

THE INDIAN LAW REPORTS ALLAHABAD SERIES



सत्यमेव जयते

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

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JUDGES PRESENT

<i>Chief Justice:</i> <i>Hon'ble Mr. Justice Arun Bhansali</i>	
<i>Permanent Judges:</i>	
<i>1. Hon'ble Mr. Justice Manoj Kumar Gupta</i>	<i>33. Hon'ble Mr. Justice Saurabh Laxania</i>
<i>2. Hon'ble Mr. Justice Anjani Kumar Mishra</i>	<i>34. Hon'ble Mr. Justice Vivek Varma</i>
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(2024) 4 ILRA 8
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.04.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Appeal U/S 37 of Arbitration & Conciliation Act
 1996 No. 389 of 2023

Union of India	Versus	...Appellant
Ms. Yauk Engineers		...Respondent

Counsel for the Appellant:

Sri S.K. Misra, Sri Ashok Nigam A.S.G.I., Sri Gopal Verma

Counsel for the Respondent:

Sudhir Dixit

(A) Arbitration Law - Appeal against arbitral award - Arbitration & Conciliation Act, 1996 - Sections 21, 28(3), 34 & 37 - The Arbitration and Conciliation (Amendment) Act, 2015 - Contractual Terms - Arbitral Award - Patent Illegality - Severability - Retrospective Application - Public Policy - Rule or law cannot be applied retrospectively unless there is a clear or manifest intention to the contrary - Contract between the parties outlines the boundaries within which an arbitral tribunal can act - Any act or decision of the arbitral tribunal beyond clearly defined contractual provisions is patently illegal and unsustainable - Any award passed against the statutory or constitutional principles goes against the public policy of India - Under Section 34 and Section 37 of the Act, courts have the authority to partially set aside an arbitral award. (Para - 9,48)

(B) Word or Phrases - *lex prospicit non respicit*: law looks forward not backward, *Principle of pacta sunt servanda*: Parties must honour their obligations under the

contract, Principle of severability - provides a mechanism for courts to partially set aside an award when certain issues within it are found to be flawed or invalid - severability does not amount to modification, which is prohibited - Courts under Section 34 of the Act have the power to sever and partly set aside the award.(Para - 9,34, 40 to 47)

M/s Yauk Engineers (Respondent) contracted with the Union of India (Appellant) to install a 33KV transformer - contract included a 12-month performance guarantee - defects arose in June 1998 which the Respondent repaired - Respondent claimed ₹6,22,268/- as repair costs - Union refused reimbursement citing guarantee terms - Arbitrator awarded the amount with interest to the Respondent - District Judge upheld the award - Union appealed under Section 37, arguing it contradicted the contractual terms - preliminary issue regarding instant appeal under Section 37 of Act - arbitral award was issued in 2006 and adjudicated in 2024 - temporal disjuncture prompts a crucial examination of legal principles - specifically concerning *retrospective application of laws* and *temporal scope of legal provisions*. (Para - 1 to 8)

HELD: - 2015 Amendment to the Arbitration and Conciliation Act did not apply retrospectively to the present case. Award of Rs.6,22,268/- and interest to the Respondent for repairing transformer defects was a violation of Section 28(3) of the Act, as it stood before the Amendment Act, 2015 & it was against the contract's clear provisions. Arbitral award granting reimbursement for repair costs was set aside as it violated the explicit contractual terms, but the remainder of the award was upheld by applying the doctrine of severability. (Paras 34, 39, 51, 52)

Appeal disposed of. (E-7)

List of Cases cited:

1. I.O.C. Ltd. Vs M/s Shree Ganesh Petroleum, (2022) 4 SCC 463
2. MTC Ltd. Vs Vedanta Ltd., (2019) 4 SCC 163

3. PSA Sical Terminals (P) Ltd. Vs Board of Trustees of V.O. Chidambranar Port Trust Tuticorin, 2021 SCC OnLine SC 508

4. Delhi Airport Metro Express Pvt. Ltd. Vs Delhi Metro Rail Corp. Ltd., (2022) 1 SCC 131

5. Commissioner of I.T. Vs Vatika Township, (2015) 1 SCC 1

6. U.O.I. Vs Parmar Construction, (2019) 15 SCC 682

7. U.O.I. Vs Pradeep Vinod Construction Co., (2020) 2 SCC 464

8. Ratnam Sudesh Iyer Vs Jackie Kakubhai Shroff, (2022) 4 SCC 206

9. West Bengal Housing Board Vs Abhisek Construction, 2023 SCC OnLine Cal 827

10. Oil & Natural Gas Corp. Ltd. Vs Saw Pipes Ltd., (2003) 5 SCC 705

11. Associate Builders Vs DDA, (2015) 3 SCC 49

12. R.S. Jiwani Vs Ircon International Ltd., 2009 SCC OnLine Bom 2021

13. J.G. Engineers (P) Ltd. Vs U.O.I., (2011) 5 SCC 758

14. Damodar Valley Corp. Vs Reliance Infrastructure Ltd., 2023 SCC OnLine Cal 3307

(Delivered by Hon'ble Shekhar B. Saraf, J.)

1. This is an appeal under Section 37 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the 'Act') filed by the Union of India through Garrison Engineer AF (hereinafter referred to as the 'Applicant') against the order dated January 12, 2012 passed by District Judge, Agra in Arbitration Case No. 406 of 2006 under Section 34 of the Act.

FACTS

2. I have laid down the factual matrix leading to the instant appeal below:

a. M/s Yauk Engineers (hereinafter referred to as the 'Respondent') entered into a contract with the Applicant for providing 33KV transformer (Independent Feeder) vide letter dated May 16, 1995 for an amount of Rs.1,00,86,922.26/-. Work was to be completed within 18 months with effect from June 06, 1995. The work order was issued on May 29, 1995. The work was finally completed on August 09, 1997 and completion certificate was issued on August 14, 1997.

b. As per clause 39 and 39.1 of the Contract between the parties and condition 46 of IAFW 2249 General Conditions of Contract (hereinafter referred to as the 'GCC'), entire installation was deemed to be guaranteed by the Respondent for efficient performance for 12 months from the date of completion of work. The Respondent had also given specific undertaking in this regard vide its letter dated October 1, 1997.

c. The Transformer provided by the Respondent became defective in June, 1998 and accordingly, the Respondent was asked by the Applicant to rectify the defects. The Respondent rectified the defects, and claimed reimbursement of Rs.6,28,268/- incurred by it in the rectification of defects. Since, the Applicant contended that based on the guarantee provided by the Respondent it was not liable to reimburse any cost incurred towards rectification of defects, disputes arose between the parties which were referred to arbitration.

d. The Arbitrator vide its award dated July 31, 2006, among other things, awarded a sum of Rs.6,22,268/- along with interest at the rate of 12% p.a. from February 2, 1998 to July 31, 2006 and at the rate of 8% p.a. from August 1, 2006 till the date of actual payment in favour of the Respondent.

e. The arbitral award dated July 31, 2006 was challenged by the Applicant under Section 34 of the Act before the District Judge, Agra (Arbitration Case No. 406 of 2006). Vide its order dated January 12, 2012, the District Judge, Agra dismissed the application filed by the Applicant and upheld the arbitral award dated July 31, 2006 in its entirety.

f. Aggrieved by the order dated January 12, 2012 passed by the District Judge, Agra, the Applicant filed the instant appeal under Section 37 of the Act before this Court on May 4, 2012.

CONTENTIONS OF THE APPLICANT

3. Although several claims that were allowed by the Arbitrator and affirmed by the District Judge are under challenge in this appeal, learned ASG of India has confined his arguments to the reimbursement of Rs.6,22,268/- . The other grounds of appeal have not been pressed by him and are accordingly dismissed in limine. With regards to the claim of reimbursement of Rs.6,22,268/-, Sri Gopal Verma, counsel has made the following arguments:

i. As per clause 39 and 39.1 of the contract between the parties, and condition 46 of IAFW 2249 GCC, entire installation was deemed to be guaranteed by the Respondent for efficient performance for 12 months from the date of completion of

work and in case of any default arising during that period, the Respondent was required to rectify/replace the same at its own cost. The Respondent had further specifically given a guarantee vide its letter dated October 1, 1997.

ii. The Arbitrator without considering the oral and written submissions as well as documentary evidence illegally awarded Rs. 6,22,268/- in favour of the Respondent.

iii. The issue regarding the undertaking given by the Respondent for 1 year from August 9, 1996, and further extended vide its letter dated October 1, 1997, in terms of clause 39 of the contract between the parties was specifically raised before the Arbitrator during the arbitration proceedings as well as before the District Judge in proceedings under Section 34 of the Act but no specific finding in this regard has been given either by the Arbitrator or by the District Judge.

iv. The contention of the Respondent that the guarantee given by the manufacturer has expired, does not give it the right to demand the expenses incurred in repair of the transformer in as much as under the terms of the contract, it was the Respondent who had given guarantee as well as undertaking for efficient performance of the transformer from August 8, 1997, and not the manufacturer. As such, the findings given by the Arbitrator as well as the District Judge are beyond jurisdiction in as much as an arbitrator is a creature of contract and it cannot travel beyond it. Reliance is placed in this regard upon the judgments of the Supreme Court in **Indian Oil Corporation Limited v. M/s Shree Ganesh Petroleum reported in (2022) 4 SCC 463**, and **MMTC Ltd. v. Vedanta Ltd. reported in (2019) 4 SCC 163**.

v. The Arbitrator while allowing the claim of the Respondent has acted without jurisdiction against the terms of contract in as much as the role of the arbitrator is to arbitrate within the terms of contract. If the arbitrator travels beyond the contract, the arbitrator can be said to be acting without jurisdiction. Reliance is placed in this regard upon the judgments of the Supreme Court in **PSA Sical Terminals (P) Ltd. .v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin reported in 2021 SCC OnLine SC 508.**

vi. Award given by the arbitrator is contrary to the contractual provisions between the parties and therefore it is patently illegal and liable to be set aside by this court.

vii. In Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation Limited reported in (2022) 1 SCC 131, it was held by the Supreme Court that a domestic award can be interfered with under Section 34(2A) of the Act on the ground of patent illegality when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to it. Without looking at the aforesaid position of law, the District Judge upheld the award under Section 34 of the Act.

viii. This Court should set aside the order dated January 12, 2012 passed by District Judge, Agra affirming the Arbitral Award dated July 31, 2006.

CONTENTIONS OF THE RESPONDENT

4. Sri Sudhir Dixit, counsel appearing on behalf of the Respondent has advanced the following submissions:

i. A perusal of the grounds taken by the Applicant in proceedings under Section 34 of the Act show that the grounds raised by the Applicant were not within the purview of Section 34(2) of the Act.

ii. The judgment dated January 12, 2012 passed by the District Judge is perfectly legal and valid.

iii. The instant appeal filed under Section 37 of the Act also does not disclose any ground which falls within the parameters of Section 34(2) of the Act.

iv. The District Judge has considered each and every objection raised by Applicant. Therefore, the instant appeal under Section 37 of the Act is devoid of any merits and deserves to be dismissed with cost.

ANALYSIS

5. I have heard the Learned Counsel appearing for the parties and perused the materials on record.

6. A preliminary issue arises before this Court before it delves into the merits of the instant appeal under Section 37 of the Act.

7. Since the arbitral award in the instant case was rendered in 2006 but the instant appeal is being heard and decided in 2024, the question arises as to the law applicable to the instant proceedings given that the Act underwent multiple amendments between 2006 and 2024.

8. The passage of time often renders legal proceedings complex, especially in cases involving arbitration awards. In the present matter, the temporal gap between the issuance of the arbitral award in 2006 and the current adjudication in 2024 presents a challenge. This temporal

disjuncture prompts a crucial examination of legal principles, specifically concerning retrospective application of laws and the temporal scope of legal provisions.

9. In Commissioner of Income Tax v. Vatika Township reported in (2015) 1 SCC 1, a Constitution Bench of the Supreme Court propounded that a rule or law cannot be applied retrospectively unless there is a clear or manifest intention to the contrary. Relevant paragraphs have been extracted below:

*“28. Of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bedrock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as *lex prospicit non respicit*: law looks forward not backward. As was observed in *Phillips v. Eyre* [(1870) LR 6 QB 1], a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.*

29. The obvious basis of the principle against retrospectivity is the principle of “fairness”, which must be the

*basis of every legal rule as was observed in *L'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co. Ltd.* [(1994) 1 AC 486 : (1994) 2 WLR 39 : (1994) 1 All ER 20 (HL)] Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. We need not note the cornucopia of case law available on the subject because aforesaid legal position clearly emerges from the various decisions and this legal position was conceded by the counsel for the parties. In any case, we shall refer to few judgments containing this dicta, a little later.”*

10. The principle against retrospective application of laws holds particular significance in the realm of arbitration. Arbitration is founded on the parties' agreement to resolve their disputes outside the traditional court system, relying on the laws as they exist at the time of their arbitration agreement. Retrospective application of laws could disrupt the parties' expectations and undermine the finality and efficiency of arbitration proceedings.

11. Retrospective application of laws to arbitral proceedings could affect the validity of arbitral awards, challenge the jurisdiction of arbitral tribunals, or introduce procedural requirements that were not in place at the time of arbitration. Retrospective application of laws introduces uncertainty and unpredictability into legal relationships. Parties cannot foresee the legal consequences of their

actions if laws can be altered retrospectively. This lack of certainty undermines the confidence in the legal system and erodes the rule of law. Arbitral awards, which are intended to provide parties with a final and binding resolution of disputes, become vulnerable to challenge or reversal based on retrospective legal changes. This prolongs the resolution of disputes, increases litigation costs, and undermines the efficacy of arbitration as an alternative to traditional court proceedings.

12. The grounds for challenge to an arbitral award under Section 34 of the Act underwent a significant change in 2015 with the enactment of the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to as the ‘Amendment Act, 2015’). However, since the arbitral proceedings in the instant case commenced in 2006, that is, prior to the enactment of the Amendment Act of 2015, the said amendment in relation to the substantive provisions in the Amendment Act will not apply to the instant case, given the principle against retrospective applicability of laws, and various pronouncements of the Supreme Court in this regard.

13. Reference can be made to Section 26 of the Amendment Act, 2015 which states that the Amendment Act, 2015 will not apply to arbitral proceedings commenced, in accordance with the provisions of Section 21 of the Act, before the enactment of the Amendment Act, 2015:

“26. Act not to apply to pending arbitral proceedings.—Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of

this Act, unless the parties, otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act.”

14. In **Union of India v. Parmar Construction reported in (2019) 15 SCC 682**, the Supreme Court held that by virtue of Section 26 of the Amendment Act, 2015, the said amendments will only apply to those arbitral proceedings which commenced in accordance with Section 21 of the Act on or after October 26, 2015, that is the day on which the Amendment Act, 2015 came into force (hereinafter referred to as ‘the effective date’). Relevant paragraphs have been extracted below:

“26. The conjoint reading of Section 21 read with Section 26 leaves no manner of doubt that the provisions of the 2015 Amendment Act shall not apply to such of the arbitral proceedings which have commenced in terms of the provisions of Section 21 of the principal Act unless the parties otherwise agree. The effect of Section 21 read with Section 26 of the 2015 Amendment Act has been examined by this Court in Aravali Power Co. (P) Ltd. v. Era Infra Engg. Ltd. and taking note of Section 26 of the 2015 Amendment Act laid down the broad principles as under :

27. We are also of the view that the 2015 Amendment Act which came into force i.e. on 23-10-2015, shall not apply to the arbitral proceedings which have commenced in accordance with the provisions of Section 21 of the principal Act, 1996 before the coming into force of the 2015 Amendment Act, unless the parties otherwise agree.”

15. Again in **Union of India v. Pradeep Vinod Construction Co.** reported

in **(2020) 2 SCC 464**, the Supreme Court reiterated that the provisions of the Amendment Act, 2015 will not apply if the arbitral proceedings commenced before the effective date:

“11. The respondent(s) are registered contractors with the Railways and they are claiming certain payments on account of the work entrusted to them. The request of the respondent(s) for appointment of arbitrator invoking Clause 64 of the contract was declined by the Railways stating that their claims have been settled and the respondent(s) have issued “no claim” certificate and executed supplementary agreement recording “accord and satisfaction” and hence, the matter is not referable to arbitration. Admittedly, the request for referring the dispute was made much prior to the Amendment Act, 2015 which came into force w.e.f. 23-10-2015. Since the request for appointment of arbitrator was made much prior to the Amendment Act, 2015 (w.e.f. 23-10-2015), the provision of the Amendment Act, 2015 shall not apply to the arbitral proceedings in terms of Section 21 of the Act unless the parties otherwise agree. As rightly pointed out by the learned counsel for the appellant, the request by the respondent(s) contractors is to be examined in accordance with the principal Act, 1996 without taking resort to the Amendment Act, 2015.”

16. Finally, in **Ratnam Sudesh Iyer v. Jackie Kakubhai Shroff** reported in **(2022) 4 SCC 206**, the Supreme Court espoused that on a conjoint reading of Section 21 of the Act and Section 26 of the Amendment Act, 2015 it becomes apparent that unless the parties otherwise agree, provisions of 2015 Amendment Act will not apply to arbitral proceedings which

commenced in accordance with Section 21 of the Act before the effective date. Relevant paragraphs have been extracted below:

“21. In BCCI v. Kochi Cricket (P) Ltd. [BCCI v. Kochi Cricket (P) Ltd., (2018) 6 SCC 287 : (2018) 3 SCC (Civ) 534] a reference was made to Section 26 of the 2015 Amendment Act which had bifurcated proceedings into arbitral proceedings and court proceedings. The said provision reads as under:

“26. Act not to apply to pending arbitral proceedings.—Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act, unless the parties, otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act.”

22. It was clearly elucidated in para 39 of the judgment that the reason behind the first part of Section 26 of the 2015 Amendment Act being couched in the negative was only to state that the Amendment Act will apply even to arbitral proceedings commenced before the amendment if the parties otherwise agree. This is not so in the second part. The judgment derived that the intention of the legislature was to mean that the 2015 Amendment Act is prospective in nature and will apply to those arbitral proceedings that are commenced, as understood by Section 21 of the said Act, on or after the 2015 Amendment Act, and to court proceedings which had commenced on or after the 2015 Amendment Act came into force.

23. The applicability of Section 34(2-A) was further elucidated

in Ssangyong Engg. & Construction Co. Ltd. V. NHAI [Ssangyong Engg. & Construction Co. Ltd. V. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213] , where the SC categorically opined that Section 34 as amended will apply only to Section 34 applications that have been made to the Court on or after 23-10-2015, irrespective of the fact that the arbitration proceedings may have commenced prior to that date.

24. In the subsequent judgment of Hindustan Construction Co. Ltd. V. Union of India [Hindustan Construction Co. Ltd. V. Union of India, (2020) 17 SCC 324 : (2021) 4 SCC (Civ) 373] , it was observed in para 60 that the result of the BCCI [BCCI v. Kochi Cricket (P) Ltd., (2018) 6 SCC 287 : (2018) 3 SCC (Civ) 534] judgment was that salutary amendments made by the 2015 Amendment Act would apply to all court proceedings initiated after 23-10-2015.”

(Emphasis Added)

17. In West Bengal Housing Board v. Abhisek Construction reported in 2023 SCC OnLine Cal 827, while dealing with a similar issue, I had concluded that the Amendment Act, 2015, will not apply to arbitral proceedings that have commenced prior to the effective date. Relevant paragraph thereof reads thus:

“ 23. Therefore, it becomes manifestly clear that Section 26 of the 2015 Amendment Act is the position of law on this subject whereas Section 87 in the principal Act is no longer in existence. While interpreting a particular statutory provision, the Court has to accord significance to every word, space, and character in that provision. Post BCCI v. Kochi (supra) interpretation of Section 26 of the 2015 Amendment Act, it

is crystal clear that the applicability of 2015 Amendment Act is prospective in nature, and will apply to those arbitral proceedings that have commenced, in accordance with Section 21 of the Act, on or after the effective date, and also to court proceedings which have commenced on or after the effective date.”

18. It is clear from the aforesaid principals and judicial pronouncements that Section 34 of Act, as it existed prior to the Amendment Act, 2015, will apply in the instant case and the award in the instant case will have to stand the test of principles governing the setting aside of arbitral awards as they existed in 2006.

19. Section 34 of the Act as it stood before the Amendment Act, 2015 came into force is reproduced below:

“1. Application for setting aside arbitral award. –

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and subsection (3).

(2) An arbitral award may be set aside by the court only if-

(a) The party making the application furnishes proof that-

(i) A party was under some incapacity, or

(ii) The arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) *The arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:*

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) *The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or*

(b) *The court finds that-*

(i) *The subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or*

(ii) *The arbitral award is in conflict with the public policy of India.*

Explanation. -Without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

(3) *An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:*

Provided that if the court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) *On receipt of an application under sub-section (1), the court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award."*

20. Section 34 of the Act, as it stood in its original form, provided that an award could be set aside, among other things, on the ground that it is against the public policy of India.

21. Public policy, encompasses a broad spectrum of principles, including principles of justice, equity, and morality. In the context of arbitration, the invocation of public policy aims to safeguard against arbitral awards that contravene these core principles, thereby preserving the integrity of the legal system. However, it is important to recognize the inherent complexity and subjectivity associated with the application of public policy in arbitration proceedings. The determination of what constitutes public policy is inherently contextual and may vary depending on the specific circumstances of each case. Consequently, courts must exercise caution and discretion in applying this ground for setting aside arbitral awards, balancing the need to uphold public policy with the principles of party autonomy and finality of arbitration.

22. Public policy as a ground for challenging arbitral awards poses significant challenges due to its inherent complexity and subjectivity. Unlike other grounds for setting aside arbitral awards, public policy is a nebulous and multifaceted concept that defies precise definition. One of the primary difficulties in applying the ground of public policy is the lack of clear and objective criteria for its assessment. Unlike legal principles that are codified in statutes or judicial precedents, public policy is often amorphous and open to interpretation. What may be considered contrary to public policy in one jurisdiction or at one point in time may be deemed acceptable in another. Furthermore, the subjective nature of public policy leaves ample room for judicial discretion, which can result in divergent interpretations and outcomes.

23. Moreover, the broad and elastic nature of public policy allows courts considerable latitude in exercising judicial review over arbitral awards. While this flexibility can be beneficial in addressing egregious cases where awards contravene fundamental principles of justice or morality, it also opens the door to judicial intervention based on vague or ill-defined notions of public policy. Another challenge associated with the ground of public policy is its potential for abuse or misuse by parties seeking to challenge unfavorable awards. Parties may attempt to invoke the ground of public policy as a pretext for re-litigating the merits of their case or for circumventing the binding nature of arbitration.

24. Despite these challenges, the ground of public policy plays a crucial role in safeguarding the integrity and legitimacy of the arbitration process. It serves as a

bulwark against arbitral awards that shock the conscience of the courts or undermine fundamental principles of justice. However, to mitigate the risks associated with its application, courts must adopt a cautious and a principled approach to determining whether an arbitral award conflicts with public policy.

25. Before the Amendment Act, 2015 came into force, the Supreme Court had propounded on the scope of public policy under Section 34 of the Act in its judgment in **Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd. reported in (2003) 5 SCC 705**. The Supreme Court espoused that the phrase “public policy of India” must be accorded a wider and not a narrower meaning. Furthermore, the Supreme Court also outlined the grounds on which a court can set aside an arbitral award under Section 34 of the Act. Relevant paragraphs have been extracted below:

“28. From this discussion it would be clear that the phrase “public policy of India” is not required to be given a narrower meaning. As stated earlier, the said term is susceptible of narrower or wider meaning depending upon the object and purpose of the legislation. Hence, the award which is passed in contravention of Sections 24, 28 or 31 could be set aside. In addition to Section 34, Section 13(5) of the Act also provides that constitution of the Arbitral Tribunal could also be challenged by a party. Similarly, Section 16 provides that a party aggrieved by the decision of the Arbitral Tribunal with regard to its jurisdiction could challenge such arbitral award under Section 34. In any case, it is for Parliament to provide for limited or wider jurisdiction to the court in case where award is challenged. But in such cases, there is no reason to give narrower

meaning to the term “public policy of India” as contended by learned Senior Counsel Mr Dave. In our view, wider meaning is required to be given so as to prevent frustration of legislation and justice. This Court in *Rattan Chand Hira Chand v. Askar Nawaz Jung* [(1991) 3 SCC 67] observed thus: (SCC pp. 76-77, para 17)

“17. ... It cannot be disputed that a contract which has a tendency to injure public interests or public welfare is one against public policy. What constitutes an injury to public interests or welfare would depend upon the times and climes. ... The legislature often fails to keep pace with the changing needs and values nor is it realistic to expect that it will have provided for all contingencies and eventualities. It is, therefore, not only necessary but obligatory on the courts to step in to fill the lacuna. When courts perform this function undoubtedly they legislate judicially. But that is a kind of legislation which stands implicitly delegated to them to further the object of the legislation and to promote the goals of the society. Or to put it negatively, to prevent the frustration of the legislation or perversion of the goals and values of the society.”

(emphasis supplied)

29. Learned Senior Counsel Mr Dave submitted that the purpose of giving limited jurisdiction to the court is obvious and is to see that the disputes are resolved at the earliest by giving finality to the award passed by the forum chosen by the parties. As against this, learned Senior Counsel Mr Desai submitted that in the present system even the arbitral proceedings are delayed on one or the other ground including the ground that the arbitrator is not free and the matters are not disposed of for months together. He

submitted that the legislature has not provided any time-limit for passing of the award and this indicates that the contention raised by the learned counsel for the respondent has no bearing in interpreting Section 34.

31. Therefore, in our view, the phrase “public policy of India” used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term “public policy” in *Renusagar* case [1994 Supp (1) SCC 644] it is required to be held that the award could be set aside if it is patently illegal. The result would be — award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality, or

(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.”

(Emphasis Added)

26. The Supreme Court in **ONGC v. Saw Pipes (supra)** also held that contravention of provisions of the Act including Section 28(3) of the Act which before the Amendment Act, 2015 provided that the arbitrator at all times shall decide in accordance with the terms of the contract, would make an award liable to be set aside on the ground of public policy. Relevant paragraphs have been extracted:

“22. The aforesaid submission of the learned Senior Counsel requires to be accepted. From the judgments discussed above, it can be held that the term “public policy of India” is required to be interpreted in the context of the jurisdiction of the court where the validity of award is challenged before it becomes final and executable. The concept of enforcement of the award after it becomes final is different and the jurisdiction of the court at that stage could be limited. Similar is the position with regard to the execution of a decree. It is settled law as well as it is provided under the Code of Civil Procedure that once the decree has attained finality, in an execution proceeding, it may be challenged only on limited grounds such as the decree being without jurisdiction or a nullity. But in a case where the judgment and decree is challenged before the appellate court or the court exercising revisional jurisdiction, the jurisdiction of such court would be wider. Therefore, in a case where the validity of award is challenged, there is no necessity of giving a narrower meaning to the term “public policy of India”. On the contrary, wider meaning is required to be given so that the “patently illegal award” passed by the Arbitral Tribunal could be set aside. If narrow meaning as contended by the learned Senior Counsel Mr Dave is given, some of the provisions of the

*Arbitration Act would become nugatory. Take for illustration a case wherein there is a specific provision in the contract that for delayed payment of the amount due and payable, no interest would be payable, still however, if the arbitrator has passed an award granting interest, it would be against the terms of the contract and thereby against the provision of Section 28(3) of the Act which specifically provides that “Arbitral Tribunal shall decide in accordance with the terms of the contract”. Further, where there is a specific usage of the trade that if the payment is made beyond a period of one month, then the party would be required to pay the said amount with interest at the rate of 15 per cent. Despite the evidence being produced on record for such usage, if the arbitrator refuses to grant such interest on the ground of equity, such award would also be in violation of sub-sections (2) and (3) of Section 28. **Section 28(2) specifically provides that the arbitrator shall decide ex aequo et bono (according to what is just and good) only if the parties have expressly authorised him to do so.** Similarly, if the award is patently against the statutory provisions of substantive law which is in force in India or is passed without giving an opportunity of hearing to the parties as provided under Section 24 or without giving any reason in a case where parties have not agreed that no reasons are to be recorded, it would be against the statutory provisions. In all such cases, the award is required to be set aside on the ground of “patent illegality”*

(Emphasis Added)

27. In **Associate Builders v. DDA** reported in **(2015) 3 SCC 49**, the Supreme Court propounded on the meaning of patent illegality and regarded it as the fourth head of public policy. The Supreme Court also

held that any contravention of the provisions of the Act itself would amount to patent illegality. Relevant paragraphs are extracted below:

“Patent Illegality

40. We now come to the fourth head of public policy, namely, patent illegality. It must be remembered that under the Explanation to Section 34(2)(b), an award is said to be in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption. This ground is perhaps the earliest ground on which courts in England set aside awards under English law. Added to this ground (in 1802) is the ground that an arbitral award would be set aside if there were an error of law by the arbitrator. This is explained by Denning, L.J. in R. v. Northumberland Compensation Appeal Tribunal, ex p Shaw [(1952) 1 All ER 122 : (1952) 1 KB 338 (CA)] : (All ER p. 130 D-E : KB p. 351)

“Leaving now the statutory tribunals, I turn to the awards of the arbitrators. The Court of King's Bench never interfered by certiorari with the award of an arbitrator, because it was a private tribunal and not subject to the prerogative writs. If the award was not made a rule of court, the only course available to an aggrieved party was to resist an action on the award or to file a bill in equity. If the award was made a rule of court, a motion could be made to the court to set it aside for misconduct of the arbitrator on the ground that it was procured by corruption or other undue means (see Statutes 9 and 10 Will. III, C. 15). At one time an award could not be upset on the ground of error of law by the arbitrator because that could not be said to be misconduct or undue means, but ultimately it was held in Kent v. Elstob

[(1802) 3 East 18 : 102 ER 502] , that an award could be set aside for error of law on the face of it. This was regretted by Williams, J., in Hodgkinson v. Fernie [(1857) 3 CB (NS) 189 : 140 ER 712] , but is now well established.”

41. This, in turn, led to the famous principle laid down in Champsey Bhara Co. v. Jivraj Balloo Spg. and Wvg. Co. Ltd. [AIR 1923 PC 66 : (1922-23) 50 IA 324 : 1923 AC 480 : 1923 All ER Rep 235 (PC)] , where the Privy Council referred to Hodgkinson [(1857) 3 CB (NS) 189 : 140 ER 712] and then laid down:

“The law on the subject has never been more clearly stated than by Williams, J. in Hodgkinson v. Fernie [(1857) 3 CB (NS) 189 : 140 ER 712] : [CB(NS) p. 202 : ER p. 717]

‘The law has for many years been settled, and remains so at this day, that, where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final Judge of all questions both of law and of fact. ... The only exceptions to that rule are cases where the award is the result of corruption or fraud, and one other, which, though it is to be regretted, is now, I think firmly established viz. where the question of law necessarily arises on the face of the award or upon some paper accompanying and forming part of the award. Though the propriety of this latter may very well be doubted, I think it may be considered as established.’

Now the regret expressed by Williams, J. in Hodgkinson v. Fernie [(1857) 3 CB (NS) 189 : 140 ER 712] has been repeated by more than one learned Judge, and it is certainly not to be desired that the exception should be in any way extended.

An error in law on the face of the award means, in Their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a reference is made to a contention of one party that opens the door to seeing first what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound. Here it is impossible to say, from what is shown on the face of the award, what mistake the arbitrators made. The only way that the learned Judges have arrived at finding what the mistake was is by saying: 'Inasmuch as the arbitrators awarded so and so, and inasmuch as the letter shows that the buyer rejected the cotton, the arbitrators can only have arrived at that result by totally misinterpreting Rule 52.' But they were entitled to give their own interpretation to Rule 52 or any other article, and the award will stand unless, on the face of it they have tied themselves down to some special legal proposition which then, when examined, appears to be unsound. Upon this point, therefore, Their Lordships think that the judgment of Pratt, J. was right and the conclusion of the learned Judges of the Court of Appeal [Jivraj Baloo Spg. and Wvg. Co. Ltd. v. Champsey Bhara and Co., ILR (1920) 44 Bom 780. The judgment of Pratt, J. may be referred to at ILR p. 787.] erroneous."

This judgment has been consistently followed in India to test awards under Section 30 of the Arbitration Act, 1940.

42. In the 1996 Act, this principle is substituted by the "patent illegality"

principle which, in turn, contains three subheads:

42.1. (a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be of a trivial nature. This again is really a contravention of Section 28(1)(a) of the Act, which reads as under:

"28. Rules applicable to substance of dispute.—(1) Where the place of arbitration is situated in India—

(a) in an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;"

42.2. (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality — for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside.

42.3. (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

*"28. Rules applicable to substance of dispute.—(1)-(2)****

(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to

decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do."

28. The phrasing of Section 28(3) of the Act underwent a significant change when the Amendment Act, 2015 came into force wherein instead of Section 28(3) of the Act mandating the arbitrator to decide in accordance with the terms of the contract, it provided that the Arbitrator shall "take into account" the terms of the contract, thereby allowing some flexibility.

29. In any case, as discussed above, the law as it existed prior to the Amendment Act, 2015 will apply to the instant case. However, the legislative intent behind Section 28(3) of the Act remains the same. Arbitrator is a creature of contract and must operate within its confines at all times. At the heart of arbitration lies the principle of party autonomy, wherein the parties have the freedom to shape the arbitration process according to their needs and preferences. Central to this principle is the notion that the arbitral tribunal must operate within the confines of the agreement entered into by the parties. Venturing beyond the terms of the contract not only undermines the autonomy of the parties but also risks eroding the legitimacy and enforceability of the arbitral award. Therefore, it is imperative that the arbitral tribunal always decides in accordance with the terms of the contract between the parties and refrains from exceeding its jurisdiction. After all, arbitral proceedings are not cricket matches, where hitting beyond the boundary is usually rewarded.

30. The sanctity of the parties' agreement lies at the core of arbitration. When parties choose arbitration to resolve

their disputes, they do so with the understanding that the arbitral tribunal will adjudicate based on the terms that they have mutually agreed upon. These terms delineate the scope of the arbitral tribunal's authority, the rules governing the proceedings, and the substantive rights and obligations of the parties. Departing from these contractual parameters not only disregards the parties' intention but also risks imposing outcomes that are contrary to their expectations. Moreover, upholding the terms of the contract promotes predictability and certainty in arbitral proceedings. Parties rely on the clarity and specificity of their contractual arrangements to guide their behaviour and expectations. By adhering to the contract, the arbitral tribunal provides parties with a sense of assurance that their rights and obligations will be respected and enforced as agreed upon. Beyond considerations of efficiency and predictability, adhering to the terms of the contract is essential for maintaining the legitimacy and enforceability of arbitral awards. Arbitral awards derive their authority and validity from the consent of the parties as expressed in their agreement to arbitrate. When the arbitral tribunal exceeds its jurisdiction by deciding matters beyond the scope of the contract, it renders an award that is vulnerable to challenge and is non-enforceable.

31. Despite the importance of adhering to the contract, arbitrators may encounter situations where the terms of the contract are ambiguous or silent on a particular issue. In such cases, arbitral tribunal is tasked with interpreting the contract in accordance with the principles of contractual interpretation. This involves examining the language of the contract, the intentions of the parties, the surrounding

circumstances, and any applicable trade usages or practices. The goal is to give effect to the parties' intentions and to resolve any ambiguities or gaps in the contract in a manner consistent with their reasonable expectations.

32. The instant case before me is not one where there are any ambiguous contractual terms leaving room for arbitral tribunal to exercise its discretion. It was explicitly clear from the contractual terms between the parties that the efficient performance of the transformer was guaranteed by the Respondent. Clause 39 of the contract between the parties is extracted below:

"The entire installations (after satisfactory completion of all test specified in the contract documents and taking over) shall be deemed to be guaranteed by the contractor for efficient performance for 12 months from the certified date of completion of work. In case of any fault arising during this period the contractor will do all the rectifications/replace the defective parts as the case may be at its own expense. The defect liability period referred to in condition 33 of IAFW -2249 (General Condition of Contract) for purpose of this contract shall be deemed to be the period covered by the guarantee given by the contractor."

33. Hence, the claim of the Respondent amounting to Rs.6,22,268/- on account of costs incurred towards repairing of the transformer (which malfunctioned in June, 1998) during the subsistence of the guarantee period as extended by the undertaking given by the Respondent dated October 1, 1997 stood on a foundationless ground as it was beyond the terms of the contract entered between the parties. As

such there was no cogent rationale behind the Arbitrator's decision to award the said claim in favour of the Respondent. The Arbitrator's decision is fundamentally flawed and cannot be sustained. The award of the aforesaid claim is unreasonable as it overlooks the unequivocal guarantee provided by the Respondent.

34. The arbitrator's decision appears to have disregarded the clear and unambiguous language of the contract, which unequivocally places the responsibility for rectifying any faults or defects during the guarantee period squarely on the shoulders of the Respondent. By awarding the claim in favour of the Respondent, the Arbitrator has effectively relieved the Respondent of its contractual obligations and imposed an unwarranted financial burden on the Applicant, contrary to and de hors the terms of the contract. Awarding this claim is definitely within the four corners of 'patent illegality' as espoused in the **ONGC v Saw Pipes (supra)** by the Supreme Court. This deviation from contractual framework not only contradicts the explicit terms of the contract but also undermines the principle of pacta sunt servanda, which means that parties must honor their obligations under the contract.

35. Arbitrator's decision also shocks the conscience of the court due to its unjust and inequitable nature. By awarding the claim of Rs. 6,22,268/- in favour of the Respondent, the Arbitrator has also set a dangerous precedent that undermines the sanctity of contracts and erodes trust in the arbitration process. If arbitrators are allowed to disregard contractual terms and impose arbitrary and unjustified outcomes, parties will lose confidence in the efficacy of arbitration as a means of dispute

resolution. This erosion of trust not only undermines the effectiveness of arbitration but also undermines the rule of law and the integrity of the legal system. As such, it cannot be sustained and warrants careful reconsideration to ensure that justice is served.

36. The District Judge, Agra ought to have corrected this jurisdictional and fundamental error in proceedings under Section 34 of the Act. The District Judge in failing to set aside the arbitral award, compounded the error inherent in the Arbitrator's decision and overlooked the fundamental principles governing the review of an arbitral award under Section 34 of the Act.

37. While Section 34 of the Act indeed imposes limitation on the court's interference with arbitral awards, it does not absolve the court of its duty to correct errors that are fundamental in nature, such as jurisdictional errors or decisions that shock the conscience of the court. Moreover, while interference on factual grounds is generally prohibited under Section 34 of the Act, courts are empowered to intervene when the Arbitrator's findings are completely contrary to the materials on record.

38. The District Judge's failure to correct the jurisdictional and fundamental errors in the Arbitrator's decision represents a dereliction of duty. Section 34 of the Act empowers the court to set aside an arbitral award if it is found to be in conflict with the public policy of India. The Arbitrator's decision clearly falls within this category since it exceeds the scope of contractual agreement between the parties. If courts are unwilling to correct manifestly unjust decisions made by arbitrators,

parties will lose confidence in the efficacy of arbitration as a means of dispute resolution.

39. Supreme Court in **ONGC v Saw Pipes (supra)**, underscored the importance of upholding the sanctity of contracts and ensuring that arbitrators abide by terms thereof. Section 28(3) of the Act, as it stood before the Amendment Act, 2015 mandated that arbitrators should decide in accordance with the terms of the contract. Any deviation from these terms, such as awarding claims beyond the contractual scope, constitutes a violation of Section 28(3) of the Act. The District Judge under Section 34 of the Act, ought to have examined the Arbitrator's award of the claim of Rs. 6,22,268/- in light of the aforesaid principle as propounded in *Saw Pipes (supra)*. The District Judge's failure to correct the Arbitrator's decision also represents a serious miscarriage of justice and therefore, the District Judge's decision must be revisited and corrected.

SEVERABILITY OF ARBITRAL AWARDS

40. Since only a portion of the arbitral award with respect to the award of Rs. 6,22,268/- in favour of the Respondent on account of costs incurred towards repairing the defects in the transformer is being interfered with and set aside by this Court, while the rest of the award is being upheld, I feel it is pertinent to discuss the principle of severability of arbitral awards.

41. Principle of severability holds immense significance since it provides a mechanism for courts to partially set aside an award when certain issues within it are found to be flawed or invalid. Severing and setting aside only those issues suffering

from infirmity allows the rest of the award to stand, thereby preserving the valid and enforceable aspects. This approach aligns with the objectives of arbitration, which prioritizes efficiency and finality.

42. From a commercial standpoint, severability makes eminent sense. In the complex world of business transactions, disputes are often multifaceted and involve numerous issues. It is not uncommon for an arbitral award to address multiple claims or issues raised by the parties. In such cases, severability provides a practical solution for resolving disputes without causing undue disruption to ongoing business relationships or transactions. Rather than invalidating the entire award due to the flaws in certain aspects, severability allows courts to salvage the valid portions of the award, thereby minimizing the potential for further disputes or litigation.

43. It is however important to note that severability does not amount to modification, which is prohibited. Severability involves setting aside only those portions of an award that are found to be flawed or invalid, without altering the substance of the decision as a whole. This approach allows courts to address specific issues within an award while respecting the finality and integrity of the arbitration process.

44. In **R.S. Jiwani v. Ircon International Ltd.** reported in **2009 SCC OnLine Bom 2021**, a full bench of the Bombay High Court exhaustively examined the scope of the law on severability of arbitral awards. Relevant portions have been extracted below:

“17. The argument raised before us is that sub-clauses (i) to (iii) and (v) of

clause (a) of sub-section (2) of section 34 are the grounds where it is mandatory for the Court to set aside the whole award and there is no other choice before the Court. It is only in the class of cases falling under section 34(2)(a)(iv) that with the aid of the proviso to that subsection, the Court can apply principle of severability. In that case, if the matter submitted to the arbitration can be separated from the one not submitted then the Court may set aside that part of the award alone which is not submitted to arbitration. This argument is founded on the Division Bench judgment of this Court in the case of Mrs. Pushpa P. Mulchandani v. Admiral Radhakrishin Tahiliani, 2008(7) LJ Soft, 161, and which was relied upon by the respondents for inviting the decision against the Appellant. Thus, we have to examine the provision of section 34 of the 1996 Act to find whether it permit of any other interpretation than the one put forward by the respondents. Sub-clauses (i), (ii), (iii) and (v) of clause (a) of sub-section (2) of section 34 deal with certain situations which may require the Court to set aside an award of the arbitral tribunal. These may be the cases where the party was under incapacity, the agreement is not valid under the law in force, where proper notice was not given to the party or otherwise enable to present his case, and the composition of arbitral tribunal or procedure was not in accordance with the agreement between the parties and lastly the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force. Explanation to section 34(2) which is in the nature of a declaration further explains that when an award is in conflict with the public policy of India when the award was induced or affected by (i) fraud or (ii) by corruption; or (iii) was in violation of section 75 or 81 of the Act. It is difficult for

this Court to hold that under all these categories it would be inevitable for the Court to set aside the entire award. It may not be very true that even under these categories, it would be absolutely essential for the Court to set aside an award. It is true that where a party was under incapacity or was not served with the notice at all and the arbitration agreement itself was not valid that an award may have to be set aside in its entirety. But even within these clauses, there is possibility of a situation where it may not be necessary for the Court to set aside the entire award. Let us take an example that where a party is given a notice has participated in the proceedings before the arbitral tribunal but was unable to lead evidence or present himself or submit his counter claim. Would it be fair for the Court to set aside an award of the arbitral tribunal in its entirety in this situation? A party who participated in the arbitral proceeding even led evidence and cross-examined the witnesses of the claimants in relation to the claims but for any reason was not able to place his evidence on record in relation to the counter claims or he was not granted sufficient opportunity to present his case or for some reason was unable to present his case before the arbitral tribunal, would it not be just, fair, equitable and in line with the object of the Act of 1996 to consider setting aside award only regarding counter claim.

Is such a party which has succeeded in the claims made by it, which are otherwise lawful and not hit by any of the stated circumstances, should be awarded his reliefs while either rejecting or even altering the award with regard to the counter claim filed by the aggrieved party before the Arbitrator. Situation may be different where arbitration agreement is not valid. In other words, where claim is

unlawful the Supreme Court in the case of Karnail Singh v. State of Haryana, 1995 Supp (3) SCC 376 held that not valid would mean unlawful and equated it to void.

“8. ‘Void’ dictionarily means, ineffectual, nugatory; having no legal force or binding effect, unable in law to support the purpose for which it was intended; nugatory and ineffectual so that nothing can cure it; not valid. In Words and Phrases (American), Vol. 44, published by West Publishing Co., at page 319 it is stated thus:

“A ‘void’ thing is nothing; it has no legal effect whatsoever; and no rights whatever can be obtained under it or grow out of it. In law it is the same thing as if the void thing had never existed.”

What was declared void was election. That is the process which led to choosing or selecting appellant as a member was invalid. The legal effect of declaration granted by the Tribunal was that the election of the appellant became nonexistent resulting automatically in nullifying the earlier declaration. The declaration did not operate from the date it was granted but it related back to the date when election was held. The legislative provision being clear and the Tribunal being vested only with power of declaring election to be void the entire controversy about voidable and void was unnecessary. The appellant could not therefore, claim any pension under section 7A of the 1975 Act.”

** * **

20. The cases would be different where it is not possible or permissible to sever the award. In other words, where the bad part of the award was intermingled and interdependent upon the good parts of the award there it is practically not possible to sever the award as the illegality may affect the award as a whole. In such cases, it may

not be possible to set aside the award partially. However, there appears to be no bar in law in applying the doctrine of severability to the awards which are severable. In the case of Messrs. Basant Lal Banarsi Lal v. Bansi Lal Dagdulal, AIR 1961 SC 823, though the Supreme Court was dealing with an application for setting aside an award passed by the Bombay City Civil Court, contending that forward contract in groundnuts were illegal as making of such contracts was prohibited by Oil Seeds (Forward Contract Prohibition) Order, 1943 and hence arbitration clause contained in the forward contracts in groundnuts between the parties was null and void, where it was found as a matter of fact that it was not possible to segregate the dispute under the various contracts as there was direct link between them. The Supreme Court held as under:

‘It would follow that the arbitration clause contained in that contract was of no effect. It has therefore to be held that the award made under that arbitration clause is a nullity and has been rightly set aside. The award, it will have been noticed, was however in respect of disputes under several contracts one of which we have found to be void. But as the award was one and is not severable in respect of the different disputes covered by it, some of which may have been legally and validly referred, the whole award was rightly set aside.’

* * *

24. Now a further question that falls for consideration of this Court is as to whether there is anything contained in 1996 Act which prohibits in law the Court from adopting the approach applicable under the 1940 Act or prohibits applicability of principle of severability to the awards under 1996 Act. We are unable to see any prohibition much less an

absolute bar in the provisions of section 34 of 1996 Act to that effect. There could be instances falling under section 34(2)(a), sub-sections (iii) and (v) where the principle of severability can safely be applied. These provisions do not specifically or impliedly convey legislative intent which prohibits the Courts from applying this principle to the awards under the 1996 Act. Again for example, an Arbitral Tribunal might have adopted a procedure at a particular stage of proceeding which may be held to be violative of principles of natural justice or impermissible in law or the procedure was not in accordance with the agreement between the parties but the parties waived such an objection and participate in the arbitration proceedings without protest, in that event it will be difficult for the Court to hold that the good part of the award cannot be segregated from the bad part.

* * *

30. *If the principles of severability can be applied to a contract on one hand and even to a statute on the other hand, we fail to see any reason why it cannot be applied to a judgment or an award containing resolution of the disputes of the parties providing them such relief as they may be entitled to in the facts of the case. It will be more so, when there is no statutory prohibition to apply principle of severability. We are unable to contribute to the view that the power vested in the Court under section 34(1) and (2) should be construed rigidly and restrictedly so that the Court would have no power to set aside an award partially. The word “set aside” cannot be construed as to ‘only to set aside an award wholly’, as it will neither be permissible nor proper for the Court to add these words to the language of section which had vested discretion in the Court. Absence of a specific language further*

supported by the fact that the very purpose and object of the Act is expeditious disposal of the arbitration cases by not delaying the proceedings before the Court would support our view otherwise the object of Arbitration Act would stand defeated and frustrated.

** * **

33. It must be understood that the scope of judicial intervention under section 34 is very limited and cannot be equated to the powers of a civil appellate Court. The award can be set aside on the grounds stated in these provisions and that is what is emphasized by the use of expression 'only'. The Supreme Court in the case of Mc Dermott International Inc. v. Burnt Standard Co. Ltd., (2006) 11 SCC 181 has discussed in some elaboration the cases where the Court can interfere with the awards and/or set aside the award. Mere appreciation of evidence or an error simpliciter in appreciation of fact or law may not essentially fall within the class of cases which may be covered within the ambit and scope of section 34 of the Act. We will shortly proceed to discuss this aspect of law but only insofar as it is relevant for answering the question posed before the larger Bench.

** * **

35. The Supreme Court was primarily stating the principles which have been kept in mind by the Courts while interfering with the award of the Arbitral Tribunal that it was to outline the supervisory role of the Courts within the ambit and scope of section 34. It is true that the Court like a Court of appeal cannot correct the errors of arbitrator. It can set aside the award wholly or partially in its discretion depending on the facts of a given case and can even invoke its power under section 34(4). It is not expected of a

party to make a separate application under section 34(4) as the provisions open with the language "on receipt of application under sub-section (1), the Court may....." which obviously means that application would be one for setting aside the arbitral award to be made under section 34(1) on the grounds of reasons stated in section 34(2) and has to be filed within the period of limitation as stated as reply under section 34(3). The Court may if it deems appropriate can pass orders as required under section 34(4). In other words, the provisions of section 34(4) have to be read with section 34(1) and 34(2) to enlarge the jurisdiction of the Court in order to do justice between the parties and to ensure that the proceedings before the Arbitral Tribunal or before the award are not prolonged for unnecessarily. In our humble view, the Division Bench appears to have placed entire reliance on para 52 by reading the same out of the context and findings which have been recorded by the Supreme Court in subsequent paragraphs. It is also true that there are no pari materia provisions like sections 15 and 16 of the Act of 1940 in the 1996 Act but still the provisions of section 34 read together, sufficiently indicate vesting of vast powers in the Court to set aside an award and even to adjourn a matter and such acts and deeds by the Arbitral Tribunal at the instance of the party which would help in removing the grounds of attack for setting aside the arbitral award. We see no reason as to why these powers vested in the Court should be construed so strictly which it would practically frustrate the very object of the Act. Thus, in our view, the principle of law stated by the Division Bench is not in line with the legislative intent which seeks to achieve the object of the Act and also not in line with accepted norms of interpretation of statute."

45. The principle on severability of arbitral awards was reiterated by the Supreme Court in **J.G. Engineers (P) Ltd. v. Union of India reported in (2011) 5 SCC 758:**

“25. It is now well settled that if an award deals with and decides several claims separately and distinctly, even if the court finds that the award in regard to some items is bad, the court will segregate the award on items which did not suffer from any infirmity and uphold the award to that extent. As the award on Items 2, 4, 6, 7, 8 and 9 was upheld by the civil court and as the High Court in appeal did not find any infirmity in regard to the award on those claims, the judgment of the High Court setting aside the award in regard to Claims 2, 4, 6, 7, 8 and 9 of the appellant, cannot be sustained. The judgment to that extent is liable to be set aside and the award has to be upheld in regard to Claims 2, 4, 6, 7, 8 and 9.”

46. In **Damodar Valley Corporation v. Reliance Infrastructure Limited reported in 2023 SCC OnLine Cal 3307**, I had dealt with the severability of arbitral awards. Relevant portions have been extracted below:

“57. It is a well-established principle that the Courts under Section 34 of the Act have the power to sever and partly set aside the award. A doctor treating a poisoned leg would prefer to cut the poisoned leg off to prevent the poison from spreading across the entire body. Afterall, you would not kill off the entire body just because the leg is poisoned. Similarly, in an arbitral award, there might be some issues suffering from infirmity, which would invite the Courts to exercise their powers under Section 34 of the Act. In

such a case, it would be preferable to sever and set aside only those issues, rather than setting aside the arbitral award in its entirety. This also makes commercial sense.

60. The principle which emerges is that while severing an arbitral award is a delicate procedure, insofar as, the severed/perverse part of the award is not in any way connected to the legally sound part of the award, the Courts under Section 34 are empowered to set aside only that portion of the award which suffers from some infirmity. In my opinion, such a practice should be encouraged also, as rather than setting aside the entire arbitral award, it will be more prudent to separate the good and the bad. It is better to take out the rotten apple, instead of throwing the entire basket out.”

47. In light of the aforesaid judicial pronouncements, it can be concluded that power of severing an arbitral award is a part and parcel of the court's power under Section 34 and Section 37 of the Act. However, severability can only be applied if the part of the award which is to be severed does not relate with the part of the award that is to be upheld in any manner whatsoever.

PRINCIPLES

48. The principles that emerge from the aforesaid discussion have been highlighted below:

a. Laws or rules will not have retrospective applicability unless and until there is a clear indication to the contrary. Especially in arbitration cases, retrospective application of laws may introduce uncertainty and unpredictability.

One cannot hold someone liable for doing something, which although was not a forbidden act at the time it was committed but became a forbidden act later. Parties, especially in arbitration, cannot be expected to walk on eggshells and be subjected to unpredictability.

b. The Amendment Act, 2015 which introduced among other things, amended grounds for challenge to an arbitral award under Section 34 of the Act, will only apply to those arbitration proceedings, which commenced in accordance with Section 21 of the Act on or before the Amendment Act, 2015 came into force.

c. Public policy as a ground under Section 34 of the Act must be invoked with certain caution since the broad and subjective nature of public policy can lead to excessive judicial interference with arbitral awards.

d. An award can be interfered with on the ground of public policy when it is in contravention of substantive provisions of the Act itself. Any award passed against the statutory or constitutional principles goes against the public policy of India.

e. The contract between the parties outlines the boundaries within which an arbitral tribunal can act. Any act or decision of the arbitral tribunal beyond clearly defined contractual provisions is patently illegal and unsustainable.

f. While the principle of minimal judicial interference must be kept in mind while dealing with challenges to an arbitral award, Courts are duty bound to ensure that arbitral tribunal has not acted in a manner contrary to the contractual provisions between the parties.

g. Under Section 34 and Section 37 of the Act, courts have the authority to partially set aside an arbitral award. If

certain issues within the award are unsustainable and can be separated from the remaining issues, it is better to set aside only those specific parts of the award.

EPILOGUE

49. The case at hand, where the arbitral award was rendered in 2006 but the challenge is being finally dismissed in 2024, underscores a glaring issue in the arbitration landscape of India: the inordinate delays that plague the arbitration. While arbitration is often hailed as a faster and more efficient alternative to traditional litigation, the reality in India frequently falls short of this ideal due to systemic challenges. Arbitration was envisioned as a means to provide parties with a quicker and more cost-effective method of resolving disputes, bypassing the lengthy court procedures associated with litigation. However, the prolonged duration of this case highlights a significant discrepancy between the theory and practice of arbitration in India. One of the primary reasons for the delay in the resolution of arbitration cases in India is the extensive backlog of cases in the judicial system. Despite efforts to promote arbitration and streamline dispute resolution processes, the Indian judiciary continues to grapple with a staggering caseload, resulting in delays at various stages of the arbitration process, including challenges to arbitral awards. In the case under consideration, the fact that it took nearly two decades for the challenge to the arbitral award to be finally dismissed raises concerns about the efficiency and effectiveness of the arbitration mechanism. Such delays not only undermine the perceived advantages of arbitration but also erode confidence in the efficacy of alternative dispute resolution mechanisms.

50. The challenges associated with delay in arbitration proceedings are multifaceted and require a comprehensive approach to address. One of the key areas that warrant attention is the need for reforms aimed to expediting the arbitration process and reducing the backlog of cases. This may involve measures such as the establishment of specialized arbitration divisions in courts, and the implementation of procedural reforms to streamline the arbitration process. In conclusion, the case under discussion serves as a stark reminder of the challenges and shortcomings inherent in the arbitration landscape of India. While arbitration holds immense potential as a faster and more efficient alternative to litigation, the prevalence of inordinate delays underscores the urgent need for reforms and corrective measures. By addressing the systemic issues contributing to delays in arbitration proceedings and promoting a culture of timely and effective dispute resolution, India can unlock the full potential of arbitration and ensure access to justice for all parties involved.

CONCLUSION AND DIRECTION

51. In light of the same, it is apparent that the award of Rs.6,22,268/- along with interest in favour of the Respondent on account of repairing of defects in transformer was in violation of Section 28(3) of the Act as it stood before the Amendment Act, 2015. Since the award of the claim was against the clear provisions of the contract, therefore, this Court in exercise of its power under Section 37 of the Act, sets aside the order dated January 12, 2012, passed by the District Judge, Agra, in Arbitration Case No. 406 of 2006, under Section 34 of the Act only to the extent that upholds the award of Rs.6,22,268/- along with interest to the

Respondent on account of costs incurred towards repairing the defects in the transformer. Consequently, the arbitral award dated July 31, 2006, is also set aside to that limited extent. I make it clear that the rest of the arbitral award stands as it is.

52. The instant arbitration appeal is disposed of on the aforesaid terms.

53. There shall be no order as to the costs.

(2024) 4 ILRA 31
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.03.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Appeal U/S 37 of Arbitration & Conciliation Act
1996 Defective No. 619 of 2023

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

Counsel for the Appellants:
C.S.C., S.C.

Counsel for the Respondents:
Ms. Poorva Agarwal, Sri Punit Kumar Gupta

(A) Arbitration Law - Delay in Filing Appeal - Arbitration & Conciliation Act, 1996 - Sections 34 & 37 - Commercial Courts Act, 2015 - Section 13(1A), Limitation Act, 1963 - Section 5, Articles 116, 117 - Sufficient cause - Speedy redressal - Arbitration Act being a legislation for speedy redressal, the delay in filing the appeal can only be allowed if the appellant makes out a very strong case and explains the reasons for delay. (Para 2-7)

Appeal filed under Section 37 with four-year delay - challenging an order passed under

Section 34 of the Act - respondents contested, citing relevant case laws. (Para 2 -4)

HELD: - Appeal dismissed as barred by limitation due to substantial delay without sufficient cause. (Para -7)

Appeal dismissed. (E-7)

List of Cases cited:

1. Govt. of Maha. (Water Resources Dept.) Represented by Exe. Engineer Vs M/s Borse Brothers Engineers & Contractors Pvt. Ltd., (2021) 6 SCC 460

2. N.H.A.I. Vs Smt. Sampata Devi & ors., 2023 (12) ADJ 787

(Delivered by Hon'ble Shekhar B. Saraf, J.)

1. Heard counsel appearing on behalf of the parties.

2. This is an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') arising out of an order passed under Section 34 of the Act.

3. There is a substantial delay of four years in filing this appeal under Section 37 of the Act.

4. Counsel appearing on behalf of respondents relied upon a judgement in **Government of Maharashtra (Water Resources Department) Represented by Executive Engineer v. M/s Borse Brothers Engineers & Contractors Pvt. Ltd. reported in (2021) 6 SCC 460** to submit that such a delay in filing an appeal under Section 37 of the Act cannot be allowed. Relevant paragraph relied upon by counsel appearing on behalf of respondents is delineated below :-

"61. Given the aforesaid and the object of speedy disposal sought to be

achieved both under the Arbitration Act and the Commercial Courts Act, for appeals filed under section 37 of the Arbitration Act that are governed by Articles 116 and 117 of the Limitation Act or section 13(1A) of the Commercial Courts Act, a delay beyond 90 days, 30 days or 60 days, respectively, is to be condoned by way of exception and not by way of rule. In a fit case in which a party has otherwise acted bona fide and not in a negligent manner, a short delay beyond such period can, in the discretion of the court, be condoned, always bearing in mind that the other side of the picture is that the opposite party may have acquired both in equity and justice, what may now be lost by the first party's inaction, negligence or laches."

5. A coordinate Bench of this Court in **National Highway Authority of India Vs. Smt. Sampata Devi and Ors. reported in 2023 (12) ADJ 787**, in similar facts and circumstances, discussed in great detail a catena of judgements of the Supreme Court and has come to the following conclusion :-

"(44) In view of the authoritative Judgments of the Apex Court in M/s Borse Brothers Engineers & Contractors (supra), it must be held that an appeal under Section 37 of the Arbitration and Conciliation Act, 1996 should be filed within 60 days from the date of the order as per Section 13(1A) of the Commercial Courts Act, 2015. However, in those rare cases where the specified value is for a sum less than INR 3,00,000.00 then the appeal under Section 37 would be governed by Articles 116 and 117 of the Schedule of the Limitation Act, as the case may be.

(45) Further, Section 5 of the Limitation Act will apply to the appeals filed under Section 37 of the Act, 1996 and

in holding the said applicability, the Apex Court noted with affirmative that Section 13(1A) of the Commercial Courts Act does not contain any provision akin to section 34(3) of the Arbitration Act, 1996 and merely provides for a limitation period of 60 days from the date of the judgment or order appealed against, without going into whether delay beyond this period can or cannot be condoned.

(46) Further, the expression 'sufficient cause' under Section 5 of the Limitation Act is not elastic enough to cover long delays and merely because sufficient cause has been made out, there is no right to have such delay condoned. The Apex Court further held that only short delays, can be condoned only by way of an exception and not by the way of rule, and that too only when the party acted in a bona fide manner and not negligently.

(47) Since, in the present bunch of appeals, the impugned order passed by the Additional District Judge, Barabanki under Section 34 of the Act, 1996 has been sought to be challenged by NHAI by filing a belated appeal under Section 37 of the Act, 1996 beyond the permissible 60 days without any "sufficient cause", the above-captioned appeals are held to be time barred."

6. Upon a perusal of the above judgement, it is clear that the Arbitration Act being a legislation for speedy redressal, the delay in filing the appeal can only be allowed if the appellant makes out a very strong case and explains the reasons for delay. In the present case, one does not find any such reason provided which would enable this Court to condone the delay.

7. In light of the same, the appeal is dismissed as barred by limitation.

(2024) 4 ILRA 33
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.04.2024

BEFORE

THE HON'BLE AJAY BHANOT, J.

Criminal Misc. Anticipatory Bail Application U/s
 438 CR.P.C No. 807 of 2024

Vijay Pal Singh **...Applicant**
State of U.P. **...Opposite Party**
Versus

Counsel for the Applicant:
 Pawan Kumar Pandey

Counsel for the Opposite Party:
 G.A.

आपराधिक विधि - भारतीय दंड संहिता, 1860 – धारा 419, 420, 467, 468, 471 – दंड प्रक्रिया संहिता, 1973 – धारा 82 - अग्रिम जमानत - दिनांक 15.06.2022 को प्रार्थी सहित पाँच नामित एवं एक अज्ञात व्यक्ति के विरुद्ध दर्ज प्राथमिकी में आरोप है कि दिनांक 13.05.2022 को शिकायतकर्त्री की भूमि का विक्रय-पत्र सह-अभियुक्त घनश्याम सिंह के पक्ष में फर्जी तरीके से निष्पादित किया गया, जबकि शिकायतकर्त्री को कोई धनराशि प्राप्त नहीं हुई - प्रार्थी प्रथम सूचना रिपोर्ट में नामित नहीं है किन्तु शिकायतकर्त्री ने धारा 161 दं०प्र०सं० के अंतर्गत दिये गये अपने बयान में कहा कि प्रार्थी भी अन्य अभियुक्तगण के साथ इस धोखाधड़ी में सम्मिलित था - उक्त विक्रय-पत्र के निष्पादन के संबंध में क्रेता घनश्याम सिंह द्वारा भी प्राथमिकी दर्ज कराई गई थी, जिसमें प्रार्थी को न्यायालय द्वारा अग्रिम जमानत प्रदान की जा चुकी है - प्रार्थना-पत्र का विरोध करते हुए राज्य सरकार के विद्वान अधिवक्ता ने कहा कि प्रार्थी के विरुद्ध धारा 82 दं०प्र०सं० की कार्यवाही प्रारंभ की जा चुकी है किन्तु उनको प्राप्त अनुदेश में नहीं कहा गया है कि धारा 82 दं०प्र०सं० के अंतर्गत

उद्धोषणा का प्रकाशन हुआ है या नहीं - अभिनिर्धारित, प्राप्त अनुदेशों में ऐसा कोई तथ्य नहीं पाया गया जिससे यह सिद्ध हो कि प्रार्थी के विरुद्ध उद्धोषणा का प्रकाशन धारा 82(2) दं.प्र.सं. के अनुसार हुआ हो या न्यायालय ने धारा 82(3) के अंतर्गत उसके सम्यक प्रकाशन पर संतोष व्यक्त किया हो - अतः प्रार्थी को धारा 82(3) दं.प्र.सं. के अंतर्गत फरार घोषित नहीं कहा जा सकता, और उसका अंतरिम जमानत प्रार्थना-पत्र गुण-दोष के आधार पर विचारणीय है - उपरोक्त तथ्यों के परिप्रेक्ष्य में, चूँकि प्रार्थी इस प्राथमिकी में नामित नहीं है और शिकायतकर्ती के बयान में उसके विरुद्ध कोई विशिष्ट कृत्य का कथन नहीं दिया गया है, साथ ही इसी विक्रय-पत्र के संबंध में सह-अभियुक्त घनश्याम सिंह की प्राथमिकी में प्रार्थी को अग्रिम जमानत प्राप्त है, अतः प्रार्थी इस प्रकरण में भी अग्रिम जमानत का अधिकारी है। (पैरा 3 से 6, 11, 12)

आवेदन स्वीकार I (E-13)

प्रोद्गत मामलों की सूची:

1. लवेश बनाम राज्य (2012) 8 एससीसी 730
2. अम्बर चौहान @ अमर सिंह बनाम उ. प्र. राज्य, आपराधिक प्रकरण अग्रिम जमानत प्रार्थना - पत्र संख्या 2670 सन 2023, आदेश दिनांक 28.11.2023, (तटस्थ उद्धरण संख्या- 2023:एचसी - लखनऊ :77863)

(Delivered by Hon'ble Ajay Bhanot, J.)

1. प्रार्थी के विद्वान अधिवक्ता श्री पवन कुमार पाण्डेय तथा राज्य सरकार के विद्वान अधिवक्ता श्री पुनीत कुमार यादव को सुना तथा पत्रावली का अवलोकन किया।

2. धारा 438 दं.प्र.सं. द्वारा प्रस्तुत प्रार्थना-पत्र द्वारा प्रार्थी ने मुकदमा

अपराध संख्या 0270 सन 2022 अन्तर्गत धारा 419, 420, 467, 468, 471 भा.दं.वि. थाना बिसवां जनपद सीतापुर में अग्रिम जमानत की प्रार्थना की है।

3. दिनांक 15.06.2022 को प्रार्थी सहित 5 नामित तथा एक अज्ञात व्यक्ति के विरुद्ध लिखाई गई प्रथम सूचना रिपोर्ट में कहा गया कि दिनांक 13.05.2022 को शिकायतकर्ती की भूमि के संबंध में एक विक्रय-पत्र सह-अभियुक्त घनश्याम सिंह के पक्ष में फर्जी तरह से निष्पादित हो गया तथा शिकायतकर्ती को कोई भी धनराशि प्राप्त नहीं हुई।

4. प्रार्थी प्रथम सूचना रिपोर्ट में नामित नहीं है किन्तु शिकायतकर्ती ने धारा 161 दं.प्र.सं. के अंतर्गत दिये गये अपने बयान में कहा कि प्रार्थी भी अन्य अभियुक्तगण के साथ इस धोखाधड़ी में सम्मिलित था।

5. इसी विक्रय-पत्र के निष्पादन के संबंध में क्रेता घनश्याम सिंह ने भी एक प्रथम सूचना रिपोर्ट संख्या 285 सन 2022 अंतर्गत धारा 409, 419, 420, 467, 468, 471, 506 भा.दं.सं. थाना बिसवां जिला सीतापुर में अंकित करायी थी,

जिसमें प्रार्थी को अग्रिम जमानत प्रार्थना पत्र संख्या 2458 सन 2023 में इस न्यायालय द्वारा पारित आदेश दिनांक 02.11.2023 द्वारा अग्रिम जमानत दी जा चुकी है।

6. प्रार्थना-पत्र का विरोध करते हुए राज्य सरकार के विद्वान अधिवक्ता श्री पुनीत कुमार यादव ने कहा कि प्रार्थी के विरुद्ध धारा 82 दं०प्र०सं० की कार्यवाही प्रारंभ की जा चुकी है किन्तु उनको प्राप्त अनुदेश में नहीं कहा गया है कि धारा 82 दं०प्र०सं० के अंतर्गत उद्घोषणा का प्रकाशन हुआ है या नहीं।

7. **लवेश बनाम राज्य (2012) 8 SCC 730** में माननीय उच्चतम न्यायालय ने यह अवधारित किया है कि सामान्यतयः एक फरार घोषित व्यक्ति को अग्रिम जमानत नहीं दी जानी चाहिए। माननीय उच्चतम न्यायालय ने यह अवधारित किया कि ऐसी व्यक्ति जिसके विरुद्ध वारण्ट जारी हुआ किन्तु वह फरार है अथवा वारण्ट की तामीली से बचने के लिए अपने को छिपा रहा है तथा जो धारा 82 दं०प्र०सं० के प्रावधानों के अनुसार फरार व्यक्ति घोषित हो चुका है, अग्रिम जमानत पाने का अधिकारी नहीं है।

8. धारा 82 दं०प्र०सं० के प्रावधान निम्नवत हैं:-

"82. फरार व्यक्ति के लिए उद्घोषणा. (1) यदि किसी न्यायालय को (चाहे साक्ष्य लेने के पश्चात् या लिए बिना) यह विश्वास करने का कारण है कि कोई व्यक्ति जिसके विरुद्ध उसने वारण्ट जारी किया है, फरार हो गया है, या अपने को छिपा रहा है जिससे ऐसे वारण्ट का निष्पादन नहीं किया जा सकता तो ऐसा न्यायालय उससे यह अपेक्षा करने वाली लिखित उद्घोषणा प्रकाशित कर सकता है कि वह व्यक्ति विनिर्दिष्ट स्थान में और विनिर्दिष्ट समय पर, जो उस उद्घोषणा के प्रकाशन की तारीख से कम से कम तीस दिन पश्चात् का होगा, हाजिर हो।

(2) उद्घोषणा निम्नलिखित रूप से प्रकाशित की जाएगी:-

(i) (क) वह उस नगर या ग्राम के, जिसमें ऐसा व्यक्ति मामूली तौर पर निवास करता है, किसी सहजदृश्य स्थान में सार्वजनिक रूप से पढ़ी जाएगी,

(ख) वह उस गृह या वासस्थान के, जिसमें ऐसा व्यक्ति मामूली तौर पर निवास करता है, किसी सहजदृश्य भाग पर या ऐसे नगर या ग्राम के किसी सहजदृश्य स्थान पर लगाई जाएगी,

(ग) उसकी एक प्रति उस न्याय सदन के किसी सहजदृश्य भाग पर लगायी जाएगी,

(ii) यदि न्यायालय ठीक समझता है तो वह यह निदेश भी दे सकता है कि उद्घोषणा की एक प्रति उस स्थान में, परिचालित किसी दैनिक समाचार पत्र में प्रकाशित की जाए जहाँ ऐसा व्यक्ति मामूली तौर पर निवास करता है।

(3) उद्घोषणा जारी करने वाले न्यायालय द्वारा यह लिखित कथन कि उद्घोषणा विनिर्दिष्ट दिन उपधारा (2) के खण्ड (1) में विनिर्दिष्ट रीति से सम्यक् रूप से प्रकाशित कर दी गई है, इस बात का निश्चयाक साक्ष्य होगा कि इस धारा की अपेक्षाओं का अनुपालन कर दिया गया है और उद्घोषणा उस दिन प्रकाशित कर दी गई थी।

2[(4) जहाँ उपधारा (1) के अधीन प्रकाशित की गई उद्घोषणा भारतीय दण्ड संहिता की धारा 302, धारा 304, धारा 364, धारा 367, धारा 382, धारा 392, धारा 393, धारा 394, धारा 395, धारा 396, धारा 397, धारा 398, धारा 399, धारा 400, धारा 402, धारा 436, धारा 449, धारा 459 या धारा 460 के अधीन दण्डनीय अपराध के

अभियुक्त व्यक्ति के संबंध में है और ऐसा व्यक्ति उद्घोषणा में अपेक्षित विनिर्दिष्ट स्थान और समय पर उपस्थित होने में असफल रहता है तो न्यायालय, तब ऐसी जाँच करने के पश्चात् जैसी वह ठीक समझता है, उसे उद्घोषित अपराधी प्रकट कर सकता है और उस प्रभाव की घोषणा कर सकता है।

(5) उपधारा (2) और उपधारा (3) के उपबंध न्यायालय द्वारा उपधारा (4) के अधीन की गई घोषणा को उसी प्रकार लागू होंगे जैसे वे उपधारा (1) के अधीन प्रकाशित उद्घोषणा को लागू होते हैं।"

9. धारा 82 द०प्र०सं० के प्रावधानों के अनुसार न्यायालय ऐसा विश्वास होने पर, कि कोई व्यक्ति जिसके विरुद्ध वारण्ट जारी किया गया हो, फरार हो गया है या अपने को छिपा रहा है, जिससे वारण्ट का निष्पादन नहीं किया जा सकता, तो न्यायालय लिखित उद्घोषणा प्रकाशित कर सकता है कि वह व्यक्ति विनिर्दिष्ट स्थान में और विनिर्दिष्ट समय पर प्रस्तुत हो। उद्घोषणा के प्रकाशन की रीति धारा 82 की उपधारा (2) में दी गयी है। उपधारा 3 के

प्रावधान के अनुसार उद्घोषणा जारी करने वाले न्यायालय को उद्घोषणा के प्रकाशन के संबंध में लिखित कथन से संतोष अंकित करना आवश्यक है।

10. **अंबर चौहान @ अमर सिंह बनाम उ०प्र० राज्य** आपराधिक प्रकरण अग्रिम जमानत प्रार्थना-पत्र संख्या 2670 सन 2023 में पारित आदेश दिनांक 28.11.2023 (Neutral Citation No.-2023:AHC LKO:77863) में इस न्यायालय ने **लवेश बनाम राज्य** के निर्णय तथा धारा 82 दं०प्र०सं० के प्रावधान पर विचार करते हुए यह प्रतिपादित किया कि धारा 82 दं०प्र०सं० के अंतर्गत व्यक्ति फरार उद्घोषित अपराधी तभी माना जाएगा जब धारा 82 दं०प्र०सं० के समस्त उपधाराओं के अंतर्गत कार्यवाही संपूर्ण हो जाय।

11. प्रस्तुत प्रकरण में ऐसा कोई तथ्य विद्वान अपर शासकीय अधिवक्ता को प्राप्त अनुदेशों में कथित नहीं किया गया है, जिससे यह प्रतीत हो कि प्रार्थी के फरारी की उद्घोषणा का प्रकाशन धारा 82 (2) दं०प्र०सं० के अनुसार हुआ है और धारा 82(3) के अंतर्गत न्यायालय ने इस उद्घोषणा के सम्यक प्रकाशन से संतुष्ट होने का लिखित कथन किया है। ऐसी

परिस्थिति में यह नहीं कहा जा सकता कि प्रार्थी धारा 82(3) दं०प्र०सं० के अंतर्गत फरार व्यक्ति घोषित किया जा चुका है। अतः प्रार्थी इस स्तर पर फरार उद्घोषित व्यक्ति नहीं कहा जा सकता और उसके द्वारा प्रस्तुत अंतरिम जमानत प्रार्थना-पत्र गुण-दोष के आधार पर निस्तारित होने योग्य है।

12. उपरोक्त तथ्यों को दृष्टिगत रखते हुए, जबकि प्रार्थी इस प्रथम सूचना रिपोर्ट में नामित नहीं है, शिकायतकर्मी ने अपने बयान में प्रार्थी के इस अपराध में सम्मिलित होने का कथन किया है, किन्तु उसमें भी प्रार्थी द्वारा किये गये किसी विशिष्ट कृत्य का कथन नहीं है तथा इसी विक्रय पत्र के संबंध में क्रेता सह-अभियुक्त घनश्याम सिंह द्वारा लिखाई गई प्रथम सूचना रिपोर्ट के संबंध में प्रार्थी को अग्रिम जमानत दी जा चुकी है, न्यायालय का मत है कि प्रार्थी इस प्रकरण में भी अग्रिम जमानत पाने का अधिकारी है।

13. उपरोक्त मुकदमा अपराध संख्या में आवेदक की गिरफ्तारी / न्यायालय के समक्ष उपस्थिति की दशा में, उसे संबंधित थाने के भारसाधक अधिकारी / न्यायालय की संतुष्टि के अनुसार

व्यक्तिगत बंध पत्र एवं दो प्रतिभू प्रस्तुत करने पर परीक्षण के अंतिम रूप से निस्तारण तक, निम्न शर्तों के अधीन अग्रिम जमानत पर रिहा किया जाएगा:

- क- आवेदक, यदि आवश्यक होगा तो पुलिस अधिकारी द्वारा जाँच हेतु अपेक्षित समय पर उपस्थित होगा।

ख- आवेदक मामले के तथ्यों से परिचित किसी व्यक्ति या पुलिस अधिकारियों को प्रत्यक्ष या परोक्ष रूप से कोई धमकी, वादा या प्रलोभन नहीं देगा जिससे कि वह ऐसे तथ्य को न्यायालय के समक्ष या किसी पुलिस अधिकारी के समक्ष प्रकट न करने पर मान जाए।

ग- आवेदक अदालत की पूर्व अनुमति के बिना भारत नहीं छोड़ेगा;

घ- आवेदक को प्रत्येक निर्धारित तिथि पर ट्रायल कोर्ट के समक्ष उपस्थित होना होगा, जब तक कि व्यक्तिगत उपस्थिति से छूट न दी गयी हो;

ङ- आवेदक अभियोजन पक्ष के गवाह पर दबाव नहीं डालेगा / धमकी नहीं देगा। च- आवेदक विवेचना एवं विचारण के दौरान सहयोग करेंगे और जमानत की स्वतंत्रता का दुरुपयोग नहीं करेगा।

(2024) 4 ILRA 38
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.04.2024

BEFORE

THE HON'BLE AJAY BHANOT, J.

Criminal Misc. Bail Application No. 2322 of 2024

Aman @ Vansh ...Applicant
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicant:
Sri Vikash Chandra Tiwari

Counsel for the Opposite Party:
Sri Ajay Singh Yadav, G.A.

Criminal Law - Indian Penal Code, 1860 - Sections 363 & 376 - Protection of Children from Sexual Offences Act, 2012 - Sections 3/4, 27 - Code of Criminal Procedure, 1973 - Section 164A - Determination of Age - Counsel on behalf of applicant submitted that victim was falsely shown as minor of 16 years in FIR to implicate applicant under provisions of POCSO Act and secure his imprisonment - Age of victim, as alleged in prosecution, is refuted in view of judgment in *Monish v. St. of U.P.* (infra) on grounds that the victim's age is materially contradictory in prosecution records - School records showing 16 years 10 months are unreliable and incorrectly registered in school records by victim's parents to give her advantage in life - Victim St.d age as 15 years u/s 161 Cr.P.C - No medical examination to determine victim's age conducted at time of applicant's arrest, it was subsequently carried out pursuant to Court's order in *Aman @ Vansh v. St. of U.P.* (infra) - Medical report opines victim's age to be about 17 years, medical report is flawed, infact victim was major - Four-day delay in lodging FIR is fatal to prosecution - Victim and applicant were intimate, FIR arose from victim's family's

opposition - In her Section 161 and 164 Cr.P.C. St.ments, victim admitted intimacy, eloping to Delhi voluntarily, and subsequently marrying applicant - No allegation of rape was made in FIR or her St.ments - Victim was never confined, remained in public places, raised no alarm, and did not resist, indicated consenting party -Held, without making any observations on merits of case, bail application allowed. (Para 5, 6)

Bail application allowed. (E-13)

List of Cases cited:

1. Junaid Vs St. of U.P. & anr.) reported at 2021 (6) ADJ 511, Criminal Misc. Bail Application No. 46998 of 2020

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

3. Arvind Singh Vs St. of U.P. Thru. Prin. Secy. Home Deptt., Application U/S 482 No.2613 of 2023

4. Anil Gaur @ Sonu @ Sonu Tomar Vs St. of U.P. reported at 2022 SCC Online All 623, Criminal Misc. Bail Application No.16961 of 2022

5. Bhanwar Singh @ Karamvir Vs St. of U.P. reported at 2023 SCC Online All 734, Criminal Misc. Bail Application No.16871 of 2023

6. Noor Alam Vs St. of U.P., Criminal Misc. Bail Application No.53159 of 2021

(Delivered by Hon'ble Ajay Bhanot, J.)

1. Matter is taken up in the revised call.

2. Shri Paritosh Kumar Malviya, learned AGA-I for the State contends that the police authorities in compliance of the directions issued by this Court in **Criminal Misc. Bail Application No. 46998 of 2020 (Junaid Vs State of U.P. and another) reported at 2021 (6) ADJ 511** and with a

view to implement the provisions of POCSO Act, 2012 read with POCSO Rules, 2020, have served the bail application upon the victim/legal guardian as well as upon the CWC.

3. By means of the bail application the applicant has prayed to be enlarged on bail in Case Crime No.419 of 2023 at Police Station-Shalimar Garden, District-Ghaziabad under Sections 363, 376 IPC and Sections 3/4 of POCSO Act. The applicant is in jail since 05.12.2023.

4. The bail application of the applicant was rejected by the learned trial court on 21.12.2023.

5. The following arguments made by Shri Vikash Chandra Tiwari, learned counsel on behalf of the applicant, which could not be satisfactorily refuted by Shri Ajay Singh Yadav, learned counsel for the informant and Shri Paritosh Kumar Malviya, learned AGA-I from the record, entitle the applicant for grant of bail:

1. The victim was wrongly shown as a minor of 16 years in the F.I.R. only to falsely implicate the applicant under the stringent provisions of the POCSO Act and cause his imprisonment.

2.The age of the victim set out in the prosecution case is refuted in light of the judgement of this Court in **Monish Vs. State of U.P. and others (Criminal Misc. Bail Application No. 55026 of 2021)** and on the following grounds:

(i) There are material contradictions in the age of the victim as recorded in various prosecution documents.

(ii) The age of the victim was incorrectly got registered in the school records by the victim's parents to give her an advantage in life. There is no lawful

basis for the age related entry of the victim in the school records. The school records disclosing her age as 16 years and 10 months are unreliable.

(iii) The victim in her statement under Section 161 Cr.P.C. has stated that she is 15 years of age respectively.

6. The medical to determine the age of the victim was not drawn up at the time of arrest of the applicant. The medical of the victim was subsequently drawn up on the order passed by this Court on 12.03.2024 in the instant Criminal Misc. Bail Application No.2322 of 2024 (Aman @ Vansh v. State of U.P. and 3 others).

The medical report opines that the age of the victim is about 17 years.

Two submissions are made in regard to the aforesaid medical report. Firstly, the range of error in determining the age is about two years and the same should be read in favour of the applicant at this stage. Secondly, the relevant scientific parameters as per latest medical protocol which would establish the majority of the victim has been excluded from consideration in the medical report. The medical report is flawed. In fact the victim is a major.

3. The incident occurred on 09.11.2023 and the F.I.R. was got registered on 13.11.2023.

4. Delay of 4 days in lodgement of the F.I.R. in the facts of this case is fatal to the prosecution case.

5. The victim and the applicant were intimate.

6. The F.I.R. is the result of opposition of the victim's family to the said relationship with the applicant.

7. The victim in her statements under Section 161 Cr.P.C. and Section 164 Cr.P.C. has admitted to intimacy with the

applicant. She has also asserted that she eloped with the applicant to Delhi of her own volition. The victim has lastly asserted that she got married to the applicant.

8. No allegation of commission of rape by the applicant with the victim was made in the F.I.R. or in the statements of the victim under Sections 161 Cr.P.C. and 164 Cr.P.C.

9. The victim was never confined or bound down in any manner. The victim was present at public places. She did not raise an alarm nor did she resist the applicant. Her conduct shows that she was a consenting party.

10. Major inconsistencies in the statements of the victim under Sections 161 Cr.P.C. and Section 164 Cr.P.C., as well as the recitals in the F.I.R. discredit the prosecution case.

11. The victim has declined to undergo the medical examination.

12. The applicant does not have any criminal history apart from the instant case.

13. 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.

7. In the light of the preceding discussion and without making any observations on the merits of the case, the bail application is allowed.

Let the applicant-Aman @ Vansh be released on bail in the aforesaid case crime number, on furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court below. The following conditions be imposed in the interest of justice:-

(i) The applicant will not tamper with the evidence or influence any witness during the trial.

(ii) The applicant will appear before the trial court on the date fixed, unless personal presence is exempted.

The learned trial court is directed to fix the sureties after due application of mind in light of the judgement rendered by this Court in **Arvind Singh v. State of U.P. Thru. Prin. Secy. Home Deptt. (Application U/S 482 No.2613 of 2023)**.

9. The learned trial court shall ensure that the right of bail of the applicant granted by this Court is not frustrated by arbitrary demands of sureties or onerous conditions which are unrelated to the socioeconomic status of the applicant.

10. Before parting some observations have to be made which arise in the facts of this case but also become applicable to large number of matters arising before this Court.

11. This Court has consistently held that while sitting in the bail determination the High Court is not denuded of its constitutional status. The bail jurisdiction though created under the statute is also a constitutional jurisdiction of first importance since the most precious right of life and liberty are engaged in the process of consideration of bail. Consequently when legal issues which directly impact the life and liberty of a citizen arise during consideration of a bail application, the Court has to squarely deal with this issues.

[See: 1. (Anil Gaur @ Sonu @ Sonu Tomar v. State of U.P. reported at 2022 SCC Online All 623) (Criminal

Misc. Bail Application No.16961 of 2022)

2. (Bhanwar Singh @ Karamvir v. State of U.P. reported at 2023 SCC Online All 734) (Criminal Misc. Bail Application No.16871 of 2023)

3. Criminal Misc. Bail Application No.53159 of 2021 (Noor Alam v. State of U.P.).]

12. In the instant case as in a large number of bail applications under the POCSO Act, issues relating to the age of the victims having serious consequences on the life and liberty of accused persons arise for consideration.

13. This Court has been finding that in the large number of cases the age of the victim set out in the prosecution case is often at variance with the age determined by the expert medical boards in accordance with the latest medical protocols. At times there are multiple contradictions in age related documents available with the prosecution. Numerous cases of false implication and abuse of POCSO Act have also been noticed. Runaway couples of young age are criminalized in the process. The age determined by the Medical Board has several benefits:-

(a) The said report may prove to be a reliable piece of evidence in the case.

(b) The said medical reports will assist the process of law and enable the courts to make a conclusive finding on the victim's age after considering all evidences in the record.

(c) The said medical reports determining the victim's age at the very outset will also help prevent misuse of the POCSO Act.

(d) The said medical reports are relatable to specific provisions of law.

14. The importance of medical reports in the criminal investigation process was recognized by the legislature while incorporating Section 164-A of the Code of Criminal Procedure. The provision is extracted hereunder:

"Section 164A. Medical examination of the victim of rape.-(1)

Where, during the stage when an offence of committing rape or attempt to commit rape is under investigation, it is proposed to get the person of the woman with whom rape is alleged or attempted to have been committed or attempted, examined by a medical expert, such examination shall be conducted by a registered medical practitioner employed in a hospital run by the Government or a local authority and in the absence of such a practitioner, by any other registered medical practitioner, with the consent of such woman or of a person competent to give such consent on her behalf and such woman shall be sent to such registered medical practitioner within twenty-four hours from the time of receiving the information relating to the commission of such offence.

(2) The registered medical practitioner, to whom such woman is sent shall, without delay, examine her person and prepare a report of his examination giving the following particulars, namely—

(i) the name and address of the woman and of the person by whom she was brought;

(ii) the age of the woman;

(iii) the description of material taken from the person of the woman for DNA profiling;

(iv) marks of injury, if any, on the person of the woman;

(v) general mental condition of the woman; and

(vi) other material particulars in reasonable detail,

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The report shall specifically record that the consent of the woman or of the person competent, to give such consent on her behalf to such examination had been obtained.

(5) The exact time of commencement and completion of the examination shall also be noted in the report.

(6) The registered medical practitioner shall, without delay forward the report to the investigating officer who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of Sub-Section (5) of that section.

(7) Nothing in this section shall be construed as rendering lawful any examination without the consent of the woman or of any person competent to give such consent on her behalf."

15. In this context reference to Section 27 of the Protection of Children from Sexual Offences Act, 2012 can also be profitably made in support of the narrative. Section 27 of the POCSO Act reads as under:

"Section 27. Medical examination of a child.-(1)

The medical examination of a child in respect of whom any offence has been committed under this Act, shall, notwithstanding that a First Information Report or complaint has not been registered for the offences under this Act, be conducted in accordance with section 164A of the Code of Criminal Procedure, 1973 (2 of 1973).

(2) In case the victim is a girl child, the medical examination shall be conducted by a woman doctor.

(3) The medical examination shall be conducted in the presence of the parent of the child or any other person in whom the child reposes trust or confidence.

(4) Where, in case the parent of the child or other person referred to in sub-section (3) cannot be present, for any reason, during the medical examination of the child, the medical examination shall be conducted in the presence of a woman nominated by the head of the medical institution.”

16. Wide ambit of the provision embraces various kinds of medical reports including a medical report determining the victim's age in POCSO Act offences. The provision contemplates that medical reports to determine the age of victims be drawn up by competent professionals from eminent institutions in accordance with the latest scientific parameters and medical protocols. Further the said medical reports have to be presented to the Court at the earliest for assisting the process of law.

17. False depiction of a victim as a minor in POCSO Act cases is an abuse of the process of court. Complications caused by false depiction of a victim as minor and contradictions in age related documents were also examined by this Court in **Monish Vs. State of U.P. and others (Criminal Misc. Bail Application No. 55026 of 2021)**.

18. In numerous cases the age determined by the Medical Board contradicted the minority of the victim set up in the prosecution case. Illustrative list of POCSO Act of such cases before this

Court where the Medical Board opined that the victim was a major is appended as appendix-Ii.

19. This Court is finding that in many instances the accused-applicants have argued that medical determination of the victim's age was not got done deliberately as it would establish the majority of the victim and repudiate the prosecution case. By falsely depicting the victim as a minor the accused persons are wrongly implicated under the stringent regime of the POCSO Act only to cause their indefinite imprisonment. Reference of such cases by way of exemplars is appended as appendix-IIIi.

20. There is a third category of cases. Despite the statutory mandate the medical report to determine the victim's age is not drawn up and made part of investigations in a majority of cases. Absence of medical report determining the age of a victim came in the way of the Court dispensing equal justice. In these cases this Court has developed a practice to call for such reports. An exemplar list of this set of cases is appended as Appendix-IIIiii.

21. Medical Report determining the age of a POCSO Act offence is an imperative requirement of law and an absolute necessity of justice.

22. In the wake of the preceding discussion the following directions are issued:

1. The police authorities/investigation officers shall ensure that in every POCSO Act offence a medical report determining the victim's age shall be drawn up at the outset under Section 164A of the Criminal Procedure

Code read with Section 27 of the Protection of Children from Sexual Offences Act, 2012. The report may be dispensed with if medical opinion advises against it in the interests of the victim's health.

2. The medical report determining the age of the victim shall be created as per established procedure of law and in adherence to latest scientific parameters and medical protocol.

3. The medical report determining the age of the victim shall be submitted under Section 164-A of the Code of Criminal Procedure to the Court without delay.

4. The Director General (Health), Government of Uttar Pradesh, Lucknow shall also ensure that the doctors who comprise the Medical Board are duly trained and follow the established medical protocol and scientific parameters for determining the age of the victims in such cases. Constant research shall be done in this field to keep the reports in line with the latest scientific developments.

A copy of this order be communicated by the learned Government Advocate to the Director General of Police, Lucknow, Uttar Pradesh for compliance and Director General (Health), Government of Uttar Pradesh, Lucknow.

Appendix-I

1. Criminal Misc. Bail Application No.7172 of 2024 (Balakram Chaurasiya v. State Of UP And 3 Others)

2. Criminal Misc. Bail Application No.42249 of 2023 (Surendra Kumar v. State Of U.P. And 3 Others)

3. Criminal Misc. Bail Application No.39386 of 2023 (Rakesh Yadav Urf Saral v. State Of U.P. And 3 Others)

4. Criminal Misc. Bail Application No.7382 of 2024 (Lakshman @ Laxman v. State Of UP And 3 Others)

5. Criminal Misc. Bail Application No.7957 of 2024(Shiva Vs. State Of U.P. And 3 Others)

6. Criminal Misc. Bail Application No. 403 of 2024(Rahul Kumar vs. State Of Up And 3 Others)

7.Criminal Misc. Bail Application No. 7384 of 2024 (Nanhe Alias Rambaran v. State Of Up And 3 Others)

8. Criminal Misc. Bail Application No.5675 of 2024(Dalveer v. State Of UP and 3 Others)

9. Criminal Misc. Bail Application No.6970 of 2024 (Yogendra v. State Of Up 3 Others)

10. Criminal Misc. Bail Application No. 55899 of 2023 (Devendra Singh v. State Of U.P. And 3 Others)

11. Criminal Misc. Bail Application No.807 of 2024(Bunti v. State of U.P.)

12. Criminal Misc. Bail Application No.2039 of 2024(Akhilesh Kumar Yadav v. State Of Up And 3 Others)

13. Criminal Misc. Bail Application No.7328 of 2024(Arun Alias Happy v. State Of UP And 3 Others)

14. Criminal Misc. Bail Application No.7263 of 2024 (Mohammad Kalam v. State Of Up And 3 Others)

15. Criminal Misc. Bail Application No. 6553 of 2024(Vikas v. State Of Up And 3 Others)

16. Criminal Misc. Bail Application No. 6592 of 2024 (Sonu @ Shanu v. State Of Up And 3 Others)

17. Criminal Misc. Bail Application No.6066 of 2024 (Guddu v. State Of UP And 3 Others)

18. Criminal Misc. Bail Application No.12178 of 2024 (Bullet Gupta @ Shivkumar Sah v. State of U.P.

19. Criminal Misc. Bail Application No.2048 of 2024(Bhonu v. State Of UP 3 Others)

20. Criminal Misc. Bail Application No.4577 of 2024 (Pinku v. State of U.P. and 3 others)

Appendix-II

1. Criminal Misc. Bail Application No. 5180 of 2024 (Chhotu Rajbhar @ Melhu v. State Of UP Others)

2. Criminal Misc. Bail Application No.56492 of 2023 (Sudhir Gautam v. State Of U.P. And 3 Others)

3. Criminal Misc. Bail Application No. 7227 of 2024 (Vikas @ Chhotu v. State Of UP)

4. Criminal Misc. Bail Application No. 26264 of 2023 (Jitendra Kumar v. State Of U.P. And 3 Others)

5. Criminal Misc. Bail Application No.5820 of 2024 (Arun Saini v. State Of UP And 3 Others)

6. Criminal Misc. Bail Application No. 55331 of 2023 (Udai Varma v. State Of U.P. And 3 Others)

7. Criminal Misc. Bail Application No.16086 of 2023 (Kunnu Raidas @ Shishupal v. State Of U.P. And 3 Others)

8. Criminal Misc. Bail Application No.12866 of 2024 (Mahesh Yadav v. State of U.P. and 3 others)

9. Criminal Misc. Bail Application No.932 of 2024 (Monu Chauhan v. State Of UP Others)

10. Criminal Misc. Bail Application No.24294 of 2023 (Shamshad Khan v. State Of U.P. And 3 Others)

11. Criminal Misc. Bail Application No.5926 of 2024(Lucky v. State Of UP And 3 Others)

12. Criminal Misc. Bail Application No.5107 of 2024 (Rajeev @ Rana vs. State Of UP And 3 Others)

13. Criminal Misc. Bail Application No. 4101 of 2024 (Sani S/O Bhaiyalal v. State Of UP Through Principal Secretary Gov Of Up Lucknow)

14. Criminal Misc. Bail Application No.4294 of 2024 (Rajesh v. State Of Up And 3 Others)

15. Criminal Misc. Bail Application No.5472 of 2024 (Lallu v. State Of UP And 3 Others)

16. Criminal Misc. Bail Application No. 7358 of 2024 (Rahul Alias Gandhi v. State Of UP And 3 Others)

17. Criminal Misc. Bail Application No. 6583 of 2024 (Adesh Yadav v. State Of UP And 3 Others)

18.Criminal Misc. Bail Application No. 5959 of 2024 Ravi Kumar v. State Of UP 3 Others)

19. Criminal Misc. Bail Application No. 6022 of 2024 (Vikas v. State Of UP And 3 Others)

20. Criminal Misc. Bail Application No.7679 of 2024 (Faisal Khan @ Nabi Hussain v. State Of U.P. And 3 Others)

Appendix-III

1. Criminal Misc. Bail Application No.7292 of 2024 (Chhotu @ Rishabh v. State of U.P. and 3 others)

2. Criminal Misc. Bail Application No.5481 of 2024 (Mohd. Saif v. State of U.P. and 3 others)

3. Criminal Misc. Bail Application No.1458 of 2024 (Tausif Ali v. State of U.P. and 3 others)

4. Criminal Misc. Bail Application No.355 of 2024 (Pradeep Kumar @ Pradeep Vishwakarma v. State of U.P. and others)

3. Baldev Singh Vs Manohar Singh, (2006) 6 SCC 498

4. Usha Balashaheb Swami Vs Kiran Appaso Swami, (2007) 5 SCC 602

5. Bhagwan Swaroop Tripathi Vs Gaushala Committee, Shikohabad, 2011 (88) ALR 188

6. Abdul Rehman Vs Mohd. Ruldu, (2012) 11 SCC 341

7. Rajendra Shanker Tripathi Vs Ajay Kumar Gupta, 2011 (113) RD 651

8. L.J. Leach & Co. Ltd. Vs Jardine Skinner & Co., AIR 1957 SC 357

9. Estralla Rubber Vs Dass Est. (P) Ltd., (2001) 8 SCC 97

10. J. Samuel Vs Gattu Mahesh, (2012) 2 SCC 300

11. Rameshkumar Agarwal Vs Rajmala Exports (P) Ltd., (2012) 5 SCC 337

(Delivered by Hon'ble J.J. Munir, J.)

1. This civil revision is directed against an order of the Civil Judge (Sr. Div.), Rampur dated the 6th of July, 2022, rejecting an application by the defendants to amend their written statement.

2. The plaintiff-respondent instituted O.S. No.203 of 2021 before the Civil Judge (Sr. Div.), Rampur for specific performance of contract against the defendant-revisionists. He claimed specific performance of a registered agreement to sell dated 30.11.2018, said to be executed in favour of the plaintiff-respondent by defendant-revisionists Nos.3 and 4, to wit, Jagtar Singh and Smt. Sukhraj Kaur. Not to enter the thicket of facts that parties have pleaded in this case, but to take note of those essential, that form the essence of the controversy, leading to this revision, it

would, for a first, need be said how the defendant-revisionists are related to each other. The defendant-revisionist No.3 Jagtar Singh, is the son of Smt. Sukhraj Kaur, defendant-revisionist No.4. Defendant-revisionist No.1, Smt. Kinder Jeet Kaur is Jagtar Singh's wife, whereas Master Gurudeep Singh Sandhu, defendant-revisionist No.2, is Jagtar and Kinder Jeet Kaur's son, a minor aged about 12 years. The plaintiff-respondent, Karam Jeet Singh, is a Non-Resident Indian, settled in Birmingham, United Kingdom. He has instituted the present suit for specific performance through his power of attorney holder, Karan Singh, a resident of Village Tali Farm, Post and Tehsil Bajpur in the district of Udham Singh Nagar, Uttarakhand.

3. The substance of the plaintiff-respondent's case is that he entered into a contract to purchase the suit property with defendant-revisionists Nos.3 and 4, which is agricultural land, comprising different plot numbers, described in the plaint, admeasuring a total of 2.0305 hectares and situate at Village Shekhupura, Tehsil Swar, District Rampur. The defendant-revisionists Nos.3 and 4 were recorded *bhumidhars* with transferable rights in the suit property. The plaintiff-respondent, on one hand, and the defendant-revisionists Nos.3 and 4, on the other, according to the plaintiff-respondent, voluntarily entered into the suit agreement dated 30.11.2018, duly admitted to registration by the Sub-Registrar, Swar, Rampur, where defendant-revisionists Nos.3 and 4 covenanted to convey the suit property to the plaintiff-respondent for a total sale consideration of Rs.78,52,000/-. The suit agreement, that was executed, was one without possession. Out of the agreed sale consideration, defendant-revisionists Nos.3 and 4,

according to the plaintiff-respondent, received an earnest of Rs.70 lakhs through cheques and cash, leaving a residue of Rs.8,52,000/- to be paid at the time of registration of the sale deed. It was covenanted also by parties to the suit agreement that the sale deed would be executed by 01.06.2020. It is the plaintiff's case that well before the arrival of the agreed date i.e. 01.06.2020, defendant-revisionists Nos.3 and 4 gifted away the suit property through registered gift deeds, both dated 29.02.2020 in favour of defendant-revisionist Nos.1 and 2. The suit was, therefore, brought for specific performance of the suit agreement, cancellation of the two registered gifted deeds dated 29.02.2020, executed by defendant-revisionists Nos.3 and 4 in favour of defendant-revisionist Nos.1 and 2, besides a permanent prohibitory injunction, restraining the defendant-revisionists from further transferring the suit property in favour of any third-party or delivering its possession to anyone else.

4. A written statement was filed in the suit on behalf of defendant-revisionists Nos.3 and 4, who are defendant Nos.1 and 2 to the suit. The defendant-revisionists Nos.3 and 4, in substance, plead in their written statement that they were defrauded by Balkar Singh, a son of defendant No.3's elder brother into executing the suit agreement in favour of the plaintiff-respondent, Karam Jeet Singh, also called Paul UK. It is pleaded in the written statement that Balkar Singh was entrusted by defendant-revisionists Nos.3 and 4 to take care of their farming done on the suit property, for reason that Balkar Singh enjoyed defendant-revisionist No.3's trust. Balkar Singh, in connivance with his wife,

Rajvinder Kaur and her brother Balveer Rai and another Gurpreet Singh, represented to the defendant-revisionists that all of them could migrate to UK and work there with the assistance of the plaintiff. It is said that at the same time for the purpose of facilitating the defendant-revisionists Nos.3 and 4's transactions of money relating to the farming, bank accounts were got opened with the Axis Bank, Branch Bajpur for both defendant-revisionists Nos.3 and 4. In the said accounts, the mobile number given was Balkar Singh's father's, so that the defendant-revisionists Nos.3 and 4 would not receive any alerts about the transactions done.

5. At the same time, Balkar Singh and his associates, inspiring the defendant-revisionists about their migration to the UK with the help of the plaintiff, told them that they had to have a sum of at least Rs. 2 crores in their account to get a UK citizenship or commercial VISA. There are some other allegations related to agreements got executed by Balkar Singh in favour of his wife, but that is not directly related to the issue involved here. It is said by defendant-revisionists Nos.3 and 4 that Balkar Singh, on the pretext of getting a special power of attorney, executed in his favour by defendant-revisionists Nos.3 and 4, took them to the Sub-Registrar's office on 30.11.2018. He represented to them that the special power of attorney had to be executed by defendant-revisionists Nos.3 and 4 in order to enable him to deal with matters relating to the defendant-revisionists' immigration to UK and also to manage their farm related transactions. The suit agreement was got executed by defendant-revisionists Nos.3 and 4 by Balkar Singh in favour of the plaintiff-

respondent, misrepresenting its character as a power of attorney, without any consideration settled or paid.

6. In this very detailed written statement filed on behalf of the defendant-revisionists Nos.3 and 4, where the defence appears to be indicative of a fraud and misrepresentation, practiced upon the said defendant-revisionists by Balkar Singh and his associates, including the plaintiff-respondent, amendments were sought to paragraph No.29 and by an addition to the written statement, numbered as paragraph No.55-अ. In paragraph No.29 of the written statement in the fourth line for the word “है” after the word “कराता”, the word “था” was sought to be substituted.

7. In order to better appreciate the nature of the amendment sought to be effected in paragraph No.29 of the written statement, it would be apposite to quote paragraph No.29 of the written statement filed on behalf of defendant-revisionists Nos.3 and 4 (defendant Nos.1 and 2 to the suit):

“29. यह कि कथित इकरारनामा मुआयदाबय का गवाह बलकार सिंह प्रतिवादी सं0-1 के ताऊ का पुत्र अर्थात् सगा तहेरा भाई है। प्रतिवादी सं0-1 कई वर्ष से बीमार चल रहा है। बीमारी के कारण अपनी काशत की आराजी पर कृषि कार्य ठेके पर अपने सगे तहेरे भाई बलकार पुत्र गुरूदेव सिंह से कराता है। बलकार सिंह परिवार का होने के कारण यह जानता है कि प्रतिवादी - उत्तरदातागण के खास सगे रिश्तेदार इंग्लैंड में हैं। बलकार सिंह लोगो को विदेश भेजने का भी कार्य वादी के सहयोग से करता है। उसकी इस सम्बन्ध में अच्छी पकड़ व जानकारी है।”

8. The amendment sought is to substitute the word “है”, shown in bold letter by the word “था”. The other amendment sought is the addition of a paragraph, numbered as 55 (अ). This reads as follows:

“55 (अ) यह कि बलकार सिंह पुत्र गुरदेव सिंह, श्रीमती रजविन्दर कौर पत्नी बलकार सिंह, दलजीत सिंह व नरेन्द्र सिंह पुत्रगण सन्तोष सिंह समस्त निवासीगण ग्राम शेखपुरा, तहसील स्वार, जिला रामपुर बलवीर सिंह राय व गुरप्रीत सिंह पुत्रगण चरनजीत सिंह, श्रीमती किरनदीप कौर पत्नी बलवीर सिंह समस्त निवासीगण ग्राम इकधारा, तहसील बाजपुर, जिला ऊधमसिंहनगर (उत्तराखण्ड) तथा सुनील कुमार पुत्र महेन्द्र सिंह निवासी ग्राम कुण्डा तहसील बाजपुर, जिला ऊधमसिंहनगर आवश्यक एवं प्रोपर पक्ष है जिस कारण वाद उपरोक्त में आवश्यक व प्रोपर पक्षकार न बनाये जाने के कारण पक्षों के असंयोजन के दोष से दूषित है।”

9. The plaintiff resisted these amendments before the learned Trial Judge on ground that one amounted to withdrawal of an admission, and the other, to implead parties to the suit, who were not parties to the contract. The learned Trial Judge by the order impugned rejected the amendment application. The Trial Court opined that after commencement of trial, it had to be established necessarily by the defendants why steps were not promptly taken to introduce the amendment. It was held that going by the proviso to Rule 17 of Order VI CPC, the defendants have not been able to show why steps were not taken promptly. The suit was indicated to be set down for trial, which had already commenced. The other reason for refusing addition of paragraph 55 (अ) to the written

statement assigned by the Trial Court is that it is not indicated in the written statement how the persons, whom the defendants want to implead as necessary and proper parties, have assisted or connived with the plaintiff. A reference is made by the Trial Court to the decision of the Supreme Court in **Vidur Impex and Traders Private Limited and others v. Tosh Apartments Private Limited and others, (2012) 8 SCC 384**, for the principle that in a suit for specific performance, non-parties to the contract need not be impleaded.

10. The Trial Judge repelled the contention put forward on behalf of the defendant-revisionists that at the stage of permitting amendment, it was not to be seen if the persons, whose names were sought to be introduced in the pleading, are necessary or proper parties. Through the plea of non-joinder sought to be introduced, the Trial Court opined that because it was proposed to seek impleadment of parties, it was necessary to examine, at that stage itself, if the persons, whose names were sought to be introduced, were in fact necessary and proper parties. Relying on the proviso to Rule 17 of Order VI and the absence of necessity to implead persons, not parties to the contract, both the proposed amendments were declined.

11. Heard Mr. Shreeprakash Singh, learned Counsel for the defendant-revisionists and Mr. Virendra Kumar Gupta, learned Counsel appearing on behalf of the sole plaintiff-respondent.

12. It is submitted by the learned Counsel for the defendant-revisionists that it is not an inflexible rule that no amendment can be made after commencement of trial, unless the Court

comes to the conclusion that despite due diligence, it could not be raised before such commencement. It is argued that amendments to the written statement are to be granted by a more liberal standard as compared to an amendment to the plaint and the amendments which the defendant-revisionists seek are no more than amplification or the correct statement of facts, not inconsistent with the other pleas. It is argued that the Trial Court has adopted a hyper-technical approach in rejecting the amendment application, which ought to be eschewed by a Court generally, while considering pleas seeking amendments to the written statement.

13. It is submitted by the learned Counsel for the plaintiff-respondent, supporting the impugned order, that it is not permissible to grant amendment after commencement of trial in view of the proviso appended to Rule 17 of Order VI CPC. The defendant-revisionists had filed a very detailed written statement and there was no purpose to be served by seeking the proposed amendments after commencement of trial. It was just a pretext to delay trial. In addition, it is argued that by seeking substitution of the word "५" in place of "६" in paragraph No.29 of the written statement, an admission in favour of the plaintiff is sought to be withdrawn, which is impermissible, going by the first principles governing the law of amendment.

14. So far as the addition of paragraph 55(3f) is concerned, it is submitted that it is well settled that persons, who are not parties to the suit agreement, need not be impleaded in a suit for specific performance. The plea sought to be introduced about non-joinder of the parties, is ultimately directed to secure their

impleadment to the suit. Therefore, it is urged that the Trial Court was right in scrutinizing, if at all the plea of non-joinder of those parties, sought to be raised in the written statement, would be of any permissible avail to the defendant-revisionists, in order to be allowed by way of amendment.

15. We have carefully considered the submissions made by parties and perused the record.

16. So far as the amendments sought to paragraph No.29 of the written statement is concerned, the amendment is one that seeks to substitute the words "है" for "थी" there. The effect of the proposed amendment is not at all to withdraw any admission made in favour of the plaintiff. This is so because the relevant pleading in the first instance is about defendant-revisionist No.3's terms with his cousin Balkar Singh about the affairs of his farming. Whereas in the unamended paragraph, the defendant-revisionists have said that they get their farming done by Balkar Singh, what they now seek to say is that defendant-revisionist No.3 got all that farming done by Balkar Singh in the past. It seeks to disown any current association between Balkar Singh and defendant-revisionist No.3, in the affairs of his farming. The proposed amendment is generally in keeping with the fabric of the defendant-revisionists' wholesome defence. The defence is about Balkar Singh being involved in fraudulently getting defendant-revisionists Nos.3 and 4 into executing the suit agreement in favour of the plaintiff in association with his wife, his wife's brother and other associates, misleading defendant-revisionists Nos.3 and 4 about the character of the document, by betraying the trust

reposed in him by them. This was done, according to the defendant-revisionists, by Balkar Singh and his associates, misrepresenting to defendant-revisionists Nos.3 and 4 that the special power of attorney that they were asked to execute would permit Balkar Singh to settle their affairs about immigration to the UK and also to handle matters of their farming back home.

17. Now, in this context of things, if the defendant-revisionists had inadvertently said in paragraph No.29 that Balkar Singh was still helping them in their farming, which obviously he would not be doing now in the changed circumstances, the substitution of the word "है" for "थी" in paragraph No.29, does not withdraw any kind of admission made. It is rather one sought to explain the correct facts, pleaded in the written statement and put them in order with the general scheme of defence. The amendment of this paragraph would also hardly cause any prejudice to the plaintiff because all facts, elsewhere pleaded in the written statement, blame Balkar Singh for his connivance with the plaintiff.

18. The principles governing amendments to the written statement have been laid down by the Supreme Court in **State of Bihar and others v. Modern Tent House and another, (2017) 8 SCC 567**. In *Modern Tent House (supra)*, it has been held by the Supreme Court:

“7. It is not in dispute that the suit filed by the respondents against the appellants out of which this appeal arises is still pending. It is also not in dispute that the evidence of the parties is not yet over. In other words, the trial in the suit is going on.

8. We have perused the amendment application filed by the appellants. We find that firstly, the proposed amendment is on facts and the appellants in substance seek to elaborate the facts originally pleaded in the written statement; secondly and in other words, it is in the nature of amplification of the defence already taken; thirdly, it does not introduce any new defence compared to what has originally been pleaded in the written statement; fourthly, if allowed, it would neither result in changing the defence already taken nor will result in withdrawing any kind of admission, if made in the written statement; fifthly, there is no prejudice to the plaintiffs, if such amendment is allowed because notwithstanding the defence or/and the proposed amendment, the initial burden to prove the case continues to remain on the plaintiffs; and lastly, since the trial is not yet completed, it is in the interest of justice that the proposed amendment of the defendants should have been allowed by the courts below rather than to allow the defendants to raise such plea at the appellate stage, if occasion so arises.”

19. The principles regarding amendment to the written statement have also been laid down by the Supreme Court in **Baldev Singh and others v. Manohar Singh and another**, (2006) 6 SCC 498, where it has been observed:

“9. Keeping this principle in mind, let us now consider the provisions relating to amendment of pleadings. Order 6 Rule 17 of the Code of Civil Procedure deals with amendment of pleadings which provides that the court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such

amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. From a bare perusal of this provision, it is pellucid that Order 6 Rule 17 of the Code of Civil Procedure consists of two parts. The first part is that the court may at any stage of the proceedings allow either party to amend his pleadings and the second part is that such amendment shall be made for the purpose of determining the real controversies raised between the parties. Therefore, in view of the provisions made under Order 6 Rule 17 CPC it cannot be doubted that wide power and unfettered discretion has been conferred on the court to allow amendment of the pleadings to a party in such manner and on such terms as it appears to the court just and proper. While dealing with the prayer for amendment, it would also be necessary to keep in mind that the court shall allow amendment of pleadings if it finds that delay in disposal of suit can be avoided and that the suit can be disposed of expeditiously. By the Code of Civil Procedure (Amendment) Act, 2002 a proviso has been added to Order 6 Rule 17 which restricts the courts from permitting an amendment to be allowed in the pleadings of either of the parties, if at the time of filing an application for amendment, the trial has already commenced. However, the court may allow amendment if it is satisfied that in spite of due diligence, the party could not have raised the matter before the commencement of trial. So far as proviso to Order 6 Rule 17 of the Code of Civil Procedure is concerned, we shall deal with it later.

11. A bare perusal of the order rejecting the application for amendment of the written statement indicates that while rejecting the application for amendment of the written statement, the High Court as

well as the trial court based their decisions mainly on three grounds. The first ground was that since the appellants had made certain admissions in the written statement, its amendment cannot be allowed permitting the appellants to withdraw their admission made in the same. Secondly, the question of limitation cannot be allowed to be raised by way of an amendment of the written statement and lastly, inconsistent pleas in the written statement cannot also be allowed to be raised by seeking its amendment.

14. As noted hereinafter, the case set up by the plaintiff-Respondent 1 was that his parents had no money to purchase the suit property and it was the plaintiff-Respondent 1 who paid the consideration money. In the written statement, this fact was denied and further it was asserted in the written statement that the suit property was in fact purchased by their parents and they had sufficient income of their own. In the application for amendment of written statement it was stated that the plaintiff-Respondent 1 did not have any income to pay the consideration money of the suit property and in fact the parents of the plaintiff-Respondent 1 had sufficient income to pay the sale price. It was only pointed out in the application for amendment that after the death of their parents, the suit property was mutated in the joint names of the plaintiff-Respondent 1 and the defendants in equal shares. Therefore, the question whether certain admissions made in the written statement were sought to be withdrawn is concerned, we find, as noted hereinafter, there was no admission in the written statement from which it could be said that by filing an application for amendment of the written statement, the appellants had sought to withdraw such admission. It is true that in the original written statement, a

statement has been made that it is Defendant-Appellant 1 who is the owner and is in continuous possession of the suit property, but in our view, the powers of the court are wide enough to permit amendment of the written statement by incorporating an alternative plea of ownership in the application for amendment of the written statement. That apart, in our view, the facts stated in the application for amendment were in fact an elaboration of the defence case. Accordingly, we are of the view that the High Court as well as the trial court had erred in rejecting the application for amendment of the written statement on the ground that in the event such amendment was allowed, it would take away some admissions made by the defendant-appellants in their written statement. That apart, in *Estralla Rubber v. Dass Estate (P) Ltd.* [(2001) 8 SCC 97] this Court held that even if there were some admissions in the evidence as well as in the written statement, it was still open to the parties to explain the same by way of filing an application for amendment of the written statement. That apart, mere delay of three years in filing the application for amendment of the written statement could not be a ground for rejection of the same when no serious prejudice is shown to have been caused to the plaintiff-Respondent 1 so as to take away any accrued right.

15. Let us now take up the last ground on which the application for amendment of the written statement was rejected by the High Court as well as the trial court. The rejection was made on the ground that inconsistent plea cannot be allowed to be taken. We are unable to appreciate the ground of rejection made by the High Court as well as the trial court. After going through the pleadings and also the statements made in the application for

amendment of the written statement, we fail to understand how inconsistent plea could be said to have been taken by the appellants in their application for amendment of the written statement, excepting the plea taken by the appellants in the application for amendment of written statement regarding the joint ownership of the suit property. Accordingly, on facts, we are not satisfied that the application for amendment of the written statement could be rejected also on this ground. That apart, it is now well settled that an amendment of a plaint and amendment of a written statement are not necessarily governed by exactly the same principle. It is true that some general principles are certainly common to both, but the rules that the plaintiff cannot be allowed to amend his pleadings so as to alter materially or substitute his cause of action or the nature of his claim has necessarily no counterpart in the law relating to amendment of the written statement. Adding a new ground of defence or substituting or altering a defence does not raise the same problem as adding, altering or substituting a new cause of action. Accordingly, in the case of amendment of written statement, the courts are inclined to be more liberal in allowing amendment of the written statement than of plaint and question of prejudice is less likely to operate with same rigour in the former than in the latter case."

20. There is a further restatement of the principle that amendments to the written statement are to be more liberally granted as compared to amendments to the plaint, even one explaining an admission or taking inconsistent pleas, to be found in **Usha Balashaheb Swami and**

others v. Kiran Appaso Swami and others, (2007) 5 SCC 602. In **Usha Balashaheb Swami (supra)**, it has been held by the Supreme Court:

"21. As we have already noted herein earlier that in allowing the amendment of the written statement a liberal approach is a general view when admittedly in the event of allowing the amendment the other party can be compensated in money. Technicality of law should not be permitted to hamper the courts in the administration of justice between the parties. In *L.J. Leach & Co. Ltd. v. Jardine Skinner & Co.* [AIR 1957 SC 357] this Court observed

"that the courts are more generous in allowing amendment of the written statement as the question of prejudice is less likely to operate in that event".

In that case this Court also held

"that the defendant has right to take alternative plea in defence which, however, is subject to an exception that by the proposed amendment the other side should not be subjected to serious injustice".

22. Keeping these principles in mind, namely, that in a case of amendment of a written statement the courts would be more liberal in allowing than that of a plaint as the question of prejudice would be far less in the former than in the latter and addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement can also be allowed, we may now proceed to consider whether the High Court was justified in rejecting the application for amendment of the written statement."

21. The issue, if the substitution of the word "थ" for "है" would amount to

withdrawal of an admission, which we have answered earlier in this judgment and held that it does not. The view that this Court takes that the proposed amendment has to be understood consistent with the general fabric of the defence, finds support in the holding of this Court in **Bhagwan Swaroop Tripathi and others v. Gaushala Committee, Shikohabad and another, 2011 (88) ALR 188**, where it is observed:

“13. In my opinion, the document has to be read in whole and in case, the amended paragraph 1 of the written statement and paragraph 20 are read together it will be found that they are inconsistent and paragraph 20 clearly shows that the intention of the petitioner was never to admit the contention of the respondent that society was registered at the time of filing the present suit and the petitioner has never tried to wriggle out from own admission since in paragraph 20 of the written statement it was categorically stated that registration of the petitioner has already expired and the suit is not maintainable, as such, there was no occasion for him to admit the contents of the paragraph 1 of the written statement with regard to registration.....”

22. This Court is, therefore, of opinion that substituting the word "५" for "६" in paragraph No.29 does not amount to withdrawal of any kind of admission and is in no way an amendment inconsistent with the general scheme of the defendant-revisionists' defence. In any case, it does not prejudice the plaintiff-respondent in any manner, so as to entitle the plaintiff to have the proposed amendments refused.

23. Now, the other issue which the Trial Court has considered in declining the

amendment is based on the proviso to Rule 17 of Order VI of the CPC. It is no doubt true as a rule that after commencement of trial, amendment should not generally be permitted. One exception, however, is mentioned by the proviso itself and that is that despite due diligence, the party could not have raised the matter before commencement of trial. But, the rule embodied in the proviso is not an inflexible rule. In this connection, the principles laid down by the Supreme Court in **Abdul Rehman and another v. Mohd. Ruldu and others, (2012) 11 SCC 341** are seminal. It is observed in **Abdul Rehman (supra)**:

“11. The original provision was deleted by Amendment Act 46 of 1999, however, it has again been restored by Amendment Act 22 of 2002 but with an added proviso to prevent application for amendment being allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. The above proviso, to some extent, curtails absolute discretion to allow amendment at any stage. At present, if application is filed after commencement of trial, it has to be shown that in spite of due diligence, it could not have been sought earlier. The object of the rule is that courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side. This Court, in a series of decisions has held that the power to allow the amendment is wide and can be exercised at any stage of the proceeding in the interest of justice. The main purpose of

allowing the amendment is to minimise the litigation and the plea that the relief sought by way of amendment was barred by time is to be considered in the light of the facts and circumstances of each case. The above principles have been reiterated by this Court in *J. Samuel v. Gattu Mahesh* [(2012) 2 SCC 300 : (2012) 1 SCC (Civ) 801] and *Rameshkumar Agarwal v. Rajmala Exports (P) Ltd.* [(2012) 5 SCC 337 : (2012) 3 SCC (Civ) 92] Keeping the above principles in mind, let us consider whether the appellants have made out a case for amendment.”

(emphasis by Court)

24. Reference may also be made to a decision of this Court in **Rajendra Shanker Tripathi v. Ajay Kumar Gupta, 2011 (113) RD 651**, where summarising the principles, it was observed:

“4. Object of Order VI, Rule 17 of the Code of Civil Procedure is that the Court should adjudicate on the merits of the case that come before them and should consequently allow all the amendments that may be necessary for determining the real question in controversy between the parties. Order VI, Rule 17 consists of two parts. The first part is discretionary and leaves it to the Court to order amendment of pleading while the second part is imperative and enjoins the Court to allow all the amendments which are necessary for the purposes of determining the real question in controversy between the parties. It may be added that there is no absolute rule that in every case where a relief is barred because of limitation an amendment should not be allowed.

