department, after the seizure of his vehicle (UP 83 AU 1915) for alleged illegal mineral transportation. The vehicle was initially seized under Section 207 of the Motor Vehicles Act, and despite the Chief Judicial Magistrate's release order on 07.02.2023, it was not released. Petitioner argued that no show-cause notice was issued before the impugned order, violating natural justice. Respondents contended that the petitioner admitted to carrying minerals, and Rules 12 and 72 of the U.P. Minor Minerals (Concession) Rules, 2021, did not mandate a hearing. Court held that natural justice principles, as established in *A.K. Kraipak* and *S.L. Kapoor*, apply to administrative actions with financial consequences, requiring a show-cause notice and fair procedure, even if the petitioner's application suggested an admission. The vehicle seizure under the Motor Vehicles Act and subsequent police reports limited the petitioner's defense opportunity. Impugned order quashed, vehicle ordered released forthwith, with liberty to respondents to proceed in accordance with law. (Paras 3, 7, 10-12)

Writ petition allowed.

List of Cases cited:

1. A.K. Kraipak & ors. Vs U.O.I. & ors., (1969) 2 SCC 262
2. Suresh Koshy George Vs The University of Kerala & ors., Civil Appeal No. 990/68
3. Ranveer Singh Vs St. of U.P. & ors., 2017 (1) ADJ 240
4. S.L. Kapoor Vs Jagmohan & ors., AIR 1981 SC 136

5. R. Vs Home Secretary, Ex. P. Hosenball, (1977) 1 WLR 766

6. Altco Ltd. Vs Sutherland, (1971) 2 Lloyd's Rep 515

7. R. Vs Thames Magistrates' Court, ex.p. Polemis, (1974) 1 WLR 1371

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

1. Instructions filed today be kept on record.

2. From the record, we find that the tractor trolley of the petitioner being vehicle no.UP 83 AU 1915 was apprehended by the police of Police Station Shikohabad, District Firozabad and an information was sent to the petitioner that the vehicle was seized for violation of the provisions under the Motor Vehicles Act, 1988 and, therefore, it was challaned under section 207 of the Motor Vehicles Act. The petitioner filed an application for release of the vehicle before the Chief Judicial Magistrate, Firozabad on 7.2.2023 stating that the vehicle was required for agricultural proposes. Thereafter a police report was called for and the police also submitted its report on 7.2.2023 stating that the vehicle was seized under section 207 of the Motor Vehicles Act. On 7.2.2023, the Chief Judicial Magistrate released the vehicle. When, however, the vehicle was not being released, the petitioner applied before the District Magistrate and informed him that even though he was carrying certain minerals legally, the vehicle had been confiscated despite the order of the Chief Judicial Magistrate dated 7.2.2023. Thereafter instead of releasing the vehicle, the District Magistrate on 25.2.2023 passed the impugned order by which the price of the mineral found, the royalty on it and the

penalty were asked for. Also the matter was referred to the department dealing with environmental pollution. Aggrieved thereof, the petitioner has filed the instant writ petition.

3. Learned counsel for the petitioner has stated that the order impugned dated 25.2.2023, on the face of it, was erroneous on account of the fact that before any order was passed and before the vehicle was confiscated/impounded under the provisions of U.P. Minerals (Prevention of Illegal Mining, Transportation and Storage), Rules 2018 (hereinafter referred to as the "2018 Rules"), the petitioner was not provided with any show-cause notice. He submits that before the petitioner was saddled with financial liability, he should have been heard. Learned counsel to bolster his arguments relied upon the judgment of the Supreme Court in *A.K. Kraipak & Ors. vs. Union of India & Ors.* reported in *1969 (2) SCC 262*. Since learned counsel relied heavily upon paragraph 20 it is being reproduced here as under :

"20. The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. **In other words they do not supplant the law of the land but supplement it.** The concept of natural justice has undergone a great deal of change in recent years. In the past it was thought that it included just two rules namely : (1) no one shall be a judge in his own case (*Nemo debet esse iudex propria causa*) and (2) no decision shall be given against a party without affording him a reasonable hearing (*audi alteram partem*). Very soon thereafter a third rule was envisaged and that is that quasi-judicial enquiries must be held in good faith,

without bias and not arbitrarily or unreasonably. But in the course of years many more subsidiary rules came to be added to the rules of natural justice. Till very recently it was the opinion of the courts that unless the authority concerned was required by the law under which it functioned to act judicially there was no room for the application of the rules of natural justice. The validity of that limitation is now questioned. **If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries.** Often times it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquiries. Enquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have more far reaching effect than a decision in a quasi-judicial enquiry. As observed by this Court in *Suresh Koshy George v. The University of Kerala and Ors.* (Civil Appeal No.990/68, decided on 15-7-1968) the rules of natural justice are not embodied rules. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the enquiry is held and the Constitution of the Tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a court that some principle of natural justice had been contravened the court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case."

(emphasis supplied)

4. Learned counsel for the petitioner further submitted that if the Statute did not provide for a hearing then the principles of natural justice should be read into the Statute. In support of this submission, learned counsel for the petitioner has also relied upon a judgment of this Court in **Ranveer Singh vs. State of U.P. & Ors.** reported in **2017 (1) ADJ 240**. Since, he specifically relies upon paragraph nos.30 and 33 of the judgment, the same are being reproduced here as under :-

"30. Thus law on the subject is clear that in case no procedure has been provided for as to in what way and manner the authority is to be exercised, then at the said point of time, the exercise of power by public authority has to be properly discharged i.e. it has to be decided with fairness and after following the principle of natural justice and the sense of justice and equity should continue to guide the Authorities concerned while conducting such proceedings in deciding the dispute on merit as the said decision in question would have large scale financial repercussions on the incumbent against whom proceedings in question have been initiated.

33. Once the liability was to be fastened on the shoulder of petitioner, then it was the obligation of the State to prove by way of credible evidence available that it was the petitioner, who has indulged in illegal mining and in the said direction, apart from issuing show-cause notice, all the evidence that was sought to be relied upon i.e. the incumbents who have carried out the search and survey and the incumbents who have come forward to depose against petitioner, their names ought to have been disclosed and they ought to have been produced to support the case of State that petitioner in fact has indulged in illegal mining. Not only this as a part of

process, petitioner was was entitled to have reasonable opportunity of defending himself by questioning the veracity of evidence produced against him and by adducing his own defence evidence, if any. Decision maker is bound to act fairly, as under the scheme of things provided for, the determination made by him will entail civil consequences, as qua the person charged with illegal mining on charges being proved financial liability would be shouldered and in contra situation, the State would be at loss."

5. Learned counsel for the petitioner has, thus, submitted that if there was no specific law or procedure provided in any Rule by which a vehicle was to be confiscated/seized under the law of mines, then the exercise of power by the public authority had to be properly discharged i.e. it had to be decided with fairness and after following the principles of natural justice. Justice and equity should always be a guiding factor. Learned counsel for the petitioner further submits that once the liability was to be fastened on the petitioner then it was obligatory for the State to prove the offence by credible evidence available and the petitioner should also be permitted to lead evidence.

6. Learned counsel for the petitioner submits that the petitioner had a permission from the owner of the minerals namely Mukesh Kumar to carry minerals on his trolley.

7. Learned counsel submits that even if the communication of the petitioner dated 9.2.2023 was being taken as an admission of the petitioner's guilt, the order impugned should have been preceded by a show-cause notice. In support of this argument learned counsel for the petitioner

relied upon the judgment of the Supreme Court in *S.L. Kapoor vs. Jagmohan & Ors.* reported in *AIR 1981 SC 136*. Since learned counsel specifically relied upon paragraph no.24 of the judgment, the same is being reproduced here as under :-

"24. The matter has also been treated as an application of the general principle that justice should not only be done but should be seen to be done. Jackson's Natural Justice (1980 Edn.) contains a very interesting discussion of the subject. He says :

"The distinction between justice being done and being seen to be done has been emphasised in many cases.

xx xx xx

The requirement that justice should be seen to be done may be regarded as a general principle which in some cases can be satisfied only by the observance of the rules of natural justice or as itself forming one of those rules. Both explanations of the significance of the maxim are found in Lord Widgery C.J.'s judgment in *R.V. Home Secretary, Ex. P. Hosenball*, (1977) 1 W.L.R.766, 772 whereafter saying that "the principles of natural justice are those fundamental rules, the breach of which will prevent justice from being seen to be done" he went on to describe the maxim as "one of the rules generally accepted in the bundle of the rules making up natural justice."

It is the recognition of the importance of the requirement that justice is seen to be done that justifies the giving of a remedy to a litigant even when it may be claimed that a decision alleged to be vitiated by a breach of natural justice would still have been reached had a fair hearing been given by an impartial tribunal. The maxim is applicable precisely when the Court is concerned not with a case of actual injustice but with the

appearance of injustice, or possible injustice. In *Altco Ltd. v. Sutherland*, (1971) 2 Lloyd's Rep 515 Donaldson J. said that the court, in deciding whether to interfere where an arbitrator had not given a party a full hearing was not concerned with whether a further hearing would produce a different or the same result. It was important that the parties should not only be given justice, but, as reasonable men, know that they had had justice or "to use the time hallowed phrase" that justice should not only be done but be seen to be done. In *R.V. Thames Magistrates' Court, ex.p. Polemis*, (1974) 1 WLR 1371, the applicant obtained an order of certiorari to quash his conviction by a stipendiary magistrate on the ground that he had not had sufficient time to prepare his defence. The Divisional Court rejected the argument that, in its discretion, it ought to refuse relief because the applicant had no defence to the charge.

'It is again absolutely basic to our system that justice must not only be done but must manifestly be seen to be done. If justice was so clearly not seen to be done, as on the afternoon in question here, it seems to me that it is no answer to the applicant to say : 'Well, even if the case had been properly conducted, the result would have been the same'. That is mixing up doing justice with seeing that justice is done (per Lord Widgery C.J. at p. 1375)."

In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It ill comes from a person who has denied justice that the person who has been denied justice is not prejudiced. As we said

earlier where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the Court may not issue its writ to compel the observance of natural justice, not because it is not necessary to observe natural justice but because Courts do not issue futile writs. We do not agree with the contrary view taken by the Delhi High Court in the judgment under appeal."

(emphasis supplied)

8. Sri Ankur Tandon, learned Standing Counsel in reply, however, has submitted that while the vehicle was confiscated on 2.2.2023, Sri Mahendra Singh, Sub-Inspector, Police Station Shikohabad, District Firozabad had sent a report that though the vehicle was seized under section 207 of the Motor Vehicles Act it had contained certain minerals which the vehicle was illegally carrying. He further submits that the petitioner himself on 9.2.2023 had submitted that he was carrying minerals. Learned Standing counsel further submits that when the petitioner himself had admitted that he was carrying the minerals and when the minerals were not accompanied by any of the papers which are provided under Rule 22 of the 2018 Rules, then it was the duty of the designated officers, as mentioned in Rule 12(2) of the 2018 Rules, to have stopped, checked and apprehended the vehicle. In the instant case, learned Standing Counsel states that even though the vehicle was seized under section 207 of the Motor Vehicles Act, action as had been taken by the mines department was justifiable.

9. Learned Standing Counsel has also submitted that since neither the provisions of Rule 12 of the 2018 Rules nor the

provisions of 72 of the U.P. Minor Minerals (Concession) Rules, 2021 provided for affording any opportunity, it was in the fitness of things that the District Magistrate had passed the impugned order dated 25.2.2023.

10. Having heard learned counsel for the petitioner and learned Standing Counsel, we are of the view that after the police had submitted its report on 2.2.2023, it was incumbent upon the District Magistrate to have issued a show-cause notice even if the petitioner was submitting the application which the respondents are stating was an admission on his behalf that he was carrying minerals illegally. The police is all powerful and we are of the view that the applicant could have written the application on the dictation of the police. The judgment of the Supreme Court in *S.L. Kapoor (supra)* clearly mandates the observance of the principles of natural justice even if the guilt is admitted.

11. Under such circumstances, we are of the view that even though the petitioner had stated in his application that he was carrying minerals, the order impugned should have been preceded by a show-cause notice and thereafter a complete procedure ought to have been adopted by the official/authority which was passing the order. We also find that the vehicle was seized under section 207 of the Motor Vehicles Act which was not in the possession of the petitioner. The reports were being submitted by the police after the vehicle was seized. The petitioner, therefore, had very little opportunity to defend himself. It may be mentioned that the application though had mentioned that the petitioner was carrying minerals it did not state that the minerals were being carried illegally.

12. Under such circumstances, the writ petition stands allowed. The order dated 25.2.2023 is quashed. Consequently the vehicle of the petitioner be released forthwith. However, passing of this order would not prohibit the respondents from taking action against the petitioner in accordance with law.

(2023) 9 ILRA 1021
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.07.2023

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
THE HON'BLE MANOJ BAJAJ, J.

Writ-C No. 20699 of 2023

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

Counsel for the Petitioners:
 Sri Anshul Kumar Singhal

Counsel for the Respondents:
 C.S.C.

Civil Law - Mines and Minerals (Development and Regulation) Act, 1957 - Section 21 - U.P. Minor Minerals (Concession) Rules, 1963 - Section 77 - Constitution of India, 1950 -Article 226 - Principles of Natural Justice - Petitioners, bhumidhars of plots used for agriculture, challenged the District Magistrate's order dated 08.12.2018, imposing royalty of Rs. 3,96,840/-, mineral price of Rs. 19,84,200/-, and penalty of Rs. 25,000/- for alleged illegal mining of 13,228 cubic meters of mud, and the Appellate Court's order dated 08.05.2023 dismissing their appeal. The orders relied on an ex parte Lekhpal report dated 20.01.2018, lacking details of inspection date or independent witnesses. Petitioners contended that notices dated 05.02.2018, 24.04.2018, and 11.10.2018 were not received, and the orders violated natural justice by not verifying the Lekhpal's findings or the end use of

the excavated mud, as required under *Promoters and Builders Association*. Respondents argued that multiple notices were served, and non-response justified the orders. Court held that the authorities erred in imposing liability without confirming the Lekhpal's report, inspection details, or mineral disposal, and failed to adhere to natural justice principles, as supported by *Ranveer Singh* and *Modul India*. Orders dated 08.12.2018 and 08.05.2023 quashed, matter remanded to the District Magistrate for fresh adjudication after hearing petitioners. Revision not considered appropriate due to clear violation of natural justice. (Paras 7, 12-13)

Writ petition partly allowed.

List of Cases Cited:

1. Modul India Vs Kamakshya Singh Deo, AIR 1989 SC 162
2. Ranveer Singh Vs St. of U.P. & ors., 2017 (1) ADJ 240
3. Promoters and Builders Association of Pune Vs The St. of Mah., (2015) 12 SCC 736

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

1. The petitioners are bhumidhars of plots no. 2744 and 2745 having an area of .271 hectares and .3040 hectares respectively. They were using their plots for agricultural purposes. However when the Authorities under the various provisions of the Mines and Minerals (Development and Regulation) Act, 1957, (hereinafter referred to as the Act of 1957) served an order dated 8.12.2018 on the petitioners that they had illegally mined from the plots and levied penalty also then the petitioners approached the Appellate Court and when the Appellate Court also on 8.5.2023 rejected the Appeal, the instant writ petition has been filed.

2. Contention of the learned counsel for the petitioners is that the order dated

8.12.2018 was based on a report of the Lekhpal dated 20.1.2018. Learned counsel for the petitioners states that this report was necessitated as the Lekhpal had received certain complaints from their own relatives that the petitioners were doing illegal mining on their bhumidhari plots. Learned counsel for the petitioners states that the lekhpal's report dated 20.1.2018 if is perused it becomes clear that the Lekhpal had not noted as to on what date the earth was removed. The Lekhpal had also not stated as to in whose presence the inspection was done on 20.1.2018.

3. Learned counsel for the petitioners has relied upon the averments made in the counter affidavit and has submitted that thereafter without further looking in the reports of the Lekhpal, the Sub Divisional Magistrate forwarded the report of the Lekhpal to the Additional District Magistrate (F & R) Mathura on 30.1.2018. Learned counsel for the petitioner again relied upon the averments made in the counter affidavit and has stated that probably a notice was also sent to the petitioner on 5.2.2018. When this notice went unreplied, on 24.4.2018 another notice was sent and when this notice was also not attended to by the petitioners then the ultimate notice dated 11.10.2018 was sent.

4. Learned counsel for the petitioners has stated that a perusal of the notice dated 11.10.2018 would reveal that the petitioners were charged with having contravened the provisions of Section 21(4) of the Act of 1957.

5. Learned counsel for the petitioners states that this notice had presumed without any actual record that the petitioners had excavated 13228 cubic meters of ordinary

mud and without any basis the royalty on mineral(mud) was evaluated at Rs. 3,96,840/- and the price of it was evaluated at Rs. 19,84,200/-. The total payable amount by the petitioner came to Rs. 23,81,040/-. Over and above this amount a penalty of Rs. 25,000/- was also imposed.

6. Learned counsel for the petitioners states that the notice was followed by an order dated 8.12.2018 and he states that even this order did not come to the notice of the petitioners. Only when recovery was being initiated for Rs. 24,06,040/- that the petitioners filed a writ petition being Writ C No. 23885 of 2019. In the writ petition, the petitioner, however, was relegated to the filing of an Appeal under Section 77 of the Uttar Pradesh Minor Minerals (Concession) Rules, 1963. The petitioners did file an Appeal and when it was dismissed without any basis, the instant writ petition was filed.

7. Learned counsel for the petitioners has raised essentially the following arguments:

I. The Lekhpal report dated 20.1.2018 was an ex parte one.

II. The Lekhpal did not indicate any date on which the Lekhpal had visited the spot.

III. All the findings which were arrived at by the Lekhpal were ex parte, and the report was prepared without the presence of any independent witness.

IV. The learned counsel for the petitioners states that no notice as had been indicated in the counter affidavit was ever received by the petitioners. The petitioners were, therefore, saddled with the responsibility of paying royalty, price of the minerals and the penalty amount without any basis.

V. Learned counsel for the petitioners states that even if there was no reply to the notice, it did not give any authority to the District Magistrate to pass a wrong order. The District Magistrate before passing the order ought to have seen as to whether the Lekhpal's report was a correct one and also he ought to have confirmed that whether as per the provisions of Section 21(5) of the 1957 Act the minerals which were raised from the land were disposed of and were used elsewhere. In the absence of such a finding the petitioners could not be saddled with the responsibility to compensate the State.

VI. Learned counsel for the petitioner states that though in the Code of Civil Procedure under Order VIII Rule 10 a Suit could be decreed on the non-filing of a written statement after notice is issued to file the written statement, the Supreme Court in the Case reported in **AIR 1989 SC 162 : Modul India vs. Kamakshya Singh Deo** has held that if a suit is to be decreed without a written statement then the court has to base its judgement on cogent reasons. In the instant case, learned counsel for the petitioners states that there was absolutely no reason provided for holding that the petitioner had to pay the price and the royalty. Also no reason was given to penalize the petitioner. Simply because the petitioners had not replied to the notice they were being penalized. The authorities, therefore, erred in holding the petitioners guilty.

VII. Learned counsel for the petitioners also submits that the Appellate Court without looking into the fact that the District Magistrate on 5.12.2018 had passed the order without any application of mind had also erred in dismissing the Appeal on 8.5.2023.

VIII. Learned counsel for the petitioners relied upon a judgement of this

Court reported in **2017 (1) ADJ 240 (Ranveer Singh vs. State of U.P. and others)** and has submitted that when there are no procedures provided in any statute or Act then the decision should be fair and should be based on fair procedure and that too after following the principles of natural justice. Since the learned counsel for the petitioners heavily relied upon paragraphs no. 30 and 33 of the judgement reported in **2017 (1) ADJ 240 (Ranveer Singh vs. State of U.P. and others)** the same are being reproduced here as under:-

"30. Thus law on the subject is clear that in case no procedure has been provided for as to in what way and manner the authority is to be exercised, then at the said point of time, the exercise of power by public authority has to be properly discharged i.e. it has to be decided with fairness and after following the principle of natural justice and the sense of justice and equity should continue to guide the Authorities concerned while conducting such proceedings in deciding the dispute on merit as the said decision in question would have large scale financial repercussions on the incumbent against whom proceedings in question have been initiated.

33. Once the liability was to be fastened on the shoulder of petitioner, then it was the obligation of the State to prove by way of credible evidence available that it was the petitioner, who has indulged in illegal mining and in the said direction, apart from issuing show-cause notice, all the evidence that was sought to be relied upon i.e. the incumbents who have carried out the search and survey and the incumbents who have come forward to depose against petitioner, their names ought to have been disclosed and they ought to have been produced to support the case of State that petitioner in fact has indulged in

illegal mining. Not only this as a part of process, petitioner was was entitled to have reasonable opportunity of defending himself by questioning the veracity of evidence produced against him and by adducing his own defence evidence, if any. Decision maker is bound to act fairly, as under the scheme of things provided for, the determination made by him will entail civil consequences, as qua the person charged with illegal mining on charges being proved financial liability would be shouldered and in contra situation, the State would be at loss."

IX. The Appellate Court referred to all the arguments of the petitioners but did not advert to them and therefore learned counsel for the petitioners states that the Appellate Court's order was a non-speaking one.

8. Learned counsel for the petitioners to bolster his argument that the volume and price of the excavated minerals should have been determined and thereafter a price and royalty of the same ought to have been fixed relied upon the judgement of the Supreme Court in the case of **Promoters and Builders Association of Pune Vs. The State of Maharashtra** reported in **2015 (12) SCC 736**. Since learned counsel for the petitioners heavily relied upon the paragraph no. 16 of the judgement, the same are being reproduced here as under:-

" 16. As use can only follow extraction or excavation it is the purpose of the excavation that has to be seen. The liability under Section 48(7) for excavation of ordinary earth would, therefore, truly depend on a determination of the use/purpose for which the excavated earth had been put to. An excavation undertaken to lay the foundation of a building would

not, ordinarily, carry the intention to use the excavated earth for the purpose of filling up or levelling. **A blanket determination of liability merely because ordinary earth was dug up, therefore, would not be justified; what would be required is a more precise determination of the end use of the excavated earth; a finding on the correctness of the stand of the builders that the extracted earth was not used commercially but was redeployed in the building operations.** If the determination was to return a finding in favour of the claim made by the builders, obviously, the Notification dated 3.2.2000 would have no application; the excavated earth would not be a specie of minor mineral under Section 3(e) of the Act of 1957 read with the Notification dated 3.2.2000."

Relying upon the judgement learned counsel also submitted that there ought to be a finding as to what was the end result of the mud excavated.

9. Learned Additional Chief Standing Counsel Ms. Priyanka Midha, however, submitted that the writ petition be dismissed as the petitioners have throughout been very lax towards the notices which were served upon them. She, relying upon the averments made in the counter affidavit, has submitted that notices dated 5.2.2018, 24.4.2018, 1.5.2018 and 11.10.2018 were received by the petitioners but none of the notices was replied to.

10. Learned Additional Chief Standing Counsel states that notices were served and that too in the presence of two witnesses. Learned Additional Chief Standing Counsel thus submits that when there was no reply submitted to the notices then there was no other option left with the Authorities but to ascertain as to what was

the mineral removed. She submits that after the ascertainment of the quantity, the price and royalty had been fixed.

11. Learned Additional Chief Standing Counsel also submitted that against the Appellate Court's order, the petitioners had a remedy of filing a Revision.

12. Having heard the learned counsel for the petitioners Sri Anshul Kumar Singhal and learned Additional Chief Standing Counsel Ms. Priyanka Midha, the Court is of the view that the District Magistrate while passing the order dated 8.12.2018 and the Appellate Court while passing the order dated 8.5.2023 erred in coming to a conclusion, ex parte, as to what was the material which was excavated and also erred in fixing the royalty and the price. Definitely when the petitioners did not file any reply to the notices then it was incumbent upon the Authorities to have seen whether the Lekhpal had made a proper inspection; whether the inspection was made on a particular date; whether it was done in the presence of any independent witness and also they had to ascertain as to what was the mineral actually removed before concluding that there was removal of minerals from the land of the petitioners and also that it was sold away. This having not been done, we are definitely of the view that the Authorities i.e. the District Magistrate/Collector, Mathura and the Commissioner, Agra Division, Agra, erred in passing the orders dated 8.12.2018 and 8.5.2023 respectively. Under such circumstances, the order dated 8.12.2018 passed by the District Magistrate/Collector, Mathura, and the order dated 8.5.2023 passed by the Commissioner, Agra Division, Agra are quashed and set aside.

"i. issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 29.4.2023 passed by Additional Commissioner, Agra Division,

Agra in Revision No.81 of 2012-13 (Computerized Case No.C2013100000274), under Section 333 of U.P.Z.A. & L.R. Act and order dated 18.01.2013 passed by Assistant Collector First Class/ Revenue Officer Mainpuri in Case No.95 of 2009-10 under Section 229B of U.P.Z.A. & L.R. Act (Ramvir Singh vs. Vinod and Others).

ii. issue a writ, order or direction in the nature of mandamus commanding the respondents not to disturb the right, title and possession of the petitioner over the land in dispute well described in the writ petition, except following the dues required procedure in accordance with law.

iii. issue a writ, order or direction in the nature of mandamus to the respondent authorities commanding them to keep intact the entries in the relevant statutory records as it is today up to the time until and unless the same are ordered to be modified, varied or expunged by any competent judicial forum.

iv. issue a writ, order or mandamus in the nature of mandamus commanding the Executive authorities not to dispossess the petitioner by any administrative fiat except otherwise than in accordance with law.

v. Pass such other and further order which this Hon'ble Court may deem fit and proper under the facts and circumstances of the case.

vi. Award the cost of the petition in favour of the petitioner."

3. Brief facts of the case are that petitioner filed a suit under Section 229B of U.P.Z.A. & L.R. Act for declaration that the petitioner be declared bhumidhar with transferable right in respect to plot no.638, 736, 762, 774, total four plots area 1.234 Hectare. On the basis of possession, State has filed written statement in the aforementioned suit. Trial Court vide ex-parte judgment and

decree dated 7.1.2013 decreed the plaintiff's suit. On 18.1.2013, State filed an application under Order 9 Rule 13 of Code of Civil Procedure for setting aside the ex-parte judgment and decree dated 7.1.2013. Trial Court vide order dated 18.1.2013 allowed the application dated 18.1.2013 filed by State setting aside the ex-parte judgment dated 7.1.2013 and restored the suit for fresh decision on merit. Petitioner challenged the order dated 18.1.2023 through revision before Commissioner which has been dismissed vide order dated 29.4.2023, hence this writ petition on behalf of petitioner challenging the orders dated 29.4.2023 and 18.1.2023.

4. Learned counsel for the petitioner submitted that the suit under Section 229B of U.P.Z.A. & L.R. Act filed by the petitioner has been decreed after filing of written statement by the State. He further submitted that in place of filing appeal under Section 331 (3) of U.P.Z.A. & L.R. Act, an application under Order 9 Rule 13 of Code of Civil Procedure was filed by the State after three days from deciding the suit under Section 229B of U.P.Z.A. & L.R. Act. He further submitted that the trial Court has allowed the application filed under Order 9 Rule 13 of C.P.C. in arbitrary manner. He next submitted that the petitioner filed a revision against the order allowing the application filed by the State which has been also dismissed in arbitrary manner. He also submitted that once the procedure prescribed has not been followed, the order impugned cannot be sustained. He further placed reliance upon the judgment of Apex Court reported in **2008 AIR (SC) 1006 (Sunil Poddar & Others vs. Union Bank of India)** in order to demonstrate that the procedure prescribed should be followed for recalling the order passed in the proceeding.

5. On the other hand, Mr. Abhishek Shukla, learned Additional Chief Standing

Counsel submitted that the trial Court has decreed the plaintiff's suit by passing cryptic order. He further submitted that although issues have been framed but there is no adjudication of the suit as required to be decided in the proceeding under Section 229 B of U.P.Z.A. & L.R. Act. He also submitted that after framing issues, the issues are to be adjudicated in accordance with law but the trial Court while decreeing the plaintiff's suit has passed the cryptic order that the plaintiff has proved the case of adverse possession without discussing any evidence relied upon by the plaintiff in the suit. He further placed reliance upon the judgment reported in **(2016) 133 R.D. 375, Kallu Khan and 6 Others vs. Commissioner Chitrakoot Dham Division Banda and three Others**, in order to demonstrate that even the ex-parte judgment are to be passed after considering the evidence adduced by the plaintiff.

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

7. There is no dispute about the fact that the suit under Section 229B of U.P.Z.A. & L.R. Act filed by the plaintiff-petitioner was decreed by the trial Court but the on the application under Order 9 Rule 13 of C.P.C. filed by the State after three days from the passing of the judgment was recalled and suit has been restored to its original number for fresh decision in accordance with law.

8. Since, the suit under Section 229 B of U.P.Z.A. & L.R. Act has been decreed by passing cryptic order dated 7.1.2013, as such, the perusal of the same will be relevant, which is as follows:

"न्यायालय राजस्व अधिकारी/ मैनपुरी।

न्यायालय सहायक कलक्टर प्रथम (माल)/ राजस्व अधिकारी मैनपुरी।

वाद संख्या- 65/09-10 धारा- 229वी ज०वि० अधिनियम

मौजा- ईसईमधुपुरी तहसील, कुरावली, तहसील व जिला मैनपुरी।

रामवीर सिंह बनाम विनोद आदि

निर्णय

सूक्ष्म विवरण वाद इस प्रकार है कि रामवीर सिंह ने ग्राम ईसईमधुपुरी के नम्बरान 638/0.081, 736/0.526, 774/2/0.607 कुल चार कित्ता 1.236 लगानी 22.00 पैसा जो कि प्रतिवादी 01 लगायत 02 के नाम खतौनी में अंकित है, से नाम प्रतिवादीगण 01 लगायत 02 के पिता महावीर सिंह के समय से चला आ रहा है। इन्द्राज खतौनी प्रतिवादीगण 01 व 02 अवैधानिक है। किसी भी प्रतिवादीगण का कोई कब्जा नहीं है।

सम्मान प्रतिवादीगण जारी किये गये है। दिनांक 15-10-97 को विनोद पप्पू की ओर से आपत्ति दाखिल की गई है। दिनांक 23-11-96 को स्टेट ने भी प्रतिवादी पत्र दाखिल किया है। पक्षगण की दलीलों के आधार पर निम्नलिखित वाद बिन्दु दिनांक 03-01-96 को बनाये गये है।

1- आया कि वादी कब्जा गासवाना के आधार पर आराजी का काशतकार भूमिधर है।

2- आया कि धारा 80 सी०पी०सी० एवं 106 पं० राज एक्ट के नोटिस विधिवत वादी द्वारा दिये गये है।

3- आया कि आराजी सार्वजनिक प्रयोग की भूमि है।

4- आया कि वाद अवैध हस्तान्तरण का है।

दावा करने से पूर्व विधिवत नोटिस दिये गये है। वादी द्वारा अपने कथन की पुष्टि करते हुए दाखिल किया है। इन तीनों ही गवाहान के बयान संदेह से परे है, जिन्होंने कब्जा गासवान को बखूबी साबित किया है। स्टेट की ओर से कोई साक्ष्य प्रस्तुत किया गया है। वाद बिन्दु बार वाद का निस्तारण निम्नवत किया जाता है-

वाद बिन्दु संख्या-1 कब्जा गासवाना को साबित बखूबी साबित वादी स्वयं व उनके गवाहान ने किया है प्रतिखण्डन में कोई भी साक्ष्य नहीं आया है। अतः वाद बिन्दु सकारात्मक रूप से तय की जाती है। वाद बिन्दु संख्या-2 धारा 80 सी०पी०सी० एवं 106 पं० राज एक्ट के नोटिस की प्रतियाँ मय रसीद रजिस्ट्री की प्रतियाँ पत्रावली पर मौजूद है, जिन्हें साबित कराया गया है। अतः उक्त वाद बिन्दु सकारात्मक रूप से तय की जाती है।

वाद संख्या-3 क्योंकि पत्रावली स्टेट की ओर से पैसा कोई जवादी एवं तहरीरी अभिलेखा दाखिल किया गया है जिससे यह साबित हो कि भूमि निजाई सार्वजनिक प्रयोजन की भूमि है। अतः उक्त वाद बिन्दु नकारात्मक रूप से निर्णीत की जाती है।

वाद बिन्दु संख्या-4 उक्त वाद अवैध हस्तान्तरण का नहीं है, क्योंकि वादी द्वारा कब्जा साबित करने को अपना साक्ष्य सन्तोषजनक रूप से दिया है। अतः उक्त वाद बिन्दु नाकारत्मक से निर्णीत की जाती है।

मैंने पत्रावली पर उपलब्ध साक्ष्यों अवलोकन किया। प्रतिवादीगण द्वारा कोई बहस प्रस्तुत नहीं की गई न ही कोई साक्ष्य प्रस्तुत किया है। प्रतिवादी की अदम पैरवी के कारण प्रतिवादी के आधार पर वादी अपना कथन साबित करने में सफल रहा है। अतः वाद एक पक्षीय रूप से डिक्री होने योग्य है।

आदेश

दावा वादी एक पक्षीय रूप से आज्ञाप्त किया जाता है तथा आराजी नम्बर नं 638/0.081, 736/0.020, 762/0.526, 774/0.607 कुल चार किता 1.234 लगानों 22-00 ग्राम ईसईमधुपुरी पर नाव वादी बतौर संक्रमणीय भूमिधर दर्ज किया जावे। तदनुसार आदेश पत्रक जारी हों। वादी आवश्यक कार्यवाही दाखिल दफ्तर हों।

ह० अप०

राजस्व कलक्टर प्रथम श्रेणी (माल)
मैनपुरी।

आज यह आदेश मेरे द्वारा खुले न्यायालय में हस्ताक्षरित एवं दिनांकित कर निर्गत किया गया।

दिनांक 07-01-13

ह० अप०

राजस्व कलक्टर प्रथम श्रेणी (माल)
मैनपुरी।"

9. The judgment of trial Court as quoted above reveals that there is no proper adjudication of suit filed by the petitioner under Section 229B of U.P.Z.A. & L.R. Act. It is material that even in the ex-parte judgment there should proper consideration and analysis of the evidence of the plaintiff and there should be proper adjudication of the dispute as suit under Section 229B of U.P.Z.A. & L.R. Act now under Section 144 of U.P. Revenue Code, 2006 is of special character, which can not be decided by passing cryptic judgment.

10. The judgment cited by Mr. Abhishek Shukla, learned Additional Chief Standing Counsel for the State-respondents in the case of **Kallu Khan and Others (supra)** is also relevant for perusal. Paragraph no.16 to 23 of the judgment

rendered in **Kallu Khan and Others (supra)** are relevant, which are as under:

"16. It would be relevant to note that 6 issues have been framed consequent to the written statement filed by the State of U.P. Although, the Trial Court by its order dated 05.04.2010 decreed the suit, it did not refer to any of the issues framed. This order does not refer to any submissions made on behalf of the State or the Gaon Sabha. It is therefore clear that the order dated 05.04.2010 is clearly exparte against the Gaon Sabha and the State of U.P.

17. Besides this order does not fulfill the requirements of the judgment as provided under the Civil Procedure Code. The case being decided, was a regular title suit under Section 229-B of the Act. The judgment therefore, was necessarily required to comply with the provisions of the Civil Procedure Code and a finding on each and every issues framed was necessarily required to be recorded. No such exercise has been done. The issues framed have not yet been referred to in the judgment of 05.04.2010. On the contrary in the last line, the Trial Court observed that it is a case of correction of papers.

18. In view of the above discussion and since this Court is of the firm view that the order dated 05.04.2010 was exparte, I do not consider it a fit case for interference on technicalities.

19. The contention of learned counsel for the petitioner is that the State was heard and that the statement of the Revenue Records Keeper had been recorded at the instance of the State is not borne out from the record. As noticed above, the Revenue Record Keeper was summoned on the application filed by the plaintiff and when he appeared with the record his statement was recorded. It therefore cannot be said that the Revenue Record Keeper was

produced on behalf of the State or the Gaon Sabha. He having been summoned on the application of the plaintiff, his deposition would necessarily be termed as as one on behalf of the plaintiff.

20. *The above noted hearing illegalities and irregularities in the judgment dated 05.04.2010 is sought to be blast over on the ground of technicalities first that the judgment was recalled without notice to the plaintiff or his heirs and that the decree was not condoned and that the order was against a dead person.*

21. *These grounds raised may have merit, but this Court in exercise of equity jurisdiction under Article 226 of the Constitution of India does not propose to interfere with the impugned orders on such technicalities. These technicalities may render the orders impugned, illegal yet this Court refuses to set aside these so called illegal orders because any interference would amount to restoring an equally illegal order passed by the Trial Court which as already noticed herein in above was clearly exparte against the State and the Gaon Sabha it also failed to comply with the provisions of the Civil Procedure Code and therefore cannot be termed a judgment in the eye of law.*

22. *Accordingly and for the reasons given above, the writ petition merits no interference. It is therefore dismissed.*

23. *The parties may appear before the Trial Court and contest the matter on its merits. The original records of Suit No. 9 of 2009-10 produced by learned Standing Counsel be returned for its transmission to the Trial Court."*

11. This Court in the case reported in **1985 R.D. 71 Paras Nath singh Vs. The Deputy Director of Consolidation and others** has held that if by setting aside the impugned order another illegal order will

be restored then the Court under Article 226 of the Constitution of India should not interfere with the impugned order although the order impugned is illegal or irregular. Paragraph No.21 of the judgment rendered in **Paras Nath (supra)** is relevant which is as follows:

"21. It is, no doubt, correct to say that any order passed without jurisdiction is a nullity and deserves to be quashed. But if as a result of quashing that order another wrong and illegal order would be restored, this Court would refuse to interfere with the impugned order which appears to be quite proper equitable and just order. As mentioned above, the power under Article 226 of the Constitution is devised to advance justice and not to thwart it. To me it appears to be well settled that an order which is illegal cannot be quashed or set aside in writ jurisdiction if quashing of it results in bringing on record another illegal order."

12. This Court in a case reported in AIR 1983 Allahabad 450, **Smt. Kaniz Fatima and another vs. Shah Naim Ashraf** has held that if no issue has been framed on a question which arise out of the pleadings of the parties, the Court cannot proceed to record a finding on that point. Paragraph nos.19 and 20 of the judgment are quoted hererunder:-

"19. There is no dispute with the proposition of law laid down in the aforesaid decision, but the true scope of the said rule would be that where the parties have led their entire evidence on all the pleas raised by them, they cannot be permitted to urge at the conclusion of the proceedings or in appeal that they were taken by surprise by non-framing of an issue on that particular point on which they

have already exhausted their evidence. In such a case it cannot be said that the parties are prejudiced in any manner whatsoever by non-framing of an issue. But the said rule cannot be construed to cover those cases as well where the evidence was led on issues on which the parties actually went to trial, because it is well settled that the evidence adduced on any particular issue by the parties cannot be made foundation for decision of any other and different plea on which no issue has been framed, because in the absence of an issue on the point they cannot be said to have an opportunity of adducing evidence in support of it or in rebuttal of it. It cannot be assumed that the parties have exhaustively led evidence on all the pleas raised in the pleadings. A party is supposed to lead evidence only on the issues framed in the suit. The other party can object and the court can always refuse to record evidence which does not relate to the issues framed in the suit. Even if evidence has been led and brought on record, the court will not be justified to look into that evidence for deciding a point not covered by the issues. Thus, it cannot be said that if the parties had led evidence in the case it should be construed to cover all the pleas raised in the pleadings although no issue has been framed on that point.

20. The object of framing the issue is to direct the attention of the parties to lead evidence on that specific issue framed and if no evidence is led (one line obliterated Ed.) drawn against the concerned party for holding that it has no evidence to support or to rebut the plea covered by the issue in question. But in the absence of proper issues covering all the pleas raised in pleadings it cannot be said that the parties have exhausted all their evidence or all the pleas raised by them although the same are not covered by the issues framed. In this

view of the matter, we find that in the present case since proper issues have not been framed, which arise out of the pleadings of the parties as well as in the statement of the case recorded under O. 10, R. 2 of the Code, it cannot be said that the defendants have led all their evidence which they would have led in support of the pleas which are not covered by the issues framed in the suit. The decision, recorded by the court below, therefore, cannot be sustained on the said ground urged by the learned counsel for the plaintiff. The case, therefore, deserves to be remanded to the trial court for decision afresh after framing proper additional issues in the suit and giving full opportunity to the parties to lead their evidence which they may like to produce in support of their case. Learned court below will carefully scrutinize pleadings and frame necessary additional issues."

13. The judgment cited by learned counsel for the petitioner will not be applicable in the facts and circumstances of this case rather the judgment rendered in **Kallu Khan (supra), Paras Nath Singh (supra) & Smt. Kaniz Fatima (supra)** shall be applicable in the instant matter.

14. Considering the entire facts and circumstances, as well as ratio of law laid down by this Court in **Kallu Khan & Others (supra), Paras Nath (supra)**, as well as **Smt. Kaniz Fatima (supra)**, no interference is required against the impugned orders in exercise of jurisdiction under Article 226 of Constitution of India as the result of quashing of impugned orders will result into restoring the illegal order of trial dated 7.1.2013 by which suit under section 229B of U.P.Z.A. and L.R. Act has been decreed in violation of the ratio of law laid down by this court in

4. Learned counsel appearing for the applicant submits that on 15.10.2018, a cheque is said to be issued by the present

applicant in favour of the complainant, amounting Rs.5,00,000/- and thereafter, the same is said to be bounced and the notice was issued to the applicant, on 01.02.2019, by the opposite party no. 2, through his attorney but the same was never served upon the applicant.

5 . He submits that on 23.03.2019, the complainant filed a case under section 138 of Negotiable Instrument Act, 1881 (hereinafter referred to as the Act, 1881), before the Chief Judicial Magistrate, Custom, Lucknow and thereafter the several dates were, fixed wherein, on 31.01.2023, due to unavoidable circumstances, the present applicant could not appear before the trial court, which has been explained in paragraph 19 of this application and for non-appearance, for a day, before the trial court, the non-bailable warrant was issued. He submits that after the order dated 31.01.2023, the other dates were fixed i.e. on 20.02.2023, 28.03.2023 and, ultimately, on 28.04.2023 and the order of non-bailable warrant as well as proclamation under section 82 was also issued against the applicant and the applicant is aggrieved with both the orders, passed by the trial court as the same is without adhering to the mandate of provision of section 82 of Cr.P.C.

6. Contention of learned counsel for the applicant is that a complaint was instituted and thereafter, when the summons were issued, the applicant kept on appearing on each and every date before the trial court, prior to 31.01.2023 and there was no deliberate deviation in appearance before the same. He submits that the manner in which the order of non-bailable warrant was passed, is totally against the procedure prescribed under the law.

7. Adding his arguments, he has drawn attention towards the procedure prescribed for issuance of proclamation under section 82 of Cr.P.C. Section 82 of Cr.P.C. are read as under:-

"82. Proclamation for person absconding.

(1) If any Court has reason to believe (whether after taking evidence or not) that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed, such Court may publish a written proclamation requiring him to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation.

(2) The proclamation shall be published as follows:-

(i) (a) it shall be publicly read in some conspicuous place of the town or village in which such person ordinarily resides;

(b) it shall be affixed to some conspicuous part of the house or homestead in which such person ordinarily resides or to some conspicuous place of such town or village;

(c) a copy thereof shall be affixed to some conspicuous part of the Court-house;

(ii) the Court may also, if it thinks fit, direct a copy of the proclamation to be published in a daily newspaper circulating in the place in which such person ordinarily resides.

(3) A statement in writing by the Court issuing the proclamation to the effect that the proclamation was duly published on a specified day, in the manner specified in clause (i) of sub-section (2), shall be conclusive evidence that the requirements of this section have been complied with, and that the proclamation was published on such day."

8. Referring the aforesaid, he submits that the above-said provision prescribes that in case of any warrant issued against a person and he is absconding and concealing himself from such warrant, the court may publish a written proclamation with the requirement for appearance at specified place and time, not less than thirty days from the date of publishing such proclamation. He contended that so far as the present case is concerned, the learned trial court did not record any reason, while issuing the proclamation under section 82, which is apparent on the face of the order sheet of the trial court. Further, the proclamation which is required to be published, has never been published, which is also one of the important lacuna in the order of the trial court.

9. The second fold of the argument of learned counsel for the applicant is that so far as the order with respect to the non-bailable warrant is concerned, the Hon'ble Apex Court has held in case of **Raghuvansh Dewanchand Bhasin vs State of Maharashtra in Criminal appeal No. 1758 of 2011 (Arising out of S.L.P. (Crl.) No. 5412 of 2008)** that the 'execution of a non-bailable warrant directly involves curtailment of liberty of a person and thus, the same cannot be issued in a mechanical manner, but only after recording satisfaction that how it is warranted.

Further in the same judgment, Hon'ble the Apex Court has issued certain guidelines in paragraph 23, to the subordinate courts, for issuance of non-bailable warrant. Paragraph 23 of the judgment is quoted hereinunder:-

"23. However, before parting with the judgment, we feel that in order to prevent such a paradoxical situation, we are faced with in the instant case, and to check or obviate the possibility of misuse of an arrest warrant, in addition to the statutory and constitutional requirements to which reference has been made above, it would be appropriate to issue the following guidelines to be adopted in all cases where non-bailable warrants are issued by the Courts:-

(a) All the High Court shall ensure that the Subordinate Courts use printed and machine numbered Form No.2 for issuing warrant of arrest and each such form is duly accounted for;

(b) Before authenticating, the court must ensure that complete particulars of the case are mentioned on the warrant;

(c) The presiding Judge of the court (or responsible officer specially authorized for the purpose in case of High Courts) issuing the warrant should put his full and legible signatures on the process, also ensuring that Court seal bearing complete particulars of the Court is prominently endorsed thereon;

(d) The Court must ensure that warrant is directed to a particular police officer (or authority) and, unless intended to be open-ended, it must be returnable whether executed or unexecuted, on or before the date specified therein;

(e) Every Court must maintain a register (in the format given below), in which each warrant of arrest issued must be entered chronologically and the serial number of such entry reflected on the top right hand of the process;

(f) No warrant of arrest shall be issued without being entered in the register mentioned above and the concerned court shall periodically check/monitor the same to confirm that every such process is always returned to the court with due report and placed on the record of the concerned case;

(g) A register similar to the one in clause (e) supra shall be maintained at the concerned police station. The Station House Officer of the concerned Police Station shall ensure that each warrant of arrest issued by the Court, when received is duly entered in the said register and is formally entrusted to a responsible officer for execution;

(h) Ordinarily, the Courts should not give a long time for return or execution of warrants, as experience has shown that warrants are prone to misuse if they remain in control of executing agencies for long;

(i) On the date fixed for the return of the warrant, the Court must insist upon a compliance report on the action taken thereon by the Station House Officer of the concerned Police Station or the Officer In-charge of the concerned agency;

(j) The report on such warrants must be clear, cogent and legible and duly forwarded by a superior police officer, so as to facilitate fixing of responsibility in case of misuse;

(k) In the event of warrant for execution beyond jurisdiction of the Court issuing it, procedure laid down in Sections 78 and 79 of the Code must be strictly and scrupulously followed; and

(l) In the event of cancellation of the arrest warrant by the Court, the order cancelling warrant shall be recorded in the case file and the register maintained. A copy thereof shall be sent to the concerned authority, requiring the process to be returned unexecuted forthwith. The date of receipt of the unexecuted warrant will be entered in the aforesaid registers. A copy of such order shall also be supplied to the accused"

10. Referring the aforesaid judgment he submits that a clear direction is issued by the Apex Court, which is law of the land, but the learned trial court has ignored the same.

11. Further placing reliance on a judgment reported in 2021 CrI.L. J. 3461:AIROnline 2021 Del 912 **Sunil Tyagi v. Govt of NCT of Delhi and another**, he has referred paragraphs 386, 387 and 388 thereof. Paragraphs 386, 387 and 388 are quoted herein-under:-

"386. The procedure for declaration of a 'Proclaimed Person' and a 'Proclaimed Offender' as stipulated in the Code of Criminal Procedure, comprises of the following steps:

(i) Pre-requisites to issuing a Proclamation under Section 82(1) Cr.P.C. - A proclamation may only be published directing that the 'Proclaimed Person' appear at a specified time and place not less than 30 days from the date of

publication, once the Court is satisfied that:

(a) A warrant of arrest has already been issued and all possible attempts to execute the warrant have been made;

(b) Subsequent to a warrant having been issued, the person is absconding or concealing himself in a manner to avoid execution of the warrant.

(ii) Enquiry to ensure that warrant of arrest has been issued and all efforts to execute the same have been made by the Police Officer - Prior to issue of proclamation, a warrant as per the Second Schedule, Form No. 2 or Form No. 9 of the Code must have been issued.

387. Procedure for Publication of the Proclamation Section 82(2) Cr.P.C. - As per section 82(2) Cr.P.C., the proclamation must be read in some conspicuous place of the town or village in which the person resides. It shall also be affixed to some conspicuous part of the house in which the person resides or to some conspicuous place of the town or village. Further, a copy of the same must also be affixed to some conspicuous part of the Court house. The Court may also direct a copy of the proclamation to be published in a daily newspaper circulating in the place in which such person ordinarily resides. The terms of Section 82 Cr.P.C. are mandatory and a proclamation cannot be issued without first issuing a warrant of arrest.

388. Where a proclamation published is in respect of a person accused of certain specified heinous offences and such person fails to appear at the specified

place and time required by the proclamation may pronounce him a 'Proclaimed Offender' and make a declaration to that effect under Section 82 Cr.P.C."

12. Placing reliance on the abovesaid judgment, he submits that the Hon'ble High Court has held that while passing the order for issuance of proclamation under section 82, reasons must be recorded and if it is not, the whole proceeding shall suffer unlawfulness.

13. Again, he has referred the judgment rendered in the case of **Devendra Singh Negi versus State of U.P.** and has placed reliance on the paragraphs 13 and 14 of the above-said judgment. Paragraphs 13 and 14 of the judgment are quoted hereinunder:-

"13. The object of the attachment under Sec. 83 of the Code is not to punish an accused but to procure his appearance. My view is supported by a Division Bench case of *Dayanand v. State* (1). The salutary provisions of proclamation under Sec. 82 have been enacted to protect an unaware person and to give notice to him that he is wanted in the crime to enable him to surrender to custody. Sec. 82 (2) lays down rigorous conditions of the manner in which the proclamation has to be published. The publication includes, inter alia, the affixation of the proclamation at some conspicuous place of the house and homestead of the accused, as also at the notice-board of the court house.

14. The words "has absconded or is concealing himself so that such warrant cannot be executed" in Sec. 82 of the Code are significant. Every person who is not immediately available cannot be characterised as an absconder. The court

has to record its satisfaction that the accused has absconded or is concealing in order to avoid execution of the warrant. The provisions of Sec. 82 are mandatory and are to be construed strictly. Sec. 82 requires that the court must, in the first instance, issue a warrant and it must put down its reasons for believing that the accused is absconding or concealing himself. My view expressed above is supported by a Division Bench case of Dip Narain Singh v. State of Bihar (2). Thus, in every case where the warrant is not executed, resort cannot be had to Sec. 82 and it may be necessary to examine the officer concerned who had gone to execute the warrant and to the measures adopted by him to serve the same. (See Kunwar Singh v. State (3))."

14. Referring the aforesaid, he submits that the case of the present applicant is squarely covered with the ratio of judgment, above-said.

15. Concluding his arguments, he submits that since the present applicant was appearing on each and every date, fixed by the trial court, as such, there is bonafide non-appearance of the present applicant, on a day i.e. on 31.01.2023 and on the said date, the trial court without recording any reason and further without following the guidelines prescribed by the Apex Court, issued non-bailable warrant against the present applicant, which curtails the right of life and liberty of the applicant and goes against the mandate of Article 21 of the Constitution of India. He further submits that the proclamation under section 82 of Cr.P.C. has also been issued along with the issuance of non-bailable warrant and that too without assigning any reason and without publication of the proclamation. Thus, submission is that the whole criminal

proceedings before the trial court, vide orders dated 31.01.2023 and 28.04.2023 are not only vitiate in the eyes of law but those are also against the settled proposition of law.

16. On the other hand, learned counsel appearing for the State has vehemently opposed the submissions aforesaid and submits that a complaint was properly instituted by the opposite party no. 2 and the learned trial court has rightly proceeded while issuing the summons. He added that prior to passing the order dated 31.01.2023, there is no erroneousness in the proceedings of the trial court, though, thereafter, the proceedings have been challenged on the premises that the trial court did not adhere to the provisions of law, whereas, it is an admitted fact that the applicant was absent on 31.01.2023 and thereafter also, thus, the trial court had no option, rather to issue non-bailable warrant against the applicant for procuring his presence.

17. He further contended that the procedure with respect to issuance of non-bailable warrant as well as issuance of proclamation under section 82 of Cr.P.C., are envisaged, for ascertaining the presence of the accused, so that the trial can be concluded timely and effectively, but so far as the present applicant is concerned, the applicant has no explanation that why he did not appear on 31.01.2023 and thereafter, on 28.04.2023, i.e. date, when the proclamation under section 82 of Cr.P.C. was issued. Therefore, submission of learned counsel for the State is that there is no illegality or infirmity in the orders impugned.

18. Considering the submission of learned counsel for the parties and after

perusal of the material placed on record, it transpires that some amount, which was promised to be given, through cheque, was later on became bounced and thereafter, notice was given to the present applicant and the complainant filed a case under section 138 of Act, 1881.

19. It borne out from the factual matrix of the case that prior to 31.01.2023, the present applicant was kept on appearing and on 31.01.2023, due to the reasons, which has been explained in paragraph 19 of the application, the applicant could not appear before the trial court and the trial court has passed the following orders, on 31.01.2023.

"पत्रावली प्रस्तुत । परिवादी उपस्थित पी(डब्लू) मो० नासिर का साक्ष्य शपथ- पत्र दाखिल हुआ। अभियुक्त अनुपस्थित । अभियुक्त के विरुद्ध एन(बी)(डब्लू) जारी हो। वास्ते हाजिरी जिरह पी(डब्लू) 20.02.23 को पेश हो । "

20. From perusal of the aforesaid order, this does not transpire that any reason has been assigned for issuance of the non-bailable warrant against, the applicant though, time and again, the Apex Court with a view to check the possibility of misuse of arrest of warrant, issued guidelines, wherein, all the highcourts are instructed to ensure that the subordinate courts should use the printed and machine numbered form 2 and the complete particulars of the case are mentioned on the warrant and further, the presiding Judges of the courts should put full legible signatures on the process, ensuring the courts seal bearing complete particulars. It has also been said to ensure that warrant be directed to a particular police officer, returnable, where executed or un-executed on or before the date specified and every court would maintain register in which each warrant of arrest be entered serially.

21. It is trite law that the 'non-bailable warrant directly involves the curtailment of liberty of a person' and therefore, this should not be passed in a mechanical manner and the trial court should always be cautious, while issuing non-bailable warrant. So far as the present case is concerned, the learned trial court while passing the impugned order, has ignored the settled proposition of law.

22. This Court is also of considered opinion that the the provision of section 82 of Cr.P.C. is also very clear that a Magistrate has to record reasons while issuance of the proclamation and it is also very overt form very first wording of the provision of section 82 of Cr.P.C. that this can be issued if there is 'reason to believe' and meaning thereby, that the same must overtly be mentioned in the order.

23. The provision of section 82 clearly mandates that once a court has reason to believe that any accused person, against whom, a warrant has been issued, absconded or concealed himself, so that the warrant cannot be executed, may publish written proclamation requiring his appearance at specified place and specified time. This clearly indicates that the proclamation of section 82 can be issued, against such person, against whom, warrant has already been executed.

24. When this Court examines the order dated 28.03.2023, passed by the learned trial court, it is lacking of the compliance of the procedure prescribed under section 82 of Cr.P.C. as the non-bailable warrant and proclamation under section 82 of Cr.P.C. has been issued simultaneously and further, the specified date and time, is not mentioned in the

order, which is in contravention of the provisions of section 82 of Cr.P.C.

25. This Court is of considered opinion that, it cannot be said that every person who is not present after the warrant is issued, is an absconder, but the court, who is issuing the proclamation under section 82, has some reason to believe that such person is absconding or concealing him to avoid the execution of warrant. The 'reason to believe' is to be reduced in writing, in nut and shell. The legislature in its wisdom was cautious enough to promulgate the provisions of proclamation, which is an stringent provision and therefore, the safeguards are also in-built, in the provision itself. Thus, the paramount importance of this provision must be honoured and applied, so as to restrain any sort of misuse of law, provided thereof.

26. In view of the above-noted submissions and discussions, the orders dated 31-1-2023 and the subsequent orders passed by learned trial court in complaint no. 2479 of 2019 (Mohd. Nasir Vs Moqbool Hasan) U/S 138 N.I. Act P.S. Aliganj District- Lucknow, are hereby set aside.

27. The matter is remitted back to the trial court concerned to proceed with the trial, in accordance with the law adhering the instruction, direction and guidelines issued by the Apex Court and this Court, time to time.

28. The applicant is directed that he will cooperate with the trial proceedings and he will remain present on each and every date fixed before the trial court and he will not seek any adjournment further, unless required under unavoidable circumstances.

29. It is clarified that if the applicant further avoids the court proceedings, the trial court is at liberty to take further course of action, in accordance with law.

30. With the aforesaid observations and directions, this application is hereby **allowed**.

(2023) 9 ILRA 1039
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.08.2023

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Application U/S 482 No. 15078 of 2023

Ashu Jain

...Applicant

Versus

State of U.P. & Ors.

...Opposite Parties

Counsel for the Applicant:

Ms. Shruti Malviya

Counsel for the Opposite Parties:

G.A., Sri Amit Daga

Criminal Law – Code of Criminal Procedure, 1973 – Sections 397 & 482 – Family Courts Act, 1984 – Section 19 – Maintainability – Application under Section 482 Cr.P.C. challenging order of Family Court under Section 125 Cr.P.C. – Statutory remedy of revision under Section 19 of the Family Courts Act read with Section 397 Cr.P.C. available – Inherent jurisdiction of the High Court under Section 482 Cr.P.C. is wide but to be exercised sparingly and in exceptional circumstances such as lack of jurisdiction or manifest injustice – Not to be invoked where efficacious statutory remedy exists – Since applicant had already preferred revision against the same order, present application under Section 482 Cr.P.C. held not maintainable – Dismissed.

Application dismissed.

List of Cases Cited:

1. Dhariwal Tobacco Products Ltd. Vs St. of Mah., (2009) 2 SCC 370
2. Prabhu Chawla Vs St. of Raj., (2016) 16 SCC 30
3. Ashu Dhiman Vs Smt. Jyoti Dhiman, 2018 (Uttarakhand HC)
4. Rajendra Kumar Vs Smt. Rukhmani Bisen, 2022 (M.P. HC)

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

1. Heard Ms. Shruti Malviya, learned counsel for the applicant, learned A.G.A. for the State and Sri Amit Daga, learned counsel for the opposite party No. 2.

2. Present application has been filed with following prayer:-

“The present 482 Cr.P.C. application has been filed to quash the order dated 03.03.2023 passed in Case No. 244/11 of 2015(Smt. Ashu Jain and others Vs. Shri Ashu Jain) passed by Additional Principal Judge, Family Court, Court No. 1, Muzaffar Nagar.”

3. Sri Amit Daga, learned counsel for the opposite party No. 2 has raised preliminary objection and submitted that applicant is having statutory remedy to file revision under Section 19 of Family Courts Act, 1984(hereinafter referred to as, ‘Act, 1984’) read with Section 397 of Code of Criminal Procedure, 1973, (hereinafter, referred to as, ‘Cr.P.C.’), therefore this application under Section 482 Cr.P.C. is not maintainable.

4. Ms. Shruti Malviya, learned counsel for the applicant though not disputed the submission made by learned

counsel for the opposite party No. 2, but submitted that though the revision is maintainable against an order of Family Court, but there is no absolute bar. In the present case, applicant is also raising question of fact, which is not possible in revision, therefore, application may be entertained.

5. She further submitted that Apex Court in the matter of ***Dhariwal Tobacco Products Ltd. and others Vs. State of Maharashtra and another: 2009(2) SCC 370 and Prabhu Chawla Vs. State of Rajasthan & Anr: (1977) SCC 551*** has considered this fact and is of the opinion that an application under Section 482 Cr.P.C. is equally maintainable challenging the order passed by Family Court.

6. Per contra, learned counsel for the opposite party No. 2 submitted that in light of Section 19 of Act, 1984, read with Section 396 of Cr.P.C., except as provided in Section 19 of Act, 1984, no appeal or revision shall lie to any court from any judgment, order or decree of the Family Court. He also pointed out that against the very same judgment/order dated 03.03.2023, plaintiff/opposite party No. 2 has filed Criminal Revision No. 3148 f 2023, which is pending before this High Court. Therefore, this application is not maintainable and the only remedy available to the applicant is to file criminal revision. He placed reliance upon the judgments of Uttarakhand High Court in ***Crl. Mis. Application(C-482) No. 434 of 2018: Ashu Dhiman Vs. Smt. Jyoti Dhiman, Madhya Pradesh High Court in Misc. Criminal Case No. 60364 of 2022: Rajendra Kumar Vs. Smt. Rukhmani Bisen.***

7. I have considered rival submissions made by learned counsel for the parties,

perused the record as well as judgments relied upon.

8. In the present case, this Court has to decide, as to whether, against a final order passed by the Family Court, instead of filing criminal revision as provided under Section 19 of Act, 1984, application under Section 482 Cr.P.C. is maintainable or not.

9. Brief facts of the case are that, plaintiff/opposite party No. 2 has filed case under Section 125 Cr.P.C. for payment of maintenance, which was partly allowed vide order dated 03.03.2023. As both the parties are aggrieved by the said order, therefore, plaintiff/opposite party No. 2 has preferred Criminal Revision No. 3148 of 2023, whereas, defendant/applicant has preferred present Application Under Section 482 Cr.P.C. challenging the very same order.

10. Ms. Shruti Malviya, learned counsel for the applicant has placed reliance upon the judgments of Hon'ble Apex Court in the matter of **Dhariwal Tobacco Products Ltd. (Supra)**.

11. From the perusal of the aforesaid judgment, it is apparently clear that undisputedly, Court may entertain application under Section 482 Cr.P.C., but while entertaining the same it has to see as to whether, matter is civil in nature and is given cloak of criminal offence or there is gross miscarriage of justice or lack of jurisdiction. It has also been expressed by the Court that inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself.

12. She also placed reliance upon the judgment of Hon'ble Apex Court in the matter of **Prabhu Chawla (Supra)**. Relevant paragraphs of the said judgment are quoted hereinbelow:

“10. The first question is as to whether the inherent power of the High Court under Section 482 stands repelled when the revisional power under Section 397 overlaps. The opening words of Section 482 contradict this contention because nothing of the Code, not even Section 397, can affect the amplitude of the inherent power preserved in so many terms by the language of Section 482. Even so, a general principle pervades this branch of law when a specific revision is made: easy resort to inherent power is not right except under compelling circumstances. Not that there is absence of jurisdiction but that inherent power should not invade areas set apart for specific power under the same Code. In Madhu Limaye v. The State of Maharashtra this Court has exhaustively and, if I may say so with great respect, correctly discussed and delineated the law beyond mistake. While it is true that Section 482 is pervasive it should not subvert legal interdicts written into the same Code, such, for instance, in Section 397(2). Apparent conflict may arise in some situations between the two provisions and a happy solution “would be to say that the bar provided in sub-section (2) of Section 397 operates only in exercise of the revisional power of the High Court, meaning thereby that the High Court will have no power of revision in relation to any interlocutory order. Then in accordance with one or the other principles enunciated above, the inherent power will come into play, there being no other provision in the Code for the redress of the grievance of the aggrieved party. But then, if the order

assailed is purely of an interlocutory character which could be corrected in exercise of the revisional power of the High Court under the 1898 Code, the High Court will refuse to exercise its inherent power. But in case the impugned order clearly brings about a situation which is an abuse of the process of the Court or for the purpose of securing the ends of justice interference by the High Court is absolutely necessary, then nothing contained in Section 397(2) can limit or affect the exercise of the inherent power by the High Court. But such cases would be few and far between. **The High Court must exercise the inherent power very sparingly. One such case would be the desirability of the quashing of a criminal proceeding initiated illegally, vexatiously or as being without jurisdiction". In short, there is no total ban on the exercise of inherent power where abuse of the process of the court or other extraordinary situation excites the court's jurisdiction. The limitation is self-restraint, nothing more. The policy of the law is clear that interlocutory orders, pure and simple, should not be taken up to the High Court resulting in unnecessary litigation and delay. At the other extreme, final orders are clearly capable of being considered in exercise of inherent power, if glaring injustice stares the court in the face. In between is a tertium quid, as Untwalia, J. has pointed out as for example, where it is more than a purely interlocutory order and less than a final disposal. The present case falls under that category where the accused complain of harassment through the court's process. Can we state that in this third category the inherent power can be exercised? In the words of Untwalia, J.: (SCC p. 556, para 10). The answer is obvious that the bar will not operate to prevent the abuse of the process of the**

Court and/or to secure the ends of justice. The label of the petition filed by an aggrieved party is immaterial. The High Court can examine the matter in an appropriate case under its inherent powers. The present case undoubtedly falls for exercise of the power of the High Court in accordance with Section 482 of the 1973 Code, even assuming, although not accepting, that invoking the revisional power of the High Court is impermissible." I am, therefore clear in my mind that the inherent power is not rebuffed in the case situation before us. Counsel on both sides, sensitively responding to our allergy for legalistics, rightly agreed that the fanatical insistence on the formal filing of a copy of the order under cessation need not take up this court's time. Our conclusion concurs with the concession of counsel on both sides that merely because a copy of the order has not been produced, despite its presence in the records in the court, it is not possible for me to hold that the entire revisory power stands frustrated and the inherent power stultified." In our considered view any attempt to explain the law further as regards the issue relating to inherent power of High Court under Section 482 Cr.P.C. is unwarranted. We would simply reiterate that Section 482 begins with a non-obstante clause to state: "Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice." A fortiori, there can be no total ban on the exercise of such wholesome jurisdiction where, in the words of Krishna Iyer, J. "abuse of the process of the Court or other extraordinary situation excites the court's jurisdiction. The limitation is self-restraint, nothing more."

We venture to add a further reason in support. Since Section 397 Cr.P.C. is attracted against all orders other than interlocutory, a contrary view would limit the availability of inherent powers under Section 482 Cr.P.C. only to petty interlocutory orders! A situation wholly unwarranted and undesirable.

In our considered opinion the learned Single Judge of the High Court should have followed the law laid down by this Court in the case of Dhariwal Tobacco Products Ltd. (supra) and other earlier cases which were cited but wrongly ignored them in preference to a judgment of that Court in the case of Sanjay Bhandari (supra) passed by another learned Single Judge on 05.02.2009 in S.B. Criminal Miscellaneous Petition No. 289 of 2006 which is impugned in the connected Criminal Appeal arising out of Special Leave Petition No. 4744 of 2009. As a result, both the appeals, one preferred by Prabhu Chawla and the other by Jagdish Upasane & Ors. are allowed. The impugned common order dated 02.04.2009 passed by the High Court of Rajasthan is set aside and the matters are remitted back to the High Court for fresh hearing of the petitions under Section 482 of the Cr.P.C. in the light of law explained above and for disposal in accordance with law. Since the matters have remained pending for long, the High Court is requested to hear and decide the matters expeditiously, preferably within six months.”

13. While dealing with the issue in the aforesaid matter, Apex Court has relied upon the Judgment of **Dhariwal Tobacco Products Ltd.(Supra)**, Court has made it very clear that though the application under Section 482 Cr.P.C. is maintainable, but in a very special circumstance like criminal

proceeding initiated illegally or without jurisdiction. Court has further clarified that power under Section 482 Cr.P.C. may be exercised in case glaring injustice stares the court in the face.

14. So far as present case is concerned, there is nothing extraordinary circumstance and the only submission is that applicant wants to raise certain factual issues, which may not be entertained in revision, therefore, Court may entertain the application under Section 482 Cr.P.C. for the convenience of applicant, which is not permissible in light of interpretation made by the Apex Court in the matter of **Dhariwal Tobacco Products Ltd.(Supra) as well as Prabhu Chawla(Supra)**.

15. For initiating proceeding under Section 125 Cr.P.C., procedure is provided in the Act, 1984 and relevant provision is Section 19 of Act, 1984, which is being quoted hereinbelow:

“19. Appeal.--(1) Save as provided in sub-section(2) and notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law, an appeal shall lie from every judgment or order, not being an interlocutory order, of a Family Court to the High Court both on facts and on law.

(2) No appeal shall lie from a decree or order passed by the Family Court with the consent of the parties [or from an order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974):

Provided that nothing in this sub-section shall apply to any appeal pending before a High Court or any order passed

under Chapter IX of the Code of Criminal Procedure 1973 (2 of 1974) before the commencement of the Family Courts (Amendment) Act, 1991].

(3) Every appeal under this section shall be preferred within a period of thirty days from the date of the judgment or order of a Family Court.

(4) The High Court may, of its own motion or otherwise, call for and examine the record of any proceeding in which the Family Court situate within its jurisdiction passed an order under Chapter IX of the code of Criminal Procedure, 1973 (2 of 1974) for the purpose of satisfying itself as to the correctness, legality or propriety of the order, not being an interlocutory order, and, as to the regularity of such proceeding.]

(5) Except as aforesaid, no appeal or revision shall lie to any court from any judgment, order or decree of a Family court.

(6) an appeal preferred under sub-section (1) shall be heard by a Bench consisting of two or more Judges.”

16. Section 19 of the Act, 1984 clearly provides about the provision of appeal or revision only against the order or decree of the Family Court. The law is settled that special law shall prevail over the general law. Therefore, in light of provision under Section 19 of the Act, 1984, the only remedy before the applicant is to file revision under Section 397 Cr.P.C. in case the matter doesn't fall within the exceptions provided by the Apex Court in the matter of **Dhariwal Tobacco Products Ltd.(Supra)** as well as **Prabhu Chawla(Supra)**.

17. Similar matter was before Uttarakhand High Court in **Ashu Dhiman(supra)** and the Court has taken the same view. Relevant paragraph of the aforesaid judgment is quoted hereinbelow:

“17. In view of the definition of the interlocutory order and the ratio of the judgment supra, this Court is of the view that an order passed under Proviso to sub section (1) of Section 125 of Cr.P.C. rejecting or allowing an application for maintenance, pending proceedings, is not an interlocutory order which adjudicates the rights of the parties to some extent. The revision under Section 397 of Cr.P.C. is maintainable. It has been held that such an order is amenable to revisional jurisdiction of this Court. The powers of High Court under Section 482 of Cr.P.C. are inherent in nature and could be exercised where statutory remedy of appeal and revision under the Cr.P.C. is not available. Thus, in view of the findings recorded above that revision against such an order is maintainable, an application under Section 482 of Cr.P.C. would not be maintainable. The core issue framed by this Court to deal with the controversy is answered accordingly. Since the criminal misc. applications filed by the applicant(s) under Section 482 of Cr.P.C. are not maintainable, the applicant(s) would be at liberty to avail the remedy of filing revision, if so advised.

18. Again this issue was subject matter before the Madhya Pradesh High Court in **Rajendra Kumar(Supra)** and view of the Court was again the same. Relevant paragraph of the said judgment is quoted hereinbelow:

“18. Considering the above legal position, I am of the considered view that

2. This application under Section 482 Cr.P.C. has been filed by applicant to quash as well as to stay the effect and operation of the entire proceedings of Criminal Misc. Case No.1 of 2023 (State of U.P. Vs. Vijay Singh and others) along with cognizance cognizance order dated 12.01.2023 and notice dated 18.5.2023 arising out of judgement and order dated 03.11.2022 having S.T. No.38/2018 (State vs. Narayandas Kushwaha and another), under Section 344 Cr.P.C., Police Station Nadigaon, District Jalaun, pending before the learned Special Judge SC/ST Act, Jalaun at Orai.

3. Brief facts of the case is that the applicant is government teacher posted in a Primary School. The father of the applicant namely Durga Prasad lodged a first information report against Narayan Das Kushwaha, Suratan Singh and Lakhan Singh under section 306 IPC and 3(2) (V) SC/ST Act, Police Station Nadigaon, District Jalaun on 20.10.2018. Applicant is the writer of the tahrir spoken by his father and villagers.

4. Learned counsel for the applicants submits that applicant was informed through mobile phone that his mother committed suicide in front of the house of Narayan Das Kushwaha in the night. It is also submitted that the charge sheet in the matter was submitted and statements were recorded by the concerned investigating officer. It is also submitted that the court after examining the entire facts of the case did not find the accused guilty and the accused were exonerated. It is further submitted that the applicant has been alleged of providing false evidence to the court and has been issued a show cause notice under section 344 Cr.P.C. Submission is that the applicant is merely a

formal witness of the incident. He was neither present on the spot on the date and place of occurrence nor he is an eye witness of the alleged incident. Submission is that the applicant has only written a tahrir that was spoken by his father Durga Prasad and villagers. Contention is that if the proceedings against the applicant are allowed to go on it will result in sheer abuse of process of law.

5. Learned counsel for the applicant in order to demonstrate the truthfulness upon his submissions has placed reliance upon following judgements :-

(i) Lalit Kumar Sharma and Anr. Vs. State of U.P. 2009 LawSuit(All) 2058

(ii) Sanjay Baburao Gitte Vs. State of Maharashtra 2017 LawSuit(Bom) 2798

Per contra, learned A.G.A. has opposed the submissions made by the counsel for the applicant but could not dispute the aforesaid facts.

6. The Apex Court in the case of Mahila Vinod Kumari v. State of Madhya Pradesh [2008] 10 S.C.R. 869 has laid down the guidelines regarding summoning of accused under section 344 Cr.P.C. :-

“2.1. The purpose of enacting Section 344, Cr.P.C. appears to be further arm the Court with a weapon to deal with more flagrant cases and not to take away the weapon already in its possession. The object of the legislature underlying enactment of the provision is that the evil of perjury and fabrication of evidence has to be eradicated and can be better achieved now as it is open to the courts to take

recourse to Section 340(1) in cases in which they are failed to take action under Section 344 Cr.P.C?

2.2. For exercising the powers under s.344/ the Code the Court at the time of delivery of judgment or final order must at the first instance express an opinion to the effect that the witness before it has either intentionally given false evidence or fabricated such evidence. The second condition is that the Court must come to the conclusion that in the interests of justice the witness concerned should be punished summarily by it for the offence which appears to have been committed by the witness. And the third condition is that before commencing the summary trial for punishment the witness must be given reasonable opportunity of showing cause why he should not be so punished. All these conditions are mandatory. The object of the provision is to deal with the evil of perjury in a summary way. [Narayanswamy v. State of Maharashtra, (1971) 2 SCC 182]

2.3. The evil of perjury has assumed alarming proportions in cases depending on oral evidence and in order to deal with the menace effectively it is desirable for the courts to use the provision more effectively and frequently than it is presently done."

7. Learned trial court while issuing notice to the applicant has passed the order dated 03.11.2022. Relevant portion of the order reads as under :-

"अभियोजन साक्षीगण पी० डब्लू०२ विजय सिंह, पी० डब्लू०३ सोवरन सिंह, पी० डब्लू०४ रामकुमार, पी० डब्लू०५ धर्मेन्द्र सिंह द्वारा विवेचक को दिए गए धरा 161 द० प्र० सं० के बयान के विरुद्ध न्यायालय में साक्ष्य प्रस्तुत

की गयी है। अतः साक्षीगण उपरोक्त के विरुद्ध आपराधिक वाद अंतर्गत धरा 344 द० प्र० सं० पंजीकृत कर कारण बताओ नोटिस जारी किया जाये कि क्यों न न्यायालय में मिथ्या साक्ष्य देने हेतु दंडित किया जाये?"

8. Considering the entire facts and circumstances of the case as well as the statements of witnesses it does not appear that the applicant had willfully and knowingly given false statements. He was merely a tahrir writer. He has not even seen the alleged incident. From perusal of the impugned order, it is apparent that condition no.1 and 2 have not been complied with while passing the impugned order. No opinion to the effect that witnesses concerned before it has either intentionally given false evidence or fabricated such evidence nor that the court has come to the conclusion that in the interest of justice the witnesses concerned should be punished summarily by it for the offence which appears to have been committed by the witnesses. Therefore both the condition no.1 and 2 as given in the judgement of **Mahila Vinod Kumari v. State of Madhya Pradesh (supra)** laid down have not been complied with. Thus, the impugned order is not sustainable in the eyes of law. The application therefore deserves to be allowed.

9. The application therefore is **allowed** and the impugned cognizance order dated 12.01.2023 and notice dated 18.5.2023 as well as entire proceedings of Criminal Misc. Case No.1 of 2023, under section 344 Cr.P.C., Police Station Nadigaon, District Jalaun, arising out of Sessions Trial No.38 of 2018 (State Vs. Narayandas Kushwaha and another) is hereby set-aside.

(2023) 9 ILRA 1048
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.08.2023

BEFORE

THE HON'BLE AJAY BHANOT, J.

Criminal Misc. IInd Bail Application No. 16871 of
2023
with

Criminal Misc. IInd Bail Application No. 27375 of
2023
with

Criminal Misc. IInd Bail Application No. 29855 of
2021
with

Criminal Misc. IInd Bail Application No. 29718 of
2023

Bhanwar Singh @ Karamvir ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Bratendra Singh

Counsel for the Opposite Party:
G.A.

Criminal Law-Code of Criminal Procedure, 1973-Section 439 - Constitution of India, 1950- Article 21--- Prolonged incarceration of accused persons due to delay in trials violates the fundamental liberties of the accused guaranteed under Article 21 of the Constitution of India, when the trial is inordinately delayed for no fault of the accused. Right to a speedy trial is a fundamental right flowing from Article 21 of the Constitution of India---Chapter VI of the Code of Criminal Procedure, 1973 provides the procedure for compelling appearance of the accused and witnesses to participate in the trial. The provisions in Chapter VI of Cr.P.C. contemplate a graduated process of coercive measures to compel the appearance of the accused and witnesses. The process is initiated with issuance of summons which is to be followed by bailable warrants. The measures are escalated by taking out non bailable warrants.

The final stages in the process are proclamation and attachment---Failure of the police authorities to serve summons or execute bailable warrants or non bailable warrants is looked askance by the statute and the courts alike---The courts are duly empowered under the Code to take out penal proceedings against defaulting police officials for failing to serve summons or execute bailable warrants or non-bailable warrants. **(Para12, 17, 24, 25 & 51)**

Bail application allowed. (E-15)

List of Cases cited:

1. Gudikanti Narasimhulu & ors.Vs Public Prosecutor, High Court of Andhra Pradesh (1978) 1 SCC 240
2. Mohd. Muslim @ Hussain Vs St. (NCT of Delhi) Special Leave Petition (Criminal) No. 915 of 2023
3. Hussainara Khatoon & ors.Vs Home Secretary, St. of Bihar 1980 (1) SCC 81
4. Anil Gaur @ Sonu @ Sonu Tomar Vs St. of U.P (Criminal Misc. Bail Application No. 16961 of 2022, 2022 SCC OnLine All 623
5. Ajeet Chaudhary Vs St. of U.P 2021 SCCOnLine All 17
6. Junaid Vs St. of U.P 2021 (6) ADJ 511
7. Monish Vs St. of U.P Criminal Misc. Bail Application No. 55026 of 2021
8. Jitendra Vs St. of U.P Criminal Misc. Bail Application No. 9126 of 2023

(Delivered by Hon'ble Ajay Bhanot, J.)

1. The issue that arises for consideration in all connected matters is a recurring theme in the criminal law process in the State of Uttar Pradesh and is arising regularly in bail applications before this Court. The failure of the police to serve summons and execute coercive processes issued by the court and its consequences on

the fundamental rights of liberty of an accused and fair administration of right of bail arise in these cases directly have to be addressed squarely. The status reports sent by the learned trial courts reveal that the trials are being delayed as the police authorities did not serve summons and execute coercive measures in a timely manner to compel appearance of the witnesses on the appointed date in the trial. The status reports are made part of the records.

2. Right of bail arises from Section 439 of Code of Criminal Procedure, 1973.

3. With coming of the Constitution and development of constitutional law, the statutory domain of bails transformed into constitutional jurisdiction.

4. The right to bail is derived from statute but cannot be removed from constitutional oversight.

5. Good authority has long entrenched the right of an accused to seek bail in the charter of fundamental rights assured by the Constitution of India.

6. Bail jurisprudence was firmly embedded in the constitutional regime of fundamental rights in ***Gudikanti Narasimhulu and Others Vs. Public Prosecutor, High Court of Andhra Pradesh***². Casting an enduring proposition of law in eloquent speech, V.R. Krishna Iyer, J. held:

“1. Bail or jail?” — at the pre-trial or post-conviction stage — belongs to the blurred area of the criminal justice system and largely hinges on the hunch of the Bench, otherwise called judicial

discretion. The Code is cryptic on this topic and the Court prefers to be tacit, be the order custodial or not. And yet, the issue is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process. As Chamber Judge in this summit court I have to deal with this uncanalised case-flow, ad hoc response to the docket being the flickering candle light. So it is desirable that the subject is disposed of on basic principle, not improvised brevity draped as discretion. Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognised under Article 21 that the curial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and the community. To glamorize impressionistic orders as discretionary may, on occasions, make a litigative gamble decisive of a fundamental right. After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of “procedure established by law”. The last four words of Article 21 are the life of that human right.”

7. More recently the interplay of constitutional liberty assured under Article 21 and statutory right of bail of an undertrial prisoner was affirmed by the Supreme Court in ***Mohd. Muslim @ Hussain Vs. State (NCT of Delhi)***³.

8. Engagement of fundamental rights in bail jurisprudence is a constant in constitutional law.

9. The Court while examining a bail application has to balance and reconcile diverse objectives, namely, the imperative

of constitutional liberties of an accused, the necessity of bringing an offender to fair and speedy justice, and the mandate of upholding the law.

10. Parameters of bail are well settled by judicial precedents and practices achieve the aforesaid aims in full measure.

11. Some of the settled parameters of grant of bail include nature and gravity of the offences, and the likelihood of an accused having committed the offence. The possibility of the accused reoffending, influencing witnesses and tampering with evidence or being a flight risk are also relevant factors to be considered while deciding a bail application.

12. Prolonged incarceration of accused persons due to delay in trials violates the fundamental liberties of the accused guaranteed under Article 21 of the Constitution of India, when the trial is inordinately delayed for no fault of the accused. Right to a speedy trial is a fundamental right flowing from Article 21 of the Constitution of India [See **Hussainara Khatoon & Ors. Vs. Home Secretary, State of Bihar**4].

13. Right to a speedy trial is the mandate of constitutional law. Delays in trials are a reality of the justice system.

14. Accordingly, the courts while deciding the bail applications also examine the period of internment of an accused and the status of trial. (See **Mohd. Muslim @ Hussain (supra)**). Further, in the facts and circumstances of cases, directions are also issued to the trial courts as a matter of accepted judicial practice to expedite the trial in order to serve justice. The said criteria and manner of exercise of bail jurisdiction are

consistent with constitutional values embedded in the constitutional text and those evolved by constitutional law. In the process the courts realise the fundamental rights of an accused to a speedy trial and administer fair justice in bail jurisdiction and uphold the rule of law.

15. Legal issues which have a direct impact on the liberty of the prisoner and administration of fair justice in bail jurisdiction often arise squarely for consideration in the facts of a bail application. Declining to decide such issues on the footing of a narrow interpretation of bail jurisdiction will amount to abdication of constitutional obligations of this Court and will result in miscarriage of justice. The narrative has the benefit of authority. This Court in **Anil Gaur @ Sonu @ Sonu Tomar Vs. State of U.P (Criminal Misc. Bail Application No. 16961 of 2022)**⁵ fortified the constitutional jurisdiction of this Court while sitting in bail determination arising from Section 439 Cr.P.C.:

“2. While discharging judicial functions in bail determination

this Court is not denuded of its status as a constitutional court. The court is under a constitutional obligation to address various legal and constitutional issues which impact the grant of bail if they arise in the facts of a case.”

16. Reference can also be profitably made to **Ajeet Chaudhary Vs. State of U.P.**⁶; **Junaid Vs. State of U.P.**⁷ and **Monish Vs. State of U.P.**⁸, in which questions of law and constitutional liberty had arisen in bail applications. The issues were duly determined which enabled the court to streamline the process of fair administration of the bail jurisdiction.

17. Chapter VI of the Code of Criminal Procedure, 1973 provides the procedure for compelling appearance of the accused and witnesses to participate in the trial. The provisions in Chapter VI of Cr.P.C. contemplate a graduated process of coercive measures to compel the appearance of the accused and witnesses. The process is initiated with issuance of summons which is to be followed by bailable warrants. The measures are escalated by taking out non bailable warrants. The final stages in the process are proclamation and attachment.

18. Summons, bailable warrants and non bailable warrants are directed to police officers. Duty is imposed by the Cr.P.C. upon police authorities to serve the summons, execute other coercive measures like bailable warrants and non-bailable warrants issued by the courts in a time bound manner.

19. The narrative will benefit from a brief survey of certain statutory provisions.

20. Section 61 Cr.P.C. vests the power in the courts to issue summons for appearance of witnesses:

“Section 61. Form of summons. Every summons issued by a Court under this Code shall be in writing, in duplicate, signed by the presiding officer of such Court or by such other officer as the High Court may, from time to time, by rule direct, and shall bear the seal of the Court.”

21. Section 62 Cr.P.C. casts the responsibility of service of summons upon the police officers.

“Section 62. Summons how served.

(1). Every summons shall be served by a police officer, or subject to such rules as the State Government may make in this behalf, by an officer of the Court issuing it or other public servant.

(2). The summons shall, if practicable, be served personally on the person summoned, by delivering or tendering to him one of the duplicates of the summons.

(3). Every person on whom a summons is so served shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate.”

22. Section 70 Cr.P.C. vests the power of issuance of warrants in the courts.

“Section 70. Form of warrant of arrest and duration.

(1). Every warrant of arrest issued by a Court under this Code shall be in writing, signed by the presiding officer of such Court and shall bear the seal of the Court.

(2). Every such warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed.”

23. The warrants are ordinarily directed to police officer under Sections 72 Cr.P.C. and 74 Cr.P.C. Warrants can also be forwarded for execution outside the local jurisdiction of the court issuing it under Section 78 Cr.P.C. Under section 78 Cr.P.C. warrants are directed to the Superintendent of Police or Commissioner of Police within whose local jurisdiction it is to be executed, or the concerned Executive Magistrate. Relevant provisions are extracted hereinunder:

“Section 72. Warrants to whom directed.

(1). A warrant of arrest shall ordinarily be directed to one or more police officers; but the Court issuing such a warrant may, if its immediate execution is necessary and no police officer is immediately available, direct it to any other person or persons, and such person or persons shall execute the same.

(2). When a warrant is directed to more officers or persons than one, it may be executed by all, or by any one or more of them.”

24. Failure of the police authorities to serve summons or execute bailable warrants or non bailable warrants is looked askance by the statute and the courts alike.

25. The courts are duly empowered under the Code to take out penal proceedings against defaulting police officials for failing to serve summons or execute bailable warrants or non-bailable warrants.

26. Failure to serve summons or execute warrants by police officers and absence of official witnesses constitute offences affecting the administration of justice.

27. Chapter 26 of the Cr.P.C. contains detailed provisions as to offences affecting the administration of justice.

28. Section 173 I.P.C. also provides for punishment for preventing service of summons or other proceedings. In this regard Section 217 I.P.C. also provides for inflicting punishment of public servant for disobeying direction of the law with intent to save person from punishment or property from forfeiture. Some of the provisions which become applicable to government servants for preventing service of summons

or neglecting to appear before the court include Sections 345 Cr.P.C., 349 Cr.P.C. and 350 Cr.P.C. The provisions are extracted in Appendix 1i.

29. There is another aspect to the matter. Non compliance of orders of a trial court issuing summons or taking out coercive measures directly interferes in the administration of justice and constitutes contempt of court.

30. However, such course of action under the statute will lead to multiplicity of litigation and consume precious judicial time. Scale of the problem is so vast that taking out criminal or contempt proceedings in every matter against erring officials would also mire the police and other State departments in excessive and avoidable litigation. Legal proceedings of this nature would drain away scarce resources of the police force from its core tasks of policing, investigations and discharging statutory duties under the Cr.P.C.

31. It is noteworthy that government circulars as well as General Rules (Criminal) also cover the field of service of summons and responsibility of officials to comply with the summons and other coercive measures issued by the courts.

32. Circular No. 51/IV-h-36 dated 10th March, 1977 casts responsibility on the Superintendent of Police and also the Inspector General of Police, Uttar Pradesh:

“(b) Normal summons should be sent through the Superintendent of Police to the Station Officer concerned within three days. The Station Officer shall report compliance directly to the, court concerned within 15 days of the receipt of the

summons in the office of the Superintendent of Police.

(c) The Inspector General of Police, Uttar Pradesh has issued separate directions in this behalf to his subordinate officers. In case, however, no report is received from the S.O. concerned within the prescribed time or report of non-compliance is received with regard to witness, the court should take up the matter with the Superintendent of Police concerned immediately.”

33. Circular No. 65/VIIb-9 dated 14th June, 1979, provides for securing appearance of transferred police officers or officials as witnesses. In this regard the summons have to be directed to the Superintendent of Police of the district and Deputy Inspector General of Police:

“The summonses requiring appearance of transferred police officers or officials, as witnesses should, instead of being sent to the Police Headquarters, Allahabad be sent to the Superintendent of Police of the district concerned after ascertaining their address from the Public Prosecutor. In case it is not possible to ascertain the addresses of transferred police officers or officials from the Public Prosecutor, the summonses of non-gazetted police officials should be sent to the local Superintendent of Police and that of gazetted police officers to the Assistant Inspector General of Police, U.P., Lucknow, requesting them to arrange for the service of summonses.”

34. Non compliance of the directions of the court is covered by Circular No. 42/98 Dated: Allahabad: 20/8/1998:

“4. If the police personnel are not complying with the directions of the court

then appropriate action under the provision of the contempt of courts Act be initiated against them.”

35. Circular No. 76/Admin. (F); Alld. Dated: 14.12.2007 issued in pursuance of various recommendations of the High Court acknowledges the delay in service of summons as main cause in disposal of the criminal cases and sets up summons cells which is manned by police constables in every districts:

“Identifying the delay in service of Summons to be the main cause for delay in disposal of the Criminal Cases, on the recommendations of Hon’ble Court a cell with adequate number of police constables to be attached to each district court exclusively, has been constituted to attend the work of each court as per direction of the Sessions Judges/CJMs.

I am directed to say that you shall exercise effective control over such cell and shall also submit a quarterly statement to the Hon’ble Court showing the performance for each month on the enclosed prescribed proforma.”

36. The existing and operative procedures and departmental accountability system to serve summons and execute coercive measures ordered by the court are largely ineffective and have failed to achieve their purpose. The police department will have to revisit extant organizational procedures, departmental oversight and determination of responsibility in respect of service of summons and execution of coercive measures issued by the courts. Necessary changes for individual accountability have to be introduced after examining the infirmities in the system apart from those found in this judgement.

37. In this wake, the powers of the courts to draw criminal proceedings or even contempt proceedings against the erring police officials for failing to serve summons or executing coercive processes have to be supplemented by effective departmental procedures delineating responsibility and fixing accountability in the police. An independent and effective internal accountability system in the police force for ensuring service of summons, and execution of coercive processes in a time bound framework may well be the need of the hour. A composite scheme of departmental accountability to ensure timely service of summons and execution of warrants, coexisting with provisions in the Cr.P.C. and powers of contempt of court for penalising acts interfering in the administration of justice will facilitate speedy conclusion of trials, besides obviating possible criminal litigation against police officials.

38. On earlier occasions when confronted with such issues, this Court issued directions to the SSP/SP of the concerned district to ensure that both summons and the coercive measures taken out by the courts are executed in a time bound manner. Directions proved effective and the object of compelling the appearance of the accused or the witnesses at the trial in a timely manner was achieved. [Ref: **Jitendra Vs. State of U.P.9**]. The operative part of **Jitendra (supra)** is reproduced hereunder for ease of reference:

"Though the process for framing of rules for ensuring expeditious service of summons and execution of coercive processes by the Court is underway, this Court would like to make a few observations. In the experience of this

Court only the nomination of a senior official not less than a rank of S.S.P. to oversee the service of summons/execution of coercive processes would prove most efficacious in such matters. The Court on past occasions had issued directions upon the S.S.P. for ensuring that summons are duly served in time and the coercive processes by the trial courts are promptly executed. On failure to do so, the S.S.P.s were required to submit their personal affidavits disclosing the causes for such failure and fixing responsibility for the same. This procedure proved efficacious as in most of the cases the Court found that both the service of summons and execution of coercive processes were prompt and which in turn led to a timely conclusion of the trials.

Secondly, a witness tracker program containing updates on the latest appointment and address of the witness will be most helpful to gain the end to be achieved."

39. Appointment of nodal officers at various levels for compelling appearance of witnesses may be an effective measure to deal with the crises situation. However, the system shall be fruitful only if the nodal officers are heads of the police at the respective levels. The nodal officers should be empowered to coordinate with police forces at various levels be it District, Zone, State or inter State. It is noteworthy that various government circulars and statutory provisions discussed earlier cast responsibility on the district police chief or the zonal chiefs as case may be.

40. The statutory obligation imposed upon the police authorities to compel appearance of witnesses on orders of the courts have to be incorporated in the charter of duties of the nodal officers to

which they shall be accountable. Performance of said officials is also liable to be evaluated on the said yardsticks and corrected by the department whenever deviations occur.

41. The magnitude of the problem of absent witnesses and inadequacy of the response of the police to enforce summons and coercive measures converge to expose a systemic fault line which threatens the credibility of the justice delivery system.

42. Inability of the police authorities to serve summons and execute coercive measures issued by the learned trial courts in the specified time frame is an endemic problem and a major bottleneck in the criminal law process. This deficiency in functioning of the police results in absence of witnesses in courts and causes interminable delays in trials and strikes at the root of public faith in the justice delivery system. The police authorities cannot turn a Nelson's eye to departmental shortcomings and senior officials cannot evade responsibility.

43. Rights of accused to a speedy trial under Article 21 of the Constitution of India are being violated and fair administration of right of bail is being hampered as a consequence of these failures of the police department.

44. True it is that judicial power is the monopoly of courts and judicial orders are the prerogative of courts. True also that realization of fundamental rights of citizens is the obligation of all organs of State and dispensation of justice to citizens is the responsibility of all instrumentalities of governance. The police cannot deny its statutory duty to compel prompt appearance of witnesses by timely service

of summons and execution of warrants on orders of the courts. The State cannot abnegate its constitutional obligation to protect the fundamental rights of prisoners who suffer prolonged incarceration due to delayed trials. Neither institution can escape accountability.

45. The need to address this issue squarely caused this Court to direct the State Government to consider framing of rules for an efficacious system of accountability within the police department for timely service of summons and execution of coercive processes issued by the courts. [Ref: **Jitendra (supra)**]. Since the consideration is on foot, the State Government may also examine these aspects of the matter. The task has to be accomplished with deep meticulousness and greatest promptitude.

46. Failure of the police authorities and neglect of the State Government to acknowledge their statutory duties and constitutional obligations respectively will lead to miscarriage of justice. Prisoners spend long years in jail simply because the police authorities do not ensure appearance of witnesses on a timely basis in defiance of orders passed by the trial courts. Failure of justice becomes more acute because many of the prisoners belong to marginalized sections of the society and are incapacitated by poverty and legal illiteracy. All stakeholders would do well remember to caution of this Court given in **Anil Gaur (supra)**:

“59...Exactions of poverty are more severe than punishments in law. For them the glorious dawn of the 75th year of independence has lost the sheen of freedom's ideals and the substance of the republic's promise.

60. Injustice is the birthmark of a slave nation. Justice is the birthright of a free people and our constitution says they shall have it.”

47. A copy to be served upon the Director General of Police, Government of U.P., Director General (Prosecution), Home Secretary, Government of U.P., Legal Remembrancer/Principal Secretary (Law), Government of U.P., Lucknow and Director, JTRI, Lucknow.

Order in Bail Application

48. By means of the second bail application the applicant has prayed to be enlarged on bail in Case Crime No.37 of 2014 (S.T. No.260 of 2014) at Police Station-Oncha, District-Mainpuri under Sections 147, 148, 149 and 302 IPC and Section 7 Criminal Law Amendment Act.

49. The applicant is on interim bail granted by this Court on 21.07.2023.

50. The following arguments made by Shri Bratendra Singh, learned counsel on behalf of the applicant, which could not be satisfactorily refuted by Shri Paritosh Kumar Malviya, learned AGA-I from the record, entitle the applicant for grant of bail:

I. The applicant is a law abiding citizen and had always cooperated with the investigations and joined the trial proceedings.

II. The trial is moving at a snail's pace and shows no sign of early conclusion. The applicant cannot be faulted for the delay in the trial.

III. The status report sent by the learned trial court records that delay in the

trial is also being occasioned by the failure of the police authorities to serve summons and execute coercive measures issued by the learned trial court.

IV. Inordinate delay in concluding trial had led to virtually an indefinite imprisonment of the applicant without there being any credible evidence to implicate him in the offence and violates the rights of the applicant to speedy trial.

V. The applicant does not have any criminal history apart from this case.

VI. The applicant is not a flight risk. The applicant being a law abiding citizen has always cooperated with the investigation and undertakes to join the trial proceedings. There is no possibility of his influencing witnesses, tampering with the evidence or reoffending.

51. In the light of the preceding discussion and without making any observations on the merits of the case, the bail application is allowed.

52. Let the applicant- **Bhanwar Singh @ Karamvir** be released on bail in the aforesaid case crime number, on the sureties already furnished while being enlarged on interim bail. The following conditions be imposed in the interest of justice:-

(a) The applicant will not tamper with the evidence or influence any witness during the trial.

(b) The applicant will appear before the trial court on the date fixed, unless personal presence is exempted.

Code Of Criminal Procedure, 1973

345. Procedure in certain cases of contempt.

(1) When any such offence as is described in section 175, section 178, section 179, section 180 or section 228 of the Indian Penal Code (45 of 1860), is committed in the view or presence of any Civil, Criminal or Revenue Court, the Court may cause the offender to be detained in custody and may, at any time before the rising of the Court on the same day, take cognizance of the offence and, after giving the offender a reasonable opportunity of showing cause why he should not be punished under this section, sentence the offender to fine not exceeding two hundred rupees, and, in default of payment of fine, to simple imprisonment for a term which may extend to one month, unless such fine be sooner paid.

(2) In every such case the Court shall record the facts constituting the offence, with the statement (if any) made by the offender, as well as the finding and sentence. (3) If the offence is under section 228 of the Indian Penal Code (45 of 1860), the record shall show the nature and stage of the judicial proceeding in which the Court interrupted or insulted was sitting, and the nature of the interruption or insult.

349. Imprisonment or committal of person refusing to answer or produce document. If any witness or person called to produce a document or thing before a Criminal Court refuses to answer such questions as are put to him or to produce any document or thing in his possession or power which the Court requires him to produce, and does not, after a reasonable opportunity has been, given, to him so to do, offer any reasonable excuse for such refusal, such Court may, for reasons to be recorded in writing, sentence him to simple imprisonment, or by warrant under the hand of the Presiding Magistrate or Judge commit him to the custody of an officer of the Court

for any term not exceeding seven days, unless in the meantime, such person consents to be examined and to answer, or to produce the document or thing and in the event of his persisting in his refusal, he may be dealt with according to the provisions of section 345 or section 346.

350. Summary procedure for punishment for non- attendance by a witness in obedience to summons.

(1) If any witness being summoned to appear before a Criminal Court is legally bound to appear at a certain place and time in obedience to the summons and without just excuse neglects or refuses to attend at that place or time or departs from the place where he has to attend before the time at which it is lawful for him to depart, and the Court before which the witness is to appear is satisfied that it is expedient in the interests of justice that such a witness should be tried summarily, the Court may take cognizance of the offence and after giving the offender an opportunity of showing cause why he should not be punished under this section, sentence him to fine not exceeding one hundred rupees.

(2) In every such case the Court shall follow, as nearly as may be practicable, the procedure prescribed for summary trials.

(2023) 9 ILRA 1057

**APPELLATE JURISDICTION
CRIMINAL SIDE**

DATED: ALLAHABAD 13.09.2023

BEFORE

THE HON'BLE AJAY BHANOT, J.

Criminal Misc. 2nd Bail Application No. 36536 of
2023

Siddhant @ Aashu

...Applicant

Versus

State of U.P. & Ors.

...Opposite Parties

Counsel for the Applicant:

Sri Atmaram Nadiwal, Sri Dinesh Kumar Yadav

Counsel for the Opposite Parties:

G.A.

Criminal Law-Code of Criminal Procedure, 1973-Section 439--- Witnesses have been declared hostile at the instance of the prosecution--- Inordinate delay in concluding trial had led to virtually an indefinite imprisonment of the applicant without there being any credible evidence to implicate him in the offence and violates the rights of the applicant to speedy trial---Applicant claims congruency in role and seeks parity in relief granted to the co-accused who has been enlarged on bail by this Court. **(Para 63 & 64)**

Bail application allowed. (E-15)

List of Cases cited:

1. Junaid Vs St. of U.P. & anr.2021 (6) ADJ 511
2. Barun Chandra Thakur Vs Master Bholu & anr.2022 SCC OnLine SC 870

(Delivered by Hon'ble Ajay Bhanot, J.)

1. The judgement is being structured in the following conceptual framework to facilitate the discussion:

I	Introduction		
II	Submissions of learned counsel for both the parties on CWC report.		
III	Statutory Schemes:		
		1.	Relevant provisions
		2.	Issues arising for consideration:
		A.	Procedure regarding care & protection of child

			B.	Conditions precedent for participation of CWC with reference to Rule 4 of POCSO Rules, 2020
			C.	Enquiry by the CWC
			D.	Agencies assisting the CWC
			E.	Evaluation of mental health of the child victim by CWC
			F.	CWC reports and process of the courts
IV	Conclusions and Directions			
V	Order in bail application			
VI	Appendix			

I. Introduction:

2. The case at hand also requires consideration of the role of Child Welfare Committee¹ report in ensuring a just hearing to the victim in bail proceedings in offences under the Protection of Children From Sexual Offences Act, 2012². The POCSO Act, 2012 read with Protection of Children from Sexual Offences Rules, 2020³ create a composite scheme to serve equal justice to victims, and the CWC report has a direct bearing on fair administration of bail jurisdiction and the trial process.

3. The prosecution case discloses that after the victim was abducted, the accused were chased and intercepted by the villagers. The F.I.R. was got lodged promptly. The accused were arrested at the

spot and the victim too was recovered. Medical report was drawn up on the same day. The statements of the victim under Sections 161 Cr.P.C. and 164 Cr.P.C., accounts of the witnesses as well as medical report fully corroborated the prosecution story of abduction and rape. However subsequently the victim turned hostile in the trial. In these circumstances the implementation of the POCSO Act, 2012 and the role of the CWC reports in securing justice to child victims of sexual offences need to be examined.

4. The CWC report available with the learned AGA does not depict examination of socio-economic circumstances of the victim and of the accused persons. The appointment of the support person in this case was not preceded by requisite enquiries and made in a mechanical manner. Support person did not send any report regarding the victim's condition to the CWC at any stage. The mental condition of the victim after the sexual assault was not adverted to in the report. These shortcomings had far reaching consequences on the trial. Protection and rehabilitation needs of the child victim in this case were absent in the report.

5. In summation the CWC report neglected various relevant aspects regarding the victim's condition and is not in consonance with the statute.

6. This Court is finding that CWC reports are often deficient and not in conformity with the statutory parameters laid down in Rule 4 of the POCSO Rules, 2020. This creates impediments in fair administration of bail jurisdiction in POCSO Act offences and in dispensation of justice to child victims of sexual offences.

II. Submissions of learned counsel for both the parties on CWC report:

7. Shri Atmaram Nadiwal, learned counsel and Shri Dinesh Kumar Yadav, learned counsel for the applicant has made these submissions:

I. The applicant cannot be penalized for the failure of the Child Welfare Committee.

II. CWC report has no bearing on the bail application.

8. Shri Paritosh Kumar Malviya, learned AGA-I; Shri Rishi Chaddha, learned AGA and Ms. Sujata Chaudhary, learned AGA for the State made the following submissions:

I. CWC report is an indispensable feature of the POCSO Act and assists in securing justice to the victim.

II. CWC report is liable to be examined by the court while hearing bail in light of judgement rendered by this Court in **Junaid Vs State of U.P. and another**⁴.

III. CWC report was not drawn in adherence to POCSO Act and Rules and has resulted in a miscarriage of justice.

III. Statutory Schemes :

III (1). Relevant Provisions

9. Grant of bails in offences under the POCSO Act, 2012 are regulated by Section 439 of the Code of Criminal Procedure, 1973 as well as the provisions of the POCSO Act, 2012 read with the POCSO Rules, 2020.

10. A distinguishable feature of the said POCSO Act, 2012 read with POCSO Rules, 2020 is that the statutory right of hearing at the bail application of the

accused is vested in the victim. The enactment marks shift from earlier tenets of criminal jurisprudence which gave a weaker right of hearing to a victim in criminal matters prosecuted by the State. Child victims of POCSO Act, 2012 offences constitute a separate and well defined class. The legislature has acknowledged their vulnerabilities of this class, and the scheme of enactment squarely addresses their plight. The protective and ameliorative regime under the POCSO Act, 2012 read with POCSO Rules, 2020, is initiated at the pre-trial stage and extends through the trial process.

11. This Court in **Junaid Vs State of U.P. and another**⁶ while examining the functions of CWC in the context of bail applications held as under:

“B. Functions of CWC:-

I. Receive information and documents from the police and take appropriate action thereupon as provided in the POCSO Act, 2012 read with POCSO Rules, 2020.

II. To apprise the child of its entitlements under the POCSO Act, 2012 read with POCSO Rules, 2020. Identify the person who would be best suited to protect the interests of the child and receive notices of the legal proceedings on its behalf from amongst the following persons: child’s parents/guardian/any other person in whom the child has trust and confidence or appoint a support person for the child whenever required.

III. To prepare reports and coordinate with the police and various government agencies for providing information and services entitled to the child.

IV. To coordinate with the DLSA and HCLSC to provide free legal aid in

appropriate cases to the child at the District Court and High Court respectively.

V. Disclose to the High Court as well as the trial court the status of entitled information and services including free legal aid provided to the child and submit relevant reports when the bail application is placed before the Court.”

12. The POCSO Act, 2012 read with POCSO Rules, 2020 contemplates a significant role for the Child Welfare Committee in securing the rights and interests of child victims of sexual abuse.

13. The police authorities while investigating an offence upon receiving information which satisfies the prerequisites of Section 19(1) of the POCSO Act, 2012 shall produce before the Child Welfare Committee in the manner stated in the provision. The provision is extracted hereinunder:

“19. Reporting of offences:—

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) any person (including the child), who has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to,—

(a) the Special Juvenile Police Unit; or

(b) the local police.

(2) Every report given under subsection (1) shall be—

(a) ascribed an entry number and recorded in writing;

(b) be read over to the informant;

(c) shall be entered in a book to be kept by the Police Unit.”

14. The monitoring framework is spelt out in Rule 12 of the POCSO Rules, 2020i (see Appendix I).

15. Appointment of a 'support person' is also a critical feature in the protective scheme of the POCSO Act, 2012 read with POCSO Rules, 2020:

"2 Definition:

(f) "support person" means a person assigned by the Child Welfare Committee, in accordance with sub-rule (7) of rule 4, to render assistance to the child through the process of investigation and trial, or any other person assisting the child in the pre-trial or trial process in respect of an offence under the Act."

16. The importance of engaging with experts of different fields and taking their assistance for the benefit of the child are mandated in Section 39 of the POCSO Act, 2012. The provision states as follows:

"39. Guidelines for child to take assistance of experts, etc. – Subject to such rules as may be made in this behalf: the State Government shall prepare guidelines for use of non-governmental organisations, professionals and experts or persons having knowledge of psychology, social work, physical health, mental health and child development to be associated with the pre-trial and trial stage to assist the child."

17. The provisions of POCSO Act, 2012 have to be implemented in conjunction with the provisions of the Juvenile Justice (Care and Protection of Children), Act, 2015. Section 2(14) of the JJ Act, 2015 defines child in need of care and protection. The provision has a wide ambit and covers a children who has

suffered sexual abuse. The provision is extracted hereinafter:

"2. Definition: —

(14) "child in need of care and protection" means a child—

(iii) who resides with a person (whether a guardian of the child or not) and such person—

(a) has injured, exploited, abused or neglected the child or has violated any other law for the time being in force meant for the protection of child; or

(b) has threatened to kill, injure, exploit or abuse the child and there is a reasonable likelihood of the threat being carried out; or

(c) has killed, abused, neglected or exploited some other child or children and there is a reasonable likelihood of the child in question being killed, abused, exploited or neglected by that person; or

(v) who has a parent or guardian and such parent or guardian is found to be unfit or incapacitated, by the Committee or the Board, to care for and protect the safety and well-being of the child; or

(viii) who has been or is being or is likely to be abused, tortured or exploited for the purpose of sexual abuse or illegal acts; or

(ix) who is found vulnerable and is likely to be inducted into drug abuse or trafficking; or

(x) who is being or is likely to be abused for unconscionable gains; or

(xii) who is at imminent risk of marriage before attaining the age of marriage and whose parents, family members, guardian and any other persons are likely to be responsible for solemnisation of such marriage;"

18. Section 31 of the JJ Act, 2015, nominates the person who may produce the

child in need of care and protection before the CWC. The provision is part of Appendixii II.

19. The procedure before the CWC after the child is produced is outlined in Rule 18 (1) of the Juvenile Justice (Care and Protection of Children) Model Rules, 2016⁸. The provision is part of Appendixiii III.

20. The procedure for enquiry which is to be undertaken into the circumstances of the child

21. The provisions for line of enquiry of the CWC in the JJ Act, 2015 are more comprehensive. However, there is no conflict with the enquiry contemplated under Rule 4 of the POCSO Rules, 2020. Both the provisions have to be interpreted harmoniously in the best interests of the child. The provisions of the JJ Rules, 2016 and the POCSO Act, 2012 read with POCSO Rules, 2020 insofar as they relate to child victims of sexual offences have to be construed as an integrated scheme to achieve the common purpose which is the welfare of the child victim.

III. Statutory Schemes :

III (2). Provisions & issues arising for consideration:

22. Some aspects of the functioning of CWCs and issues with respect of CWC reports which arise directly for consideration in the facts and circumstances of this case are discussed in this part of the narrative.

III (2) A. Procedure regarding care and protection of child

23. The procedure regarding care and protection of a child and the duties of the

police authorities, the CWC and other agencies are delineated in Rule 4 of the POCSO Rules, 2020. Rule 4(3) of the POCSO Rules, 2020, nominates the SJPU or the local police as the first responders and requires them to take various actions upon receipt of information in accordance with the provisions of Section 19(1) of the POCSO Act, 2012. The relevant provision is extracted hereinunder:

"4. Procedure regarding care and protection of child:-

(3) Where an SJPU or the local police, as the case may be, receives information in accordance with the provisions contained under sub-section (1) of section 19 of the Act in respect of an offence that has been committed or attempted or is likely to be committed, the authority concerned shall, where applicable, —

(a) proceed to record and register a First Information Report as per the provisions of section 154 of the Code of Criminal Procedure, 1973 (2 of 1974), and furnish a copy thereof free of cost to the person making such report, as per sub-section (2) of section 154 of that Code;

(b) where the child needs emergency medical care as described under sub-section (5) of section 19 of the Act or under these rules, arrange for the child to access such care, in accordance with rule 6;

(c) take the child to the hospital for the medical examination in accordance with section 27 of the Act;

(d) ensure that the samples collected for the purposes of the forensic tests are sent to the forensic laboratory immediately;

(e) inform the child and child's parent or guardian or other person in whom the child has trust and confidence of the availability of support services including

counselling, and assist them in contacting the persons who are responsible for providing these services and relief;

(f) inform the child and child's parent or guardian or other person in whom the child has trust and confidence as to the right of the child to legal advice and counsel and the right to be represented by a lawyer, in accordance with section 40 of the Act."

III (2) B. Conditions precedent for participation of CWC with reference to Rule 4 of the POCSO Rules, 2020

24. The prerequisites which have to be satisfied by the SJPU or the local police prior to production of child before the CWC for detailed assessment of the latter are stated in Rule 4 (4) of the POCSO Rules, 2020:

"4(4) Where the SJPU or the local police receives information under sub-section (1) of section 19 of the Act, and has a reasonable apprehension that the offence has been committed or attempted or is likely to be committed by a person living in the same or shared household with the child, or the child is living in a child care institution and is without parental support, or the child is found to be without any home and parental support, the concerned SJPU, or the local police shall produce the child before the concerned Child Welfare Committee (hereafter referred to as "CWC") within 24 hours of receipt of such report, together with reasons in writing as to whether the child is in need of care and protection under sub-section (5) of section 19 of the Act, and with a request for a detailed assessment by the CWC."