5. A party cannot be refused a just relief merely because of some mistake, negligence, inadvertence or even infraction of the rules of procedure. The Court generally gives leave to amend the

pleadings to a party unless it is satisfied that the party applying was acting mala fide or that by his blunder he had caused injury to his opponent. In the present case the amendments which have sought to be incorporated will not change the basic nature of the written statement (sic-plaint).

6. After engaging an advocate the party may remain supremely confident that the lawyer will look after his interest. It will not be proper that the party should suffer for the inaction, deliberate omission or misdemeanour of his Counsel. It is well settled that litigant should not suffer for the lapses on the part of his Counsel. Laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice.”

25. The rule is not, therefore, inflexible that in every case, where trial has commenced, the doors of amendment are irreversibly shut. In a case, where the facts warrant, amendment can be granted post commencement of trial as well. In case of amendment to the written statement, the standard has already been indicated to be liberal, and to the understanding of this Court, it would also have bearing on the issue of a belated amendment to the written statement, if brought in to clarify or elaborate facts, already pleaded in the written statement. In the present case, as already said, the amendment to paragraph No.29 does nothing more than to put the pleadings in paragraph No.29 in accord with the general matrix of pleadings on behalf of defendant-revisionists.

26. So far as the other amendment is concerned, the principle against non-joinder of persons, who are not parties to the suit agreement, was laid down by the Supreme Court in **Vidur Impex and Traders Private Limited (supra)** in a

completely different context. The principle was laid down in the context of an application for impleadment by a party, who had entered into a transaction with the vendor to purchase the suit property, while a suit for specific performance was pending. The transaction was in violation of an order of injunction, restraining the vendor from alienating the suit property or creating third party rights. It was a denial of that kind of an application, that was upheld by the Supreme Court in **Vidur Impex and Traders Private Limited**.

27. Here, the amendments sought is about parties, who are said to have facilitated the plaintiff along with Balkar Singh in perpetrating a fraudulent transaction, as the defendant-revisionists say, that led defendant-revisionists Nos.3 and 4 into entering into the suit agreement with the plaintiff, thinking that it was something very different. If in the background of this defence, the plaintiff has sought to raise a plea about non-joinder of these persons said to be involved in the conspiracy or the act of connivance, refusal of the amendment can hardly be said to be justified. It would still be a matter to be seen, if indeed, these persons ought to be impleaded as parties. As already seen in the context of broad principles relating to the amendment of a written statement, many pleas, some inconsistent, can and ought to be permitted by way of amendment, that cannot be permitted in the case of a plaint. The Trial Judge, in refusing the amendment here, has certainly not gone by the settled standards of permitting amendment to a written statement.

28. The Trial Court, in declining the amendment, has failed to exercise

jurisdiction vested in it, which would result in failure of justice to the defendant-revisionists, if allowed to stand.

29. In the considered opinion of this Court, therefore, the amendment application ought to have been and must, therefore, be allowed.

30. In the result, this revision succeeds and is **allowed**. The impugned order dated 06.07.2022 passed by the Civil Judge (Sr. Div.), Rampur, is hereby **set aside** and **reversed**. The application for amendment is **allowed**. Let the written statement be amended in the terms prayed. The interim stay order is hereby vacated. The proceedings of the suit shall now be expedited and concluded early without granting any unnecessary adjournment to either party.

31. There shall be no order as to costs.

32. Let a copy of the judgment be communicated to the Civil Judge (Sr. Div.), Rampur through the learned District Judge, Rampur by the Registrar (Compliance).

(2024) 4 ILRA 57
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.04.2024

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Contempt Application (Civil) No. 2467 of 2017

Rajendra Singh & Ors. ...Applicants
Versus
Prabhu Narayan Singh V.C. L.D.A. Lko. &
Anr. ...Opposite Parties

Counsel for the Applicants:

Sharad Kumar Srivastava, Lalita Prasad Misra

Counsel for the Opposite Parties:

Shobhit Mohan Shukla, Madan Mohan Pandey, Neel Kamal Mishra, Ratnesh Chandra, Shobhit Mohan Shukla

Contempt of Courts Act, 1971 - Section 12 - Constitution of India, 1950 - Article 32 - U.P. Development Authorities Centralised Service Rules, 1985 - Rule 20-A - Applicants alleged non-compliance with order dated 19.08.1992 directing regularization of their services as Junior Engineers within nine months.

Court held: (1) Direction to "take steps" for regularization within nine months was not mandatory but required reasonable efforts, considering posts were under U.P. Public Service Commission and no regularization rules existed initially (Shri Ram Kishan Vs U.O.I., Writ Petition (Civil) No. 853 of 1990). (2) St.'s efforts, including creating supernumerary posts, amending Rule 20-A in 2001, and regularizing services in 2003 after litigation, demonstrated compliance despite delay due to legal challenges (Rama Narang Vs Ramesh Narang, (2009) 16 SCC 126). (3) Applicants' failure to challenge the 1997 select list and their participation in subsequent litigation indicated acceptance of regularization process; delay was not deliberate but due to absence of rules and ongoing appeals (Kunwar Singh Saini Vs High Court of Delhi, (2012) 4 SCC 307). (4) Applicants' non-disclosure of relevant Supreme Court orders and litigation history did not amount to material suppression, but no wilful disobedience was established, as St. showed earnest efforts through cabinet approvals and rule amendments. Contempt notices discharged; petition dismissed. (Paras 24-38)

Contempt Petition Dismissed.

List of Cases cited:

1. Shri Ram Kishan Vs U.O.I., Writ Petition (Civil) No. 853 of 1990, decided on 21.02.1991 (Para 5)

2. Somesh Thapliyal Vs Vice Chancellor H.N.B. Garhwal University, (2021) 10 SCC 166 (Para 14)

3. Rama Narang Vs Ramesh Narang, Contempt Petition (Civil) No. 92 of 2008, (2009) 16 SCC 126 (Para 37)

4. Kunwar Singh Saini Vs High Court of Delhi, (2012) 4 SCC 307 (Para 37)

5. Niaz Mohammad Vs St. of Har., (1994) 6 SCC 332 (Para 37)

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

1. Heard Dr. L.P.Mishra, assisted by Sri Sharad Kumar Srivastava, learned counsel for the petitioners, Sri Upendra Nath Mishra, learned Senior Counsel assisted by Sri Neel Kamal Mishra, for opposite party no. 3 and Sri Ratnesh Chandra assisted by Sri Ishan Singh, for the Lucknow Development Authority.

2. Instant contempt petition is preferred for alleged non compliance of the Judgment and Order dated 19-08-1992 passed in Writ Petition No. 222(S/S) of 1992 connected with Writ Petition No. 6384 (S/S) of 1989.

3. Factual matrix of the case is that the petitioners were appointed as Junior Engineers on workcharge basis in the years 1984, 1985 and 1987, in the Lucknow Development Authority, and in the year 1992, they approached this court by preferring several petitions namely, Writ Petition No. 222(S/S) of 1992 connected with Writ Petition No. 6384 (S/S) of 1989, and were heard together. The final Judgment and order was passed by this court on 19-08-1992, whereby these writ petitions were allowed, while directing the Lucknow Development Authority to pay minimum of the pay-scale to the petitioners as is being paid to the regularly appointed Junior Engineers, Clerks and Class-IVth

employees, were getting at that point of time and as many as 7 directions were issued, but, so far as the last direction in the Judgment and Order dated 19-08-1992, which is allegedly not complied with, by the opposite parties, is to the effect that 'to take step to obtain regularization of the services of those petitioners within nine months, if the posts are within the purview of Public Service Commission. If posts are not within the purview of Public Service Commission, the opposite parties will regularize the services of the petitioners within said period.'

4. Being aggrieved with the above said Judgment and Order dated 19-08-1992, the Lucknow Development Authority filed two Special Appeals namely; Special Appeal No. 35 of 1993 and the Special Appeal No. 39 of 1993. Since, the Judgment and Order dated 19-08-1992 was with respect to the Junior Engineers, Clerks and Class-IVth employees, whereas the Special Appeal No. 35 of 1993, particularly; challenging the Judgment and Order with respect to the Assistant Engineers and that was dismissed on 20-10-2003. The Special Appeal No. 39 of 1993; was also dismissed for non-prosecution on 20-12-2016. Later on, the order dated 20-12-2016 was recalled vide order dated 30-10-2017 though on 30-10-2017, on the request of the learned counsel for the appellant, the same was dismissed as being rendered infructuous but no objection was raised by the learned counsel for the petitioners /respondent, then.

5. Admitted fact in between the parties are that the services of the petitioners were regularized in the year 2003 and further, the special appeal, which was preferred by the Lucknow Development Authority, is dismissed as

infructuous as no objection was raised by the learned counsel for the petitioners against the statement given by the learned counsel for the appellants/opposite parties. The fact remains that the Writ Petition (Civil) No. 853 of 1990 titled as 'Shri Ram Kishan and Ors Vs Union of India & Others' was filed by some of the employees of the Development Authority for regularization of their services directly before the Hon'ble Supreme Court, invoking powers under Article 32 of the Constitution of India, wherein, while passing the Judgment and order dated 21-02-1991 by the Hon'ble Apex Court, it was directed to the authority 'to take steps through the State of Uttar Pradesh to obtain regularization of the petitioners' as far as possible preferably within nine months from now so that by the end of the year the process of regularization may, as far as practicable be completed.'

6. Thereafter, the Apex Court clarified it's order on 04-09-1991, while observing that 'the question is one of recruitment into U.P. Development Centralised Service. For that purpose, we understand that there are a set of rules and recruitment is through the State Public Service Commission. Our direction on February, 21,1991, is obviously not intended to require regularization contrary to the rules inforce.'

7. The order dated 19-08-1992 passed in Writ Petition No. 6384 (S/S) of 1989 and Writ Petition No. 222(S/S) of 1992 was stayed in Special Appeal No. 47 of 1994 preferred by the Lucknow Development Authority on 23-11-1995. It is also said that since the petitioners were appointed against the posts, which come under the purview of U.P. Public Service Commission and since there were no rules with respect to the

regularization of such appointees and thus, several exercise is said to be done by the State Government and ultimately, on 22-07-1997, the petitioners under the special circumstances, a select list was issued wherein, the names of the petitioners also find place.

8. After the aforesaid select list was prepared, the same was assailed by some of the employees of the Development Authorities and an order was passed on 08-09-1997, whereby the exercise with respect to appointment of the petitioners including other similarly situated employees are done, had been declared unsustainable. Thereafter, Special Appeal No. 788 of 1997 alongwith other special appeals were preferred by the petitioners including the other employees, which was finally decided on 16-06-2000, whereby the order passed by the learned Single Judge dated 08-09-1997 was set aside. Paragraph no. H of the plaint of the Special Appeal No. 788 of 1997 preferred by the petitioners, is evident that the petitioners have sought parity of the Judgment and Order passed in Shri Ram Kishan's case (Supra). Thereafter, Civil Appeal No. 353 of 2001 was preferred, wherein, as an interim measure, the following order was passed by the Hon'ble Apex Court on 24-03-2003, which is quoted hereinunder :-

“Learned counsel for the State of U.P. submits that the State of U.P. would try to regularise the adhoc/daily wage appointees who are in service for a number of years and that said regularization would be subject to the final decision in the appeal.

In view of the aforesaid statement, learned counsel for the applicant is not pressing the applications. Hence, the applications stand disposed of

accordingly. It is made clear that no further contempt proceedings should be initiated by the parties.”

9. Thereafter, this appeal was disposed of with the following observations :-

“Heard learned counsel for the appellants and counsel for the State.

The Judgment of the Division Bench of the High Court of Allahabad dated 26-06-2000, directing regularisation of certain adhoc employees and daily wage appointees who were working as Junior Engineers. The appellants herein have already been regularised by the State pursuant to the Judgment of the High Court. However, they have raised a contention that while making regularisation these appellants were entitled to get seniority over some other candidates who were regularised by the respondent-State. If there is such a dispute regarding inter-se seniority of regularised candidates, they challenge the same before an appropriate forum. We see no justification to consider such a question in these appeals.

The appeals are disposed of without prejudice to such contentions raised by the appellants.”

10. Now, it emerges out that the services of the petitioners have been regularized on 23-07-2003, while amendment in the rule 20-A of Rules 1985.

11. Contention of learned counsel for the petitioners is that on place of regularization of the services of the petitioners within a period of nine months from the date of the Judgment and Order dated 19-08-1992, the same is done w.e.f. 23-07-2003. He submits that the Judgment

and Order dated 19-08-1992 passed in Writ Petition No. 7638 (S/S) of 1989 (Vijay Kumar Srivastava and Others Vs State of U.P. and Others), has never been modified, altered or changed in any proceeding before any court of law and the Amendment Application moved in Special Leave to Appeal (C) Nos. 2332-2333 of 2023 has also been dismissed on 19-10-2023 and the Special Appeal No. 39 of 1993 (Lucknow Development Authority and Others Vs. Vijay Kumar Srivastava and Others) filed against the Judgment and Order dated 19-08-1992, was stayed and the same was dismissed as infructuous, on 30-10-2017, on the statement of the learned counsel for the appellants that the order passed by the Single Judge has been complied with, though the statement given by the appellant was incorrect and misleading and the present contempt petition has been filed after the Special Appeal No. 39 of 1993 was dismissed. He further argued that the exercise, which is said to be done in the year 1997 for appointing/treating the petitioners as adhoc employees, is not in compliance of the Judgment and order dated 19-08-1992, as no reference is made, in the order dated 22-07-1997.

12. Further, submitted that in the Judgment and order passed in Shri Ram Kishan's Case (Supra), it is evident that the directions are flexible as the words are used 'as far as possible preferably within nine months' and so far as the Judgment and Order dated 19-08-1992 is concerned, there is a specific direction that 'to take steps to obtain regularization of the services of these petitioners within nine months'. Therefore, submission is that the period prescribed for regularization of the services of the petitioners is very particular and that has not been interfered at any stage before

any higher forum/court and thus, it is not open for the opposite parties to make any interpretation of the direction of this court as per their own facility and thus, it is not the second set of regularization, but the regularization of the petitioners should have been done, since the year 1992, that too, within a period of nine months, which apparently, has not been done. Further more, the S.L.P. has also been dismissed by the Hon'ble Apex Court regarding any interference in the order of the year 1992 and it is open for the petitioners to press their contempt petition.

13. He further contended that the petitioners were not the parties in the case of Shri Ram Kishan (Supra) and even the order dated 22-07-1997 also does not disclose that the Judgment and order passed by the writ court is also taken care of and the petitioners could not approach this court by way of instituting the contempt petition, prior to the decision in the Special Appeal No. 39 of 1993 as the Judgment and Order dated 19-08-1992 was stayed and as soon as the same was dismissed, the petitioners have preferred the present contempt petition. Infact the petitioners were not in a position to refuse their regularization w.e.f. 23-07-2003 as the interim order was stayed and the petitioners were not in a bargaining position as they had no option to insist that they should be regularized within nine months, from the date of the Judgment dated 19-08-1992.

14. In support of his contentions, he has placed reliance on the Judgment reported in *(2021)10 SCC, 166 (Somesh Thapliyal and another Vs Vice Chancellor H.N.B. Garhwal University and another)* and has referred paragraphs nos. 43 & 44 of the said judgment, which are quoted hereinunder :-

43. *The bargaining power is vested with the employer itself and the employee is left with no option but, to accept the condition dictated by the authority. If that being the reason, it is open for the employee to challenge the conditions if it is not being in conformity with the statutory requirement under the law and he is not stopped from questioning at a stage where he finds himself aggrieved.*

44. *In the instant case, they lodged the protest petition and brought their grievances to the notice of the respondents but were unable to question except to pray to the Almighty to consider their grievances sympathetically."*

15. Adding his arguments, he submits that there is no concealment of facts by the petitioners in contempt petition and if any word is left to be transcribed but the paragraph discloses the sense of the word left to be mentioned, could not be termed as the concealment of facts and it is mere an inadvertence or typographical error. He also added that the opposite parties have failed to substantiate with any of the counter attack that there is any intentional concealment of facts on the part of the petitioners, may be there are certain documents left to be annexed alongwith the pleadings exchanged in the contempt proceedings.

16. Concluding his arguments, he submits that admittedly, the regularization is done since 23-07-2003 and the Judgment and Order dated 19-08-1992 is very clear in it's term of directions that the opposite parties shall take steps to obtain regularization of the petitioners, which has apparently not been done even after passing of more than three decades and the Judgment and Order dated 19-08-1992 is

still intact. Therefore, submission is that the opposite parties have committed wilful and deliberate contempt of the Judgment and Order passed by the writ court and thus, they may be dealt with strictly, in accordance with the provisions contained in Contempt of Courts Act, 1971.

17. On the other hand, Sri Upendra Nath Mishra, learned Senior Counsel appearing for the opposite party no. 3 has very vehemently opposed the contentions aforesaid and submitted that after the Judgment and Order dated 19-08-1992, there are several developments, as various set of writ petitions, special appeals and S.L.Ps, were filed and the opposite parties after making their best efforts, have made compliance of the order dated 19.08.1992.

18. While craving the leave to put a brief history of appointment of the petitioners for proper adjudication, he submits that the petitioners were initially engaged as work-charge Junior Engineers by the Lucknow Development Authority, though the said posts are a centralised services post, which falls within the purview of the U.P. Public Service Commission and there were neither any rules for regularization of daily wage/work-charge employees working on the centralized posts covered under the U.P. Public Service Commission nor there were sufficient number of sanctioned posts of Junior Engineers to accommodate all the daily wage and muster roll employees and therefore, efforts were made by the state authorities to ensure compliance of the Judgment and Order dated 19-08-1992 passed in the writ petition of the petitioners, as after, creating supernumerary posts by resorting to the cabinet approval, the services of the petitioners were regularized on 23-07-2003.

Further submitted that that it is an admitted fact that the Judgment and order dated 19-08-1992 was passed by Hon'ble Single Judge while referring the Judgment and Order dated 21-02-1991 passed in case of Shri Ram Kishan's and later on, the Lucknow Development Authority, had filed an Special Appeal, wherein the Judgment and Order dated 19-08-1992 was stayed uptill 30-10-2017; as there were six other directions in the Judgment and Order dated 19-08-1992 and undisputedly, those were complied, within period of nine months as was directed by the writ court, but, so far as the grievance of the petitioners with respect to alleged non compliance of the one of the direction i.e. 'to take steps to obtain regularization of the petitioners' is concerned, because of non existence of rules of regularization, the certain exhaustive exercise was done by the State authorities positively and ultimately, the select list could be prepared on 22-07-1997, though thereafter, also the same was challenged and the Hon'ble Single Judge found it unsustainable and thereafter, Special Appeals were preferred by certain other employees including the present petitioners also, which were allowed and after long running litigations, the exercise could reach to it's logical end, in the year 1997 and thereafter, finally the services of the petitioners could be regularized in the year 2003. These exercises are done resorting to the cabinet decision as there was no rule of regularization, which shows the earnest endeavour of the opposite parties regarding the compliance of the orders passed by this court as well as by the Hon'ble Apex Court, as is evident from the order dated 22-07-1997.

19. Further rebutting the contention of learned counsel for the petitioners regarding the difference in the directions

given in the case of Shri Ram Kishan (Supra) and the Judgment and Order dated 19-08-1992, he submits that the Judgment and Order dated 19-08-1992 is 'not to obtain the regularization but, to take steps for obtaining regularization' and thus, it opens to the opposite parties to carry out the necessary formalities and to adhere to the rules of regularization for obtaining regularization as the claim of the petitioners for the regularization was on the posts, which comes under the purview of U.P. Public Service Commission and since the petitioners were not the adhoc employees, as they were appointed on daily wages, which is an admitted fact, and there were no rules prevalent at that point of time, with respect to regularization of the services of the daily wage employees, on the posts, under the purview of U.P. Public Service Commission, therefore, in compliance of the order passed in the case of Shri Ram Kishan (Supra) as well as the Judgment and Order dated 19-08-1992, a detailed exercise was done and while resorting to the cabinet proceedings, the select list dated 22-07-1997 was prepared and thereafter, the amendment in the rules 1985 was done on 02-08-2001 and the services of the petitioners were regularized with effect from 23-07-2003.

20. Drawing attention towards the order dated 30-10-2017, by which the Special Appeal No. 39 of 1993 was dismissed, he submits that the petitioners were the parties over there, but, they did not make any objection to the statement given by learned counsel for appellant or the Lucknow Development Authority, as it was said that the special appeal has become infructuous. He added that once the select list dated 22-07-1997 was challenged and said list was quashed, the petitioners by way of moving an special appeal,

challenged the said order passed by the learned Single Judge and they succeeded in the special appeal. Further, the opening sentence of the select list dated 22-07-1997 is evident that the same is done in compliance of the order passed by the High Court as well as by the Hon'ble Apex Court, though, the description is not given, but it is clear that the said exercise is not aloof but, the same is in compliance of the orders passed by the Courts. He submits that in the Judgment and Order dated 19-08-1992, the Judgment and order passed in the case of Shri Ram Kishan (Supra) was also considered and thereafter, when all the exercises are done and the petitioners have been accorded the benefit of regularization, even all the proceedings regarding challenge of the select list; was in the knowledge of the petitioners and they took the benefit of the same, now at this stage, they are claiming that there is non compliance of the Judgment and Order dated 19-08-1992, though they never challenged the select list dated 22-07-1997 and are regularized on the very basis of the same.

21. Adding his arguments, he submits that the petitioners did not disclose the complete facts and documents while preferring the contempt petition as they did not disclose the Judgment and Order of the Hon'ble Apex Court, which is relevant for adjudication of the contempt petition and he tried to demonstrate that the same has not been disclosed deliberately and thus, his submission is that there are certain implications of concealment of facts before the court; for which the petitioners should be dealt with strictly, and also added that the contempt petition is not maintainable on the ground of suppression of material facts; as the petitioners are not with the clean hands and there are clear cut

misrepresentation and deliberate suppression of the facts and the documents.

22. Further contended that there is no wilful, deliberate or intentional disobedience of the Judgment and the directions dated 19-08-1992, passed by the writ court and law is very clear on this point as the provisions of Contempt of Courts Act as well as several verdicts of the Hon'ble Apex Court is very clear that while punishing a contemnor for non compliance of the order and direction of the court, the court must satisfy that the disobedience is deliberate and intentional.

23. Concluding his arguments, he submits that because of the foregoing reasons, stated in the preceding paragraphs, the petitioners have failed to put their case under the four corners of the wilful disobedience as is defined under section 12 of the Contempt of Courts Act, 1971 and the petitioners are not with clean hands before this court as there are material suppression of facts in the contempt petition itself. Therefore, submission is that this contempt petition is liable to be dismissed.

24. Having heard learned counsels for the parties and after perusal of material placed on records, it transpires that the Judgment and Order dated 19-08-1992 was passed in Writ Petition No. 222(S/S) of 1992 connected with Writ Petition No. 6384 (S/S) of 1989 filed by the Junior Engineers, initially appointed on work-charge basis in the years 1984,1985 and 1987 alongwith clerks and Class-IVth employees of the development authorities of centralised services department (hereinafter referred to as 'centralised services'). The writ court issued, as many as seven directions and the opposite parties

were directed to make compliance of the order within a period of nine months.

25. Undisputedly, except apart the issue with respect to regularization of the services of the petitioners, all other directions/orders passed by the writ court, in the aforesaid writ petitions have been complied with, within period prescribed by the writ court, but, so far as regularization of services of the petitioners is concerned, it went upto the long litigations in between the parties. From the Judgment and order dated 19-08-1992, it is evident that the Writ Petition(Civil) No. 853 of 1990 titled as 'Shri Ram Kishan and Ors Vs Union of India & Others', was directly preferred before the Hon'ble Apex Court by some of the identically situated employees of the centralised services under Article 32 of the Constitution of India, wherein the Judgment and Order was passed on 21-02-1991; and subsequently, clarifying it's order dated 21-02-1991, an order was passed by the Hon'ble Apex Court on 04-09-1991, which briefly says 'not intended to ensure regularization contrary to the rules inforce.' The writ petition of the petitioners were decided relying upon the case of Shri Ram Kishan(Supra), which is referred in paragraph no. 20 of the Judgment and Order dated 19-08-1992 and similar directions were issued as given in Shri Ram Kishan's Case (Supra) by the Hon'ble Apex Court, though the learned counsel for the petitioners has tried to demonstrate the difference in between the Judgment and Order passed by the Hon'ble Apex Court in Shri Ram Kishan's Case (Supra) as well as in the Judgment and Order dated 19-08-1992, while pointing out that in the direction of Shri Ram Kishan's Case (Supra), the same is flexible as the words 'possible and preferably' are used, but, in the Judgment and Order dated 19-

08-1992, the time prescribed is strict and there is no liberty given to the opposite parties to go beyond the time prescribed, but, while going through both the directions, the start wordings is common i.e. 'to take steps' and therefore, this court finds that so far as the purposive interpretation applies the words 'to take steps' qualifies the rest part of the direction and once this court examines the steps taken by the opposite parties regarding the regularization of services of the petitioners, it emerges that admittedly, there was no rules or regulations to regularize the services of work-charge or daily wage employees on the posts, which come under the purview of U.P. Public Service Commission and therefore, State Government started exhaustive exercise so as to make the appointment of the petitioners on adhoc basis and therefore, after great deliberations with U.P. Public Service Commission by way of putting a cabinet note, an amendment was got done, which is known as '**The Uttar Pradesh Development Authorities Centralised Services (7th Amendment Rules,2001)**' and prior to it, on 22-07-1997, a select list was prepared, wherein the names of the petitioners also find place.

26. Notably when the select list dated 22-07-1991, was prepared, the same was assailed by way of instituting Civil Misc. Writ Petition No. 1907 of 1995, alongwith other connected writ petitions, which were finally decided vide Judgment and Order dated 08-09-1997, whereby the writ court found that the exercise, which has been done, with regard to selection for making adhoc appointments against substantive post, is unsustainable in the eyes of law, whereafter, the same was assailed by way of an Special Appeal bearing no. 792 of 1997 alongwith other connected special

appeals, wherein the petitioners including Shri Ram Kishan also filed Special Appeal No. 788 of 1997, which were finally decided on 26-06-2000 and it was directed that the State Government shall reconsider the claim for regularization of the services of the Junior Engineers in accordance with the provisions contained in Rule 20-A of U.P. Development Authorities Centralised Service Rules, 1985 (hereinafter referred to as 'Rules 1985') and the liberty was given to make amendment in the Rule 20-A; as aforesaid. The Rule 20-A of the Rules 1985, was amended and thereafter, an S.L.P. bearing no. 356 of 2001 along with other S.L.Ps were preferred before the Hon'ble Apex Court and the same was finally decided on 20-04-2006, wherein the following order was passed :-

“Heard learned counsel for the appellants and counsel for the State.

The Judgment of the Division Bench of the High Court of Allahabad dated 26.6.2000, directed regularisation of certain adhoc employees and daily wage appointees who were working as Junior Engineers. The appellants herein have already been regularised by the State pursuant to the Judgment of the High Court. However, they have raised a contention that while making regularisation these appellants were entitled to get seniority over some other candidates who were regularised by the respondent-State. If there is such a dispute regarding inter se seniority of regularised candidates, they challenge the same before an appropriate forum. We see no justification to consider such a question in these appeals.

The appeals are disposed of without prejudice to such contentions raised by the appellants.”

27. From perusal of the order dated 20-04-2006 passed by the Hon'ble Apex Court, it transpires that the Hon'ble Apex Court while considering the facts that the services of the appellants/petitioners have already been regularized by the State Government and therefore, further dispute of inter-se seniority etc. were open to be challenged before the appropriate forum.

28. In all these exercises, the petitioners were the parties and the facts were fully in the knowledge of the petitioners that though the State Government was intended to regularize the services of the petitioners, but, since the several writ petitions, special appeals and S.L.Ps were preferred and therefore, the delay occurred, which is not done intentionally.

29. It is apparent from the directions given in the Judgment and Order dated 19-08-1992 that the opposite parties will proceed to take steps for regularization and the records, which were preferred through the pleadings before this court, are evident that the State Government was in a continuous process of undertaking steps for regularization of the services of the petitioners including the other identically situated employees of the 'centralised services department' and therefore, the directions cannot be gone into aloof. So far as the allegation of deliberate defiance is raised by the petitioners, the fact remains that the petitioners were not adhoc employees and further from perusal of the Judgment and Order dated 19-08-1992, it is also apparent that the writ court was cautious enough regarding variations of the posts falling under the purview of the U.P. Public Service Commission and outside of the purview of U.P. Public Service Commission and therefore, as on

immediate direction, it is observed that 'if the posts are not within the purview of U.P. Public Service Commission, the opposite party will regularize the services of the petitioners, within the said period.' This clearly shows that the exercise and steps, which are necessarily to be carried out, were in the knowledge of the writ court and the writ court could not have speculated that number of litigations would be instituted in future and which will cause delay in exercise of regularization proceedings.

30. The Judgment and Order dated 19-08-1992 was assailed in Special Appeal No. 39 of 1993, wherein an interim order was passed and the Judgment and Order dated 19-08-1992 was stayed and the Special Appeal No. 39 of 1993 was finally decided on 30-10-2017, on the statement of the appellants that the special appeal has been rendered infructuous, though no objection was ever raised by the counsel for the petitioners at that point of time.

31. If the petitioners are taking a stand that the exercise of preparing the select list was carried out vide order dated 22-07-1997, wherein the names of the petitioners also find place, but, the same was never challenged by them, which shows that principally the petitioners, were satisfied that some exercises are being done for regularization of their services, but, as soon as the order dated 22-07-1997 was found as unsustainable by Hon'ble Single Judge in the writ petitions, the petitioners immediately ran to challenge the same by way of instituting special appeals and ultimately, they succeeded and thereafter, the exercise was done and admittedly, their services were regularized in the year 2003.

32. Further there was no provision under 20-A of the Rules, 1985 regarding regularisation of daily wage or muster roll employee against the post comes under purview of U.P. Public Service Commission and therefore, the Rules were amended vide 7th Amendment, 2001 and thereafter, the regularization exercise became possible, particularly, with respect to the petitioners, which indicates the earnest efforts of the State, regarding compliance of the order of the writ court.

33. This court is also aware that the interim order passed in Special Appeal No. 39 of 1993, wherein the Judgment and Order dated 19-08-1992 was stayed for quite long time and that could only be dismissed in the year 2017, when the statement was given by the appellants that the same has become infructuous.

34. When this court examines the matter on its facts and law that whether there is any deliberate or wilful disobedience on the part of the opposite parties? it borne out that there was no rule or regulation with respect to regularization of the services of the petitioners as they were not appointed on adhoc basis but, they were working as work-charge or daily wages and therefore, regularization of their services could have been done after the amendment in the rules and the petitioners have failed to substantiate that no exercise or any steps are taken or carried out, for regularization of their services. Number of letters were written by the State Government to the U.P. Public Service Commission, by the time of preparation of the select list and the effort of the State Government is apparent regarding substantive exercise for regularizing the services of the petitioners.

35. The petitioners have also failed to substantiate that the opposite parties have intentionally not considered the claim for regularization of their services and they have also failed to demonstrate that the exercises, which were being carried out by the State Government including the preparation of select list dated 22-07-1997 as well as the litigations challenging the action of the State Government while proceeding with the regularization of the services of the petitioners, were not in their knowledge.

36. While the direction in the order dated 19.08.1992, the words 'taking steps' is said meaningfully, as the same clearly encapsulates the intention and cautiousness of the writ court regarding the time taking process of regularization. At the same time, the writ court was also cautious enough regarding the nature of the posts, which are under the purview of U.P. Public Service Commission and therefore, the time which was consumed either in several set of litigations or in the exercises done to ease out the process of regularization, enough to show that the element of deliberate or intentional disobedience is missing in the present matter.

37. It is trite law that the willful and deliberate defiance of the order is pivotal aspect in so far as adjudicating the contempt proceedings against a contemnor. It is the factual matrix, which can be interpreted and looked into, to come to a final conclusion that is there any intention of the alleged contemnor to commit defiance of any order or direction passed by the court. If in a case, the contemnor succeeds to demonstrate that if a particular time or period prescribed for compliance of the Judgment and Order is disobeyed for some reasonable causes or those were not

within the approach of such contemnor or such disobedience is the out-come of some compelling circumstances which created impossibility for the contemnor to comply with the order, the same cannot be termed as wilful or deliberate contempt, though this could be considered on the facts of each and every case. Hon'ble Apex Court has also considered the issue with respect to wilful and deliberate contempt in the case of Rama Narag Vs. Ramesh Narang and Others, Contempt Petition (Civil) No. 92 of 2008, Kunwar Singh Saini Vs High Court of Delhi, 2012(4) SCC 307 and 1994(6)SCC 332 and the case of the contemnors/opposite parties is squarely covered with the ratio of the Judgment abovesaid.

38. In view of abovesaid submissions and discussions, no contempt is made out against the contemnors/opposite parties. Consequently, the contempt notices are hereby discharged.

39. The contempt petition is **dismissed** accordingly.

40. Consigned to records.

(2024) 4 ILRA 68
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.04.2024

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Criminal Misc. Writ Petition No. 11838 of 2023
 With
 Criminal Misc. Writ Petition No. 11837 of 2023

Himri Estate Pvt. Ltd. & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:

Sri Varad Nath

Counsel for the Respondents:

G.A.

Criminal Law - Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 - Sections 13, 14, 17 & 32 - Indian Penal Code, 1860 - Sections 420, 120-B - Registration Act, 1908 - Section 82 - Constitution of India, 1950 - Article 226

- Petitioners challenged FIR dated 22.07.2023 alleging fraudulent transfer of property under SARFAESI Act, claiming it was a civil dispute and an abuse of process. Court held: (1) FIR filed by defaulter-borrower company, after failing to secure relief against SARFAESI proceedings in multiple forums, was an attempt to scuttle lawful auction of secured asset (Plot No. 9, Ahinsakhand, Ghaziabad) (K. Virupaksha Vs St. of Karn., (2020) 4 SCC 440). (2) Issues regarding valuation, auction legality, or alleged encroachment beyond transferred property are civil in nature, exclusively triable by Debt Recovery Tribunal (DRT) under Section 17 of SARFAESI Act, not through criminal proceedings (Indian Overseas Bank Vs Ashok Saw Mill, (2009) 8 SCC 366). (3) Section 32 of SARFAESI Act protects actions taken in good faith by secured creditors, barring prosecution unless mala fides are established (Priyanka Srivastava Vs St. of U.P., (2015) 6 SCC 287). (4) Vague allegations of encroachment without specifics and absence of Section 441 I.P.C. charge rendered FIR unsustainable, as criminal proceedings cannot override DRT's jurisdiction. (5) Allowing FIR would enable defaulters to misuse criminal process to challenge SARFAESI actions, undermining legislative intent of specialized tribunals. FIR quashed; petitions allowed. (Paras 14-23)

Writ Petitions Allowed.**List of Cases cited:**

1. K. Virupaksha Vs St. of Karn., (2020) 4 SCC 440 (Para 20)

2. Indian Overseas Bank Vs Ashok Saw Mill, (2009) 8 SCC 366 (Para 20)

3. Priyanka Srivastava Vs St. of U.P., (2015) 6 SCC 287 (Para 21)

4. Army Headquarters Vs CBI, (2012) 6 SCC 228 (Para 20)

(Delivered by Hon'ble Ashwani Kumar Mishra, J.

&

Hon'ble Ashutosh Srivastava, J.)

1. Petitioners have invoked the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India, challenging the First Information Report lodged against them on 22.07.2023, registered as Case Crime No.611 of 2023, under Sections 420, 120-B of IPC and Section 82 of Registration Act, 1908, Police Station - Kavi Nagar, District – Ghaziabad. It is urged that the FIR is maliciously instituted in respect of a civil dispute and is thus an abuse of the process of law. It is also urged that the first informant has lodged the FIR on behalf of the borrower company, which undertook loan and defaulted in its repayment, on account of which proceedings were initiated in accordance with the provisions of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the 'SARFAESI Act'). Borrower company since has failed to seek any protection before the competent forum, in respect of coercive proceedings under the SARFAESI Act, it has lodged the impugned FIR with the intent to pressurize the finance company as well as auction purchaser to withdraw lawful actions initiated against the borrower/defaulters. Prayer accordingly is made to quash the aforesaid FIR.

2. We have heard Sri Gopal S. Chaturvedi and Sri Siddharth Agarwal (through VC), learned Senior Advocate assisted by Sri Dhruv Kapur, Sri Debashish Chauhan, Sri Varad Nath, Sri Rajan Kohli, Sri Divya Lamba, Sri Maharshi Kaler and Sri Chiranjivi Sharma (through VC), Advocates for the petitioners in Writ Petition No. 11838 of 2023; Sri Anoop Trivedi, learned Senior Advocate assisted by Sri Raghav Dwivedi, Advocate for the petitioner in Writ Petition No. 11837 of 2023 and Sri Syed Imran Ibrahim, learned counsel for the first informant/respondent no. 3 and Sri J.K. Upadhyaya and Sri Pankaj Kumar, learned AGA for the State and perused the materials on record.

3. The writ petition was entertained and despite the matter being deferred on different occasions no counter affidavit has been filed in the matter. When the matter was taken last on 14th March, 2024, following orders were passed:-

“Learned State Counsel as well as Sri Syed Imran Ibrahim, learned counsel appearing for the private respondents pray for and are allowed three weeks and no more time to file counter affidavit. Rejoinder affidavit may be filed within one week thereafter.

List this case on 15.04.2024.”

4. Though a stop order was passed granting last opportunity to the informant and the State to file a counter affidavit the respondents have not chosen to file any counter affidavit in the matter so far. Since opportunity to file counter affidavit has not been availed, we proceed with the hearing of the matter treating the averments made in the writ petition to be correct by applying the doctrine of *non-traverse*.

5. The first informant i.e. respondent no.3 claims to be a resident of District Ghaziabad and authorized representative of M/s Shipra Hotel Private Limited, a company registered under the Companies Act. Allegation in the first information report is that Plot No. 9, Ahinsakhanda, Indirapuram, District Ghaziabad is owned by M/s Shipra Hotel Private Limited on which a Shipra Mall was constructed, which has been fraudulently and unauthorizedly transferred to the owners of M/s Himri Estate Pvt. Ltd. namely, Sumit Kumar Narwar through its authorized representative Rajeev Goel, by Smt. Reena Bagga, authorized representative of M/s India Bulls Housing Finance Limited on 12.5.2023 by way of a registered transfer deed for a consideration of Rs.551 crores, although its value is Rs.2000 crores so as to cause financial loss to the U.P. Government. It is also alleged that Sumit Kumar Narwar by exercising undue influence and extending threats has got the agreement entered into between Shipra Mall and Shipra Estate and other companies cancelled. The FIR further recites that a securitization appeal raising such issue is pending before the Debt Recovery Tribunal at Lucknow. It is also alleged that in addition to the property kept as mortgaged certain other property has also been encroached by M/s Himri Estate Private Limited, though such property was not specifically kept as mortgage with M/s India Bulls Pvt. Ltd. Allegations are also made that the accused persons are influential and despite a complaint made to the concerned Police Station Incharge no action has been taken and, therefore, request has been made to the Chief Minister of the State of U.P. to take appropriate steps to ensure justice for the informant.

6. The first information report is challenged by the two petitioners namely M/s Himri Estate Private Limited and its

officer-bearers (hereinafter referred to as the 'auction purchasers') as well as Smt. Reena Bagga authorized representative of M/s India Bulls Housing Finance Limited as well as M/s India Bulls Housing Finance Limited a non-banking finance company limited incorporated under the provisions of the Indian Companies Act, 1956 (hereinafter referred to as the 'Finance Company').

7. The petitioners state that Plot No. 9, Ahinsakhanda, Indirapuram, District – Ghaziabad, on which Shipra Mall was established by M/s Shipra Hotel Private Limited, was kept as mortgage with the Finance Company in lieu of loan availed by M/s Shipra Hotel Private Limited and its sister concerns (hereinafter referred to as the 'borrower') of approximately Rs.2000 crores. It is asserted that the borrower company has defaulted in repayment of loan amount to the finance company. It is thereafter that the finance company proceeded to recover its dues from the assets of the borrower company, which were kept as mortgage, for securing the loan.

8. According to petitioners about 16 loan agreements were entered into between the finance company and the borrower company details whereof are mentioned in para 30 of writ petition no. 11837 of 2023. It is also asserted in para 33 of the said petition that in order to secure the loan amount the borrower company has kept various assets as mortgage with the finance company which included Plot No. 9, Ahinsakhanda, Indirapuram, District Ghaziabad on which exists the Shipra Mall.

9. It is further stated that on account of default in repayment of loan by borrower company, proceedings were initiated under

the SARFAESI Act with issuance of a notice under Section 13(2) of the SARFAESI Act on 28.7.2021 in respect of the property in question i.e. Plot No.9, Ahinsakhanda, Indirapuram, District Ghaziabad. This notice was acknowledged by the borrower company vide its reply dated 25.9.2021. Jurisdiction under Section 14 of the SARFAESI Act was then invoked by the competent authority who passed an order on 30.5.2022 permitting taking of possession of the property in question i.e. Plot No.9, Ahinsakhanda, Indirapuram, District Ghaziabad.

10. Action taken under Section 14 of the SARFAESI Act was challenged by the borrower company by filing writ petition no. 22594 of 2022 before this Court. A Co-ordinate Bench by a detailed judgment dismissed the writ petition on 25th November, 2022. Aggrieved by this order, the M/s Shipra Hotels Limited and another approached the Hon'ble Supreme Court by filing Special Leave Petition (Civil) No. 40574 of 2022, which was dismissed as withdrawn on 28th February, 2023, vide following orders:-

"1. Upon being mentioned, taken on board.

2. Mr Sajan Poovayya, senior counsel appearing on behalf of the petitioners, states that the petitioners are advised to withdraw the Special Leave Petition so as to pursue the alternate remedy which is available under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 before the Debts Recovery Tribunal.

3. Since the Special Leave Petition is not pressed, we clarify that this Court has not expressed any opinion on the merits.

4. *The Special Leave Petition is dismissed as withdrawn.”*

11. The borrower company also invoked arbitration proceedings and an order came to be passed by the learned arbitrator on 30.8.2022 staying the auction proceedings initiated by the finance company. This order was challenged before the Delhi High Court in arbitration appeal under Section 37 of the Arbitration and Conciliation Act, 1996. The appeal was allowed by the Delhi High Court on 21st February, 2023. The Delhi High Court set aside the order passed by the Arbitrator and allowed the auction proceedings to proceed as per law.

12. The order of Delhi High Court was then challenged by the borrower company before the Supreme Court and the SLP was withdrawn vide following orders on 24.4.2023:-

“1. Mr CA Sundaram, senior counsel appearing on behalf of the petitioner seeks liberty to withdraw the Special Leave Petition on the ground that the petitioner has been advised to pursue its remedies under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act.

2. The Special Leave Petition is dismissed as withdrawn with liberty to pursue remedies under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act.”

13. Our attention has been invited by Sri Anoop Trivedi appearing for the petitioner in writ petition no. 11837 of 2023 to the assertions made in para 12 of the writ petition which refers to various steps taken by M/s Shipra Hotel for challenging the proceedings initiated under

the SARFAESI Act. For the sake of convenience we reproduce the chart contained in para 12 of the writ petition:-

Sl. No.	Case No.	Particulars	Forum	Status
		Application under Section 17 of the A & C Act.	Ld. Sole Arbitrator	The Application was allowed by the Ld. Sole Arbitrator vide Order dated 30.08.2022, which was set aside in Appeal by the Hon'ble Delhi High Court vide Order dated 21.02.2023. The Shipra Group has preferred SLP(C) No. 7084-7089/2023 against the Order dated 21.02.2023 which has also been dismissed as withdrawn by Shipra Group vide order dated 24.04.2023.
2.	W.P.(C) No. 22594 /2022	Writ Petition under Article 226 of the Constitution of India challenging the Order of the Ld. District Magistrate dated 30.05.2022.	This Hon'ble Court	Dismissed vide Order dated 25.11.2022.
3.	SLP(C) Diary No. 40574 /2022	Special Leave Petition under Article 136 of the Constitution of India challenging the Order dated 25.11.2022.	Hon'ble Supreme Court	Dismissed as withdrawn vide Order dated 28.02.2023.
4.	S.A. No. 906/2022	Securitization Application dated 17.12.2022 under Section 17 of the SARFAESI Act challenging the possession and sale notice dated 12.12.2022.	Debt Recovery Tribunal	Dismissed vide Order dated 16.03.2023.
5.	Matters under	Writ Petition under Article 227 of the Constitution	This Hon'ble Court	Dismissed vide Order dated

	Article 227 No. 1501/2023	of India challenging the Order dated 16.03.2023 passed by the Ld. DRT		28.03.2023
6.	S.A. No. 248/2023	Securitization Application dated 22.03.2023 under Section 17 of the SARFAESI Act challenging the possession.	Debt Recovery Tribunal	Dismissed vide Orders dated 19.04.2023
7.	S.A. No. 337/2023	Securitization Application under Section 17 of the SARFAESI Act challenging the sale notice dated 08.04.2023	Debt Recovery Tribunal	Pending adjudication of maintainability. However, no stay has been granted.
8.	S.A. No. 469/2023	Securitization Application under Section 17 of the SARFAESI Act challenging the sale dated 27.04.2023 and valuation.	Debt Recovery Tribunal	Pending adjudication. However, no stay has been granted.

14. Various steps in accordance with the provisions of the SARFAESI Act were then undertaken by the finance company against the borrower company in respect of property in question. Notice of sale in terms of Rule 8(6) read with Rule 9(1) and its proviso to the Security Interest (Enforcement) Rules, 2002 was issued lastly on 8.4.2023. E-auction notice was published in newspaper on 11.4.2023 in respect of Plot No.9, Ahinsakhanda, Indirapuram, District Ghaziabad (excluding specified shops on lower ground floor and first floor) under the Rules framed under the SARFAESI Act. It is asserted that pursuant to these lawful proceedings initiated under the SARFAESI Act the property popularly known as Shipra Mall has been transferred by the finance company in favour of M/s Himri Estate Private Limited (the auction purchaser). The petitioners have also brought on record the sale certificate issued in favour of the auction purchaser on 10.5.2023. It is also pointed out that the proceedings initiated under the SARFAESI Act have been challenged by the defaulter-borrower

company by instituting Securitization Application No. 906 of 2022 and the same is engaging attention of DRT at Lucknow. It is submitted that lawful proceedings initiated under the SARFAESI Act cannot be assailed at the instance of a defaulter by lodging an FIR as the same amounts to an abuse of the process of law.

15. So far as the allegation in the FIR with regard to petitioners having encroached upon other property of M/s Shipra Group is concerned, it is argued vehemently on behalf of the petitioners that neither the property allegedly encroached upon has been specified, nor any details in that regard have been mentioned. It is submitted that the auction purchaser has taken possession of the properties of the borrower on Plot No.9, Ahinsakhanda, Indirapuram, District Ghaziabad popularly known as Shipra Mall. It is pointed out that there is no allegation of trespass and the FIR has not even been registered under Section 441 IPC. Contention is that in the absence of any details furnished in the FIR with regard to the property allegedly encroached upon it would not be open for the petitioners to effectively controvert such vague allegations. It is nevertheless asserted that the petitioners have not encroached upon any land and its possession is restricted only to the property which has been validly obtained in public auction, for lawful consideration, under the provisions of the SARFAESI Act.

16. The first information report in the present case has been lodged by the first informant on behalf of the defaulter-borrower company i.e. M/s Shipra Group. The assertions made in the writ that finance to the tune of Rs. 2000 crores has been availed by the borrower company from the finance company i.e. petitioner no.2, in

Writ Petition No.11837 of 2023, remains undisputed. The further assertion that the borrower company i.e. M/s Shipra Group has failed to repay the loan availed from the finance company i.e. M/s India Bulls Housing Finance Ltd. equally remains undisputed. Records further reveal that on account of failure on part of the borrower company to repay the loan availed by it various steps have been taken by the finance company i.e. M/s India Bulls Housing Finance Ltd. by invoking the provisions of the SARFAESI Act. A notice under Section 13(2) of the SARFAESI Act has been issued on 28.7.2021. This notice is followed with steps taken under Section 13(4) of the Act. Auction notices have also been issued pursuant to which the property identified as Plot No. 9, (except specified shops on the lower ground floor and first floor) has been transferred by the finance company i.e. M/s India Bulls Housing Finance Ltd. to M/s Himri Estate Private Limited. Sale certificate is also on record, which would go to show that the property has been transferred on a consideration of Rs. 551 crores. Stamp duty has also been paid of Rs. 38,57,00000/-. It is otherwise acknowledged by the informant that action taken under the SARFAESI Act resulting in transfer of property in question to M/s Himri Estate (auction purchaser) is subject matter of challenge in Securitization Application No. 906 of 2022.

17. It is also reflected from the materials placed on record that repeated attempts of the defaulter-borrower company M/s Shipra Hotel Limited to assail the ongoing auction proceedings before the competent forum, where such issues can be examined, have not succeeded, so far. The matter is otherwise sub-judice before the Debt Recovery Tribunal at Lucknow. It is in this context

that this Court is required to consider as to whether proceedings initiated under the SARFAESI Act, 2002 culminating in auction of secured assets can be questioned by lodging an FIR?

18. Records reveal that the secured asset i.e. Plot No.9, Ahinsakhand, Indirapuram, District Ghaziabad has been transferred to the auction purchaser M/s Himri Estate Pvt. Ltd. by the secured creditor M/s India Bulls Housing Finance Ltd. pursuant to the proceedings undertaken under the SARFAESI Act. Though the defaulter company has instituted various proceedings before different forums to stall the auction proceedings but without any success. The matter is otherwise pending before the competent forum i.e. the Debt Recovery Tribunal, Lucknow. Such auction proceedings conducted under the SARFAESI Act cannot be allowed to be challenged by lodging an FIR as it would amount to opening a new avenue for the defaulter to challenge the auction proceedings, which is not countenanced in law. We are, therefore, of the considered opinion that the FIR at the instance of the defaulter company on the allegations contained therein cannot be allowed to proceed any further as it would amount to an abuse of the process of law.

19. Once that be so, we fail to understand as to how a first information report can be lodged in respect of various transactions undertaken by the finance company culminating in transfer of property in question to the auction purchaser. We are, therefore, of the view that impugned FIR could not have been lodged at the instance of the defaulter company which is already contesting this matter before DRT at Lucknow. In the

event we allow first information report of the present kind to be entertained, it would only enable the defaulter-borrower company getting another avenue to challenge the auction proceedings, on the pretext of criminal action, against the finance company or the auction purchasers.

20. The issue as to whether legality of the auction proceedings undertaken pursuant to SARFAESI Act could be questioned by lodging an FIR came to be examined by the Hon'ble Supreme Court in K. Virupaksha and Anr. vs. State of Karnataka and Anr. (2020) 4 SCC 440. The High Court of Karnataka repelled the challenge laid to the initiation of criminal action in respect of auction proceedings under the SARFAESI Act, at the instance of the defaulter-borrower. In appeal, the Supreme Court noticed the facts of the case in para 14 and after scrutinizing the scope of SARFAESI Act proceeded to hold that issues such as valuation of property or conduct of auction can be examined only in proceedings before the DRT. Consequently, the criminal proceedings initiated in respect of such issues came to be quashed. Para 14 to 18.1 of the judgment in Virupaksha (supra) are reproduced hereinafter:-

“14. The issue, however is, as to whether such proceedings by the police in the present facts and circumstances could be permitted. At the outset, the sanction of loan, creation of mortgage and the manner in which the sanctioned loan was to be released are all contractual matters between the parties. The complainant is an industrialist who had obtained the loan in the name of his company and the loan account was maintained by Canara Bank in that regard. The loan admittedly was sanctioned on 16-3-2009. When at that

stage the amount was released and if any amount was withheld, the complainant was required to take appropriate action at that point in time and avail his remedy. On the other hand, the complainant had proceeded with the transaction, maintained the loan account until the account was classified as NPA on 15-1-2013. Initially, the issue raised was only with regard to the undervaluation of the property when it was brought to sale. On that aspect, as taken note, the writ proceedings were filed and the learned Single Judge having examined, though did not find merit had reserved liberty to raise it before DRT, which option is also availed. It is only, thereafter, the impugned complaint was filed on 20-5-2016.

15. The Sarfaesi Act is a complete code in itself which provides the procedure to be followed by the secured creditor and also the remedy to the aggrieved parties including the borrower. In such circumstance, as already taken note of by the High Court in writ proceedings, if there is any discrepancy in the manner of classifying the account of the appellants as NPA or in the manner in which the property was valued or was auctioned, DRT is vested with the power to set aside such auction at the stage after the secured creditor invokes the power under Section 13 of the Sarfaesi Act. This view is fortified by the decision of this Court in Indian Overseas Bank v. Ashok Saw Mill [Indian Overseas Bank v. Ashok Saw Mill, (2009) 8 SCC 366 : (2009) 3 SCC (Civ) 403] wherein it is held as hereunder : (SCC pp. 375-76, paras 34-37)

“34. The provisions of Section 13 enable the secured creditors, such as banks and financial institutions, not only to take possession of the secured assets of the borrower, but also to take over the management of the business of the

borrower, including the right to transfer by way of lease, assignment or sale for realising secured assets, subject to the conditions indicated in the two provisos to clause (b) of sub-section (4) of Section 13.

35. In order to prevent misuse of such wide powers and to prevent prejudice being caused to a borrower on account of an error on the part of the banks or financial institutions, certain checks and balances have been introduced in Section 17 which allow any person, including the borrower, aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor, to make an application to the DRT having jurisdiction in the matter within 45 days from the date of such measures having taken for the reliefs indicated in sub-section (3) thereof.

36. The intention of the legislature is, therefore, clear that while the banks and financial institutions have been vested with stringent powers for recovery of their dues, safeguards have also been provided for rectifying any error or wrongful use of such powers by vesting the DRT with authority after conducting an adjudication into the matter to declare any such action invalid and also to restore possession even though possession may have been made over to the transferee.

37. The consequences of the authority vested in the DRT under sub-section (3) of Section 17 necessarily implies that the DRT is entitled to question the action taken by the secured creditor and the transactions entered into by virtue of Section 13(4) of the Act. The legislature by including sub-section (3) in Section 17 has gone to the extent of vesting the DRT with authority to even set aside a transaction including sale and to restore possession to the borrower in appropriate cases. Resultantly, the submissions

advanced by Mr Gopalan and Mr Altaf Ahmed that the DRT has no jurisdiction to deal with a post-Section 13(4) situation, cannot be accepted.”

(emphasis supplied)

16. We reiterate, the action taken by the Banks under the Sarfaesi Act is neither unquestionable nor treated as sacrosanct under all circumstances but if there is discrepancy in the manner the Bank has proceeded it will always be open to assail it in the forum provided. Though in the instant case, the application filed by the complainant before DRT has been dismissed and Appeal No. 523 of 2015 filed before DRAT is also stated to be dismissed the appellants ought to have availed the remedy diligently. In that direction, the further remedy by approaching the High Court to assail the order of DRT and DRAT is also available in appropriate cases. Instead the petitioner after dismissal of the application before the DRT filed the impugned complaint which appears to be an intimidatory tactic and an afterthought which is an abuse of the process of law. In the matter of present nature, if the grievance as put forth is taken note of and if the same is allowed to be agitated through a complaint filed at this point in time and if the investigation is allowed to continue it would amount to permitting the jurisdictional police to redo the process which would be in the nature of reviewing the order passed by the learned Single Judge and the Division Bench in the writ proceedings by the High Court and the orders passed by the competent court under the Sarfaesi Act which is neither desirable nor permissible and the banking system cannot be allowed to be held to ransom by such intimidation. Therefore, the present case is a fit case wherein the extraordinary power is necessary to be invoked and exercised.

17. *The appellants herein had also referred to the provision as contained in Section 32 of the Sarfaesi Act which provides for the immunity from prosecution since protection is provided thereunder for the action taken in good faith. The learned Senior Counsel for the complainant has in that regard referred to the decision of this Court in Army Headquarters v. CBI [Army Headquarters v. CBI, (2012) 6 SCC 228 : (2012) 3 SCC (Cri) 88] to contend that the defence relating to good faith and public good are questions of fact and they are required to be proved by adducing evidence. Though on the proposition of law as enunciated therein there could be no cavil, that aspect of the matter is also an aspect which can be examined in the proceedings provided under the Sarfaesi Act. In a circumstance, where we have already indicated that a criminal proceeding would not be sustainable in a matter of the present nature, exposing the appellants even on that count to the proceedings before the investigating officer or the criminal court would not be justified.*

18. *In that view, for all the reasons stated above, we pass the following:*

Order

18.1. *The complaint bearing PC No. 389 of 2016 and the order dated 20-5-2016 passed therein as also FIR No. 0152 of 2016 insofar as the appellants herein are concerned stand quashed concerned."*

21. In *Priyanka Srivastava vs. State of U.P.* (2015) 6 SCC 287 the Supreme Court considered the entertainment of application under Section 156(3) Cr.P.C. in respect of proceedings initiated under the SARFAESI Act. The Hon'ble Court emphasized that a separate procedure existed in respect of SARFAESI Act proceedings under the Recovery of Debts Due to Banks and

Financial Institutions Act, 1993 and, therefore, the Magistrate must show an attitude of care, caution and circumspection while entertaining application under Section 156(3) Cr.P.C. Section 32 of the SARFAESI Act, 2002 has been referred to and relied upon by the Court in para 32 and 33 of the judgment in *Priyanka Srivastava* (supra) which are reproduced hereinafter:-

"32. The present lis can be perceived from another angle. We are slightly surprised that the financial institution has been compelled to settle the dispute and we are also disposed to think that it has so happened because the complaint cases were filed. Such a situation should not happen.

33. *At this juncture, we may fruitfully refer to Section 32 of the Sarfaesi Act, which reads as follows:-*

"32. Protection of action taken in good faith.—No suit, prosecution or other legal proceedings shall lie against any secured creditor or any of his officers or manager exercising any of the rights of the secured creditor or borrower for anything done or omitted to be done in good faith under this Act."

In the present case, we are obligated to say that the learned Magistrate should have kept himself alive to the aforesaid provision before venturing into directing registration of the FIR under Section 156(3) Cr.P.C. It is because Parliament in its wisdom has made such a provision to protect the secured creditors or any of its officers, and needless to emphasize, the legislative mandate has to be kept in mind."

22. We have carefully perused the allegations made in the impugned First Information Report which are in respect of transfer of secured asset in favour of

auction purchaser by the secured creditor/finance company under the SARFAESI Act. Allegations that proceedings have not been lawfully undertaken or that the secured asset is undervalued are aspects which can only be examined in pending proceedings before the Debt Recovery Tribunal. The defaulter company has already approached the Supreme Court twice and such proceedings were withdrawn with liberty to approach the Debt Recovery Tribunal. The defaulter company has already approached the DRT, Lucknow where the matter is pending. Question as to whether the auction purchaser has exceeded its possession beyond the property transferred in auction purchase is also open for examination before the DRT, Lucknow. Such issues are otherwise civil in nature and cannot be allowed to be raised by lodging an First Information Report. Vague and unsubstantiated ancillary allegations made of encroachment, beyond the transferred secured asset, or alleged irregularity in conduct of auction etc. cannot be allowed to be raised by lodging an FIR and thereby vest jurisdiction in the police regarding civil issues which are required to be adjudicated exclusively by the DRT or the civil court. The tendency of the defaulter to invoke criminal proceedings for resisting coercive action under the SARFAESI Act has to be curbed. The Parliamentary vision of vesting exclusive jurisdiction in specialized tribunal viz DRT, in respect of banking transactions relating to loan, debt etc. has to be respected. Criminal proceedings cannot be pressed into action at the instance of defaulter to scuttle proceedings under the SARFAESI Act on issues exclusively triable by DRT.

23. For the reasons recorded above, these two petitions succeed and are

allowed. The First Information Report, dated 22.07.2023, registered in Case Crime No.611 of 2023, under Sections 420, 120-B of IPC and Section 82 of Registration Act, 1908, Police Station - Kavi Nagar, District - Ghaziabad is quashed.

(2024) 4 ILRA 78
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.04.2024

BEFORE

THE HON'BLE RAJAN ROY, J.
THE HON'BLE NARENDRA KUMAR JOHARI, J.

Habeas Corpus Writ Petition No. 211 of 2023

Sandeep Yadav ...Petitioner
Union of India & Ors. Versus
...Respondents

Counsel for the Petitioner:
Rajendra Prasad Mishra

Counsel for the Respondents:
A.S.G.I., Dr. Pooja Singh, Dr. Pooja Singh,
G.A.

Criminal Law - Constitution of India, 1950 – Articles 21, 22 – National Security Act, 1980 – Section 3(2) & 3(3) – Habeas Corpus Petition – Preventive Detention – Distinction Between Public Order and Law and Order – Delay in Detention Order – Subjective Satisfaction of Detaining Authority – Single Offence Without Criminal History - The petitioner, Sandeep Yadav, challenged the detention order dated 17.05.2023 passed by the District Magistrate, Gonda, under Section 3(2) of the National Security Act, 1980 (NSA), seeking release through a habeas corpus petition filed by his brother. The detention stemmed from an FIR (Crime No. 008/2023) alleging that on 28.01.2023, the petitioner and an accomplice murdered Krishna Kumar Yadav, a teacher, inside his rented room in Gonda, after a dispute over money, under Sections 452, 302, 379 IPC, later expanded to Sections 449, 380, 411, 201

IPC, and Section 3/25 Arms Act. The SHO's report dated 12.05.2023 claimed the murder caused widespread fear, disrupted public order, and led to protests by the Teachers' Association, justifying detention due to the petitioner's bail application and potential for further crimes. The detention order was approved by the St. Government on 25.05.2023, and the petitioner's representations were rejected by the District Magistrate, St., Central Government, and the U.P. Advisory Board. Held: The petition was allowed, and the detention order quashed, as: (1) the murder, committed inside a private residence, was an isolated act against an individual, constituting a law and order issue, not a public order disturbance, per T. Devaki Vs Government of T.N., (1990) 2 SCC 456, and Gulab Mehra Vs St. of U.P., (1987) 4 SCC 302; (2) the absence of specific evidence showing societal impact or repercussions failed to justify the detention under Section 3(2) NSA, as the SHO's report lacked concrete details beyond general assertions; (3) the three-and-a-half-month delay between the incident (28.01.2023) and the detention order (17.05.2023), with the charge sheet filed on 27.04.2023, rendered the order punitive rather than preventive, snapping the live link between the act and detention, per Santosh Kumar Upadhyay Vs District Magistrate, Gonda, 2006 (1) LCrR 338; (4) the petitioner's lack of criminal history and the solitary nature of the offence did not support the detaining authority's subjective satisfaction that the petitioner would likely commit prejudicial acts if released on bail, per Manu Bhushan Roy Pradhan Vs St. of W.B., AIR 1973 SC 295; (5) the detaining authority's failure to apply judicial mind to the material, which lacked specificity on public order disruption, violated Articles 21 and 22, rendering the detention order a colorable exercise of power. The petitioner was ordered released unless required in other cases.

List of Cases cited:

1. T. Devaki Vs Government of T.N., (1990) 2 SCC 456
2. Gulab Mehra Vs St. of U.P., (1987) 4 SCC 302
3. Manu Bhushan Roy Pradhan Vs St. of W.B., AIR 1973 SC 295

4. Ram Bharose Yadav Vs District Magistrate, Deoria, [2004 (2) JIC 116 (All)]
5. Santosh Kumar Upadhyay Vs District Magistrate, Gonda, 2006 (1) LCrR 338
6. Pahadi @ Shiv Shanker Verma Vs St. of U.P., [Writ Petition No. 670 (H.C.) of 2003, decided on 27.07.2004]
7. Waseem Vs St. of U.P., L.Cr.R 225
8. Ram Singh Vs District Magistrate, Lucknow, 1985 L.L.Journal 335
9. Shiv Kumar @ Mukhiya Vs St. of U.P., [2015 (3) JIC 92 (All)]
10. Bharat Lal Tewari Vs St. of U.P., [Habeas Corpus Petition No. 12782 of 1988, decided on 17.02.1989]
11. Islamuddin Vs The St., 1991 L.Cr.R 27
12. Malwa Shaw Vs St. of W.B., (1974) 4 SCC 127
13. Ibrahim Nazeer Vs St. of T.N., AIR 2006 SC 3606
14. Veeramani Vs St. of T.N., (1994) 2 SCC 337

(Delivered by Hon'ble Dr. Narendra Kumar Johari, J.)

1. Heard Shri R.P. Mishra, learned counsel for the petitioner, learned A.G.A. for the State/opposite party Nos. 2 to 4 and Mrs. Pooja Singh, learned counsel for the Union of India/opposite party No.1 and perused the record carefully.

2. This habeas corpus petition has been filed by detenu Sandeep Yadav, S/o Ram Dhani Yadav through his next friend/real brother Pradeep Yadav, assailing the detention order dated 17.05.2023, passed by the District Magistrate, Gonda/Detaining Authority,

with prayer to release the petitioner on the ground that the detention order passed under the National Security Act, 1980 (herein after referred as the "Act of 1980") is illegal, arbitrary and bad in the eye of law.

3. The brief facts of the case are that, one Ram Kewal Yadav lodged an F.I.R. under Sections 452, 302, 379 IPC vide Crime No.008/2023, at Police Station Kotwali Nagar, District Gonda against the petitioner and one unknown person, with contention that the son of informant, namely, Krishna Kumar Yadav, who was working as teacher in Janta Inter College, Itiyathok, Gonda and was residing in the house of Mohd. Sabir Ali on rent. On 28.01.2023 at about 7.35 P.M., he was taking rest in his rented accommodation, when accused Sandeep Yadav with one unknown person entered into the room of his son and started quarreling for demand of money. His son refused to give money, resultantly, the above Sandeep Yadav and his colleague struck the head of his son against the inner wall of the room many times, consequently, his son fell down and died on the spot. Thereafter, the accused persons snatched the money of his son and fled away.

4. On receiving information, the informant came from his village. The date and time of the occurrence has been shown as 28.01.2023, at 07.35 P.M. and the F.I.R. of the case lodged on 29.01.2023, at 4.30 A.M.

5. In furtherance of the F.I.R., the police came in action and arrested the accused Sandeep Yadav and his colleague Jagga @ Jawahar Mishra on 30.01.2023, at 10:10 A.M. During the course of investigation, on the basis of evidence

collected, the Investigating Officer added Sections 449, 380, 411, 201 IPC and Section 3/25 Arms Act and after completion of investigation, submitted charge sheet against the accused Sandeep Yadav under Sections 302, 449, 380, 201, 411 IPC and Section 3/25 Arms Act on 27.04.2023. Accordingly, the trial of the case proceeded.

6. On 12.05.2023, the S.H.O., Police Station Kotwali Nagar, District Gonda submitted a report to the Superintendent of Police, Gonda stating that the accused Sandeep Yadav on 28.01.2023, at 3.30 P.M. with intention to create terror, forcefully hit the head of Krishna Kumar Yadav against the wall of his room and after killing him mercilessly, took money from his pocket and fled away. Before the occurrence, the deceased Krishna Kumar Yadav was taking rest in his room at that time accused Sandeep Yadav along with his one colleague came at his room and demanded money. When the deceased refused to give money, the accused killed him brutally. At that time another tenant Km. Lucky Singh was present in her room. When she heard cry of the deceased Krishna Kumar Yadav, she made a call to brother of the deceased named Rahul Yadav from her mobile phone. Rahul Yadav told her to go in the room of his brother and see why he is crying. Rahul Yadav also made video call to Lucky Singh and saw the occurrence from the mobile phone of Lucky Singh, who peeked into the slightly open door of Krishna Kumar Yadav's room. She saw that Krishna Kumar Yadav was lying on the floor and the accused Sandeep Yadav was sitting on the chest of Krishna Kumar Yadav and was strangulating his neck with a Muffler and a colleague of Sandeep Yadav was catching hold the legs of Krishna Kumar Yadav.

Having seen the occurrence, the witness Lucky Singh fell in fear, returned back to her room and called an ambulance by dialing 108 from her room. Before ambulance reached, the accused persons fled away from the spot. The persons of the ambulance informed to the police immediately by dialing 112. The occurrence of murder took place in a densely populated area of the locality. As a consequence of aforesaid brutal murder, residents of Mohalla and businessmen of the market were instilled with fear and panick. All the residents of the locality locked themselves in their houses due to the brutal crime. They did not dare to come out of their houses even to purchase articles of their daily use. Simultanelusly, the public order got affected badly in the area. The businessmen shut down shutters of their shops and there was an eerie silence in the area and market. As the S.H.O. of Police Station Kotwali Nagar, got information of the occurrence, he immediately infromed his higher authorities. The Circle Officer, Superintendent of Police, D.I.G., Devipatan Division, Gonda and the Additional Superintendent of Police, etc. reached the spot. They deployed sufficient police force after calling from the nearby police stations and police line of the district and made effort to restore public order. As a consequence of the occurrence, law and order along with the public order got completely disturbed.

7. He further mentioned that the office bearers of the Teachers Association also made Dharna-Pradarshan and submitted their representation to higher authorities enraged by the occurrence and they expressed their annoyance. Persons of the locality became fearful for their safety and

security. The newspapers also published the news of the brutal murder and residents of the entire district were fearful for many days. Police authorities gave assurance to the people of the area that they would ensure that the accused may not be released from jail as the people were in apprehension that as the accused will be released on bail, he will try to influence the witnesses and may again commit heinous offences, like murder. The accused submitted his bail application in the Court of Session Judge on 08.05.2023, in which the date 18.05.2023 was fixed for its hearing and there was a high probability that his bail application will be allowed, hence, necessary action be taken to detain the accused under the Act of 1980.

8. The Circle Officer concerned in his letter to Superintendent of Police, Gonda dated 15.05.2023, expressed his consent on the report of S.H.O., Kotwali Nagar, Gonda and recommended to detain the accsued under the Act of 1980.

9. The Additional Superintendent of Police, Gonda also expressed his agreement with the letter of S.H.O., Police Station Kotwali Nagar, Gonda and gave consent to the report of Circle Officer, City, Gonda and requested to the Superintendent of Police, Gonda to detain accused under the Act of 1980 vide his letter dated 16.05.2023 to Superintendent of Police, Gonda.

10. The Superintendent of Police, Gonda considered the reports of S.H.O., Police Station Kotwali, Circle Officer and Additional Superintendent of Police, and requested the District Magistrate, Gonda by his letter dated 17.05.2023 to detain the accused/petitioner under the Act of 1980.

11. The District Magistrate, Gonda perused and considered the above reports as well as other related material/documentary evidence submitted by the police, which were collected by the Investigating Officer during the course of investigation of the case and after his subjective satisfaction that accused/petitioner has committed the heinous offence and as a result of the fearful and daring offence public order had been affected adversely in the locality. The act of accused was prejudicial to public order. He is a criminal minded and powerful person who has moved his bail application before Sessions Judge, Gonda and it's very likely he will be released on bail, there is a great apprehension that after release from jail, the accused/petitioner may again indulge in his criminal activities and may again commit any crime prejudicial to the maintenance of public order, hence the District Magistrate, Gonda passed the order dated 17.05.2023 to detain the petitioner/accused under Section 3 (2) of the Act of 1980.

12. Above detention order along with the grounds of detention and appended documentary evidences have been served to accsued, through Jail Superintendent, Gonda on the same date as he was under incarceration. The District Magistrate, Gonda also sent his report along with the detention order, grounds of detention and related documentary evidence to opposite party No.2 on 18.05.2023, the detentioin order was approved by the opposite party No.2 on 25.05.2023, i.e. between 12 days from the date of order of detention. The approval order of the State Government was received by the District Magistrate through

radiogram on 25.05.2023 itself, which was served upon the petitioner on the same date in jail through opposite party No.4.

13. Opposite party No.2 further sent the copy of detention order, grounds of detention with appended documentary evidence as well as its approval to opposite party No.1, in accordance with the provisions of Section 3 (5) of the Act of 1980.

14. The petitioner against his detention under Section 3 (2) of the Act of 1980, submitted his representation dated 27.05.2023 to opposite party No.4, who transmitted it to opposite party No.3 on 27.05.2023 itself. Opposite party No.3, the District Magistrate, Gonda sent the copies of representation to opposite party No.1, 2 and the Advisory Board (detention), Lucknow promptly.

15. Opposite Party No.3 called the report from Superintendent of Police, Gonda on the representation of petitioner/accused. 28.05.2023 was Sunday holiday. Thereafter, on 29.05.2023, he received the report of Superintendent of Police, Gonda and after due consideration, he rejected the representation of accused/petitioner on 30.05.2023 and communicated his rejection order to detenue on same date through opposite party No.4.

16. The representation of the petitioner/accused sent by opposite party No.3 was received by concerned official of State Government on 01.06.2023 along with the letter of District Magistrate, Gonda dated 30.05.2023 and parawise comment on it. The State Government sent a copy of the representation along with parawise comments thereon to opposite party No.1

through speed post and to Advisory Board through special messenger vide its separate letters dated 01.06.2023. The concerned official of opposite party No.2 examined the representation on 02.06.2023. The joint Secretary also examined it on the same day. There was Saturday and Sunday on 03.06.2023 and 04.06.2023, hence the Special Secretary (Home) examined the representation on 05.06.2023. Subsequently, the Secretary (Home) and Principal Secretary (Home) Government of U.P., Lucknow, examined the same on 06.06.2023. Thereafter, the representation was submitted to the higher authorities for final order, who, after due consideration, rejected the same on 07.06.2023. The information of rejection was sent through telegram to opposite party No.3 on 08.06.2023. The said telegram was communicated to the petitioner/accused on same day through opposite party No.4.

17. The U.P. Advisory Board (Detention), Lucknow vide its letter dated 22.06.2023 informed the opposite party No.3 that the case of the petitioner would be taken up before the Board for hearing on 28.06.2023. Opposite party No.2 communicated the same through telegram/email dated 22.06.2023 to petitioner. On 28.06.2023, the petitioner personally appeared before the U.P. Advisory Board (Detention). The Board also, after due consideration, rejected the representation of the petitioner and submitted its report to the section of opposite party No.2 on 03.07.2023. The said order was also communicated to petitioner promptly.

18. Opposite party No.2 again considered the case of the petitioner after getting the report of U.P. Advisory Board under Section 11 of the Act of 1980 and

extended the period of detention for 03 months from the date of detention and for communication sent the order vide telegram/letter dated 6th July, 2023, which (the telegram) was received by opposite party No.4 on 07.07.2023 and formal order on 13.07.2023. The aforesaid radiogram as well as formal order were served to the petitioner on 07.07.2023 and 13.07.2023 respectively.

19. The representation of petitioner along with report and parawise comments was received by official of opposite party No.1 on 09.06.2023. There was holiday on 10.06.2023 and 11.06.2023. Hence, the said representation was examined by officials of opposite party No.1 on 12.06.2023. Thereafter, the representation was examined by Under Secretary and Deputy Secretary on 13.06.2023, by Additional Secretary on 14.06.2023, and on the same day, i.e. on 14.06.2023, opposite party No.1 rejected the representation after due consideration. Thereafter, the file was returned through proper channel and reached the concerned section on 16.06.2023, who, by wireless message dated 16.06.2023, informed the above rejection order, which was also served to petitioner.

20. From the perusal of counter affidavits of opposite party No.1 to 4, it transpires that the detention order dated 17.05.2023 was communicated to the petitioner on the same day along with grounds of detention and annexed documents. Thereafter, the detention order was confirmed by the State Government within the period prescribed by the Statute. The representations of accused/petitioner were also decided by the opposite party Nos.1, 2 and 3 as well as by the Advisory Board (Detention), Lucknow, and

communicated the decisions to petitioner with due promptness. No violation of any provision of the Act of 1980 has been found in disposal of representation as well as communication of aforesaid decisions to petitioner.

21. Learned counsel for the petitioner submitted that according to provisions of Section 3 (2) of the Act of 1980, the accused can be detained under the Act, when there is an apprehension of disturbance of public order. In present case, as according to the F.I.R., the offence was committed by the accused/petitioner within the four walls of a residential house. According to the prosecution story there may be a situation of disturbance of "law and order" but there was no disturbance in "public order", hence, the provisions of Section 3 (2) of the Act, 1980 has been slapped on accused illegally and without any basis. Petitioner has no criminal history. Learned counsel for petitioner further submitted that order of preventive detention has been passed against petitioner after approximately 3 and 1/2 months after the date of occurrence, i.e. on stale grounds, that too, on a solitary criminal case. At the time of passing of detention order, the petitioner was in jail. The detaining authority failed to consider essential ingredients of Section 3 of the Act, 1980 for his subjective satisfaction, therefore, the impugned order is against Article 21 and 22 of the Constitution.

22. Learned counsel for the petitioner, in support of his arguments, has placed reliance upon the following case laws :-

(i) Shiv Kumar @ Mukhiya Vs. State of U.P. , [2015 (3) JIC 92 (All)]

(ii) Mrs. T. Devaki v. Government of Tamil Nadu and others, (1990) 2 SCC 456

(iii) Gulab Mehra Vs. State of U.P. and others (1987) 4 SCC 302

(iv) Bharat Lal Tewari Vs. State of U.P. & others [Habeas Corpus Petition No.12782 of 1988, decided on 17.02.1989]

(v) Manu Bhushan Roy Pradhan Vs. State of West Bengal and others, AIR 1973 SC 295.

(vi) Islamuddin Vs. The State, 1991, L.Cr.R 27

(vii) Ram Bharose Yadav Vs. District Magistrate, Deoria & Ors., [2004 (2) JIC 116 (All)]

(viii) Santosh Kumar Upadhyay Vs. District Magistrate, Gonda and others, 2006 (1) LCrR 338

(ix) Pahadi @ Shiv Shanker Verma Vs. State of U.P. and others [Writ Petition No.670(H.C.) of 2003, decided on 27.07.2004]

(x) Waseem Vs. State of U.P. and others, L.Cr.R 225 and in the case of Ram Singh Vs. District Magistrate, Lucknow and others, 1985 L.L.Journal 335

23. The counsel for the opposite parties vehemently opposed the writ petition and submitted that accused is a criminal minded person; he has committed the murder of a Government teacher brutally; as a consequence of daring and fearless act of petitioner, public order in the area got disturbed badly. The detaining authority considered the police report properly and after his subjective satisfaction that the act of petitioner was prejudicial to maintenance of public order detention order has been passed by the District Magistrate. Petitioner was likely to be released on bail and there was great apprehension that after release on bail he

may commit heinous crimes and acts against the maintenance of public order as well, therefore, petitioner has rightly and legally been detained under the Act of 1980 by the opposite party No.3.

24. Learned counsel for the opposite parties relied upon following case laws in support of their arguments :-

(i) Malwa Shaw Vs. State of West Bengal, (1974) 4 SCC 127

(ii) Ibrahim Nazeer Vs. State of Tamil Nadu & another, AIR 2006 SC 3606

(iii) Veeramani Vs. State of Tamil Nadu, (1994) 2 SCC 337

25. We have considered the arguments of both the sides and have also perused the records.

26. According to the facts of the case the petitioner had caused the murder of Krishna Kumar Yadav on 28.01.2023. As a consequence of the offence the residents and business persons of the area became fearful and terrorised. The public order and tranquility got disturbed badly. The petitioner who was arrested in connection with the aforesaid offence on 30.01.2023 was trying to be released on bail. Knowing about it, the general public again got panicked. There was a great apprehension that after release on bail the petitioner will again indulge in criminal acts and act prejudicial to public order and peace, hence District Magistrate, Gonda/detaining authority passed the order on 17.05.2023 to detain him under the provisions of the Act of 1980.

27. Learned counsel for the petitioner has submitted that the murder of a single person took place inside the room. The offence was committed by accused neither

in day light, nor in public view. Lucky Singh is a planted witness. Trial is still pending. The petitioner was not known criminal. He was having no criminal history. Hence, there was no situation of disturbance in public order; maximum, as a result of offence, there would have been adverse effect on law and order situation of the area.

28. In support of his argument, learned counsel for the petitioner submitted the judgment of Hon'ble Supreme Court in the case of **T. Devaki v. Government of Tamil Nadu and others, (1990) 2 SCC 456**, the Hon'ble Apex Court has held that :

*“18. The question which falls for consideration is whether single incident of murderous assault by the detenu and his associates on the Minister at the Seminar held at Dry Chilly Merchants' Association Kalai Arangam Hall was prejudicial to the maintenance of public order. Any disorderly behaviour of a person in the public or commission of a criminal offence is bound to some extent affect the peace prevailing in the locality and it may also affect law and order problem but the same need not affect maintenance of public order. There is basic difference between 'law and order' and 'public order', this aspect has been considered by this Court in a number of decisions, see: **Dr. Ram Manohar Lohia v. State of Bihar; Pushkar Mukherjee v. The State of West Bengal, and Shymal Chakraborty v. Commissioner of Police**. In these cases it was emphasised that an act disturbing public order is directed against individuals which does not disturb the society to the extent of causing a general disturbance of public peace and tranquillity. It is the degree of disturbance and its effect upon the life of the community in the locality*

which determines the nature and character of breach of public order. In **Arun Ghosh v. State of West Bengal**, [1970] 3 SCR 288 the Court held that the question whether a man has only committed a breach of law and order, or has acted in a manner likely to cause disturbance of the public order, is a question of degree and the extent of the reach of the act upon the society. This view was reiterated in **Nagendra Nath Mondal v. State of West Bengal**; **Sudhir Kumar Saha v. Commissioner of Police, Calcutta**; **S.K. Kedar v. State of West Bengal**; **Kanu Biswas v. State of West Bengal**; **Kishori Mohan v. State of West Bengal**, and **Amiya Kumar Karmakar v. State of West Bengal**.

19. In the instant case the detenu was placed under detention on the sole incident which took place on July 29, 1989 and in respect of which the detenu is facing criminal trial before a court of law. The alleged attempted murderous assault made by the detenu and his associates on Thiru Durai Murugan, Minister for Public Works Department may have been made on account of political rivalry. In fact, in his affidavit Thiru Durai Murugan has admitted that in the past the detenu had misbehaved with him even on the floor of the Legislative Assembly of Tamil Nadu while participating in discussion. The attempted assault took place in the hail of Dry Chilly Merchants' Association Kalai Arangam where two Ministers, a number of officials including the District Magistrate, as well as members of the public were present. It is alleged that the attempted murderous assault on Thiru Durai Murugan created scare and a feeling of insecurity in the minds of the persons present in the hail and the detenu's action interrupted the "proceedings of the Seminar for a while" (emphasis supplied). This shows that the detenu's activity

disturbed the proceedings of the Seminar for a while but the Seminar appears to have continued later on. The incident did not and could not affect public peace and tranquillity nor it had potential to create a sense of alarm and insecurity in the locality. How could a single murderous assault on the Minister concerned at the Seminar could prejudicially affect the even tempo of the life of the community? No doubt in paragraph 4 of the grounds the detaining authority has stated that by committing this grave offence in public, in broad day light, the detenu created a sense of alarm, scare and a feeling of insecurity in the minds of the public of the area and there by acted in a manner prejudicial to the maintenance of public order which affected even tempo of life of the community. Repetition of these words in the ground are not sufficient to inject the requisite degree of quality and potentiality in the incident in question. A solitary assault on one individual can hardly be said to disturb public peace or place public order in jeopardy so much as to bring the case within the purview of the Act. Such a solitary incident can only raise a law and order problem and no more. Moreover, there is no material on record to show that the reach and potentiality of the aforesaid incident was so great as to disturb the normal life of the community in the locality or it disturbed general peace and tranquillity. In the absence of such material it is not possible to hold that the incident at the seminar was prejudicial to the maintenance of public order. In **Manu Bhusan Roy Prodhan v. State of West Bengal**, this Court held that a solitary assault on one individual, which may well be equated with an ordinary murder which is not an uncommon occurrence, can hardly be said to disturb public peace and its impact on the society as a whole cannot

be considered to be so extensive, widespread and forceful as to disturb the normal life of the community, thereby shaking the balanced tempo of the orderly life of the general public. The Court held that the detention order which had been made for preventing the petitioner from acting in a manner prejudicial to the maintenance of public order, was not sustainable in law. On a careful consideration of the matter in all its aspects and having regard to the circumstances in which the alleged incident took place on 29.7.89, we are of the opinion that the solitary incident as alleged in the ground of detention is not relevant for sustaining the order of detention for the purpose of preventing the petitioner from acting in a manner prejudicial to the maintenance of public order."

(Emphasis supplied)

29. In the case of **Gulab Mehra Vs. State of U.P. and others (1987) 4 SCC 302**, the Hon'ble Apex Court on the basis of its previous decisions has explained the difference in "public order" and "law and order" situation as under :-

*"12. The meaning of the word 'public order' has been determined by this Court in the case of **Kanu Biswas v. State of West Bengal**. In this case it has been held that the question whether a man has only committed a breach of law and order or has acted in a manner likely to cause a disturbance of the public order is a question of degree and the extent of the reach of the act upon the society. Public order is what the French call "order publique" and is something more than ordinary maintenance of law and order.*

*13. In the case of **Haradhan Saha v. The State of West Bengal**, this*

Court has observed that the following principles emerge from the judicial decisions : [SCC p.209, SCC (Cri) p. 827, para 341]

"First, merely because a detenu is liable to be tried in a criminal court for the commission of a criminal offence or to be proceeded against for preventing him from committing offences dealt with in Chapter VIII of the Code of Criminal Procedure would not by itself debar the Government from taking action for his detention under the Act.

Second, the fact that the police arrests a person and later on enlarges him on bail and initiates steps to prosecute him under the Code of Criminal Procedure and even lodges a first information report may be no bar against the District Magistrate issuing an order under the preventive detention.

Third, where the concerned person is actually in jail custody at the time when an order of detention is passed against him and is not likely to be released for a fair length of time, it may be possible to contend that there could be no satisfaction on the part of the detaining authority as to the likelihood of such a person indulging in activities which would jeopardise the security of the State or the public order.

Fourth, the mere circumstance that a detention order is passed during the pendency of the prosecution will not violate the order.

Fifth, the order of detention is a precautionary measure. It is based on a reasonable prognosis of the future behaviour of a person based on his past conduct in the light of the surrounding circumstances."

*14. This has been followed in **Kanchanlal Meneklal Chokshi v. State of Gujarat and others**, wherein it has been*

observed that : [SCC pp.18-19, SCC (Cri) p.901, para 8]

"The ordinary criminal process is not to be circumvented or short circuited by ready resort to preventive detention. But, the possibility of launching a criminal prosecution is not an absolute bar to an order of preventive detention. Nor is it correct to say that if such possibility is not present to the mind of the detaining authority the order of detention is necessarily bad. However, the failure of the detaining authority to consider the possibility of launching a criminal prosecution may, in the circumstances of a case, lead to the conclusion that the detaining authority had not applied its mind to the vital question whether it was necessary to make an order of preventive detention. Where an express allegation is made that the order of detention was issued in a mechanical fashion without keeping present to its mind the question whether it was necessary to make such an order when an ordinary criminal prosecution could well serve the purpose, the detaining authority must satisfy the Court that question too was borne in mind before the order of detention was made. If the detaining authority fails to satisfy the Court that the detaining authority so bore the question in mind the Court would be justified in drawing the inference that there was no application of the mind by the detaining authority to the vital question whether it was necessary to preventively detain the detenu."

15. In the case of **Dr Ram Manohar Lohia v. State of Bihar**, it has been observed by this Court that :

"The contravention of law always affects order but before it can be said to affect public order, it must affect the community or the public at large. There are three concepts according to the learned

Judge (Hidayatullah, J) i.e. "law and order", "public order" and 'security of the State' . It has been observed that to appreciate the scope and extent of each of them, one should imagine three concentric circles. The largest of them represented law and order, next represented public order and the smallest represented the security of the State. An act might affect law and order but not public order just as an act might affect public order but not the security of the State."

16. As observed in the case of **Arun Ghosh v. State of West Bengal**, [SCC pp.99-100, SCC (Cri) p.69, para 31 :

"Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquility. It is the degree of disturbance and its effect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of law and order. Take for instance, a man stabs another. People may be shocked and even disturbed, but the life of the community keeps moving at an even tempo, however much one may dislike the act. Take another case of a town where there is communal tension. A man stabs a member of the other community. This is an act of a very different sort. Its implications are deeper and it affects the even tempo of life and public order is jeopardized because the repercussions of the act embrace large sections of the community and incite them to make further breaches of the law and order and to subvert the public order. An act by itself is not determinant of its own gravity. In its quality it may not differ from another but in its potentiality it may be very different."

17. This has been followed in the case of **Nagendra Nath Mondal v. State of West Bengal**, and **Nandlal Roy v. State of West Bengal**.

18. Thus from these observations it is evident that an act whether amounts to a breach of law and order or a breach of public order solely depends on its extent and reach to the society. If the act is restricted to particular individuals or a group of individuals it breaches the law and order problem but if the effect and reach and potentiality of the act is so deep as to affect the community at large and or the even tempo of the community that it becomes a breach of the public order.

19. In the case of **S.K. Kedar v. State of West Bengal**, this Court has observed that : [SCC p. 818, SCC (Cri) p.3, para 6]

"The question whether a person has only committed a breach of law and order or has acted in a manner likely to cause a disturbance of the public order is one of degree and the extent of the reach of the act upon the society. An act by itself is not determinative of its own gravity. In its quality it may not differ from another but in its potentiality it may be very different. Similar acts in different contexts affect differently law and order on the one hand and public order on the other. It is always a question of degree of the harm and its effect upon the community. Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. It is the degree of disturbance upon the life of the community which determines whether the disturbance amounts only to a breach of the law and order."

20. This Court has further observed in the case of **Ashok Kumar v. Delhi Administration**, while dealing with the distinction between "public order" and

"law and order" to which one of us is a party that : [SCC pp. 409-10, SCC (Cri) p. 457, para 13]

"The true distinction between the areas of 'public order' and 'law and order' lies not in the nature of quality of the act, but in the degree and extent of its reach upon society. The distinction between the two concepts of 'law and order' and 'public order' is a fine one but this does not mean that there can be no overlapping. Acts similar in nature but committed in different contexts and circumstances might cause different reactions. In one case it might affect specific individuals only and therefore touch the problem of law and order. The act by itself therefore is not determinant of its own gravity. It is the potentiality of the act to disturb the even tempo of the life of the community which makes it prejudicial to the maintenance of public order."

21. On a conspectus of all these decisions it has been observed by this Court in the case of **State of U.P. v. Hari Shankar Tewari**, that conceptually there is difference between law and order and public order but what in a given situation may be a matter covered by law and order may really turn out to be one of public order. One has to turn to the facts of each case to ascertain whether the matter relates to the larger circle or the smaller circle. An act which may not at all be objected to in certain situations is capable of totally disturbing the public tranquility. When communal tension is high, an indiscreet act of no significance is likely to disturb or dislocate the even tempo of the life of the community. An order of detention made in such a situation has to take note of the potentiality of the act objected to. Thus whether an act relates to law and order or to public order depends upon the impact of the act on the life of the community or in

other words the reach and effect and potentiality of the act if so put as to disturb or dislocate the even tempo of the life of the community, it will be an act which will affect public order.

(emphasis supplied)

30. In the case of **Bharat Lal Tewari Vs. State of U.P. & others [Habeas Corpus Petition No.12782 of 1988, decided on 17.02.1989]**, the co-ordinate bench of this court has marked the difference in “public order” and “law and order” in following words :

“7. The distinction between concept of “law and order” and “public order” is one of the degree and the extent of the reach of the act upon the society. Any contravention of law always affects order but before it could be said to affect ‘public order’ it must affect the community or the public at large. The true distinction between the words of “law and order” and “public order” (lies not merely in the nature or quality of the act but upon the degree and extent of its reach upon the society. If the act disturbs or dislocates the even tempo of the life of the community, it will be an act which will affect “public order” and not otherwise. To say in other words, the ratio of ‘public order’ and ‘law and order’ depends upon the impact of the act. If the impact of the act is confined to an individual only, it will be a matter of law and order while if the act will have any impact upon a large section of the community the act will fall within the realm of public order. This is a question of degree and the extent of the impact of the act upon the society which is vital. The public order embraces more of the community than law and order. One of the vital acts is to consider the effect of the act on the even tempo of the life of the community.

8. In this case the police had raided only Room No.10 in the Kesari Lodge and the petitioner fired one shot at the police when he was inside the said room and the second shot was fired by him just outside the Kesari Lodge in a blind lane from a pistol on an individual police officer. Therefore, it cannot be said that by the said act of the petitioner a large section of the community was affected or that the potentiality of the said act of the petitioner was such as would disturb the tranquility or dislocate the even tempo of the life of the community. The said act came within the domain of “law and order” and not “public order”.

(emphasis supplied)

31. The Hon’ble Apex Court in the case of **Manu Bhushan Roy Pradhan Vs. State of West Bengal and others [Writ Petition No. 252 of 1972, decided on 31.10.1972]** has held as under :

“7. In our view, ground no. 1 which does not mention the names details of the others along with whom the petitioner is alleged to have committed the assault, only refers to an assault on an individual named Bulu Das Gupta on April 16, 1971 which prima facie appears to raise only a law and order problem. In Arun Ghosh v. State of West Bengal, (1970) 3 SCR 288 = (AIR 1970 SC 1228) several instances of assaults were stated in the grounds of detention. Hidayatullah C.J. speaking for the Court observed in that case.

"The submission of the counsel is that these are stray acts directed against individuals and are not subversive of public order and therefore the detention on the ostensible ground of preventing him from acting in a manner prejudicial to public order was not justified. In support of this

submission reference is made to three cases, of this Court : Dr. Ram Manohar Lohia v. State of Bihar, (1966) 1 SCR 709 = (AIR 1966 SC 740); Pushkar Mukherjee & Ors. v. State of West Bengal, (1969) 2 SCR = (AIR 1970 SC 852); and Shyamal Chakraborty v. The Commissioner of Police, Calcutta, (1970) 1 SCR 762 = (AIR 1970 SC 269). In Dr. Ram Manohar Lohia's case this Court pointed out the difference between maintenance of law and order and its disturbance and the maintenance of public order and its disturbance. Public order was said to embrace more of the community than law and order. Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquillity. It is the degree of disturbance and its effect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of law and order. Take for instance, a man stabs another. People may be shocked and even disturbed, but, the life of the community keeps moving at an even tempo, however much one may dislike the act. Take another case of a town where there is communal tension. A man stabs a member of the other community. This is an act of a very different sort. Its implications are deeper and it affects the even tempo of life and public order is jeopardized because the repercussions of the act embrace large sections of the community and incite them to make further breaches if the law and order and to subvert the public order. An act by itself is not determinant of its, own gravity. In its quality it may not differ from another but in

its potentiality it may be very different."

The learned Chief Justice, after referring to the lines of demarcation drawn by Ramaswami J., in W.P. 179 of 1968 between serious and aggravated forms of breaches of public order which affect the community or endanger the public interest at large and minor breaches of peace which do not affect the public at large, and after noting the analogy drawn by Ramaswami J., between public and private crimes, cautioned against that analogy being pushed too far, observing, that a large number of acts directed against persons or individuals may total up into a breach of public order. After referring to Dr. Ram Manohar Lohia's case (supra) the learned Chief Justice observed :

"It is always a question of degree of the harm and its effect upon the community. The question to ask is : Does it lead to disturbance of the current of life of the community so as to amount to a disturbance of the public order or does it affect merely an individual leaving the tranquillity of the society undisturbed? This question has to be faced in every case on facts. There is no formula by which one case can be distinguished from another."

This view was reaffirmed in Nagendra Nath Mondal v. The State of West Bengal (AIR 1972 SC 665), Sudhir Kumar Saha v. Commissioner of Police, Calcutta (1970) 3 SCR 360 = (AIR 1970 SC 814), S.K. Kader v. The State of West Bengal (AIR 1972 SC 1647), Kanu Biswas v. State of West Bengal (AIR 1972 SC 1656), Kishori Mohan v. State of West Bengal (AIR (1972) SC 1749 and Amiya Kumar Karmakar v. State of West Bengal, (W.P. 190 of 1972, D/- 31-7-1972) = (reported in AIR 1972 SC 2259).

Ground no. 1 in the case before us merely mentions murderous assault by

the petitioner on *Bulo Das Gupta*. It shows neither the nature of the weapon used nor the nature or extent of the injuries inflicted, nor does it disclose as to how long after the assault the injured person died. The motive or the purpose of the assault is also not stated. This kind of a solitary assault on one individual, which may well be equated with an ordinary murder which is not an uncommon occurrence, can hardly be said to disturb public peace or place public order in jeopardy, so as to bring the case within the purview of, the Act. It can only raise a law and order problem and no more; its impact on the society as a whole cannot be considered to be so extensive, widespread and forceful as to disturb the normal life of the community thereby rudely shaking the balanced tempo of the orderly life of the general public. This ground is, therefore, not at all relevant for sustaining the order of detention for preventing the petitioner from acting in a manner prejudicial to, the maintenance of public order. Ground no. 2, however, is quite germane to the problem of maintenance of public order. But the question arises whether in the absence of ground no. 1 which, in our view, is wholly irrelevant, the detaining authority would have felt satisfied on the basis of the solitary ground no. 2 alone to make the impugned order. Can it be said that ground no. 1 is of a comparatively unessential nature so as not to have meaningfully influenced the decision of the detaining authority. Similar problem has faced this Court on a number of occasions and the decision has generally gone in favour of the detenu. This Court in **Dr. Ram Krishan Bhardwaj v. The State of Delhi, 1953 SCR 708 = (AIR 1953 SC 318)** laid down that the requirement that the grounds must not be vague must be satisfied with respect to each of the grounds. In **Dwarka Das**

Bhatia v. The State of Jammu & Kashmir, 1956 SCR 948 = (AIR 1957 SC 174) the principle deduced from the earlier decisions of this Court and also from the decision of the Federal Court in **Keshav Talpade v. The King Emperor, 1943 FCR 88 = AIR 1943 FC 72** was stated thus :

"Where power is vested in a statutory authority to deprive the liberty of a subject on its subjective satisfaction with reference to specified matters, if that satisfaction is stated to be based on a number of grounds or for a variety of reasons, all taken together, and if some out of them are found to be non-existent or irrelevant the very exercise of that power is bad. That is so because the matter being one for subjective satisfaction, it must be properly based on all the reasons on which it purports to be based. If some out of them are found to be nonexistent or irrelevant, the Court cannot predicate what the subjective satisfaction of the said authority would have been on the exclusion of those grounds or reasons. To uphold the validity of such an order in spite of the invalidity of some of the reasons or grounds would be to substitute the objective standards of the Court for the subjective satisfaction of the statutory authority. In applying these principles however the Court must be satisfied that the vague or irrelevant grounds are such as, if excluded, might reasonably have affected the subjective satisfaction of the appropriate authority. It is not merely because some ground or reason of a comparatively unessential nature is defective that such an order based on subjective satisfaction can be held to be invalid. The Court while anxious to safeguard the personal liberty of the individual will not lightly interfere with such orders. It is in the light of these principles that the validity of the impugned order has to be judged." In **Rameshwar Lal**

v. State of Bihar, (1968) 2 SCR 505 = (AIR 1968 SC 1303) it was observed :

*"Since the detenu is not placed before a Magistrate and has only a right of being supplied the grounds of detention with a view to his making a representation to the Advisory Board the grounds must not be vague or indefinite and must afford a real opportunity to make a representation against the detention. Similarly, if a vital ground is shown to be non-existing so that it could not have and ought not to have, played a part in the material for consideration, the court may attach some importance to this fact." In **Motilal Jain v. State of Bihar (1968) 3 SCR 587 = (AIR 1968 SC 1509)**, a decision by a Bench of six Judges, after reviewing the earlier decisions, this Court expressed its view thus :*

"The defects noticed in the two grounds mentioned above are sufficient to vitiate the order of detention impugned in these proceedings as it not possible to hold that those grounds could not have influenced the decision of the detaining authority. Individual liberty is a cherished right, one of the most valuable fundamental rights guaranteed by our Constitution to the citizens of this country. If that right is invaded, excepting strictly in accordance with law, the aggrieved party is entitled to appeal to the judicial power of the State for relief. We are not unaware of the fact that the interest of the society is no less important than that of the individual. Our Constitution has made provision for safeguarding the interests of the society. Its provisions harmonise the liberty of the individual with social interest. The authorities have to act solely on the basis of those provisions. They cannot deal with the liberty of the individual in a casual

manner, as has been done in this case. Such an approach does not advance the true social interest. Continued indifference to individual liberty is bound to erode the structure of our democratic society."

(Emphasis supplied)

32. With reference to acts prejudicial to maintenance of public order, Hon'ble Apex Court in the case of **Ram Ranjan Chatterjee Vs. State of West Bengal, (1975) 4 SCC 143** has held as under :-

"8. It may be remembered that qualitatively, the acts which affect "law and order" are not different from the acts which affect "public order". Indeed, a state of peace or orderly tranquility which prevails as a result of the observance or enforcement of internal laws and regulations by the Government, is a feature common to the concepts of "law and order" and "public order". Every kind of disorder or contravention of law affects that orderly tranquility. The distinction between the areas of "law and order" and "public order" as pointed by this Court in **Arun Ghosh v. State of West Bengal**, "is one of degree and extent of the reach of the act in question on society". It is the potentiality of the act to disturb the even tempo of the life of the community which makes it prejudicial to the maintenance of public order. If the contravention in its effect is confined only to a few individuals directly involved as distinguished from a wide spectrum of the public, it would raise a problem of law and order only. These concentric concepts of "law and order" and "public order" may have a common "epicentre", but it is the length, magnitude and intensity of the terror wave unleashed by a particular eruption of disorder that helps distinguish it as an act affecting "public order" from that concerning "law and order"."

33. In view of the above decisions of Hon'ble Apex Court and this Court, it is apparent in the present case that why the accused/petitioner was demanding money from the deceased Krishna Kumar Yadav, has not been shown. Whether the money was borrowed or it was extortion money is not clear. The conclusion regarding motive of crime can be drawn after final decision of the trial of concerned criminal case. Whether there was any personal enmity or not is also a matter of merit of the trial. On the factual matrix the contention of the F.I.R. and the report of S.H.O. Police Station Kotwali Nagar, Gonda dated 12.05.2023 do not have similarity on certain facts although it is also the subject matter of the decision of the trial court, yet the material available on record shows that the occurrence took place against an individual person. The material available on record does not indicate that accused while returning from the place of occurrence after committing the offence had ever opened any fire in air or towards any person. The time of occurrence has been shown as 7.35 P.M. in the month of January when the sun sets quite early. The incident was committed inside the house by the accused. The deceased was a teacher in a government school, therefore, the protest/representation of the association of Teachers against the occurrence is a natural act. The deceased might have been the member of the Teachers Association and the Association might have submitted the representation regarding safety, security and arrest the accused. It can be seen commonly that in present society when the population is rising and the resources are limited, moral values and patience are reducing, greed for physical substance and luxury life is raising, therefore, heinous crimes in society are increasing frequently. In this scenario the occurrence of murder is

not a rare incident. News papers contain news of occurrence of such criminal acts almost every day. Such a criminal act may be prejudicial to law and order but every crime cannot be termed as prejudicial act against public order. In the present case no specific consequences of offence of aforesaid murder has been shown in the report of S.H.O., Police Station Kotwali Nagar, Gonda as well as in the grounds of detention order.

34. The co-ordinate Bench of this Court has also in the case of **Ram Bharose Yadav Vs. District Magistrate, Deoria & Ors., [2004 (2) JIC 116 (All)]**, held in paragraph 6 as under :-

“6. We have given thoughtful consideration to the rival submissions. In our opinion disturbance of this nature in such incidents are common in any area where they take place. There does not appear any disturbance to the public order of some lasting endure. It has no where been stated that the incident caused any Chakka jam, etc. organized by the public to show their repugnance to such an occurrence. Public order in itself is a phenomenon, which requires some substantive disturbance in the even tempo of the life of the society. In the region or in whole of the township where such an incident takes place, a temporary disturbance, as a consequence to these incidents, is a normal phenomenon and is most likely to occur. The shorter the life of such disturbance is the lower would be the degree of its potential to disturb the even tempo of the life of the society. This is one serious criterion to differentiate or to draw a wedge between the public order and the law and order. The mere allegation in the General Diary etc. That police force including Circle Officer and S.P. arrived at

the spot soon after the occurrence is not sufficient indication of any serious disturbance to the public order. This is a routine and normal practice that senior officers to arrive at the scene of occurrence to supervise the investigation. Therefore, this mere fact does not lead to the conclusion that the incident had any potentiality to disturb the public order or the even tempo of the social life of the concerned area. Nothing serious has been pointed out except the above said fact to disturb the public order. At least no such incident was brought on record otherwise to amplify any such circumstance. We, therefore, see no force in the contention raised by learned A.G.A. In our opinion, the submission made by learned counsel for the petitioner has sufficient force and is accordingly accepted. From the facts it is evident that while passing the detention order the detaining authority lacked an application of mind to the facts and circumstances brought before him.”

(Emphasis supplied)

35. The detention order against any person can be passed, according to the provisions of Section 3 of the Act, 1980, which reads as under :-

“3. Power to make orders detaining certain persons.—(1) The Central Government or the State Government may,-

(a) if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the defence of India, the relations of India with foreign powers, of the security of India, or

(b) if satisfied with respect of any foreigner that with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion

from India, it is necessary so to do, make an order directing that such person be detained.

(2) The Central Government or the State Government may, if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the security of the State or from acting in any manner prejudicial to the maintenance of Public order or from acting in any manner prejudicial to the maintenance of supplies and services essential to the community it is necessary so to do, make an order directing that such person be detained.

Explanation. - For the purposes of this sub-section, “acting in any manner prejudicial to the maintenance of supplies and services essential to the community” does not include “acting in any manner prejudicial to the maintenance of supplies of commodities essential to the community” as defined in the explanation to sub-section (1) of Section 3 of the Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980 (7 of 1980), and accordingly, no order of detention shall be made under this Act on any ground on which an order of detention may be made under that Act.

(3) If, having regard to the circumstances prevailing or likely to prevail in any area within the local limits of the jurisdiction of a District Magistrate or a Commissioner of Police, the State Government is satisfied that it is necessary so to do, it may, by order in writing, direct, that during such period as may be specified in the order, such District Magistrate or Commissioner of Police may also, if satisfied as provided in sub-section (2), exercise the powers conferred by the said sub-section :

Provided that the period specified in an order made by the State Government

under this sub-section shall not, in the first instance, exceed three months, but the State Government may, if satisfied as aforesaid that it is necessary so to do, amend such order to extend such period from time to time by any period not exceeding three months at any one time.

(4) When any order is made under this section by an officer mentioned in sub-section (3), he shall forthwith report the fact to the State Government to which he is subordinate together with the grounds on which the order has been made and such other particulars as, in his opinion, have a bearing on the matter, and no such order shall remain in force for more than twelve days after the making thereof unless, in the meantime, it has been approved by the State Government:

Provided that where under section 8 the grounds of detention are communicated by the officer making the order after five days but not later than ten from the date of detention, this sub-section shall apply subject to the modification that, for the words "twelve days", the words "fifteen days" shall be substituted.

(5) When any order is made or approved by the State Government under this section, the State Government shall, within seven days, report the fact to the Central Government together with the grounds on which the order has been made and such other particulars as, in the opinion of the State Government, have a bearing on the necessity for the order."

36. Accordingly, the following essential ingredients for application of Section 3 of the Act of 1980 came into light :-

(i) There should be subjective satisfaction of Central Government or the

State Government or District Magistrate or a Commissioner of Police that –

(a) any person is acting in any manner

(b) prejudicial to defence of India, the relation of India with foreign power, of the security of State/India, or

(c) prejudicial to the maintenance of the public order, or to the maintenance of the supplies and services essential to the community, and

(d) there is necessity to prevent the person from doing the above prejudicial acts.

37. Under section 3 (3) of the Act of 1980, the District Magistrate or a Commissioner of Police (under delegation of power by State Government) may pass the written order to detain any person involved in a prejudicial act, after his subjective satisfaction. The words "law and order" have not been mentioned in Section 3 of the Act of 1980. The words "prejudicial to maintenance of public order" has meaning wider than the "maintenance of law and order."

38. Learned counsel for the petitioner has further submitted that the detention order has been passed on occurrence of single offence of murder. The petitioner has no criminal antecedent, therefore, in the light of the facts of the case, the decision of detaining authority to detain the petitioner under the provisions of the Act of 1980 was neither justified, proper nor in accordance with law. On the above point, learned counsel has referred some decisions of this Court. The co-ordinate Bench of this Court, in the case of **Islamuddin Vs. The State, 1991, L.Cr.R 27** has held on the basis of dictum of Hon'ble Apex Court that :-

*“16. In **Manu Bhushan Roy Prodhon v. State of West Bengal**, AIR 1973 SC 295, it was held that a solitary assault on an individual, which could well be equated with an ordinary murder, could hardly be said to disturb public peace. The Supreme Court further observed that its impact on the society as a whole could not be considered to be so extensive, wide spread and forceful as to disturb the normal life of the community.”*

(Emphasis supplied)

39. Learned counsel for the petitioner has also placed his argument that the date of occurrence has been shown as 28.01.2023 and the detention order has been passed on 17.05.2023, after approximately three and half months, which is illegal. In support of his argument he has submitted the decision of the co-ordinate bench of this Court in the case of **Santosh Kumar Upadhyay Vs. District Magistrate, Gonda and others, 2006 (1) LCrR 338**, wherein it has been held as under :-

“11. In the case in hand, the offence under Section 302, I.P.C. was committed on 13.8.2004 while the detention order was issued on 29.10.2004, i.e. more than 2-1/2 months after. No doubt, this was a heinous offence which might be said to have been committed but such act was not immediately considered to be as prejudicial to the maintenance of public order. Neither the detaining authority, nor the learned Counsel for the State could explain as to why there was a long delay of 2-1/2 months in issuing the detention order, if the act of the petitioner was prejudicial to the public safety and security in the vicinity. Therefore, we are of the

considered view that the detention order is not based on sound rational and, as such, it stands vitiated.”

(Emphasis supplied)

In the case of **Pahadi @ Shiv Shanker Verma Vs. State of U.P. and others [Writ Petition No.670(H.C.) of 2003, decided on 27.07.2004]**, it has been held by co-ordinate bench of this Court as under :-

“6. A perusal of paragraph 12 of the affidavit of the detaining authority would show that since the petitioner-detenu had preferred a bail application before the Court of Special Judge, Gangster Act, Faizabad on 18.8.2003 the detaining authority was convinced that there was every likelihood of his being released on bail and consequently on 3.9.2003 clamped the impugned detention order on him. We are afraid, that a perusal of paragraph 12 of the return of detaining authority shows, that he has not comprehended the pleadings contained in paragraph 14 of the writ petition. Paragraph 12 of the return of the detaining authority shows that he was oblivious of the fact that the pleading in para 14 was that the unexplained delay of three months in the issuance of the detention order has vitiated it in the law.

7. We are afraid that this is a classic instance where the detaining authority has confused cheese with chalk.

8. For the aforesaid reasons, the pleading contained in paragraph 14 of the petition, in terms, that the impugned detention order was passed after an inordinate delay of over three months, resulting in the live link between the prejudicial activities of the petitioner-detenu and the rationale of clamping a detention order on him being snapped, thereby vitiating the impugned detention

order, has been left unanswered in the return of the detaining authority. In our judgment the unexplained delay of three months in the issuance of the impugned detention order has brought about a three-fold results namely :-

(a) the live-link between the prejudicial activities of the petitioner-detenu and the rationale of clamping a detention order on him has been snapped.

(b) the bonafides of the subjective satisfaction of the detaining authority to detain the petitioner-detenu vide the impugned detention order has been rendered suspect, and

(c) the impugned detention order lost its preventive purport and instead acquired a punitive character, defeating the very object of its issuance."

((Emphasis supplied))

The same view has been taken by the co-ordinate bench of this Court in the case of **Waseem Vs. State of U.P. and others, L.Cr.R 225** and in the case of **Ram Singh Vs. District Magistrate, Lucknow and others, 1985 L.L.Journal 335**.

40. On the point of delay in passing the order for preventive detention of accused learned counsel for the opposite parties have submitted that the dictum of Hon'ble Apex Court in **Malwa Shaw Vs. State of West Bengal, (1974) 4 SCC 127**, Hon'ble Apex Court held that :

"2. Though at the commencement of the arguments three contentions were formulated by the learned Counsel appearing on behalf of the petitioner against the validity of the order of detention, two were given up when it became evident in the course of the discussion that they were wholly unfounded and ultimately only one contention was pressed by him on behalf of the petitioner.

He contended that all the three grounds on which the order of detention was made related to incidents alleged to have taken place between 5th October, 1971 and 31st October, 1971 and they could not reasonably form the basis for reaching a satisfaction on 21st April, 1972 when the order of detention was made, that the petitioner was acting in a manner prejudicial to the maintenance of supplies and services essential to the community and with a view to preventing him from so acting, it was necessary to detain him. The argument was that the date when the order of detention was made was so far removed from the dates of the alleged incidents that no reasonable person, on the basis of the alleged incidents which took place about five months before, could possibly arrive at the satisfaction leading to the making of the order of detention. The satisfaction of the District Magistrate, which was the foundation of the making of the order of detention, was therefore no satisfaction at all and the order of detention based on it was invalid. This contention is without force and cannot be accepted. The District Magistrate has filed an affidavit in reply to the petition stating that he was satisfied on the basis of the incidents referred to in the grounds of detention that the petitioner was acting in a manner prejudicial to the maintenance of supplies and services essential to the community and he had, therefore, passed the impugned order detaining the petitioner. Of course this statement made on oath by the District Magistrate merely affirms the recital made in the order of detention and like the recital, it can be shown to be incorrect. But when the District Magistrate has made a statement on oath, the burden would be heavy on the petitioner to show that what is stated by the District Magistrate is not correct. The petitioner would have to

establish from the material on record that the District Magistrate could not possibly have arrived at the satisfaction which he claims to have done and that his satisfaction is colourable. Now the only circumstance on which the petitioner has been able to rest his case is the fact that the incidents referred to in the grounds of detention took place between October 5, 1971 and October 31, 1971 while the satisfaction which constitutes the foundation of the order of detention was arrived at by the District Magistrate on 21st April, 1972, more than five months after the date of the alleged incidents. But this circumstance cannot avail the petitioner. It is but a read of straw which cannot support the argument of the petitioner. The time lag between the dates of the alleged incidents and the making of the order of detention is not so large that it can be said that no reasonable person could possibly arrive at the satisfaction which the District Magistrate did on the basis of the alleged incidents. It must be remembered that some time is bound to elapse before the investigation into the alleged incidents is completed and the matter is brought to the notice of the District Magistrate and the District Magistrate applies his mind and arrives at the requisite satisfaction culminating in the order of detention. The period of about five months which elapsed between the dates of alleged incidents and the making of the order of detention cannot be regarded as so unreasonably long as to warrant the inference that no satisfaction was really arrived at by the District Magistrate or that the satisfaction was colourable or no satisfaction at all as required by the statute. The satisfaction which the District Magistrate is required to reach in order to support the order of detention is that it is necessary to detain

the petitioner with a view to preventing him from acting in a particular manner and that satisfaction can obviously be founded only on a reasonably anticipated prognosis of future behavior of the petitioner made on the basis of past incidents. It is not possible to say that the incidents referred to in the grounds of detention were such that they could not reasonably lead to the satisfaction which the District Magistrate reached when he made the order of detention. This contention urged on behalf of the petitioner must, therefore, be rejected and the order of detention must be held to be valid.”

(Emphasis supplied)

41. In above case, the accused was having criminal history of same kind of offence. The accused was involved in theft, which took place on different dates. The accused was involved in the theft of 1133 Mts. length of copper wire from the electric pole, which took place on 5/6.10.1971; 1070 Mts. of copper wire from the electric pole on 5/7.10.1971; theft of 805 Kg. of copper wire on 30/31.10.1971 which disturbed the community at large. The offence committed by the accused were of the similar nature and it has been found that as a result and repercussion of the offence, the normal life and routine of large number of people of the area was affected, accordingly the detaining authority applied his mind that accused is indulging in activities in a manner prejudicial to the maintenance of supplying the services essential for the community at large. Therefore, with a view to prevent further commission of same nature of offences, the detaining authority rightly passed the detention order against him. The time gap from the date of incident and the date of detention order, was not material, but it is the nature of offences, which provided

material for subjective satisfaction of the detaining authority.

42. Learned A.G.A. also argued that the accused who had committed the offence under the substantive law and who is languishing in jail was likely to be released on bail. If the detaining authority satisfies that the accused is likely to release on bail, this fact was sufficient for his subjective satisfaction. In support of his argument, learned counsel for the opposite parties have relied upon paragraph 7 of the judgment of Hon'ble Apex Court in the case of **Ibrahim Nazeer Vs. State of Tamil Nadu & another, AIR 2006 SC 3606, which reads as under :-**

"7. It has to be noted that whether prayer for bail would be accepted depends on circumstances of each case and no hard and fast rule can be applied. The only requirement is that the detaining authority should be aware that the detenu is already in custody and is likely to be released on bail. The conclusion that the detenu may be released on bail cannot be ipsi dixit of the detaining authority. On the basis of materials before it, the detaining authority came to the conclusion that there is likelihood of detenu being released on bail. That is his subjective satisfaction based on materials. Normally, such satisfaction is not to be interfered with. On the facts of the case, the detaining authority has indicated as to why he was of the opinion that there is likelihood of the detenu being released on bail. It has been clearly stated that in similar cases, orders granting bail are passed by various courts. Appellant has not disputed the correctness of this statement. Strong reliance was placed by learned counsel for the appellant on Rajesh Gulati v. Govt. of NCT of Delhi. The factual scenario in that case was

entirely different. In fact, five bail applications filed had been already rejected. In that background this Court observed that it was not a "normal" case. The High Court was justified in rejecting the stand of the appellant."

(Emphasis supplied)

43. In the above case the accused was engaged in smuggling of foreign goods. As he arrived at on 31.08.2005, at Chennai Airport, he falsely declared that he was having only foreign electronic goods of value Rs.30,000/-, whereas after seizure the value of such goods was found as Rs.8,22,500/-. He gave a false statement before the authority that the goods belong to one Selvi Narayana. Infact the bags were belonging to the accused. The accused was detained by the police under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. The offence of the accused was found serious in nature and was found fit for detention of accused under Section 3 of the Act of 1980, therefore, the detaining authority satisfied with the material available before him that accused was likely to be released on bail, therefore, he passed the detention order. It was his just subjective satisfaction in accordance with law. However, the facts and circumstances of said case are different from the facts and circumstances of the case in hand, as in that case smuggling of foreign electronic items were likely to cause adverse effect to the defence and security of India as well as economy and market policy of the State. Undoubtedly, it may affect the public at large.

44. On the same point, learned counsel for the opposite parties have submitted another dictum of Hon'ble Apex Court in the case of **Veeramani Vs. State of**

Tamil Nadu, (1994) 2 SCC 337. He relies upon paragraph 8, which reads as under :-

"8. But in the instant case what we have to mainly see is whether there was awareness in the mind of the detaining authority that the detenu is in custody and that he had reason to believe that he is likely to be released. The grounds do disclose that the detaining authority was aware that the detenu is in custody and it is further mentioned that he was also aware that bail is usually granted by the courts in such cases and it is further emphasised that there is 'imminent possibility' of the detenu coming out on bail. As a matter of fact the High Court in its judgment while considering this aspect also observed thus :

"The grounds indicate that the detenu, who was in remand, was likely to file a bail application and come out on bail. This shows the subjective satisfaction of the detaining authority not only of the awareness of the petitioner being in remand, but his subjective satisfaction of the likelihood of the petitioner coming out on bail by filing bail application. Of course, the detaining authority need not have stated that he was also aware that bail is usually granted by courts in such cases and hence there is imminent possibility that he will come out on bail if it has to be held to be a sweeping statement, but on facts, it cannot be said that the statement is of a sweeping nature for, it is well known that in offences punishable under the sections listed above, bail orders are usually granted after some time and most certainly except in rarest of rare cases after the final report is laid."

Therefore it cannot be said that the detaining authority has not applied its mind to this aspect. It is also submitted that

the detenu, as a matter of fact, did not file any bail application. But it must be noted that the detenu was arrested on February 11, 1993 and remanded to custody and on February 16, 1993 itself the detention order was passed. Therefore there was no opportunity for him to file a bail application within this short interval."

45. In that case the accused was having criminal history of six cases. When the police party went to apprehend the accused and his associates in connection with the offence committed under Sections 148, 341, 302 and 506 (ii) I.P.C., the accused with intention to kill the police inspector, aimed to cut his head with Patta knife but it fell on his forearm causing blood and injury and similarly some of the associates of the accused inflicted injuries to the other police personnel and stones were pelted against them, which also caused injuries to them. Anyhow they were apprehended and the accused was threatening the general public and thereby instilled a sense of fear and panic in their minds. In the case, there was a fearful condition. The accused had tried to kill a police officer, who protects the society from criminal activities. Fearless accused and his associates inflicted injuries to police persons with intention to kill in public view and also at the time of arrest the accused was threatening the general public. He had committed a heinous offence and was having criminal history of six cases. In the backdrop of above facts, the Hon'ble Apex Court found that it was not colorable application of subjective satisfaction of detaining authority as bail can be granted to accused by application of law. Only after 05 days from the arrest, the accused was detained under the provisions of the Act. The facts and circumstances of the case

cited by learned A.G.A., differs with the facts of present case.

46. However, regarding the applicability of Section 3 of the Act, 1980, Hon'ble Apex Court has stated in para 6 of the above judgment that :-

"6.From the catena of decisions of this Court it is clear that even in the case of a person in custody, a detention order can validly be passed if the authority passing the order is aware of the fact that he is actually in custody; if he has reason to believe on the basis of the reliable material that there is a possibility of his being released on bail and that on being so released, the detenu would in all probabilities indulge in prejudicial activities and if the authority passes an order after recording his satisfaction the same cannot be struck down."

47. So far as the satisfaction of District Magistrate is concerned, it is subjective to the detaining authority, who is the highest authority of the District. Since the above satisfaction relates to society as well as the community at large, hence the above subjective satisfaction must be based on proper assessment of material produced before him to pass the detention order. It should be kept in mind that the available material should be of such degree which may be capable to show the necessity for passing the detention order just to prevent, present imminent danger or prejudicial act in maintenance of public order or which is likely to prevail in future.

48. The report of S.H.O., Police Station Kotwali Nagar, Gonda is available on record which contains the wording of general in nature. No specific effect or counter effect/repercussion in retaliation to

act done by accused has been mentioned by the S.H.O. or the police officers, in their reports. In other words the satisfaction of the detaining authority should be recorded with reasoning as the detention order can affect the guarantee given by the Constitution to its citizen in part III thereof. The above satisfaction of the authority must not be based on any vague material or against the mandates of law.