(emphasis supplied)

25. The words "the child is found to be without any home and parental support" in Rule 4 (4) of the POCSO Rules, 2020, denote that the legislative intent is to go beyond the fact that the child is simply living with their⁹ parents and stays in the shelter of a temporary/permanent structure. The provision casts a duty to examine the status of the child in the family, the nature of support and understanding which are bestowed on the child by their parents. This fact is particularly critical in view of relegation of the girl child and children with disabilities to an insignificant position in many families on account of a skewed value systems or oppressive social norms.

III (2) C. Enquiry by the CWC:

26. The role of the CWC commences upon receipt of a report in Rule 4(3) of the POCSO Rules, 2020. The CWC shall thereafter proceed to make its determination under Rule 4 (5) of the POCSO Rules, 2020, in accordance with the powers vested under Section 31 (1) of the JJ Act, 2015. The relevant provisions are extracted hereunder:

"4(5) Upon receipt of a report under sub-rule (3), the concerned CWC must proceed, in accordance with its powers under sub-section (1) of section 31 of the Juvenile Justice Act, 2015 (2 of 2016), to make a determination within three days, either on its own or with the assistance of a social worker, as to whether the child needs to be taken out of the custody of child's family or shared household and placed in a children's home or a shelter home."

27. CWC is enjoined by law to create a report after meeting the victim on various aspects related to their¹⁰ conditions.

Parameters of the CWC report which also define its purpose are provided in Rule 4(6) of the POCSO Rules, 2020. The provisions being germane to the controversy are reproduced below for ease of reference:

“(6) In making determination under sub-rule (4), the CWC shall take into account any preference or opinion expressed by the child on the matter, together with the best interests of the child, having regard to the following considerations, namely: -

(i) the capacity of the parents, or of either parent, or of any other person in whom the child has trust and confidence, to provide for the immediate care and protection needs of the child, including medical needs and counselling;

(emphasis supplied)

(ii) the need for the child to remain in the care of parent's, family and extended family and to maintain a connection with them;

(iii) the child's age and level of maturity, gender, and social and economic background;

(iv) disability of the child, if any;

(v) any chronic illness from which a child may suffer;

(vi) any history of family violence involving the child or a family member of the child; and,

(vii) any other relevant factors that may have a bearing on the best interests of the child:

Provided that prior to making such determination, an inquiry shall be conducted in such a way that the child is not unnecessarily exposed to injury or inconvenience.”

28. While enquiring into the “capacity of the parents”, the CWC under Rule 4(6) of the POCSO Rules, 2020, will examine

the ability of the parents to give unconditional support to the victim in the hour of crisis, and to rally the family behind the child to tide over the trauma. The statutory mandate is furthered by ascertaining the empathy shown by the parents to the plight of the victim, and responsive engagement with the child in assisting them¹¹ to overcome the ordeal. The capacity of the parents is reflected in the manner they facilitate the victim's rehabilitation and confident re-entry into the social mainstream. The enquiry should factor in the strength of the parents to withstand pressures and to insulate the child from unhealthy influences during the investigation/trial.

29. The “capacity of the parents” signifies the need to determine the socio-economic conditions and vulnerabilities of the victim and her family in the facts and circumstances of the case. These have to be seen in light of the impact of the crime on the child and the ability of the parents to provide a conducive environment to the child victim in their¹² striving for justice and search for closure with dignity.

III(2) D. Agencies assisting the CWC

30. The CWC in drawing up its report can seek the assistance of a social worker and other expert agencies in light of Rule 4(5) of the POCSO Rules, 2020 (quoted earlier). The conduct of the process by the CWC should not be intrusive and has to respect the privacy of the child and the family.

31. Rules 4(8) to 4(12) of the POCSO Rules, 2020, contemplate the appointment of a suitable “support person” by the CWC. The CWC after considering the relevant

facts and circumstances should appoint a suitable support person to assist the child in all possible manner through the process of investigation and trial and also to obviate the possibility of the victim being pressurized on any count. Information of the support person shall be conveyed to police authorities. The support person shall be monitored by the CWC. The provision is extracted hereinunder:

“(8) The CWC, on receiving a report under sub-section (6) of section 19 of the Act or on the basis of its assessment made under sub-rule (5), and with the consent of the child and child’s parent or guardian or other person in whom the child has trust and confidence, may provide a support person to render assistance to the child in all possible manner throughout the process of investigation and trial, and shall immediately inform the SJPU or Local

(9) The support person shall at all times maintain the confidentiality of all information pertaining to the child to which he or she has access and shall keep the child and child’s parent or guardian or other person in whom the child has trust and confidence, informed regarding the proceedings of the case, including available assistance, judicial procedures, and potential outcomes. The Support person shall also inform the child of the role the Support person may play in the judicial process and ensure that any concerns that the child may have, regarding child’s safety in relation to the accused and the manner in which the Support person would like to provide child’s testimony, are conveyed to the relevant authorities.

(10) Where a support person has been provided to the child, the SJPU or the local police shall, within 24 hours of making such assignment, inform the Special Court in writing.

(11) The services of the support person may be terminated by the CWC upon request by the child and child’s parent or guardian or person in whom the child has trust and confidence, and the child requesting the termination shall not be required to assign any reason for such request. The Special Court shall be given in writing such information.

(12) The CWC shall also Seek monthly reports from support person till the completion of trial, with respect to condition and care of child, including the family situation focusing on the physical, emotional and mental wellbeing, and progress towards healing from trauma; engage with medical care facilities, in coordination with the support person, to ensure need-based continued medical support to the child, including psychological care and counseling; and shall ensure resumption of education of the child, or continued education of the child, or shifting of the child to a new school, if required.”

III(2) E. Evaluation of mental health of the child victim by CWC:

32. The scope of the enquiry by the CWC after taking into account the preference or opinion of the child in the matter, together with the best interests of the child are provided in Rule 4 (6) of the POCSO Rules, 2020 (as quoted earlier).

33. The words employed in Rule 4 and Rule 4 (6)(vii) of the POCSO Rules, 2020 especially the phrase “best interests of the child” reflect the wide ambit of the CWC enquiry. Operationalizing the broad terms of Rule 4(6)(vii) of the POCSO Rules, 2020, is the key to achieving the legislative object of the CWC. Rule 4(6)(vii) of the POCSO Rules, 2020 also

embraces an enquiry into the mental health and psychological condition of a victim of a POCSO Act offence.

34. Engaging with child victims of sexual offences and evaluating their conditions is a complex task. The process requires sensitive engagement and professional handling of the victim by experts in child psychology, mental health and allied fields. In many instances CWC members are not professional psychologists or experts in mental health and behavioural sciences, and often do not have a ready access to the advice of the latter. Absence of expert advice results in infirmities in CWC reports which may inflict lasting traumas upon victims, impede their rehabilitation and even cheat the process of justice. In these circumstances it is mandatory for the CWC to work with expert agencies to develop a scientific framework for evaluating the mental condition and needs of a child victims of sexual abuse.

35. Paucity of trained psychologists and mental health experts was noticed by the National Institute of Mental Health & Neurosciences, Bangalore¹³ in its report published in August 2023 rendered in the context of ‘Juveniles in conflict with law.’

36. Creation of standardized lines of enquiries and templates developed by expert agencies like NIMHANS can supply the deficiencies in the current system. Standardized evaluation systems/enquiry formats so drawn up by institutions like NIMHANS can guide the CWC in assessing the mental condition of a child victim of a POCSO Act offence, and to determine the process of rehabilitation of the latter. The said standards of enquiry can form the basis of the CWC reports.

37. Opinions of mental health experts/psychologists in CWC reports is a legal mandate which aid the courts to determine the capacity of the child victim to depose before the court and to sensitize the trial proceedings. Incorporating opinions of mental health professionals/psychologists in the said reports will also assist in the rehabilitation of the victim by making a timely reference to mental health professionals for prolonged treatment if needed.

38. In a number of fields the legislature has acknowledged the necessity of interface of law and legal professionals with other domains and domain experts.

39. At times the intellectual capital created by the siloed process of courts is inadequate for addressing complex legal issues of moment. In such situations, the Courts have not hesitated to draw from other fields of knowledge or domains of specialization. Interdisciplinary engagement garners the intellectual capital which is necessary to serve justice in complex decision making processes like those related to minor victims of sexual offences. The concept of interdisciplinary engagement has found legitimacy in the legal process. Inclusive decision making is noticeable in holdings of constitutional courts. This paradigm shift in the process of law was recognized by the Supreme Court in **Barun Chandra Thakur Vs. Master Bholu and Another**¹⁴.

40. The discussion will profit from the holdings and the methodology adopted in **Barun Chandra Thakur (supra)** which arose out of proceedings under the Juvenile Justice (Care and Protection of Children) Act, 2015.

41. The concept of interdisciplinary engagement between the courts and experts

in the field of child psychology was affirmed in **Barun Chandra Thakur (supra)** by referencing and relying on various specialized agencies and institutions like NIMHANS, Bangalore.

42. **Barun Chandra Thakur (supra)** went on to notice specialized nature of the field of child psychology and the importance of integrating report of such experts in the preliminary assessment mandated by Section 15 of the JJ Act, 2015 by holding thus:

“75. It is to be noted that child psychology is a specialised branch of development psychology, its genesis is based on the premise that children and adults have a different thought process. The individualised assessment of adolescent mental capacity and ability to understand the consequences of the offence is one of the most crucial determinants of the preliminary assessment mandated by Section 15 of the Act, 2015. The report of the preliminary assessment decides the germane question of transferring the case of a child between 16 to 18 years of age to the Children’s Court. This evaluation of ‘mental capacity and ability to understand the consequences’ of the child in conflict with law can, in no way, be relegated to the status of a perfunctory and a routine task. The process of taking a decision on which the fate of the child in conflict with law precariously rests, should not be taken without conducting a meticulous psychological evaluation.”

43. The interdisciplinary interface in the judicial process was pioneered by Justice Louis D. Brandeis. The engagement of courts and the process of law with other domains of knowledge has a long history. It is gaining more acceptability in our country in recent

times. The courts have consistently called for reports of environmental experts, scientists and so on as and when the need has arisen to secure the ends of justice.

III (2) F. CWC report & process of the courts

44. Consideration of CWC reports while deciding bail applications reflects the new contours of law created by the POCSO Act [also see **Junaid (supra)**].

45. CWC reports play a critical role in the implementation of various protective measures and other entitlements of victims under the POCSO Act, 2012 read with POCSO Rules, 2020.

46. The CWC report assists the courts in evaluating the victim's condition and to sensitize the process of law. The CWC report also helps the court to determine whether the victim has access to various protective and rehabilitative measures under the POCSO Act, 2012 read with POCSO Rules, 2020. The courts are obligated to direct the authorities to provide the benefits and entitlements to child victims under the POCSO Act, 2012 read with POCSO Rules, 2020, whenever shortcomings are observed. The rights of the child victims are brought to fruition in this manner.

47. Denial of statutory support systems like counselling services, medical care, support persons, and legal aid put the victims at a disadvantage in court proceedings, impede their rehabilitation and defeat the intent of the legislature.

48. CWC reports also enable courts to oversee the functioning of various government agencies and statutory bodies

charged with duties of implementing the POCSO Act, 2012 read with POCSO Rules, 2020.

49. Authorities upon whom the statute imposes the duty to secure the rights of victims under the POCSO Act, 2012 read with POCSO Rules, 2020 are accountable to courts where legal proceedings are pending. This Court in **Junaid (supra)** held thus:

“42....It has to be stated that the said judgments of Delhi High Court and Bombay High Court enrich legal debate, and elevate the concerns of child rights to the conscience of the court. The judgments have sensitized the process of law and ameliorated the plight of child victims by acknowledging the responsibilities of the courts and making the CWC, Legal Services Authorities and police officials accountable to courts in bail applications. These recognizable principles of law can be clearly distilled from **Reena Jha (supra)**, **Miss G (supra)**, **Arjun Kishanrao Malge (supra)**.”

50. In summation the CWC reports are pivotal to serve justice to child victims of POCSO Act, 2012 offences in line with the enactment. It is thus imperative that CWC report should be placed before the learned trial court as well as High Court for consideration at the time of hearing of the bail applications.

IV. Conclusions and Directions

51. Justice to child victims of POCSO Act offences is not secured only by a singular act of bringing an accused to face the law. The POCSO Act scheme takes a composite view of the menace of sexual abuse of children, and justice under the

enactment has many facets. Justice to child victims of sexual offences is truly served when the protective script of the legislation sensitizes the process of law, the alleviating measures under the enactment heal the trauma and efface the scars suffered by the victim, and the rehabilitative scheme contemplated by the legislature absorbs the victim in the social mainstream with full dignity.

52. In this wake, the following directions are issued to the competent authorities for execution:

I. The Judicial Training & Research Institute, Lucknow, in consultation with the State Government, institutions of higher legal learning, institutions of higher research and education, institutions of special expertise like NIMHANS, CWCs and other experts in the field shall create a standardized evaluation system/line of enquiry to determine the mental condition of the victims of offences under the POCSO Act, 2012 and to provide for their rehabilitation. The said standardized lines of enquiry shall provide the basis for the CWC to engage with the child and to create a report contemplated under Rule 4 of the POCSO Rules, 2020.

II. State Government/Additional Chief Secretary, Department of Women & Child Development, Government of U.P., Lucknow shall render all support to the JTRI in this undertaking.

III. NIMHANS shall create standardized evaluation enquiries/templates for determining the mental health and rehabilitation measures of a child victim of sexual offences at the request of the JTRI.

IV. The JTRI shall similarly after consultation with the State Government, CWCs and other institutions of expertise

and higher learning create appropriate standardized evaluation formats /templates containing all other relevant facts contemplated in Rule 4 of the POCSO Rules, 2020 and Rule 19 of the JJ Rules, 2016, and other relevant provisions of law.

V. The CWCs shall use the above standardized lines of enquiries/templates for drawing up the CWC reports under the POCSO Act, 2012 read with POCSO Rules, 2020.

VI. The State Government is directed to ensure that details of agencies whose assistance can be taken by the CWC under Section 39 of the POCSO Act, 2012 are duly provided to the CWCs.

VII. The JTRI shall after due consultation with the State Government, CWC and other stake holders prepare the training modules for all CWC members in the State. The training modules will be implemented by the State Government.

VIII. The JTRI, Lucknow, shall conclude the exercise within a period of four months from the date of receipt of a copy of this order.

53. Apart from the above standardized evaluation system/templates so create, it shall be open for the CWC to further enquire into any other relevant issues in the facts and circumstances of a case and as per law.

54. This Court also notices that the CWC have not been provided with the necessary infrastructure and lack the required wherewithal to discharge their functions. The State Government/Additional Chief Secretary, Government of U.P. Lucknow, are directed to urgently evaluate and upgrade infrastructure available with the CWC to facilitate discharge of their statutory functions.

55. CWC while creating the report has to be conscious of the scope and limitations of its jurisdiction. The CWC report is not part of the investigations made by the police into the offences under Section 173 Cr.P.C. The report cannot be equated with the statements of the victim made under the relevant provisions of the Cr.P.C.

56. The CWC has to adhere to norms of legal propriety and act within the bounds of its jurisdiction in order to achieve its statutory purpose. The CWC acting in consonance with these tenets will sensitize the statutory authorities and the process of justice to the plight of victims and bring their rights to fruition.

57. Dysfunctions of the CWCs and neglect of their reports stymies the operation of the POCSO Act, 2012, negates the promise of the legislature and degrades the quality of justice for the child victims of sexual abuse. Remedial action has to be taken by the State Government on an urgent basis.

58. Copy of this order may be respectfully placed before the Hon'ble Juvenile Justice (Care and Protection) Act Committee, and Hon'ble Protection of Children from Sexual Offences Act Committee for kind consideration and appropriate action and also before the Director, Judicial Training & Research Institute, Lucknow for compliance.

59. The Director, JTRI, Lucknow and Additional Chief Secretary, Department of Women & Child Development, Government of U.P, shall frame a training programme for Child Welfare Committees in consultation with various stakeholders.

V. Order in Bail Application

60. This is the second bail application.

61. By means of the bail application the applicant has prayed to be enlarged on bail in Case Crime No.150 of 2021 at Police Station-Badgaon, District-Saharanpur under Sections 363, 366, 376D IPC and Section 5(g)6 of the POCSO Act.

62. The applicant is on interim bail granted by this Court on 22.08.2023.

63. The following arguments made by Shri Atmaram Nadiwal, learned counsel and Shri Dinesh Kumar Yadav, learned counsel on behalf of the applicant, which could not be satisfactorily refuted Shri Paritosh Kumar Malviya, learned AGA-I, Shri Rishi Chaddha, learned AGA and Ms. Sujata Chaudhary, learned AGA for the State from the record, entitle the applicant for grant of bail:

I. P.W. 1 who is the first informant and father of the victim as well as the victim in their testimonies before the learned trial court have repudiated the prosecution case. The aforesaid witnesses have been declared hostile at the instance of the prosecution.

II. The applicant is a law abiding citizen who cooperated with the police investigations and had joined the trial.

III. The trial is moving at a snail's pace and is not likely to conclude anytime in the near future. The applicant is not responsible for the delay in the trial.

IV. Inordinate delay in concluding trial had led to virtually an indefinite imprisonment of the applicant without there being any credible evidence to implicate him in the offence and violates the rights of the applicant to speedy trial.

V. The applicant claims congruency in role and seeks parity in relief granted to the co-accused who has been enlarged on bail by this Court by order dated 27.07.2023 in Criminal Misc. Bail Application No. 5489 of 2023.

VI. The applicant is not a flight risk. The applicant being a law abiding citizen has always cooperated with the investigation and undertakes to join the trial proceedings. There is no possibility of his influencing witnesses, tampering with the evidence or reoffending.

64. In the light of the preceding discussion and without making any observations on the merits of the case, the bail application is allowed.

65. Let the applicant- **Siddhant @ Aashu** be released on bail in the aforesaid case crime number, on the sureties already furnished while being enlarged on interim bail. The following conditions be imposed in the interest of justice:-

(i) The applicant will not tamper with the evidence or influence any witness during the trial.

(ii) The applicant will appear before the trial court on the date fixed, unless personal presence is exempted.

i VI. Appendix I POCSO Rules, 2020

12. Monitoring of implementation of the Act.-

(1) The National Commission for the Protection of Child Rights (hereafter referred to as "NCPCR") or the State Commission for the Protection of Child Rights (hereafter referred to as "SCPCR"), as the case may be, shall in addition to the

functions assigned to them under the Commissions for Protection of Child Rights Act, 2005 (4 of 2006), perform the following functions for implementation of the provisions of the Act-

(a) monitor the designation of Special Courts by State Governments; (b) monitor the appointment of the Special Public Prosecutors by the State Governments;

(c) monitor the formulation of the guidelines described in section 39 of the Act by the State Governments, for the use of non-governmental organisations, professionals and experts or persons having knowledge of psychology, social work, physical health, mental health and child development to be associated with the pre-trial and trial stage to assist the child, and to monitor the application of these guidelines;

(d) monitor the designing and implementation of modules for training police personnel and other concerned persons, including officers of the Centre and State Governments, for the effective discharge of their functions under the Act; (e) monitor and support the Central Government and State Governments for the dissemination of information relating to the provisions of the Act through media including the television, radio and print media at regular intervals, so as to make the general public, children as well as their parents and guardians aware of the provisions of the Act.

(f) call for a report on any specific case of child sexual abuse falling within the jurisdiction of a CWC (g) collect information and data on its own or from the relevant agencies regarding reported cases of sexual abuse and their disposal under the processes provided under the Act, including information on the following:- (i) number

and details of offences reported under the Act;

(ii) whether the procedures prescribed under the Act and rules were followed, including those regarding time frames;

(iii) details of arrangements for care and protection of victims of offences under this Act, including arrangements for emergency medical care and medical examination; and,

(iv) details regarding assessment of the need for care and protection of a child by the concerned CWC in any specific case;

(h) use the information so collected to assess the implementation of the provisions of the Act. The report on monitoring of the Act shall be included In a separate chapter in the annual report of the NCPDR or the SCPCR. (2) The concerned authorities mandated to collect data, under the Act, shall share such data with the Central Government and every State Government, NCPDR and SCPCRs

JJ Act, 2015

ii Appendix II

31. Production before Committee (1)

Any child in need of care and protection may be produced before the Committee by any of the following persons, namely:

(i) any police officer or special juvenile police unit or a designated Child Welfare Police Officer or any officer of District Child Protection Unit or inspector appointed under any labour law for the time being in force,

(ii) any public servant;

(iii) Childline Services or any voluntary or non-governmental organisation

or any agency as may be recognised by the State Government;

(iv) Child Welfare Officer or probation officer; (v) any social worker or a public spirited citizen;

(vi) by the child himself; or

(vii) any nurse, doctor or management of a nursing home, hospital or maternity home:

Provided that the child shall be produced before the Committee without any loss of time but within a period of twenty-four hours excluding the time necessary for the journey.

(2) The State Government may make rules consistent with this Act, to provide for the manner of submitting the report to the Committee and the manner of sending and entrusting the child to children home or fit facility or fit person, as the case may be, during the period of the inquiry."

JJ Rules, 2016

iii Appendix III

18. Production before the Committee (1) Any child in need of care and protection shall be produced before the Committee during the working hours at its place of sitting and beyond working hours before the member as per the duty roster. Provided that where the child cannot be produced before the Committee, the Committee shall reach out to the child where the child is located.

iv Appendix IV

JJ Rules, 2016

"19. Procedure for inquiry.-

(1) The Committee shall inquire into the circumstances under which the child is produced and accordingly declare such child to be a child in need of care and protection.

(2) The Committee shall, prima facie determine the age of the child in order to ascertain its jurisdiction, pending further inquiry as per section 94 of the Act, if need be.

(3) When a child is brought before the Committee, the Committee shall assign the case to a social worker or Case Worker or Child Welfare Officer or to any recognised non-governmental organisation for conducting the social investigation under sub-section (2) of section 36 of the Act through an order in Form 21

(4) The Committee shall direct the person or organisation concerned to develop an individual care plan in Form 7 including a suitable rehabilitation plan. The individual care plan prepared for every child in the institutional care shall be developed with the ultimate aim of the child being rehabilitated and re-integrated based on the case history, circumstances and individual needs of the child.

(5) The inquiry shall satisfy the basic principles of natural justice and shall ensure the informed participation of the child and the parent or guardian. The child shall be given an opportunity to be heard and his opinion shall be taken into consideration with due regard to his age and level of maturity. The orders of the Committee shall be in writing and contain reasons.

(6) The Committee shall interview the child sensitively and in a child friendly manner and will not use adversarial or accusatory words or words that adversely impact the dignity or self-esteem of the child. (7) The Committee shall satisfy itself through documents and verification reports, before releasing or restoring the child, as per Form 19, in the best interest of the child

(8) The social investigation conducted by a social worker or Case Worker or Child Welfare Officer of the institution or any non-governmental organisation shall be as per Form 22 and must provide an assessment of the family situation of the child in detail, and explain

in writing whether it will be in the best interest of the child to restore him to his family

(9) Before the Committee releases or restores the child, both the child as well as the parents or guardians may be referred to the Counsellor

(10) The Committee shall maintain proper records of the children produced before it including medical reports, social investigation report, any other report(s) and orders passed by the Committee in regard to the child.

(11) In all cases pending inquiry, the Committee shall notify the next date of appearance of the child not later than fifteen days of the previous date and also seek periodic status report from the social worker or Case Worker or Child Welfare Officer conducting investigation on each such date.

(12) In all cases pending inquiry, the Committee shall direct the person or institution with whom the child is placed to take steps for rehabilitation of the child including education, vocational training, etc., from the date of first production of the child itself

(13) Any decision taken by an individual member, when the Committee is not sitting, shall be ratified by the Committee in its next sitting.

(14) At the time of final disposal of a case, there shall be at least three members present including the Chairperson, and in the absence of Chairperson, a member so nominated by the Chairperson to act as such. (15) The Committee shall function cohesively as a single body and as such shall not form any subcommittees.

(16) Where a child has to be sent or repatriated to another district or state or country the Committee shall direct the District Child Protection Unit to take

necessary permission as may be required, such as approaching the Foreigners Regional Registration Offices and Ministry of External Affairs for a no-objection certificate, contacting the counterpart Committee, or any other voluntary organisation in the other district or state or country where the child is to be sent.

(17) At the time of final disposal of the case, the Committee shall incorporate in the order of disposal, an individual care plan in Form 7 of such child prepared by the social worker or Case Worker or Child Welfare Officer of the institution or any non- governmental organisation, as the case may be..

(18) While finally disposing of the case, the Committee shall give a date for follow- up of the child not later than one month from the date of disposal of the case and thereafter once every month for the period of first six months and thereafter every three months for a minimum of one year or till such time as the Committee deems fit.

(19) Where the child belongs to a different district, the Committee shall forward the age declaration, case file and the individual care plan to the Committee of the district concerned which shall likewise followup the individual care plan as if it had passed such disposal order.

(20) The individual care plan shall be monitored by means of a rehabilitation card in Form 14 issued for the purpose by the Committee passing the disposal order and which shall form part of the record of the Committee which follow up the implementation of the individual care plan. Such rehabilitation card shall be maintained by the Rehabilitation-cum-Placement Officer.

(21) All orders passed by the Committee in respect of a child in need of care and protection shall also be uploaded

on the designated portal with due regard to the confidentiality and privacy of the child.

(22) When a parent or guardian, wishes to surrender a child under sub-section (1) of section 35 of the Act, such parent or guardian shall make an application to the Committee in Form 23. Where such parent or guardian is unable to make an application due to illiteracy or any other reason, the Committee shall facilitate the same through the Legal Aid Counsel provided by the Legal Services Authority, the deed of surrender shall be executed as per Form 24.

(23) The inquiry under sub-section 3 of section 35 of the Act shall be concluded by the Committee expeditiously and the Committee shall declare the surrendered child as legally free for adoption after the expiry of sixty days from the date of surrender

(24) In case of orphan or abandoned child, the Committee shall make all efforts for tracing the parents or guardians of the child and on completion of such inquiry, if it is established that the child is either an orphan having no one to take care, or abandoned, the Committee shall declare the child legally free for adoption.

(25) In case an abandoned or orphan child is received by a Child Care Institution including a Specialised Adoption Agency, such a child shall be produced before the Committee within twenty-four hours (excluding the time necessary for the journey) along with a report in Form 17 containing the particulars and photograph of the child as well as the circumstances in which the child was received by it and a copy of such report shall also be submitted by the Child Care Institution or a Specialised Adoption Agency to the local police station within the same period.

(26) The Committee shall issue an order in Form 18 for short term placement and interim care of the child, pending inquiry under section 36 of the Act.

(27) The Committee shall use the designated portal to ascertain whether the abandoned child or orphan child is a missing child while causing the details of the orphan or the abandoned child to be uploaded. (28) The Committee, after taking into account the risk factors, and in the best interest of the child, may direct the publication of the particulars and photograph of an orphan or abandoned child in national newspapers with wide circulation within seventy two hours from the time of receiving the child for the purposes of tracing out the biological parents or the legal guardian(s).

(29) The Committee, after making inquiry as per the provisions of the Act, shall issue an order in Form 25 declaring the abandoned or orphan child as legally free for adoption and send the same information to the Authority.

(30) Where the parents of the child are traced, the procedure for restoration of the child shall be as per rule 82 of these rules."

(2023) 9 ILRA 1074

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 06.09.2023

BEFORE

THE HON'BLE RAHUL CHATURVEDI, J.

THE HON'BLE MOHD. AZHAR HUSAIN

IDRISI, J.

Habeas Corpus Writ Petition No. 655 of 2023

Golu @ Arun Patel

...Petitioner

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioner:

Sri Chandra Prakash Tiwari, Sri Mahesh Kumar,
Sri Yogendra Singh

(Delivered by Hon'ble Rahul Chaturvedi, J.
& Hon'ble Mohd. Azhar Husain Idrisi, J.)

Counsel for the Respondents:

G.A.

**Criminal Law-Constitution of India, 1950-
Article 226---**

Habeas Corpus writ---Only prayer is sought is a direction to the respondent to produce the corpus of petitioner Golu @ Arun Patel before this Court and thereafter to set free the corpus Golu @ Arun Patel at his own liberty, who is in judicial confinement pursuant to the FIR in case crime no. 41 of 2023 and facing the trial in S.T. No. 385 of 2023 under Sections 4, 5 and 6 of the Immoral Traffic (Prevention) Act 1956---Writ of Habeas Corpus is not to be entertained when a person committed to the judicial custody or the police custody by a competent court by an order, which prima facie does not appear without jurisdiction or passed in absolutely mechanical manner or wholly illegal---Where there is no prayer with regard to the alleged judicial remand is ex-facie defective or illegal, instant Habeas Corpus writ petition in favour of the petitioner cannot be allowed---Prayer rejected with a cost of Rs50,000/.**(Para 21 & 24)**

Petition dismissed. (E-15)

List of Cases cited:

1. Serious Fraud Investigation Office & ors.Vs Rahul Modi & ors.2019 (5)SCC 266
2. Manubhai Ratilal Patel through Ushaben Vs St. of Guj. & ors.(2013) 1 SCC 314
3. Secretary of Home Affairs Vs O Brien 1923 AC 603
4. Kanu Sanyal Vs District Magistrate, Darjeeling 1976(2) SCC 674
5. Sanjay Dutt (2) Vs State 1994 (5)SCC 410
6. St. of Mah. Vs Tanseem Rizwan Siddiquee (2018) 9 SCC 745
7. VS Senthil Bala Ji Vs The St. of represented by Deputy Director & Others in Crl. Appeal no. 2288- 2289 of 2023

1. Heard Sri Yogendra Singh, learned counsel for the petitioner and Sri Satendra Tiwari, learned AGA for the State and perused the record.

2. Before hearing the arguments on merits, learned AGA have objected regarding the 'maintainability' of instant Habeas Corpus writ petition, allegedly filed by Golu @ Arun Patel, the petitioner. Thus the Court has directed the counsel for the petitioner to advance his argument with regard to the 'maintainability' of the instant Habeas Corpus writ petition, at the admission stage itself, so that the same shall be decided at the threshold stage.

3. Before appreciating the arguments advanced by learned counsel for the petitioner with regard to the 'maintainability', it is imperative to spell out the 'prayer' sought by the petitioner in the instant habeas corpus writ petition coupled with the facts of the case, which has allegedly given rise to this writ petition:-

4. The prayer sought by the petitioner is that :-

“ i) A writ, order or direction in the nature of habeas corpus to direct the respondents to produce the corpus namely, Golu @ Arun Patel before this Hon'ble Court and to set free the corpus namely Golu @ Arun Patel at his own liberty in pursuance of the F.I.R. dated 16.02.2023 registered as Case Crime No. 41 of 2023, Sessions Trial No. 385 of 2023 under Sections 4,5 and 6 of the Prevention of Immoral Trafficking Act, Police State-Jaipura, District-Varanasi.

ii) An order or direction for compensation in favour of the petitioner and against the respondents.

iii) To pass an order of disciplinary enquiry against the erring officer.

iv) Any other writ order or direction, which this Hon'ble Court may deem fit and proper under the facts and circumstances of the case.

v) Award the cost of the petition in favour of the petitioner and against the respondents."

5. Thus, from the prayer sought, it is apparent that the only prayer is sought is a direction to the respondent authorities to produce the corpus of petitioner Golu @ Arun Patel before this Court and thereafter to set free the corpus Golu @ Arun Patel at his own liberty, who is in judicial confinement pursuant to the FIR dated 16.02.2023 in case crime no. 41 of 2023 and facing the trial in S.T. No. 385 of 2023 under Sections 4, 5 and 6 of the Immoral Traffic (Prevention) Act 1956, P.S. Jaitpura, District Varanasi. There is neither any prayer nor any pleadings to this effect that the alleged judicial remand is absolutely illegal or suffers from the vice of lack of jurisdiction or has been passed in absolutely mechanical manner by the court concerned. Moreover, now the petitioner is facing the regular trial S.T. No.385 of 2023 and thus to canvass that the judicial remand is farfetched.

FACTUAL MATRIX OF THE CASE

6. On 16.02.2023 around 13.38 hours one Habiburrehman has lodged an FIR against unknown person for the incident said to have been taken place on 12.02.2023 under Section 363 IPC at P.S. Jaitpura, District Kashi (Police

Commissionerate Varanasi) with the allegation that the informant is residing at adjacent lane, nearby Kohinoor Garden in a tenanted accommodation. Informant's daughter V.P. (the name of the victim has been eclipsed) on 12.02.2023 went from her home without informing anybody and since then her whereabouts were not traceable and thus prayed that the police may help in searching his daughter V.P.. After lodging of the FIR the police has inquired from the informant-Habiburrehman but the victim was recovered after 15 days. In her 161 Cr.P.C. statement was recorded and the same is annexed as Annexure No. 2A to the petition. In this 161 Cr.P.C., dated 25.02.2023, she declares that her age is 16 years and she further states in her 161 Cr.P.C. statement that she left her home on her own, without any information or knowledge to any of the family members in order to earn money. She went to Cantt. Railway Station Varanasi and started searching out work for her. At the Station she met with one Prakash. Prakash has made an offer that he would provide service at Indore, M.P. and asked her to purchase ticket for Indore. For this purpose, she contacted with one Golu, her own old acquaintance. Golu and her father came to station and taken her to home. She remained silent when the question was put by the I.O. as there was any sexual excessive were done by Prakash or not. She further states that all during these 15 days she remained at Varanasi Station.

7. Thereafter, the I.O. of the case has brought her before the Magistrate for recording her statement under Section 164 Cr.P.C. dated 27.02.2023, in which, she discloses that her age is 17 years and she further states that on her own she left her home, as the condition of the home were

not congenial on account of financial distress & paucity. She went to the railway station to get herself engage in some work, so that she may earn money. At the station, she met with two ladies and a man-Prakesh, the ladies did not disclose their names or identity and all of them have made an offer to accompany her to Indore, so that, they may arrange a good service for her. Consequently, she joined their company and thereafter, all of them have administered her 'Beer' and some other 'intoxicant', so that she got unconscious. Not only this, they have taken her to some nearby hotel, where Prakash got her engage in sexual activities with some unknown persons. Not only this, Prakash and his wife compulsorily making her, as an subject of the sexual activities with some unknown persons person and in flesh trading while sending her in number of hotels and virtually they have thrown her in the "so called profession" of prostitution for 15 days.

8. In the 'Majeed Bayan' of Habiburrehman, after inquiring from her daughter thereby she disclose her pathetic & ordeal experience during these 15 days. She has given every minutest detail of suffering faced by her to her father. In which she has almost reiterated the 164 Cr.P.C. version with necessary details in it. Many other characters were inserted in her story as she was dumped into market of flesh trading. It is not out of place to mention here, that this shameful profession there are number of persons involved in it in the dark of secrecy. Since she was thrown in this furnace of flesh trading, she has disclosed the names of all those persons, who were engaged in it as pimp or broker, hotel owners, its mangers, customers etc.. She states that Prakash used to collect the amount and never shares with

her, however, she managed to come from his clutches and came to her father's place on 25.02.2023.

9. During this investigation the police has recorded the statement of Durga Vishwakarma, yet another victim and recorded her 161 & 164 Cr.P.C. statement. She was also engaged in the same business of prostitution with V.P.. She too have shared her experience before the Magistrate by narrating pathetic saga faced buy her & V.P.. Accused Abid Khan @ Rinku, Manager of the Suyog Guest House, who have disclose the active complicity of the present petitioner Golu @ Arun Patel in this racket. These statements clearly indicates that the petitioner was actively involved in this act of prostitution and flesh trading, who was working as a pimp or a broker, who used to provide the space in the Guest House to his customer. Deepak Kumar too has recorded her statement under Section 161 Cr.P.C., one Suhani Pathak, wife of Ramesh Kumar Pathak recorded her statement under Section 161 Cr.P.C., accused Prakash Vishwakarma, Golu Jaiswal and lastly the 'Majeed Bayan' of the victim V.P.. In her 'Majeed Bayan' states that Prakash used to keep knife with him and extending the threats she was compelled to satisfy the customers. The hotel owners, the Managers, the hotel waiters are all engage in the act prostitution. Not only this, the petitioner named above has also confessed his guilt and involvement in his 161 Cr.P.C. statement before the police.

10. After collecting the material during investigation and critically analysing the same, the police have submitted a supplementary "Charge Sheet" on 01.07.2023 under Section 363 and Section 5, 4 and 6 Immoral Traffic

(Prevention) Act 1956 and Section 4,17 and 7 of the POCSO Act against the petitioner named above and the learned trial judge has taken the cognizance of the offence. Not only this, the learned Magistrate after committing the case to learned Sessions Judge for the trial of the petitioner and all other accused, who were facing the trial in S.T. No. 385 of 2023.

11. On these factual matrix of the case, learned counsel for the petitioner have tried to assail the confinement order of the petitioner. It is contended by the counsel that the petitioner's incarceration into the jail is a result of the procedural fallacy. The petitioner ought not to have send to jail in connection with the offence. It is stated that petitioner's name does not find place in the FIR and the way and the manner petitioner's alleged complicity has shown by the police is wholly untrustworthy. In this regard number of procedural fallacy were pointed out by the learned counsel for the petitioner. In this regard, it is contended that the 161 Cr.P.C. statement of Deepak Kumar and Abid Khan, the co-accused could be read against the petitioner. Interestingly in the entire pleadings the petitioner has not made any whisper with regard to non-compliance of mandatory provisions along with a total non-applications of mind while passing the judicial remand order.

We have perused the grounds taken in which no ground was taken challenging the alleged remand order or the powers of Magistrate while passing the remand orders.

12. It is not disputed that after having a thread bare investigation, the police has already submitted report under Section 173(2) Cr.P.C. and the learned Magistrate

has already taken the cognizance of the offence. Presently, the petitioner is under the judicial remand by an order of competent Judicial Magistrate, who is empowered to pass judicial remand order. Without any pleadings or ground taken in this petition, learned counsel for the petitioner have started taking tangent arguments, half heartedly with regard to the judicial remand, without any basis or ground taken by him.

It is also not disputed that the petitioner is facing the S.T. No. 385 of 2023 and is in behind the bars pursuant to the judicial remand. At this stage, when there is ensuing Session's Trial, in which the petitioner is facing the trial, much water has flown in the river and at this juncture we cannot put the clock back to the cognizance stage & challenge the charge sheet.

13. The second limb of the argument is that after the recording the 164 Cr.P.C. statement "majeed bayan" of the victim cannot be looked into. Thirdly, the confinement made by the State-Authority is per-se illegal and remand order is bad in eye of law and therefore, the petitioner is entitled to be released from the jail as the same is violative of Article 21 of the Constitution of India.

14. Broadly speaking aforementioned are moot issues canvassed by the learned counsel for the petitioner, in support of prayer sought by means of the present Habeas Corpus writ petition.

15. Per contra, Sri Satendra Tiwari, learned AGA has vehemently opposed the 'maintainability' aspect of the present Habeas Corpus writ petition. He has charged, the counsel for the petitioner for

concealing the material fact, a deliberate and intentional attempt for hiding of the material fact that the petitioner's Bail Application No.3252 of 2023 was rejected by the court concerned on 11.07.2023 arising out of case crime no. 41 of 2023 in S.T. No. 385 of 2023 under Sections, 4,5 and 6 of Immoral Traffic (Prevention) Act, 1956. In this regard, it is contended by learned AGA that though there is passing reference of the aforesaid bail rejection order in paragraph 2A of the petition but the learned counsel for the petitioner has purposely concealed and have not annexed the said bail rejection order by the concerned court for the reasons best known to him. Moreover, when learned court below have rejected the bail application of the petitioner, then natural outcome would be to move Bail Application before the High Court under Section 439 Cr.P.C. and not by filing the Habeas Corpus Petition.

16. Learned AGA has produced a judgment of Hon'ble Apex Court in the case of **Serious Fraud Investigation Office and Ors. Vs. Rahul Modi and Ors.** reported in **2019 (5)SCC 266** in which reads thus:-

“(21) The act of direction remand of an accused is thus held to be a judicial function and the challenge to the order of remand is not to be entertained in a habeas corpus petition.”

We have also noticed in paragraph 19 of the judgment :-

“(19) The law is thus clear that “in habeas corpus proceedings a court is to have regard to the legality or otherwise of the detention at the time of the return and not with reference to the institution of the proceedings”.

17. In addition to above, Sri Satendra Tiwari, learned AGA also cited yet another judgement of Hon'ble Apex Court in the case of **Manubhai Ratilal Patel through Ushaben Vs. State of Gujrat and others reported in (2013) 1 SCC 314**, in the aforesaid judgment the Hon'ble Apex Court has an occasion to evaluate the depth and the reach and the import of Habeas Corpus Petition, since the petitioner had knocked the door of the High Court in the Habeas Corpus Petition. The writ of Habeas Corpus has always been given due signification as a effective method to ensure the release of detained person from the prison. In and old treatises expounding the scope and ambit of Habeas Corpus Petition while defining the Habeas Corpus states as under:-

“The ancient prerogative writ of habeas corpus take its name from two mandatory word Habeas & Corpus which contain at the time when it, in common with all forms of legal process, was framed in latin. The general purpose of these writs as there name indicates, was to obtain the production of an individual.”

In the case of **Secretary of Home Affairs Vs. O Brien** reported in **1923 AC 603** in which it has been observed that :-

“It has been observed that it is perhaps the most important writ known to the constitutional law of England affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty third year of Edward I. It has through the ages been jealously maintained by the courts of law as a check upon the illegal usurpation of power by the executive at the cost of liege.”

18. The whole object of proceeding for a writ of habeas corpus writ is to make them expeditious, keep them free from all the technicality as possible and keep them simple as possible.

19. In the case of Kanu Sanyal Vs. District Magistrate, Darjeeling reported in 1976(2) SCC 674, the Hon'ble Apex Court has laid down that these writ of habeas corpus deals with the machinery of justice and not a substantive law. The object of the writ is to secure the release of the person who is illegally restrained to this liberty.

20. At this juncture, we may profitably refer to the Constitutional Bench Judgement in the case of Sanjay Dutt (2) Vs. State reported in 1994 (5) SCC 410, the relevant extract of the judgment, which reads thus:-

“48.....It is settled by the Constitution Bench decisions that a petition seeking the writ of habeas corpus on the ground of absence of a valid order of remand or detention of the accused, has to be dismissed, if on the date of return of the rule, the custody or detention is on the basis of a valid order.”

“23. Keeping in view the aforesaid concepts with regard to the writ of habeas corpus, especially pertaining to an order passed by the learned Magistrate at the time of production of the accused, it is necessary to advert to the schematic postulates under the Code relating to remand. There are two provisions in the Code which provide for remand, i.e., Sections 167 and 309. The Magistrate has the authority under Section 167(2) of the Code to direct for detention of the accused in such custody, i.e., police or

judicial, if he thinks that further detention is necessary.

24. The act of directing remand of an accused is fundamentally a judicial function. The Magistrate does not act in executive capacity while ordering the detention of an accused. While exercising this judicial act, it is obligatory on the part of the Magistrate to satisfy himself whether the materials placed before him justify such a remand or, to put it differently, whether there exist reasonable grounds to commit the accused to custody and extend his remand. The purpose of remand as postulated under Section 167 is that investigation cannot be completed within 24 hours. It enables the Magistrate to see that the remand is really necessary. This requires the investigating agency to send the case diary along with the remand report so that the Magistrate can appreciate the factual scenario and apply his mind whether there is a warrant for police remand or justification for judicial remand or there is no need for any remand at all. It is obligatory on the part of the Magistrate to apply his mind and not to pass an order of remand automatically or in a mechanical manner. It is apt to note that in Madhu Limaye (supra), it has been stated that once it is shown that the arrests made by the police officers were illegal, it was necessary for the State to establish that at the stage of remand, the Magistrate directed detention in jail custody after applying his mind to all relevant matters.”

21. Thus, the exercise of jurisdiction clearly shows that the Magistrate performs a judicial act. The order of remand, which is a judicial act, as we perceive does not suffer from any infirmity. It is a well accepted principle that a writ of Habeas Corpus is not to be entertained when a

person committed to the judicial custody or the police custody by a competent court by an order, which prima facie does not appear without jurisdiction or passed in absolutely mechanical manner or wholly illegal as has been stated in judgement in **B.Ramchandra Rao(supra) & Kanu Sanyal(supra)**. The court is required to scrutinize the legality or otherwise of the order of detention which has been passed unless the court is satisfied the person has been committed to the jail custody by virtue of an order that suffer from vice of lack of jurisdiction or absolute illegality a habeas corpus writ petition cannot be granted. It is apposite to note that the investigation, as has been dealt with in a various authorities of the courts is neither an inquiry or a trial. It is within the exclusive domain of the police to investigate and is independent of any control by Magistrate. The sphere of activities is clear cut and well demarcated, thus we are of the considered opinion that the prayer sought by means of the present Habeas Corpus writ petition could not be granted in favour of the petitioner.

22. Seeking help from yet another judgment in the case of **State of Maharashtra Vs. Tanseem Rizwan Siddiquee** reported in **(2018) 9 SCC 745** :-

*“The question as to whether a writ of Habeas Corpus could be maintained in respect of a person who is in police custody pursuant to a remand order passed by the jurisdictional Magistrate in connection with the offence under investigation, this issue has been considered in the case of **Saurabh Kumar through his father Vs. Jailor, Koneila Jail and Anr., [2014 13 SCC 346]** and **Manubhai Ratilal Patel Vs. State of Gujarat and Ors. [2013 1 SCC 314]**. It is*

no more res integra. In the present case, admittedly, when the writ petition for issuance of a writ of habeas corpus was filed by the respondent on 18th/19th March, 2018 and decided by the High Court on 21st March, 2018 her husband Rizwan Alam Siddique was in police custody pursuant to an order passed by the Magistrate granting his police custody in connection with FIR No.131 vide order dated 17th March, 2018 and which police remand was to enure till 23 rd March, 2018. Further, without challenging the stated order of the Magistrate, a writ petition was filed limited to the relief of habeas corpus. In that view of the matter, it was not a case of continued illegal detention but the incumbent was in judicial custody by virtue of an order passed by the jurisdictional Magistrate, which was in force, granting police remand during investigation of a criminal case. Resultantly, no writ of habeas corpus could be issued.”

23. In the latest pronouncement of the Hon’ble Supreme Court delivered on 07.08.2023 in the case of **V. Senthil Bala Ji Vs. The State of represented by Deputy Director & Others** in Crl. Appeal no. 2288-2289 of 2023 in which Hon’ble Supreme Court lucidly explained :-

“29. A writ of Habeas Corpus shall only be issued when the detention is illegal. As a matter of rule, an order of remand by a judicial officer, culminating into a judicial function cannot be challenged by way of writ of Habeas Corpus, while it is open to the person aggrieved to seek other statutory remedies. When there is a non-compliance of the mandatory provisions along with a total non-application of mind, there may be a

case for entertaining a writ of Habeas Corpus and that too by way of challenge.”

As mentioned earlier the petitioners neither challenged the judicial remand order nor any pleadings to this effect was made in the entire proceedings. The Court is at complete loss to appreciation the arguments which are tangent to the pleadings.

24. In the light of the above judgements, when there is a no prayer with regard to the alleged judicial remand is ex-facie defective or illegal by the aforesaid any of the vices, we cannot allow the instant Habeas Corpus writ petition in favour of the petitioner. As it is evident from the prayer, that only limited remedy is sought to the extent that the personal presence of the petitioner may be ordered and he is sat at liberty. There is no whisper with regard to the fact that the alleged remand by the Magistrate suffers from any of the vices enumerated above. Even assuming for the sake of argument that the said judicial remand order suffers from any of the vice mentioned above the apt remedy is challenge the said order first by invoking proper remedy for the same and then to approach this Court.

25. Now coming to the last leg of the argument that the petitioner's bail application has already been rejected by the concerned court by order dated 11.07.2023, he ought to have invoked the powers of this Court under Section 439 Cr.P.C. for filing the bail application but instead of invoking the same, learned counsel for the petitioner has wrongly advices the petitioner to move a instant Habeas Corpus writ petition without challenging the judicial remand order, which clearly indicates the professional incompetence of the counsel

for the petitioner. Not only this, the learned counsel during this marathon argument of two days never divulged this important aspect of this issue, that petitioner's bail application was rejected on 11.07.2023. When a counsel is invoking the extraordinary jurisdiction of this Court, he must come with clean hands. We are of the opinion that the learned counsel for the petitioner without annexing the bail rejection order has made a passing reference, so as to justify his conduct.

26. More over, when he has only given a passing reference the petitioner bail application was rejected on 11.07.2023 without annexing the bail rejection order clearly establish the fact that he wants to hide something while invoking the equitable jurisdiction of this Court, which was purpose and intentional attempt on the part of the counsel for the petitioner to play a hide and seek with the court's proceedings by concealing the material fact.

27. Thus we are not at all inclined to grant the desired prayer to the petitioner on the aforesaid reasons and ground hereby **REJECTED** the present Habeas Corpus petition with the **cost of Rs. 50,000/- (Rs. Fifty Thousand Only)**, which the petitioner shall deposit with the Registrar General, High Court, Allahabad within a period of one month from today. On deposit of such cost, it shall be transmitted to the account of '**High Court Legal Services Committee, Allahabad**'. If the petitioner fails to deposit the cost of Rs. 50,000/- (Rs. Fifty Thousand Only), the Registrar General of this Court shall inform the District Magistrate/Collector, Varanasi for recovery of the said amount as **arrears of land revenue**, who shall after recovering the said amount from the petitioner,

transmit it to the Registrar General of this Court for depositing in the account of **‘High Court Legal Services Committee, Allahabad’** within a further period of two months. It is also incumbent upon the DM/Collector to apprise the court after executing the order within the aforesaid period.

28. No laxity would be tolerated in executing the directions of the Court while collecting the ‘COST’ from the petitioner by the executive authority concerned within time bound period.

(2023) 9 ILRA 1083

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 29.08.2023

BEFORE

THE HON'BLE DR. KAUSHAL JAYENDRA

THAKER, J.

THE HON'BLE UMESH CHANDRA SHARMA, J.

Criminal Appeal No. 948 of 2014

Sunil Kumar Katiyar **...Appellant**
Versus
State of U.P. **...Respondent**

Counsel for the Appellant:

Sri Yashpal, Sri Abhay Nitin Singh, Sri Ashok Kumar Tripathi, Sri Binod Kumar Tripathi, Sri Rajesh Yadav, Sri Shamimul Hasnain

Counsel for the Respondent:

Govt. Advocate

Criminal Law-Code of Criminal Procedure, 1973-Section 374 - The Evidence Act,1872-Section 106- Appeal against judgment whereby accused has been convicted under Section 302 I.P.C and sentenced for life imprisonment with fine of Rs.10,000/- with default stipulation---Case of circumstantial

evidence---Any ingredient mandatory for conviction and sentencing of an accused in a case based on circumstantial evidence has not been proved beyond reasonable doubt and chain of circumstantial evidence also could not be established against the accused---Order of conviction and sentencing passed by the learned Trial Court is not liable to be sustained in the eye of law and is liable to be set-aside. **(Para 15)**

Appeal allowed. (E-15)

List of Cases cited:

1. Ujjagar Singh Vs St. of Punj., (2007) 13 SCC 90
2. Bhaskar Rao & ors.Vs St. of Mah., (2018) 6 SCC 591
3. Shivaji Chintappa Patil Vs St. of Mah., 2021 0 Supreme (SC) 121
4. Kulwinder Singh Vs St. of Punj., AIR 2007 SC 2868
5. Ganpat Singh Vs St. of M.P., (2018) 2 SCC (Cri) 159
6. P. Mani Vs St. of T.N., AIR 2006 SC 1319
7. Kailash Chand Vs St. of Raj. (2017) 11 SCC 268
8. Gargi Vs St. of Har., 2019 0 Supreme SC 1042
9. Satye Singh & anr.Vs St. of Uttrakhand, (2022) 5 SCC 438
10. Devilal; Babulal Vs St. of Raj., 2019 Law Suit (SC) 36

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

1. Heard Shri Ashok Kumar Tripathi learned counsel for the sole appellant and learned AGA for the state.

2. This appeal has been preferred against the judgment and order dated

20.1.2014 passed by learned Additional Sessions Judge Court No.9, Kanpur Dehat, in S.T. No. 446 of 2011 (State Vs. Sunil Kumar Katiyar) arising out of Case Crime No. 104 of 2011 under Section 302 I.P.C. Police Station- Sikandara, Kanpur Dehat, by which the accused-appellant Sunil Kumar Katiyar has been convicted under Section 302 I.P.C. and has been sentenced for life imprisonment with fine of Rs. 10,000/- with default stipulation.

3. In brief, facts of the case are that on 21.7.2011 informant, Pramod Kumar, lodged an F.I.R. with the averments that his younger sister Kiran Devi Katiyar was married with accused Sunil Kumar Katiyar about 26 years back. Out of their wed lock, three children have been born. The elder son named Ankur Katiyar is doing B.Tech in Noida, the daughter Anupama is the student of Rajpur Degree College and the younger son Abhai Katiyar, studies at Sikandra. The accused used to do farming in village Nandana and lives in mohalla Muhammadnagar in Sikandara. His sister used to live in both the houses from time to time. His brother-in-law (Bahnoi), the accused, used to take alcohol etc. and his sister used to forbid him on which he used to beat his sister in anger which was complained to the accused many times. On 19.7.2011, he was informed that the dead body of his sister was lying on the second floor of the house at Muhammadnagar. The information was given to the police station by his cousin Ramesh Kumar Katiyar on which basis postmortem was conducted. No other person used to visit to his sister's house. She was murdered by Sunil Kumar and he was missing since then. The informant requested to lodge the F.I.R. and take legal action against the accused.

4. On the basis of above written complaint, Ex. Ka-1, the F.I.R. was lodged

and chik F.I.R. at crime no. 04 of 2011 under Section 302 I.P.C. was lodged and was entered into Kayami G.D. on 4:30 P.M. on 21.7.2011.

5. After this information P.W.3, S.I., Aditya Narain Pandey visited the place and prepared inquest, Ex.Ka-2, and also prepared papers like challan nash, Ex.Ka-3, photo nash Ex.Ka-4, letter to R.I. Ex. Ka-5, letter to C.M.O. Ex. Ka-6 and sent the dead body for postmortem.

6. Dr. Riaz Ali Mirza, P.W.-4 conducted the postmortem and prepared post mortem report, Ex. Ka-7. S.O. Sanjay Kumar Gupta took the investigation and prepared site plan, Ex. Ka-6. During the investigation he also recovered Lodha (pestle) alleged to be used in commission of crime and also prepared site plan Ex. Ka-10, recorded the statement of the witness and after finding the case under Section 302 I.P.C., submitted the charge-sheet Ex. Ka-11.

7. The learned Magistrate took the cognizance and committed the case for trial to the Court of Sessions. On 11.01.2012, the appellant was charged u/s 302 IPC to which he pleaded not guilty and sought trial.

8. Following witnesses were examined by the prosecution to prove the guilt of the accused:

PW-1	Pramod Kumar Katiyar
PW-2	Ramesh Kumar Katiyar
PW-3	Atitya Narain Pandey
PW-4	Dr. R. A.Mirza
PW-5	Abhai Katiyar
PW-6	Anupam Katiyar

PW-7	Sanjay Gupta
PW-8	Kunwar Pal

9. Following documentary evidence were relied on by the prosecution:

Ex. Ka.-1	Written report
Ex. Ka.-2,	Panchanama
Ex. Ka.-3,	Challan Nash
Ex. Ka.-4,	Photo Lash
Ex. Ka-5	Letter to R.I.
Ex. Ka.-6	Letter to C.M.O.
Ex. Ka.-7	Postmortem report
Ex. Ka.-8	Site plan
Ex.Ka.-9,	Recovery Memo (Pestle)
Ex. Ka.-10,	Site plan
Ex. Ka.- 11,	Charge-sheet
Ex. Ka.-12	Chick F.I.R.
Ex. Ka.-13 and	Kayami G.D.
Material Ex.-1	Pestle as Weapon of offence

10. After closure of prosecution evidence, the statement of the accused u/s 313 Cr.P.C was recorded, wherein, he outrightly denied all the charges and incriminating evidence against him and claimed to be innocent.