49. Perusal of record and fact of the present case indicates that the offence of murder of an individual was allegedly committed by the accused-petitioner on 28.01.2023. He was apprehended on 30.01.2023. The detention order has been passed on 17.05.2023. The Investigation of the offence was concluded and the charge sheet was submitted in the court on 27.04.2023. The accused has no criminal antecedent. In the report of S.H.O. Police Station Kotwali Nagar, Gonda no specific effect on the society at large has been shown. It can be presumed that post mortem report and the statement of the witnesses would have been available at the early stage of investigation. In the light of above circumstances, it transpires that grounds of detention of petitioner lack reasoning with regard to necessity of immediate detention of petitioner to prevent any prejudicial act against public order. In absence of any situation requiring prevention, the order of the detaining authority becomes punitive and not preventive in nature.

50. Infact the primary object of detention of an accused under the provisions of the Act of 1980 is not to punish him for having done something/offence under the substantive law but to intercept him further before he does so. The detention order is not a

penalty for the offence done by the accused in past but it is intended to preempt a person from indulging in future activities, sought to be prohibited, by a relevant law and with a view to prevent the accused from doing prejudicial activities against the public order in future.

51. In the case of ***State of Punjab Vs. Sukhpal Singh, (1990) 1 SCC 35***, the Hon'ble Apex Court has held as under :-

"10. It is submitted that in the instant case, there were sufficient materials to show that the detenu would act in the future to the prejudice of the maintenance of public order, security of the State and the government's effort to curb terrorism. From the nature and contents of his speeches stated in the grounds of detention there was sufficient justification for the inference that he would repeat such speeches if not eventively detained. Again when grievous crime against the community was committed it would surely be subject to the penal law and stringent sentences, but at the same time it could be considered unsafe to allow him the opportunities to repeat prejudicial acts during the period the penal process was likely to take. The learned Attorney General refers us to Giani Bakshish Singh v. Government of India, Smt. Hemlata v State of Maharashtra and Raj Kumar Singh v. State of Bihar submitting that the possibility of criminal prosecution was no bar to order any preventive detention and that the court should not substitute its decision or opinion in place of decision of the authority concerned on the question of necessity of preventive detention: [(1981) 4SCC p.656,para21]

"A prosecution or the absence of it is not absolute bar to an order of preventive detention; the authority may

prosecute the offender for an isolated act or acts of an offence for violation of any criminal law, but if it is satisfied that the offender has a tendency to go on violating such laws, then there will be no bar for the State to detain him under a Preventive Detention Act in order to disable him to repeat such offences. The detaining authority is not the sole judge of what national security or public order requires. But neither is the court the sole judge of the position. When power is given to an authority to act on certain facts and if that authority acts on relevant facts and arrives at a decision which cannot be described as either irrational or unreasonable, in the sense that no person instructed in law could have reasonably taken that view, then the order is not bad and the court cannot substitute its decision or opinion in place of the decision of the authority concerned on the necessity of passing the order."

52. Taking into consideration the provisions of the Statute, in the light of the law laid down by Hon'ble Apex Court, it can be concluded that the Statute has given the power to Central Government or to the State Government to detain an accused person under the preventive detention, in the circumstances as mentioned in Section 3 (1) and (2) of the Act of 1980. Apart from that, section 3 (3) gives power to District Magistrate or the Commissionerate of Police to pass the detention order after considering the circumstances prevailing or the likely to prevail in any area within the local limits of their jurisdiction. Such detaining authorities are the highest authorities of the district executive, who may pass the preventive detention order, considering in mind the fundamental rights (particularly Articles 21 and 22 of the Constitution of India) of a person, guaranteed by the Constitution. Apart from

that they have been entrusted to maintain the situation of law and order and the public order in the area of their jurisdiction.

53. Although the court cannot review the subjective satisfaction of detaining authority, also the material to pass detention order cannot be assessed by the court but there should be some reliable material before the detaining authority showing that there is a possibility of release of accused on bail and that, on being so released on bail, the detenue would, in all probability indulge in such prejudicial activities.

54. The court cannot review subjective satisfaction of detaining authority. It is for detaining authority to examine the material which was produced before the detaining authority by the police is sufficient to establish prima facie the ground that the accused has acted prejudicial to maintenance of public order and such material is also sufficient to indicate that, if accused will be set free after getting bail, it is more likely that he may commit such act which will be prejudicial to maintenance of public order in future also. If the material so cogent has not been produced by police before detaining authority, passing of preventive detention order by the authority may fall under the category of colourable exercise of power. There may be a situation that if such material so produced by police before the detaining authority, for his subjective satisfaction, lacks merit or are unable to show some specific repercussions or counter effect on society or public at large in consequence of crime committed by the accused, then preventive detention cannot be resorted, otherwise every offender/accused of heinous offence, like murder, will be behind the bars under the

provisions of preventive detention act. In nutshell we may say that in the appropriate case before reaching the conclusion that there is likelihood that the accused will be released on bail, it will be necessary for the detaining authority to ascertain as to whether the act of accused comes under the provisions of Section 3 (1), 3 (2) and 3 (3) of the Act of 1980 or not, and whether there exists any material throwing light that accused, so detained, can commit such act after release on bail, and there is need/urgency to prevent the accused from doing such act. The distinction between the words - law and order and public order has to be kept in mind, which has not been done in this case.

55. Article 22 of the Constitution of India makes provision for protection against arrest and detention in certain cases. Its sub clause (1) and (2) makes following provision :-

“22. Protection against arrest and detention in certain cases

(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply –

(a) to any person who for the time being is an enemy alien; or

(b) to any person who is arrested or detained under any law providing for preventive detention.

(4).....

.....

(5).....

.....

(6).....

.....

(7).....

.....”

56. The above sub-clause (3) (b) is like exception of above sub clause (1) and (2) of Article 22, it affects the right of detained person adversely. Fundamental Rights are meant for protecting the civil liberties of the citizens, whereas the above exceptional clause keeps the accused under incarceration without trial. Although the State has been granted the power to curb the civil liberties under the law of preventive detention, they are required to be exercised with due caution and after due consideration and on application of mind to the facts and material of a case in the light of the law on the subject.

57. In the light of the facts, circumstances and material available on record, it is apparent that in the present case there was an offence against the individual person which was committed within the walls of a residential accommodation. Any use of deadly weapon has not been shown in the F.I.R. Commission of any other offence has also not been shown subsequent to commission of murder. The accused was arrested just third day of

occurrence, no specific and substantive effect on public at large in consequence of or as a repercussion of murder has been mentioned by the police authorities as well. It has also been shown that the petitioner is not having any criminal history in his credit. The detention order has been slapped after lapse of three and half months. The apprehension that he would be released on bail, apart from being a sure cannot justify the preventive detention in the absence of satisfaction of ingredients of Section 3 (3) of the Act, 1980. The above delay has not been properly explained, whereas, after the conclusion of investigation, charge sheet was submitted in the court on 27.04.2023 itself. Repetition of general and ornamental words regarding the disturbance in public order has been mentioned in the report of sponsoring authority. There seems no proximity in passing the order dated 17.05.2023 from the date of occurrence. The detaining authority has not applied his judicial mind to curb the protection guaranteed by the Constitution against the personal liberty of the petitioner.

58. Having considered the arguments of learned counsels for the petitioner and opposite parties, material available on record and dictums of Hon'ble Apex Court and co-ordinate bench decisions of this Court, as discussed above, we are of considered view that the impugned order of detention dated 17.05.2023, passed by the District Magistrate, Gonda was without application of mind, hence the detention order is held illegal, which deserves to be set aside.

59. Accordingly, the habeas corpus petition is **allowed**. The detention order dated 17.05.2023, passed by the District Magistrate, Gonda is hereby quashed. The

accused/petitioner, if not required in any other offence, be released immediately from the Jail.

Original records be given back to learned A.G.A.

(2024) 4 ILRA 106
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.02.2024

BEFORE

THE HON'BLE MANISH KUMAR NIGAM, J.

Matters Under Article 227 No. 113 of 2024
 (Civil)

Smt. Kushma Devi ...Petitioner
Versus
Darshan Singh & Ors. ...Respondents

Counsel for the Petitioner:

Sri Vidyadhar Yadav, Sri Vidya Dhar Yadav,
 Sri Satya Man Singh

Counsel for the Respondents:

(A) Civil Law - Dispute over land possession - Code of Civil Procedure, 1908 - Order 7 Rule 11 (d) - Rejection of Plaint - Where the suit appears from the statement in the plaint to be barred by any law, U.P. Revenue Code, 2006 - Section 206 - Jurisdiction of civil Courts and revenue courts - Jurisdiction of civil courts is presumed unless explicitly or implicitly barred by statute - Suit for injunction can be maintained on possessory title grounds and is not barred under Section 206 of the U.P. Revenue Code, 2006 - Civil Court has jurisdiction to entertain a suit for injunction if it does not fall under the prohibited categories listed in the Second and Third Schedules of the U.P. Revenue Code, 2006.(Para 10-12,14, 31-33)

Plaintiff-respondents filed a suit for prohibitory injunction - to restrain defendant-petitioners from interfering with their possession of disputed land -

defendants contended - suit was barred under Section 206 of the U.P. Revenue Code - as the subject matter fell within the exclusive jurisdiction of the Revenue Court - lower courts rejected contention - dismissed the defendants' application under Order VII Rule 11 (d) of CPC - Hence petition. (Paras 2-3, 16-17, 30)

HELD: - For filing a suit simpliciter for injunction there is no prohibition in any of the clauses of section 206 of the UP-Revenue Code, 2006. Jurisdiction of the civil court to entertain a suit for injunction is neither expressly barred nor by implication. Courts below were right in holding that suit will not be barred by provisions of Section 206 of the U.P. Revenue Code and have committed no illegality in dismissing the application of the petitioner under Order 7 Rule 11 C.P.C.(Para 32 -34)

Petition dismissed. (E-7)

List of Cases cited:

1. Secy. of St. Vs Mask & Co., A.I.R. 1940 PC 105
2. Abdul Waheed Khan Vs Bhawani & ors., 1966 (SC) 1718
3. St. of T.N. Vs Ramalinga Samigal Madam, A.I.R. 1986 (SC) 794,
4. Nagri Pracharini Sabha & anr. Vs Vth Addl. Dist. & Sessions Judge, Varanasi & ors., 1991 Supp (2) SCC 36
5. Kamla Prasad & ors. Vs Sri Krishna Kant Pathak & ors., 2007(4) SCC 213
6. Rajeshwar Gupta & anr. Vs Smt. Gauri Devi & ors., 2017 (134) RD 34

(Delivered by Hon'ble Manish Kumar Niagam, J.)

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

2. The instant writ petition has been filed for following relief:

"I. Issue/Pass an order setting aside Impugned Judgment/Order and Formal Order dated 16.08.2023 and 21.08.2023 passed in civil Revision No.3 of 2021, "Kushma Devi Vs Darshan Singh (Dead) and Others" by Addl. District and Session Judge, Court No.1 Farrukhabad, arising out of order dated 15.01.2021 and Formal Order dated 25.01.2021 passed by Learned Civil Judge (J.D.) Kayamganj; Farrukhabad in O.S. No.225 of 2018, "Darshan Singh (Dead) and Others Vs Jabar Singh and others"

II. Issue/Pass an order allowing Application 32C-2 dated 04.01.2019, of the petitioner filed under Order-VII, Rule-11(d) of C.P.C. and to dismiss the above mentioned suit with cost, as is barred by Sec.206 (2) A and Serial No.15 & 16 of second Schedule of U.P. Revenue Code 2006."

3. Brief facts of the case are that the plaintiff-respondent instituted suit for prohibitory injunction being Suit No. 225 of 2018 (Darshan Singh and others Vs. Javar Singh) restraining the defendant-petitioners from interfering with their possession over the land in dispute. The defendant-petitioners filed an application in the suit for rejecting plaint under Order 7 Rule 11(d) C.P.C., contending therein that the suit is barred by Section 206 of the U.P. Revenue Code, 2006 read with Schedule 2 entry 15 and 16 of the Schedule. The aforesaid application filed by the defendant-petitioners has been rejected by the trial court vide order dated 25.01.2021. The revision No. 3 of 2021 filed by the defendant-petitioner against the order dated 25.01.2021 has also been dismissed by order dated 16.08.2023 passed by Additional District and Sessions Judge Court No. 1, Farrukhabad. Hence the present petition.

4. The contention of learned counsel for the petitioner is that in the revenue records the name of plaintiff and defendants are recorded as co-tenure holders as *Bhumidhars* and all the gata number being minjumla, which has not been partitioned and therefore, the jurisdiction is with the revenue court and the suit of the plaintiff is barred by Section 206 of the U.P. Revenue Code, 2006.

5. Before examining the contention, it will be useful to look into the statutory provisions.

6. Section 206 of the U.P. Revenue Code, 2006 provides for jurisdiction of Civil and Revenue Courts and is quoted as under:-

" 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."

7. Schedule 2 of the U.P Revenue Code, 2006 provides for 16 matters which are excluded from the jurisdiction of the Civil Court. Schedule 2 of the U.P Revenue Code, 2006 is quoted as under:

SECOND SCHEDULE

[See Section 206(2)(a)]

Sl. No.	Matters excluded from the jurisdiction of the Civil Court
1.	Any question regarding the demarcation of boundaries or fixing of boundary marks.
2.	Any claim to question a decision determining abadi made by the Collector.
3.	Any claim to have any entry made in any revenue records or to have any such entry omitted, amended or substituted.
4.	Any question regarding the assessment, remission or suspension of land revenue or rent.
5.	Any claim connected with or arising out of the collection by the State Government or the enforcement by such Government of any process for the recovery of land revenue or any sum recoverable as an arrear of land revenue under this Code or any other law for the time being in force.
6.	Any claim against the vesting of any property in the State Government, Gram Panchayat or other local authority under this Code.
7.	Any question relating to the levy or imposition of a fine, cost, expense, charge, penalty or compensation under this Code.
8.	Any question regarding reinstatement of a Bhumidhar or asami wrongfully ejected or dispossessed from any land.
9.	Any claim to compel the performance of any

	duty imposed by this Code on any revenue officer appointed under this Code.
10.	Any question, relating to division, creation, amalgamation, abolition or readjustment of revenue areas and Lekhpal's circles under Chapter II.
*11.	Any question relating to the allotment of land referred to in Section 64 or Section 125 or cancellation of such allotment.
12.	Any claim to question a direction issued by the Collector under section 71.
13.	Any claim to question the delivery of possession over any land and part thereof referred to in Section 124, or the eviction of any person under Section 134 or Section 201.]
14.	Any claim to question the validity of any order made by the State Government under Chapter XI.
15.	Any claim regarding possession over any land.
16.	Any claim to establish the rights of a co-tenure holder in respect of any land.

*Substituted by Section 187 of U.P. Act No.4 of 2016,

8. Third schedule of the U.P Revenue Code, 2006 provides for description of the suit application or proceeding, Court or officer of original jurisdiction, first appeal and second appeal provided under the Act. Third schedule of the Code is quoted as under:-

Third Schedule

Sect ion	Description of suit application or proceedings	Court or Officer of original jurisdiction	First Appeal	Second Appeal
1	2	3	4	5
24	Boundary and boundary marks	Sub-Divisional Officer	Commissioner	---
35	Mutation Cases	Tahsildar	Sub-Divisional Officer	1[***]
54, 56, 57	Disputes relating to trees	Collector	Commissioner	---
67	Eviction of illegal occupier of Gram Panchayat	2[Assistant Collector]	3[Collector]	---

82(2)(c)	Suit for ejectment by a Bhumidhar against the person in possession of any land on the basis of a contract or lease	Sub-Divisional Officer	Commissioner	Board
85(1)	Suit for ejectment by Gram Panchayat against a Bhumidhar with non-transferable rights	Do	Do	Do
85(2)	Suit for ejectment by a landholder against an asami	Do	Do	Do
96(2)	Suit for partition by a disabled co-sharer	Do	Do	Do
116	Suit for division of a holding	Do	Do	Do
131(1)	Suit for ejectment of an asami	Do	Do	Do
131(4)	Suit for recovery of arrears or rent against an asami	4[Sub-Divisional Officer]	Collector	Nil
133	Suit for injunction, compensation etc.	Do	Do	Do
134	Suit for ejectment against a person occupying land without title or for damages or for both	Sub-Divisional Officer	Commissioner	Board
137(1)	Suit for possession, compensation or injunction	Do	Do	Do

139(1)	Application for fixation of rent	Tahsildar	Sub-Divisional Officer	Nil
141(1)	Application for commutation of rent	Sub-Divisional Officer	Collector	Nil
144	Suit for declaration by Bhumidhar or asami	Do	Commissioner	Board
145	Suit for declaration by Gram Panchayat	Do	Do	Do
151(1)	Suit by a Government lessee for ejectment or for damages or both	Do	Do	Do

9. Section 9 of the Code of Civil Procedure enables the civil court to try all suits of civil nature excepting suits of which cognizance is barred either specifically or impliedly. A litigant having a grievance of civil nature has, independently of any statute, has a right to institute a suit in a civil court unless its cognizance is either expressly or impliedly barred.

10. In **Secretary of State Vs. Mask and Company A.I.R. 1940 PC 105**, Privy Council has observed that it is settled law that exclusion of jurisdiction of civil court is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied.

11. The Supreme Court in case of **Abdul Waheed Khan Vs. Bhawani and others reported in 1966 (SC) 1718** has held in paragraph no. 9 as under:

“ Under s. 9 of the Code of Civil Procedure, a civil court can entertain a suit

of a civil nature except a suit of which its cognizance is either expressly or impliedly barred. It is settled principle that it is for the party who seeks to oust the jurisdiction of a civil court to establish his contention. It is also equally well settled that a statute ousting the jurisdiction of a civil court must be strictly construed."

In case of Dhulabhai etc. Vs. State of Madhya Pradesh A.I.R. reported in 1969 SC(78) in paragraph no. 32 has summarized the position as under:-

" 32. Neither of the two cases of Firm of Illuri Subayya(1) or Kamla Mills(2) can be said to run counter to the series of cases earlier noticed. The result of this inquiry into the diverse views expressed in this Court may be stated as follows :-

(1) Where the statute gives a finality to the orders of the special tribunals the Civil Courts' jurisdiction must be held to be excluded if there is adequate remedy to do what the Civil Courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability

and provides for the determination of the right or liability and further lays down that all ques- tions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in Civil Courts are prescribed by the said statute or not.

(3).....

(4).....

(5).....

(6).....

(7) An exclusion of the jurisdiction of the Civil Court is not readily to be inferred unless the conditions above set down apply."

12. The Supreme Court in case of **State of Tamil Nadu Vs. Ramalinga Samigal Madam** reported in A.I.R. 1986 (SC) 794, in paragraph no. 14 has held as under:-

"14. Thirdly, having regard to the principle stated by this Court while enunciating the first proposition in Dhulabhai's case (supra) it is clear that even where the statute has given finality to the orders of the special tribunal the civil Court's jurisdiction can be regarded as having been excluded if there is adequate remedy to do what the civil Court would normally do in a suit. In other words, even where finality is accorded to the orders passed by the special tribunal one will have to see whether such special tribunal has powers to grant reliefs which Civil Court would normally grant in a suit and if the answer is in the negative it would be difficult to imply or infer exclusion of civil Court's jurisdiction."

13. Again in case of **Nagri Pracharini Sabha and another Vs. Vth Additional District and Sessions Judge,**

Varanasi and others reported in 1991 Supp (2) SCC 36 in paragraph no. 2 and 3 of the judgment has held as under:

“ 2. A litigant having a grievance of a civil nature has, independently of any statute, a right to institute a suit in the civil court unless its cognizance is either expressly or impliedly barred. The position is well settled that exclusion of jurisdiction of the civil court is not to be readily inferred and such exclusion must be either express or implied.

3. Reliance has been placed by Mr. Mukhoty before us on the ratio of the Constitution Bench decision of this Court in K.S. Venkataraman & Company v. State of Madras, where reference has been made to the Privy Council case in Raleigh Investment Company Limited v. The Governor General in Council. It has been laid down that the Civil Court's jurisdiction would be presumed unless the contrary is indicated. Mr. Mukhoty has also relied upon two other decisions being Ganga Bai v. Vijay Kumar and Others, and Dhulabhai v. The State of M.P. The legal position thus seems to be clear and it is not necessary to quote further authorities.”

14. Thus from the case laws as discussed above, it is clear that normally there will be a presumption as to the jurisdiction of the civil court unless the same is expressly or impliedly barred.

15. Since in the present case, the application under Order 7 Rule 11 filed by the petitioner has been dismissed and as it is settled that for deciding an application under Order 7 Rule 11, only the plaintiff's averments has to be seen. Except for the plaintiff's averments, the averments made in the application filed by

the defendant under Order 7 Rule 11 or in the written statement can be looked into therefore, it will be useful to see in short the plaintiff's averments.

16. The suit was instituted with the allegation that Bhukhand Khasra No. 352 M/0.142 hectare and Bhukhand Khasra No. 344 M/0.049 hectare which are part of Gata No. 77 situated at village Katra Rehmat Khan, the original owner in possession of the aforesaid khasra numbers was Dinanath son of Baldev Prasad, Mewaram s/o Mukti, Jabar Singh, Gajraj Singh, Havaladar Singh and Jahan Singh sons of Masal Singh. In the aforesaid parcel of land, Dinanath had half share which he received in inheritance from his father Baldev. After the death of Dinanath his half share devolved upon his sons plaintiff nos. 1 and 2 having 1/4 share each. The half share of Mukti, after his death devolved upon Mewa Ram and Masal Singh having 1/4 share each. After the death of Mewaram his 1/4 share devolved upon his son Amar Singh through his widow Jaldevi and other sons, namely, Rakesh Chandra, Maheshchandra, Sarveshchandra, Pushpendra Singh and Nilesh Singh. The 1/4 share of Masal Singh devolved upon defendant nos. 1 and 2, Havaladar Singh and Jahan Singh, who have sold their entire share to one Shareef Khan s/o Munku Khan and thereafter, nothing remained in the share of defendant nos. 1 and 2. Later on Sharref Khan sold different portion to different persons over which they have raised constructions and in the present suit the plaintiffs have no dispute with those purchasers of Shareef Khan. Over the land in dispute, name of Smt. Hridavati widow of Sher Singh was recorded as Bhumidhar and she has executed a sale deed dated 03.07.1987 of 6 Decimal 24 aire which was registered on 03.08.1987 in favour of plaintiff no. 2.

17. The aforesaid Hridawati executed another sale deed dated 11.6.1999 of her entire 1/3 share in Khasra No. 344 M area 0.049 hectare in favour of plaintiff no. 3, which has been described in the plaint as letters च, छ, ज, झ and where construction raised by the plaintiff no. 3 exist. It has also been stated that towards north of च, छ, ज, झ which belongs to the plaintiff there are constructions of the defendant. The defendants in the suit wants to illegally dispossess the plaintiffs from land च, छ, ज, झ and therefore, the suit was filed for prohibitory injunction restraining the defendants from interfering with the possession of the plaintiff.

18. From the perusal of provisions of Section 206 of the U.P. Revenue Code, 2006, it is clear that in the first place, Section 206 of the Code makes a general declaration that 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 officer or a revenue court is empowered to determine, decide or dispose of under this Code.

19. Then comes Section 206 (2) of the Code which has been divided in two parts.

i. Clause (a) of the Section expressly excludes the jurisdiction of civil court on all matters specified in the Second Schedule.

ii. Clause (b) of 206 (2) further lays down that no court other than revenue court or revenue officer specified in the Third Schedule shall entertain any suit, application or proceedings specified in the said schedule.

20. Section 206 (3) of the Code seeks to prohibit all appellate, revisional or executing courts from entertaining the plea

of jurisdiction, unless such plea was taken before the trial court, at the earliest opportunity, and unless there was a consequent failure of justice.

21. Section 206 (2) (a) refers to the Second Schedule and provides that no civil court shall have jurisdiction over any of the 16 matters specified in the said schedule.

22. Learned counsel for the petitioner has relied upon Clause 15 and 16 of the Second Schedule and has contended that the suit is barred by Section 206 of the Code. Clause 15 relates to any claim regarding possession over any land and Clause 16 states that any claim to establish right of co-tenure holder in respect of any land.

23. From the pleadings as noted above neither the Clause 15 nor Clause 16 applicable in the present case. As from the plaint's allegation, it is clear that it has been contended by the plaintiff-respondents that the defendants in the suit has no right to the property as they have already sold their share much before filing the present suit. So, there is no question of any claim to establish the right of a co-tenure holder as stated in paragraph 16 of the Second Schedule. The Clause-15 will also not apply for the reason, the petitioner is claiming an injunction, restraining the defendant-petitioners in the suit from interfering with their possession.

24. So far as the proceedings covered under the Third Schedule do not include the suit for injunction except for there is a mention of Section 133 and 137(1) of the U.P. Revenue Code, in the Third Schedule, it has been mentioned that

the suit for injunction, compensation etc. (Section 133) and suit for possession, compensation and injunction (Section 137).

25. Section 133 of the U.P. Revenue Code, 2006 relates to suit for injunction, compensation etc. Section 133 of the U.P. Revenue Code, 2006 is quoted as under:

“133. Suit for injunction, compensation etc.- The [Gram Panchayat] or the land-holder may, in lieu of suing for ejectment of an asami under Section 131, file a suit in the Court of Sub-Divisional Officer.

(a) for injunction restraining him from putting the land to any unauthorised use or causing any waste or damage to it;

(b) for compensation for such use, waste or damage; or

(c) for repair of the waste or damage caused to the land.”

26. From the perusal of Section 133 it is clear that Section 133 contemplates a suit by the Gram Panchayat or by the land-holder for injunction restraining the *asami* from putting a land to any unauthorized use or causing any waste or damage to it instead of suing for ejectment of *asami* under Section 131 of U.P. Revenue Code, 2006

27. Section 133 of the Code will not apply to the suit simpliciter for injunction as in the present case.

28. Section 137 provides for remedies for wrongful ejectment. Section 137 of U.P. Revenue Code 2006 is quoted as under:-

“137. Remedies for wrongful ejectment:

(1) An *asami* ejected or apprehending ejectment from or prevented

from obtaining possession of any land otherwise than in accordance with the provisions of any law for the time being in force, may sue the person so ejecting him, trying to eject him or keeping him out of possession –

(i) for possession of the [land; or]

(ii) for compensation for wrongful dispossession; or

(2) When a decree is passed for compensation for wrongful dispossession but not possession the compensation awarded shall be for the whole period during which the *asami* was entitled to remain in possession.”

29. Section 137 of the U.P. Revenue Code, 2006 provides only for compensation and possession in case of *asami* is ejected or apprehends ejectment and the provisions of 137 will clearly not be applicable in the present case.

30. Learned counsel for the petitioner relied upon the judgement of the Supreme Court in case of **Kamla Prasad and others versus Sri Krishna Kant Pathak and others reported in 2007(4) SCC 213**. In case of Kamla Prasad, it has been held by Apex Court that civil court will have no jurisdiction to decide the issue of validity of sale-deeds in respect of an agricultural land, particularly in view of the case put forward by the plaintiff that he was not the sole owner of the property and defendant nos. 10 to 12, who were proforma defendants had also right, title and interest therein. He had also stated in the plaint that though, in the revenue record, only his name had appeared but the defendant nos. 10 to 12 have also right in the property. Supreme Court held that, both the courts below were right in holding that such question can be decided by a revenue court in a suit instituted under Section 229 of

U.P.Z.A. & L.R. Supreme Court further held that, courts below were right in coming to the conclusion that legality or otherwise of insertion of names of purchaser in record of rights and deletion of name of the plaintiff from such record can only be decided by revenue court since the name of purchasers had already been entered into. Only revenue court can record a finding whether such action was in accordance with law or not and it cannot be decided by the civil court.

31. This court in case of **Rajeshwar Gupta and another Vs. Smt. Gauri Devi and others reported in 2017 (134) RD 34** has held as under:-

“ 14. It is settled law that a suit for injunction can be maintained also on the ground of possessory title. A person in possession over some property can defend his possession and claim an injunction for protecting such possession, from the entire world, except the true owner.”

32. From the discussion made above that it is clear that for filing a suit simpliciter for injunction there is no prohibition in any of the clauses of section 206 of the UP Revenue Code, 2006. The jurisdiction of the civil court to entertain a suit for injunction is neither expressly barred nor by implication .

33. In my opinion, the courts below were right in holding that suit will not be barred by provisions of Section 206 of the U.P. Revenue Code and have committed no illegality in dismissing the application of the petitioner under Order 7 Rule 11 C.P.C.

34. The writ petition lacks in merit and is therefore, **dismissed.**

(2024) 4 ILRA 114

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 21.03.2024

BEFORE

THE HON'BLE MANISH KUMAR NIGAM, J.

Matters Under Article 227 No. 3022 of 2024
(Civil)

Rajeev Gupta

...Petitioner

Versus

Swatantrata Sangram Senani Ashrit

Sangathan Pilibhit & Ors. ...Respondents

Counsel for the Petitioner:

Sri Prabha Shankar Pandey, Sri Satish Kumar

Counsel for the Respondents:

Sri Arpit Agarwal

(A) Civil Law - Rejection of Complaint - Code of Civil Procedure, 1908 - Order VII Rule 11 – rejection of a complaint if it does not disclose a cause of action or is barred by law, Order 23 Rule 3A - Bar to suit to set aside a compromise decree , Specific Relief Act, 1963 - Section 38, Section 41(j) - Perpetual injunctions and when they can be granted - Compromise decree - Cause of action - Locus standi - Supervisory jurisdiction - Only the complaint averments can be seen at the time of considering an application under Order VII Rule 11 C.P.C. (Para -13)

(B) Civil Law - Code of Civil Procedure, 1908 - Order VII Rule 11 - complaint can be rejected under Order VII Rule 11(d) of C.P.C. if the statements in the complaint itself reveal that the suit is barred by law or does not disclose a cause of action - Court must limit itself to the statements in the complaint without considering any external evidence or written statements. (Para 10, 11, 13, 16)

(C) Civil Law - Code of Civil Procedure, 1908 - Order 23 Rule 3A - Compromise decree under Order 23 Rule 3A cannot be

challenged by a person who was not a party to the compromise - Such a person has the right to file a separate suit to challenge the decree if it affects their rights. (Para 17, 18, 19, 20)

Ownership of the property in dispute - Plaintiff-respondents filed a suit seeking a permanent injunction against the defendant-petitioner - alleging attempts to take possession and construct on disputed land - sought to declare a previous compromise decree as void - petitioner contended - suit was barred by law - filed an application under Order VII Rule 11 for rejection of plaint - which was dismissed by both trial court and appellate court. (Para 2, 3, 15)

HELD: - Application under Order VII Rule 11 was rightly rejected as the issues raised by the petitioner require evidence to be examined during trial, and the plaint discloses a valid cause of action. Courts below did not commit any illegality in rejecting the application under Order VII Rule 11 CPC. (Para 24, 25)

Petition dismissed. (E-7)

List of Cases cited:

1. M/s. Sree Surya Developers & Promoters Vs N. Sailesh Prasad & ors., 2022 (1) ACJ 655 (S.C.)
2. Tej Bahadur Vs Narendra Modi, 2021 (1) ACJ 109 (S.C.)
3. Bharvagi Constructions & anr. Vs Kothakapu Muthyam Reddy & ors., 2017 (137) RD 574
4. Kamala & ors. Vs. K.T. Eshwara Sa, (2008) 12 SCC 661
5. Madanuri Sri Rama Chandra Murthy Vs. Syed Jalal, (2017) 13 SCC 174: (2017) 5 SCC (Civ) 602
6. Smt. Suraj Kumari Vs. Dist. Judge, Mirzapur & ors., AIR 1991 AllD 75
7. Siddalingeshwar & ors. Vs. Virupaxgouda & ors., AIR 2003 Karnataka 407
8. Khalil Haji Bholumiya Salar & ors. Vs. Parveen & ors., 2013 (6) BomCR 841

(Delivered by Hon'ble Manish Kumar Nigam, J.)

1. This petition has been filed by the defendant-petitioner for the following relief:

“a. To pass an order under the supervisory jurisdiction of this Hon'ble High Court, setting aside the impugned order dated 04.12.2023 passed by the learned Civil Judge (Senior Division)/F.T.C., Pilibhit in Application No. 18 Ga under Order 7 Rule 11(d) read with Section-151 of C.P.C. filed in Original Suit No. 399 of 2021 (Swatantrata Sangram Senani Ashrit Sangathan through President- Vishwa Mitra Tandon and Others vs. Rajeev Gupta) and impugned order dated 27.02.2024 passed by the learned Additional District Judge, Court No. 1, Pilibhit in Civil Revision No. 94 of 2023 (Rajeev Gupta vs. So-called Swatantrata Sangram Senani Sangathan, Pilibhit through President- Vishwa Mitra Tandon and Others).

b. To pass an order under the supervisory jurisdiction of this Hon'ble High Court, staying the further proceedings of Original Suit No. 399 of 2021 (Swatantrata Sangram Senani Ashrit Sangathan through President- Vishwa Mitra Tandon and Others vs. Rajeev Gupta), pending before the Court of Civil Judge (Senior Division)/F.T.C., Pilibhit.”

2. Brief facts of the case are that the plaintiff-respondents instituted Original Suit No. 399 of 2021 (Swatantra Sangram Senani Ashrit Sangathan through President- Vishwa Mitra Tandon and 2 others Vs. Rajeev Gupta) for the relief that defendant be restrained from taking possession and raising construction over the land in dispute belonging to the plaintiffs and also that

decree passed in O.S. No. 287 of 2020 (Rajeev Gupta Vs. Karan Verma) dated 03.11.2020 be declared void. Defendant-petitioner appeared in the suit and moved an application under Order VII Rule 11 C.P.C. for rejection of the plaint on the ground that the plaintiffs have no locus standi to file the suit and the suit is also barred by Section 38 read with Section 41 (J) of Specific Relief Act, 1967. The aforesaid application filed by the petitioner was rejected by the trial court by judgment and order dated 04.12.2023. Against the judgment and order dated 04.12.2023 passed by Civil Judge (Senior Division), Pilibhit, Civil Revision No. 94 of 2023 was filed by the defendant-petitioner and the same had also been dismissed by the Additional District Judge, Court No.1 Pilibhit by its judgment and order dated 27.02.2024. Hence present petition.

3. Learned counsel for the petitioner contended that plaintiffs have no cause of action and no locus standi to file the present suit. It has been further contended by learned counsel for the petitioner that the suit as filed by the plaintiff is barred under Section 38 and 41 (J) of the Specific Relief Act. It is next contended by learned counsel for the petitioner that second relief claimed by the plaintiff that the compromise judgment and decree passed in O.S. No. 287 of 2020 (Rajeev Gupta Vs. Karan Verma) dated 03.11.2020 be declared void is hit by provisions of Order 23 Rule 3-A of the C.P.C. Courts below have rejected the application filed by the petitioner erroneously without considering the law as cited by the petitioner before the court below.

4. Learned counsel for the petitioner relied upon the judgments of the Supreme Court as well as of this Court in case of

M/s. Sree Surya Developers and Promoters Versus N. Sailesh Prasad and Ors. reported in 2022 (1) Apex Court Judgments 655 (S.C.), *Tej Bahadur Versus Narendra Modi* reported in 2021 (1) Apex Court Judgments 109 (S.C.), *Bharvagi Constructions and another Versus Kothakapu Muthyam Reddy and others* reported in 2017 (137) RD 574.

5. It will be useful to examine the provisions of law relied upon by the learned counsel for the petitioner before considering the submissions made by the learned counsel for the petitioner.

6. Rule 11 of the Order VII CPC is quoted as under :-

"11. Rejection of plaint — *The plaint shall be rejected in the following cases:-*

(a) *where it does not disclose a cause of action;*

(b) *where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;*

(c) *where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;*

(d) *where the suit appears from the statement in the plaint to be barred by any law;*

[(e) where it is not filed in duplicate];

[(f) where the plaintiff fails to comply with the provisions of rule 9];

[Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite

stamp-papers shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-papers, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.]"

7. Section 38 of the Specific Relief Act 1963 relates to perpetual injunctions. Section 38 and Section 41(J) of Specific Relief Act is quoted as under:

"38. Perpetual injunction when granted.—

(1) Subject to the other provisions contained in or referred to by this Chapter, a perpetual injunction may be granted to the plaintiff to prevent the breach of an obligation existing in his favour, whether expressly or by implication.

(2) When any such obligation arises from contract, the court shall be guided by the rules and provisions contained in Chapter II.

(3) When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the court may grant a perpetual injunction in the following cases, namely:— (a) where the defendant is trustee of the property for the plaintiff;

(b) where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;

(c) where the invasion is such that compensation in money would not afford adequate relief;

(d) where the injunction is necessary to prevent a multiplicity of judicial proceedings.

41. Injunction when refused.—

(a).....(i).....

(j) when the plaintiff has no personal interest in the matter."

8. Order 23 Rule 3 and Rule 3(A) of the C.P.C. is quoted as under:—

"3. Compromise of suit.—Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, [in writing and signed by the parties] or where the defendant satisfied the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith [so far as it relates to the parties to the suit, whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit:]

[Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question; but not adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment.]

Explanation.— An agreement or compromise which is void or voidable under the Indian Contract Act, 1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this rule.

3A. Bar to suit.—No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful."

9. From the reading of Clause 11 of Order 7 C.P.C., it is clear where the suit appears from the statements in the plaint

that plaintiff has no cause of action or to be barred by any law, the Court shall reject the plaint.

10. Order VII Rule 11 CPC provides that the plaint shall be rejected “where the suit appears from the statement made in the plaint that plaintiff has no cause of action or to be barred by any law”. In order to decide whether the plaintiff has no cause of action or the suit is barred by law, it is the statement in the plaint will have to be construed. The Court while deciding such an application under Order 7 Rule 11 C.P.C. must have due regard only to the statements made in the plaint. Whether the suit is barred by any law or the plaintiff has no cause of action must be determined from the statements in the plaint and it is not open to decide the issue on the basis of any other material including the written statement in the case.

11. In ***Kamala and others Vs. K.T. Eshwara Sa; (2008) 12 SCC 661***, S.B. Sinha, J speaking for the Bench examined the ambit of Order VII Rule 11(d) CPC and observed: (SCC 668-69, paras 21 and 22)

“21. Order 7, Rule 11(d) of the Code has limited application. It must be shown that the suit is barred under any law. Such a conclusion must be drawn from the averments made in the plaint. Different clauses in Orders 7, Rule 11, in our opinion, should not be mixed up. Whereas in a given case, an application for rejection of the plaint may be filed on more than one ground specified in various sub-clauses thereof, a clear finding to that effect must be arrived at. What would be relevant for invoking clause (d) of Order 7 Rule 11 of the Code is the averments made in the plaint. For that purpose, there cannot be any addition or subtraction. Absence of

jurisdiction on the part of a court can be invoked at different stages and under different provisions of the Code. Order 7 Rule 11 of the Code is one, Order 14 Rule 2 is another.

22. For the purpose of invoking Order 7 Rule 11(d) of the Code, no amount of evidence can be looked into. The issues on merit of the matter which may arise between the parties would not be within the realm of the court at that stage. All issues shall not be the subject matter of an order under the said provision.”

12. In case of ***Madanuri Sri Rama Chandra Murthy Vs. Syed Jalal; (2017) 13 SCC 174: (2017) 5 SCC (Civ) 602***; the Apex Court has summarized the legal position as follows :-

“The plaint can be rejected under Order 7 Rule 11 if conditions enumerated in the said provision are fulfilled. It is needless to observe that the power under Order 7 Rule 11 CPC be exercised by the Court at any stage of the suit. The relevant facts which need to be looked into for deciding the application are the averments of the plaint only. If on an entire and meaningful reading of the plaint, it is found that the suit is manifestly vexatious and meritless in the sense of not disclosing any right to sue, the court should exercise power under Order 7 Rule 11 CPC. Since the power conferred on the Court to terminate civil action at the threshold is drastic, the conditions enumerated under Order 7 Rule 11 of CPC to the exercise of power of rejection of plaint have to be strictly adhered to. The averments of the plaint have to be read as a whole to find out whether the averments disclose a cause of action or whether the suit is barred by any law. It is needless to observe that the

question as to whether the suit is barred by any law, would always depend upon the facts and circumstances of each case. The averments in the written statement as well as the contentions of the defendant are wholly immaterial while considering the prayer of the defendant for rejection of the plaint. Even when the allegations made in the plaint are taken to be correct as a whole on their face value, if they show that the suit is barred by any law, or do not disclose cause of action, the application for rejection of plaint can be entertained and the power under Order 7 Rule 11 CPC can be exercised. If clever drafting of the plaint has created the illusion of a cause of action, the court will nip it in the bud at the earliest so that bogus litigation will end at the earlier stage."

13. Thus, from the law laid down by the Apex Court, it is clear that only the plaint averments can be seen at the time of considering an application under Order VII Rule 11 C.P.C.

14. With the help of counsel for the petitioner, I have perused the copy of the plaint which has been filed as Annexure No. 2 to the present petition.

15. As per the plaint case, the property in dispute was constructed by the various freedom fighters as office for the freedom fighters, which was used after the independence for various social activities. The aforesaid property was maintained by the freedom fighters and after their death by their successors. It had also been stated that plaintiff nos. 2 and 3 along with other successors of freedom fighters were managing the property in dispute. After independence, in the premises of the property in dispute Bhai Kishan Lal and Chunni Lal used to carry business in the

name of Haryana Handloom with the permission of the then Manager of the premises and in lieu thereof they used to get premises painted and repaired. Later on Bhai Kisan Lal and Chunni Lal handed over their business to the defendant in the suit and the defendant carried on business in the name of Haryana Handloom in the premises in dispute. Earlier, the business was being carried in the tent but later on with the permission of the then manager, the tent was removed and a tin shade was constructed by the defendant with the permission of the plaintiffs. It had also been stated that on the western side of the premises, a room was constructed by the father of the plaintiff no.2 in the memory of his wife and apart from that, in the aforesaid premises on the eastern- northern corner, two rooms were constructed. The defendant was carrying business in the name of Haryana Handloom since 1988 and for the last five years used to keep his goods in the room constructed by the father of the plaintiff no. 2. Later on the defendant turned dishonest and instituted suit being Original Suit No. 287 of 2020 (Rajeev Gupta Vs. Karan Verma) with the allegation that the plaintiff was the owner in possession of the property in dispute and the defendant was a licensee of a tin shade. The aforesaid suit was filed by the defendant in the present suit against one Karan Verma, who was the close associate of the defendant. Karan Verma, defendant in the O.S. No. 287 of 2020 filed a written statement admitting the averments made in the plaint and an agreement was entered into between the defendant in the present suit and his friend Karan Verma and the suit was decreed in terms of compromise by judgment and decree dated 03.11.2020. It was also stated that the defendant Karan Verma had no concern with the property in dispute. It had been further stated that on

the basis of compromise decree passed in Original Suit No. 287 of 2020, the defendant in the suit got the map sanctioned from the prescribed authority regulated area, Pilibhit for raising a construction after demolishing the existing constructions on 03.06.2020. After the map was sanctioned, the defendant removed his tin shade and started demolishing the room constructed by the father of the plaintiff no. 2. After coming to know about the activities of the defendant, complaints were made by the plaintiff no. 2 with the administrative authorities and when the matter was opposed by the plaintiffs, the defendant informed them regarding the decree passed in Original Suit No. 287 of 2020. Thereafter, the plaintiff no. 2 moved an application before the Nagar Pallika Parishad, Pilibhit for correction of revenue records and on the aforesaid application by order dated 06.07.2021 Executive Officer, Nagar Officer Pilibhit directed for corrections of revenue records. An application was also made by the plaintiff no. 2 for cancellation of map passed by the prescribed authority regulated area, Pilibhit by order dated 06.07.2020. On the aforesaid application, the map was cancelled by order dated 17.08.2021. On 05.09.2021, the defendant tried to take forceful possession of the property in dispute and tried to raise construction, which was resisted by the plaintiff no. 2, therefore, the present suit (O.S. No. 399 of 2021) was filed by the plaintiff against the defendant for the relief of permanent injunction as well as for a declaration declaring compromise decree dated 03.11.2020 passed in Original Suit No. 287 of 2020 as void.

16. In the present case, from the reading of the plaint as a whole and proceeding on the basis that the averments

made therein are correct, which is what the Court is required to do so it cannot be said that the pleadings ex facie do not disclose any cause of action. There is a serious dispute between the plaintiffs and the defendants as to the ownership of the property in dispute which is a question of fact and can only be decided after framing an issue in this respect and considering the evidence led by the parties at the time of deciding the suit.

17. So far as contention of learned counsel for the petitioner is that the second relief as claimed by the plaintiff is barred by Order 23 Rule 3(A) C.P.C. is also misconceived for reason that the plaintiffs in the present suit are not parties to the compromise, which has been entered into between the present defendant and one Karan Verma, defendant in Original Suit No. 287 of 2020. The plaintiff-respondents are not party to the aforesaid suit and therefore Order 23 Rule 3(A) will not come in their way to challenge the compromise decree by filing a suit for setting aside or declaring the same void.

18. This Court in case of **Smt. Suraj Kumari Vs. District Judge, Mirzapur and others** reported in **AIR 1991 Alld 75** has held as under :

22. The petitioner's second submission regarding the applicability of O.23, R. 3-A of the Code of Civil Procedure is misconceived the provision is confined only to the parties to the suit. The said provision is not applicable to a stranger to the said compromise decree. A suit by stranger to set aside the compromise decree, which affects his rights is not barred by the said provision. Order 23, Rule 3-A of the Code of Civil Procedure cannot be read dehors its earlier provision

of the same chapter. The said provision is only a part of the entire Chapter of Order 23 of the Code of Civil Procedure which prescribes provisions for withdrawal and adjustment of the suit. Order 23 Rule 3 of the Code of Civil Procedure provides for a situation where the parties have arrived at a compromise. Order 23, Rule 3 and Rule 3-A of the Code of Civil Procedure as added by Amending Act No. 104 of 1976 read together, makes it clear that a party to the suit is debarred from filing suit for setting aside compromise decree on the ground of being unlawful. Such a party has remedy by moving appropriate application before the Court concerned which has passed the compromise decree.

23. The said provision does not bar the present petitioner who was not a party to the said compromise decree to file a suit. As such there is no force in the petitioner's contention that a suit for setting aside the compromise decree entered into between Sri Nagarmal and Smt. Paradevi was barred by O.23, R. 3-A of the Code of Civil Procedure. The suit at the instance of present petitioner for setting aside compromise decree entered into between Smt. Paradevi and Sri Nagarmal is maintainable in law. In support of this contention the petitioner has placed reliance on AIR 1985 Karnataka 270, Smt. Tarabai v. Krishnaswamy Rao. Since the said provision does not bar the petitioner from filing the suit the decision is of no help to the petitioner."

19. The Karnatka High Court in case of Siddalingeshwar & others Vs. Virupaxgouda and others reported in AIR 2003 Karnataka 407 has held as under:

A bar is imposed to challenge the compromise in a separate suit because a party to a compromise is entitled to

challenge the compromise as not lawful, either by filing an application in the same suit or by filing an appeal under Order 43 Rule 1A. But such remedies are available only to the parties to the suit. A person who is not a party to the suit, cannot obviously file an application in the suit, or an appeal, to challenge a compromise as being not lawful.

20. The Bombay High Court in case of **Khalil Haji Bholumiya Salar and others Vs. Parveen and others** reported in **2013 (6) BomCR 841** relying upon the judgment of Allahabad High Court in case of **Suraj Kumari (supra) as well as Karnatka High Court in Siddalingeshwar & others (supra)** has held as under :

Order 23 of CPC deals with adjustment/compromise of a suit. An appeal is a continuation of the suit. Section 107(2) CPC provides that subject to sub-section 1, the appellate Court shall have same powers and shall perform as nearly as may be the same duties as are conferred and imposed by the Code on Courts of original jurisdiction in respect of suits instituted therein. Therefore, the provisions of Order 23 apply in full force to appeal proceedings. By amendment of CPC, Rule 3A has been inserted in Order 23 to bar a suit to set aside a decree on the ground that the compromise on which the decree is based is not lawful. Therefore, if a party to a suit who enters into a compromise in terms of which a consent decree is made, wants to challenge it on the ground that it is not lawful, the remedy available to him, is either to file an application in the very suit to recall the consent decree on the ground that compromise is not lawful, or is vitiated by fraud, or to file an appeal under Order 43 Rule 1A CPC, contending that the compromise was not lawful and that it

ought not to have been recorded. A compromise decree is based on the agreement arrived at between the parties, which gets a seal of approval from the Court. A stranger to the suit is obviously a stranger to the agreement of compromise. He cannot file an application either in the suit or in the appeal proceedings to challenge a compromise decree as he is not a party to the suit. Therefore, the bar under Rule 3A of Order 23 cannot be extended to him. The provision must confine only to the parties to the suit, who are parties to the agreement to compromise. Hence, I am in respectful agreement with the decisions of the Allahabad High Court and Karnataka High Court, holding that a stranger to a compromise decree cannot file an application in a suit or an appeal to challenge a compromise, as not being lawful, but must file a separate suit for the purpose. The application filed by the applicants, therefore, is required to be dismissed as not maintainable. Since the application is not at all maintainable, there is no need to enter into discussion on the rival contentions as regards the merits of the application. The Civil Application is dismissed.

21. The judgment of the Supreme Court in case of **M/s Sree Surya Developers and Promoters (supra)** relied upon by the Counsel for the petitioner is distinguishable on facts as in case of **M/s Sree Surya Developers and Promoters (supra)**, the suit was filed for declaring the compromise decree void by one of the parties to the compromise and not by the person who was not party to the suit or compromise. Similarly in case of **Bharvagi Constructions (supra)** a suit was filed by the some of the defendants (who were party to the award) against the plaintiff and the remaining defendants for declaring the

award passed by Lok Adalat on the basis of compromise illegal and null & void having been obtained by playing fraud was held not maintainable. There also the plaintiff filed the suit challenging the award was party to the award and therefore the suit was held not maintainable.

22. So far as the contention of learned Counsel for the petitioner is that the suit filed by the plaintiff-respondent was barred in view of Section 38 and Section 41(j) of the Specific Relief Act, 1963 is concerned, it cannot be said from the reading of the plaint that the plaintiff has no personal interest in the matter. In the judgment relied upon by the learned Counsel for the petitioner in case of **Tej Bahadur Vs. Narendra Modi (supra)**, it has been held by the Supreme Court the election petition was rightly rejected under Order VII Rule 11 C.P.C., as the petitioner was neither an elector for such constituency nor he was a candidate and as such he has no cause of action which invest him with right to sue. Judgment in case of **Tej Bahadur (supra)** is also distinguishable on facts and is of no help to petitioner.

23. The ground which were taken by the petitioner in his application under Order VII Rule 11 can be pleaded by the petitioner in his written statement and the same can be decided after framing an issue in this regard after considering the evidence of the parties at this stage of hearing of the suit, but the same cannot be looked into at the time of considering an application under Order VII Rule 11 as it is only on the basis plaint averment the application has to be decided.

24. In view of the above discussion, I am of the view that the courts below have committed no illegality in rejecting the

application filed by the petitioner under Order VII Rule 11 C.P.C.

25. Accordingly, the writ petition is dismissed.

26. No order as to costs.

(2024) 4 ILRA 123
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.03.2024

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SYED QAMAR HASAN RIZVI, J.

Special Appeal No. 56 of 2024

Rajni Rani	Versus	...Appellant
State of U.P. & Ors.		...Respondents

Counsel for the Appellant:

Sri Rakesh Kumar Rathore, Sri Shyam Narayan Verma, Sri Radha Kant Ojha (Sr. Advocate)

Counsel for the Respondents:

Sri Siddharth Khare

Civil Law - Hindu Marriage Act, 1955 - Section 13 - Code of Criminal Procedure, 1973 - Section 125 - Family Pension - Marriage between deceased employee (Bhojraj Singh) and first wife (Usha Devi) governed by Hindu Marriage Act, 1955; cannot be dissolved by compromise in maintenance proceedings under Sec. 125 Cr.P.C., which is limited to determining maintenance amount. Consent cannot confer jurisdiction on Magistrate to annul marriage; dissolution requires decree of divorce by competent civil court. Appellant's (second wife, Rajni Rani) claim to family pension rejected, as no such decree obtained and first marriage subsists. Claim of first wife's subsequent marriage disputed; requires declaration by competent court for nullity. Distinguished *Deoki Panjhiyara* (supra) as it

involved void marriage due to bigamy (pre-existing marriage), not applicable here where first marriage was valid. (Paras 9-13)

Special Appeal Dismissed.

List of Cases cited:

1. *Deoki Panjhiyara Vs Shashi Bhushan Narayan Azad*, 2012 Supreme (SC) 899 (Paras 6, 12)

(Delivered by Hon'ble Ashwani Kumar Mishra, J.

&

Hon'ble Syed Qamar Hasan Rizvi, J.)

1. Heard Sri Radha Kant Ojha, learned Senior Counsel for the appellant and Sri Siddharth Khare, learned counsel appearing on behalf of the opposite party.

2. This appeal arises out of an order passed by learned Single Judge in Writ-A No. 11483 of 2023 whereby the writ petition itself has been dismissed.

3. Facts of the case as have been noticed by learned Single Judge are that one Bhojraj Singh was an assistant teacher in Maharaja Tej Singh, Junior High School Aurandh, Vikash Khand Sultanganj, District Mainpuri. He superannuated on 30.06.2012 and later died on 02.10.2021. The petitioner/appellant came up with a case of payment of family pension on the ground that she has contracted marriage with late Bhojraj Singh and has been residing as such for the last several years. In order to put-forth its case, the petitioner-appellant contended that though Bhojraj Singh had initially contracted marriage with contesting private respondent Usha Devi but the marriage ultimately did not succeed and the marital parties parted ways. Proceeding under Section 125 Cr.P.C. had been initiated by Usha Devi in which a compromise was arrived at, as per

which, the parties had separated. It was therefore urged that once Usha Devi parted ways with the deceased employee no right survived in her as against the deceased employee. The deceased employee contracted marriage with the present petitioner-appellant. Various documents have been relied upon in order to prove the factum of marriage. It also appears that in proceeding before the authorities, the petitioner-appellant also set up a claim of second marriage of Usha Devi which fact is specifically disputed by the private respondent. The appellant also claim to have obtained succession certificate and relying upon it claim for family pension was put-forth by the appellant which has been rejected by the authorities. The writ petition filed against such order has also been dismissed.

4. Learned Single Judge has returned a finding to the effect that the marriage legally contracted between Bhojraj Singh and Usha Devi could not have been dissolved except by a decree of competent court and merely in proceeding under Section 125 Cr.P.C. such marriage cannot be annulled. The claim of the appellant based on second marriage has therefore been rejected.

5. Aggrieved by the judgment of learned Single Judge, the appellant who is admittedly the later wife has filed the present appeal. On the previous occasion when the matter was heard, this Court had called upon the appellant to demonstrate as to whether a legally contracted marriage could be dissolved except by a decree of divorce passed by the competent forum. Order passed in that regard on 05.02.2024 reads as under:

"Learned counsel for the appellant seeks adjournment as he intends to further examine the law with regard to

the impact of compromise between the parties and to what extent such compromise would provide an alternative to a decree of divorce otherwise contemplated under Section 13 of Hindu Marriage Act, 1955 by which alone a marriage can otherwise be dissolved.

List again as fresh on 19.2.2024."

6. Sri R.K. Ojha, learned Senior Counsel appearing on behalf of the appellate has vehemently urged that in the facts of the present case the claim of the appellant is clearly sustainable inasmuch as the previous marriage itself was dissolved by way of a compromise entered into between the parties in proceedings under Section 125 Cr.P.C. It is further submitted that the contesting opposite party has otherwise solemnized subsequent marriage, and therefore, the claim of family pension by the private respondent would be unsustainable. In order to support his contention, learned Senior Counsel for the appellant has placed reliance upon a judgment of Hon'ble Supreme Court in the case of **Deoki Panjhiyara Vs. Shashi Bhushan Narayan Azad & another**, reported in **2012 0 Supreme (SC) 899**. Reliance is placed upon paragraphs 18 & 19 of the said judgment which are reproduced hereinafter:

"In the present case, however, the appellant in her pleadings had clearly, categorically and consistently denied that she was married to any person known as Rohit Kumar Mishra. The legitimacy, authenticity and genuineness of the marriage certificate dated 18.4.2003 has also been questioned by the appellant. Though Section 11 of the aforesaid Act gives an option to either of the parties to a void marriage to seek a declaration of

invalidity/nullity of such marriage, the exercise of such option cannot be understood to be in all situations voluntarily. Situations may arise when recourse to a court for a declaration regarding the nullity of a marriage claimed by one of the spouses to be a void marriage, will have to be insisted upon in departure to the normal rule. This, in our view, is the correct ratio of the decision of this Court in Yamunabadi (supra) and M.M. Malhotra (supra). In this regard, we may take note of a recent decision rendered by this Court in A. Subash Babu Vs. State of Andhra Pradesh & another [5] while dealing with the question whether the wife of a second marriage contracted during the validity of the first marriage of the husband would be a 'person aggrieved' under Section 198(1)(c) of the Code of Criminal Procedure to maintain a complaint alleging commission of offences under Section 494 and 495 IPC by the husband. The passage extracted below effectively illuminates the issue:

'Though the law specifically does not cast obligation on either party to seek declaration of nullity of marriage and it may be open to the parties even without recourse to the Court to treat the marriage as a nullity, such a course is neither prudent nor intended and a declaration in terms of Section 11 of the Hindu Marriage Act will have to be asked for, for the purpose of precaution and/or record. Therefore, until the declaration contemplated by Section 11 of the Hindu Marriage Act is made by a competent Court, the woman with whom second marriage is solemnized continues to be the wife within the meaning of Section 494 IPC and would be entitled to maintain a complaint against her husband.'

19. In the present case, if according to the respondent, the marriage between him and the appellant was void on account of the previous marriage between the appellant and Rohit Kumar Mishra the respondent ought to have obtained the necessary declaration from the competent court in view of the highly contentious questions raised by the appellant on the aforesaid score. It is only upon a declaration of nullity or annulment of the marriage between the parties by a competent court that any consideration of the question whether the parties had lived in a 'relationship in the nature of marriage?' would be justified. In the absence of any valid decree of nullity or the necessary declaration the court will have to proceed on the footing that the relationship between the parties is one of marriage and not in the nature of marriage. We would also like to emphasise that any determination of the validity of the marriage between the parties could have been made only by a competent court in an appropriate proceeding by and between the parties and in compliance with all other requirements of law. Mere production of a marriage certificate issued under Section 13 of the Special Marriage Act, 1954 in support of the claimed first marriage of the appellant with Rohit Kumar Mishra was not sufficient for any of the courts, including the High Court, to render a complete and effective decision with regard to the marital status of the parties and that too in a collateral proceeding for maintenance. Consequently, we hold that in the present case until the invalidation of the marriage between the appellant and the respondent is made by a competent court it would only be correct to proceed on the basis that the appellant continues to be the wife of the respondent so as to entitle her to

claim all benefits and protection available under the DV Act, 2005."

7. Sri Siddharth Khare, learned counsel for the private opposite party submits that the plea of second marriage by the private respondent Usha Devi was not pleaded in writ and accept to make a vague allegations in that regard in this appeal no other material has been placed. Sri Siddharth Khare support the judgment of the learned Single Judge for the reasons contained therein. So far as the judgment of the Hon'ble Supreme Court in ***Deoki Panjhiyara*** (supra) is concerned, it is pointed out that the facts of that case are clearly distinguishable.

8. We have heard learned counsel for the parties and perused the material available on record.

9. The short question that arises for determination in the facts of the present case is as to whether the admitted marriage between Bhojraj Singh and Usha Devi could be dissolved by way of a compromise in proceedings under Section 125 Cr.P.C.? As a sequel to the above question, the issue that would arise is as to whether the claim of private respondent could be non suited on the ground that she has contracted a second marriage. It is also urged on behalf of the appellant that the question as to whether Usha Devi has contracted a second marriage ought to have been adjudicated by the competent court and the authorities, on their own, could not have returned a finding on that aspect.

10. So far as the proceedings under Section 125 Cr.P.C. are concerned, such proceedings are in respect of payment of maintenance to the deserted wife. The scope of the proceeding under Section 125

Cr.P.C. is limited i.e. with regard to determination of the amount of maintenance. In such proceeding the marriage between the parties cannot be dissolved by the court inasmuch as the jurisdiction of the court would be limited to determination of the aspect of maintenance. Even with the consent of the parties, the jurisdiction of the concerned court under Section 125 Cr.P.C. cannot be expanded so as to concede the power with such court to pass a decree of divorce. Law is well settled that consent of the parties cannot confer jurisdiction if it is otherwise not vested by law.

11. Admittedly the parties herein are Hindu by religion and the marriage between them would be governed by the provisions of Hindu Marriage Act, 1955. It is undisputed that late Bhojraj Singh and Usha Devi were capable of entering into a marital alliance and that such a marriage was performed between the parties. This factum is undisputed. The question that would arise is as to how and in what manner such a marriage could be dissolved. The marriage between the parties since are governed by the provisions of the Hindu Marriage Act, 1955, the only manner in which such marriage can be dissolved is by passing of an appropriate decree by the competent court in accordance with the provisions of the Act of 1955. It is admitted that no such decree by a competent court was ever passed.

12. In that view of the matter, we are of the considered view that the marriage between the parties could not have been dissolved merely on the basis of a compromise allegedly entered into between the parties. Reliance has been placed by the learned counsel for the appellant upon the judgment of the Hon'ble Supreme Court in

Deoki Panjhiyara (supra). In order to examine the judgment, it would be apt to refer to the facts of the case which are noticed in paragraph 3 of the judgment which are reproduced:

"While the Writ Petition was pending, the respondent sought a recall of the order dated 13.02.2008 on the ground that he could subsequently come to know that his marriage with the appellant was void on the ground that at the time of the said marriage the appellant was already married to one Rohit Kumar Mishra. In support, the respondent ? husband had placed before the learned trial court the certificate of marriage dated 18.04.2003 between the appellant and the said Rohit Kumar Mishra issued by the competent authority under Section 13 of the Special Marriage Act, 1954 (hereinafter referred to as ?the Act of 1954?)."

13. The above paragraph would go to show that the claim of the appellant of the first marriage being void was based upon the assertion that the other party was already married to one Rohit Kumar Mishra and during subsistence of such previous marriage the second marriage was performed which was void. It was in that context that the Hon'ble Supreme Court proceeded to make observations in paragraphs 18 & 19 of the judgment. In paragraph 19 the Court has specifically noticed that the claim of marriage, as had been put-forth, was disputed on the ground that the lady had already contracted a previous marriage, and therefore, the marriage solemnized with the appellant therein was a nullity. The conditions of a valid marriage have been noticed and it is thereafter that the Court has proceeded to observe that once the previous marriage was void a declaration of nullity or

annulment of marriage between the parties by a competent court was not required. We find that the marriage between Bhojraj Singh and Usha Devi admittedly was the first marriage contracted by either of the parties and there was no allegation of incompetence of either of the persons to contract marriage. The plea of nullity of marriage therefore is not available on facts of the present case. The claim that subsequent in point of time Usha Devi has contracted marriage is a fact, which is specifically disputed by the contesting respondents. Unless a declaration in that regard is granted by the competent court, we are not inclined to interfere with the right of first wife to claim family pension etc. merely on the ground that either the marriage stood dissolved on account of a compromise in proceeding under Section 125 Cr.P.C. or on the ground that Usha Devi has subsequently contracted marriage with anyone else. For the reasons that have been recorded above, we find that this appeal lacks merit and is, accordingly, dismissed.

(2024) 4 ILRA 127

**APPELLATE JURISDICTION
CIVIL SIDE**

DATED: ALLAHABAD 09.04.2024

BEFORE

**THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SYED QAMAR HASAN RIZVI, J.**

Special Appeal No. 59 of 2024

And

Special Appeal No. 54 of 2024

Paramjit Singh **...Appellant**
Versus
Union of India & Ors. **...Respondents**

Counsel for the Appellants

Sri Alok Kumar Yadav, Sri Vashistha Dubey

Counsel for the Respondents:

A.S.G.I., Ms. Pooja Agarwal

Service Law - Central Industrial Security Force (CISF) Rules, 2001 - Rules 32, 34, 36 & 39(ii) - Constitution of India, 1950- Article 311(2) - Dismissal from Service - Principles of Natural Justice - Appellants, Head Constables in CISF, dismissed without regular departmental enquiry under Rule 39(ii) for alleged misconduct and absconding during suspension, following an FIR under Section 376 IPC and SC/ST Act, 1989, despite acquittal in criminal trial on 07.06.2007. Disciplinary authority's invocation of Rule 39(ii) held arbitrary; no objective evidence to justify dispensing with enquiry under Rule 36. Appellants' absence (to pursue legal remedy) not amounting to desertion; no efforts made to ascertain their whereabouts. Preliminary enquiry findings insufficient for major punishment like dismissal, violating audi alteram partem. High Court's earlier order (17.08.2011) directing reconsideration post-acquittal ignored by revisional authority. Impugned dismissal order (25.09.2004), appellate/revisional orders, and Single Judge's dismissal of writ petitions (22.12.2023) set aside for procedural flaws. Appellants entitled to reinstatement; employer granted liberty to hold fresh enquiry within four months, with subsistence allowance during suspension, or reinstatement with 25% back wages if no enquiry initiated. (Paras 13-38).

Special Appeals Allowed.**List of Cases cited:**

1. U.O.I. Vs Tulsiram Patel, (1985) 3 SCC 398 (Para 14)
2. Nirmala J. Jhala Vs St. of Guj., (2013) 4 SCC 301 (Para 10)
3. Sri Vikas Verma Vs U.O.I., 2022 SCC OnLine Kar 1417 (Para 10)
4. Manojit Ghosh Vs U.O.I., 2012 SCC OnLine Del 888 (Para 12)
5. Jaswant Singh Vs St. of Punj., (1991) 1 SCC 362 (Para 21)

6. Sudesh Kumar Vs St. of Hary., (2005) 11 SCC 525 (Para 22)

7. Chief Security Officer Vs Singasan Rabi Das, (1991) 1 SCC 729 (Para 23)

8. Amalendu Ghosh Vs North Eastern Railway, AIR 1960 SC 992 (Para 24)

9. G.M. Tank Vs St. of Guj., (2006) 5 SCC 446 (Para 30)

10. Roop Singh Negi Vs Punj. National Bank, (2009) 2 SCC 570 (Para 33)

11. St. of U.P. Vs Aditya Prasad Srivastava, 2017 (2) ADJ 554 (DB) (Para 34)

12. Managing Director, ECIL, Hyderabad Vs B. Karunakar, (1993) 4 SCC 727 (Para 38)

(Delivered by Hon'ble Ashwani Kumar Mishra, J.

&

Hon'ble Syed Qamar Hasan Rizvi, J.)

1. Both these intra Court appeals filed by the appellants-petitioners under Rule 5 of Chapter VIII of Allahabad High Court Rules (Rules of the Court, 1952), are against the judgments and orders dated 22.12.2023 passed by the learned Single Judge in exercise of its writ jurisdiction. The Writ Court separately, vide impugned judgments and orders dated 22.12.2023, dismissed the writ petitions filed by Paramjit Singh and Jitendra Singh bearing Writ-A No. 8019 of 2012 and Writ- A No. 18146 of 2012, respectively, inter alia, challenging the order dated 25.09.2004 as also the appellate order dated 13.01.2005 and the orders passed by the revisional authority on 31.10.2005 and 28.11.2011. Though the Writ Petitions have been decided separately, but the reasons for dismissal of the petitions as returned by the learned Single Judge are the same and as

such both the Special Appeals are hereby decided by this common order.

2. Facts that are culled out from the pleadings and the material available on record before this Court are that the appellants-petitioners were appointed as Constable and subsequently got promoted to the post of Head Constable in the Central Industrial Security Force (hereinafter referred to as CISF) and were assigned duties of security at NARORA Atomic Power Plant (Anupshahar), Bulandshahar. The case of the appellants-petitioners is that while posted at NARORA Atomic Power Plant, on 03.09.2004 at around 2:30 PM, 5 ladies were spotted inside the said atomic power plant. Since the security of the aforesaid power plant was extremely sensitive, the appellant namely Paramjit Singh immediately raised alarm and in response to the same the petitioner of the Writ- A No.18146 of 2012 namely Jitendra Singh, who was also a Head Constable/Driver immediately reached the spot, but could detain only 3 ladies and brought them at the security gate and before any paperwork could be done, a large number of villager, local politicians and media persons assembled and created a scene and mounted pressure to secure release of the aforesaid detained women.

3. On 12.09.2004, an F.I.R. was lodged against the appellants-petitioners under section 376 I.P.C. read with Section 3(i)(xii) and 3(ii)(v) of the SC/ST Act, 1989, and the case was registered as Case Crime No. 182 of 2004. The incident was highlighted in the local newspapers.

4. The appellants-petitioners were suspended vide order dated 13.09.2004 passed by the Assistant Commandant, CISF UNIT NAPS (respondent no.4) with the

direction not to leave the headquarters without obtaining the prior permission of the respondent no.4 during the suspension period.

5. The contention of the appellants is that they could have not stayed at the headquarters during the suspension period under the unavoidable circumstances inasmuch as an First Information Report (F.I.R.) having been lodged against them and there was an apprehension of being arrested. The appellants in order to seek legal protection from the Court of law, approached the High Court at Allahabad by way of filing a Criminal Misc. Writ Petition No.7426 of 2004 (Jitendra Singh and another versus State of U.P. and others). The High Court vide order dated 23.09.2004 dismissed the said writ petition with the observation that in case the petitioner surrenders and moves an application for bail in the aforesaid criminal case, the court concerned shall consider and dispose of the same expeditiously and in accordance with law.

6. A preliminary inquiry was also conducted against the petitioners for disobeying the conditions imposed in the suspension order dated 13.09.2004. Thereafter, the Commandant, CISF UNIT NAPS, NARORA, vide order dated 25.09.2004 held that it was not reasonably practicable to hold an enquiry in the matter as is provided under Rule 36 of the CISF Rules, 2001 and exercising the powers conferred under Rule 32, 34 & 39(ii) of the CISF Rules, 2001, proceeded to dismiss the appellants-petitioners from service. Both the above named appellants filed departmental appeals against the dismissal order dated 25.09.2004 before the Deputy Inspector General, CISF (respondent no.3) that were dismissed vide order dated

13.01.2005. Thereafter, they filed separate revisions challenging the said order of dismissal. The Inspector General (WS), CISF (respondent no.2) dismissed the said revisions of the appellants, namely, Paramjit Singh and Jitendra Singh vide orders dated 31.10.2005 and 09.08.2005, respectively.

7. Both the above named appellants individually filed writ petitions before this Court assailing the dismissal order and also the appellate as well as revisional orders passed against the them. The said writ petition filed by the petitioner-appellant Paramjit Singh was registered as Writ- A No.59016 of 2007 and the writ petition filed by Jitendra Singh was registered as Writ- A No.78351 of 2005. It would not be out of place to note that since both the appellants were acquitted vide judgment and order dated 07.06.2007 passed by the Court of learned Special Judge (SC/ST Act), Bulandshahar in Session Trial No.271 of 2005 (State versus Paramjit Singh and another), this Court by a common order dated 17.08.2011 disposed of both the said writ petitions by granting liberty to the petitioner to approach the revisional authority by way of an appropriate representation with a direction to the revisional authority to pass appropriate orders in accordance with law in the light of the observations made in the said order within a period of two months from the date of submission of such representation. The extract of the aforementioned order dated 17.08.2011 is reproduced below:

“Having considered the submissions, what is to be noticed is that the basis for passing the order of dismissal was lodging of the criminal case against the petitioners, it being highlighted in the newspapers, adversely affected the image

of the CISF as a whole. Although the petitioners have not been able to demonstrate why they were falsely implicated but the fact remains that in the trial both the victims have denied in their statements that it was the petitioners who had raped them. Once the victims have themselves in the trial not recognized the petitioners as the culprits, the basis for their dismissal on the ground of the said incident needs to be reconsidered.

It is well settled that where an employee who is dismissed on the ground of a criminal case filed against him, although acquitted in the said criminal case, it would still be at the discretion and within the power of the Disciplinary Authority whether or not to take back in service such employees. the Disciplinary Authority for reasons to be recorded may refuse. There could be a case where after the lodging of a criminal case, the department may hold an internal inquiry and based upon the material adduced in the said inquiry may award the punishment. However in the present case no inquiry has been conducted and the order of dismissal has been passed exercising special powers under Rule 39(ii) of the CISF Rules. In the opinion of the Court, the Disciplinary Authority or the Appellate Authority or the Revisional Authority may re-examine the case of the petitioners in the light of the judgment of the trial Court in the Criminal case and pass appropriate orders. The petitioners should not be made to suffer for an offence they may not have committed.

Thus, without going into the question as to whether the order of dismissal in absence of any inquiry was vitiated or not in the opinion of the Court the appropriate authorities may reconsider the matter upon appropriate representation being moved by the petitioners. As the matter had been taken into appeal and

revision, the proper course open to the petitioners would be to approach the Revisional Authority for recalling its order and for reconsidering the matter. It would be for the Revisional Authority whether to consider the matter at its level or remit the same to the Disciplinary Authority to reconsider in the light of the judgment of acquittal and the evidence led in the trial. In view of the above, both the petitions stand disposed of with liberty to the petitioners to approach the Revisional Authority by way of an appropriate representation annexing a copy of the judgment of the trial court along with certified copy of this order and upon such representation being filed the Revisional Authority may proceed to pass appropriate orders in accordance with law in the light of the observations made in this order within a period of two months from the date of submission of such representation along with certified copy of the order.”(emphasis supplied by us)

8. The representation filed by the appellants-petitioners, said to have been moved on 04.10.2011, was rejected by the Inspector General (respondent no.2) vide order dated 28.11.2011. The extract of the relevant portion of the order dated 28.11.2011 is reproduced hereinbelow:

“.....The representation of the petitioner has been considered on merit in compliance of order of Hon’ble Allahabad High Court and the entire proceeding has been re-examined.

8. Therefore, in due compliance of the judgment orders of Hon’ble Allahabad High Court dated 17.8.2011 and Hon’ble trial court dated 07.6.2007 to reconsider this matter, the charges on the basis of which departmental action was processed against the petitioner and the

decision of the revisional authority need to be analyzed. Upon examination of materials held on records it is revealed that the Disciplinary Authority got a Preliminary enquiry conducted into the reported breach in discipline and found that (i) the petitioner while deployed for patrolling/mess duty in STF wing remained absent from STF barrack from 1400 hrs on 03.9.2004 unauthorisdlly, (ii) he alongwith HC/Dvr Jitender Singh detained 03 ladies, letting two other ladies to go out of boundary wall and then they misbehaved with two of the ladies, namely Smt. Meena and Smt. Maharani and (iii) that they did not inform this incident of trespass and subsequent events to any of their senior officer. Thus, even though the petitioner has been acquitted from the charges of committing rape and offence under SC/ST Act, the facts as mentioned at (i), (ii) and (iii) above have not been disputed.

9. With reference to the issue of conducting regular DE after culmination of Preliminary Enquiry it has come on record that the petitioner deserted the unit lines on 19.9.2004 while under suspension violating the instructions contained in para-3 of suspension order dated 13.9.2004 which was duly acknowledged by him and the Disciplinary Authority found it highly impractical to conduct Departmental Enquiry in the manner provided under rule-36 of CISF Rules 2001 in the hostile situation.

10. Thus, the delinquencies at (i) to (iii) above in para-8 proved in the preliminary enquiry which formed the basis of order passed by the disciplinary authority are different from the crime of rape and offense under SC/ST Act from which the Hon’ble Trial court has acquitted the petitioner. In other words, the charges under criminal case against the petitioner have not been the sole matter of

consideration in the instant Departmental proceedings.

11. As such, even after due compliance of the Hon'ble High Court order and after taking into consideration the observations made in the order, I find the order of Disciplinary Authority commensurate with the gravity of undisciplined acts and misconduct on the part of the petitioner being a member of Armed Force of Union and subversive for good order and Force discipline and, therefore, does not warrant interference in order passed by Disciplinary Authority and upheld by Appellate Authority.

12. The representation submitted by the petitioner herein is, therefore, rejected being devoid of merit."

9. After the rejection of their above-mentioned representations; by the second respondent vide order dated 28.11.2011, the appellants separately filed petitions before the Writ Court, having Writ- A No. 8019 of 2012 and Writ- A No. 18146 of 2012. The learned Writ Court after hearing the parties and exchange of pleadings, dismissed both the writ petitions, vide the impugned order dated 22.12.2023 on the identical grounds. The extract of the findings returned by the learned Writ Court resulting into the dismissal of the Writ- A No.8019 of 2012 is reproduced below:

"23. After hearing the submissions extended on behalf of learned counsels for rival parties, after perusing the records and giving full regards to the judgments rendered by Hon'ble Supreme Court and relied upon by learned counsels for the parties, it is crystal clear that submission made by learned counsel for the petitioner on the factual aspect are difficult to be gone into by this Court in proceedings of this petition where writ

jurisdiction under Article 226 of the Constitution of India has been invoked.

24. It is well settled while judicially reviewing any punishment order passed in disciplinary proceedings, the scope of interference of this Court is very limited and is confined to finding of fact the procedural flaws, if any.

25 The arguments raised by learned counsel for respondents seems to be forceful.

26. The entire disciplinary proceeding initiated against petitioner and the punishment has been based on the concurrent findings of facts which cannot be interfered by this Court. Moreover, no procedural flaw has been highlighted by learned counsel for petitioner while challenging the punishment order through the present petition.

27. In view of aforesaid, I do not find any good ground to interfere in the impugned orders. The instant petition thus lacks merit is accordingly dismissed."

10. Being aggrieved by the impugned order dated 22.12.2023, the petitioners-appellants preferred the instant Special Appeals. The bone of contention as advanced by the learned counsel for the appellants is that the learned Writ Court has failed to appreciate the material fact that the order of dismissal from service, being a major punishment could not have been passed merely on the basis of a preliminary enquiry which is simply a fact-finding enquiry, but the respondent authorities without giving any plausible reason for the exercise of the special procedure as contemplated under Rule 39(ii) of the CISF Rules, 2001, proceeded to pass the order of major punishment by circumventing the regular enquiry. It has been further contended that no punishment can be passed merely on the basis of the evidence

collected during preliminary enquiry. In support of his contention, learned counsel relied upon the judgment of the Hon'ble Supreme Court in the case of **Nirmala J. Jhala versus State of Gujarat and another**, reported in (2013) 4 SCC 301 and also the Judgment dated 15.06.2022 passed by a Division Bench of the Karnataka High Court in the case of **Sri Vikas Verma and others versus Union of India and others** (W.P. No. 12681-12685 of 2016). He further asserted that the appellants-petitioners were honorably acquitted as the prosecution miserably failed to prove the charges in the Sessions Trial. Since the evidence and witness before the Criminal Court as well as before preliminary enquiry were same, thus, the judgment and order passed by the Sessions Court dated 07.06.2007 had a serious bearing on the preliminary enquiry but the respondents, despite the categorical direction dated 17.08.2011 issued by the Writ Court in Writ- A No.78351 of 2005 connected with Writ- A No. 59016 of 2007, did not consider the said aspect of the matter and rejected the representation of the appellants in the most mechanical manner thereby holding that the impugned orders do not warrant interference. This aspect of the matter has not been appreciated even by the Hon'ble Single Judge while passing the impugned order dated 22.12.2023.

11. It has also been contended that the respondent authorities have invoked the special procedure contemplated under Rule 39 of the CISF Rules, 2001, by treating the short absence of the appellants-petitioners from the headquarters as 'absconders' or 'deserters' while no proceeding was ever initiated for declaring them as 'absconders' or 'deserters'. Further, a short absence from Unit cannot be construed as a sufficient ground to invoke the extra-ordinary powers

of dispensing with the enquiry, and as such the order of dismissal passed by the respondent authority under the garb of Rule 39(ii) of the CISF Rules, 2001, is not only violative of principles of natural justice but is also per-se illegal. It has also been asserted by the learned counsel for the appellant-petitioner that the Writ Court has failed to consider that the order dated 28.11.2011 passed by the second respondent is on a premise, which is entirely distinct from the issue that has been made the basis of dismissal order dated 25.09.2004. The second respondent while passing the impugned order dated 28.11.2011 carved out a new case by giving colour to the allegations that ultimately failed before the learned Sessions Court and as such are unsustainable in law.

12. Per contra, appearing on behalf of the Union of India/respondent, the learned Additional Solicitor General vehemently opposed the Special Appeals and asserted that on an F.I.R. being lodged under Section 376 I.P.C. and Section 3(i)(xii) of SC/ST Act, by the victims against the appellants-petitioner, they were placed under suspension vide order dated 13.09.2004 and they were instructed not to leave headquarters during suspension period without obtaining prior permission of the competent authority. While the preliminary enquiry was being conducted, the appellants-petitioners were reported absconding from the unit lines without permission/information of the competent authority. However, while returning to barracks, neither they informed about the incident nor did they make G.D. to that effect and hid from everyone. This incident caused rift in the relationship between the CISF and the locals. Due to such activity of the appellant-petitioner, the image of CISF was badly tarnished by the print and

electronic media. Taking into consideration the seriousness of the matter and the fact that the issue could not be prolonged for an indefinite period and since appellants-petitioners were considered “absconding” from the unit lines during the suspension period, it was considered not practicable to hold enquiry under Rule 36 of the CISF Rules, 2001. Thus, the action was initiated in exercise of Rule 39(ii) of the CISF Rules, 2001 and the appellants-petitioners were dismissed from service vide order dated 25.09.2004. He further contended that the said order dated 25.09.2004 was passed to bridge the gap between the CISF and society and to restore the pride and prestige of the Force. Learned Additional Solicitor General of India placed reliance upon a Division Bench Judgment passed by the Delhi High Court in the case of **Manojit Ghosh versus Union of India and others**, reported in **2012 SCC OnLine DEL 888**.

13. Having heard Sri Alok Kumar Yadav, learned counsel for the appellant and Sri Shashi Prakash Singh, learned Additional Solicitor General of India, assisted by Ms. Pooja Agarwal, learned counsel for the respondent and upon perusal of the pleadings on record before this Court, the pivotal issue that emerges for consideration is that whether in the facts and circumstances of the instant case the provision of Rule 39(ii) of the CISF Rules, 2001 has been correctly invoked to dismiss the appellants-petitioners by dispensing with the procedure of enquiry for imposing major penalties otherwise contemplated under Rule 36 of the CISF Rules, 2001. The relevant provision of Rule 39(ii), for a ready reference, is quoted below:

“Special procedure in certain cases- Notwithstanding anything contained in rules 36 to 38-

(i) where any penalty is imposed on an enrolled member of the Force on the ground of conduct which had led to his conviction on a criminal charge; or

(ii) where the disciplinary authority is satisfied for reasons to be recorded by it in writing that it is not reasonably practicable to hold an inquiry in the manner provided in these rules, or

(iii) where the President is satisfied that in the interest of the security of the State, it is not expedient to hold any inquiry in the manner provided in these rules, the disciplinary authority may consider the circumstances of the case and make such orders thereon as it deems fit;

Provided that the enrolled member of the Force may be given an opportunity of making representation against the penalty proposed to be imposed before any order is made in case under clause (i).”

14. The question as to the circumstance in which the disciplinary enquiry could be dispensed has been elaborately dealt with by the Hon’ble Supreme Court in the case of **Union of India and another versus Tulsiram Patel** and other connected appeals, reported in **(1985) 3 SCC 398**. The extract of paragraph 130 of the said judgment is quoted below for ready reference:

“130. The condition precedent for the application of clause (b) is the satisfaction of the disciplinary authority that “it is not reasonably practicable to hold” the inquiry contemplated by clause (2) of Article 311. What is pertinent to note is that the words used are “not reasonably practicable” and not “impracticable”. According to the Oxford English Dictionary “practicable” means “Capable of being put into practice, carried out in

action, effected, accomplished, or done; feasible". Webster's Third New International Dictionary defines the word "practicable" inter alia as meaning "possible to practice or perform : capable of being put into practice, done or accomplished: feasible". Further, the words used are not "not practicable" but "not reasonably practicable". Webster's Third New International Dictionary defines the word "reasonably" as "in a reasonable manner: to a fairly sufficient extent". Thus, whether it was practicable to hold the inquiry or not must be judged in the context of whether it was reasonably practicable to do so. It is not a total or absolute impracticability which is required by clause (b). What is requisite is that the holding of the inquiry is not practicable in the opinion of a reasonable man taking a reasonable view of the prevailing situation. It is not possible to enumerate the cases in which it would not be reasonably practicable to hold the inquiry, but some instances by way of illustration may, however, be given. It would not be reasonably practicable to hold an inquiry where the government servant, particularly through or together with his associates, so terrorizes, threatens or intimidates witnesses who are going to give evidence against him with fear of reprisal as to prevent them from doing so or where the government servant by himself or together with or through others threatens, intimidates and terrorizes the officer who is the disciplinary authority or members of his family so that he is afraid to hold the inquiry or direct it to be held. It would also not be reasonably practicable to hold the inquiry where an atmosphere of violence or of general indiscipline and insubordination prevails, and it is immaterial whether the concerned government servant is or is not a party to bringing about such an

atmosphere. In this connection, we must bear in mind that numbers coerce and terrify while an individual may not. The reasonable practicability of holding an inquiry is a matter of assessment to be made by the disciplinary authority. Such authority is generally on the spot and knows what is happening. It is because the disciplinary authority is the best judge of this that clause (3) of Article 311 makes the decision of the disciplinary authority on this question final. A disciplinary authority is not expected to dispense with a disciplinary inquiry lightly or arbitrarily or out of ulterior motives or merely in order to avoid the holding of an inquiry or because the Department's case against the government servant is weak and must fail. The finality given to the decision of the disciplinary authority by Article 311(3) is not binding upon the court so far as its power of judicial review is concerned and in such a case the court will strike down the order dispensing with the inquiry as also the order imposing penalty....."

15. In the instant case, the reason for absence from the Unit narrated by the appellant-petitioner in paragraphs no.8 and 9 of the writ petition No. 8019 of 2012, is that he was pursuing his case before the High Court at Allahabad during the period of alleged preliminary enquiry, the report of which has been made the sole basis of the passing of the dismissal order dated 25.09.2004. The said averment has been replied by the respondents in the corresponding paragraphs of the counter affidavit dated 11.06.2012, inter-alia stating therein that the departmental proceedings have no relation with the criminal proceedings. The appellant-petitioner was placed under suspension vide order dated 19.09.2004 with a direction that they shall not leave the headquarters without the prior

permission of the disciplinary authority, but for the reason that the petitioner disobeyed the instruction and absconded from the unit lines at 21:05 hours on 19.04.2005, that compelled the disciplinary authority to take up disciplinary action by exercising the power under Rule 39(ii) of the CISF Rules, 2001.

16. Refuting the above stand of the respondent authorities, it is pleaded on behalf of the appellants-petitioners that in so far as the temporary absence of the appellants from the headquarter is concerned, the same did not amount to desertion inasmuch as the desertion has to be permanent. Justifying his absence from the Unit at the time when the alleged preliminary enquiry was in contemplation, the learned counsel submitted that the appellants-petitioners had to go to file the writ petition before the High Court at Allahabad, and it is for this reason, they left the unit on 20.09.2004 and reported back to the unit on 25.09.2004 and furthermore, there is nothing on record to show that the petitioners were ever declared 'absconders' or 'deserters'. The action on the part of the disciplinary authority in proceeding against them under the garb of Rule 39(ii) of the CISF Rules, 2001 is a hasty and unreasonable decision and cannot be justified in view of the fact that they were slapped with the major punishment of dismissal from service in the most arbitrary manner even without following the due procedure as is provided under law thereby depriving them of their valuable right to defend their case by filing a reply to the alleged charges and to cross-examine the witnesses.

17. The law is well settled that the rule of *audi alteram partem* cannot be ignored ordinarily and especially when it is

a case of major punishment adversely affecting the rights of a person. The Hon'ble Supreme Court in the case of **Tulsiram Patel** (supra) has been pleased to hold as under:

"96. The rule of natural justice with which we are concerned in these appeals and writ petitions, namely, the audi alteram partem rule, in its fullest amplitude means that a person against whom an order to his prejudice may be passed should be informed of the allegations and charges against him, be given an opportunity of submitting his explanation thereto, have the right to know the evidence, both oral or documentary, by which the matter is proposed to be decided against him, and to inspect the documents which are relied upon for the purpose of being used against him, to have the witnesses who are to give evidence against him examined in his presence and have the right to cross-examine them, and to lead his own evidence, both oral and documentary, in his defence. The process of a fair hearing need not, however, conform to the judicial process in a Court of law, because judicial adjudication of causes involves a number of technical rules of procedure and evidence which are unnecessary and not required for the purpose of a fair hearing within the meaning of audi alteram partem rule in a quasi-judicial or administrative inquiry. If we look at clause (2) of Article 311 in the light of what is stated above, it will be apparent that that clause is merely an express statement of the audi alteram partem rule which is implicitly made part of the guarantee contained in Article 14 as a result of the interpretation placed upon that article by recent decisions of this Court. Clause (2) of Article 311 requires that before a government servant is

dismissed, removed or reduced in rank, an inquiry must be held in which he is informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. The nature of the hearing to be given to a government servant under clause (2) of Article 311 has been elaborately set out by this Court in Khem Chand case [AIR 1958 SC 300 : 1958 SCR 1080 : (1959) 1 LLJ 167] in the passages from the judgment extracted above. Though that case related to the original clause (2) of Article 311, the same applies to the present clause (2) of Article 311 except for the fact that now a government servant has no right to make any representation against the penalty proposed to be imposed upon him but, as pointed out earlier, in the case of Suresh Koshy George v. University of Kerala [AIR 1969 SC 198 : (1969) 1 SCR 317, 326] such an opportunity is not the requirement of the principles of natural justice and as held in Associated Cement Companies Ltd. v. T.C. Shrivastava [1984 Supp SCC 87 : 1984 SCC (L&S) 488 : (1984) 3 SCR 361, 369] neither the ordinary law of the land nor industrial law requires such an opportunity to be given. The opportunity of showing cause against the proposed penalty was only the result of the interpretation placed by the Judicial Committee of the Privy Council in Lall case [AIR 1948 PC 121 : LR (1947-1948) 75 IA 225, 243-4 : 1948 FCR 44] upon Section 240(3) of the Government of India Act, 1935, which was accepted by this Court in Khem Chand case [AIR 1958 SC 300 : 1958 SCR 1080 : (1959) 1 LLJ 167] . If, therefore, an inquiry held against a government servant under clause (2) of Article 311 is unfair or biased or has been conducted in such a manner as not to give him a fair or reasonable opportunity to defend himself, undoubtedly, the principles

of natural justice would be violated, but in such a case the order of dismissal, removal or reduction in rank would be held to be bad as contravening the express provisions of clause (2) of Article 311 and there will be no scope for having recourse to Article 14 for the purpose of invalidating it.”

18. In so far as the contention of the learned counsel for the petitioners-appellants that the order of dismissal has been passed neither on merits of the case nor by taking into consideration the factual matrix of the case, rather the order of dismissal was passed under the pressure and influence of the local residents and the media, finds strength from a bare perusal of the impugned order dated 25.09.2004, which contains the following:

“.....

9. Whereas on 12.09.04, a news article appeared in Hindi daily Dainik Jagaran containing all fame for CISF Unit Arora as a whole, which continues till date.

10. Whereas, an FIR lodged by the aggrieved two ladies vide crime no. 182/04 dated 12.09.04 under section 376 IPC and Section 3(1)12 of SC / ST Act against him in Narora Police Station.

11. Whereas, HC/Dvr, Paramjit Singh has been placed under suspension wef, 13.09.04.

12. Whereas MOTO directed her he would not Paramjit Singh was clearly leave Unit Hqrs., without prior permission of the Disciplinary Authority, during the period of suspension.

13. Whereas, absconding suspension, with effect from 19.09.04, himself from without the he is unit lines during taking permission from any competent authority and is still absconding till date which itself speaks that he wanted to evade from the legal and disciplinary

action against the delinquency he committed.

14. *Whereas, from the articles published in various news papers from 12.09.04 to till date and news articles broadcasted in various TV news channels, it is clear that not only, this incident has badly tarnished the image of CISF in this vicinity but also brought ill fame and disgrace to the Force as a whole.*

15. *Whereas, this incident has caused rift in the relationship of brotherhood, peace and harmony between CISF and locals and also the employees of the Undertaking where he is deployed.*

16. *Whereas, considering the sensitivity and seriousness of heinous act on the part of HC/Dvr. Paramjit Singh, it is eminent to keep the morale of the members of the force high by taking stern decision in the matter.*

17. *Whereas, since it is considered that to bridge the gap between the CISF and local inhabitants and also to restore normalcy of the situation this case cannot be prolonged for indefinite period.*

18. *Whereas, HC/Dvr. Paramjit Singh is still absconding himself and his whereabouts are still not known and I am satisfied that it will not be reasonably practicable to hold an enquiry in the manner provided under Rule-36 of CISF Rules, 2001, meet the ends of justice.*

19. *And whereas, on considering facts and circumstances of this case I am satisfied that the penalty of 'Dismissal from Service' should be imposed on No. 884526522 HC/Dvr. Paramjit Singh. Now, therefore, by view of the powers conferred upon me by Rule 32, read in conjunction with Schedule-I and Rule 34, and Rule 39(ii) of CISF Rules, 2001, I order that No. 884526522 HC/Dvr. Paramjit Singh be 'Dismissed from service' from the date of issue of this order from his above serious*

misconduct being a member of disciplined Force of the Union like CISF as his continuance in the service will prejudicial in the interest of public service.

.....”

19. Further, it has been vehemently argued on behalf of the appellant-petitioners that once the appellants have been acquitted in the criminal case, on finding it to be a case of 'no evidence' and more so when this aspect of the matter has been directed to be noticed by the High Court vide order dated 17.08.2011 in the writ petition No. 78351 of 2005, the revisional authority was required to reconsider the matter in the light of the judgment of acquittal and the evidence led in the trial. The action of Inspector General (respondent no.2) in passing the order treating the petitioners to be guilty of the alleged offence is not only in disregard to the order dated 17.08.2011 passed by the High Court but amounts to a premeditated decision to punish the appellants for the alleged act for which no evidence exists.

20. In so far as the judgment passed in **Manojit Ghosh** (supra), relied upon by Ms. Pooja Agarwal, learned counsel for the respondent, is concerned, the same is not applicable in the present case. In the case of **Manojit Ghosh** (supra), the Court found no malafide and arbitrariness on the part of the authorities while in the present case, the allegation of the appellants-petitioners is that the disciplinary authority without taking into consideration the merits of the case, passed the order of dismissal under the pressure of the villagers, local politicians and media and the said allegation contained in paragraph 20 of the writ petition has been replied in paras 20 and 17 of the counter affidavit filed by the respondents wherein there is no specific

denial of the said argument. Further, the impugned order itself speaks the basis of the proceeding as 'to bridge the gap between the CISF and local inhabitants' which renders the factual matrix of Manojit Ghosh (supra) case distinguishable from the facts of the present case, and the judgment relied upon is not attracted in the present case. The other judgment passed in the case of **Sri Vikas Verma** (supra), as relied upon by the learned counsel appearing for the respondent, is also not applicable in the present case as the same has been passed in a case where the Court considered the 'incident being rarest of the rare'. For ready reference, the observations made in para 19 of the said judgment are quoted below:

"The incidents being rarest of the rare and considering the discipline and moral of the force, the disciplinary authority rightly held that it is not reasonably practicable to hold a regular enquiry. The disciplinary authority has rightly held that if a regular enquiry would have been held, the same would have spread the news of heinous incidents committed in the premises of CISF when the complainant's husband was away for duty. It would have caused serious psychological impact and insecurity in the minds of personnel who have left their family on campus and holding of departmental enquiry, would have adverse ramification and administrative difficulties while deploying the personnel outside the area of premises. Thus, the disciplinary authority has recorded the satisfaction on the objective facts and the decision to dispense with the departmental enquiry is neither outcome of whim or caprice of the disciplinary authority nor is malafide. This court cannot sit in appeal over the decision taken by disciplinary authority to dispense

with enquiry. Therefore, no case for interference with the decision to dispense with the regular enquiry is made out in exercise of powers of judicial review."

21. In the case of **Jaswant Singh versus State of Punjab and others; reported in (1991) 1 SCC 362**, the Hon'ble Supreme Court held:-

"It was incumbent on the respondents to disclose to the Court the material in existence at the date of the passing of the impugned order in support of the subjective satisfaction recorded by respondent No.3, in the impugned order. Clause (b) of the second proviso to Article 311(2) can be invoked only when the authority is satisfied from the material place before him that it is not reasonably practicable to hold a departmental inquiry."

The Supreme Court further held:

"The decision to dispense with the departmental inquiry cannot, therefore, be rested solely on the ipse dixit of the concerned authority. When the satisfaction of the concerned authority is questioned in a Court of law, it is incumbent on those who support the order to show that the satisfaction is based on certain objective facts and is not the outcome of the whim of caprice of the concerned officer."

22. Further, in the case of **Sudesh Kumar versus State of Haryana and others; reported in (2005) 11 SCC 525**, the Supreme Court observed as follows:-

"It is now established principle of law that an inquiry under Article 311(2) is a rule and dispensing with the inquiry is an exception. The authority dispensing with the inquiry under Article 311(2)(b) must satisfy for reasons to be recorded that it is

*not reasonably practicable to hold an inquiry. A reading of the termination order by invoking Article 311(2)(b), as extracted above, would clearly show that no reasons whatsoever have been assigned as to why it is not reasonably practicable to hold an inquiry. The reasons disclosed in the termination order are that the complainant refused to name the accused out of fear of harassment; the complainant, being a foreign national, is likely to leave the country and once he left the country, it may not be reasonably practicable to bring him to the inquiry. This is no ground for dispensing with the inquiry. On the other hand, it is not disputed that, by order dated 23-12-1999, the visa of the complainant was extended up to 22-12-2000. Therefore, there was no difficulty in securing the presence of Mr Kenichi Tanaka in the inquiry.*³⁵

A reasonable opportunity of hearing enshrined in Article 311(2) of the Constitution would include an opportunity to defend himself and establish his innocence by cross-examining the prosecution witnesses produced against him and by examining the defence witnesses in his favour, if any. This he can do only if inquiry is held where he has been informed of the charges levelled against him. In the instant case, the mandate of Article 311(2) of the Constitution has been violated depriving reasonable opportunity of being heard to the appellant."

23. Moreover, the Hon'ble Supreme Court in the case of **Chief Security Officer and others versus Singasan Rabi Das; reported in 1991(1) SCC 729**, has also held that in the absence of sufficient material or good ground for dispensing with the inquiry, the termination order is illegal.

24. It is settled law that the evidence recorded in the preliminary enquiry cannot be used in regular enquiry as the delinquent

is not associated with it, and opportunity to cross-examine the persons examined in such enquiry is not given. Using such evidence would be violative of the principles of natural justice. A Constitution Bench of this Court in the case of **Amalendu Ghosh versus North Eastern Railway, reported in AIR 1960 SC 992**, has held that the purpose of holding a preliminary enquiry in respect of a particular alleged misconduct is only for the purpose of finding a particular fact and prima facie to know as to whether the alleged misconduct has been committed and only on the basis of the findings recorded in preliminary enquiry, no order of punishment can be passed.

25. Having regard to the facts and circumstances as have been narrated hereinabove, it is evident that the disciplinary authority-respondents dismissed the appellants without following the procedure as contemplated under Rule 36 of the CISF Rules, 2001, and by resorting to Rule 39(ii) thereby treating the petitioner to be absconding from the Unit. However, from the pleadings as are available before us, it is evident that the absence of the appellant from the Unit was not as such to be treated as 'absconding' and compelling the respondents to resort to the Rule 39(ii) which empowers the disciplinary authority to dispense with the departmental enquiry for passing of the punishment order.

26. The mandate of the law is clear that before dispensing with an enquiry, a subjective satisfaction is to be arrived at by the Disciplinary Authority that it is not reasonably practicable to hold a regular departmental enquiry. These reasons must be based on an objective criterion and not on the whims and fancies of the

Disciplinary Authority. In other words, it cannot be based on surmises and conjectures, but must reflect the actual ground reality, which makes it not reasonably practicable for the Disciplinary Authority to order a regular departmental enquiry.

27. As such the action on the part of the disciplinary authority to proceed against the appellants in the garb of Rule 39 of the CISF Rules, 2001 is a hasty decision and cannot be justified in light of the fact that the major punishment of dismissal has been awarded against the appellants without even following the due procedure, resultantly depriving them to defend their case by filing a reply to the alleged charges and to cross-examine the witnesses.

28. Further, nothing could be shown on behalf of the respondents that any effort was made by the authorities to find out the whereabouts of the appellants-petitioners, before resorting to the provisions of 39(ii) of the CISF Rules, 2001. The learned Additional Solicitor General defending the action of the respondent authorities in passing the impugned dismissal order by dispensing with the regular departmental enquiry; submitted that due to the misconduct committed by the appellant-petitioner, the image of CISF was badly tarnished by the print and electronic media. Taking into consideration the seriousness of the matter, the case could not be prolonged for the indefinite period and since appellants-petitioners were absconding from the unit lines during the suspension period and also their whereabouts were not known, it was considered not practicable to hold enquiry under Rule 36 of the CISF Rules, 2001 and as such, action was initiated on the strength of Rule 39(ii) of the CISF Rules, 2001 and

the appellants-petitioners were dismissed from service vide order dated 25.09.2004.

29. It also goes without saying that in the set of circumstances as narrated above, instead of resorting to the provisions of Rule 39(ii) of the CISF Rules, 2001, dealing with the dispensation of the regular departmental enquiry, the Disciplinary Authority at the most could have held an ex-parte regular enquiry, as contemplated under the said Rules, 2001, to proceed for dismissal of the services of the appellants-petitioners.

30. Needless to say that the power of the disciplinary authority to continue with the department enquiry cannot be curbed on the ground of acquittal of the delinquent by the Criminal Court, but normally where the accused is acquitted honorably and exonerated of the charges it would not be expedient to carry out a departmental enquiry on the very same charge or grounds or evidence. This aspect has been discussed by the Hon'ble Supreme Court in the case of **G.M. Tank versus State of Gujarat, reported in (2006) 5 SCC 446**. The relevant paragraphs of the same are reproduced below:

“ 30. The judgments relied on by the learned counsel appearing for the respondents are distinguishable on facts and on law. In this case, the departmental proceedings and the criminal case are based on identical and similar set of facts and the charge in a departmental case against the appellant and the charge before the criminal court are one and the same. It is true that the nature of charge in the departmental proceedings and in the criminal case is grave. The nature of the case launched against the appellant on the basis of evidence and material collected

against him during enquiry and investigation and as reflected in the charge-sheet, factors mentioned are one and the same. In other words, charges, evidence, witnesses and circumstances are one and the same. In the present case, criminal and departmental proceedings have already noticed or granted on the same set of facts, namely, raid conducted at the appellant's residence, recovery of articles therefrom. The Investigating Officer Mr V.B. Raval and other departmental witnesses were the only witnesses examined by the enquiry officer who by relying upon their statement came to the conclusion that the charges were established against the appellant. The same witnesses were examined in the criminal case and the criminal court on the examination came to the conclusion that the prosecution has not proved the guilt alleged against the appellant beyond any reasonable doubt and acquitted the appellant by its judicial pronouncement with the finding that the charge has not been proved. It is also to be noticed that the judicial pronouncement was made after a regular trial and on hot contest. Under these circumstances, it would be unjust and unfair and rather oppressive to allow the findings recorded in the departmental proceedings to stand.

31. In our opinion, such facts and evidence in the departmental as well as criminal proceedings were the same without there being any iota of difference, the appellant should succeed. The distinction which is usually proved between the departmental and criminal proceedings on the basis of the approach and burden of proof would not be applicable in the instant case. Though the finding recorded in the domestic enquiry was found to be valid by the courts below, when there was an honourable acquittal of the employee

during the pendency of the proceedings challenging the dismissal, the same requires to be taken note of and the decision in *Paul Anthony case [(1999) 3 SCC 679 : 1999 SCC (L&S) 810]* will apply. We, therefore, hold that the appeal filed by the appellant deserves to be allowed.”

31. Once it has been observed that there was no material available on record to establish that there was such a situation, much less any plausible justification to arrive at the conclusion that it was ‘not reasonably practicable’ to exercise the proceeding under section 36 of the CISF Rules, 2001; then the regular departmental enquiry becomes inevitable before awarding the major punishment of dismissal.

32. We have carefully perused the materials on record and we find that there was no intent from the very beginning on part of the employer to hold disciplinary enquiry, nor has it been shown that holding of the disciplinary enquiry became impermissible because of the alleged absence of the appellants. Since no steps were ever taken to initiate disciplinary enquiry, it was not open for the employer to state that holding of disciplinary enquiry became impermissible on account of non-availability of the appellants. We have already held that the absence from work was otherwise not for a long duration and had occasioned because the appellants were pursuing the legal remedy in respect of the criminal proceedings initiated against them by approaching the High Court.

33. In the case of **Roop Singh Negi versus Punjab National Bank and others**, reported in **(2009) 2 SCC 570**, the Hon’ble Supreme Court has been pleased to hold

that a departmental proceeding is a quasi-judicial proceeding. The enquiry officer performs a quasi-judicial function. The charges levelled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the investigating officer against all the accused by itself cannot be treated to be credible evidence in the disciplinary proceeding. The witnesses are necessary to be examined to prove the documents and merely tendering of the same by the witnesses does not prove the contents thereof further, reliance inter alia, placed by the enquiry officer on the FIR could not be treated as evidence.

34. An eloquent statement of the aforesaid law, to the same end, can be found in a decision of this Court rendered by a Co-ordinate Bench in the case of State of U.P. versus **Aditya Prasad Srivastava and another, reported in 2017 (2) ADJ 554 (DB) (LB)**, wherein it has been held as under:

"17. It is trite law that the departmental proceedings are quasi judicial proceedings. The Inquiry Officer functions as quasi judicial officer. He is not merely a representative of the department. He has to act as an independent and impartial officer to find out the truth. The major punishment awarded to an employee visit serious civil consequences and as such the departmental proceedings ought to be in conformity with the principles of natural justice. Even if, an employee prefers not to participate in enquiry the department has to establish the charge against the employee by adducing oral as well as documentary evidence. In case charges warrant major punishment

then the oral evidence by producing the witnesses is necessary."

35. In view of the aforesaid, we are of the opinion that the impugned order of dismissal does not reflect any satisfactory reasons for dispensing with the disciplinary inquiry. The charges so leveled are such that it can only be enquired through a proper departmental enquiry. It is not a case where it could be said that it was not reasonably practicable to hold an inquiry. In our opinion, the decision of the disciplinary authority was wholly arbitrary. In view of the aforesaid, the exercise of the powers under Rule 39(ii) of the CISF Rules, 2001 was totally unwarranted. Consequently, the impugned order of dismissal from the services against the appellants-petitioners is unsustainable in the eyes of law and as such is liable to be quashed.

36. The learned Single Judge while passing the impugned order dated 22.12.2023 has failed to appreciate the real controversy involved in the case, as discussed hereinabove and has declined to entertain the writ petitions by holding that the scope of interference of the Writ Court is very limited and is confined to the findings of fact of the procedural flaws, if any, in exercise of the writ jurisdiction under Article 226 of the Constitution of India and further recorded a finding that the entire disciplinary proceeding initiated against the petitioners and the punishment is based on the concurrent findings of facts which cannot be interfered by the Writ Court. We cannot approve of the view taken by the learned Single Judge that there is no procedural flaw in holding of the enquiry.

37. Taking into consideration the factual matrix of the case and the deliberations made hereinabove, we find

ourselves unable to accord approval to the findings returned by the Hon'ble Single Judge while deciding the Writ- A No.8019 of 2012 and Writ- A No.18146 of 2012, and are of the considered opinion that the impugned orders dated 22.12.2023 passed by the learned Writ Court are liable to be set aside and are hereby set aside. Accordingly, the impugned dismissal order dated **25.09.2004** and the consequential orders passed by the Appellate as well as the Revisional Authorities are hereby quashed. Consequently, the appellants are entitled to be reinstated in service. Since the order impugned has been set aside primarily on the ground that holding of disciplinary enquiry could not have been dispensed with, in the facts of the present case, it would be open for the employer to hold fresh departmental enquiry in accordance with the CISF Rules, 2001. In case if the respondent authorities choose to hold the regular enquiry in the matter, in accordance with the prescribed rules, then in that event, the payment of back wages shall abide by the result of such enquiry.

38. This direction is being issued keeping in view the law laid down by the Supreme Court in **Managing Director, ECIL, Hyderabad versus B. Karunakar**, reported in **(1993) 4 SCC 727**. It would be open for the employer to place the appellants under suspension for the purposes of holding of enquiry. The appellants would, however, be entitled to payment of subsistence allowance during the period of enquiry which would be concluded within a period of four months. The appellants undertake to extend full cooperation in holding of such enquiry. However, in the event the employer is not desirous of holding disciplinary enquiry in terms of the above liberty the appellants shall be reinstated in service along with

continuity and arrears of salary at the rate of 25% in the facts of the present case.

39. Both the appeals are, accordingly, **disposed of** with the aforesaid liberty. No order as to cost.

(2024) 4 ILRA 144

**APPELLATE JURISDICTION
CIVIL SIDE**

DATED: ALLAHABAD 11.03.2024

BEFORE

**THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SYED QAMAR HASAN RIZVI, J.**

Special Appeal No. 214 of 2024

**Rajesh Kumar Yadav & Anr. ...Appellants
Versus
Union of India & Ors. ...Respondents**

Counsel for the Appellants
Sri Atul Kumar Dubey

Counsel for the Respondents:
A.S.G.I., Sri Pradeep Shankar Pandey

Service Law - Recruitment - Central Police Organization (SSB) - Medical Examination Guidelines (20.05.2015, modified 21.05.2021) - Clause 25 - Small Hydrocele - Appellants rejected for Constable Driver post due to small hydrocele; review medical examination upheld rejection. Clause 25 allows selection for small hydrocele only if operated prior to medical examination with no bad scar left, not post-rejection surgery. No right exists for candidates to undergo surgery after being found medically unfit and seek fresh examination. Judicial review limited to procedural flaws or arbitrariness; none found. Single Judge's dismissal of writ petition (Writ-A No. 21108 of 2023) upheld; no violation of guidelines. (Paras 6-8)

Special Appeal Dismissed.

(Delivered by Hon'ble Ashwani Kumar
Mishra, J.
&
Hon'ble Syed Qamar Hasan Rizvi, J.)

ailments/deformity on account of which the candidature of a candidate could be rejected. Clause 25 which deals with large and small hydrocele reads as under:-

1. This special appeal arises out of an order passed by learned Single Judge in Writ-A No.21108 of 2023 whereby the appellants' grievance in respect of their candidature having been overlooked on account of a medical ailment has been rejected.

2. Learned Single Judge has noticed the facts of the case as per which the appellants applied for the post of Constable Driver in the Central Police Organization-SSB. They were found suffering from small hydrocele. The Rules of recruitment permitted conduct of review medical examination, wherein also the appellants were non-suited. Aggrieved by the rejection of their candidature, the appellants approached writ Court. Learned Single Judge has observed that the respondents fairly treated the appellants in the matter of recruitment and the conduct of medical examination as well as the review medical examination was found in accordance with the procedure laid down for recruitment.

3. It is not in issue that the physical examination of the candidate provisionally selected for appointment in Central Police Organization has to be undertaken in accordance with the guidelines issued by the Ministry of Home Affairs, Government of India. Detailed guidelines were earlier issued on 20.5.2015, which have been partially modified on 21.5.2021. The guidelines have been produced before us. The manner of conduct of examination has been specified in the guidelines. Clause 6 contains various physical

"25. Large hydrocele, even if curable by operation. Small hydrocele (if operated upon and no bad scar is left after operation may be accepted)."

4. With reference to the above clause, learned counsel for the appellants submits that in case of small hydrocele the guidelines permits a candidate to be selected even in a case where the candidate is operated upon and no bad scar is left after operation. With reference to the above provisions, it is urged before us that the respondents ought to have given a reasonable opportunity to the appellant to get him operated upon and thereafter the candidature ought to have been considered afresh. Learned counsel submits that the purpose of holding a review medical test is to allow opportunity to the candidate to get such operation performed so that the candidature is not discarded on a ground which otherwise could be overlooked.

5. Submission in that regard is opposed by Sri Pradeep Shankar Pandey, learned counsel for the respondents.

6. We have considered the respective submissions raised at the bar. The interpretation which is sought to be suggested by the appellants does not appeal to us. Clause 25 categorically provides that in case of large hydrocele, even if it is curable by operation, the candidate would be rejected for selection. In the case of small hydrocele the candidate could still be selected even if it is found that he has been operated upon and no bad scar is left after operation. The clause, in our

8. In view of the discussions and deliberations held above, we find that the

Service Law - Uttar Pradesh Recognized Basic Schools (Junior High Schools) (Recruitment and Conditions of Service of Ministerial Staff and Group 'D' Employees) Rules, 1984 - Rule 21 - Termination of Service - Class-IV employee in recognized Junior High School terminated without prior written approval of District Basic Education Officer (BSA), violating mandatory Rule 21. Termination order (10.04.2014) issued day after suspension (09.04.2014) without departmental enquiry, rendering it illegal. BSA's order (31.03.2017) rejecting salary claim unsustainable due to admitted lack of prior approval. Single Judge's direction (18.01.2024) for BSA to decide on

approval post-termination erroneous, as prior approval is mandatory. Termination order and BSA's order quashed; appellant entitled to reinstatement. Employer granted liberty to conduct enquiry within four months for alleged absence, with subsistence allowance during suspension. Arrears and salary entitlement subject to enquiry outcome and BSA approval under Rule 21. (Paras 6-13)

Special Appeal Allowed.

(Delivered by Hon'ble Ashwani Kumar
Mishra, J.
&
Hon'ble Syed Qamar Hasan Rizvi, J.)

1. The special appeal arises out of an order passed by the writ court on 18.1.2024 disposing of the appellant's Writ-A No. 24667 of 2017. Services of the petitioner-appellant have been terminated by the management and the order was sent to District Basic Education Officer for his approval. Learned Single Judge has noticed that no decision has been taken on decision of management and this aspect is not even clarified in the personal affidavit of the officer. A direction has accordingly been issued to the District Basic Education Officer to take a decision regarding grant of approval to the order of termination within a period of two weeks.. In default, the petitioner has been held entitled to salary for the period he has actually worked, subject to verification.

2. Learned counsel for the appellant submits that the statutory scheme has been completely overlooked by the learned Single Judge and facts have not been examined in correct perspective.

3. It is undisputed that the appellant was a Class-IV employee in the Mahajan

Laghu Madhyamik Vidyalaya Salempur, Deoria. This Institution is duly recognized and the provisions of the Payment of Salaries Act, 1978 are applicable upon it. The services of the appellant were approved and he was working. The management apparently objected to the working of the appellant and consequently the appellant filed Writ A No. 7588 of 2016, which came to be disposed of on 19.2.2016 vide following order:-

"It is stated that petitioner is a Class-IV employee, working in the institution, but the Management for the reasons unknown, is not permitting him to incorporate signature in the attendance register, and on such count, the salary of petitioner alongwith two other employees has been stopped since the year 2013. It is contended that subsequently payment of salary to other two persons has been restored, but petitioner continues to be victimized. Learned counsel for the petitioner submits that Management of the institution is acting in an arbitrary manner, and the authorities are not examining the petitioner's grievance.

Notices on behalf of respondent nos.1 and 2 have been accepted by learned Standing Counsel, whereas Sri S.K. Gupta has accepted notices on behalf of respondent nos.3 and 4.

Considering the nature of order proposed to be passed today, notices need not be issued to the respondent no. 5, as it would further delay the disposal of cause, and the writ petition is being disposed of, at this stage, itself.

Considering the facts and circumstances, as have been noticed above, it would be appropriate to direct the respondent no.4 to examine the grievance of petitioner, noticed above, in accordance with law, by means of a reasoned speaking

order to be passed after affording an opportunity of hearing in the matter to respondent no.5, within a period of three months from the date of presentation of a certified copy of this order. All consequential action shall be taken, accordingly.

With the aforesaid observations/directions, the writ petition stands disposed of."

4. The appellant accordingly represented before the District Basic Education Officer that he be allowed to continue in the employment of the Institution and be paid salary. Since, no orders were passed by the District Basic Education Officer,□ a Contempt Application (Civil) No. 6230 of 2016 was filed, in which further time was granted to the District Basic Education Officer to comply with the order of the Writ Court. It is pursuant to this direction that the District Basic Education Officer has passed the order impugned in the writ filed before the learned Single Judge. This order is dated 31.3.2017. In the discussion part of this order it is recorded that the Block Education Officer has submitted a report on 21.7.2014, as per which the appellant was not attending to his duties and his signatures were not available in the attendance register. The Management also informed that with effect from 1.7.2013 the appellant was not working. The Committee of Management thus placed the appellant under suspension on 9.4.2014. It is then recorded by the District Basic Education Officer that on 10.4.2014 i.e. the very next day of passing of the order of suspension, the services of appellant were terminated and papers were forwarded for grant of approval to the District Basic Education Officer. The District Basic Education Officer has recorded in his order that

appropriate decision relating to grant of approval would be taken later. However, claim of payment of salary to the appellant has been rejected. Aggrieved by this order dated 31.3.2017, the appellant filed Writ-A No. 24667 of 2017, which has been disposed of by the learned Single Judge vide order under challenge.

5. We have heard Shri Prabhakar Awasthi for the appellant, Shri K.N. Mishra for the Committee of Management and learned State Counsel representing respondent Nos. 1 and 2.

6. Upon hearing the counsel for the parties, it transpires that Institution is a duly recognized Junior High School and the service conditions of the Class-II and Class-IV employees in the Institution would be governed by the provisions of□ Uttar Pradesh Recognized Basic Schools (Junior High Schools) (Recruitment And Conditions Of Service Of Ministerial Staff And Group 'D' Employees) Rules, 1984. Rule 21 would be attracted in the facts of the present case, which is reproduced hereinafter:-

"21- Termination of Service-No clerk or group 'D' employee of a recognized school may be discharged or removed or dismissed from service or reduced in rank or subjected to any diminution in emoluments or served with notice of termination of service except with the prior approval in writing of the District Basic Education Officer:-

Provided that, in the case of schools established and administered by minority referred to in clause 1 of the Article 30 of the Constitution, such an order shall not require the approval of District Basic Education Officer, but shall be reported to him."

7. Rule 21 clearly mandates that a Group 'D' employee cannot be terminated except with the prior approval, in writing of the District Basic Education Officer.

8. In the facts of the case, it is apparent that the appellant had approached this Court with the grievance that the Committee of Management is not permitting him to incorporate his signatures on the attendance register and he is not being permitted to work. It was this grievance of the appellant which was directed to be considered by the District Basic Education Officer. The District Basic Education Officer, however has proceeded on a tangent and has mechanically rejected the claim of the appellant for payment of salary on the ground that the appellant's services have already terminated by the Managing Committee. The District Basic Education Officer in the self same order has recorded that appropriate decision would be taken later with regard to grant of approval to the order of termination. It is thus admitted in the order of the officer that no prior approval was accorded, in writing, by the competent authority and consequently the termination order would be in clear derogation of Rule 21 of the applicable Rules.

9. We are at a loss to understand as to how the District Basic Education Officer could reject the claim of the appellant when it is admitted to the officer concerned that no prior approval was obtained by the Managing Committee before terminating the services of the appellant. Rule 21 has neither been noticed by the District Basic Education Officer nor the attention of learned Single Judge appears to have been invited to it. We further find from the order of District Basic Education Officer that on 9.4.2014 a decision was taken to proceed departmentally against the appellant. On

the very next day i.e. 10.4.2014 the appellant has been terminated from service. It is, therefore, apparent that no enquiry whatsoever has been conducted in the matter by the Managing Committee of the Institution, and therefore, the order of termination otherwise could not have been sustained.

10. We may note that when the writ petition was earlier placed for hearing on 4.7.2017, the learned Single Judge had passed the following orders:-

"The petitioner is a Class-IV employee working in a recognised institution, namely, Mahajan Laghu Madhyamik Vidyalaya, Salempur, Deoria. He was prevented from signing the attendance register and his salary was also stopped since 2013. Later, the salaries of two other employees were released, however, in respect of the petitioner's grievance no decision was taken by the Committee of Management.

Aggrieved by the said highhandedness of the respondents, the petitioner instituted a writ petition, being Writ-A No. 7588 of 2016 (Vijay Prakash Verma v. State of U.P. and others) for redressal of his grievance. In the said writ petition this Court issued a direction to the District Basic Education Officer to decide the matter within three months. The said order was passed by this Court on 19th February, 2016. It is stated that the said order was served upon the District Basic Education Officer but he did not comply with the same. Hence, the petitioner was compelled to file Contempt Application (Civil) No. 6230 of 2016, wherein on 20th March, 2017 this Court has ordered as under:

"Despite the order dated 06.02.2017, neither the counsel appearing

for the opposite party no. 1 has put in appearance nor has the opposite party no. 1 complied with the order nor is he present in the Court.

Issue bailable warrant to opposite party no. 1 through the CJM, Deoria."

It is stated that after the aforesaid order, the District Basic Education Officer has passed the impugned order dated 31st March, 2017, whereunder he has again not decided the matter and has observed that he has received the documents from the Committee of Management in respect of suspension order of the petitioner on 21st July, 2014 and the subsequent decision of the Committee of Management dismissing the services of the petitioner and the order shall be passed by him later on.

Sri K. Ajit, learned counsel for the petitioner, submits that the conduct of the District Basic Education Officer clearly indicates that his orders are infected by malafide and still he is sitting over the matter in spite of the positive direction of this Court in its order dated 19th February, 2016 to pass the order within three months. He further submits that the impugned order is just an eye-wash and the District Basic Education Officer has not taken any decision and the petitioner, who is a poor Class-IV employee, is without salary since 2013.

In view of the above, the conduct of the District Basic Education Officer needs examination.

Accordingly, the District Basic Education Officer, Deoria is directed to file his personal affidavit on or before 14th July, 2017. In case the affidavit is not filed, he shall be personally present in the Court along with the record on the next date.

Put up this case on 14th July, 2017 in the additional cause list."

11. It is thereafter that the District Basic Education Officer has filed his personal affidavit. The only explanation offered by the officer in his personal affidavit is that the officer has recently joined. In para 6 of the affidavit, it is clearly admitted that no approval has been granted to the termination of petitioner-appellant. The fact that prior approval has not been obtained before terminating the services of the petitioner is therefore admitted on record. Once that be so, the termination order itself would be illegal for non compliance of the mandatory procedure stipulated in Rule 21 of the Rules of 1984. The order passed by the District Basic Education Officer rejecting the claim of salary of the appellant for such purpose cannot be sustained. The termination order dated 10.7.2014 would be equally bad for such reason.

12. The view taken by learned Single Judge in calling upon the District Basic Education Officer to take a decision in the matter relating to grant of approval also cannot be sustained, as the law mandates requirement of a prior approval, which cannot be cured by any subsequent approval to be obtained from the officer concerned. The judgment of learned Single, dated 18.1.2024, thus cannot be sustained.