11. In brief, evidence of the witnesses is reproduced hereinbelow:

(a) P.W.-1, Pramod Kumar Katiyar, informant, has given evidence in support of written complaint. He has deposed that his brother-in-law used to consume alcohol and drugs. Whenever his sister (deceased) forbid the accused, he used to quarrel with her and beat her. The accused would beat his children coming to her rescue. The informant and his family members whenever complained about the

matter, the he used to promise not to repeat but few days later he would repeat the same.

On 19.7.2011, when he was in Mahoba, he was informed by his cousin Ramesh Katiyar that his sister had been killed. After getting the information, he reached Sikandara between 9-10 P.M., he came to know that the dead body was sent for postmortem. He went to the post-mortem house at Ramabai Nagar where he saw the dead body. He and his brother had participated in last rituals of his sister. His brother Ramesh had informed that Sunil had killed the deceased, thereafter on 21.7.2011 at about 4:30 P.M. the lodged the F.I.R. This witness has proved the written complaint Ex. Ka-1.

From the perusal of above evidence, it is very much clear that this witness is not an eye-witness and he has deposed as he had heard from P.W.-2.

(b) P.W.-2, Ramesh Kumar Katiyar, has deposed that on 19.7.2011 at about 12:00 P.M., his cousin Sarvesh Kumar had informed him on mobile that his cousin Kiran Devi had been killed. On being informed, he reached Sikandara, where he saw that dead body of Kiran was lying on the second floor of the house. There were injuries on her back, chest and eyes. She was not happy in her in-laws house. The accused was addicted to drugs which was cause of the quarrel between the two. The accused had two houses, one in village Nandana and another in Sikandra. The deceased used to live at both the places. He had warned the accused not to beat his sister but to no avail. He had orally informed police station Sikandra. After being informed, police had reached at 3:00 P.M. and had conducted inquest. He was one of the punch and had also signed inquest report. The witness has confirmed his presence at post-mortem house and also

at the time of funeral of the deceased which was conducted by her in laws.

According to this witness, his sister had been killed by the accused Sunil who was an alcohol addict and drunkard and which was opposed by his sister. The I.O. had recorded his statement.

(c) P.W.-3, S.I. Aditya Narain Pandey, has proved inquest report Ex. Ka-2 and related paper viz Ex. Ka-3 to Ex. Ka-6.

(d) P.W.-4, Dr. Riaz Ali Mirza, has proved the post-mortem report, Ex. Ka-7. This witness has noted following injuries on the person of the deceased:

External Examination:

There was drooling, mouth was half open, eyes were closed. There was staining on the back part of the dead body. Rigor mortis was over. There was green mark on the right side of lower part to her private part. The marbidity was on the lower part, both shoulders and on the face.

Ante-mortem Injuries:

i. Scrap wound $\frac{1}{2}$ cm X 0.3 cm on the left side of the face next to the nose.

ii. Contusion 20 cm X 10 cm on both sides of the chest, there was clotted blood.

iii. Contusion 10 cm X 6 cm on the right side of just below the ribs on the upper abdomen.

iv. Contusion 11 cm S. 6.1/2 cm on the front and outer part of right leg below 15 cm from the right knee.

v. Blood was oozing from vagina.

Internal Examination:

This witness found that brain was pale and 3rd and 6th ribs were fractured. Sternum was also fractured at the level of

fifth ribs. Lungs were torn and pale. Both the heart cavity were empty. 500 M.L. was found in the chest cavity and 1.5 liter blood was found in the abdomen cavity. There was semi digested food in the small and large intestine. Gallbladder was half empty, liver was torn. Spleen was pale.

According to this witness, the deceased had died due to excessive bleeding. The deceased would have died 1 and half day to two days ago. This witness has proved post mortem report Ex. Ka-7.

(e) P.W.-5, Abhay Katiyar, son of the deceased and the accused, has given hostile evidence and deposed that there was no quarrel between his parents. His father did not take any drug. His father did not beat his mother a day before the incident and his father had gone to Kota. This witness was declared hostile.

In the cross-examination by the prosecution this witness did not support the prosecution version.

(f) P.W.-6, Km. Anupam Katiyar, daughter of the deceased, is alleged to be the eye-witness of the incident has also not supported the prosecution version and has given similar statements to that of her brother, P.W.-5.

(g) P.W.-7, Sanjay Kumar Gupta, has proved the site plan Ex. Ka-8. This witness had recorded the statements of all the witnesses relating to the accused and also prepared recovery memo of Pestle Ex. Ka-9. This witness has also proved site plan regarding recovery of pestle.

(h) P.W.-8, Constable Moharrir, proved the chik F.I.R., Ex. Ka-12 and carbon copy Kayami G.D. Ex. Ka-13, to be in his handwriting and signature.

12. The accused denied the charges and allegations levelled against them under Section 313 Cr.P. C. and has stated that the witnesses P.W.1 & 2 have given evidence

on account of enmity with him. He has further stated that one day before the incident, he had gone to his brother at Kota, Rajasthan. He was not present on the spot. He has been falsely implicated on account of enmity.

13. In defence two witnesses D.W.-1 and D.W.-2 have been examined;

(I) D.W.-1, Sushil Kumar; has deposed that he has been living at Kota for the last five years where he was a teacher in Resonance Coaching Centre and teaches chemistry. Accused is his biological brother. The incident took place on 19.7.2011. His brother had come to him one day before the incident. His brother had constructed a house in Sikandara, *linter* was open and plaster was yet to be done for which his brother had come to him to take money. He got the information of the incident at about 1:30 P.M. on phone. His brother was also there. After getting the information, he and his brother reached Kanpur from his Car RJ 20 CB 2994 and reached Nandana at about 4-5 P.M. in the evening. Preparation of last rites was going on. The distance between Kota and Nandana is about six hundred kilometer, they reached late as on the way the vehicle was broken down. The last ritual were performed by his brother Sunil Kumar. The informant and Ramesh Kumar were not there. Anpuam and Abhay had told him that when *linter* was open, some bricks were left there which had fallen down on the deceased. There was cordial relation between his brother and bhabhi. His brother does not consume liquor or anyother intoxication.

(II) D.W.-2, Vipin Katiyar, has deposed that house of the accused Sunil Katiyar was at the distance of 10-15 steps from his house. On 18.7.2011, accused met

to him at Sikandra Bus Stand. On asking, the accused had told him that he was going to Kota Rajasthan to his brother. This witness has further deposed that on 19.7.2011 while he was going through the news paper, he heard the news that wife of Sunil Kumar has died. On which he went to the house of Sunil Kumar and saw that his wife was lying dead on a cot, some part of the roof were lying on her chest. Sunil Kumar was not there. Sunil was informed by his son on phone. After getting the information, Sunil alongwith his brother Sushil reached village at about 4-5 P.M. on 20.7.2011. Sunil had performed last rites of his wife and he was also present there.

The appeal is being decided as under:

14. From the above facts and evidence, it is clear that it is not a case of direct evidence but it is based on circumstantial evidence in which if the chain of the circumstances is complete only then an accused can be convicted. In such cases, motive, last seen, recovery, extra judicial confession like necessary elements are also considered. It has to be seen as to whether the aforesaid ingredients necessary for the conviction of an accused have been sufficiently established and proved by the prosecution or not. These necessary ingredients are being discussed herein below in the light of facts of the case and evidence available on record.

(a) **Motive** : According to the prosecution and the evidence of the P.W.1 and P.W.2, the accused used to drink and take drug and when the deceased used to forbid him, a quarrel would take place between them and when children come to save the deceased, the accused would also beat them. This fact has not been accepted by the accused and P.W.5, P.W.6 or P.W.7

S.I./I.O. Sanjay Gupta have also not given affirmative evidence in support of the prosecution regarding consumption of intoxication by the accused.

D.W.1 & D.W.2, Sushil Kumar and Vipin Katiyar, have also not admitted that the deceased used to consume intoxication prior to the incident or thereafter. The learned trial Court has accepted the aforesaid motive on the basis of statement recorded under Section 161 Cr.P.C. which is not admissible in evidence.

Therefore, the motive put forth by the prosecution can not be said to be proved.

In *Bhaskar Rao and Others Vs. State of Maharashtra, (2018) 6 SCC 591; Ujjagar Singh Vs. State of Punjab, (2007) 13 SCC 90*, it has been held that the motive has significance in cases based on circumstantial evidence.

In *Shivaji Chintappa Patil Vs. State of Maharashtra, 2021 0 Supreme (SC) 121*, it has been held that in a case of circumstantial evidence, motive plays an important link to complete the chain of circumstances. If motive could not be proved, the chain of circumstances would not be said to be completed.

The above citations apply in favour of the appellant and it is concluded that there was no motive with the appellant to kill the deceased.

(b) **Alibi and last seen:** In this case an alibi has been taken by the accused that one day before the incident, he had gone to Kota and he was not present on the spot with the deceased. Similar statement has been given by P.W.5, son Abhay Katiyar, P.W.6 Km. Anupam, D.W.1, Sushil Kumar and D.W.2, Vipin Katiyar, neighbour.

D.W.1 Sushil Kumar has deposed that one day prior to the incident, the accused Sunil had come to him to take money for

completion of the house as the *linter* was open and plaster was yet to be done. According to this witness after being informed about the incident, he alongwith the deceased came to Kanpur by his car RJ 20 CB 2994. They reached village at about 4-5 P.M. on 20.7.2011 when last rites of the deceased was under preparation and it was performed by the accused. Anupam and Abhay had informed him that when *linter* was open, some bricks remained stuck to it and the incident occurred as it fell on the deceased. The relation between the accused and the deceased was good and there was no dispute between them. The accused did not take intoxication.

Similar statement has been given by D.W.2, Vipin Katiyar, that house of the accused Sunil Katiyar was at the distance of 10-15 steps from his house. On 18.7.2011 accused met to him at Sikandra Bus Stand. On asking, the accused had told him that he was going to Kota Rajasthan to his brother. This witness has further deposed that on 19.7.2011 while he was going through the news paper, he heard the news that wife of Sunil Kumar has died, on which he went to the house of Sunil Kumar and saw that his wife was lying dead on a cot, some part of the roof were lying on her chest. Sunil Kumar was not there. Sunil was informed by his son on phone. After getting the information, Sunil alongwith his brother Sushil reached village at about 4-5 P.M. on 20.7.2011. Sunil had performed last rites of his wife and he was also present there.

Thus, from the above evidence, it is very much clear that the accused was not present on the spot on the date and time of the incident. Hence, it has not been proved that the deceased was lastly seen in the company of the accused soon before her death.

In *Kulwinder Singh Vs. State of Punjab, AIR 2007 SC 2868*, it has been

held that there must be proximity of time and place. In this case it is lacking.

In *Ganpat Singh Vs. State of M.P.*, (2018) 2 SCC (Cri) 159, it has been observed, it would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In absence of any other positive evidence to conclude that accused and deceased were last seen together, it would be hazardous to come to a conclusion of guilt in such cases.

In this case the prosecution has failed in establishing that soon before death the deceased was with the accused but it has been proved that when the accused was out of the house, the deceased has died.

On the basis of above discussion this Court is of the conclusion that the chain of circumstantial evidence such as last seen together has not been proved beyond reasonable doubt and it is concluded that the deceased had died when the accused was in Kota with his brother.

(c) Extra judicial confession- The prosecution has not taken the pleas of extra judicial confession by the accused though as per I.O., the accused had confessed his guilt before him and at his disclosure statement the pestle was recovered from the backside plot of the house on his pointing. Such statements written in the case diary has not been proved by the I.O. and such confessions can not be proved in view of Section 25 of the Evidence Act.

(d) Recovery: According to the I.O., the accused confessed his guilt and made a disclosure statement on which the blood stained pestle used in commission of crime was recovered on his pointing. So far as recovery is concerned, Suresh Kumar, Pratap Narain, Nirmal Singh, Gopi Shyam and Vijay Kumar were shown to be

witnesses of the recovery memo but none of them has been examined to prove the recovery memo.

P.W.7, I.O. has been examined to prove the recovery memo who has proved his handwriting and signature on the recovery memo Ex. Ka-9. It is argued that since P.W.7 is the I.O. and is an interested person, therefore, it was necessary to examine the independent witness before whom the alleged recovery is said to be made. Therefore, the recovery of the pestle is not free from doubt.

It is also noteworthy that no FSL report has been obtained regarding the allegedly recovered pestle that it was containing human blood and the blood belonged to the deceased.

No question has been put by learned A.D.G.C. (Crl.) that the injuries found on the person of the deceased could occur from the pestle.

In the cross-examination P.W.-4 Dr. Riaz Ali has admitted that the injury no. 1 & 4 may occur if a person falls from the stair and injury nos. 2 & 3 may occur if a person falls on the hard object.

Thus, the witness P.W.4 who had conducted the postmortem has not deposed that the injuries found on the person of the deceased may occur from a pestle.

Therefore, this Court is of the view that the prosecution has failed in establishing that the pestle M Ex. 1 was used in commission of crime and it was containing human blood or it was recovered on the pointing of the accused.

(e) It is also not a case of the prosecution that after the commission of crime, the accused had absconded. Sometimes abscondence of an accused is considered in favour of the prosecution but in this case it has been proved that after knowing that his wife has died, he returned home directly from Kota.

(f) **Applicability of Section 106 of the Indian Evidence Act-** It is not denied that the accused and the deceased were not living together in their dwelling house but it could not be proved that at the time of commission of crime the accused was present there.

Section 106 Evidence Act is as under:-

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

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.”

In **P. Mani Vs. State of Tamilnadu, AIR 2006 SC 1319**, it has been held that it is for the prosecution to prove the involvement of an accused beyond all reasonable doubt. It was not a case where both, accused and deceased were last seen together inside a room. Hence Section 106 of the Evidence Act can not be said to have any application whatsoever.

In **Kailash Chand Vs. State of Rajasthan, (2017) 11 SCC 268**, it has been held that it is trite that prosecution has to stand on its own legs and sufficient evidence should be produced to prove the allegation, no aid of Section 106 can be taken by the Trial Court.

Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused, but the Section would apply to the cases where prosecution has succeeded in proving facts for which reasonable inference can be drawn regarding the existence of certain

other facts, unless the accused by virtue of special knowledge regarding such facts failed to offer any explanation which might drive the Court to draw a different inference.

In para 22 of **Shivaji Chintappa Patil (Supra)**, it has been held that ---

22. It could thus be seen, that it is well-settled that Section 106 of the Evidence Act does not directly operate against either a husband or wife staying under the same roof and being the last person seen with the deceased. Section 106 of the Evidence Act does not absolve the prosecution of discharging its primary burden of proving the prosecution case beyond reasonable doubt. It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or which makes out a prima facie case, that the question arises of considering facts of which the burden of proof would lie upon the accused.

In para 28.1 of **Gargi Vs. State of Haryana, 2019 0 Supreme SC 1042**, it has been held that---

28.1. Insofar as the ‘last seen theory’ is concerned, there is no doubt that the appellant being none other than the wife of the deceased and staying under the same roof, was the last person the deceased was seen with. However, such companionship of the deceased and the appellant, by itself, does not mean that a presumption of guilt of the appellant is to be drawn. The Trial Court and the High Court have proceeded on the assumption that Section 106 of the Indian Evidence Act¹¹ directly operates against the appellant. In our view, such an approach has also not been free from error where it was omitted to be considered that Section 106 of the Indian Evidence Act does not absolve the prosecution of its primary burden. This Court has explained the

principle in Sawal Das (supra) in the following:-

“10. Neither an application of Section 103 nor of 106 of the Evidence Act could, however, absolve the prosecution from the duty of discharging its general or primary burden of proving the prosecution case beyond reasonable doubt.

It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or which makes out a prima facie case, that the question arises of considering facts of which the burden of proof may lie upon the accused.....”

In **Satye Singh and Another Vs. State of Uttarakhand, (2022) 5 SCC 438**, in this case the deceased was the wife, the entire case was based on circumstantial evidence as there was no eyewitness to the alleged incident, injuries on the dead body were ante mortem in the nature, no incriminating articles were recovered during the investigation and no attempt was made to collect any evidence much less cogent evidence to connect the accused with the alleged crime. The deceased had left house on previous evening of the alleged incident. It was held that circumstances howsoever strong can not take place of proof and guilt of accused have to be proved by prosecution beyond reasonable doubt. Prosecution had miserably been failed in proving the entire chain of circumstances that the alleged act was committed by the accused only and none else. Hence the order of conviction and sentencing passed by the High Court of Uttarakhand was quashed and the accused were acquitted.

In **Devilal; Babulal vs. State of Rajasthan, 2019 Law Suit (SC) 36**, it has been held that while scrutinizing the circumstantial evidence, a Court has to evaluate it to ensure the chain of events clearly and completely established to rule

out any reasonable likelihood of innocence of the accused, there must be evidence to come to conclusion that there can not be a person other than the accused who alone is the perpetrator of the alleged crime and the circumstances must establish the conclusive nature consistent only with the hypothesis of the guilt of the accused.

In para 11 of **Shivaji Chintappa Patil (Supra)** similar principles have been laid down regarding the cases based on circumstantial evidence.

“11. The law with regard to conviction on the basis of circumstantial evidence has been very well crystalised in the 5 (2010) 9 SCC 189 6 (2019) 19 SCC 447 7 (2006) 12 SCC 254 judgment of this Court in the case of Sharad Birdhichand Sarda v. State of Maharashtra8 :-

“153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned “must or should” and not “may be” established. There is not only a grammatical but a legal distinction between “may be proved” and “must be or should be proved” as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra (1973) 2 SCC 793 where the observations were made : [SCC para 19, p. 807 : SCC (Cri) p. 1047] “19. Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between ‘may be’ and ‘must be’ is long and divides vague conjectures from sure conclusions.” (2) the facts so established should be consistent

only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty, (3) the circumstances should be of a conclusive nature and tendency, (4) they should exclude every possible hypothesis except the one to be proved, and (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. “

15. On the basis of above discussion this Court is of the view that any ingredient mandatory for conviction and sentencing of an accused in a case based on circumstantial evidence has not been proved beyond reasonable doubt and chain of circumstantial evidence also could not be established against the accused-appellant. Thus, this Court concludes that the order of conviction and sentencing passed by the learned Trial Court is not liable to be sustained in the eye of law and is liable to be set-aside.z

Order

The appeal is **allowed** and the impugned order of conviction and sentencing dated 20.1.2014 is hereby quashed. Let the appellant be set free from jail. This order be sent immediately to the Jail Superintendent concerned. Lower Court record be sent back along with a copy of this judgment.

(2023) 9 ILRA 1092
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.09.2023

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE RAJENDRA KUMAR-IV, J.

Criminal Appeal No. 2202 of 2013

Sonu @ Pinku **...Appellant**
Versus
State of U.P. **...Respondent**

Counsel for the Appellant:

Sri T.K. Mishra, Abhilash Singh, Sri Ashutosh Yadav, Sri Gaurav Kakkar, Sri Rajeev Kumar Rai, Sri Shyam Lal

Counsel for the Respondent:

G.A.

Criminal Law-Code of Criminal Procedure, 1973-Section 374 - The Evidence Act,1872-

Appeal against judgment whereby accused has been convicted under Sections 363 & 376(2)(f) IPC & under Section 25 Arms Act--- Accused raped the victim and threw her on the side of road, where she was found injured with bleeding--- Victim although is a child witness but the concerned court has recorded its satisfaction on the basis of questioning of the victim that she is capable of giving answers to the questions posed to her--- Where direct evidence is worthy, it can be believed, and motive does not carry much weight, merely because that there was no strong motive to commit the present offence, prosecution case cannot be disbelieved--- Nothing in cross-examination which may render the St.ments of prosecution witnesses doubtful. Naturally some minor contradictions and discrepancies have occurred in their examination but they do not go to the root of case--- Trial court, after proper appreciation of evidence, has rightly convicted the accused under the alleged sections---Sentence of life imprisonment is modified to 14 years rigorous imprisonment keeping in view that accused is a first offender and the possibility of his correction cannot be ruled out. **(Para 22, 23, 25 & 28)**

Appeal dismissed. (E-15)

List of Cases cited:

1. P. Ramesh Vs St. Rep. By Inspector of Police, AIR (2019) SC 3559

2. Lokesh Shivakumar Vs St. of Karn., (2012) 3 SCC 196

3. Sampath Kumar Vs Inspector of Police, Krishnagiri, (2012) 4 SCC 124

4. Sachin Kumar Singhraha Vs St. of M.P. (2019) 8 SCC 371

5. Sumer Singh Vs Surajbhan Singh & ors., (2014) 7 SCC 323

6. Sham Sunder Vs Puran (1990) 4 SCC 731

7. M.P. Vs Saleem, (2005) 5 SCC 554

8. Ravji Vs St. of Raj., (1996) 2 SCC 175

(Delivered by Hon'ble Rajendra Kumar-IV, J.)

1. Present appeal has been filed by accused-appellant Sonu @ Pinku against the judgement and order dated 19.12.2012 passed by IInd Additional District & Sessions Judge, Gautam Budh Nagar in Session Trial No.629 of 2010 (State Vs. Sonu @ Pinku) under Section 363, 366-Ka and 376(2)(f) IPC and Session Trial No. 630 of 2010 (State vs. Sonu @ Pinku), under Section 25 Arms Act arising out of Case Crime No. 824 of 2010, P.S. Sector-58, NOIDA, Gautam Budh Nagar, whereby Trial Court has convicted accused Sonu @ Pinku and sentenced him to rigorous imprisonment for 5 years with fine of Rs.10,000/- under Section 363 IPC, 7 years rigorous imprisonment and fine of Rs. 10,000/- under Section 366-Ka I.P.C. and life imprisonment and fine of Rs. 2000/- under Section 376(2)(f) I.P.C. with default punishment and 2 years rigorous imprisonment with fine of Rs. 2000/- under Section 25 Arms Act.

2. Prosecution story in brief in F.I.R. is as follows :-

On 10.06.2010, informant / complainant's children were playing outside the slums / Jhuggis built on the vacant plot before the petrol pump Wajidpur when the informant had gone to his work as usual. At about 11:30 a.m., one black Indica Car stopped near the children, which was being driven by accused-appellant Sonu @ Pinku, who seduced the victim aged about 8 years (name is not disclosed by the Court) and 3-4 other children were playing there and made them sit in the car and after covering some distance, he took off all the children except the victim from the car and took her (victim) towards Sector 62. Information, whereof, was given to police then the police vehicles came on spot in search of Indica Car and started its search. The accused-appellant raped the victim and threw her on the side of road in A-Block Sector 62, Noida, where she was found injured with bleeding, victim was taken to hospital in injured position for medical examination where she was medically examined.

3. A written Tehrir Ex.Ka-1 was presented by victim's father Ramesh @ Mehadi Hasan in the police station concerned whereupon F.I.R. (Ex.Ka-4) was drawn by constable Moharrir and entry was made in general diary.

4. P.W.-5 Dr. Archana Tyagi, medically examined the victim and prepared medical report (Ex.Ka-2). P.W.-8 Dr. Renu Awana, later on, examined her and prepared medical report Ex.Ka-11. The patient was admitted and undergone operation in hospital till 30.06.2010 under the supervision of Dr. Renu Awana.

5. P.W.-7 Rajesh Bharti undertook investigation in the matter, visited the spot, prepared site plan, recorded the statement of informant, victim and other witnesses and apprehended the accused on the information of informer on 15.06.2010 and recovered one country made tamancha of 12 bore with one cartridge from the possession of accused-appellant and on his pointing out one blood stained seat cover was recovered, prepared Fards thereof (Ex.Ka-8 and 9) and after completing entire formalities of investigation submitted charge sheet (Ex.Ka-10) against the accused-appellant under Section 363 and 376 I.P.C

6. P.W.-10 S.I. Mangeram Sharma undertook the investigation of Case Crime No. 824 of 2010, under Section 25 of Arms Act and after completing entire formalities of investigation, found sufficient evidence and submitted charge sheet (Ex.Ka-16) against the accused-appellant under Section 25 Arms Act.

7. Case, being exclusively triable by Court of Sessions, learned Magistrate committed the case of accused-appellant to the Court of Session wherefrom it was transferred to and came to be decided by IInd Additional District & Sessions Judge, Gautam Budh Nagar.

8. Learned Trial Court, after perusing the record, framed charges against accused-appellant Sonu @ Pinku under Sections 363 & 376 IPC and Section 25 Arms Act to which he denied, pleaded not guilty and claimed to be tried.

9. In order to substantiate its case, prosecution examined as many as ten witnesses out of whom PW-1 Ramesh @ Mehadi Hasan, PW-2 Victim, PW-3 Rajjab

and P.W.-4 Nazreen are witnesses of fact and PW-5 Dr. Archana Tyagi, PW-6 Rajpal Singh, PW-7 Rajesh Bharti, PW-8 Dr. Renu Awana, P.W.-9 Satish Chandra Sharma and PW-10 Mangeram Sharma are formal witnesses.

10. Subsequent to closure of prosecution evidence, statement of accused-appellant under Section 313 Cr.P.C. was recorded by Court explaining entire evidence and other incriminating circumstances. In the statement under Section 313 Cr.P.C., accused-appellant denied prosecution story in toto, story and statement of witnesses are said to be wrong and under the pressure of police, he claimed false implication in the present case. He specifically stated that 3 to 4 days before incident, victim had broken the glass of his vehicle, he demanded the damages whereupon there was a quarrel with her Mausea, thus, he has been falsely implicated in this case. No evidence has been produced in defence.

11. Trial Court, after hearing learned counsel for the parties and appreciating entire evidence led by prosecution on record found accused-appellant guilty and convicted him as stated above. Feeling aggrieved and dissatisfied with impugned judgement and order of conviction, present appeal has been filed by the accused-appellant.

12. We have heard Sri Ashutosh Yadav, learned counsel for the accused-appellant and Sri Arun Kumar, learned A.G.A for State-respondent and perused the record carefully with the valuable assistance of learned counsel for the parties.

13. Learned counsel for the accused-appellant advanced his argument in following manner :-

(i) The accused-appellant is innocent and has been falsely implicated in the

present case. There is no eye witness of the occurrence. Independent witness has not been produced from the side of prosecution to support its case.

(ii) There was a prior dispute between the accused-appellant and parents of victim. Thus, he has been falsely roped in this case.

(iii) There is no strong motive to the accused-appellant to commit such heinous crime that too with the minor victim.

(iv) There is material contradiction in the statement of victim itself. He referred some part of cross-examination and argued that no case under Section 376 I.P.C. is made out.

(v) Learned counsel for the accused-appellant further requested that in case, appellant is found guilty, the accused-appellant already served imprisonment more than 13 years, thus, he should be considered for imprisonment already undergone.

14. Learned AGA refuted the argument by submitting that victim was about 8 years old at the time of incident. The accused-appellant rudely ruptured her due to which she got injured, P.W.-3 Rajjab, who was playing with her at the time of incident supported the prosecution case. There is no scope for any doubt in the prosecution case. Trial court rightly appreciated the evidence in trial and convicted the accused-appellant. Considering the act committed by the accused-appellant with the minor child, no sympathy is required in such circumstances. The appeal lacks merit and deserves to be dismissed.

15. Now, we may proceed to consider the argument advanced by both the sides and evidence produced from the side of prosecution as no defence evidence has been produced.

16. P.W. -1 Ramesh @ Menhdi Hassan (father of victim) is the informant. He supported the prosecution case but he is not the eye witness of the incident. He lodged the F.I.R. by saying that his minor daughter / victim was playing with other kids in the vacant plot. The incident was told by his daughter / victim, he found his daughter in injured position at the side of road towards Sector 62. His daughter was thrown away by accused-appellant Sonu after committing rape on her. He lodged the F.I.R. in police station concerned. He proved Tehrir as Ex.Ka-1. The informant's wife made a call at helpline number 100 whereupon police also came there, then his wife and police took the victim to hospital where she was treated. The victim told the name of accused as Sonu. Police also inquired him and recorded his statement. Witness withstood a lengthy cross-examination. Since he is not eye witness of incident, thus, a serious scrutiny of his examination is not much required. In cross-examination, nothing has been extracted so as to disbelieve his statement.

17. P.W.-3 Rajjab, aged about 13 years at the time of examination in 2011, who was playing with victim, supported the prosecution version by stating that he was known to accused-appellant Sonu from before and at the time of incident he was playing with other kids namely Chand Babu, Shabana and 2 or 3 other kids beneath the tree. Sonu (Accused) came there with Indica Car and asked them for a ride in the car, they sat in the car and after moving a bit, accused Sonu asked all the kids to get down, Sabana was sitting on the front seat of the car, everyone asked Sabana to get down but Sonu drove the car away. Then, he went to Sabana's house and narrated the entire incident to her mother, her father was not there and had gone to

work. Later, police inquired him and he told the police whatever happened. This witness was minor at the time of cross-examination also. He was playing with the victim. He supported the prosecution case to the extent that he had seen the accused taking the victim with him. Witness was sufficiently cross-examined but nothing has come in evidence so as to disbelieve his natural statement. Actually, he had not seen the incident of rape but he proved that accused-appellant Sonu had taken away the victim. Later on she was found injured at the side of road towards Sector 62.

18. P.W-4 Nazreen, mother of victim had not seen the actual occurrence. She supported the prosecution case upon the saying of others for whatever she was informed regarding the incident. Thus, this witness also does not require a thorough scrutiny. She was also cross-examined but nothing could be brought on record making her statement unbelievable.

19. The statement of P.W.-2 injured herself remains important and is to be scrutinized carefully. P.W.-2, victim aged about 8 years at the time of incident, supported the prosecution evidence on oath by stating that at the time of occurrence she was playing with other kids at about 11:00-12:00 in the plot. Accused-appellant Sonu came there with a car and asked them to take a ride in the car. She also sat in the car with other children, after covering some distance he took off other kids from the car but did not allow her to get off from the car. He drove her ahead for some distance and stopped the car and started misbehaving with her at the back seat of the car. Accused Sonu started misbehaving and beat her so she cried, screamed. By the misbehavior, she meant, he took off her pantyhose, he threw her from moving car, blood also

came out of her genital. She told everything to her parents, police also came, they questioned her and took her to hospital where she was treated. The victim was sufficiently cross-examined. Much emphasis for disbelieving the prosecution story was given from the accused-appellant's side to the statement of witnesses in cross-examination where she stated that accused has torn her genital by his finger and due to excess fingering, bleeding occurred. Accused had nothing else except tearing it with his finger, by referring that part of her statement learned counsel for the accused-appellant argued that it may be a case under Section 354 I.P.C. and some other section but no offence of rape is made out.

20. So far as the aforesaid statement of the victim is concerned, it is relevant to mention here that the victim further clarified that accused-appellant Sonu had pressed her feet in the car and slapped her and first put his finger, then he put his penis on her genital due to which she cried, screamed and bled. She further clarified that accused on the pretext of urinating, took her off the car and ran away. When she got off the car, she was bleeding. Thus, statement of victim clearly shows that she was raped by the accused-appellant and it is well settled position of law that evidence of prosecutrix is sufficient to set the accused convicted if her statement is found reliable. So far as the plea of false implication, it is not natural for any father to stake the honour of his minor daughter to avenge a previous dispute, that too by falsely alleging that she has been raped.

21. It would be worth noticing that the victim in the present case is an eight year old female child, who had been admitted to Prakash Hospital at Noida. A certificate has

been issued by the doctor that the victim was admitted in the hospital and had undergone third degree perineal tear repair on 25.06.2010 and was discharged on 30.06.2010. The certificate of doctor has been exhibited as Ka.11. The prosecution has also brought on record the injury report of minor victim prepared by doctor of Dr. Bheem Rao Multi-speciality Hospital, Sector-9, Noida. The injury report has been proved as Ex.Ka.2 by Dr. Archana Tyagi (PW-5). PW-5 has specifically stated that the victim was brought by Sub-Inspector Kalpana Gautam on 10.06.2010 at 04.00 pm. In the internal examination of the victim the doctor found her bleeding from her vagina. There was a cut at 7 'O' clock position. The victim was admitted in the hospital and her age has been found as seven years. The doctor has clearly stated that possibility of sexual assault on the minor victim cannot be ruled out. From the evidence on record as also the specific implication of accused by the victim herself, we find that the prosecution has clearly succeeded in establishing the guilt of the accused beyond reasonable doubt.

22. The victim although is a child witness but we find her testimony to be reliable as she has been examined by the court before recording her statement. The victim has clearly disclosed the name of her village and the district to which she belonged. The concerned court has recorded its satisfaction on the basis of questioning of the victim that she is capable of giving answers to the questions posed to her. Law with regard to competence of child witness to depose has been examined by the Supreme Court in P. Ramesh vs. State Rep. By Inspector of Police, AIR (2019) SC 3559, wherein the Court has observed as under in para 15 of the judgment:-

“In order to determine the competency of a child witness, the judge has to form her or his opinion. The judge is at the liberty to test the capacity of a child witness and no precise rule can be laid down regarding the degree of intelligence and knowledge which will render the child a competent witness. The competency of a child witness can be ascertained by questioning her/him to find out the capability to understand the occurrence witnessed and to speak the truth before the court. In criminal proceedings, a person of any age is competent to give evidence if she/he is able to (i) understand questions put as a witness; and (ii) give such answers to the questions that can be understood. A child of tender age can be allowed to testify if she/he has the intellectual capacity to understand questions and give rational answers thereto. 9 A child becomes incompetent only in case the court considers that the child was unable to understand the 8 (2004) 1 SCC 64. Subsequently, relied upon in Nivrutti Pandurang Kokate v. State of Maharashtra, (2008) 12 SCC 565 Dalsukhbhai Nayak v. State of Gujarat, (2004) 1 SCC 64 questions and answer them in a coherent and comprehensible manner. If the child understands the questions put to her/him and gives rational answers to those questions, it can be taken that she/he is a competent witness to be examined.”

23. So far as motive is concerned, it is well settled that where direct evidence is worthy, it can be believed, and motive does not carry much weight. It is also notable that mind set of accused persons differs from each other. Thus merely because that there was no strong motive to commit the present offence, prosecution case cannot be disbelieved. We do not find any substance

in the argument advanced by learned counsel for appellants.

24. In **Lokesh Shivakumar v. State of Karnataka, (2012) 3 SCC 196**, Court has held as under :-

“As regards motive, it is well established that if the prosecution case is fully established by reliable ocular evidence coupled with medical evidence, the issue of motive looses practically all relevance. In this case, we find the ocular evidence led in support of the prosecution case wholly reliable and see no reason to discard it.”

25. So far as discrepancies, variation and contradiction in the prosecution case are concerned, we have analysed entire evidence in consonance with the submissions raised by learned counsel and the witnesses PWs 1, 2, 3 and 4 supported the prosecution case as witnesses. All the four witnesses withstood lengthy cross-examination but nothing adverse material could be brought on record so as to disbelieve their statements. There is nothing in cross-examination which may render their statements doubtful. Naturally some minor contradictions and discrepancies have occurred in their examination but they do not go to the root of case.

26. In **Sampath Kumar v. Inspector of Police, Krishnagiri, (2012) 4 SCC 124**, Court has held that minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and sense of observation differs from person to person.

27. In **Sachin Kumar Singhraha v. State of Madhya Pradesh (2019) 8 SCC**

371, Supreme Court has observed that Court will have to evaluate evidence before it keeping in mind the rustic nature of depositions of the villagers, who may not depose about exact geographical locations with mathematical precision. Discrepancies of this nature which do not go to the root of the matter do not obliterate otherwise acceptable evidence. It need not be stated that it is by now well settled that minor variations should not be taken into consideration while assessing the reliability of witness testimony and the consistency of the prosecution version as a whole.

28. Upon careful consideration of the statement of witnesses especially the statement of victim we are of the opinion that trial court, after proper appreciation of evidence, has rightly convicted the accused-appellant under the alleged sections and we do not persuade ourselves to take a different view than that of trial court.

29. We find no merit in appeal, accordingly, the appeal is **dismissed** on merit.

30. So far as the sentence awarded by trial court to the accused-appellant in the alleged sections is concerned, it is settled legal position that appropriate sentence should be awarded after giving due consideration to the facts and circumstances of each case, nature of offence and the manner in which it was executed or committed. It is obligation of court to constantly remind itself that right of victim, and be it said, on certain occasions person aggrieved as well as society at large can be victims, never be marginalised. The measure of punishment should be proportionate to gravity of offence. Object of sentencing should be to

protect society and to deter the criminal in achieving avowed object of law. Further, it is expected that courts would operate the sentencing system so as to impose such sentence which reflects conscience of society and sentencing process has to be stern where it should be. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against individual victim but also against society to which criminal and victim belong. Punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality which the crime has been perpetrated, enormity of crime warranting public abhorrence and it should 'respond to the society's cry for justice against the criminal'. [Vide: **Sumer Singh vs. Surajbhan Singh and others, (2014) 7 SCC 323, Sham Sunder vs. Puran, (1990) 4 SCC 731, M.P. v. Saleem, (2005) 5 SCC 554, Ravji v. State of Rajasthan, (1996) 2 SCC 175**].

31. Under the facts and circumstances of the case and considering the manner in which offence is committed as also the age of the victim, who is sexually assaulted, we deem it appropriate to modify the sentence awarded to the accused-appellant by trial court, keeping in view that accused is a first offender and the possibility of his correction cannot be ruled out.

(i) The conviction of the accused under the alleged sections is maintained.

(ii) Sentence of life imprisonment under Section 376(2)(f) I.P.C. is converted to 14 years rigorous imprisonment.

(iii) In default of payment of fine as awarded by trial court under the alleged sections, accused-appellant shall further

undergo for a period of two months imprisonment.

(iv) All the sentences shall run concurrently and accused-appellant shall be entitled to the benefit of Section 428 Cr.P.C.

32. Certify the copy of this judgement to the trial court concerned for immediate compliance.

(2023) 9 ILRA 1099
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.08.2023

BEFORE

THE HON'BLE JASPREET SINGH, J.

Civil Misc. Arbitration Application No. 10 of 2020

Raster Images Pvt. Ltd. Tamil Nadu

...Applicant

Versus

State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:

Ritesh Kalia, Abhishek Khare, Debasish Moitra, Pravin Kumar Verma, Vabhu Shankar

Counsel for the Opposite Parties:

Vivek Kumar Rai, Ajai Kumar, C.S.C.

Civil Law-The Arbitration and Conciliation Act, 1996-Section 11(6)---

The petition has been filed by one member of the Consortium only without impleading the other Consortium members including against whom allegations have been leveled and the said allegations are prima facie indicative of disputes inter-se the Consortium members which may not be referable for arbitration.--- Petition is not maintainable at the behest of the petitioner alone for the nature of disputes so raised.

(Para 61 & 62)

Petition dismissed. (E-15)

(Delivered by Hon'ble Jaspreet Singh, J.)

A. Background Facts:-

1. The instant petition has been preferred under Section 11 (6) of the Arbitration and Conciliation Act, 1996 by the petitioner-company who is a member of a Consortium comprising of Pawanshree Foods International Pvt. Ltd. and Nanotrics Innovations Pvt. Ltd. The aforesaid two companies along with the present petitioner company had jointly made a bid for a contract floated by the Department of Medical Health and Family Welfare, Government of Uttar Pradesh, for implementation of Tele Medicine Services in the State of Uttar Pradesh.

2. Proposals were invited and a request for qualification (RFQ) cum (Request for proposal) (RFP) along with instructions to bidder (tender document) inviting bids from bidders for the implementation of tele- medicine services in the State of Uttar Pradesh. The said tender document in Clause 2.1.1 permitted the bidder to submit only one technical proposal for video consultation services and/or Tele-Consultation Services and submit separate financial proposals for each cluster for video consultation services and tele-consultation services on E-tender portal. It permitted the bidder to bid as an individual or as a member of Consortium but they were not entitled to submit another bid for the same cluster either individually or as a member of any other Consortium, as the case may be.

3. Clause 2.1.10 instructed that the bidder should submit a power of attorney as per the format set forth in Annexure-C of Appendix-1 authorizing the Signatory to commit the bid. In case if the bidder is a

Consortium, the members thereof should furnish a power of attorney in favour of the lead member as per the format set forth in Annexure-D of Appendix-1 duly supported with a chartered document or Board Resolution in favour of the executant.

4. Clause 2.1.14 states that a bidder shall not have a conflict of interest that affects the bidding process and thereafter certain stipulations are mentioned which would affect the bidding process and would be treated to be a conflict of interest. This particular clause also had an explanation which clearly stated that in case a bidder is a Consortium then the term 'bidder' as used in this Clause 2.1.14 shall include each member of such Consortium.

5. Clause 2.2 related to eligibility of bidders and in Clause 2.2.1 (a), it stated that a bidder may be a single entity or a group of entities (the Consortium) coming together to implement the project, however, no bidder applying individually or as a member of a Consortium, as the case may be, can be a member of another bidder. The term 'bidder' used herein would apply to both a single entity and a Consortium.

6. Clause (b) of Clause 2.2.1 also stated that a Consortium for being eligible for consideration would be subject to the conditions set out in Clause 2.2.3. which in the instant case, for clarity is being reproduced hereinafter :-

“2.2.3 The Bidder (single entity or consortium of entities), may form an SPV. Alternatively, the Bidder (Lead Member in case of Consortium) may itself execute the Service Agreement and implement the Project. In case the Bidder is a Consortium, it should comply with the following additional requirements:

(a) Bid should contain the information required for each Member of the Consortium provided number of members of Consortium should not exceed 3(three).

(b) Members of the Consortium shall nominate 1 (one) member as the lead member ("**Lead Member**"), who shall have capital investment share of at least 26 % (twenty six per cent) of the Project:

(c) The nomination of the Lead Member shall be supported by a Power of Attorney, as

per the format set forth in Annexure D of Appendix-I, signed by all the other

members of the Consortium,

(d) The parties to a Consortium may form an appropriate SPV or itself execute the Project through Lead Member shall sign the agreement with Authority, for and behalf of consortium and other members shall join in signing the agreement as confirming party. In this regard, its clarified that all member of the consortium shall be jointly and severally liable to execute the Project during the contract period, and

(e) Members of the Consortium shall enter into a binding Joint Bidding Agreement (the **-Joint Bidding Agreement**") for the purpose of submitting the Bid. The Joint Bidding Agreement shall, inter alia:

(i) convey the intent to form an SPV with capital investment commitment
(s) execute through Lead Member in accordance with this RFP which would enter into the Service Agreement and subsequently carry out all the responsibilities as Service Provider in terms of the Service Agreement. in case the Contract to undertake the Project is awarded to the Consortium

(ii) clearly outline the proposed roles and responsibilities of each Member at each stage.

(iii) commit the minimum capital investment contribution by each Member, and

(iv) include a statement to the effect that all Members of the Consortium shall, till the term of draft Service Agreement in accordance with the Service Agreements, be liable Jointly and severally for all obligations of the Service Providers in relation to the Project.

(f) except as provided under this RFP and the Bidding Documents. there shall not be any amendment to the Joint Bidding Agreement without the prior written consent of the Authority.

(Note: Joint Bidding Agreement should be submitted along with the Bid. The Joint Bidding Agreement entered into between the members of the Consortium should be specific to the Project and should fulfill the above requirements, failing which the Bid shall be considered non-responsive."

7. From the perusal of the aforesaid Clause, it would indicate that a bidder either a single entity or consortium of entities may form a SPV (Special Purpose Vehicle). Alternatively, the lead member in case of a Consortium may itself execute the service agreement and implement the project. In case the bidder is a Consortium, it should comply with the additional requirements as provided in Clause 2.2.3 which has already been reproduced hereinabove.

8. Clause 2.2.6 stated that no change in the composition of the Consortium will be allowed subsequent to the submission of the bid during the bidding process.

9. The tender document also contained the prescribed formats in shape of Appendix. However, in the instant case Annexure-B relating to general information of bidder, Annexure-C, power of attorney for signing of bid, Annexure -D- Power of attorney for lead member of Consortium, Annexure-E-relating to the format of bid security (bank guarantee) and Annexure F-joint bidding agreement was also provided including Annexure G which related to the technical capacity of the bidder.

10. It is in the aforesaid backdrop that the petitioner along with Pawanshree Foods International Pvt. Ltd. and Nanotrics Innovations Pvt. Ltd., as a Consortium made a bid for the RFQ-cum-RFP for implementation of Tele-medicine services in the State of Uttar Pradesh. The bid of the Consortium comprising of the petitioner along with Pawanshree Foods International Pvt. Ltd. and Nanotrics Innovations Pvt. Ltd. (with Pawanshree Foods International Pvt. Ltd. being the lead member) was accepted and a service agreement was entered by the lead member of the Consortium with the State of Uttar Pradesh through the Director General, Medical and Health Services, Department of Medical Health and Family Welfare.

11. This agreement dated 30th January, 2019 clearly outlined that the Governor of the State of Uttar Pradesh through the Director General, Medical and Health Services, Department of Medical Health and Family Welfare was referred to as the 'Authority' and treated as a first party of the first part of the agreement and M/s Pawanshree Foods International Pvt. Ltd., being the lead member of the Consortium comprising of Consortium members (i) M/s Raster Images Pvt. Ltd. (ii) M/s Nanotrics Innovations Pvt. Ltd.

were referred as the Service Provider and party of the second part. The agreement further clarified that for the purposes of the agreement both the Authority and the Service Provider are collectively referred to as the 'parties' and individually a 'party'.

12. The agreement amongst various conditions/obligations delineated therein also provided a complete Dispute Resolution Mechanism in Article 28. For the sake of convenience, the entire Article 28 relating to the Dispute Resolution Mechanism is being reproduced hereinafter:-

“ARTICLE 28-DISPUTE RESOLUTION

28.1 Dispute resolution

28.1.1 *Any dispute, difference or controversy of whatever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the Parties, and so notified in writing by either Party to the other Party, (the "Dispute") shall, in the first instance, be attempted to be resolved amicably in accordance with the conciliation procedure set forth in Clause 28:2*

28.1.2 *The Parties agree to use their best efforts for resolving all Disputes arising under or in respect of this Agreement promptly, equitably and in good faith, and further agree to provide each other with reasonable access during normal business hours to all non-privileged records, information and data pertaining to any Dispute.*

28.2 Conciliation

28.2.1 *In the event of any Dispute between the Parties, either Party may call upon the designated official of the Authority to mediate and assist the Parties in arriving at an amicable settlement thereof. Failing mediation by the Authority,*

either Party may require such Dispute to be referred to the chairman or any designated official of the Authority and the chairman or any designated official of the board of directors or any equivalent official of the Service Provider for amicable settlement and upon such reference, the said persons shall meet no later than 7 days from the date of reference to discuss and attempt to amicably resolve the Dispute. If such meeting does not take place within the 7 days period or the Dispute is not amicably settled within 15 days of the meeting or the Dispute is not resolved as evidenced by the signing of written terms of settlement within 30 days of the notice in writing referred to in Clause 28.1.1 or such longer period as may be mutually agreed by the Parties, either Party may refer the Dispute to arbitration in accordance with the provisions of Clause 28.3.

28.3 Arbitration

28.3.1 Any Dispute which is not resolved amicably by conciliation, as provided in Clause 28.2, shall be finally decided by reference to arbitration in accordance with Clause 28.3.2. Such arbitration shall be held in accordance with the provisions of the Arbitration Act. The venue of such arbitration shall be Lucknow, and the language of arbitration proceedings shall be English

28.3.2 Each Party shall appoint one arbitrator and the two appointed arbitrators shall appoint a third arbitrator, who will be the presiding arbitrator in accordance with the Arbitration and Conciliation Act 1996 and any amendment thereof. In the event of disagreement between the two arbitrators, the appointment shall be in accordance with the Arbitration and Conciliation Act, 1996 and any amendment thereof.

28.3.3 The arbitrators shall make a reasoned award (the "Award"). Any

Award made in any arbitration held pursuant to this Article 28 shall be final and binding on the Parties as from the date it is made, and the Service Provider and the Authority agree and undertake to carry out such Award without delay.

28.3.4 The Service Provider and the Authority agree that an Award may be enforced against the Service Provider and/or the Authority, as the case may be, and their respective assets wherever situated.

28.3.5 This Agreement and the rights and obligations of the Parties shall remain in full force and effect, pending the Award in any arbitration proceeding hereunder."...

13. From the perusal of the aforesaid Article 28, it would indicate that any dispute, difference or controversy of whatever nature, howsoever arising, under or out of or in relation to this agreement (including its interpretation) between the parties and so notified in writing by either party to the other party (the dispute) shall in the first instance be attempted to be resolved amicably in accordance with the conciliation procedure.

14. In the event of any dispute between the parties, either party is required to call upon the designated official of the Authority to mediate and assist the parties in arriving at an amicable settlement. Failing mediation by the Authority, either party could require such dispute to be referred to the Chairman or any designated official of the Authority and such designated official would enter into such reference and would meet the parties within seven days. In case if the meeting did not take place within seven days or the dispute is not amicably settled within 15 days of the meeting or the dispute is not resolved as

evidenced by signing of the written terms in a settlement within 30 days of notice in writing or such longer period as may be mutually agreed by the parties, then either party may refer the disputes to Arbitration.

15. As per the arbitration clause contained in Clause 28.3.2 each party is entitled to appoint one Arbitrator and the two appointed Arbitrators shall appoint a third Arbitrator who would be the Presiding Arbitrator and the proceedings will be held in accordance with the Arbitration and Conciliation Act, 1996.

16. It is in the aforesaid factual background that M/s Raster Images Pvt. Ltd., the petitioner has approached this Court under Section 11 (6) of the Arbitration and Conciliation Act, 1996 for appointment of an Arbitrator on behalf of the respondents with an alternate prayer that the Arbitrator appointed by the petitioner may be permitted to continue as a sole Arbitrator or any other person may be appointed as an Arbitrator.

B- Pleadings and Cause of Action:-

17. The petitioner has referred to the Tele-Medicine Service Agreement which has been brought on record as Annexure No. 1 with the petition. In paragraph 9 of the petition, it has been stated that the petitioner had written a letter dated 17.06.2019 informing that the lead member of the Consortium in the agreement had surpassed all conditions and is taking charge of every sector which he is not competent to do and he has unilaterally made a breach of Consortium Agreement as referred to as Annexure -F of the bid document read along with Annexure-B.

18. It is also stated that on account of gross violation, made by the lead member

of the Consortium namely M/s Pawanshree Foods International Pvt. Ltd. which could give rise to medico legal cases and since the liability amongst the Consortium members was joint and several, hence, it was in the fitness of things that the respondent would take note of such issues flagged by the petitioner-company as enumerated in its letter dated 17.06.2019 which has been brought on record as Annexure No. 4.

19. The petitioner further requested the respondents to settle the claims and issues which were enumerated by the petitioner in its letter dated 17.06.2019 which was followed by another letter dated 18.09.2019 but the respondent did not refer the matter to the designated authority for resolution of disputes amicably.

20. Since the conciliation as contemplated in Article 28.2 did not materialize, consequently, the petitioner by means of its letter dated 21st of October, 2019 nominated its Arbitrator Mr. Rakesh Kumar. A copy of the said letter has been brought on record as Annexure No. 2. Since there was no response from the side of the respondents, accordingly, the petitioner filed the instant petition claiming the reliefs which have been referred to hereinabove in para 15 above.

21. This Court by means of order dated 31.01.2020 had passed the following order which reads as under:-

“Learned counsel for the petitioner has preferred this petition under Section 11(6) of the Arbitration and Conciliation Act, 1996. It has been averred that an agreement was entered between Pawan Shree International Pvt. Ltd. and the respondents dated 13.01.2019. The

aforesaid agreement contains a dispute resolution mechanism in Clause-28. It has also been averred that in furtherance of the aforesaid clause, the present petitioner, who is a part of the consortium invoked the conciliation mechanism by means of the letter dated 18.09.2019. Since, the same remained unresolved, therefore, the petitioner again invoked the arbitration clause by means of his notice dated 21.10.2019.

Prima-facie, it appears that the dispute is between the consortium members inter-se and not so between the SPV and the respondents.

A specific query was put to the learned counsel for the petitioner to explain the aforesaid position for which he seeks time.

Accordingly, put up this matter on 12.02.2020. In the meantime, learned counsel for the petitioner shall also bring on record the agreement entered between the consortium members for creating the SPV as well as the tender documents by which SPV Le. Pawan Shree International Pvt. Ltd., was granted the tender. The aforesaid documents shall be filed by means of a supplementary affidavit prior to the next date as fixed by this Court."

22. From the pleadings as made in the petition, it would indicate that the petitioner is a consortium member along with Pawan Shree International Pvt. Ltd. and Nanotrics Innovations Pvt. Ltd. and that there are disputes amongst the consortium members inasmuch as certain specific duties/obligations were assigned to each consortium member, however, the same has been usurped by the lead member to detriment of the other members.

23. Noticing the pleadings, this Court at the first blush, noticed that the disputes

which have been raised by the petitioner somehow gave a flavour of disputes between the Consortium members inter-se and not so much between the Consortium on one hand and the respondent-Authority on the other.

24. In order to clarify, the Court vide its order dated 31.01.2020 directed the petitioner to bring on record the agreement entered between the Consortium members. Significantly, the said documents were filed by the petitioner only by means of the supplementary affidavit dated 12th August, 2023.

25. In the meantime, the record indicates that no counter affidavit was filed on behalf of the State, though, it was duly represented. There is a clear indication in the order passed by this Court dated 16.11.2021 that despite time having been granted to the learned counsel for the State yet neither any counter affidavit nor any instructions were available with them.

26. In the aforesaid background, in absence of any counter affidavit filed by the State and since the petitioner had also not filed the requisite documents as required of the petition and stated in the order of the Court dated 31.01.2020, accordingly, a coordinate Bench of this Court found that since the Arbitration clause was subsisting and a request for appointment of an Arbitrator has been made which has not been responded, hence, the Court proposed the name of Hon'ble Mr. Justice Brijesh Kumar Srivastava-II, a retired Judge of this Court, as a proposed Arbitrator and sought his consent vide order dated 16.11.2021. On 06.12.2021, as the consent from the proposed Arbitrator had been received, consequently, the Court appointed Hon'ble Mr. Justice Brijesh

Kumar Srivastava-II a retired Judge of this Court as an Arbitrator on behalf of the respondent.

27. It is at this stage, the lead member of the Consortium M/s Pawanshree Foods International Pvt. Ltd. filed a Review-Application bearing No. 120 of 2022 in the Arbitration Application No. 10 of 2020 seeking recall of the order dated 16.11.2021 and 06.12.2021.

28. After hearing the learned counsel for the parties in the Review-Application, the Court by means of order dated 13.12.2022 allowed the Review-Application and recalled the order dated 16.11.2021 and 06.12.2021 and further provided that the application under Section 11(6) of the Act of 1996 shall now be placed before the appropriate Court. The order in review, dated 13.12.2022, is being re-produced hereinafter for ready reference..

“Heard Sri Mahendra Pratap Singh, learned counsel for the applicant, Sri Vivek Shukla, learned Addl. C.S.C. and Sri Debashish Moitra, learned counsel for the opposite parties.

On 14.10.2022, this Court had passed the following order:-

"Heard Mr. Mahendra Pratap Singh, learned counsel for the review-applicant and Mr. Debashish Moitra, Ms. Viha Shankar and Mr. Pravin Kumar Verma, learned counsel for the opposite parties.

After hearing counsel for the parties, what comes out is firstly that the Review Application seeking review of an order passed in the proceedings under Section 11 (6) of the Arbitration and Conciliation Act, 1996 is maintainable in view of Para 12 of the judgment dated

05.04.2021 rendered by Hon'ble the Supreme Court in Special Leave Petition (C) No. 4820 of 2021; Mohd. Anwar and Ors. Vs. Pushplata Jain and Ors., Jain Studios Ltd. v. Shin Satellite Public Co. Ltd.; (2006) 5 SCC 501 and Municipal Corporation of Greater Mumbai and Anr. Vs. Pratibha Industries Limited and Ors.; (2019) 3 SCC 203 and, secondly while filing the application under Section 11 (6) of the Act, the applicant did not implead the other two Members of the Consortium i.e. the lead Member who has filed the Review Application and other Member, namely, M/s Nanotricks Innovations Private Limited. This would also have not affected the order, but for the arbitration clause according to which a three member Arbitral Tribunal is to hold arbitration proceedings. As the Government had not appointed its Arbitrator in spite of a notice by the applicant, therefore, this Court appointed an Arbitrator under Section 11 (6) of the Act, leaving it open for the Arbitrator appointed by the applicant and the Arbitrator appointed by this Court to appoint the third Arbitrator.

Now, in this scenario, the counsel appearing for the applicant seeking review says that what about his client's right to appoint an Arbitrator. Likewise the third Member of the Consortium referred hereinabove, therefore, this has resulted in a complication on account of non impleadment of two Members of the Consortium by the applicant and passing of an order behind their back in the proceedings under Section 11 (6) of the Act, which renders the order under Review apparently erroneous, especially as there appears difference between the Consortium Members.

However, at this stage, counsel for the original applicant who is respondent in the review application, M/s

Raster Images Private Limited says that the third Member would also appear before the Court on the next date and accordingly the Arbitrator be appointed replacing its Arbitrator.

Let the applicant implead the third Member of the Consortium i.e. M/s Nanotricks Innovations Private Limited as a party in the review application, even if it was not a party in the original application so as to facilitate the aforesaid exercise.

Mr. D. Moitra, learned counsel who has appeared on behalf of the original applicant does not have any objection to such impleadment.

Issue notice to newly impleaded opposite party.

Let this matter come up on 16.11.2022.

The interim arrangement made earlier shall continue till next date of listing."

The Court had categorically held that review application even in a proceedings under Section 11(6) of the Arbitration and Conciliation Act, 1996 is maintainable in view of decisions of Hon'ble the Supreme Court, thereafter, this Court had pointed out error which had occurred while passing the final order in the proceedings. The Court would have disposed of the review application on the earlier date itself but one of the necessary parties had not been impleaded. In the review application, the third member of the consortium, lead member being the applicant seeking review, and the other member being the respondent herein who was original applicant in the proceedings under Section 11(6) of the Act, 1996, is present today. The third member of the consortium is represented by Sri Vivek Kumar, Advocate who has filed his Vakalatnama.

Considering the error already pointed out in the earlier order dated 14.10.2022, especially as, necessary parties were not impleaded and they were not heard and there is difference of opinion between the consortium members themselves, this Court is of the opinion that the order dated 06.12.2021 passed in Arbitration Application No.10 of 2020 [Raster Images Pvt. Ltd. vs. State of U.P. & Anr.] needs to be recalled. It is hereby recalled. Consequences shall follow accordingly. The proceedings are restored to its original number. The application under Section 11(6) of the Act, 1996 shall now be placed before the appropriate Court which has been assigned such matters, on 19.12.2022.

Accordingly, the application for review is allowed in the aforesaid terms."

29. It is in this background that the matter came up before this Court and once again the Court by means of order dated 09.08.2023 had required the learned counsel for the petitioner to address the Court on the maintainability of the present petition. It is thereafter that the petitioner filed a supplementary affidavit dated 12th August, 2023 and 23rd August, 2023 by which it brought on record the joint bidding agreement, the tender document and certain other letters which will be referred to at a later stage. The petitioner brought on record the orders which were passed by the Arbitral Tribunal which was constituted in furtherance of the order dated 06.12.2021.

30. This Court further notices that despite adequate time was given to the State to respond, unfortunately, neither any counter affidavit was filed nor there was any assistance on part of the State. On one occasion i.e. on 21.08.2023 the Director of the respondent was also called to assist the

Court, however, even that attempt was futile as neither the Director nor the Standing Counsel could answer the query of the Court and in the aforesaid backdrop mere cosmetic submissions were made by the State which were of no help and it is disappointing to note how the State conducts its case as it is practically a case of no contest from the side of the respondent.

C: Submissions on behalf of the petitioner:-

31. Mr. Debasish Moitra along with Mr. Vibhu Shankar, learned counsel, for the petitioner has made the following submissions:-

(a) The RFQ-cum-RFP permitted a Consortium to participate in the tender and make its bid. The Consortium members comprising of M/s Pawanshree Foods International Pvt. Ltd., M/s Raster Images Pvt. Ltd. (the petitioner herein) and M/s Nanotrics Innovations Pvt. Ltd. had entered into an agreement with the respondent on 30th January, 2019. It is urged that since the Consortium was required to make a SPV (Special Purpose Vehicle) for the purpose of implementing the project and each Consortium member had been assigned specific roles but in violation thereof the lead member M/s Pawanshree Foods International Pvt. Ltd. was unilaterally executing the projects and was also involved in certain undesirable practices which would harm the project as a whole, coupled with the fact that the petitioner being a member of Consortium, though, had no role or involvement in such undesirable practices yet would be unnecessarily implicated as the agreement provided for joint and several liabilities of Consortium members. This was an issue of

concern to the petitioner and it was appropriately flagged with the respondent-Authority but it did not meet any favourable response.

(b) It is further contended that instead of remedying the situation, the respondent were perhaps were in cahoots with the lead member and turned a nelson's eye. It was necessary for the respondent-authority to have discharged its obligations by settling the disputes and the issues which were flagged by the petitioner rather than to let the situation go out of control.

(c) It is thus, submitted that on one hand, the petitioner had amplified the gross violations made by the lead member of the terms and conditions, as agreed, and had requested for an amicable settlement which was ignored by the Authority but on the other hand, a letter was issued, by the respondent Authority cautioning the members of the Consortium including the petitioner that since the work was not being done in accordance with the agreement, the Authority would take action which would be against the Consortium Members both jointly and severally.

(d) In the aforesaid backdrop, the petitioner had invoked the arbitration clause and nominated its arbitrator and requested the Authority to appoint its own which was not acceded, hence, the petition.

(e) It is also submitted that in the RFQ-cum-RFP tender document in Clause 2.1.14 and the explanation appended thereto, clearly stated that in case a bidder is a consortium then the term 'bidder' as used in Clause 2.1.14 shall include each member of such Consortium. It is sought to be emphasized by Mr. Moitra, that from the perusal of the entire document as well as the tele-medicine service agreement, it would indicate that each and every member of the Consortium had a right to call upon

the other party, i.e. the Authority to resolve any dispute which was arising out of and of whatever nature from the Tele-medicine Service Agreement, as the arbitration clause was widely worded.

(f) It is urged that the issues which were brought to the notice of the respondent-authority were all such issues which arose from the Service Agreement dated 30th January, 2019 and consequently since each party had a right to invoke the Dispute Resolution Mechanism which included the petitioner as well, consequently, the petitioner invoked the Dispute Resolution Mechanism, which failed and now the said Company is before the Court in terms of Section 11(6) of the Act of 1996.

(g) Mr. Moitra, has further referred to the supplementary affidavit dated 23rd August, 2023 and has referred to the order which was passed by the Arbitral Tribunal dated 02.06.2022 whereby on an application moved by M/s Pawanshree Foods International Pvt. Ltd. the lead member had sought its impleadment before the Arbitral Tribunal. Reference was also made to an order dated 24.05.2022 whereby this Court while entertaining the Review-Application of the lead member M/s Pawanshree Foods International Pvt. Ltd. had granted time to the respondents to file their response to the review-application.

It was urged that the Arbitral Tribunal on 02.06.2022 allowed the application for impleadment of M/s Pawanshree Foods International Pvt. Ltd. and it was directed to be impleaded as respondent no. 2 and later by the order dated 06.07.2022 the Tribunal further kept for consideration the application for impleadment moved by M/s Nanotrics Innovations Pvt. Ltd.

(h) The learned counsel for the petitioner has also drawn the attention of

the Court to certain letters which were written by the petitioner dated 23rd August, 2019 addressed to the respondents as well as letter dated 22.06.2021 written by M/s Nanotrics Innovations Pvt. Ltd. addressed to the respondents also flagging concerns regarding violation of the conditions by the lead member which was similar to the ones raised by the petitioner-company. With the aid of the Clauses in the agreement and the documents as referred in the petition and in the two supplementary affidavits, the thrust of the submission is that apparently disputes had emerged between the parties (which collectively meant the members of the Consortium and the respondent) and according to Article 28 each party had a right to invoke the Dispute Resolution Mechanism and since the same did not bear any fruitful result, consequently, the Arbitrator appointed by the petitioner may proceed as a sole Arbitrator or in the alternate an Arbitral Tribunal be constituted in accordance with the provisions contained in the agreement.

In support of his submissions, Mr. Moitra, has relied upon the decision of the Apex Court in *Bharat Sanchar Nigam Ltd. and Another Vs. Nortail India Pvt. Ltd.; (2021) 5 SCC 738; State of Kerala Vs. Zoom Developers Pvt. Ltd.; (2009) 4 SCC 563* and a decision of the Telangana High Court in *Tecpro Systems Ltd. Vs. Telangana State Power Generation Power Ltd. ; 2019 SCC Online TS 1658*.

(i) Relying upon the aforesaid decisions, it is urged by Mr. Moitra, that Section 11 (6-B) of the Arbitration and Conciliation Act, 1996 has not been amended by the 2019 amendment as introduced in the Act, accordingly, the High Court does not exercise any judicial power that may determine the maintainability of the petition, existence or validity of the arbitration agreement which

is to be left to be decided by the Arbitral Tribunal as held in para 37.1 of Nortal India Pvt. Ltd. (supra).

(j) While referring to the decisions in **Zoom Developers Pvt. Ltd. (supra)**, it is urged that since responsibilities and work stood demarcated between the members of the Consortium, it would entitle each member of the Consortium to raise the grievance and so also in the instant case, as indicated in the joint bidding agreement dated 17th August, 2018, each Consortium member had separate responsibilities assigned, hence, any aggrieved member could raise the issue.

(k) While relying upon the decision of **Tecpro System Ltd. (supra)**, it is urged that it has been held in the said case that any member of a Consortium can invoke the Arbitration Clause and thus the petitioner being a member of Consortium is entitled to invoke the Arbitration Clause and any disputed or contentious matter can be left for adjudication before the Tribunal.

(l) The petitioner has been able to establish that the Arbitration Clause, its due invocation as envisaged in the agreement and that the petitioner is a party to the said agreement and practically there is no opposition from the other side, in all the aforesaid circumstances, the petition deserves to be allowed and the Arbitral Tribunal be constituted.

D- Discussions and Analysis:-

32. The Court has given its thoughtful consideration to the submissions made by the learned counsel for the appellant and also perused the record.

33. At the outset, it may be noticed RFQ-cum-RFP document permits a bidder who may be a single entity or a group of

entities which is referred to as the Consortium therein for coming together to implement the project. The reference made by Mr. Moitra, learned counsel for the petitioner to the explanation appended to Clause 2.1.14, if seen, would reveal that is confined to the word 'bidder' in context with the said Clause 2.1.14 only and it relates to the stipulations for a bidder to not have a conflict of interest and certain enumerations have been made in the said clause which would be treated as conflict of interest and thus in order to clarify the same, the explanation has been appended to mean that a bidder would include each and every member of such Consortium.

34. The Tele-medicine Service Agreement, if seen, would reveal that it envisages two party regime. One is the State of Uttar Pradesh who has been referred to in the said agreement as the Authority and the other is the Service Provider i.e. M/s Pawanshree Foods International Pvt. Ltd. as the lead member of the Consortium comprising of the members namely the petitioner and M/s Nanotrics Innovations Pvt. Ltd. are referred to as the Service Provider and a party of the second part. The said agreement clarifies that the word 'Authority' and the 'Service Provider' are collectively referred to as the parties and individually as a party.

35. The Court has also taken note of the letters which have been brought on record along with the petition as Annexure No. 4 which cumulatively refers to letters dated 17th June, 2019 and 29th June, 2019. Considering the letter dated 17th June, 2019 which is addressed to the respondent, the petitioner in paragraph 3, 4, 5, 6 and 7 has raised disputes stating that Mr. Anoop Bardia who has signed the Service Agreement as an authorized person holding

power of attorney for and on behalf of all the Consortium members is not authorized since the petitioner and the other Consortium member had granted the power of attorney to Mr. Shashank Jain, the C.O.O. of M/s Pawanshree Foods International Pvt. Ltd. and not to the person who has signed the agreement for the Consortium. It was also alleged that the respondent was granting undue favours to M/s Pawanshree Foods International Pvt. Ltd. To the exclusion of the other Consortium members.

36. It was also alleged that the diagnostic kits which were supplied were not from a reliable vendor and was against the role and responsibilities assigned to the Consortium members. It was requested that the Tele-medicine Service Agreement signed by Anoop Bardia representing himself on behalf of the other Consortium members was being violated, hence, the service contract be cancelled. The lead member be required to form the SPV and get a revised service agreement signed with the SPV only. It was also requested that the bank guarantees may be accepted from each member of the Consortium in ratio of the stake held by such Consortium Member in the project and the respondent should not permit the project to be executed by an entity who is not a party to the agreement and that no money should be released in favour of M/s Pawanshree Foods International Pvt. Ltd. as they had breached the service agreement.

37. It is in context that the disputes have been raised and it was in the aforesaid background that the Court had required the learned counsel for the petitioner to address on the maintainability of the petition, as the disputes prima facie were amongst the members of the Consortium inter-se.

38. Article 28 of the service agreement would also be relevant to be read and the same has already been reproduced hereinabove in the previous paragraphs. The said article would reveal that it refers to the word “parties” and “party” which has been clarified in the beginning of the service agreement itself. If the two i.e. ‘Parties’ and ‘party’ are read in context with Article 28 and also for the appointment of an Arbitrator, it would reveal that as per the agreement each party is required to appoint its own nominee Arbitrator. This further indicates that in the two party regime the respondent-Authority is taken as a one party and the members of the Consortium on the other hand are taken collectively as the other party. It is for the said reason that the Arbitration Clause provides that the Authority would nominate its own Arbitrator while the Consortium members, being one entity collectively, would appoint one Arbitrator and the two such party nominated Arbitrators would appoint a Presiding Arbitrator.

39. At this stage, it will also be relevant to notice the joint bidding agreement which has been brought on record as Annexure-7 to the supplementary affidavit dated 12th August, 2023 and a conjoint reading of the same would indicate that the members of the Consortium amongst themselves are treated as one party and the Authority is treated as the other party.

40. Thus, putting things together, it clearly indicates that, though, the Consortium members are three separate entities who have come together, willingly, to bid as a single entity is to be treated as one bidder. The Consortium comprising of three entities in so far as its jural relations with the Authority (as referred to in the

agreement) is concerned is that of collective, one entity. It is for the said reason that the liability of the Consortium members is joint and several qua the Authority.

41. The Authority had invited the bids from an individual or a firm or a Consortium and the idea behind is clear that even more than one entity can get together to form a Consortium and bid as one collective bidder treated as a single entity. It further provides that the Consortium on being declared a successful bidder may form a SPV and alternatively the lead member in the case of Consortium may itself execute the service agreement and implement the project which does give credence to the fact that the members of the Consortium may be separate entities but in so far as the contract is concerned, it still remains a two party regime between the Authority and the Service Provider.

42. Thus, all the relevant Clauses as noticed above in the agreement as well as in the joint bidding agreement signed between the members of the Consortium and submitted to the Authority as part of the bid unequivocally indicates that as far as the Authority is concerned, it treats the Consortium as one entity and a single bidder. On being successful, it is at the discretion of the members of the Consortium to form a SPV, alternatively, the lead member would be entitled to sign the service agreement.

43. Admittedly, in the instant case M/s Pawanshree Foods International Pvt. Ltd. is the lead member of the Consortium who signed the agreement. The respondent-authority is not obliged to deal with the members of the Consortium separately nor such a situation is contemplated from the

meaningful reading of the bidding document along with the Appendix and annexure.

44. At this stage, this Court gainfully refers to a decision of the Delhi High Court in *ITD Cementation India Ltd. Vs. SSJV-Joint Venture and Others*; 2023 (2) SCC Online Delhi 1391 wherein the various facets of joint venture and the like such as a Consortium has been discussed in detail and it also strengthens the view taken by this Court. The relevant portion of the said decision read as under:-

“6. Dr George while explaining the concept of a joint venture firstly relied upon a judgment rendered by the Division Bench of the Gujarat High Court in Asia Foundations & Constructions Ltd.v.State of Gujara [Asia Foundations & Constructions Ltd.v.State of Gujarat,1985 SCC OnLine Guj 93] . While rendered in the context of a tendering process that was assailed, the said High Court described the essential attributes of a joint venture in the following terms—

47. The different Forms ‘A’ to ‘G’ which have been referred to in the facts narrated hereinabove containing requisite particulars to be furnished by the applicants seeking prequalification, inter alia, relate to joint venture also. The particulars which are to be furnished in Form ‘C’ relating to joint venture consist of: (1) name and address of joint venture; (2) name and address of all the partners of joint, venture; (3) the responsibility of the firm leading the joint venture and the responsibility of the other joint venture partners; (4) the name of bankers; and (5) the financial participation of each firm in the joint venture. Thus, it is clear that in case of a group of firms, the applicant has to give, more particulars which have been

set out above, namely, which firm will be responsible for applying for and submission of tender and for completion of the contract document, and also the responsibility of the lead firm as well as other member—firms is to be clearly stated. The effect of the conjoint reading of the memorandum of instructions and information as well as the forms in which the particulars were to be furnished clearly indicates that the authorities had visualised and envisaged the group of firms as well as the joint venture consortia as different entities which could seek pre-qualification. It appears from the particulars which are required to be furnished in Form 'C' that the authorities envisaged that there may be cases of joint venture consortia where one of the partner firms may have a leading role to play, and the responsibility of their joint venture partners may not be so leading and important. It is in respect of such cases that the particulars are to be furnished about the responsibility of the firm leading the joint venture, and the responsibility of the other partners thereof. The legal concept of the joint venture is very well recognised, and we do not think that the authorities in these High Powered Committees can be oblivious of this recognised legal concept. If they are, they have completely misdirected themselves. The common law did not recognise the relationship of co-adventures but with the passage of time, the judicial decisions recognised what is known as 'joint adventure' of two or more persons undertaking to combine, their property or labour in conduct of particular line of trade or a general business for joint profits. The courts do not treat a joint adventure as identical with a partnership though it is so similar in nature, and in the contractual relationship created by such adventurers that the rights as between them are

governed practically by the same rules that govern the partnership. This relationship has been defined to be a special combination of persons undertaking jointly some specific adventure for profit without any actual partnership. It is also described as a commercial or a maritime enterprise undertaking by several persons jointly; a limited partnership not limited in the statutory sense as to the liabilities of partners but as to its scope and duration. Generally speaking the distinction between a joint adventure and a partnership is that former relates to a single transaction 'though it may comprehend a business to be continued over several years' while the later relates to a joint business of a particular kind (see: 48 American Law Reports at p. 1055 under the caption 'what amounts to a joint adventure' at pp. 1056-57 and 1060). It is generally agreed that in order to constitute a joint venture, there must be community of interest and right to joint control. It is recognised on authority that each of the parties must have an equal voice in the matter of its performance and control over the agencies used therein, though one authority may entrust the performance, to another. There, is also an authority to the effect that a joint venture may exist although the parties have unequal control of operations. The rights, duties and liabilities of joint venturers are similar or analogous to those which govern the corresponding rights, duties and liabilities of the partners. As in the case of partners, joint venturers may be jointly and severally liable to third parties for the debts of the venture (see: American Jurisprudence, 2nd Edn., Vol. 46, para 12 at pp. 33-34 and para 57 to p. 76). Joint venture groups are internationally recognised in form of cooperation in the joint fulfilment of the construction contract obligations. Joint venture groups in the

construction, industry come about through agreements for combination of legally independent contractors for the joint rendering of construction services limited in both time and content. Typically they are restricted to a single project in which case the members of the group act jointly at both the tendering and award stages. Joint venture groups are generally unincorporated associations. The legal systems in general have not kept pace with the growing economic means of joint venture groups and there is no special legal form for this type of cooperation which has come to stay in construction industry. However, in Australia and Germany, joint venture groups as also unincorporated civil law partnerships are subjected to law of partnership. In United States also the law of partnership is applied to joint venture consortia. It is only in France that a special legal form has been created in this behalf. The joint venture groups have got, *inter alia*, the characteristics of joint organisation, joint action through cooperation of all members of all individual persons acting on the instructions of the members, and joint liability for rendition of services to third parties, and the relation between the partners *inter se* to be governed according to the joint venture group agreements. The economic importance of joint venture consortia on the one hand, and absence of specific legal provisions on the other has raised a host of problems of interpretation in individual cases since a wide variety of model contracts and preprinted contract forms are adopted to suit the needs and convenience of a particular construction project. These problems have direct effect on the partners *inter se* and indirect effect on the third parties, such as customers. If several construction enterprises tender jointly and have been jointly awarded the

construction contract, they are obliged to perform the contract jointly as joint venture group. One of the difficult problems which is likely to arise when a construction contract is about to be entered into since the customer when concluding the contract with a joint venture is dealing with all the members of the group, who are jointly committed to rendering the services. The contract has, therefore, to be concluded by an authorised representative of all the members of such a group *en-bloc* for the simple reason that joint venture groups are unincorporated associations. The services to be rendered by the group are to be allocated amongst the members of the same by internal agreement, and consequently the rights and duties of the members *inter se* are also regulated by the group agreement. These internal agreements are not effective *vis-à-vis* the third parties, and they operate amongst the members *inter se*. Thus, all the members are jointly and severally liable for performance of the construction work jointly undertaken irrespective of internal division of the work. If one member of the joint venture group does not fulfil his commitments, the others are under joint and several obligation to carry out such obligations *vis-à-vis* the customer. Such a situation may arise when a member of a joint venture group drops out prematurely because of the liquidation or insolvency. When a contract is concluded with a joint venture group all members are made jointly and severally liable even if only one is capable of rendering the service in question. The joint and several liabilities of the members of a joint venture group may cover the marginal areas of the contract performance such as late performance, faults, deficiency of goods and services, etc. It is, therefore, very necessary while entering into such contracts with joint venture group that the

construction contracts are carefully drafted, and the members of such group must also enter into detailed agreements amongst themselves, (see: Article on Joint Venture Groups — Effects of Construction Contract: Dr Manfred Straube, Professor of Commercial Law, Technical University, Vienna in 'International Business Lawyer', March 1985, a monthly published by a section of Business Law of International Bar Association, London). 48. In India, a person can become a partner with another person in a particular adventure or undertaking (see: Section 8 of the Partnership Act, 1932). This is described as a particular partnership also since it is confined to a particular adventure or undertaking, or it may be one limited even to a particular advantage or undertaking or an isolated transaction in course of trade or business. However, the three elements of partnership, namely, agreement, business and mutual agency must exist as a matter of course. The only difference between such partnership in nature of joint venture and an ordinary partnership is that in joint venture partners incur no responsibility beyond the limits of the particular adventure or business or undertaking and the rights and obligations are, therefore, less extensive than those of partners in ordinary partnership (see: *Karmali Abdulla Allarakhia v. Vora Karimji Jiwanji* [*Karmali Abdulla Allarakhia v. Vora Karimji Jiwanji*, 1914 SCC OnLine PC 75 : ILR (1915) 39 Bom 261 : AIR 1914 PC 132]).”

7. The views as expressed in *Asia Foundations* were reiterated again by the Gujarat High Court in *Continental Construction Ltd. v. State of Gujarat* [*Continental Construction Ltd. v. State of Gujarat*, 1986 SCC OnLine Guj 16] as would be evident from the following

observations as appearing in para 14 of the report:

“14. It should not be lost sight of that internal agreements between the members of a joint venture group are not generally effective vis-à-vis the third parties, and they merely constitute the basis for mutual services and entitlements within the joint venture group. The members of joint venture are jointly and severally liable for performance of the construction work jointly undertaken irrespective of the internal division of work. If a member of a joint venture group does not fulfil his commitments, the other members thereof are under obligation to provide the missing services to the customer. If the customer enters into a contract with a joint venture group, it increases the liability of the members of the joint venture for due performance of the construction work. As noted above, when a contract is concluded with a joint venture group, all members are made jointly and severally liable, even if only one is capable of rendering the services in question. The justification for such liability is the possibility of bringing pressure to bear on a member of the group in order to induce him to render his share of the services or, if necessary, to arrange for a substitute. Of course, members of a joint venture group who do not fulfil their commitments remain liable to co-share to indemnify their co-venturers (see: Articles on Joint Venture Groups). The joint and several liability of co-venturers is not only for the execution of the works but also in respect of any claims for damages by the customer and in respect of all joint financial commitments to suppliers, planners and architects and also in respect of fees, dues, penalties or other payments to public authorities. In any case the internal agreements regarding liability have no force vis-à-vis third parties.”

8. Dr George also drew the attention of the court to the decision of the Supreme Court in *New Horizons Ltd. v. Union of India* [*New Horizons Ltd. v. Union of India*, (1995) 1 SCC 478] which explained the concept of a joint venture in the following terms: (SCC pp. 493-495, paras 24 to 26)

“24. The expression ‘joint venture.’ is more frequently used in the United States. It connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. It requires a community of interest in the performance of the subject-matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share both in profit and losses. (Black's Law Dictionary, 6th edn., p. 839). According to Words and Phrases, Permanent edn., a joint venture is an association of two or more persons to carry out a single business enterprise for profit (p. 117, Vol. 23). A joint venture can take the form of a corporation wherein two or more persons or companies may join together. A joint venture corporation has been defined as a corporation which has joined with other individuals or corporations within the corporate framework in some specific undertaking commonly found in oil, chemicals, electronic, atomic fields. (Black's Law Dictionary, 6th edn., p. 342.) Joint venture companies are now being increasingly formed in relation to projects requiring inflow of foreign capital or technical expertise in the fast developing countries in East Asia viz. Japan, South Korea, Taiwan, China, etc. [see Jacques Buhart: *Joint Ventures in East Asia — Legal Issues*

(1991).] There has been similar growth of joint ventures in our country wherein foreign companies join with Indian counterparts and contribute towards capital and technical knowhow for the success of the venture. The High Court has taken note of this connotation of the expression ‘joint venture’. But the High Court has held that NHL is not a joint venture and that there is only a certain amount of equity participation by a foreign company in it. We are unable to agree with the said view of the High Court.

25. As noticed earlier, in its tender NHL had stated that it is a joint venture company established by TPI, LMI and WML and IIPL wherein TPI, LMI and WML and other companies in the same group as well as Mr Aroon Purie own 60% shares and IIPL owns 40% shares. It was also stated that the joint venture has received approval of the Government of India and is currently in operation and that the promoter will increase their capital/contribution to commensurate with the project need and that the company has been established as an information and database management company with expertise in database processing, publishing, sales/marketing and the dissemination of related information. In the tender it is also stated that as a joint venture in the true sense of the phrase, the company will have access to expertise in database management, sales and publishing of its parent group companies. It would thus appear that the Indian group of companies (TPI, LMI and WML) and the Singapore-based company (IIPL) have pooled together their resources in the sense that TPI, LMI and WML have made available their equipment and organisation at various places in the country while IIPL has made available its wide experience in the field as well as the expertise of its

managerial staff. All the constituents of NHL have thus contributed to the resources of the Company (NHL). This shows that NHL is an association of companies jointly undertaking a commercial enterprise wherein they will all contribute assets and will share risks and have a community of interest. We are, therefore, of the view that NHL has been constituted as a joint venture by the group of Indian companies and I IPL, the Singapore-based company and it would not be correct to say that I IPL which has a substantial stake in the success of the venture, having 40% of shareholding, is a mere shareholder in NHL.

26. Once it is held that NHL is a joint venture, as claimed by it in the tender, the experience of its various constituents, namely, TPI, LMI and WML as well as I IPL had to be taken into consideration if the Tender Evaluation Committee had adopted the approach of a prudent businessman.”

9. A more detailed exposition on the concept of a joint venture is found in corpus juris secundum, which defines the nature of such enterprises in the following terms:

“A. Definition and Nature of Joint Ventures

Research References

A.L.R. Library

A.L.R. Index, Joint Ventures

West's A.L.R. Digest, Joint Ventures — 1, 1.1, 1.13

§ 1 Generally

Research References

West's Key Number Digest, Joint Ventures — 1, 1.1, 1.13

A joint venture is a legal relation created by the American courts and is generally described as an association of two or more persons to carry on a single business enterprise for profit.

‘Joint venture’ a term used interchangeably and synonymous with ‘joint adventure’ or coventure, has been defined as a special combination of two or more persons wherein some specific venture for profit is jointly sought without any actual partnership or corporate designation. It features an association of two or more persons to carry out a single business enterprise for profit or a special combination of persons undertaking jointly some specific adventure for profit, for which purpose they combine their property, money, effects, skill, and knowledge.

A joint venture or enterprise has also been defined as being in the nature of a partnership and existing when two or more persons contribute cash, labor, or property to a common fund with the intention of entering into some business or transaction for the purpose of making a profit to be shared in proportion to the respective contributions. Under yet another definition, a joint venture is created when parties contribute money, property, knowledge, skill, or other assets to a common undertaking; the parties have a joint property interest in the subject-matter of the venture and a right of mutual control over management; the parties have expectations of profits or presence of venture; the parties are given the right to participate in profits; and the objective of the parties is limited to a single undertaking. In fact, no exact definition can be given of a joint venture, and the decisions have not established any fixed or certain boundaries to the legal concept of joint venture. Rather, the answer in each case depends largely upon the intent of the alleged parties as manifested from the facts and circumstances involved in each particular case, the terms of the agreement, the acts of the parties, the nature of the undertaking, and other facts.

Among the acts or conduct which are indicative of a joint venture, no single one of which is controlling in determining whether a joint venture exists, are: (1) joint ownership and control of property; (2) sharing of expenses, profits and losses, and having and exercising some voice in determining division of net earnings; (3) community of control over, and active participation in, management and direction of business enterprise; (4) intention of parties, express or implied; and (5) fixing of salaries by joint agreement.

A joint venture or joint adventure is not based on any statute and is purely a creature of American courts.

Participants.

The participants in a joint venture or adventure are coventurers, co-adventurers, or, more commonly, joint adventures.

§ 2 Joint enterprise

Research references

West's Key Number Digest, Joint Adventures —1, 1.1, 1.13

The term 'joint enterprise' may be used interchangeably with joint venture although a distinction often is made in that joint ventures apply to business ventures while joint enterprises do not.

A joint enterprise has been defined as an informal association of two or more persons, partaking of the nature of a partnership, usually, but not always, limited to a single transaction in which the participants combine their money, efforts, skill, and knowledge for gain, with each sharing in the expenses and profits or losses. 'Joint enterprise' is not a status created by law but is a contractual relationship of mutual agency employed to represent unity between persons in pursuit of common purpose as the result of which negligence of one member of the unity may be imputed to another. A joint enterprise is

created when the following factors are established: (1) an agreement, express or implied, among members of a group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose among the members; and (4) an equal right to a voice in the enterprise's direction, which gives an equal right of control.

The term 'joint enterprise' is often used interchangeably with 'joint venture' and it has been stated that when the term 'joint enterprise' is used to describe a business or commercial undertaking, no significant differences between the terms may be drawn. The terms are often distinguished, however, in that a joint venture, unlike a joint enterprise, necessarily involves the factor of a common commercial purpose. Stated another way, the basic difference between a joint venture and a joint enterprise is that a business relationship is needed for a joint venture but not for a joint enterprise; that is, there is no business motive underlying the parties' efforts in a joint enterprise. Further, although it has been said that the elements of joint ventures and joint enterprises are essentially the same, with the distinction that joint ventures apply to business ventures while joint enterprises do not, there is authority indicating that another distinction between a joint enterprise and a joint venture is that the latter requires an express or implied agreement to share profits, as well as an express or implied contract demonstrating the existence of the joint relationship.

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..13. As would be manifest from the aforesaid principles which stand enunciated, a joint venture may be recognised as a quasi partnership where two or more entities jointly undertake a

particular transaction or contract for mutual profit. It essentially represents a concept where two or more persons jointly take on the obligation to implement a contract or undertake an enterprise for gain and profit. While not strictly understood in law to be a legal person, a joint venture by virtue of entering into a contract binds itself to the various obligations that stands placed thereunder and to exercise all rights conferred therein. It could also be a consortium where either two or more persons or companies come together to discharge obligations.

14. Undisputedly, the contract in the present case was executed by the joint venture itself acting for and on behalf of all its constituents. It was an enterprise in which Respondents 2 and 3 came together and agreed to share profits from the venture. Insofar as the enforcement petitioner is concerned, it is clearly entitled in law to proceed against the respondents jointly and severally. The court further holds that the enforcement petitioner was neither obliged nor placed under a duty to array the individual members of the joint venture as party respondents. As long as the joint venture itself was before the Arbitral Tribunal, the same was clearly sufficient for the purposes of adjudication of claims that came to be laid by the petitioner. The individual members of a joint venture cannot seek the trial of such disputes based upon their own agreed upon or perceived individual responsibilities and obligations. Those would clearly not bind third parties. When a contract is executed in favour of the joint venture, the person awarding the same is clearly entitled to proceed on the basis that each of the members of the consortium shall be jointly and severally liable. This subject of course to any contract or agreement to the contrary. In any case, a constituent of the

joint venture cannot escape from the liability which stands raised or arises from that venture. It would remain, as noted above, jointly and severally liable.”

45. Another significant feature that this Court notices is the fact that by means of order dated 16.11.2021 and 06.12.2021, the Court had initially appointed Hon'ble Mr. Justice Brijesh Kumar Srivastava-II (ret'd.) as a member of the Arbitral Tribunal for the Authority. Thereafter, the two appointed Arbitrators (one nominated by the petitioner and the other appointed by the Court for the respondent) had appointed a Presiding Arbitrator and the proceedings commenced before the Arbitral Tribunal. During the proceedings, at the behest of the lead member of the Consortium, a review-application bearing No. 120 of 2022 was filed before the Court which was allowed by the Court on 13.12.2022 and the said order has already been reproduced hereinabove.

46. Despite the fact that the petitioner who has all through been aware of the fact that once the Arbitrator was appointed by this Court, and a review-application came to be filed at the behest of the lead member and even before the Arbitral Tribunal, the other two members of the Consortium had made separate applications seeking their impleadment and the application of M/s Pawanshree Foods International Pvt. Ltd. was allowed (the said order passed by the Tribunal has already been brought on record by the petitioner), however, there has been no explanation given by Mr. Moitra, learned counsel as to why the other consortium members were not impleaded as a party in the instant arbitration petition.

47. It is one thing to say that any one member of the Consortium is entitled to

invoke the arbitration but at the same time it does not mean that the other members of the Consortium are to be excluded altogether and even though the Consortium members may be at variance with each other but they ought to be impleaded as a party more so when the allegations in the petition are against the lead member and an arbitration proceedings are sought to be commenced between the Consortium on one hand and the Authority on the other and that too without notice to the other Consortium members as they have not been impleaded as a party in the petition and after the decision in the review-application, they are neither represented nor impleaded.

48. For the very same reason, the earlier order passed by this Court dated 06.12.2021 was recalled by means of order dated 13.12.2022 and yet the petitioner did not take any corrective measures to rectify this patent defect in its petition. Even certain letters have been brought on record with the supplementary affidavit dated 23rd August, 2023 written by M/s Nanotrics Innovations Pvt. Ltd. to indicate that they were also having grievances with the lead member and had sought the invocation of the conciliatory process but even then no effort was made by the petitioner to implead M/s Nanotrics, who is also a member of the Consortium, as a party to the instant petition.

49. It is in the aforesaid circumstances, this Court finds that apparently, the petition suffers from the vice of non-joinder of necessary parties.

50. In light of the discussions made in the factual backdrop of the instant case, this Court finds, that the reliance placed by the learned counsel for the petitioner on the decision of Telangana High Court in

Tecpro System Pvt. Ltd. (supra) has no applicability to the instant case. The issue before the Telangana High Court was whether a member of a Consortium can invoke the arbitration clause. This was answered by the Telangana High Court on the basis of the decision of the Apex Court in *Chloro Controls India Pvt. Ltd. Vs. Severn Trent Water Purification Inc. and others; (2013) 1 SCC 641* where the issue was in respect of binding a non-signatory to an Arbitration and the effect of the arbitral award on such non-signatory. The facts at hand are clearly quite different as in terms of the agreement, there is a clear demarcation of the Authority as one party and the Consortium as the other. The disputes which are referable is in context with the dispute between the Consortium on one hand as a part and the Authority on the other as a party and not merely an inter-se dispute between the Consortium members.

51. If the intent of the Arbitration Clause was to refer every disputes inter-se the Consortium members then it would have been worded differently. As per the Arbitration Clause one Arbitrator is to be appointed by each party that is to say one by the Authority and the other by the Consortium. Any other meaning, if ascribed, to the said Clause would do violence to the language of the clauses as elucidated in the terms of the contract and the bidding document, which binds the parties.

52. The intent of the Arbitration Clause would stand frustrated if each member is allowed to raise its grievance inter-se. In such a case, then each member of the Consortium would have a right to appoint its own Arbitrator and then three Arbitrators would be appointed in a given

situation on behalf of each member of Consortium and one by the Authority and these four Arbitrators would then go on to appoint a Presiding Arbitrator that would make the numbers of Arbitrators constituting the Tribunal as five which is not envisaged in the agreement and in law the Court cannot by relying on implications, re-write the terms of the contract.

53. There is another way to look at this situation and to illustrate the fallacy it will be seen that, in case, as per the Section 10 of Arbitration of Conciliation Act, 1996, the number of Arbitrators cannot be in even number and in case of a Tribunal of more than two members the award of the majority Arbitrators is to prevail. Then in a case of a dispute where each of the Consortium member (as 3 in the instant case) appoint its 3 separate Arbitrators and the Authority appoints its own nominee Arbitrator and the four nominated Arbitrators appoint the fifth as Presiding Arbitrator, it would give rise to an unequal constitution, inasmuch as, all the three Arbitrators appointed by the Consortium members would be in a position to always prevail, being the majority. The Authority who would have has nominated its one Arbitrator and even if the Presiding Arbitrator rules with the Arbitrator nominated by the Authority, still the award would be 3:2 and this is definitely not the intent as borne out from the agreement.

54. Thus, for the aforesaid reasons, the Court is not inclined to accept the submissions made by Mr. Moitra that each member would be entitled to invoke the arbitration Clause separately in exclusion to the other members of the Consortium.

55. There is another fallacy that even assuming that each of the aggrieved member of the Consortium has a separate

right of nominating an arbitrator in exclusion to the other members of the same Consortium then the situation would arise that there would be multiple arbitrations, inasmuch as, each member may raises his certain grievances with the department, therefore the department would be contesting separate arbitrations in respect of the disputes raised by the Consortium members separately which would result in absurd results and for the said reason too, this Court is unable to subscribe to the view as suggested by the learned counsel for the petitioner. This Court is of the clear view that the contention set forth by Mr. Moitra is not what is envisaged in the agreement and therefore the same are turned down by this Court.

56. In so far as the submission regarding the jurisdiction of this Court is concerned for which Mr. Moitra, had relied upon the decision of the Apex court in *Nortail India Pvt. Ltd. (Supra)*, suffice to state that the issue before the Apex Court in the said decision was regarding the period of limitation for filing an application under Section 11 of the Arbitration and Conciliation Act, 1996 and whether the Court can refuse to make a reference under Section 11 of the Act of 1996 where the claims are ex-facie time barred.

57. It is in this context that in paragraph 37 and 37.1, the Apex Court held that Section 11 (6-B) has not been amended by the 2019 Act and Sub Section 11 (6-B) which provides that the designation of any person or institution by the Court shall not be regarded as delegation of judicial power, consequently, it would not be open for the person or institution designated by the Court to exercise any judicial power and adjudicate on any dispute issued relating to the validity of the agreement or the arbitrability of the dispute.

58. This issue has no applicability in the instant case. Apparently, neither there is any dispute regarding the validity of the agreement or the existence of the dispute or the arbitration clause. Rather the core issue is whether a single member of the Consortium can file a petition without impleading the other members and raise disputes which prima facie are inter-se the Consortium members and roping in the Authority with whom the agreement has been entered into and for the reasons which has been already recorded by this Court in the previous paragraphs, this Court finds that the decision in *Nortail India Pvt. Ltd. (supra)* does not help or come to the aid of the petitioner.

59. Even the decisions of *Zoom Developers (supra)*, though, relates to the rights and liabilities of the Consortium members but is in a different context altogether as would be seen that before the Apex Court in *Zoom Developers (supra)*, the issue was whether the decision of the Bid Evaluation Committee in rejecting the bid proposal made by a Consortium as non-admissible since there was a change in the compositions of members of the Consortium which is not the issue at hand. Thus, on account of different factual matrix before the Apex Court than the issue involved in the instant case, the said decision also does not salvage the situation for the petitioner.

60. Importantly, it will be pertinent to notice the Constitution Bench decision of the Apex Court in *Vidya Drolia and Others Vs. Durga Tradi Corporation; 2021 (2) SCC 1* wherein the Apex Court has considered the issue regarding the scope and issues which are to be considered by the Referral Court under Section 11 of the Arbitration and Conciliation Act, 1996 and

the relevant paragraphs no. 96, 97, 98, 99, 100, 101, 138, 139, 140, 143, 144 and 145 are being reproduced hereinafter for ease of reference:-

“96. In *National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.* [*National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.*, (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] , a two-Judge Bench of this Court, elucidating on *Patel Engg. Ltd. [SBP & Co. v. Patel Engg. Ltd.*, (2005) 8 SCC 618] , had identified and segregated the issues that arise for consideration in an application under Section 11 of the Arbitration Act into three categories viz. (i) issues which the Chief Justice or his designate is bound to decide; (ii) issues which he can also decide, that is, issues which he may choose to decide or leave it to the Arbitral Tribunal to decide; and (iii) issues which should be left to the Arbitral Tribunal to decide, and thereafter had enumerated them as under : (*Boghara Polyfab case [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.*, (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] , SCC pp. 283-84, paras 22-24)

“22.1. The issues (first category) which the Chief Justice/his designate will have to decide are:

(a) Whether the party making the application has approached the appropriate High Court.

(b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement.

22.2. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:

(a) Whether the claim is a dead (long-barred) claim or a live claim.

(b) *Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection.*

22.3. *The issues (third category) which the Chief Justice/his designate should leave exclusively to the Arbitral Tribunal are:*

(i) *Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration).*

(ii) *Merits or any claim involved in the arbitration.*

23. *It is clear from the scheme of the Act as explained by this Court in SBP & Co. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618], that in regard to issues falling under the second category, if raised in any application under Section 11 of the Act, the Chief Justice/his designate may decide them, if necessary, by taking evidence. Alternatively, he may leave those issues open with a direction to the Arbitral Tribunal to decide the same. If the Chief Justice or his designate chooses to examine the issue and decides it, the Arbitral Tribunal cannot re-examine the same issue. The Chief Justice/his designate will, in choosing whether he will decide such issue or leave it to the Arbitral Tribunal, be guided by the object of the Act (that is expediting the arbitration process with minimum judicial intervention). Where allegations of forgery/fabrication are made in regard to the document recording discharge of contract by full and final settlement, it would be appropriate if the Chief Justice/his designate decides the issue.*

24. *What is however clear is when a respondent contends that the dispute is not arbitrable on account of*

discharge of the contract under a settlement agreement or discharge voucher or no-claim certificate, and the claimant contends that it was obtained by fraud, coercion or undue influence, the issue will have to be decided either by the Chief Justice/his designate in the proceedings under Section 11 of the Act or by the Arbitral Tribunal as directed by the order under Section 11 of the Act. A claim for arbitration cannot be rejected merely or solely on the ground that a settlement agreement or discharge voucher had been executed by the claimant, if its validity is disputed by the claimant."

97. *The issues included in the first category were : whether the party making the application had approached the appropriate High Court, that is, the jurisdictional High Court; whether there is an arbitration agreement and whether the person who had applied under Section 11 is a party to such agreement. This would include the question whether the defendant or the opposite party is a party to the arbitration agreement or bound by the arbitration agreement in terms of Section 7 of the Arbitration Act. With respect to the second category, the Court observed that the Chief Justice or his designate may decide the issue, if necessary, by taking evidence or in the alternative may leave the issues open with the direction to the Arbitral Tribunal to decide the same. Where the Chief Justice or his designate examines the issue and decides it, the Arbitral Tribunal cannot re-examine the issue. The Chief Justice or his designate would exercise this choice being guided by the object of the Arbitration Act, that is, expediting the arbitration process with minimum judicial intervention. Where dispute arises on account of settlement agreement, discharge voucher, no-claim certificate amounting to discharge or*

accord and satisfaction, and the other side contends that such certificates were obtained by fraud, coercion or undue influence, the issue will have to be decided either by the Chief Justice or his designate in proceedings under Section 11 or by the Arbitral Tribunal as directed by the order under Section 11 of the Act. A claim for arbitration cannot be rejected merely or solely on the ground that the settlement agreement or discharge voucher had been executed if its validity is disputed. The third category would cover all other questions within the arbitration clause, which the court believed are within the exclusive jurisdiction of the Arbitral Tribunal at the first stage. This was explained by giving an example of a matter purportedly reserved for the final determination of the departmental authority or excepted or excluded matters. It would also include merits of any claim involved in arbitration.

98. Para 22 of *Boghara Polyfab (P) Ltd. [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117]*, if read carefully, states that the factors to be considered while deciding an application under Sections 8 and 11 of the Arbitration Act would require an examination of whether there exists an arbitration agreement, that is, the agreement provides for arbitration proceedings in respect of disputes which have arisen between the parties to the agreement. The latter portion requires the court to apply its mind whether the disputes which have arisen can be settled by the arbitration agreement. The aforesaid observations, in our opinion, would be in conformity with the majority decision of the Constitution Bench in *Patel Engg. Ltd. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618]* wherein it was observed that Sections 8 and 11 of the Arbitration Act are complementary in nature and the

Court, while exercising powers under the two sections on whether the matter should be referred to arbitration, enjoys equal powers, otherwise, it would lead to an anomalous situation in that a judicial authority has wider power under Section 8 but lesser power of examination under Section 11.

99. In *Arasmeta Captive Power Co. (P) Ltd. v. Lafarge (India) (P) Ltd. [Arasmeta Captive Power Co. (P) Ltd. v. Lafarge (India) (P) Ltd., (2013) 15 SCC 414 : (2014) 5 SCC (Civ) 302]*, this Court had examined whether there is any conflict between *Patel Engg. Ltd. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618]* and *Boghara Polyfab (P) Ltd. [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117]* on the question of the scope of inquiry while deciding an application under Section 11(6) of the Arbitration Act. The Division Bench in *Arasmeta Captive Power Co. (P) Ltd. [Arasmeta Captive Power Co. (P) Ltd. v. Lafarge (India) (P) Ltd., (2013) 15 SCC 414 : (2014) 5 SCC (Civ) 302]* had referred to para 39 and sub-para (iv) of para 47 in *Patel Engg. Ltd. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618]*, to observe : *[Arasmeta Captive Power Co. (P) Ltd. case [Arasmeta Captive Power Co. (P) Ltd. v. Lafarge (India) (P) Ltd., (2013) 15 SCC 414 : (2014) 5 SCC (Civ) 302], SCC pp. 423-24, para 18]*

“18. On a careful reading of para 39 and Conclusion (iv), as set out in para 47 of SBP case *[SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618]*, it is limpid that for the purpose of setting into motion the arbitral procedure the Chief Justice or his designate is required to decide the issues, namely, (i) territorial jurisdiction, (ii) existence of an arbitration agreement between the parties, (iii) existence or otherwise of a live claim, and (iv) existence

of the conditions for exercise of power and further satisfaction as regards the qualification of the arbitrator. That apart, under certain circumstances the Chief Justice or his designate is also required to see whether a long-barred claim is sought to be restricted and whether the parties had concluded the transaction by recording satisfaction of the mutual rights and obligations or by receiving the final payment without objection.”

100. Thereafter, reference was made to the opinion expressed in judgment in *Shree Ram Mills Ltd. v. Utility Premises (P) Ltd.* [*Shree Ram Mills Ltd. v. Utility Premises (P) Ltd.*, (2007) 4 SCC 599] , which it was contended had taken a different view from one in *Boghara Polyfab (P) Ltd.* [*National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.*, (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] Disagreeing, the Court referred to the three-Judge Bench decision in *Chloro Controls (India) (P) Ltd.* [*Chloro Controls (India) (P) Ltd. v. Severn Trent Water Purification Inc.*, (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] which had considered the issue whether there was any variance between *Shree Ram Mills Ltd.* [*Shree Ram Mills Ltd. v. Utility Premises (P) Ltd.*, (2007) 4 SCC 599] and *Boghara Polyfab (P) Ltd.* [*National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd.*, (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] , to hold that there was none and both the judgments are capable of being read in harmony to bring in line with the law declared in *Patel Engg. Ltd.* [*SBP & Co. v. Patel Engg. Ltd.*, (2005) 8 SCC 618] In particular, a reference was made to the following portion of the para 27 of *Shree Ram Mills Ltd.* [*Shree Ram Mills Ltd. v. Utility Premises (P) Ltd.*, (2007) 4 SCC 599] and para 119 of *Chloro Controls (India) (P) Ltd.* [*Chloro Controls (India)*

(P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689] which read as under : [*Arasmeta Captive Power Co. (P) Ltd. case [Arasmeta Captive Power Co. (P) Ltd. v. Lafarge (India) (P) Ltd.*, (2013) 15 SCC 414 : (2014) 5 SCC (Civ) 302] , SCC pp. 426-27, paras 24-25]

“24. ... ‘27. ... If the Chief Justice does not, in the strict sense, decide the issue, in that event it is for him to locate such issue and record his satisfaction that such issue exists between the parties. It is only in that sense that the finding on a live issue is given. Even at the cost of repetition we must state that it is only for the purpose of finding out whether the arbitral procedure has to be started that the Chief Justice has to record satisfaction that there remains a live issue in between the parties. The same thing is about the limitation which is always a mixed question of law and fact. The Chief Justice only has to record his satisfaction that prima facie the issue has not become dead by the lapse of time or that any party to the agreement has not slept over its rights beyond the time permitted by law to agitate those issues covered by the agreement. It is for this reason that it was pointed out in the above paragraph that it would be appropriate sometimes to leave the question regarding the live claim to be decided by the Arbitral Tribunal. All that he has to do is to record his satisfaction that the parties have not closed their rights and the matter has not been barred by limitation. Thus, where the Chief Justice comes to a finding that there exists a live issue, then naturally this finding would include a finding that the respective claims of the parties have not become barred by limitation.’ (*Shree Ram Mills Ltd. case [Shree Ram Mills Ltd. v. Utility Premises (P) Ltd.*, (2007) 4 SCC 599] , SCC p. 608, para 27)

25. ... '119. ... Thus, the Bench while explaining the judgment of this Court in *SBP [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618]* has stated that the Chief Justice may not decide certain issues finally and upon recording satisfaction that prima facie the issue has not become dead even leave it for the Arbitral Tribunal to decide.' [*Chloro Controls (India) (P) Ltd. case [Chloro Controls (India) (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689], SCC p. 700, para 119]*"

101. In *Arasmeta Captive Power Co. (P) Ltd. [Arasmeta Captive Power Co. (P) Ltd. v. Lafarge (India) (P) Ltd., (2013) 15 SCC 414 : (2014) 5 SCC (Civ) 302]*, elucidating on the question whether the dispute was arbitrable within the scope of the arbitration clause should be decided by the Chief Justice/designate Judge or by the arbitrator, this Court has observed : (SCC pp. 432-33, para 40)

"40. ... The stress laid thereon may be innovative but when the learned Judges themselves have culled out the ratio decidendi in para 39, it is extremely difficult to state that the principle stated in *SBP [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618]* requires the Chief Justice or his designate to decide the controversy when raised pertaining to arbitrability of the disputes. Or to express an opinion on excepted matters. Such an inference by syllogistic process is likely to usher in catastrophe in jurisprudence developed in this field. We are disposed to think so as it is not apposite to pick up a line from here and there from the judgment or to choose one observation from here or there for raising it to the status of "the ratio decidendi". That is most likely to pave one on the path of danger and it is to be scrupulously avoided. The propositions set out in *SBP [SBP & Co. v. Patel Engg.*

Ltd., (2005) 8 SCC 618], in our opinion, have been correctly understood by the two-Judge Bench in *Boghara Polyfab (P) Ltd. [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117]* and the same have been appositely approved by the three-Judge Bench in *Chloro Controls (India) (P) Ltd. [Chloro Controls (India) (P) Ltd. v. Severn Trent Water Purification Inc., (2013) 1 SCC 641 : (2013) 1 SCC (Civ) 689]* and we respectfully concur with the same. We find no substance in the submission that the said decisions require reconsideration, for certain observations made in *SBP [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618]*, were not noticed. We may hasten to add that the three-Judge Bench has been satisfied that the ratio decidendi of the judgment in *SBP [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618]* is really inherited in para 39 of the judgment."

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.....138. In the Indian context, we would respectfully adopt the three categories in *Boghara Polyfab (P) Ltd. [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117]* The first category of issues, namely, whether the party has approached the appropriate High Court, whether there is an arbitration agreement and whether the party who has applied for reference is party to such agreement would be subject to more thorough examination in comparison to the second and third categories/issues which are presumptively, save in exceptional cases, for the arbitrator to decide. In the first category, we would add and include the question or issue relating to whether the cause of action relates to action in personam or rem; whether the subject-matter of the dispute

affects third-party rights, have erga omnes effect, requires centralised adjudication; whether the subject-matter relates to inalienable sovereign and public interest functions of the State; and whether the subject-matter of dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s). Such questions arise rarely and, when they arise, are on most occasions questions of law. On the other hand, issues relating to contract formation, existence, validity and non-arbitrability would be connected and intertwined with the issues underlying the merits of the respective disputes/claims. They would be factual and disputed and for the Arbitral Tribunal to decide. [Ed. : The Boghara categories are set out in para 96, at pp. 86-87, hereinabove. Given that Boghara case was decided before the 2015 Amendment, it is worthwhile juxtaposing the observations of Ramana, J. in his supplementing opinion hereinbelow, on this issue in paras 225.1, 225.2 and 227: "Post the 2015 Amendment, judicial interference at the reference stage has been substantially curtailed... post the 2015 Amendment, the structure of the Act was changed to bring it in tune with the pro-arbitration approach. Under the amended provision, the court can only give prima facie opinion on the existence of a valid arbitration agreement." This would only appear to emphasise the limited and restricted nature of review by the court at the referral stage even while having resort to the Boghara categories, which must be read in light of the observations made in para 138, modifying and limiting them in light of the 2015 Amendment and the fourfold test of non-arbitrability postulated herein.

139. We would not like to be too prescriptive, albeit observe that the court may for legitimate reasons, to prevent

wastage of public and private resources, can exercise judicial discretion to conduct an intense yet summary prima facie review while remaining conscious that it is to assist the arbitration procedure and not usurp jurisdiction of the Arbitral Tribunal. Undertaking a detailed full review or a long-drawn review at the referral stage would obstruct and cause delay undermining the integrity and efficacy of arbitration as a dispute resolution mechanism. Conversely, if the court becomes too reluctant to intervene, it may undermine effectiveness of both the arbitration and the court. There are certain cases where the prima facie examination may require a deeper consideration. The court's challenge is to find the right amount of and the context when it would examine the prima facie case or exercise restraint. The legal order needs a right balance between avoiding arbitration obstructing tactics at referral stage and protecting parties from being forced to arbitrate when the matter is clearly non-arbitrable. [Ozlem Susler, "The English Approach to Competence-Competence" *Pepperdine Dispute Resolution Law Journal*, 2013, Vol. 13.]

140. Accordingly, when it appears that prima facie review would be inconclusive, or on consideration inadequate as it requires detailed examination, the matter should be left for final determination by the Arbitral Tribunal selected by the parties by consent. The underlying rationale being not to delay or defer and to discourage parties from using referral proceeding as a ruse to delay and obstruct. In such cases a full review by the courts at this stage would encroach on the jurisdiction of the Arbitral Tribunal and violate the legislative scheme allocating jurisdiction between the courts and the Arbitral Tribunal. Centralisation of

litigation with the Arbitral Tribunal as the primary and first adjudicator is beneficent as it helps in quicker and efficient resolution of disputes.

.....143. *We would now examine Section 11 of the Arbitration Act. As noticed above sub-section (6-A) was inserted by Act 3 of 2016 with retrospective effect from 23-10-2015 and omitted by Act 33 of 2019. Section 11(6) requires the court to appoint an arbitrator on an application made by a party. Section (6-A) to Section 11 stipulates that the court shall, at the stage of appointment under sub-sections (4), (5) or (6), confine itself to the examination of the existence of an arbitration agreement. Sub-section (6-A) was omitted by Act 33 of 2019, but the omission is in view of the introduction of a new regime of institutionalised arbitration as per the report of the committee headed by Justice B.N. Srikrishna, dated 30-7-2017 which records for the reason of recommending the omission as:*

“Thus, it can be seen that after the Amendment Act of 2019, Section 11(6-A) has been omitted because appointment of arbitrators is to be done institutionally, in which case the Supreme Court or the High Court under the old statutory regime are no longer required to appoint arbitrators and consequently to determine whether an arbitration agreement exists.”