13. Consequently, this appeal succeeds and is allowed. The order passed by learned Single Judge dated 18.1.2024 in Writ-A No. 24667 of 2017 is set aside. The order passed by the District Basic Education Officer dated 31.3.2017 is also quashed. The appellant shall be reinstated in service forthwith. It shall however be open for the employer to conduct an enquiry against the appellant for the alleged absence from work within a period of four months from today. The appellant's

contention that he was actually presented from work shall be examined, as per law. It shall also be open to the Management to place the appellant under suspension for the purposes of holding of the enquiry. The subsistence allowance as well as arrears in that regard would be paid to the appellant within a period of six weeks from today. The decision taken by the Committee of Management upon conclusion of such enquiry, would determine the entitlement of the appellant to arrears of salary etc. subject to appropriate approval of District Basic Education Officer in terms of Rule 21, if so required.

(2024) 4 ILRA 151
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.03.2024

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SYED QAMAR HASAN RIZVI, J.

Special Appeal Defective No. 425 of 2023

Nitesh Kumar Singh Yadav ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:

Sri Ramesh Kumar Tiwari, Sri Seemant Singh, Sri H.N. Singh (Sr. Advocate), Sri G.K. Singh (Sr. Advocate)

Counsel for the Respondents:

C.S.C., Sri Siddharth Singhal

Service Law - Recruitment - Uttar Pradesh Subordinate Service Selection Commission - Revenue Lekhpal Examination, 2022 - Challenge to Answer Key - Questions 78 and 93 (Booklet Series 'F') - Question 78 on PURA scheme (Providing Urban Amenities to Rural Areas) upheld as correct, despite scheme's discontinuation in 2015-16, as question only asked which scheme proposes to prevent rural-

to-urban youth migration; PURA correctly identified as the only such scheme among options. Question 93 on Kanya Vidya Dhan Yojana upheld, though poorly framed, as it correctly identifies Rs. 30,000 as the amount payable, despite omitting that payment is post-intermediate examination for high school pass-outs pursuing higher education. Scope of judicial interference in public examinations limited; questions not wrong or incomprehensible, and some latitude must be given to examining authority. Appellant's score (78.75, OBC) below cut-off (81.25); no relief warranted even if appeal allowed, as per Rule 8(2)(iv) of U.P. Direct Recruitment to Group-C Posts Rules, 2015. Single Judge's dismissal of Writ-A No. 19234 of 2022 upheld. (Paras 17-26)

Special Appeal Dismissed.

List of Cases cited:

1. Ran Vijay Singh Vs St. of U.P., (2018) 2 SCC 357 (Para 14)
2. Secretary (Health), Dept. of Health and Family Welfare Vs Dr. Anita Puri, (1996) 6 SCC 282 (Para 23)
3. Kapil Kumar Vs St. of U.P., 2023 (12) ADJ 338 (DB) (Para 15)
4. Special Appeal Defective No. 112 of 2024 (Para 14)

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. Heard Sri Seemant Singh, learned counsel for the appellant, Sri Siddharth Singhal, learned counsel for the Commission, Sri H.N. Singh and Sri G.K. Singh, learned Senior counsels for the selected candidates.

2. Delay in filing the present appeal is explained to the satisfaction of the Court. Delay is, accordingly, condoned.

3. Appellant is aggrieved by rejection of his writ petition no.19234 of 2022, whereby challenge laid to the answer to

question nos.78 and 93 of booklet series 'F' has been rejected. The recruitment admittedly was for 8085 posts of Revenue Lekhpal pursuant to advertisement issued by the respondent-Uttar Pradesh Subordinate Service Selection Commission (hereinafter referred to as the 'Commission') in January, 2022. Pursuant to the advertisement examination was conducted on 31.7.2022. A tentative answer-key was published by the commission on 1.8.2022. Objections were invited against this tentative answer-key till 7.8.2022. After consideration of the objections raised, the commission published the revised answer-key on 7.9.2023. Result of the examination was declared on 2.5.2023. Document verification thereafter took place in July, 2023. Final result of the examination was declared on 30.12.2023. Recommendation has been made by the commission to State Government for offering appointment against 8085 posts on 16.1.2024.

4. The two questions with which we are concerned in the present appeal are reproduced hereinafter:-

“78. भारत सरकार की निम्नलिखित में से कौन सी योजना ग्रामीण क्षेत्रों से शहरी क्षेत्रों में युवाओं के प्रवास को रोकने का प्रस्ताव करती है?

Which of the following scheme of Indian government proposes to prevent the migration of youth from the rural areas to urban areas?

- (A) PURA (B) NSAP
(C) SAGY (D) SGRY

93. कन्या विद्या धन योजना के तहत, आर्थिक रूप से कमजोर परिवारों की लड़कियाँ, जो हाई स्कूल पास हैं, को उच्च शिक्षा

प्राप्त करने के लिए _____ एकमुश्त राशि प्रदान की जाती है।

Under the Kanya Vidya Dhan Scheme, girls of financially weak families who are high school passout are provided with _____ one time amount for pursuing higher education.

(A) 10000

(B) 15000

(C) 30000

(D) इनमें से कोई नहीं/None of these”

5. According to the appellant, four answers have been suggested to the question no.78 which are different schemes framed by the Government. According to the commission correct answer to question no.78 is '(A) PURA'. PURA stands for Providing Urban Amenities to Rural Areas. Learned counsel for the appellants submits that PURA although was a scheme launched with the object of preventing migration of youths from rural areas to urban areas but the scheme itself was discontinued in the financial year 2015-16. It is, therefore, submitted that PURA was actually not a subsisting scheme on the date question was posed and in such circumstances answer '(A)' could not have been treated to be a correct answer. Learned counsel further submits that none of the other three options were correct either. It is, therefore, submitted that question no.78 in booklet series 'F' ought to have been cancelled and even marks ought to have been awarded to those who had attempted the question as per the prevalent practice.

6. In respect of his contention, Sri Seemant Singh, learned counsel for the appellant has placed reliance upon the answer to question no.442 dated 17.11.2016 by the Minister of Rural

Development in the Parliament, wherein it is clearly admitted that the PURA scheme has been discontinued. A note appended to the Parliamentary answer is also highlighted as per which PURA scheme has been replaced by Shyama Prasad Mukherji Rurban Mission (SPMRM). Other literatures are also replied upon in order to submit that the scheme having been discontinued, it could not have been relied upon as the correct answer to question no.78.

7. So far as question no.93 is concerned, learned counsel submits that Kanya Vidya Dhan Yojana is a scheme launched by the Government to provide one time financial assistance to girls of financially weak families for pursuing higher education. The scheme of Kanya Vidya Dhan Yojana has been placed before the Court in order to submit that entitlement to receive such amount is only to those girls, who have passed intermediate. It is, therefore, submitted that the question no.93 was incorrectly formulated, inasmuch as Kanya Vidya Dhan Yojana was not admissible to high school pass out and, therefore, answer '(C)', relied upon by the commission, was incorrect.

8. Sri Seemant Singh, learned counsel for the petitioner has further placed reliance upon Government Order dated 20.7.2016 whereby the Kanya Vidya Dhan Scheme has been modified. The entitlement to receive financial aid as per the modified scheme is specified in para 3 of the Government Order which is reproduced hereinafter:-

“3- तदनुसार वर्ष 2016 में मेधावी छात्राओं के लिए प्रदेश के प्रत्येक जनपद में माध्यमिक शिक्षा परिषद, उ०प्र० सी०वी०एस०ई० एवं आई०सी०एस०ई० बोर्ड उ०प्र० मदरसा शिक्षा परिषद, उ०प्र० संस्कृत

शिक्षा परिषद से इण्डरमीडिएट/स्तर की परीक्षा उत्तीर्ण 99,000 छात्राओं को प्राप्तांको के अवरोही क्रम में मेरिट के अनुसार रू० 30,000/- (रू० तीस हजार मात्र) की धनराशि प्रदान कर लाभान्वित किया जायेगा।”

9. Learned counsel appearing for the opposite parties submits that though the questions could have been better formulated yet the questions cannot be treated to be incorrect questions, for the reasons enumerated hereinafter.

10. So far as question no.78 is concerned, it is stressed on behalf of the respondents that the precise question posed to the candidate was as to which of the four specified schemes proposes to prevent migration of youths from rural areas to urban areas. Learned counsels submits that there is no stipulation in the question that any of the four schemes are either existing on the date of question or the question gives an inference that the schemes are presently in vogue.

11. So far as answer to question no.93 is concerned, it is stated that the precise question posed is as to what is the amount which is provided to a girl belonging to financially weak family for pursuing higher education. The four options quantified the amount as Rs.10,000/-; Rs.15,000/-; Rs.30,000/- or none of these. It is argued that Rs.30,000/- is the correct answer. The scheme contained in the Government Order dated 22.8.2012 of Kanya Vidya Dhan Yojana has been placed before the Court. Paras 1 and 2 of the scheme reads as under:-

“उपर्युक्त विषय के संबंध में मुझे यह कहने का निदेश हुआ है कि श्री राज्यपाल महोदय प्रदेश में आर्थिक दशा से कमजोर

परिवारों की हाईस्कूल उत्तीर्ण ऐसी छात्रायें जो उच्च शिक्षा की ओर उन्मुख होकर वर्ष 2012 एवं उसके पश्चात इण्टरमीडिएट परीक्षा अथवा उसके समकक्ष परीक्षा उत्तीर्ण हों, को प्रोत्साहन प्रदान किये जाने के उद्देश्य से कन्या विद्या धन योजना वर्ष 2012 से लागू किये जाने की सहर्ष स्वीकृति प्रदान करते हैं।

2- इस योजना के अन्तर्गत निर्धारित मानक एवं शर्तें पूर्ण करने वाली आर्थिक दशा से कमजोर परिवारों की हाईस्कूल उत्तीर्ण छात्रायें उच्च शिक्षा की ओर उन्मुख हों और ऐसी छात्रायें जो उच्च शिक्षा की ओर उन्मुख होकर इण्टरमीडिएट परीक्षा अथवा उसके समकक्ष परीक्षा उत्तीर्ण करने वाली छात्राओं को प्रोत्साहन स्वरूप ₹ 30,000/- की धनराशि एक मुश्त प्रदान की जायेगी।”

12. With reference to the scheme, quoted above, it is urged that financial support of Rs.30,000/- would be admissible to high school passed girls students of poor financial families, who pass intermediate after 2012. Submission is that though the amount becomes payable after the girl student passes class 12th but the scheme does refer to eligibility as high school but the payment is to be released after passing the intermediate examination. It is, therefore, submitted that question no.93 is also not incorrect.

13. Various judgments have been cited before the Court including the Division Bench judgment in Writ-A no.12344 of 2017 on the scope of interference in such matters by the writ Court.

14. Reliance is placed upon the judgment of Supreme Court in *Ran Vijay Singh & Ors. vs. State of U.P.* (2018) 2 SCC 357. Learned counsel for the

commission has also placed reliance upon the Division Bench judgment of this Court in *Special Appeal Defective No.112 of 2024*, wherein this Court had recognized the limited scope of the writ Court to re-evaluate or scrutinized the answer-sheets of a candidate.

15. Reliance is also placed on the judgment of this Court in *Kapil Kumar & Ors. vs. State of U.P. & Ors.* 2023 (12) ADJ 338 (DB), wherein reference is made to various judgments of the Supreme Court, and this Court, specifying the scope of interference made in different cases.

16. The commission has also filed an affidavit stating that the appellant belongs to OBC category and has scored 78.75 marks. His date of birth is 11.1.1996. The cut-off in the respective OBC category stands at 81.25 marks. The last selected candidate was born on 25.6.1992. Referring to Rule 8(2)(iv) of the Uttar Pradesh Direct Recruitment to Group-C Posts (Mode and Procedure) Rule, 2015, it is pointed out that in the event two and more candidates obtain equal marks in the aggregate then the name of the candidate obtaining higher marks in the written examination shall be placed higher in the list. Submission is that even if this appeal was to be allowed yet the appellant would only be placed at serial no.103 of the list of candidate who are not selected. Argument is that, in such circumstances, no interference is otherwise required to be made in the present appeal, at the instance of the present appellant. It is also submitted that no other similar claim is pending before this Court or the Supreme Court.

17. Having heard learned counsel for the parties, we find substance in the argument advanced by the respondents in

response to the contentions advanced in this appeal.

18. So far as question no.78 is concerned, the specific question posed to the candidate is with reference to the four schemes namely, PURA, NSAP, SAGY, SGRY. Question is as to which of these schemes proposes to prevent migration of youths from rural areas to urban areas. The appellant admits that out of these four schemes, the only scheme which proposes to prevent migration of youths from rural areas to urban areas is PURA. What is, however, argued is that PURA scheme stands discontinued with effect from financial year 2015-16. Although this fact is not seriously disputed by the commission, yet learned counsel for the commission points out that on several websites of the Central Government including <https://pib.gov.in/newsite/PrintRelease.aspx?relid=57173>, PURA is still shown as a scheme and it is nowhere mentioned that the scheme is abandoned.

19. Upon examination of the materials on record, we do find that no funds have been sanctioned in PURA scheme after the financial year 2015-16, and the scheme is currently not in vogue yet this fact alone would not be determinative of the issue posed before us. The precise question posed to the candidate is that which of the four schemes proposes to prevent migration of youths from rural areas to urban areas. It is admitted to the appellant that out of the four schemes provided as the option to the question, PURA alone proposes to prevent migration of youths from rural areas to urban areas. In such circumstances, merely because no funds are released in the scheme after financial year 2015-16 or even if the scheme is not presently

operational it would not mean that question no.78 becomes wrong. From the formulation of question it is otherwise not suggested in any manner that the scheme had to be an existing scheme.

20. The answer to Lok Sabha question no.442 by the Minister of Rural Development is as under:-

“(a) to (b): The Government was implementing the Scheme of Provision of Urban Amenities in Rural Areas (PURA) on pilot basis for providing basic amenities in rural areas through Public Private Partnership (PPP) mode. The scheme was restructured in 2010 with the aim to achieve holistic and accelerated development of compact areas around a potential growth centre in Gram Panchayat(s) through PPP framework for providing livelihood opportunities and urban amenities to improve the quality of life in rural areas.

(c) to (c): The activities proposed under PURA projects include drinking water supply and sewerage, construction and maintenance of village streets, drainage, solid waste management, skill development, development of economic activities etc. The current status of PURA projects is as follows. There is no provision to provide funds under the PURA Scheme during the last three years.”

21. As per the answer of the Minister concerned, the PURA scheme has been replaced by SPMRM scheme but SPMRM is not one of the options given for the answer. The appellant in his reply to question no.78 has actually claimed SGRY to be the right answer. Learned counsel for the appellant, however, does not dispute that SGRY is not the right answer. What is asserted by learned counsel for the

appellant is that had he not attempted question no.78 it would not have been open for the appellant to challenge answer to the question.

22. Upon analysis of the materials placed on record, we are, therefore, persuaded to the view that the correct answer to question no.78, in the manner the question is posed, would be PURA.

23. We are also conscious of the observations made by the Supreme Court in a series of judgments, limiting the scope of examination of such issues by the High Court. In para 9 and 10 of the judgment of the Supreme Court in *Secretary (Health), Department of Health and Family Welfare & Anr. vs. Dr. Anita Puri* (1996) 6 SCC 282, the Supreme Court observed as under:-

“9. It is too well settled that when a selection is made by an expert body like the Public Service Commission which is also advised by experts having technical experience and high academic qualification in the field for which the selection is to be made, the courts should be slow to interfere with the opinion expressed by experts unless allegations of mala fide are made and established. It would be prudent and safe for the courts to leave the decisions on such matters to the experts who are more familiar with the problems they face than the courts. If the expert body considers suitability of a candidate for a specified post after giving due consideration to all the relevant factors, then the court should not ordinarily interfere with such selection and evaluation. Thus considered, we are not in a position to agree with the conclusion of the High Court that the marks awarded by the Commission was arbitrary or that the

selection made by the Commission was in any way vitiated.

10. In the aforesaid premises, we set aside the judgment of the Division Bench of the Punjab and Haryana High Court and allow this appeal. The writ petition filed by the respondents stand dismissed, there will be no order as to costs.”

24. So far as the question no.93 is concerned, we have already taken note of the Government Order dated 22.8.2012 whereby Kanya Vidya Dhan Yojana was introduced in the State of Uttar Pradesh. The scheme clearly provides that financial assistance is to be offered to girls belonging to poor financial families who have passed high school examination and are progressing towards higher education and complete intermediate or equivalent examination after 2012. The amount of Rs.30,000/- is to be paid only after the girl student passes intermediate examination after 2012. The formulation of question no.93 is not exhaustive, inasmuch as first part of the scheme although refers to grant of financial assistance to girls of financially weak family who have passed high school but the fact that such amount would be payable only after passing intermediate examination or equivalent post 2012 has been omitted. Although we are of the opinion that the question ought to have been better framed for it to be consistent with the scheme contained in the Government Order dated 22.8.2012, but the fact that question does not specify that the amount would be payable only after the girl student has passed intermediate or equivalent examination, after 2012, the question itself would not become wrong. Considering the substance of question i.e. the amount payable in the scheme, simpler way of putting the question could be as to

what is the amount of financial benefit available to a girl student in Kanya Vidya Dhan Scheme. This, in our opinion, remains the substance of the question. The amount payable in the scheme undisputedly is Rs.30,000/-.

25. The question posed is essentially with regard to Kanya Vidya Dhan Scheme which has been introduced by Government Order dated 22.8.2012. The emphasis laid on the question is with reference to original scheme which is already discussed above and the amount payable thereunder. Merely because in the modified scheme, launched later, high school pass out student is omitted and only passing of intermediate or equivalent examination is mentioned, it cannot be said that question no.93 has become wrong. The modified scheme limits the grant of benefit to 99,000 students and specified the criteria for choosing such limited candidates for the grant of benefit.

26. We are of the considered view that in the matter of public examination where large scale recruitment are undertaken some play in the joints would have to be conceded to the examining authority. It is possible that the question may not have been framed in the best possible manner or a better formulation may be advisable, but it cannot be a ground to hold the question itself to be wrong as long as the question can be understood by a candidate and can be answered. Unless it is shown that the question is wrong or the formulation of question is such that the candidate could not have understood the question or answered it, we would not be justified in interfering with the question itself.

27. In view of the deliberations held above, we find ourselves to be in respectful agreement with the view taken by the

learned Single Judge for dismissing the writ petition filed by the petitioner. The special appeal lacks merit and is, accordingly, dismissed.

(2024) 4 ILRA 157

APPELLATE JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 06.03.2024

BEFORE

THE HON'BLE SIDDHARTHA VARMA, J.
HON'BLE MANOJ BAJAJ, J.

Special Appeal No. 456 of 2023

Indian Oil Corporation Ltd. & Ors.

...Appellants

Versus

**M/S Modern Service Station, Yamunapar,
Laxminagar, Mathura**

...Respondents

Counsel for the Appellants:

Sri Shrey Sharma, Sri Anil Sharma

Counsel for the Respondents:

Ms. Shreya Gupta

Contract Law - Marketing Discipline Guidelines, 2012 - Clause 5.1.4 - Principles of Natural Justice - Termination of Petrol Pump Dealership - Indian Oil Corporation terminated dealership of M/s Modern Service Station for alleged tampering in dispensing units (broken seals, soldering, extra wiring) detected during joint inspection on 17.09.2020, classified as "critical irregularities" under Guidelines. Petitioner's defence that tampering occurred during software upgradation by M/s GVR engineer (16.09.2020) not considered by authorities, violating natural justice. No evidence showed petitioner's unauthorized access to equipment post-GVR intervention. Single Judge correctly quashed termination order (05.10.2021) and appellate order (07.04.2022) for failing to address petitioner's defence, without remanding for fresh appraisal due to potential evidence tampering. Scope of judicial review under Article 226 limited but warranted due to procedural unfairness. (Paras 18-26)

Special Appeal Dismissed.**List of Cases cited:**

1. Board of High School and Intermediate Education, U.P. Vs Kumari Chitra Srivastava, (1970) 1 SCC 121 (Para 22)
2. M/s Chaudhary Filling Point Vs St. of U.P., 2019 (3) ADJ 345 (Para 24)
3. Savitri Devi Vs U.O.I., Writ-C No. 29859 of 2017, decided on 13.07.2017 (Para 17)
4. Writ-C No. 50151 of 2017, decided on 22.03.2018 (Para 17)

(Delivered by Hon'ble Siddhartha Varma, J.
&
Hon'ble Manoj Bajaj, J.)

1. The petitioner/respondent in the instant Appeal was a retail outlet by the name of M/s Modern Service Station. It was appointed a dealer in terms of petrol/HSD Pump Dealer Agreement executed between the petitioner and the Indian Oil Corporation on 11.4.2011. The petitioner's retail outlet had two dispensing units which were manufactured by M/s. Gilbarco Veeder Root (hereinafter referred to as "M/s GVR"). As per the Rules, the Dispensing Units had to be periodically stamped by the manufacturer and by the Weights and Measures Department and on 23.3.2019 the Weights and Measures Department had given its report as "Dispensing Unit is OK". Similarly on 19.4.2019 also with regard to the Dispensing Units a report was given that "dispensing unit is ok so no need for calibration".

2. On 20.4.2019, after taking into account all the reports, the Weights and Measures Department issued a verification certificate. Similarly on 14.1.2020, the

Sales Officers inspected and reported "No variation in stocks".

3. In April 2020 again the stamping of the two dispensing units was required and, therefore, on 13.3.2020, the petitioner deposited the required fees for the stamping of the two dispensing units. In March 2020, the pandemic of Covid – 19 broke and a lock down was imposed nationwide and, therefore, on 12.6.2020 a Government Order was issued extending the validity of the last existing "Stamping" till 30th September 2020. The petitioner requested the Weights and Measures Department on 13.9.2020 to grant permission to the M/s. GVR engineer to break open the seal for stamping/software upgradation which was last done around a year back. On 15.9.2020, A.M Retail Sales, Mathura -I, through Abhishek Sharma visited the petitioner's retail outlet and issued verbal directions for immediate stoppage of sales from the dispensing units until the software of the dispensing unit was upgraded and re-stamping was done. Subsequently, the petitioner (respondent herein) stopped the dispensation of the diesel from the dispensing units.

4. On 16.9.2020 one Mr. Girendra, the Authorized Service Engineer of M/s GVR informed the petitioner that he had obtained permission from the Weights and Measures Department for breaking open the seal of the two dispensing units for software upgradation and for checking the dispensing unit for annual re-stamping.

5. Mr. Girendra broke open the seal and prepared an inspection report wherein he had stated that both CPU Cards had defect and that two new CPU Cards were required for software upgradation. On 17.9.2020, the petitioner had expected the

M/s GVR personnel to return and to correct the defect and also replace the two CPU Cards and thereafter upgrade the software. However, instead, on 17.9.2020 the Joint Inspection Team visited the retail outlet for allegedly conducting inspection of the dispensing unit and as per the report of the team the seals on the motherboard of both the dispensing units were not available and extra soldering with small wire was found in both the motherboards. The report thereafter stated that both the motherboards had been taken out from the dispensing unit in the presence of Sri Raja Babu Bansal (dealer's representative) and, thereafter, they were sealed and taken away.

6. On 21.9.2020, the petitioner received written instructions from Sri Abhishek Sharma, A.M. Retail Sales Mathura – I, of the Indian Oil Corporation Limited to stop the sales from both the dispensing units.

7. On 8.10.2020, the petitioner received a fact finding letter wherein it was observed that as per the provisions of the Marketing Discipline Guidelines, 2012 (amended on 3.8.2018), the irregularities which were found in the dispensing units of the petitioner's retail outlet were termed as “critical irregularities” and it was further observed that penal action in the form of termination of dealership was required. To the fact finding report, the petitioner put in a reply on 12.10.2020 and had stated that after Mr. Girendra of M/s GVR Engineering who had opened the machine on 16.9.2020, the petitioner had no control over the dispensing units and that he was responsible for the tampering with the machine. Paragraphs no. 3 and 4 of the reply dated 12.10.2020 being

relevant are being reproduced here as under:

“3. it is to be noted here that it is evidence that both the motherboards were good in all respects and as such he could update the software. We apprehend that in this process of updating software some short circuit could have occurred in both the motherboards and he must have been trying to rectify the motherboard by soldering/extra wiring. The above act is without our consent and our knowledge. He left both the MPDU's with broken seals and left the RO after preparing his inspection report

4. On 17.09.2020 A Joint Inspection with few officers (as described in your subjected letter) visited at our RO. They asked us to open both the MPDU's to verify the work carried out by the engineer Mr. Girendra who visited at our RO on 16.09.2020. We opened the MPDU's and it was pointed out to us that the seals of the motherboards are broken and are having soldering and extra wire. We told the team members that all these acts were carried out by Mr. Girendra on his visit on 16.09.2020, which we were totally not in our knowledge. And we also told them that the machine was in same condition for almost 26 hours as left by the fitter. This states that we don't have any wrong intention. A report was made by the members of the team and we were made to sign on it.”

8. From the perusal of paragraphs no. 3 and 4 of the reply, it is evident that the petitioner had no control over the dispensing units as the same had been opened by Mr. Girendra, the Engineer of the M/s. GVR. The report as was submitted by the Indian Oil Corporation on 17.9.2020 and on the basis of which the fact finding report was submitted on 8.10.2020 was not

denied by the petitioner. Evidently, it had only stated that the missing seal on the motherboard, extra soldering with small wires on both the motherboards were such defects which had crept in because of the opening of the units by Mr. Girendra, the Engineer of the M/s GVR and that he himself was responsible for any tampering etc. The petitioner had insisted that in view of clause 5.1.4 of the Marketing Discipline Guidelines, which was being used against the petitioner, also had provided that in cases where views and independent opinion of the Original Equipment Manufacturer (hereinafter referred to as “the OEM”) had to be obtained then they should be taken and only then a suitable decision could be taken. After the petitioner had submitted his reply and the petitioner's unit had been asked to be shut down, the petitioner waited for some order to be passed and when that was not done it approached this Court by filing a writ petition being Writ – C No. 23158 of 2020 (M/s Modern Service Station and 2 others vs. Union of India and 5 others) which was disposed of by this Court by means of order dated 18.12.2020 directing the respondents to conclude the pending enquiry initiated against the petitioner expeditiously, preferably within a period of 4 weeks. Thereafter a Joint Inspection of the Retail Outlet was once again conducted by the same team which had conducted the inspection previously on 17.9.2020.

9. This inspection was carried on 19.12.2020 once again in the presence of Raja Babu Bansal, the authorized representative of the petitioner and the team once again noticed the very same errors and it sealed the dispensing units and

collected the relevant parts of both the dispensing units for further testing.

10. On 21.3.2021, a show cause notice was issued to the petitioner by the Indian Oil Corporation calling upon the petitioner to explain within 15 days as to why action should not be initiated against the petitioner for the breach of Terms and Conditions of the dealership agreement and the Marketing Discipline Guidelines, 2012.

11. The show cause notice which ran into 4 pages basically alleged that there was tampering in the dispensing unit of the petitioner which was in violation of the dealership agreement dated 11.4.2011 and the Marketing Discipline Guidelines, 2012.

12. The petitioner submitted its reply on 21.6.2021 to the show cause notice dated 21.3.2021 and the gist of the reply was that it had carried on with the dealership with utmost sincerity ever since 11.4.2011. When they had obtained the dealership they had run it with unblemished track record. The petitioner in the reply had denied any soldering etc. and had also denied that it had put any wire etc. on the motherboard. The petitioner had only blamed the authorized service engineer of M/s. GVR who had visited the retail outlet of the petitioner on 16.9.2020 for the upgradation of the software and for the facilitating of the stamping of the dispensing unit. The paragraph 17 of the reply sent by the petitioner on 21.6.2021 is relevant for the purpose of this case wherein the petitioner had alleged that everything irregular which was found by the Indian Oil Corporation was not done by the petitioner but by the

Engineer of M/s. GVR who had visited the retail outlet on 16.9.2020.

allowed on 18.5.2023, the instant Special Appeal has been filed.

13. In paragraph no. 22 of the reply dated 21.6.2021, the petitioner had categorically stated that they had no knowledge of what was done by the Engineer of M/s. GVR, Sri Girendra. The paragraph no. 22 of the reply is being reproduced here as under: -

“22. In so far as the allegation contained in the SCN (at page 2 & 3), that we have accepted in our reply dt. 12.10.2020 about the broken DU seals, soldering as well as extra wire in the DU, is concerned, we wish to reiterate that we had simply shared our opinion/ apprehension in the peculiar factual conspectus of the present case, which cannot be construed as our admission. It is beyond our knowledge as to what was done by the GVR Engineer - Mr. Girendra on 16.09.2020 in the DUs. It appeared to us (theoretically) that the GVR Engineer might have placed the alleged soldering and extra wire on the motherboard while attempting to upgrade its software, which was ultimately unsuccessful. Therefore, it will be in the Interest of Justice and fairness that an explanation be sought from the GVR Engineer, Mr. Girendra, instead of taking action against us.”

14. However upon considering the show cause notice and the reply of the petitioner, the dealership of the petitioner was terminated vide order dated 5.10.2021.

15. This order was appealed against under Section 8.9 of the Marketing Discipline Guidelines 2012 and when the same was dismissed on 7.4.2022, a writ petition being Writ – C no. 13514 of 2022 was filed. This writ petition when was

16. Sri Anil Sharma, learned Senior Counsel assisted by Sri Shrey Sharma learned counsel for the appellants has argued that :

(a). The learned Single Judge erred when it entered into the decision making process of the Indian Oil Corporation and submitted that the powers of the High Court under Article 226 of the Constitution of India with regard to contractual matters is limited.

(b). Even if the decision making process is looked into then it becomes evident that the Engineer of M/s. GVR when it had given its report had clearly observed that there was manipulation in the dispensing unit. The expert opinion of the OEM i.e. M/s. GVR was against the petitioner (respondent in the Appeal) and that the expert opinion of the OEM was not considered by the learned Single Judge.

(c). The finding of the learned Single Judge that the principles of natural justice were violated was also erroneous inasmuch as the show cause notice was given and the petitioner had replied and thereafter the orders were passed.

(d). Under Clause 5.1.4 of the Marketing Discipline Guidelines 2012, independent opinion of the OEM i.e. M/s. GVR was obtained and only on the opinion of the OEM action was taken.

(e). Learned counsel for the appellants further submitted that the submission of the petitioner (respondent herein) that the manipulation in the dispensing unit could have been done by the Engineer of the OEM sometime during the inspection on 16.9.2020 was not supported by any material evidence available on record and he, therefore,

submits that the learned Single Judge had placed a negative burden on the appellants to prove allegations made by the dealer (respondent herein).

(f). Learned Single Judge had not considered the fact that the manipulation in the cards would lead to affected delivery of petroleum products from the dispensing units and that there was no occasion for the service engineer to make any addition/alteration during the inspection dated 16.9.2020. He submits that the dealer alone stood to benefit from any addition/modification/tampering which was done to the dispensing unit.

(g). Learned counsel for the appellants has submitted that even if the report dated 16.9.2020 is perused, it becomes clear that the Engineer of M/s. GVR had found that both the CPU Cards in both the dispensing units were found defective.

17. Learned counsel for the appellants has further to bolster his arguments relied upon a judgement of this Court dated 13.7.2017 passed in Writ – C No. 29859 of 2017 (Savitri Devi and 2 others v. Union of India and 4 others) and has supported his submissions. For a similar purpose, he relied upon the judgement of this Court passed on 22.3.2018 in Writ – C No. 50151 of 2017.

18. Learned counsel for the petitioner (respondents here) Ms. Shreya Gupta has opposed the Special Appeal and has supported the order passed by the learned Single Judge. She has submitted that the learned Single Judge had very correctly allowed the writ petition basing his judgement on the fact that the defence raised by the petitioner (respondent here) regarding the visit of the M/s. GVR Engineer on 16.9.2020 was not considered

at all. She submits that during the visit on 16.9.2020 vital pieces of evidence were lost which were not considered at the time of the termination of the dealership and this was, she submits, in gross-violation of the principles of natural justice. She had further submitted that the information regarding the vital piece of evidence which was in possession of the engineer was not a part of the procedure but it related to the merits of the case. She submits that when on 16.9.2020, the engineer of M/s. GVR Mr. Girendra came at the petitioner's retail outlet and broke open the seal of the dispensing units and fiddled with the units for upgrading them then it could safely be said that the dispensing units were no longer in the guardianship of the dealers. Instead they were now being looked after by the Engineer of M/s. GVR who had broken the seal and had fiddled with the CPU Cards etc.

19. Learned counsel for the petitioner (respondent here) submitted that when this submission/argument was made in the reply to the show cause notice then the Indian Oil Corporation did not care to include the M/s. GVR's Engineer in the decision making process.

20. Learned counsel for the petitioner (respondent here) has submitted that learned Single Judge, therefore, had found that when issues raised by the petitioners were not dealt with then there was actual violation of the principles of natural justice. She submits that "fair hearing" and "opportunity of hearing" during the enquiry proceedings would be meaningless in case the Enquiry Officer does not consider the submissions which were raised in defence by the person who was being proceeded against. She submits that the learned Single Judge had clearly found that the

opportunity of hearing would include due consideration of all defences raised by a person who was being proceeded against and, therefore, the learned counsel for the respondents states that if the Disciplinary Authority failed to consider the reply then it was a clear violation of the principles of natural justice.

21. Learned counsel for the petitioner has further submitted that before the unit was sealed there was absolutely no complaint from any quarter with regard to the volume of dispensation.

22. Learned counsel for the respondent-petitioner further argued that if there is violation of principles of natural justice then that itself becomes a ground for allowing the writ petition. She has relied upon the decision of **The Board of High School and Intermediate Education, U.P. and others vs. Kumari Chitra Srivastava and Others reported in 1970 (1) SCC 121** and has argued that the Principles of natural justice are to some minds burdensome but this price – a small price indeed – has to be paid if we desire the society to be governed by the rule of law. Since the learned counsel has specifically relied upon paragraphs no. 7 and 8 of the aforesaid judgement, they are being reproduced here as under:-

“7.The learned counsel for the appellant, Mr. C. B. Agarwala, contends that the facts are not in dispute and it is further clear that no useful purpose would have been served if the Board had served a show-cause notice on the petitioner. He says that in view of these circumstances it was not necessary for the Board to have issued a show-cause notice. We are unable to accept this contention. Whether a duty arises in a particular case to issue a show

cause notice before inflicting a penalty does not depend on the authority's satisfaction that the person to be penalised has no defence but on the nature of the order proposed to be passed.

8. We agree with the High Court that the impugned order imposed a penalty. The petitioner had appeared in the examination and answered all the question papers. According to her she had passed. To deny her the fruits of her labour cannot but be called a penalty. We are unable to appreciate the contention that the Board in "cancelling her examination" was not exercising quasi-judicial functions. The learned counsel urges that this would be casting a heavy burden on the Board. **Principles of natural justice are to some minds burdensome but this price-a small price indeed-has to be paid if we desire a society governed by the rule of law.** We should not be taken to have decided that this rule will also apply when a candidate is refused admission to an examination. We are not concerned with this question and say nothing about it. ”

23. Learned counsel also had submitted that the case may not be remanded back for considering the case as might be put forth by the engineer of the M/s GVR. She submits that the evidence having not been put in sealed cover must have by now been fiddled by all and sundry.

24. Having considered the rival submissions of the parties, we are definitely of the view that the learned Single Judge while dealing with the case of the petitioner correctly came to the conclusion that when a particular defence which was taken by the petitioner was not considered then that itself becomes a violation of the principles of natural justice. In the instant case, the

petitioner had taken a definite stand that when on 16.9.2020, the engineer of M/s. GVR Mr. Girendra had opened the unit and had broken the seal then the dispensing unit was no longer in the control of the petitioner/respondents and there was every possibility of the seal being tampered and the unit being fiddled with by the engineer of M/s. GVR Mr. Girendra. When the defence of the petitioner was not considered the learned Single Judge correctly came to the conclusion that the petitioner was wronged inasmuch as there was a definite violation of principles of natural justice. Also the learned Single Judge rightly put an end to the matter and did not remand the case for a fresh appraisal. He, therefore, rightly relied upon the decision in **M/s Chaudhary Filling Point, Kazipur through its Prop. And another vs. State of U.P. through Prin. Secy. Food & Civil Supplies and Ors.** reported in 2019 (3) ADJ 345 the relevant paragraph no. 39 is being reproduced here as under:

“39. As seen from the reading of the impugned order, the only reason assigned for being not satisfied with the explanation offered by the petitioner was that there was tampering in the DU and pulsar card contains certain soldering marks. However, what was not considered by the competent authority was that at what point of time this unauthorized tampering/soldering was done in the dispensing unit and how the dealer is manipulating the distribution of fuel. No material, much less credible one has been brought on record by the respondents to disclose the unauthorized access to the equipment by the petitioner. It was specific stand of the petitioner that periodically the Weights and

Measurements Department officials inspected the seals and they were found to be intact. Further more, what is the impact on tampering/soldering in delivery unit is not disclosed. How the dealer can manipulate delivery of fuel by inserting such unit is not explained. The only objective of a dealer to tamper with dispensing unit is to manipulate delivery of fuel. In this case, the delivery of fuel was found to be accurate prior to checking of unit and after the checking. Furthermore, the defence of the petitioner that it is possible that the supplier himself might have done soldering while repairing for proper functioning of the unit by supplier himself cannot be brushed aside.”

25. This Appellate Court, thus, finds that when the main defence of the petitioner that i.e. the tampering was, in fact, a result of the act of the Original Equipment Manufacturer and that the petitioner had no hand in it was not considered then definitely the petitioner's interest was prejudiced.

26. We are thus of the view that the writ petition was rightly allowed and the matter was also rightly not remanded back. This we say as the appellants definitely had not been able to bring on record any fact by which it could be ascertained that the dealer had an authorized access to the equipment after the M/s GVR engineer had opened the dispensing unit and had fiddled with the motherboard and that the dealer was in any way responsible for the tampering etc.

27. For the reasons stated above, the Special Appeal stands dismissed.

(2024) 4 ILRA 165
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.04.2024

BEFORE

THE HON'BLE ABDUL MOIN, J.

Writ A No. 556 of 2022

Smt. Kavita Tiwari ...Petitioner
Versus
State of U.P. Ors. ...Respondents

Counsel for the Petitioner:
Tushar Verma, Prashant Kumar Singh

Counsel for the Respondents:
C.S.C.

A. Service Law – Compassionate Appointment – Eligibility of Married Daughter – Petitioner, a married daughter of a deceased government servant, challenged the rejection of her claim for compassionate appointment under the U.P. Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 – Held, the rejection based on her marital status was unsustainable, as the Division Bench in Smt. Vimla Srivastava Vs St. of U.P. held that a married daughter's claim cannot be rejected solely on the ground of marital status under the Rules, 1974 – The respondents' reliance on St. of U.P. Vs Madhavi Mishra, which pertained to Regulations, 1995, was inapplicable. (Paras 6, 10, 19, 20)

B. Service Law – Compassionate Appointment – Employment of Other Family Members – The respondents rejected the petitioner's claim citing her brothers' employment as Lekpals – Held, under Rule 5(1) of the Rules, 1974, as amended in 1999, compassionate appointment is barred only if the surviving spouse is in government service, not if other family members like siblings are employed – Kumari Nisha Vs St. of U.P. clarified that a sibling's employment does not preclude compassionate appointment, as their earnings are for their own family – This ground was legally untenable. (Paras 8, 11, 21, 22)

C. Service Law – Compassionate Appointment – Pension and Financial Benefits
– The respondents argued that the petitioner's mother receiving pension and retiral benefits disqualified the petitioner's claim – Held, the Rules, 1974 do not stipulate financial benefits as a bar to compassionate appointment – Pramod Kumar Rajak Vs Registrar General High Court Allahabad confirmed that receipt of pensionary benefits does not disentitle a family member from seeking compassionate appointment – This ground was rejected. (Paras 8, 12, 23)

D. Service Law – Compassionate Appointment – Dependency Requirement – The respondents contended in their counter affidavit that the petitioner was not dependent on her deceased father – Held, Rule 2(c) and Rule 5 of the Rules, 1974 define “family” to include a married daughter and do not mandate dependency on the deceased employee as a condition for compassionate appointment – The respondents could not impose an extra-statutory requirement of dependency to deny the petitioner’s claim. (Paras 9, 13, 24)

E. Judicial Review – Relief in Compassionate Appointment Cases –
The respondents’ rejection order dated 25.10.2021 was based on grounds inconsistent with the Rules, 1974 and prior judicial precedents – Held, the order was legally unsustainable due to misapplication of law and failure to adhere to the Division Bench’s ruling in Smt. Vimla Srivastava – The writ petition was allowed, the impugned order was quashed, and the respondents were directed to reconsider the petitioner’s claim within two months in accordance with the law. (Paras 14, 17, 25)

Writ Petition Allowed.

Impugned Order Dated 25.10.2021 Quashed – Respondents Directed to Reconsider Petitioner's Claim for Compassionate Appointment.

List of Cases cited:

1. Smt. Vimla Srivastava Vs St. of U.P., Writ A No. 60881 of 2015, decided on 04.12.2015
2. St. of U.P. Vs Madhavi Mishra, Special Appeal No. 223 of 2021

3. Kumari Nisha Vs St. of U.P., Writ A No. 16068 of 2023, decided on 08.02.2024

4. Pramod Kumar Rajak Vs Registrar General High Court Allahabad, 2011 (4) U.P.L.B.E.C. 2692

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

1. Heard learned counsel for the petitioner as well as learned Standing counsel for the respondents.

2. The instant petition has been filed challenging the order dated 25.10.2021 passed by the respondent No.3, a copy of which is annexure 1 to the petition, whereby the claim of the petitioner for compassionate appointment has been rejected. Further prayer is for a mandamus commanding the respondents to grant compassionate appointment to the petitioner under the U.P. Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974.

3. Bereft of unnecessary details, the case set forth by the learned counsel for the petitioner is that the petitioner's father namely Shri Om Prakash Tiwari, while working on the post of Driver in the office of Executive Engineer, Sinchai Khand, Lucknow, died in harness on 18.05.2019 leaving behind his widow namely Smt. Uma Tiwari, a married son namely Rahul Tiwari and two married daughters namely the petitioner and Smt. Pratibha Tiwari.

4. The petitioner staked her claim for compassionate appointment under the provisions of U.P. Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 (hereinafter referred to as Rules, 1974). The claim of the petitioner was rejected vide orders dated 15.02.2020 and 11.03.2020 on the

ground that she being a married daughter is not entitled for being appointed on compassionate grounds under the provisions of the Rules, 1974.

5. A challenge was raised to both the orders by filing **Writ Petition No.12052(S/S) of 2020 in Re: Smt. Kavita Tiwari Vs. State of U.P. and Others** and writ Court, vide order dated 30.07.2020, a copy of which is annexure 7 to the petition, set aside both the orders and required the competent authority to reconsider the claim of the petitioner afresh. The said judgment was passed considering the judgment of this Court passed in Writ A No.60881 of 2015 decided on 04.12.2015 and the Special Leave to Appeal against which had also been dismissed.

6. Incidentally, **Writ A No.60881 of 2015 in Re: Smt. Vimla Srivastava Vs. State of U.P. and Another**, a copy of the judgment which has been annexed as annexure No.8 to the petition, pertains to a judgment of this Court whereby this Court had also held a married daughter to be entitled for compassionate appointment and the State was required to consider the case of a married daughter and to not reject the same solely on the ground of her marital status.

7. In pursuance thereof, the petitioner again staked her claim for being appointed on compassionate grounds, which has been rejected vide order impugned dated 25.10.2021, a copy of which is annexure 1 to the petition.

8. Learned counsel for the petitioner states that a perusal of the order impugned would indicate that the respondents have rejected the claim of the petitioner for compassionate appointment primarily on

three grounds namely (a) that as per the judgment of Division Bench of this Court passed in Special Appeal No.223 of 2021 in **Re: State of U.P. and Another Vs. Madhavi Mishra and 2 Others**, a married daughter is not entitled for compassionate appointment and would be said to be dependent on her husband (b) two brothers of the petitioner are working on the post of Lekpal and (c) the mother of the petitioner is receiving pension every month and has also received the GPF amount.

9. Learned counsel for the petitioner further states that in the counter affidavit filed by the respondents, another ground has been taken in paragraph 7 of the counter affidavit that the petitioner was not dependent on her father.

10. The contention of learned counsel for the petitioner is that so far as the judgment is concerned, over which reliance has been placed by the respondents while rejecting the claim of the petitioner i.e. in the case of **Madhavi Mishra (supra)**, the same does not pertain to the Rules, 1974 and as such, has no applicability to the facts of the present case, more particularly, when the petitioner has staked her claim for compassionate appointment under the provisions of the Rules, 1974 which in fact have been considered by the Division Bench of this Court in the case of **Smt. Vimla Srivastava (supra)**.

11. So far as the allegation of two brothers of the petitioner being in employment are concerned, reliance has been placed on the provisions of Rules, 1974 to contend that there is no such bar in the Rules which prohibits the petitioner from being appointed on

compassionate ground in case any of her brothers are in employment. He further states that this aspect of the matter has been considered by this Court in **Writ A No.16068 of 2023 in Re: Kumari Nisha Vs. State of U.P. and 3 Others** decided on 08.02.2024.

12. So far as the ground of the petitioner's mother having received pension and other dues is concerned, it is contended that mere grant of pensionary benefits to a person would not disentitle either that person or the family member of the deceased from staking their claim for compassionate appointment. Reliance has also been placed over the judgment of this Court in the case of **Pramod Kumar Rajak Vs. Registrar General High Court Allahabad, 2011 (4) U.P.L.B.E.C. 2692**.

13. So far as the ground taken in the counter affidavit of the petitioner not being dependent on the deceased employee is concerned, again reliance has been placed on the provisions of the Rules, 1974 to contend that the Rules, 1974 do not contemplate the family member to be dependent upon the deceased employee rather the definition of family, as indicated in Rule 2 (c), would now include a married daughter and the only condition for compassionate appointment, as stipulated in Rule 5, does not contemplate or stipulate a person seeking compassionate appointment to be dependent upon the deceased employee, rather he should be a family member.

14. Thus, it is contended that all the grounds taken by the respondents, while rejecting the claim of the petitioner for compassionate appointment, are legally unsustainable in the eyes of law and accordingly, the order impugned merits to

be set aside with a direction to the respondents to consider the claim of the petitioner on compassionate grounds afresh.

15. On the other hand, learned Standing counsel, on the basis of averments contained in the counter affidavit, has supported the order impugned and states that on account of the grounds, as contained in the order impugned, the petitioner is not entitled for compassionate appointment.

16. Heard the learned counsels for the parties and perused the record.

17. From a perusal of record, it emerges that admittedly, the petitioner is a married daughter of the deceased employee, who died in harness. She staked her claim for compassionate appointment which was initially rejected by the respondents, vide orders dated 15.02.2020 and 11.03.2020, on the ground that she being a married daughter is not entitled for compassionate appointment. The writ Court, vide judgment and order dated 30.07.2020, quashed both the orders considering the judgment of this Court passed in the case **Smt. Vimla Srivastava (supra)** and required the respondents to reconsider the claim of the petitioner for compassionate appointment.

18. In pursuance thereof, the respondents have reconsidered the claim of the petitioner for compassionate appointment but have rejected her claim on the grounds as already indicated above.

19. So far as the ground taken by the respondents of the Division Bench of this Court in the case of **Madhavi Mishra (supra)** having held that a married

daughter as not being dependent and hence not entitled for compassionate appointment, is concerned, a perusal of the judgment in the case of **Madhavi Mishra (supra)** would indicate that the Division Bench of this Court was considering the provisions of Regulations, 1995 and not the provisions of the Rules, 1974 rather the Division Bench has gone to the extent of indicating that the order of Single Judge, whose judgment had been challenged in the Special Appeal, had wrongly invoked the provisions of the Rules, 1974.

20. Thus, the said judgment would have no applicability in the instant case, more particularly, when the claim of the petitioner for compassionate appointment is governed by the Rules, 1974 which aspect of the matter has been considered threadbare by the Division Bench of this Court in the case of **Smt. Vimla Srivastava (supra)**, wherein the Division Bench has observed that the case of compassionate appointment of a married daughter would not be rejected solely on the ground of her marital status.

21. So far as the ground of two brothers of the petitioner working as Lekpal is concerned, the said ground may also not detain the Court as this aspect of the matter has been considered threadbare by this Court in the case of **Kumari Nisha (supra)** wherein this Court, after considering the provisions of the Rules, 1974, has held as under:

17. This Court finds that initially Rule 5(1) of the Rules of 1974 provided for compassionate appointment to one family member dependent on the deceased government servant provided he is not in government job meaning thereby that there was only one condition where the

compassionate appointment could have been refused i.e. person seeking compassionate appointment was already in government job. Later on, Rule 5(1) of the Rules of 1974 has been amended in the year 1999 and amended Rule 5(1) provides that if the surviving spouse of the deceased government servant is in government job then the other family members dependent on the deceased government servant shall not be entitled for compassionate appointment.

15. *This Court further finds that the legislature while amending Rule 5(1) of the Rules of 1974 was conscious of the fact that if one son of the deceased government servant is in government job, his earnings may not be available for survival of the remaining family members of the deceased government servant for the reason that the earnings of the son are meant for survival of his own family (his wife and children) and therefore only one prohibition has been incorporated that if the surviving spouse of the deceased government servant is in government job, the other dependent family members are not entitled for compassionate appointment."*

22. Thus, from a perusal of the judgment of this Court in the case of **Kumari Nisha (supra)**, it clearly emerges that the mere fact that any brother of a person seeking compassionate appointment is in a government service the same would not be a bar to the family member of staking a claim for compassionate appointment under the Rules, 1974. Thus, the said ground is also rejected.

23. So far as the ground that the mother of the petitioner is receiving pension every month and had also received the other retiral dues, financial benefits have not been made a bar under the Rules,

1974 or cannot be considered to be a bar when no such condition has been stipulated in the Rules, 1974 as to entail a person seeking compassionate appointment as being not eligible for seeking compassionate appointment. This aspect of the matter has been considered threadbare by the Court in the case of **Pramod Kumar Rajak Vs. Registrar General High Court Allahabad, 2011 (4) U.P.L.B.E.C. 2692** while considering the provisions of the Rules, 1974. Thus, the said ground is also rejected.

24. So far as the ground of the petitioner not being dependent on the deceased government servant, as has been taken in the counter affidavit, is concerned, even the said ground may not detain the Court inasmuch as Rules, 1974 only defines the word Family as per Rule 2 (c) and Rule 5, which specifically governs the compassionate appointment, also does not indicate that a person seeking compassionate appointment should be a dependent of the deceased government servant. It cannot be a case that when a word is not included under the Rules, 1974, the respondents may add any word in order to deprive the consideration of the claim of the petitioner for compassionate appointment.

25. Keeping in view of the aforesaid discussion, the writ petition is **allowed**. The order impugned dated 25.10.2021, a copy of which is annexure 1 to the petition, is set aside. The respondents are required to reconsider the claim of the petitioner for compassionate appointment keeping in view the discussion made above. Let such a decision be taken in accordance with law within a period of two months from the date of receipt of a certified copy of this order.

(2024) 4 ILRA 170
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.03.2024

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE DONADI RAMESH, J.

Writ A No. 602 of 2024

Dr. Brajendra Singh Chauhan ...Petitioners
Versus
Central Administrative Tribunal & Ors.
...Respondents

Counsel for the Petitioners:
Sri Pramod Kumar Pandey

Counsel for the Respondents:

A. Contempt Jurisdiction – Maintainability of Writ Petition Against Tribunal's Contempt Orders – Petitioners challenged the Central Administrative Tribunal's order dated 20.10.2023, which closed contempt proceedings for alleged non-compliance with its earlier order dated 10.05.2022 – Held, under Section 17 of the Administrative Tribunals Act, 1985, read with Section 19 of the Contempt of Courts Act, 1971, orders passed by the Tribunal in contempt proceedings are appealable only to the Supreme Court within 60 days, and no writ petition is maintainable before the High Court under Articles 226/227 of the Constitution, as per T. Sudhakar Prasad Vs Government of A.P. – The writ petition was dismissed as non-maintainable. (Paras 5, 7, 10, 11, 16, 17, 20, 21)

B. Administrative Tribunals – Contempt Powers and Jurisdiction – The Central Administrative Tribunal, under Section 17 of the Administrative Tribunals Act, 1985, has the same jurisdiction to punish for contempt as a High Court under the Contempt of Courts Act, 1971, with references to "High Court" construed as "Tribunal" – Held, this power is derived from Article 323-A(2)(b) of the Constitution, and the Tribunal's contempt orders are distinct from its regular orders under Section 14, as the former are appealable only to the Supreme Court, not

subject to High Court's judicial review under Articles 226/227, per L. Chandra Kumar Vs U.O.I.. (Paras 7, 8, 10, 13, 15, 16, 17)

C. Judicial Review – Scope Over Tribunal's Contempt Orders – Petitioners sought to invoke High Court's jurisdiction under Article 226 to challenge the Tribunal's closure of contempt proceedings – Held, the High Court's judicial review under Articles 226/227 is limited to matters under Section 14 of the Administrative Tribunals Act, 1985, and does not extend to contempt orders under Section 17, which are exclusively appealable to the Supreme Court – The Tribunal's contempt jurisdiction is supplemental, not substitutional, to the High Court's powers under Article 215, as clarified in T. Sudhakar Prasad and L. Chandra Kumar . (Paras 11, 13, 15, 16, 20)

D. Compliance with Tribunal's Orders – Contempt Proceedings – The Tribunal's order dated 10.05.2022 directed regularization of petitioners as Assistant Medical Officers from their initial appointment date as Short Term Medical Officers, with notional service benefits but no salary arrears – Held, the Tribunal found substantial compliance by the respondents' order dated 19.04.2023, which regularized petitioners and granted notional service benefits, and closed contempt proceedings – The petitioners' claim for additional benefits like notional seniority and promotions was not expressly directed by the Tribunal's order, and no willful disobedience was established. (Paras 2, 3, 13, 14)

E. Statutory Interpretation – Contempt Appeals and Tribunal's Role – The Administrative Tribunals Act, 1985, and Contempt of Courts Act, 1971, create a distinct framework for contempt appeals – Held, Section 19 of the Contempt of Courts Act, read with Section 17 of the Administrative Tribunals Act, explicitly provides for appeals from Tribunal's contempt orders to the Supreme Court, excluding intra-Tribunal appeals or High Court review – The Tribunal, while exercising contempt powers, remains subject to High Court's supervisory jurisdiction under Articles 226/227 for non-

contempt matters, but contempt orders are insulated from such review, as per R. Mohajan Vs Shefali Sengupta . (Paras 10, 17, 19, 20)

Writ Petition Dismissed as Non-Maintainable.

List of Cases cited:

1. T. Sudhakar Prasad Vs Government of A.P., (2001) 1 SCC 516
2. L. Chandra Kumar Vs U.O.I., (1997) 3 SCC 261
3. R. Mohajan Vs Shefali Sengupta, (2012) 4 SCC 761
4. S.P. Sampath Kumar Vs U.O.I., (1987) ILLJ 128 SC
5. Supreme Court Bar Association Vs U.O.I., (1998) 4 SCC 409
6. St. of Orissa Vs Bhagaban Sarangi, (1995) 1 SCC 399
7. T.N. Seshan, Chief Election Commissioner of India Vs U.O.I., 1994 (1) SCALE 7

(Delivered by Hon'ble Donadi Ramesh, J.)

1. Heard Sri Pramod Kumar Pandey, learned counsel for the petitioners.

2. The petitioners have approached the Central Administrative Tribunal, Allahabad Bench Allahabad, by invoking the provisions of the Contempt of Courts Act, 1971 (hereinafter referred to as 'the Act 1971'). The petitioners have filed original application no.1427 of 2018 before the Central Administrative Tribunal and the same was disposed of vide order dated 10.05.2022 with the following observations:

“9. In view of the facts and circumstances as discussed above, the

present original application is allowed with a direction to the Competent Authority amongst the respondents to issue orders forthwith, in any case not later than a period of twelve weeks from the date of this order giving appointment to the applicants as regular Assistant Medical Officers with effect from the date on which they were initially appointed as Short Term Medical Officer.

10. While the applicant shall be entitled to all the consequential benefits as a result of this Order, they shall have no claim over any arrears of salary and allowances, etc. The benefit of the service rendered by them as STMOs till 16.09.2015 shall be awarded to them only on notional basis.”

3. For non-compliance of the above order, the petitioners have approached the Tribunal by filing the contempt petition and the same was numbered as 48 of 2023 in original application no.1427 of 2018. The said contempt application has been disposed of vide order dated 20.10.2023 with the following observations:

12. Simple reading of the para 10 of the order of the Tribunal, which mentions of consequential benefit, cannot be read beyond the wordings of the order as all consequential benefits are as per rules and entitlement and nothing more or less can be given to the petitioners. We fail to read within the order if there is any express direction, which confers any benefit of seniority and other consequential benefit of out of turn promotion to the petitioners vide order dated 10.05.2022. The respondents have finally issued regularization order dated 19.04.2023 in compliance of the order dated 10.05.2022 and it is noted that similar benefit, as has been extended to the petitioners, has been granted to other

Medical Officers, who initially joined as Short Terms Medical Officers and were subsequently regularized on recommendations of the UPSC as AMOs at a later date and these Medical Officers are deemed to be in service from the date of their first appointment and the break being ignored and shall be treated as leave to which these Medical Officers may be entitled to or as Extra Ordinary Leave without pay, if there is no leave in credit. Seniority of the Medical Officers will, however, count with effect from the date of their regular appointment as Assistant Medical Officer.

13. We have seen the order dated 19.04.2023 passed by the respondents, which is annexed at page 28 of the counter affidavit, regarding counting of past service, grant of condonation of break, increments, etc in respect of Short Term Medical Officer (STMOs) regularized following judgment of this Tribunal, we are satisfied that substantial compliance of the order of this Tribunal dated 10.05.2022 passed in OA No. 1427/2018 has been made and there is nothing on record which show anything contrary to this.

14. In view of the above facts and circumstances, this court is of the view that sufficient compliance has been made and we do not find any wilful disobedience of the direction of this Tribunal on the part of the respondents. Therefore, no further proceeding is required and the contempt proceeding is liable to be closed. Accordingly, the contempt proceeding is closed, the notices are discharged and the respondents are discharged from their liabilities. All associated pending MAs stand disposed off”

4. Aggrieved by the same, the petitioners have filed the present writ petition with the following prayers:

(i) To issue writ, order or direction in the nature of certiorari quashing the impugned order dated 20.10.2023 passed by Central Administrative Tribunal, Allahabad Bench, Allahabad in Civil Misc. Contempt Application No.48 of 2023, Dr. Brajendra Singh Chauhan and others Vs. Sri Giridhar Aramane and another, in Original Application No.1427 of 2018, Dr. Brajendra Singh Chauhan and others v. Union of India and another (Annexure No.1 to the writ petition).

(ii) To issue writ, order or direction in the nature of mandamus commanding and directing the respondent nos.2 and 3 to comply with the order dated 10.05.2022 passed by Central Administrative Tribunal, Allahabad Bench Allahabad, in Original Application No.1427 of 2018 (Dr. Brajendra Singh Chauhan and 2 others Vs. Union of India and another) (Annexure No.5 to the writ petition) in letter and spirit and in pith and assign the notional seniority to the petitioners from their initial appointment date, amend the seniority list and place the petitioners at the bottom of their respective batches and grant all due notional promotions to the petitioners upto the Chief Medial Officer through review DPC and thereafter fix their salary accordingly.

(iii) To issue any other suitable writ, order or direction, which this Hon’ble Court may deem fit and proper.

(iv) To award the cost of the writ petition in favour of the petitioners”

5. Learned Standing Counsel has raised a preliminary objection with regard to maintainability of the present writ petition under Article 226 of the Constitution of India by virtue of Section 17 of the Administrative Tribunal Act, 1985 (hereinafter referred to as “the Act

1985”) read with Section 19 of the Contempt of Courts Act, 1971.

6. To answer preliminary objection, issue fell for consideration is whether the writ petition is maintainable before the High Court against the orders passed under the Contempt of Courts Act.

7. To decide the above issue, the following relevant Statutes and provisions namely (1) Article 323 A of the Constitution of India, (2) Sections 14 and 17 of the Administrative Tribunal Act, 1985 and Sections 11, 12 and 19 of the Contempt of Courts Act, 1971 are extracted respectively hereinbelow:-

“Article 323A Administrative Tribunals- (1) Parliament may, by law, provide for the adjudication or trial by administrative tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation owned or controlled by the Government.

(2) A law made under clause (1) may—

(a) provide for the establishment of an administrative tribunal for the Union and a separate administrative tribunal for each State or for two or more States;

(b) specify the jurisdiction, powers (including the power to punish for contempt) and authority which may be exercised by each of the said tribunals;

(c) provide for the procedure (including provisions as to limitation and rules of evidence) to be followed by the said tribunals;

(d) exclude the jurisdiction of all courts, except the jurisdiction of the Supreme Court under article 136, with respect to the disputes or complaints referred to in clause (1);

(e) provide for the transfer to each such administrative tribunal of any cases pending before any court or other authority immediately before the establishment of such tribunal as would have been within the jurisdiction of such tribunal if the causes of action on which such suits or proceedings are based had arisen after such establishment;

(f) repeal or amend any order made by the President under clause (3) of article 371D;

(g) contain such supplemental, incidental and consequential provisions (including provisions as to fees) as Parliament may deem necessary for the effective functioning of, and for the speedy disposal of cases by, and the enforcement of the orders of, such tribunals.

(3) The provisions of this article shall have effect notwithstanding anything in any other provision of this Constitution or in any other law for the time being in force.”

“Section 14. Jurisdiction, powers and authority of the Central Administrative Tribunal.

(1) Save as otherwise expressly provided in this Act, the Central Administrative Tribunal shall exercise, on and from the appointed day, all the jurisdiction, powers and authority exercisable immediately before that day by all courts except the Supreme Court in relation to—

(a) recruitment, and matters concerning recruitment, to any All-India Service or to any civil service of the Union or a civil post under the Union or to a post connected with defence or in the defence

services, being, in either case, a post filled by a civilian;

(b) all service matters concerning—

(i) a member of any All-India Service; or

(ii) a person [not being a member of an All-India Service or a person referred to in clause (c)] appointed to any civil service of the Union or any civil post under the Union; or

(iii) a civilian [not being a member of an All-India Service or a person referred to in clause (c)] appointed to any defence services or a post connected with defence,

and pertaining to the service of such member, person or civilian, in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation [or society] owned or controlled by the Government;

(c) all service matters pertaining to service in connection with the affairs of the Union concerning a person appointed to any service or post referred to in sub-clause (ii) or sub-clause (iii) of clause (b), being a person whose services have been placed by a State Government or any local or other authority or any corporation [or society] or other body, at the disposal of the Central Government for such appointment.

Explanation.--For the removal of doubts, it is hereby declared that references to "Union" in this sub-section shall be construed as including references also to a Union territory.]

(2) The Central Government may, by notification, apply with effect from such date as may be specified in the notification the provisions of sub-section (3) to local or other authorities within the territory of

India or under the control of the Government of India and to corporations [or societies] owned or controlled by Government, not being a local or other authority or corporation [or society] controlled or owned by a State Government:

Provided that if the Central Government considers it expedient so to do for the purpose of facilitating transition to the scheme as envisaged by this Act, different dates may be so specified under this sub-section in respect of different classes of, or different categories under any class of, local or other authorities or corporations [or societies].

(3) Save as otherwise expressly provided in this Act, the Central Administrative Tribunal shall also exercise, on and from the date with effect from which the provisions of this sub-section apply to any local or other authority or corporation [or society], all the jurisdiction, powers and authority exercisable immediately before that date by all courts (except the Supreme Court in relation to—

(a) recruitment, and matters concerning recruitment, to any service or post in connection with the affairs of such local or other authority or corporation [or society]; and

(b) all service matters concerning a person [other than a person referred to in clause (a) or clause (b) of sub-section (1)] appointed to any service or post in connection with the affairs of such local or other authority or corporation [or society] and pertaining to the service of such person in connection with such affairs.

Section 17. Power to punish for contempt. - A Tribunal shall have, and exercise, the same jurisdiction, powers and authority in respect of contempt of itself as a High Court has and may exercise and, for this purpose, the provisions of the

Contempt of Courts Act, 1971 (70 of 1971) shall have effect subject to the modifications that-

(a) the references therein to a High Court shall be construed as including a reference to such Tribunal; (b) the references to the Advocate-General in section 15 of the said Act shall be construed,-(i) in relation to the Central Administrative Tribunal, as a reference to the Attorney-General or the Solicitor-General or the Additional Solicitor-General; and (ii) in relation to an Administrative Tribunal for a State or a Joint Administrative Tribunal for two or more States, as a reference to the Advocate-General of the State or any of the States for which such Tribunal has been established."

"Section 11 of the Contempt of Courts Act, 1971. Power of High Court to try offences committed or offenders found outside jurisdiction.—

A High Court shall have jurisdiction to inquire into or try a contempt of itself or of any court subordinate to it, whether the contempt is alleged to have been committed within or outside the local limits of its jurisdiction, and whether the person alleged to be guilty of contempt is within or outside such limits.

Section 12. Punishment for contempt of court.—

(1) Save as otherwise expressly provided in this Act or in any other law, a contempt of court may be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both: Provided that the accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the court. Explanation.—An apology shall not be rejected merely on the ground that it is qualified or conditional if

the accused makes it bona fide. (2) Notwithstanding anything contained in any other law for the time being in force, no court shall impose a sentence in excess of that specified in sub-section (1) for any contempt either in respect of itself or of a court subordinate to it. (3) Notwithstanding anything contained in this section, where a person is found guilty of a civil contempt, the court, if it considers that a fine will not meet the ends of justice and that a sentence of imprisonment is necessary shall, instead of sentencing him to simple imprisonment, direct that he be detained in a civil prison for such period not exceeding six months as it may think fit. (4) Where the person found guilty of contempt of court in respect of any undertaking given to a court is a company, every person who, at the time the contempt was committed, was in charge of, and was responsible to, the company for the conduct of business of the company, as well as the company, shall be deemed to be guilty of the contempt and the punishment may be enforced, with the leave of the court, by the detention in civil prison of each such person: Provided that nothing contained in this sub-section shall render any such person liable to such punishment if he proves that the contempt was committed without his knowledge or that he exercised all due diligence to prevent its commission. (5) Notwithstanding anything contained in sub-section (4), where the contempt of court referred to therein has been committed by a company and it is proved that the contempt has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of the contempt and the punishment may be enforced, with the leave of the court, by the detention in

civil prison of such director, manager, secretary or other officer. Explanation.—For the purposes of sub-sections (4) and (5),—(a) “company” means any body corporate and includes a firm or other association of individuals; and (a) “director”, in relation to a firm, means a partner in the firm.

Section 19. Appeals.—

(1) An appeal shall lie as of right from any order or decision of High Court in the exercise of its jurisdiction to punish for contempt— (a) where the order or decision is that of a single Judge, to a Bench of not less than two Judges of the Court; (a) where the order or decision is that of a Bench, to the Supreme Court: Provided that where the order or decision is that of the Court of the Judicial Commissioner in any Union territory, such appeal shall lie to the Supreme Court.(2) Pending any appeal, the appellate Court may order that—(a) the execution of the punishment or order appealed against be suspended; (b) if the appellant is in confinement, he be released on bail; and (c) the appeal be heard notwithstanding that the appellant has not purged his contempt.(3) Where any person aggrieved by any order against which an appeal may be filed satisfies the High Court that he intends to prefer an appeal, the High Court may also exercise all or any of the powers conferred by sub-section (2). (4) An appeal under sub-section (1) shall be filed— (a) in the case of an appeal to a Bench of the High Court, within thirty days; (a) in the case of an appeal to the Supreme Court, within sixty days, from the date of the order appealed against.”

8. The Constitution by (42nd Amendment) Act, 1976 introduced Article 323-A empowering the Parliament to enact the law and providing for adjudication or

trial by Administrative Tribunals. Clause 2 (b) of Article 323 A empowers the Parliament to specify the jurisdiction and powers of such Tribunal including the power to punish for contempt.

9. Pursuant to the Article 323-A of the Constitution of India, the Parliament enacted the Administrative Tribunals Act, 1985 (further it is referred to as the Act, 1985). Section 14 of the Act 1985 specifies the jurisdiction, powers and authority of the Central Administrative Tribunal. Section 15 specifies the same for the State Administrative Tribunal. There is no remedy of appeal statutorily available for the orders passed under Sections 14/15 of the Act 1985.

10. Section 17 of the Act, 1985 empowers the Tribunal to punish for contempt of itself and provides that the provisions of the Contempt of Courts Act, 1971 (further it is referred to as the Act, 1971) shall have effect in this regard subject to the modification that any reference to High Court under the Act, 1971 shall be construed as a reference to the Tribunal. Further, the Tribunal shall have the same jurisdiction, powers and authority in respect of contempt of itself as a High Court has. There is a distinction between the orders passed by the Tribunal under Section 14(1) of the Act, 1985 and the order passed under Section 19 of the Act, 1971 as against the former there is no remedy of appeal statutorily provided but as against the latter remedy of appeal is provided under Section 19 of the Act, 1971. An order or decision of the Tribunal in exercise of its jurisdiction to punish for contempt would be appealable as a matter of right under sub-section (1) of Section 19 of the Act, 1971, which provides that an appeal shall lie as a matter of right to the

Bench of at least two Judges where the contempt order is passed by the Single Judge and it shall lie to the Supreme Court where the order is passed by the Bench.

11. Since proceeding for contempt under Section 17 of the Act, 1985 is dealt with by the Bench of not less than two Members and the order passed under Section 17 of the Act, 1985 would be appealable before the Supreme Court only. Therefore, any order or decision of the Tribunal under the Act, 1971 shall be appealable only to the Supreme Court within 60 days from the date of the order.

12. The provisions of the Act, 1971 are in addition to and not in derogation of Article 129 and 215 of the Constitution. The jurisdiction contemplated by Articles 129 and 215 of the Constitution is unalienable and it cannot be taken away or whittled down by any legislative enactment subordinate to the Constitution.

13. In view of the above backdrop, to answer the issue, we have to rely on the ratio decided by the three Judges Bench of the Apex Court in the case of **T. Sudhakar Prasad Vs. Government of A.P. (2001) 1 SCC 516**, relevant paragraph nos.7, 8, 11, 14, 16, 17 and 18 are reproduced as under:

7. In pursuance of Article 323A of the Constitution the Parliament enacted the Administrative Tribunals Act, 1985 to provide for the adjudication or trial by Administrative Tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any

Corporation or society owned or controlled by the Government. On coming into force of the Act and Constitution of the Central Administrative Tribunal all the jurisdiction, powers and authority exercisable immediately before that day by all courts, which would include the High Courts (except the Supreme Court) in relation to the matters specified in Section 14(1) of the Act came to be conferred on the Tribunal. Section 17 gives the Tribunal power to punish for contempt which reads as under:

17. Power to punish for contempt - A Tribunal shall have, and exercise, the same jurisdiction, powers and authority in respect of contempt of itself as a High Court has and may exercise and, for this purpose, the provisions of the Contempt of Courts Act, 1971 (7.0 of 1971), shall have effect subject to the modifications that:

(a) the references therein to a High Court shall be construed as including a reference to such Tribunal;

(b) the references to the Advocate-General in Section 15 of the said Act shall be construed.

(i) in relation to the Central Administrative Tribunal, as a reference to the Attorney-General or the Solicitor-General or the Additional Solicitor-General; and

(ii) in relation to an Administrative Tribunal for a State or a Joint Administrative Tribunal for two or more States, as a reference to the Advocate-General of the State or any of the States for which such Tribunal has been established.

[emphasis supplied]

8. Section 22 provides that a Tribunal shall not be bound by the procedure laid down in the CPC, 1908 but shall be guided by the principles of natural justice and subject to the other provisions of the Act and of any Rules made by the

Central Government, the Tribunal shall have power to regulate its own procedure including the fixing of places and times of its enquiry and deciding whether to sit in public or in private. Sub-section (2) empowers the Tribunal to decide the application before it on a perusal of documents and written representations and after hearing such oral arguments as may be advanced. Sub-section (3) confers on the Tribunal specified powers of a civil court under the CPC in respect of specified matters. Section 27 provides that the order of a Tribunal finally disposing of an application or an appeal shall not be called in question in any court including a High Court. On a Tribunal being functional, Section 28 excludes the jurisdiction of all courts, including High Court, but not the Supreme Court, Industrial Tribunal, Labour Court or other Authority constituted under the Industrial Disputes Act, 1947 or any other corresponding law from exercising any jurisdiction, power or authority in relation to matters falling within the jurisdiction of the Tribunal.

11. In *L. Chandra Kumar v. Union of India and Ors.* MANU/SC/0261/1997 : [1997] 228ITR725(SC) the matter had come up before the seven-Judges Bench of this Court consequent upon a reference made by a Division Bench of this Court which doubted the correctness of a five-Judges Constitution Bench of this Court in *S.P. Sampath Kumar v. Union of India* MANU/SC/0851/1987 : (1987)ILLJ 128SC and felt the need of the same being comprehensively reconsidered. This Court framed three broad issues for its consideration and proceeded to consider the constitutional validity of Articles 323A, 323B and several provisions of the Administrative Tribunals Act, 1985. We need not extensively reproduce several

conclusions arrived at by the Constitution Bench (excepting where necessary); it would suffice to briefly summarise the conclusions of the Constitution Bench insofar as necessary for our purpose. The Constitution Bench held that the jurisdiction conferred upon the High Courts and the Supreme Court under Articles 226 and 32 of the Constitution respectively is a part of the inviolable basic structure of our Constitution. The power of judicial review over legislative action vesting in the High Courts under Article 226 and in the Supreme Court under Article 32 of the Constitution are an integral and essential feature of such basic structure and therefore their power to test the constitutional validity of legislations can never be ousted or excluded (paras 73, 78). The power vested in the High Courts to exercise judicial superintendence over the decisions of all courts and Tribunals within their respective jurisdictions is also part of the basic structure of the Constitution and a situation where the High Courts are divested of all other judicial functions apart from that of constitutional interpretation is equally to be avoided (para 79). Though the subordinate judiciary or Tribunal created under ordinary legislations cannot exercise the power of judicial review of legislative action to the exclusion of the High Courts and the Supreme Court, there is no constitutional prohibition against their performing a supplemental - as opposed to a substitutional - role in this respect. Clause (3) of Article 32 itself contemplates that Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under Clause (2), without prejudice to the powers conferred on the Supreme Court by Clauses (1) and (2).

14 The jurisdictional powers of the Tribunal were summarised by the Constitution Bench as under (vide para 93):

1. The Tribunals are competent to hear matters where the vires of statutory provisions are questioned. However, in discharging this duty, they cannot act as substitutes for the High Courts and the Supreme Court which have, under our constitutional set up, been specifically entrusted with such an obligation. Their function in this respect is only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. The Tribunals will consequently also have the power to test the vires of subordinate legislations and rules. However, this power of the Tribunals will be subject to one important exception. The Tribunals shall not entertain any question regarding the vires of their parent statutes following the settled principle that a Tribunal which is a creature of an Act cannot declare that very Act to be unconstitutional. In such cases alone, the High Court concerned may be approached directly.

2. All other decisions of these Tribunals, rendered in cases that they are specifically empowered to adjudicate upon by virtue of their parent statutes, will also be subject to scrutiny before a Division Bench of their respective High Courts. The Tribunals will, however, continue to act as the only courts of first instance in respect of the areas of law for which they have been constituted; meaning thereby that it will not be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except, as mentioned, where the legislation which creates the particular

Tribunal is challenged) by overlooking the jurisdiction of the Tribunal concerned.

The Constitution Bench concluded as under :

"We hold that Clause (2)(a)(d) of Article 323-A and Clause (3)(d) of Article 323-B, to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32 of the Constitution, are unconstitutional. Section 28 of the Act and the "exclusion of jurisdiction" Clauses in all other legislations enacted under the aegis of Articles 323-A and 323-B would, to the same extent, be unconstitutional. The jurisdiction conferred upon the High Courts under Articles 226/227 and upon the Supreme Court under Article 32 of the Constitution is a part of the inviolable basic structure of our Constitution. While this jurisdiction cannot be ousted, other courts and Tribunals may perform a supplemental role in discharging the powers conferred by Articles 226/227 and 32 of the Constitution. The Tribunals created under Article 323-A and Article 323-B of the Constitution are possessed of the competence to test the constitutional validity of statutory provisions and rules. All decisions of these Tribunals will, however, be subject to scrutiny before a Division Bench of the High Court within whose jurisdiction the Tribunal concerned falls. The Tribunals will, nevertheless, continue to act like courts of first instance in respect of the areas of law for which they have been constituted. It will not, therefore, be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the Tribunal concerned. Section 5(6) of the Act is valid

and constitutional and is to be interpreted in the manner we have indicated.

16. *It is thus clear that the Constitution Bench has not declared the provisions of Article 323-A(2)(b) or Article 323-B(3)(d) or Section 17 of the Act ultra vires the Constitution. The High Court has, in its judgment under appeal, noted with emphasis the Tribunal having been compared to like 'courts of first instance' and then proceeded to hold that the status of Administrative Tribunals having been held to be equivalent to court or Tribunals sub-ordinate to High Court the jurisdiction to hear their own contempt was lost by the Administrative Tribunals and the only course available to them was either to make a reference to High Court or to file a complaint under Sections 193, 219 and 228 of IPC as provided by Section 30 of the Act. The High Court has proceeded on the reasoning that the Tribunal having been held to be subordinate to the High Court for the purpose of Articles 226/227 of the Constitution and its decisions having been subjected to judicial review jurisdiction of the High Court under Articles 226/227 of the Constitution the right to file an appeal to the Supreme Court against an order passed by the Tribunal punishing for contempt under Section 17 of the Act was defeated and on these twin grounds Section 17 of the Act became unworkable and unconstitutional. We do not find any basis for such conclusion or inference being drawn from the judgments of this Court in the cases of Supreme Court Bar Association (supra) or L. Chandra Kumar (supra) or any other decision of this Court. The Constitution Bench has in so many words said that the jurisdiction conferred on the High Courts under Articles 226/227 could not be taken away by conferring the same on any court or Tribunal and jurisdiction hitherto exercised by the High*

Court now legislatively conferred on Tribunals to the exclusion of High Court on specified matters, did not amount to assigning Tribunals a status of substitute for the High Court but such jurisdiction was capable of being conferred additionally or supple mentally on any Court or Tribunal which is not a concept strange to the scheme of the Constitution more so in view of Articles 323-A and 323-B. Clause (2)(b) of Article 323-A specifically empowers the Parliament to enact a law specifying the jurisdiction and powers, including the power to punish for contempt, being conferred on Administrative Tribunals constituted under Article 323-A. Section 17 of the Act derives its legislative sanctity therefrom. The power of the High Court to punish for contempt of itself under Article 215 of the Constitution remains intact but the jurisdictional power and authority to hear and decide the matters covered by Sub-section (1) of Section 14 of the Act having been conferred on the Administrative Tribunals the jurisdiction of the High Court to that extent has been taken away and hence the same jurisdiction which vested in the High Court to punish for contempt of itself in the matters now falling within the jurisdiction of Tribunals if those matters would have continued to be heard by the High Court has now been conferred on the Administrative Tribunals under Section 17 of the Act. The jurisdiction is the same as vesting in the High Courts under Article 215 of the Constitution read with the provisions of the Contempt of Courts Act, 1971. The need for enacting Section 17 arose, firstly, to avoid doubts, and secondly, because the Tribunals are not "courts of record". While holding the proceedings under Section 17 of the Act the Tribunal remains a Tribunal and so would be amenable to jurisdiction of High Court

under Articles 226/227 of the Constitution subject to the well-established rules of self-restraint governing the discretion of the High Court to interfere with the pending proceedings and upset the interim or interlocutory orders of the Tribunals. However any order or decision of Tribunal punishing for contempt shall be appealable only to the Supreme Court within 60 days from the date of the order appealed against in view of the specific provision contained in Section 19 of the Contempt of Courts Act, 1971 read with Section 17 of the Administrative Tribunals Act, 1985. Section 17 of Administrative Tribunals Act is a piece of legislation by reference. The provisions of Contempt of Courts Act are not as if lifted and incorporated in the text of Administrative Tribunals Act (as is in the case of legislation by incorporation); they remain there where they are yet while reading the provision of Contempt of Courts Act in the context of Tribunal the same will be so read as to read the word 'Tribunal' in place of the word 'High Court' wherever it occurs, subject to the modifications set out in Section 17 of the Administrative Tribunals Act. Section 19 of the Contempt of Courts Act, 1971 provides for appeals. In its text also by virtue of Section 17 of the Administrative Tribunals Act, 1985 the word 'High Court' shall be read as 'Tribunal'. Here, by way of abundant caution, we make it clear that the concept of intra-Tribunal appeals i.e. appeal from an order or decision of a member of a Tribunal sitting singly to a bench of not less than two members of the Tribunal is alien to the Administrative Tribunals Act, 1985. The question of any order made under the provisions of the Contempt of Courts Act, 1971 by a member of the Tribunal sitting singly, if the rules of business framed by the Tribunal or the appropriate Government permit such

hearing, being subject to an appeal before Bench of two or more members of Tribunal therefore, does not arise. Any order or decision of the Tribunal punishing for contempt is appealable under Section 19 of the Act to the Supreme Court only. The Supreme Court in the case of L. Chandra Kumar has nowhere said that orders of Tribunals holding the contemnor guilty and punishing for contempt shall also be subjected to judicial scrutiny of High Court under Article 226/227 of the Constitution in spite of remedy of statutory appeal provided by Section 19 of the Contempt of Courts Act being available. The distinction between orders passed by Administrative Tribunal on matters covered by Section 14(1) of Administrative Tribunals Act and orders punishing for contempt under Section 19 of the Contempt of Courts Act read with Section 17 of Administrative Tribunals Act; is this : as against the former there is no remedy of appeal statutorily provided, but as against the latter statutory remedy of appeal is provided by Section 19 of Contempt of Courts Act itself.

17. Subordination of Tribunals and courts functioning within the territorial jurisdiction of a High Court can be either judicial or administrative or both. The power of superintendence exercised by the High Court under Article 227 of the Constitution is judicial superintendence and not administrative superintendence, such as one which vests in the High Court under Article 235 of the Constitution over subordinate courts. Vide para 96 of L. Chandra Kumar's case, the Constitution Bench did not agree with the suggestion that the Tribunals be made subject to the supervisory jurisdiction of the High Courts within whose territorial jurisdiction they fall, as our constitutional scheme does not require that all adjudicatory bodies which

fall within the territorial jurisdiction of any High Court should be subject to its supervisory jurisdiction. Obviously, the supervisory jurisdiction referred to by the Constitution Bench in para 96 of the judgment is the supervision of the administrative functioning of the Tribunals as is spelt out by discussion made in paras 96 and 97 of the judgment.

18. Jurisdiction should not be confused with status and subordination. The Parliament was motivated to create new adjudicatory fora to provide new, cheap and fast-track adjudicatory systems and permitting them to function by tearing of the conventional shackles of strict rule of pleadings, strict rule of evidence, tardy trials, three/four-tier appeals, endless revisions and reviews - creating hurdles in fast flow of stream of justice. The Administrative Tribunals as established under Article 323-A and the Administrative Tribunals Act 1985 are an alternative institutional mechanism or authority, designed to be not less effective than the High Court, consistently with the amended constitutional scheme but at the same time not to negate judicial review jurisdiction of constitutional courts. Transfer of jurisdiction in specified matters from the High Court to the Administrative Tribunal equates the Tribunal with the High Court insofar as the exercise of judicial authority over the specified matters is concerned. That, however, does not assign the Administrative Tribunals a status equivalent to that of the High Court nor does that mean that for the purpose of judicial review or judicial superintendence they cannot be subordinate to High Court.

It has to be remembered that what has been conferred on the Administrative Tribunal is not only jurisdiction of the High Court but also of the subordinate courts as to specified

matters. High Courts are creatures of Constitution and their Judges hold constitutional office having been appointed under the Constitution. The Tribunals are creatures of statute and their members are statutorily appointed and hold statutory office. In State of Orissa v. Bhagaban Sarangi : (1995)1SCC399, it was held that Administrative Tribunal is nonetheless a Tribunal and so it is bound by the decision of the High Court of the State and cannot side-track or bypass it. Certain observations made in the case of T.N. Seshan, Chief Election Commr. of India v. Union of India MANU/SC/2271/1995 : 1994(1)SCALE7, may usefully be referred to. It was held that merely because some of the service conditions of the Chief Election Commissioner are akin to those of the Supreme Court Judges, that does not confer the status of a Supreme Court Judge on the C.E.C. This Court observed "Of late it is found that even personnel belonging to other fora claim equation as High Court or Supreme Court Judges merely because certain jurisdictions earlier exercised by those Courts are transferred to them not realising the distinction between constitutional and statutory functionaries". We are, therefore clearly of the opinion that there is no anathema in the Tribunal exercising jurisdiction of High Court and in that sense being supplemental or additional to the High Court but at the same time not enjoying status equivalent to High Court and also being subject to judicial review and judicial superintendence of the High Court."

*14. While deciding the issue in the above said decision, the observations made by the Apex Court in the case of **L. Chandra Kumar Vs. Union of India** (1997) 3 SCC 261, was also taken into consideration and finally observed that the*

Constitution Bench has not declared the provisions of Article 323-A(2)(b) or Article 323-B (3) (d) or Section 17 of the Act ultra vires.

15. Analysing the above said decision, the powers to the High Court to punish for contempt of itself under Article 215 of the Constitution remains intact but the jurisdiction, power and authority to hear and decide the matters covered by sub-section (1) of Section 14 of the Act, 1985 having been conferred on the Administrative Tribunals and the jurisdiction of the High Court to that extent has been taken away and hence the same jurisdiction which vested in the High Court to punish for contempt of itself in the matter now falling within the jurisdiction of Tribunals if those matters would have continued to be heard by the High Court has now been conferred on the Administrative Tribunals under Section 17 of the Act.

16. It has been held that jurisdiction is the same as vested in the High Courts under Article 215 of the Constitution read with the provisions of the Act, 1971. Further it has been observed that the need for enacting Section 17 arose, firstly to avoid doubts, and secondly, because the Tribunals are not 'courts of record'. While holding the proceedings under Section 17 of the Act, 1985, the Tribunal remains a Tribunal and would be amenable to the jurisdiction of the High Court under Article 226/227 of the Constitution subject to the well established rules of self-restraint governing the discretion of the High Court to interfere with the pending proceedings. But any order or decision of the Tribunal for contempt shall be appealable only to the Supreme Court within 60 days from the date of the order in view of the specific

provision contained under Section 19 of the Act, 1971 read with Section 17 of the Act, 1985.

17. Section 19 of the Act, 1971 provides for appeal and by virtue of Section 17 of the Act, 1985, the word 'High Court' shall be read as 'Tribunal'. Accordingly, any order or decision of the Tribunal punishing for contempt is appealable under Section 19 of the Act to the Supreme Court only. The Supreme Court in the case of **L. Chandra Kumar** (supra) has nowhere said that the orders of the Tribunal under the contempt proceedings shall also be subject to the judicial scrutiny of the High Court under Articles 226 / 227 of the Constitution despite of having remedy of appeal provided by Section 19 of the Act, 1971.

18. In the case of **R. Mohajan Vs. Shefali Sengupta (2012) 4 SCC 761**, as against the order of the contempt proceedings of the Central Administrative Tribunal, Calcutta Bench, the contemnor in the contempt case has approached the Apex Court, the learned counsel appearing on behalf of the respondent therein raised an objection with regard to maintainability of the appeal before the Supreme Court and contended that the aggrieved parties have to approach the concerned High Court as per ratio laid down by the Constitution Bench in the case of **L. Chandra Kumar** (supra).

19. The Apex Court in the said case has rejected the objection raised by the respondent's counsel and by following the observations of the three Judges Bench in the case of **T. Sudhakar Prasad** (supra) held that aggrieved parties are at liberty to approach the Apex Court without exercising the remedy before the High Court. In the said case, the Supreme Court

clarified the issue by following the observation in the case of T. Sudhakar Prasad (supra) and rejected the objection declaring the maintainability of the appeal before the Supreme Court.

20. Considering the relevant provisions of the Contempt of Courts Act, 1971, the Administrative Tribunal Act, 1985 and also observations made by the Apex Court, more particularly in the case of **T. Sudhakar Prasad** (supra), we hold that all the orders of the Tribunal under the Contempt of Courts Act, 1971 shall be appealable to the Supreme Court only within a period of 60 days from the date of the order and no writ petition is maintainable before the High Court under Article 226 / 277 of the Constitution of India.

21. Accordingly, the present writ petition being not maintainable, is dismissed.

(2024) 4 ILRA 184
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.03.2024

BEFORE

THE HON'BLE MANJIVE SHUKLA, J.

Writ A No. 608 of 2022

Poornima Singh ...**Petitioner**
Versus
State of U.P. & Ors. ...**Respondents**

Counsel for the Petitioner:

Sri Kushmondeya Shahi, Sri Tanuj Shahi

Counsel for the Respondents:

Sri Bhanu Pratap Singh Kachhawah, C.S.C.,
 Sri Sanjay kumar Srivastava

A. Service Law – Resignation and Withdrawal – Validity of Acceptance – Petitioner, an Assistant Teacher, challenged the order dated 31.3.2021 accepting her resignation

despite her withdrawal applications dated 5.2.2021 and 11.2.2021 – Held, under Rule 7 of the U.P. Government Servants Resignation Rules, 2000, a government servant can withdraw resignation before its acceptance – The petitioner's withdrawal applications, supported by evidence of submission and postal delivery, preceded the acceptance order, rendering it unsustainable, as per *Lalit Mohan Upadhyay Vs The Principal, Kumaun Engineering College* and *U.O.I. Vs Gopal Chandra Misra* – The order dated 31.3.2021 was quashed. (Paras 6, 7, 11, 12, 20, 21, 23, 24, 27)

B. Service Law – Procedure for Resignation Withdrawal – Petitioner alleged that a clerk misled her into signing a resignation letter and affidavit under the pretense of facilitating a posting change – Held, the petitioner promptly withdrew her resignation on 5.2.2021 and 11.2.2021, with the latter sent via registered post and confirmed delivered – The respondents' denial of receiving these applications was rejected due to lack of substantiation, and the acceptance of resignation post-withdrawal was deemed illegal, as per *Pravesh Kumar Pal Vs St. of U.P.* and *Dinesh Prasad Chaurasia Vs Managing Director*. (Paras 5, 6, 7, 18, 19, 20, 25, 26)

C. Service Law – Back Wages and Relief – Petitioner sought reinstatement and back wages after the quashing of the resignation acceptance order – Held, as the petitioner did not perform duties from 5.2.2021, full back wages were not warranted – Following *Shambhu Murari Sinha Vs Project and Development India* and *Managing Director, Orissa St. Handloom Weavers' Cooperative Society Vs Satyanarayan Pattnaik*, the petitioner was granted reinstatement with continuity of service and 25% of admissible back wages from 5.2.2021 until reinstatement, balancing equity and the fact of non-performance of duties. (Paras 28, 29, 31)

D. Judicial Review – Arbitrary Administrative Action – The District Basic Education Officer accepted the petitioner's resignation despite her timely withdrawal applications – Held, the acceptance order dated 31.3.2021 was arbitrary and contrary to the legal principle that resignation can be withdrawn before acceptance, as established in *Balram*

Gupta Vs U.O.I. and Power Finance Corporation Ltd. Vs Pramod Kumar Bhatia – The court directed reinstatement within four weeks and payment of 25% back wages within four months, ensuring proportionality in relief. (Paras 11, 13, 26, 27, 30, 31)

E. Service Law – Evidence of Withdrawal Applications

– Respondents denied receiving petitioner's withdrawal applications dated 5.2.2021 and 11.2.2021 – Held, the petitioner's submission of the 5.2.2021 application with an official receipt endorsement and the 11.2.2021 application with postal tracking evidence sufficiently established their delivery – The respondents' bald denial in the counter affidavit was insufficient to rebut the petitioner's evidence, reinforcing the invalidity of the resignation acceptance. (Paras 18, 19, 20)

Writ Petition Allowed.

List of Cases cited:

1. Lalit Mohan Upadhyay Vs The Principal, Kumaun Engineering College, Dwarhat, District Almora, (2000) 1 UPLBEC 130

2. U.O.I. Vs Gopal Chandra Misra, AIR 1978 SC 694

3. M/s. J.K. Cotton Spinning & Weaving Mills Co. Ltd., Kanpur Vs St. of U.P., AIR 1990 SC 1808

4. Pravesh Kumar Pal Vs St. of U.P., Writ Petition No. 12263 (S/S) of 2020, decided on 12.1.2021

5. Dinesh Prasad Chaurasia Vs Managing Director, 2016 (6) ADJ 550

6. Balram Gupta Vs U.O.I., AIR 1987 SC 2354

7. Power Finance Corporation Ltd. Vs Pramod Kumar Bhatia, (1997) 4 SCC 280

8. Raj Kumar Vs U.O.I., (1968) 3 SCR 857

9. Shambhu Murari Sinha Vs Project and Development India, 2000 (86) FLR 206

10. Managing Director, Orissa St. Handloom Weavers' Cooperative Society Ltd. Vs Satyanarayan Pattnaik, (2014) 3 SCC 218

11. Tanweer Alam Vs U.P. Cooperative Spinning Mills Fed. Ltd., Writ-A No. 47852 of 2000, decided on 31.08.2017

12. J.N. Srivastava Vs U.O.I., (1998) 9 SCC 559

(Delivered by Hon'ble Manjive Shukla, J.)

1. Heard Sri Tanuj Shahi, learned counsel appearing for the petitioner, learned Standing Counsel appearing for the Respondents No.1 and 3 as well as learned counsel appearing for the Respondents No.2, 4 and 5.

2. Petitioner has filed this writ petition challenging therein the order dated 31.3.2021 passed by the District Basic Education Officer, Etah whereby her resignation from the post of Assistant Teacher has been accepted.

3. Brief facts of the case are that petitioner appeared in the selection for appointment on the posts of Assistant Teachers of Junior Basic Schools run by the U.P. Basic Education Board. Petitioner was selected and thereafter was issued an appointment order on 5.12.2020. Pursuant to appointment order dated 5.12.2020, petitioner was allowed to join in the office of District Basic Education Officer, Etah and thereafter vide order dated 21.12.2020 she was directed to work on the post of Assistant Teacher in Junior Basic School Lalpur, Block Awagarh, District Etah.

4. Petitioner submitted her joining on the post of Assistant Teacher in Junior Basic School Lalpur, Block Awagarh, District Etah on 23.12.2020 and thereafter, the District Basic Education Officer, Etah

passed another order on 29.1.2021 whereby petitioner was posted as Assistant Teacher in Junior Basic School Mirzapur, Block Awagarh, District Etah. Petitioner submitted her joining in Junior Basic School Mirzapur, Block Awagarh, District Etah on 3.2.2021. Petitioner being unmarried female candidate was having some difficulty to reach the aforesaid school as the same was situated at a distant place therefore, she requested the District Basic Education Officer, Etah for changing her posting to another school. Petitioner has alleged in the writ petition that instead of considering her request, one Mr. Vikrant Pratap Singh posted as clerk in the office of District Basic Education Officer, Etah provided a printed letter and affidavit to the petitioner and asked her to sign the said papers with an assurance that in the next counselling on the basis of such papers her posting may be changed.

5. Petitioner under impression given by the aforesaid Mr. Vikrant Pratap Singh signed the aforesaid letter and affidavit and submitted in the office of District Basic Education Officer, Etah on 5.2.2021. Thereafter, she realized that the contents of the letter and affidavit which she submitted on 5.2.2021 amount to her resignation from the post of Assistant Teacher.

6. Petitioner immediately after realizing her mistake submitted application on 5.2.2021 itself to the District Basic Education Officer, Etah whereby she withdrew her resignation dated 5.2.2021. Petitioner also submitted application to District Magistrate, Etah on 8.2.2021 through registered post whereby she informed about the entire case to the District Magistrate, Etah and requested him to help her out. As per online postal tracking report, the aforesaid letter dated

8.2.2021 has been delivered in the office of District Magistrate, Etah on 15.2.2021.

7. Later on, petitioner again submitted an application on 11.2.2021 to the District Basic Education Officer, Etah through registered post whereby she requested that her resignation dated 5.2.2021 may not be accepted as she does not want to resign from her post. Petitioner in the application dated 11.2.2021 further stated that she was under depression and thus, tendered resignation on 5.2.2021 but now she does not intend to resign from her post. As per online postal tracking report, the aforesaid letter dated 11.2.2021 has been delivered in the office of District Basic Education Officer, Etah on 17.2.2021. The application dated 11.2.2021 and online postal tracking report have been annexed at page-34 and 35 of the writ petition.

8. Since no action was taken by the District Basic Education Officer, Etah therefore, petitioner also submitted representations to the higher authorities.

9. To the utter dismay of the petitioner, she was served the copy of the order dated 31.3.2021 vide communication dated 3.6.2021 sent by the Block Education Officer whereby petitioner for the first time came to know that her resignation from the post of Assistant Teacher dated 5.2.2021 has been accepted by the District Basic Education Officer, Etah vide order dated 31.3.2021.

10. Petitioner in her writ petition has taken various grounds to challenge the order dated 31.3.2021 including that the order accepting resignation of the petitioner has been passed in the month of June but it has been dated as 31.3.2021. Her main ground to challenge the order dated

31.3.2021 is that once petitioner withdrew her resignation dated 5.2.2021 by submitting applications dated 5.2.201 and 11.2.2021, the same could not have been accepted.

11. Learned counsel appearing for the petitioner has vehemently argued that it is well settled proposition of law through catena of judgments of this court as well as of Hon'ble Supreme Court that resignation can be withdrawn at any time before its acceptance therefore, since petitioner withdrew her resignation by submitting applications on 5.2.2021 and 11.2.2021, there was no occasion for the District Basic Education Officer, Etah to accept her resignation on 31.3.2021. Learned counsel appearing for the petitioner has further argued that since order dated 31.3.2021 has been passed after petitioner withdrew her resignation by submitting applications on 5.2.2021 and 11.2.2021, the order dated 31.3.2021 is absolutely unsustainable in the eyes of law.

12. Learned counsel appearing for the petitioner has relied on Rule 7 of the Uttar Pradesh Government Servants Resignation Rules, 2000 wherein it has been categorically provided that a government servant may withdraw his resignation by making a request in writing to the appointing authority before its acceptance.

13. Reliance has also been placed by the learned counsel appearing for the petitioner on the judgment rendered by the Division Bench of this Court in the case of **Lalit Mohan Upadhyay Vs. The Principal, Kumaun Engineering College, Dwarhat, District Almora and others, (2000) 1 UPLBEC 130**, judgment and order dated 12.1.2021 passed by learned Single Judge of this Court in **Writ Petition**

No.12263 (S/S) of 2020, Pravesh Kumar Pal Vs. State of U.P. and others and judgment and order dated 30.5.2016 rendered by this Court in the case of **Dinesh Prasad Chaurasia Vs. Managing Director and others, 2016 (6) ADJ 550**. Learned counsel appearing for the petitioner on the strength of aforesaid judgments has submitted before this Court that it is well settled proposition of law that resignation tendered by an employee can be withdrawn at any time before its acceptance and in the case of petitioner, she withdrew her resignation dated 5.2.2021 by submitting applications dated 5.2.2021 and 11.2.2021 therefore, the order dated 31.3.2021 accepting petitioner's resignation is absolutely unsustainable in the eyes of law.

14. Learned counsel appearing for the petitioner has thus concluded his arguments and has submitted that order dated 31.3.2021 is liable to be quashed by this Court and the writ petition filed by the petitioner deserves to be allowed.

15. On the other hand, learned counsel appearing for the Respondents No.2, 4 and 5 has submitted that petitioner tendered her resignation on 5.2.2021 and same has been accepted by the District Basic Education Officer, Etah on 31.3.2021. It has further been submitted that so far as applications dated 5.2.2021 and 11.2.2021 submitted by the petitioner are concerned, the contents of paragraphs 10 to 12 of the writ petition have been denied in paragraph 7 of the counter affidavit.

16. Learned counsel appearing for the Respondents No.2, 4 and 5 has further submitted that petitioner was not willing to work in the school in which she was posted

therefore, she willingly submitted the resignation from her post and that has been duly accepted by the District Basic Education Officer, Etah vide order dated 31.3.2021, which is perfectly in accordance with law and does not call for any interference by this Court.

17. Learned counsel appearing for the Respondents No.2, 4 and 5 has thus concluded his arguments and has submitted that writ petition filed by the petitioner being absolutely misconceived is liable to be dismissed by this Court.

18. I have considered the rival arguments advanced by the learned counsels appearing for the parties and I find that petitioner was appointed on the post of Assistant Teacher in Junior Basic School at District Etah on 5.12.2020 and thereafter, she tendered her resignation on 5.2.2021. This court finds that petitioner in paragraphs 10 and 11 of the writ petition has categorically stated that she submitted applications on 5.2.2021 and 11.2.2021 to the District Basic Education Officer, Etah whereby she withdrew her resignation. The application dated 5.2.2021 was given in the office of District Basic Education Officer, Etah and it bears endorsement of receipt by some official working in the office. The application dated 11.2.2021 has been sent through registered post and online postal tracking report has also been annexed to show that the said application has been delivered in the office of District Basic Education Officer, Etah. Respondent No.4 has filed counter affidavit in which contents of paragraphs 10 to 12 of the writ petition have been denied and it has been stated that petitioner has never submitted any application for cancellation of her resignation, before 31.3.2021.

19. Petitioner has filed rejoinder affidavit to the aforesaid counter affidavit and has reiterated her stand that she submitted applications on 5.2.2021 and 11.2.2021 whereby she withdrew her resignation.

20. This court is of the view that once petitioner in her writ petition has stated that she has submitted one application on 5.2.2021 and another on 11.2.2021 and has annexed online postal tracking report to show that application dated 11.2.2021 has been delivered in the office of the District Basic Education Officer, Etah, bald denial made in the counter affidavit filed by Respondent No.4 cannot be accepted.

21. This court finds that petitioner submitted her resignation on 5.2.2021 and thereafter she has withdrawn the said resignation by submitting two applications before the District Basic Education Officer, Etah, first personally in his office on 5.2.2021 itself and second, through registered post on 11.2.2021.

22. The Uttar Pradesh Government Servants Resignation Rules, 2000 have been framed to deal with the matters of resignation from service by government servants. Rules 6 and 7 are relevant for the purpose of adjudication of the present case therefore, Rules 6 and 7 of the Rules of 2000 are extracted as under:-

"6. Termination of service.-(1)

The services of the said Government servant shall stand terminated with effect from the date of issue of order of the acceptance of his resignation or from such future date as mentioned therein.

7. Withdrawal of Resignation.-

The Government servant may withdraw his resignation by making a request in writing

to the appointing authority only before the date of termination of his services as provided in rule 6 of these rules."

23. On conjoint reading of Rules 6 and 7 of the Rules of 2000, this Court is of the categorical view that resignation tendered by the government servant can be withdrawn at any time before its acceptance.

24. The Division Bench of this Court in the case of **Lalit Mohan Upadhyay Vs. The Principal, Kumaun Engineering College, Dwarhat, District Almora and others, (2000) 1 UPLBEC 130** has categorically held that resignation tendered by the employee can be withdrawn before its acceptance by the employer. Relevant paragraphs of the judgment rendered in the case of *Lalit Mohan Upadhyay (supra)* are extracted as under:-

"5. In our opinion, the Principal had no authority or jurisdiction to accept the petitioner's resignation as the petitioner's Appointing Authority is the Board of Governors and hence only the Board of Governors can accept his resignation. In fact, the Principal has recognised this legal position as he forwarded the papers to the Board, but there was no acceptance by the Board of Governors and instead it was the State Government which accepted the resignation on 17.1.1994 i.e. long after the petitioner had withdrawn his resignation.

6. In Union of India v. Copal Chand Mishra. AIR 1978 SC 694. it has been held that resignation can be withdrawn at any time before it becomes effective. In the case of employees for whom acceptance of resignation is necessary, obviously the resignation becomes effective only when it is accepted.

Similarly in M/s. J. K. Cotton Spinning & Weaving Mills Co. Ltd.. Kanpur v. State of U. P. and others, AIR 1990 SC 1808, it has been held that resignation is not complete until it is accepted by the proper authority. The same view has been taken in several other decisions. In the present case, since the petitioner's resignation was withdrawn before it was accepted, hence in our opinion the withdrawal of the resignation was valid and acceptance of the resignation was illegal.

7. Hence we set aside the Impugned order dated 27.1.1994 (Annexure-22 to the writ petition) and hold that the petitioner validly withdrew his resignation. The petitioner will be reinstated in service within six weeks from the date of production of a certified copy of this order before the authority concerned and shall be treated in continuous service as if his service had never come to an end. He will get seniority and all consequential benefits and also arrears within three months from the date of production of a certified copy of this order. No order as to costs."

25. This Court vide order dated 12.1.2021 passed in **Writ Petition No.12263 (S/S) of 2020, Pravesh Kumar Pal Vs. State of U.P. and others**, has held in the following terms:-

"After hearing learned counsel for the parties, it is found that the petitioner had withdrawn his resignation on 3.10.2018 prior to the passing of the impugned order dated 9.10.2018, which is not in dispute in the counter affidavit filed on behalf of Respondent Nos.2 to 4. The Rule 7 of the Rules 2000 is very clear that the application for withdrawal of resignation is to be prior to the acceptance of the resignation. In the present case the

resignation was accepted by the impugned order dated 9.10.2018 and the application was preferred by the petitioner on 3.10.2018.

Learned counsel for the respondents is not in a position to dispute the legal provision i.e. Rule 7 of the Rules 2000 and its applicability in the present case. The arguments raised by the learned counsel for the respondents that the knowledge of the application for withdrawal of the resignation submitted by the petitioner is only after the passing of the impugned order. At the same time in the counter affidavit it is not disputed that the petitioner had made an application for withdrawal of the resignation on 3.10.2018 and the office had taken time to place the same before the Competent Authority i.e. Respondent No.2. However, the fact is that the resignation was withdrawn before its acceptance. The petitioner would not be responsible for delay on the part of the office for placing it before Respondent No.2 late. The case of the petitioner is covered by the judgement of this Court dated 31.08.2017 passed in Writ-A No.- 47852 of 2000 (Tanweer Alam vs. U.P. Cooperative Spinning Mills Fed. Ltd & Others) (Supra)."

26. This court has considered the issue of withdrawal of resignation before its acceptance in the case of **Dinesh Prasad Chaurasia Vs. Managing Director and others, 2016 (6) ADJ 550** and has held that resignation tendered by an employee can be withdrawn at any time before its acceptance. Relevant paragraphs of the judgment rendered in the case of Dinesh Prasad Chaurasia (supra) are extracted as under:-

10. So far as legal proposition with regard to resignation and its

acceptance are concerned, the same is settled. Clause 23 of the U.P. Forest Corporation General Service Regulation, 1985, which has been extracted above, provides that resignation will not become effective till it is accepted by the competent authority. The resignation submitted by petitioner on 28.10.1986 remained on paper, and was not accepted till it was withdrawn on 28.2.1996. It is not in dispute that letter dated 28.2.1996 was duly served. Once the resignation was withdrawn by petitioner prior to its acceptance by the competent authority, it was not open for the respondents to have accepted the same, vide order impugned dated 30th December, 1998. This is particularly so, as the offer on part of petitioner to sever the contract of employment was not subsisting on the date when it was accepted. The acceptance of resignation, therefore, was incompetent. Even otherwise, law is settled that resignation can be accepted, so long as it is not withdrawn. The observation made by the Apex Court in para-22 of Raj Narain (supra) reads as under:-

"22. For the reasons mentioned above, we think that the learned judge was not justified in striking out Issue No. 1. On the other hand, he should have reframed that issue, as mentioned earlier. Before leaving- this question, it is necessary to mention one other fact. Yashpal Kapur appears to have tendered his resignation to the office he was holding on January 13, 1971. The certified copy of the notification produced shows that the President accepted his resignation on the 25th of January '71 and the same was gazetted on February 6, 1971. The order of the President shows that he accepted Yashpal Kapur's resignation with effect from January 14, 1971. The learned trial judge without examining the true effect of the President's order has abruptly come to the

conclusion that Yashpal Kapur's resignation became effective as from January 14, 1971. This conclusion, in our opinion, requires re examination. It is necessary to examine whether a government servant's resignation can be accepted with effect from an earlier date. At any rate whether such an acceptance has any validity in considering a corrupt practice under S. 123(7). If such a course is permissible, it might enable the government to defeat the mandate of S. 123(7). The question as to when a government servant's resignation becomes effective came up for consideration by this Court in *Raj Kumar v. Union of India*(1). Therein this Court ruled that when a public servant has invited by his letter of resignation the determination of his employment, his service normally stands terminated from the date on which the letter of resignation is accepted by the appropriate authority and, in the absence of any law or statutory rule governing the conditions of his service, to the contrary, it will not be open to the public servant to withdraw his resignation after it is accepted by the appropriate authority. Hence the question as to when Yashpal Kapur's resignation became effective will have to be examined with reference to his conditions of service. This examination having not been done, the conclusion of the learned trial judge that it became effective on January 14, 1971, has to be ignored."

11. Reliance has also been placed upon a judgment of the Apex Court in *Balram Gupta Vs. Union of India* and another, reported in AIR 1987 SC 2354. Paras-10 to 13 of the judgment, which are relevant for the purpose, are reproduced:-

"10. This question arose in the case of one Shri Satish Chandra, then a Judge in the High Court of Allahabad in *Union of India v. Shri Gopal Chandra*

Misra and others, [1978] 3 S.C.R. 12. There the second respondent Shri Satish Chandra wrote to the President of India, on May 7, 1977, intimating his resignation from the office of Judge of the Allahabad High Court, with effect from 1st of August, 1977. On July 15, 1977, he again wrote to the President, revoking his earlier communication, and commenced deciding matters in Court from July 16, 1977. On 1st of August, 1977 the first respondent Shri Misra, an advocate of the said High Court filed a writ petition under Article 226 of the Constitution contending that the resignation of Shri Satish Chandra having been duly communicated to the President of India in accordance with Article 217(1) Proviso (a) of the Constitution was final and irrevocable, and that the continuance of said Shri Satish Chandra as a Judge of the High Court there- after, was an usurpation of public office. The High Court allowed the petition holding that Shri Satish Chandra was not competent to revoke his resignation letter. On appeal this Court held that the resigning office necessarily involved relinquishment of the office which implied cessation or termination of, or cutting as under from the office. A complete and effective act of resigning office is one which severs the link of the resigner with his office and terminates its tenure. In the context of Article 217(1) this assumes the character of a decisive test, because the expression "resign his office" occurs in a proviso which excepts or qualifies the substantive clause fixing the office tenure of a judge upto the age of 62 years. It was further reiterated that in the absence of a legal, contractual or constitutional bar, an intimation in writing sent to the appropriate authority by an incumbent, of his intention or proposal to resign his office/post from a future specified date, can

be withdrawn by him at any time before it becomes effective i.e., before it effects termination of the tenure of the office/post, or employment. This general rule equally applies to Government servants and constitutional functionaries, this Court reiterated. The other peculiar essence of Article 2 17 which was discussed need not detain us in the facts of this case. On the principle of general law the offer to relinquishment could have been withdrawn by the appellant before the date it became effective if sub-rule (4) of Rule 48-A was not there.

11. In Air India etc. etc. v. Nergesh Meerza & Ors. etc. etc., [1982] 1 S.C.R. 438, there the Court struck down certain provisions of Air India Employees Service Regulations. We are not concerned with the actual controversy. But the Court reiterated that there should not be arbitrariness and hostile discrimination in Government's approach to its employees. On behalf of the respondent it was submitted that a Government servant was not entitled to demand as of right, permission to withdraw the letter of voluntary retirement, it could only be given as a matter of grace. Our attention was also drawn to the observations of this Court in Raj Kumar v. Union of India, [1968] 3 S.C.R. 857. There the Court reiterated that till the resignation was accepted by the appropriate authority in consonance with the rules governing the acceptance, the public servant concerned has locus poenitentiae but not thereafter. Undue delay in intimating to the public servant concerned the action taken on the letter of resignation may justify an inference that resignation had not been accepted. But in the facts of the instant case the resignation from the Government servant was to take effect at a subsequent date prospectively and the withdrawal was

long before that date. Therefore, the appellant, in our opinion, had locus. As mentioned hereinbefore the main question was whether the sub-rule (4) of Rule 48-A was valid and if so whether the power exercised under the sub-rule (4) of Rule 48-A was proper. In the view we have taken it is not necessary, in our opinion, to decide whether subrule (4) of Rule 48-A was valid or not. It may be a salutary requirement that a Government servant cannot withdraw a letter of resignation or of voluntary retirement at his sweet will and put the Government into difficulties by writing letters of resignation or retirement and withdrawing the same immediately without rhyme or reasons. Therefore, for the purpose of appeal we do not propose to consider the question whether sub-rule (4) of Rule 48-A of the Pension Rules is valid or not. If properly exercised the power of the government may be a salutary rule. Approval, however, is not ipse dixit of the approving authority. The approving authority who has the statutory authority must act reasonably and rationally. The only reason put forward here is that the appellant had not indicated his reasons for withdrawal. This, in our opinion, was sufficiently indicated that he was prevailed upon by his friends and the appellant had a second look at the matter. This is not an unreasonable reason. The guidelines indicated are as follows:

"(2) A question has been raised whether a Government servant who has given to the appropriate authority notice of retirement under the para 2(2) above has any right subsequently (but during the currency of the notice) to withdraw the same and return to duty. The question has been considered carefully and the conclusion reached is that the Government servant has no such right. There would, however, be no objection to permission

being given to such a Government servant, on consideration of the circumstances of his case to withdraw the notice given by him, but ordinarily such permission should not be granted unless he is in a position to show that there has been a material change in the circumstances in consideration of which the notice was originally given.

Where the notice of retirement has been served by Government on the Government servant, it may be withdrawn if so desired for adequate reasons, provided the Government servant concerned is agreeable."

12. In this case the guidelines are that ordinarily permission should not be granted unless the Officer concerned is in a position to show that there has been a material change in the circumstances in consideration of which the notice was originally given. In the facts of the instant case such indication has been given. The appellant has stated that on the persistent and personal requests of the staff members he had dropped the idea of seeking voluntary retirement. We do not see how this could not be a good and valid reason. It is true that he was resigning and in the notice for resignation he had not given any reason except to state that he sought voluntary retirement. We see nothing wrong in this. In the modern age we should not put embargo upon people's choice or freedom. If, however, the administration had made arrangements acting on his resignation or letter of retirement to make other employee available for his job, that would be another matter but the appellant's offer to retire and withdrawal of the same happened in so quick succession that it cannot be said that any administrative set up or management was affected. The administration has now taken a long time by its own attitude to

communicate the matter. For this purpose the respondent is to blame and not the appellant.

13. We hold, therefore, that there was no valid reason for withholding the permission, by the respondent. We hold further that there has been compliance with the guidelines because the appellant has indicated that there was a change in the circumstances, namely, the persistent and personal requests from the staff members and relations which changed his attitude towards continuing in Government service and induced the appellant to withdraw the notice. In the modern and uncertain age it is very difficult to arrange one's future with any amount of certainty, a certain amount of flexibility is required, and if such flexibility does not jeopardize Government or administration, administration should be graceful enough to respond and acknowledge the flexibility of human mind and attitude and allow the appellant to withdraw his letter of retirement in the facts and circumstances of this case. Much complications which had arisen could have been thus avoided by such graceful attitude. The court cannot but condemn circuitous ways "to ease out" uncomfortable employees. As a model employer the government must conduct itself with high probity and candour with its employees."

12. In Power Finance Corporation Ltd. Vs. Parmod Kumar Bhatia, reported in 1997 (4) SCC 280, following observations have been made in paragraph-7:-

"7. It is now settled legal position that unless the employee is relieved of the duty, after acceptance of the offer of voluntary retirement or resignation, jural relationship of the employee and the employer does not come to an end. since the order accepting the voluntary

retirement was a conditional one, the conditions ought to have been complied with. Before the conditions could be complied with, the appellant withdrew the scheme. consequently, the order accepting voluntary retirement did not become effective. Thereby no vested right has been created in favour of the respondent. The High court, therefore, was not right in holding that the respondent has acquired a vested right and, therefore, the appellant has no right to withdraw the scheme subsequently."

13. *A Constitution Bench in Union of India Vs. Gopal Chandra Misra and others, reported in AIR 1978 SC 694, has been pleased to make following observations:-*

"It will be repetition that the general principle is that in the absence of a legal, contractual or constitutional bar, a 'prospective' resignation can be withdrawn at any time before it becomes effective, and it becomes effective when it operates to terminate the employment or the office-tenure of the resignor..... If he chooses to resign from a future date, the act of resigning office is not complete because it does not terminate his tenure before such date and the Judge can, at any time before arrival of prospective date on which it was intended to be effective, withdraw it, because the Constitution does not bar such withdrawal."

14. *In view of the settled legal position, as well as considering the fact that in terms of applicable service rules, resignation was to become effective only from the date of its acceptance by the competent authority, the decision taken by the respondents to accept resignation from the date of its tendering, after it had been withdrawn, is illegal and arbitrary. The order impugned, consequently, cannot be sustained.*

15. *Having reached the conclusion aforesaid, the next question, which arises for consideration, is as to what relief is liable to be granted to the petitioner. Law by now is well settled that back wages cannot be granted, as a matter of routine. Learned counsel for the petitioner has placed various decisions on this aspect of the matter. In Shambhu Murari Sinha Vs. Project and Development India and another, reported in 2000 (86) FLR 206, it has been observed that in such circumstances, the employee concerned would be entitled to continue with all consequential benefits. Para-4 of the judgment is reproduced:-*

"4. From the facts stated above, it would be seen that though the option of voluntary retirement exercised by the appellant by his letter dated 18.10.1995 was accepted by the respondent-management by their letter dated 30.7.1997, the appellant was not relieved from service and he was allowed to continue in service till 26.9.1997, which, for all practical purposes, would be the "effective date" as it was on this date that he was relieved from service. In the meantime, as pointed out above, the appellant had already withdrawn the offer of voluntary retirement vide his letter dated 7.8.1997. The question which, therefore, arises in this appeal is whether it is open to a person having exercised option of voluntary retirement to withdraw the said offer after its acceptance but before it is made effective. The question is squarely answered by the three decisions, namely, Balram Gupta vs. Union of India & Anr. 1987 (Supp.) SCC 228; J.N. Srivastava vs. Union of India & Anr. (1998) 9 SCC 559 and Power Finance Corporation Ltd. vs. Pramod Kumar Bhatia (1997) 4 SCC 280, in which it was held that the resignation, in spite of its acceptance, can be withdrawn

before the "effective date". That being so, the appeal is allowed. The impugned judgment of the High Court is set aside with the direction that the appellant shall be allowed to continue in service with all consequential benefits. There will, however, be no order as to costs."

16. In Managing Director, Orissa State Handloom Weavers' Cooperative Society Ltd. Vs. Satyanarayan Pattnaik and another, reported in 2014 (3) SCC 218, following observations have been made in para-4 of the judgment, awarding 20% of back wages:-

"4. Keeping the question of law open, looking at the peculiar facts of the case, we feel that the appeal deserves to be allowed to a limited extent by directing the appellant employer to pay only 20% of the back wages from the date when the respondent ceased to discharge his duties till the date he is reinstated in service. The respondent shall be reinstated in service within two weeks from today."

17. Per contra, learned counsel for the respondent Corporation submits that in the facts of the present case, the petitioner has virtually abandoned the services, and acceptance of resignation was a mere formality, and even if, the order of acceptance is held to be illegal, petitioner would not be entitled to any back wages.

18. From the materials, which have been brought on record, this Court finds that there was an intentional act on part of the petitioner not to perform his duties from 1985 onwards. Except for sending of certain letters, there was no serious intent on part of petitioner to actually work. It is only after 11 years that the resignation was withdrawn. Even thereafter, petitioner did nothing, and only

in October, 1998, petitioner approached this Court by filing a writ petition.

19. From the facts aforesaid, this Court finds that it was not a case, in which respondents have prevented the petitioner from working, but petitioner was himself responsible for failing to perform his duties. Since the resignation was not accepted by the competent authority, and it had been withdrawn before its acceptance, as such, the order impugned cannot be sustained, but the petitioner would not be entitled to full back wages.

20. In the opinion of the Court, as the respondents could not have accepted the resignation after it stood withdrawn, the order impugned dated 30.12.1998 is set aside. Petitioner would be entitled to reinstatement alongwith continuity of service. In the peculiar facts and circumstances of the present case, petitioner would be entitled to a consolidated sum of Rs.1,00,000/- towards back wages."

27. In view of the law laid down in the aforesaid judgments, this court is of considered view that petitioner has withdrawn her resignation dated 5.2.2021 by submitting applications on 5.2.2021 and 11.2.2021 therefore, order dated 31.3.2021 whereby petitioner's resignation dated 5.2.2021 has been accepted, is unsustainable in the eyes of law and is liable to be quashed.

28. It is also to be seen that on order dated 31.3.2021 being quashed, what relief can be granted to the petitioner in respect of period in which she has actually not performed any work as Assistant Teacher.

29. This court is of the view that since petitioner has actually not worked from the date of her resignation therefore, she may be entitled only for 25% of the back wages.

30. In view of the aforesaid reasons, this writ petition is allowed. Order dated 31.3.2021 is quashed. The District Basic Education Officer, Etah is directed to allow the petitioner to join on her post of Assistant Teacher in Junior Basic School Mirzapur, Block Awagarh, District Etah within four weeks from today and to pay her current salary as and when it becomes due.

31. It is further provided that petitioner shall be entitled to get 25% of the salary admissible to her for the period from 5.2.2021 till the date of her reinstatement in service and the said amount shall be calculated and paid to the petitioner within four months from the date of service of certified copy of this order.

(2024) 4 ILRA 196

**APPELLATE JURISDICTION
CIVIL SIDE**

DATED: ALLAHABAD 01.03.2024

BEFORE

**THE HON'BLE MANOJ KUMAR GUPTA, J.
HON'BLE DONADI RAMESH, J.**

Special Appeal No. 698 of 2023

District Basic Education Officer & Anr.

...Appellants

Versus

Mahendra & Ors.