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144. *As observed earlier, Patel Engg. Ltd. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] explains and holds that Sections 8 and 11 are complementary in nature as both relate to reference to arbitration. Section 8 applies when judicial proceeding is pending and an application is filed for stay of judicial proceeding and for reference to arbitration. Amendments to Section 8 vide Act 3 of 2016 have not been*

omitted. Section 11 covers the situation where the parties approach a court for appointment of an arbitrator. Mayavati Trading (P) Ltd. [Mayavati Trading (P) Ltd. v. Pradyut Deb Burman, (2019) 8 SCC 714 : (2019) 4 SCC (Civ) 441], in our humble opinion, rightly holds that Patel Engg. Ltd. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] has been legislatively overruled and hence would not apply even post omission of sub-section (6-A) to Section 11 of the Arbitration Act. Mayavati Trading (P) Ltd. [Mayavati Trading (P) Ltd. v. Pradyut Deb Burman, (2019) 8 SCC 714 : (2019) 4 SCC (Civ) 441] has elaborated upon the object and purposes and history of the amendment to Section 11, with reference to sub-section (6-A) to elucidate that the section, as originally enacted, was facsimile with Article 11 of the Uncitral Model of law of arbitration on which the Arbitration Act was drafted and enacted. Referring to the legislative scheme of Section 11, different interpretations, and the Law Commission's Reports, it has been held that the omitted sub-section (6-A) of Section 11 of the Arbitration Act would continue to apply and guide the courts on its scope of jurisdiction at stage one, that is, the pre-arbitration stage.

145. *Omission of sub-section (6-A) by Act 33 of 2019 was with the specific object and purpose and is relatable to by substitution of sub-sections (12), (13) and (14) of Section 11 of the Arbitration Act by Act 33 of 2019, which, vide sub-section (3-A) stipulates that the High Court and this Court shall have the power to designate the arbitral institutions which have been so graded by the Council under Section 43-I, provided where a graded arbitral institution is not available, the High Court concerned shall maintain a panel of arbitrators for discharging the function and thereupon the High Court shall perform the*

duty of an arbitral institution for reference to the Arbitral Tribunal. Therefore, it would be wrong to accept that post omission of sub-section (6-A) of Section 11 the ratio in Patel Engg. Ltd. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] would become applicable.”

E:- Conclusions:-

61. For the detailed discussions, this Court finds that the issue for the Referral Court, at least is to see whether the the correct party has approached the correct High Court for invocation of an Arbitration Clause which is existing and binding on the parties and the disputes are covered by the said agreement. To examine the same the Court shall apply the prima facie test and drawing strength from the aforesaid decision of the Apex Court in *Vidya Drolia (supra)* prima facie this Court comes to an inescapable conclusion that the petition has been filed by one member of the Consortium only without impleading the other Consortium members including against whom allegations have been levelled and the said allegations are prima facie indicative of disputes inter-se the Consortium members which may not be referable for arbitration.

62. For the detailed reasons hereinabove and in the humble opinion of this Court, such a petition is not maintainable at the behest of the petitioner alone for the nature of disputes so raised. Consequently, the petition is ***dismissed***. Costs are made easy.

(2023) 9 ILRA 1129

APPELLATE JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 19.09.2023

BEFORE

THE HON'BLE SAURABH LAVANIA, J.

First Appeal From Order No. 49 of 2018
alongwith other connected cases

Bharat Petroleum Corp. Ltd. ...Appellant
Versus

U.O.I. ...Respondent

Counsel for the Appellant:

Sm Singh Royekwar, Mohammad Ehtesham Khan

Counsel for the Respondents:

Arun Kumar Verma, Neerav Chitravanshi

Civil Law-The Railways Act, 1989-Sections 93,94 & 97 -The Indian Evidence Act, 1872, Sections 101 & 102--- Railway Administration would not be responsible for any loss, destruction, damage, deterioration or non-delivery in transit, of any consignment from whatever cause arising, except upon proof, that such loss, destruction, damage, deterioration or non-delivery was due to negligence or misconduct on its part or on the part of any of its servants--- Plaintiff can succeed only on the strength of his own case and not on the weakness of defense--- The petroleum product was loaded by BPCL at its siding and thereafter the Railway issued the receipt(s) bearing remark(s) 'S/C' (said to contain), 'SWA' (Sender's Weight Accepted) as also 'loading was not supervised by Railway Staff' and 'Joint Dip Certificate(s)' also indicates the Railway as per Section 94 of the Act of 1989 is not responsible for any loss and as such, it was the duty of the BPCL to prove by adducing appropriate evidence that (i) the petroleum product/consignment was properly loaded; (ii) quantity was appropriate as indicated in the receipt(s) and (iii) was got damaged on account of some misconduct or negligence on the part of the Railway or its servants---The BPCL, in all the case(s), failed to establish its claim as also the negligence of Railway Administration. **(Para 37, 38 & 39)**

Appeals dismissed. (E-15)

List of Cases cited:

1. FAFOD No.182 of 2003 (U.O.I.Vs M/s Indian Oil Corporation)

2. FAO No.249 of 2019 (U.O.I.Vs M/s Steel Authority of India Limited)

3. U.O.I.Vs Aluminium Industries Limited, MANU/OR/0040/1987

4. U.O.I.Vs Steel Authority of India Ltd.; MANU/AP/1039/2004

5. U.O.I.Vs Jugal Kishore Khandelwal; MANU/OR/0026/1988

6. U.O.I.Vs Aluminium Industries Ltd.; AIR 1987 Ori 149

7. FAO No. 225 of 2013 (Steel Authority of India Limited Vs U.O.I.), MANU/DE/6299/2017

8. First Appeal No. 309 of 1999 (M/s Hindustan Petroleum Corporation Ltd. Vs U.O.I.); MANU/MH/0223/2004

9. Kanhaiya Bhalotia Vs U.O.I.; 2013 SCC OnLine Pat 506

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

1. As the issue involved in all these appeal(s), broadly, is similar as such with the consent of the learned counsel for the parties, the same are being decided by this common order.

2. Heard Sri M.E. Khan alongwith Sri Shashank Mishra, learned Counsel for the appellant and Sri Arun Kumar Verma as also Sri Mahendra Kumar Mishra, learned Counsel for the respondent-Railway.

3. All the appeal(s), indicated above, were filed by Bharat Petroleum Corporation Limited (in short "BPCL"), under Section 23 of The Railway

Claims Tribunal Act, 1987 (in short "Act of 1987"), challenging the award(s) passed by the Railway Claims Tribunal (in short "Tribunal"), at Lucknow in the case(s) detailed here under:-

Sl. No.	Case No.	Parties Name	Amount Claimed	Dismissed On
1.	OA/I/04/09	BPCL vs. Union Of India	Rs.10,19,849/-	06.10.2017
2.	OA/I/07/09	BPCL vs. Union Of India	Rs.1,65,452/-	25.11.2016
3.	OC/I/10/2010	BPCL vs. Union Of India	Rs.3,54,010/-	25.08.2017
4.	OA/I/32/2012	BPCL vs. Union Of India	Rs.1,88,626/-	15.09.2017
5.	OA/I/33/2012	BPCL vs. Union Of India	Rs.1,58,451/-	15.09.2017
6.	OA/I/03/14	BPCL vs. Union Of India	Rs.4,32,279/-	04.11.2016
7.	OC0400030	BPCL vs. Union Of India	Rs.1,35,100/-	01.12.2016
8.	OC0400045	BPCL vs. Union Of India	Rs.3,41,542/-	21.04.2017

4. In all the case(s), indicated above, the Tribunal dismissed the claim petition(s) preferred by BPCL.

5. It would be apt to refer that all the appeals were filed along with the application(s) for condonation of delay duly supported with an affidavit and after taking note of the facts and circumstances indicated therein, this Court condoned the delay and now all the appeals can be heard and decided on merits. The relevant record of the Tribunal pertaining to the case(s) indicated above is also available.

6. The relevant facts, in brief, related to all the appeals are to the effect that the BPCL loaded the consignment/petroleum product from its siding meaning thereby the petroleum product, which is subject matter of all the appeal(s), was not loaded at a siding belonging to Railway Administration and undisputedly at the time of loading of petroleum product in the wagon(s), no Goods Clerk or any other Staff of Railway Administration was present for tallying or supervising the petroleum product loaded in the wagon(s) and the petroleum product loaded by BPCL was unloaded at a siding of BPCL and just prior to unloading of the same, at the request of BPCL, the 'Joint Dip Certificate(s)' were prepared and as per these Certificate(s), the shortage was found in petroleum product loaded in the wagon(s) by BPCL at its siding.

7. In all the 'Joint Dip Certificate(s)', it has been indicated that "RA 1989, AR-94-(2), RLY not responsible for any shortage".

8. It would be apt to refer that the Railway receipt(s) related to claim(s), in issue, were issued to BPCL with remark(s) namely 'S/C' (said to contain), 'SWA' (senders' weight accepted) and 'loading not supervised by Railway Staff'.

9. It would also be apt to take note that the BPCL has not stated that the

receipt(s) issued by Railway Administration to BPCL were not with remark(s) namely 'S/C' (said to contain) SWA (senders' weight accepted), 'loading not supervised by Railway staff' as also remark on 'Joint Dip Certificate(s)' before the Tribunal.

10. In the aforesaid factual background, claim petition(s), cases indicated above, were filed on the basis of 'Joint Dip Certificate(s)'.

11. In support of the pleas taken, the BPCL adduced the evidence by way of affidavit(s) except in one Case i.e. Case No.OC0400030.

12. The affidavit(s) of evidence were not filed by a responsible person present at the siding of the BPCL from where the petroleum product was loaded in the wagon(s) and which was subsequently delivered at the place indicated by BPCL and this aspect of the case can be taken note of from the following details:-

(i) In Case No.OA/I/04/09, the affidavit of evidence was filed by Sri Baldev, Senior Assistant-Claims at the Office of General Manager, Bharat Petroleum Corporation Ltd., Regional Office at Plot No. 5 & 6, Sector-1, Noida, U.P.

(ii) In Case No.OA/I/07/09, the affidavit of evidence was filed by Sri Baldev, Assistant-Claims at the Office of General Manager, Bharat Petroleum Corporation Ltd., Regional Office at Plot No. 5 & 6, Sector-1, Noida, U.P.

(iii) In Case No.OC/I/10/2010, the affidavit of evidence was filed by Sri Baldev, Senior Assistant-Claims at the Office of General Manager, Bharat Petroleum Corporation Ltd., Regional

Office at Plot No. 5 & 6, Sector-1, Noida, U.P.

(iv) In Case No.OA/I/32/2012, the affidavit of evidence was filed by Sri Baldev, Senior Assistant-Claims at the Office of General Manager, Bharat Petroleum Corporation Ltd., Regional Office at Plot No. 5 & 6, Sector-1, Noida, U.P.

(v) In Case No.OA/I/33/2012, the affidavit of evidence was filed by Sri Baldev, Senior Assistant-Claims at the Office of General Manager, Bharat Petroleum Corporation Ltd., Regional Office at Plot No. 5 & 6, Sector-1, Noida, U.P.

(vi) In Case No.OA/I/03/14, the affidavit of evidence was filed by Sri Baldev, Senior Assistant-Claims at the Office of General Manager, Bharat Petroleum Corporation Ltd., Regional Office at Plot No. 5 & 6, Sector-1, Noida, U.P.

(vii) In Case No.OC0400030, the affidavit of evidence of BPCL was not filed.

(viii) In Case No.OC0400045, the affidavit of evidence was filed by Sri Baldev, Senior Assistant-Claims at the Office of General Manager, Bharat Petroleum Corporation Ltd., Regional Office at Plot No. 5 & 6, Sector-1, Noida, U.P.

13. The claim of the BPCL in all the claim petitions was opposed by the Railway before the Tribunal. It appears from the record available before this Court that the Railway based upon the provisions of The Railways Act, 1989 (in short "Act of 1989") and remark(s) upon the railway receipt(s) as also 'Joint Dip Certificate(s)' opposed the claim(s) of BPCL and based upon the same the Railway stated that there is no liability on the Railway Administration. Stand of Railway before

the Tribunal was to the effect that the petroleum product was not loaded at a siding of Railway and the loading was not supervised by the Goods Clerk/Staff of Railway and was required to be delivered by the Railway Administration at a siding not belonging to Railway Administration and accordingly, the Railway, as per law, shall not be responsible for any loss of such consignment for whatever cause arising after the wagon(s) containing the consignment has been placed at the specified point of interchange. The Railway denied the claim(s) of the BPCL by saying that the loading, sealing and tightening of the valves etc. is always done by the BPCL or its servants at the siding belonging to BPCL and the Railway receipt(s) were issued with remark(s) i.e. 'S/C' ('said to contain'), 'SWA' ('senders' weight accepted') 'loading not supervised by the Railway Staff' and as such a conjoint reading of relevant provisions of the Act of 1989 and these remark(s) make the point crystal clear that the Railway would not be responsible for any loss, if any, occurred during transshipment/transportation.

14. Taking note of the facts that the petroleum product was loaded by BPCL at a siding not belonging to Railway Administration for carriage by Railway and Goods Clerk or any other Staff for tallying or supervising petroleum product loaded by BPCL in the wagon(s) was not deputed by the Railway at the siding of BPCL as also the relevant provisions of the Act of 1989 and remark(s) on the receipt(s) and 'Joint Dip Certificate(s)', the Tribunal rejected the claim of the BPCL, as appears from the order(s), under appeal(s).

15. For causing interference in the order(s), under appeal(s), Mohammad Ehtesham Khan, learned counsel appearing

for the appellant/Bharat Petroleum Corporation Ltd. stated that the Tribunal failed to consider and appreciate the relevant provisions i.e. Sections 93, 94 and 110 of the Act of 1989 in its true spirit while rejecting the claim of the BPCL. He also submitted that the shortage of petroleum product was apparent from the 'Joint Dip Certificate(s)' and the same was due to mishandling, negligence, carelessness and misconduct on the part of respondent and/or their servants/agents and despite the same, the Tribunal rejected the claim of the BPCL in utter arbitrary and mechanical manner. The BPCL discharged its burden of proof regarding shortage and on the other hand, the Railway Administration failed to discharge its burden of proof as required under Sections 93, 94 and 110 of the Act of 1989. Thus, the order(s) are liable to be interfered with and the appeal(s) are liable to be allowed with a direction upon Railway to pay the amount claimed in claim petition(s) alongwith due interest.

16. In support of his submission, Sri Khan placed reliance on the judgment passed by the Delhi High Court in FAO No.249 of 2016 (Union of India Vs. M/S Steel Authority of India Ltd.) decided on 12.01.2018 and the judgment by this Court in First Appeal From Order Defective No.182 of 2003 (Union of India Vs. M/S Indian Oil Corporation) decided on 14.02.2013.

17. Opposing the appeal(s), Sri Arun Kumar Verma and Sri Mahendra Kumar Mishra, learned counsel appearing for the Railway stated that before the Tribunal all the claim petition(s) were opposed by filing written statement(s) and in support of pleas taken in written statement(s), the affidavit(s) of evidence were also filed in

some cases. A conjoint reading of pleas taken in written statement(s) as also the relevant provisions of the Act of 1989 and remark(s) on the 'Joint Dip Certificate(s)' and on the Railway receipt(s) would show that no liability can be fastened on the Railway Administration.

18. Further stated that no doubt as per 'Joint Dip Certificate(s)', the material, which was loaded by the BPCL in the tank(s)/wagon(s) was not found appropriate. However, the fact remains that the consignor namely BPCL loaded the material at a siding belonging to BPCL and receipt(s) therefor were issued under qualified remark(s) namely 'S/C' (said to contain), 'SWA' (Sender's Weight Accepted), 'loading not supervised by Railway staff' and in view of said remark(s) as also the remark(s) on the 'Joint Dip Certificate(s)', which was accepted without any protest, more particularly the remark 'As per RA 1989 AR 94(II) Rly is not responsible for any shortage', the Railway is not responsible for any shortage or loss and being so, the Tribunal rightly rejected the claim of the BPCL and being so the order(s) impugned passed by the Tribunal are not liable to be interfered with by this Court.

19. Learned counsel appearing for the Railway placed reliance on the following judgments:-

- (i) Union of India Vs. Jugal Kishore Khandelwal : AIR 1988 Orissa 113;
- (ii) Union of India Vs. Steel Authority of India Ltd. : (2004) 12 AP CK 0115;
- (iii) Union of India Vs. Aluminium Industries Limited : 1986 LawSuit (Ori) 79;
- (iv) Steel Authority of India Limited Vs. Union of India : reported in 2017:DHC:4760.

20. Considered the submissions made by the learned counsel for the parties and perused the record.

21. In the aforesaid background of the case, the issue before this Court is to the effect that as to 'Whether the claim(s) of the BPCL, in the case(s) indicated above based upon the 'Joint Dip Certificate(s)', were rightly rejected by the Tribunal'.

22. In order to come to the conclusion on the aforesaid issued involved in the present appeal(s), this Court finds it appropriate to refer certain provisions of the Act, 1989 and the relevant paragraph of the Indian Railway Commercial Manual, which have been indicated.

"Relevant provisions of Railway Act, 1989

Section 62. Conditions for receiving, etc., of goods.

(1) *A railway administration may impose conditions, not inconsistent with this Act or any rules made thereunder, with respect to the receiving, forwarding, carrying or delivering of any goods.*

(2) *A railway administration shall maintain, at each station and at such other places where goods are received for carriage, a copy of the conditions for the time being in force under sub-section (1) and make them available for the reference of any person during all reasonable hours without payment of any fee.*

Section 63. Provision of risk rates.

(1) *Where any goods are entrusted to a railway administration for carriage, such carriage shall, except where owner's risk rate is applicable in respect of such goods, be at railway risk rate.*

(2) *Any goods, for which owner's risk rate and railway risk rate are in force, may be entrusted for carriage at either of the*

rates and if no rate is opted, the goods shall be deemed to have been entrusted at owner's risk rate.

Section 64. Forwarding note.—

(1) *Every person entrusting any goods to a railway administration for carriage shall execute a forwarding note in such form as may be specified by the Central Government:*

Provided that no forwarding note shall be executed in the case of such goods as may be prescribed.

(2) *The consignor shall be responsible for the correctness of the particulars furnished by him in the forwarding note.*

(3) *The consignor shall indemnify the railway administration against any damage suffered by it by reason of the incorrectness or incompleteness of the particulars in the forwarding note.*

Section 65. Railway receipt.—

(1) *A railway administration shall,—*

(a) *in a case where the goods are to be loaded by a person entrusting such goods, on the completion of such loading; or*

(b) *in any other case, on the acceptance of the goods by it, issue a railway receipt in such form as may be specified by the Central Government.*

(2) *A railway receipt shall be prima facie evidence of the weight and the number of packages stated therein:*

Provided that in the case of a consignment in wagon-load or train-load and the weight or the number of packages is not checked by a railway servant authorized in this behalf, and a statement to that effect is recorded in such railway receipt by him, the burden of proving the weight or, as the case may be, the number of packages stated therein, shall lie on the consignor, the consignee or the endorsee.

Section:73 Punitive charge for overloading a wagon.

Where a person loads goods in a wagon beyond its permissible carrying capacity as exhibited under sub-section (2) or sub-section (3), or notified under sub-section (4), of section 72, a railway administration may, in addition to the freight and other charges, recover from the consignor, the consignee or the endorsee, as the case may be, charges by way of penalty at such rates, as may be prescribed, before the delivery of the goods:

Provided that it shall be lawful for the railway administration to unload the goods loaded beyond the capacity of the wagon, if detected at the forwarding station or at any place before the destination station and to recover the cost of such unloading and any charge for the detention of any wagon on this account.

Section 78. Power to measure, weigh, etc.

Notwithstanding anything contained in the railway receipt, the railway administration may, before the delivery of the consignment, have the right to—

- (i) re-measure, re-weigh or re-classify any consignment;*
- (ii) recalculate the freight and other charges; and*
- (iii) correct any other error or collect any amount that may have been omitted to be charged.*

Section 79. Weighment of consignment on request of the consignee or endorsee.

A railway administration may, on the request made by the consignee or endorsee, allow weighment of the consignment subject to such conditions and on payment of such charges as may be prescribed and the demurrage charges if any:

Provided that except in cases where a railway servant authorised in this behalf considers it necessary so to do, no weighment shall be allowed of goods

booked at owner's risk rate or goods which are perishable and are likely to lose weight in transit:

Provided further that no request for weighment of consignment in wagon-load or train-load shall be allowed if the weighment is not feasible due to congestion in the yard or such other circumstances as may be prescribed.

Section 93. General responsibility of a railway administration as carrier of goods.

Save as otherwise provided in this Act, a railway administration shall be responsible for the loss, destruction, damage or deterioration in transit, or non-delivery of any consignment, arising from any cause except the following namely:—

- (a) act of God;*
- (b) act of war;*
- (c) act of public enemies;*
- (d) arrest, restraint or seizure under legal process;*
- (e) orders or restrictions imposed by the Central Government or a State Government or by an officer or authority subordinate to the Central Government or a State Government authorised by it in this behalf;*
- (f) act or omission or negligence of the consignor or the consignee or the endorsee or the agent or servant of the consignor or the consignee or the endorsee;**
- (g) natural deterioration or wastage in bulk or weight due to inherent defect, quality or vice of the goods;**
- (h) latent defects;*
- (i) fire, explosion or any unforeseen risk:*

Provided that even where such loss, destruction, damage, deterioration or non-delivery is proved to have arisen from any one or more of the aforesaid causes, the railway administration shall not be relieved of its responsibility for the loss, destruction,

damage, deterioration or non-delivery unless the railway administration further proves that it has used reasonable foresight and care in the carriage of the goods.

Section 94. Goods to be loaded or delivered at a siding not belonging to a railway administration.—

(1) Where goods are required to be loaded at a siding not belonging to a railway administration for carriage by railway, the railway administration shall not be responsible for any loss, destruction, damage or deterioration of such goods from whatever cause arising, until the wagon containing the goods has been placed at the specified point of interchange of wagons between the siding and the railway administration and a railway servant authorised in this behalf has been informed in writing accordingly by the owner of the siding.

(2) Where any consignment is required to be delivered by a railway administration at a siding not belonging to a railway administration, the railway administration shall not be responsible for any loss, destruction, damage or deterioration or non-delivery of such consignment from whatever cause arising after the wagon containing the consignment has been placed at the specified point of interchange of wagons between the railway and the siding and the owner of the siding has been informed in writing accordingly by a railway servant authorised in this behalf.

Section 97. Goods carried at owner's risk rate.

Notwithstanding anything contained in section 93, a railway administration shall not be responsible for any loss, destruction, damage, deterioration or non-delivery in transit, of any consignment carried at owner's risk rate, from whatever cause arising, except upon proof, that such loss, destruction, damage, deterioration or non-

delivery was due to negligence or misconduct on its part or on the part of any of its servants:

Provided that—

(a) where the whole of such consignment or the whole of any package forming part of such consignment is not delivered to the consignee or the endorsee and such non-delivery is not proved by the railway administration to have been due to fire or to any accident to the train; or

(b) where in respect of any such consignment or of any package forming part of such consignment which had been so covered or protected that the covering or protection was not readily removable by hand, it is pointed out to the railway administration on or before delivery that any part of that consignment or package had been pilfered in transit,

the railway administration shall be bound to disclose to the consignor, the consignee or the endorsee how the consignment or the package was dealt with throughout the time it was in its possession or control, but if negligence or misconduct on the part of the railway administration or of any of its servants cannot be fairly inferred from such disclosure, the burden of proving such negligence or misconduct shall lie on the consignor, the consignee or the endorsee."

Relevant provisions of Indian Railway Commercial Manual Volume II are as under:-

1529. Loading and unloading of goods in assisted or private sidings.—(a)

Where a Goods Clerk is posted in an assisted private siding, and his wages and other costs are paid for by the owner thereof, the loading of goods will be supervised and tallied by the Goods Clerk, and railway receipts will be granted for the specific number of packages loaded. Similarly, unloading of inward goods will

be supervised and tallied by him (see Para 2513 also).

(b) Where no Goods Clerk is posted, consignments loaded in an assisted private siding will be booked at the serving station in the same way as any other consignment. However, since loading is not supervised by the railway staff, and also in view of the difficulty of making an accurate check of an already loaded wagon, only a "said to contain" receipt should be granted in such cases, the receipt being endorsed 'Loading not supervised by railway staff nor contents checked.'

1582. Transshipment of P. O. L. traffic—(a) Where due to leakage, accident or any other cause it becomes necessary to transship the contents of a tank wagon, loaded with petroleum or other inflammable liquids, a fresh tank wagon of suitable capacity should be arranged for transshipment. The fresh tank must be of the same type as the original tank to obviate possibilities of damage to the consignment due to contamination.

(b) As the transshipment of such traffic in tank wagons is required to be done by the consignors [consignees, the senders should be telegraphed to immediately arrange for the attendance of their representative at the time of transshipment. The responsibility to take all precautions during the transshipment rests with the representatives of oil companies. The station staff should, however, give all necessary assistance to the representative of the senders to cordon off the area where transshipment is to be done.

(c) A certificate of the transshipment of such tank wagons is to be signed jointly by the representative of the oil companies and the Station Master in the form prescribed for the purpose by the railway administration which inter alia requires the dip, the specific gravity and the

temperature of the contents both before and after the transshipment to be recorded on the form. The Station Master should personally verify the 'dip', etc. of the damaged tank wagon before transshipment starts and also of the fresh tank wagon before the transshipment is completed. One copy of the certificate, duly signed as above, should be retained as station record.

(d) Other instructions regarding issue of transshipment advice, etc. as laid down in Para 1581 also apply in case of transshipment of tank wagons containing petroleum or other inflammable liquids.

1919. Goods Clerks at Depots or other places, where specially provided will witness the loading of railway materials and stores. In such case, receipts for the number of articles actually loaded should be given to the despatching official. The responsibility for tallying and weighing such consignments and scaling and riveting the wagons, where necessary, rests with the station staff as for public traffic.

1920. At other places, however, where Goods Clerks are not provided, wagon containing railway materials and stores loaded by Departments in their own sidings, will be sealed and riveted independently by the depots concerned with wagon seals of their own. Station staff will grant 'said to contain receipts' at the forwarding stations. The receipts should, therefore, show "sealed and riveted by sender said to contain....."

1921. Outward books for railway materials and stores.—Separate outward books (see Para 2008), both for local and through traffic, should be maintained for recording the invoices of railway materials and stores issued from the station. These books should be posted daily from record foil's of invoices, which should be entered in the order of their issue, i.e., in the order of their printed machine numbers.

2515. (a) *Where no separate Goods Clerk is posted in a siding, the outward consignments loaded in the siding will be booked at the serving station in the same way as any other consignment. However, owing to the difficulty of making an accurate check of an already loaded wagon/vehicle, a 'said to contain' railway receipt will be granted in all cases in which such a check has not been exercised. In the case of inward traffic, the book delivery will be affected after collection of the railway receipt and freight and other charges due at the serving station before file wagons are placed in the siding on at the point of interchange, where prescribed. The Goods Clerk will neither supervise the loading of outward goods nor the unloading of inward goods.*

(b) *In no circumstances, should the wagons be placed in the siding or on the point of interchange, where prescribed, unless the book delivery has been effected and freight and other charges have been collected at the serving station. In the event of the siding user failing to affect book delivery after the arrival of inward wagons vehicles at the station within the time provided for in the agreement, the usual demurrage charges should be levied as prescribed from time to time.*

Note.—The railway administration may permit placement of wagons without effecting the book delivery and collecting the freight and other charges due, in specific cases, where it is not possible for operational or other reasons to strictly enforce the instruction contained in (b) above. In such cases, it should be ensured that there is no delay in affecting the book delivery and collecting, the charges due immediately after the wagons are placed in the siding.

(c) *Should space permit, the siding user may be allowed the option of*

unloading the goods at the station or in the goods shed serving the siding. In such cases, the wharfage charges should be levied at the goods are not taken delivery of and for removed within the free time allowed for this purpose.

(d) *Inward wagons/vehicles which arrive at the serving station with defective seals, cut-panels, etc. must not be placed in the siding unless the contents are checked at the station/goods shed."*

23. What borne out from the above quoted statutory provisions including Section 94 and Section 97 of the Act of 1989, which would be relevant for the present case, are as under:-

(i) The consignor shall be responsible for the correctness of the particulars furnished by him in the forwarding note. It is for the reason that the entries in receipt(s) indicates 'F/Note' (forwarding note). [Sub-section 2 of Section 64]

(ii) The burden of proving the weight or, as the case may be, number of packages stated therein, shall lie on the consignor, the consignee or the endorsee if the weight or number of packages is not checked by a railway servant authorized in this behalf and a statement to that effect is recorded in such railway receipt. It is in view of the fact that the receipt(s) containing remark that the 'loading not supervised by the railway staff' were issued by Railway. [Sub-Section 2 of Section 65]

(iii) The act or omission or negligence of the consignor or the consignee or the endorsee or the agent or servant of the consignor or the consignee or the endorsee and natural deterioration or wastage in bulk or weight due to inherent defect, quality or vice of the goods are required to be considered. [Sub-Section (f) and (g) of Section 93]

(iv) Proviso to Section 93 indicates that if the loss, destruction, damage, deterioration or non-delivery is proved to have arisen from any one or more of the causes indicated under Section 93, the Railway Administration shall not be relieved of its responsibility for the loss, destruction, damage, deterioration or non-delivery and thereafter the liability would be on Railway Administration to prove that it has used reasonable foresight and care in the carriage of the goods. Thus, first claimant has to prove its claim and thereafter onus would be shifted on Railway Administration.

(v) As per Section 94(2) where consignment is required to be delivered by a Railway Administration at a siding not belonging to Railway Administration, the Railway-Administration shall not be responsible for any loss, destruction, damage or deterioration or non-delivery of such consignment from whatsoever cause arising after the wagon containing the consignment has been placed at the specified point of interchange of wagon between the railway and the siding has been informed in writing by the Railway servant authorized in this behalf. It would not be out of place to refer Section 94(1) relates to goods loaded at a siding not belonging to Railway-Administration.

(vi) Section 97 starts from non-obstante clause. It says that notwithstanding anything contained in Section 93, a railway administration shall not be responsible for any loss, destruction, damage, deterioration or nondelivery in transit, of any consignment carried at owners risk rate, from whatever cause arising, except upon proof, that such loss, destruction, damage, deterioration or non-delivery was due to negligence or misconduct on its part or on the part of any of its servants. Proviso (b) to this Section

also indicates that if negligence or misconduct on the part of the railway administration or of any of its servants cannot be fairly inferred from such disclosure, the burden of proving such negligence or misconduct shall lie on the consignor, the consignee or the endorsee. In this view of the matter, the burden to prove the loss, destruction, damage, deterioration or non-delivery on account of negligence or mis-conduct of Railway staff is upon the claimant.

(vii) Para 1529 of Indian Railway Commercial Manual Volume II particularly Sub Para (b) indicates that if loading is not supervised by the railway staff then in that eventuality the receipt containing remark 'said to contain' should be issued with further endorsement that 'loading not supervised by Railway Staff nor contents checked'.

(viii) Para 1920 also indicates that where Goods Clerks are not provided the station staff will grant 'said to contain receipts' at the forwarding stations.

(ix) Sub-Para (a) of Para 2515 also indicates in the same tune. As per this para, where no separate Goods Clerk is posted in a siding, it is very difficult to make an accurate check of an already loaded wagon/vehicle, a 'said to contain' railway receipt will be granted in all cases. The Goods Clerk will neither supervise the loading nor unloading of any goods.

24. Now coming to the judgment(s) on which reliance has been placed by the learned counsel for the parties.

25. In the judgment dated 12.01.2018 passed in FAO No.249 of 2019 (Union of India vs. M/s Steel Authority of India Limited), the Delhi High Court dismissed the appeal challenging the order of the Railway Claims Tribunal. This judgment

was passed by the Delhi High Court after taking note of the facts which are to the effect that the 8 Packets of Hot Rolled Sheets (HR Sheets) were booked under the Railway Receipt dated 18.11.2008 and the same were checked by RPF staff on 19.11.2008 and again on 24.11.2008 and RPF staff recorded that wagon contained 8 Bundles of HR Sheets and thereafter on 28.11.2008 at the destination only 5 packets of HR Sheets were found and also that wagon handed over to Railway on 19.11.2008 remained in the custody of Railway and was not taken back to the plant.

26. From the judgment of Delhi High Court it is apparent that the claimant before the Tribunal namely M/s Steel Authority of India Ltd. proved its case that 8 bundles of HR Sheets were handed over to the Railway and therefore the Tribunal passed the order in favour of claimant and the same was affirmed by the Delhi High Court.

27. In the judgment dated 14.02.2013 passed in FAFOD No.182 of 2003 (Union of India vs. M/s Indian Oil Corporation), this Court while dismissing the appeal of Railway and affirming the order of Tribunal, which was favourable to Indian Oil Corporation, observed that "the dip measurement was taken jointly by the staff of the respondents and Railways and thereafter, the Railway's receipt was issued mentioning the quantity of goods to be transported. The transit risk was of the Railways" and thereafter observed that "Section 94 would not apply in the instant case. Thus, in this case also the claimant proved its case regarding quantity which was loaded and was handed over to the Railways for transportation to the destination mentioned in the Railway receipt.

28. In the judgment passed in the case of **Union of India vs. Aluminium Industries Limited**, MANU/OR/0040/1987; the High Court of Orissa, after considering the fact that claimant examined only one witness namely Claims Assistant dealing with the Railway consignments and claims of the claimant's company and this witness in the statement stated that "he has no idea about the actual loading of the wagon at the consignor's siding at Renukoot" as also that he admitted that the place of loading was at a siding not belonging to Railway Administration but to the consignor, allowed the appeal and interfered in the order of Tribunal, which was favourable to the claimant company. Relevant paras of the same are as under:-

"6. The onus is on the plaintiff-company to establish as to what quantities had actually been booked at the forwarding station. The consignment had been booked at the consignor's own siding and there is absence of evidence from the side of the plaintiff and there has been no admission from the side of the defendant that loading had been done with the supervision of the railway staff."

7. The case reported in MANU/NA/0101/1949 : AIR 1950 Nag 85, *Dominion of India v. Firm Museram Kishunprasad Melonigunj, Jubbulpore dealt with Rules 15 and 22, Railway Goods Tariff General Rules. It was held :*

"Further there is no proof in this case that 255 bags were in fact loaded. According to Rule 22 of the Goods Tariff General Rules then in force cocoanuts were required to be loaded and unloaded by senders and consignees when in wagon loads. It is nowhere stated or proved by the plaintiff that the bags were loaded by railway servants or that they had

opportunity to verify the number. The wagon was placed at the service of the consignor and the number stated was accepted as correct for the purpose of charging freight. It was thus that the receipt issued qualified the number by stating that the wagon was 'said to contain' 255 bags. This was perfectly fair and in order, and the number was mentioned merely to calculate the freight.

Under Rule 15 *ibid* it is clearly stated that by mentioning weight, etc., in the railway receipt the railway does not admit the correctness of the statement. This rule applies with even more rigour where the railway receipt in addition contains the 'said to contain' remark."

In AIR 1956 Mad 176, *Union of India v. S. L. L. Lekhu Reddiar*, it has been laid down that where goods were loaded in the wagon by the sender and not by the railway servants and the information given by the sender is accepted as correct for the purpose of charging freight and receipt is granted and at the destination station, shortage is detected, it is for the plaintiff to establish as to what actually were the goods delivered to the railway for carrying at the forwarding station.

As held in MANU/OR/0059/1961, *South Eastern Railway v. Epari Satyanarayana*, the railway receipt conveys no admission by the Railway Administration that the weight of the consignment as shown in the receipt or the description of goods as furnished by the consignor is correct. In the absence of evidence of actual booking of the goods as shown in the railway receipt, the railway is not liable for short delivery where goods are received in sound and intact condition. It is for the consignors or the consignees to adduce evidence as to the actual booking of the goods, as these facts are within their special knowledge.

8. A shortage certificate amounts neither to an acknowledgment of liability nor holds out any hope to the consignee as to the time of delivery and is merely evidence of actual event that certain goods or articles have fallen short with reference to what the plaintiff states to have been despatched. A shortage certificate is no proof of the fact that the quantum of goods claimed to have been despatched has actually been despatched unless the fact of despatch of the quantum of goods is actually established. In this connection, reference may be made to the principles laid down in MANU/OR/0012/1963, *Union of India v. Prakash Ch. Sahu*.

In MANU/BH/0081/1973, *Union of India v. Chotelal Shewnath Rai*, it has been held that where there is no evidence to prove the actual weight of the goods loaded in the wagon-and the loading had been done at the despatching station by the consignor, the Railway Administration is not liable for short delivery detected at the destination. From mere mention of a particular weight on the railway receipt and the forwarding note for the purpose of calculating the freight charge, no admission on the part of the railway as to the correctness of the weight of the goods loaded can be made out to fix up the liability.

9. Approving the decisions reported in MANU/NA/0101/1949 : AIR 1950 Nag 85 (*supra*) and AIR 1956 Mad 176 (*supra*), the Supreme Court has laid down in MANU/SC/0099/1969 : AIR 1970 SC 843, *Hari Sao v. State of Bihar*, which also deals with the expression "S.W.A.", as follows :

".....There would be no presumption that the goods put in the wagon were chillies because the railway did not accept the consignment as such and described it as 251 bags allegedly containing chillies. Nor was there any acceptance of the weight of

the goods by the railway. The endorsement 'S.W. A.' would negative the plea, if any, that the weight was accepted by the railway. The endorsement 'L/U' emphasised that the loading and unloading being in charge of the consignor the railway could not be held liable for any negligence in loading or unloading."

In MANU/OR/0046/1984, *Orient Paper Mills Ltd. v. Union of India*, a Division Bench of this Court, with one of us (B.K. Behera, J.) has held that in a suit for damages for loss of goods against the Railway Administration, the onus lies on the plaintiff to establish the actual loading of the goods for the loss of which the claims have been made. That was also a case where the consignment had been loaded and despatched from the siding of the consignor.

10. In MANU/OR/0138/1984, *Union of India v. Krishna Stores*, on which reliance has been placed for the respondent, the Hon'ble Judges have dealt with the scope of Sections 73 and 74 of the Act. In that case, 660 tins of groundnut oil were despatched from ex-Havagudh by Saurashtra Oil Mill to be delivered at the Kantabanji Railway Station in a wagon as per the railway receipt for being carried by the defendant railway as a carrier at the railway risk rate and the groundnut oil tins had been delivered to the defendant railway at the point of despatch in properly packed condition. It was not a case where the loading had been done at the consignor's siding without any supervision by the Railway Administration. On the facts of the reported case and in view of the provisions made in Sections 73 and 74 of the Act, the judgment and decree passed against the Railway Administration had been upheld by this Court.

11. There is no legal evidence to come to a finding that 1122 pieces of aluminium

ingots had actually been loaded in the wagon at the consignor's siding at Renukoot. Apart from the shortage certificate (Ext. 5) and the description given in the railway receipt (Ext. A), there is no proof in support of the impugned finding that actually the consignor had loaded 1122 pieces of aluminium ingots at the siding of the consignor for delivery to the plaintiff at Sambalpur. The suit, mainly based on the shortage certificate and the railway receipt, the evidentiary value of which has been discussed above, was not to be decreed by the trial Court. There is no legal basis for a finding that there had been shortage of 252 pieces of aluminium ingots. There was no evidence, as earlier indicated, that the railway staff had supervised the loading and sealing of the wagon at the siding of the consignor and this should not have been assumed, as has been done by the learned subordinate Judge."

29. In the judgment passed in the case of **Union of India vs. Steel Authority of India Ltd.**; MANU/AP/1039/2004, the Andhra Pradesh High Court, after taking note of remark on the Railway receipt i.e. S/C ('said to contain') as also the fact that 'loading was not supervised by Railway staff', allowed the appeal and order of Tribunal favourable to the claimant was set aside. The relevant paragraphs of the same extracted here in under:-

"5. The Surveyor was examined as Applicant Witness No. 1. He stated that he saw the wagon containing the consignment for the first time on 01.11.1990 i.e., just before the re-weighment and he had not seen the consignment earlier, nor did he see in what condition the consignment arrived and was placed at SAIL siding. The gist of the condition of the consignment made him

believe that pilferage had taken place somewhere.

6. *The Junior Executive (Marketing) of SAIL was examined as A.W.2. He also stated that he had no knowledge about the circumstances and conditions of the loading of the subject consignment at the booking end at Bokaro. He saw the consignment for the first time on arrival of the consignment at SAIL siding on 25.10.1990. He noticed depressions in the level of loading of the material inside the wagon. At one point, prior to removal of large quantity of material, the wagon floor was visible. This made him to conclude that the material has been tampered and some pilferage had taken place before the wagon was placed at their siding.*

7. *Admittedly, the loading and delivery places are the private sidings of the SAIL. That apart, as per Section 94 of the Railways Act, 1989, (for short 'the Act') the applicant is not entitled for any compensation for whatever cause. Section 94 of the Act reads as follows Section 94: Goods to be loaded or delivered at a siding not belonging to a railway administration.-*

(1) Where goods are required to be loaded at a siding not belonging to a railway administration for carriage by railway, the railway administration shall not be responsible for any loss, destruction, damage or deterioration of such goods from whatever cause arising until the wagon containing the goods has been placed at the specified point of interchange of wagons between the siding and the railway administration and a railway servant authorized in this behalf has been informed in writing accordingly by the owner of the siding.

(2) Where any consignment is required to be delivered by a railway administration at a siding not belonging to a railway

administration, the railway administration shall not be responsible for any loss, destruction, damage or deterioration or non-delivery of such consignment from whatever cause arising after the wagon containing the consignment has placed at the specified point of interchange of wagon between the railway and the siding and the owner of the siding has been informed in writing accordingly by a railway servant authorized in this behalf.

8. *The learned counsel appearing for the SAIL submits that under Section 78 of the Act, before delivery of the consignment the railway administration has right to re-weigh the consignment. Under Section 79 of the Act, the railway administration may, on the request made by the consignee or endorsee, allow weighment of the consignment subject to such conditions and on payment of such charges as may be prescribed and the demurrage charges if any.*

9. *But, in the instant case, the railway administration has refused for re-weighment of the consignment.*

10. *The learned counsel for the Railways submits that if the goods are booked at the owners risk, there is no obligation on the part of the railways to undertake any re-weighment. Under Section 78 of the Act, the Railways are empowered to re-weigh and re-classify the consignment for the purpose of calculating the freight and other charges and to rectify the mistakes.*

11. *Section 79 of the Act has no application in respect of the goods required to be loaded at a siding not belonging to the railway administration and also in respect of consignment required to be delivered by the railway authorities at a siding not belonging to the railway administration. Therefore, I am of the view that under Section 94 of the Railways Act,*

the SAIL is not entitled for any compensation for the alleged short delivery. However, Ex.R-1 discloses that the Railway authorities cancelled the railway receipt on delivery of the concerned goods. The consignment was received without any protest, and thereafter, they have made an attempt to throw the burden on the railways making them responsible for the short delivery of the said consignment.

12. In view of the aforesaid specific provision contained in Section 94 (1) and (2) of the Act, I am of the opinion that the SAIL is not entitled for any compensation for the damages or for the short delivery of the consigned material or for whatever reasons. Thus, the impugned order of the railway tribunal is illegal and contrary to the specific provisions contained in Section 94 of the Act."

30. The High Court of Orissa in the judgment passed in the case of **Union of India vs. Jugal Kishore Khandelwal; MANU/OR/0026/1988**, after considering the facts which are to the effect that the goods were not loaded under the supervision of Railway staff and the consignment was booked under 'L/U condition', which indicates that loading at dispatching station and unloading at destination station were the responsibility of consignor, as also that goods were loaded in the Wagon by the consignor himself and sealed by him and thereafter was delivered to Railway only for carriage and the endorsement on the Railway receipt, as per which the loading was not supervised by Railway and further that claimant never examined any witness to prove that actually what amount of Kerosene oil was loaded, in fact 24,500 litres kerosene oil were loaded in the wagon and that such quantity was delivered to the Railway for carriage, and also taking

note of Section 73 and earlier judgment passed in the case of **Union of India vs. Aluminium Industries Ltd.; AIR 1987 Ori 149**, allowed the appeal filed by the Railway and interfered in the order of Tribunal, which was favourable to the claimant-Jugal Kishore Khandelwal. The relevant paragraphs reads as under:-

"3. The suit was contested by the appellant contending that the goods were not loaded at Budge-Budge under the supervision of the Railway staff. The consignment was booked under L/U condition which meant that loading at the despatch station and unloading at the destination station were the responsibility of the consignor. The goods were loaded in the wagon by the consignor himself, sealed by him and was delivered to the railways only for carriage. The railway receipt granted to the respondent itself contained the endorsement about the amount of kerosine oil loaded as only 'said to contain' and there was no acceptance on the part of the railways at any time that actually 24,500 litres of kerosine oil had been loaded in the tanker and thus no liability on the part of the appellant could be found.

4. The learned Subordinate Judge, Balasore came to the conclusion that the appellant was responsible for the loss caused to the respondent since in the shortage certificate issued at the time of delivery, loss of 11,500 litres of kerosine oil had been admitted and that further the seal on the tanker had been found to be broken at the delivery site.

5. The plaintiff-respondent, to prove his case, had examined one witness, P.W. 1 who admitted in the cross-examination that the loading as per the contract was to be made by the consignor and unloading was to be done by the consignee. Since it was a self consignment both the functions were to

be discharged by the respondent. The appellant also examined 2 witness of whom D.W. 1 is the Commercial Clerk at the Budge-Budge Railway Station. D .W. 1 stated that the wagon was loaded at the siding of the Oil Corporation and not in the Railway Station and that the loading had not been supervised by the Railway staff. He also duly proved Exts. A and B i.e. the Railway receipt and the forwarding note. On the Railway receipt the endorsement regarding number and description of the wagon was entered as "One F wagon said to contain 24,500 of ..." and Ext. B/1 contained the endorsement "Loading not supervised". Such evidence led on behalf of the appellant remained unchallenged and hence it goes without saying that the wagon had been loaded only at the Corporation siding and not in the Railway Station and that further the loading was also not done under the supervision of the Railways but by the consignor himself. The Railway receipt also never acknowledged the receipt of the wagon with 24,500 litres of kerosine oil but only stated that the amount was "said to contain" in the wagon. The respondent never examined any witness to prove that actually what amount of kerosine oil was loaded at Budge-Budge to establish that in fact 24,500 litres of kerosine oil was loaded in the wagon and that such quantity was delivered to the appellant for carriage.

6. Section 73 of the Indian Railways Act attaches responsibility on the Railway Administration for loss, destruction, damage, deterioration or non-delivery in transit of animals and goods delivered to it for being carried. What is important to note is that the goods in respect of which loss is alleged and damage is claimed must first have been delivered to the Railway administration and unless such delivery is proved, there can be no question of any claim for damages. In this case however

*there is absolutely no proof of 24,500 litres of kerosine oil to have been delivered to the Railway Administration. A shortage certificate issued by the Railway Administration at the delivery station is not an admission of actual shortage but is merely a statement of a fact of what quantity has been taken delivery of at the destination station. It does not constitute an admission of the actual quantity received by the Railways for carriage. The law on the question was pointedly discussed by this Court in MANU/OR/0040/1987 Union of India v. Aluminium Industries Ltd. and following the principles decided in that case, it must be held that the respondent has not been able to establish any loss caused to him and hence the claim of damages must be negatived."*³

31. In the judgment passed in **FAO No. 225 of 2013 (Steel Authority of India Limited vs. Union of India)**, MANU/DE/6299/2017, the Delhi High Court after considering the remark on the Railway receipt i.e. SWA ('senders' weight accepted') as also Section 65 and 94 of the Act of 1989 dismissed the appeal. The relevant paragraphs of the same are extracted herein under:-

"3. The respondent pleaded that it is not liable because the railway receipt in question was issued on the basis of 'Senders Weight Accepted' (SWA) i.e the railway receipt was not an unconditional receipt but was only the conditional receipt that what is the weight of the consignment has not been checked by the respondent/railways but the weight as given by the consignor/appellant has been accepted. Respondent relies upon Sections 65 and 94 of the Railways Act for dismissing of the claim petition.

4. *It is not disputed in the facts of the present case that railway receipt shows that the same was as per SWA basis. Once the railway receipt is as per SWA basis, then, the respondent is protected by Section 94 of the Railways Act and which provides that there is no liability of the respondent/railways unless at the point of interchange to the railway wagon from the private siding a railway servant duly authorized is present, i.e the railway servant is present at the time of loading of the consignment, and therefore the railways is responsible for the weight of the consignment. Once the railway receipt is on SWA basis, then, there would be no liability in law of the respondent in terms of Section 94 of the Railways Act. Even Section 65 of the Railways Act only states that the railway receipt is only a prima facie proof of its contents and which expression of prima facie so found because of the procedure in the respondent/railways for taking SWA consignments and which is done because railways does not have provision for weighing of those consignments which are extremely heavy/bulky or those consignments because of their nature or for some other reason cannot weighed at the point of handing over of the consignment by the consignor to the railways.* Sections 65 and 94 of the Railways Act are reproduced as under:-

"Section 65. Railway receipt.-(1) A railway administration shall,--

(a) in a case where the goods are to be loaded by a person entrusting such goods, on the completion of such loading; or

(b) in any other case, on the acceptance of the goods by it, issue a railway receipt in such form as may be specified by the Central Government.

(2) A railway receipt shall be prima facie evidence of the weight and the number of packages stated therein:

Provided that in the case of a consignment in wagon-load or train-load and the weight or the number of packages is not checked by a railway servant authorised in this behalf, and a statement to that effect is recorded in such railway receipt by him, the burden of proving the weight or, as the case may be, the number of packages stated therein, shall lie on the consignor, the consignee or the endorsee. Section 94. Goods to be loaded or delivered at a siding not belonging to a railway administration.-(1) Where goods are required to be loaded at a siding not belonging to a railway administration for carriage by railway, the railway administration shall not be responsible for any loss, destruction, damage or deterioration of such goods from whatever cause arising, until the wagon containing the goods has been placed at the specified point of interchange of wagons between the siding and the railway administration and a railway servant authorised in this behalf has been informed in writing accordingly by the owner of the siding.

(2) Where any consignment is required to be delivered by a railway administration at a siding not belonging to a railway administration, the railway administration shall not be responsible for any loss, destruction, damage or deterioration or non-delivery of such consignment from whatever cause arising after the wagon containing the consignment has been placed at the specified point of interchange of wagons between the railway and the siding and the owner of the siding has been informed in writing accordingly by a railway servant authorised in this behalf."

32. In the judgment passed in **First Appeal No. 309 of 1999 (M/s Hindustan Petroleum Corporation Ltd. vs. Union of India)**; MANU/MH/0223/2004, the

Nagpur Bench of Bombay High Court took note of the remark(s) on the Railway receipt i.e. S/C ('said to contain') and 'loading not supervised by the Railway staff' as also the judgment passed in the case of Union of India vs. Jugal Kishore Khandelwal and Union of India vs. Roop Narayan; AIR 1997 Raj. 123, dismissed the appeal. The relevant paragraphs of the same extracted herein under:-

"5. The case of Union of India v. Jugal Kishore Khandelwal, supra, has been based on the fact that the goods were delivered under certain conditions written on the railway receipt. First condition was denoted by the remark "said to contain" certain quantity of material. The remark "said to contain" has been interpreted by the learned Single Judge of Orissa High Court as not constituting any acceptance on the part of the railway administration that the quantity shown in the railway receipt was actually received for transportation to the destination point. The second condition was indicated by another remark to the effect that "loading not supervised" by the railway staff and this remark together with the former remark has been interpreted by the learned Single Judge of Orissa High Court to be constituting no admission on the part of railway administration of acceptance of that much quantity of goods, as has been shown in the railway receipt, for transportation to the destination point.

6. In the instant case also, the facts are similar. If we look at the railway receipt vide Ex. R/1, it can be seen that this receipt contains both the said remarks. The remark "said to contain" appears in abbreviated form as "S/C". So far as the latter remark is concerned, it appears in terms "loading not supervised by the staff". Learned counsel for the appellant submits that the

abbreviation "S/C" cannot be understood by a person who has not worked any time with the railways and the appellant being not conversant with the practice of railway administration, was not expected to know the meaning and implication of the remark "S/C", and, therefore, the respondent cannot be allowed to take advantage of this remark. I am not inclined to accept this argument for the reason that when any additional remarks are made on a railway receipt, and if those remarks are illegible or could not be understood by the consignor; the consignor must seek clarification from the concerned staff of the railway, and if he does not do so, he must suffer for the inaction shown by him. Once the railway receipt is accepted by the consignor without any protest, the consignor cannot be allowed to take the defence that he did not understand the contents of the railway receipt and in this case the appellant accepted railway receipt with both the said remarks without any protest. Both the said remarks, "said to contain" and "loading not supervised by the staff" clearly indicated that the railway administration did not accept as correct the quantity of motor spirit shown to have been loaded in the tank wagon at Bajwa and appearing in the railway receipt. The appellant could have at that time insisted upon the railway staff to check the quantity of motor spirit loaded in the wagon at the time of handing over of the wagon to railways for its transportation to the destination point. If the railway staff had refused to budge, the railway receipt could have been accepted only under protest by the appellant. This has not been done by the appellant, rather the appellant appears to have accepted the remark that loading was said to contain certain quantity and was done without any supervision by the staff and, in turn, also accepted the risk

that was inherently involved in handing over of the tank wagon to the railway staff for being its transported to the destination point at Khapri. These facts are similar to the facts of the aforesaid case of Union of India v. Jugal Kishore Khandelwal. Therefore, the view expressed therein by the learned Single Judge of Orissa High Court that these remarks indicated that there was no acceptance on the part of the railways of the quantity of goods delivered to it for carriage, commends itself to me and can be applied here also. Learned Member of the Tribunal, therefore, has committed no error in recording a finding that appellant failed to prove that the motor spirit delivered to it by railway administration at Khapri was in quantity shorter than what was handed over by the appellant to railways at Bajwa.

7. The learned Member has pressed into service the proviso to Section 65 of the Indian Railways Act, 1989 for rejecting the claim of appellant and rightly so. It lays down that in case consignment in wagon-load is not checked by an authorised railway servant, and a statement to that effect is recorded in such railway receipt by him, the burden of proving the weight stated therein, shall lie on the consignor, the consignee or the endorsee. In this case, such statement as required by the said proviso has already been found by me to be made in the railway receipt. Therefore, burden to prove the weight stated in the railway receipt lay upon the consignor, i.e. the appellant in this case and not the respondent. The appellant, however, did not discharge it by adducing necessary evidence and, therefore, there was no way the claim application could have been granted by the Tribunal.

8. So far as the decision given by the learned Judicial Member on 6.11.1998 in the case 118/OAI/RCT/NGP/94 is concerned, which has been relied upon by

the appellant, one can very well see, upon perusal of the entire judgment, that in that case there was only one remark which was to the effect "said to contain" and that the case did not have any other remark "loading not supervised by the staff", which is borne on the railway receipt involved in this case. Therefore, one can say that the facts of that case are not similar to the facts of this case, and as such, no question of acquiescence in this decision by the respondent would arise. Further, it appears that said judgment does not properly take into account the impact of proviso to Section 65 of the Railways Act, 1989, which shifts the burden of proving weight of the consignment upon the consignor, in case it is not checked by railway staff authorised in that behalf and statement to that effect is made on the railway receipt on the over all claim of the appellant in that case. Such a judgment, therefore, should not prevent the respondent from repudiating claim, in accordance with law. I, therefore, find no substance in the argument of learned counsel for the appellant made in this regard.

9. Learned counsel for respondent has also placed reliance upon the decision in Union of India v. Roop Narayan reported in MANU/RH/0026/1997 : AIR 1997 Raj. 123 to support his argument that since there was no acceptance on the part of the railway administration of the quantity of goods loaded at loading point, the railway administration was not liable for damages on account of any shortage in delivery at destination point. In the said case, there were various remarks incorporated in the railway receipt, the relevant of which were "said to contain" and "SWA" indicating sender's weight was accepted for the purpose of calculation of freight at the forwarding station. Interpreting these remarks, the learned Judge of Rajasthan

High Court held that there was no admission on the part of the railways that the articles in number, as mentioned in the railway receipt, had in fact been loaded. This judgment, in my view, certainly supports the case of the respondent herein."

33. The relevant paras of the judgment passed in the case of **Kanhaiya Bhalotia vs. Union of India; 2013 SCC OnLine Pat 506** by the High Court of Patna are as under:-

"The Supreme Court in the case of **Hari Saov. The State of Bihar : AIR 1970 SC 843** has considered the issue of carriage of goods at 'owner's risk rate' and the various remarks mentioned in the railway receipt applicable to such cases and it has been observed at page 845 (AIR) as follows:

"7... Under section 74 where goods are tendered to a railway administration for carriage at special reduced rate known as 'the owner's risk rate' then, notwithstanding anything contained in section 73, the railway administration is not to be responsible for any loss, destruction, damage etc., from whatever cause arising, except upon proof that such loss, damage, destruction etc. was due to negligence or misconduct on the part of the railway administration or any of its servants... .."

"8. It is, therefore, clear that the railway administration may be liable for loss, destruction or non-delivery of the goods under section 73 if it fails to use reasonable foresight and care in the carriage of the same and would also be similarly liable even in respect of goods carried at special reduced rate if there was negligence and misconduct on its part or

any of its servants... .."

There would be no presumption that the goods put in the wagons were chillies because the railway did not accept the consignment as such and described it as 251 bags allegedly containing chillies. Nor was there any acceptance of the weight of the goods by the railways. The endorsement of 'S.W.A.' would negative the plea, if any, that the weight was accepted by the railway. The endorsement "L/U" emphasized that the loading and unloading being in charge of the consignor the railway could not be held liable for any negligence in loading or unloading."

In paragraph 10 of the judgment the Supreme Court has taken note of the judgment passed in the case of **Dominion of Indiav. Firm Museram Kishunprasad : AIR 1950 Nagpur 85** and observed as follows:

"10. ... It was held by the Nagpur High Court that there was no proof that 255 bags had in fact been loaded. Referring to rule 22 of the Goods Tariff General Rules it was said that the receipt issued "qualified the number by stating that the wagon was 'said to contain' 255 bags.... and the number was mentioned merely to calculate the freight". Reference was also made to rule 15 under which mentioning of the weight in railway receipt did not amount to admission of correctness of the statement and according to Nagpur High Court "this rule applies with even more vigour where the railway receipt in addition contains the 'said to contain' remarks."

A Division Bench of this Court in the case of **Union of India v. Chotelal Shewnath Rai : AIR 1973 Patna 244** while considering the import of a railway receipt,

forwarding note and the Bijak has held in paragraph 8 as follows:

“8.

I have already adverted to above that the entry about the weight of the consignment mentioned in the railway receipt and the forwarding note are no admission of the railway department about the weight carried in that consignment because in the case before us the railway has not weighed the consignment at the despatching station and the loading was done by the sender

So far as the Bijak (Ext.2) is concerned, this is a statement made by the consigner that 565 maunds and odd ground-nut oil was despatched from Kharsalia to Tata Nagar; The person who wrote this Bijak (Ext.2) has not been examined in this case nor is it known that the said person was actually present at the time when the ground-nut oil in question was loaded in the tank wagon. As such this document (Ext.2) too cannot be said to be a legal evidence... ..

..... ..”

34. From the above quoted provisions as also the judgments referred and the remark(s) on the Railway receipt(s) i.e. 'S/C' (said to contain), 'SWA' (Sender's Weight Accepted) and 'loading not supervised by Railway Staff'; it is apparent that Railway Administration would not be responsible for any loss, destruction, damage, deterioration or non-delivery in transit, of any consignment from whatever cause arising, except upon proof, that such loss, destruction, damage, deterioration or non-delivery was due to negligence or misconduct on its part or on the part of any of its servants.

35. From the statutory provisions governing the goods/consignment carried by the railways and the various judgments passed after considering the relevant statutory provisions as also the remark(s) on the Railway receipt, it is crystal clear that for seeking compensation the consignor, consignee or the endorsee is under obligation to prove negligence or misconduct by the railway administration or its servants and even if any such negligence is proved, yet the concerned is also required to prove the loss, destruction, damage, deterioration or short delivery or the likes by adducing appropriate oral and documentary evidence.

36. The aforesaid conclusion is in consonance with the principle that plaintiff can succeed only on the strength of his own case and not on the weakness of defense. In other words, plaintiff has to stand on his own legs, not on the legs of others. As per Sections 101 and 102 of Indian Evidence Act, 1872, the initial onus is always on the plaintiff/claimant and if he discharges the onus and makes out a case which entitles him relief, the onus shifts to the defendant/opponent to prove those circumstances, if any, which dis-entitles the plaintiff/claimant to the same. Latin maxim 'Onus Probandi' conveys the Rule that one who asserts a positive fact has to prove it.

37. Admittedly, in the case(s) of BPCL, indicated above, the petroleum product was loaded by BPCL at its siding and thereafter in all the case(s) the Railway issued the receipt(s) bearing remark(s) 'S/C' (said to contain), 'SWA' (Sender's Weight Accepted) as also 'loading was not supervised by Railway Staff' and 'Joint Dip Certificate(s)' also indicates the Railway as per Section 94 of the Act of 1989 is not responsible for any loss and as such, it was

the duty of the BPCL to prove by adducing appropriate evidence that (i) the petroleum product/consignment was properly loaded; (ii) quantity was appropriate as indicated in the receipt(s) and (iii) was got damaged on account of some misconduct or negligence on the part of the Railway or its servants.

38. To prove the fact that the petroleum product at a siding of BPCL was loaded properly and the same was as indicated in the receipt(s), the consignor namely BPCL was under obligation to adduce the evidence of at least one appropriate person (the person who supervised the loading at a siding of BPCL or the person who was authorized for loading and was present at a siding of BPCL) as also the relevant documentary evidence viz. Register, book etc. prepared with regard to loading by BPCL at its siding.

39. In absence of appropriate evidence, as indicated above, of consignor, the 'Joint Dip Certificate' or Calibration Certificate (on record of F.A.F.O. No.49 of 2018), to the view of this Court, was not sufficient to allow the claim of the BPCL. Thus, the BPCL, in all the case(s), failed to establish its claim as also the negligence of Railway Administration.

40. In the case(s), indicated above, it is apparent from record(s) that the BPCL failed to adduce the evidence, as required, before the Tribunal.

41. It would be apt to refer here that the affidavit of evidence in all the case, except in one case, as indicated hereinabove, was filed by one Sri Baldev, Senior Assistant Claims, Office of General Manager, BPCL, Noida, U.P. and this person has not stated in the affidavit(s) that

he was present at the time of loading, obviously he can not. Moreover, in these affidavit(s) it has not been specifically stated with supporting document(s) prepared, as per norms, at the time of loading at a siding of BPCL that (i) petroleum product, in issue, was properly loaded; (ii) the sealing, tightening of valves etc. was done as per norms and further the affidavit(s) are also silent on the aspects indicated under Sub-section (f) and (g) of Section 93. Thus, to the view of this Court, the evidence adduced by the BPCL in all the case(s) was not appropriate/sufficient so as to allow the claim(s) of BPCL.

42. In view of the circumstances set forth above there cannot be any other conclusion but to dismiss these appeals.

43. In the result, these appeals are **dismissed** but without any order as to costs.

44. Let the lower court records be returned to the tribunal concerned forthwith.

(2023) 9 ILRA 1151

**ORIGINAL JURISDICTION
CIVIL SIDE**

DATED: LUCKNOW 30.08.2023

BEFORE

THE HON'BLE SAURABH LAVANIA, J.

RERA Appeal Defective No. 42 of 2023

**M/S Agc Realty Pvt. Ltd.
Versus**

Smt. Raj Rani

...Appellant

...Respondent

Counsel for the Appellant:

Aahuti Agarwal, Abhishek Khare

Counsel for the Respondent:

Civil Law-The U.P. Real Estate Regulation and Development Act, 2016 - The U.P. Real Estate Regulation and Development Rules, 2016-Rule 2(h) -The U.P. Urban Planning Development Act, 1973-Section 15-A--- To claim that the project was not an '**ongoing project**' the appellant is under obligation to plead and prove in the light of Rule 2(h)--- As regards to Sub-Rule (i) and (ii) of Rule 2(h) of the Rules of 2016, nothing has been brought on record, wherefrom, it can be deduced that the services of the project have been handed over to local authority for maintenance or that the common areas and facilities of the same have been handed over to RWA for maintenance including with regard to Tower, in issue--- The case set up by the appellant on the basis of deeming provision in relation to 'completion certificate', indicated in Section 15A of the Act of 1973 has no force--- The completion certificate regarding Tower-W, undisputedly, was given by the Development Authority on 26.06.2018--- Appellant not entitled to the benefit of Sub-Rule (iii) and (iv) of Rule 2(h) of the Rules of 2016. **(Para 21, 22, 26 & 27)**

Appeal dismissed. (E-15)

List of Cases cited:

1. Bharat Sanchar Nigam Ltd. & anr.Vs Nortail India Pvt. Ltd.; (2021) 5 SCC 738
2. St. of Kerala Vs Zoom Developers Pvt. Ltd.; (2009) 4 SCC 563
3. Tecpro Systems Ltd. Vs Telangana St. Power Generation Power Ltd. ; 2019 SCC Online TS 1658.
4. ITD Cementation India Ltd. Vs SSJV-Joint Venture & ors.; 2023 (2) SCC Online Delhi 1391
5. Chloro Controls India Pvt. Ltd. Vs Severn Trent Water Purification Inc. & ors.; (2013) 1 SCC 641
6. Vidya Drolia & ors.Vs Durga Tradi Corp.; 2021 (2) SCC 1

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

C.M. Application No.IA-01-2023

Heard.

The present appeal has been filed by the appellant along with an application for condonation of delay as the registry has indicated delay of 39 days in filing the instant appeal.

The cause shown in the affidavit filed in support of the application for condonation of delay to the view of this Court is sufficient. Accordingly, the application is allowed.

Delay is condoned.

Order on Appeal

1. For the purpose of admission, Shri Abhishek Khare, learned counsel for the appellant assisted by Ms. Aahuti Agrawal says that in the instant appeal assailing the order dated 08.12.2022 passed by Uttar Pradesh Real Estate Appellate Tribunal Lucknow (in short "Lucknow") in appeal No.308 of 2019 (Smt. Rajrani and another vs. M/S Agc Realty Private Limited), the main issue revolves around the expression 'ongoing project' which expression, infact, has not been defined under the Act, namely, Uttar Pradesh Real Estate (Regulation and Development) Act, 2016 (in short "Act of 2016"), however, the same has been indicated in the U.P. Real Estate Regulation And Development Rules, 2016 (in short "Rules of 2016"), particularly, Rule 2(h).

2. He submitted that this aspect of the case is required to be dealt with as it strikes the issue of jurisdiction of the Tribunal. If this Court comes to the conclusion that the project in issue of the present appellant was

an 'ongoing project' as defined under Rule 2(h) of Rules, 2016, at the time of filing of the complaint, then in that case, the claim was rightly entertained else the Tribunal was not having jurisdiction to decide the claim of the private opposite parties and the order would be set aside on the ground of jurisdiction.

3. It would be apt to refer that the present appeal has been preferred by the appellant-M/S Agc Realty Private Limited under Section 58 of the Act of 2016. It is also settled principle of law that the appeal under Section 58 is akin to the second appeal as provided under Section 100 of Code of Civil Procedure, meaning thereby, if the appeal involves substantial question of law, then can only be entertained otherwise the appeal can be dismissed at the admission stage.

4. On the expression of 'ongoing project', the learned counsel for the appellant stated that the project was introduced / launched in the year 2009. This project is known as " Homes 121. NOIDA". As per the plan, Twenty Two Towers were to be constructed. Admittedly, when the Act and Rules of 2016, came into force, only Twenty One Towers were constructed rather completed in all aspects. It is in view of the fact that 'occupation certificate' of these Towers were provided by the competent authority, namely, New Okhla Industrial Development Authority, Noida (in short "Development Authority") on 25.02.2016.

5. He further stated that one tower i.e. Tower-W, out of Twenty Two Towers, the Order on Appeal 'occupation certificate' though applied prior to coming into force of the Act and Rules of 2016, was not issued by the Development

Authority. In this Tower-W, the flat of the respondents is situated. Undisputedly, the Flat No.12023, 12th Floor, Tower W was allotted to the respondent by the appellant.

6. He also stated that in Tower-W, there are as many as ninety two flats. As per the allotment letter dated 09.03.2012, the appellant (Promoter/ Developer) was under obligation to provide the possession of the flat by July 2014. As the possession was not given, the private opposite parties approached the U.P. Real Estate Regulatory Authority claiming refund of the amount deposited with the appellant. The amount claimed before the authority as per record was Rs. 75,87,757/-. The claim of the private opposite parties was opposed by the appellant by filing the written statement. In short, in the written statement regarding the delay, it has been indicated that, in fact, there was no delay in constructing the Tower-W. The Tower-W was constructed within time and the application was preferred for providing 'occupation certificate' regarding the Tower-W before the Development Authority in the year 2015.

7. At this stage, on query being put, neither the date of presenting the application nor the copy of the application could be placed before this Court.

8. Learned counsel for the appellant further stated that despite preferring the application in the year 2015 seeking 'occupation certificate', the authority failed to provide the 'occupation certificate', as such, there is no fault on part of the appellant. Moreover, Section 15-A of the U.P. Urban Planning Development Act, 1973 (in short "Act of 1973"), which is applicable in the instant case, provides deeming provision in relation to

'completion certificate' and accordingly, taking note of the fact that the application seeking 'occupation certificate' was preferred in the year 2015 and the Act of 2016 came into force on 01.05.2017, it can be deemed that the 'occupation/completion certificate' was issued by the authority concerned.

9. At this stage, a query being put to counsel for the appellant that as to whether the document i.e. application seeking 'occupation certificate' was filed before the Authorities under the Act of 2016 including the Tribunal in support of pleadings related to preferring an application seeking 'occupation/completion certificate' made in the written statement, he fairly stated that the application was not filed.

10. It would be apt to refer that it is settled principle of law that pleadings could be considered only when in support thereof there is an evidence on record and vice versa, meaning thereby, in absence of evidence, the pleadings cannot be considered and evidence in absence of pleadings cannot be considered.

11. It would also to be noted at this stage that copies of 'occupation/completion certificate' on record dated 15.02.2016 and 26.06.2018 indicate that regarding Tower-W, the inspection was carried out on 18.12.2017 and thereafter, 'occupation certificate' in relation to Tower-W was issued on 26.06.2018.

12. To support his case based upon Rule 2(h) (ii) and (iii), counsel for the appellant further stated that the project admittedly contains Twenty Two Towers and Twenty One Towers were completed and 'occupation certificate' in relation to these 21 Towers was issued by the

Development Authority on 15.02.2016 and more than sixty percent apartments were handed over to the allottees. Thus, as per Rule 2(h), the project was not an 'ongoing project'. Thus, the Authority or the Tribunal under the Act of 2016 was not having jurisdiction to entertain and decide the case or appeal, as the case may be.

13. To substantiate the fact that prior to the Act of 2016, which came into force on 01.05.2017, more than 60% sale-deeds were executed, learned counsel for the appellant, based upon the supplementary affidavit dated 05.04.2023, stated that a perusal of Annexure SA-1, which is a copy of chart pertaining to registration of sale-deeds, would show that the sale-deeds of approximately 73% of the flats of whole project prior to commencement of the Act of 2016 were executed.

14. However, a perusal of the chart annexed with the supplementary affidavit reflects that no flat of Tower-W, in which flat in issue is situated and which form part of Phase-IV, was sold prior to coming into force of the Act of 2016.

15. During the course of the arguments on being asked that 'occupation certificate' or 'completion certificate' were to be obtained phase-wise/Tower-wise as per the brochure of the project or agreement between the parties, in issue, and that whether the same indicates separate date of completion of Towers and handing over the possession of the same, learned counsel for the appellant failed to reply the said queries based upon the documents available on record.

16. Before considering the submission of the counsel for the appellant, this Court is of the view that the decision of the

Tribunal on issue No.6 is relevant, as the same relates to the issue involved in this appeal and while deciding the same, the Tribunal referred all the relevant provisions of the Act of 2016 and Rules of 2016. Accordingly, the same is extracted hereinunder:-

15. Vide Issue No. (6) we are required to examine as to Whether there is any illegality or perversity in the impugned order dated 02.08.2019?

15.1 As per the pleadings of the respondent, the respondent launched a real estate project in the name of 'Homes 121, Noida' in several phases consisting of 22 towers. The Noida Authority issued OC/CC on 15.12.2016 to the respondent for 21 towers containing 1640 dwelling units, copy of the same has been placed on record by the respondent along with its reply dated 02.11.2020 as R-3. The respondent in para 9 of the reply admitted that there remained only one power, namely Tower-W which contains only 92 dwelling units and construction whereof had also been completed in the year 2015. The issue of occupation certificate was lying with the Noida Authority and the competent authority of Noida issued occupation/completion certificate on 22.06.2018 in respect of Tower-W (Annexure R-6).

15.2 The appellant has brought on record a copy of the order dated 02.01.2019 of the Secretary, UP RERA, whereby the respondent was informed that the project of the respondent falls in the category of 'ongoing project' and by not registering the same with UP RERA the respondent violated the provisions of the Act 2016 and directed for registration of the same as per order of UP RERA dated 27.11.2018 along with prescribed penalty, within 7 days, failing which action will be initiated under

the provisions of Section 59 of the Act 2016.

15.3 The learned counsel for the appellant further submitted that Regulatory Authority, without examining the direction of the Secretary, UP RERA issued by the competent authority of Noida on 22.06.2018, held that the project in question is not required to be registered, while directing the pleadings and prayer of the appellant. It was incumbent, against the pleadings and prayer of the appellant. It was incumbent upon the Regulatory Authority to proceed against the respondent for not registering the project with UP RERA, taking into consideration the fact that OC/CC of Tower-W has been issued by the competent authority Noida much after enforcement of the provisions of the Act 2016, wherein it was incumbent upon the promoter of ongoing project to get the same registered within three months.

15.4 It would be apt to understand the import of certain sections, definitions contained under the Act and the Rules framed thereunder. Section 3 of the Real Estate (Regulation and Development) Act, 2016 which came into effect on 25th March, 2016, is being reproduced below:-

Section 3 "Prior registration of real estate project with Real Estate Regulatory Authority"

(1) No promoter shall advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner any plot, apartment or building, as the case may be, in any real estate project or part of it, in any planning area, without registering the real estate project with the Real Estate Regulatory Authority established under this Act:

Provided that projects that are ongoing on the date of commencement of this Act and for which the completion certificate has not been issued, the

promoter shall make an application to the Authority for registration of the said project within a period of three months from the date of commencement of this Act:

Provided further that if the Authority thinks necessary, in the interest of allottees, for projects which are developed beyond the planning area but with the requisite permission of the local authority, it may, by order, direct the promoter of such project to register with the Authority, and the provisions of this Act or the rules and regulations made thereunder, shall apply to such projects from that stage of registration.

(2) Notwithstanding anything contained in sub-section (1), no registration of the real estate project shall be required-

(a) where the area of land proposed to be developed does not exceed five hundred square meters or the number of apartments proposed to be developed does not exceed eight inclusive of all phases:

Provided that, if the appropriate Government considers it necessary, it may, reduce the threshold below five hundred square meters or eight apartments, as the case may be, inclusive of all phases, for exemption from registration under this Act:

(b) where the promoter has received completion certificate for a real estate project prior to commencement of this Act:

(c) for the purpose of renovation or repair or re-development which does not involve marketing, advertising selling or new allotment of any apartment, plot or building, as the case may be, under the real estate project.

Explanation. -For the purpose of this section, where the real estate project is to be developed in phases, every such phase shall be considered a standalone real estate project, and the promoter shall obtain

registration under this Act for each phase separately.

15.5 Thus under Chapter II of the Act 2016, registration of real estate projects become mandatory and to make the statute applicable and to take its place under Sub-section (1) of Section 3, it was made statutory that without registering the real estate project with a real estate regulatory authority established under the Act, no promoter shall advertise, market, book, sell or offer for sale, or invite persons to purchase in any manner a plot, apartment or building, as the case may be in any real estate project, but with the aid of provisions to Section 3(1), it was mandated that such of the projects which are ongoing on the date of commencement of the Act and more specifically the projects to which the completion certificate has not been issued such promoters shall be under obligation to make an application to the authority for registration of the said project within a period of three months from the date of commencement of the Act, except as the projects covered by sub section-(2) of Section 3 of the Act, as a consequence, all such home buyers agreements which have been executed by the parties inter se have to abide the legislative mandate in completion of their ongoing projects.

The term "ongoing project" has not been so defined under the Act while the expression "Real Estate Project" is defined under Section 2(zn) of the Act, which reads as under:-

"2(zn)- real estate project" means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartments, as the case may be, for the purpose of selling all or some of the said apartments or plots or building, as the case may be, and includes the common

areas, the development works, all improvements and structures thereon, and all easement, rights and appurtenances belonging thereto"

As per the legislative mandate, the Act is intended to apply even to the ongoing real estate projects. The expression "On Going Project" has been defined under Rule 2(h) of the U.P. Real Estate (Regulation and Development) Rules, 2016, which reads as under-

"2(h) 'ongoing project' means a project where development is going on and for which completion certificate has not been issued but excludes such projects which fulfill any of the following criteria on the date of notification of these rules:

(i) where services have been handed over to the Local Authority for maintenance.

(ii) where common areas and facilities have been handed over to the Association for the Residents' Welfare Association for maintenance.

(iii) where all development work have been completed and sale/lease deeds of sixty percent of the apartment/houses/plots have been executed.

(iv) where all development works have been completed and application has been filed with the competent authority for issue of completion certificate."

The expression "Completion Certificate" has been defined under Section 2(q) and "Occupancy Certificate" under Section 2(zf) of the Act, which reads as under:-

"2(q) 'completion certificate' means the completion certificate, or such other certificate, by whatever name called, issued by the competent authority certifying that the real estate project has been developed according to the sanctioned plan, layout plan and specifications, as

approved by the competent authority under the local laws;

"2(zf) 'occupancy certificate' means the occupancy certificate, or such other certificate, by whatever name called, issued by the competent authority permitting occupation of any building, as provided under local laws, which has provision for civic infrastructure such as water, sanitation and electricity;"

15.6 Looking at the scheme of the Rules, the Completion Certificate can only be issued after all norms etc. have been complied with and only thereafter a project would escape from the mandate of registration.

15.7 Further, as per the scheme of Act 2016 and Section 3 in particular all 'ongoing projects' that commence prior to the Act and in respect to which completion certificate has not been issued are covered under the Act. It manifests that the legislative intent is to make the Act applicable not only to the projects which were yet to commence after the Act became operational but also to bring under its fold the ongoing projects and to protect from its inception the inter se rights of the stakeholders, including allottees/home buyers, promoters and real estate agents while imposing certain duties and responsibilities on each of them and to regulate, administer and supervise the unregulated real estate sector within the fold of the real estate authority.

15.8 The Apex Court recently in **M/s Newtech Promoters and Developers Pvt. Ltd. Vs. State of U.P. & others (Civil Appeal No.(s) 6745-6749 of 2021** arising out of SLP (Civil) No.(s) 3711-3715 of 2021 had the occasion to consider as to whether the Real Estate (Regulation and Development) Act, 2016 is retrospective or retroactive in its operation and what will be its legal consequence, if tested on the ambit

of the Constitution of India. The Apex Court after extensive analysis of the aims and objects, provisions of the Act observed as under:-

"41. The clear and unambiguous language of the statute is retroactive in operation and by applying purposive interpretation rule of statutory construction, only one result is possible, i.e., the legislature consciously enacted a retroactive statute to ensure sale of plot, apartment or building. real estate project is done in an efficient and transparent manner so that the interest of consumers in the real estate sector is protected by all means and Sections 13, 18(1) and 19(4) are all beneficial provisions for safeguarding the pecuniary interest of the consumers/allottees. In the given circumstances, if the Act is held prospective then the adjudicatory mechanism under Section 31 would not be available to any of the allottee for an ongoing project. Thus, it negates the contention of the promoters regarding the contractual terms having an overriding effect over the retrospective applicability of the Act, even on facts of this case.

42. What the provision further emphasizes is that a promoter of a project which is not complete/sans completion certificate shall get the project registered under the Act but while getting the project registered, promoter under an obligation to prescribe fresh timelines for getting the remaining development work completed and from the scheme of the Act, we do not find that the first proviso to Section 3(1) in any manner is either violative of Articles 14 and 19(1)(g) of the Constitution of India. The Parliament is always competent to enact any law affecting the antecedent events under its fold within the parameters of law,"

The Apex Court further drawing a distinction between retrospective and retroactive statutes observed as under-

48. The distinction between retrospective and retroactive has been explained by this Court in Jay Mahakali Rolling Mills Vs. Union of India and Others, which reads as under:-

"8. "Retrospective" means looking backward, contemplating what is past. having reference to a statute or things existing before the statute in question. Retrospective law means a law which looks backward or contemplates the past, one, which is made to affect acts or facts occurring, or rights occurring, before it comes into force. Retroactive statute means a statute, which creates a new obligation on transactions or considerations or destroys or impairs vested rights,"

49. Further, this Court in Shanti Conductors Private Limited and Another Vs. Assam State Electricity Board and Others, held as under:-

"67. Retroactivity in the context of the statute consists of application of new rule of law to an act or transaction which has been completed before the rule was promulgated. 68. In the present case, the liability of buyer to make payment and day from which payment and interest become payable under Sections 3 and 4 does not relate to any event which took place prior to the 1993 Act, it is not even necessary for us to say that the 1993 Act is retroactive in operation. The 1993 Act is clearly prospective in operation and it is not necessary to term it as retroactive in operation. We, thus, do not subscribe to the opinion dated 31.8.2016 [Shanti Conductors (P) Ltd. v. Assam SEB. (2016) 15 SCC 13] of one of the Hon'ble Judges holding that the 1993 Act is retroactive."

50. In the recent judgment of this Court rendered in the case of Vineeta Sharma Vs. Rakesh Sharma and Others wherein, this Court has interpreted the scope of Section 6(1) of the Hindu

Succession Act, 1956, the law of retroactive statute held as under:-

"61. The prospective statute operates from the date of its enactment conferring new rights. The retrospective statute operates backwards and takes away or impairs vested rights acquired under existing laws. A retroactive statute is the one that does not operate retrospectively. It operates in futuro. However, its operation is based upon the character or status that arose earlier. Characteristic or event which happened in the past or requisites which had been drawn from antecedent events. Under the amended Section 6, since the right is given by birth, that is, an antecedent event, and the provisions operate concerning claiming rights or and from the date of the Amendment Act,"

"51. Thus, it is clear that the statute is not retrospective merely because it affects existing rights or its retrospection because a part of the requisites for its action is drawn from a time antecedent to its passing, at the same time, retroactive statute means a statute which creates a new obligation on transactions or considerations already passed or destroys or impairs vested rights.

52. The Parliament intended to bring within the fold of the statute the ongoing real estate projects in its wide amplitude used the term "converting and existing building or a part thereof into apartments" including every kind of developmental activity either existing or upcoming in future under Section 3(1) of the Act, the intention of the legislature by necessary implication and without any ambiguity is to include those projects which were ongoing and in cases where completion certificate has not been issued within fold of the Act

54. From the scheme of the Act 2016, its application is retroactive in

character and it can safely be observed that the projects, already completed or to which the completion certificate has been granted are not under its fold and therefore, vested or accrued rights, if any, in no manner are affected. At the same time, it will apply after getting the ongoing projects and future projects registered under Section 3 to prospectively follow the mandate of the Act 2016."

15.9 We have also examined the provisions of the U.P. Apartment (Promotion of Construction, Ownership and Maintenance) Act, 2010, wherein in Chapter II under the heading of **DUTIES AND LIABILITIES OF PROMOTERS** vide Section 4(5) it has been provided that an apartment may be transferred to any person only after obtaining the completion certificate from the prescribed sanctioning authority concerned as per balding by-laws and under the heading of Explanation, it has been further provided that for the purposes of this sub-section "completion" means or the completion of the construction works of a building as a whole the completion of an independent block of such building, as the case may be.

15.10 The purpose of this beneficial legislation', it says "is to safeguard the pecuniary interest of the consumers/allottees". It was observed that the Act, obligates a promoter to get a project registered, which is either not complete or is sans completion certificate on the date of commencement of the Act.

15.11 The key word, i.e., "ongoing on the date of the commencement of this Act" by necessary implication, ex-facie and without any ambiguity, means and includes those projects which were ongoing and in cases where only issuance of completion certificate remained pending, legislature intended that even those projects have to be registered under the Act.

Therefore, the ambit of Act is to bring all projects under its fold, provided that completion certificate has not been issued. Thus, those projects under Section 3(2) need not be registered under the Act and, therefore, the intent of the Act hinges on whether or not a project has received a completion certificate on the date of commencement of the Act. The project is ongoing or not it has to be distinguished on the basis of ongoing project under Section 3(2)(h) of the Act 2016 which states that where the promoter has received completion certificate for a real estate project prior to commencement of the Act 2016 notwithstanding anything contained in sub-section (1), no registration of real estate project is required and the project shall not be 'ongoing project', but in other cases with respect to the project existed at the time of commencement of the Act, the same need to the registered failing which the Regulatory Authority is required to take action under Section 59 of the Act 2016 and ensure that ongoing project is registered in order to make the provisions of the Act and Rules 2016 applicable.

15.12 Section 31 of the Act deals with filing of complaint and reads that "Any aggrieved person may file a complaint with the Authority or the adjudicating officer, as the case may be, for any violation or contravention of the provisions of the Act or the rules and regulations made thereunder against any promoter allottee or real estate agent, as the case may be.

15.13 An aggrieved person has not been defined in the Act, which means that this term should be given a wider and not a restrictive interpretation, in this scenario, any person can come to agitate his/her grievance before the Authority. If a complaint is made under section 31 for violation or contravention of the provisions

of the Act (as the language of the statute suggests), it may also include a complaint by the allottee against the promoter for not registering the project, apart from other complaints of non-delivery, delayed possession or any other conceivable, or otherwise, an exploitative condition, where a person's life's earnings are at stake in a real estate project.

5.14 The authority would have to admit a complaint even if it is to reach a conclusion about the completion of a project or to draw further conclusions about the applicability of the Act. Merely because a project hasn't been registered can never be an acceptable reason to deprive the allottee of his/her statutory right to file a complaint.

15.15 In our view, the Authority has to act as a watchdog and play an active role in thwarting such malpractices which may result in closing its doors to any aggrieved person.

15.16 Further, the Authority cannot also turn a blind eye to its own powers under Section 35, under which it can act suo motu to call for information or clarifications relating to the affairs of any promoter, especially when an allottee complaint of incomplete work as well as infrastructural development, suggesting that the project may still be an ongoing project.

15.17 Sections 32, 34 and 35 of the Act read together leave no doubt that the Authority is a watchdog designed to ensure transparency in the real estate sector, to protect all players, be it the allottee, the promoter Or be a real estate agent. The underlying emphasis is to protect the interest of an allottee, who is a dwarf compared to the might of the promoters/developers.

15.18 No doubt the language of the statute would state that registration

would not be required on completion of a project, but in the event of a complaint regarding deficiency in development works, it is the duty of the Authority to consider the matter, watch closely, otherwise such pleas may be resorted to by unscrupulous developers/promoters to defeat the valuable rights of the allottees.

15.19 We are of the opinion that the language of the statute also provides that a developer shall be protected from the registration and consequences of the Act, only in case where the project was completed with completion certificate. But, to establish a fact that whether the project is ongoing or completed just to free the promoter from the consequences of the act are matters of fact to be determined in the course of proceedings initiated by an aggrieved person. Non-applicability of the Act cannot be a presumption to be derived from a mere fact simplification of a project not being registered.

15.20 Proceeding under section 59 of the Act is a course available to the Authority except for determination of a complaint. Once a complaint is filed on issues pointing out the deficiencies and defaults of a promoter, the Authority has to decide on its own whether to take recourse to the procedure prescribed under section 59 after filing a complaint.

15.21 As the provisions of the Act 2016 were enforced with effect from 1" May 2016 and, therefore, in absence of completion certificate for Tower-W, which contains the unit of the appellant, the Tower-W will fall in the category of ongoing project and, therefore, the respondent is required to register the same with UP RERA under the provisions of Section 3 of the Act 2016.

15.22 In our considered view the finding of the Regulatory Authority regarding no requirement of registration of

the project of the respondent is not only perverse but also against the record. Apart from this, a direction has been issued for giving possession, which is contrary to the pleadings of the complainant/appellant.

15.23 It was also incumbent upon the Regulatory Authority to get the issue examined regarding status of the project by referring the matter to the administrative side of the Regulatory Authority, in the instant case the Secretary had already issued direction to the respondent for registration of the project being fallen in the category of ongoing project but surprisingly contrary to the said order learned Bench of Regulatory Authority passed the impugned order.

15.24 On the basis of the aforesaid analysis and after examining the provisions of the Act 2016 and the Rules 2016, we hold that at the time of enforcement of the provisions of the Act 2016 (i.e. 01.05.2016) the project of the respondent fell in the category of ongoing project and was required to be registered with UP RERA. The directions for the same had already been issued by the Secretary of the UP. RERA. Thus, we find the impugned order dated 02.08.2019 is not only perverse but also illegal and against the record. **Issue no. (6)** is answered accordingly.

The Hon'ble Supreme Court vide its judgments (i) Civil Appeal No. 3182 of 2019 **Kolkata West Industrial City Pvt. Ltd. Vs. Devashish Ryudra**, (ii) Civil Appeal No. 3207 & 3208 of 2019 **Marvel Omega Builders Pvt. Ltd. & others Vs. S. Wiharis Gokhale & others**, (iii)(2018)5 SCC 442 **Fortune Infrastructure** and another Vs. Trevor D. Lima & others and (iv) (2007)6 SCC 711 **Bangalore Development Authority Vs. Syndicate Bank** was pleased to observe that it would be unreasonable to require the allottee to

wait indefinitely for possession of the unit and the allottee is entitled to seek refund of the amount paid by him along with compensation.

17. On the basis of the aforesaid analysis we are of the considered view that the judgment and order dated 02.08.2019 passed by the Regulatory Authority in Complaint No. 11201824577 (Smt. Raj Rani & Shri Virendra Kumar Vs. M/S AGC Realty Pvt. Ltd.) is not sustainable in the eyes of law. Accordingly, the same is hereby set aside and we allow the **appeal** with the following directions:--

(i) The respondent is directed to refund the amount of Rs.75,87,757/- to the complainant/appellants.

(ii) The respondent is further directed to pay interest to the complainant/appellants on the amount of Rs. 75,87,757/- from the date of deposit till the refund of the amount at the rate of MCLR+1% per annum."

17. Considered the submissions made by the learned counsel for the appellant and perused the record including the order, under appeal, dated 08.12.2022 passed by the Tribunal.

18. The question in the present case is as to whether the project or Tower- W, in issue, would be covered under the expression 'ongoing project', which has been defined under Rule 2(h) of the Rules of 2016 or not.

19. In order to decide the issue aforesaid, this Court is of the view that following facts are required to be considered:-

(i) The appellant/promoter started the project in the name and style "Homes-121 NOIDA". As per plan, 22 Towers were to be constructed.

(ii) As per admitted case, with regard to 21 Towers except Tower, in issue, i.e. Tower-W were completed and 'occupation/completion certificate' was provided by the Development Authority on 15.02.2016.

(iii) As per agreement between the parties, the possession of the flat, in issue, i.e. Flat No. 1202 in Tower-W in Phase-IV was to be handed over to the Allottee(s) (respondents) in the month of July, 2014.

(iv) The relevant clause of agreement under the heading 'PERIOD OF POSSESSION' says that "The Tower wise possession of the flat shall be given to the Allottee(s). The Company hereby assures that possession of this flat be handed over to the Allottee(s) on or before July, 2014 in phase-IV".

(v) Agreement also says that "The proposed project shall be executed in phase/block wise. Each phase/block would be separate entity and Allottee(s) shall be (not legible) the possession on completion of their respective phase/block. No Allottee(s) shall have the right to seek/claim possession (not legible) phase/block, other than the phase/block in which he/she has been allotted the flat. All amenities will be handed over on the completion of the project."

(vi) It would be relevant to point out here that it appears that deliberately the clause indicated in para (v), above, was not included in the pleadings/affidavits filed by the appellant before the authorities under the Act of 2016, as is evident from the record of the present appeal.

(vii) As per the case of appellant, prior to the Act of 2016, the Tower, in issue, i.e. Tower-W was constructed and an application was moved before the Development Authority seeking 'occupation/completion certificate'.

(viii) The said application was neither placed before the authorities concerned under the Act of 2016 including the Tribunal nor has been brought on record of the present appeal nor with regard to the same, the appellant has indicated the specific date in pleadings/affidavits submitted before the authorities under the Act of 2016 including the Tribunal.

(ix) Till enforcement of the Act of 2016 and Rules of 2016, the 'occupation/completion certificate' was not provided by the Development Authority to the appellant with regard to Tower-W.

(x) The 'occupation certificate' of Tower-W was given on 26.06.2018 after inspecting the site on 18.12.2017.

(xi) The demand-cum-offer of possession letter was issued on 31.07.2018.

(xii) The appellant was served with a notice to register the project under the Act of 2016, which was never opposed by the appellant by moving any appropriate application/representation or challenging the same before the appropriate authority.

(xii) From the aforesaid including the clauses of the agreement between the parties, referred above, it is apparent that the development work of the entire project was 'phase/block' wise.

(xiii) On 18.12.2017, the officials of Development Authority inspected the site for the purposes of providing 'occupation certificate' with regard to Tower-W, which fall in Phase-IV and on that date, the development work of Tower-W has been completed and thereafter 'occupation certificate' was provided to the appellant on 26.06.2018.

(xiv) Thus, the entire Phase-IV of the project could be considered to be completed on 26.06.2018 and prior to this, the Act of 2016 came into force.

(xv) The record available before this Court reflects that the appellant failed

to indicate that 60% or more sale/lease deeds of flat of Tower-W or Phase-IV, in which Tower-W is situated, have been executed and also that the services of this Phase-IV have been handed over to local authority or common areas and facilities have been handed over to the Association for Residents' Welfare Association (in short "RWA") for maintenance.

(xvi) From the record available, it is evident that with regard to other Towers also, the appellant has not stated in specific terms that the common area and facilities were handed over to the RWA and just to mislead, the appellant has indicated the date of registration of RWA under the Societies Registration Act, which is 01.09.2017.

20. The Act of 2016 does not define the expression "ongoing project". However, the same has been defined under Rule 2(h) of the Rules of 2016, which on reproduction reads as under:-

"2(h) "ongoing project" means a project where development is going on and for which completion certificate has not been issued but excludes such projects which fulfill any of the following criteria on the date of notification of these rules:

(i) where services have been handed over to the Local Authority for maintenance.

(ii) where common areas and facilities have been handed over to the Association for the Residents' Welfare Association for maintenance.

(iii) where all development work have been completed and sale/lease deeds of sixty percent of the apartment/houses/plots have been executed.

(iv) where all development works have been completed and application has

been filed with the competent authority for issue of completion certificate."

21. To claim that the project was not an 'ongoing project' the appellant is under obligation to plead and prove in the light of Rule 2(h). Accordingly, for deciding the issue involved in this appeal, this Court would consider the aforesaid in the light of Rule 2(h).

22. As regards to Sub-Rule (i) and (ii) of Rule 2(h) of the Rules of 2016, nothing has been brought on record, wherefrom, it can be deduced that the services of the project have been handed over to local authority for maintenance or that the common areas and facilities of the same have been handed over to RWA for maintenance including with regard to Tower, in issue, i.e. Tower-W or Phase-IV, in which Tower-W is situated, which was found completed on 18.12.2017 (date of inspection by officials of Development Authority) and thereafter, the 'completion/occupation certificate' with regard to Tower-W was issued on 26.06.2018.

23. It would be relevant to indicate here that from the record available, it is evident that with regard to the Towers in project, the appellant has not stated in specific terms that the common area and facilities have been handed over to the RWA and just to mislead, the appellant has indicated the date of registration of RWA under the Societies Registration Act, which is 01.09.2017.

24. Thus, for the reasons aforesaid, the appellant would not be entitled to the benefit of Sub-Rule (i) and (ii) of Rule 2(h) of the Rules of 2016.

25. Similarly, to get the benefit of Sub-Rule (iii) of Rule 2(h) of the Rules of 2016, the details with supporting evidence pertaining to execution of sale/lease deeds of 60% of apartments of Phase-IV or Tower-W were not brought on record, which reflects from the pleadings and documents filed by the appellant before the authorities under the Act of 2016 including Tribunal and the supplementary affidavit filed before this Court also does not indicate the same, albeit the same was required as this Court after considering the relevant clauses has already observed that the development work of entire project was 'phase/block' wise.

26. Similarly, to substantiate and prove that all development work with regard to Tower-W or Phase-IV was completed, which to the view of this Court was required as the development work of entire project was 'phase/block' wise, and also that an application was filed before the competent Authority for issuance of 'occupation certificate' before the Act of 2016 came into force, no document was placed before the authorities under the Act of 2016 including the Tribunal nor has been placed before this Court. Accordingly, the case set up by the appellant on the basis of deeming provision in relation to 'completion certificate', indicated in Section 15A of the Act of 1973 has no force. Whereas, the completion certificate regarding Tower-W, undisputedly, was given by the Development Authority on 26.06.2018.

27. In view of the aforesaid, this Court finds that the appellant would not be entitled to the benefit of Sub-Rule (iii) and (iv) of Rule 2(h) of the Rules of 2016.

28. Thus, for the aforesaid reasons, to the view of this Court, the project i.e.

Phase-IV of the entire project, in issue, in which Tower-W and flat in issue is situated, would be covered under the expression 'ongoing project', as such, the claim raised by the respondents under the Act of 2016 was maintainable and accordingly, the Tribunal rightly allowed the claim of the respondents, which does not suffer from any error of law and as such, in the instant appeal, no substantial question of law is involved. The appeal is hereby *dismissed*. Cost made easy.

(2023) 9 ILRA 1165
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.09.2023

BEFORE

THE HON'BLE SAURABH SHYAM
SHAMSHERY, J.

Election Petition No. 6 of 2014

Rajendra Kumar ...Petitioner
Versus
Kunwar Bhartendra Singh ...Respondent

Counsel for the Petitioner:

Sri Utkarsh Srivastava, Sri Rajendra Kumar In Person, Sri B.P. Singh Dhakrey, Durga Singh, Sri K.S. Jadaun, Sri N.K. Pandey, Sudha Pandey, Sri Navin Sinha (Sr. Advocate)

Counsel for the Respondent:

Sri K.R. Singh, Sri Triloki Singh, Sri H.P. Singh, Sri Jitendra Bahadur Singh, Sri R.K. Jain

Election Petition- The Representation of People Act, 1951-Section 125A-Relief sought by Election-Petitioner was to declare the result of Returned Candidate to be null and void and set aside the order dated 24.03.2014 whereby objections filed by petitioner were rejected and Nomination Form of Returned Candidate was accepted---The election petition does not survive

since it would be a futile exercise to adjudicate the same at this stage after not only term of Lok Sabha 2014-2019 was over but term of subsequent Lok Sabha 2019-2024 is likely to be over within few months--- Election-Petitioner is carrying an impression that since his Nomination Form was rejected by Returning Officer, it amounts to be a dent on his public image that he has undertaken something illegal or there was something fishy in his Nomination Form. However, from bare perusal of order passed by the Returning Officer, the impression does not appear to be true. Therefore, the impression of Election-Petitioner is baseless which is also supported and evident by subsequent events--- It is an old saying that in a political life, there are no permanent enemies or friends. Both Election-Petitioner and Returned Candidate have declared themselves to be dedicated workers of the said National Political Party and the Election petition was filed only to clear a cloud of doubt which might have created by rejection of Nomination Form of Election-Petitioner. **(Para 26, 29 & 30)**

Election Petition dismissed. (E-15)

List of Cases cited:

1. Kashi Nath Mishra Vs Vikramaditya Pandey & ors.(1998) 8 SCC 735
2. Loknath Padhan Vs Birendra Kumar Sahu, AIR 1974 SC 505
3. Chandra Mohan Shukla Vs Anil Dhirubhai Ambani & ors., 2010(10) ADJ 63 (LB)
4. Prempal Singh Vs Satya Pal Singh Baghel (2020) 0 Supreme (All) 658
5. Dharti Pakar Madanlal Agarwal Vs Rajiv Gandhi: (1987) Supp. SCC 93

(Delivered by Hon'ble Saurabh Shyam Shamschery, J.)

1. In present election petition this Court has passed following order on 29th August, 2023:

“Order on Restoration
Application No. 9 of 2023

1. This is an application for recall of the order dated 04th August, 2023, whereby the election petition were dismissed for want of prosecution.

2. Cause shown for absence of learned counsel for election-petitioner, is sufficient. The order dated 04th August, 2023 is recalled and the election petition is restored to their original number. This application is accordingly allowed.

Order on Memo of Petition

1. Heard Sri Utkarsh Srivastava, learned counsel for election petitioner and Sri K.R. Singh, Advocate for returned candidate.

2. Learned counsel appearing for returned candidate-respondent at the outset submits that since this election petition is pending for last more than nine years and in between relevant period of returned candidate has already been over and even thereafter the term of next Lok Sabha is likely to be over within few months, therefore, there are certain judgments of Supreme Court as well as this Court that at this stage entire exercise would be academic. He further submits that since petitioner has challenged rejection of his nomination form on ground being improper and illegal, therefore, it would be a futile exercise to hear the election petition on merit. Learned counsel has placed reliance on Supreme Court's judgments in *Loknath Padhan vs. Birendra Kumar Sahu*, AIR 1974 SC 505; *Kashi Nath Mishra vs. Vikramadiya Pandey and others* (1998) 9 SCC 735 as well as this Court's judgment in *Chandra Mohan Shukla vs. Anil Dhirubhai Ambani and others*, 2010(10) ADJ 63 (LB) and *Prempal Singh vs. Satya Pal Singh Baghel and others*, (2020) 0 Supreme (All) 658.

3. Learned counsel for election petitioner submits that there are specific

averments in election petition that nomination form submitted by returned candidate was a forged document, which contains false declaration also, therefore, it would be an offence under Section 125-A of Representation of People Act, 1951 and in case contention of election petitioner found true, the legal consequence would fall which shall include adverse effect on benefit granted to returned candidate so far as pension etc. are concerned and punitive consequence under Article 104 of the Constitution would also fall. He submits that judgments cited by learned counsel for returned candidate are distinguishable on facts of the case. Learned counsel for petitioner has read out the averments made in election petition specifically para 15 as well as reasons given by Returning Officer while accepting nomination form of returned candidate.

4. Put up on 12th September, 2023 for orders on above issue."

2. The issue raised before this Court is, whether due to efflux of time this election petition, which is arising out of a dispute of General Election-2014, when not only tenure of that Lok Sabha was already over in 2019 but tenure of present Lok Sabha is about to be over in 2024, i.e. within few months, has become infructuous or if survives, it would only for an academic purpose?

3. In order to appreciate the rival submissions on above referred issue, few facts which are not in dispute are necessary to refer hereinafter.

4. The Election Petitioner-Rajender Kumar, an active member of a National Political Party (Bhartiya Janta Party) for last few decades, was set up as a candidate from 04-Bijnor Parliamentary Constituency

of District Bijnor, Uttar Pradesh for Parliamentary Election of year 2014. He accordingly submitted his Nomination Form alongwith party symbol accompanied by Form A and Form B in accordance with provisions of Election Symbols (Reservation and Allotment) Order, 1968.

5. It appears that Returned Candidate was later on set up as a candidate for above referred Parliamentary Constituency and he also submitted Nomination Form alongwith all requisite documents.

6. The Election-Petitioner filed objections to Nomination Form submitted by Returned Candidate being set up by same National Political Party. However, the Returning Officer vide order dated 24th March, 2014 rejected objections of Election-Petitioner and Nomination Form of Returned Candidate was accepted.

7. Rest is history, since Respondent-Kunwar Bhartendra Singh, was declared a Returned Candidate by defeating his nearest rival by more than 2.5 lacs votes and he in capacity of Member of Parliament from 04-Bijnor Parliamentary Constituency, has participated in proceedings of Parliament as well as undertaken other responsibilities as and when entrusted upon him.

8. Tenure of 16th Lok Sabha came to an end in 2019 and thereafter fresh election was conducted and respondent has again participated as a candidate of said National Political Party, however, this time he lost. It is also not in dispute that tenure of current Lok Sabha (17th Lok Sabha) is likely to conclude within few months.

9. During arguments the Court has interacted with Election-Petitioner and

Returned Candidate and found that there are no personal grudges between them, rather they have supported each other during their political career. The Election-Petitioner or his family members were also supported as and when they were set up for any other election by same National Political Party and they are still good political friends.

10. As referred above the Election-Petitioner is mainly aggrieved that his Nomination Form submitted being a duly set up candidate by said National Political Party was erroneously rejected by the Returning Officer as well as there was no reason for National Political Party to set up respondent/Returned Candidate as it's candidate when he was already set up as candidate and this act has dented his public image, not only in his political constituency but otherwise also.

11. Sri Utkarsh Srivastava, learned counsel for Election-Petitioner, has urged that cause still survives and even today legal consequence of this Election-Petition would fall. He also submitted that the judgments relied upon by Returned Candidate are distinguishable on facts. An application under Order VII Rule 11 C.P.C. filed by Returned Candidate was dismissed on 08.04.2022 and an Special Leave Petition against the order was filed before Supreme Court as well as this Court has framed following three issues on 13.04.2022:

“(i) Whether the nomination paper of the election petitioner was improperly rejected by the Returning Officer in view of Section 100(1)(c) of the Representation of People Act, 1951 ?

(ii) Whether the Returning Officer had committed illegality in accepting the

nomination paper of the Returned candidate and by improper acceptance of the nomination paper of the Returned candidate, the result of the election, in so far as it concerns the Returned candidate has been materially affected ?

(iii) To what relief, if any, is the election petitioner entitled to ?”

12. Per contra, Sri K.R. Singh, learned counsel appearing for Returned Candidate/ sole respondent, on the strength of judgments cited, has submitted that it would be only a futile exercise to proceed to decide the present election petition, which may be curtailed at this stage.

13. In order to consider the above referred submissions, the Court proceed to consider the judgments cited before this Court.

14. Supreme Court in **Kashi Nath Mishra vs. Vikramaditya Pandey and others (1998) 8 SCC 735** by a short order dismissed an election petition on the ground that term of assembly has expired by efflux of time and thereafter another election was also held and another assembly was constituted. For reference the said order is reproduced hereinafter:

“1. This appeal arises from Election Petition No. 4 of 1991 filed under Section 81 of the Representation of the People Act, 1951. The appellant had challenged the election of the second respondent to the U.P. Legislative Assembly from the 227 Ballia Assembly Constituency in District Ballia. The election petition was dismissed. The term of the Assembly has expired by efflux of time; thereafter, another election has been held and another Assembly constituted.

2. Under these circumstances, the appeal having become infructuous is dismissed. No costs.” (Emphasis supplied)

15. Next judgment is in **Loknath Padhan vs. Birendra Kumar Sahu, AIR 1974 SC 505** wherein Supreme Court has held as under:

“6. We are, therefore, of the view that, the Orissa Legislative Assembly being dissolved during the pendency of this appeal, it is now wholly academic to consider whether the respondent was disqualified under Section 9A at the date of nomination and since that is the only ground on which election of the respondent is challenged, we think it would be futile to hear this appeal on merits. We accordingly dismiss the appeal with no orders as to costs all throughout.” (Emphasis supplied)

16. A Coordinate Bench of this Court in **Chandra Mohan Shukla vs. Anil Dhirubhai Ambani and others, 2010(10) ADJ 63 (LB)** has held that:

“22. Keeping in view the submission made by learned counsel for the parties it appears that whenever in a petition, which includes election petition, the relief claimed with regard to main issue involved becomes redundant or infructuous then for other relief courts may exercise its discretion and may not proceed further in case right of the plaintiff or dependent satisfied or no grievance remained pending against defendant or respondents because of the change circumstances. Court may use its discretion to drop the proceeding and may not proceed further in a matter even if, some relief of academic nature stand survive. In the present case, admittedly the term of respondent no. 1 to 4 expired and vacancy has been filled up by fresh election accordingly even if the impugned provision is struck down or the case of

Kuldip Nayar (supra) is distinguished because of larger bench neither the petitioner will have any gain nor respondent no. 1 to 4 will suffer from any loss like loss of office as the member of Rajya Sabha. The things remain for adjudication would be the validity of impugned provision after taking into account the judgement of Kuldip Nayar(supra). Observation made by Hon'ble Supreme Court in the case of Rajeev Gandhi that time of the court is precious one and academic exercise is not warranted unless still some relief may be granted to petitioner or the appellant may be followed.

23. In view of above, there appears to be no good ground to proceed further in the matter to make academic exercise with regard to impugned provision. I leave the question under Relief no. 1 open for adjudication in case warranted in some other case if raised by a person.

24. The election petition does not survive. Dismissed keeping the issue open for adjudication in some other case.”

(Emphasis supplied)

17. Another Coordinate Bench of this Court in **Prempal Singh vs. Satya Pal Singh Baghel (2020) 0 Supreme (All) 658** has held that:

“23. In *P.H. Pandian vs. P. Veldurai* and another ((2013) 14 SCC 685), an appeal under Section 116-A of the Representation of the People Act, 1951 was filed questioning the judgment and order made in the election petition in ELP.No.1 of 1996 on 29.12.1999. In this case, the Apex Court has observed that though fresh elections have since been held to Tamil Nadu Legislative Assembly and to an extent this appeal has been rendered infructuous, the manner in which the election petition

was dealt with by the High Court causes us concern and that necessitates our making reference to some salient facts. **Ultimately, the Apex Court has observed that it is a settled practice of Supreme Court not to pronounce upon matters which are only of an academic interest. Once the charge of corrupt practice fails, rest of the appeal would be rendered infructuous because fresh elections have already taken place and the old Assembly is no longer in existence.** Even if the appellant was to succeed on the issue that the returned candidate had a subsisting contract with the Panchayat Union and the State Government and was, therefore, disqualified to be chosen for the seat under Section 9-A of the Representation of the People Act, 1951, it would only be of an academic interest.

24. Whenever in a petition, which includes election petition, the relief claimed with regard to main issue involved becomes redundant or infructuous then for other relief courts may exercise its discretion and may not proceed further in case right of the plaintiff or dependent satisfied or no grievance remained pending against defendant or respondents because of the change of circumstances. The court may use its discretion to drop the proceeding and may not proceed further in a matter even if, some relief of academic nature stand survive.

25. In the present case, admittedly the respondent no.1 submitted his resignation on 4.6.2019 from the Tundla Constituency and the same has been accepted by the competent authority on the same date. The notification was issued on 4.6.2019 to give effect to the said resignation since 4.6.2019 and thus the vacancy of Member of Legislative Assembly for Tundla Constituency has arisen. The Secretariat of Legislative Assembly, U.P

has also notified the said vacancy to the Election Commission of India for conducting the bye-election for filling up the said post and therefore, the relief no.1, as claimed by the petitioner, has become infructuous. It is consistent view of Hon'ble Supreme Court that time of the court is precious one and academic exercise is not warranted unless still some relief may be granted to petitioner or the appellant may be followed. No allegations are levelled in the election petitions on corrupt practice and therefore, this Court finds that there is no impediment or obstacle in dismissing this petition as the prayer itself has become infructuous.

26. In view of the aforesaid discussion and in the light of the aforesaid decisions of Apex Court, I am of the considered view that nothing further survives in this matter. The aforesaid applications preferred by the respondent no.1 for dismissing the Election Petition Nos.12 of 2017 and 13 of 2017 as infructuous, are allowed.” (Emphasis supplied)

18. In the present election petition the relief sought by Election-Petitioner was to declare the result of Returned Candidate to be null and void and set aside the order dated 24.03.2014 whereby objections filed by petitioner were rejected and Nomination Form of Returned Candidate was accepted. No consequential relief was sought, i.e., for fresh election.

19. I have carefully perused the reasons given by Returning Officer while rejecting Nomination Form of Election-Petitioner and for reference, relevant part of it is extracted as below:

“A revised notice in Form B, in favour of Kunwar Bhartendra Singh has been given by Bhartiya Janata Party.

Kunwar Bhartendra Singh has already made a declaration in his nomination paper that he has been set up by the Bhartiya Janta Party.

Undersigned is satisfied about the genuineness of the Revised Form B. Hence, the nomination paper filed by the present candidate declaring himself to be a candidate set up by the Bhartiya Janta Party stands rejected.”

20. Aforesaid reasons given by Returning Officer were only based on subsequent Form B submitted by Returned Candidate. Similarly the objections filed on behalf of Election-Petitioner which was rejected by Returning Officer on the same day, i.e., 24.03.2014 though referred that Returning Officer is barred from accepting any other form of communication regarding rescinding of notice as valid, except from notice in Form B submitted by prescribed time and for that he has placed reliance on Compendium of Instructions and as such affidavit sworn by authorised person of the party in favour of revised candidate has limited legal standing from the point of nominations. Returning Officer further held that it cannot be denied that still it holds evidentiary value to support the contents of revised Form B submitted by Returned Candidate, i.e., the respondent herein, on the day of nomination, particularly in the face of doubts being expressed by the objectors on the genuineness of the revised Form B. Returning Officer further held that he cannot ignore the evidentiary value of the said affidavit, in summary inquiry, particularly, to prima facie prove the genuineness of revised Form B submitted by Returned Candidate and thus he accepted the Nomination Form of revised candidate.