...Respondents

Counsel for the Appellants:

Ms. Akansha Sharma

Counsel for the Respondents:

C.S.C., Sri Santosh Kumar Shukla

**Service Law - Right to Education Act, 2009
- Section 23 - Teacher Eligibility Test (T.E.T.) - Recruitment of Assistant Teacher in Primary Schools - U.P. Basic Shiksha Parishad - Government Order dated 15.10.2013 - Clause**

1.1 - Petitioner's candidature for Assistant Teacher (Classes I to V) rejected for possessing T.E.T. certificate in Sanskrit Language (Primary Level) instead of T.E.T. for Primary Level (Classes I to V). Government Order dated 17.04.2013 and NCTE guidelines (11.02.2011) prescribe distinct T.E.T. categories, including Primary Level (Classes I to V) and Language Teacher-Primary Level; petitioner's T.E.T. in Sanskrit lacked required testing in Hindi, Mathematics, and Environmental Studies, rendering him ineligible for Primary Teacher post. Single Judge's finding that Government Order dated 15.10.2013 imposed no such restriction erroneous, as Clause 1.1 mandates T.E.T. for Classes I to VS Order of District Basic Education Officer (19.08.2014) rejecting candidature upheld; Single Judge's judgment (14.03.2023) allowing Writ-A No. 45784 of 2014 set aside. (Paras 11-23)

Special Appeal Allowed.

List of Cases cited:

1. Shiv Kumar Pathak Vs St. of U.P., (Division Bench, Allahabad High Court) (Para 5)

2. St. of U.P. Vs Shiv Kumar Pathak, (Supreme Court) (Para 20)

(Delivered by Hon'ble Manoj Kumar Gupta, J.)

1. The present intra-court appeal filed under Chapter VIII Rule 5 of the Rules of Court is directed against the judgement and order dated 14.03.2023 passed by learned Single Judge allowing Writ-A No.45784 of 2014 filed by respondent no.1 (hereinafter referred to as 'the petitioner'). In the writ petition, the petitioner had challenged the order dated 19.08.2014 passed by appellant no.1 rejecting the candidature of the petitioner for appointment on the post of Assistant Teacher in Primary Schools run by U.P. Basic Shiksha Parishad (appellant no.2) on the ground that the petitioner had passed T.E.T. Examination in Sanskrit language and not T.E.T. meant for teaching

primary level classes. He therefore did not fulfill the eligibility prescribed for the post. In reaching to the said conclusion, reliance has been placed on the Government Order dated 15.10.2013.

2. The learned Single Judge has held that the Government Order dated 15.10.2013 does not place any such restriction. It merely requires that the candidate should have passed T.E.T. Examination. As the petitioner had duly cleared the T.E.T. Examination, though in Sanskrit language, he was held eligible for the post and accordingly, direction was issued to the appellants to issue appointment letter to the petitioner.

3. Learned counsel for the appellants submitted that the Government decided to fill up 10,000 vacant posts of Assistant Teachers in primary schools run by Basic Shiksha Parishad. In furtherance, it issued a Government Order dated 15.10.2013. It stipulated that the educational qualification required was graduation degree from a recognised degree college, two years BTC Course from authorised institution of the State Government and certificate of Teacher Eligibility Test (T.E.T.) meant for classes 1 to 5 i.e. primary level. The requirement of having T.E.T. certificate was an essential condition in view of the stipulations laid down in this behalf by the National Council for Teacher Education in exercise of its powers under Section 23 (1) of the Right to Education Act, 2009. The State Government, in accordance with the guidelines framed by the NCTE, had issued Government Order dated 17.04.2013 disclosing the manner in which T.E.T. Examination would be held. According to it, T.E.T. Examination was held for four separate categories-

(i) Primary Level (Classes I to V)

(ii) Language Teacher- Primary Level (Classes I to V)

(iii) Upper Primary Level (Classes VI to VIII)

(iv) Language Teacher- Upper Primary Level (Classes VI to VIII)

4. In para 2 of the said Government Order, the subjects in which candidates would be tested for T.E.T. certificate in a particular category, was specified. It reveals that a candidate who passes T.E.T. in any particular category can only teach students of that category. The candidates also had the option to appear in papers of all categories. The Guidelines issued by the State Government dated 17.04.2013 were kept in mind while taking decision to fill up 10,000 vacancies of primary teachers. This is evident from Clause 1.1 of the Government Order dated 15.10.2013 which specifically provided that the person should have passed T.E.T. meant for teaching Classes I to V. As such, the finding of learned Single Judge that there was no bar under the Government Order for a candidate possessing T.E.T. in Sanskrit language to be recruited for the post of primary teacher is manifestly incorrect. In other words, the submission of learned counsel for the appellants is that as per guidelines dated 17.04.2013 issued by the Government keeping in mind the notifications issued by NCTE from time to time, a candidate to be recruited for teaching primary classes from Standard I to V had to possess T.E.T. certificate of primary level and not the T.E.T. certificate of any other category.

5. On the other hand, learned counsel for the petitioner submitted that the Government Order dated 15.10.2013 contains no such inhibition and the learned Single Judge was right in holding that the

petitioner, who held T.E.T. certificate, though in Sanskrit Language, was fully qualified for teaching primary level classes i.e. Standard I to V. The Division Bench of this Court in *Shiv Kumar Pathak and Others vs. State of U.P. and Others*¹ has held that NCTE Notifications prescribing eligibility have overriding effect and the same merely prescribes T.E.T. as eligibility criteria, without making any distinction between different types of T.E.T. Certificates. Therefore, the appeal deserves to be dismissed.

6. The main question, which thus arises for consideration, is whether the petitioner, on the strength of T.E.T. certificate in Sanskrit language, was eligible for appointment as Assistant Teacher in Primary School in pursuance of advertisement issued in the year 2016 for filling up 10,000 vacancies. In other words, whether the test passed by the petitioner in Sanskrit language fulfilled the requirements of Teacher Eligibility Test prescribed for teachers for the Primary Schools.

7. Indisputably, the vacancies notified by advertisement issued in different newspapers in October, 2013 were for filling up posts of Assistant Teachers in Primary Schools imparting elementary education (Standard I to V). All the schools are covered within the definition of Section 2(n) of the Right of Children to Free and Compulsory Education Act, 2009 (hereinafter referred to as 'the Act').

8. Section 23 of the Act stipulates that any person possessing such minimum qualifications, as laid down by an academic authority authorized by the Central Government by notification, shall

be eligible for appointment as a teacher. In exercise of powers under Section 23 of the Act, the Central Government issued notification dated 31st March, 2010 authorizing the NCTE as the academic authority to lay down the minimum qualifications for a person to be eligible for appointment as a teacher.

9. The NCTE issued a notification dated 23.10.2010 laying down the minimum qualifications for appointment as a teacher in a school referred to in clause (n) of Section 2 of the Act. The minimum qualifications *inter alia* provided for a pass certificate in the Teacher Eligibility Test to be conducted by the appropriate government in accordance with the guidelines framed by the NCTE for the purpose. A separate set of qualifications was prescribed for teachers for Classes I to V and Classes VI to VIII. The said notification was amended by a notification dated 29.07.2011 but the prescription regarding T.E.T. test remained the same.

10. On 11.02.2011, NCTE framed guidelines for Teacher Eligibility Test to be conducted by the appropriate governments. In pursuance of the said guidelines, the State Government issued a Government Order dated 17th April, 2013 addressed to the Director, State Education Research and Training Board, U.P., Lucknow and Secretary, Examination Regulatory Authority, U.P., Allahabad emphasizing the need for conducting Teacher Eligibility Test. It refers to a previous Government Order dated 25.09.2012 by which the State Government had required the aforesaid two Authorities to submit proposal for holding T.E.T. Examination. The guidelines on basis of which T.E.T. Examination was to be conducted, was enclosed with the Government Order dated 17th April, 2013.

11. The guidelines stipulated holding of T.E.T. Examination for four different categories, namely, (i) Primary Level (Classes I to V), (ii) Language Teacher-Primary Level (Classes I to V), (iii) Upper Primary Level (Classes VI to VIII), and (iv) Language Teacher- Upper Primary Level (Classes VI to VIII). The guidelines provided for different course structure and content of question papers for different categories, however, liberty was given to the candidates to appear in one or more categories, so as to attain eligibility for appointment as teacher in more than one category.

12. The petitioner had passed U.P. T.E.T., 2013 of Primary Level- Sanskrit language. Now, it is to be seen whether the said certificate fulfilled the pre-eligibility prescribed for participating in the selection for recruitment of Primary Teachers of Classes I to V. The T.E.T. Certificate possessed by the petitioner for Classes I to V was awarded to him on basis of the test held by Examination Regulatory Authority, U.P., Allahabad in accordance with the guidelines contained in Government Order dated 17th April, 2013. The structure and content of the said test as per Government Order dated 17th April, 2013 was as follows:

(i) Child Development and Pedagogy-	30 MCQs	30 Marks
(ii) Comprehension-	30 "	30 "
(iii) Grammer-	30 "	30 "
(iv) Language Expression-	-	60 "

(MCQ is acronym for Multiple Choice Question)

13. In clear distinction of the structure and content of T.E.T. prescribed for teacher of Primary Level- Language (Standard I to V), the structure and content of T.E.T. for

Primary Teacher (Standard I to V) was as follows:

(i) Child Development and Pedagogy-	30 MCQs	30 Marks
(ii) Language I-	30 "	30 "
(iii) Language II-	30 "	30 "
(iv) Mathematics-	30 "	30 "
(v) Environmental Studies-	30 "	30 "

14. The guidelines prescribed by NCTE for holding T.E.T. for Classes I to V, in terms of the structure and content of the test is exactly similar to that prescribed by the State Government vide Government Order dated 17th April, 2013.

15. The petitioner, who had passed T.E.T. meant for Classes I to V-Sanskrit language was, thus, not tested on the structure and content prescribed for T.E.T. for Classes I to V. The petitioner was not tested for Hindi language in contrast to his counter-parts, who appeared for T.E.T. I to V and had to answer questions of thirty marks in Hindi Language. Again, the petitioner was not tested for Mathematics nor for Environmental Studies, which was essential part of the structure and content of the test paper meant for students appearing for T.E.T. for Classes I to V.

16. As is the own case of the petitioner, the guidelines framed by NCTE were binding on the States while holding the T.E.T. The T.E.T. held by the State for Classes I to V was in consonance with the guidelines prescribed by NCTE in this behalf. The NCTE guidelines as well as the guidelines issued by the State Government vide Government Order dated 17th April,

2013 specifically gave an option to the candidates to appear in a specified category or in all the categories. However, the petitioner did not avail the said option and only qualified T.E.T. for Classes I to V in Sanskrit language. He had the option to appear in T.E.T. Primary (Classes I to V) as well as T.E.T. for Upper Primary Level (Classes VI to VIII) and Language- Upper Primary Level (Classes VI to VIII).

17. It is pertinent to note that Government Order dated 15th October, 2013 vide Clause 1.1 specifically provided that the candidate should inter alia possess T.E.T. Certificate for Classes I to V. The relevant part of the said clause is reproduced below:

"1- आवेदन हेतु पात्रता

(i) शैक्षिक अर्हता- सहायक अध्यापक के पदों पर चयन / नियुक्ति हेतु ऐसे अभ्यर्थी पात्र होंगे, जो भारत में विधि द्वारा स्थापित विश्वविद्यालय से स्नातक की उपाधि रखते हों, राज्य शैक्षिक अनुसंधान एवं प्रशिक्षण परिषद उ०प्र० द्वारा आयोजित दो वर्षीय बी०टी०सी० प्रशिक्षण, दो वर्षीय उर्दू प्रवीणता बी०टी०सी० प्रशिक्षण, विशिष्ट बी०टी०सी० प्रशिक्षण सफलतापूर्वक उत्तीर्ण किए हों, उ०प्र० सरकार अथवा भारत सरकार द्वारा आयोजित कक्षा 1 से 5 हेतु अध्यापक पात्रता परीक्षा सफलतापूर्वक उत्तीर्ण किए हों।"

(Emphasis supplied)

18. Since all the posts advertised were for Primary Teachers for teaching Classes I to V and not teacher in Sanskrit language only and, therefore, the aforesaid stipulation was specifically embodied in Clause 1.1 of the Government Order dated 15th October, 2013.

19. It is noticeable that the structure and content of the tests were designed in a

manner so as to test the teaching ability of a candidate to teach students of that category or subject. Thus, a teacher passing T.E.T. meant for Classes I to V was not tested nor eligible for recruitment as a teacher for Upper Primary Level i.e., Classes VI to VIII nor as a teacher for any specific language like Sanskrit, English or Urdu. Likewise, a candidate passing T.E.T. in any specific language would be eligible for consideration for appointment as a teacher of that language only.

20. The Division Bench judgement of this Court in *Shiv Kumar Pathak (supra)*, holding that the qualifications prescribed by NCTE are binding, though, reversed in appeal by the Supreme Court in *State of U.P. and Others vs. Shiv Kumar Pathak and Others*², still holds the field to the extent it lays down the above legal proposition. In fact, there is also no dispute about the said legal proposition, as arguments of both the sides rest on the said premise, though, giving a different interpretation to advance their respective submissions.

21. As already noted above, if we go by the stipulations prescribed by NCTE for holding T.E.T., for a person to become eligible for recruitment as Primary Teacher for Classes I to V, the T.E.T. Certificate possessed by the petitioner for Sanskrit language did not meet the specified requirements.

22. The learned Single Judge has overlooked Clause 1.1 of Government Order dated 15th October, 2013 in holding that the said Government Order did not prohibit a candidate seeking appointment on the post of Assistant Teacher in Junior Basic School to possess T.E.T. Certificate in Sanskrit language. In fact, when the said

stipulation in Clause 1 of Government Order dated 15th October, 2013 is read with the guidelines issued by the State Government on 17th April, 2013 and the guidelines issued by NCTE dated 11.02.2011, the distinction between the two set of tests becomes amply clear.

23. In the result, the irresistible conclusion is that the petitioner, who was not having T.E.T. Certificate for teaching Classes I to V but T.E.T. Certificate in Sanskrit Language Primary Level, was not eligible for selection on the post of Primary Teacher in Junior Basic Schools in pursuance of the advertisement.

24. We, thus, find no illegality in the stand contained in the order of Basic Shiksha Adhikari dated 19.08.2014, against which the writ petition was filed.

25. Accordingly, the instant appeal is **allowed**.

26. The impugned judgement and order of the learned Single Judge is set aside and the writ petition is dismissed.

(2024) 4 ILRA 201

APPELLATE JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 01.03.2024

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.

THE HON'BLE DONADI RAMESH, J.

Special Appeal Defective No. 781 of 2023

Uttar Pradesh Public Service Commission

...Appellant

Versus

Renu & Ors.

...Respondents

Counsel for the Appellant:

Ms. Nisheeth Yadav

Counsel for the Respondents:

Sri Shantanu Khare, Sri Kauntey Singh, Sri Ashok Khare (Senior Adv.)

Service Law - U.P. Subordinate Nursing (Non-Gazetted) Service (Fourth Amendment) Rules, 2016 - Rule 15 -

Recruitment of Staff Nurse - Experience Certificate - Uttar Pradesh Public Service Commission (UPPSC) rejected candidature of petitioner for Staff Nurse post due to an erroneous experience certificate (09.11.2021) mentioning 'Nurse Mentor' instead of 'Staff Nurse', despite her having requisite experience (01.04.2015 to 18.10.2019). Corrected certificate (24.08.2022) and issuing authority's admission of mistake (30.08.2022) submitted post-re-scrutiny, but not considered by UPPSC, citing cut-off date for document submission (18.11.2021, extended to 22.11.2021). Single Judge allowed Writ-A No. 21430 of 2022, setting aside UPPSC's rejection order (16.11.2022), holding that procedural requirement of proof submission is relaxable, unlike essential qualifications. Distinction between possession of qualification (mandatory by cut-off date) and proof thereof (directory) upheld, supported by Supreme Court precedents. No prejudice to others, as 1,729 posts remained vacant. Single Judge's view, being plausible, not interfered with in intra-court appeal. (Paras 15-37)

Special Appeal Dismissed.

List of Cases cited:

1. St. of T.N. Vs G. Hemalathaa, (Supreme Court) (Para 10)
2. Gaurav Sharma Vs St. of U.P., (Allahabad High Court, Full Bench) (Para 10)
3. Rajendra Patel Vs St. of U.P., (Allahabad High Court, Full Bench) (Para 10)
4. Charles K. Skaria Vs Dr. C. Mathew, (Supreme Court) (Paras 11, 16, 18)
5. Dolly Chhanda Vs Chairman, JEE, (Supreme Court) (Paras 11, 17, 24)

6. Food Corporation of India Vs Rimjhim, (Supreme Court) (Paras 11, 18)

7. Aarav Jain Vs Bihar Public Service Commission, (Supreme Court) (Para 11)

8. Sweety Kumari Vs St. of Bihar, (Supreme Court) (Para 11)

9. Karn Singh Yadav Vs Govt. of NCT of Delhi, (Supreme Court, Two-Judge Bench) (Para 11)

10. Karn Singh Yadav Vs Govt. of NCT of Delhi, (Supreme Court, Three-Judge Bench) (Paras 11, 21)

11. Ram Kumar Gijroya Vs Delhi Subordinate Services Selection Board, (2016) 4 SCC 754 (Paras 20, 21, 23)

12. Ashok Kumar Sharma Vs Chander Shekhar, (Supreme Court, Three-Judge Bench) (Para 22)

13. Divya Vs U.O.I., Writ Petition (C) No. 724 of 2023, decided on 09.10.2023 (Para 22)

14. Secretary, UP Public Service Commission Vs S Krishna Chaitanya, (Supreme Court) (Para 24)

(Delivered by Hon'ble Manoj Kumar Gupta, J.)

1. The present intra-court appeal under Chapter VIII Rule 5 of the Rules of Court is against the judgment of learned Single Judge dated 31.7.2023 in Writ – A No. 21430 of 2022 (Renu vs. State of U.P. and 3 others), whereby the writ petition filed by Renu, non-appellant no. 1 (hereinafter referred to as the 'Original Writ Petitioner') has been allowed and the order passed by the Secretary, U.P. Public Service Commission, Prayagraj (the appellant herein) (for short 'the Commission') dated 16.11.2022, has been set aside and a direction was issued to the Director, Medical and Health, Government of U.P., Lucknow (proforma respondent no.

4 herein) to grant benefit of experience certificate to her and consider her candidature for appointment as a Staff Nurse, if all other conditions stand satisfied.

Background Facts:

2. The U.P. Public Service Commission issued an advertisement dated 16.7.2021, notifying the holding of Staff Nurse/Sister Grade-2 (Male/Female) Examination, 2021. It was for filling up the posts of nursing staff in (a) Medical and Health Services Department (b) Medical Education and Training Department and (c) KGMU. The date of commencement of submission of online application was 16.7.2021; last date for receipt of examination fee online in the bank was 12.8.2021 and last date for submission of online application was 16.8.2021. Clause 10(4) of the advertisement stipulated that a maximum of 15 marks would be awarded to a candidate for past experience as Staff Nurse on contractual basis. For the first completed year of service, a candidate would be entitled to 3 marks. For the next and every completed year of service on contract basis, 3 marks for each year. In this regard, the certificate issued by the Competent Authority only was to be treated as valid. The said stipulation around which the controversy revolves, in the present appeal is extracted below: -

10(4) Selection shall carry on hundred marks. The merit list of the candidates shall be prepared in the following manner: -

(a) Written Examination shall carry Eighty Five marks.

(b) Marks to a person who is working as Staff Nurse on contract basis in the Medical and Health Services

Department, Uttar Pradesh shall be awarded in the following manner subject to the maximum of fifteen marks: -

(i) For the first completed year of service on contract basis Three marks.

(ii) For the next and every completed year of service on contract basis, Three marks for each year. In this regard the certificate issued by the Appointing Authority only shall be treated valid. A Proforma for this purpose is available in Appendix – 6 of this advertisement.

(c) The marks obtained by each candidate under clause (a) shall, where applicable, be added to the marks obtained under clause (b).

Note : The candidates must possess all the requisite qualifications upto the last date for submitting the applications.

3. Thus, out of total 100 marks on which candidates were to be tested, 85 marks were allocated for the written examination and 15 marks for past experience in service.

4. The aforesaid stipulation was in accordance with Rule 15 of the U.P. Subordinate Nursing (Non-Gazetted) Service (Fourth Amendment) Rules, 2016 (for short ‘the Rules 2016’).

5. The Original Writ Petitioner after completing all the formalities, appeared in the written examination. The result was declared on 4.1.2022 and she was shown selected. She had secured 28.50 marks in the written examination and was given 12 marks for experience. Thus, she had secured a total of 40.50 marks. After the result was declared, a Writ Petition bearing No. 1815 of 2022 (Priti Patel and another vs. State of U.P. and others) was filed challenging the result on the ground that the Commission did not properly scrutinize

the experience certificates of the candidates. In the said writ petition, the Commission made statement through its counsel that it would re-scrutinize the experience certificates of 814 selected candidates in respect of whom recommendation for appointment had not been made to the State Government by that time. The Court having regard to the said submission permitted the Commission to carry out the said exercise.

6. In pursuance thereof, the Commission re-scrutinized the experience certificates and issued fresh select list on 23.8.2022, in which the name of the petitioner was missing. It is pertinent to note that the petitioner had filed experience certificate dated 9.11.2021 issued by Chief Medical Officer, Rampur. In the said certificate, the Chief Medical Officer by mistake mentioned that the petitioner had worked as Nurse Mentor instead of Staff Nurse. The said mistake, it seems, came to the knowledge of the petitioner when she found her name missing in the revised result declared on 23.8.2022. On 24.8.2022, she submitted another certificate from the Chief Medical Officer, certifying that she had worked as Staff Nurse. She also filed yet another certificate from Chief Medical Officer dated 30.8.2022, stating that by inadvertence and oversight, it came to be mentioned in the certificate issued on 9.11.2021 that she had worked as Nurse Mentor in place of Staff Nurse (contractual basis). The petitioner represented to the Commission on 5.9.2022 on basis of the aforesaid certificates and highlighted the inadvertent mistake on part of the Issuing Authority and prayed for being declared selected.

7. It is pertinent to note that out of total advertised posts, 1,729 posts had

remained vacant as the same could not be filled up because of non-availability of suitable eligible candidates. However, the representation filed by the petitioner did not find favour with the Commission and was rejected by the order dated 16.11.2022. It has been observed therein that the original writ petitioner had filed experience certificate as Nurse Mentor and consequently she was not given the benefit of past experience. In other words, the Commission declined to take notice of the experience certificate dated 24.8.2022 and another certificate dated 30.8.2022, in which the Issuing Authority admitted its mistake.

8. The learned Single Judge after considering a number of judgments of Supreme Court and of this Court, held in favour of the Original Writ Petitioner and issued direction for considering the experience certificate and aggrieved whereby, the instant appeal has been filed.

Issues:

9. The main issue for consideration is whether the petitioner has been wrongly denied the benefit of experience as Staff Nurse and whether the certificates furnished by her from time to time, could be considered for awarding marks on that score.

Submissions of learned counsel for the parties:

10. Shri Nisheet Yadav, counsel for the Commission contended that the Original Writ Petitioner had submitted the experience certificate of working on the post of Nurse Mentor and not Staff Nurse along with the hard copy of the online application form in terms of notifications

dated 02.11.2021 and 15.11.2021 issued by the Commission after declaration of result of the written examination. Therefore, the Commission did not grant her marks for experience as that would have been in contravention of the Rules 2016 as well as the stipulations in the advertisement. The Commission in its aforesaid notifications dated 02.11.2021 and 15.11.2021, specified a cut-off date for submitting the testimonials/ documents and also mentioned that no claim would be entertained thereafter and therefore it was bound by the same. In case the Commission entertains any claim after the cut-off date, it would be an unending process and the Commission would not be able to finalize the selection process. Reliance has been placed on the following judgments: -

- (i) The State of Tamil Nadu and Others vs. G. Hemalathaa and another¹;**
- (ii) Gaurav Sharma vs. State of U.P.²;**
- (iii) Rajendra Patel vs. State of U.P. and Another³.**

11. On the other hand, Sri Ashok Khare, learned counsel for the Original Writ Petitioner, submitted that the petitioner duly possessed the requisite experience. The inadvertent mistake on part of the Issuing Authority in the certificate originally furnished, but which was rectified as soon as the mistake was detected, would not disentitle her to the marks under the heading “experience”. The post of Nurse Mentor is a superior post and therefore even otherwise, experience on the said post could not have been brushed aside. There is difference in a candidate possessing essential qualification before the prescribed last date which is a must and

from which there cannot be any deviation. However, the same principle would not apply to furnishing of documents in proof thereof, which is only directory in nature, being in the realm of procedure. Moreover, in the instant case, the Commission itself extended the date for submitting the documents from time to time and therefore, it could not have ignored the experience certificate of the petitioner. It is also urged that it was not a case of filing of experience certificate after the prescribed date, but only correction of the error in the original certificate. In support of his contention, he has placed reliance on the following judgments: -

(i) Charles K. Skaria and others vs. Dr. C. Mathew and others⁴;

(ii) Dolly Chhanda vs. Chairman, Jee and Others⁵;

(iii) Food Corporation of India vs. Rimjhim⁶;

(iv) Aarav Jain vs. The Bihar Public Service Commission and others⁷;

(v) Sweety Kumari vs. State of Bihar and others⁸;

(vi) Karn Singh Yadav vs. Govt. of NCT of Delhi and others⁹;

(vii) Karn Singh Yadav vs. Govt. of NCT of Delhi and others¹⁰.

Analysis:

12. Before we proceed to analyse the issue involved, certain facts which are not in dispute, are noted hereunder –

The petitioner applied in pursuance of advertisement dated 16.7.2021. Under the Service Rules as well as in terms of the advertisement, a candidate is entitled to a maximum of 15 marks for experience as Staff Nurse on contractual basis. The petitioner had worked as Staff Nurse on contractual basis

under National Rural Health Mission from 01.04.2015 to 18.10.2019, i.e. for more than four years. It thus entitled her to 12 marks towards ‘experience’. The petitioner appeared in the written examination held on 03.10.2021 and was declared successful. Thereafter, in pursuance of press communique (Notification) dated 3.11.2021 and 15.11.2021 requiring the candidates to submit hard copy of the online application form and documents in support of the claim made in the application, she submitted experience certificate dated 9.11.2021, issued by Chief Medical Officer, Rampur. When the final result was published on 04.01.2022, she was declared selected. She was awarded 12 marks for past experience. However, on re-scrutiny, when revised result was declared on 23.8.2023, her name was missing from the list of selected candidates. The petitioner on coming to know of discrepancy in the original experience certificate dated 9.11.2021, got another certificate issued on 24.8.2022 by Chief Medical Officer, Rampur. He also issued a certificate on 30.8.2022, admitting the mistake while issuing the original certificate.

13. In the above backdrop, it has to be examined whether the stand taken by the Commission is sustainable or not and whether in the facts and circumstances of the instant case, the writ-petitioner was entitled to the benefit of experience as Staff Nurse.

14. One of the first principles clearly discernible from various judgments cited by counsel for the parties is that the rules/instructions framed by the Commission are binding and the Commission is not empowered to relax the same. Thus, in **State of Tamil Nadu**

(supra), where the instructions framed by the Commission stipulated that in case of use of whitener, sketch pens, pencils, colour pencils, multi-colour pencils, crayons, etc. a candidate would be disqualified, use of such material by candidate leading to disqualification was upheld.

15. There are series of decisions which draw distinction between essential requirements and the proof/mode of proof. It has been held that while the general rule is that a candidate should possess the eligibility qualification on a specified date or in its absence on the last date of submitting the application form and for which there can be no relaxation, but the same does not apply in relation to the requirement of submitting documents in proof thereof.

16. Thus in **Charles K. Skaria**, (supra), a case relating to admission to post-graduate course in Ophthalmology, a weightage of 10 per cent marks was provided to candidates possessing diploma in the relevant stream. The benefit was denied to the appellants before the Supreme Court on the ground that they had failed to produce the diploma certificate alongwith application form, despite specific requirements to the said effect. The Supreme Court drawing distinction between possessing of the qualification and its proof observed as follows:

"20. There is nothing unreasonable or arbitrary in adding 10 marks for holders of a diploma. But to earn these extra 10 marks, the diploma must be obtained at least on or before the last date for application, not later. Proof of having obtained a diploma is different from the factum of having got it. Has the candidate,

in fact, secured a diploma before the final date of application for admission to the degree course? That is the primary question. It is prudent to produce evidence of the diploma along with the application, but that is secondary. Relaxation of the date on the first is illegal, not so on the second. Academic excellence, through a diploma for which extra mark is granted, cannot be denuded because proof is produced only later, yet before the date of actual selection. The emphasis is on the diploma; the proof thereof subserves the factum of possession of the diploma and is not an independent factor. The prospectus does say:

(4) (b) 10% to diploma holders in the selection of candidates to M. S., and M. D., courses in the respective subjects or sub-specialities.

13. Certificates to be produced :- In all cases true copies of the following documents have to be produced :—

(k) Any other certificates required along with the application.

This composite statement cannot be read formalistic fashion. Mode of proof is geared to the goal of the qualification in question. It is subversive of sound interpretation and realistic decoding of the prescription to telescope the two and make both mandatory in point of time. **What is essential is the possession of a diploma before the given date; what is ancillary is the safe mode of proof of the qualification. To confuse between a fact and its proof is blurred perspicacity. To make mandatory the date of acquiring the additional qualification before the last date for application makes sense. But if it is unshakeably shown that the qualification has been acquired before the relevant date, as is the case here, to invalidate this merit factor because proof, though indubitable, was adduced a few days later but before the selection**

or in a manner not mentioned in the prospectus, but still above-board, is to make procedure not the handmaid but the mistress and form not as subservient to substance but as superior to the essence."

(emphasis supplied)

17. The judgement in **Charles K. Skaria** (supra) was followed by a three Judge Bench in **Dolly Chhanda vs. Chairman, JEE and Others** (supra). The facts of the said case are very similar to that of the instant case. The appellant therein submitted application for appearing in the Joint Entrance Examination, 2003 under the reserved M.I. category being daughter of an ex-servicemen, who was discharged from armed forces on the ground of permanent disability. Under Clause 2.1.4 of the admission brochure, certain percentage of seats were reserved for children, widows of personnel of armed/para military forces of Orissa, killed/disabled in action during war or peace time operations. Her position was 20 in M.I. category and she was called for counselling. During scrutiny of papers, it transpired that the certificate dated 29.06.2003 given to her father by Zila Sainik Board in column three pertaining to 'disabled/killed in war/hostilities' contained an endorsement "not eligible". Consequently, her candidature was rejected. She then filed another certificate dated 16.07.2003, which mentioned that her father was permanently disabled. This, undoubtedly entitled her to the benefit of M.I. category. However, it was not considered on the ground that she failed to produce the said certificate at the time of counselling on 07.07.2003. The appellant filed writ petition contending that she falls under M.I. category and she could not be made to suffer for the fault committed by Zila Sainik Board in not issuing a correct

certificate in the first instance. The writ filed by her was dismissed. The Supreme Court held that there can be relaxation in the matter of submission of proof and it will not be proper to apply any rigid principle as it pertains to the domain of procedure. Every infraction of the rule relating to submission of proof need not necessarily result in rejection of candidature. The relevant observations in paragraph no.7 of the law report are extracted below:

"7. The general rule is that while applying for any course of study or a post, a person must possess the eligibility qualification on the last date fixed for such purpose either in the admission brochure or in application form, as the case may be, unless there is an express provision to the contrary. There can be no relaxation in this regard i.e. in the matter of holding the requisite eligibility qualification by the date fixed. This has to be established by producing the necessary certificates, degrees or marksheets. Similarly, in order to avail of the benefit of reservation or weightage, etc. necessary certificates have to be produced. These are documents in the nature of proof of holding of particular qualification or percentage of marks secured or entitlement to benefit of reservation. **Depending upon the facts of a case, there can be some relaxation in the matter of submission of proof and it will not be proper to apply any rigid principle as it pertains in the domain of procedure. Every infraction of the rule relating to submission of proof need not necessarily result in rejection of candidature."**

(emphasis supplied)

18. In **Food Corporation of India (supra)**, the Supreme Court followed the

judgement in **Charles K. Skaria and Dolly Chhanda** and considered the experience certificate of a candidate filed along with the writ petition, again drawing distinction between a fact and its proof. The relevant observations are as follows:

13. Now so far as the submission or behalf of the FCI that a candidate must and/or ought to have produced the experience certificate along with the application is concerned, at this stage, a decision of this Court in **Charles K. Skaria v. C. Mathew** and the subsequent decision of this Court in **Dolly Chhanda v. JEE** are required to be referred to. In **Charles K. Skaria**, this Court had an occasion to consider the distinction between the essential requirements and the proof/mode of proof. In the aforesaid case, this Court had an occasion to consider the distinction between a fact and its proof. In the aforesaid case before this Court, a candidate/student was entitled to extra 10% marks for holders of a diploma and the diploma must be obtained on or before the last date of the application, not later. In the aforesaid case, a candidate secured diploma before the final date of application, but did not produce the evidence of diploma along with the application. Therefore, he was not allowed extra 10% marks and therefore denied the admission. Dealing with such a situation, this Court observed and held that what was essential requirement was that a candidate must have obtained the diploma on or before the last date of application but not later, and that is the primary requirement and to submit the proof that the diploma is obtained on or before a particular date as per the essential requirement is secondary. This Court specifically observed and held that **"What is essential is the possession of a diploma before the given date; what is ancillary is**

the safe mode of proof of the qualification." This Court specifically observed and held that "To confuse between a fact and its proof is blurred perspicacity."

(emphasis supplied)

19. Now, coming to the judgement relied upon by learned counsel for the appellant in **Gaurav Sharma** (supra), it is noticeable that there was requirement of filing OBC certificate before a prescribed date. The Full Bench held that a candidate claiming benefit of OBC category has to establish twin conditions: (i) that he belongs to OBC category recognized by State and (ii) that he does not fall within creamy layer. These requirements were to be adjudged with reference to the date prescribed in the advertisement. The Full Bench took notice of the fact that OBC certificate (non-creamy layer) is issued with reference to financial condition of holder or his parents assessed over a period of three years and, therefore, it was liable to change over a period of time. Therefore, a caste certificate submitted after the prescribed last date was held to be inadmissible. The said judgement, in our considered opinion, would not apply to the facts of the instant case, where there is no dispute of the fact that the original writ petitioner possessed experience as staff nurse but was denied its benefit only on account of mistake on the part of the issuing authority in mentioning her experience to be on the post of staff mentor instead of staff nurse.

20. The judgment of Supreme Court in **Ram Kumar Gijroya vs. Delhi Subordinate Services Selection Board**¹¹, on which reliance was placed before the Full Bench in submitting that OBC certificate filed even later on could be

considered, was distinguished on the ground that therein the need of filing OBC Certificate was not a pre-condition for accepting the application form but was notified along with the declaration of result. To highlight the said aspect, even Para 8 of the judgment in **Ram Kumar Gijroya** (supra) was quoted, which is as follows: -

"8. Mr. R.C. Kaushik, the learned counsel appearing on behalf of the appellant contends that the Division Bench of the High Court erred in not giving the opportunity to the appellant to submit the O.B.C. certificate after the cut-off date of the application. The requirement of submitting the O.B.C. certificate before the cut-off date of the application was introduced by the respondent-DSSSB only while declaring the result on 15.12.2008, holding that the appellant was not eligible for selection of the post of Staff Nurse as the O.B.C. certificate was received after cut-off date. The learned counsel contends that the stand of respondent-DSSSB is arbitrary, illegal and unreasonable and is also contrary to the settled proposition of law and guidelines issued on reservation and concession for candidates belonging to the reserved categories. The learned counsel places reliance upon the judgment of the Delhi High Court in the case of **Tej Pal Singh v. Govt. of NCT of Delhi**, wherein it was categorically held by the High Court that the petitioners therein were entitled to submit such certificates even after the cut-off date fixed by the advertisement".

21. A two Judge Bench of the Supreme Court in **Karn Singh Yadav** (supra) referred the issue involved in **Ram Kumar Gijroya** (supra) to Bench of three judges. When **Karn Singh Yadav** case came up before the Larger Bench, the

Larger Bench in para-5 observed as follows:

"It must be stated here that an identical fact situation came up for consideration before this Court in **Ram Kumar Gijroya v. Delhi Subordinate Services Selection Board**, (2016) 4 SCC 754, wherein this Court ruled in favour of the concerned candidate. The instant matter is thus completely covered by said decision."

At the same time, noticing that the candidate was never appointed to the post in question and the matter related to the year 2007 and considerable time had lapsed, no relief was granted.

22. The judgment in **Karn Singh Yadav** (supra) was considered by the Supreme Court in **Divya vs. Union of India, Writ Petition (C) No. 724 of 2023**, decided on 09.10.2023. It is observed that the three Judge Bench in **Karn Singh Yadav** (supra) did not answer the question. Another judgment of three Judge Bench in **Ashok Kumar Sharma and others vs. Chander Shekhar and Another**¹², was preferred and relied upon. The judgment in **Ram Kumar Gijroya** (supra) was distinguished on the ground that in the said case, requirement of filing OBC Certificate before the cut-off date was notified by the Selection Body while declaring the result. The relevant observations are as follows: -

"54. The strong reliance placed on **Ram Kumar Gijroya** case (supra) also does not impress us. Not only was there no rule, like we have in the present case, **it was only while declaring the result, the requirement of submitting the OBC certificate before the cut-off date was introduced by the Selection Authority there.** Moreover, unlike the present, there

was no contention or issue raised in that case that eligibility enures or crystalizes only on the issuance of the certificate and on possession of the certificate, before the prescribed cut-off date."

(emphasis supplied)

It is noteworthy that in the said case, under the relevant Rules, it was mandatory for a candidate to possess EWS certificate before the prescribed cut-off date. There was a negative covenant by way of Rule 13 that the proof of documents filed beyond the last date of submitting the application form would not be admissible and shall lead to cancellation of the candidature. Having regard to the said negative covenant, it was held that for a candidate to be eligible, he/she should not only fall in EWS category but should possess said certificate by the relevant date. It is for the said reason that the judgment in *Charles K. Skaria* (supra) and other cases echoing the same view, were distinguished. It is evident from para-45 of the Law Report, which is extracted :-

That is the fundamental distinction between the **Charles K. Skaria** (supra) line of cases and the cases at hand. As pointed out earlier, the eligibility for being categorized as EWS candidate crystallizes only when the I&AC is issued and, in this case, as required under the rules, it was to be issued and possessed by the candidate before 22.02.2022.

23. The judgment in **Divya vs. Union of India** (supra) is clearly distinguishable on facts. In the instant case, there was no prescription of possessing experience certificate by the last date prescribed for submitting online application rather the advertisement itself provided that the date for submitting proof of claims would be notified by the Commission in due course. This was also the situation in **Ram Kumar**

Gijroya (supra) where the Commission notified the requirement of filing OBC Certificate at the time of declaring the result.

24. Other Full Bench judgement of this Court in **Rajendra Patel** (supra) is also not of much help to the appellants. Therein, there was a prescribed last date for filing the documents and a negative covenant to the effect that in case the prescribed deadline for completing various stages of recruitment is not complied with scrupulously, it would entail rejection of the candidature. In the aforesaid backdrop, the Full Bench observed as follows:

"Reliance was also sought to be placed on a judgment of the Supreme Court in *Dolly Chhanda Vs Chairman, JEE*, In *Dolly Chhanda* (supra), the Supreme Court has observed that the general rule is that while applying for any course of study or post, a person must possess the eligibility qualification on the last date fixed for such purpose either in the admission brochure or in the application form, as the case may be, unless there is an express provision to the contrary. The Supreme Court held that there could be no relaxation in the matter of holding the requisite eligibility qualification by the date fixed. However, depending upon the facts of the case, there can be some relaxation in the matter of submitting proof and it may not be proper to apply a rigid, principle which may pertain to the domain of procedure. Hence, every infraction of the rule relating to submission of proof need not necessarily result in the rejection of the candidature. These principles which have been laid down are not in dispute and they cannot be. However, the issue in the present case is whether the submission of a hard copy by the specified date together with all the

documents was merely a matter of procedure. To accept the submission of the petitioner would, as we have held earlier, result in a situation where a candidate would be entitled to assert that despite the stipulated last date and a prescribed consequence of invalidation which has been drawn to the notice of the candidates, the Commission would be bound to scrutinise applications which are received together with the hard copies beyond the prescribed date. This, in our view, would not be permissible. We may also note that in a judgment in Secretary, UP Public Service Commission Vs S Krishna Chaitanya, the Supreme Court has held that the Commission cannot be directed to declare the final results when the application form of a candidate had not been received within the prescribed period."

25. The cardinal principles which emerge from the above discussion are that-

(a) A candidate should possess the prescribed qualification before cut-off date or the last date prescribed for submission of the application form unless there is stipulation to the contrary.

(b) There is difference between the fact of possessing minimum prescribed qualification by a specified date and the proof thereof. While there can be no relaxation in the first requirement, in appropriate cases and having regard to the fact of particular case and the Recruitment Scheme, there can be some relaxation in submitting the proof.

(c) If there is stipulated last date and a prescribed consequence of invalidation, the same is sacrosanct and cannot be relaxed.

26. Reverting to the facts of the case, it is important to note certain stipulations in the original advertisement dated 16.07.2021. Note no. 2 provided that - "the

candidate must send hard copy of their online applications and enclose self-attested copies of all certificates in support of their claim rendered in the online application. In this connection, a separate press communique shall be published in due course by the Commission."

27. Clause no. 13(4) of the 'Important instructions to candidates' provided that- 'The candidates will have to enclose self-attested copies of mark sheets, certificates and degrees alongwith the application forms of examination in support of their claim of educational qualifications. If they do not enclose self-attested copies of certificates/documents in support of their claims, the application shall be rejected.'

28. Clause no. 13(10) stipulates that - 'The Commission may admit the candidate provisionally after summarily checking of the applications but if it is found at any stage that the applicant was not eligible or that his/her application should have been rejected or not entertainable initially, his/her candidature will be rejected and if the candidate is selected, the recommendation of the Commission for selection shall be withdrawn.'

29. The scheme of selection, as evident from the aforesaid stipulations in the advertisement is that initially the applications were entertained provisionally on basis of disclosures made in the application. Later, the Commission would notify, by a separate press communique, the date by which hard copy of the online applications and self-attested copies of all certificates and documents in support of the claim made in the online applications were to be submitted before the Commission by a

specified date. This is also admitted to the Commission in paragraphs 12 and 14 of the affidavit filed in the instant appeal.

30. Accordingly, the Commission after conducting the written examination, notified the list of candidates, who had obtained marks above the minimum efficiency standard. It was 25 marks for candidates of General category and 20 marks for SC & ST candidates. The petitioner, who had obtained marks above minimum efficiency standard was duly included in the list. The Commission issued a press communique in shape of a notification on 03.11.2021 requiring the candidates, who had obtained marks above cut-off marks, to fill online application form mentioning therein the details in respect of the date, sex, residence, category etc. and after filling up online application form, the candidate was required to save and submit hard copy of the application form along with relevant certificates in support of the claim made in the application form by 18.11.2021. Paragraph nos.1, 2 and 5 of the said notification are extracted below:

"उ०प्र० लोक सेवा आयोग, प्रयागराज द्वारा विज्ञापन संख्या - ए-4 / ई-1 / 2021 के अन्तर्गत दिनांक-03.10.2021 को आयोजित स्टाफ नर्स / सिस्टर ग्रेड-2 (पुरुष / महिला) परीक्षा- 2021 में सम्मिलित सामान्य, ई०डब्ल्यू०एस० व अन्य पिछड़ा वर्ग के ऐसे अभ्यर्थी जिन्होंने उक्त लिखित परीक्षा (कुल - 85 अंक में) 25 अंक व उससे अधिक एवं अनुसूचित जाति व अनुसूचित जनजाति श्रेणी के ऐसे अभ्यर्थी जिन्होंने 20 अंक व उससे अधिक अंक प्राप्त किए हैं, उन अभ्यर्थियों की सूची आयोग की वेबसाइट <https://uppsc.up.nic.in> पर उपलब्ध है।

2 - उक्त समस्त अभ्यर्थियों से आनलाइन दावे के समर्थन में समस्त शैक्षिक अंक पत्र व प्रमाण पत्र, अनुभव सम्बन्धी प्रमाण

पत्र, उ०प्र० के आरक्षित श्रेणी की दशा में निर्धारित प्रारूप पर प्रमाण पत्र तथा उ०प्र० की महिला अभ्यर्थी होने की दशा में पिता पक्ष की ओर से निवास प्रमाण पत्र सहित परम्परागत आवेदन पत्र आमंत्रित किये जाते हैं।

5 - आनलाइन भरे गये फार्म सेट (आवेदन-पत्र) को मुद्रित करके उसके साथ समस्त संलग्नकों (प्रत्येक वर्ष की अंक तालिकाओं, उपाधियों तथा अन्य सभी दावों से सम्बन्धित प्रमाण-पत्रों की स्वप्रमाणित प्रतियाँ एवं वरीयता प्रपत्र सहित एक लिफाफे में भरकर तथा उक्त लिफाफे पर मुद्रित पता पर्ची (Address Slip) चस्पा कर दिनांक 18 नवम्बर, 2021 को 5.00 अपराह्न तक अथवा उसके पूर्व सचिव, उ०प्र० लोक सेवा आयोग, (सेवा अनुभाग-6) 10-कस्तूरबा गांधी मार्ग, प्रयागराज, पिन कोड नं०-211018 को पंजीकृत डाक द्वारा अथवा व्यक्तिगत रूप से आयोग के गेट संख्या - 3 पर स्थित डाक अनुभाग के काउन्टर (पूछ-ताछ काउन्टर) पर अवश्य उपलब्ध करा दें। उक्त अन्तिम तिथि के बाद प्राप्त होने वाले आवेदन पत्र किसी भी दशा में स्वीकार नहीं किए जाएंगे।"

31. Thereafter, the said time limit was relaxed and was extended up to 22.11.2021 by notification dated 15.11.2021.

32. It is reiterated at the cost of repetition that the aforesaid notifications were issued after holding of the written examination. The petitioner, admittedly, obtained marks above the cut-off marks. The selection scheme was not such that appearance of candidates in the written examination was dependent upon proof of experience. On the contrary, Note no. 2 of the advertisement itself provided that separate press communique would be issued at appropriate stage of selection notifying the date for filing documents in support of the claims made in the application. Thus, the requirement of filing documents had

nothing do with eligibility, but with proof of claims made in the online application submitted after declaration of the result of the written- examination. The two press communiques issued were in realm of procedure and since there was nothing sacrosanct in it, the Commission itself extended the time fixed for submitting documents. Undoubtedly, the benefit of experience which was claimed was for the period anterior to the last date prescribed for submitting the online applications i.e., 16.08.2021.

33. In pursuance of notification dated 22.11.2021 and 15.11.2021, the petitioner submitted hard copy of online application forms, testimonials and certificates. In support of experience as 'staff nurse', she submitted experience certificate dated 09.11.2021, issued by Chief Medical Officer. It was in prescribed proforma – Appendix 6. It was as follows: -

परिशिष्ट –6

“उ० प्र० अधीनस्थ नर्सिंग (अराजपत्रित) सेवा (चतुर्थ संशोधन) नियमावली, 2016 के नियम 15(3) (ख) के परिपेक्ष्य में स्टाफ नर्स के रूप में संविदा के आधार पर कार्यरत अभ्यर्थियों के लिए आवश्यक प्रमाण – पत्र का प्रारूप :
प्रमाणित किया जाता है कि श्री/कु०/श्रीमती रेनु पुत्र/पुत्री/पत्नी – लक्ष्मण जन्म तिथि 19.09.1989 स्थायी निवासी – काशीराम एच –90 द्वारकाधीस मन्दिर मुरादाबाद। चिकित्सा एवं स्वास्थ्य सेवाएं विभाग, उ० प्र० में संविदा के आधार पर दिनांक- 01.04.2015 से नर्स मेन्टर वेतन रु.23000/- के पद पर कार्यरत है।

स्थान – रामपुर
दिनांक –09.11.2021

ह०/ नियुक्ति प्राधिकारी
मुहर
Chief Medical Officer
Rampur”

34. The 'heading' of the certificate reveals that it was in respect of experience of a person as 'Staff Nurse'. However, in the end, it came to be mentioned that the Original Writ Petitioner worked as 'Staff Mentor' instead of 'Staff Mentor'. It is not in dispute between the parties that the petitioner had worked as a 'Staff Nurse' only, on contractual basis, and not as 'Staff Nurse'. However, it seems that it escaped notice of the Commission as well as the petitioner. It was only when re-scrutiny was done, that the mistake was discovered. As soon as the mistake came to the notice of the petitioner, she applied for its correction and submitted corrected certificate dated 24.08.2022 alongwith another certificate of the issuing authority dated 30.08.2022 admitting its mistake. Concededly, the certificate initially filed by the petitioner was well within time stipulated by the respondents vide the aforesaid two notifications.

35. Another noteworthy feature is that the selection in question was for filling up the posts of staff nurses, which are posts of utmost importance in any medical set up or hospital. They play crucial role as caregiver for patients by managing their physical needs, administering medications, maintaining medical records, etc. In fact, no hospital can run successfully without adequate nursing staff at its disposal. It is not disputed that even after the present selection, as many as 1729 posts could not be filled up because eligible candidates were not available. Undoubtedly, the petitioner had passed the written examination and she also possess the experience as staff nurse.

36. In the aforesaid backdrop, we are of considered opinion that it would not be proper to non-suit the petitioner on account

sought salary arrears for 2016–2019 and post-retirement benefits, including pension, after wrongful termination attempts by the committee of management were quashed – Held, as the petitioner's termination was deemed illegal and his regularisation was upheld, he was entitled to salary for the period 2016–2019 when interim orders prevented his service, and to post-retirement benefits, including pension, consistent with his continuous service, as per *Jahaj Pal Vs District Inspector of Schools*. (Paras 5, 6, 16, 17, 38)

E. Judicial Review – Erroneous Rejection of Regularisation

– The Regional Selection Committee rejected the petitioner's regularisation claim, citing the absence of a substantive vacancy in 1993 when Section 33-B was enacted – Held, the Committee's reasoning was flawed, as the vacancy became substantive in 1990 due to deemed abandonment under Fundamental Rule 18 – The order dated 02.05.2022 was set aside for misapplication of law, and the Committee was directed to regularise the petitioner under Section 33-B with all consequential benefits, as supported by *Kalyan Dombivali Municipal Corporation Vs Sanjay Gajanan Gharat*. (Paras 8, 15, 27, 37, 38)

Writ Petition Allowed .

Order Dated 02.05.2022 Quashed – Petitioner Entitled to Regularisation and Consequential Benefits.

List of Cases cited:

1. Jahaj Pal Vs District Inspector of Schools, Special Appeal No. 280 of 2013, decided on 21.02.2019
2. Jyoti Yadav Vs Deputy Director of Education (Secondary), 2016 SCC OnLine All 3532; 2016 (4) All LJ 27
3. Kalyan Dombivali Municipal Corporation Vs Sanjay Gajanan Gharat, 2022 SCC OnLine SC 385; AIR 2022 SC 1618
4. Sanjay Singh Vs St. of U.P., Civil Appeal No. 8300 of 2016, decided on 26.08.2020

5. Philips India Ltd. Vs Labour Court, Madras, (1985) 3 SCC 103

6. Sultana Begum Vs Prem Chand Jain, (1997) 1 SCC 373

7. Punjab Beverages Pvt. Ltd. Vs Suresh Chand, (1978) 2 SCC 144

8. Poppatlal Shah Vs St. of Madras, AIR 1953 SC 274

9. Attorney General Vs Bastow, (1957) 1 All ER 497

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

1. Heard Sri Ashok Khare, learned Senior Advocate assisted by Sri Parashar Pandey, learned counsel for the petitioner and learned Additional Chief Standing Counsel for the State-respondents.

2. Petitioner who has finally retired as Lecturer from the institution of 5th respondent on 31.03.2022, has approached this Court questioning the decision of the Regional Selection Committee dated 02.05.2022 whereby his claim for regularisation as Lecturer has been rejected and so resultantly he stands denied of post retirement dues including pension.

3. Briefly stated facts of the case are that on account of one Suraj Prakash Agrawal, Lecturer (Chemistry) proceeding on long leave, the committee of management proceeded to fill up such short term vacancy by appointing petitioner as ad-hoc Lecturer on 29.10.1985. The appointment of the petitioner though came to be approved by the District Inspector of Schools (DIOS) but he was not paid any salary. Resultantly, petitioner filed a writ petition before this Court being Writ-A No.20807 of 1986 and the High Court while entertaining the petition issued a

direction on 17.12.1986 to the effect that until services of the petitioner were terminated or some other candidate came and joined on recommendation of the Selection Board, petitioner shall be continued and he shall be entitled to emoluments (salary).

4. Ever since his appointment, petitioner continued to teach in the institution regularly and received salary as the sitting Lecturer Suraj Prakash Agrawal who had lien against the post, did not turn up to resume his duties. Section (1-A) came to be inserted after Section 33-A(1) of the UP Secondary Education Service Selection Board Act, 1982 (for short, 'the Act, 1982') w.e.f. 06.04.1991 taking aid of which, the services of petitioner came to be regularised and the order to this effect was passed by the DIOS on 19.05.1992. Since the services of the petitioner were regularised, the writ petition earlier filed by the petitioner being Writ Petition (A) No.20807 of 1986 was dismissed as infructuous on 11.09.2006. Petitioner was accorded with selection grade upon 12 years of continuous service after regularisation, by the order of DIOS vide order dated 22.11.2008, however, suddenly the committee of management adopted a resolution on the back of the petitioner on 22.11.2016 terminating the services of the petitioner. Petitioner represented before the DIOS against the resolution adopted by the committee of management on the ground that until prior approval of the UP Secondary Education Service Selection Board (for short, "Selection Board"), no such order could have been passed. The DIOS allowed the representation of the petitioner on 25.11.2016 holding that without approval of the Board, resolution adopted by the committee of management will be taken to be null and void.

5. The committee of management challenged the decision of the DIOS dated 25.11.2016 vide writ petition being Writ-A No.57215 of 2016 and got an interim stay order. It is also pertinent to mention here that, when the question of appointment of ad-hoc/officiating principal arose on account of post falling vacant on 30.06.2014, both the petitioner and one Ganesh Chandra Goel put up their repetitive claims on the basis of seniority to be appointed and claim of petitioner having been rejected, he filed a writ petition before this Court vide Writ-A No.52277 of 2014. While this writ petition remained pending, the DIOS passed an order accepting the claim of petitioner for being appointed as officiating principal on 28.09.2016, which came to be challenged by Ganesh Chandra Goel vide writ petition being Writ-A No.48836 of 2016. One more writ petition was filed by the petitioner as Writ Petition No.60494 of 2016 which was directed against the resolution of the committee of management dated 20.11.2016 and the consequential order dated 22.11.2016, though the same got subsequently disapproved by the DIOS on 25.11.2016.

6. All these four writ petitions came to be adjudicated by a common judgment delivered on 02.04.2019. Under this judgment, the writ petition of petitioner against Ganesh Chandra Goel as to seniority being Writ- A No.52277 of 2014 was dismissed and writ petition of Ganesh Chandra Goel, Writ-A No.48836 of 2016 was consequently allowed. The writ petition of the committee of management being No.57215 of 2016 to the above extent was also allowed. However, its writ petition directed against the order of DIOS holding resolution and the consequential action of the committee of management taken by the manager dated 20.11.2016 and

22.11.2016 respectively, was dismissed holding both the resolutions and the consequential action as unsustainable and consequently writ petition of the petitioner against the resolution and the consequential action being Writ Petition No.60494 of 2016 was allowed. The regularisation of the petitioner under sub-section (1-A) of Section 33(1) was also held to be unsustainable and accordingly, matter was remitted for the purposes of consideration of claim of petitioner for regularisation afresh.

7. Against this order, petitioner as well as committee of management both preferred intra-court appeals, total five in number, being Special Appeal Nos.743 of 2019, 744 of 2019, 745 of 2019, 595 of 2019 and 599 of 2019; respectively. The Division Bench considered the claim of petitioner for regularisation more to be maintainable under Section 33-B of the Act, 1982 and in light of judgment of the Full Bench in case of **Jahaj Pal v. District Inspector of Schools & anr (Special Appeal No.280 of 2013)**, decided on 21.02.2019, petitioner's continuance was held to be valid one even after short-term vacancy getting converted into a substantive vacancy. Accordingly, all the appeals were dismissed subject to the modification that regularisation shall be considered in view of Section 33-B of the Act, 1982.

8. The Regional Selection Committee proceeded to examine the matter of petitioner for the purposes of regularisation afresh but rejected the claim chiefly on the ground that the post fell vacant substantively on 30.06.2006 and, therefore, claim of petitioner would not stand covered under Section 33-B which came to be enforced w.e.f. 07.08.1993 and on that date there was no substantive vacancy of Lecturer in place.

9. Learned Senior Counsel, Mr. Khare raised following two grounds of attack:

(i) lecturer Suraj Prakash Agrawal having proceeded on leave in the year 1985 and having not turned up again shall be deemed to have abandoned his employment with the institution upon expiry of period of five years, the maximum period for which extraordinary leave could have been granted and, therefore, vacancy should be taken to have substantively fallen vacant in the year 1991 much ahead of Section 33-B being incorporated under the Act 1982 being only w.e.f. 07.08.1993; and

(ii) taking into consideration the object with which various sections 33-A, 33-B, 33-B, 33-D, 33-E, 33-F and 33-G had come to be incorporated by the State continuously paving way for regularisation of the services of the ad-hoc teachers w.e.f. 1991 till 25.01.1999 when the powers of the committee of management to make ad-hoc appointments were finally taken away, it would lead to draw an inevitable conclusion that whoever was appointed and had been teaching on ad-hoc basis continuously as on 22.03.2016, would be regularised.

10. In support of his first argument, learned Senior Counsel had relied upon Fundamental Rule 18 which provides that if a government servant remains absent continuously for a period of five years or more whether with leave or without leave, such government servant would automatically cease to be in service/employment.

11. Sri Khare had further submitted that for the purposes of leave rules etc. vide Regulation 99 of Chapter III of UP Intermediate Education Act, 1921, the rules

applicable to government servant had been made applicable to the teachers and employees of recognised schools and intermediate colleges under the Act, 1921 and so as per Fundamental Rule 18, Sri Agrawal would be taken to have abandoned his service for having not reported back to the institution for more than five years. In support of his contention, Sri Khare had further relied upon a division bench judgment of this Court in the case of ***Deputy Director of Education (Secondary) & anr v. Jyoti Yadav & anr; 2016 SCC OnLine All 3532; 2016 (4) All LJ 27***, in which the Court has very categorically held that continuous absence from duty for a period of five years and above would result in automatic cession of employment without reference to any departmental inquiry whatsoever.

12. Thus, according to Mr. Khare, since Mr. Agrawal did not turn up ever to join back to resume his duties in the institution, he ought to have been taken to have abandoned his employment in the year 1991 and the Management as well as the Regional Selection Committee was not justified in holding that vacancy fell vacant in the year 2006 when Mr. Agrawal in ordinary course of employment had retired.

13. In support of his second argument, learned Senior Advocate Sri Khare had placed reliance upon a judgment of Supreme Court in the case of ***Kalyan Dombivali Municipal Corporation v. Sanjay Gajanan Gharat & anr; 2022 SCC OnLine SC 385***; AIR 2022 SC 1618. Citing the judgment, Mr. Khare had placed emphasis upon paragraphs 31, 32 & 33 thereof to demonstrate as to how the principle of

construction had been evaluated as to the interpretation of different provisions contained in an enactment. He had also relied upon the judgment of Full Bench in ***Jahaj Pal's*** case (supra).

14. Sri Khare submitted that the entire act had to be read in its entirety and the relevant provisions contained therein under various sections could not be interpreted in a compartmentalised manner. He submitted that besides the principle that an Act had to be read in its entirety for the purposes of understanding its object with which the various provisions had been incorporated but the elementary rule was to have a purposive interpretation and for that it was necessary to read various provisions of the Act harmoniously. He had argued that no word or letter in an enactment could be rendered redundant as legislature had inserted it in the Act with conscious mind and taking it to be necessary in its wisdom. According to Mr. Khare, if the clauses under various sections running from 33-A to 33-G that provided for cut-off dates for regularisation purposes were taken together then one could safely arrive at a conclusion that every appointment made on ad-hoc basis against a substantive vacancy and short-term vacancy as per the powers that were available with the management or other authority, as the case may be, teachers working between 12.06.1985 and 25.01.1998 were directed to be regularised. These cases of regularisation were covered with different cut-off dates under different sections running from Section 33-A to 33-G and according to Mr. Khare, this was indicative of a fact and law that whoever was lawfully appointed against available vacancy on a short-term basis and was having the

requisite eligibility, was to be regularised, sometimes automatically and sometimes with reference to authorities including Regional Selection Committee.

15. Thus, Mr. Khare had strenuously argued that Regional Selection Committee both on the count of existence of substantive vacancy in the year 1991 and aims and object of the various sections providing for regularisation from time to time, manifestly erred in rejecting the claim of petitioner for regularisation.

16. Mr. Khare had also pressed the 3rd relief claimed in the writ petition for payment of arrears of salary in between 2016 and 2019 when his writ petitions remained pending and the interim order continued to operate against the order of DIOS in the writ petition filed by the committee of management. He submitted that he was wrongly terminated from employment and that order having been held to be bad both initially in the writ petition by Single Judge and then by the Division Bench in the appeal filed by the committee of management, petitioner upon reinstatement, was also entitled to full salary for such period.

17. Mr. Khare had further submitted that in the event writ petition succeeds against the rejection of regularization order, petitioner would be entitled to post retirement dues including pension in light of law laid down by this Court from time to time.

18. Learned Additional Chief Standing Counsel had sought to urge that in absence of any resignation letter or any order passed by the committee of management, an employee who has been a member of service, would be taken to have continued to enjoy lien against post and,

therefore, if he/she proceeded on leave, such leave vacancy would be taken to be a short term vacancy until such employee attained his age of superannuation. He submitted that there had to be no order declaring the vacancy as a substantive vacancy for making regular appointment. He had further sought to argue that every section added under the Act, 1982 was as per the need of the time and must be contextually interpreted to mean that State intended to regularise the services of ad-hoc employees working against short term vacancy or substantive vacancy at the relevant point of time. He had submitted that there were other reasons also assigned in the order impugned which went on to show that neither any procedure was adopted for making appointment, nor any material was available as to the merit of petitioner vis-a-vis other candidates with reference to any selection committee, if ever held. Thus, he sought to justify the order for the reasons assigned therein.

19. Having heard learned counsel for the respective parties and their arguments raised across the bar, I find following facts to be undisputed to the parties:

(i) Sri Suraj Prakash Agrawal was working as a Lecturer in the institution against substantive vacancy as on 1985 when he proceeded on leave.

(ii) Petitioner came to be appointed against the post thus fallen vacant on account of leave granted to Sri Suraj Prakash Agrawal, treating it to be a short term vacancy.

(iii) Sri Suraj Prakash Agrawal, the Lecturer who had proceeded on leave without pay, never turned up to join back to resume his duties.

(iv) The DIOS though approved the appointment of the petitioner but he

was not paid salary so he approached this Court by filing a writ petition being Writ-A No.20807 of 1986, in which, on 17.12.1986 an interim order was passed for continuance of petitioner and payment of salary. The services of the petitioner came to be regularised under Section 33-A(1-A) by the DIOS on 19.05.1992.

(v) Sri Suraj Prakash Agrawal in normal course of events would have retired only in the year 2006.

20. In view of the above, the question, therefore, arises whether petitioner could have been regularised in view of Section 33-B taking vacancy to have converted into substantive vacancy upon expiry of period of five years on the principle of deemed cession of contract of employment between Suraj Prakash Agrawal and the institution. Section 33-B(1)(a)(i) runs as under:

33-B(1) Any teacher, other than the Principal or Headmaster, who-

(a) (i) was appointed by promotion or by direct recruitment in the lecturer grade or Trained Graduate grade on or before May 14, 1991 or in the Certificate of Teaching grade on or before May 13, 1989 against a short term vacancy in accordance with paragraph 2 of the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981 and such vacancy was subsequently converted into a substantive vacancy

(emphasis added)

21. A bare reading of the aforesaid provisions makes it clear that whoever has been appointed by way of direct recruitment in the Lecturer's Grade on or before 14.05.1991 will be considered for regularisation if such a vacancy got converted into a substantive vacancy.

22. Admittedly, petitioner was appointed prior to 14th May, 1991 and, therefore, his case stood covered if the vacancy upon which he was appointed, is taken to have converted into substantive vacancy on account of Suraj Prakash Agrawal, who had lien against the post, having not turned up to join.

23. Now, it is to be seen in light of Division Bench judgment of this Court in the case of **Jyoti Yadav** (*supra*) as to what rules of leave are; how a leave can be condoned; when it can be granted and what rules are applicable. Regulation 99 of Chapter III of the UP Intermediate Education Act, 1921 very specifically provides that in matters of leave and grant of leave and related matters, the rules as applicable to the employees of the government intermediate colleges would apply. Regulation 99 runs as under:-

99. (1) आचार्य, प्रधानाध्यापक एवं अन्य कर्मचारियों को आकस्मिक अवकाश, अर्जित अवकाश, चिकित्सा अवकाश, प्रसूति अवकाश, व्यक्तिगत कार्य अवकाश तथा असाधारण अवकाश उत्तनी अवधि के लिए तथा उन प्रतिबंधों के अधीन स्वीकृत किया जा सकता है जो राज्य सरकार समय समय पर राजकीय उच्चतर माध्यमिक विद्यालयों के इन्ही श्रेणी के कर्मचारियों के लिए निश्चित करे या अपने किसी विशिष्ट आदेशों द्वारा किन्ही अपवादों सहित, जो किसी विशेष परिस्थिति वश अपेक्षित हों, निर्धारित करें। आकस्मिक अवकाश आचार्य अथवा प्रधानाध्यापक के मामले में प्रबंधक द्वारा तथा अन्य कर्मचारियों के मामले में आचार्य/प्रधानाध्यापक द्वारा

स्वीकृत किया जायेगा। अन्य अवकाश प्रबन्धक द्वारा (आचार्य / प्रधानाध्यापक द्वारा) प्रार्थना पत्र प्रस्तुत/अग्रासरित किये जाने पर स्वीकृत किये जायेंगे। चतुर्थ श्रेणी के कर्मचारी के सम्बन्ध में अन्य अवकाश भी आचार्य/प्रधानाध्यापक द्वारा स्वीकृत किये जायेंगे।

परंतु विशेष परिस्थिति में राज्य सरकार ऐसा अवकाश और ऐसी शर्तों पर जो वह उचित समझे, स्वीकृत कर भी सकती है।

(2) अवकाश अधिकार स्वरूप नहीं मांगा जा सकता, परिस्थिति की आवश्यकता को देखते हुए संमोदन अधिकारी किसी भी प्रकार का अवकाश स्वीकृत करने से इंकार कर सकता है और पहले स्वीकृत किये गये अवकाश को भी रद्द कर सकता है

टिप्पणी- यदि कोई आचार्य, प्रधानाध्यापक अथवा अध्यापक, राज्य विधान मंडल या संसद का सदस्य हो तो उसे विधान मंडल, संसद अथवा उसकी समितियों की बैठकों में भाग लेने हेतु उसके द्वारा ऐसी बैठक तथा उसमें भाग लेने हेतु जाने के अपने इरादे की सूचना दिये जाने पर, उसे संस्था से अवमुक्त कर दिया जायेगा और संस्था से उनकी ऐसी अनुपस्थिति की अवधि में उसे ऐसे अवकाश पर समझा जायेगा जैसा उसे देय हो तथा जिसके लिए वह आवेदन करें। यदि उसे कोई अवकाश देय न हो तो ऐसी अनुपस्थिति की अवधि में बिना वेतन के अवकाश पर समझा जायेगा।

(emphasis added)

24. It is not disputed by learned Standing Counsel that Fundamental Rule 18 as applicable to the government servants in various matters would apply to the government college teachers also as they are government employees and so these Rules would also be attracted in view of Regulation 99 to the teachers of secondary education recognised private aided institution.

25. Coming to the judgment of Division Bench of this Court in case of *Jyoti Yadav* (supra), I find that this case is related to an Assistant Teacher of a recognised private institution. Interpreting provisions as contained under Rule 18 of the Fundamental Rules and quoting the same as well, the Court vide paragraphs 10, 11 & 12 held thus:

"10. Fundamental Rule 18 runs as follows:

"18. Unless the Government in view of the special circumstances of the case, shall otherwise determine, after five years' continuous absence from duty elsewhere then on foreign service in India whether with or without leave, a government servant ceases to be in Government employee"

11. The aforementioned Fundamental Rule provides for abandonment of service/cessation of service after five years continuous absence from duty, whether with or without leave. Once five year continuous absence from duty is there, then leave or no leave will not make any difference, the abandonment of service/cessation of employment has to be accepted and prior to expiry of period of five years, if there is absence from duty, the same has to be accepted as misconduct and for the same disciplinary proceedings will have to be initiated by holding regular

departmental enquiry. Here the shortcut method that has been adhered to cannot at all be subscribed by law.

12. As the above extracts from the judgment would indicate the Division Bench has proceeded to hold that if the absence is continuous and for five years or more abandonment of service and consequent cessation of employment has to be accepted. The rule clearly seems to indicate that in case of absence of five years or more, the cessation of employment is automatic and the presumption of abandonment is immediately attracted. At this stage, as the Division Bench has held, the holding of an enquiry is not necessary. Fundamental Rule 18, in the submission of the learned counsel for the appellant, would clearly be attracted to the services of the original petitioner. If the appellant be correct in this submission then and in that case the requirement of a separate provision in the service rules for automatic termination would not arise. These aspects do not appear to have been considered or taken into account by the learned Single Judge while allowing the writ petition."

(emphasis added)

26. In view of the above, therefore, the legal proposition settled is that if an employee does not proceed on leave and does not turn up to join back the institution where he has been working, beyond a period of five years, this will invite preposition of 'deemed abandonment' of employment. The result of abandonment of job by an employee having lien against post, would end his or her lien and this will automatically result in converting/creating a vacancy as a substantive vacancy.

27. Upon above legal proposition, therefore, since Sri Suraj Prakash Agrawal

since did not turn up to join the post of Lecturer (Chemistry) upon which he was working on 1985 and he proceeded on leave, after expiry of five years, the post would be taken to have fallen vacant substantively by legal fiction in October, 1990 and therefore, upon incorporation of provisions contained under Section 33-B on 07.08.1993, the short-term vacancy against which petitioner in the case in hand was working since 1985, will be taken to have converted into substantive vacancy to entitle petitioner for regularisation. Thus, the contrary findings returned by the Regional Selection Committee that the post would be taken to have fallen vacant in 2006 only upon retirement of Suraj Prakash Agrawal, is absolutely unsustainable and the order deserves to be set aside on this count alone.

28. Coming to further argument about harmonious construction of various provisions incorporated under the Act, 1982 right since 1991 till the year 2016 in light of object of the State Government to regularise the services of all such employees who have been working on ad-hoc basis upon being appointed against short-term vacancy from time to time and even on substantive vacancy in accordance with law, I would like here to refer to a judgement of Five-Judge Bench of this Court in the case of **Jahaj Pal** (supra) where the Full Bench has observed that Section 33-G was a residuary provision to make regularisation of all such employees teachers who were appointed till 25.01.1999 or even subsequently if proceedings for selection had started prior to 25.01.1999.

29. Para 102 of the **Jahaj Pal's** case (supra) is quoted as under;

"102. Section 33-G in fact is a kind of residuary provision taking into consideration ad hoc appointees against short term vacancies or substantive vacancies which remained to be covered for substantive appointments under various provisions already made. Section 33-G(l)(a) says that ad hoc appointments made against short term vacancies, in accordance with procedure prescribed in Para 2 of Second Order, whether by promotion or by direct recruitment, in Lecturer or Trained Graduate Grade, and the vacancies were subsequently converted into substantive, would be considered for substantive appointment by a Selection Committee to be constituted under aforesaid provision. Section 33-G(l)(b) provided similar benefit to ad hoc appointments made against substantive vacancies in accordance with section 18 in Lecturer or Trained Graduate Grade from 7.8.1993 to 30.12.2000. All other conditions were similar as provided in earlier similar provisions, which we have already discussed."

30. Now if one examines various sections running from Section 33-A to 33-G, one would find that since prior to 1985 upto 25.01.1999 all such ad-hoc appointments were sought to be regularised. These provisions are to the rescue of those teachers who were appointed in accordance with law against the existing vacancies for the reason that selection Board was not in a position to hold selection to enable government to make appointment regularly so as to meet the requirement. Education is heart and soul of any civilized society and it is also a function of the State to ensure that its citizens are provided with adequate means of education. Ours is a social welfare State and so State Government had rightly come

to the rescue of such teachers who had been validly appointed having eligibility against existing vacancies and had continued to teach for a very long period. The intendment of legislature has been not to fire them upon vacancies getting converted into substantive vacancies from short-term vacancy. In Jahaj Pal's case (supra), the Full Bench has dealt with this aspect of the matter in detail and hold appointees against short-term vacancy were entitled to continue even upon short-term vacancies getting converted into substantive vacancies later on. Vide paragraph 207(XV), the Full Bench has held thus:

XV. The teachers, who come within the ambit of section 33-B, whether appointed on ad-hoc basis against substantive vacancies or short term vacancies on and after 7.8.1993 (the date when Amendment Act 1 of 1993 came into force) would be entitled to continue till they are not considered by the Selection Committee for substantive appointment. In their cases, the term of ad-hoc appointment would not be governed either by the First Order or the Second Order, and with effect from 7.8.1993, it would be governed by sub-section (5) of section 33-B. In other words, on and after 7.8.1993, a teacher appointed on ad-hoc basis, whether against short term vacancy or substantive vacancy, falling within the ambit of section 33-B(l) will continue to work till such date, as the State Government may by order specify, and, his tenure will not be governed either by Para 3 of the First Order or Para 3 of the Second Order, as the case may be.

31. Interestingly, the Government did not specify any date to end such appointment what it did was to end appointments made under Section 16-E(ii) in light of judgement of Supreme Court in

the case of *Sanjay Singh v. State of UP & ors passed in Civil Appeal No.8300 of 2016, decided on 26.08.2020* and in the process directed that all such ad-hoc appointees, who were not validly appointed and who could therefore, not be regularised shall cease to continue. In my considered view, this is not a specification of date in cases covered under the judgment in *Jahaj Pal's case* (supra). All these appointees did continue but they remain ad-hoc because their cases were never examined for regularisation either on the relevant date when concerned sections were incorporated, or even subsequently. So, there cannot be any presumption that there appointments were invalid.

32. Mr. Khare was right in arguing that looking to the intendment of legislature, if the harmonious construction is given to various provisions contained under Section 33-A to 33-G, one would find that purpose for which the various sections were inserted from time to time would be achieved. In *Kalyan Dombivali* (supra) vide paragraphs 31 to 33, the Court held thus:

31. In the case of *Philips India Ltd. v. Labour Court, Madras and Others* (1985) 3 SCC 103, this Court had an occasion to decide the rate of overtime wages as mentioned in Section 31 of the *Tamil Nadu Shops and Establishments Act, 1947*. This Court found that for finding the minimum rate of overtime wages as mentioned in Section 31 of the said Act, it will have to be interpreted in the light of the provisions contained in Section 14(1) read with proviso to Section 31 of the said Act. Coming to this conclusion, this Court observed thus:

"15. No canon of statutory construction is more firmly established

than that the statute must be read as a whole. This is a general rule of construction applicable to all statutes alike which is spoken of as construction *ex visceribus actus*. This rule of statutory construction is so firmly established that it is variously styled as "elementary rule" (see *Attorney General v. Bastow* [(1957) 1 All ER 497]) and as a "settled rule" (see *Poppatlal Shah v. State of Madras* [AIR 1953 SC 274 : 1953 SCR 667]). The only recognised exception to this well-laid principle is that it cannot be called in aid to alter the meaning of what is of itself clear and explicit. Lord Coke laid down that: "it is the most natural and genuine exposition of a statute, to construe one part of a statute by another part of the same statute, for that best expresseth meaning of the makers" (Quoted with approval in *Punjab Beverages Pvt. Ltd. v. Suresh Chand* [(1978) 2 SCC 144 : 1978 SCC (L&S) 165 : (1978) 3 SCR 370])."

32. It could thus be seen that this Court has held that the Statute must be read as a whole. It has been held that this rule of statutory construction is so firmly established that it is variously styled as "elementary rule". It has been held that for finding out the true meaning of one part of a statute, a reference will have to be made to another part of the statute and that will best express meaning of the makers.

33. In the case of *Sultana Begum v. Prem Chand Jain* (1997) 1 SCC 373, this Court was considering the question regarding the conflict between Section 47 of the Code of Civil Procedure, 1908 and Order XXI Rule 2 thereof. This Court held that applying the rule of harmonious construction, the so-called conflict between the said two provisions had been dispelled. Observing so, this Court reiterated the following well settled principles of interpretation of statutes:"

15. On a conspectus of the case law indicated above, the following principles are clearly discernible:

(1) It is the duty of the courts to avoid a head on clash between two sections of the Act and to construe the provisions which appear to be in conflict with each other in such a manner as to harmonise them.

(2) The provisions of one section of a statute cannot be used to defeat the other provisions unless the court, in spite of its efforts, finds it impossible to effect reconciliation between them.

(3) It has to be borne in mind by all the courts all the time that when there are two conflicting provisions in an Act, which cannot be reconciled with each other, they should be so interpreted that, if possible, effect should be given to both. This is the essence of the rule of "harmonious construction".

(4) The courts have also to keep in mind that an interpretation which reduces one of the provisions as a "dead letter" or "useless lumber" is not harmonious construction.

(5) To harmonise is not to destroy any statutory provision or to render it otiose."

(emphasis added)

33. The rule of harmonious construction of various provisions contained under Sections 33-A to 33-G leads me to conclude that no Assistant Teacher who has been working upon being validly appointed against a short-term vacancy would be thrown out of job upon vacancy getting converted into substantive on the ground that his claim could not be considered at relevant time and now time has run out. Each and every appointment has to be examined vis-a-vis

vacancy upon which it had been made at relevant point of time and status of vacancy subsequently and so long as sections for regularisation from 33-A to 33-G are not repealed and remain on statute book, all such cases of regularisation would be given positive consideration, as last of such appointments made as on 25.01.1999 are sought to be regularised and thereafter no such power vested in the appointing authority to make ad-hoc appointments.

34. The Full Bench did not proceed further to make any observation to explain scope of various sections incorporated for regularisation 33-B, 33-E, 33-F and 33-G. The question, therefore, arises as to whether an Assistant Teacher can be rendered remediless who has continued in a short-term vacancy even after getting converted into a substantive vacancy.

35. When the legislature intended not to throw a teacher from his job who has been working against short-term vacancy, merely because State authorities have not attempted to rescue a teacher from getting fired only upon not being considered in accordance with Rules and the provisions contained under the law, such teacher cannot be denied benefit of regularisation.

36. A teacher who has spent more than three decades of service in an educational institution cannot be denied fruits of post retirement dues once he has rendered service against a vacancy which was very much in existence as a substantive vacancy and there is no finding that appointment of petitioner even while it was a short-term vacancy to be illegal or that such a teacher was not eligible to hold the post in question. Petitioner has continued lawfully until he attained age of superannuation.

37. In view of the above, writ petition succeeds and is allowed. The order passed by Regional Selection Committee dated 02.05.2022 rejecting claim of regularisation of petitioner as Lecturer is set aside.

38. Petitioner is held entitled to regularisation under Section 33-B and Regional Selection Committee is directed to pass appropriate orders. Petitioner is also held entitled to all consequential benefits including salary for the period between 2016 and 2019 and post retirement benefits in accordance with law.

39. There will be no order as to cost.

(2024) 4 ILRA 226
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.03.2024

BEFORE
THE HON'BLE NEERAJ TIWARI, J.

Writ A No. 1448 of 2024

Dharmendra Kumar & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
 Sri Pranesh Kumar Mishra

Counsel for the Respondents:
 C.S.C., Sri Kartikeya Saran

A. Service Law – U.P. Government Servant (Discipline and Appeal) Rules, 1999 – Rule 4 – Regulation of 2020 – Reg. 4(1) – Suspension – Order was passed without contemplation of enquiry – Effect – Held, once there is no contemplation of inquiry, no suspension order can be passed – In the orders in question inquiry is neither contemplated nor pending, therefore, impugned suspension orders are in the teeth of Regulation 4(1) of the

Regulations, 2020 as well as law laid down by this Court in *Smt. Meera Tiwari & Munshi Lal*. (Para 10 and 13)

Writ petition allowed. (E-1)

List of cases cited :-

1. Atiullah Khan Vs St. of U.P. & ors.; 2013 SCC OnLine All 5652

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

1. Heard learned counsel for the petitioners, learned Standing Counsel for respondent no. 1 and Sri Kartikeya Saran, learned counsel for respondent nos. 2 & 3.

2. Present petition has been filed with the following prayer:

"I. Issue a writ, order or direction in the nature of certiorari quashing the impugned Official Memorandum dated 18.01.2024 bearing letter No. 308, Official Memorandum dated 18.01.2024 bearing letter dated 310 and Official Memorandum dated 16.01.2024 bearing letter No. 309 issued by the Respondent No. 2 by which the Petitioner No. 1, 2 and 3 has been suspended respectively."

3. The case was heard on 22.02.2024 and the Court has passed the following order:

"1. Heard learned counsel for the petitioner, learned standing counsel for respondent no. 1 and Sri Vinayak Ranjan, advocate holding brief of Sri Kartikeya Saran, learned counsel for respondent nos. 2 & 3.

2. Learned counsel for the petitioner submitted that suspension order against the petitioner has been passed without completion of inquiry, which is in the teeth of Rule 4 of Uttar Pradesh

Government Servant (Discipline and Appeal) Rules, 1999 as well as judgment of this Court in the matter of Atiullah Khan Vs. State of U.P. and Others: 2013 SCC OnLine All 5652.

3. Sri Vinayak Ranjan, advocate holding brief of Sri Kartikeya Saran, learned counsel for respondent nos. 2 & 3 prays for and is granted a week's time to seek written instruction about the initiation of inquiry and service of charge sheet upon the petitioner.

4. Put up this case as fresh on 29.02.2024."

4. Learned counsel for the respondents did not produce the instruction on the next date fixed i.e. 29.02.2024 and the Court has passed the following order:

"1. Sri Vinayak Ranjan, Advocate, holding brief of Sri Kartikeya Saran, learned counsel for the respondents prays for and is granted three days' time to seek instruction as directed by this Court vide order 22.02.2024.

2. Put up as fresh on 05.03.2024.
"

5. Ultimately on 13.03.2024 Court has passed the following order:

"1. Heard learned counsel for the petitioner, learned standing counsel for respondent no. 1 and Sri Vinayak Ranjan, advocate holding brief of Sri Kartikeya Saran, learned counsel for respondent nos. 2 & 3.

2. Sri Ranjan prays for and is granted three days and no more time to seek instruction in light of orders dated 22.02.2024 & 29.02.2024.

3. Put up this case as fresh on 18.03.2024 at 10:00 AM. "

6. Today, Sri Kartikeya Saran, learned counsel for respondent nos. 2 & 3 has not produced the instructions, but provided copies of charge sheet dated 16.03.2024 against the petitioners and submitted that the same have also been served upon the petitioners. He could not demonstrate the fact that suspension orders have been passed in contemplation of any inquiry or during the course of inquiry.

7. I have perused Regulation 4(1) of the Regulations, 2020, which is being quoted hereinbelow:

"4-(एक) कोई कार्मिक जिसके आचरण के विरुद्ध कोई जाँच अनुध्यात है या उसकी कार्यवाही चल रही है, नियुक्ति प्राधिकारी अथवा उसके द्वारा सशक्त अधिकारी के विवेक पर जाँच की समाप्ति के लंबित रहने तक, निलंबन के अधीन रखा जा सकेगा,"

8. From the perusal of Regulation 4(1) of the Regulations, 2020 it is apparently clear that any suspension order can only be passed either in contemplation of inquiry or during the course of inquiry.

9. I have also also perused judgment of Division Bench of this Court in the matter of **Smt. Meera Tiwari(Supra)** and judgment of this Court in **Munshi Lal(Supra)**.

10. In the matter of **Smt. Meera Tiwari(Supra)**, Division Bench of this Court has taken a specific view that once there is no contemplation of inquiry, no suspension order can be passed. Relevant paragraphs of the aforesaid judgment are being quoted hereinbelow:

"Heard Sri A.N. Tripathi, learned Advocate for the appellant and Sri Ranvijai Singh, learned Standing Counsel for the respondents.

2. The Special Appeal is directed against the order dated 4-4-2001 passed by the learned single Judge dismissing the writ petition.

3. The challenge in the writ petition was against the order of suspension. The contention of the appellant is that the learned single Judge did not properly appreciate the question that suspension is not permissible unless enquiry is contemplated or enquiry is pending. Learned counsel for the appellant referred to us sub-rule (1) of Rule 4 of the U.P. Government Servant (Discipline and Appeal) Rules, 1999 which is set out herein below:

"4. Suspension (1) A Government servant against whose conduct an inquiry is contemplated, or is proceeding may be placed under suspension pending the conclusion of the inquiry in the discretion of the appointing authority.

Provided that suspension should be resorted to unless the allegations against the Government servant are so serious that in the event of their being established may ordinarily warrant major penalty;

Provided further that concerned Head of the Department by the Governor by an order in this behalf may place a Government Servant or class of Government Servants belonging to Group A and B posts under suspension under this rule.:

Provided also that in the case of any Government Servant or class of Government Servant belonging to Group 'C' and 'D' posts, the Appointing Authority

may delegate its power under this rule to the next lower authority."

4. From the said rule it appears that a Government Servant against whose conduct an inquiry is contemplated, or its proceeding may be placed under suspension pending the conclusion of the enquiry. The impugned order of suspension does not refer to any contemplated inquiry or the fact that any inquiry is pending.

5. In that view of the matter, we are of the view that the order of suspension is against the provisions of Rule 4 of the U.P. Government Servant (Discipline and Appeal) Rules, 1999 and the same cannot be sustained. The learned single Judge has directed the inquiry to be completed within three months, it was not within the scope of the learned single Judge to direct any inquiry to be made on his own. We are of the view that since the order of suspension is contrary to Rule 4 of the said Rules, the same should be quashed and set aside.

6. The Special Appeal is allowed and the order of suspension is hereby quashed.

7. Appeal allowed.?

*11. This Court again in the matter of **Munshi Lal(Supra)**, following the judgment of Division Bench of this Court in the matter of **Smt. Meera Tiwari(Supra)** has taken the same view. Relevant paragraphs of the aforesaid judgment are being quoted hereinbelow:*

"7. As the present case is squarely covered with the judgment of Division Bench of this Court in Smt. Meera Tiwari(Supra) and very same view has also been taken by this Court in Atiullah Khan(Supra), therefore, under such facts of the case of the case, impugned suspension order dated 19.01.2024 is hereby quashed.

8. *Writ petition is allowed in light of judgment of this Court in Smt. Meera Tiwari(Supra) as well as Atiullah Khan(Supra).*

9. *However, this order shall not preclude the respondents to pass fresh order or to complete the inquiry against the petitioner in accordance with law. "*

12. From the perusal of Rregulation 4(1) of the Regulations, 2020 as well as law laid down by this Court in ***Smt. Meera Tiwari(Supra) & Munshi Lal(Supra)***, this Court is also of the view that suspension order can only be passed in contemplation of inquiry or during the pendency of inquiry and if in the suspension order, there is no such averment, the same is bad and liable to be set aside.

13. So far as present case is concerned, it is apparently clear that in the orders in question inquiry is neither contemplated nor pending, therefore, impugned suspension orders are in the teeth of Rregulation 4(1) of the Regulations, 2020 as well as law laid down by this Court in ***Smt. Meera Tiwari(Supra) & Munshi Lal(Supra)***.

14. Accordingly, impugned Official Memorandum dated 18.01.2024 bearing letter No. 308, Official Memorandum dated 18.01.2024 bearing letter dated 310 and Official Memorandum dated 16.01.2024 bearing letter No. 309 are hereby quashed.

15. Writ petition is **allowed**.

16. No order as to costs.

17. However, this order shall not preclude the respondents to pass fresh order or complete the departmental

proceeding against the petitioners in accordance with law.

(2024) 4 ILRA 229

**ORIGINAL JURISDICTION
CIVIL SIDE**

DATED: LUCKNOW 20.03.2024

BEFORE

THE HON'BLE MANISH KUMAR, J.

Writ A No. 1453 of 2024

**Shiv Pratap Maurya & Ors. ...Petitioners
Versus
State of U.P. ...Respondent**

Counsel for the Petitioners:

Vidhu Bhushan Kalia, Adarsh Saxena, Vidhu Bhushan Kalia

Counsel for the Respondent:

C.S.C., Mahesh Chandra Chaturvedi, Mohd. Zafar Khan, Nandita Bharti, Puneet Chandra, Ravi Shanker Tiwari

A. Service Law – National Rural Health Mission (NRHM) – Multi Purpose Health Workers (Male) – Contractual Appointment – Guidelines for Multipurpose Health Worker (Male), 2010 – Clause 3.1 and 3.3 – Constitutional Law – Article 23 and Article 21 – Petitioners appointed as MPHWS (Male) under NRHM scheme for three years – Challenged termination orders limiting services to 31.03.2014 – Held, petitioners entitled to continue for three years from their appointment dates (2012-2015 or 2013-2016) as per Guidelines, 2010 – St. Government failed to create regular posts for continuity as mandated – Work taken beyond three years till March 2018 without payment violates Article 23 (prohibition of begar) and Article 21 (right to livelihood) – Government of India and St. to pay salaries for three-year period as per sharing ratio; St. to pay for work beyond three years till actual work period – *Ram Chet Verma Vs St. of U.P.* relied upon. (Para 26-28, 31-32)

Writ petitions allowed.

List of Cases cited:

1. Ram Chet Verma & ors. Vs St. of U.P. & ors.; (2020) 3 SCT 640 (SC)

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

1. Heard Shri Sandeep Dixit, learned Senior Advocate assisted by Shri Vidhu Bhushan Kalia, learned counsel for the petitioners, Sri S.B. Pandey, learned Senior Advocate assisted by Shri Mahendra Kumar Mishra, learned Counsel for the Union of India, Shri Kuldeep Pati Tripathi, learned Additional Advocate General assisted by learned Standing Counsel and Shri Puneet Chandra, learned counsel for the National Health Mission.

2. Since in all the petitions same issue & controversy is involved, so they have been heard together and decided by this common judgment.

3. All the writ petitions are having almost the identical prayers and it would be difficult to mention the prayers of all the petitions but for convenience, the prayer made in the leading petition No. 1453 of 2014 (Shiv Pratap Maurya and 667 others Vs. State of U.P. and others) are being quoted hereinbelow:-

" i) to issue a suitable writ, order or direction in the nature of Certiorari quashing the impugned orders dated 22.11.2013, 11.12.2013 and 26.02.2014 issued by the respondent no. 3, 7 and 4 respectively, so far as the same provides approval of services of the petitioners till 31.03.2014 and also to the extent the same provides salary/honorarium to Multipurpose Workers only upto 31.03.2014 (as are contained in Annexure No. 1, Annexure No.

2 and Annexure no. 3 respectively to this writ petition) and other consequential orders if any.

ii) to issue a suitable writ, order or direction in the nature of Mandamus commanding the respondents not to give effect to the impugned orders dated 22.11.2013, 11.12.2013 and 26.02.2014 issued by the Respondent no.-3, 7 and 4 respectively, so far as the same provides approval of services of the petitioners till 31.03.2014 and also to the extent the same provides salary/honorarium to Multipurpose Workers only upto 31.03.2014 (as are contained in Annexure No. 1, Annexure no. 2 and Annexure No. 3 respectively to this writ petition) and other consequential orders if any.

iii) to issue a suitable writ, order or direction in the nature of Mandamus commanding the respondents to allow the petitioners to continue on the post of MPWs/MPHW till the continuation of the National Rural Health Mission Scheme and other related schemes launched by the Government of India and to pay them their salary/honorarium as and when the same accrues alongwith their arrears;

iv) to issue a writ, order or direction in the nature of Mandamus commanding the Respondents to fill up the posts of Health Worker (Male) after initiating the regular process of selection for appointment as per the Service Rules, 1997 as amended in the year 1998 and provide preference to the petitioners in appointment and during training on account of their length of service and the nature of job and duties being same after granting required age relaxation in accordance with relevant rules and Government Order;"

4. Appointments were given to the petitioners on different dates between the

period from October, 2012 till March, 2013 on the post of Multi Purpose Health Workers (Male) (hereinafter referred to as, the M.P. H.W. (Male) for a period of three years under the scheme namely National Rural Health Mission (hereinafter referred to as, the N.R.H.M.) floated by the Ministry of Health and Family Welfare, Government of India.

5. Government of India had also issued guidelines for M.P. H.W. (Male) namely, Guidelines for Multipurpose Health Worker (Male), 2010, (hereinafter referred to as, the Guidelines, 2010) wherein clause 3.1 provides for engagement of □ M.P. H.W. (Male) for a period of three years.

6. In pursuance of the Guidelines, 2010 the Mission Director, N.R.H.M. vide its letter dated 05.09.2012 had directed all the District Magistrates/Chief Medical Officers of State of U.P. for appointment of MPHWS (Male) as per the scheme floated by the Government of India and in pursuance thereof, all the petitioners were given appointment.

7. On 22.11.2013, the Director, N.R.H.M. issued a letter addressed to the Mission Director, N.R.H.M., U.P. □ mentioning therein that Government of India has directed to convey approval of contractual appointment of MPHWS (Male) uptill 31.03.2014 and Government of India will bear in payment of wages to the extent of 75% for current financial year subject to certain conditions and it was clarified that further support for contractual MPHWS (Male) will not be provided by the Government of India beyond financial year 2013-14. □ Against the letter dated 22.11.2013, which is under challenge in the present petitions, an interim order has been

granted by this Court vide its order dated 25.03.2014 whereby this Court allowed the petitioners to continue beyond 31.03.2014. The interim order dated 25.03.2014 is being reproduced hereinbelow:-

"Since controversy involved in the aforesaid writ petitions are one and the same, as such they have been connected and heard together.

Heard Mr. S.K. Kalia, learned Senior Advocate Assisted by Mr. Vidhu Bhushan Kalia, learned counsel appearing for petitioners, Mr. K.C. Kaushik, learned Additional Solicitor General for opposite parties no. 2 and 3 as well as Mr. Saurabh Lavania, learned counsel appearing for opposite party no. 4 and the learned Standing Counsel for State.

Mr. S.K. Kalia, learned Senior Advocate, duly assisted by Mr. V.B. Kalia, Advocate, appearing for petitioners submits that under the guidelines for Multipurpose Health Worker (Male) 2010 [hereinafter referred to as the "MPHW (M)"], MPHW (M) shall be engaged for initial period of three years. The expenditure shall be shared by the Central Government and the State Government during the said period. The said guidelines also provide that the State Government is required to create requisite number of posts and fill up on regular basis within next three years so that the continuity of these workers is maintained after the initial period of three years, during which the Government of India is to provide financial assistance.

It is submitted that the Scheme under which MPHW (M) have been engaged has been initiated in the year 2012 in the State of U.P. The petitioners shall be allowed to initially continue for three years at least before being absorbed against regular posts sanctioned by the State

Government. It is submitted that earlier identically situated persons like petitioners were not getting honorarium after 30th September, 2013 and, as such, had approached the Court by filing Writ Petition No.3792 (SS) of 2013. The Court, after recording the observations that learned Additional Solicitor General of India does not dispute the fact that the Scheme has been extended by the Central Government up to the year 2017, had directed the respondents to allow the petitioners to work and discharge their duties till the next date of listing and pay honorarium on the post, in question under N.R.H.M. Scheme, till the end of financial year 2013-14.

It is submitted that in compliance of the aforesaid order the Director, Ministry of Health and Family Welfare (N.R.H.M.-I Section), Government of India vide letter dated 22.11.2013 has conveyed the approval of contractual MPHWS till 31st March, 2014 only.

The submission is that there is no justification for granting approval to the petitioners' engagement for a period up to 31st March, 2014 only when as per the guidelines the petitioners are required to continue for initial period of three years before being absorbed against regular posts created by the State Government. It is submitted that the work and post on which the petitioners are working are very much available and directions be issued to respondents to allow the petitioners to continue after 31st March, 2014.

Mr. K.C. Kaushik, learned Additional Solicitor General of India submits that the Scheme is in fact in two parts; one part is to continue till 2017 whereas the second part of the Scheme under which petitioners have been engaged has been approved for the period up to 31.3.2014 only. It is also submitted that the

financial burden after 31.3.2014 is to be borne by the State Government.

Be that as it may, prima-facie, I am of the view that as per Scheme petitioners are required to be engaged initially for a period of three years. The engagement of petitioners is to be approved on year to year basis. The scheme has started in the State of U.P. in the year 2012 and has to continue initially for three years. The financial assistance is to be provided by the Central Government in the ratio of 85%, 75% and 65% respectively as per letter dated 3.1.2011. The remaining cost shall be shared by the State Government.

The petitioners, as such, shall be allowed to continue after 31.3.2014 and in this regard necessary formalities with respect to approval of their engagement, sanction of project implementation plan, availability of finance etc. shall be done by the authorities concerned and they shall be paid salary/emoluments regularly provided their work and conduct is satisfactory.

Let counter affidavit be filed by the opposite parties within six weeks. In case counter affidavit is filed petitioners may file rejoinder affidavit within two weeks, thereafter.

List thereafter."

8. After passing of the said interim order dated 25.03.2014, the Government of India has issued another letter dated 18.06.2014 communicating the decision that the period of service of the petitioners/MPHWs (Male) has been extended till 30.09.2014 and thereafter the Government of India will not support and the State Government shall bear the cost of payment to the MPHWS (Male). In pursuance of the letter dated 18.06.2014, the Mission Director had also issued a letter dated 09.07.2014 informing the Director

General (Medical Health Services) regarding the decision of the Government of India.

9. Learned Counsels for the petitioners have submitted that as per Clause 3.1. of the Guidelines, 2010 issued by the Government of India, the period of service provided was three years and the petitioners are entitled to be treated in service for a period of three years from the date of their appointment on the post of MPHWS (Male).

10. It is further submitted that the petitioners who were appointed in the month of October, 2012 they were entitled to continue on the post till the year 2015 whereas the petitioners who were appointed in the year 2013, they shall be permitted to continue till the year 2016 and payment of their honorarium/salary would be made as per the Guidelines, 2010 laid down by the Government of India as per the ratio divided between the Government of India and the State Government.

11. It is further submitted that after the completion of three years of period, the petitioners are entitled for continuity in service on regular basis and the State Government is liable to pay the salary/honorarium after the expiry of three years of period from the date of initial appointment and in support of their submissions, they placed reliance on Clause 3.3 of the Guidelines, 2010.

12. It is further submitted that almost all the petitioners had worked uptill March, 2018 and thereafter they were not permitted to continue and thus they are entitled for the salary from the expiry of period of three years till they had actual worked.

13. On the other hand, Shri S.B. Pandey, learned Senior Advocate & Deputy Solicitor General of India assisted by Mahendra Kumar Mishra, learned counsel for the Union of India has submitted that as per the Clause 3.1 of the Guidelines, 2010, the Scheme was only for a period of three years and not beyond that but it was extended by letter dated 18.06.2014 for a further period of six months i.e. uptill 30.09.2014, so the Government of India is ready to bear its share as per the Clause 3.1 of the Guidelines, 2010 and thereafter it is the State of U.P., who is liable to make the payment till they had taken work from the MPHWS (Male).

14. Whereas, Shri Kuldeep Pati Tripathi, learned Additional Advocate General assisted by learned Standing Counsel has submitted that the petitioners are entitled for the payment only uptill the existence of the scheme i.e. till 30.09.2014.

15. It is further submitted that the payment of salary/honorarium to the petitioners was on the basis of matching grant share of the Government of India and the State Government and after 30.09.2014, the Government of India has not provided any grant or share for the purpose of payment to these petitioners and there is no budgetary provisions for payment to the petitioners.

16. It is further submitted that on 04.02.2016, the State Government had issued a letter to all the Chief Medical Officers of State of U.P. that the Government of U.P. has already closed the scheme under which these petitioners were working and directed the C.M.Os not to take any work from these MPHWS (Male) and if they take work, they will be personally liable for the same.

17. It is further submitted that the petitioners were not permitted to work after 30.09.2014.

18. Replying thereto, learned counsels for the petitioners have relied on the letter dated 29.10.2018 written by the Director General, Family Welfare which enclosed as annexure No. S.A. 4 to the supplementary affidavit filed on 18.02.2021 in Writ A No. 5624 of 2014 mentioning therein that 394 MPHWS (Male) are working and secondly, the letter of the State Government dated 04.02.2016 directing all the C.M.Os to stop taking work from MPHWS (Male).

19. Learned counsels for the petitioners are not disputing that the number given in the letter dated 29.10.2018 that only 394 MPHWS (Male) were working and not all the petitioners and there was no occasion for the State Government to issue the letter dated 04.02.2016 if the petitioners were not working after 30.09.2014.

20. After hearing learned counsel for the parties and going through the record of the case, the position which emerges out in the present case is that to prevent the people from Vector Bond diseases, the National Vector Bond Control Program was introduced by the Government of India. In the State of U.P., the Vector Bond diseases are a major public health problem. Malaria is prevalent in all 72 districts and a matter of concern in interstate border districts. Filariasis continues to be endemic in 50 districts with a micro filarial rate of 1.5% and above. Kala-azar is endemic in 4 districts of eastern U.P. In around 27 districts Japanese encephalitis is widespread and hyper endemic in 4 districts as indicated in the Scheme itself.

21. Petitioners were appointed on different dates between the period from October, 2012 to March, 2013 so one of the important question which is to be decided would be about the date of implementation of the Scheme introduced by the Government of India. As per Clause 3.1 of the Guidelines, 2010 issued by the Government of India, the Scheme is only for a period of three years, during which it would be functional. The purpose of the scheme is to eradicate and prevention of diseases, as mentioned above and to depute the MPHWS (Male) at different Primary Health Centre in the State of U.P.□ The Central Government gave approval to the State of U.P. for making appointment under the Scheme only on 05.09.2012.

22. After the approval by the Government of India, the State Government had gone through the process of appointment by making advertisement etc and the appointments were made on different dates from October, 2012 uptill March, 2013. The date of implementation of the Scheme thus cannot be before the date of appointment on which these petitioners were given appointment.

23. The scheme would become functional only after the appointments were made which can only be taken as the date of the period of implementation of scheme and the undefined three years of scheme and this period of three years would end in the case of the petitioners, who were appointed in the year 2012 would be 2015 and the petitioners who were appointed in the year 2013 in their case, it would be 2016.

24. As far as the working of the petitioners beyond the expiry of the period of three years, reliance has been placed on

Clause 3.3.□ of the Guidelines, 2010 which is quoted hereinbelow:-

"3.3 The State Governments need to create the requisite number of posts and fill up on regular basis within next three years so that the continuity of these workers is maintained after the initial period of three years during which the Government of India is to provide financial assistance."

25. From the perusal of the same, it comes out that the State Government was required to create the requisite number of posts and fill up on regular basis but no such exercise was done. The purpose of filling up the vacancy on regular basis is for giving continuity to these MPHWS (Male)/petitioners□ and they may maintained after the end of scheme/expiry of three years period. On the contrary, the letter was issued by the State Government on 04.02.2016 directing the C.M.O.s of the State of U.P. not to take work from these petitioners/MPHWS (Male) and if they will be permitted then the officer concerned will be liable personally.□□ This direction by the State Government is against the interim order dated 25.03.2014 granted by this Court and that too on the stay vacation application preferred□ for vacating the interim order dated 25.03.2014, no orders have been passed by this Court vacating the order. When the stay order is in operation, then there was no occasion to issue such letters.□ The C.M.O.s are bound to comply with the orders passed by this Court and not the order issued by the authorities contrary to the orders of this Court.

26. The work was taken from the MPHWS (Male), so after the expiry of the three years period till the work taken from them by the State Government from the

petitioners till March, 2018, the State respondents being welfare State is liable to make payment as Begar is prohibited under Article 23 read with Article 21 of the Constitution of India. Moreso, the nature of the work was prevention of certain diseases which was definitely for the benefit or the interest of the people of the State & broadly in the interest of the State itself. As indicated earlier the Central Government intended that the MPHWS (Male) may be absorbed on regular basis by creating posts. In such circumstances, the State cannot refuse to pay to the MPHWS (Male) till the date they worked. If the work was taken then they must be paid salary for the same.

27. Article 23 of the Constitution of India has wider implications and scope regarding begar i.e. by taking work but not paying for the same which is linked with right to livelihood covered under Article 21 of the Constitution of India.

28. In the present case, the interim order has been granted by this court which is quoted in the preceding paragraph in favour of the petitioners permitting them to continue and the Hon'ble Supreme Court in the case of **Ram Chet Verma and others Vs. the State of U.P. and others (2020) 3 SCT 640 (SC)** has held that if the petitioners have served, as per the interim order, obviously they have to be paid the salary for the period they have rendered their services. Non payment of salary to them for the period they have served under the interim order or otherwise would tantamount to taking begar from them, which is prohibited under Article 23 of the Constitution of India. For convenience, the said judgment is quoted hereinbelow:-

"1. Heard the learned counsel appearing for the parties.

2. *Leave Granted.*

3. *Since the Appellants have served as per the interim order, obviously they have to be paid the salary for the period they have rendered their services. Non-payment of salary to them for the period they have served under the interim order or otherwise would tantamount to taking begar from them, which is prohibited Under Article 23 of the Constitution of India.*

4. *Therefore, we direct that the Appellants shall be entitled to salary for the period they have rendered their services. The salary, if not paid, shall be paid to the Appellants within four weeks from today.*

5. *It is made clear that if the Appellants have been paid the salary for the aforesaid period, the same shall not be recovered from them.*

6. *In view of the aforesaid directions, the appeal is disposed of. "*

29. The Share/Matching Grant of the Government of India and State Governments is provided in Clause 3.1 of the Guidelines, 2010, which is quoted hereinbelow:-

"3.1:- Considering the need for MPHWS (Male) for the disease control programs, the Government of India decided to provide financial assistance to states for contractual remuneration of the MPHWS (Male) at 53,544 PHCs in 235 high focus districts for a period of three years. The remuneration will be paid at a rate of Rs. 6000 per MPHWS per month. The expenditure will be on sharing basis, 85% by NRHM and 15% by State Governments for the first year followed by 75% and 25% for the second year and 65% and 35% for the third years."

30. Clause 3.1 of the Guidelines, 2010 provides for matching grant by the the Government of India and State Government

for the purpose of payment salaries to the MPHWS (Male).

31. As per Clause 3.1 of the Guidelines, 2010, the Government of India and the State of U.P. is directed to ensure the payment to the petitioners who were working till the period they had completed three years of service from the date of their initial appointment within a period of two months from the date of certified copy of this order is served.

32. For the period beyond three years petitioners shall be paid by the State Government till they had actually worked . The State Government shall make payment within a period of two months from the date of production of certified copy of this order after verification of 394 MPHWS (Male) of their actual working.

33. In view of the facts, circumstances and discussions made hereinabove, the present petition is ***allowed***.

(2024) 4 ILRA 236

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 19.04.2024

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Writ A No. 1939 of 2024

Ajay Kumar Singh	...Petitioner
Versus	
State of U.P. & Ors.	...Respondents

Counsel for the Petitioner:
Anagh Shukla, Shweta Shukla

Counsel for the Respondents:
C.S.C., Akhilesh Kumar Srivastava,
Parmatma Prasad Singh, Rakesh Kumar
Srivastava, Rakesh Mishra

A. Service Law – U.P. St. Universities Act, 1973 – Section 68 – Constitutional Law – Article 226 – Alternative Remedy – Writ Petition – Maintainability – Petitioner challenged Vice Chancellor's order dated 11.10.2023 refusing appointment as Chairman/Convener of Board of Studies on rotation basis – Respondent contended that alternative statutory remedy available under Section 68 – Held, writ petition not maintainable due to efficacious alternative remedy under Section 68 of the Act, 1973 – No exceptional circumstances (e.g., violation of fundamental rights, principles of natural justice, lack of jurisdiction, or challenge to vires of Act) established to invoke writ jurisdiction – Petitioner relegated to exhaust statutory remedy – *Whirlpool Corporation Vs Registrar of Trade Marks and Radha Krishna Industries Vs St. of Himachal Pradesh* relied upon. (Para 16-22, 25)

Writ petition dismissed.

List of Cases cited:

1. Committee of Management DAV Post Graduate College Vs St. of U.P.; 2018 LawSuit(All) 2163
2. Managing Committee Shibli National PG College Vs St. of U.P.; Writ-A No. 44972 of 2013, dated 30.09.2013
3. Committee of Management, Raja Balwant Singh College Vs St. of U.P.; 2016 (1) ADJ 781
4. Dr. Smt. Abha Sharma Vs St. of U.P.; Special Appeal No. 64 of 2020, dated 27.01.2020
5. Whirlpool Corporation Vs Registrar of Trade Marks, Mumbai; (1998) 8 SCC 1
6. Radha Krishna Industries Vs St. of Himachal Pradesh; (2021) 6 SCC 771
7. South Indian Bank Ltd. Vs Naveen Mathew Philip; (2023) SCC OnLine SC 435

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

1. Vakalatnama filed by Shri Parmatma Pd. Singh, Advocate on behalf of opposite party no. 5, is taken on record.

2. Heard Ms. Shweta Shukla, learned counsel for the petitioner, Sri Akhilesh Kumar Srivastava, learned counsel for opposite party nos. 2 and 3, Sri Shailendra Kumar Singh, learned Chief Standing Counsel for State, Sri Rakesh Kumar Srivastava, learned counsel for opposite party no. 4 and Sri Parmatma Pd. Singh, learned counsel for opposite party no. 5.

3. Notices to opposite party no. 4 is hereby dispensed with.

4. At the very out-set, Shri Akhilesh Kumar Srivastav, learned counsel appearing for the respondent-University has raised preliminary objection that the order dated 11th October 2023 passed by the Vice Chancellor is revisable under Section 68 of the UP State Universities Act 1973 (hereinafter referred as 'Act, 1973'). He added that the Vice Chancellor has taken decision vide order dated 11th October 2023 and refuted the claim of the petitioner while observing that the petitioner was promoted on the post of Associate Professor on 14th May 2022, and therefore, he is not entitled to be posted on rotation basis, as the same can be between the Professors, who can be inducted as Chairman/Convener of Board of Studies.

5. Adding his arguments, he submits that the petitioner has an efficacious alternative statutory remedy before the Chancellor, against the order passed by the Vice Chancellor and therefore, the present writ petition is not maintainable on this ground alone.

6. In support of his contention, he has placed reliance on a judgement reported in ***2018 LawSuit(All) 2163, Committee of Management DAV Post Graduate College and Another Vs. State of U.P. and Others***

and has referred paragraph 13, 14 and 15 of the abovesaid judgement.

7. Paragraph 13, 14 and 15 of the abovesaid judgement is quoted hereinunder:-

"13. The question as to whether the order of the Vice Chancellor impugned herein is sustainable or not, could very well be examined in Reference under Section 68 of the Act. It is noteworthy that the petitioner Committee claims that meeting dated 25.9.2016 in which it was elected was called by Narendra Kumar Srivastava, Secretary of the parent society. Concededly, the person initially elected as Secretary of the parent society was Vinod Kumar Srivastava. The petitioners claim that he was expelled from the post of Secretary of the parent society on 25.3.2016 and his membership was also ceased. So far, there is no adjudication by any authority upholding expulsion of Vinod Kumar Srivastava. The said dispute is pending before the Prescribed Authority under Section 25 (1) of the Act. In order to be successful, the petitioners have also to establish that Vinod Kumar Srivastava was validly expelled and in his place, Narendra Kumar Srivastava was validly elected. In the opinion of the Court, these issues, which require appreciation of evidence, should be permitted to be examined in Reference under Section 68 of the Act.

14. The remedy of Reference under Section 68 is an efficacious remedy, inasmuch as the Chancellor, while exercising power under Section 68 pertaining to a dispute relating to election, is also invested with specific power to pass such orders of stay as he thinks just and expedient. A Division Bench of this Court in Writ-A No.44972 of 2013 Managing Committee Shibli National PG College Vs.

State of U.P. and others by judgement dated 30.9.2013 declined to entertain a writ petition holding that the remedy under Section 68 by way of Reference is a comprehensive remedy where questions of fact as well as law both could be raised and decided. Again, in Committee of Management, Raja Balwant Singh College and others Vs. State of U.P. and others, 2016 (1) ADJ 781, I have taken the same view and declined to entertain the writ petition relegating the parties to invoke the remedy of Reference under Section 68 of the Act.

15. No doubt, there is no absolute bar in entertaining a writ petition under Article 226 even though an alternative remedy is available under the Statute, but having regard to the facts and circumstances of the instant case, this Court is of the considered opinion that it is a fit case where the petitioners should be relegated to avail the alternative statutory remedy under Section 68 of the Act."

8. Referring the aforesaid, he submits that the Court, while dealing with the legal question has held that there is no absolute bar in entertaining a Writ under Article 226 of the Constitution of India. Concluding his arguments, he submits that since the petitioner did not refer any reason that why this Court should invoke it's discretion to entertain this petition, even the alternative statutory remedy is available to him. Therefore, submission is that this petition is liable to be dismissed on this ground alone.

9. Shri Parmatma Pd. Singh, learned counsel appearing for the opposite no. 5 has also opted the aforesaid arguments of counsel for the respondent-University and added that several litigation are instituted by the petitioner, though he is not entitled to be appointed, as the claim which is being

raised by the petitioner is premature according to his present post.

10. On the other hand, the learned counsel for the petitioner has vehemently opposed the contentions aforesaid and submits, that the order impugned dated 11th October 2023 has been passed after an order was passed by this Court on 4th August 2023 in Writ-A No. 5631 of 2023. She further added that there can be no absolute bar, in entertaining the writ petition under article 226 of the Constitution of India and therefore the petition is maintainable. She also added that the facts which are narrated/contended by the learned counsel for the opposite parties, are not correct as the petitioner is entitled for his appointment on rotation basis.

11. The learned counsel for the petitioner has also placed reliance on a judgement, rendered in ***Special Appeal No. 64 of 2020, Dr. Smt. Abha Sharma, Associate Professor, Department of English, Agra College, Agra Vs. State of U.P. and Others*** passed by this Court and has referred paragraph 9 of the abovesaid judgement.

12. Paragraph 9 of the judgement is quoted hereinunder:-

"9. Having regard to the facts of the case, and in particular the fact that one of the principal grounds sought to be raised to assail the order impugned in the writ petition is that the statutory authority has not acted in accordance with the provisions of the relevant statutory provisions, this Court is of the view that the writ petition ought to have been heard upon exchange of affidavits and only after consideration of what has

been stated by the respective parties in their affidavits a final decision ought to have been taken in the matter."

13. Placing reliance on the aforesaid, she submits that the Division Bench of this Court has held that in case, any order is passed by the Vice Chancellor and even if the remedy under Section 68 of the Act 1973 is available, that could not be a bar and therefore, submission is that the writ petition is maintainable.

14. Considering the submissions of the learned counsel for the parties and after perusal of the material placed on record, it transpires that the petitioner is aggrieved as he is not being considered to be appointed following the roster, as prescribed under the law, though it is contended from other side that the petitioner is appointed in year 2022 on the post of Associate Professor and as such he is not even entitled for the same.

15. Needless to say that there is an efficacious alternative remedy under Section 68 of the Act, 1973, which clearly speaks about the provision with respect to challenge to the order passed by the Vice Chancellor and the same is also applicable in the present case as the Vice Chancellor has rejected the claim of the petitioner while observing that he is not entitled to be considered for his appointment while applying the roster as he is appointed on 14th May 2022 on the post of Associate Professor.

16. Time and again it has been settled that if there is efficacious and alternative statutory remedy available, the interference would be under the exceptional circumstances. It's self imposed restriction and thus, it's rule of discretion not compulsion.

17. Hon'ble Supreme Court has settled this issue and the view of the Apex Court remains consistent starting from the judgement and order rendered in Case of ***Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others***, reported in (1998) 8 SCC 1.

18. In the aforesaid case, it has specifically been held by the Supreme Court that a Writ Court would be justified entertaining a writ petition despite the alternative remedy is not availed, provided that: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is violation of principles of natural justice; (iii) where the order or the proceedings are wholly without jurisdiction; or (iv) where the vires of an Act is under challenge.

19. The law laid down by the Supreme Court in case of ***Radha Krishna Industries v. State of Himachal Pradesh***, reported in (2021) 6 SCC 771, also adopts the same view as is held in case of Whirlpool Corporation (supra).

20. Paragraphs 25, 26 and 27 of the abovesaid judgement are quoted hereinunder:-

"25. In this background, it becomes necessary for this Court, to dwell on the "rule of alternate remedy" and its judicial exposition. In *Whirlpool Corporation v Registrar of Trademarks, Mumbai*²¹, a two judge Bench of this Court after reviewing the case law on this point, noted:

"14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised

by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other purpose".

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on" some old decisions of the evolutionary era of the constitutional law as they still hold the field."

(emphasis supplied)

26. Following the dictum of this Court in *Whirlpool* (supra), in *Harbanslal Sahnia v Indian Oil Corpn. Ltd.*²², this court noted that

"7. So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed is concerned, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an

alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. (See Whirlpool Corpn. v. Registrar of Trade Marks [(1998) 8 SCC 1] .) The present case attracts applicability of the first two contingencies. Moreover, as noted, the appellants' dealership, which is their bread and butter, came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings."

(emphasis supplied)

27. The principles of law which emerge are that :

(i) The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well;

(ii) The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person;

(iii) Exceptions to the rule of alternate remedy arise where (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c) the order

or proceedings are wholly without jurisdiction; or (d) the vires of a legislation is challenged;

(iv) An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law;

(v) When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion; and

(vi) In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with."

21. This view has also been adopted by the Apex Court in judgement and order rendered in case of **South Indian Bank Ltd. and Others Vs. Naveen Mathew Philip and Another reported in (2023) SCC OnLine SC 435** and has held that the Apex Court is conscious enough of the fact that powers conferred under Article 226 of Constitution of India are rather wide but are required to be exercised only in extraordinary circumstances.

22. Thus, it has been a settled view of the Apex Court that an alternative remedy is not an absolute bar in an

appropriate case but ordinarily a writ petition should not be entertained when an efficacious alternative remedy is provided under law.

23. From the above said principles, laid down by the Apex Court, the present matter is not an appropriate case, wherein, this Court could find objectively that the nature of the controversy requires the exercise of writ jurisdiction.

24. Sheet anchor of the argument of counsel for the petitioner is the judgement and order dated 27.01.2020, is with respect to peculiar facts and circumstances of the case concerned, which is apparent from the starting words of paragraph 9 of the judgement itself, and further the counsel for the petitioner has also failed to substantiate that those facts are identical to the facts of present matter and therefore, the benefit of the judgement and order dated 27th January 2020 is not available to the petitioner.

25. Considering the abovesaid facts and circumstances, this Court is of considered opinion that under the facts and circumstances of the present matter, this is a fit case, where the petitioner should be relegated to exhaust the alternative remedy under Section 68 of the Act, 1973.

26. Consequently, the writ petition is hereby **dismissed** on the ground of maintainability.

27. However, it is open for the petitioner to approach the appropriate forum, in accordance with law.

28. No order as to costs.

(2024) 4 ILRA 242
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.04.2024

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Writ A No. 2511 of 2024

Kavita Giri **...Petitioner**
Versus
Union of India & Ors. **...Respondents**

Counsel for the Petitioner:
Asit Srivastava

Counsel for the Respondents:
A.S.G.I., Anand Kumar Singh, Krishna Lal Yadav, Lalit Shukla

A. Service Law – Bank of Baroda Transfer Policy – Clause 8.9 – Transfer of Lady Officers – Petitioner challenged transfer order dated 04.11.2023 and rejection of representation dated 09.06.2023 as violative of Transfer Policy and court orders – Held, transfer from Kanpur Dehat Region to Kanpur Metro Region within the same zone not covered under Clause 8.9.4 and 8.9.5, which apply only to inter-zonal transfers – Three-year tenure protection for lady officers applies only to inter-zonal transfers on request – Impugned order not violative of Transfer Policy or prior court orders in Special Appeal No. 347 of 2023 and Writ A No. 7948 of 2023 – Transfer policy to be read as a whole, and transfer within zone does not attract special provisions for lady officers – *Nazir Ahmad Vs King Emperor* relied upon. (Para 16-19, 23-25)

Writ petition dismissed.

List of Cases cited:

1. *Nazir Ahmad Vs King Emperor*; 1936 SCC Online PC 41

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

1. Heard Dr. L.P.Mishra, Advocate assisted by Sri Asit Srivastava, learned counsel for the petitioner and Sri Sanjay Bhasin, learned Senior Advocate assisted by Sri Anand Kumar Singh, for the opposite parties no. 2 to 6. No one is present for the Union of India.

2. This matter is being decided finally at admission stage on the consent of counsels for both the parties.

3. Under challenge is the order dated 04-11-2023, passed by the General Manager (HRM), Bank of Baroda i.e. opposite party no. 6 as well as the order dated 09-06-2023 passed by the Regional Head, Bank of Baroda, which are said to be passed in utter violation of the order dated 13-07-2023, by this court in Special Appeal No. 347 of 2023 and against the transfer policy, particularly, with respect to the lady officers of the respondent Bank.

4. Factual matrix of the case are that the petitioner was initially appointed on 26-11-2008, on the post of Probationary Clerk, in Vijaya Bank, which was subsequently merged into Bank of Baroda and she joined in the office at district-Lucknow. Thereafter, in the year, 2012, she was promoted on the post of Assistant Manager in the office at Gomti Nagar, Lucknow. Later on, the petitioner was transferred on 23-05-2022 to Kanpur Dehat Region from Lucknow office and being far away from her family (parental and matrimonial), there was hardship before the petitioner and therefore, she requested for her transfer in nearby place and considering the request of the petitioner, she was transferred to Kanpur Metro Region Kanpur.

5. The Transfer Policy was framed on 31-03-2019 by the Board of Bank of

Baroda under the regulations, published on the official website of the bank on 31-03-2019, wherein Clause 8.9 of the Transfer Policy provides that the lady employees posted upto Scale-III posts, shall be posted as per their request for a stipulated tenure of three years.

6. On 09-06-2023, the petitioner was transferred from Kanpur (U.P.) to Vadodara(Gujarat), on inter-zonal transfer, on the ground of 'longest stay' in one zone. As soon the inter zonal transfer was communicated to the petitioner, she preferred a detailed representation before the respondent-bank, citing therein the hardships of staying thousands of Kilometers away from her family members and her mother and also shown severity of medical condition with respect to her elders. On 16-06-2023, her representation was rejected by the Zonal Office at Lucknow and the same was communicated to the petitioner on 16-06-2023 through e-mail by the opposite party no. 3 and the relieving order was passed on 17-06-2023 from Harjinder Nagar, Kanpur Branch.

7. Being aggrieved with the order dated 17-06-2023, the petitioner approached this court on 19-06-2023 while preferring a writ petition, which was dismissed by the Hon'ble Single Judge on 21-06-2023, whereafter, an Special Appeal bearing No. 347 of 2023 was filed, wherein, on 13-07-2023, while setting aside the Judgment and Order passed by the Hon'ble Single Judge, the petitioner was permitted to make a fresh representation and the opposite parties were directed to decide the same in accordance with law and thereafter, the petitioner joined her duties at Harjinder Nagar Branch at district-Kanpur, but, she was told to join her duties at Sisamau Branch on deputation and the

petitioner joined at Sisamau Branch on 21-08-2023. Thereafter, on 28-07-2023, the petitioner preferred a representation before the General Manager, Bank of Baroda, but, on 08-09-2023, the petitioner was again sent on deputation at Behrana Road Branch and ultimately, the representation of the petitioner is rejected vide order dated 11-09-2023, which was challenged by the petitioner vide Writ A No. 7984 of 2023, wherein an order was passed on 18-10-2023 and the learned Single Judge while disposing of the abovesaid writ petition, left it open to the petitioner to submit a fresh comprehensive representation for redressal of her grievances before the competent authority and the competent authority was directed to decide the same within further period of ten days. In compliance thereof, a representation was preferred by the petitioner and the same was decided vide order dated 04-11-2023, which is under challenge in the present writ petition.

8. Contention of learned counsel for the petitioner is that the impugned order dated 04-11-2023 is passed in absolute defiance of the order passed in Special Appeal No. 347 of 2023 and the order dated 18-10-2023 passed in Writ A No. 7948 of 2023. He added that the orders impugned suffer from non application of mind as the ground of longest stay considered by the opposite parties, is not applicable in the present case as the provisions of Clause 8.9.5 of the Transfer Policy with respect to transfer of the lady officers, is evident that in consideration of any request for transfer of any lady officer by the bank at anyone instance, shall be for one tenure of posting i.e. 3 years and after completion of one tenure of posting in the requested region, it is open to the bank to transfer such

employee from the said region but so far as the present matter is concerned, the locking period of three years, is admittedly not completed.

9. Adding his arguments, he submits that the transfer of the petitioner is with malafide intention and for harassing her and is not in consonance with the Transfer Policy as the opposite parties have acted in a most arbitrary and illegal manner, as the petitioner is not only transferred, but, she has been forced, while seizing her bank accounts and discontinuing her salary, which is her hard earned money.

10. Further contention of learned counsel for the petitioner is that since the Judgment and Order dated 13-07-2023 passed by this court in Special Appeal No. 347 of 2023, is evident that the Hon'ble Division Bench of this court has observed that earlier transfer policy is *pari materia* to the subsequent transfer policy with respect to the transfer of lady officers, however, in the new transfer policy, the request of transfer, appears to be confined to the request of transfer involving change of zone i.e. inter-zonal transfers, whereas, in case of transfer of any lady officer, on her request at anyone instance, her tenure of posting shall be three years, remains the same even in the new transfer policy and the Division Bench of this court has also taken note of the fact so far as paragraph 8.9.1 of the Transfer Policy is concerned, which stipulates that the '*Bank recognizes the commitment, responsibilities of lady employees towards home, family and office and will remain empathetic on issues regarding their transferability.*'

11. Sheet anchor of the argument of counsel for the petitioner is that the impugned orders passed by the opposite

parties are in utter violation of the Transfer Policy of the Bank and it reflects non application of mind by the concerned authorities as the petitioner has been thrown thousands of Kilometers away from her place of posting, coupled with the argument that the transfer order passed is also in violation of the observations made in Special Appeal No. 347 of 2023 as well as the order passed by the Hon'ble Single Judge, subsequently. Therefore, submission is that the orders impugned are wholly without application of mind, unjustified and against the Transfer Policy and at the same time i.e. against the observations of the Hon'ble Division Bench made in Special Appeal No. 347 of 2023. Thus, submission is that the impugned orders may be quashed.

12. On the other hand, learned counsel appearing for the respondent-bank has vehemently opposed the contentions aforesaid and submitted that after the order passed by the Hon'ble Single Judge on 18-10-2023, in Writ A No. 7948 of 2023, a representation was moved by the petitioner, which has rightly and lawfully been decided by the opposite party no. 6, vide order dated 04-11-2023. While adding his arguments, he straightaway came to the provisions of the Transfer Policy i.e. 8.9 meant for transfer of the Lady Officers and contended that the provisio of 8.9.5 of the Transfer Policy, cannot be read in isolation, as the same starts from the proviso 8.9.1 of the Transfer Policy and if the provision of 8.9.4 of the Transfer Policy is read in toto, that itself is explanatory that the same speaks about the transfer from one zone to another zone.

13. Adding his arguments, he submits that so far as the proviso 8.9.4 of the Transfer Policy is concerned, that speaks

that '*such requests may be considered upto Scale III but not more than two occasions in the entire career, as 'Only such requests which involve change of zone shall be reckoned for being counted under this clause.'*' and so far as the present case is concerned, the petitioner is not transferred from one zone to another zone but her transfer was made on her request in Lucknow Zone, i.e. from Kanpur Dehat Region to Kanpur Metro Region. Further for sometimes, looking into the work in different branches, she was sent on deputation on other branch in Kanpur region itself.

14. He next submits that so far as proviso 8.9.2 of the Transfer Policy is concerned, that too, is with respect to the transfer from one zone to another zone, i.e. known as inter zonal transfer. Thus concluding his arguments, he submits that since the transfer of the petitioner is in consonance with the provisions of the Transfer Policy and therefore, no interference is warranted in the transfer order dated 04-11-2023.

15. Having heard the learned counsels for the parties and after perusal of the material placed on record, two basic legal questions emerge so as to resolve the controversy in question. The first and foremost question is as to whether the transfer of the petitioner is in contravention of the Clause 8.9 (proviso 8.9.1 to proviso 8.9.5) of the Transfer Policy with respect to the transfer of the lady officers? The second question is as to whether the transfer order dated 04-11-2023, is hit by or under the teeth of the Judgment and Order passed in Special Appeal No. 347 of 2023 dated 13-07-2023 as well as order dated 18-10-2023 passed in Writ A No. 7948 of 2023?

16. When this court examines the first question, it is relevant to go through the extract of the Transfer Policy with respect of the lady officers, which is quoted hereinunder :-

“8.9 TRANSFER OF LADY OFFICERS

8.9.1 Bank recognizes the concomitant responsibilities of lady employees towards home, family and office and will remain empathetic on issues regarding their transferability. 8.9.2 At the time of initial placement upon recruitment, Bank shall, as far as possible, place lady officers (married/ unmarried) to the Zone of her choice, on her request or to the nearest zone of her choice subject to availability of vacancies in the said zone.

In case of unavailability of vacancies, such female officers can be posted to other Zone as per Bank's requirement.

8.9.3 For lady Officers upto MMG/S-III, Bank shall consider requests for transfer on marriage grounds/on the grounds of joining spouse etc., subject to availability of vacancies at the requested Region.

8.9.4 Such requests may be considered upto Scale III but not more than two occasions in the entire career. Only such requests which involve change of zone shall be reckoned for being counted Under this clause

8.9.5 Consideration of any request for transfer of any lady Officer by the Bank at any one instance, shall be for one tenure of posting (3 years). After completion of one tenure of posting in the requested Region, it shall be open to the Bank to transfer her from the said Region in accordance with the Bank's business requirements, or in furtherance of any other policy/guidelines of the Bank/Govt.

like career path policy, job rotation guidelines etc. Thus the female Officers who have been granted any placement in accordance with her request, shall be transferable in line with the general transfer policy provisions of longest stay, career path policy, job rotation policy etc. as may be applicable to her on completion of one stipulated tenure of posting in such place.”

17. Perusal of the aforesaid provisions, indicates the enabling provisions regarding the transfer of the lady officers and the instructions, which are to be taken care of. This Transfer Policy is meant looking into the responsibilities of the lady employees towards home, family and office, but, the same cannot be read aloof, as the other provisions are explanatory which says that the request under the provisions of Transfer Policy of the lady officers may be considered not more than two occasions in the entire career and the further provision, which is of much importance, to resolve the controversy is that ‘only such requests which involve change of zone, shall be reckoned for being counted under this clause’. In the next clause i.e. proviso 8.9.5 of the Transfer Policy, it has also been provided that ‘Consideration of any request for transfer of any lady Officer by the Bank at any one instance, shall be for one tenure of posting i.e. for 3 years’.

18. It is obvious from the aforesaid provisions, that the special provision with respect to the transfer of the lady officers, will be considered subject to the request of such lady officer from one zone to another zone and then only the rider of three years, as provided under the proviso 8.9.5 of the Transfer Policy, would attract. Further, clause 8.9.4 readwith Clause 8.9.5 of the

Transfer Policy for the lady officers, do not leave any confusion with respect to the benefit of rider of three years subject to condition of the transfer from one zone to another zone.

19. It is not in dispute that the transfer of the petitioner is made within the zone, from one region to another region i.e. in Kanpur Dehat Region to Kanpur Metro Region and that's why, the proviso 8.9.4 readwith proviso 8.9.5 of the Transfer Policy, do not attract in the present matter and therefore, answer accordingly is that the transfer order of the petitioner dated 04-11-2023, is in no way violative of any directions/provisions envisaged under Clause 8.9.1 to 8.9.5 of the Transfer Policy.

20. Now coming to the next legal question as to whether the impugned transfer order is in any way passed in violation of the Judgment and Order dated 13-07-2023, passed in Special Appeal No. 347 of 2023 and the Judgment and Order dated 18-10-2023 passed in Writ A No. 7948 of 2023.

21. Having at a glance, the Judgment and Order dated 13-07-2023, passed in Special Appeal No. 347 of 2023, it transpires that the Special Appeal No. 347 of 2023, was filed by the petitioner assailing the Judgment and Order dated 21-06-2023 passed in Writ A No. 4679 of 2023. The Hon'ble Single Judge did not find any illegality or erroneousness in the transfer order dated 09-06-2023 challenged earlier and therefore, the writ petition was dismissed, whereafter the Division Bench of this court while dealing with the matter in Special Appeal No. 347 of 2023, set aside the Judgment and Order dated 21-06-2023 and left it open to the petitioner to move a representation and the opposite

parties were directed to consider the same, particularly, in the light of the provisions of the 'Transfer Policy Of The Lady Officers' of the respondent bank.

22. Much emphasis is also placed on para nos. 12 & 15 of the Judgment and Order dated 13-07-2023 passed in Special Appeal No. 347 of 2023 and it's tried to substantiate that the Division Bench of this court, has directed the opposite parties to consider the object of having separate and distinct provision for transfer of the lady officers while passing the fresh orders and the impugned order does not disclose that the same is complied with by the opposite party-bank.

23. In totality, the transfer of the petitioner is governed with an special provision of transfer of the lady officer. The Division Bench of this court in paragraph no. 12 of the Judgment and Order dated 13-07-2023 passed in Special Appeal No. 347 of 2023, has noticed the provisions of the Transfer Policy as '*to be confined to request of transfer involving change of zone i.e. interzonal transfers*'. Therefore, the Transfer Policy cannot be read in isolation, particularly, with respect to Clause 8.9.1 of the Transfer Policy, but, it has to be read in toto and qualifying Clause 8.9.4 and Clause 8.9.5 shall also be read alongwith Clause No. 8.9.1. The aforesaid provisions are very clear in it's terms that if a transfer is made on the request of a lady officer, such request is reckoned for being counted in case of change of zone i.e. inter zonal transfer.

24. Undisputedly, the tenure of the posting on request would be for a period of three years, which is a rider provided under Clause 8.9.5 of the Transfer Policy, but, such rider would only be invoked, in the

event, when the transfer is made inter zonal and in all over the Judgment and Order of the Division Bench, there is no such direction to ignore the rest of the provisions of the Transfer Policy regarding the lady officers, more so, the provision of inter zonal transfer, is also viewed.

25. Resultantly, the second question is also decided negatively, as the impugned transfer order dated 04- 11-2023 is in no way violative of the order or direction issued vide judgment and order dated 13-07-2023 passed in Special Appeal No. 347 of 2023 as well as the Judgment and Order dated 21-06-2023 passed in Writ A No. 4679 of 2023.

26. This court is also not unmindful to the several verdicts of the Hon'ble Apex Court, wherein it is held that the statute or rules made thereunder, should be read as a whole and one provision should be construed with reference to the other provision to make the provision consistent with the object sought to be achieved.

27. It is settled law, started from the Judgment in the case of Nazir Ahmad Vs.King Emperor, rendered by the Privy Council, reported in 1936 SCC Online PC 41, as well as the consistent view of the Hon'ble Apex Court that where the law prescribes a thing to be done in a particular manner while following a particular procedure, it shall be done in the same manner following the provisions of law, without deviating from the prescribed procedure. Conclusively, it is to be done in a manner prescribed not otherwise.

28. In view of the abovesaid submissions and discussions, the writ petition is devoid of merits, hence, the Writ Petition is **dismissed** accordingly.

29. No order as to costs

(2024) 4 ILRA 248

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 29.04.2024

BEFORE

THE HON'BLE ABDUL MOIN, J.

Writ A No. 3258 of 2024

Sanjay Kumar Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Prem Shankar, Mahendra Kumar Dwivedi

Counsel for the Respondents:

C.S.C

**A. Service Law – U.P. Collection Amins
Service Rules, 1974 – Rule 19-A –
Constitutional Law – Article 226 –**
Alternative Remedy – Natural Justice – Writ
Petition – Maintainability – Petitioner challenged
removal order dated 12.01.2024 passed by Sub
Divisional Magistrate (SDM) – Contended order
was without jurisdiction (SDM not appointing
authority) and violative of natural justice – Held,
SDM is appointing authority under Rule 19-A,
not District Magistrate, despite approval of
select list by latter – Alleged procedural
irregularities (e.g., not calling witnesses, not
considering reply properly) do not constitute
gross violation of natural justice – No
exceptional circumstances (e.g., violation of
fundamental rights, natural justice, lack of
jurisdiction, or challenge to vires of Act) to
bypass statutory appeal remedy – Writ petition
dismissed for availability of efficacious
alternative remedy – Godrej Sara Lee Ltd. Vs
Excise and Taxation Officer and Whirlpool
Corporation Vs Registrar of Trade Marks relied
upon. (Para 14, 18-20, 23)

Writ petition dismissed.

List of Cases cited:

1. Harbanslal Sahnia Vs Indian Oil Corporation Ltd.; AIR 2003 SC 2120
2. Rajendra Prasad Upadhyaya Vs St. of U.P.; Special Appeal No. 73 of 2012, dated 29.03.2012
3. Smt. Manju Devi Vs St. of U.P.; Writ-C No. 29150 of 2018, dated 28.08.2018
4. Godrej Sara Lee Ltd. Vs Excise and Taxation Officer; Civil Appeal No. 5393 of 2010, dated 01.02.2023
5. St. of U.P. Vs Mohd. Nooh; 1958 SCR 595
6. Whirlpool Corporation Vs Registrar of Trade Marks, Mumbai; (1998) 8 SCC 1
7. Assistant Commissioner of St. Tax Vs M/s. Commercial Steel Ltd.; 2021 SCC OnLine SC 884
8. St. of U.P. Vs Indian Hume Pipe Co. Ltd.; (1977) 2 SCC 724
9. U.O.I. Vs St. of Haryana; (2000) 10 SCC 482
10. Krushnakant B. Parmar Vs U.O.I.; Civil Appeal No. 2106 of 2012, dated 15.02.2012

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

1. Heard learned counsel for the petitioner and Sri Saharsh Srivastava, learned Additional Chief Standing Counsel appearing for the respondents.

2. Instant petition has been filed challenging the order of removal dated 12.01.2024, a copy of which is Annexure-2 to the writ petition.

3. A preliminary objection has been taken by Sri Saharsh Srivastava, learned Additional Chief Standing Counsel that the petitioner has an alternative and statutory remedy of filing an appeal against the order impugned.

4. However, learned counsel for the petitioner states that as the order impugned is patently without jurisdiction having been passed by the Sub Divisional Magistrate, who is not the appointing authority rather the appointing authority is the District Magistrate. Further, the order impugned has been passed in gross violation of principles of natural justice and consequently placing reliance on the judgment of the Apex Court in the case of **Harbanslal Sahnia and another vs. Indian Oil Corporation Limited and others – AIR 2003 SC 2120** and a Division Bench judgment of this Court passed in Special Appeal No.73 of 2012 in re: **Rajendra Prasad Upadhyaya vs. State of U.P. and others** decided on 29.03.2012, the contention is that as the order impugned is patently without jurisdiction and in gross violation of natural justice as such the statutory and alternative remedy of appeal would not be an absolute bar in this Court entertaining the petition. Reliance has also been placed on the judgment of this Court in the case of **Smt. Manju Devi vs. State of U.P. and others** passed in Writ-C No.29150 of 2018 decided on 28.08.2018.

5. Whether the remedy of statutory appeal would be an absolute bar for entertaining a petition has been considered threadbare recently by the Supreme Court in the case of **M/s Godrej Sara Lee Ltd. vs. The Excise and Taxation Officer Cum Assessing Authority and others** passed in Civil Appeal No.5393 of 2010 wherein the Apex Court vide judgment and order dated 01.02.2023 after considering its earlier judgments has held as under:-

“4. Before answering the questions, we feel the urge to say a few words on the exercise of writ powers

conferred by Article 226 of the Constitution having come across certain orders passed by the high courts holding writ petitions as “not maintainable” merely because the alternative remedy provided by the relevant statutes has not been pursued by the parties desirous of invocation of the writ jurisdiction. The power to issue prerogative writs under Article 226 is plenary in nature. Any limitation on the exercise of such power must be traceable in the Constitution itself. Profitable reference in this regard may be made to Article 329 and ordinances of other similarly worded articles in the Constitution. Article 226 does not, in terms, impose any limitation or restraint on the exercise of power to issue writs. While it is true that exercise of writ powers despite availability of a remedy under the very statute which has been invoked and has given rise to the action impugned in the writ petition ought not to be made in a routine manner, yet, the mere fact that the petitioner before the high court, in a given case, has not pursued the alternative remedy available to him/it cannot mechanically be construed as a ground for its dismissal. It is axiomatic that the high courts (bearing in mind the facts of each particular case) have a discretion whether to entertain a writ petition or not. One of the self-imposed restrictions on the exercise of power under Article 226 that has evolved through judicial precedents is that the high courts 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 has not pursued, would not oust the jurisdiction of the high court and render a writ petition “not maintainable”. In a long line of

decisions, this Court has made it clear that availability of an alternative remedy does not operate as an absolute bar to the “maintainability” of a writ petition and that the rule, which requires a party to pursue the alternative remedy provided by a statute, is a rule of policy, convenience and discretion rather than a rule of law. 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. Hence, dismissal of a writ petition by a high court on the ground that the petitioner has not availed the alternative remedy without, however, examining whether an exceptional case has been made out for such entertainment would not be proper.

5.A little after the dawn of the Constitution, a Constitution Bench of this Court in its decision reported in 1958 SCR 595 (*State of Uttar Pradesh vs. Mohd. Nooh*) had the occasion to observe as follows:

“10. In the next place it must be borne in mind that there is no rule, with regard to certiorari as there is with mandamus, that it will lie only where there is no other equally effective remedy. It is

*well established that, provided the requisite grounds exist, certiorari will lie although a right of appeal has been conferred by statute, (Halsbury's Laws of England, 3rd Edn., Vol. 11, p. 130 and the cases cited there). The fact that the aggrieved party has another and adequate remedy may be taken into consideration by the superior court in arriving at a conclusion as to whether it should, in exercise of its discretion, issue a writ of certiorari to quash the proceedings and decisions of inferior courts subordinate to it and ordinarily the superior court will decline to interfere until the aggrieved party has exhausted his other statutory remedies, if any. But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies. ***"*

6. At the end of the last century, this Court in paragraph 15 of its decision reported in (1998) 8 SCC 1 (Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai and Others) carved out the exceptions on the existence whereof a Writ Court would be justified in entertaining a writ petition despite the party approaching it not having availed the alternative remedy provided by the statute. The same read as under:

(i) where the writ petition seeks enforcement of any of the fundamental rights;

(ii) where there is violation of principles of natural justice;

(iii) where the order or the proceedings are wholly without jurisdiction; or

(iv) where the vires of an Act is challenged.

7. Not too long ago, this Court in its decision reported in 2021 SCC OnLine SC 884 (Assistant Commissioner of State Tax vs. M/s. Commercial Steel Limited) has reiterated the same principles in paragraph 11.

8. That apart, we may also usefully refer to the decisions of this Court reported in (1977) 2 SCC 724 (State of Uttar Pradesh & ors. vs. Indian Hume Pipe Co. Ltd.) and (2000) 10 SCC 482 (Union of India vs. State of Haryana). What appears on a plain reading of the former decision is that whether a certain item falls within an entry in a sales tax statute, raises a pure question of law and if investigation into facts is unnecessary, the high court could entertain a writ petition in its discretion even though the alternative remedy was not availed of; and, unless exercise of discretion is shown to be unreasonable or perverse, this Court would not interfere. In the latter decision, this Court found the issue raised by the appellant to be pristinely legal requiring determination by the high court without putting the appellant through the mill of statutory appeals in the hierarchy. What follows from the said decisions is that where the controversy is a purely legal one and it does not involve disputed questions of fact but only questions of law, then it should be decided by the high court instead of dismissing the writ petition on the ground of an alternative remedy being available.

9. Now, reverting to the facts of this appeal, we find that the appellant had claimed before the High Court that the suo motu revisional power could not have been exercised by the Revisional Authority in view of the existing facts and circumstances leading to the only conclusion that the assessment orders were legally correct and that the final orders impugned in the writ petition were passed

upon assuming a jurisdiction which the Revisional Authority did not possess. In fine, the orders impugned were passed wholly without jurisdiction. Since a jurisdictional issue was raised by the appellant in the writ petition questioning the very competence of the Revisional Authority to exercise suo motu power, being a pure question of law, we are of the considered view that the plea raised in the writ petition did deserve a consideration on merits and the appellant's writ petition ought not to have been thrown out at the threshold.

10. Reliance placed by the High Court on the decision in *Titagarh Paper Mills (supra)*, in our view, was completely misplaced. The respondent Electricity Board had levied coal surcharge on the appellant company in terms of an agreement. Such agreement contained an arbitration agreement in clause 23. Instead of pursuing its remedy in arbitration, the appellant company unsuccessfully invoked the writ jurisdiction. This Court was approached whereupon it was held that in view of the issues raised, there was no reason why the appellant company should not pursue its remedy in arbitration, having solemnly accepted clause 23 of the agreement, and instead invoke the extraordinary jurisdiction of the high court under Article 226 of the Constitution to determine questions which really form the subject matter of the arbitration agreement. This decision could not have been of any relevance having regard to the issue presented for resolution before the High Court by the appellant, particularly when the disputes inter se were not referable to arbitration.

6. From perusal of the aforesaid judgment in the case of **Godrej Sara Lee Limited (supra)**, it emerges that the

Hon'ble Supreme Court has carved out the distinction between the 'maintainability' of a writ petition and 'entertainability' of a writ on the ground of alternative remedy.

7. The Hon'ble Supreme Court has held that the 'maintainability' of a writ petition goes to the root of the matter and the mere fact that the party invoking jurisdiction of the High Court under Article 226 of the Constitution has not pursued the alternative remedy of appeal or revision, would not oust the jurisdiction of the High Court and render the writ petition being 'not maintainable'.

8. So far as the 'entertainability' of the writ petition is concerned, Hon'ble Supreme Court has held that the question of "entertainability" is entirely within the realm of discretion of the High Courts, writ remedy being discretionary and a writ petition despite being maintainable may not be entertained by a High Court for various reasons or relief could be refused to the petitioner, despite setting up a sound legal point, if grant of the claimed relief would not further public interest.

9. The Apex Court has again reiterated the principles of law laid down by it earlier in the case of **Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai and Others-(1998) 8 SCC 1** wherein the Hon'ble Apex Court has held that a Writ Court would be justified in entertaining a writ petition despite the party approaching it not having availed the alternative remedy provided by the statute in the following exceptions namely (a) where the writ petition seeks enforcement of any of the fundamental rights, (b) where there is violation of principles of natural justice, (c) where the order or the proceedings are wholly without

jurisdiction, or (f) where the vires of an Act is challenged. The same principle of law has been laid down in the earlier judgment of Hon'ble Apex Court in the case of **Harbanslal Sahnia (supra)** and the Division Bench judgment of this Court in the case of **Rajendra Prasad Upadhyaya (supra)**.

10. In the instant case, as already indicated above, the petitioner has approached the writ Court directly without filing of an appeal, as per rules, on the ground that (a) the order impugned is patently without jurisdiction, and (b) that the order is patently violative of the rules of natural justice.

11. Considering the aforesaid two grounds as have been raised on behalf of the petitioner, the Court thus proceeds to examine as to whether the order impugned is without jurisdiction and in gross violation of the rules of natural justice so as to entertain the writ petition despite alternative remedy of appeal.

12. So far as the order being without jurisdiction is concerned, learned counsel for the petitioner contends that the appointing authority of the petitioner is the District Magistrate while the order impugned has been passed by Sub Divisional Magistrate and as the order has been passed by a lower authority than the appointing authority the said act would render the order being without jurisdiction.

13. In this regard, learned counsel for the petitioner has invited the attention of this Court towards the appointment order of the petitioner as Collection Amin dated 20.08.1997, a copy of which is Annexure-3 to the petition. Placing reliance on the said appointment order which in fact has been

issued by the Sub Divisional Magistrate but the said order also indicates that the select list has been approved by the District Magistrate, the argument of learned counsel for the petitioner is that as the select list has been approved by the District Magistrate consequently even if the appointment order has been issued by the Sub Divisional Magistrate it is the District Magistrate who is the appointing authority of the petitioner.

14. The aforesaid argument of learned counsel for the petitioner apart from being patently fallacious is also patently misconceived considering the fact that admittedly the services of the petitioner are governed by the U.P. Collection Amins Service Rules, 1974 (hereinafter referred as the 'Rules, 1974'). Rule 19-A of the Rules, 1974 categorically indicates that the appointing authority of a Collection Amin is the Sub Divisional Magistrate. Thus, considering the provisions of Rule 19-A of the Rules, 1974 vis-a-vis the appointment order of the petitioner dated 20.08.1997 which in fact has been issued by the Sub Divisional Magistrate and the removal order of the petitioner has also been issued by the Sub Divisional Magistrate consequently it cannot be said that merely because the select list had been approved by the District Magistrate, consequently it is the District Magistrate who would become the appointing authority of the petitioner. Thus, the aforesaid argument is rejected. It is held that the appointing authority of the petitioner is in fact the Sub Divisional Magistrate as per Rules, 1974.

15. So far as the ground that the order has been passed in gross violation of rules of natural justice, reliance has been placed on the judgment of Apex Court in the case of **Krushnakant B. Parmar vs. Union of**

India passed in Civil Appeal No.2106 of 2012 decided on 15.02.2012 to contend that as one of the charges against the petitioner was his unauthorized absence consequently the disciplinary authority was required to prove that the absence is willful and in absence of such finding the absence would not amount to misconduct and as such the disciplinary authority has patently erred in law in removing the petitioner from service on the ground that the petitioner was unauthorisedly absent.

16. Apart from the fact that in case the disciplinary authority may have arrived at a wrong finding by not considering the relevant records it cannot be said that the said finding would be patently violative of rules of natural justice.

17. Even otherwise, a perusal of the inquiry report dated 23.06.2023, which is part of Annexure-18 to the writ petition, would indicate that the competent authority has considered the medical certificate of the petitioner to specifically arrive at a finding that the said medical certificate does not inspire confidence as there is a difference in date in the medical certificate pertaining to the start of medical leave.

18. Thus, merely because the inquiry officer/disciplinary authority may have arrived at a finding which was at the variance with what has been indicated in the medical certificate and thereafter has gone to hold that the petitioner was willfully absent, the same cannot be said to be violative of rules of natural justice.

19. So far as the further argument of learned counsel for the petitioner that the order is also in gross violation of rules of natural justice as the witnesses who were indicated in the charge sheet were never

called to appear before the inquiry officer, the Court may only observe that mere calling or not calling the witnesses cannot be construed that the order impugned is in violation of rules of natural justice rather the same may amount to procedural irregularity which can always be looked into by the appellate authority.

20. Another ground which has been taken by the petitioner in support of his argument of the order being violation of rules of natural justice is that the reply as filed by the petitioner dated 11.12.2023 has not been considered. The said argument is also found patently fallacious inasmuch as a perusal of the order impugned dated 12.01.2024 would indicate that the reply of the petitioner has in fact been considered. Obviously, it cannot be the case of the petitioner that his reply should have been considered in a particular manner and the petitioner should have been exonerated of all the charges inasmuch as it is always the discretion of the disciplinary authority to take a view which could be erroneous but the same would not result into the said order being rendered in gross violation of the rules of natural justice.

21. So far as the judgment in the case of **Smt. Manju Devi (supra)** is concerned, the writ Court had proceeded on the ground that the order impugned had been passed without an effective opportunity of hearing to the petitioner.

22. In the instant case, it is not that the petitioner has not been heard rather his case is that the reply that had been filed by him has not been considered in its proper perspective. Thus, the judgment of this Court in the case of **Smt. Manju Devi (supra)** would be of no help to the petitioner.

23. Keeping in view the aforesaid discussion, this Court finds that the principles of law as laid down by the Apex Court in the case of **Godrej Sara Lee Limited (supra)** of entertaining a writ petition are not made out. Accordingly, the writ petition is dismissed leaving it open to the petitioner to pursue the remedy of appeal as per rules.

(2024) 4 ILRA 255
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.03.2024

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ A No. 4071 of 2020

Basu Dev Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sri Girja Shanker Mishra, Sri Govind Kumar Singh (Sr. Advocate), Sri Sankalp Narain, Sri H.N. Singh (Sr. Advocate)

Counsel for the Respondents:
C.S.C

A. Service Law – U.P. Secondary Education (Services Selection Board) Act, 1982 – Section 33C – Intermediate Education Act, 1921 – Natural Justice – Fraud in Appointment – Petitioner's appointment as lecturer regularized on 25.04.2006 – Regional Joint Director of Education stopped salary and declared appointment fraudulent vide order dated 19.03.2020 based on despatch register discrepancy – Held, order passed without notice to petitioner, principal, or management, violating natural justice – No specific finding of fraud or misrepresentation by petitioner or management – Regularization order not cancelled, cannot be deemed automatically void – Inquiry into appointment legality during seniority dispute impermissible – Orders

quashed for lack of authority and procedural fairness – *Radhey Shyam Yadav Vs St. of U.P.* and *Asha Saxena Vs S.K. Chaudhari* relied upon. (Para 8-9, 11-12)

Writ petition allowed.

List of Cases cited:

1. Radhey Shyam Yadav Vs St. of U.P.; AIR 2024 SC 260
2. Chief Engineer, M.S.E.B Vs Suresh Raghunath Bhokare; (2005) 10 SCC 465 (AIR 2005 SC 1622)
3. Asha Saxena Vs S.K. Chaudhari; 1991(2) UPLBEC 1202
4. Ram Sarup Vs St. of Har.; AIR 1978 SC 1536
5. Malcom Lawrence Cecil D'Sousa; 1975 L.I.C. 816

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

1. Heard Shri H.N. Singh, learned Senior Counsel assisted by Shri G.S. Mishra, learned counsel for the petitioner and Shri Neeraj Tripathi, learned Additional Advocate General for the State-respondents.
2. The petitioner before this Court has been working as a lecturer in the institution and his services were regularized way back on 25.04.2006. He is aggrieved now by the order passed by the Regional Joint Director of Education dated 19.03.2020, holding the appointment of the petitioner to be bad for being result of fraud and forgery and thus directed for stoppage of payment of salary of the petitioner, and also the consequential order passed by the District Inspector of Schools on 20.03.2020 withholding the payment of salary of the petitioner and further directing the authorized controller

to take appropriate action under the Intermediate Education Act, 1921 against illegal and fraudulent appointment of petitioner.

3. Briefly stated facts of the case are that petitioner was initially appointed on ad-hoc basis as a lecturer against a substantive vacancy on 20.01.1991. His appointment came to be approved on 07.03.1991 and thus petitioner started functioning in the institution and was paid salary accordingly. In view of the section 33C of the U.P. Secondary Education (Services Selection Board) Act, 1982, the Regional Joint Director of Education passed an order with the condition that if any fact was found to have been concealed, his regularization shall automatically stands cancelled. This order was passed on 25.04.2006 and thereafter nothing happened until a dispute arose of seniority amongst three teachers namely the petitioner, one Uday Narayan Dwivedi and Chandbhan yadav so as to be appointed as officiating principal of the institution. It transpires that the Regional Joint Director of Education who was seized with the matter, called for some report and on the basis of report, he questioned the order of the District Inspector of Schools giving charge to one Sri Uday Narayan Dwivedi as officiating principal of the institution and directed that the order be immediately recalled. It is in that process that he held, since one Ramujagir Shukla was recommended to be appointed with the formal approval granted by the District Inspector of Schools on 07.03.1991 and since Ramujagir Shukla did not turn up to join then his appointment must have been cancelled and then only any financial approval could have been granted to another teacher Basu Dev Singh (petitioner) as lecturer in Geography but

the despatch register did not demonstrate the approval order to have been issued to either Ramujagir Shukla or Basu Dev Singh and thus concluded that appointment of petitioner Basu Dev Singh to be *prima facie* bad and directed that the payment of salary of Basu Dev Singh be stopped. It is as a sequential to the order passed by the Regional Joint Director of Education that District Inspector of Schools passed order on 20.03.2020.

4. Two fold argument has been advanced:

(i) Once the regularization order had been passed, taking recourse to the provisions contained under the U.P. Secondary Education (Services Selection Board) Act, 1982, until and unless that order was recalled or reviewed by putting petitioner to prior notice and giving him reasonable opportunity of hearing, the Regional Joint Director of Education was not justified in ordering for stoppage of payment of salary of the petitioner and,

(ii) On a mere apprehension and doubt being raised regarding the despatch letter of the year 1991, the Regional Joint Director of Education could not have returned a finding that the approval order to the appointment of the petitioner was forged/fraudulent.

5. Yet another argument has been advanced that the Regional Joint Director of Education does not act as court to issue an interim direction that since *prima facie* the approval order appeared to be doubtful, so the payment of salary be stopped despite the fact that petitioner's regularization had already taken place.

6. Meeting the arguments, learned Standing Counsel appearing for the State-

respondent has sought to urge that the very regularization order contained a condition that if any fact was concealed in obtaining the regularization, it would stand automatically cancelled, so there was no question of passing any order for recalling the order of regularization. He has further sought to urge that both the despatch letters of financial approval in favour of one Ramujagir Shukla and that of the petitioner were bearing same despatch number and, therefore, there was no question of any doubt. According to him the despatch number was in respect of some requisition sent to the Manager of Janta Inter College, Ranipur as per entry and wherein neither the name of the petitioner, nor Ramujagir Shukla has been mentioned.

7. Having heard learned counsel for the parties and perused the record, I proceed first to examine the order passed by the Regional Joint Director of Education impugned herein this petition. Closely examining the order passed by the Regional Joint Director of Education dated 19.03.2020, I find that the Regional Joint Director of Education has not doubted the existence of the vacancy. All that he has doubted is the financial approval accorded to the petitioner's appointment on 07.03.1991, bearing letter No.6272 but this, as per records, was meant for Janta Inter College, Ranipur, Mau for some requisition and not in relation to the approval of petitioner's appointment. This finding is based upon a discussion held qua report of District Inspector of Schools dated 12.03.2020, that was regarding despatch number entered in his office despatch register. This finding if compared with the document brought on record in the counter affidavit at page No.34, then it is seen to be in reference to some requisition being sent in respect of a vacancy and not in relation

to approval order of Ramujagir Shukla. This extract of the despatch register, typed copy of which has been filed, has no head and tail in terms of date and year.

8. The report that was filed by the District Inspector of Schools dated 12.03.2020 upon which the finding has come to be returned is *verbatim* as mentioned in the order of the Regional Joint Director of Education. Thus the Regional Joint Director of Education has not applied his independent mind and just mechanically acted upon report and virtually reproduced the same in passing the order. He did not even care to examine as to whether petitioner was guilty of any misrepresentation or fraud in getting appointment and financial approval. This, of course, could have been done, had the petitioner been put to notice but the order clearly shows that the petitioner was never put to notice, nor the order proceeds to hold any inquiry in the matter.

9. Looking to the regularization order which has been brought on record as annexure No.2 to the writ petition, carries a condition that if any fraud was committed by management or principal then the order would automatically stand cancelled. In order to find answer to the question as to whether there was any fraud committed by the management or the principal in the matter of approval to the appointment of petitioner, in my considered view a notice ought to have been given to the management and the principal in the first instance but surprisingly Joint Director of Education while determining the question of seniority travelled beyond the scope of dispute pending before him in holding that the appointment of the petitioner was bad that too without issuing any prior notice to the petitioner, principal and the Manager of

the institution. There is no finding that the petitioner committed any fraud or misrepresentation, nor any finding has been returned regarding fraud or misrepresentation at the end of Principal or Manager of the institution. Thus, on this ground alone, the impugned order passed by the Regional Joint Director of Education is liable to be quashed and so the order passed by the Regional Joint Director of Education and consequential order of District Inspector of Schools cannot be sustained in law. Very recently, in the case of **Radhey Shyam Yadav and another Etc. Vs. State of U.P. and others (AIR 2024 SC 260)** decided on 03.01.2024, Supreme Court relied upon its earlier authority in the case of **Chief Engineer, M.S.E.B and Another Vs. Suresh Raghunath Bhokare (2005) 10 SCC 465 (AIR 2005 SC 1622)**, and vide paragraph 5, held thus:

"5. The entire basis of the dismissal of the appellant depends upon the factum of the alleged misrepresentation attributed to the respondent. The Industrial Court in its impugned order has noticed the fact that the respondent was appointed in April 1994 pursuant to the selection procedure followed by the competent authority and that he was selected by the panel of Selection Committee consisting of 6 members which included the very same Social Welfare Officer who had sent the proposal including the name of the respondent for appointment. It also noticed the fact that the selection in question was made after an oral interview and the required test as also the medical examination. The Industrial Court also noticed the fact that the appointment of the respondent was confirmed after one-year period and thereafter the respondent has been working without any complaint. The said Industrial Court also noticed the fact

that the termination of the respondent was based on a showcause notice issued on 5-7-1999 which was replied to by the respondent on 17-7-1999 and the termination was made in a summary procedure permissible under Rule 90(b) of the Service Regulations. The Industrial Court after perusing the pleadings and the notice issued to the respondent came to the conclusion that the alleged misrepresentation which is now said to be a fraud was not specifically pleaded or proved. In the show-cause notice, no basis was laid to show what is the nature of fraud that was being attributed to the appellant. No particulars of the alleged fraud were given and the said pleadings did not even contain any allegation as to how the appellant was responsible for sending the so-called fraudulent proposal or what role he had to play in such proposal being sent. It also noticed from the evidence of Mr Waghmare, Social Welfare Officer who sent the proposal before the Labour Court that he did not utter a single word as to whether the said supplementary list was ever called for by the department concerned or not. Thus applying the basic principle of rule of evidence which requires a party alleging fraud to give particulars of the fraud and having found no such particulars, the Industrial Court came to the conclusion that the respondent could not be held guilty of fraud. The said finding of the Industrial Court has been accepted by the High Court. Mr. Bhasme though contended that the fraud in question was played in collusion with the Social Welfare Officer and 2 other employees of the Board and action against the said 2 employees of the Board has been taken, but by that itself we are unable to accept the argument of Mr. Bhasme that there is material to support the contention of the Board that the appellant had also contributed to making

the misrepresentation at the time of applying for the job with the Board. In the absence of any such particulars being mentioned in the showcause notice or at the trial, attributing some overt act to the respondent, we do not think the Board can infer that the respondent had a role to play in sending a fraudulent list solely on the basis of the presumption that since the respondent got a job by the said proposal, the said list is a fraudulent one. It was the duty of the Board to have specifically produced the material to prove that the respondent himself had the knowledge of such a fraud and he knowingly or in collusion with other officials indulged in this fraud. Since there is no such material on record, on the facts of the instant case, the Industrial Court and the High Court have come to the right conclusion that the alleged fraud has not been established by the appellants, hence, this is not a fit case in which interference is called for. This appeal, therefore, fails and the same is dismissed."

(emphasis added)

10. Thus, the Court took a view that if the beneficiary is not liable to be charged with any misrepresentation or any kind of involvement in any conspiracy for securing such appointment, such a teacher cannot be dismissed from service for such irregularity in appointment. Once, the appointment has been made and a teacher has been made to continue for a very long time like two decades or more, now to fire such a teacher by one stroke of pen only on the ground that some despatch register did not show to be addressed to the institution granting approval to the petitioner, is not justifiable. Further, it has been held in the said judgment that if

there is no cancellation of appointment order or cancellation of approval order, then such teacher is liable to be treated in the service. The Court in that case has also held vide paragraph No.34 which reads thus:

"34. We feel that the appellants were not at fault and the State could not have abruptly stopped their salaries. Accordingly, we set aside the judgments of the High Court dated 15.09.2021 in Special Appeal Nos. 1435/2013 and 1445/2013 and direct that the State shall pay the salaries of the appellants for the period from 25.06.1999 till January, 2002 in full. We also direct that insofar as the period from October, 2005 till today is concerned, the State shall pay the appellants 50% of the backwages. Since the appointment order and the approval order are still in force, we declare that the appellants have always been and are deemed to be in service. Apart from 50% backwages, as ordered above, we direct that all consequential benefits, including seniority, notional promotion, if any, and fitment of salary and other service benefits due, be granted to the appellants. We direct the State to comply with these directions within four weeks from today. We also direct that the appellants be allowed to commence work within the said period of four weeks."

11. Thus, there being no finding of fraud or misrepresentation at the end of the petitioner or the Manager of the Committee of Management under the order impugned, the earlier order of regularization cannot be said to have stood cancelled automatically and in such circumstances, therefore, the order passed by the Regional Joint Director of Education dated 19.03.2020 and the consequential

order passed by the District Inspector of Schools dated 20.03.2020, are held to be bad for want of authority of law.

12. Besides the above, it is also worth noticing that the matter of legality of the appointment is sought to be inquired into in a seniority dispute. The law is well settled that in the matters of the seniority dispute, the legality and validity of an appointment neither can be questioned, nor can even be gone into, instead it is only to be seen as to who was appointed when and whether under the relevant regulations of the Intermediate Education Act 'A' is senior to 'B' or 'B' is senior to 'A'. Questioning the legality of appointment in the matter of seniority is going too far to adjudicate upon an issue which is never raised. A Full Bench judgment of this Court in the case of *Asha Saxena Vs. S.K. Chaudhari and others reported in 1991(2) UPLBEC 1202* held that while deciding the matter of seniority even the power under Section 16E(10) ought not to have been exercised at a very belated stage. Referring to a judgment of the Supreme Court in the case of *Ram Sarup Vs. State of Haryana (AIR 1978 SC 1536)*, the Full Bench has observed thus:

"That the three teachers should be deemed to have been appointed from the date on which they would acquire qualifications for being promoted to the post of lecturers. At the very outset it may be mentioned that the earlier writ petition of Dr. Asha Saxena had been allowed inasmuch as complete material had not come before the Full Bench regarding the fact that Dr. Asha Saxena had filed objections immediately after her promotion which had been rejected and had become final. It has also not been brought to the notice of the Full bench that seniority list

grade-wise was prepared every year after the incorporation of Chapter III in the year 1976. It may also be noted that Dr. Asha Saxena has not challenged the validity of the appointment and had only made a challenge to the seniority list. One fails to understand that after a lapse of nearly 17 years the Regional Inspectress of Girls Schools referred the matter to the Director of Education for adjudicating the question as to whether the appointments were valid or not. In our opinion, the exercise of power by the Regional Inspectress of Girls Schools on the facts and circumstances of the case is wholly arbitrary as that power could not be exercised after lapse of 17 years. The objections filed by Dr. Asha Saxena in the year 1986 which are contained in Annexure "3" to the writ petition are liable to be rejected inasmuch as the ground that she did not know the provision of Clause 3(1)(bb) in Chapter II was of no avail to her. The seniority lists were being prepared year after year after 1975-76 and the objection filed by Dr. Asha Saxena after the lapse of nearly 11 years was not liable to be entertained as has been held by the Supreme Court in the case of Malcom Lawrence Cecil D'Sousa (1975 L.I.C. 816) (supra). In any view of the matter, the appointments which were existing for the last 17 years could not be set aside after a lapse of such a long period. Even the earlier Full Bench had quashed the order of the Regional Inspectress of Girls Schools referring the matter under Section 16E(10) of the Act we are also of the opinion that the aforesaid order is liable to be quashed. It is true that there is power under Section 16E (10) of the Act to cancel the appointments but the power has to be exercised within a reasonable time. The appointments had been made in the year 1973 and by no stretch of imagination it can be said that

the exercise of that power after the lapse of 17 year by the Director of Education under Section 16E(10), on the facts and circumstances of the case can be said to be exercise of a power within a reasonable time. In our opinion, the order of the Regional Inspector of Girls Schools referring the matter to the Director of Education under Section 16E(10) is thus liable to be quashed."

(emphasis added)

13. I have also gone through each paragraphs of the counter affidavit filed on behalf of the State-respondents and sworn by the District Inspector of Schools, Mau and I do not find there to be any pleadings qua fraud or misrepresentation committed by the petitioner or the Manager of the Committee of the Management. If any fraud was committed in the office of the District Inspector of Schools, it cannot be presumed that it was at the instance of the manager or the assistant teacher, the petitioner in this case. All these facts should have been brought to the notice of the Regional Joint Director of Education when the regularization of the petitioner's service was being considered. Having not done so, on mere apprehension or *prima facie* view, such impugned orders cannot be passed.

14. In view of the above writ petition succeeds and is **allowed**. The impugned orders, passed by the Regional Joint Director of Education dated 19.03.2020 and the consequential order passed by the District Inspector of Schools dated 20.03.2020, are hereby quashed. No order as to cost.

(2024) 4 ILRA 261
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.03.2024

BEFORE

THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Writ A No. 4307 of 2024

Mayank Mittal ...Petitioner
District Judge & Anr. ...Respondents
Versus

Counsel for the Petitioner:
 Sri Nipun Singh, Sri Sumit Suri

Counsel for the Respondents:
 C.S.C., Sri Sundeep Agarwal

A. Tenancy Law – U.P. Regulation of Urban Premises Tenancy Act, 2021 – Section 35(1) – U.P. Regulation of Urban Premises Tenancy Rules, 2021 – Rule 6, Rule 12 – Pre-deposit for Appeal – Petitioner challenged Rent Tribunal's order dated 11.03.2024 directing pre-deposit of 50% of payable amount with Rent Authority before pressing appeal – Held, Section 35(1) mandates pre-deposit for appeal to be maintainable, and expression "no appeal shall lie" implies deposit with Rent Authority, not Rent Tribunal – Rule 6 provides mechanism for deposits, applicable to pre-deposits for appeals – No provision in Act or Rules specifies deposit with Rent Tribunal – Impugned order directing deposit with Rent Authority upheld – No illegality warranting interference under Article 226 – Petitioner granted liberty to seek preponement of appeal hearing to avoid execution of eviction order. (Para 9-13, 15)

Writ petition dismissed.

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

1. Heard Sri Nipun Singh, learned counsel for the petitioner and Sri Sundeep Agarwal, learned counsel representing the plaintiff-respondent no. 3.

2. The learned Standing Counsel has accepted notice of the Writ Petition on behalf of the State-Respondents.

3. The instant Writ Petition at the instance of the Tenant/petitioner has been filed for quashing the order dated 11.03.2024 passed by the District Judge/Rent Tribunal, District Gautam Budh Nagar/Respondent no. 1, in Misc Case No. 58 of 2024 (Mayank Mittal Vs. Pooran Dev Adlakha (Deceased) and others) so far as it relates to the direction to deposit the pre-deposit 50% payable amount with the Rent Authority-Respondent no. 2 and file the receipt in the Appeal under Section 35 of the UP Act No. 16 of 2021 and only thereafter press the Appeal.

4. It is the case of the Writ Petitioner that he is a tenant of the Respondent no. 3. The Respondent no. 3 filed an Application u/s 21 (2) of the U.P. Regulation of Urban Premises Tenancy Act 2021 (U.P. Act No. 16 of 2021) before the Rent Authority/Additional District Magistrate (Finance and Revenue) District Gautam Budh Nagar seeking the eviction of the Petitioner as also for recovery of rent and damages. The application u/s 21 (2) registered as Case No. 72 of 2023 was allowed vide judgment and order dated 26.02.2024 by the Rent Authority directing eviction of the petitioner and further directing the petitioner to pay twice the rent of first two months after September, 2019 and thereafter to pay four times of rent and vacating the premises within 30 days.

5. The petitioner aggrieved by the judgment and order of the Rent Authority has preferred a Rent Appeal u/s 35 (1) of the U.P. Act No. 16 of 2021. Section 35 (1) of the U.P. Act No. 16 of 2021 contemplates pre-deposit of 50% of the entire payable amount under the impugned order of the Rent Authority, for the Appeal to be entertainable.

6. Learned counsel for the petitioner submits that the petitioner submitted the Appeal to the Rent Tribunal along with a Draft of Rs. 16,64,000/- (being 50% of the total amount payable as ordered by the Rent Authority under the order dated 26.02.2024 impugned in the Appeal) but the Rent Tribunal did not accept the Draft and passed the order dated 11.03.2024 (impugned in the present Writ Petition) to deposit the amount before the Rent Authority and file the receipt of the deposit so made along with the Appeal. The Rent Tribunal has not entertained the Appeal and no number has been allotted to it but the case has been registered as Misc. Case No. 58 of 2024. The petitioner has been directed to press the Appeal only after making the deposit before the Rent Authority and has fixed the Appeal for 02.04.2024.

7. Sri Nipun Singh, learned counsel for the petitioner submits that the Rent Tribunal has committed manifest error of law in refusing to accept the pre-deposit of 50% of the amount directed to be paid by the Rent Authority. He submits that the amount being a precondition for maintainability of the Appeal was required to be accepted by the Rent Tribunal. He has invited the attention of this Court to the provisions of Section 35 (1) of the Act as also to Rule 12 of the U.P. Regulation of Urban Premises Tenancy Rules 2021 to demonstrate that there is no provision as to where the amount of pre-deposit would be payable. He also submits that the Form-9 under which the Appeal is to be preferred also does not mention where the pre-deposit is to be made. It is further contended that the Rent Authority under the order dated 26.02.2024 sought to be assailed in the Appeal preferred before the Rent Tribunal had directed eviction of the

petitioner within 30 days. The Rent Tribunal has fixed the Case on 02.04.2024 without hearing the Appeal. The Rent Authority has become functus-officio after passing the order dated 26.02.2024. If the amount is not accepted by the Rent Authority the petitioner would be evicted even without his Appeal being heard and it would be travesty of justice. It is thus prayed that appropriate directions be issued by this Court to the Rent Tribunal to accept the Demand Draft bearing No. 460797 dated 07.03.2024 or in the alternative prepone the date fixed by the Rent Tribunal and direct the Respondent No. 2 i.e. the Rent Authority to accept the pre-deposit and issue the receipt thereof so as to enable the petitioner to press his Appeal.

8. Sri Sundeep Agarwal, learned counsel for the Respondent No. 3 as also the learned Standing Counsel have submitted that the petitioner ought to have carried out the direction under the impugned order. They however could not justify the directions contained in the impugned order.

9. I have heard the learned counsels for the parties and have perused the record. I have also gone through the provisions of the Act and the Rules framed thereunder. It is not in dispute that Section 35 (1) of the Act, Rule 12 of the Rules as also the Form-9 which is referable to Rule 12 (1) of the Rules is silent about before whom the pre-deposit of the 50% of the total payable amount as directed by the Rent Authority is to be made. However a perusal of the provisions of Section 35 (1) of the U.P. Act No. 16 of 2021 under which the Appeal is to be instituted the legislature in its wisdom has used the expression "**no appeal shall lie**" in the proviso to the

section 35 (1). The relevant provision is being quoted herewith :

35. Appeal to Rent Tribunal- (1)

"Any person ☐ aggrieved by an order passed by the Rent Authority may prefer an appeal along with a certified copy of such order to the Rent Tribunal within the local limits of which the premises is situated, within a period of thirty days from the date of that order:

Provided that **no appeal shall lie** unless the appellant pre-deposits fifty percent of the entire payable amount under the impugned order of the Rent Authority."

10. In the opinion of the Court the inclusion of the expression "no appeal shall lie" necessarily means that the Appeal could not be conceived in the absence of a pre-deposit. Since the Appeal itself could not be conceived the Rent Tribunal has no role to play. This necessarily implies that the pre-deposit is required to be deposited with the Rent Authority whose order is sought to be appealed against.

11. In this view of the matter the impugned direction to make the deposit before the Rent Authority and file the receipt thereof along with the Memo of the Appeal cannot be faulted.

12. In the opinion of the Court, there is one other aspect of the matter. The Court on the perusal of the Rule 6 of the U.P. Regulation of Urban Premises Tenancy Rules 2021 finds that the Rule provides a elaborate mechanism for accepting deposit of Rent and other charges referable to Section 14 of the Act, 2021. Sub Rule 2 of Rule 6 provides that such deposits can be made by postal money order or on account payee Cheque or by any digital mode in the name of the Rent Authority, which amount

is to be deposited by the Rent Authority in a Saving Bank account opened by it in any of the Nationalized Bank with due approval of the Collector of the District and the Rent Authority has been made solely responsible for the proper and safe maintenance of such account and the transactions therein. In the opinion of the Court, the said mechanism can very well be utilized for the purposes of accepting the pre-deposits for maintaining appeals before the Rent Tribunal.

13. In view of the above the Court finds no illegality or irregularity in the impugned order dated 11.03.2024 directing the pre-deposit of 50% payable amount with the Rent Authority/Respondent No. 2 and file receipt in the Appeal u/s 35 of the Act 2021 and only thereafter press the Appeal warranting interference of this Court under Article 226 of the Constitution of India.

14. The Writ Petition lacks merit and is accordingly **dismissed**.

15. However the Court finds that the Rent Tribunal has fixed 02.04.2024 as the date fixed for consideration of the Appeal which falls beyond 30 days of the order of the Rent Authority and there is every likelihood of the order of the Rent Authority being executed, under Section 36, even before the Appeal is heard. In such circumstances the petitioner is granted liberty to make the pre-deposit of 50% of the total amount payable by the Demand Draft No. 460797 dated 07.03.2024 obtain the receipt thereof and file an application seeking to prepone the date fixed by filing an appropriate application in that regard. In the eventuality of such an application being made the learned District Judge/Rent Tribunal Gautam Budh Nagar shall prepone

the date and proceed to entertain and hear the Appeal on merits.

(2024) 4 ILRA 264

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: LUCKNOW 26.04.2024

BEFORE

THE HON'BLE OM PRAKASH SHUKLA, J.

Writ A No. 4562 of 1998

Mohd. Asgar Ali ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:

H.G.S. Parihar, Nakul Dubey, PC Misra, Shivam Sharma

Counsel for the Respondents:

Rakesh Sharma, Deepanshu Dass, Dinesh Kumar Pandey, IH Farooqui, Raj Kumar Singh, Sanjiv Srivastava

A. Service Law – Central Industrial Security Force (CISF) Rules, 1969 – Rule 7-A, Rule 29-A, Rule 34 – Constitutional Law – Article 226 – Disciplinary Proceedings – Natural Justice – Bias – Petitioner, a CISF Constable, challenged removal order dated 04.12.1996, appellate order dated 01.08.1997, and revisional order dated 24.06.1998 – Alleged bias of Inquiry Officer, non-supply of documents, and lack of jurisdiction of Deputy Commandant to appoint Inquiry Officer – Held, Deputy Commandant competent as Disciplinary Authority under Rule 7-A and Rule 29-A read with Schedule II – No prejudice shown from alleged bias or non-supply of documents – Petitioner participated in inquiry, cross-examined witnesses, and received all requested documents – Revisional powers of DG/CISF validated by CISF (Amendment and Validation) Act, 1999 – No violation of natural justice or statutory rules – Punishment proportionate to charges of dereliction of duty and indiscipline – *B.C. Chaturvedi Vs U.O.I., H. VS Nirmala Vs Karnataka St. Financial Corporation, and Ex*

Sepoy Madan Prasad Vs U.O.I. relied upon.
(Para 16-19, 23-29)

Writ petition dismissed.

List of Cases cited:

1. B.C. Chaturvedi Vs U.O.I.; (1995) 6 SCC 749
2. H. VS Nirmala Vs Karnataka St. Financial Corporation; (2008) 7 SCC 639
3. St. Bank of India Vs Ram Das; (2003) 12 SCC 474
4. Managing Director, ECIL, Hyderabad Vs B. Karunakar; (1993) 4 SCC 727
5. Haryana Financial Corporation Vs Kailash Chandra Ahuja; (2008) 9 SCC 31
6. Burdwan Central Cooperative Bank Ltd. Vs Asim Chatterjee; (2012) 2 SCC 641
7. Debotosh Pal Choudhary Vs Punjab National Bank; (2002) 8 SCC 68
8. Ex Sepoy Madan Prasad Vs U.O.I.; 2023 LiveLaw (SC) 580

(Delivered by Hon'ble Om Prakash Shukla, J.)

(1) Heard Mr. Shivam Sharma, learned Counsel representing the the petitioner and Mr. Deepanshu Dass, learned Counsel representing the Union of India/respondents.

(2) The present writ petition came to be filed by the petitioner in the year 1998 i.e. about 26 years ago, impugning order dated 3/4.12.1996 (Annexure No.1), 01.08.1997 (Annexure No.2) and 24.06.1998 (Annexure No. 3) and thereby seeking his re-instatement in service with all consequential benefits.

(3) Briefly stating, the petitioner was appointed on the post of Constable in CISF

on 12.04.1987 and after training, he was posted at CISF KCC Khetri, Rajasthan and subsequently he was transferred to PGUTPP, Uchahar Unit of CISF in the year 1991 and thereafter to Rae Bareli unit of CISF on 10.08.1994. It has been claimed that the petitioner was thereafter sent in election duty in the month of April, 1996, wherein a memorandum dated 09.06.1996 came to be issued to him. The said memorandum inter-alia alleged that on 07.06.1996 between 21.00 Hours to 5.00 Hours, the petitioner's duty was assigned at Quarter Guard and apparently, in the midnight, the Company Hawaldar Major checked the Quarter Guard as usual at about 2:00 hours, wherein the petitioner was found to be absent from the place of duty and he was found sleeping with rifle on his side in his room No. 22 and, as such, on the instance of Surendra Rai and Suraj Mani, the petitioner was woken from his sleep and sought an explanation. However, the petitioner failed to give any reply and instead went back on his duty. It is stated that the petitioner, after the service of the aforesaid memorandum, gave his written explanation on 09.06.1996.

(4) However, in the interregnum, the petitioner was placed under suspension and was also served with a charge-sheet on 23.06.1996 levelling charges on four counts. The 1st being, he was found sleeping on duty, which amounted to dereliction of duty; the 2nd being hurling abuses on colleagues and threatening them on 10.06.1996 at about 2:30 hours, which again amounted to violation of rules and amounted to serious indiscipline; the 3rd being his absence from the assigned duty at the Hon'ble High Court of Allahabad on 12.05.1996, amounting to dereliction of duty; and the 4th charge being absence from roll-call parade on 12.05.1996

amounting to defiance of orders of higher authorities.

(5) The petitioner appears to have given explanation to all the four charges. However, it seems thereafter, one Mr. I.P Singh, Inspector was appointed as Inquiry Officer on 20.07.1996. Apparently, the petitioner represented before his higher authority for change the said Inquiry officer, terming him to be an interested person, which, however, came to be rejected on 20.08.1996. The petitioner alleged bias against the inquiry officer on the ground that some earlier allegations levelled against the petitioner by the same said inquiry officer was found to be wrong and he was also exonerated from the said charges on the said earlier occasion. Thus, the petitioner alleging the inquiry officer to be biased sent several representations to his higher officers but without any success.

(6) Records further reveal that after the aforesaid failure to change the inquiry officer, the petitioner went on to participate in the said enquiry proceedings and the department produced several witnesses, including PW-1(Surajmani), PW-2(Surendra Rai), Pw-4 (Subhas Ram), PW-5 (Chottey Rai), PW-6 (J.K. Hambram), PW-7 (L.D Joshi), who all were cross-examined by the petitioner. Thereafter, the statement of the petitioner was recorded on 08.09.1998 and subsequently a copy of the inquiry report was supplied to the petitioner on 12.10.1998, giving him opportunity to give his explanation against the said report.

(7) It appears that the petitioner gave a representation against the said inquiry report on 02.11.1996. However, it seems that the said explanation did not find favour with the competent authority and, as such, the petitioner was punished by removal

from his service vide order dated 04.12.1996. Against the said order of removal from service, an appeal came to be filed by the petitioner, which was also rejected by the appellate authority vide order dated 01.08.1997. Against the said appellate order, the petitioner preferred a revision, which was also rejected vide order dated 24.06.1998.

(8) The learned Counsel for the petitioner challenging all these three impugned orders has taken several grounds in the present petition, including (i) non-application of mind by the punishing authority, (ii) inquiry officer being biased, (iii) inquiry being conducted without following the principles of natural justice, (iv) the apparent prejudice of the inquiry officer Shri I.P. Singh, (v) non-consideration of his several representation for change in inquiry officer, (vi) refusal to supply documents during inquiry, (vii) inquiry not having been conducted in a fair manner, (viii) absence of any presenting officer during the departmental inquiry, (ix) recording of the statement being not proper, (x) non-consideration of the repetition of the petitioner by the punishing authority, (xi) order of removal being too excessive and not being commensurate with the gravity of charges levelled against him, (xii) Rejection of appeal in a mechanical manner, etc.

(9) During the course of hearing, a legal objection of lack of jurisdiction of the Deputy Commandant in terms of Rule 34 of the Central Industrial Security Rules, 1969 to appoint inquiry officer had been pointed out by the petitioner by referring to CISF Circular No.9/78, however, the same was opposed by the learned counsel for the respondents on the ground that no such ground or pleading has been taken in the

writ petition. However, this Court vide an order dated 08.12.2021 permitted the petitioner to amend the writ petition.

(10) Further, the learned Counsel for the petitioner referring to a letter dated 03.08.1998 of the CISF has submitted that since the revisional powers under the CISF Act, 1968 has been conferred to Central Government only under Section 9(3) of the CISF Act, 1968 and not to DG/CISF, the said powers cannot be delegated to the DG/CISF. He has pointed out to the contents of the said letter, wherein it has been suggested that an amendment be made in the CISF Act, 1968 to bring in conformity with the provisions of Rule 49 of the CISF Rules, 1969, thereby giving revisional powers to DG/CISF. According to the learned Counsel, since the revision filed by the petitioner has not been considered/dismissed by the Central Government, the said impugned dismissal is without any authority and the same is liable to be set-aside.

(11) *Per contra*, the learned Counsel for the respondent has contended that the petitioner was on election duty when the various acts of misconduct were committed by him and at that point of time, Shri S.H. Ansari, Dy. Commandment of CISF, TSL Naini was his overall in-charge. Further, it has been stated that as far as circular No. 9/78, wherein it has been observed that “Disciplinary Authority” used in sub Rule (4) of Rule 34 of the CISF Rules, 1969 would only imply, the appointing authority is concerned, besides the point that the petitioner had not taken the said ground before the Appellate authority, revisional authority or the present writ petition, the explanation to Rule 34(2) clearly stated that the term “Disciplinary Authority” shall include the authority competent under the

said rules to impose upon the member of the Force any of the penalties specified in clause (e) to (h) of Rule 31. According to him, the Disciplinary authority is the Dy. Commandant, who is also well competent to issue charge-sheet and as such appoint Inquiry officer within the meaning of sub-rule 1(4) of Rule 34 of CISF Rules, 1969. As regards the Circular dated 03.08.1998, it has been contended by the learned Counsel for the respondents that no doubt, the revisional powers under CISF Act had been conferred on Central Government only under Section 9(3) of the CISF Act, 1968 and not DG, CISF, however, the said stands amended with retrospective effect in the CISF Act, 1968 vide amendment act namely “the CISF (Amendment and validation) Act, 1999 dated 29.12.1999 vide section 6 read with section 10 of the said Act of 1999.

(12) As far as the merits of the present writ petition is concerned, it has been contended that the petitioner has been subjected to a fair trial, which he has participated and the punishment inflicted was commensurate to the various allegations levelled against him, which were found to be true. It has been submitted that there was no irregularity in appointment of Inquiry Officer, all the documents have been duly supplied to the petitioner as is apparent from the records itself and there is no bias in the inquiry held by the inquiry officer. It has been further contended that mere allegations of irregularity in disciplinary proceeding, is not sufficient and the petitioner has failed to show as to how prejudice is caused to him and all those pleas which have not been taken by the petitioner may be deemed to have been taken and rejected. It was also submitted that the punishment should not be ordinarily interfered by this

Court as has been held in several Judgments passed by this Court as well as the Hon'ble Supreme Court. Thus, he has submitted for rejection of the present writ petition as being without merits.

(13) Having heard the submissions of the parties, this Court is of the view that the present petition seeking quashing of the dismissal order as well as the order in appeal and revision has been challenged by the petitioner primarily for two reasons. The first being that the petitioner has sent representations to the higher authorities for change in the inquiry officer on the ground that he is biased, however, the same was not allowed and second that opportunity to defend was not adequately provided to the petitioner as document were not supplied to him. Further a ground, although not taken in the writ petition but subsequently amendment by the petitioner is relating to the implication of Rule 34(4) of the extant rules, which provides that the appointing authority is the only competent authority to appoint an inquiry officer for a departmental proceeding.

(14) Although, this Court is premised to examine the various grounds agitated by the petitioner for preferring the present writ petition, however this Court is reminded of the limited jurisdiction in entertaining this kind of petition as has been laid down by a larger bench of the Hon'ble Apex Court in the case of **B.C. Chaturvedi Vs. Union of India and others: (1995) 6 SCC 749**, wherein a three Judge Bench of the Apex Court held in paragraph-12 as under :-

"Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. Power of judicial review is meant to ensure that the individual receives fair treatment and not

to ensure that the conclusion which the authority reaches is necessarily correct in the eye of the Court. When an inquiry is conducted on charges of misconduct by a public servant, the Court/Tribunal is concerned to determine whether the inquiry was held by a competent officer or whether rules of natural justice are complied with. Whether the findings or conclusions are based on some evidence, the authority entrusted with the power to hold inquiry has jurisdiction, power and authority to reach a finding of fact or conclusion. But that finding must be based on some evidence. Neither the technical rules of Evidence Act nor of proof fact or evidence as defined therein, apply to disciplinary proceeding. When the authority accepts that evidence and conclusion receives support therefrom, the disciplinary authority is entitled to hold that the delinquent officer is guilty of the charge. The Court/Tribunal in its power of judicial review does not act as appellate authority to re- appreciate the evidence and to arrive at its own independent findings on the evidence. The Court/Tribunal may interfere where the authority held that the proceedings against the delinquent officer in a manner inconsistent with the rules of natural justice or in violation of statutory rules prescribing the mode of inquiry or where the conclusion or finding reached by the disciplinary authority is based on no evidence. If the conclusion or finding be such as no reasonable person would have ever reached, the Court/Tribunal may interfere with the conclusion or the finding, and mould the relief so as to make it appropriate to the facts of each case."

(15) Keeping in view the judicial limitation as propounded by the Hon'ble Apex Court, this Court finds that the present writ petition has a chequered

history of being pending since the last more than twenty-six years. A close scrutiny would reveal that this writ petition was dismissed for non-prosecution on at least 5 different occasions on 06.02.2009, 05.03.2009, 10.03.2010, 13.12.2013 and 09.03.2018. Apparently one of the reasons for pendency of this writ petitions for such a long year is due to lack of diligence in pursuing the present writ petition by the petitioner. However, the delay in pendency of this writ petition would not hold back this Court in adjudicating the present writ petition on its own merits, keeping in view the grounds agitated by the contesting parties.

(16) As far as the ground agitated by the petitioner relating to implication of Rule 34(4) of the 1969 Rules, to contend that the appointing authority is only competent to appoint the enquiry officer, this court finds that Rule 29-A of the CISF Rules, 1969, *inter-alia* states that

“The disciplinary authority in respect of a member of the Force for the purpose of imposing any particular penalty or the passing of any disciplinary order shall be the authority specified in this behalf in Schedule II under whose administrative control of the member is serving and shall include any authority mentioned in the said schedule superior to such authority”.

(17) Apparently, the petitioner was posted as a Constable under the supervision and authority of unit head i.e the Deputy Commandant and was in election duty and as such as per rule 29A read with Schedule II of the Rules, the Dy. Commandant being the unit head and within whose administrative control the petitioner was serving, was the competent disciplinary

authority. Further, Rule 7A of the extant rules prescribes the duties of a Deputy Commandant as follows:

“7-A. Duties of Deputy Commandant – (1) *The Deputy Commandant shall assist the Commandant in the discharge of his duties; and where he is placed as head of the unit, he shall discharge all the duties of a Commandant and shall exercise only those financial powers that are delegated to him under the relevant rules.*

(2) *The Deputy Commandant shall be responsible for the efficiency, discipline, and morale of the personnel under him and shall also be responsible for the security of the undertaking or its part entrusted to him.”*

(18) This Court finds that the use of the word ‘discipline’ in rule 7A sub-rule (2) sufficiently indicate that the Deputy Commandant is responsible for the discipline of the personnel under him and since he is responsible for the discipline for the said personnel as a corollary, he is also competent to take such measures as may be prescribed by law to ensure that the discipline is enforced. Thus, this Court has no hesitation in holding that the Deputy Commandant in view of the provisions of Rule 7-A read with rule 29A of the Rules, 1969, was the sole person responsible for the discipline of those under him including the petitioner and as being the head of the unit concerned is the appropriate Disciplinary Authority and is to exercise all the powers and duties of Commandant except such financial powers as are not delegated to him.

(19) Additionally, this Court cannot be oblivious to the fact that the petitioner has not raised this objection as to

procedural irregularity either during the inquiry or during the appeal or during the statutory revision preferred by him. Even before this Court, the aforesaid ground has been sought to be introduced by way of amendment after 22/23 years of filing of the present writ petition. In any case, there are two ways in which the contravention of rules in appointment of the inquiry officer may be flagged by the delinquent officer, the first being during the inquiry itself and the second being after the inquiry, provided that the delinquent officer is able to show as to how the said appointment has caused prejudice to his rights. Admittedly, the petitioner in the present case during the inquiry did not flag the irregularities in appointment of the inquiry officer and at the later stage, although a ground had been taken after 22/23 years of filing of the present writ petition, however there is absolutely no ground nor any iota of mention as to how the same has caused prejudice to the petitioner. Further, this Court finds that the petitioner has not only participated in the proceedings but has also cross-examined almost seven departmental witnesses and relied on several documents during the departmental proceedings. There had been no report of biasness by the petitioner during the said proceedings.

(20) It would be appropriate at this stage, to quote few paragraphs from the judgment of the Hon'ble Apex Court, which are relevant to the present context. The Apex Court in the case of **H.V. Nirmala vs Karnataka State Financial Corporation and Ors. : (2008) 7 SCC 639** observed as follows :-

10. Appellant did not raise any objection in regard to the appointment of the Enquiry Officer. He participated in the enquiry proceeding without any demur

whatsoever. A large number of witnesses were examined before the Enquiry Officer. They were cross-examined. Appellant examined witnesses on her own behalf. Learned Single Judge as also the Division Bench of the High Court opined that the appellant has failed to establish that any prejudice has been caused to her by reason of appointment of a Legal Advisor as an Enquiry Officer and as the appellant has participated in the enquiry proceeding, she could not be permitted to raise the said contention.

11. Mr. Patil, however, would submit that such a contention which goes to the root of jurisdiction can be urged at any stage. We do not agree. Appointment of an incompetent enquiry officer may not vitiate the entire proceeding. Such a right can be waived. In relation thereto even the principle of Estoppel and Acquiescence would apply.

12. In State Bank of India vs. Ram Das: (2003) 12 SCC 474 this Court held (SCC P.484, Para 27) :

"It is an established view of law that where a party despite knowledge of the defect in the jurisdiction or bias or malice of an arbitrator participated in the proceedings without any kind of objection, by his conduct it disentitles itself from raising such a question in the subsequent proceedings. What we find is that the appellant despite numerous opportunities made available to it, although it was aware of the defect in the award of the umpire, at no stage made out any case of bias against the umpire. We, therefore, find that the appellant cannot be permitted to raise the question of bias for the first time before this Court."

(21) That the next ground agitated by the petitioner was regarding the bias in the whole process of inquiry by the inquiry

officer. The petitioner has contended that the inquiry officer Shri I.P. Singh was biased as he had already called explanation of the petitioner while he was posted as Company Commander on 24.03.1996, to the effect that he was absent from P.T. parade and the petitioner was directed to submit reply within 24 hours failing which disciplinary proceedings were to be initiated against him and on the basis of explanation called by Shri I.P. Singh proceedings were initiated, which eventually came to be dropped and he was exonerated. Thus, it has been contended by Shri I.P. Singh, Inspector that since he was appointed as inquiry Officer to inquire into the charges framed against the petitioner within the meaning of sub-rule 1(4) of Rule 34 of CISF Rules, 1969, he was bound to be biased because of the earlier proceedings.

(22) This Court has already held that the appointment of inquiry officer in the case of petitioner was in accordance with the provisions of Rules governing disciplinary proceedings. Further, from records of the present case, it is available that the petitioner has replied in negative regarding any objection to the appointment of inquiry officer Shri I.P. Singh during the inquiry proceedings. This Court also finds that the inquiry officer Shri I.P. Singh has no administrative control over the petitioner. Furthermore, Shri I.P. Singh was neither a prosecution witness nor a defence witness and in no way was related to the inquiry proceedings.

(23) The well-established canons controlling the field of bias in service jurisprudence can reasonably be extended to the element of prejudice as well in such matters. Prejudice *de facto* should not be

based on a mere apprehension or even on a reasonable suspicion. It is important that the element of prejudice should exist as a matter of fact or there should be such definite inference of likelihood of prejudice flowing from such default, which relates to statutory violations. It will not be permissible to set aside the departmental inquiries in any of these classes merely on the basis of apprehended prejudice. In the present case, no instances of proved bias have been pleaded by the petitioner in the present writ petition or shown from the records of the present case. Thus, this Court finds no basis for any bias or prejudice in the appointment of the inquiry officer Shri I.P. Singh in the inquiry proceedings.

(24) The next ground taken by the petitioner is relating to not having been provided with reasonable opportunity to defend his case in the departmental proceedings on the ground that all the documents have not been supplied to him. This Court finds that it would be profitable to quote a very celebrated judgment of the Hon'ble Supreme Court on the aspect of providing reasonable opportunity to a delinquent officer in a departmental proceeding. The Hon'ble Apex Court in the case reported as **Managing Director, ECIL, Hyderabad Vs. B. Karunakar : (1993) 4 SCC 727** held that the theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are neither incantation to be invoked nor rites to be performed on all and sundry occasions. Whether, in fact, prejudice has been caused to the employee or not on account of denial of report to him, has to be considered on the facts and circumstances of each case. The Apex Court has clarified even the stage to which the departmental

proceedings ought to be reverted in the event the order of punishment is set aside for these reasons.

(25) Further, it will be useful to refer to the judgment of Apex Court in the case of **Haryana Financial Corporation v. Kailash Chandra Ahuja : 2008 (9) SCC 31** at page 38 where the Court held as under :-

"From the ratio laid down in B. Karunakar it is explicitly clear that the doctrine of natural justice requires supply of a copy of the inquiry officer's report to the delinquent if such inquiry officer is other than the disciplinary authority. It is also clear that non- supply of report of the inquiry officer is in the breach of natural justice. But it is equally clear that failure to supply a report of the inquiry officer to the delinquent employee would not ipso facto result in the proceedings being declared null and void and the order of punishment non-est and ineffective. It is for the delinquent employee to plead and prove that non- supply of such report had caused prejudice and resulted in miscarriage of justice. If he is unable to satisfy the court on that point, the order of punishment cannot automatically be set aside."

(26) Further, there is another aspect of the matter. The petitioner by merely putting allegations of irregularity in disciplinary proceedings cannot escape his responsibility to show that prejudice has been caused to him by the same. In the case of **Burdwan Central Cooperative Bank Limited & Anr. Vs. Asim Chatterjee & Ors., (2012) 2 SCC 641**, the Hon'ble Supreme Court held that

"However, there is one aspect of the matter which cannot be ignored. In B.

Karunakar's case (supra), despite holding that non-supply of a copy of the report of the Inquiry Officer to the employee facing a disciplinary proceeding, amounts to denial of natural justice, in the later part of the judgment it was observed that whether in fact, prejudice has been caused to the employee on account of non-furnishing of a copy of the inquiry report has to be considered in the facts of each case. It was observed that where the furnishing of the inquiry report would not make any difference to the ultimate outcome of the matter, it would be a perversion of justice to allow the concerned employee to resume his duties and to get all consequential benefits. It was also observed that in the event the Inquiry Officer's report had not been furnished to the employee in the disciplinary proceedings, a copy of the same should be made available to him to enable him to explain as to what prejudice had been caused to him on account of non-supply of the report. It was held that the order of punishment should not be set aside mechanically on the ground that the copy of the inquiry report had not been supplied to the employee. This is, in fact, a case where the order of punishment had been passed against the Respondent No.1 on allegations of financial irregularity. Such an allegation would require serious consideration as to whether the services of an employee against whom such allegations have been raised should be retained in the service of the Bank. Since a Bank act in a fiduciary capacity in regard to people's investments, the very legitimacy of the banking system depends on the complete integrity of its employees. As indicated hereinbefore, there is a live-link between the Respondent No.1's performance as an employee of the Samity, which was affiliated to the Bank, and if the Bank was of the view that his services

could not be retained on account of his previous mis-demeanour, it is then that the second part of B. Karunakar's case (supra) becomes attracted and it becomes necessary for the court to examine whether any prejudice has been caused to the employee or not before punishment is awarded to him. It is not as if the Bank with an ulterior motive or a hidden agenda dismissed the Respondent No.1 from service, in fact, he was selected and appointed in the Appellant-Bank on account of his merit and performance at the time of interview. It cannot be said that the Bank harboured any ill-feeling towards the Respondent No.1 which ultimately resulted in the order of dismissal passed on 8th May, 2010. We, therefore, repeat that since no prejudice has been caused to the Respondent No.1 by the non-supply of the Inquiry Officer's report, the said Respondent had little scope to contend that the disciplinary proceedings had been vitiated on account of such non-supply."

(27) Having traced the law on the issue, it would be apt to record that it is an admitted fact as stated in para 9 of the Counter Affidavit that the petitioner was supplied all documents requested by him vide his application dated 20.08.1996, and the same is also evident from the petitioner's own receiving in his own hand-writing dated 21.08.1996 on his said application. Furthermore, the petitioner during the inquiry has admitted that he had received all documents sought by him and as is apparent from para 19 of the counter affidavit that the delinquent petitioner was also allowed inspection of all records. The Apex Court in the case of **Debotosh Pal Choudhary Vs Punjab National Bank & Ors. : (2002) 8 SCC 68**, inter-alia held

"5. The petitioner had been given documents for inspection as per the list given by the Presenting Officer and he made a statement on 18.7.1988 that he had verified all the documents and papers and inspected the documents as per the list given in the letter dated 24.5.1988. The Inquiring Authority allowed the petitioner to file a list of documents and as sought for by his letter dated 24.5.1988, the request for inspection or copies was also allowed. It is thereafter the Enquiry Officer has relied upon the documents produced by the Presenting Officer and adverted to various documents produced by the petitioner as well. Therefore, the contention of the petitioner that he did not have reasonable opportunity to inspect the documents is incorrect."

(28) Additionally, in the present writ petition, the petitioner was not able to point out as to which document was not provided to him in the department proceedings. The contention of the petitioner relating to non-supply of documents, in the absence of any specific enumeration, is devoid of merits and as such the present ground of the petitioner fails.

(29) Admittedly, the petitioner was a member of disciplined armed force, namely, Central Industrial Security Force but had acted in a most reprehensible manner, which is unexpected from a member of disciplined force. If the character of a cop is found to be unsatisfactory, it would be perilous in public interest to allow him continue in public service. Recently, the Hon'ble Supreme Court in the case of **Ex Sepoy Madan Prasad Vs Union of India and Others** [2023 Livelaw (SC) 580] has held

that discipline is the implicit hallmark of armed forces and a non-negotiable conditions of service.

(30) Having regard to the aforesaid facts and circumstances of the case, what this Court find is that learned counsel for the petitioner has failed to point out any illegality, perversity or ambiguity in the orders under challenge so as to warrant the indulgence of this Court under Article 226 of the Constitution of India.

(31) In view of the aforesaid, this Court do not find any justifiable ground to exercise extraordinary jurisdiction to interfere with the orders impugned and as such, the present writ petition, being devoid of merits, is **dismissed**.

(32) However, in the facts of the present case, there shall be no order as to costs.

(2024) 4 ILRA 274
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 16.04.2024

BEFORE

THE HON'BLE ABDUL MOIN, J.

Writ A No. 4827 of 2022

Chhavi Ram **...Petitioner**
Versus
State of U.P. & Anr. **...Respondents**

Counsel for the Petitioner:
Avinash Tiwari, Anuj Kumar Mishra

Counsel for the Respondents:
C.S.C.

A. Service Law – U.P. Qualifying Service for Pension and Validation Act, 2021 – Minimum Pay Scale for Daily Wagers –

Petitioner, a daily wager appointed in 1990, sought minimum pay scale and increments from 1990 to regularization in 2002 – Challenged rejection order dated 19.05.2022 – Held, daily wagers entitled to minimum pay scale of regular employees for same post, as per *Sabha Shanker Dube Vs Divisional Forest Officer* – Petitioner entitled to minimum pay scale from 1994 (three years prior to filing Writ A No. 2023 of 1997) till regularization on 25.02.2002 – Increments not permissible as per *St. of U.P. Vs Puttilal*, which prevails over *Gyan Prakash Srivastava Vs St. of U.P.* – Claim for counting daily wage service for pension subject to challenge of vires of Act, 2021, as per *Ram Das Yadav Vs St. of U.P.* – Impugned order quashed, respondents directed to pay minimum pay scale with arrears. (Para 13, 16-19)

Writ petition partly allowed.

List of Cases cited:

1. Sabha Shanker Dube Vs Divisional Forest Officer; (2019) 12 SCC 297
2. St. of U.P. Vs Puttilal; (2006) 9 SCC 337
3. St. of Haryana Vs Tilak Raj; (2003) 6 SCC 123
4. St. of Punjab Vs Surjit Singh; (2009) 9 SCC 514
5. St. of Punjab Vs Jagjit Singh; (2017) 1 SCC 148
6. Gyan Prakash Srivastava Vs St. of U.P.; Writ Petition No. 5923 (SS) of 1996, dated 18.10.2016
7. Ram Das Yadav Vs St. of U.P.; Writ Petition No. 25955 (SS) of 2017, dated 08.11.2021
8. Habib Khan Vs St. of Uttarakhand; Civil Appeal No. 10806 of 2017, dated 23.08.2017
9. Prem Singh Vs St. of U.P.; (2019) 10 SCC 516

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

1. Heard learned counsel for the petitioner and Shri Saharsh Shrivastav,

learned Additional Chief Standing Counsel for the respondents no. 1 and 2.

2. The instant writ petition has been filed praying for the following main relief(s):

"(i) issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 19.05.2022 passed by opp-party no.2 with all consequential benefits, as is contained in annexure no. 1 respectively to this writ petition.

(ii) issue a writ, order or direction in the nature of mandamus commanding the opposite parties to provide the regular pay scale of class IV post with yearly increments on the period of 22.07.1990 to 25.02.2002, with all other consequential benefits of service, within time as directed by this Hon'ble Court.

(iii) issue a writ, order or direction in the nature of mandamus commanding the opposite parties to refix the salary and post retirement benefits and pension of petitioner after providing regular pay scale of class IV post with yearly increments on the period of 22.07.1990 to 25.02.2002, within time as directed by this Hon'ble Court.

(iv) issue a writ, order or direction in the nature of mandamus commanding the opposite parties to grant and pay all retirement benefit of petitioner after counting his entire services for the purpose of qualifying service for retirement benefit."

3. The case set forth by the petitioner is that the petitioner had been appointed on daily wage basis on 22.07.1990 under the respondents. As the petitioner was not being paid the minimum pay scale he was constrained to approach this Court by filing

Writ A No. 2023 of 1997 in re: Chhavi Ram vs State of U.P. and others praying for following reliefs:

"(i) issue a writ, order or direction in the nature of mandamus commanding the opposite parties to give regular scale of pay to the petitioner that is Rs.750-940 which is being given to the other counter-parts of the petitioner;

(ii) issue a writ, order or direction in the nature of mandamus commanding the opposite parties to regularise the services of the petitioner from the date of initial appointment that is 22.07.1990 in Class IV establishment and further.

(iii) issue a writ, order or direction in the nature of mandamus commanding the opposite parties to give all consequential benefits such as seniority in Class IV establishment from the date of initial appointment i.e. 22.7.1990, arrears of difference of pay and other benefits arising thereof."

4. During pendency of the aforesaid writ petition the service of the petitioner was regularised vide order dated 25.02.2002, a copy of which is annexure 2 to the petition. The petitioner was regularised on a class IV post in the pay scale of Rs 2550-55-2660-60-3200. The petitioner also retired on attaining the age of superannuation on 31.07.2021. Subsequent to his retirement, the writ petition filed by the petitioner has been decided vide judgement and order dated 12.04.2022, a copy of which is annexure 3 to the petition, whereby the writ court has permitted to the petitioner to file a fresh representation to the respondent no. 2 with respect of his grievance and the respondent no. 2 was directed to consider the same and

pass a reasoned and speaking order. In pursuance thereof the claim of the petitioner for grant of minimum pay scale and increments has been rejected primarily on the ground that the petitioner has been regularized vide the order dated 25.02.2002 and other persons who have been granted a minimum pay scale have been granted the same in pursuance to the order passed by the writ court.

5. Raising a challenge to the said order the instant writ petition has been filed with the reliefs as aforesaid.

6. The argument of learned counsel for the petitioner is that grant of minimum pay scale to daily wagers is no longer res-integra having been settled by Hon'ble Apex Court in the case of **Sabha Shanker Dube vs Divisional Forest Officer and others, 2019 (12) SCC 297** wherein Hon'ble Apex Court, after considering various other judgements, has held that temporary employees are entitled to draw wages at minimum of pay scales which are applicable to regular employees holding the said post. The contention is that when the petitioner was appointed on daily wages basis way back in the year 1990 and staked his claim for being given minimum pay scale in the year 1997 as such the petitioner is entitled for being given the minimum of pay scale of a class IV post with effect from the date of appointment till his regularization on 25.02.2002 with all attendant benefits including yearly increments.

7. With regard to claim for grant of yearly increments reliance has been placed on a judgement of this Court in the case of **Gyan Prakash Srivastava and others vs State of U.P. and others passed in Writ Petition No. 5923 (SS) of 1996** decided on

18.10.2016, a copy of which is annexure 7 to the petition which judgement has held that daily wagers who have been given a regular pay scale would be entitled to annual increment.

8. On the other hand, learned Standing Counsel on the basis of averments contained in the counter affidavit argues that as the petitioner already stands regularised in service on 25.02.2002 and now stands retired on 31.07.2021 consequently there cannot be any occasion for grant of minimum pay scale to the petitioner.

9. So far as grant of increments to petitioner is concerned on the basis of judgement of this Court in the case of **Gyan Prakash Srivastava (supra)**, reliance has been placed on judgement of Hon'ble Apex Court passed in the case of **State of U.P. & others vs Puttilal, 2006 (9) SCC 337** to contend that Hon'ble Apex Court has held that grant of minimum pay scale to a daily wager would not entail grant of any increment or any other allowance and thus the petitioner is not entitled for any increment on payment of minimum pay scale or other allowances.

10. Heard learned counsels for the parties and perused the records.

11. From perusal of record it emerges that the petitioner was initially appointed on daily wages in July 1990. As he was not being paid the minimum of pay scale, he staked his claim for being given minimum pay scale by filing Writ A No. 2023 of 1997 praying for being granted the regular scale of pay of Rs 750-940 and to regularise his services. During pendency of writ petition the service of the petitioner was regularised on 25.02.2002. The

petitioner has retired from service on attaining the age of superannuation on 31.07.2021. Subsequent to the petitioners regularisation and retirement from service, the writ petition filed by the petitioner for grant of minimum pay scale has been decided vide the judgement and order dated 12.04.2022 leaving it open to the petitioner to submit a representation and the respondents were required to decide the said representation in accordance with law. The said representation and the claim of the petitioner for grant of minimum pay scale has been rejected vide the order impugned dated 19.05.2022 primarily on the ground that as the petitioner now stands regularised on 25.02.2002 as such he would not be entitled for grant of minimum pay scale apart from the fact that various other persons who have been granted minimum of pay scale have been granted the same in pursuance to the order of this Court.

12. The grant of minimum pay scale to a person working on daily wage basis is no longer res-integra having been settled by Hon'ble Apex Court in the case of **Sabha Shanker Dube (supra)** wherein Hon'ble Apex Court has held as under:

"9. The daily-wagers relied upon a judgment of this Court in Putti Lal [State of U.P. v. Putti Lal, (2006) 9 SCC 337 : 2006 SCC (L&S) 1819] and submitted that the same relief may be extended to them. It is relevant to note that the judgment in Putti Lal [State of U.P. v. Putti Lal, (2006) 9 SCC 337 : 2006 SCC (L&S) 1819] relates to a dispute similar to that involved in this case. Daily-rated wage earners in the Forest Department in the State of Uttar Pradesh approached the High Court for regularisation of their services. The Division Bench of the High Court of Allahabad directed the State Government

to constitute the Committee as directed in order to frame the scheme for regularisation. The judgment of the High Court that the daily-rated wage workers shall be paid at the minimum of the pay scales was affirmed by this Court on the principle of equal pay for equal work. The Division Bench of the High Court while deciding State of U.P. v. Chhiddi [State of U.P. v. Chhiddi, 2015 SCC OnLine All 9087 : (2016) 1 All LJ 226] referred to the judgment in Putti Lal [State of U.P. v. Putti Lal, (2006) 9 SCC 337 : 2006 SCC (L&S) 1819] but placed reliance on a later judgment of this Court in Tilak Raj [State of Haryana v. Tilak Raj, (2003) 6 SCC 123 : 2003 SCC (L&S) 828] . The Division Bench of the High Court also cited Surjit Singh [State of Punjab v. Surjit Singh, (2009) 9 SCC 514 : (2009) 2 SCC (L&S) 696] to hold that the daily-wagers cannot seek the benefit of the judgment of Putti Lal case [State of U.P. v. Putti Lal, (2006) 9 SCC 337 : 2006 SCC (L&S) 1819] in view of the subsequent decisions of this Court wherein, according to the High Court, it was held that daily-wage employees were not entitled to the minimum of the pay scales.

10. On a comprehensive consideration of the entire law on the subject of parity of pay scales on the principle of equal pay for equal work, this Court in Jagjit Singh [State of Punjab v. Jagjit Singh, (2017) 1 SCC 148 : (2017) 1 SCC (L&S) 1] held as follows: (SCC p. 223, para 58)

*"58. In our considered view, it is fallacious to determine artificial parameters to deny fruits of labour. **An employee engaged for the same work cannot be paid less than another who performs the same duties and responsibilities. Certainly not, in a welfare State. Such an action besides being***

demeaning, strikes at the very foundation of human dignity. Anyone, who is compelled to work at a lesser wage does not do so voluntarily. He does so to provide food and shelter to his family, at the cost of his self-respect and dignity, at the cost of his self-worth, and at the cost of his integrity. For he knows that his dependants would suffer immensely, if he does not accept the lesser wage. Any act of paying less wages as compared to others similarly situate constitutes an act of exploitative enslavement, emerging out of a domineering position. Undoubtedly, the action is oppressive, suppressive and coercive, as it compels involuntary subjugation."

11. The issue that was considered by this Court in *Jagjit Singh [State of Punjab v. Jagjit Singh, (2017) 1 SCC 148 : (2017) 1 SCC (L&S) 1]* is whether temporary employees (daily-wage employees, ad hoc appointees, employees appointed on casual basis, contractual employees and likewise) are entitled to the minimum of the regular pay scales on account of their performing the same duties which are discharged by those engaged on regular basis against the sanctioned posts. After considering several judgments including the judgments of this Court in *Tilak Raj [State of Haryana v. Tilak Raj, (2003) 6 SCC 123 : 2003 SCC (L&S) 828]* and *Surjit Singh [State of Punjab v. Surjit Singh, (2009) 9 SCC 514 : (2009) 2 SCC (L&S) 696]*, **this Court held that temporary employees are entitled to draw wages at the minimum of the pay scales which are applicable to the regular employees holding the same post.**

12 In view of the judgment in *Jagjit Singh [State of Punjab v. Jagjit Singh, (2017) 1 SCC 148 : (2017) 1 SCC (L&S) 1]*, we are unable to uphold the view of the High Court that the appellants

herein are not entitled to be paid the minimum of the pay scales. We are not called upon to adjudicate on the rights of the appellants relating to the regularisation of their services. We are concerned only with the principle laid down by this Court initially in *Putti Lal [State of U.P. v. Putti Lal, (2006) 9 SCC 337 : 2006 SCC (L&S) 1819]* relating to persons who are similarly situated to the appellants and later affirmed in *Jagjit Singh [State of Punjab v. Jagjit Singh, (2017) 1 SCC 148 : (2017) 1 SCC (L&S) 1]* that temporary employees are entitled to minimum of the pay scales as long as they continue in service.

14. For the aforementioned reasons, we allow these appeals and set aside the judgments of the High Court **holding that the appellants are entitled to be paid the minimum of the pay scales applicable to regular employees working on the same posts.** The State of Uttar Pradesh is directed to make payment of the minimum of pay scales to the appellants with effect from 1-12-2018."

(emphasis by the Court)

13. From a perusal of the judgment of Hon'ble Apex Court in the case of **Sabha Shanker Dube (supra)** it emerges that Hon'ble Apex Court after considering its earlier judgements in the case of **Tilak Raj (supra)** and *Jagjit Singh (supra)* has held that temporary employees are entitled to minimum of pay scales which are applicable to regular employees holding the same post. Once admittedly the petitioner was working as a temporary employee / daily wager right since the year 1990 and he staked his claim for being granted the minimum pay scale in the year 1997 and Hon'ble Apex Court has also held that a temporary employee would be entitled to draw wages at minimum of pay scales which are applicable to the regular

employees holding the same post consequently, there cannot be any occasion for non grant of minimum pay scale to the petitioner as are applicable to regular employees holding the same post and accordingly the petitioner is entitled for grant of minimum of pay scale for a period from three years prior to filing of writ petition in the year 1997 i.e. since the year 1994 with arrears of pay till his regularisation on 25.02.2002.

14. So far as the relief of grant of increments is concerned, the sheet anchor of the claim of the petitioner is the judgement of this Court in the case of **Gyan Prakash Srivastava (supra)** wherein this Court has held as under:

"Since petitioners had been appointed in the years 1982, 1983 and 1984 as Junior Clerk on daily wage basis against the sanctioned post of Junior Clerks and their services have been regularized and they have been given pay scale of regular Junior Clerk from the date of their initial appointment, there appears no reason not to provide annual increments to them from the date of their initial appointment. The stand taken by the opposite parties for not providing annual increments to petitioners from the date of initial appointments being not in accordance with law, rather being without any basis and justification, the order dated 15th may 1996 of the State Government denying annual increments to petitioners from the date of their initial appointment is not sustainable in the eyes of law. The order is, therefore, quashed and opposite parties are directed to provide annual increments to petitioners from the date of their initial appointment within a period of three months from the date of production of certified copy of this order."

15. However Hon'ble Apex Court in the case of **Puttilal (supra)** has held as under: paragraph 5 dalna hai

*"5. In several cases, this Court, applying the principle of equal pay for equal work has held that a daily-wager, if he is discharging the similar duties as those in the regular employment of the Government, should at least be entitled to receive the minimum of the pay-scale though he might not be entitled to any increment or any other allowance that is permissible to his counterpart in the Government. In our opinion, that would be the correct position and we, therefore, direct that these daily-wagers would be entitled to draw at the minimum of the pay-scale being received by their counter-part in the Government and **would not be entitled to any other allowances or increment so long as they continue as daily-wager.** The question of their regular absorption will obviously be dealt with in accordance with the statutory rule already referred to."*

(emphasis by the Court)

16. From perusal of judgement of Hon'ble Apex Court in the case of **Puttilal (supra)** it clearly emerges that though daily wagers would be entitled for grant of minimum pay scale yet would not be entitled to draw any allowances or any increments while drawing the minimum pay scale.

17. Perusal of the judgement of **Gyan Prakash Srivastava (supra)** would indicate that the said judgement has been passed by Hon'ble Single Judge of this Court. However while passing the said judgement, the writ court has failed to consider the judgement of Hon'ble Apex Court in the case of **Puttilal (supra)**

wherein the Apex Court has categorically held that though the daily wagers are entitled for grant of minimum pay scale yet they would not be entitled to draw any increments.

18. Thus the single bench judgement of this Court in the case of **Gyan Prakash Srivastava (supra)** would have to give way to the judgment Hon'ble Apex Court in the case of **Putilal (supra)**. Accordingly, the petitioner would not be entitled to draw any increments on the minimum pay scale which would be payable to him.

19. As regards the prayer of counting entire service rendered by petitioner as daily wager for the purpose of qualifying service for retirement benefits, though no arguments have been advanced by both learned counsel for the petitioner and learned Additional Chief Standing Counsel on the said prayer yet what the Court finds is that keeping in view the promulgation of the Uttar Pradesh Qualifying Service for Pension and Validation Act, 2021 (hereinafter referred to as the Act, 2021) which defines qualifying service as the services rendered by an officer appointed on a temporary or permanent post in accordance with the provisions of the service rules prescribed by the Government for the post and the fact that a full bench of this Court in a bunch of writ petitions leading being **Writ Petition No. 25955 (SS) of 2017 in re: Ram Das Yadav vs State of U.P. and others** decided on 08.11.2021 after considering the judgement of Hon'ble Apex Court in the case of **Habib Khan vs State of Uttarakhand** passed in **Civil Appeal No. 10806 of 2017** decided on 23.08.2017 and considering Regulations 370 of the U.P. Civil Service Regulations as well as judgement of Hon'ble Apex Court in the case of **Prem Singh vs State of U.P. and others, 2019 (10) SCC 516** has held that with promulgation of Act, 2021 defining

qualifying services for pension which Act has been given retrospective effect from 01.04.1961 and the validity of the Act has been challenged in a bunch of petitions the leading being Writ Petition No. 25955 (SS) of 2017 as such the relief prayed for by the petitioner may not survive as the same will depend on the result of the petitioner challenging the vires of the Act, 2021. Accordingly, considering the full bench judgement in the case of **Ram Das Yadav (supra)** the petitioner, if so advised, may challenge the vires of the Act, 2021.

20. Considering the aforesaid discussion, the writ petition is **partly allowed**. The order impugned dated 19.05.2022, a copy of which is annexure 1 to the petition, is quashed. The respondents are directed to pay the minimum of pay scale to the petitioner as was applicable to regular employees working on the same post. The pay scale shall be payable along with arrears with effect from 3 years prior to filing of Writ A No. 2023 of 1997 till the date of regularization of the petitioner i.e. till 25.02.2002.

21. Let the compliance be made within a period of three months from the date of production of a certified copy of this order.

(2024) 4 ILRA 280
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.02.2024

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE DONADI RAMESH, J.

Writ A No. 5017 of 2023

Vibha Tiwari		...Petitioner
	Versus	
State of U.P. & Ors.		...Respondents

Counsel for the Petitioner:

Sri Prashant Mishra, Sri Tarun Agrawal

Counsel for the Respondents:

C.S.C

A. Service Law – U.P. Recruitment of Dependents of Government Servant Dying in Harness Rules, 1974 – Rule 2(c), Rule 5 – Constitutional Law – Compassionate Appointment

– Petitioner, daughter-in-law of deceased employee, sought compassionate appointment – Claim rejected vide order dated 23.11.2022 as daughter-in-law with surviving husband not included in definition of “family” under Rule 2(c) – Held, exclusion of daughter-in-law with disabled spouse (75% locomotor disability) from compassionate appointment arbitrary, given purpose of Rules to relieve family distress – Indian societal norms treat daughter-in-law as integral family member – Full Bench in *U.P. Power Corporation Vs Urmila Devi* emphasized irrationality of excluding widowed daughter-in-law – Special circumstances of petitioner’s husband’s disability warrant liberal interpretation of Rule 2(c) – Impugned order quashed, respondent directed to reconsider petitioner’s claim. (Para 8-15)

Writ petition allowed.**List of Cases cited:**

1. U.P. Power Corporation, Urban Electricity Transmission Division-II, Allahabad Vs Urmila Devi; 2011 (3) ADJ 432
2. Smt. Sharma Devi Vs St. of U.P.; 2022 (3) ADJ 646
3. Basic Shiksha Adhikari, Hardoi Vs Madhu Mishra; [2009 (27) LCD 995]
4. Smt. Urmila Devi Vs U.P. Power Corporation; 2003 (4) AWC 3205
5. Sanyogita Rai Vs St. of U.P.; (2006) 2 UPLBEC 1972

(Delivered by Hon’ble Vivek Kumar Birla, J.

&

Hon’ble Donadi Ramesh, J.)

1. Heard Sri Prashant Mishra, learned counsel for the petitioner and perused the record.

2. Petitioner is daughter in law of the deceased employee. She filed the present petition for the following relief:

i) Issue a writ, order or direction in the nature of mandamus declaring Rule 2 (c) (iii) of the Uttar Pradesh Recruitment of Dependents of Government Servant Dying in Harness Rules, 1974 (as amended from time to time) as unconstitutional to the extent it creates a distinction between widowed daughters-in-law and those whose spouses are alive but suffering from incapacity;

ii) Issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 23.11.2022 passed by the respondent no.3 rejecting the claim of compassionate appointment of the petitioner.

iii) Issue a writ, order or direction in the nature of mandamus directing the respondent no.3 to reconsider the claim of the petitioner for compassionate appointment.

3. The mother-in-law of the petitioner Smt. Kaushalya Tiwari died in harness on 18.1.2022. At the time of her death, she was serving as class IV employee in the office of respondent no.3. Smt. Kaushalya Tiwari was survived by her son Abhay Kumar Tiwari (husband of the petitioner) and her married daughter Smt. Poonam Tiwari Pandey who is living a prosperous and happy married life in her matrimonial home. The son of Smt. Kaushalya Tiwari i.e. Abhay Kumar Tiwari, met with a severe accident on 07.5.2019 in which he suffered grave injuries resulting in locomotor disability up to 75% and after

thorough medical examination, a disability certificate was issued to Abhay Kumar Tiwari was declaring him to have suffered 75% permanent disability and incapable of earning a livelihood owing to his disability.

4. During the lifetime of Smt. Kaushalya Tiwari, she has taken care of her son and the entire family post accident. It is an admitted fact that at the time of her death, she was the sole bread earner of her family and the petitioner and her husband were also totally dependent upon her. By virtue of her sudden demise, there was no other earning member of the family as the husband of the petitioner is incapable of working. Left with no other option, the petitioner has moved an application to consider her case for compassionate appointment under The U.P. Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 (hereinafter referred to as "the Rules"). Considering the said application, the third respondent passed an order dated 23.11.2022 rejecting her claim only on the ground that 'daughter-in-law' was not included in the definition of 'family' under the Rules. Questioning the said order, the present petition has been filed.

5. Based on the above facts, after arguing for some time, learned counsel for the petitioner intended to withdraw the first prayer which reads as follows:

i) Issue a writ, order or direction in the nature of mandamus declaring Rule 2 (c) (iii) of the Uttar Pradesh Recruitment of Dependents of Government Servant Dying in Harness Rules, 1974 (as amended from time to time) as unconstitutional to the extent it creates a distinction between widowed

daughters-in-law and those whose spouses are alive but suffering from incapacity;

6. Learned counsel for the petitioner has mainly relied on the observations made by the third respondent in the order dated 23.11.2022. In the said order, the third respondent has considered all the relevant facts and also the observations of the Full Bench judgment of this Hon'ble Court in **U.P. Power Corporation, Urban Electricity Transmission Division-II, Allahabad vs. Urmila Devi 2011 (3) ADJ 432** and also the judgement of **Smt. Sharma Devi vs. State of UP through its Additional Chief Secretary, Food and Civil Supply Lko And Ors. 2022 (3) ADJ 646** as respondents have considered in apprising manner but for the reason that daughter-in-law was not included in the definition of 'family' under Rule 2 (c) of the Rules. To support his contention and to decide the issue involved in the matter, Rule 2 (c) has been quoted which is as follows:

"(c) "family" shall include the following relations of the deceased Government Servant:-

(i) wife or husband

(ii) sons/adopted sons;

(iii) unmarried daughters, unmarried adopted daughters, widowed daughters and widowed daughter-in-law;

(iv) unmarried brothers, unmarried sisters and widowed mother dependent on the deceased Government servant, if the deceased Government servant was unmarried;

(v) aforementioned relations of such missing Government servant who has been declared as "dead" by the Competent Court:

Provided that if a person belonging to any of the abovementioned

relations of the deceased Government servant is not available or is found to be physically and mentally unfit and thus ineligible for employment in Government service, then only in such situation, the word "family" shall also include the grandsons and the unmarried granddaughters of the deceased Government servant dependent on him."

7. Learned counsel has submitted that the definition of family under Rule 2 (c) includes wife or husband, sons and adopted sons, daughters (including adopted daughters) and widowed daughters-in-law, unmarried brothers, unmarried sisters and widowed mother dependent on the deceased Government servant, if the deceased Government servant was unmarried and Rule 5 deals with recruitment of members of the family of the deceased. From the above said Rule, one member of the family who is not already employed under the Central Government or State Government or a Corporation owned or controlled by the Central Government or State Government, on making an application in suitable manner in the Government Service in relaxation of the normal recruitment rules, if such person fulfills the educational qualification.

8. On perusal of both the Rules, it is clarified that if there are no other earning members in the family, any member of the family is entitled to make an application to be considered under the said Rule but surprisingly, the definition of "family" under Rule 2 (c) of the Rules, all the members were included except the daughter-in-law with surviving husband. The fact of the instant case is that the husband of the petitioner is surviving with disability of more than 75%, she could not

be considered as a member of the family for employment as per the abovesaid Rule.

9. The relevant paragraphs of the Full Bench judgment of this Hon'ble Court relied upon by the respondent in **Urmila Devi (supra)** are quoted below:

"6. We may mention that, at the preliminary hearing, our attention was invited to a Division Bench judgment of this Court in the case of Basic Shiksha Adhikari, Hardoi Vs. Madhu Mishra & Ors., [2009 (27) LCD 995], where the question for consideration was whether a widowed daughter-in-law can claim appointment under the Dying in Harness Rules? The learned Bench, after considering the definition of the word family, was pleased to hold that the decisions in Smt. Urmila Devi Vs. U.P. Power Corporation & Ors., 2003 (4) AWC 3205 & Sanyogita Rai (Smt.) Vs. State of Uttar Pradesh & Ors. (2006) 2 UPLBEC 1972, are not in conformity with the well settled principles of law and they are, accordingly, overruled. In other words, the judgment in Urmila Devi (supra) no longer subsists. It is, therefore, clear that the reference as such, would not be maintainable.

7. However, during the pendency of these proceedings, considering the peculiar features of the case, the appellant themselves, on queries raised by the Court, have taken a decision to give appointment to the respondent on producing the documents as set out in the affidavit filed on behalf of the appellants. They have also made it clear that the age bar would not come in the way while giving appointment to the respondent. In the light of that, in our opinion, really, nothing further would survive in this reference. However, liberty

to the respondent, in the event appointment is not given, to apply.

8. We must, however, note one feature of the definition of the word 'family' as generally contained in most Rules. The definition of 'family' includes wife or husband; sons; unmarried and widowed daughters; and if the deceased was an unmarried government servant, the brother, unmarried sister and widowed mother dependant on the deceased government servant. It is, therefore, clear that a widowed daughter in the house of her parents is entitled for consideration on compassionate appointment. However, a widowed daughter-in-law in the house where she is married, is not entitled for compassionate appointment as she is not included in the definition of 'family'. It is not possible to understand how a widowed daughter in her father's house has a better right to claim appointment on compassionate basis than a widowed daughter-in-law in her father-in-law's house. The very nature of compassionate appointment is the financial need or necessity of the family. The daughter-in-law on the death of her husband does not cease to be a part of the family. The concept that such daughter-in-law must go back and stay with her parents is abhorrent to our civilized society. Such daughter-in-law must, therefore, have also right to be considered for compassionate appointment as she is part of the family where she is married and if staying with her husband's family. In this context, in our opinion, arbitrariness, as presently existing, can be avoided by including the daughter-in-law in the definition of 'family'. Otherwise, the definition to that extent, *prima facie*, would be irrational and arbitrary. The State, therefore, to consider this aspect and take appropriate steps so that a widowed daughter-in-law like a widowed daughter,

is also entitled for consideration by way of compassionate appointment, if other criteria is satisfied."

10. Learned counsel further contended that in the identical situation, the Full Bench has considered and held that the widowed daughter in the house of her parents is entitled for consideration for compassionate appointment. However, a widowed daughter-in-law in the house where she is married, is not entitled for compassionate appointment as she is not included in the definition of 'family'. It is not possible to understand how a widowed daughter in her father's house has a better right to claim appointment on compassionate basis than a widowed daughter-in-law in her father-in-law's house.

11. Learned counsel for the petitioner has stated that in the present case also the daughter-in-law with surviving husband having more than 75 % disability has not been considered for compassionate appointment only on the ground that she is not included in the definition of 'family'.

12. Though counsel for the petitioner has not pressed prayer no.1 and withdrawn the same but considering the facts and circumstances of the present case as noted and admitted by the respondent in the impugned order, this Court also considered the observations made by the Hon'ble Full Bench in the above noted judgment.

13. As per the custom of Indian Society, daughter-in-law is also supposed to be treated as a daughter as she is also an integral part of the family. The main purpose of extending the benefit of compassionate appointment to the dependents of a deceased government

servant is to relieve the family from distress and destitution on account of death of sole bread earner of the family. Even in the instant case, an exceptional situation has been created as though the husband of the petitioner is alive but he is having more than 75% disability and he is unable to earn/work, which requires a liberal construction of the meaning under Section 2(c) of the Rules, 1974.

14. Considering the special circumstances of the case and disability of the husband of the petitioner, the writ petition is **allowed**. The impugned order dated 23.11.2022 passed by respondent no.3 i.e. Joint Commissioner (Karya Palak), Rajya Kar, Sambhag-A, Prayagraj is set aside.

15. The respondent no.3 is directed to reconsider the case of the petitioner for compassionate appointment as per Rule 5 of the Rules and pass appropriate order within a period of three months from the date of production of certified copy of this order.

(2024) 4 ILRA 285
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 01.04.2024

BEFORE

THE HON'BLE PRAKASH PADIA, J.

Writ A No. 5113 of 2023

Mukesh Kumar & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:

Sri Harindra Prasad, Sri Ramesh Kumar Tiwari

Counsel for the Respondents:

C.S.C., Sri Siddharth Singhal, Sri Ramesh Kumar Tiwari, Sri Ashok Khare (Sr. Advocate), Sri G.K. Singh (Sr. Advocate)

A. Administrative Law – U.P. Subordinate Service Selection Commission – Revised Answer Key – Judicial Review – Petitioner challenged revised answer key dated 07.09.2022 for question no. 10 of booklet series 'B' in Revenue Lekhpal main examination – Alleged correct answer as 'D' instead of 'B' based on publication – Held, courts exercise restraint in interfering with expert committee's opinion unless mistake is patently obvious without requiring inferential reasoning – Expert committee revised answer key to 'B' after objections, supported by ambiguity in term "Vindhyachal" without "Parvat" – Petitioner failed to demonstrate glaring error in revised answer key – *Ran Vijay Singh Vs St. of U.P., U.P. Public Service Commission Vs Rahul Singh, and Arsiya Bano Vs St. of U.P.* relied upon – No interference warranted under Article 226. (Para 18-23)

Writ petition dismissed.

List of Cases cited:

1. *Ran Vijay Singh Vs St. of U.P.*; (2018) 2 SCC 357
2. *U.P. Public Service Commission Vs Rahul Singh*; (2018) 7 SCC 254
3. *Arsiya Bano Vs St. of U.P.*; (2022) 5 ALJ 287
4. *Jitendra Singh Vs U.O.I.*; Writ C No. 53877 of 2017

(Delivered by Hon'ble Prakash Padia, J.)

1. Heard learned counsel for the petitioners, learned Standing Counsel for the respondent no.1, Shri Siddharth Singhal, learned counsel for the respondent no.2 as well as Shri Ashok Khare and Shri G.K. Singh, learned Senior Advocates assisted by Shri Ramesh Kumar Tiwari

appearing on behalf of newly impleaded respondent no.4.

2. The present writ petition has been filed by two petitioners, namely, Mukesh Kumar & Sandeep Kumar for issuance of a writ in the nature of certiorari calling for record of the case and quashing the revised answer key dated 7.9.2022 issued by the respondent no. 3, namely, Examination Controller, Uttar Pradesh Subordinate Service Selection Commission, Lucknow only to the extent of question nos. 10, 65, 86 & 90 of the booklet series 'B' and its equivalent in all other series of main examination held in pursuance of the advertisement No. 01-Exam/2022 issued by the respondent no. 2, namely, Secretary, Uttar Pradesh Subordinate Service Selection Commission, Lucknow. The consequential reliefs have also been prayed for.

3. After filing of the present writ petition, an application on behalf of the petitioner no. 2, being Application No. 2 of 2023 was filed on 18.5.2023 for dismissing the writ petition as withdrawn in respect of the petitioner no. 2. The said application was allowed, by an order dated 21.7.2023 passed by the Coordinate Bench of this Court, as such, in the present writ petition, there is only one petitioner, i.e., petitioner no. 1. namely, Mukesh Kumar.

4. The counsel for the petitioner, during the course of argument has made a statement that he did not challenge the revised answer key dated 7.9.2022, insofar as it relates to the question nos. 65, 86 & 90 of booklet series 'B'. Thus, in the present writ petition, the only challenge is to revised answer key dated

7.9.2022 only to the extent of question no. 10.

5. The facts as stated in the writ petition are that the petitioner has cleared the PET-2021, hence on the basis of his score he was shortlisted of appearing in the main examination, being conducted in pursuance of the advertisement No. 01-Exam/2022 for the post of Revenue Lekhpal.

6. The petitioner has appeared in the main examination held on 31.7.2022 which was conducted by the respondent nos. 2 & 3. The petitioner no. 1 was provided booklet series 'B' and the petitioner no. 2 was provided booklet series 'D'. Since the writ petition with regard to the petitioner no. 2 has been dismissed as withdrawn, as such, the facts relating to the petitioner no. 2 are not being mentioned, being not relevant.

7. The answer key of the main examination held on 31.7.2022 was published on 1.8.2022. In para 9 of the writ petition, it is stated that the petitioner has filed objection and revised answer key of booklet series 'B' and other series was published on 7.9.2022.

8. According to the petitioner, the dispute is with regard to question No. 10, which is as under:

“निम्नलिखित में कौन सा वाक्य अशुद्ध है?

- (1) उसे मृत्युदंड की सजा हुई ।
- (2) विंध्याचल पर्वत पर घने जंगल है ।
- (3) यहाँ शुद्ध भैंस का दूध मिलता है।
- (4) मेरे को उससे बात करना पसंद

नहीं है ।

(A) पहला और तीसरा

(B) पहला, तीसरा और चौथा
 (C) दूसरा, तीसरा और चौथा
 (D) पहला, दूसरा, तीसरा और चौथा
 चारो”

9. It is stated in the writ petition that the petitioner has marked answer 'D' as correct answer, whereas in the revised answer key, answer 'B' has been treated to be correct answer.

10. Learned counsel for the petitioner in support of his argument has placed and relied upon an publication made by the राजस्थान राज्य पुस्तक मण्डल जयपुर stating that answer 'D' is correct answer. In the said publication at sl. no. 9 (at page 72 of the writ petition), it is mentioned that विन्ध्याचल पर्वत हिमालय से प्राचीन है is an incorrect sentence and the correct sentence is विन्ध्याचल हिमालय से प्राचीन है.

11. Relying on the aforesaid publication, the counsel for the petitioner submits that answer 'D' is the correct answer and the publication of revised answer key holding option 'B' as correct answer is incorrect.

12. One of the candidate, namely, Krishna Pratap Singh Patel has moved an impleadment application for his impleadment as respondent stating therein that he has been selected and a conditional allotment letter has been issued to him but due to pendency of the present writ petition, he is not being allowed to join. The application for impleadment was allowed by an order dated 14.3.2024 and he was impleaded as respondent no. 4 in the present writ petition.

13. In the affidavit filed in support of the impleadment application, in para 8 it is

stated that in the publication relied upon by the petitioner, there was a comparison made between two mountains hence mentioning of Parwat was not required. It is further stated that there are various places named as Vindhyachal in the official website of the State Government relating to Mirzapur. Relying upon the said website, three places have been mentioned in para 8 of the affidavit filed in support of the impleadment application, which reproduced below:

“i. According to official website of Mirzapur District Administration (Mirzapur.nic.in), There is a famous religious place with the name Vindhyachal Dham.

ii. There is a railway station in Mirzapur with the name Vindhyachal.

iii. There is village with the name Vindhyachal, in Tehsil-Premnagar, District – Soorajpur, Chhattisgarh.”

14. In view of the aforesaid, it is argued that if only Vindhyachal word is used, various meanings are coming out like religious place, railway station and villages. However, if word parvat is used along with word Vindhyachal, then scene becomes crystal clear and same is beyond any doubt.

15. A counter affidavit to the impleadment application has been filed by the petitioner and in the counter affidavit, the petitioner has relied upon the book, namely Prayojanmoolak Hindi. In chapter-III of aforesaid book, the correct and incorrect sentence is explained. Item No. 13 of aforesaid chapter contains अगस्त्य विन्ध्याचल पर्वत पार कर गये as incorrect sentence and the correct sentence mentioned is अगस्त्य विन्ध्याचल पार कर गये.

16. Relying upon the aforesaid books, it is argued by the counsel for the petitioner

that the correct answer of question no. 10 is 'D'.

17. Shri Siddharth Singhal, learned counsel appearing on behalf of the respondent-Commission, on the basis of the instructions submits that after objections were invited from the candidate, an Expert Committee was constituted and after taking into consideration all the aspect of the matter, the revised answer key was published and based on the revised answer key, the result was declared. It is further argued that answer 'D' was published as the correct answer on 1.08.2022 but subsequently, it was found by the Expert Committee that the correct answer is option 'B', and as such, based on Expert opinion, revised answer key was published, mentioning therein option 'B' of question no. 10 of booklet series 'B' as correct answer.

18. Learned counsel appearing on behalf of the respondent-Commission has further argued that time and again it has been held by this Court as well as by the Hon'ble Apex Court that it is only the Expert Committee who look into the matter and the Writ Court should not interfere into this kind of matter especially because the Courts are not experts and once an expert opinion had been obtained, the Court should not interfere in expert opinion. Learned counsel has further relied upon the law laid down by Hon'ble Apex Court in case of **Ran Vijay Singh Vs. State of U.P. & others, reported in 2018(2) SCC 357**. Paragraph nos.30, 31 and 32 reads as follows:-

“30. The law on the subject is therefore, quite clear and we only propose

to highlight a few significant conclusions. They are:

30.1. If a statute, Rule or Regulation governing an examination permits the re-evaluation of an answer sheet or scrutiny of an answer sheet as a matter of right, then the authority conducting the examination may permit it;

30.2. If a statute, Rule or Regulation governing an examination does not permit re-evaluation or scrutiny of an answer sheet (as distinct from prohibiting it) then the Court may permit re-evaluation or scrutiny only if it is demonstrated very clearly, without any "inferential process of reasoning or by a process of rationalisation" and only in rare or exceptional cases that a material error has been committed;

30.3. The Court should not at all re-evaluate or scrutinize the answer sheets of a candidate – it has no expertise in the matter and academic matters are best left to academics;

30.4. The Court should presume the correctness of the key answers and proceed on that assumption; and

30.5. In the event of a doubt, the benefit should go to the examination authority rather than to the candidate.

31. On our part we may add that sympathy or compassion does not play any role in the matter of directing or not directing re-evaluation of an answer sheet. If an error is committed by the examination authority, the complete body of candidates suffers. The entire examination process does not deserve to be derailed only because some candidates are disappointed or dissatisfied or perceive some injustice having been caused to them by an erroneous question or an erroneous answer. All candidates suffer equally, though some might suffer more but that cannot be helped since mathematical

precision is not always possible. This Court has shown one way out of an impasse – exclude the suspect or offending question.

32. It is rather unfortunate that despite several decisions of this Court, some of which have been discussed above, there is interference by the Courts in the result of examinations. This places the examination authorities in an unenviable position where they are under scrutiny and not the candidates. Additionally, a massive and sometimes prolonged examination exercise concludes with an air of uncertainty. While there is no doubt that candidates put in a tremendous effort in preparing for an examination, it must not be forgotten that even the examination authorities put in equally great efforts to successfully conduct an examination. The enormity of the task might reveal some lapse at a later stage, but the Court must consider the internal checks and balances put in place by the examination authorities before interfering with the efforts put in by the candidates who have successfully participated in the examination and the examination authorities. The present appeals are a classic example of the consequence of such interference where there is no finality to the result of the examinations even after a lapse of eight years. Apart from the examination authorities even the candidates are left wondering about the certainty or otherwise of the result of the examination – whether they have passed or not; whether their result will be approved or disapproved by the Court; whether they will get admission in a college or University or not; and whether they will get recruited or not. This unsatisfactory situation does not work to anybody's advantage and such a state of uncertainty results in confusion being

worse confounded. The overall and larger impact of all this is that public interest suffers.”

19. The Hon'ble Apex Court, further in case of **Uttar Pradesh Public Service Commission Vs. Rahul Singh & others**, reported in 2018(7) SCC 254, affirmed the aforesaid judgment of **Ran Vijay Singh (Supra)** and further held in para 12 that candidate has to not only demonstrate that the key answer is incorrect but also that it is a glaring mistake which is totally apparent and no inferential process or reasoning is required to show that the key answer is wrong. Paragraph-12 of the aforesaid judgment reads as follows:-

“12. The law is well settled that the onus is on the candidate to not only demonstrate that the key answer is incorrect but also that it is a glaring mistake which is totally apparent and no inferential process or reasoning is required to show that the key answer is wrong. The Constitutional Courts must exercise great restraint in such matters and should be reluctant to entertain a plea challenging the correctness of the key answers. In Kanpur University case (supra), the Court recommended a system of–

(1) moderation;

(2) avoiding ambiguity in the questions;

(3) prompt decisions be taken to exclude suspected questions and no marks be assigned to such questions.”