21. The above referred reasoning does not contain any element of fraud or forgery

in submitting Nomination Form by the Election-Petitioner being set up a candidate by said National Political Party. Returning Officer has rather given more evidentiary value to the affidavit as well as revised Form B submitted by the Returned Candidate that his form was also genuine. The issue, whether a political party has power or not to set up another candidate and procedure thereof would be an academic question.

22. Learned counsel for Election-Petitioner has argued that legal consequence would fall if this election petition is allowed but in my considered opinion this argument has no legal basis and for that I have carefully perused Section 125A of Representation of People Act, 1951 (*hereinafter referred to as "Act, 1951"*) which prescribes penalty for filing false affidavit. In this regard a brief reference of paragraphs no. 56, 57, 58 and 59 of election petition would be relevant to the extent that the contents thereof do not effectively alleged that it was a case of false affidavit rather a case was set up that to issue a subsequent Form B was beyond power, therefore, according to my considered view no legal consequence would fall on Returned Candidate under Section 125A of Act, 1951 if this election petition is allowed.

23. I have also carefully perused Article 104 of the Constitution, which provides penalty for sitting and voting before making oath or affirmation under Article 99 or when not qualified or when disqualified. However, according to my considered opinion the facts of present case do not fall under the said provision since Returned Candidate has subscribed an oath or affirmation to set up or set out under third schedule after duly elected in election

and there was no allegation that election was not conducted properly. The only dispute was that whether Nomination Form of Election-Petitioner was rejected wrongly or not and Nomination Form of Returned Candidate was rightly accepted or not as evident from issues framed in this election petition on 13.04.2022. Subsequent proceedings or process of election have not been disputed. Therefore, no legal consequence would fall on the ground also even this election petition is allowed.

24. In view of above discussion, the above referred judgments become relevant wherein a consistent view has been taken that due to efflux of time especially when subsequent election of Lok Sabha was also held, to adjudicate election petition at this stage would be a futile exercise and it would only for academic purpose.

25. At this stage para 4 of the judgment passed by Supreme Court in **Dhartipakar Madanlal Agarwal vs. Rajiv Gandhi: (1987) Supp. SCC 93**, would be relevant to extract hereinafter:

"4. The election under challenge relates to 1981, its term expired in 1984 on the dissolution of the Lok Sabha, thereafter another general election was held in December, 1984 and the respondent was again elected from 25th Amethi Constituency to the Lok Sabha. The validity of the election held in 1984 was questioned by means of two separate election petitions and both the petitions have been dismissed. The validity of respondent's election has been upheld in Azhar Hussain v. Rajiv Gandhi, AIR 1986 SC 1253 and Bhagwati Prasad v. Rajiv Gandhi, (1986) 4 SCC 78. Since the impugned election relates to the Lok Sabha which was dissolved in 1984 the respondent's election cannot be set aside in

the present proceedings even if the election petition is ultimately allowed on trial as the respondent is a continuing member of the Lok Sabha not on the basis of the impugned election held in 1981 but on the basis of his subsequent election in 1984. Even if we allow the appeal and remit the case to the High Court the respondent's election cannot be set aside after trial of the election petition as the relief for setting aside the election has been rendered infructuous by lapse of time. In this view grounds raised in the petition for setting aside the election of the respondent have been rendered academic. Court should not undertake to decide an issue unless it is a living issue between the parties. If an issue is purely academic in that its decision one way or the other would have no impact on the position of the parties, it would be waste of public time to engage itself in deciding it. Lord Viscount Simon in his speech in the House of Lords in Sun Life Assurance Company of Canada v. Jervis, (1944) AC 111 observed:

"I do not think that it would be a proper exercise of the Authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way. It is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue."

These observations are relevant in exercising the appellate jurisdiction of this Court." (Emphasis supplied)

26. The outcome of above discussion is that this election petition does not survive since it would be a futile exercise to adjudicate the same at this stage after not only term of Lok Sabha 2014-2019 was

over but term of subsequent Lok Sabha 2019-2024 is likely to be over within few months.

27. Before parting with judgment, it would be necessary to observe that delay in deciding election petition would result sometimes in loss of a legal battle of an Election-Petitioner. However, for that Election-Petitioner as well as the Court has to be more careful and has to take endeavor to decide election petition at the earliest so that it may not render infructuous due to efflux of time. However, in present case, even Election-Petitioner appears to be slow in pursuing the election petition, as evident from order sheet.

28. As referred above, I have opportunity to have conversation with Election-Petitioner and Returned Candidate and as referred earlier the relations between both parties are cordial so much as that they still visit each other's house and also support each other as and when required in elections or otherwise. It also appears that said National Political Party has still confidence on both the parties.

29. The Court finds that Election-Petitioner is more conscious of his public image which is not an incorrect approach since a socially and politically active person who engaged with people of his area always wants to carry a good public image and good fan following. A political person is normally image conscious since it always carry with him. It appears that Election-Petitioner is carrying an impression that since his Nomination Form was rejected by Returning Officer, it amounts to be a dent on his public image that he has undertaken something illegal or there was something fishy in his Nomination Form. However, as referred above, from bare perusal of order

passed by the Returning Officer, the impression does not appear to be true. Therefore, the impression of Election-Petitioner is baseless which is also supported and evident by subsequent events, when both parties have admitted that said National Political Party has still confidence on Election-Petitioner and his family members and party has set up his family members in other elections as its candidate.

30. It is an old saying that in a political life, there are no permanent enemies or friends. Both Election-Petitioner and Returned Candidate have declared themselves to be a dedicated workers of the said National Political Party and it also appears that this election petition was filed only to clear a cloud of doubt which might have created by rejection of Nomination Form of Election-Petitioner. As referred above, this was only a misconception of the Election-Petitioner.

31. In the end this order is concluded by reproducing a saying of an unknown author, *“Great rivalries don't have to be built on hatred. They are built on respect, on a respect for excellence”*.

32. इस स्तर पर निम्न संस्कृत सुभाषितानि का उल्लेख करना भी उचित रहेगा:

“चन्दनं शीतलं लोके, चन्दनादपि चन्द्रमाः।

चन्द्रचन्दनयोर्मध्ये शीतला साधु संगतिः॥”

(इस दुनिया में चन्दन को सबसे अधिक शीतल माना जाता है, पर चन्द्रमा चन्दन से भी शीतल होता है, लेकिन एक अच्छा मित्र चन्द्रमा और चन्दन दोनों से शीतल होता है)

33. With aforesaid observations, this election petition stands dismissed.

(2023) 9 ILRA 1173
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.07.2023

BEFORE

THE HON'BLE GAJENDRA KUMAR, J.

Application U/S 482. No. 23998 of 2023

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

Counsel for the Applicants:
 Sri Shailendra Kumar Tripathi

Counsel for the Opposite Parties:
 G.A.

Criminal Law-Code of Criminal Procedure, 1973-Section 482 -The Prevention of Damage to Public Property Act, 1984-Section 3(1) -The U.P.Revenue Code, 2006-Section 67---Whether in respect of allegations relating to damage to Gram Sabha properties, only proceedings for eviction under Section 67 of the Revenue Code can be initiated, or criminal proceedings under the provisions of the PDPP Act can also be proceeded with?--- The proceedings under the PDPP Act are also distinct from matters which are covered under the Revenue Code, and in particular Section 67 thereof, which provides procedure for eviction and recovery of damages on account of unauthorized occupation and use of land belonging to the St. under the management of Gaon Sabha. The procedure provided there-under is summary in nature and is purely a civil remedy with no criminality attached. On the other hand, any act which constitutes a "mischief" within the meaning of Section 2(a) of the PDPP Act, wherein the definition of the word "mischief" has been assigned the same meaning as in Section 425 of Penal Code, and would relate to any act which causes destruction of any property, or any change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, and the property

is a "public property" as described under Section 2(b) of the PDPP Act, the same would constitute a criminal offence under Section 3 and would be visited by penal consequences, namely, imprisonment and fine--- Criminal proceedings, which have been initiated in the present case pursuant to FIR lodged under the the PDPP Act, thus cannot be held to be vitiated for the reason that in respect of the allegations relating to encroachment/damage to Gaon Sabha land, only proceedings for eviction and recovery of damages can be initiated under the provisions of the Revenue Code and no criminal proceedings for causing damage or destruction of public property can be initiated under the PDPP Act. **(Para 31 & 33)**

Petition dismissed. (E-15)

List of Cases cited:

1. Prabhakant & anr.Vs St. of U.P. & anr.passed in the Application u/s 482 Cr.P.C. No.398 of 2023 vide order dated 13.07.2023
2. Munshi Lal & anr.Vs St. of U.P. & anr., 2020(8) ADJ 311
3. Devnath Yadav Vs St. of U.P. & ors., AIR Online 2021 ALL 2018,
4. Re: Destruction of Public and Private Properties Vs St. of Andhra Pradesh & ors., AIR Online 2007 SC 81
5. Kodungallur Film Society & anr.Vs U.O.I.& ors., AIR Online 2018 SC 737

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

1. Heard learned counsel for the applicants and learned AGA for the State.

2. The present application under Section 482 Cr.P.C. has been filed seeking to quash the charge sheet dated 05.12.2022 as well as the cognizance/summoning order dated 10.02.2023 passed by C.J.M., Farrukhabad and also the entire proceedings of Case No.580 of 2023 (State

vs. Ramnarayan Pandey and Others), arising out of Case Crime No.235 of 2022, under Section 427 IPC and Section 3(1) of the Prevention of Damage to Public Property Act, Police Station Rajepur, District Farrukhabad pending before the Chief Judicial Magistrate, Farrukhabad.

3. The records of the case indicate that the criminal proceedings were initiated pursuant to an FIR dated 11.10.2022 lodged against the applicants, which was registered as Case Crime No.0235 of 2022, under Section 427 IPC and Section 3(1) of the Prevention of Damage to Public Property Act, Police Station Rajepur, District Farrukhabad. The case was investigated and a charge sheet dated 05.12.2022 was placed whereupon cognizance was taken by the Magistrate on 10.02.2023 and the case was registered as Case No.580 of 2023.

4. The principal ground, which has been sought to be urged to seek quashment of the proceedings, is that the allegation in the FIR being in regard to the making encroachment, breaking of Pillar and wiring and boundary over the Gram Sabha land, the provisions of the PDPP Act could not have been invoked to initiate criminal proceedings. It is also submitted that the Uttar Pradesh Revenue Code, 2006 provides complete procedure for eviction of an unauthorized occupation from Gram Sabha land and in view of the same, criminal proceedings which have been initiated, are an abuse of process of court and are liable to be quashed. In support of his submission learned counsel has placed reliance upon the judgment of this Court in the case of *Prabhakant and another Vs. State of U.P. and another passed in the Application u/s 482 Cr.P.C. No.398 of 2023 vide order dated 13.07.2023.*

5. Controverting the aforesaid submissions, learned AGA submitted that the proceedings for eviction of unauthorized occupation, as provided under Section 67 of the Revenue Code, are of a summary nature and there is no bar in initiating of criminal proceedings under the PDPP Act in case of damage to public property which would include within its purview Gram Sabha property also. It is submitted that the scope of criminal proceedings and the proceedings for eviction under the Revenue Code are entirely different and there is no bar in the same being simultaneously proceeded with.

6. Based on the rival contentions the question which falls for consideration is as to whether in respect of allegations relating to damage to Gram Sabha properties, only proceedings for eviction under Section 67 of the Revenue Code can be initiated, or criminal proceedings under the provisions of the PDPP Act can also be proceeded with.

7. The Prevention of Damage to Public Property Act (3 of 1984) was enacted to provide for prevention of damage to public properties and the matters connected therewith. For ease of reference the aforesaid Act i.e. The Prevention of Damage to Public Property Act, 1984 (3 of 1984) is being reproduced in its entirety:-

"1. Short title, extent and commencement.- (1) This Act maybe called the Prevention of Damage to Public Property Act, 1984.

(2) It extends to the whole of India.

(3) It shall be deemed to have come into force on the 28th day of January, 1984.

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

(a) "mischief" shall have the same meaning as in section 425 of the Indian Penal Code (45 of 1860);

(b) "public property" means any property, whether immovable or movable (including any machinery) which is owned by, or in the possession of, or under the control of--

(i) the Central Government; or

(ii) any State Government; or

(iii) any local authority; or

(iv) any corporation established by, or under, a Central, Provincial or State Act; or

(v) any company as defined in section 617 of the Companies Act, 1956 (1 of 1956); or

(vi) any institution, concern or undertaking which the Central Government may, by notification in the Official Gazette, specify in this behalf:

Provided that the Central Government shall not specify any institution, concern or undertaking under this sub-clause unless such institution, concern or undertaking is financed wholly or substantially by funds provided directly or indirectly by the Central Government or by one or more State Governments, or partly by the Central Government and partly by one or more State Governments.

3. Mischief causing damage to public property. (1) Whoever commits

mischief by doing any act in respect of any public property, other than public property of the nature referred to in sub-section (2), shall be punished with imprisonment for a term which may extend to five years and with fine.

(2) Whoever commits mischief by doing any act in respect of any public property being--

(a) any building, installation or other property used in connection with the production, distribution or supply of water, light, power or energy;

(b) any oil installations;

(c) any sewage works;

(d) any mine or factory;

(e) any means of public transportation or of tele-communications, or any building, installation or other property used in connection therewith, shall be punished with rigorous imprisonment for a term which shall not be less than six months, but which may extend to five years and with fine:

Provided that the court may, for reasons to be recorded in its judgment, award a sentence of imprisonment for a term of less than six months.

4. Mischief causing damage to public property by fire or explosive substance.-- Whoever commits an offence under sub-section (1) or sub-section (2) of section 3 by fire or explosive substance shall be punished with rigorous imprisonment for a term which shall not be less than one year, but which may extend to ten years and with fine:

Provided that the court may, for special reasons to be recorded in its judgment, award a sentence of imprisonment for a term of less than one year.

5. Special provisions regarding bail. --No person accused or convicted of an offence punishable under section 3 or section 4 shall, if in custody, be released on bail or on his own bond unless the prosecution has been given an opportunity to oppose the application for such release.

6. Saving. The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force, and nothing contained in this Act shall exempt any person from any proceeding (whether by way of investigation or otherwise) which might apart from this Act, be instituted or taken against him.

7. Repeal and saving.-- (1) The Prevention of Damage to Public Property Ordinance, 1984 (Ord. 3 of 1984), is hereby repealed.

Notwithstanding such repeal, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under the corresponding provisions of this Act."

8. Section 3 of the PDPP Act provides for imposition of punishment with imprisonment for a term which may extend to five years and with fine, in respect of mischief causing damage to public property.

9. The word "mischief" has been defined under Section 2 (a) as having the same meaning as in the Section 425 of the

Indian Penal Code, 1860. For ready reference Section 425 of the Penal Code is being extracted below:-

"425. Mischief.-- Whoever with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, cause the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits "mischief"."

10. The expression "public property" has been defined under Section 2(b) to mean any property, whether immovable or movable (including any machinery) which is owned by, or in the possession of, or under the control of--

- (i) the Central Government; or
- (ii) any State Government; or
- (iii) any local authority; or
- (iv) any corporation established by, or under, a Central, Provincial or State Act; or
- (v) any company as defined in Section 617 of the Companies Act, 1956 (1 of 1956); or
- (vi) any institution, concern or undertaking which the Central Government may, by notification in the Official Gazette, specify in this behalf:

11. The expression "public property", as defined under Section 2(b) of the PDPP Act, would therefore include within its ambit any property, movable or immovable, owned by or in possession or

under the control of any local authority, which would include a Gram Sabha. The Gram Sabha land would therefore be covered within the definition of the expression "public property" under the Act 3 of 1984.

12. The term "mischief" has been defined under Section 2(a) of the Act 3 of 1984 as having the same meaning as defined under Section 425 of the Penal Code. For ready reference, the term "mischief" as defined under Section 425 of the Penal Code, is as under:-

425. Mischief.-- Whoever with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, cause the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits "mischief".

13. A conjoint reading of the aforesaid provisions would go to show that the Gram Sabha property would be covered within the meaning of the term "public property" and any damage to the same would be within the ambit of the expression "mischief causing damage to public property" which would constitute a punishable offence under Section 3 of the PDPP Act.

14. The Revenue Code is an Act to consolidate and amend the law relating to land tenures and land revenue in the State of Uttar Pradesh, and to provide for matters connected therewith and incidental thereto.

15. Section 67 of the Revenue Code which corresponds to Section 122B of the U.P. Zamindari Abolition & Land Reforms

Act, 1950 (now repealed), provides the power to prevent damage, misappropriation and wrongful occupation of Gram Panchayat property. Section 67 of the Revenue Code, reads as follows:

"67. Power to prevent damage, misappropriation and wrongful occupation of Gram Panchayat property.--

(1) Where any property entrusted or deemed to be entrusted under the provisions of this Code to a Gram Panchayat or other local authority is damaged or misappropriated, or where any Gram Panchayat or other authority is entitled to take possession of any land under the provisions of this Code and such land is occupied otherwise than in accordance with the said provisions, the Bhumi Prabandhak Samiti or other authority or the Lekhpal concerned, as the case may be, shall inform the Assistant Collector concerned in the manner prescribed.

(2) Where from the information received under sub-section (1) or otherwise, the Assistant Collector is satisfied that any property referred to in sub-section (1) has been damaged or misappropriated, or any person is in occupation of any land referred to in that sub-section in contravention of the provisions of this Code, he shall issue notice to the person concerned to show cause why compensation for damage, misappropriation or wrongful occupation not exceeding the amount specified in the notice be not recovered from him and why he should not be evicted from such land.

(3) If the person to whom a notice has been issued under sub-section (2) fails to show cause within the time specified in the notice or within such extended time as

the Assistant Collector may allow in this behalf, or if the cause shown is found to be insufficient, the Assistant Collector may direct that such person shall be evicted from the land, and may, for that purpose, use or cause to be used such force as may be necessary, and may direct that the amount of compensation for damage or misappropriation of the property or for wrongful occupation, as the case may be, be recovered from such person as arrears of land revenue.

(4) If the Assistant Collector is of opinion that the person showing cause is not guilty of causing the damage or misappropriation or wrongful occupation referred to in the notice under sub-section (2), he shall discharge the notice.

(5) Any person aggrieved by an order of the Assistant Collector under Sub-section (3) or Sub-Section (4), may within thirty days from the date of such order, prefer an appeal to the Collector.

(6) Notwithstanding anything contained in any other provisions of this Code, and subject to the provisions of this section every order of the Sub-Divisional Officer under this section shall, subject to the provisions of sub-section (5) be final.

(7) The procedure to be followed in any action taken under this section shall be such as may be prescribed.

Explanation. - For the purposes of this section, the word "land" shall include the trees and building standing thereon."

16. The procedure to be followed in respect of any action to be taken under the aforesaid section is described under Rules

66 and 67 of the Uttar Pradesh Revenue Code Rules, 2016. Rules 66 and 67 read as follows:-

"R.66. Information to Assistant Collector (Section 67).-- The information to Assistant Collector required by Section 67(1) shall be submitted by the Chairman or any member or the Secretary of the Land Management Committee, or any officer of the Local Authority concerned in R.C. Form-19.

R.67. Further inquiry by Assistant Collector (Section 67).-- (1) On receipt of the information under Rule 66, or on facts otherwise coming to his knowledge, the Assistant Collector may make such inquiry as he deems proper and may obtain further information regarding the following points --

(a) full description of damage or misappropriation caused or the wrongful occupation made with details of village, plot number, area, boundary, property damaged or misappropriated and market value thereof;

(b) full address along with parentage of the person responsible for such damage, misappropriation or wrongful occupation;

(c) period of wrongful occupation, damage or misappropriation and class of soil of the plots involved;

(d) value of the property damaged or misappropriated calculated at the circle rate fixed by the Collector and the amount sought to be recovered as damages.

(2) The Assistant Collector shall thereafter proceed to take action under

section 67(2) and for that purpose issue a notice to the person concerned in R.C. Form-20 to show cause as to why compensation for damage, misappropriation or wrongful occupation not exceeding the amount specified in the notice be not recovered from him and why he should not be evicted from such land.

(3) If the notice referred to in section 67(2) remains uncomplied with or if the cause shown by the person concerned is found to be insufficient, the Assistant Collector may direct by order that --

(a) such person be evicted by using such force as may be necessary; or

(b) the amount of compensation for damage or wrongful occupation ordered by the Assistant Collector, if not paid in specified time, may be recovered as arrears of land revenue, including the amount of expenses referred to in sub-rule (3).

(4) The amount of damages sought to be recovered and the expenses of execution of the order shall be specified in such notice, which shall be determined in the following manner:-

(a) In the case of damage or misappropriation, the amount of damages shall be assessed at the prevailing market rate.

(b) In the case of unauthorized occupation of any land, the amount of damages shall be the amount equal to the five percent of the market value of the land calculated at the circle rate fixed by the Collector for each year of unauthorized occupation.

(c) The expenses of execution of the order shall be assessed on the basis of

one day's pay and allowances payable to the staff deputed.

(5) If the person wrongfully occupying the land has done cultivation therein, he may be allowed to retain possession thereof until he has harvested the crops subject to the payment by him of the amount equal to the five percent of the market value of the land calculated as per the circle rate which shall be credited to the Consolidated Gaon Fund or the Fund of the local authority other than the Gram Panchayat as the case may be. If the person concerned does not make the payment of the aforesaid amount within the period specified in the notice in R.C. Form-20, the possession of the land shall be delivered to the Land Management Committee or the local authority, as the case may be, together with the crop:

Provided that where such person again wrongfully occupies the same land or any other land within the jurisdiction of the Gram Panchayat or the local authority as the case may be, he shall be evicted therefrom forthwith and possession of the land vacant or together with the crop thereon shall be delivered to the Land Management Committee or the local authority as the case may be.

(6) The Assistant Collector shall make an endeavour to conclude the proceeding under section 67 of the Code within the period of ninety days from the date of issuance of the show cause notice and if the proceeding is not concluded within such period the reasons for the same shall be recorded.

(7) Nothing in sub-rule (5) shall debar the Land Management Committee or the local authority as the case may be from prosecuting the person who encroaches

upon the same land second time in spite of having been evicted under the Code or the rules, under section 447 of the Indian Penal Code, 1860.

(8) There shall be maintained in the office of each Collector a register in R.C. Form-21 showing details of the amount ordered to be realized on account of damages and compensation awarded in proceedings under section 67.

(9) A similar register shall also be maintained by each tahsildar showing realization of damages and compensation awarded in such proceeding. The entries made in the register maintained at tahsil shall be compared with the register maintained by the Collector to ensure accuracy of the entries made therein.

(10) A progress report showing realization of damages and compensation awarded in proceedings under section 67 shall be sent to Board of Revenue, U.P., Lucknow by the fifteenth day of April and October every year. The Board after consolidating the report so received from the districts shall send it to the Government.

(11) Nothing in Rules 66 and 67 shall debar any person from establishment of his right, title or interest in a court of competent jurisdiction in accordance with the law for the time being in force in respect of any matter for which any order has been made under Section 67 of the Code."

17. The provisions contained under Section 67 of the Revenue Code and the Rules 66 and 67 of the Rules, 2016, provide a summary procedure for proceeding in respect of damage,

misappropriation and wrongful occupation of Gram Panchayat properties and includes the powers to prevent such damage, misappropriation or wrongful occupation. The procedure prescribed includes giving information to the Assistant Collector, whereupon inquiry is to be made and after issuance of notice to the person concerned, a direction for eviction and recovery of compensation for damage or misappropriation of the property or wrongful occupation may be made. The order to be passed in this regard is subject to a statutory appeal, which may be preferred to the Collector.

18. The Revenue Code also contains provisions for institution of regular suits for declaration of rights. Section 145 pertains to declaratory suits by Gram Panchayat and it provides that notwithstanding anything contained in Section 34 of the Specific Relief Act, 1963, the Gram Panchayat may institute a suit against any person claiming to be entitled to any right in any land for the declaration of the right of such person in such land, then the court may, in its discretion, make a declaration of right of such person, and the Gram Panchayat need not in such suit ask for any further relief.

19. The PDPP Act, on the other hand, has been enacted to curb acts of vandalism and damage to public property, and in terms thereof any act of mischief i.e. causing destruction of any property, or any change in any property or in the situation thereof which destroys or diminishes its value or utility, or affects it injuriously, would constitute a punishable offence, as per Section 3 thereof.

20. Section 5 of the PDPP Act contains special provisions regarding bail and it mandates that no person accused or

convicted of an offence punishable under Section 3 or Section 4 shall, if in custody, be released on bail or on his own bond unless the prosecution has been given an opportunity to oppose the application for such release.

21. Section 6 is a saving clause and in terms thereof the provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force, and nothing contained in the Act shall exempt any person from any proceeding (whether by way of investigation or otherwise) which might apart from this Act, be instituted or taken against him.

22. The aforesaid provisions are indicative of the object and purpose of the PDPP Act, which is an enactment to curb acts of vandalism and damage to public property and to provide punishment in respect thereof.

23. The scope of proceedings under the PDPP Act is, therefore entirely different from that of proceedings of eviction, which might be initiated in respect of wrongful occupation of Gram Panchayat properties under Section 67 of the Revenue Code. The saving clause under Section 6 of the PDPP Act makes it clear that the provisions of the Act are in addition to, and not in derogation of, the provisions of any other law for the time being in force, and that the proceedings under any other enactment may also be instituted or taken without there being any bar in respect of the same.

24. In the instant case, criminal proceedings have been initiated pursuant to lodging of an FIR by the Gram Pradhan of the village containing allegations that the accused applicant had damaged the pillar

and wiring and boundary over the Goan Sabha land, which is recorded in the revenue records. As per the FIR version, the land in question bearing Gata No.298, area 0.470 hectares is recorded as a Naveen Parti of the land of Gaon Sabha and it is stated that the accused applicants have damaged the pillar etc. over the Gram Sabha land thereby causing damage to public property and in view thereof criminal proceedings under Section 3/4 of the PDPP Act were being initiated against him for the said act.

25. Pursuant to FIR the case was investigated and the material collected during the course of investigation supported the FIR allegations and accordingly a charge sheet dated 14.05.2015 was submitted whereupon cognizance was taken by the Magistrate on 06.04.2016 and a criminal case was instituted.

26. *In Munshi Lal and Another Vs. State of U.P. and Another, 2020(8) ADJ 311*, after noticing the provisions of the PDPP Act, has taken the view that as far as criminal proceedings for illegal encroachment, damage or trespass over the land belonging to Gram Sabha is concerned, the same can be undertaken but it would be subject to the adjudication of rights of the parties over the land in dispute as the said determination can be done only by the revenue court. In so far as the observation made in the decision that the Act covers the specific area relating to any act of vandalism including the destruction or damage during any riots or public demonstration in the name of agitations, bandhs, hartals and the like, is concerned, reference may be had to a recent decision by a Division Bench of this Court in *Devnath Yadav vs. State of U.P. and three*

Others, AIR Online 2021 ALL 2018, which was a case where an FIR under Section 2/3/5 of the PDPP Act, in respect of encroachment over the Gaon Sabha land, had been sought to be challenged. The Division Bench upon considering the legal position held that the judgment in the case of *Munshi Lal* and *Another* was distinguishable and made the following observations :-

"Coming to the judgement in the case of Munshi Lal (supra), we find that the learned Single Judge, proceeded on the premise that Prevention of Damage to Public Property Act, 1984 was enacted to curb vandalism and damage to public property. The first sentence of its Statement of Objects and Reasons reads as follows-

"With a view to curb acts of vandalism and damage to public property, including destruction and damage caused during riots and public commotion, a need was felt to strengthen the law to enable the authorities to deal effectively with cases of damage to public property."

The use of the word "including" has been given a restrictive interpretation in the judgment cited. We are of the opinion that the said word is illustrative rather than bringing also within its ambit, "destruction and damage caused during riots and public commotion" as stated in the Statement of Objects and Reasons. The use of word "including" therefore, cannot be read to mean that the Prevention of Damage to Public Property Act can be invoked only where damage to public property is occasioned by vandalism, riots or public commotion.

In our considered opinion, the learned Single Judge has taken a narrow

view of Section 3(1) of the Act and has primarily relied upon Sections 3(2) of the Act as also upon Section 4 of the Act for arriving at the final conclusion, in the judgement cited.

However, we find that in view of Section 425 of IPC and Section 3(1) of the Prevention of Damage to Public Property Act, 1984, the action of the petitioner clearly falls within the purview of these two sections, especially when construction of a boundary wall over public property is clearly admitted by petitioner.

Under the circumstances, therefore, the petitioner is not entitled to any benefit of the judgement in the case of Munshi Lal cited by him, as in the foregoing part of the judgement, we have come to the conclusion that the provision of Section 3(1) of the Prevention of Damage to Public Property Act, 1984 is clearly attracted in the facts and circumstances of the case. Also, the judgement in the case of Munshi Lal is distinguishable on facts."

27. It may be relevant to note that in so far as damage to public or private properties by acts of violence during hartals, bandhs, riots, public commotion and protests, certain observations were made by the Supreme Court in **Re: Destruction of Public and Private Properties vs. State of Andhra Pradesh and Others**, AIR Online 2007 SC 81, and taking a serious note of various instances where there was large scale destruction of public and private properties in the name of agitations, bandhs, hartals and the like and also considering certain suggestions given by the committees appointed by the Court, recommended amendment to the PDPP Act, Criminal Procedure Code, 1973 and other criminal laws, statutes; and also set

out guidelines to assess damages to property in the absence of a statutory framework.

28. The aforementioned issues were subsequently taken up in the case of **Kodungallur Film Society and Another vs. Union of India and Others**, AIR Online 2018 SC 737, and taking note of the recommendations/directions in **Re: Destruction of Public and Private Properties (supra)**, certain further recommendations/directions were made.

29. The subject matter relating to acts of violence at public places, to control its persistence and escalation, and to provides for recovery of damage to public or private property during hartals, bands, riots, public commotion and protests in respect of property and constitution of claims tribunals to investigate and determine the damages caused and to award compensation in relation thereto have been provided for under the aforementioned U.P. Act No.11 of 2020.

30. The scope and the subject matter of the PDPP Act is different from the subject matter covered under the Act, 2020, which deals with all acts of violence at public places and to provide for measures to control its persistence and escalation and also provides for recovery of damage by constitution of claims tribunals.

31. The proceedings under the PDPP Act are also distinct from matters which are covered under the Revenue Code, and in particular Section 67 thereof, which provides procedure for eviction and recovery of damages on account of unauthorized occupation and use of land belonging to the State under the management of Gaon Sabha. The

procedure provided there-under is summary in nature and is purely a civil remedy with no criminality attached. On the other hand, any act which constitutes a "mischief" within the meaning of Section 2(a) of the PDPP Act, wherein the definition of the word "mischief" has been assigned the same meaning as in Section 425 of Penal Code, and would relate to any act which causes destruction of any property, or any change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, and the property is a "public property" as described under Section 2(b) of the PDPP Act, the same would constitute a criminal offence under Section 3 and would be visited by penal consequences, namely, imprisonment and fine.

32. The provisions under the Revenue Code, the Act, 2020 and the PDPP Act would, therefore be seen to operate in different fields with there being no bar in respect of the institution of proceedings under the aforesaid enactments separately or simultaneously in respect of matters covered thereunder.

33. The criminal proceedings, which have been initiated in the present case pursuant to FIR lodged under the provisions of the PDPP Act, thus cannot be held to be vitiated for the reason that in respect of the allegations relating to encroachment/damage to Gaon Sabha land, only proceedings for eviction and recovery of damages can be initiated under the provisions of the Revenue Code and no criminal proceedings for causing damage or destruction of public property can be initiated under the PDPP Act.

34. No other ground was urged, therefore, no case is made out for invoking

the inherent power of the Court under Section 482 Cr.P.C..

35. In the facts and circumstances of the case, the application u/s 482 Cr.P.C. for the prayer made is liable to be dismissed.

36. Hence, the application under Section 482 Cr.P.C. is **dismissed**.

(2023) 9 ILRA 1184

ORIGINAL JURISDICTION

CRIMINAL SIDE

DATED:LUCKNOW 11.09.2023

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Application U/S 482. No. 6864 of 2023

Smt. Sangeeta Shukla **...Applicant**
Versus
State of U.P. & Ors. **...Opposite Parties**

Counsel for the Applicant:

Nadeem Murtaza, Amitav Singh, Umang Agarwal

Counsel for the Opposite Parties:

G.A.

Criminal Law-Code of Criminal Procedure, 1973-Section 482---

Applicant assailed the impugned orders by which, the charges were framed against the applicant under sections 323 & 506 of I.P.C. and Section 10 of the POCSO Act--- Under section 35(2) of the Act, there is a provision that the Special Court dealing with the matters of the offences under the POCSO Act, shall complete the trial, as far as possible, within a period of one year, from the date of taking cognizance of the offence--- The compliance of the provision of Section 207 of the Cr.P.C. is done by the trial court and thereafter, the matter was posted for after lunch session, wherein the applicant alongwith her counsel appeared and the counsel for the applicant was heard--- Neither any application for adjournment of the case nor any objection

was filed, regarding grant of further time and the applicant along with her counsel appeared before the trial court and opted for arguments on framing of charges--- To frame the charges, reasons are not required to be recorded, but, as soon as the court decides to discharge an accused, it is incumbent upon the trial court to record the reasons in writing. **(Para 30, 32 & 34)**

Petition dismissed. (E-15)

List of Cases cited:

1. (1979) 3 SCC 4, U.O.I.Vs Prafulla Kumar Samal
2. (2012)9 SCC 460, Amit Kapoor Vs Ramesh Chander
3. 2021 SCC Online SC 367, Sanjay Kumar Rai Vs St. of U.P.& anr.

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

1. Heard Sri Nadeem Murtaza, Sri Amitav Singh, Sri Umang Agarwal, learned counsels for the applicant, Sri Nirmal Kumar Pandey, learned A.G.A. for the State and Sri Janardan Dixit, learned counsel for the opposite parties no. 2 & 3.

2. By means of instant application, the applicant has assailed the impugned orders dated 26-06-2023, annexed as annexures No. 1 & 2 to the application, passed by the learned Additional District and Sessions Judge/Special Judge, POCSO Act, Court No. 1, Lucknow, by which, the charges were framed against the applicant under sections 323 & 506 of I.P.C. and Section 10 of the POCSO Act, in Sessions Trial No. 1991 of 2023 namely 'The State of U.P. Versus Sangeeta Shukla', arising out of first information report no. 15 of 2022, Police Station-Cantt., District-Lucknow. Further has assailed the chargesheet

submitted in first information report no. 15 of 2022, which is annexed as Annexure No. 3 with the paper book as well as the summoning order dated 24-08-2022.

3. The factual matrix of the case is that the applicant and her husband namely Lt. Colonel, Shiv Narain Shukla, (hereinafter referred as opposite party no.3), were known to each other since before their marriage and the marriage was solemnized on 23-03-2006 at Pathankot. Soon after their marriage, the applicant and her husband started living at Pathankot in army camp and thereafter two daughters, one aged about 14 years and her younger sister aged about 13 years, were born out of their wedlock on 13-01-2008 and on 12-09-2009 respectively. After the marriage, the husband of the applicant was posted at different places and when he was posted at Pune, in-laws of the applicant visited over there and started humiliating the applicant while taunting that the applicant is failed to give birth to a male child and she was also beaten by them.

4. He added that on the instigation of in-laws, the husband of the applicant had also become hostile and he usually beat the applicant and also started assassinating her character and when this became unbearable, the applicant made a complaint to the nearest police station at Barabanki and narrated the entire incident and both were called upon, wherein, the husband of the applicant apologized before the police officials and assured that he will mend his ways. Thereafter, the opposite party no. 3 was posted at IIT Bombay for pursuing his M.Tech Course, but, the husband of the applicant refused to take the applicant and her minor children and thus, the applicant took a flat on rent at Ansal API, Lucknow and stayed there with her minor daughters.

Further a flat was purchased in the joint names of the applicant and her husband, wherein; most of the amount was paid by the applicant and the E.M.I's. against the loan amount has been paid by her.

5. Further argued that in the year 2017, the husband of the applicant took signatures of the applicant on the blank paper with ill motive and in the year 2019, misusing those papers, he succeeded to get decree of divorce and he started torturing minor daughters and instigated them against their own mother. The applicant narrated her plight to the senior officials before the Army Wives Welfare Association. He added that in the month of April, 2021, the opposite party no. 3 i.e. the husband of the applicant, took away the children from the school and pressurized the applicant to resign from school. Thereafter, the children again got admissions in the month of October, 2021, in the A.P.S., Bhatinda on the several request of the applicant.

6. It has also been said that on 21-12-2021, the husband of the applicant tried to kill her by pressing a quilt over her mouth and tried to smother her. On 25-12-2021, the applicant gave an application at one Staff Centre/Asha Jyoti Kendra, Lucknow and to the Regional President, Army Wives Welfare Association, narrating her plight and the immense physical and mental harassment caused by her husband, but, due to the influence of her husband, the applicant was denied any maintenance from AWWA .

7. He contended that being puzzled and harassed by the opposite party no. 3, the applicant lodged the first information report on 27-12-2021, which was registered as First Information Report No. 186 of

2021, at Police Station-Cantt., District-Lucknow under sections 498-A, 323, 504 & 506 of I.P.C. and Section 3/4 of the Dowry Prohibition Act, thereby stating that she is being mentally tortured and dowry is also being demanded. Thereafter, the investigation was done and the chargesheet was filed against the opposite party no. 3.

8. Adding his arguments, he submits that on application dated 25-12-2021, the officials of One Staff Centre went to the matrimonial home of the applicant; wherein, they were told by the daughters of the applicant that they want their mother to be back at home. Thereafter, on 29-12-2021, an application was given by the husband of the applicant for counselling of his daughters and for production of his daughters before the Bal Kalyan Samiti, Lucknow. On 29-12-2021, after counselling of the daughters, a report was submitted, which reveals that there is no allegation of sexual assault or any sort of bad touching as is alleged.

9. It is argued that unbelievable story has been narrated in the first information report by the father of the alleged prosecutrix and thereafter, the Investigating Officer without collecting the material evidences, filed the chargesheet against the present applicant, who is admittedly the mother of the opposite party no. 2. He submits that under the duress, the statements of the daughter were got recorded under section 161 and thereafter, under section 164 of Cr.P.C. before the trial court.

10. Next submission is that the learned trial court, without application of judicial mind, has taken cognizance on the chargesheet and issued the summons against the applicant and thereafter, the

copy of the case diary was provided on 26-06-2023 in pre lunch session, while complying with the mandate of the provisions of Section 207 of Cr.P.C. and thereafter, in the post lunch session, learned trial court framed the charges against the applicant. He also added that an application under section 207 of Cr.P.C. was moved by the applicant through her counsel on 26-06-2023 and it is apparent from the order dated 26-06-2023 of the pre lunch session that the counsel for the applicant has noted on the ordersheet itself, that the copy of the requisite prosecution record is not served either to the applicant or her counsel. He submits that the documents were only served to the applicant, on 07-07-2023, whereas the impugned order for framing of charges upon the applicant was passed on 26-06-2023 itself.

11. Further urged that even assuming the fact that the copies of the documents were handed over to the applicant on 26-06-2023, even then, no reasonable period of time has been given to the applicant to go through the prosecution record/case diary or to move a discharge application. It has been submitted that right to fair trial has been held to be a fundamental right as guaranteed under Article 21 of the Constitution of India, which has been discussed in case of Hussainara Khatoon & Ors. Vs. Home Secretary, State of Bihar, reported in 1979 AIR 1369 and the procedure prescribed by law so far as the trial is concerned, is provided in the Criminal Procedure Code, 1973 i.e. the trial to be conducted by the Court of Sessions, as laid down in Chapter XVIII starting from sections 225 to sections 237 whereas Sections 227 & 228 of Cr.P.C. provide the provision of discharge and framing of charges, respectively. He added that the discharge is a valuable right of an accused

and the trial starts after the charges are framed i.e. the subsequent stage of discharge, but, the trial court in the instant matter, has ignored the aforesaid provisions.

12. In support of his contentions, he has placed reliance on a case reported in (1979) 3 SCC 4, **Union of India Vs. Prafulla Kumar Samal** and has referred paragraphs 4,7 & 10 of the abovesaid Judgment, which are reproduced as under :-

“4. We might state, to begin with, that so far as the present case (offences committed under the Prevention of Corruption Act) is concerned it is regulated by the procedure laid down by the Criminal Law Amendment Act under which the police has to submit a charge-sheet directly to the Special Judge and the question of commitment to the Court of Session does not arise, but the Sessions Judge has nevertheless to follow the procedure prescribed for trial of sessions cases and the consideration governing the interpretation, of Section 227 of the Code apply mutatis mutandis to these proceedings after the charge-sheet is submitted before the Special Judge.

7. Section 227 of the Code runs thus:

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

The words “not sufficient ground for proceeding against the accused”

clearly show that the Judge is not a mere post office to frame the charge at the behest of the prosecution, but has to exercise his judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. In assessing this fact, it is not necessary for the court to enter into the pros and cons of the matter or into a weighing and balancing of evidence and probabilities which is really his function after the trial starts. At the stage of Section 227, the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. The sufficiency of ground would take within its fold the nature of the evidence recorded by the police or the documents produced before the court which ex facie disclose that there are suspicious circumstances against the accused so as to frame a charge against him.

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

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

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

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay

down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

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

13. Referring the aforesaid, he submits that after due consideration, certain guidelines were framed which says that the court while exercising its jurisdiction under section 227 of the Code, cannot merely act as post office or a mouthpiece of prosecution, but, has to consider the broad probabilities of the case and the total effect of the evidence, but, it is not extended to touch the periphery of the trial. He added that so far as the present case is concerned, the trial court has overlooked the ratio of the Judgment in the case of **Union of India Vs. Prafulla Kumar Samal (Supra)** and straightaway proceeded for framing of the charges.

14. While further placing reliance on the case reported in (2012)9 SCC 460, **Amit Kapoor Vs. Ramesh Chander**, he submits that the framing of charges is an

exercise of jurisdiction by the trial court in terms of the Section 228 of the Code, unless the accused is discharged under section 227 of the Code and thus, it is evident that the court is required to consider the record of the case and the documents submitted therewith and therefore, it emerges that reasonable opportunity of hearing is essential.

15. Again, reliance has been placed on the Judgment reported in **2021 SCC Online SC 367, Sanjay Kumar Rai Vs. State of Uttar Pradesh and Another**, and has referred paragraph no. 19 of the judgment, which is reproduced as follows :-

“19.The High Court has committed jurisdictional error by not entertaining the revision petition on merits and overlooking the fact that ‘discharge’ is a valuable right provided to the accused. In line with the fact that the High Court and the court below have not examined the fairness of criminal investigation in this case and other related aspects concerning improvement of witness statements, it is necessary for the High Court to reconsider the entire matter and decide the revision petition afresh. Accordingly, we set aside the impugned order dated 28.11.2018 and remand the case back to the High Court for its reconsideration in accordance with law.”

16. Referring the aforesaid, he submits that Hon’ble Apex Court has reiterated that ‘discharge is a valuable right provided to the accused’ and therefore, fairness of criminal investigation as well as other related aspects, must be examined at the level of the discharge.

17. Concluding his arguments, he submits that the applicant is a highly

educated lady, who completed her B.Sc. in the year 2003, and had also obtained two B.Ed degrees in the year 2008 & 2018 and Diploma Course of PGDVA in Human Rights Resource Management from Symbiosis School and also worked as teacher for some time, but, the opposite party no. 3 being annoyed and inimical has hatched the applicant in a criminal conspiracy and as a result whereof, the applicant is facing criminal proceedings and being harassed.

18. Further submitted that the reasonable opportunity of hearing as well as time has not been accorded by the trial court on discharge and the order dated 26-06-2023 has been passed in post lunch session by the trial court, whereby charges have been framed under sections 323 & 506 of I.P.C. and Section 10 of the Protection of Children from Sexual Offences Act, 2012(hereinafter referred to as Act,2012). Therefore, submission is that the impugned orders dated 26-06-2023 passed in the pre lunch session and post lunch session, by which the charges have been framed, may be set aside and the learned trial court may be directed to hear the applicant on discharge and further the consequential proceedings, may also be set aside.

19. Per contra, learned counsel appearing for the opposite nos. 2 & 3 has vehemently opposed the contentions of the learned counsel for the applicant and submits that the prosecutrix is the minor daughter of the applicant and the minor daughter, who is innocent, in her statements recorded under sections 161 & 164 Cr.P.C., has stated that she has been preyed of bad touch and sexual harassment by her mother and thus, she has fully supported the version of the prosecution.

The victim was also produced before the Child Welfare Committee, Lucknow, wherein she also reiterated her statement. He added that the Investigating Officer thoroughly investigated the matter and after recording the statements of the victim as well as other witnesses and collecting the cogent evidences against the accused, filed the chargesheet and the Magistrate has rightly taken cognizance and has issued summons and in case of avoidance of criminal proceedings by the applicant, non bailable warrant was also issued on 10-12-2022, whereafter, the applicant was arrested and sent to jail.

20. Further contention of learned counsel for the opposite parties no. 2 & 3 is that on 26-06-2023, an application for recall of the order of non bailable warrant was submitted by the applicant and thereafter, he also moved a discharge application, whereafter the same was dismissed and the charges were framed against the applicant under sections 323 & 506 of I.P.C. and Section 10 of the POCSO Act. Thereafter, on 07-07-2023, the Examination-in-Chief of the prosecutrix has been completed and the next date was fixed on 19-07-2023 for recording the cross examination of the prosecutrix. He added that from perusal of the pre lunch session order dated 26-06-2023, it reveals that there is compliance of provision of Section 207 of Cr.P.C. as the prosecution documents have been provided to the applicant and thereafter, the matter was posted after lunch session, wherein the applicant alongwith her counsel appeared before the court concerned and the learned counsel for the applicant was heard alongwith the Public Prosecutor, which is apparent from the impugned order. He added that there is no iota of evidence that the applicant or her counsel has ever, requested for

adjournment of the case or for providing further opportunity of hearing.

21. A.G.A. appearing for the State submits that so far as the endorsement made on the pre lunch session, on the order dated 26-06-2023, that ‘*कॉपी प्राप्त नहीं कराई*’, is concerned, the same is being belied as per the appearance of the counsel for the applicant in the post lunch session, which is evident in the order dated 26-06-2023, wherein, the learned counsel for the applicant appeared and has argued the case.

22. Fortifying his arguments, he submits that looking into charges framed against the applicant under the POCSO Act, and the procedure prescribed under section 35 (2) of the Act, 2012, it is apparent that Special Court is mandated that the trial shall be completed as far as possible, within period of one year from the date of taking cognizance of the offence. For ready reference, Section 35 of the Act, 2012, is reproduced hereinunder :-

“35. Period for recording of evidence of child and disposal of case-(1)
The evidence of the child shall be recorded within a period of thirty days of the Special Court taking cognizance of the offence and reasons for delay, if any, shall be recorded by the Special Court.

(2) The Special Court shall complete the trial, as far as possible, within a period of one year from the date of taking cognizance of the offence.”

23. He argued that it is apparent from the conduct of the applicant that after issuance of the summons, accused persons did not put their appearance before the non bailable warrants were issued against them and thereafter, the applicant was arrested

on 12-12-2022 and was sent to jail. This clearly shows that the applicant is adopting dilly dallying tactics, which infact, is not permitted as per the intent of legislature, which is evident from the provision of Section 35 (2) of the Act, 2012, and therefore, following the aforesaid provisions, the trial court has rightly proceeded in the matter and is trying to conclude the trial, at the earliest.

24. Adding his arguments, he submits that there is no unlawfulness or perversity in the order dated 26-06-2023 as the applicant has failed to establish her case that she was not afforded the reasonable period of time so as to be heard on discharge, contrary to it, learned counsel for the applicant was present and argued the matter and thereafter, the charges were framed. But, once, the applicant failed to be successful in delaying the matter, she raised the plea, which could not be substantiated either by the counsel for the applicant or from the records submitted with the paper book. Therefore, the contention is that the instant application has no merit and the same may be dismissed.

25. Having heard learned counsel for the parties and after perusal of material placed on record, it transpires that the first information report was lodged on 10-02-2022, under sections 323, 354, 506, 120-B of I.P.C. and Section 7/8 of the POCSO Act, 2012 at Police Station-Cantt., District-Lucknow, on the orders of U.P. State Commission for Protection of Children's Rights and thereafter, the statement of the prosecutrix was recorded under section 161 of Cr.P.C. on 14-02-2022 and on 15-03-2022, the statement of the prosecutrix was recorded under section 164 of Cr.P.C. and in both the statements, the prosecutrix has fully supported the version of the

prosecution. The chargesheet was filed by the Investigating Officer on 19-08-2022, under sections 323 & 506 of I.P.C. and section 9/10 of the POCSO Act, and thereafter, on 24-08-2022, the trial court took cognizance and summoned the accused persons for facing trial and in case of non appearance, the non bailable warrant was issued, wherein the applicant was arrested and sent to jail. For faster disposal of the matter, the Special POCSO Court separated the file of the applicant from the other co-accused persons on 31-05-2023.

26. It is apparent that on 26-06-2023, in the pre-lunch session, the following order was passed :-

दिनांक-26.06.2023 पत्रावली पेश हुई। पुकार कराई गयी। पुकार पर अभियुक्ता संगीता शुक्ला मय विद्वान अधिवक्ता उपस्थित। अभियुक्ता संगीता शुक्ला के विरुद्ध पूर्व में जारी गैर जमानतीय वारंट को निरस्त करने के लिए प्रार्थनापत्र मय शपथपत्र व आधार कार्ड तथा आई.डी. की छाया प्रति दाखिल की गयी तथा कहा गया कि प्रार्थिनी/अभियुक्ता गुडगांव में रहती है। इस लिए वह नियत तिथि पर उपस्थित नहीं हो पाई। प्रार्थिनी/अभियुक्ता संगीता शुक्ला को न्यायिक अभिरक्षा में लिया जाये।

विद्वान अभियोजन अधिकारी द्वारा मौखिक रूप से विरोध किया गया।

सुना तथा पत्रावली का अवलोकन किया।

पत्रावली के अवलोकन से स्पष्ट है कि प्रस्तुत मामले में आवश्यक अभियोजन प्रपत्रों की प्रति अभियुक्ता वा उसके अधिवक्ता को प्राप्त नहीं करायी गयी है। कार्यालय/रीडर/मुंसरिम को निर्देशित किया जाता है कि वह तत्काल अभियुक्ता व उनके अधिवक्ता को आवश्यक अभियोजन प्रपत्रों की प्रति उपलब्ध कराये। पत्रावली लंच बाद पेश हो।

दिनांक-26.06.2023

(आशुतोष कुमार सिंह)

अपर जिला एवं सत्र

न्यायाधीश/विशेष न्यायाधीश,

पॉक्सो एक्ट, कोर्ट नं०- 1, लखनऊ।

27. From perusal of the order abovesaid, it transpires that in case of the non appearance of the applicant before the trial court, the non bailable warrant was issued, wherein an application was moved by the applicant for recall of the order of issuance of non bailable warrant and she was heard, after taking her in judicial custody and thereafter, the compliance of provisions of Section 207 of the Cr.P.C., has been done and the matter was directed to be posted after lunch session.

28. Further; in the post lunch session, the following order was passed :-

“26-06-2023

पत्रावली प्रस्तुत हुई। पुकार पर अभियुक्ता संगीता शुक्ला मय विद्वान अधिवक्ता उपस्थित। अभियुक्ता के विद्वान अधिवक्ता व विद्वान विशेष लोक अभियोजक उपस्थित।

अभियुक्ता की ओर से कथन किया गया कि उसके विरुद्ध धारा- 323, 506 भा०द०सं० व धारा-9/10 पॉक्सो एक्ट का आरोप नहीं बनता है। उसे मामले से उन्मोचित किया जाए।

विद्वान विशेष लोक अभियोजक द्वारा कथन किया गया है कि पत्रावली पर मौजूद साक्ष्यों के आधार पर अभियुक्त के विरुद्ध आरोप विरचित किये जाने के आधार पर्याप्त हैं।

मैंने आरोप के बिन्दु पर विद्वान विशेष लोक अभियोजक व अभियुक्त के विद्वान अधिवक्ता को सुना एवं पत्रावली का परीशीलन किया।

पत्रावली पर उपलब्ध प्रलेखीय साक्ष्य का अवलोकन करने तथा अभियुक्ता के विद्वान अधिवक्ता एवं विद्वान विशेष लोक अभियोजक को सुनने के उपरान्त मेरा यह मत है कि अभियुक्ता के विरुद्ध धारा-323, 506 भा०द०सं० व धारा-9/10 पॉक्सो एक्ट के अन्तर्गत आरोप विरचित किये जाने हेतु पर्याप्त आधार हैं।

अतः अभियुक्ता संगीता शुक्ला के विरुद्ध धारा- 323, 506 भा०द०सं० व धारा-9/10 पॉक्सो एक्ट के अन्तर्गत आरोप विरचित किया जाता है।

पत्रावली वास्ते साक्ष्य दिनांक-07-07-2023 को पेश हो। गवाहान तलब हों।

दिनांक-26.06.2023

(आशुतोष कुमार सिंह)

अपर जिला एवं सत्र न्यायाधीश/विशेष न्यायाधीश,
पॉक्सो एक्ट, कोर्ट नं०- 1, लखनऊ।

29. While going through the abovesaid order, it emerges that the present applicant alongwith her counsel, appeared before the trial court in the post lunch session and the counsel for the applicant was heard. The applicant as well as the counsel for the applicant, neither moved any application for adjournment of the case nor made any objection while hearing the matter for providing further opportunity of hearing.

30. This court is aware of the fact that the charges have been framed against the present applicant under the provisions of POCSO Act, wherein under section 35(2) of the Act, there is a provision that the Special Court dealing with the matters of the offences under the POCSO Act, shall complete the trial, as far as possible, within a period of one year, from the date of taking cognizance of the offence and therefore, the trial court very well proceeded in the matter, following the mandate abovesaid.

31. It is also evident that the applicant was avoiding her appearance before the trial court after issuance of the summons in the month of August, 2022, uptill she was arrested in the month of December, 2022 and the matter could very hardly put into motion by the trial court and the applicant appeared, after issuance of the non bailable warrant, which itself is overt that the present applicant is trying to delay the

matter, so that she could escape from the clutches of the law.

32. When this court examines the crux of the matter, as to whether the proper opportunity was accorded to the present applicant or not; it emerges from the order dated 26-06-2023 (pre lunch session) that the compliance of the provision of Section 207 of the Cr.P.C. is done by the trial court and thereafter, the matter was posted for after lunch session, wherein the present applicant alongwith her counsel appeared and the counsel for the applicant was heard, which is apparent from the order itself. It also reveals that neither any application for adjournment of the case nor any objection was filed, regarding grant of further time and the applicant alongwith her counsel appeared before the trial court and opted for arguments on framing of charges.

33. It is trite law that discharge is a valuable right of an accused and that cannot be circumvented, but, at the same time, there can be no straight jacket formula for examining that opportunity of discharge is infact been accorded or not and this can be looked into as per it's facts and circumstances, in each and every case.

34. Law is also settled that once the court comes to the conclusion to frame the charges, reasons are not required to be recorded, but, as soon as the court decides to discharge an accused, it is incumbent upon the trial court to record the reasons in writing.

35. So far as the present case is concerned, it is apparent from the impugned order itself, that the provisions of the Code including the provisions of Section 207 of Cr.P.C. have very well been complied with and it is not the case of the

present applicant that even after an application for granting further time, the court has proceeded to frame the charges, contrary to it, the present applicant alongwith her counsel was present before the trial court and counsel for the applicant was properly heard and therefore, there seems to be no merit in the contentions of learned counsel for the applicant that the applicant was not afforded an opportunity to be heard on discharge.

36. This court has also prima-facie noticed that the endorsement, which has been shown on the order dated 26-06-2023, at pre lunch session, is not genuine and that has perhaps subsequently, been made as after having at a glance, on the order dated 26-06-2023, it is evident that the applicant and her counsel appeared before the trial court in the post lunch session. Therefore, no prejudice is caused to the applicant as such.

37. In view of aforesaid submissions and discussions, this court finds no merit in the instant application, consequently, the same is hereby *dismissed*.

38. It is made clear that the observations made as above, would have no bearing on the merits of the trial.