20. The Court further held in paragraph no.14 of the aforesaid judgment that when there are conflicting views, then the Court must bow down to the opinion of the experts. Paragraph-14 reads as follows:-

“14. In the present case we find that all the 3 questions needed a long

process of reasoning and the High Court itself has noticed that the stand of the Commission is also supported by certain text books. When there are conflicting views, then the court must bow down to the opinion of the experts. Judges are not and cannot be experts in all fields and, therefore, they must exercise great restraint and should not overstep their jurisdiction to upset the opinion of the experts.”

21. A Coordinate Bench of this Court in **Writ-A No. 481 of 2021 Arsiya Bano Vs. State of U.P. & others**, reported in (2022) 5 ALJ 287, after relying upon various judgments of the Hon’ble Apex Court and also of this Court, held as under:

“47. Undoubtedly, the Courts cannot judicially review the expert opinion unless and until the key answer is patently wrong. There is no doubt that the candidates put in dreadful efforts while preparing for an examination, it must not be unremembered that even the examination authorities as well as experts put in equally great efforts to successfully conduct the examination, therefore the Court must consider the internal checks and balances put in place by the examination authorities before interfering with the efforts put in by the candidates who have successfully participated in the examination and the examination authorities.

48. Therefore, the Court should restrain in interfering with the efforts put in by the candidates as well as the examination authorities unless and until the mistake is apparent on the face of record and no research has to be done in proving the same, as the same will be an

unending process resulting in uncertainty and confusion.

54. Taking into consideration the settled position of law in the matters where the answer key is disputed, this Court in case of Jitendra Singh Vs. Union of India and Another, passed in Writ C No. 53877 of 2017, has held that the Court has to proceed on the assumption and presumption that the answer key is correct as the same is based on experts opinion given by the persons specialised. In the event of any doubt, benefit should go to the examination authority rather than to the candidate. It is with a rider that the Court should not re-evaluate or scrutinize the answer sheets of the candidates as it has no expertise in the matter, the academic matters are best left to the academicians there being no scope of judicial review in the matter.”

22. Applying well settled principle of law in the present case, the Court finds that there are different places, named as Vindhyachal as is clear from State of U.P. website i.e., mirzapur.nic.in. If only word Vindhyachal is mentioned without mentioning therein Parvat, Station or Dham, the area on which the dense forest is situated cannot be identified, as such, the revised answer key based on the opinion of expert mentioning answer 'B' as correct answer of question no. 10 of series 'B' Booklet does not call for any interference.

23. Moreover, the learned counsel for the petitioner has failed to demonstrate that the answer key is not only incorrect, but also that it is a glaring mistake which is totally apparent and no inferential process or reasoning is required to show that the answer key is wrong.

24. In view of the above, the writ petition is devoid of merit and is hereby **dismissed**. No order as to cost.

(2024) 4 ILRA 291

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 22.01.2024

BEFORE

THE HON'BLE SAUMITRA DAYAL SINGH, J.

THE HON'BLE SHIV SHANKER PRASAD, J.

Writ A No. 6112 of 2021

Pradeep Narayan Pandey ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sri Ramanand Pandey, Sri Abhishek Kumar Mishra, Sri Chandrakesh Mishra, Sr. Advocate, Sri Ashok Khare, Sri D.S. Mishra (Sr. Advocate)

Counsel for the Respondents:

C.S.C, Sri Apoorv Tiwari, Sri Ashish Mishra, Sri Satya Prakash, Sri Vinayak Mithal, Sri Raj Kumar Yadav, Sri T.P. Singh (Sr. Advocate)

Service Law - U.P. Higher Judicial Service Rules, 1975 - Rule 5(c), Rule 7 - Direct Recruitment to Higher Judicial Service (HJS) - Eligibility and Reservation - Dheeraj Mor Vs High Court of Delhi, (2020) 7 SCC 401 - Petitioner challenged revised result (01.10.2020) of U.P. HJS Recruitment Examination 2018 and appointments of nine candidates, claiming inclusion in the select list and appointment as Additional District & Sessions Judge. Supreme Court's ruling in Dheeraj Mor requiring continuous practice as an advocate till the date of appointment applied prospectively by the High Court, as resolved on 18.03.2020, approved by Full Court on 30.09.2020. Respondents Nos. 3 to 9, who joined other judicial services post-provisional result (28.03.2019) but before final result

(01.10.2020), held eligible, as their interim service was fortuitous, under interim orders during Dheeraj Mor's pendency, and they were not parties to that litigation. Horizontal reservation for women (20%) applied as overall, not compartmentalized, per Rule 7 and advertisement, validly including two women candidates (respondents Nos. 10 & 11) lower in merit than petitioner to meet reservation quota. No provision for wait list under Rules; petitioner's claim based on wait list (13.03.2019) untenable, as subsequent resolution (24.07.2020) modified earlier resolutions, and no vacancy existed. (Paras 49-95)

Writ Petition Dismissed.

List of Cases cited:

1. Deepak Agarwal Vs Keshav Kaushik, (2013) 5 SCC 277 (Paras 6, 31, 34, 52)
2. Dheeraj Mor Vs High Court of Delhi, (2020) 7 SCC 401 (Paras 11, 16-19, 32-38, 49-78)
3. Malik Mazhar Sultan Vs UPPSC, (2008) 17 SCC 703 (Paras 37, 57, 58)
4. R. Poornima Vs U.O.I., 2020 SCC OnLine SC 714 (Para 77)
5. Praveen Kumar Vs High Court of Delhi, 2022 SCC OnLine DEL 4447 (Para 77)
6. Smt. Lily Krishnan Vs St. of Kerala, 2023 KER 68493 (Para 77)
7. K. Deepa Vs St. of Kerala, 2020 SCC OnLine KER 2769 (Para 77)
8. Sunil Kumar Verma Vs St. of Bihar, 2021 SCC OnLine BIH 786 (Para 77)
9. Shashank Singh Vs High Court of Judicature at Allahabad, 2021 SCC OnLine All 835 (Para 77)
10. St. of Punj. Vs Baldev Singh, (1999) 6 SCC 172 (Para 19)
11. Praveen Garg Vs High Court of Delhi, 2022 SCC OnLine DEL 4477 (Para 19)

12. Union Territory of Ladakh Vs J&K National Conference, 2023 INSC 804 (Para 19)

13. P.VS George Vs St. of Kerala, followed in Manoj Parihar Vs St. of Jammu & Kashmir, 2022 SCC OnLine SC 782 (Para 19)

14. U.O.I. Vs Ramesh Ram, Civil Appeal Nos. 4310-4311 of 2010 (Para 20)

15. K. Manjushree Vs St. of Andhra Pradesh, (2008) 3 SCC 512 (Para 20)

16. Rajesh Kumar Dariya Vs Rajasthan PSC, (2007) 8 SCC 785 (Paras 21, 41)

17. Ajay Kumar Vs St. of U.P., 2019 SCC OnLine All 2674 (FB) (Para 21)

18. Anil Kumar Gupta Vs St. of U.P., (1995) 5 SCC 173 (Para 21)

19. Tamannaben Ashok Bhai Desai Vs Shital Amrutlal Nishad, 2020 SCC OnLine Guj 2592 (Para 22)

20. Saurav Yadav Vs St. of U.P., (2021) 4 SCC 542 (Paras 22, 41, 80)

21. Nawal Kishore Mishra Vs High Court of Judicature at Allahabad, (2015) 5 SCC 479 (Para 40)

22. Shiv Shanker Vs Public Service Commission, (1996) 3 ESC 50 (Para 41)

23. Rajeev Kumar Vs St. of U.P., 2010 (5) AWC 5321 (Para 41)

24. N.I.C. Ltd. Vs Pranay Sethi, (2017) 16 SCC 680 (Para 34)

25. Shivanandan C.T. Vs High Court of Kerala, 2023 SCC OnLine 994 (Para 35)

26. Kushagra Upadhyay Vs St. of U.P., Writ A 8118/2020, decided on 05.10.2020 (Para 35)

27. Nirav Kumar Dilip Bhai Makwana Vs Gujarat Public Service Commission, (2019) 7 SCC 383 (Para 28)

28. St. of U.P. Vs Karunesh Kumar, 2022 SCC OnLine SC 1706 (Paras 47, 86)

29. Indra Sawhney Vs U.O.I., AIR 1993 SC 477 (Para 71)

30. Sunil Kumar Verma Vs St. of Bihar, (2022) 9 SCC 686 (Paras 49, 72)

(Delivered by Hon'ble Saumitra Dayal
Singh, J.
&

Hon'ble Shiv Shanker Prasad, J.)

1. Heard Sri D. S. Mishra learned Senior Advocate assisted by Sri Ramanand Pandey learned counsel for the petitioner, Sri Ashish Mishra learned counsel for the High Court and Sri T.P. Singh learned Senior Advocate assisted by Sri Satya Prakash and Sri Raj Kumar Yadav learned counsel for private respondent Nos. 6, 8 and 10.

2. Present writ petition has been filed seeking quashing of the revised result dated 01.10.2020-of U.P. Higher Judicial Service Recruitment Examination 2018 (hereinafter referred to as the 'impugned examination'). Also, challenge has been laid to Notification dated 24.3.2021 issued by the High Court (on administrative side) under Rule 22(1) of the Uttar Pradesh Higher Judicial Service Rules, 1975 (hereinafter referred to as the 'Rules') insofar as it pertains to appointment of Sri Shashwata Pandey, Sri Pinku Kumar, Sri Utkarsh Yadav, Sri Awanish Kumar, Sri Prakash Chand Rana, Sri Sharad Kumar Tripathi, Sri Ajay Kumar, Smt. Sandeep Chauhan and Ms. Hemlata Tyagi as Additional District & Sessions Judges pursuant to the impugned examination. Since the writ petition filed by Sri Rahul Singh/respondent No.12 stands dismissed by the Supreme Court, the petitioner claims appointment in his place. Further, direction has been sought to include the petitioner in the revised result dated 01.10.2020 and to

grant appointment to him as Additional District & Sessions Judge, in the State of U.P., pursuant to the impugned examination.

3. Pleadings had been exchanged earlier. Accordingly, the matter was proceeded. During hearing, learned counsel for the High Court produced the original record and consequently also filed Supplementary Counter Affidavit on 23.11.2023. Supplementary Rejoinder Affidavit thereto was filed by the petitioner on 28.11.2023. Those have also been taken on record.

4. On 10.5.2018, the High Court advertised 37 vacancies in Higher Judicial Service being 21 vacancies in Unreserved/Open Category, 07 in the Scheduled Caste category and 09 in the Other Backward Class category. Applications were invited “from Advocates having not less than 7 years standing as on the last date fixed for the submission of application forms”. That date was 14.6.2018. As to the age limit, it was stipulated, the candidate must have attained the age of 35 years and must not have attained the age of 45 years, on 01.01.2019. At the same time, age relaxation of three years was granted to candidates belonging to Scheduled Caste, Scheduled Tribes and Other Backward Class.

5. As to horizontal reservation for women, in terms of Rule 7 of the Rules, the advertisement contemplated 20 % horizontal reservation for women belonging to the State of U.P. only, in the following terms:

“20% horizontal reservation for women belonging to State of U.P. only.”

Also, Rule 7 of the Rules reads as below: -

“7. Reservation of posts for Scheduled Caste, etc.- *Reservation to posts in the*

service for the members of the Scheduled Castes, Scheduled Tribes and other categories including women shall be in accordance with orders of the Government for reservation as adopted by the High Court.

Provided that twenty percent horizontal reservation for women to posts in service in direct recruitment from Bar in Uttar Pradesh Higher Judicial Service shall be subject to suitability i.e. if the sufficient number of women candidates is not available, then and in that event the reservation shall not have any operation to the extent of such unavailability.

Provided further that there shall be no carry forward of reservation for women.”

6. Of candidates who applied under the above advertisement many were serving judicial officers in the State of Uttar Pradesh and even outside. In view of the amended Rule 5 of the Rules and the ratio of the decision of the Supreme Court in **Deepak Agarwal Vs. Keshav Kaushik, (2013) 5 SCC 277**, candidature of serving judicial officers was rejected by the High Court, on the administrative side. For ready reference, amended Rule 5(c) of the Rules reads as below:

“5. Source of recruitment- *The recruitment to the service shall be made---*

(a)

(b).....

(c) by direct recruitment from amongst the Advocates of not less than seven years standing as on the last date fixed for the submission of application forms.”

7. Occasioned by that rejection of their application forms, some such candidates approached this Court as also the Supreme Court in exercise of writ jurisdiction to

assail the rejection of their candidature-Interim orders came to be passed in their favour allowing them to provisionally participate in the impugned examination. However, their results were not declared during pendency of litigation. Also, respondent No. 12-Rahul Singh approached the Supreme Court by filing Writ Petition (Civil) No. 1371 of 2018. Interim order was granted in his favour on 22.11.2018 allowing him to provisionally participate in the examination.

8. Consequently, petitioner as also the private respondents participated in the main written test of the impugned examination from 07.12.2018 to 09.12.2018. First, the High Court declared result of that examination on 28.02.2019. In that, 40 Unreserved/Open Category candidates and 04 Other Backward Class candidates were declared successful for the interview test. They were invited for interview conducted on 11.3.2019 and 12.3.2019. Petitioner was one of them.

9. Thereafter, the High Court declared result on 28.03.2019 wherein 21 candidates under the Unreserved/Open Category and 2 candidates under the OBC category were declared successful. None was successful under the SC Category. Of the 21 candidates successful under the Unreserved/Open Category, 11 were such who had participated in the impugned examination provisionally under interim orders granted by this Court and the Supreme Court. For that reason, their names were not disclosed/published in the result. Against their respective merit position, word “Reserved” was published. Also, a Note was attached below that result:

10. For ready reference that result as declared is extracted below: -

**“THE HIGH COURT OF JUDICATURE
AT ALLAHABAD**

*U.P. HIGHER JUDICIAL SERVICE
RECRUITMENT 2018*

*No. 171/S & A/2019 Dated: Allahabad:
March 28, 2019*

FINAL RESULT

On the basis of written examination held on 07, 08 and 09 December 2018 followed by Interview on 11th and 12th March 2019 the following candidates, in order of merit, have been recommended by the High Court for appointment by way of direct recruitment to U.P. Higher Judicial Service under Rule 5(c) read with Rule 18 of U.P.H.J.S. Rules, 1975:

Unreserved Category

Sl No.	Roll No.	Name of Candidates SRI/SMT/KM	Category
1		RESERVED	
2		RESERVED	
3		RESERVED	
4		RESERVED	
5	3553	POONAM (F)	GEN
6	2960	MOHD. SHARIQ SIDDIQUE	GEN
7	2513	LAKHWINDER SINGH SOOD	GEN
8		RESERVED	
9	5468	SMT RAGINI (F)	GEN
10		RESERVED	
11		RESERVED	
12	6180	VINOD KUMAR CHAURASIA	OBC
13	2844	MAYANK TRIPATHI	GEN
14	3564	POONAM SINGHAL (F)	GEN
15		RESERVED	
16	5201	SHAILJA RATHI (F)	OBC
17		RESERVED	
18	759	ANURAG PANWAR	GEN
19		RESERVED	
20	6411	ZAIBA MAJID (F)	GEN

21		RESERVED	

Note: (1) Names of 02 OBC category candidates have been included in the list of unreserved category candidates on the basis of their marks in the written examination and interview and they are being treated as unreserved category candidates.

(2) The results of the petitioners in the above list are kept reserved and their fate shall be decided after the final outcome of the petitions filed by them.

OBC Category

Sl No.	Roll No.	Name of Candidates SRI/SMT/KM	Category
1	158	AJAY KUMAR	OBC
2	5708	SURENDRA PAL SINGH	OBC

”

11. Since the result of 10 selected advocate candidates (under the Open/Unreserved category) and 2 candidates (under the OBC category) was undisputed or clear, the selection of those selected candidates was notified in accordance with the terms of the resolution of the Selection Committee dated 15.07.2019 as approved by the Full court. They were issued appointment letters. Consequently, they joined in service. For the remaining, the matter remained pending final disposal of petitions filed by them. Meanwhile, the decision of the Supreme Court in **Dheeraj Mor Vs. High Court of Delhi, (2020) 7 SCC 401** was delivered on 19.02.2020. In short, it may be noted, for the first-time law was declared, to be eligible, an advocate candidate seeking direct recruitment to HJS Examination must not only have completed seven years of practice on the last date of submission of applications, but he must continue to be an

advocate up to the date of his appointment as a HJS Officer.

12. After the judgement of **Dheeraj Mor (supra)** all the serving judicial officers whose application had been rejected by the High Court but who appeared in the impugned examination under interim orders granted by this Court and the Supreme Court, were disqualified. Their writ petitions both before this Court and also before the Supreme Court came to be dismissed.

13. In that circumstance, the High Court revised the earlier result dated 28.03.2019 and declared further (final) result pursuant to the impugned examination, on 01.10.2020. In that, all 21 posts for Unreserved/Open category were filled up. 7 female candidates and 3 candidates who had applied under the OBC category were also shown successful in the Unreserved/Open category. Further, as against 2 OBC candidates shown selected under the earlier result declared on 28.03.2019 only 1 found his name included under that category. One above him in the merit list namely, Ajay Kumar was now shown selected under the Unreserved category. Those found ineligible were replaced by those placed lower in merit (in the Unreserved/Open category). For ready reference, the result dated 01.10.2020 reads as below: -

“UNRESERVED CATEGORY

Sl No.	Roll No.	Name of Candidate	Catg
1	3553	POONAM (F)	GEN
2	2960	MOHD. SHARIQUE SIDDIQUE	GEN
3	2513	LAKHWINDER SINGH SOOD	GEN

4	5468	SMT. RAGINI (F)	GEN
5	6180	VINOD KUMAR CHAURASIA	OBC
6	2844	MAYANK TRIPATHI	GEN
7	3564	POONAM SINGHAL (F)	GEN
8	5201	SHAILJA RATHI (F)	OBC
9	759	ANURAG PANWAR	GEN
10	6411	ZAIBA MAJID (F)	GEN
11	5294	SHASHWATA PANDEY	GEN
12	3535	PINKU KUMAR	GEN
13	44	ABHISHEK KUMAR BAGARIA	GEN
14	5908	UTKARSH YADAV	GEN
15	1133	AWANISH KUMAR	GEN
16	3452	PARKASH CHAND RANA	GEN
17	4997	SARAD KUMAR TRIPATHI	GEN
18	5511	SUBHASH CHANDRA TIWARI	GEN
19	158	AJAY KUMAR	OBC
20	4740	SANDEEP CHAUHAN (F)	GEN
21	2026	HEMLATA TYAGI (F)	GEN

O.B.C. CATEGORY

<i>Sl No.</i>	<i>Roll No.</i>	<i>Name of Candidate</i>	<i>Catg</i>
<i>I.</i>	<i>5708</i>	<i>SURENDRA PAL SINGH</i>	<i>OBC</i>

14. It is also a fact, besides the impugned examination, three other examinations of U.P.H.J.S. were conducted during the period July, 2016 to September, 2018 being U.P.H.J.S.-2016, U.P.H.J.S.-2018 (Part-II) and U.P.H.J.S.-2018 (Part-III). Litigation was experienced at those three examinations as well. Only upon pronouncement of the decision of the Supreme Court in **Dheeraj Mor (supra)** and dismissal of individual litigation brought by various candidates (allowed to

provisionally appear at those examinations), the results for U.P.H.J.S.-2016, U.P.H.J.S.-2018 (Part-II) and U.P.H.J.S.-2018 (Part-III) were finalised on 01.10.2020 along with the impugned examination. For ready reference, the dates of advertisement published and declaration of results of all four exams is given below:-

<i>Sl No.</i>	<i>Recruitment Year</i>	<i>Advertisement Date</i>	<i>Written Exam</i>	<i>Interview Date</i>	<i>Final Result</i>	<i>Modified Result</i>
1.	UPHJS -2016	10.5.2016	24.3.2017	29/30.04.2017	18.08.2017	01.10.2020
2.	UPHJS -2018	10.5.2018	28.2.2019	11/12.03.2019	28.03.2019	01.10.2020
3.	UPHJS -2018(II)	12.11.2018	03.07.2019	13/14.07.2019	26.07.2019	01.10.2020
4.	UPHJS -2018(II)	9.8.2019	09.12.2019	14/15.12.2019	20.12.2019	01.10.2020

15. In such facts, Sri D.S. Mishra, learned Senior Advocate has vehemently urged that respondent Nos. 3 to 9 namely Sri Shashwat Pandey, Sri Pinku Kumar, Sri Utkarsh Yadav, Sri Awnish Kumar, Sri Prakash Chand Rana, Sri Sharad Kumar Tripathi and Sri Ajay Kumar were ineligible, as on 01.10.2020.

16. Sri Shashwata Pandey, Sri Pinku Kumar, Sri Utkarsh Yadav, and Sri Prakash Chandra Rana had earlier been declared successful in U.P.H.J.S.-2018 (Part-2) Examination vide result declared on 26.07.2019. They had joined pursuant to that result. Sri Awanish Kumar was selected at the H.J.S. Examination conducted in the State of Gujarat; Sri Prakash Chand Rana had also been selected at the H.J.S. Examination conducted in the State of Himachal Pradesh and Sri Sharad Kumar Tripathi had been selected at the H.J.S. Examination conducted in the State of Jharkhand. All three had joined against those selections before declaration of the

result of the impugned examination, on 01.10.2020. In fact, Sri Prakash Chand Rana first resigned from U.P.H.J.S and then joined at Himachal Pradesh. Last, Sri Ajay Kumar had joined U.P.H.J.S. pursuant to the result declared on 28.03.2019 upon his selection as a OBC candidate. Also, the subsequent result declared on 01.10.2020 was not acted upon inasmuch as no notification has been issued to appoint him under Unreserved/Open category. Hence, all seven (respondent Nos. 3 to 9) are described ineligible to appointment on 01.10.2020, in view of the ratio of **Dheeraj Mor (supra)**. On the self-same reasoning Rahul Singh, respondent No. 12 is described as ineligible for reason of his appointment and joining M.P. Judicial Service, prior to declaration of result of the impugned examination on 01.10.2020. Though he has not been declared successful, it is further asserted, his higher merit position (as compared to petitioner) is to be ignored owing to his ineligibility. In any case, his Writ Petition filed by him before the Supreme Court has been dismissed. Hence, he may have no claim.

17. The underlying reasoning in support of the above submission advanced by Sri D.S. Mishra is-being a mandatory condition prescribed in **Dheeraj Mor (supra)**, no candidate could be eligible at the impugned examination unless he had continued in practice without any break till his appointment under the impugned examination. None of the private respondent Nos. 3 to 9 remained eligible for appointment on 01.10.2020 as they had discontinued their practice of law before that date. Respondent Nos. 3 to 9 had joined judicial service prior to that date. Therefore, they were not in continuous practice on the date of appointment offered to them by the High Court, on 01.10.2020.

In support of the above, heavy reliance has been placed on the language of Article 233 of the Constitution of India as last interpreted by the Supreme Court in **Dheeraj Mor (supra)**. Here, it has been further disclosed, in similar circumstances, Awanish Kumar filed a writ petition before the Delhi High Court to gain appointment under the Delhi H.J.S. That claim was negated and his writ petition was dismissed by the Delhi High Court on 28.01.2020 being **Awanish Kumar Vs. Registrar General, Writ Petition (C) 489 of 2020**, since he stood appointed in Gujarat on 05.07.2018.

18. The dictum of the Supreme Court in **Dheeraj Mor (supra)** has further been relied on and followed in all subsequent decisions pronounced by the Supreme Court and different High Courts. Reference has been made to **R. Poornima and others versus Union of India and others 2020 SCC OnLine SC 714; Praveen Kumar Vs. High Court of Delhi and others 2022 SCC Online DEL 4447; Smt. Lily Krishnan Vs. State of Kerala and others 2023-KER 68493; K. Deepa Vs. State of Kerala 2020 SCC Online KER 2769; Sunil Kumar Verma Vs. State of Bihar 2021 SCC Online BIH 786.**, as also a decision of this Court in **Shashank Singh and 4 others Vs. High Court of Judicature at Allahabad and another, 2021 SCC OnLine All 835, (Writ-A No. 27120 of 2018 decided on 03.12.2021) 2021:AHC:152579:DB**. Thus, it has been emphasised, the only consistent view on the issue is that laid down by the Supreme Court in **Dheeraj Mor** as reiterated in **R. Poornima (supra)**.

19. To complete his submission on the issue, Sri Mishra has pointed out, the correctness of the view taken by the

Supreme Court in **Dheeraj Mor (supra)** may have been doubted and the matter referred to a larger bench of the Supreme Court on a Review Application, at the same time, in absence of any order passed to stay the operation and effect of the judgment in the case of **Dheeraj Mor (supra)**, the ratio of the said decision retains its binding precedential value. In absence of any doubt as to that, this Court must apply that law declared by the Supreme Court. Here reference has been made to 5 judge bench decision of the Supreme Court in the case of **State of Punjab versus Baldev Singh (1999) 6 SCC 172** and a division bench decision of the Delhi High Court in **Praveen Garg Vs. High Court of Delhi and Others, 2022 SCC OnLine 4477**. Referring to a recent decision of the Supreme Court in **Union Territory of Ladakh and others Vs. J&K National Conference and Another, 2023 INSC 804**, it has been vehemently asserted, in view of the clear law declared by the Supreme Court, it does not remain open to the High Court to await the outcome of the result of the reference made to the larger bench of the Supreme Court. It is clearly not open to the High Court to refuse to follow the said law even if it may have been doubted later, by another bench of the Supreme Court. It has been further asserted, in that situation the earlier decision of the Supreme Court would bind this Court. In any case, review has not been preferred (before the Supreme Court), by any of the respondents in the present case. Hence, relying on **P.V. George and Others Vs. State of Kerala and Others** as followed in **Manoj Parihar and another Vs. State of Jammu & Kashmir, 2022 SCC OnLine SC 782**, it has also been asserted, the law declared by the Supreme Court would operate retrospectively.

20. Second, it has been submitted, the procedure of selection; the process of selection and result has been changed during the selection process. 20% reservation for women was originally advertised. That would translate to 4 vacancies under the Open/Unreserved category. Against that, 5 female candidates were declared selected in that category in the provisional result declared on 28.3.2019. Instead of rectifying that error, at the stage of declaration of the further result on 01.10.2020, 2 more female candidates were declared selected under the Open/Unreserved category that too those who were placed lower in merit to the present petitioner. Thus, against 5 posts reserved for women, 7 women candidates have been selected, two of whom (respondent Nos. 10 & 11) stood lower in merit to the petitioner. Reliance has been placed on the decision of the Supreme Court in **Union of India Vs. Ramesh Ram and others, Civil Appeal Nos. 4310-4311 of 2010**. Relying on the decision of the Supreme Court in **K. Manjushree Vs. State of Andhra Pradesh and Another (2008) 3 SCC 512**, it has been emphasised, it was never permissible for the High Court to change the rules of recruitment after issuance of the advertisement.

21. First referring to the terms of advertisement dated 10.05.2018, it has been asserted 20% horizontal reservation for women had to be provided according to the Government Order issued by the Government of UP i.e. in a compartmentalised manner only. Reliance has been placed on **Rajesh Kumar Dariya Vs. Rajasthan PSC, (2007) 1 SCC 785** as also a Full Bench decision of this court in **Ajay Kumar Vs State of UP and others 2019 SCC Online All 2674 (FB)**. Applying that method, only four women

candidates may have been selected under the Unreserved/Open category i.e. on the strength of merit. This exact approach was criticised by the Supreme Court in **Anil Kumar Gupta and ors. Vs St. of U.P. (1995) 5 SCC 173**. Thus, it has been submitted, the mandatory rule in favour of compartmentalised reservation to give effect to 20% horizontal reservation for women, was violated. To that extent selection of respondent numbers 10 and 11 must be cancelled.

22. Further, as to the correct method to be applied to implement compartmentalised horizontal reservation, the law laid down by the Gujarat High Court in **Tamannaben Ashok Bhai Desai Vs Shital Amrutlal Nishad 2020 SCC Online Guj 2592** as affirmed by the Supreme Court in **Saurav Yadav Vs State of UP and others 2020 SCC Online 1109** has been relied. Following that method, respondent Nos. 10 & 11 would remain excluded from selection as an Unreserved/Open category candidate as four women candidates stood selected (under that category), from before, on the strength of their higher merit position.

23. In this regard, it has also been submitted, Ms. Poonam Singhal the candidate selected at serial no. 1 of the result dated 01.10.2020 cannot be included under horizontal reservation for women. She being a candidate domiciled in the State of Haryana, the horizontal reservation for women of Uttar Pradesh was not available to her.

24. Next, it has been submitted, a Wait List of 12 candidates including the present petitioner had been prepared and approved in the meeting of the Selection Committee

dated 13.03.2019. That was approved by the Full Court. Though, its existence was initially denied in the Counter Affidavit filed by respondent number 2 yet, pursuant to the earlier order of this Court, the record produced clearly demonstrates and confirms the existence of that Wait List. That resolution of the Selection Committee had been approved by the Full Court. Thus, it has been submitted, the candidate Yogesh Kumar though placed at serial number 6 of the Wait List, he was granted appointment in the Higher Judicial Service pursuant to his selection in the examination for the year 2016. Similarly, Ajay Kumar had been selected as OBC candidate. Since, the writ petition filed by Rahul Singh (the candidate placed at serial number 11 of the Wait List) was dismissed by the Supreme Court, the petitioner claims absolute entitlement to appointment being placed at Serial No. 12 of the Wait List number in terms of the resolution of the Selection Committee dated 13.03.2019.

25. On that premise and reasoning, learned senior counsel for the petitioner vehemently urged - the petitioner deserved to be included in the list of 21 selected candidates under the Unreserved/Open category. The petitioner is entitled to that selection irrespective of application of the rule of compartmentalised horizontal reservation for women. In fact, the Selection Committee itself made a note in the minutes of the meeting dated 13.03.2019 that the petitioner would be selected if the writ petition filed by Rahul Singh would be dismissed. For ready reference, relevant extract of the Wait List considered by the Selection Committee in its meeting held on 13.03.2019, is quoted below:

*“IN THE HIGH COURT OF
JUDICATURE AT ALLAHABAD*

**U.P. HIGHER JUDICIAL RECRUITMENT
2018 (DHJS)**

Waiting List Against Petitioners

**Remarks: * Permitted by Courts Order (F)
Female Candidate**

Sl No.	Roll No.	Name of Candidates	Date of Birth	Category	Marks of Written Exam (Max. 800)	Marks of Interview (Max. 200)	Total Marks (Max. 1000)
1.	5294	SHASHWATA PANDEY	21.06.1983	GEN	374.50	120.00	494.50
2.	3535	PINKU KUMAR	10.04.1981	GEN	392.50	100.00	492.50
3.	44	ABHISH EK KUMAR BAGARIA	20.12.1978	GEN	371.00	120.00	491.00
4.	5908	UTKARSH YADAV	11.08.1983	GEN	364.50	125.00	489.50
5.	1133	AWANISH KUMAR	01.03.1981	GEN	369.00	120.00	489.00
6.	6392	YOGESH KUMAR	20.01.1975	GEN	363.50	125.00	488.50
7.	3452	PARKASH CHAND RANA	13.05.1979	GEN	367.00	120.00	487.00
8.	4997	SARAD KUMAR TRIPATHI	02.01.1979	GEN	364.50	120.00	484.50
9.	5511	SUBHASH CHANDRA TIWARI	16.09.1974	GEN	361.50	120.00	481.50
10.	3418	PANKAJ KUMAR RAI	01.01.1978	GEN	373.00	100.00	473.00
11.	*3952	RAHUL SINGH	28.04.1979	GEN	360.00	110.00	470.00
12.	3446	PARDEEP	01.11.1979	GEN	369.00	100.00	469.00

		NARAYAN PANDEY	5				

*** Permitted by Courts Order**

Note: Sri Rahul Singh Advocate, appearing at serial number 11 has also filed a petition before Apex Court in case of His Petition gets dismissed Sri Pardeep Narayan Pandey appearing at serial number 12 shall be recommended.

26. Yogesh Kumar, Prakash Chand Rana and Rahul Singh being not available for consideration against their Wait List positions, the petitioner claims a perfect right to be appointed against his Wait List position 12, on the strength of the resolution of the Selection Committee dated 13.03.2019 (extracted above).

27. Again, as noted above, respondent No.9 Ajay Kumar who was earlier shown selected under the OBC category was later migrated to the Open/Unreserved category. It has been reiterated since Ajay Kumar joined as OBC candidate pursuant to the result declared on 28.03.2019, he ceased to be in practice as an Advocate on the occurrence of that event. Consequently, he became ineligible to be appointed under the Open/Unreserved Category under the result declared on 01.10.2020.

28. It has also been submitted, Surendra Pal Singh was selected under the social category OBC, under the result declared on 28.03.2019. However, he had appeared in the impugned examination upon age relaxation granted to him as an OBC candidate. Therefore, he would remain selected under that category and may never claim selection/migration from OBC Category to Open/Unreserved Category. Reliance has been placed on **Nirav Kumar Dilip Bhai Makwana Vs.**

Gujarat Public Service Commission & Ors., (2019) 7 SCC 383.

29. According to the learned Senior Advocate appearing for the petitioner, in any case, three vacancies are still available under Open/Unreserved Category being that of Prakash Chand Rana who has not joined pursuant to the result dated 01.10.2020, Ajay Kumar who may continue only as an OBC candidate only. Yogesh Kumar had been moved to 2016 U.P.H.J.S. Since the writ petition filed by Rahul Singh was dismissed by the Supreme Court on 27.09.2021, the petitioner is one of the only two candidates available for that selection. Therefore, without prejudice to the other submissions advanced on behalf of the petitioner, he remains entitled to appointment against that vacant post.

30. Responding to the above, Sri Ashish Mishra, learned counsel for the High Court submitted, it is factually incorrect to say that the appointment of respondent no. 9/Ajay Kumar had not been notified.

31. Second, as to eligibility condition of seven years continuous practice, the unamended Rule 5(c) of the Rules prescribed eligibility of seven years of practice on the first day of January following the year of publication of the advertisement. That stipulation in the Rule was contrary to the law declared by the Supreme Court in **Deepak Agarwal (supra)**. Consequently, vide amendment made on 20.12.2016, Rule 5(c) was amended to prescribe seven years of practice on the last date for submitting applications. Applying that law, the advertisement was published on 10.05.2018, for the impugned examination. Second, similar selections for H.J.S. (both

in the State of Uttar Pradesh and elsewhere) were initiated in different years, during 2016 to 2018.

32. While such selections were pending, another controversy arose namely, whether judicial officers (of the Nyayik Seva/similar cadre in other states) who had been an advocate for seven years before joining such judicial service, were eligible as an advocate candidate to apply for appointment in the H.J.S. cadre of a state judiciary. Thus, in **Dheeraj Mor (supra)** that issue was raised by serving judicial officers in the context of Delhi Higher Judicial Service examination. They claimed eligibility under advocate candidate category as they had completed seven years continuous practice before joining the state judiciary in the lower cadre. Pending that challenge raised, many such officers/applicants approached the Supreme Court or this Court. They were provisionally permitted to participate in the H.J.S. examinations conducted during 2016 to 2018.

33. In dealing with that issue the Supreme Court ruled (for the first time) in **Dheeraj Mor (supra)** that the eligibility condition of seven years of continuous practice must not only be met on the last date of filing the application but must it continue to be met till the date of appointment in the H.J.S. cadre. That stipulation first arose in **Dheeraj Mor (supra)**. It was a clear departure made from the law laid down by the Supreme Court in **Deepak Agarwal (supra)**. He has also referred to the difference of language employed by the Rules and Rule 9 of the Delhi Higher Judicial Service Rules considered by the Supreme Court in **Dheeraj Mor (supra)**. There, the eligibility condition required a candidate to

have not less than seven years of practice. That language alone fell for interpretation.

34. Thus, Sri Ashish Mishra has attempted to distinguish **Dheeraj Mor (supra)**. Relying on **N.I.C. Ltd. Vs Pranay Sethi (2017) 16 SCC 680** it has been submitted, a subsequent coequal bench of the Supreme Court in **Dheeraj Mor (supra)** may have differed and thus referred to a larger bench of that Court, the point of disagreement. Yet, it may not have laid down a law contrary to **Deepak Agarwal (supra)**. To that extent, the earlier law laid down remains the only binding law.

35. Third, invoking the evidentiary rule of legitimate expectation and relying on **Shivanandan C.T. Vs High Court of Kerala 2023 SCC Online 994** it has been submitted, upon publication of the advertisement for the impugned examination and by notification of the eligibility condition of seven years of practice on the last date of making the application, a legitimate expectation arose in favour of all applicants fulfilling that eligibility condition. Therefore, it was not possible to make any addition or change to those eligibility conditions and/or create fresh disabilities to exclude the eligible candidates. The same principle was applied by a coordinate bench of this Court in **Kushagra Upadhyay Vs State of U.P and others** (Writ A 8118/2020 decided on 05.10.2020). There, in the context of the same examination it was ruled- the eligibility had to be seen on the last date of submitting the application form.

36. Fourth, it has been submitted if the law laid down in **Dheeraj Mor (supra)** was applied retrospectively, it would lead to unintended, grossly harsh, and wholly

unwarranted results. Its literal compliance would require the respondents to comb through the entire H.J.S. cadre, to eliminate those who may have joined service against vacancies for advocate candidates while serving as judicial officers on the date of their respective appointments. It would result in removal from service of officers whose selection had never been challenged and who fulfilled the eligibility condition on the date of their respective appointment. Even in the context of the present dispute, the ousted candidates would lose their eligibility at any subsequent examination for reason of their suffering forced discontinuance of practice for the duration they remained in service upon their selection under the impugned examination. Thus, reference has been made to the interim orders granted by the Supreme Court in Misc. Application No. 1050/2021 i.e. in the Review Application proceedings arising from **Dheeraj Mor (supra)** being order dated 04.01.2023 as also the order dated 12.07.2021 in **Rejanish K.V. Vs K. Deepa and Others**, Civil Appeal No. 3947/2020.

37. The challenge raised in **Dheeraj Mor (supra)** remained pending before the Supreme Court from year 2015 to 2020, upon arising of vacancies (in the H.J.S. cadre). In due compliance of the directions issued by the Supreme Court in **Malik Mazhar Sultan (3) and another Vs UPPSC & others (2008) 17 SCC 703** the High Court conducted 4 examinations, including the impugned examination. Results of all such selections became pending, occasioned by pendency of **Dheeraj Mor (supra)** while vacancies continued to pile. Considering the above circumstances, initially on 15.07.2019, the Selection Committee resolved to give effect to the interim order dated 10.05.2019

passed by the Supreme Court in **Dheeraj Mor (supra)**. Thus, it resolved to appoint such practicing advocates who had been selected (pending the outcome of that litigation), whose eligibility was not in doubt. That declaration of the results is therefore described provisional. For ready reference, a relevant extract of the resolution dated 15.07.2019 is quoted below:

".....The Committee before recommending the name of the candidates finally, for appointment against the vacancies determined under 25% quota of direct recruitment to U.P. Higher Judicial Service, 2018 (Part-II) deliberated over the order dated 10.05.2019 Dheeraj Mor vs. Hon'ble High Court of Delhi (supra) wherein it has been directed that the ".....practicing advocates who have been found selected for appointment, their result be declared and they be appointed subject to the outcome of the pending matter."

38. Upon pronouncement of the decision in **Dheeraj Mor (supra)**, the Selection Committee vide further resolution dated 27.02.2020 initially resolved to exclude from the Select List such advocate candidates who may have been serving in the judicial service/Nyayik Seva, on the date of their appointment in the H.J.S. cadre. Later, on 18.03.2020 the Selection Committee reconsidered its earlier resolution dated 27.02.2020 and took a conscious decision to apply the ratio of **Dheeraj Mor (supra)** prospectively. Further, the Selection Committee resolved to place the selected candidates in order of their seniority against success in their first/earlier selection gained in the four H.J.S. selection examinations referred to above. To that extent, the earlier

resolutions were specifically modified. That resolution dated 18.03.2020 was approved by the Full Court on 30.9.2020. For ready reference the relevant extract of the resolution dated 18.03.2020 is quoted below:

"1. It has been apprised that certain candidates have been selected in multiple recruitment such as UPHJS-2016, UPHJS-2018, UPHJS-2018 (Part II) and UPHJS-2018 (Part III). The Hon'ble Supreme Court in the above pronouncement in context with Article 232(2) of the Constitution of India observed as below:

"Under Article 232(2), an Advocate has to be continuing in practice for not less than 7 years as on the cut off date and at the time of appointment as District Judge..."

In the light of above observation, the Committee in its meeting held on 27.02.2020 had resolved to the effect that:

"The Committee is of the considered opinion that in view of the above observation of the Hon'ble Supreme Court, it is necessary to ensure that a direct recruit shall not be in employment as on the cut off date fixed for determining the continuous practice of 7 years as well as on the date of appointment. In case the candidate is found to be in employment on any such dates, he/she shall be considered as in-eligible for appointment in Higher Judicial Service. This shall be ensured by the Government of U.P. before issuing appointment to such direct recruits."

The Committee reconsidered its above resolution dated 27.02.2020 and is of the considered opinion that such criterion be not applied on any of the past recruitments and may be enforced prospectively. Hence,

the resolution of the Committee dated 27.02.2020, in the matter, stands modified.

2. The High Court has conducted one examination in year 2016-17 and three examinations in the year 2018-19. The advocate-candidates have appeared in the multiple examinations as they were eligible and this Court had permitted them to take multiple examinations (provisionally). Some of the candidates have succeeded in UPHJS-2016 as well as in 2018 or in other UPHJS examinations.

The Committee resolves that such candidates shall not be denied their claim for recruitment on the basis of earliest examination.

The Committee is of the considered opinion that in case a candidate is getting selected in Direct Recruitment to UPHJS- 2016 and UPHJS-2018 as well, he/she shall be considered eligible and be placed in the final select list of UPHJS-2016 as per his/her merit and will forego his selection in UPHJS-2018. The post so becoming vacant will be filled up by the candidate placed below in the select list of the relevant year and as per Rule.

3. The Committee considered a possibility that while revision of result of the relevant years, the posts falling under the quota of direct recruitment may remain unfilled due to unavailability of suitable candidates. Under these circumstances, said unfilled post shall be filled up by promotion of the officers in Nyayik Sewa in the select list of that particular examination as per the provision of Rule 8(2) of the Rules, 1975.

4. The Committee further resolves that the vacancy already determined for the UPHJS Recruitments 2016, 2018, 2018 (Part II) and 2018 (Part III) shall not be re-determined and in case, during the course of revision of results of UPHJS Recruitment, 2016, UPHJS Recruitment, 2018, UPHJS Recruitment, 2018 (Part-II), UPHJS

Recruitment, 2018 (Part-III), vacancies are occurring under the quota of direct recruitment due to unavailability of suitable candidates and insufficient number of officers in the select list for promotion by application of Rule 8(2) of the Rules, 1975, such vacancies be taken into account as unforeseen vacancies for the next UPHJS Recruitment."

(emphasis supplied)

39. On the second submission regarding horizontal reservation for women, first reference has been made to the clear language of Rule 7 of the Rules and paragraph 2 of the Advertisement. They only provide for 20% horizontal reservation for women belonging to the State of U.P. Neither compartmentalised reservation was prescribed under the governing Rules, or the Advertisement nor overall horizontal reservation was prohibited in law. Therefore, there is no error in selecting all 7 suitable women candidates against 37 total vacancies- that being well within the overall 20% ceiling prescribed. In absence of availability of any other/more women candidate, all 7 women candidates suitable got selected. Insofar as the Rules and the advertisement did not prescribe compartmentalised reservation, the selection made is claimed to be protected under the ratio of **Malik Mazhar Sultan (supra)**. Therefore, the selections made are in accordance with the governing Rules.

40. Further, reliance has been placed on **Nawal Kishore Mishra Vs High Court of Judicature of Allahabad (2015) 5 SCC 479** to submit even in the context of social reservation to be provided, the independence of the High Courts in the recruitment process is preserved. Therefore, no legal error occurred upon the

High Court applying the non-compartmentalised reservation in accordance with the governing statutory Rules.

41. Reference has also been made to the conscious decision of the Selection Committee dated 06.12.2010, taken upon consideration of **Shiv Shanker Vs Public Service Commission (1996) 3 ESC 50; Rajeev Kumar Vs State of U.P. & ors. 2010 (5) AWC 5321. and Rajesh Kumar Dharia Vs Rajasthan Public Service Commission (2007) 8 SCC 785.** The Committee took a conscious decision to apply non-compartmentalised overall 20% reservation. That administrative decision does not fall foul to the law laid down by the Supreme Court in **Saurav Yadav Vs State of U.P. (2021) 4 SCC 542.** However, since the declaration of that law, the High Court has provided for compartmentalized horizontal reservation.

42. As to actual method employed to give effect to 20% horizontal reservation, it has been shown, the Select List was finalised after pronouncement made in **Dheeraj Mor (supra).** Thus, upon exclusion of those provisionally selected candidates who were serving judicial officers on the last date of submitting their application, the Select List was finalised/drawn. Thus, the Combined Merit List earlier prepared was utilised in order of merit to fill up the vacant posts. In that, effect was also given to 20% horizontal reservation for women. The Combined Merit List of all 44 candidates who faced the selection process up to the final stage of interview, is extracted below:

“Combined Merit List

Sl No.	Roll No.	Name of Candidates	Date of Birth	Category	Marks of Written Exam (Max. 800)	Marks of Interview (Max. 200)	Total Marks (Max. 1000)
1.	*2471	KULDEEP SHARMA	04/06/1982	GEN	444.00	130.00	574.00
2.	*3627	PRADEEP KUMAR MANI	02/07/1982	GEN	420.50	130.00	550.50
3.	*3308	NISHANT DEV	07/08/1983	GEN	407.00	125.00	532.00
4.	*3728	PRASHANT BILGAIYAN	15/06/1980	GEN	404.00	125.00	529.00
5.	3553	POONAM (F)	04/07/1977	GEN	426.50	100.00	526.50
6.	2960	MOHD. SHARIQ SIDDIQUE	29/05/1977	GEN	401.50	120.00	521.50
7.	2513	LAKHWINDER SINGH SOOD	08/01/1976	GEN	397.00	123.33	520.33
8.	*6266	VISHNU PRATAP SINGH	02/08/1983	GEN	388.50	125.00	513.50
9.	5468	SMT. RAGINI (F)	05/08/1979	GEN	392.00	120.00	512.00
10.	*3267	NIDHI YADAV (F)	23/01/1981	GEN	381.50	130.00	511.50
11.	*5343	SHIV KUMAR TIWARI	01/02/1982	GEN	384.50	120.00	504.50
12.	6180	VINOD KUMAR CHAURASIA	15/08/1983	OBC	384.50	120.00	504.50
13.	2844	MAYANK TRIPATHI	10/01/1980	GEN	384.00	120.00	504.00

14.	3564	POONAM SNGHAL (F)	27/09 /1981	GEN	382.00	120.00	502.00
15.	*361 4	PRADEEP KUMAR	05/03 /1980	GEN	380.50	120.00	500.50
16.	5201	SHAILJA RATHI (F)	23/07 /1983	OBC	384.50	115.00	499.50
17.	*158 3	DHARAM VEER SINGH	14/07 /1983	GEN	378.00	120.00	498.00
18.	759	ANURAG PANWAR	17/01 /1983	GEN	367.50	130.00	497.50
19.	*555 2	SUDHANS HU SHEKHAR PANDEY	19/08 /1983	GEN	366.50	130.00	496.50
20.	6411	ZAIBA MAJID (F)	15/09 /1982	GEN	366.00	130.00	496.00
21.	5294	SHASHWA TA PANDEY	21/06 /1983	GEN	374.50	120.00	494.50
22.	3535	PINKU KUMAR	10/04 /1981	GEN	392.50	100.00	492.50
23.	44	ABHISHE K KUMAR BAGARIA	20/12 /1978	GEN	371.00	120.00	491.00
24.	5908	UTKARSH YADAV	11/08 /1983	GEN	364.50	125.00	489.50
25.	1133	AWANISH KUMAR	01/03 /1981	GEN	369.00	120.00	489.00
26.	*352 5	PEEYUSH TRIPATHI	03/05 /1983	GEN	364.00	125.00	489.00
27.	6392	YOGESH KUMAR	20/01 /1975	GEN	363.50	125.00	488.50
28.	3452	PARKASH CHAND RANA	12/05 /1979	GEN	367.00	120.00	487.00
29.	4997	SHARAD KUMAR TRIPATHI	02/01 /1979	GEN	364.50	120.00	484.50
30.	*268 3	MANINDR A PAL	01/07 /1982	GEN	368.00	115.00	483.00

		SINGH					
31.	5511	SUBHASH CHANDR A TIWARI	16/09 /1974	GEN	361.50	120.00	481.50
32.	*160 3	DHARME NDRA KUMAR TIWARI	30/06 /1976	GEN	360.00	120.00	480.00
33.	158	AJAY KUMAR	25/11 /1981	OBC	360.00	120.00	480.00
34.	*412 4	RAJESH KUMAR MISHRA	21/11 /1976	GEN	365.00	110.00	475.00
35.	3418	PANKAJ KUMAR RAI	01/01 /1978	GEN	373.00	100.00	473.00
36.	5708	SURENDR A PAL SINGH	15/01 /1973	OBC	372.00	100.00	472.00
37.	*395 2	RAHUL SINGH	28/04 /1979	GEN	360.00	110.00	470.00
38.	3446	PARDEEP NARAYAN PANDEY	01/11 /1975	GEN	369.00	100.00	469.00
39.	*355 9	POONAM PATHAK (F)	07/01 /1982	GEN	364.50	100.00	464.50
40.	5835	TOSH KUMAR SHARMA	28/07 /1974	GEN	374.00	90.00	464.00
41.	4740	SANDEEP CHAUHA N (F)	30/06 /1983	GEN	361.00	100.00	461.00
42.	3367	OM PRAKASH MISHRA	05/01 /1977	GEN	360.50	100.00	460.50
43.	2026	HEMLATA TYAGI (F)	20/01 /1983	GEN	363.50	90.00	453.50
44.	1861	GIRISH CHANDR A SHUKLA	01/01 /1976	GEN	366.00	80.00	446.00

Remarks: * Permitted by Court's
Order (F) Female Candidate

43. Referring to that, it has been asserted, the candidates at merit position Nos. 1 to 4, 8, 10-11, 15, 17, 19, 26, 30, 32, 34, 37 and 39 were ineligible being in service of the Union or the State on the last date of submission of application. The candidate at serial no. 27/Yogesh Kumar was adjusted against his first selection in the H.J.S. 2016 examination. Excluding those 17 candidates, the remaining were considered for appointment in order of *inter se* merit. It caused displacement of 11 candidates from the provisional Select List dated 28.03.2019. An equal number of other candidates were now included in the Select List under the Unreserved/Open category. First, nine candidates were included in the Open/Unreserved Category in strict order of *inter se* merit. They happened to be male candidates. Thereafter, two women candidates placed lower in merit to the next three suitable male candidates were accommodated to give effect to 20% horizontal reservation (overall) to women.

44. Thus, all 21 vacancies under the Unreserved/Open category got filled. It included the first 19 eligible candidates in order of merit. Of that only 5 happened to be women candidates. Also, two out of 19 thus selected in the Unreserved/Open category namely, Shailja Rathi (female candidate) and Vinod Kumar Chaurasia (male candidate) were also members of OBC. However, having earned their selection under the General Merit, they were included under the Unreserved/Open category. Thereafter, Yogesh Kumar who stood 16th in the Combined Merit List was excluded for reason of his prior selection under H.J.S. 2016. Also, upon exclusion of the first 11 candidates from the provisional Select List

dated 28.03.2019, Ajay Kumar who till then was provisionally shown selected against OBC category became the 19th suitable candidate, in order of merit. Therefore, he was included in Open/Unreserved category. He had scored total 480 marks against 469 marks scored by the petitioner. 2 vacancies remained under that category.

45. Thus, only 5 women candidates stood selected in the first 19 in the Unreserved/Open category and none was selected under the social/vertical categories of reservation. Thereafter, only 2 more were available both under the Unreserved/Open category and none under other/social/vertical reservation category. Thus, Ms. Sandeep Chauhan and Ms. Hemlata Tyagi though placed lower in merit (under Open/Unreserved category), to next three male candidates in order of merit (including the petitioner), were selected to complete the 20% overall horizontal reservation for women. Therefore, the next 2 Unreserved/Open category male candidates namely, Pankaj Kumar Rai and failing him Rahul Singh (both placed higher in merit to the petitioner), were not selected. Surender Pal Singh remained selected, under reserved category, O.B.C.

46. Thus, it has been claimed, there neither was practiced any “change of the rule of the game” nor the Rules read with the terms of Advertisement of the impugned selection were violated. In fact, the entire selection process including provision of 20% horizontal reservation for women was completed strictly in accordance with the law. As to existing or possible vacancies, it has been stated there are none. Unforeseen vacancy, if any had been carried forward to the next H.J.S. examination in accordance with the Rules. Thus, referring to the Combined Merit List it has been submitted,

the petitioner being placed 3rd beyond the last male candidate / Ajay Kumar, he has no claim whatsoever.

47. As to the submission based on preparation of the Wait List, it has been replied, the Rules did not permit preparation of Wait List. Relying on **State of U.P. Vs Karunesh Kumar and Ors. 2022 SCC Online SC 1706** it has been asserted, in the absence of provision to prepare a Wait List, no right can be claimed (by the petitioner), to selection. Reference has also been made to Rule 20 of the U.P. Judicial Services Rules to contrast the absence of Wait List under the Rules applicable to the impugned examination.

48. Last, referring to the resolution/s of the Selection Committee dated 24.07.2020 as approved by the Full Court, it has been further submitted, earlier resolutions dated 17.05.2017, 13.03.2019, 15.07.2019 and 16.12.2019 stood modified. Therefore, in absence of any selection gained by the petitioner (at an earlier point in time), no right vested in the petitioner under the original/unmodified resolutions of the Selection Committee dated 13.03.2019, even if those may have been approved by the Full Court at that stage, pending decision in **Dheeraj Mor (supra)**. In absence of selection made, no right vested in the petitioner upon the resolution dated 24.07.2020 passed by the Selection Committee as was approved by the Full Court on 30.09.2020.

49. Sri. T.P. Singh learned Senior Advocate for the private respondent Nos. 6 & 8 has supported the submissions advanced by Sri Ashish Mishra. Additionally, he emphasised, **Dheeraj Mor (supra)** involved a different issue of eligibility of a member of a lower judicial

service of a State seeking appointment to Higher Judicial Service in the same State. It did not involve any dispute of a member of Higher Judicial Service in one State seeking to join similar service in another State, before declaration of the result of his selection in the (other) State of his choice. That chance service rendered in the interregnum, by force of circumstance, did not create any ineligibility of lack of seven years continuous practice. That eligibility must arise on the last date of submission of application. The stipulation of continuous practice till the date of appointment must exist *qua* those in service in the same State from before i.e. on the date of submitting their individual application. He has relied on a decision of the Supreme Court in **Sunil Kumar Verma Vs State of Bihar and Ors (2022) 9 SCC 686**. The peculiarity of facts noticed in that case exists in the present case as well.

50. Having heard learned counsel for the parties and having perused the record, in the first place, it is undisputed between the parties, in the overall merit list drawn by the High Court, the petitioner was placed lower in merit - to respondent Nos. 3, 4, 5, 6, 7, 8 and 9. Respondent no.9 (the last male candidate selected on merit), obtained 480 marks whereas the petitioner obtained 469 marks. Thus, if the dictum of **Dheeraj Mor (supra)** had been available before the issuance of the Advertisement published on 10.05.2018, the petitioner would have no right to selection over respondent Nos. 3 to 9. The claim made by the petitioner viz-a-viz respondent Nos. 8 & 9 may be considered a later while considering the issue of horizontal reservation, granted to female candidates.

51. Therefore, only if respondent Nos. 3 to 9 are found ineligible, the petitioner's

claim may merit consideration along with Pankaj Kumar Rai and Rahul Singh, both placed higher in merit (to the petitioner). Then, learned Senior Counsel for the petitioner is right in his contention - since Surendra Pal Singh was granted relaxation of age as a member of a reserved category, he could not be included under the Unreserved/Open category despite higher merit than the petitioner.

52. It is also not disputed, on the date of issuance of the Advertisement, the law was, as declared in **Deepak Agarwal (supra)**. Later, in the year 2020, the Supreme Court laid down the further law in **Dheeraj Mor (supra)** - that eligibility of seven years of practice must not only exist on the date of filing of the application, but the eligible candidate must continue/remain in practice up to the date of his appointment in service.

53. Thus, admittedly respondent Nos. 3 to 9 were eligible on the date of issuance of Advertisement dated 10.05.2018. They had completed seven years of practice on the last date of submission of their applications and remained in practice till declaration of the result on 28.03.2019. The ineligibility is alleged to have been acquired by them later, notably during pendency of **Dheeraj Mor (supra)**. Yet, only to give effect to the interim orders passed by the Supreme Court and this Court, they were not declared successful at the impugned examination.

54. Again, it is not in doubt that the dispute in **Dheeraj Mor (supra)** arose not at the behest of any advocate candidate who may have been in practice on the date of submission of his application. It arose at

the instance of existing judicial officers serving in the lower judicial service (Nyayik Sewa, in the State of Uttar Pradesh and others) on the date of submission of their application. They claimed to have earned eligibility to appear as a direct recruit for the HJS Examination having completed seven years of practice prior to entering that judicial service. Such, in-service candidates applied as direct recruits amongst others, under the impugned examination.

55. Since, such in-service candidates were treated ineligible to apply for direct recruitment, upon that challenge raised, solely under interim orders granted by the Supreme Court as were replicated by this Court and other High Courts, many candidates including Kuldeep Sharma, Pradeep Kumar Mani, Nishant Dev, Prashant Bilgaiyan, Vishnu Pratap Singh, Nidhi Yadav, Shiv Kumar Tiwari, Pradeep Kumar, Dharam Vir Singh, Sudhanshu Shekhar Pandey and Piyush Tripathi appearing at overall merit position Nos. 1, 2, 3, 4, 8, 10, 11, 15, 17, 19 and 26 of the merit list extracted in paragraph 42 above (hereinafter referred to as 'in-service candidates'), appeared at the impugned examination.

56. However, by virtue of the interim orders granted by the Supreme Court and this Court, the in-service candidates did not earn any right to selection pending decision in **Dheeraj Mor (supra)**. Then, none of the private respondent Nos. 3 to 11 was party to the proceedings in **Dheeraj Mor (supra)**. Though those respondents had no *lis* with the in-service candidates yet, they could not be considered for selection in face of interim orders operating in favour of the in-service candidates. In fact, as would be discussed below, those

respondents have suffered on account of litigation brought by in-service candidates and interim orders passed therein.

57. It may also be noted, the impugned examination was not a stray selection examination held by this Court. Considering the pre-existing directions issued by the Supreme Court in **Malik Mazhar Sultan (supra)**, regular exams had to be held for recruitment to the HJS, periodically. That compliance was independent of the dispute or issue arising in **Dheeraj Mor (surpa)**. Thus, as noticed in paragraph 14 above, four examinations being U.P.H.J.S. 2016, U.P.H.J.S. 2018, U.P.H.J.S. 2018 (Part-II) and U.P.H.J.S. 2018 (Part-III) came to be conducted pursuant to separate advertisements dated 10.05.2016, 10.05.2018, 12.11.2018 and 09.08.2019 respectively, all during pendency of **Dheeraj Mor (supra)**. We take judicial notice of similar examinations conducted in other States as well.

58. While it may have otherwise remained open to the High Court to not declare result of the above noted examinations till decision in **Dheeraj Mor (supra)** yet, it is also an undisputed position on record, by virtue of interim orders granted by the Supreme Court, *inter alia* the order dated 10.05.2019, passed on I.A. No. 49518 of 2019 in **Dheeraj Mor**, that fact circumstance was considered and it was clearly provided (as an interim measure), that the result of the practicing advocates (i.e. non in-service candidates) found selected for appointment, be declared and they be appointed subject to outcome of the proceedings in **Dheeraj Mor (supra)**. For ready reference, we consider it proper to extract the order of the Supreme Court dated 10.05.2019. It reads as below:

In these matters, it is in dispute as to whether the incumbents who have joined the services as Civil Judge can stake their claims for the posts meant for direct recruitment from the Bar reserved for practicing advocates for appointment as District Judges. Since there is a quota in the direct recruitment of Bar Members, in order to attract talent from the Bar out of practicing advocates. There are separate quota of promotional posts for the incumbents who have joined the services as Civil Judge to the post of District Judge. There is a set procedure for that and there is a merit promotion quota which has to be made by virtue of the limited departmental examination as held in All India Judges' Association & Ors. v. Union of India and Ors. (2002) 4 SCC 247 and followed in All India Judges' Association & Ors. v. Union of India And Ors. - (2010) 15 SCC 170. Nowhere it is provided that such inservice incumbents can stake their claim as against posts which are reserved for direct recruitment from the Bar.

It was contended that in certain cases, interim relief has been granted by this Court and by virtue of the interim directions issued, certain in-service incumbents participated in the exam and other process by staking claim to be appointed in the quota which is basically meant for lawyers. Since the entitlement of Civil Judges to occupy posts of Bar quota is yet to be decided by hearing matter finally and in case such interim orders are continued to be granted and the Civil Judges from the judiciary are permitted to be appointed as against the quota which basically meant for practicing lawyers, serious prejudice may be caused to the Bar incumbents. In the past, for the last 65-66 years no person from the Civil Judge cadre were permitted to stake their claims as

against the posts which are reserved for direct recruitment from the Bar.

It is settled proposition of law that final relief cannot be granted by way of interim measure. When direct recruitment has to be from Bar, we cannot continue to grant interim order of final nature leaving the situation virtually irreversible, an incumbent from Bar has to be deprived of the post given to in-service candidate which is reserved for Bar, question of seniority would also arise and in case relief is not finally granted several other complications would arise. In any case such ad-hoc arrangements by appointing such incumbents is not at all warranted that too in higher judiciary unless and until the case is decided in favour of in-service candidates.

It was also contended that in Dheeraj Mor case, certain interim orders have been passed allowing the members of the judicial service to stake their claims for the posts which are meant to be filled by the direct recruitment from the Advocates. In the circumstances, for years together such interim orders cannot be granted nor interim orders can be treated as a precedent. As they are creating more complications and the question of entitlement of in-service candidates has been referred to Larger Bench which will take call on it. It is considered appropriate that quota meant for the Bar no more filled by in-service candidates. However, the recruitment from Bar shall be subject to the final outcome of the matter which has been referred. We are of the considered opinion that we cannot direct any more appointment by way of interim orders of Civil Judges as against posts meant for practicing advocates or allow the judiciary members to participate in such examination to make position worse. Serious complications would arise in case

ultimately in-service candidates are not found eligible for such quota. As such we are not inclined to pass any further interim orders either by permitting in service candidates to stake their claims in the examination or for being appointed as against the quota reserved for Bar. It would not be proper to stop all recruitments for years together, so as to prevent complications as to seniority as well as the quota which is required to be maintained.

It was submitted that if such an anomaly is permitted to be continued, the posts reserved for the Bar members in the High Court too will have to be filled even from the District Judges who might have earlier practiced for 10 years. Be that as it may, as we are not on that issue, in the facts and circumstances of the case, we find that it is not appropriate to pass such interim orders any more. As the matter is urgent, we request Hon'ble The Chief Justice to post the matter before appropriate Bench for hearing it finally as early as possible.

We make it clear that we are not disturbing the appointments which have been made so far by virtue of such interim orders. However, no new appointments be made from now onwards of in-service candidates against quota reserved for Bar. In case even if in-service candidate has been selected in the examination held earlier as against the Bar quota no further appointment to be made of such candidates. However, the practicing advocates who have been found selected for appointment, their result be declared and they be appointed subject to the outcome of the pending matter.

Similar course was followed in the other three HJS examinations conducted in the State of U.P. (noted above), and similar H.J.S. examination in all other States.

59. Thus, the results declared by the High Court - of UPHJS-2016 on 18.08.2017, UPHJS-2018 on 28.03.2019, UPHJS-2018 (Part-II) on 26.07.2019 and UPHJS-2018 (Part III) on 20.12.2019 remained consistent and compliant to the interim order passed by the Supreme Court as above noted and other similar orders passed by that Court and this Court. By no means those results may be described as final. In fact, in face of pending litigation in **Dheeraj Mor (supra)** and orders passed therein, final results could not be declared, at that stage.

60. Therefore, the in-service candidates who had been permitted to appear at the impugned examination, also could not be excluded from the selection process, at that stage. Their candidature could neither have been accepted nor it could have been disregarded or rejected, pending decision in **Dheeraj Mor (supra)** generally, and during pendency of their individual writ petitions, especially. Thus, the results declared remained provisional. It is also not in dispute that all such individual writ petitions remained pending till decision in **Dheeraj Mor (supra)**.

61. Therefore, the net effect of the interim orders passed in their respect, created a lien in favour of the in-service candidates - to be considered for selection subject to outcome of **Dheeraj Mor (supra)**. That lien was first lifted upon decision in **Dheeraj Mor (supra)**. Therefore, pending that decision, results declared for all H.J.S. examinations (all over the country) including the impugned examination remained provisional. Such results did not confer or vest substantive rights in the in-service candidates provisionally included in the Select List declared on 28.03.2019.

62. Thus, the candidature of the in-service candidates-Kuldeep Sharma, Pradeep Kumar Mani, Nishant Dev, Prashant Bilgaiyan, Vishnu Pratap Singh, Nidhi Yadav, Shiv Kumar Tiwari, Pradeep Kumar, Dharam Vir Singh, Sudhanshu Shekhar Pandey and Piyush Tripathi remained subject to outcome of litigation in **Dheeraj Mor (supra)**. It is a settled position in law that interim orders do not seek to create or vest final rights in the parties to a dispute. In fact, on the jurisprudential plain, no interim order may be granted by any Court that has the effect of granting final relief. The interim orders granted in favour of the in-service candidates only prevented the High Courts from excluding the claims of the in-service candidates, pending the litigation in **Dheeraj Mor (supra)**.

63. In the facts of the present case, upon vacation of the interim orders granted in favour of the in-service candidates and dismissal of their individual writ petitions - considering the law declared in **Dheeraj Mor (supra)**, those candidates lost their lien or right to be considered for selection. It cannot be said, by virtue of the law declared by the Supreme Court in **Dheeraj Mor (supra)**, the selection of such in-service candidates was first cancelled. Since the in-service candidates were never selected at any earlier point in time, no selection or right to selection ever vested in those candidates. That consequence in law never arose.

64. It is a settled principle in law (as has been rightly relied by the learned Senior Counsel for the petitioner), that declaration of a law must relate back or be retrospective. Therefore, the 11 in-service candidates provisionally allowed to participate in the impugned examination

were found ineligible - from inception. If that consequence is truly recognised, only 10 Advocate candidates were found eligible to selection in the result declared on 28.03.2019. However, there selection was also made subject to outcome of the decision in **Dheeraj Mor (supra)**. That selection was provisional. Also, there remained available 11 vacancies and other candidates (including respondent Nos. 3 to 9) suitable for selection, against the same. Hence the entire result declared on 28.03.2019 was provisional.

65. At that stage, the merit/suitability of the private respondents 3-11 and the petitioner and other non-selected candidates had not been considered for reason of *inter se* lower merit position achieved. Therefore, after the decision in **Dheeraj Mor (supra)** and upon dismissal of the individual petitions filed by the in-service candidates i.e. at the stage of drawing the (final) result on 01.10.2020, the High Court was right in include private respondent Nos. 3 to 9 under the Unreserved/Open category. To that, petitioner cannot be heard to complain because the petitioner himself falls outside the list of first 21 candidates (in order of merit), initially considered for selection in the provisional result, dated 28.03.2019.

66. Then, respondent Nos. 3, 4, 5 and 7 had been selected in the provisional result declared on 26.07.2019 for U.P.H.J.S. 2018 (Part-II) examination, by virtue of their higher merit position, secured in a similar scheme of things in the context of that later examination in the State of U.P. Similarly, respondent Nos. 6, 7 and 8 came to be similarly provisionally selected at separate H.J.S. examinations for the States of Gujarat, Himachal Pradesh, and Jharkhand while respondent No. 9 came to be

provisionally selected as a O.B.C. candidate under the impugned examination itself.

67. Those private respondents never had a choice to join or to not join pursuant to the provisional selection offered to them (under different examinations) at that stage i.e. during pendency of proceedings in **Dheeraj Mor (supra)**. Arising from and during pendency of that proceeding, they competed and provisionally earned a right to selection under different examinations, in different States, on undisputed eligibility and high merit achieved at other examinations. Pending declaration of (final) results of those similar/other examinations written by them, the private respondents were never required/called to, either elect or surrender their right to selection under the impugned examination.

68. Theoretically, joining pursuant to a clear selection made at another examination, would have vested rights in the private respondents (*qua* that examination). At the same time, till then all results of H.J.S. examination results were expressly and by necessary intent only provisional. Therefore, no rights were vested in the private respondents at that stage, considering the clear stipulation made in the order dated 10.05.2019, passed by the Supreme Court. Also, in the quagmire of litigation in **Dheeraj Mor (supra)** that lasted five years, during that period, the right to selection (under the impugned examination) was not lost to those respondents. They did not concede/surrender their right to selection under the impugned examination.

69. Thus, respondent Nos. 3, 4 and 5 had been offered clear selection in U.P.H.J.S.-2018 (Part-II), conducted later.

They could not be forced to, and they never gave up their natural seniority in U.P.H.J.S. arising under the impugned examination, conducted earlier, occasioned by late declaration of the (final) result of the impugned examination on 01.10.2020. Selected at the impugned examination (held earlier), they had a natural right to retain and enjoy that higher seniority in the cadre of U.P.H.J.S. – the service.

70. If the law (in **Dheeraj Mor (supra)**), had existed from before i.e. before the conduct of the impugned examination, there is no doubt that those respondents would have found their names included in the final list on the first date of the declaration of the result itself. Same effect must be preserved to them upon declaration of the law made in the year 2020. First, on principle, that declaration of law must relate back or be retrospective. Second, they cannot be prejudiced by an act of Court arising from litigation involving rights claimed by in-service candidates. We find no justifiable reason to deny them that right, for reason of circumstances arising as a direct result of interim orders passed by the Supreme Court and this Court in such other litigation. Third, the service rendered by them pursuant to any provisional result declared in any State pending litigation in **Dheeraj Mor (supra)** was purely fortuitous being service rendered under the interim order granted by the Supreme Court. It did not create or alter the rights of the private respondents, that otherwise existed and must be recognised in terms of the final order in **Dheeraj Mor (supra)**. In absence of any direction in that decision to that effect, the private respondents 3-5 who were non-parties to that litigation must be kept immune to the unintended side-effects of that litigation.

71. Similarly, respondent Nos. 6, 7 and 8 found their names included in the final select list declared on 01.10.2020. Since respondent Nos. 6 and 8 were offered selection under provisional results declared for H.J.S. examinations in different States - in circumstances no different than those noted above, it may never be inferred that those respondents would not have accepted selection under the impugned examination (at higher seniority), at the relevant time. Also similarly, owing to his higher merit position (*qua* the petitioner), respondent No. 9 was entitled to, and he would naturally have been selected under the Unreserved/Open category. He was initially disclosed selected under Reserved Category/OBC in the provisional result dated 28.03.2019. At the same time, the petitioner does not dispute that the said Ajay Kumar obtained a higher merit position as compared to the petitioner. The former secured 482 marks as against 469 marks secured by the present petitioner. In view of the discussion made above, category allocation/OBC assigned to the said Ajay Kumar in that provisional result also did not vest any rights and did not restrict his selection under that social category. The law in that regard being well settled since **Indra Sawhney and Others Vs. Union of India**, AIR 1993 SC 477, the said Ajay Kumar remained entitled to selection under the Unreserved/Open Category by virtue of his higher merit position, in the (final) result declared on 01.10.2020. For the reasons assigned above, we find the same would apply to the case of respondent no.9 as well.

72. Similar peculiarity of facts was taken note of by the Supreme Court in **Sunil Kumar Verma (supra)**. In that decision the Supreme Court observed as below:

“12. It could thus be seen that firstly, the appellant was neither in services of the Bihar Subordinate Judicial Services Cadre on the date on which he applied and secondly, nor was he in the services of the Bihar Subordinate Judicial Officer Cadre on the date on which he was selected.

*13. In that view of the matter, we find that the law laid down in the case of **Dheeraj Mor** (supra) is not applicable in the peculiar facts and circumstances of the present case.”*

73. Further ineligibility has been set up in the candidate of Prakash Chandra Rana/respondent no.7 who had been declared successful in the provisional result declared for U.P.H.J.S. 2018 (Part-II). He joined pursuant to that selection. Later, he resigned his position in U.P.H.J.S. 2018 (Part-II) and joined another service on 27.12.2019, consequent to his selection in the Himachal Pradesh H.J.S. However, that occurred prior to decision in **Dheeraj Mor** (supra) which was pronounced on 19.02.2020. It being undisputed that respondent No.7 was first declared successful under the impugned examination, on 01.10.2020 and not earlier, no ineligibility arose in his candidature under the impugned examination. His rights under the impugned examination were separate and independent of his rights under other similar examination for U.P.H.J.S. 2018 (Part-II).

74. The administrative decision of the Selection Committee to apply **Dheeraj Mor** (supra) prospectively and to provide for selection against the first examination at which a candidate may have been selected, is wholly correct, just, proper, and equitable. It does not alter or affect the rights of the petitioner, who stood lower in merit to respondent nos. 3-9.

75. Seen in that light, the resolution of the Selection Committee dated 18.03.2020 as approved by the Full Court on 30.09.2020 is only an administrative step-in-aid necessary to give effect to the correct position in law and equity. Since no adverse consequence may have been visited on a person not party to the dispute in **Dheeraj Mor** (supra) and since the provisional result declared during pendency of that litigation did not confer/vest rights as may be perceived to be final (in the context of the then existing litigation), the Selection Committee ensured that no such undeserved adverse consequence is visited on the innocent non-parties to the dispute in **Dheeraj Mor** (supra).

76. We may also note, in the review petitions that are pending before the Supreme Court arising from the decision of the **Dheeraj Mor** (supra), the Supreme Court has stayed removal of selected candidates pending that review application. However, we have made this note only to complete the narration of facts but not to rely on the same by way of reasoning in these proceedings. Again, the order of the Supreme Court (noted above) is an interim order.

77. As to the principle invoked by learned Senior Counsel for the petitioner that **Dheeraj Mor** (supra) has been consistently applied and followed, it must be noted:

(i). in **R. Poornima** (supra), the Supreme Court considered whether length of practice as an advocate could be considered and added to the length of service as a District Judge consideration for appointment as a High Court Judge, to overlook the otherwise lower seniority position of the person thus recommended

for that appointment. Clearly, that fact situation and legal issue is not involved in the instant case. Hence, that ratio is distinguishable.

(ii). neither this Court in **Shashank Singh (supra)** nor the Delhi High Court in **Awanish Kumar (supra)**, considered the issue of purely provisional nature of all H.J.S. results declared during pendency of **Dheeraj Mor (supra)**. Also, the Courts did not have the occasion to consider and deal with the effect of that fact and legal situation created at the instance and for the benefit of the in-service candidates/ petitioners in that case/proceeding. Plainly, no submission was advanced to that effect. Hence, ratio of those decisions is also distinguished.

(iii). in **Praveen Kumar (supra)**, the Delhi High Court; **Smt. Lily Krishnan (supra)** and **Rajanish Kumar (supra)** the Kerala High Court; **Sunil Kumar Verma (supra)** the Patna High Court had the occasion to consider another fact situation. In all those cases, the candidates had been found to be ineligible on the test of **Dheeraj Mor (supra)**. However, prior to their selection against respective HJS examination, each one of them stood selected in the another/separate examination for a different service, on final and undisputed result basis. Also, each such candidate had joined that other service before being declared selected under H.J.S. examination. Thus, they were persons exactly similarly placed as the in-service candidates here. Hence, ratio of those decisions is also distinguished.

(iv). we are unable to persuade ourselves to the reasoning expressed by a coordinate bench of our Court in **Kushagra Upadhyay (supra)**. To us, that reasoning is in the teeth of **Dheeraj Mor (supra)**. Therefore, it may not be good law.

78. We therefore conclude - all services rendered by respondent Nos. 3 to 9

during pendency of litigation in **Dheeraj Mor (supra)**, whether in the State of U.P. or elsewhere were wholly provisional and fortuitous as a direct result of and under the interim orders passed by the Supreme Court and this Court. That service was rendered without prejudice to the pre-existing rights of those respondents under the impugned examination, though declaration of that right stood delayed upon interim orders granted by the Supreme Court and this Court. Also, respondent Nos. 3 to 9 were not party to the **Dheeraj Mor (supra)** and other litigation brought by the in-service candidates. They cannot be non-suited under the provisional results declared under interim orders passed, pending that litigation. While no litigant may be prejudiced by an act of Court, without exception, a person who is not party to the dispute before a Court may never be prejudiced. Thus, the first submission advanced by learned Senior Counsel for the petitioner does not find our favour. It is rejected.

79. The case of the petitioner is therefore to be tested against the selection offered to respondent Nos. 10 and 11. Both placed lower in merit to the petitioner, it is to be seen if there is any error in their selection under the 20% horizontal reservation offered to woman candidates. As extracted above, both under Rule 7 and under paragraph no.2 of the Advertisement, provision was made in favour of 20% horizontal reservation to women belonging to the State of Uttar Pradesh. The Rule and the Advertisement did not specify if such reservation would be compartmentalized or overall, yet as pointed out by learned counsel for the High Court, the Selection Committee, vide its earlier resolution dated 06.12.2010 had resolved as below:

"Thus according to Rule 7 of the U.P. Higher Judicial Services Rules, 1975 as

well as the advertisement, the 20% horizontal reservation for women in U.P. HJS Examination is overall reservation and not compartmentalised reservation."

80. Since the High Court had resolved in favour of 20% horizontal reservation to women, the Government Order issued by the State Government providing for compartmentalised horizontal reservation did not apply - of its own force, to the selections made by the High Court till its' adoption by the High Court vide later resolution. Therefore, compartmentalised horizontal reservation was not applicable to the impugned examination. In absence of that method to provide for horizontal reservation and further in absence of any direct challenge raised to the method applied by the High Court, the ratio in **Saurav Yadav (supra)** as to the method of computation of compartmentalised horizontal reservation may not engage us any further. That issue is academic in the context of the exact dispute brought before us.

81. The High Court being independent of the State Government, in matters of selection of the judicial officers, the Government Order/decision to apply compartmentalised horizontal reservation for women cannot be enforced on its own strength. That principle (of compartmentalised horizontal reservation) was adopted by the High Court, much later in the year 2022. Since then, recruitments being made by the High Court provide for compartmentalised horizontal reservation - as orally stated by Sri Ashish Mishra, learned counsel for the High Court. Thus, in absence of any patent illegality seen to exist in that method of horizontal reservation provided, we are not inclined to

treat as illegal the approach adopted by the High Court. Suffice to note that Rule-7 of the Rules and the Advertisement did not provide for compartmentalised horizontal reservation. In fact, the intent was otherwise – to provide overall reservation.

82. Seen in that light, against 37 vacancies advertised 21 fell for selection under the Open/Unreserved category. Also, 7 (20% of 37) were reserved for women, overall. Under the (final) result declared on 01.10.2020, the first 19 selected included 5 women candidates who got selected on the strength of their higher merit (as compared to the petitioner). Only other candidate selected (besides the two lower placed female candidates) is Surendra Pal Singh. With him the petitioner has no *lis* as he was selected under OBC social category. No woman candidate found selection under the social reservation categories (SC & OBC) and none was available for further selection under those categories. Therefore, on one hand, two vacancies remained under the Open/Unreserved category and two vacancies remained to be filled against 7 vacancies reserved for women candidates under the horizontal reservation provided to them.

83. It was a coincidence that only two other suitable women candidates were available in the original Combined Merit List of 44 candidates prepared pursuant to the impugned examination. Both belonged to Open/Unreserved category. It is true, both had secured lesser merit marks than the petitioner - being 461 and 453.5 marks, respectively. At that stage and in that situation, in the backdrop of overall horizontal reservation provided, they got selected in preference to the petitioner who had obtained higher merit marks.

84. All reservations (whether under vertical or horizontal reservation scheme) result in - higher merit achieved by Open/Unreserved or Male category candidates being ignored in favour of reservation granted. At the same time, that reservation is provided to achieve a higher constitutional objective referable to Article 16 of the Constitution of India. Therefore, no equitable relief may be claimed and that relief may not be granted by a writ Court to undo the plain result of reservation.

85. Insofar as it cannot be denied that respondent Nos. 10 and 11 were the only two women candidates available against the remaining two seats available under horizontal reservation quota guaranteed to them under Article 16(1) of the Constitution of India, hard as it is, the petitioner's case would remain on a lower pedestal. To the extent there is no visible change of Rule of selection (incorporated during pendency of the selection and in absence of any real challenge available to the petitioner to doubt the overall horizontal reservation granted to women, we are not inclined to accept the challenge to appointment of respondent Nos. 10 and 11.

86. Insofar as the argument has been advanced on the strength of Waiting List prepared, it may first be noted that Rules do not permit or contemplate preparation of Waiting List. The law in that regard is clear. Unless enabled by the Rules, the recruiting body may not prepare a Waiting List as may give rise to any right to the candidates be included in such list. In **State of U.P. Vs. Karunesh Kumar (supra)**, it has been observed:

“29. The learned counsel appearing for the respondents made a specific reference to the decision rendered in the case of Rajiv

Kumar Srivastava (supra) to press home the contention that, when a post is not filled due to non-joining of a candidate, another one waiting in the wings merits consideration, as a vested right inures in his benefit.

30. The aforesaid decision, in our considered view, may not have any application to the case on hand. The effect of the relevant rules is not considered therein, as the select list shuts the door to everyone other than the selected candidates. The aforesaid decision was in the context of the 1999 GO, however, as we have held that the 1978 Rules do not apply to the present recruitment, the aforesaid decision would not be of any service. Further, it is settled law that there is no vested right of the unsuccessful candidate to insist upon their consideration, in the absence of any such rule requiring for the preparation of a waiting-list. This Court in the recent decision in Vallampati Sathish Babu v. State of A.P. (Civil Appeal No. 2473 of 2022) has held that:

“7.4 In the present case, the final selection list of 33 candidates was prepared. Thereafter all the selected candidates were called for counselling, but one of the candidates did not report for counselling. The aforesaid event took place after the final selection list was prepared and published. As there was no requirement of preparation of a waiting list, the appellant claiming to be the next in the merit cannot claim any appointment as his name neither figured in the list of the selected candidates nor in any waiting list as there was no provision at all for preparation of the waiting list. Sub-rule (5) of Rule 16 is very clear. Therefore, the post remained unfilled due to one of the candidates in the final list did not appear for counselling and/or

accepted the employment. Hence, that post has to be carried forward for the next recruitment.

7.5 The appellant could have claimed the appointment to the post which remained unfilled provided there is a provision for waiting list as per the statutory provision. In absence of any specific provision for waiting list and on the contrary, there being a specific provision that there shall not be any waiting list and that the post remaining unfilled on any ground shall have to be carried forward for the next recruitment. The appellant herein, thus, had no right to claim any appointment to the post which remained unfilled.

xxxxxxxx

8.1 An identical question came to be considered by this Court in the case of Suresh Prasad (supra). In the said decision, it is specifically observed and held that even in case candidates selected for appointment have not joined, in the absence of any statutory rules to the contrary, the employer is not bound to offer the unfilled vacancy to the candidates next below the said candidates in the merit list. It is also further held that in the absence of any provision, the employer is not bound to prepare a waiting list in addition to the panel of selected candidates and to appoint the candidates from the waiting list in case the candidates from the panel do not join. The aforesaid decision of this Court has been subsequently followed by the Andhra Pradesh High Court in the case of Samiula Shareef (supra)".

87. At the same time, learned Senior Counsel for the petitioner is quite right in his submission that as a fact a list had been

prepared. The same has also been extracted above (in paragraph-25). Yet, as reasoned above, in the context of the wholly provisional result declared on 28.03.2019, preparation of such a list was an administrative necessity to deal with the circumstances arising from the provisional Select List declared in the background of litigation pending in **Dheeraj Mor (supra)** and the interim orders passed by the Supreme Court and this Court. Since the result of 11 candidates declared on 28.03.2019 was wholly provisional, commensurate provision had to be made and maintained to provide for a legal contingency to replace such candidates if they were found ineligible upon final decision in **Dheeraj Mor (supra)**.

88. In fact that ineligibility arose to 11 candidates provisionally selected in the result declared on 28.03.2019. Therefore, the High Court remained under an obligation to finalise the result by accommodating 11 other candidates who may have been found eligible and suitable for selection under the impugned examination.

89. That exercise has been carried out in preparation and computation of the (final) result dated 1.10.2020. No candidate except those who had been included in the Combined Merit List have been considered strictly in order of *inter se* merit (respondent Nos. 3 to 9) and to accommodate the constitutionally imposed preferential order of status/reservation that pre-existed in favour of respondent Nos. 10 and 11. Since there was no other litigation pending at that stage, horizontal reservation had also to be settled at that stage. Therefore, we find no illegality on part of the High Court in having finalised the result on 01.10.2020 to accommodate

respondent Nos. 10 and 11, in preference to the present petitioner.

90. The above discussion with respect to the Waiting List also leads us to the conclusion that a vacancy that may have arisen after declaration of result dated 01.10.2020 i.e. upon non-joining of respondent No. 7/Prakash Chand Rana was neither required nor permitted to be filled up by any other direct recruit. That result was final in all respects. Selected candidates who joined against that declaration of result became members of H.J.S. and those who did not only gave rise to vacancy (at that stage), to be dealt with in accordance with Rules.

91. The Rules do not permit preparation of a Wait List. Rather, they provide for a complete mechanism to fill up any vacancy initially available to direct recruits that may remain vacant upon completion of the selection process. Therefore, equitable considerations may not arise contrary the statutory provisions. Hence, we are unable to consider grant of the writ in favour of the petitioner, at this stage. Also, in any case, it cannot be lost sight - both Pankaj Kumar Rai and Rahul Singh were placed higher in merit to the petitioner. Though Rahul Singh lost a similar litigation as infructuous, the petitioner cannot claim a preferential right over Pankaj Kumar Rai, who in any case did not litigate and was not shown selected elsewhere.

92. In view of the above, the fact that Yogesh Kumar who was placed higher in the initial Wait List prepared died, is of no consequence. Further, in view of the discussion made above, we also find that the tentative observation made by the Selection Committee in its resolution

dated 13.03.2019 to the effect that the petitioner may be recommended if the writ petition filed by Rahul Singh is dismissed did not confer any right on the petitioner to gain appointment.

93. At that stage, a tentative opinion appears to have emerged with the Committee to allow for inclusion of the petitioner as the 11th candidate if the 11 in-service candidates, provisionally selected in the selection dated 28.03.2019 were eventually disqualified. However, what remained to be considered by the Selection Committee at that stage was the effect that such inclusion would cause on the horizontal reservation to be provided to women. It is that provision made at the stage of preparation of (final) result declared on 01.10.2020 that led to ouster the claim of Pankaj Kumar Rai and the petitioner, rather than anything else.

94. All resolutions passed by the Selection Committee were administrative steps in aid to the final decision taken on 24.07.2020. Upon that resolution and its ratification by the Full Court all earlier resolutions stood modified, and the legal effect caused by the earlier/modified resolutions stood lost. That being exercise of administrative power, neither it was contrary to the Rules or any precedent nor any challenge has been raised to the exercise of that power. Upon subsequent resolution dated 24.07.2020 being passed by the Selection Committee as was also approved by the Full Court, it wiped out with no trace of an enforceable legal right to the petitioner or any party to claim under any earlier resolution. Suffice to note, there is no challenge raised to that later resolution. For ready reference, resolution dated 24.07.2020 is extracted below:

“... *The Committee further resolves that resolutions of the Committee dated 17.05.2017, 13.03.2019, 15.07.2019 and 16.12.2019 pertaining to the results of U.P. Higher Judicial Service Direct Recruitment, 2016, 2018, 2018 (Part-II), 2018 (Part-III) respectively, stand modified*”

95. Once no legal infirmity is seen in the selection of respondent Nos. 3 to 11, there did not exist any vacancy against which the petitioner may have been accommodated. Unfortunate as it appears, yet the fate met by the petitioner must be recognised as fair and consistent to the law declared in **Dheeraj Mor (supra)**.

96. Writ petition lacks merit and is accordingly **dismissed**. No order as to costs.

(2024) 4 ILRA 321
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.03.2024

BEFORE

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

Writ A No. 6576 of 2023

Netram **...Petitioner**
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:
 Sri Darwari Lal

Counsel for the Respondents:
 C.S.C

A. Service Law – Constitutional Law – Article 311 – Dismissal from Service – ReinSt.ment – Pension – Petitioner, a tubewell operator, dismissed from service vide order

dated 28.12.1983 following conviction in a criminal case for corruption – Acquitted on appeal by High Court on 01.02.2023 with benefit of doubt – Sought reinSt.ment, back wages, and pension – Held, dismissal lawful under Article 311(2) proviso (a) based on conviction, without need for departmental inquiry – Post-acquittal, reinSt.ment not feasible as petitioner superannuated in 2016 – No entitlement to back wages for period out of service due to conviction, as per *Ranchhodji Chaturji Thakore Vs Superintendent Engineer and U.O.I. Vs Jaipal Singh* – No departmental proceedings initiated; acquittal not honorable – Pension and back wages denied due to non-rendering of service – *Raj Narain Vs U.O.I.* distinguished, as no departmental proceedings dropped – Hardship acknowledged but relief denied to avoid departing from legal principles. (Para 15-25)

Writ petition dismissed.

List of Cases cited:

1. Ranchhodji Chaturji Thakore Vs Superintendent Engineer, Gujarat Electricity Board; (1996) 11 SCC 603
2. U.O.I. Vs Jaipal Singh; (2004) 1 SCC 121
3. Raj Narain Vs U.O.I.; (2019) 5 SCC 809

(Delivered by Hon'ble J.J. Munir, J.)

1. The petitioner, a tubewell operator in the Tubewell Division of the Department of Irrigation, Government of Uttar Pradesh, last posted at Bareilly, seeks redemption of his lost service and its incidents, to wit, payment of his emoluments for the period that he was out of service, pension etc. The petitioner lost his service in consequence of conviction in a criminal case on charges of corruption by the Trial Court. Now that he has been acquitted in appeal by this Court, he says that he is entitled to the revocation of the order of his dismissal from service dated 28.12.1983 with consequential benefits.

2. The facts, giving rise to this writ petition, are:

The petitioner was appointed a tubewell operator in the Tubewell Division of the Department of Irrigation *vide letter* of appointment dated 17.08.1977 issued by the Executive Engineer, Tubewell Division, Bareilly. He was posted at Tubewell No.32, Fatehganj-West. He joined service on 01.09.1977. As the letter of appointment would show, the petitioner's services were temporary and carried a condition that the employment could be determined by either side, giving a month's notice. While working at Village Satuia Khass, falling within the local limits of Police Station Fatehganj-West, District Bareilly, the petitioner was accused of accepting a sum of Rs.30/- in illegal gratification from one Puran Lal Yaduvanshi on 15.12.1978. The illegal gratification was said to be accepted by the petitioner to favour Yaduvanshi in the matter of not making an irrigation entry for him in government record. A First Information Report was registered against the petitioner on 15.12.1978, giving rise to Crime No.159 of 1978, under Section 161 IPC and Section 5(2) of the Prevention of Corruption Act, 1988, Police Station Fatehganj-West, District Bareilly. After investigation, the Police charge-sheeted the petitioner on 21.08.1979. The petitioner stood his trial on the aforesaid charge before the Additional District and Sessions Judge-VII, Bareilly, who convicted and sentenced him to one year's rigorous imprisonment and a fine of Rs.100/-.

3. The aforesaid information was conveyed to the Executive Engineer, Tubewell Division, U.P., Bareilly by the Superintendent of Police, Anti-Corruption Organization, C.I.D., U.P., Lucknow *vide letter* dated 16.11.1983. Acting on the said

information, the Executive Engineer, Tubewell Division, Bareilly, *vide* his Order No. 46/83-84 dated 28.12.1983 dismissed the petitioner from service, consequent upon conviction. No departmental proceedings were initiated or held against the petitioner, where he was found guilty. The dismissal from service was based, according to the petitioner, on the judgment of conviction alone, passed by the Trial Judge.

4. It also appears, according to the prosecution case before the Criminal Court, that the petitioner was caught red-handed on 15.12.1978 accepting a bribe of Rs.30/-. He was immediately arrested. The petitioner was suspended from service by an order dated 18.12.1978. During the period of suspension, the petitioner was paid half his salary, including allowances as per standing orders of the State Government. This happened in the interregnum between the petitioner's arrest and his conviction by the Criminal Court. What happened after the judgment of conviction was passed by the Trial Judge, has already been said and need not be repeated.

5. The petitioner challenged his conviction by the Trial Judge before this Court by preferring an appeal, being Criminal Appeal No. 2187 of 1983. The appeal was heard and allowed by this Court *vide* judgment and order dated 01.02.2023 and the petitioner was acquitted. The acquittal, however, was one extending the benefit of doubt. Post acquittal, the petitioner lodged an application before the Executive Engineer, Tubewell Division, Bareilly and the Superintending Engineer, Tubewell Central, Lucknow, requesting that in accordance with Government Orders on the subject, the respondents may pay

half salary to the petitioner between 15.12.1978 and 05.09.1983 and full salary from 05.09.1983 until the petitioner's superannuation in the year 2016. He also requested that he may be sanctioned and paid his retirement pension. Representations to this effect were made on 24.02.2023 and 22.03.2023. No action was taken on any of these applications/representations.

6. It is the petitioner's case that he had never committed any offence, but was implicated falsely on account of someone's grudge and ill will. Now that he has been acquitted, it is the petitioner's case that he is entitled to his salary and pension. The inaction of the respondents to restore him to status and the incidents of it, despite acquittal by the Court of appeal, a status that was taken away upon conviction by the Trial Court, is an act on the respondents' part that is illegal, arbitrary and unjust. On the foot of these facts and urging his case as aforesaid, the petitioner has instituted the present writ petition.

7. To the extent of the facts and events leading to the petitioner's dismissal from service on account of his conviction in the criminal case on charges of corruption by the Trial Judge and his subsequent acquittal in appeal by this Court, the parties are *ad idem*.

8. A short counter affidavit has been filed by respondent Nos.3, 4 and 5, followed by a counter affidavit on behalf of all the respondents. The short counter affidavit does not say much on the issues raised and was necessitated because the petitioner's records had gone untraceable. This affidavit was filed with the service records relating to the petitioner, which was

until then untraceable. Later on, these were traced out and produced before the Court and duly perused. A counter affidavit was then filed on behalf of all the respondents, answering the petitioner's case on the merits.

9. Apart from facts and issues noticed hereinbefore, where parties are not at conflict, it is averred in paragraph No.7 of the counter affidavit that the petitioner's acquittal by this Court was not an honourable one, but extending the benefit of doubt. In paragraph No.8 of the counter affidavit, it is pleaded that the total period, during which the petitioner rendered service, was one year and three months. Whatever GPF is due, the same is being calculated and will be paid to the petitioner. It is emphasized that the petitioner having retired seven years prior to the judgment of acquittal dated 01.02.2023, there cannot be any reinstatement for him. It is emphasized that the petitioner has not done any official work from 15.12.1978 to 31.01.2016, the latter being the date of his superannuation. It is also pleaded that the respondents have no role in the criminal case launched against the petitioner. He is solely responsible for his conviction. It is averred that it is on account of the petitioner's own misdeeds that he was arrested and subsequently convicted, which led to his dismissal from service. It has been pleaded that under such circumstances, the petitioner is not entitled to salary or emoluments, as claimed by him in his representations to the District Magistrate.

10. Learned Counsel for the petitioner waived his opportunity to file a rejoinder, consequent upon which the petition was admitted to hearing and heard forthwith. Judgment was reserved.

11. Heard Mr. Darwari Lal, learned Counsel for the petitioner and Mr. Girijesh Kumar Tripathi, learned Additional Chief Standing Counsel appearing on behalf of the respondents.

12. It is submitted by the learned Counsel for the petitioner that the petitioner would be entitled to reinstatement in the event the judgment of acquittal had been passed before the date of his superannuation. According to the learned Counsel for the petitioner, this is so for reason that the petitioner's dismissal from service vide order dated 28.12.1983, ordered by the Executive Engineer, was in consequence of the judgment of conviction passed by the learned Trial Judge in the criminal case. There were no disciplinary proceedings held against the petitioner, holding him guilty. Now that the petitioner has retired from service, the respondents are obliged to pay him salary for the entire period that he has remained out of service, the balance of his salary for the period that he suffered suspension pending trial, and also retirement pension, which is the logical incident of his status as an employee of the respondents, that must be deemed to have been restored to him upon his acquittal in the criminal case, on appeal by this Court.

13. On the other hand, Mr. Girijesh Kumar Tripathi, learned Additional Chief Standing Counsel has submitted that the petitioner has not been honourably acquitted, but granted the benefit of doubt. If the judgment had been rendered during the period of time that he was still on the right side of his age of superannuation, the respondents would have the option of instituting disciplinary proceedings against him on the same charges on which he was tried, and determining the worth of the

charge by a different standard, that is applicable to disciplinary proceedings. The judgment of the Criminal Court would not foreclose that avenue for the respondents.

14. It is submitted in the alternative that even if the petitioner be entitled to reinstatement in service upon the judgment of acquittal passed by this Court in appeal, now that the petitioner has retired, it is not a case where he can be paid his emoluments for not rendering any work during the time period between the judgment of the Trial Court and this Court. For the same reason, since the petitioner has not rendered any work, ever since his suspension from service, way back in the year 1978 until the date of his superannuation in the year 2016, the petitioner would not be entitled to any retirement pension.

15. Upon hearing learned Counsel for the parties, this Court finds that the petitioner has been placed in circumstances where hardly any relief can be extended to him, though, may be, not for much fault of his. Learned Counsel for both parties have not brought to this Court's notice the service rules applicable to the petitioner, governing a situation like the present one, to wit, where the employee is convicted in a criminal case. But, it is safe to assume that the service rules would follow what Article 311 provides, if they are to be regarded constitutionally valid. Article 311 the Constitution provides:

“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.”

16. A perusal of Article 311 shows that the normal rule, governing the

dismissal or removal of a member of a civil service of the Union or the civil service of a State, or one who is holding a civil post under the Union or a State, mandates that no such dismissal etc. can be ordered unless the employee concerned has been informed of the charges against him and given a reasonable opportunity of hearing. This rule envisaged under Article 311 (2) makes it mandatory that before an order of dismissal etc. can be passed against the holder of a civil post under the State, departmental proceedings have to be convened, that involve holding of a departmental inquiry in accordance with procedure prescribed under the relevant rules applicable. Some salutary principles about the holding of such inquiry have also to be followed.

17. Clause (a) of the proviso to Article 311 (2), however, carves out an exception in a case where the employee is dismissed or removed etc. on ground of conduct, which has led to his conviction on a criminal charge. Therefore, while it was lawful for the respondents to have dismissed the petitioner from service upon his conviction by the Trial Judge on charges under the Prevention of Corruption Act, involving acceptance of illegal gratification, the order was passed not on the employer's own opinion about the charges. It was merely a consequence of the judgment of conviction passed by the Trial Judge in the criminal case.

18. Now that the petitioner has been acquitted in appeal, if indeed, he had not superannuated, the respondents would be obliged to reinstate him in service, may be without paying anything for the period of time that he was out of employment. They would still have the option, if they so elected, considering the case and the

evidence appearing against the petitioner, to initiate disciplinary proceedings against him, holding an inquiry on the relative charge. If they could indeed have done so, can now only be a subject matter of speculation. In **Ranchhodji Chaturji Thakore v. Superintendent Engineer, Gujarat Electricity Board, Himmatnagar (Gujarat) and another, (1996) 11 SCC 603**, the facts would show that the petitioner was charged for an offence of murder punishable under Section 302 read with Section 34 IPC. The Sessions Judge convicted him and awarded life imprisonment. On the foot of this judgment, the petitioner, who was a Junior Clerk, employed with the Electricity Board, was dismissed from service. The petitioner challenged his dismissal from service by a writ petition before the High Court. While the writ petition was pending, in the appeal carried by the petitioner from the Trial Judge's order, he was acquitted. The learned Single Judge, before whom the writ petition came up, taking into consideration the petitioner's acquittal by the High Court in appeal, directed his reinstatement in service with continuity, but denied back wages. The petitioner's Letters Patent Appeal was dismissed by the Division Bench. It was in the context of of these facts that it was held by the Supreme Court in **Ranchhodji Chaturji Thakore (supra)**:

“3. The reinstatement of the petitioner into the service has already been ordered by the High Court. The only question is whether he is entitled to back wages. It was his conduct of involving himself in the crime that was taken into account for his not being in service of the respondent. Consequent upon his acquittal, he is entitled to reinstatement for the reason that his service was terminated on the basis

of the conviction by operation of proviso to the statutory rules applicable to the situation. The question of back wages would be considered only if the respondents have taken action by way of disciplinary proceedings and the action was found to be unsustainable in law and he was unlawfully prevented from discharging the duties. In that context, his conduct becomes relevant. Each case requires to be considered in its own backdrop. In this case, since the petitioner had involved himself in a crime, though he was later acquitted, he had disabled himself from rendering the service on account of conviction and incarceration in jail. Under these circumstances, the petitioner is not entitled to payment of back wages. The learned Single Judge and the Division Bench have not committed any error of law warranting interference.”

19. In **Union of India and others v. Jaipal Singh, (2004) 1 SCC 121**, the employee was charged with murder and convicted by the Trial Judge for the said offence by his judgment and order dated 05.03.1997. On appeal, the Division Bench acquitted him. Despite the acquittal, the employee was not reinstated in service. He petitioned the High Court, which allowed the writ petition, granting reinstatement with full back wages and consequential benefits. On appeal by special leave by the Union of India from the judgment of the High Court, the order was modified to provide that the employee would be entitled to back wages from the date of acquittal, though the period for which the employee remained out of service, will be counted towards service without any break. The reinstatement was not disturbed. What was, therefore, denied by the Supreme Court were wages for the period that the employee remained out of service on

account of the judgment of conviction passed by the Trial Court. In **Jaipal Singh (supra)**, it was observed by the Supreme Court:

“4. On a careful consideration of the matter and the materials on record, including the judgment and orders brought to our notice, we are of the view that it is well accepted that an order rejecting a special leave petition at the threshold without detailed reasons therefor does not constitute any declaration of law by this Court or constitute a binding precedent. Per contra, the decision relied upon by the appellant is one on merits and for reasons specifically recorded therefor it operates as a binding precedent as well. On going through the same, we are in respectful agreement with the view taken in *Ranchhodji* [(1996) 11 SCC 603 : 1997 SCC (L&S) 491] . If prosecution, which ultimately resulted in acquittal of the person concerned was at the behest of or by the department itself, perhaps different considerations may arise. On the other hand, if as a citizen the employee or a public servant got involved in a criminal case and if after initial conviction by the trial Court, he gets acquittal on appeal subsequently, the department cannot in any manner be found fault with for having kept him out of service, since the law obliges a person convicted of an offence to be so kept out and not to be retained in service. Consequently, the reasons given in the decision relied upon, for the appellants are not only convincing but are in consonance with reasonableness as well. Though exception taken to that part of the order directing reinstatement cannot be sustained and the respondent has to be reinstated in service, for the reason that the earlier discharge was on account of those criminal proceedings and conviction only, the

appellants are well within their rights to deny back wages to the respondent for the period he was not in service. The appellants cannot be made liable to pay for the period for which they could not avail of the services of the respondent. The High Court, in our view, committed a grave error, in allowing back wages also, without advertent to all such relevant aspects and considerations. Consequently, the order of the High Court insofar as it directed payment of back wages is liable to be and is hereby set aside.”

20. In **Raj Narain v. Union of India and others, (2019) 5 SCC 809**, a much later decision of their Lordships of the Supreme Court, the facts show that the employee was working as a Sorting Assistant in the Railway Mail Service at Mughalsarai. He was placed under suspension in contemplation of disciplinary proceedings on allegations of forgery, which led to payment of high-value money orders. A First Information Report was lodged against the employee. The order of suspension was revoked on 21.10.1987, in consequence of which he worked till 28.02.1997. However, upon conviction by the Trial Judge in the criminal case, he was dismissed from service on 28.02.1997. On appeal, the employee succeeded and a judgment of acquittal was passed in his favour. The appellant claimed reinstatement, which the employers refused. The order refusing reinstatement said that as he was dismissed from service more than six years ago, he could not be reinstated. The order declining reinstatement was challenged before the Central Administrative Tribunal. The Tribunal allowed the Original Application and directed the employee's reinstatement with benefit of seniority and notional fixation of pay together with increments

from the date of his dismissal till reinstatement. The Tribunal, nevertheless, denied back wages for the period that the employee was not in service. The employee was reinstated in compliance with the Tribunal's order. The employee's claim for full emoluments during the period of suspension was also declined by the employers. The employee preferred a writ petition against the Tribunal's judgment, by which he was denied back wages. The High Court partly allowed the writ petition, holding him entitled to full back wages from the date of his acquittal until his reinstatement. The employee then carried the matter in appeal to the Supreme Court by special leave to the extent that he was denied back wages for the period between his dismissal from service and the judgment of acquittal in his favour. Their Lordships considered both **Ranchhodji Chaturji Thakore and Jaipal Singh**, and, explained the distinction between a criminal case initiated by the employers and one instituted by the Police, without the employers' involvement and its impact on the claim for back wages in the event of acquittal.

21. In **Raj Narain** (*supra*) one feature that was noticed by the Court was the fact that departmental proceedings had been initiated in relation to conduct that had led to the criminal prosecution with the employee being placed under suspension in contemplation of disciplinary proceedings, but the disciplinary proceedings were dropped on 21.03.1983, which was much before his conviction by the Criminal Court on 28.02.1997, when he was also dismissed from service. The employee was held entitled to backwages from the date of his acquittal as directed by the High Court and also full salary from the date of his suspension to the date of his reinstatement,

because the disciplinary proceedings were dropped. However, back wages were not granted for the period that the employee remained out of employment on account of the order of dismissal following conviction by the Trial Judge.

22. In **Raj Narain**, considering the various facts and how the law would bear upon it, it was held:

“5. This Court in *Ranchhodji Chaturji Thakore [Ranchhodji Chaturji Thakore v. Gujarat Electricity Board, (1996) 11 SCC 603 : 1997 SCC (L&S) 491]* considered the case of an employee who sought back wages for the period he was kept out of duty during the pendency of a criminal case for his involvement in an offence under Section 302 IPC. The claim of the petitioner therein was that he was entitled to full wages on his acquittal by the criminal court. This Court rejected the said submission by holding that the question of payment of back wages would arise only in case of termination of service, pursuant to findings recorded in a departmental enquiry. In the event of the dismissal order being set aside by the Court, the delinquent employee would be entitled to claim back wages as he was unlawfully kept away from duty by the employer. This Court was of the opinion that an employee against whom criminal proceedings are initiated would stand on a different footing in comparison to an employee facing a departmental enquiry. The employee involved in a crime has disabled himself from rendering his services on account of his incarceration in jail. Subsequent acquittal by an appellate court would not entitle him to claim back wages.

6. The decision of *Ranchhodji Chaturji Thakore [Ranchhodji Chaturji Thakore v. Gujarat Electricity Board,*

(1996) 11 SCC 603 : 1997 SCC (L&S) 491] was followed by this Court in *Union of India v. Jaipal Singh* [Union of India v. Jaipal Singh, (2004) 1 SCC 121 : 2004 SCC (L&S) 12] to refuse back wages to an employee who was initially convicted for an offence under Section 302 read with Section 34 IPC and later acquitted by the High Court in a criminal appeal. While refusing to grant relief to the petitioner therein, this Court held that subsequent acquittal would not entitle an employee to seek back wages. However, this Court was of the opinion that if the prosecution is launched at the behest of the department and the employee is acquitted, different considerations may arise. The learned counsel for the appellant endeavoured to distinguish the prosecution launched by the police for involvement of an employee in a criminal case and the criminal proceedings initiated at the behest of the employer. The observation made in the judgment in *Union of India v. Jaipal Singh* [Union of India v. Jaipal Singh, (2004) 1 SCC 121 : 2004 SCC (L&S) 12] has to be understood in a manner in which the department would become liable for back wages in the event of a finding that the initiation of the criminal proceedings was mala fide or with vexatious intent. In all other cases, we do not see any difference between initiation of the criminal proceedings by the department vis-à-vis a criminal case lodged by the police. For example, if an employee is involved in embezzlement of funds or is found indulging in demand and acceptance of illegal gratification, the employer cannot be mulcted with full back wages on the acquittal of the person by a criminal court, unless it is found that the prosecution is malicious.

7. The point that remains to be considered is whether the appellant is entitled to payment of full wages between

1979 and 1987. The appellant was placed under suspension on 23-10-1979 and his suspension was revoked on 21-10-1987. An interesting development took place during the interregnum by which the disciplinary proceedings were dropped on 21-3-1983. It is clear from the record that the appellant was the one who was seeking postponement of the departmental enquiry in view of the pendency of criminal case. The order of suspension was in contemplation of disciplinary proceedings. By virtue of the disciplinary proceedings being dropped, the appellant becomes entitled to claim full salary for the period from the date of his suspension till the date of closure of the departmental enquiry. Thereafter, the respondents took four years to reinstate him by revoking his suspension. The order of suspension dated 23-10-1979 came to an end on 21-3-1983 which is the date on which disciplinary proceedings were dropped. The appellant ought to have been reinstated immediately thereafter unless a fresh order was passed, placing him under suspension during the pendency of the criminal trial which did not happen. Ultimately, the appellant was reinstated by an order dated 21-10-1987 by revocation of the order of suspension. Though, technically, the learned Additional Solicitor General is right in submitting that the impugned judgment does not even refer to the IA, we are not inclined to remit the matter to the High Court at this stage for fresh consideration of this point. We hold that the appellant is entitled for full wages from 23-10-1979 to 21-10-1987 after adjustment of the amounts already paid towards subsistence allowance.”

23. This is a case where no departmental proceedings were ever initiated and the dismissal order was founded entirely on the judgment of the

27. Costs easy.

Writ A No. 11279 of 2023

Moulabi Ram ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Sri Samarath Singh, Ramesh Chandra
Tiwari, Sri V.K. Singh (Sr. Advocate)

C.S.C., Sri Naresh Chandra Tripathi, Suchita Tripathi, Sri Trilok Nath Dubey

A. Service Law – U.P. Secondary Education Services Selection Board Rules, 1998 – Rule 11 – Intermediate Education Act, 1921 – Regulations 55 to 61 – Transfer of Principal – Petitioner Moulabi Ram challenged transfer order dated 30.06.2023 of respondent Ramyash as Principal of Goverdhan Inter College, Jaunpur – Requisition for direct recruitment sent on 16.04.2021 – Held, requisition sent by Manager on 16.04.2021 valid despite being offline, as procedural irregularity curable and no substantial injustice caused – Government Order dated 13.08.2021 prohibits transfer against requisitioned vacancy – Requisition predates transfer order, rendering it unsustainable – Equity favors Moulabi Ram, an officiating Principal, over Ramyash, a settled Principal – *Tata Chemical Ltd. Vs Commissioner of Customs and Krishna Rai Vs Banaras Hindu University* relied upon for procedural compliance – Transfer order quashed, Moulabi Ram's writ petition allowed, Ramyash's writ petition dismissed. (Para 12-20)

Writ petition of Moulabi Ram allowed; writ petition of Ramyash dismissed; writ

petition of Mahatim Singh de-tagged for separate hearing.

List of Cases cited:

1. Tata Chemical Ltd. Vs Commissioner of Customs; (2015) 11 SCC 628
2. Krishna Rai Vs Banaras Hindu University; (2022) 8 SCC 713

(Delivered by Hon'ble Ajit Kumar J.)

1. Heard Sri V.K. Singh, learned Senior Advocate assisted by Sri Ramesh Chandra Tiwari, learned counsel for the petitioner in Writ - A No. 11297 of 2023. Sri Naresh Chandra Tripathi, learned Advocate appearing for 5th respondent and also petitioners' counsel in Writ - A No. 17926 of 2023 and Sri Trilok Nath Dubey, learned Advocate appearing for Committee of Management in both the petitions as well as Sri P.K. Srivastava, learned Additional Chief Standing Counsel for the State respondent.

2. These three above captioned writ petitions have been filed by Moulabi Ram, Ramyash and Mahatim Singh respectively. While Moulabi Ram is seeking a writ of certiorari for quashing the order of transfer dated 30.06.2023 in respect of Ramyash impleaded as 5th respondent, Ramyash the petitioner in his writ petition seeks a writ of certiorari quashing the order dated 20.07.2023 putting in abeyance his transfer order upon a representation dated 15.07.2023 of Moulabi Ram who is impleaded as 7th respondent in his writ petition. He further seeks a writ of mandamus to give him joining as Principal of Goverdhan Inter College, Muftiganj, Jaunpur pursuant to the transfer order dated 30.06.2023. One Mahatim Singh who is working as Assistant Teacher L.T. Grade in the Institution in question, questions the

promotion of Moulabi Ram as Lecturer (Sociology) as according to him on the date of occurrence of the said vacancy i.e. 01.07.2007 he was not having experience of five years' continuous regular service in L.T. Grade and so also did not possess the academic qualification as per Appendix - A.

3. Looking to the facts pleaded by respective parties in the writ petitions and their grounds for relief claimed and as the learned Advocates appearing for respective parties agree, in my considered view also the controversy between Moulabi Ram and Ramyash is required to be decided in the first instance. The transfer order of Ramyash is under challenge in the petition of Moulabi Ram and there is a prayer for mandamus also in the writ petition of Ramyash to give him joining. The order putting in abeyance the transfer order of Ramyash can be considered while deciding these two petitions first and so far as Mahatim Singh's writ petition is concerned, it involves an entirely different issue and therefore, it can be decided separately.

4. Coming to the writ petition of Moulabi Ram, the facts pleaded are that on account of regular Principal Bhaiya Lal Yadav attaining the age of superannuation on 31.03.2021 he was appointed as Officiating Principal of the Institution w.e.f. 01.04.2021 and his signatures were attested by the District Inspector of Schools on 13.04.2021, however, for a short period between 30.06.2022 to 20.08.2022 attestation of petitioner's signatures as officiating Principal was put in abeyance but then it was restored. It is pleaded in the writ petition that, when the post of Principal of the Institution substantively fell vacant, a requisition was sent to the District Inspector of Schools on 19.09.2020

for seeking direct recruitment by the Board as per Rule 11(1) and 11(2) of the U.P. Secondary Education Services Selection Board Rules, 1998. Later on another requisition was sent to the board through the District Inspector of Schools on 16.04.2021. The transfer order of the 5th respondent Ramyash came to be issued only on 30.06.2023. Taking the legal plea of the Government order dated 27.01.2021, wherein transfer is not permissible in the event post of the Principal has been requisitioned, present petition was filed challenging the transfer of the 5th respondent dated 30.06.2023.

5. It transpires further that while this writ petition was pending admission before this Court, petitioner Moulabi Ram approached the Additional Director of Education (Secondary), U.P. by means of representation dated 15.07.2023 to the effect that since he has challenged the transfer order and writ petition was listed for hearing on 30.07.2023 the transfer order may be stayed and the Additional Director of Education (Secondary), U.P. on his own stayed the transfer order vide order dated 20.07.2023, which led to the filing of writ petition by Ramyash being Writ - A No. 17926 of 2023 placing reliance upon the Government Order dated 14.06.2019 according to which if the requisition has not been sent for the post of Principal to the Board online then on the basis of report regarding existence of vacancy, transfers could be made.

6. The argument advanced by learned Senior Advocate appearing for petitioner Moulabi Ram is that the Government Order dated 14.06.2019 has subsequently been superseded by the Government Order dated 27.01.2021, which provides that even if the requisition has been sent to the Board no

transfer can be made against such vacancy, may be the vacancy does not stand advertised on the date of consideration of application for transfer. The other argument raised is that requisition was duly sent for the post of Principal of the Institution on 21.09.2019 itself and in the event it is claimed to have not been sent by the Management, the requisition was again sent on 16.04.2021 for the second time, which the State in its instruction given by the District Inspector of Schools on 25.11.2023 has admitted to have received on 23.04.2021. So in any case, there was a requisition sent for appointment prior to the transfer order dated 30.06.2023 and thus, according to him, transfer was bad.

7. To justify the requisition sent on 16.04.2021 under the signatures of the Manager upon prescribed form and with details, it is contended that the offline requisitions were being entertained by the District Inspector of Schools and in this regard a letter was issued by the office of District Inspector of Schools on 19.08.2020 to all the Managers and Principals of the recognized and aided Higher Secondary and Intermediate Schools for sending offline applications in triplicate within a week. It is contended also that no letter was received in the school/ college for sending requisition online.

8. *Per contra*, Sri N.C. Tripathi, learned Advocate appearing for 4th respondent Ramyash and petitioner in Writ - A No. 17926 of 2023 contended that the Additional Director of Education (Secondary) had written a letter to all the District Inspector of Schools (first and second) on 03.03.2020 that requisition should be made qua available vacancy on a prescribed format by 15.03.2020 as the exercise was to be undertaken to process

transfer applications in terms of regulation 55 to 61 of Chapter III (as amended) of Intermediate Education Act, 1921. The seven point directives were appended to this letter and therefore, the requisition was to be sent meeting all the seven points by the Manager and not by the Principal of the Institution. So according to him the requisition sent by the Principal of the Institution on 19.09.2020 as is brought on record, was neither by the competent authority namely the Manager of the Institution in terms of Rule 11 of 1998 Rules, nor was upon prescribed format issued by the Additional Director of Education.

9. In so far as the second requisition sent by the Manager on 16.04.2021 received in the office of District Inspector of Schools on 23.04.2021 is concerned, it was argued that this requisition offline was not permissible in law for the reason that the Secretary of U.P. Secondary Education Services Selection Board, Prayagraj had already written letter on 02.12.2021 to all the District Inspector of Schools of Uttar Pradesh to direct that Institution to upload their respective requisitions online between 03.12.2021 and 17.12.2021 when the website would remain open and available.

10. According to him this letter was further circulated by the District Inspector of Schools to the Managers of the recognized and aided Institutions and therefore, offline requisition was not entertainable. It was submitted that according to the rules as applicable to the Secondary Education Services Selection Board, it can adopt mode and methodology to invite and entertain applications, inasmuch as, the amended regulations also provided for entertaining online transfer applications to be registered. In support of

the transfer order meeting the conditions as prescribed under the relevant regulations, Sri Tripathi submitted that after obtaining the report from the District Inspector of Schools regarding existence of substantive vacancy in the Institution in question that application of Ramyash for transfer came to be expedited and his name got enlisted in the combined list of transfers that was issued on 30.06.2023. Sri Tripathi further argued that merely because petitioner Moulabi Ram had filed a writ petition before this Court, it would not have changed the circumstances either, in the absence of any interim order in the writ petition filed by Moulabi Ram. The Additional Director of Education (Secondary) exceeded his authority in putting in abeyance the transfer order of the petitioner.

11. Having heard learned counsel for the respective parties and their arguments raised across the bar, the legal issue that arises for consideration before this Court is two fold:

(a) whether the two requisitions made by the Principal and Manager of the Committee of Management of the Institution namely Goverdhan Inter College, Muftiganj, Jaunpur were valid requisitions within the meaning and scope of Rule 11 of 1998 Rules; and

(b) whether in the event of requisitions sent to the Board through proper channel for the post of Principal of the Institution, the transfer can still be made against such vacancy taking aid to the regulations 59 to 61 of Chapter III of the Intermediate Education Act, 1921.

12. In order to appreciate the arguments of respective parties as to the first point, I find it more appropriate to go

first through the rules qua determination and notification of vacancies as prescribed under rule 11 of 1998 Rules. For ready reference rule 11 is reproduced hereunder:

"11. Determination and notification of vacancies. - (1) For the purposes of direct recruitment to the post of teacher, the Management shall determine the number of vacancies in accordance with sub-section (1) of Section 10 and notify the vacancies through the Inspector, to the Board in the manner hereinafter provided.

(2) (a) The statement of vacancies for each category of posts to be filled in by direct recruitment including the vacancies that are likely to arise due to retirement on the last day of the year of recruitment, shall be sent in quadruplicate, in the *pro forma* given in Appendix "A" by the Management to the Inspector by July 15 of the year of recruitment and the Inspector shall, after verification from the record of his office, prepare consolidated statement of vacancies of the district subjectwise in respect of the vacancies of lecturer grade, and group wise in respect of vacancies of Trained graduates grade. The consolidated statement so prepared shall, along with the copies of statement received from the Management, be sent by the Inspector to the Board by July 31 with a copy thereof to the Joint Director :

Provided that if the State Government is satisfied that it is expedient so to do, it may, by order in writing, fix other dates for notification of vacancies to the Board in respect of any particular year of recruitment :

Provided further that in respect of the vacancies existing on the date of the commencement of these rules as well as the vacancies that are likely to arise on June 30, 1998, the Management shall, unless some other dates are fixed under the

preceding proviso, send the statement of vacancies by July 20, 1998 to the Inspector and the Inspector shall send the consolidated statement in accordance with this sub-rule to the Board by July 25, 1998.

Explanation. - For the purposes of this sub-rule the word 'groupwise' in respect of time Trained graduates grade means in accordance with the following groups, namely :

(a) Language This group consists of the subjects of

Hindi, Sanskrit, Urdu, Persian and Arabic;

(b) Science This group consists of the subjects of Science and Mathematics;

(c) Art and Craft

(d) Music

(e) Agriculture

(f) Home Science

(g) Physical Education

(h) General This group consists of the subjects not

covered in any of the foregoing groups.

(b) With regard to the post of Principal or Headmaster, the Management shall also forward the names of two senior most teachers, along with copies of their service records (including character rolls) and such other records or particulars as the Board may require, from time to time.

Explanation. - For the purpose of this sub-rule "senior-most teacher" means the senior-most teacher in time post of the highest grade in time institution, irrespective of total service put in the institution.

(3) If, after the vacancies have been notified under sub-rule (2), any vacancy in the post of a teacher occurs, the Management shall, within fifteen days of its occurrence, notify to the

Inspector in accordance with the said sub-rule and the Inspector shall within ten days of its receipt by him send it to the Board.

(4) Where, for any year of recruitment, the Management does not notify the vacancies by the date specified in sub-rule (2) or fails to notify them in accordance with the said sub-rule, the Inspector shall on the basis of the record of his office, determine the vacancies in such institution in accordance with sub-section (1) of Section 10 and notify them to the Board in the manner and by the date referred to in the said sub-rule. They vacancies to the Board under this sub-rule shall be deemed to be notified by the Management of such institution.”

(emphasis added)

13. Upon bare reading of aforesaid provisions, I find that sub rule (1) of Rule 11 permits notification of vacancies to the Board through the District Inspector of Schools in the manner provided for. The manner is given in sub rule (2) of Rule 11 of the Rules, 1998, according to which the vacancies that are likely to arise due to retirement on the last day of the year of recruitment shall also be sent to the District Inspector of Schools by July 15 of the year of recruitment and then the District Inspector of Schools after due verification from the records of his office shall prepare a consolidated statement of vacancies subject wise and group wise of Lecturers and TGT as the case may be and then forward the same to the Board by 31st of July with a copy thereof to the Joint Director of Education. So in any case, the determination of vacancy under Rule 10 read with Rule 11(1) and (2) by 15th July all the vacancies that are likely to occur till 30th June next year would be sent to the District Inspector of Schools on a proforma

prescribed under Appendix - A and that too in triplicate. So the duty is cast upon the Management to determine the vacancies and forward the same and not upon the Principal of the Institution. The second thing that bornes out is that the vacancies falling vacant in the year of recruitment by 30th June next also shall have to be requisitioned and that too on format given in Appendix – A of Intermediate Education Act, 1921.

14. It is also well settled law that when a thing is required to be done in a particular manner, that thing should be done in that manner alone. So, if the statutory rules provide for intimating a vacancy or in other words requisitioning a vacancy for direct recruitment by a particular authority then it should be done by that particular authority only under his signatures and still further, it should be on the same format/ proforma as prescribed for. In the case of **Tata Chemical Ltd. v. Commissioner of Customs (2015) 11 SCC 628**, it has been settled by the Hon’ble Supreme Court that *“if the law requires that something be done in a particular manner, it must be done in that manner, and if not done in that manner has no existence in the eye of the law at all.”* This has been reiterated by Supreme Court in the case of **Krishna Rai v Banaras Hindu University (2022) 8 SCC 713**).

15. Testing the first requisition claimed by petitioner Moulabi Ram sent on 19.09.2020, I find that it does not bear signatures of Manager at all. It had been sent upon a common office pad of the Principal and Manager of Goverdhan Inter College, Muftiganj, Jaunpur but bore the signature and seal of Principal only and the proforma annexed as per Appendix – A, did not bear any signature either of the

Principal or the Manager and so also the certificates appended thereto regarding vacancy falling vacant on 31.03.2021 and that vacancy was not disputed one, had been signed by the Principal only. Further, I do not find there to be any compliance of the provisions for sending two names of senior most teachers of the Institution along with the requisition and still further, I do not find there to be any compliance of the letter issued by the Additional Director of Education (Secondary), U.P. dated 03.03.2020. While it could be said that the letter dated 03.03.2020 was sent to the District Inspector of Schools and was not even marked to the Management but I do not find the requisition to be valid enough on the score of the prescribed procedure and method given under Rule 11 of the 1998 Rules.

16. Coming to the second requisition claimed to have been sent by the Manager of the Institution on 16.04.2021 even though details appended thereto have not been annexed but it will be taken to have been received in the office of the District Inspector of Schools on 23.04.2021 as per the admission made in the instructions given by District Inspector of Schools dated 25.11.2023. The requisition this time of course bore the signatures of both the Manager and Principal of the Institution. So while the requisition sent on 19.09.2020 cannot be a valid requisition being signed by the Principal only, second requisition sent on 16.04.2021 will be taken to have been sent by the competent authority namely the Manager. However, the issue that remains to be resolved in order to hold requisition dated 16.04.2021 to be valid, as to whether the Manager was justified in sending the requisition offline instead online between 03.12.2021 to 12.12.2021

as per the directives issued on 02.12.2021 to all the District Inspector of Schools of Uttar Pradesh. Rule 11(2) clearly stipulates that the vacancies have to be intimated to District Inspector of Schools who after due verification shall send the same to the Board but the requisition has to be sent by 15th July. Since vacancy in question was to fall vacant on 31.03.2021, therefore, vacancy was to be sent by 15.07.2020, as 1st July 2020 to 30th June 2021 will be the recruitment year. As the recruitment year starts from 1st July 2020 to the following 30th June 2021, the process had started to consider applications for transfer of available vacancies in the relevant financial year if available vacancy was neither requisitioned, nor advertised. However, consideration had yet not started qua application of transfer and any process if was under way, validity of a transfer is to be seen on the date of its issuance. Admittedly transfer order was issued on 30.06.2023 and so it is to be seen as to whether requisition had been made of the post in question prior to this date. District Inspector of Schools has admitted to have received requisition on 23.04.2021, a date much prior to transfer order. However, now the legal issue is to be answered as to whether requisition sent on 16.04.2021 received by District Inspector of Schools on 23.04.2021 was a valid requisition having been sent off line. The letter of the District Inspector of Schools dated 19.08.2020 acknowledges off line requisition provided thus:

“प्रेषक,
जिला विद्यालय निरीक्षक,
जौनपुर।

सेवा में,
समस्त प्रबन्धक / प्रधानाचार्य

अशासकीय सहायता प्राप्त /
उ०मा०वि०/ इण्टर कालेज
जौनपुर।

पत्रांक / 3141-42 /2020-21

दिनांक 19-08-2020

विषय- दिनांक 31.03.2021 तक
सेवानिवृत्त हो रहे प्रधानाचार्य / प्रवक्ता / स०अ०
के रिक्त पद का अध्याचन प्रेषण के सम्बन्ध में।

महोदय

उपर्युक्त विषयक के सम्बन्ध में
अवगत कराना है कि आपके विद्यालय में दिनांक
31.03.2021 तक सेवानिवृत्त हो रहे प्रधानाचार्य /
प्रवक्ता/ स०अ० के रिक्त पद का अध्याचन
चयनबोर्ड को प्रेषित किया जाना है जिसके लिए
पूर्व में आप द्वारा माह अक्टूबर 2019 में
ऑनलाइन अध्याचन प्रेषित किया गया था के
अतिरिक्त 31 मार्च 2021 को सेवानिवृत्त होने
वाले प्रधानाचार्य / प्रवक्ता / स०अ० का विषयवार
/ आरक्षणवार अध्याचन आफलाइन माध्यम से
किस पद से रिक्त पद है का स्पष्ट उल्लेख करते
हुए (तीन प्रतियों में) अधोहस्ताक्षरी कार्यालय में
एक सप्ताह के मध्य उपलब्ध कराना सुनिश्चित
करें। प्रकरण अतिमहत्वपूर्ण एवं समयबद्ध है।

इसमें किसी भी प्रकार का विलम्ब
अपेक्षित नहीं है।

भवदीय

ह० अप०

(प्रवीण मणि त्रिपाठी)

जिला विद्यालय निरीक्षक

जौनपुर।

पृ०सं०/ /2020-21 दिनांक:

प्रतिलिपि-संयुक्त शिक्षा निदेशक वाराणसी
मण्डल वाराणसी की सेवा में सूचनार्थ प्रेषित।

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जिला विद्यालय निरीक्षक

जौनपुर।”

requisition had been sent to District Inspector of Schools off line would not have rendered it null and void. Rules, 1998 do not provide for any mode of sending requisition but acknowledge its route via office of District Inspector of Schools. The District Inspector of Schools was a responsible authority and it was his duty to send it back to the Institution same day for online sending or ought to have sent it himself using his good offices. Such intimation if was kept unforwarded by the District Inspector of Schools, it could not be presumed that there was no requisition to justify action to fill up the vacancy by transfer after receipt of requisition in the office of District Inspector of Schools on 23.04.2021.

18. Offline requisition of a vacancy for direct recruitment cannot be a ground itself to hold that Board has no authority to advertise such vacancy. It is only a procedural aspect of a matter and substantive power do not get adversely affected or diluted for such irregularity. Procedural irregularities are curable until it is established that someone's rights are adversely affected to cause him substantial injustice or may result in miscarriage of justice. But for this hyper technical stand that requisition was sent but only offline, otherwise, had it been online as on 16.04.2021, no such transfer could have been made on 30.06.2023. It was respondent education authority's own stand that online requisition of intimation was not possible due to server problem and so offline requisitions were invited. Transfer is not a vested right as such. It depends upon many factors and availability of vacancy at a desired place is a sine qua non. Requisition sent through the District Inspector of Schools was not such a serious irregularity that transfer should be

17. It is true that Board required later on online requisition, but merely because a

permitted to deny the claim of senior teacher participating in the selection by way of direct recruitment as an internal candidate. Continuance of such a teacher as an Officiating Principal would not cause such a serious loss of opportunity to the transferee Principal that if his transfer is not sustained any miscarriage of justice would take place.

19. The Government Order dated 13.08.2021 is to be read in supersession to the Government Order dated 27.01.2020. The earlier Government Order dated 27.01.2020 vide clause 12 very much provided that “a transfer application can be filed in respect of a vacancy which may have been requisitioned but not advertised.

12- अध्यापक द्वारा जिस विषय के पद के प्रति स्थानान्तरण हेतु आवेदन किया गया है वह पद उत्तर प्रदेश माध्यमिक शिक्षा सेवा चयन बोर्ड अथवा उत्तर प्रदेश शिक्षा सेवा चयन आयोग द्वारा विज्ञापित नहीं होना चाहिए किन्तु अध्याचित हो सकता है। ” Whereas, the Government Order dated 13.08.2021 provided that no transfer is to be made against the post already requisitioned and if it is found that the transfer has taken place in respect of a vacancy already requisitioned, such transfer would be taken to be automatically cancelled. Clause 4 of the Government Order dated 13.08.2021 runs as under:

“4- अध्याचित पदों के सापेक्ष स्थानान्तरण नहीं किया जाना है, अतः स्थानान्तरण आदेश निर्गत होने के उपरान्त अध्याचित पद के सापेक्ष स्थानान्तरण होने का संज्ञान होने पर स्थानान्तरण आदेश स्वतः निरस्त समझा जायेगा।”

20. One must always bear in mind that appointment with it entails a number

of rights and duties. Rights are to receive pay perquisites, periodical promotional pay scales and other allowance and duties are to carry out work entrusted diligently and honestly. Transfer is incidence of service where posts are subject to routine transfers but where cadre is Institution wise or establishment wise, it all depends upon available vacancies and agreement of establishment where transfer is sought. Such rights are recognized but are not absolute and comparing the rights of petitioner Moulabi Ram with that of Ram Yash, equity finds favour with Moulabi Ram. Petitioner Ramyash is a settled Principal of an Institution and may get an opportunity of transfer to another Institution of choice in future but if vacancy of institution in question is not subjected to recruitment, petitioner Moulabi Ram will suffer more loss. So basically, while I hold that requisition was sent in respect of the vacancy in question on 16.04.2021 was valid and so also much prior to the transfer list and order issued on 30.06.2023, I hold the impugned transfer order to be unsustainable and even equity favours more claim of Moulabi Ram than that of Ramyash.

21. In view of the above, writ petition of Moulabi Ram being **Writ – A No. 11279 of 2023** succeeds and is **allowed**. The order of transfer dated 30.06.2023 issued in favour of respondent Ramyash is hereby quashed. In the circumstances writ petition of Ramyash being Writ – A No. 17926 of 2023 is hereby **dismissed**. **Writ petition No. 7516 of 2023** filed by Mahatim Singh is **de-tagged** and is directed to be listed separately before appropriate bench.

(2024) 4 ILRA 339
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.03.2024

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ A No. 11555 of 2021

Anil Kumar Singh ...Petitioner
Versus
State of U.P. Ors. ...Respondents

Counsel for the Petitioner:
Sri Vimal Chandra Mishra

Counsel for the Respondents:
C.S.C.

A. Service Law – Suspension – Back Wages – Petitioner, a Routine Grade Clerk, suspended on 05.10.2009 due to detention in a criminal case (Case Crime No. 177 of 2009, under Sections 396, 412, 201, 120-B IPC) – Acquitted on 30.01.2016, reinSt.d on 04.10.2016 – Claim for salary during suspension period rejected vide order dated 01.05.2018 – Held, no departmental inquiry initiated; suspension solely due to detention, a circumstance beyond petitioner's control – Principle of 'no work no pay' inapplicable as petitioner was in jail, not on bail – Acquittal not challenged in appeal – Entitled to full salary for suspension period (19.08.2009 to 06.02.2016) as per *Raj Narain Vs U.O.I.*, distinguished from cases involving departmental proceedings – Impugned orders quashed, respondents directed to pay arrears. (Para 7-18)

Writ petition allowed.

List of Cases cited:

1. *Brahma Chandra Gupta Vs U.O.I.*; AIR 1984 SC 380
2. *Raj Narain Vs U.O.I.*; (2019) 5 SCC 809

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

1. Heard Sri Vimal Chandra Mishra, learned counsel for the petitioner and learned Additional Chief Standing Counsel for the State respondents.

2. Petitioner before this Court, who is working as a Routine Grade Clerk in the institution, namely Government Girls Inter College, Fatehpur, is aggrieved by the order dated 1st May, 2018, whereby petitioner's claim for regular payment of salary for the period he remained under suspension on account of involvement in a criminal case, has come to be rejected.

3. Briefly stated facts of the case are that petitioner while working as Routine Grade Clerk in the institution came to be implicated in connection with criminal offence registered as Case Crime No.- 177 of 2009 under Sections 396, 412, 201 & 120-B I.P.C., District - Fatehpur and remained in jail from 9th August, 2009 to 1st August, 2010 and then continued in detention from 1st August, 2010 on-wards until he was finally released pursuant to the judgment of the acquittal passed by the Sessions Court dated 30th January, 2016 in Sessions Trial No.- 606 of 2010, on 6th February, 2016. As a consequence to the implication of the petitioner in a criminal case and detention in jail, he had also been placed under suspension by the disciplinary authority vide order dated 5th October, 2009, however, no disciplinary proceeding was initiated ever against the petitioner and after his acquittal in the criminal case and consequentially being released from jail, he came and joined the institution pursuant to the order of reinstatement dated 4th October, 2016 revoking his suspension.

4. It is further submitted by learned counsel for the petitioner that since the respondents did not proceed to hold

disciplinary inquiry by holding departmental proceedings against the petitioner and petitioner was simply placed under suspension on account of his detention in jail, upon his reinstatement with the revocation of suspension order, petitioner became entitled to salary for the period he remained under suspension. It is submitted that petitioner since has been finally acquitted in the criminal case then on the principle that petitioner has been restrained under a circumstances beyond his control and also there being order of suspension, from discharging his duties as a clerk in the institution, the respondents could not have denied payment of salary to the petitioner for the period in question. He further submits that order of reinstatement dated 4th October, 2016 clearly recorded that this order was being passed subject to any contrary order being passed in appeal against the acquittal and since no appeal to the best knowledge of the petitioner has been preferred against the acquittal inasmuch as the counter affidavit is also silent about the same, respondents are not justified in rejecting the claim of the petitioner for payment of salary for the period in question on the principle of 'no work no pay'. He submits that petitioner could not have worked on account of being under detention in jail which was beyond his control and so it was his legitimate expectation that as and when he would be released after grant of bail or acquittal, he would not only resume his duty as clerk but he would be compensated for the period he had remained under suspension for implication in the criminal case.

5. Learned counsel for the petitioner has also placed reliance upon a judgment of Supreme Court in the case of **Brahma Chandra Gupta v. Union of India**, AIR 1984 SC 380.

6. *Per contra*, learned Additional Chief Standing Counsel, defending the order impugned herein this petition, has sought to contend□ that the department cannot be blamed for petitioner not being permitted to discharge his duty as admittedly petitioner was under detention and as per the relevant service rules he was required to be placed under suspension. It is also sought to be urged that even though petitioner has been acquitted but every acquittal is not a honourable acquittal so as to make him entitled for the payment of salary for the period he had remained under a lawful detention. However, upon a pointed query being made as to whether the State respondents ever initiated any departmental inquiry against the petitioner, learned Additional Chief Standing Counsel could not give any satisfactory reply. He also could not deny that records do not reveal factum of any departmental inquiry except order of suspension.

7. Having heard learned counsel for the respective parties and their arguments raised across the bar and having perused the record, I find that petitioner was placed under suspension only on account of being under detention in jail for implication in a criminal case in the year 2009 in which ultimately he came to be acquitted in the year 2016. The order of suspension though was passed by the disciplinary authority but the suspension was not in contemplation of any inquiry as the order does not disclose that competent authority intended to hold disciplinary inquiry. So it should be taken as a suspension simpliciter for detention of the petitioner in jail. The department also did not proceed further in the matter and upon acquittal of the petitioner in a criminal case, he came to be reinstated under the order of reinstatement revoking his suspension. The order of reinstatement

only records that reinstatement would abide by the result of the criminal appeal, if any filed. The respondents have not come out with any case that criminal appeal has been preferred against the order of acquittal.

8. The principle that has been argued before me by learned Additional Chief Standing Counsel that petitioner was not honourably acquitted would have carried weight provided the department had proceeded against the petitioner holding disciplinary proceeding.

9. While the petitioner preferred an appeal against the order impugned, I find that appellate authority to have relied upon certain reports of authorities of education department especially Finance and Accounts Officer that petitioner since was reinstated subject to the appeal being preferred against the acquittal which was a conditional reinstatement, so no question of payment of arrears of salary would have arisen but I find that upon a fact being brought to its notice that no such criminal appeal was preferred, even the appellate authority has rejected the claim of the petitioner for salary on the same ground which was taken earlier by the Joint Director of Education.

10. In the absence of any departmental proceeding being drawn, the only conclusion that can be drawn is that petitioner was restrained from discharging duties on account of his detention in jail in connection with a criminal case a circumstance to be taken as beyond his control and his innocence ultimately being proved by way of acquittal in the said criminal case, he should not be penalized.

11. The principle of 'no work no pay' could have been attracted if petitioner had

enjoyed bail in criminal case and had been merely kept under suspension but this is not the case either. Petitioner remained in detention until he was acquitted. There was no question of petitioner giving any certificate that he was not gainfully employed anywhere during the period he was under suspension. One must draw difference between an under-trial on bail and convicted person in jail.

12. In the judgment cited by learned counsel for the petitioner I find that the some observations regarding payment of salary for the period during the employee was under detention, but there was a decree of trial court which is not a case here. In principle petitioner might have been simply acquitted but petitioner was not responsible in any manner for not discharging his duties in the department.

13. There is nothing in the counter affidavit to demonstrate that even otherwise the conduct of the petitioner has not been good and fair while discharging his official duties. The averments raised in the counter affidavit are quite sketchy as they only refer to the criminal case and detention of petitioner in jail.

14. On the backwages to the petitioner for the period he remained suspended due to detention in jail and upon his reinstatement by revoking his suspension for acquittal in the criminal case, I find support of my view in an authority of Supreme Court in the case of **Raj Narain v. Union of India and others (2019) 5 SCC 809** in which an identical issue was dealt with. In the said case even though departmental inquiry was set up but was later on dropped and upon acquittal the employee was reinstated revoking his suspension order. Vide paragraphs 7 and 8 the Court held thus:-

"7. The point that remains to be considered is whether the appellant is entitled to payment of full wages between 1979 and 1987. The appellant was placed under suspension on 23-10-1979 and his suspension was revoked on 21-10-1987. An interesting development took place during the interregnum by which the disciplinary proceedings were dropped on 21-3-1983. It is clear from the record that the appellant was the one who was seeking postponement of the departmental enquiry in view of the pendency of criminal case. The order of suspension was in contemplation of disciplinary proceedings. By virtue of the disciplinary proceedings being dropped, the appellant becomes entitled to claim full salary for the period from the date of his suspension till the date of closure of the departmental enquiry. Thereafter, the respondents took four years to reinstate him by revoking his suspension. The order of suspension dated 23-10-1979 came to an end on 21-3-1983 which is the date on which disciplinary proceedings were dropped. The appellant ought to have been reinstated immediately thereafter unless a fresh order was passed, placing him under suspension during the pendency of the criminal trial which did not happen. Ultimately, the appellant was reinstated by an order dated 21-10-1987 by revocation of the order of suspension. Though, technically, the learned Additional Solicitor General is right in submitting that the impugned judgment does not even refer to the IA, we are not inclined to remit the matter to the High Court at this stage for fresh consideration of this point. We hold that the appellant is entitled for full wages from 23-10-1979 to 21-10-1987 after

adjustment of the amounts already paid towards subsistence allowance.

8. For the reasons mentioned above, we approve the judgment of the High Court by holding that the appellant shall be entitled for back wages only from the date of acquittal on 31-8-2001, till the date of his reinstatement on 20-1-2003. Further, the appellant shall be entitled to full salary from 23-10-1979 to 21-10-1987."

15. I find petitioner's case to be on a much better footing as he was only suspended for detention in jail without there being any inquiry in contemplation and his suspension was revoked immediately upon his acquittal in the criminal case and no appeal was preferred against the judgment of acquittal.

16. In view of the above, therefore, the Court is of the considered view that respondents are not justified in denying salary to the petitioner applying the principle of 'no work no pay'.

17. Accordingly, writ petition succeeds and is allowed. The order passed by the Joint Director of Education, Prayagraj Region, Prayagraj dated 1st May, 2018 and also the order passed by the Additional Director of Education (Basic) dated 28th January, 2020 are hereby quashed.

18. Respondents are directed to make payment of arrears of salary to the petitioner for the period petitioner has remained under suspension i.e. from 19th August, 2009 to 6th February, 2016 within a period of 30 days from the date of production of certified copy of this order.

(2024) 4 ILRA 343
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.03.2024

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ A No. 11734 of 2023

Ms. Priti Upadhyay ...Petitioner
Versus
Banaras Hindu University & Ors. ...Respondents

Counsel for the Petitioner:

Sri Ishwar Kumar Upadhyay, Sri Sanjeev Singh

Counsel for the Respondents:

Sri Dhananjay Awasthi, Sri Hem Pratap Singh, Ms. Pooja Agarwal, Sri Sudhanshu Srivastava

Service Law - UGC Regulations, 2018 - Banaras Hindu University - Assistant Professor Recruitment - Qualification for Genetics and Plant Breeding - Challenge to rolling advertisement no. 01 of 2023-24 (28.06.2023) prescribing 4-year B.Sc. (Agriculture)/B.Sc. (Hons.) (Agriculture)/B.Sc. (Horticulture) as essential qualification for Assistant Professor in the Department of Genetics and Plant Breeding dismissed. UGC Regulations, 2018, under Regulations 1, 1.1, 3.1, 3.2, 3.4, 3.5, 4, 4.1, mandate a Master's degree with 55% marks and NET/SLET/SET or Ph.D. as minimum qualifications for Assistant Professor, applicable to disciplines including Agriculture. Employer (University) has discretion to prescribe specific Bachelor's degree (e.g., 4-year B.Sc. Agriculture) to suit departmental needs, provided it does not dilute the minimum qualification of a Master's degree. Prescription of specific Bachelor's degree is not a modification of UGC's minimum standards but an enhancement within employer's prerogative to ensure quality. Ministry of Agriculture's endorsement (02.08.2010) of UGC Regulations for Agriculture faculties does not preclude

additional qualifications by the University. Petitioner, holding B.Sc. (Biology), failed to plead equivalence to 4-year B.Sc. (Agriculture). No illegality in University's requirement, upheld as within its discretion. (Paras 5-19)

Writ Petition Dismissed.

List of Cases cited:

1. St. of T.N. Vs S.VS Bratheep (Minor), (2004) 4 SCC 513 (Para 15)
2. Maharashtra Public Services Commission Vs Sandeep Sriram Varade, (2019) 6 SCC 362 (Para 15)
3. P.U. Joshi Vs Accountant General, Ahmedabad, (2003) 2 SCC 632 (Para 15)
4. Dr. Thingujam Achouba Singh Vs Dr. H.N. Nabachandra Singh, (2020) 20 SCC 312 (Paras 11, 16)

(Delivered by Hon'ble Ajit Kumar J.)

1. Heard Sri Sanjeev Singh, learned counsel for the petitioner, Ms. Pooja Agarwal, learned counsel for the University and Sri Sudhanshu Srivastava, learned counsel for the Indian Council of Agricultural Research.
2. Petitioner before this Court questions the rolling advertisement no. 01 of 2023-24 dated 28.06.2023 issued by Banaras Hindu University (6th respondent) in so far as it provides for 4 years Honor's Bachelor's Degree as an essential qualification for the post of Assistant Professor in the Department of Genetics and Planned Breeding.
3. The argument is two fold: (i) for the purpose of appointment on the post of Assistant Professor in a recognized University at Master's level the minimum qualification prescribed for by the

University Grants Commission through its guidelines would prevail; and (ii) while the University Act have prescribed for additional qualification as a preferential qualification but could not have modified the minimum qualification prescribed as eligibility for the post in question.

4. In support of his first argument, learned Advocate has taken the Court through the UGC Regulations, 2018 that prescribed minimum qualification for the post of Assistant Professor, Associate Professor and Professor in the Universities and Colleges running Bachelor's and Master's Courses and Senior Professors in the Universities on the basis of merit and through an All India Advertisement. Regulation 1 of the UGC Regulations states that it shall apply to Universities and College Teachers and cadre of Librarian etc. while regulation 1.1 provides norms of standards for teaching positions in various disciplines that includes Agriculture in the University. Regulation 3 provides for recruitment and qualifications and regulation 3.4 and 4.1(i) provide for minimum marks that a candidate must have and also the minimum degree with minimum percentage of marks. Regulation, 1, 1.1, 3.1, 3.2, 3.4, 3.4(i), 3.5, 3.6, 4, 4.1, 4.1(I), A(i) and (ii) are reproduced hereunder:

Minimum qualifications for the post of Senior Professor, Professors and Teachers, and other Academic Staff in Universities and Colleges and revision of pay scales and other Service Conditions pertaining to such posts.

1.0 Coverage

These Regulations are issued for minimum qualifications for appointment and other service conditions of University and College teachers and revision of pay

scales Directors of Physical Education and Sport for maintenance of standards in higher education and revision of pay-scales.

1.1 For the purposes of direct recruitment to teaching posts in disciplines relating to university and collegiate education, interalia in the fields of health, medicine, special education, agriculture, veterinary and allied fields, technical education, teacher education, norms or standards laid down by authorities established by the relevant Act of Parliament under article 246 of the Constitution for the purpose of co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions, shall prevail.

i. Provided that where no such norms and standards have been laid down by any regulatory authority, UGC Regulations herein shall be applicable till such time as any norms or standards are prescribed by the appropriate regulatory authority.

ii. Provided further that for appointment to the post of Assistant Professor and equivalent positions pertaining to disciplines in which the National Eligibility Test (NET), conducted by the University Grants Commission or Council of Scientific and Industrial Research as the case may be, or State Level Eligibility Test (SLET) or the State Eligibility Test (SET) conducted by bodies accredited by the UGC for the said purpose, qualifying in NET/SLET/SET shall be an additional requirement.

1.2 Every university of institution deemed to be University, as the case may be, shall as soon as may be, but not later than within six months of the coming into force of these Regulations, take effective steps for the amendment of the statutes,

ordinance or other statutory provisions governing it, so as to bring the same in accordance with these regulations.

2.0 Pay Scales, Pay Fixation, and Age of Superannuation

Pay scales as notified by the Government of India from time to time will be adopted by the University Grants Commission.

2.1 Subject to the availability of vacant positions and fitness, teachers such as Assistant Professor, Associate Professor, Professor and Senior Professor only, may be re-employed on contract appointment beyond the age of superannuation, as applicable to the concerned University, college and Institution, up to the age of seventy years.

Provided further that all such re employment shall be strictly in accordance with the guidelines prescribed by the UGC, from time to time.

2.2 The date of implementation of the revision of pay shall be 1st January, 2016.

3.0 Recruitment and Qualifications

3.1 The direct recruitment to the posts of Assistant Professor, Associate Professor and Professor in the Universities and Colleges, and Senior Professor in the Universities, shall be on the basis of merit through an all-India advertisement, followed by selection by a duly-constituted Selection Committee as per the provisions made under these Regulations. These provisions shall be incorporated in the Statutes/Ordinances of the university concerned. The composition of such a committee shall be as specified in these Regulations.

3.2 The minimum qualifications required for the post of Assistant Professor, Associate Professor, Professor, Senior Professor. Principal, Assistant Librarian,

Deputy Librarian, Librarian, Assistant Director of Physical Education and Sports, Deputy Director of Physical Education and Sports and Director of Physical Education and Sports. shall be as specified by the UGC in these Regulations.

3.3

I. The National Eligibility Test (NET) or an accredited test (State Level Eligibility Test SLET/SET) shall remain the minimum eligibility for appointment of Assistant Professor and equivalent positions wherever provided in these Regulations. Further, SLET/SET shall be valid as the minimum eligibility for direct recruitment to Universities/Colleges/Institutions in the respective state only:

Provided that candidates who have been awarded a Ph.D. Degree in accordance with the University Grants Commission (Minimum Standards and Procedure for Award of M.Phil./Ph.D. Degree) Regulation, 2009, or the University Grants Commission (Minimum Standards and Procedure for Award of M.Phil/Ph.D. Degree) Regulation 2016, and their subsequent amendments from time to time, as the case may be, shall be exempted from the requirement of the minimum eligibility condition of NET/SLET/SET for recruitment and appointment of Assistant Professor or any equivalent position in any University, College or Institution.

Provided further that the award of degree to candidates registered for the M.Phil/Ph.D. programme prior to July 11, 2009, shall be governed by the provisions of the then existing Ordinances/Bye-laws/ Regulations of the Institutions awarding the degree. All such Ph.D. candidates shall be exempted from the requirement of NET/SLET/SET for recruitment and appointment of Assistant Professor or

equivalent positions in Universities/ Colleges/ Institutions subject to the fulfillment of the following conditions:

a) The Ph.D. degree of the candidate has been awarded in regular mode only;

b) The Ph.D. thesis has been awarded by at least two external examiners;

c) An open Ph.D. viva voce of the candidate has been conducted;

d) The candidate has published two research papers from his/her Ph.D. work out of which at least one is in a refereed journal;

e) The candidate has presented at least two papers, based on his/her Ph.D. work in conferences/seminars sponsored/funded/supported by the UGC/ICSSR/CSIR-or any similar agency.

The fulfilment of these conditions is to be certified by the Registrar or the Dean (Academic Affairs) of the University concerned.

II. The clearing of NET/SLET/SET shall not be required for candidates in such disciplines for which NET/SLET/SET has not been conducted.

3.4 A minimum of 55% marks (or an equivalent grade in a point-scale, wherever the grading system is followed) or the Master's level shall be the essential qualification for direct recruitment of teachers and other equivalent cadres at any level

I. A relaxation of 5% shall be allowed at the Bachelor's as well as at the Master's level for the candidates belonging to Scheduled Caste/Scheduled Tribe/Other Backward Classes (OBC) (Non-creamy Layer)/Differently abled ((a) Blindness and low vision; (b) Deaf and Hard of Hearing, (c) Locomotor disability including cerebral palsy, leprosy cured, dwarfism, acid-attack victims and muscular dystrophy; (d)

Autism, intellectual disability, specific learning disability and mental illness; (e) Multiple disabilities from amongst persons under (a) to (d) including deaf-blindness) for the purpose of eligibility and assessing good academic record for direct recruitment. The eligibility marks of 55% marks (or an equivalent grade in a point scale wherever the grading system is followed) and the relaxation of 5% to the categories mentioned above are permissible, based only on the qualifying marks without including any grace mark procedure.

3.5 A relaxation of 5% shall be provided, (from 55% to 50% of the marks) to the Ph.D. Degree holders who have obtained their Master's Degree prior to 19 September, 1991.

3.6 A relevant grade which is regarded as equivalent of 55%, wherever the grading system is followed by a recognized university, at the Master's level shall also be considered valid.

3.7 The Ph.D. Degree shall be a mandatory qualification for appointment and promotion to the post of Professor.

3.8 The Ph.D. Degree shall be a mandatory qualification for appointment and promotion to the post of Associate Professor.

3.9 The Ph.D. Degree shall be a mandatory qualification for promotion to the post of Assistant Professor (Selection Grade/Academic Level 12) in Universities.

3.10 The Ph.D. Degree shall be a mandatory qualification for direct recruitment to the post of Assistant Professor in Universities with effect from 01.07.2021.

3.11 The time taken by candidates to acquire M.Phil. and/or Ph.D. Degree shall not be considered as teaching/ research experience to be claimed for appointment to the teaching positions.

Further the period of active service spent on pursuing Research Degree simultaneously with teaching assignment without taking any kind of leave, shall be counted as teaching experience for the purpose of direct recruitment/ promotion. Regular faculty members upto twenty per cent of the total faculty strength (excluding faculty on medical/maternity leave) shall be allowed by their respective institutions to take study leave for pursuing Ph.D. degree.

3.12 Qualifications:

No person shall be appointed to the post of University and College teacher, Librarian or Director of Physical Education and Sports, in any university or in any of institutions including constituent or affiliated colleges recognised under clause (f) of Section 2 of the University Grants commission Act, 1956 or in an institution deemed to be a University under Section 3 of the said Act if such person does not fulfil the requirements as to the qualifications for the appropriate post as provided in the Schedule 1 of these Regulations.

4.0 Direct Recruitment

4.1 For the Disciplines of Arts, Commerce, Humanities, Education, Law, Social Sciences, Sciences, Languages, Library Science, Physical Education, and Journalism & Mass Communication.

I. Assistant Professor:

Eligibility (A or B):

A.

i) A Master's degree with 55% marks (or an equivalent grade in a point scale wherever the grading system is followed) in a concerned/relevant/allied subject from an Indian University, or an equivalent degree from an accredited foreign university.

ii) Besides fulfilling the above qualifications, the candidate must have

cleared the National Eligibility Test (NET) conducted by the UGC or the CSIR, or a similar test accredited by the UGC, like SLET/SET or who are or have been awarded a Ph. D. Degree in accordance with the University Grants Commission (Minimum Standards and Procedure for Award of M.Phil Ph.D. Degree) Regulations 2009 or 2016 and their amendments from time to time as the case may be exempted from NET/SLET/SET:

Provided, the candidates registered for the Ph.D. programme prior to July 11, 2009, shall be governed by the provisions of the then existing Ordinances/Bye-laws/ Regulations of the Institution awarding the degree and such Ph.D. candidates shall be exempted from the requirement of NET/SLET/SET for recruitment and appointment of Assistant Professor or equivalent positions in Universities/ Colleges/ Institutions subject to the fulfillment of the following conditions:

a) The Ph.D. degree of the candidate has been awarded in a regular mode;

b) The Ph.D. thesis has been evaluated by at least two external examiners;

c) An open Ph.D. viva voce of the candidate has been conducted:

d) The Candidate has published two research papers from his/her Ph.D. work, out of which at least one is in a refereed journal;

e) The candidate has presented at least two papers based on his/her Ph.D work in conferences/seminars sponsored/funded/supported by the UGC/ICSSR/ CSIR or any similar agency.

The fulfilment of these conditions it to be certified by the Registrar or the Dean (Academic Affairs) of the University concerned.

NET/SLET/SET shall also not be required for such Master's Programmes in disciplines for which NET/SLET/SET is not conducted by the UGC, CSIR or similar test accredited by the UGC, like SLET/SET.

5. *A conjoint reading of the provisions as quoted above, minimum qualification that a candidate must possess to be appointed as Assistant Professor for all Universities and Colleges in various disciplines including Agriculture. All Universities have to follow the minimum qualification prescribed for.*

6. The recruitment has to be made by advertisement the vacancy on All India basis and then selection has to be held by a duly selected Committee constituted as per provisions made under the regulation. A candidate must possess minimum 55% marks both on Bachelor's Level and Master's Level subject to relaxation of 5%, if one holds a Ph.D. degree, but must have obtained Master's degree prior to 19.09.1991. Broad disciplines are Arts, Commerce, Humanities, Education, Law, Social Sciences, Sciences, Languages, Library Science, Physical Education and Journalism & Mass Communication. Agriculture would equally be a discipline governed under the Regulations. For the post of Assistant Professor, one must have a Master's degree with 55% marks subject to relaxation applicable under regulation 3.5. A candidate must have cleared National Eligibility Test conducted by UGC or CSIR.

7. Now from the above, two things are cleared that one must have both Master's degree and Bachelor's degree with 55% marks subject to relaxation as

provided to a Ph.D. holder who has done Master's degree prior to 19.09.1991.

8. The argument, therefore, is that since Master's degree in the subject in a concerned relevant or allied is required under the regulation, whether one has an Bachelor's degree with four years simple degree or four years Honor's degree or even three years degree would not make any difference and hence the respondent University was not justified in incorporating the provisions as an essential qualification of four years B.Sc. (Agriculture) or four years B.Sc. (Hons.).

9. This according to learned Advocate Mr. Sanjeev Singh, appearing for the petitioner is an additional qualification in modification to the UGC Regulations and therefore, are bad. He submits that as per the Universities own stand vide instruction no. 3 of the advertisement, the minimum qualification for appointment of teachers and other academic staff in the Universities and Colleges would be same as prescribed for under UGC Regulations, 2018. He submits that any additional quality parameters in order to promote merit and quality over and above UGC qualifications would only be applicable if the candidates are larger than the number of candidates to be called for interview as per clause 4 of the instructions. He therefore, submits that rule of preferential qualification is only with a purpose to short list the candidate to avoid a large number of candidate appearing in which may otherwise affect the quality in selection, but preferential qualification is a preferential qualification and cannot be a minimum eligibility qualification. He also submits that even the Ministry of Agriculture, Department of Agriculture Research and Education, Government of India, New Delhi vide its

letter dated 02.08.2010 had clarified that UGC Regulations notified on 30.06.2010 providing for minimum qualification for appointment of teachers and other academic staffs in Universities and Colleges in the Higher Education and the norms issued by ICAR shall apply for teachers in Faculties of Agriculture and Veterinary Science. He submits that since the UGC Regulations themselves provide applicability of norms and regulations issued by ICAR for teachers in the Faculties of Agriculture and Veterinary Science, the ICAR regulations would have prevailed had they been issued independent of the UGC Regulations in the sense that they provided different minimum qualification but since the Ministry of Agriculture itself decided to endorse the UGC regulations, 2018 and directed it to be adopted by the State Agriculture Universities, this only would be applied.

10. Countering the aforesaid submissions, learned Advocate appearing for the University Ms. Pooja Agarwal has argued that since post is Agriculture specific dealing with Agriculture Science, the University is justified in providing four years B.Sc. Course/ four years B.Sc. (Hons.) also along with M.Sc. (Agriculture) as a minimum qualification to promote merit and quality in the department of Agriculture in the Department of Genetics and Plant Breeding relating to Agriculture Science. Ms. Pooja Agarwal submitted that even previously when the advertisement was published, the same qualification was prescribed and since there is a uniform pattern brought in the four years Bachelor's course now almost in All India basis, the employer correctly thought in its wisdom to provide it also as a minimum qualification. Ms. Pooja Agarwal has submitted that UGC prescribes for minimum qualification

and does not bar to the employer from providing additional qualification or a higher qualification. The four years Agriculture Undergraduate degree course or four years Honor's course is only an additional qualification to the minimum qualification prescribed for and it cannot be said to be modifying the minimum qualification. She argued that the minimum qualification is a concept for laying down a bottom line and therefore, this parameter cannot be relaxed. She submitted that the UGC Guidelines that ask for a Bachelor's degree with 55% marks is sufficient to demonstrate that one must possess Bachelor's degree. Now to provide a particular Bachelor's degree with a particular standard and course cannot be said to be modifying the minimum qualification nor can it be said to be transgressing in any manner the authority of the UGC. She argued that had it been a case that University required less than 55% marks in Bachelor's level, it could have been said that University modified the minimum qualification but at the same time the University could have asked for a higher percentage of marks.

11. Meeting the argument relating to the letter dated 02.08.2010 issued by the Ministry of Agriculture, Department of Agriculture Research and Education, Government of India, New Delhi it is sought to be urged that this did not dilute the argument advanced by her either. She argued that the minimum qualification under the UGC Regulations have been accepted by the University and merely the University prescribes for four years course as a course one must have passed through or four years Honor's does not amount to modifying the minimum qualification. Since UGC itself provides 55% marks in the Bachelor's degree that a candidate must

have, the University could have been provided equally whether to four years Agriculture Course or four years (Hons.) course. It was also argued by Ms. Pooja Agarwal that providing a qualification falls within the domain of the employer either by way of additional qualification or preferential qualification. The minimum standards and norms if are fixed by UGC, any enhancement thereof cannot be said to be in transgression of the authority vested in the employer. It was argued that the University was in a best position to assess its requirement and to prescribed qualification to suit that and therefore, this Court may not embark upon an inquiry as to the qualification prescribed by the University. She relied upon the authority of Supreme Court in the case of **Dr. Thingujam Achouba Singh and Others v. Dr.H.N.Nabachandra Singh and Others, (2020) 20 SCC 312.**

12. Sri Sudhanshu Srivastava, learned counsel appearing for Indian Council of Agricultural Research has adopted the arguments of Ms. Pooja Agarwal in defending the advertisement.

13. Having heard learned counsel for the respective parties and their arguments raised across the bar and having perused the records, I find that the UGC vide its regulation no. 3.4 provides that one must have a Bachelor's degree with 55% marks and there can be relaxation upto 5%, meaning thereby, one must have both Bachelor's degree and Master's degree. Now whether one has a Bachelor's degree in a particular subject relating to the discipline in which the appointment is sought to be made or in some other discipline shall fall within the domain of the employer to determine. An employer can ask for four years Honor's degree in a

particular subject or four years ordinary bachelor degree in particular subject or a three years' Bachelor degree in particular subject or related subject. If the University in the discipline of Agriculture like in the present case Plant Breeding and Genetics, wants to prescribe for a particular Bachelor degree with a particular course and if it provided for B.Sc. With four years course/ B. Sc. four years Honor's course, it cannot be said that this being not the minimum qualification required, the University has modified the minimum qualification against the UGC Regulations. The minimum qualification is still the Master's degree in the discipline concerned which a candidate must possess to in order to provide a suitable candidate to the particular subject of Agriculture discipline and if the University wants that one should have Bachelor's degree also of Agriculture Science like B.Sc. (Agriculture) with four year's course or B.Sc. four year's Honor's course, it cannot be said that it had in any manner provided an additional qualification only with a purpose to short list the candidates.

14. The University running courses in agriculture can of course, besides M.Sc. (Agriculture) can ask for B.Sc. (Agriculture) at the same time as Bachelor's degree is also required. Petitioner, who is B.Sc. (Biology) can not complain against requirement of B.Sc. (Agriculture) 4 years' course. It is sole discretion of employer to ask for a qualification in a particular discipline but of course cannot ask for lesser qualification as minimum qualification contrary to the U.G.C. regulations.

15. In State of **Tamilnadu & Another v. S.V. Bratheep (minor) & Others, (2004) 4 SCC 513** while dealing in

the matter of prescribed qualification by AICTE and the scope of University prescribing qualification for admission in Engineering Colleges the Court held that the State once prescribes a qualification for having secured certain percentage of marks in the related subjects which were higher than the minimum qualifying marks examination in order to be eligible for admission, the Court held that if the higher minimum marks is prescribed by the State Government in common entrance than what was the prescribed by AICTE for admission in Engineering Colleges, it could not be faulted with as it would be permissible for the State Government to prescribe higher qualification. The Court has held in that case that if the AICTE provided for certain marks to be obtained in the qualifying examination, then if the State Government prescribes certain higher marks in the Common Entrance Test which would be higher than the minimum in the qualifying examination to participate in the Common Entrance Test it would though be in addition to the Common Entrance Test and would not be contrary to what was prescribed by the AICTE but would be complementary and supplementary. The Court in this case had relied upon the judgment of Supreme Court in the case of **Maharashtra Public Services Commission v. Sandeep Sriram Varade and others (2019) 6 SCC 362** and in the case of **P.U. Joshi and others v. Accountant General, Ahmedabad & Others (2003) 2 SCC 632** wherein it was held that the High Court under Article 226 of the Constitution cannot exercise a judicial review to inquire into the validity of the qualifications prescribed for and to modify the requisite qualification. Four years B.Sc. Agriculture Course or four

years B.Sc. Agriculture (Hons.) will rest upon the discretion of the employer as employer would be in better position to go ahead with the particular degree course to suit the requirement to ensure quality in teaching and other academic activities in the department concerned.

16. In the case of **Dr. Thingujam Achouba Singh (supra)** the court vide paragraph no. 16 has observed thus:

“16. So far as relaxation of upper age limit, as sought by the petitioners in one of the writ petitions is concerned, High Court has directed the competent authority and Executive Council of the Society to consider for providing such relaxation clause. We fail to understand as to how such direction can be given by the High Court for providing a relaxation which is not notified in the advertisement. While it is open for the employer to notify such criteria for relaxation when sufficient candidates are not available, at the same time nobody can claim such relaxation as a matter of right. The eligibility criteria will be within the domain of the employer and no candidate can seek as a matter of right, to provide relaxation clause.”

17. In the circumstances, therefore, the decision taken by the Policy and Planning Committee (Institute of Agriculture Sciences) in its meeting held on 29.03.2023 providing for four years B.Sc. (Agriculture)/ B.Sc. (Hons.) (Agriculture)/ B.Sc. (Horticulture) in respect of the departments with various sub disciplines of discipline of agriculture including the department of Genetics and Plant Reading cannot be said to be erroneous one and in excess of the authority nor it can be said to be in any manner modifying the minimum qualification so as

to further pull it down by way of minimum qualification which the UGC had prescribed for.

18. No pleading has been raised in the entire writ petition that the petitioner has the same standard of learning in B.Sc. (Biology) as provided and prescribed under the four years B.Sc. (Agriculture)/ four years B.Sc.(Hons.). All that is pleaded is that since minimum qualification prescribed by UGC is only M.Sc. in the concerned subject/ allied subject from an Indian University whether one is B.Sc. (Agriculture) or otherwise in any other discipline would be entitled.

19. Writ petition fails and is accordingly **dismissed**.

(2024) 4 ILRA 352

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 23.04.2024

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.

THE HON'BLE DONADI RAMESH, J.

Writ A No. 12307 of 2019

Shashi Kant Tiwari **...Petitioner**

Versus

High Court of Judicature at Allahabad &

Ors.

...Respondents

Counsel for the Petitioner:

Sri Sushil Kumar Shukla, Sri Shashi Kant Shukla

Counsel for the Respondents:

Sri Ashish Mishra

Service Law - U.P. Higher Judicial Service Rules, 1975 - Rule 5(c) - Direct Recruitment to Higher Judicial Service (HJS) - Eligibility - Continuous Practice as Advocate - Shashi Kant

Tiwari Vs High Court of Judicature at Allahabad, Writ A No. 12307 of 2019 - Petitioner challenged rejection order (08.05.2019) of his candidature for U.P. HJS Examination 2016, claiming inclusion in the final select list. Petitioner, registered as an advocate since 16.11.1998, was in full-time employment as Law Officer with Alliance Builders and Contractors Ltd. from 15.01.2009 to 01.02.2010, which interrupted his continuous practice. Per Article 233(2) of the Constitution and Rule 5(c), a candidate must have 7 years of continuous practice as an advocate immediately preceding the application cut-off date (18.06.2016). Supreme Court's rulings in *Deepak Aggarwal Vs Keshav Kaushik*, (2013) 5 SCC 277, and *Dheeraj Mor Vs High Court of Delhi*, (2020) 7 SCC 401, mandate continuous practice as an advocate, excluding periods of full-time employment except for public prosecutors or government pleaders acting predominantly as advocates. Petitioner's employment terms prohibited engaging with other clients, and his practice from 01.02.2010 to 18.06.2016 amounted to only 6 years, 4 months, and 17 days, falling short of the required 7 years. Claim of filing vakalatnamas for other clients during employment not considered, as it was potentially in violation of Bar Council of India Rules 43 and 49 and employment terms. A belated letter (19.01.2009) permitting practice with other clients, raised for the first time, was not relied upon. Petitioner's higher marks (471) compared to the last selected candidate (455) irrelevant due to ineligibility. Resolution of Selection and Appointment Committee (17.05.2017) upheld, finding no infirmity. (Paras 5-24)

Writ Petition Dismissed.

List of Cases cited:

1. Deepak Aggarwal Vs Keshav Kaushik, (2013) 5 SCC 277 (Paras 5, 9, 12, 14, 15, 18)
2. Dheeraj Mor Vs High Court of Delhi, (2020) 7 SCC 401 (Paras 9, 13, 18)
3. Rameshwar Dayal Vs St. of Punj., AIR 1961 SC 816 (Paras 16, 18)
4. Chandra Mohan Vs St. of U.P., AIR 1966 SC 1987 (Paras 13, 16)

5. Sushma Suri Vs Govt. of NCT of Delhi, (1999) 1 SCC 330 (Paras 12, 16)

6. Satish Kumar Sharma Vs Bar Council of Himachal Pradesh, (2001) 2 SCC 365 (Paras 15, 16)

7. Smt. Ruchi Chaudhary Vs High Court of Judicature at Allahabad, Writ A No. 46742 of 2015, decided on 01.09.2015 (Paras 14, 15)

8. Shiv Kumar Vs High Court of Judicature at Allahabad, Writ A No. 25580 of 2018, decided on 05.04.2019 (Para 15)

9. Kumar Mitakshar Vs St. of U.P., Writ A No. 33829 of 2015, decided on 20.04.2023 (Paras 9, 18)

10. Rajesh Chaubey Vs High Court of Judicature at Allahabad, 2019 (3) ADJ 60 (Para 17)

11. Smt. Rashmi Sharma Vs St. of U.P., Writ A No. 59375 of 2014, decided on 12.11.2014 (Para 17)

12. Deep Kumar Vs St. of U.P., Writ A No. 32440 of 2014, decided on 16.06.2014 (Para 15)

13. Haniraj L. Chulani (Dr.) Vs Bar Council of Maharashtra, (1996) 3 SCC 342 (Para 15)

14. Sudhakar Govindrao Deshpande Vs St. of Maharashtra, 1986 Lab IC 710 (Bom) (Para 13)

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

1. Heard Sri Shashi Kant Shukla along with Sri Sushil Kumar Shukla, learned counsel for the petitioner and Sri Ashish Mishra, learned counsel appearing for the respondents-High Court.

2. Present petition has been filed with the following prayers:-

“I. Issue a writ order of direction in the nature of certiorari to quash the

impugned order dated 08.05.2019 vide Memo No. 232/S & A Cell/2-019 passed by respondent no. 2 Registrar (J) Selection and Appointment/Seniority High Court of Judicature at Allahabad.

II. Issue a writ order of direction in the nature of mandamus commanding and directing the respondents to declare the result of the petitioner as finally selected candidate in Uttar Pradesh Higher Judicial Service Examination 2016 bearing roll No. 6242.

III. Issue a writ order of direction in the nature of mandamus commanding the respondents to issue the appointment letter to the petitioner as finally selected candidate in Uttar Pradesh Higher Judicial Service Examination 2016 bearing roll No. 6242.”

3. As stated, the case of the petitioner is that the petitioner is a practising lawyer and was registered as an Advocate on 16.11.1998 in Bar Council of Uttar Pradesh. He was appointed as Law Officer on 15.1.2009 in a company with the name and style of Alliance Builders and Contractors Limited, Bareilly (hereinafter referred as the Company). It is alleged that he was representing on behalf of the Company in different courts of law, a copy of the appointment letter dated 15.1.2009 has been annexed as Annexure-3 to the writ petition. It is the case of the petitioner that he was simultaneously also appearing for private clients and had filed several Vakalatnamas on behalf of other litigants as well in various courts of law during the year 2009-10. He appeared in U.P. Higher Judicial Services Examination, 2009 and in the Form the fact regarding his legal services to the abovenoted Company has been mentioned. He was qualified the prelims as well as the written examination and was called for interview but he was not

permitted to participate in the interview on the ground that he is a salary paid employee. As he intended to appear in Higher Judicial Services Examination, therefore, he moved an application dated 1.1.2010 before the Managing Director of the Company tendering his resignation, copy whereof has been annexed as Annexure-14 to the writ petition. The resignation of the petitioner was accepted by the Company and relieving order was passed on 1.2.2010. Subsequently, the petitioner appeared in U.P. Higher Judicial Services Examination, 2012 and was again successful in prelims as well as in the written examination and was called for interview, however, as he has obtained only 21 marks out of 100 marks, therefore, his name did not figure in the select list. He again appeared in U.P. Higher Judicial Services Examination, 2014 but could not qualify the written examination. The petitioner again applied in April 2016 for U.P. Higher Judicial Services Examination, 2016 against 72 vacancies so advertised. He filled up the Form on 6.6.2016 (Annexure-19 to the writ petition), however, it is claimed that due to inadvertent mistake some facts were wrongly mentioned by the petitioner in the form and the said facts were clarified by filing affidavit dated 12.6.2016 (Annexure-20 to the writ petition). The petitioner again cleared prelims as well as written examination in the aforesaid examination and was called for interview on 22.4.2017, the final result whereof was declared on 18.8.2017, however, name of the petitioner did not figure in the final select list. It is asserted that when marks of the candidate were uploaded on 19.4.2019 the petitioner came to know that he has obtained total 471 marks while lastly selected candidate of the general category, namely, Anchal Lavania has obtained only 455 marks, then

the petitioner was surprised that he had obtained 16 marks more than last final selected candidate of the general category, why his name has not been placed in the final selected list, therefore, he moved a representation dated 3.5.2019, the same was rejected by the impugned order dated 8.5.2019 (Annexure-25 to the writ petition).

4. The rejection order is being challenged by learned counsel for the petitioner mainly on the ground that since 16.11.1998, the date on which he was registered as an Advocate with the Bar Council of Uttar Pradesh, the petitioner was a regular practitioner as an Advocate in various courts of law specifically in Civil Court, Bareilly. It is submitted that although the petitioner was engaged for the Company for one year, however, his nature of job was to represent the cases of the company as an Advocate before various courts of law, therefore, he had always been working as an Advocate and that the nature of work performed by the petitioner for the Company was purely advocacy. It is submitted that the petitioner appeared in U.P. Higher Judicial Services Examinations in 2009, 2012, 2014 and 2016 and always Bar Association concerned had issued experience certificate countersigned by the District Judge to the effect that he was a regular practitioner as an Advocate, therefore, the ground of rejection that he was engaged in full time employment as Law Officer of the Company and thus, did not fulfill the necessary eligibility criteria of having seven year continuous practice as on 18.6.2016 i.e. the last date of filling up the Form, is not sustainable in the eyes of law.

5. In support of his arguments, learned counsel for the petitioner has

heavily placed reliance on the judgment of Hon'ble Apex Court in the case of **Deepak Aggarwal vs. Keshav Kaushik and others (2013) 5 SCC 277**.

6. Learned counsel for the respondent High Court has vehemently opposed the petition. A detailed counter affidavit has been filed by the respondents-High Court disputing the correctness of the arguments of learned counsel for the petitioner specifically highlighting the contents of the appointment letter, resignation letter, the Form filled up by the petitioner and the Affidavit filed by the petitioner. It would be appropriate to extract relevant paragraphs of the Counter Affidavit, which are as under:-

“4. That as per the admitted case of the petitioner, the petitioner was under full time employment of Alliance Builder and Contractors Limited from 15.01.2009. The appointment letter which is annexed to the writ petition (as Annexure 3) contains the detailed terms and conditions of employment, one of the conditions of employment contained at Clause 10 of the said appointment letter reads as follows:

10. This appointment is on a full-time basis and you shall devote your full-time to the duties assigned by the company and will not engage yourself for any other person, firm or company in any capacity during your employment with us.

5. That said appointment letter and its terms and conditions were duly accepted by the petitioner vide his endorsement dated 15/01/2009. It is pertinent to mention here that the petitioner was fully aware of the scope of his employment and the fact that in continuance of his employment the petitioner cannot be considered to be an Advocate with continuing practice for the

purpose of his candidature in the U.P. Direct Higher Judicial Services exams which are conducted by the High Court, as such the petitioner himself in his resignation letter dated 01/01/2010 (Annexure 14) specifically stated as follows:-

“मैं शशिकान्त तिवारी आपकी प्रतिष्ठित कंपनी एलायंस बिल्डर्स एंड कॉन्ट्रैक्टर्स लि. में दिनांक 15 जनवरी 2009 से लॉ ऑफिसर पद पर पूर्णकालिक नियोजन में नियुक्त हूँ।

कंपनी द्वारा दिए गए नियुक्ति पत्र में वर्णित शर्त के अनुसार चूंकि मेरा नियोजन पूर्णकालिक था अतः इस कारण मैं साक्षात्कार देने से वंचित रह गया।

चूंकि मुझे भविष्य में पुनः उच्चतर न्यायिक सेवाओं में सम्मिलित होना है जिसके कारण मैं कंपनी में लॉ ऑफिसर पद के पूर्णकालिक नियोजन में कार्य कर पाने में असर्थ हूँ।

अतः श्रीमान जी से अनुरोध है कि उपरोक्त परस्थिति को देखते हुए मेरा त्यागपत्र स्वीकार कर मुझे मेरे लॉ ऑफिसर पद के पूर्णकालिक नियोजन से कार्य मुक्त करने की कृपा करें।”

As such it is submitted that even as per the understanding of the petitioner, the petitioner's employment was full time and due to his employment he was not eligible for candidature in the Direct HJS exams which were being conducted by the High Court. The petitioner's resignation was accepted on 01/02/2010 on which date he was released from service.

6. That it is further submitted that the present writ petition relates to the cancellation of candidature of the petitioner with respect to the advertisement of the year 2016; as per the admitted case of the petitioner, the petitioner has after filling of the online form, submitted an affidavit with respect to certain inadvertent error in filling

the form. The contents of the affidavit itself reveal that the petitioner's stand was that during his full time employment the petitioner was ineligible for appearing in the Direct Higher Judicial Services exam. It is further submitted that the petitioner has not provided any evidence or even stated in his affidavit that he was permitted to practice or was actually practising during the period in which he was under employment. For convenience the relevant part of the affidavit of the petitioner dated 12.06.2016 (Annexure 20) to the writ petition, is reproduced herein under:

“4. यह कि शपथकर्ता का वर्तमान समय में कोई नियोजन नहीं है।

5. यह कि पूर्व में शपथकर्ता ने एक प्राइवेट कंपनी- एलाइंस बिल्डर्स एंड कॉन्ट्रैक्टर्स लिमिटेड स्टेडियम रोड बरैली में लॉ ऑफिसर के रूप में दिनांक 15.01.2009 से 01.02.2010 तक कार्य किया था तथा भविष्य में HJS परीक्षाओं में सम्मिलित होने के कारण त्यागपत्र दे दिया था। शपथकर्ता का नियोजन प्राइवेट था तथा उसे रुपये 9000/- मासिक वेतन मिलता था।”

7. That it is further submitted that no averment or evidence was provided by the petitioner that the petitioner during his course of employment was employed to act and plead in the Court of law as an advocate; no averment was made or evidence was provided by the petitioner that he continued to practice law even after his appointment. On the other hand it was categorically stated in the affidavit that the petitioner was in full term private employment and for the purposes of him becoming eligible for appearing in Direct HJS examinations in the future, he has tendered his resignation on 01.02.2010.”

(emphasis supplied)

7. Paragraph 8 of the Counter Affidavit containing the resolution passed

by the Selection and Appointment Committee, while rejecting the candidature of the petitioner in its meeting dated 17.5.2017, is also quoted as under:-

“8. That the Hon'ble Selection and Appointment Committee while rejecting his candidature, in its meeting held on 17.05.2017 has resolved as under:

3. Shashi Kant Tiwari (Roll No. 6242):

The candidate vide affidavit dated 13/06/2016 had submitted that he was in employment as Law Officer in a private firm, Alliance Builders and Contractors Ltd. Stadium Road, Bareilly from 15/01/2009 to 01/02/2010. However, he had also submitted an application dated 13/06/2016 in which he had submitted that he had inadvertently filled NO in column number 15 of the application, form which seeks information regarding employment.

Further, the candidate had enclosed an appointment letter issued by the firm Alliance Builders and Contractors Ltd. Stadium Road, Bareilly dated 15/01/2009 offering him appointment as Law Officer at their corporate office disclosing therein that his remuneration will be ₹ 9000 per month.

At point number 10 of the said appointment letter, it is specified that:

“This appointment is on a full-time basis and you shall devote your full-time to the duties assigned by the company and will not engage yourself for any other person, firm or company in any capacity during your employment with us.”

The candidate had also submitted relieving order dated 01.02.2010 accepting his resignation from the service and thereby relieving him from duties with effect from 01.02.2010. Sri. Tiwari had disclosed the same facts again through his affidavit dated 03/04/2017. Nothing was found on record to show that he was otherwise practicing as

a lawyer in this period, though the candidate had submitted an experience certificate issued by the District Judge, Bareilly showing his practice as on 18/06/2016 as 17 years 7 months and 2 days [since 16.11.1998].

A perusal of the affidavit submitted by Sri. Shashi Kant Tiwari, Roll No. 6242 with regard to his employment revealed that he was in service during the period from 15/01/2009 to 01/02/2010, which caused discontinuity in his practice. As per the instructions issued for the candidates, only APO/APP were permitted to fill up the application form pursuant to the order passed by the Apex Court in *Deepak Agarwal Vs Keshav Kaushik & Others* (2013) 5 SCC 277 and in Special Leave Petition No. 17201-17212 of 2007 High Court of Judicature At Allahabad Vs Sanjay Agarwal and Anr.

The last date of submission of online application form was 18/06/2016, therefore the length of continuous practice of Shri Shashi Kant Tiwari on 18/06/2016 [from 01/02/2010] was found to be 6 years 4 months and 17 days and thus, he did not fulfill the necessary eligibility criteria of having 7 years continuous practice as on 18.06.2016.

Therefore in view of the above deliberation, the Committee resolved to treat him ineligible for direct recruitment of U.P.H.J.S.-2016 rejected the provisional candidature of Sri. Shashi Kant Tiwari, Roll No. 6242.

The aforesaid resolution of the Hon'ble Committee was approved by the Hon'ble Full Court and thereafter, the final result of U.P. Higher Judicial Service Recruitment, 2016 was declared on 18.06.2017."

(emphasis supplied)

8. It is next submitted that, therefore, **Deepak Aggarwal (supra)** is of no help to the petitioner.

9. Reliance has been placed by learned counsel for the respondents to a recent decision of Hon'ble Apex Court in the case of **Dheeraj Mor vs. High Court of Delhi (2020) 7 SCC 401**. Reliance has also been placed to a judgment of Division Bench of this Court dated 20.4.2023 passed in **Writ A No. 33829 of 2015 (Kumar Mitakshar vs. State of U.P. and others)**, wherein the decision of Hon'ble Apex Court passed in **Deepak Aggarwal (supra)** as well as **Dheeraj Mor (supra)** has extensively been considered and claim of the similarly placed candidate was rejected.

10. We have considered the rival submissions and have perused the record.

11. Before proceeding further it would be appropriate to take note of relevant provisions of Constitution of India, definition of 'Advocate' as defined in Advocates Act, 1961, relevant rules of Bar Council of India Rules and U.P. Higher Judicial Service Rules, 1975, which are quoted as under:-

"Constitution of India

"233(2)- A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an Advocate or a pleader and is recommended by the High Court for appointment."

The Advocates Act, 1961

"2. Definitions – (1) In this Act, unless the context otherwise requires-

(a) "advocate" means an advocate entered in any roll under the provisions of this Act;

49- General power of the Bar Council of India to make rules- (1) The Bar Council of India may make rules for discharging its functions under this Act, and, in particular, such rules may prescribe-

...

(c) the standards of professional conduct and etiquette to be observed by advocates;

.....”

The Bar Council of India Rules

“43. An advocate who has been convicted of an offence mentioned under section 24A of the Advocates Act or has been declared insolvent or has taken full time service or part time service or engages in business or any avocation inconsistent with his practising as an advocate or has incurred any disqualification mentioned in the Advocates Act or the rules made thereunder, shall send a declaration to that effect to the respective State Bar Council in which the advocate is enrolled, within ninety days from the date of such disqualification. If the advocate does not file the said declaration or fails to show sufficient cause for not filing such declaration provided therefor, the Committee constituted by the State Bar Council under rule 42 may pass orders suspending the right of the advocate to practise.

Provided that it shall be open to the Committee to condone the delay on an application being made in this behalf.

Provided further that an advocate who had after the date of his enrolment and before the coming into force of this rule, become subject to any of the disqualifications mentioned in this rule, shall within a period of ninety days of the coming into force of this rule send declaration referred to in this rule to the respective Bar Council in which the Advocate is enrolled and on failure to do so

by such advocate all the provisions of this rule would apply.

49. An advocate shall not be a full-time salaried employee of any person, government, firm, corporation or concern, so long as he continues to practise, and shall, on taking up any such employment, intimate the fact to the Bar Council on whose role his name appears and shall thereupon cease to practise as an advocate so long as he continues in such employment.

RESOLVED and further clarified that as Supreme Court has struck down the appearance by Law Officers in Court even on behalf of their employers the Judgment will operate in the case of all law officers. Even if they were allowed to appear on behalf of their employers all such Law Officers who are till now appearing on behalf of their employers shall not be allowed to appear as advocates. The State Bar Council should also ensure that those Law Officers who have been allowed to practise on behalf of their employers will cease to practise. It is made clear that those Law Officers who after joining services obtained enrolment by reason of the enabling provision cannot practise even on behalf their employers.

RESOLVED that the Bar Council of India is of the view that if the said officer is a whole time employee drawing regular salary, he will not be entitled to be enrolled as an advocate. If the terms of employment show that he is not in full time employment he can be enrolled.”

The Uttar Pradesh Higher Judicial Service Rules, 1975

“5. Sources of Recruitment-

The recruitment to the service shall be made-

(a) by promotion from amongst the Civil Judges (Senior Division) on the

basis of Principle of merit-cum-seniority and passing a suitability test.

(b) by strictly on the basis of merit through limited competitive examination of Civil Judges (Senior Division) having not less than five years qualifying service;

(c) By direct recruitment from amongst the Advocates who have been, for not less than seven years, practicing as an Advocate, as on the last date fixed for the submission of application forms.” (emphasis supplied)

12. It would be appropriate to take note of paragraphs 57, 58, 59, 99 and 102 of Deepak Aggarwal (supra) relied on by learned counsel for the petitioner, which are quoted as under:-

“57. In Sushma Suri, a three-Judge Bench of this Court considered the meaning of the expression "advocate" occurring in Article 233 (2) of the Constitution and unamended Rule 49 of the BCI Rules. In paragraph 6 of the Report (Pg. 335) this Court held as under :

"6. If a person on being enrolled as an advocate ceases to practise law and takes up an employment, such a person can by no stretch of imagination be termed as an advocate. However, if a person who is on the rolls of any Bar Council is engaged either by employment or otherwise of the Union or the State or any corporate body or person practises before a court as an advocate for and on behalf of such Government, corporation or authority or person, the question is whether such a person also answers the description of an advocate under the Act. That is the precise question arising for our consideration in this case."

58. Then in paragraph 8 of the Report, this Court observed that for the purposes of the 1961 Act and the BCI Rules, a law officer (Public Prosecutor or

Government Pleader) would continue to be an advocate. Not accepting the view of Delhi High Court in Oma Shanker Sharma v. Delhi Administration case (C.W.P. No. 1961 of 1987), this Court having regard to the object of recruitment under Article 233(2) held in paragraph 9:

"9. To restrict it to advocates who are not engaged in the manner stated by us earlier in this order is too narrow a view, for the object of recruitment is to get persons of necessary qualification, experience and knowledge of life. A Government Counsel may be a Public Prosecutor or Government Advocate or a Government Pleader. He too gets experience in handling various types of cases apart from dealing with the officers of the Government. Experience gained by such persons who fall in this description cannot be stated to be irrelevant nor detrimental to selection to the posts of the Higher Judicial Service. The expression "members of the Bar" in the relevant Rule would only mean that particular class of persons who are actually practising in courts of law as pleaders or advocates. In a very general sense an advocate is a person who acts or pleads for another in a court and if a Public Prosecutor or a Government Counsel is on the rolls of the Bar Council and is entitled to practise under the Act, he answers the description of an advocate."

59. With regard to unamended Rule 49 of the BCI Rules, this Court held as under :

"10. Under Rule 49 of the Bar Council of India Rules, an advocate shall not be a full-time employee of any person, Government, firm, corporation or concern and on taking up such employment, shall intimate such fact to the Bar Council concerned and shall cease to practise as long as he is in such employment. However, an exception is made in such

cases of law officers of the Government and corporate bodies despite his being a full-time salaried employee if such law officer is required to act or plead in court on behalf of others. It is only to those who fall into other categories of employment that the bar under Rule 49 would apply. An advocate employed by the Government or a body corporate as its law officer even on terms of payment of salary would not cease to be an advocate in terms of Rule 49 if the condition is that such advocate is required to act or plead in courts on behalf of the employer. The test, therefore, is not whether such person is engaged on terms of salary or by payment of remuneration, but whether he is engaged to act or plead on its behalf in a court of law as an advocate. In that event the terms of engagement will not matter at all. What is of essence is as to what such law officer engaged by the Government does — whether he acts or pleads in court on behalf of his employer or otherwise. If he is not acting or pleading on behalf of his employer, then he ceases to be an advocate. If the terms of engagement are such that he does not have to act or plead, but does other kinds of work, then he becomes a mere employee of the Government or the body corporate. Therefore, the Bar Council of India has understood the expression "advocate" as one who is actually practising before courts which expression would include even those who are law officers appointed as such by the Government or body corporate.

99. What we have said above gets fortified by Rule 43 of the BCI Rules. Rule 43 provides that an advocate, who has taken a full-time service or part-time service inconsistent with his practising as an advocate, shall send a declaration to that effect to the respective State Bar Council within time specified therein and any default in that regard may entail suspension

of the right to practice. In other words, if full-time service or part-time service taken by an advocate is consistent with his practising as an advocate, no such declaration is necessary. The factum of employment is not material but the key aspect is whether such employment is consistent with his practising as an advocate or, in other words, whether pursuant to such employment, he continues to act and/or plead in the courts. If the answer is yes, then despite employment he continues to be an advocate. On the other hand, if the answer is in negative, he ceases to be an advocate.

102. As regards construction of the expression, "if he has been for not less than seven years an advocate" in Article 233(2) of the Constitution, we think Mr. Prashant Bhushan was right in his submission that this expression means seven years as an advocate immediately preceding the application and not seven years any time in the past. This is clear by use of 'has been'. The present perfect continuous tense is used for a position which began at some time in the past and is still continuing. Therefore, one of the essential requirements articulated by the above expression in Article 233(2) is that such person must with requisite period be continuing as an advocate on the date of application."

13. It would also be relevant to take note of **Dheeraj Mor (supra)** as relied on by learned counsel for the respondent-High Court, relevant paragraphs whereof are quoted as under:-

"13. Article 233(2) starts with a negative stipulation that a person who is not already in the service of the Union or the State, shall be eligible only to be appointed as District Judge if he has been

an advocate or a pleader for not less than 7 years and is recommended by the High Court for appointment. The expression 'in the service of the Union or of the State' has been interpreted by this Court to mean the judicial service. A person from judicial service can be appointed as a District Judge. However, Article 233(2) provides that a person who is not in the service of the Union, shall be eligible only if he has been in practice, as an advocate or a pleader for 7 years; meaning thereby, persons who are in service are distinguished category from the incumbent who can be appointed as District Judge on 7 years' practice as an advocate or a pleader. Article 233(2) nowhere provides eligibility of inservice candidates for consideration as a District Judge concerning a post requiring 7 years' practice as an advocate or a pleader. Requirement of 7 years' experience for advocate or pleader is qualified with a rider that he should not be in the service of the Union or the State. Article 233 provides two sources of recruitment, one from judicial service and the other from advocates or pleaders. There are two separate streams provided; one is for persons in judicial service, and the other is for those not in judicial service of the Union or the State and have practiced for seven years. The expression 'in service of the Union or the State' has been interpreted in Chandra Mohan (supra) to mean judicial service, not any other service of the Union or the State. Thus, it is clear that the members of the judicial service alone are eligible for appointment as against the post of District Judge as the only mode provided for the appointment of inservice candidates is by way of promotion. They can stake their claim as per rules for promotion or merit promotion as the case may be. This Court has excluded the persons from the

Indian Civil Service, the Provincial Judicial Service, or other Executive Services, before Independence, recruitment to the post of District Judge was provided from other services also. In Chandra Mohan (supra), this Court held that no person from the Executive Service can be promoted as District Judge. There is separation of the judiciary in terms of Article 50 of the Constitution of India. It mandates the State to take steps to separate the judiciary from the Executive in the public services of the State. Article 50 is extracted hereunder:

"50. Separation of judiciary from executive. The State shall take steps to separate the judiciary from the executive in the public services of the State."

14. Article 233(2) provides that if an advocate or a pleader has to be appointed, he must have completed 7 years of practice. It is coupled with the condition in the opening part that the person should not be in service of the Union or State, which is the judicial service of the State. The person in judicial service is not eligible for being appointed as against the quota reserved for advocates. Once he has joined the stream of service, he ceases to be an advocate. The requirement of 7 years of minimum experience has to be considered as the practising advocate as on the cutoff date, the phrase used is a continuous state of affair from the past. The context 'has been in practice' in which it has been used, it is apparent that the provisions refers to a person who has been an advocate or pleader not only on the cutoff date but continues to be so at the time of appointment.

17. After having answered the question about recruitment from the Bar, the further question considered in Chandra Mohan (supra) was whether the Governor could directly appoint persons from service other than judicial service as District

Judges in consultation with the High Court. They belonged to the executive branch of the Government and performed certain revenue and ministerial functions. This Court took note of the fact that in the pre-Independence era, there was a demand that the judiciary should be separated from the Executive, and that was based upon the assumption that unless they were separated, independence of the judiciary at the lower level would be a mockery. Thus, Article 50 of Directive Principles of State Policy provides that States to take steps to separate judiciary from the executive in public services of the State. There shall be separate judicial service from the executive service. This Court considered the provisions of Articles 234, 235, 236 and 237 and observed that there are two sources of recruitment, services of the Union or State and members of the Bar. This Court observed thus:

"15. With this background, if the following provisions of the Constitution are looked at, the meaning of the debated expressions therein would be made clear:

We have already extracted Art. 233.

Article 234. Appointments of persons other than district judges to the judicial service of a State shall be made by the Governor of the State in accordance with rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State.

Article 235. The control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district Judges shall be vested in the High Court; but nothing in this Article shall be

construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law.

Article 236. In this Chapter

(a) the expression "district judge" includes judges of a city civil court, additional district judge, joint district judge, assistant district judge, chief judge of a small cause court, chief presidency magistrate, additional chief presidency magistrate, sessions judge, additional sessions judge and assistant sessions judge:

(b) the expression "judicial service" means a service consisting exclusively of persons intended to fill the post of district judge and other civil judicial posts inferior to the post of district judge.

Article 237. The Governor may by public notification direct that the foregoing provisions of this Chapter and any rules made thereunder shall with effect from such date as may be fixed by him in that behalf apply in relation to any class or classes of magistrates in the State as they apply in relation to persons appointed to the judicial service of the State subject to such exceptions and modifications as may be specified in the notification.

The gist of the said provisions may be stated thus:

Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State. There are two sources of recruitment, namely, (i) service of the Union or of the State, and (ii) members of the Bar. The said judges from the first source are appointed in consultation with the High Court and those from the second source are appointed on

the recommendation of the High Court. But in the case of appointments of persons to the judicial service other than as district judges they will be made by the Governor of the State in accordance with rules framed by him in consultation with the High Court and the Public Service Commission. But the High Court has control over all the district courts and courts subordinate thereto, subject to certain prescribed limitations."

(emphasis supplied)

As to the question whether persons from other services can be appointed as District Judges, the expression service of Union or State, has been held to be construed to be judicial service in Article 233(2) thus:

16. So far there is no dispute. But the real conflict rests on the question whether the Governor can appoint as district judges persons from services other than the judicial service; that is to say, can he appoint a person who is in the police, excise, revenue or such other service as a district judge? The acceptance of this position would take us back to the pre independence days and that too to the conditions prevailing in the Princely States. In the Princely States one used to come across appointments to the judicial service from police and other departments. This would also cut across the wellknit scheme of the Constitution and the principle underlying it, namely, the judiciary shall be an independent service. Doubtless if Art. 233(1) stood alone, it may be argued that the Governor may appoint any person as a district judge, whether legally qualified or not, if he belongs to any service under the State. But Art. 233(1) is nothing more than a declaration of the general power of the Governor in the matter of appointment of district judges. It does not lay down the qualifications of the candidates to be

appointed or denote the sources from which the recruitment has to be made. But the sources of recruitment are indicated in cl. (2) thereof. Under cl. (2) of Art. 233 two sources are given, namely, (i) persons in the service of the Union or of the State, and (ii) advocate or pleader. Can it be said that in the context of Ch. VI of Part VI of the Constitution "the service of the Union or of the State" means any service of the Union or of the State or does it mean the judicial service of the Union or of the State? The setting, viz., the chapter dealing with subordinate courts, in which the expression "the service" appears indicates that the service mentioned therein is the service pertaining to courts. That apart, Art. 236(2) defines the expression "judicial service" to mean a service consisting exclusively of persons intended to fill the post of district judge and other civil judicial posts inferior to the post of district judge. If this definition, instead of appearing in Art. 236, is placed as a clause before Art. 233(2), there cannot be any dispute that "the service" in Art. 233(2) can only mean the judicial service. The circumstance that the definition of "judicial service" finds a place in a subsequent Article does not necessarily lead to a contrary conclusion. The fact that in Article 233(2) the expression "the service" is used whereas in Arts. 234 and 235 the expression "judicial service" is found is not decisive of the question whether the expression "the service" in Art. 233(2) must be something other than the judicial service, for, the entire chapter is dealing with the judicial service. The definition is exhaustive of the service. Two expressions in the definition bring out the idea that the judicial service consists of hierarchy of judicial officers starting from the lowest and ending with district judges. The expressions "exclusively" and "intended" emphasise the fact that the

judicial service consists only of persons intended to fill up the posts of district judges and other civil judicial posts and that is the exclusive service of judicial officers. Having defined "judicial service" in exclusive terms, having provided for appointments to that service and having entrusted the control of the said service to the care of the High Court, the makers of the Constitution would not have conferred a blanket power on the Governor to appoint any person from any service as a district judge.

18. We, therefore, construe the expression "the service" in cl. (2) of Art. 233 as the judicial service."

(emphasis supplied)

23. In Deepak Aggarwal (supra) a three Judge Bench of this Court considered the provisions of Article 233(2) and held that service in Article 233 to mean judicial service and there is dichotomy of sources of recruitment, namely, (i) from judicial service; and (ii) from the advocate/pleader or in other words from the Bar. The meaning of the term advocate/pleader too has been considered by this Court. The expression "advocate" or "pleader" refers to the members of the Bar practicing law. Relying upon *Sushma Suri v. Govt. (NCT of Delhi)*, (1999) 1 SCC 330, this Court further observed that members of the Bar meant classes of persons who were practicing in a court of law as pleaders or advocates. This Court further held that in Article 233(2), "if he has been for not less than seven years," the present perfect continuous tense is used for a position which began at some time in the past and is continuing. Therefore, one of the essential requirements is that such a person must with requisite period be continuing as an advocate on the date of application. This Court has observed:

"70. A few decisions rendered by some of the High Courts on the point may also be noticed here. In *Sudhakar Govindrao Deshpande v. State of Maharashtra*, 1986 Lab IC 710 (Bom) the issue that fell for consideration before the Bombay High Court was whether the petitioner therein who was serving as Deputy Registrar at the Nagpur Bench of the Bombay High Court, was eligible for appointment to the post of the District Judge. The advertisement that was issued by the High Court inviting applications for five posts of District Judges, inter alia, stated that, "candidate must ordinarily be an advocate or pleader who has practised in the High Court, Bombay or court subordinate thereto for not less than seven years on 110 1980". The Single Judge of the Bombay High Court considered Articles 233, 234 and 309 of the Constitution, relevant recruitment rules and noted the judgments of this Court in *Chandra Mohan v. State of U.P.*, AIR 1966 SC 1987, *Satya Narain Singh v. High Court of Judicature of Allahabad*, (1985) 1 SCC 225 and *Rameshwar Dayal v. State of Punjab*, AIR 1961 SC 816. It was observed as follows: (*Sudhakar case*, Lab IC p. 715, para 16)

"16. ... the phrase 'has been an advocate or a pleader' must be interpreted as a person who has been immediately prior to his appointment a member of the Bar, that is to say either an advocate or a pleader. In fact, in the above judgment, the Supreme Court has repeatedly referred to the second group of persons eligible for appointment under Article 233(2) as 'members of the Bar'. Article 233(2) therefore, when it refers to a person who has been for not less than seven years an advocate or pleader refers to a member of the Bar who is of not less than seven years' standing."

89. We do not think there is any doubt about the meaning of the expression "advocate or pleader" in Article 233(2) of the Constitution. This should bear the meaning it had in law preceding the Constitution and as the expression was generally understood. The expression "advocate or pleader" refers to legal practitioner and, thus, it means a person who has a right to act and/or plead in court on behalf of his client. There is no indication in the context to the contrary. It refers to the members of the Bar practising law. In other words, the expression "advocate or pleader" in Article 233(2) has been used for a member of the Bar who conducts cases in court or, in other words acts and/or pleads in court on behalf of his client. In *Sushma Suri v. Govt. (NCT of Delhi)*, (1999) 1 SCC 330, a three-Judge Bench of this Court construed the expression "members of the Bar" to mean class of persons who were actually practising in courts of law as pleaders or advocates. ...

102. As regards construction of the expression, "if he has been for not less than seven years an advocate" in Article 233(2) of the Constitution, we think Mr Prashant Bhushan was right in his submission that this expression means seven years as an advocate immediately preceding the application and not seven years any time in the past. This is clear by use of "has been". The present perfect continuous tense is used for a position which began at sometime in the past and is still continuing. Therefore, one of the essential requirements articulated by the above expression in Article 233(2) is that such person must with requisite period be continuing as an advocate on the date of application."

(emphasis supplied)

It is clear from the decision of Deepak Aggarwal (*supra*) that recruitment from the Bar is only from among practicing advocates and those continuing as

advocates on the date of appointment. The submission that the issue of eligibility of inservice candidates did not come up for consideration is of no consequence as provisions of Article 233(2) came up for consideration directly before this Court.

32. Consistently, this Court in its previous judgments has taken the view which we now take. We find absolutely no reason to take a different view, though it was urged that mistakes committed earlier should not continue. We find the argument to be devoid of substance and based upon misapprehensions. We have found that the aforesaid decisions are vivid and clear, and there is no room to entertain such a submission then for a moment. Even otherwise, when the law has been administered in this country after Independence in the manner mentioned above on the principle of *stare decisis* and rules framed by various High Courts, we find ourselves unable to accept the submission raised on behalf of inservice candidates. The decisions in *Satya Narain Singh (supra)*, *Deepak Aggarwal (supra)* and *All India Judges Association case (supra)* also cannot be said to be contrary to the provisions of Article 233. We unhesitatingly reject the submission to the contrary.

45. In view of the aforesaid discussion, we are of the opinion that for direct recruitment as District Judge as against the quota fixed for the advocates/pleaders, incumbent has to be practicing advocate and must be in practice as on the cutoff date and at the time of appointment he must not be in judicial service or other services of the Union or State. For constituting experience of 7 years of practice as advocate, experience obtained in judicial service cannot be equated/combined and advocate/pleader should be in practice in the immediate past

for 7 years and must be in practice while applying on the cutoff date fixed under the rules and should be in practice as an advocate on the date of appointment. The purpose is recruitment from bar of a practicing advocate having minimum 7 years' experience.

47. We answer the reference as under :

(i) The members in the judicial service of the State can be appointed as District Judges by way of promotion or limited competitive examination.

(ii) The Governor of a State is the authority for the purpose of appointment, promotion, posting and transfer, the eligibility is governed by the Rules framed under Articles 234 and 235.

(iii) Under Article 232(2), an Advocate or a pleader with 7 years of practice can be appointed as District Judge by way of direct recruitment in case he is not already in the judicial service of the Union or a State.

(iv) For the purpose of Article 233(2), an Advocate has to be continuing in practice for not less than 7 years as on the cutoff date and at the time of appointment as District Judge. Members of judicial service having 7 years' experience of practice before they have joined the service or having combined experience of 7 years as lawyer and member of judiciary, are not eligible to apply for direct recruitment as a District Judge.

(v) The rules framed by the High Court prohibiting judicial service officers from staking claim to the post of District Judge against the posts reserved for Advocates by way of direct recruitment, cannot be said to be ultra vires and are in conformity with Articles 14, 16 and 233 of the Constitution of India.

(vi) The decision in Vijay Kumar Mishra (supra) providing eligibility, of

judicial officer to compete as against the post of District Judge by way of direct recruitment, cannot be said to be laying down the law correctly. The same is hereby overruled."

14. In Writ A No. 46742 of 2015 (**Smt. Ruchi Chaudhary vs. High Court of Judicature at Allahabad and another**) decided on 1.9.2015 this Court held that in a case of private job, decision of Deepak Aggarwal (supra) is of no help. Relevant paragraphs of the aforesaid judgment are quoted as under:-

"Learned Senior Counsel appearing for the petitioner pointed out that as the petitioner was enrolled as an advocate on 12 January 2002 and had worked as a Senior Analyst Para Legal in the CPA Global from 17 May 2010 to 6 June 2014 and had filled up application form on 10 June 2014, she had more than seven years standing as on 1 January 2015. The contention advanced by learned Senior Counsel for the petitioner is that not only did the petitioner have more than seven years standing prior to taking up the assignment of a Senior Analyst Para Legal on 17 May 2010 but even otherwise it cannot be urged that the petitioner was not an advocate of not less than seven years standing preceding the date of her application as she had not surrendered her licence and she was also performing work of a legal nature as she was a Senior Analyst Para Legal in the CPA Global. Learned Senior Counsel has, in support of his contention, placed reliance upon the provisions of Article 233 of the Constitution and also the decision of the Supreme Court in Deepak Aggarwal, particular to paragraphs 62, 62.2, 94 and 98. Learned Senior Counsel also placed reliance upon the provisions of Article

217(2)(b) of the Constitution and the decision of the Supreme Court in Mahesh Chandra Gupta Vs. Union of India & Ors.3.

Sri Manish Goyal, learned counsel for the respondents has also placed reliance upon the decision of the Supreme Court in Deepak Aggarwal and on a decision of a Division Bench of this Court in Writ-C No.664 of 20154. It is the submission of learned counsel for the respondents that in view of the provisions of Article 233 of the Constitution as interpreted by the Supreme Court in Deepak Aggarwal, the expression 'if he has been for not less than seven years an advocate' in Article 233(2) of the Constitution would mean seven years as an advocate immediately preceding the date of application and since the petitioner was not an advocate immediately preceding the date of the application, the candidature of the petitioner was rightly rejected.

.....

Learned Senior Counsel for the petitioner then contended that in any case, the nature of the work of the petitioner as a Senior Analyst Para Legal in CPA Global from 17 May 2010 to 6 June 2014 should not disentitle the petitioner from being considered as eligible for the post. The contention of learned Senior Counsel is that the service rendered on the post of Senior Analyst Para Legal is consistent with the work of an advocate and, therefore, in view of the decision of the Supreme Court in Deepak Aggarwal, she is eligible for appointment.

.....

In the present case, the petitioner was appointed as a full time Senior Analyst Para Legal. The application form submitted by the petitioner also shows that the petitioner is

receiving salary of Rs.30,315/- per month. Her service conditions would also be governed by the rules framed by CPA Global.

This apart, from the application form submitted by the petitioner which has been enclosed with the writ petition, it transpires that the petitioner was enrolled as an advocate with the U.P. Bar Council on 12 January 2002 and the period of employment which the petitioner has mentioned in the application form is from 17 May 2010 to 6 June 2014. The petitioner has also stated that her standing as an advocate as on 1 January 2015 is eight years, three months and twenty-eight days. This is obviously the period commencing 12 January 2002 and ending 16 May 2010. The petitioner herself not considered for the period she was in employment with CPA Global as a Senior Analyst Para Legal.

The decision in the case of Deepak Aggarwal, therefore, does not help the petitioner.”

(emphasis supplied)

15. It would also be relevant to take note of the judgment of this Court passed in **Writ A No. 25580 of 2018 (Shiv Kumar and another vs. Honorable High Court of Judicature at Allahabad and another)** decided on 5.4.2019, relevant paragraphs whereof are quoted as under:-

“It would be profitable to first refer to the various statutory provisions regarding the eligibility and appointment to the post of District Judge/UP HJS before proceeding to answer the controversy arising in this petition.

The first and foremost provision in this regard is Article 233 of the Constitution of India which reads as under:-

233. Appointment of district judges:-

"(1) Appointments of persons to be, and the posting and promotion of district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State.

(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment."

Article 233 (2) in unequivocal term provides that a person not already in service shall be eligible for appointment as District Judge if he has been in practice as an advocate or pleader for not less than 7 years provided his name is recommended for appointment by the High Court. In other words, as regards a person not already in service what is required is that he should be an advocate or pleader of 7 years standing and that his name is recommended by the High Court for appointment as District Judge. Thus, 7 years of standing as an advocate is one of the essential eligibility condition for appointment as District Judge.

After the above constitutional provision comes the Bar Council of India Rules framed under Section 49 of the Advocates Act, 1961. Rules 47 to 52 of the said Rules provide regarding employment of an Advocate.

In this regard, Rule 49 is relevant of our purpose and is quoted below:-

"49. An advocate shall not be a full-time salaried employee of any person, government, firm, corporation or concern, so long as he continues to practise, and shall, on taking up any employment,

intimate the fact to the Bar Council on whose roll his name appears, and shall thereupon cease to practise as an advocate so long as he continues in such employment"

The aforesaid rule completely prohibits an advocate from taking any full time employment during his continuance of practice and provides that if he so takes up employment, he shall inform the Bar Council whereupon he shall cease to be in practice as an advocate so long his employment continues. Therefore, as soon as an advocate enrolled with the Bar Council takes up full time salaried employment he ceases to practice as an advocate.

The UP HJS Rules, 1975 vide Rule 5 provides for the source of recruitment to the Higher Judicial Service. It provides for three sources namely; by promotion from the Civil Judge (Senior Division); by promotion through limited competitive examination of Civil Judge (Senior Division); and by direct recruitment from amongst the advocates.

The aforesaid 3rd source of recruitment is relevant for our purpose and therefore Rule 5 (c) alone of the Rules is being reproduced herein below:-

5. Source of recruitment:-

(a)

(b)

(c) by direct recruitment from amongst the Advocates of not less than seven years standing on the first day of January next following the year in which the notice inviting applications is published"

A bare reading of the aforesaid Rule reveals that the eligibility for direct recruitment to the UP HJS is from amongst the advocates of not less than 7 years standing meaning thereby that a minimum of 7 years standing as an Advocate is a

sine-qua-non for selection/appointment in UP HJS through direct recruitment.

It is in this context that a question has arisen before us whether a person or an advocate who takes up full time employment with the Bank as Law Officer and in discharge of his duties may be appearing for the employer before the law courts would still continue to be an advocate so as to count the period in service towards his standing as an advocate for selection/appointment to the UP HJS/District Judge.

The issue is very simple if we go by the strict literary sense in which the aforesaid provisions have been couched.

Article 233 (2) clearly provides 7 years standing as an advocate as the condition for eligibility for appointment as District Judge. Same is the position that has been reiterated by Rule 5 (c) of the UP HJS Rules, 1975. Thus, 7 years of standing as an advocate on the relevant date is sine-qua-non for appointment as District Judge or in UP HJS. At the same time Rule 49 of the Bar Council of India Rules clearly stipulates that an advocate who accepts a full time salaried employment ceases to practice as an advocate so long as he continues in such employment. In other words, as soon as an advocate enters into full time salaried employment, he loses the right to practice even though he may represent the employer before the law courts.

Rule 49 of the Bar Council of India Rules creates a legal fiction to the effect that a person duly enrolled as an advocate ceases to be one as soon as he takes a full time employment on salary even if continues to occasionally appear in law Court.

The purpose of creating a legal fiction is to create an imaginary thing to be legally in existence even if it does not exist

in reality. So the image created by legal fiction has to be recognized as real, otherwise the purpose of such legal fiction would stand frustrated.

In such a situation, the petitioner who practiced as an advocate from 8.10.2010 to 6.10.2014 and then took up a full time salaried employment did not have to his credit 7 years of standing as an advocate while applying for UPHJS. The period of full time employment as Law Officer with the Bank despite his appearance before the court as part of the service condition would not make him a practicing advocate for the above purpose. The period of full time employment can not be treated as time spent on practice as an advocate.

In Satish Kumar Sharma a three Judges Bench was seized with a controversy with regard to withdrawal of the enrolment of an advocate by the Bar Council as he was a permanent employee of Himachal Pradesh State Electricity Board and was holding the post of Deputy Secretary with it. In the said case the advocate obtained the law decree in the year 1975 and entered into full time employment of the Board as Law Officer Grade-II and later rose to the post to the Deputy Secretary. During the course of employment he was permitted by the Board to act an advocate on its behalf. Later, he also got himself enrolled on 9.7.1984 as an advocate. However, the enrollment was withdrawn as he was in full time employment. The withdrawal of the enrolment was challenged by him before the Division Bench of the High Court but failed. The matter went up to the Supreme Court where an affidavit of the advocate to the effect that his duties with the Board right from Law Officer to the present post were exclusively those of an advocate and that he had been personally appearing for

the Board before the various courts was brought on record but even then it was held that as the appellant was undoubtedly a full time salaried employee at the time of his enrolment as an advocate and continues to be so he can not be conferred with the status of an advocate. His duties, may be exclusively to work/plead in courts but having regard to the plain language and clear term of Rule 49 of the Bar Council of India Rules and looking to the fact that his substantial and predominant duties were not that of a lawyer except for mere occasional appearance in some courts solely on behalf of the Board would not make him an advocate.

In Haniraj L Chulani (Dr.)³ it was observed that legal profession requires full time attention and would not countenance advocates riding two horses or more at a time.

In the said case the petitioner was a medical practitioner and wanted to get himself enrolled as an advocate after obtaining decree of LLB. It was in that connection that the Court observed as above and proceeded to observe further as under:-

"It is axiomatic that an advocate has to burn the midnight oil for preparing his cases for being argued in the court next day. Advocates face examination every day when they appear in courts. It is not as if that after court hours an advocate has not to put in hard work on his study table in his chamber with or without the presence of his clients who may be available for consultation. To put forward his best performance as an advocate he is required to give wholehearted and full-time attention to his profession. Any flinching from such unstinted attention to his legal profession would certainly have an impact on his professional ability and expertise. If he is permitted to simultaneously practise as a

doctor then the requirement of his full-time attention to the legal profession is bound to be adversely affected. Consequently, however equally dignified may be the profession of a doctor he can not simultaneously be permitted to practice law which is a full-time occupation. It is for ensuring the full-time attention of legal practitioners towards their profession and with a view to bringing out their best so that they can fulfill their role as an officer of the court and can give their best in the administration of the justice, that the impugned rule has been enacted by the State Legislature."

In Deepak Aggarawal the question that was raised before the Supreme Court was whether a public prosecutor/ Assistant Public Prosecutor/District Attorney/Assistant District Attorney/Deputy Advocate General who is in full time employment of the Government seizes to be an advocate or pleader within the meaning of Article 233 (2) of the Constitution.

It is in context with the above controversy that the Supreme Court referring to its earlier decision in Sushma Suri⁴ considered the meaning of the expression 'advocate' used in the un-amended Rule 49 of the Bar Council of India Rules and held that if a person was on the roll of the Bar Council and was engaged either by employment or otherwise by the Union of India or the State for the purpose of practice before a court as an advocate such a person does not cease to be an advocate.

The aforesaid decision was in reference to the employment of an advocate as a lawyer and not for doing any other office duty. The predominant purpose of the employment in such a situation was that of an advocate rather than that of an official of the Government.

A Division Bench of this Court in Writ A No. 59375 of 2014 (Smt. Rashmi Sharma Vs. State of U.P., and 3 others) vide judgment and order dated 12.11.2014 decided a similar controversy which also related to the recruitment of U.P. HJS. In the said case also the petitioner was appointed as a full time Deputy Manager (Law) in Andhra Bank. Thus his name was not included in the list of eligible candidates for UP HJS on the ground that he was in full time employment. The Division Bench on consideration of the entire case law on the subject including Deepak Aggarwal came to the conclusion that mere appearance of the candidate before the Lok Adalat as representative of the Bank does not make him eligible and that the decision of the Deepak Aggarwal is of no help. The petition was accordingly dismissed.

A similar view was taken by another Division Bench of this Court vide its judgment and order dated 1.9.2015 passed in Writ A No. 46742 of 2015 (Smt. Ruchi Chaudhari Vs. High Court of Judicature of Allahabad and another). In the said case the candidate for U.P. HJS after enrolment as an advocate had taken up job as a Senior Analyst para legal in a company CPA Global. The period of working in the aforesaid full time employment was not counted towards her standing as an advocate and the writ petition was dismissed holding that the decision of the Deepak Aggarwal does not help her.

In yet another case a Division Bench of this Court in deciding Writ A No. 32440 of 2014 (Deep Kumar and 3 others Vs. State of U.P., and another) vide its judgment and order dated 16.6.2014 distinguishing Deepak Aggarwal's case did not permit the Law Officers in employment of the Bank to participate for direct

recruitment to the U.P. Higher Judicial Service Examination of the year 2014 as they were full-time salaried employees of the Bank and no longer the advocates.

A similar view was expressed by one another Division Bench of which one of us (Pankaj Mithal, J.) was a member in Rajesh Chaubey which related to the present recruitment to the UP HJS. The Division Bench considering the decision of the Supreme Court in Deepak Aggarwal's case and the eligibility condition contained in Article 333 (2) and Rule 5 (c) of the UP HJS Rules read with Rule 49 of the Bar Council of India Rules held that once a person by virtue of his full time employment ceases to be an advocate, the period of service rendered by him would not enure to his benefit for determining his standing as an advocate.

It may worth noting that the case of Deepak Aggarwal related to Public Prosecutors or Advocates in employment of Government who by nature of the duties assigned continued to appear before the law courts regularly on behalf of the employer. Their work during employment was treated to be predominantly to be of an advocate and was thus added towards standing as an advocate.

The position in the case of employment in other capacity is quite different from that of employment as public prosecutor. In such other services appearance before the Court is occasional and is not the predominant part of the duties. Therefore, mere occasional appearance of such employees in Courts/tribunals while in full time employment in few cases that too solely on behalf of their employer can not be taken to mean that they are continuing to be in practice as advocates. It is but natural that in such employment their main job is not that of pleading and arguing cases before the law

courts on behalf of a variety of persons as is expected of an advocate. The nature of their duties is mostly of advising, conveyance etc., which may not allow them enough time for regular appearance before the law courts thus depriving them of experience of a lawyer. Any effort to treat persons in such employment as practicing advocates would be de hors of Rule 49 of the Bar Council of India Rules. An advocate is a person who assists, defends, pleads, or prosecute for another. At times he may represent the State or the public at large in matters of public concern such as in criminal cases and for this limited purpose is a public advocate. The public prosecutor or the district attorney as such by the nature of his work is a public advocate. He as such despite his full time engagement with the State does not cease to be advocate. This is an exception to Rule 49 of the Bar Council of India Rules.

An advocate is a responsible officer of the Court. He is as important as a Judge in the matter of dispensation of justice. He is virtually a minister of justice equally in line with a Judge. He acquires the skills of advocacy by experience and it is often said that at times experience is much more important than knowledge. It is more true in the profession of law wherein devotion to higher cause, the cause of truth and justice is more vital. One gains knowledge through experience by regular practice which can not be acquired otherwise while in employment or by appearance in some stray cases. It is therefore elementary for holding the post of DJ/UPHJS to have atleast 7 years of actual standing as an advocate and not the theoretic knowledge of law as in full time employment.

In the above situation, the persons employed as public prosecutor/District Authority predominantly discharge

functions of advocates and would be recognized as advocates in the light of Deepak Aggarwal's case but in no other situation or employment. In the present case, there is no material or evidence to establish that the predominant function of the employment of the petitioner as defined/described in the letter of appointment issued to him by his employer Bank is that of practice as a lawyer and that the other functions discharged by him are only bare minimum or incidental. The Circular letter of the Reserve Bank of India does not seek to alter the terms and conditions of employment of the petitioner, neither do stray appearances recorded in some court cases establish that the Bank had engaged the services of the petitioner, predominantly to represent it in cases before courts, tribunals etc.

In view of the aforesaid facts and circumstances, we are of the opinion that in the light of the legal fiction created by Rule 49 of the Bar Council of India Rules, the petitioner who has full time employment of the SBI ceased to be an advocate and his service period would not be counted/added in his practice as an advocate to make him eligible for UPHJS.

Accordingly, there is no force in the petition. It is therefore dismissed.”

(emphasis supplied)

16. The issue involved herein has also been considered time and again by Hon'ble Apex Court in the cases of **Rameshwar Dayal vs. State of Punjab AIR 1961 SC 816, Chandra Mohan vs. State of U.P. AIR 1966 SC 1987, Sushma Suri vs. Govt of National Capital Territory of Delhi (1999) 1 SCC 330 and Satish Kumar Sharma vs. Bar Council of Himachal Pradesh (2001) 2 SCC 365, which have already been considered in the judgments quoted above, hence to avoid**

repetition are not being referred to separately.

17. Similarly, this issue has been considered by this Court in the cases of **Rajesh Chaubey vs. Hon. High Court Judicature at Allahabad and another 2019 (3) ADJ 60, Smt. Rashmi Sharma vs. State of U.P. (Writ A No. 59375 of 2014) decided on 12.11.2014 and Rajesh Chaubey vs. Hon. High Court of Judicature at Allahabad and another (Writ A No. 27608 of 2018) decided on 2.1.2019** also.

18. The question was again considered and decided by this Court in **Writ A No. 33829 of 2015 (Kumar Mitakshar vs. State of U.P. and others)** decided on 20.4.2023. Relevant paragraphs of the aforesaid judgement are also quoted as under:-

“Taking note of the above submissions, we may further go through Article 233(2) of the Constitution which provides the eligibility for appointment as the District Judge of a person who is not in service of the Union of the State. It provides that any such person would be eligible for appointment if he has been for not less than 7 years as an Advocate/pleader and is recommended by the High Court. The appointment by direct recruitment to the Higher Judicial Service is made by the High Court in the spirit of the constitutional provision under Article 233(2) of the Constitution in accordance with the service Rules' 1975.

The language of Article 233(2) of the Constitution has been read and interpreted by the Apex Court in the case of Deepak Agarwal (supra) in the following manner:-

"102. As regards construction of the expression, 'if he has been for not less than seven years an advocate?' in Article 233(2) of the Constitution, we think Mr. Prashant Bhushan was right in his submission that this expression means seven years as an advocate immediately preceding the application and not seven years any time in the past. This is clear by use of 'has been?'. The present perfect continuous tense is used for a position which began at some time in the past and is still continuing. Therefore, one of the essential requirements articulated by the above expression in Article 233(2) is that such person must with requisite period be continuing as an advocate on the date of application. "

In the case of Dheeraj (supra) it was further considered in paragraphs-'58', '60(iv)' as under:-

"58. In view of the aforesaid discussion, we are of the opinion that for direct recruitment as District Judge as against the quota fixed for the advocates/pleaders, incumbent has to be practising advocate and must be in practice as on the cut off date and at the time of appointment he must not be in judicial service or other services of the Union or State. For constituting experience of 7 years of practice as advocate, experience obtained in judicial service cannot be equated/combined and advocate/pleader should be in practice in the immediate past for 7 years and must be in practice while applying on the cut off date fixed under the rules and should be in practice as an advocate on the date of appointment. The purpose is recruitment from bar of a practising advocate having minimum 7 years experience.

60. We answer the reference as under :

(iv) For the purpose of Article 233(2), an Advocate has to be continuing in practice for not less than 7 years as on the cut off date and at the time of appointment as District Judge. Members of judicial service having 7 years' experience of practice before they have joined the service or having combined experience of 7 years as lawyer and member of judiciary, are not eligible to apply for direct recruitment as a District Judge."

It is, thus, held in Deepak Agarwal (supra) and considered in Dheeraj Mor (supra) that 7 years standing as an Advocate means the period practising law as an Advocate for 7 years immediately preceding the application and not 7 years any time in the past. The applicant who is an Advocate/pleader should be in practice in the immediate past for 7 years and must be in practice, while applying, on the cut-off fixed under the rules and should be in practice as an Advocate on the date of appointment. The purpose is to recruit the members of the bar, i.e. practising Advocates having minimum 7 years practice. The continuity accorded to the period of 7 years for computing eligibility criteria of experience as provided in Rule 5(c) of the U.P. Higher Judicial Service Rules 1975, thus, is determined with the decision of the Apex Court.

The contention of the learned senior counsel for the petitioner that the period of 1 year 2 months and 10 days is to be counted in the period practising law by the petitioner as on the date of application, the cut off date under the Rules, cannot be accepted as the requirement is that the total period of 7 years experience must be in continuity immediately preceding the last date of the submission of the application form.

The result is that as on 03.07.2014, i.e. the last date of submission of the application form, the petitioner herein had gained experience of only 6 years 11 months and 3 days as practising Advocate. He, therefore, cannot be said to be eligible for appointment by direct recruitment to the Higher Judicial Services as per the eligibility criteria under the U.P. Higher Judicial Service Rules, 1975 read with Article 233(2) of the Constitution of India.

As regards the submission of the learned senior Advocate that the observation in Deepak Agarwal (supra) in para-'102' would not be attracted in case of the petitioner, inasmuch as, the issue herein is covered by the decision in Rameshwar Dayal vs State of Punjab reported in AIR 1961 SC 816, suffice it to note that in Dheeraj Mor (supra), both the decisions of the Apex Court in Deepak Agarwal (supra) and Rameshwar Dayal (supra) had been considered to observe in para-'58' and '60(iv)' noted hereinabove.

The submission of the learned counsel for the appellant, therefore, cannot be accepted. Even otherwise the Apex Court in case of Deepak Agarwal (supra) has made observation in paragraph '102' that the words "has been" used in Article 233(2) of the Constitution being in present perfect continuous tense, continuous practice of 7 years or experience of continuous 7 years immediately preceding the cutoff date as per the service rules, is necessary.

The words "has been" used in Article 233(2) of the Constitution gives continuity to the period and the requirement, thus, is that the candidate for being treated as eligible must possess 7 years continuous period practising law immediately preceding the last date of

submission of the application form i.e. on the cut off date as per the recruitment rules.

For the above discussion, no infirmity can be found in the decision of the respondent High Court.

The writ petition is, accordingly, dismissed.”

(emphasis supplied)

19. The discussion made hereinabove clearly establishes that as per eligibility condition contained in Article 233 (2) of the Constitution of India and Rule 5 (c) of the U.P. H.J.S. Rules read with Rule 43 and 49 of the Bar Council of India Rules framed under Section 49 of the Advocates Act, 1961 completely prohibits an advocate from taking a part time / full time employment during continuance of his practice and if he takes any such employment he shall inform the Bar Council whereas he shall cease to practice as an advocate so long as he continues in such employment and that Rule 49 creates a legal fiction that on taking of full time employment he ceases to be an advocate and cannot be conferred status of an advocate.

20. No doubt, it can be argued that nature of work matters, however, the law as discussed above clearly establishes that now settled law is that full time work/employment as a public prosecutor is distinguishable and is different from full time employment with any other bank/private company/ employer etc. This conclusion can be safely drawn from the judgement of Dheeraj Mor (**supra**) and various other judgements of Division Bench of this Court.

21. Coming back to the facts of this case, it may be noted that the petitioner was registered as an advocate on 16.11.1998;

vide appointment letter dated 15.1.2009 he was appointed as Law Officer in a private company, namely, M/s Alliance Builders and Contractors Limited Bareilly; it is alleged that apart from the said company, he had filed Vakalatnamas on behalf of other litigants; he appeared in UP HJS Examination-2009 and qualified in prelims and written examination but was not permitted to appear in interview on the ground that he was in full time salaried class employment; as he intended to appear in UP HJS, he tendered his resignation from the company on 01.1.2010, which was accepted on 01.2.2010; in UP HJS 2012, he could not qualify in interview; in UP HJS-2014, he could not qualify. In the relevant UP HJS Examination-2016, he filled the form, however, allegedly there was some mistake hence, he filed affidavit dated 12.6.2016 and cleared prelims and written examination and was called for interview on 22.4.2017 but his name did not find figure in the select list; when he came to know that he had obtained 471 marks whereas last general category selected candidate has obtained only 455 marks, he filed representation which was rejected. Hence, present petition has been filed.

22. We have already noted and discussed the case law on the issue in hand extensively. We have also noted the resolution of the Selection and Appointment Committee taken in its meeting dated 17.5.2017. The admitted facts of the case are that as per para 10 of the appointment letter dated 15.1.2009 the appointment of the petitioner was on a full time basis with specific condition that he shall devote full time to the duty assigned by the company and that he will not engage himself for any other person, firm or company in any capacity during his appointment with the company. Further, the

23. During the course of arguments, learned counsel for the petitioner sought to place reliance on a letter dated 19.1.2009 allegedly given by the company, crux whereof appears to be that the petitioner can continue with his other clients as well. We may put it on record that on a pointed query, learned counsel for the petitioner could not dispute the fact that this document has never been mentioned or relied on earlier and has surfaced for first time in the present petition. We, therefore, are not inclined to place reliance thereon. In so far as filing of Vakalatnama on behalf of others in the year 2009-10 is concerned, we restrain ourselves from going into the issue that when the petitioner was in full time employment of a private company, whether, his act of filing Vakalatnama was in violation of Rule 43 and 49 of the Bar Council Rules or was in violation of terms of his appointment as Law Officer of the company, as this issue is not before us.

25. The petition is devoid of merits and is accordingly dismissed. No costs.

(2024) 4 ILRA 376
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.03.2024

BEFORE

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

Writ A No. 13368 of 2023

Anchal Kumar Tiwari ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sri Shivam Yadav, Sri Aditya Yadav

Counsel for the Respondents:

C.S.C., Sri Ashok Kumar Lal, Sri Satyam Singh

Civil Law - U.P. Cooperative Societies Act, 1965 - U.P. Cooperative Societies' Employees' Service Regulations, 1975 - Regulation 84 - Disciplinary Proceedings; Imposition of Multiple Penalties - Burden of Proof in Inquiry

Facts: The petitioner, a Branch Manager at the Bhogaon Branch of Mainpuri District Cooperative Bank Ltd., was punished with reversion from Manager Grade-II to Manager Grade-III and ordered to pay Rs.8,53,480/- with 6% interest for alleged negligence leading to financial loss. The petitioner, who unearthed embezzlement by a cashier, was charged with negligence and vicarious liability, suspended, and subjected to disciplinary proceedings. He challenged the order dated July 26, 2023, and the Committee of Management's resolution dated April 27, 2023, under Article 226, alleging procedural irregularities and violation of Regulation 84, which permits only one penalty.

Held: Single Penalty under Regulation 84: The court held that Regulation 84 of the U.P. Cooperative Societies' Employees' Service

Regulations, 1975, limits the imposition to one penalty from the enumerated list. The imposition of both reversion (Regulation 84(1)(e)) and recovery of loss (Regulation 84(1)(d)) was impermissible, relying on Pancham Ram Yadav Vs U.P. Co-Operative Federation Ltd., 2019 (9) ADJ 1 (FB) and Vijay Bahadur Yadav Vs Chairman, U.P. Cooperative Federation Ltd., 1992 AWC 1479 All (Paras 14-19).

Burden of Proof in Disciplinary Inquiry: The establishment must prove charges through documentary and oral evidence presented by a Presenting Officer, even if the delinquent does not reply or appear. The Inquiry Officer cannot assume charges to be true by default or rely solely on charge-sheet documents. The court found the inquiry defective as no formal evidence was produced, and the Inquiry Officer relied on an appraisal note, violating principles of natural justice (Paras 20-22).

Precedents: Relied on St. of U.P. Vs T.P. Lal Srivastava, (1996) 10 SCC 702, St. of Uttar Pradesh Vs Saroj Kumar Sinha, (2010) 2 SCC 772, Roop Singh Negi Vs Punj. National Bank, (2009) 2 SCC 570, & ors., emphasizing the establishment's burden to prove charges and the need for formal inquiry proceedings (Para 22).

Outcome: The impugned order dated July 26, 2023, and the resolution dated April 27, 2023, were quashed due to procedural irregularities and imposition of multiple penalties. The respondents were permitted to initiate fresh proceedings from the charge-sheet stage, adhering to proper inquiry procedures and imposing only one penalty under Regulation 84, not exceeding the severity of the quashed order (Para 23).

No Costs: No order as to costs was passed (Para 24).

List of Cases cited:

1. Pancham Ram Yadav Vs U.P. Co-Operative Federation Ltd., 2019 (9) ADJ 1 (FB)
2. Vijay Bahadur Yadav Vs Chairman, U.P. Cooperative Federation Ltd., 1992 AWC 1479 All
3. St. of U.P. Vs T.P. Lal Srivastava, (1996) 10 SCC 702

4. St. of Uttar Pradesh Vs Saroj Kumar Sinha, (2010) 2 SCC 772

5. Roop Singh Negi Vs Punj. National Bank, (2009) 2 SCC 570

6. St. of Uttaranchal Vs Kharak Singh, (2008) 8 SCC 236

7. St. of U.P. Vs Kishori Lal, 2018 (9) ADJ 397 (DB)

8. Smt. Karuna Jaiswal Vs St. of U.P., 2018 (9) ADJ 107 (DB)

9. St. of U.P. Vs Aditya Prasad Srivastava, 2017 (2) ADJ 554 (DB)

(Delivered by Hon'ble J.J. Munir, J.)

1. This matter has been heard on rather unconventional pleadings. On the 25th of August, 2023, the learned Counsel for the petitioner sought time to file a supplementary affidavit, when the matter came up for admission. The writ petition was, accordingly, adjourned to 12th of September, 2023. A further adjournment was sought on that day. A supplementary affidavit was filed in Court by the learned Counsel for the petitioner on 27.09.2023, when time was granted to file a supplementary counter affidavit. The learned Counsel for the respondents filed a supplementary counter affidavit on 11.10.2023. On that day, the parties did not press for further affidavits; not even a counter affidavit to the writ petition. The matter was, accordingly, admitted to hearing, which proceeded forthwith, leading to judgment being reserved.

2. This writ petition is directed against an order dated 26th July, 2023 passed by the Secretary/ Chief Executive Officer, Mainpuri District Cooperative Bank Ltd., punishing the petitioner after disciplinary proceedings with reversion

from the post of Branch Manager Grade-II to Manager Grade-III, and, further, directing recovery of a sum of Rs.8,53,480/- together with 6% interest on account of loss caused to the Bank.

3. The District Cooperative Bank Ltd., Mainpuri is a Cooperative Bank governed by the provisions of the UP Cooperative Societies Act, 1965 (for short, 'the Act of 1965') and service conditions of their employees are governed by the UP Cooperative Societies' Employees' Service Regulations, 1975 (for short, 'the Regulations'). The petitioner is employed with the Mainpuri District Cooperative Bank Ltd. (for short, 'the Bank') as a Branch Manager. He was posted as the Branch Manager at the Bhogaon Branch of the Bank. The Committee of Management of the Bank is the petitioner's appointing authority, which comprises the Board of Directors thereof. The Chief Executive Officer of the Bank, who is the Secretary of the Committee of Management, exercises all administrative powers conferred upon him for the purpose of managing the affairs of the Bank.

4. The petitioner was appointed a Clerk/ Cashier in the year 2009. He was promoted to the post of the Junior Branch Manager in the year 2014. It is his case that he has been working to the satisfaction of higher officials of the Bank. The petitioner was posted as the Branch Manager at the Bhogaon Branch, District Mainpuri with effect from 01.09.2021. The petitioner has pleaded for a fact that as the Branch Manager, he was not assigned any role in dealing with direct cash deposits made by customers. The duties assigned to the petitioner at the Bhogaon Branch were to supervise the activities of various functionaries at the Branch, and, at the end

of the day, make a tally of the balance-sheet with the cashier. In case, the cashier did not enter any cash deposit in the book, there are no means, according to the petitioner, to know about it, unless there was a complaint. The petitioner says that the genesis of the orders impugned, giving rise to the present writ petition, are that on 20.07.2022, a customer approached the Bank to make some payment through RTGS. That payment, however, could not be made because of insufficient funds. He complained in the matter to the petitioner and when the petitioner personally inquired into it, he found that it was the cashier of the Bank, who would deposit receipts but not credit the customer's account. To safeguard the interest of the Bank and the customer, the petitioner called upon the cashier, one Harish Chandra Gautam, and confronted him with the customer's complaint. The cashier admitted his guilt in writing as also the fact that he had not posted the customer's account with credits of deposit made by the latter. The petitioner made the cashier write a letter on 20.07.2022 and it was retained on record. The petitioner was confronted with the situation that called for disciplinary action against the cashier. He informed top officials of the bank, to wit, the Chief Executive Officer, since the petitioner was not empowered to initiate proceedings. The Deputy General Manager of the Bank was also informed over telephone and requested to come over to the Bank at the earliest. When the higher officers of the Bank reached there, the petitioner tendered them the written report against the cashier and also apprised them of the fact that the cashier had been made to pay the sum of Rs.6,32,000/-, that he had apparently embezzled. The petitioner also took into custody deposit receipts from the cashier, Harish Chandra Gautam, which bore the

various dates of deposit by the customer, to wit, 02.07.2022, 07.07.2022 and 15.07.2022. The recovered amount from the cashier was deposited in the relative account on 20.07.2022. The written admission by Harish Chandra Gautam, the cashier about the fact that he had not deposited the customer's money in his bank account, was placed before the Chief Executive Officer when he reached the Bank on 20.07.2022.

5. Notwithstanding the fact that it was the petitioner who acted promptly upon intimation of this fraud, the petitioner says that he became a victim of office politics and framed in the matter, charging him of negligence and vicarious liability. The petitioner was suspended from service pending inquiry, just two days after the incident i.e. on 22.07.2022. An interim inquiry report was submitted by the Deputy General Manager, where the entire allegations were directed at the cashier and the petitioner held responsible for negligence of duty. There is then by the petitioner a whole lot of pleas of fact and law raised to demonstrate the absence of any liability for him, but that is not a matter with which this Court is concerned.

6. A First Information Report was lodged against Harish Chandra Gautam and the petitioner, giving rise to Crime No.424 of 2022, under Sections 420, 409 IPC, P.S. Bhogaon, District Mainpuri. The petitioner was granted anticipatory bail in the matter by this Court vide order dated 31.10.2022 passed in Criminal Misc. Anticipatory Bail Application u/s 438 Cr.P.C. No.10110 of 2022. The Investigating Officer, during the investigation, did not find any complicity for the petitioner and exculpated him. The petitioner, however, remained suspended from service. The petitioner says that he

was the man, who unearthed the embezzlement by the cashier, and yet he was proceeded with against by the respondents in their disciplinary jurisdiction. He was served with two charge-sheets, one dated 31.10.2022 and a supplementary dated 03.01.2023, charging him with embezzlement of funds in collusion with the cashier.

7. It is the petitioner's case that he demanded evidence collected against him and wrote various letters demanding documents. Nothing was provided to the petitioner in order to enable him to submit an effective reply to the charge-sheet. The bank proceeded unilaterally and called upon the petitioner through a show cause notice dated 03.04.2023, asking him to show cause why he may not be held guilty and punished with reversion from the post of Manager Grade-II to Manager Grade-III, and saddled with recovery of a sum of Rs.8,53,480/-, on the charge of embezzling funds in connivance with the cashier. The petitioner answered the show cause notice vide his reply dated 13.04.2023, where again the grievance raised was that necessary documents had not been provided to him. He again pleaded not guilty. On the 15th of April, 2023, the Committee of Management of the Bank passed a resolution calling upon their members to discuss certain points, including the issue of considering the petitioner's reply to the show cause notice with personal opportunity to him.

8. Pursuant to the said resolution, the petitioner was directed to appear before the Committee of Management on 27.04.2023. He appeared before the Committee on the date fixed, and thereafter, submitted his representation on 02.05.2023. It is the petitioner's case that there was a dissent in

the Committee with a divided house of 7 to 6, out of the total 13. Six members spoke for the petitioner. However, on 27.04.2023, a resolution was passed by the Committee of Management to punish the petitioner, on which the impugned order dated 26.07.2023 passed by the Secretary/Chief Executive Officer of the Bank has followed.

9. Heard Mr. Aditya Yadav, learned Counsel for the petitioner, Mr. Ashok Kumar Lal, learned Counsel appearing on behalf of respondent Nos. 3 and 4 and Mr. R. D. Mishra, learned Standing Counsel on behalf of the State.

10. It is submitted by the learned Counsel for the petitioner in the first place that going by the provisions of Regulation 84 of the Regulations, two punishments cannot be awarded to an employee and has placed reliance for the purpose upon the law laid down by a Full Bench of this Court in **Pancham Ram Yadav Vs. U.P. Co-Operative Federation Ltd. and another, 2019(9) ADJ 1 (FB)**. Reliance has also been placed on the authority of a learned Single Judge in **Vijay Bahadur Yadav v. Chairman, U.P. Cooperative Federation Ltd., Lucknow and others, 1992 AWC 1479 All**.

11. The other submission, that is founded on the averments in paragraph No.5 of the supplementary affidavit, is that the establishment bore the burden of proving the charges by producing evidence on their behalf before the Inquiry Officer, including witnesses. It is argued that even if the petitioner was ex parte before the Inquiry Officer, it was the bounden duty of the establishment to produce evidence through a Presenting

Officer, both documentary and oral, to prove the charges. The Inquiry Officer could not assume the charges in the charge-sheet to be true merely because the petitioner had not filed a reply or not appeared before the Inquiry Officer and produced evidence in his defence.

12. Mr. Ashok Kumar Lal and the learned Standing Counsel, on the other hand, have supported the impugned order and said that the entire record of proceedings show that despite extravagant opportunity provided to the petitioner, he chose not to avail the same and kept on harping on an issue of no consequence, to wit, the provision of copies of documents, on the basis of which the case was founded against him by the establishment.

13. This Court has considered the submissions advanced on behalf of the parties by learned Counsel very carefully and perused the record.

14. So far as the first point urged on behalf of the petitioner is concerned, it is necessary to refer to the provisions of Regulation 84 of the Regulations, which read:

“84. Penalties.- (i) Without prejudice to the provisions contained in any other regulation, an employee who commits a breach of duty enjoined upon him or has been convicted for criminal offence or an offence under section 103 of the Act or does anything prohibited by these regulations shall be liable to be punished by any one of the following penalties: -

(a) censure,

(b) with holding of increment,

(c) fine on an employee of Category IV (peon, chaukidar, etc.).

(d) recovery from pay or security deposit to compensate in whole or in part for any pecuniary loss caused to the co-operative society by the employee's conduct,

(e) reduction in rank or grades held substantively by the employee,

(f) removal from service, or

(g) dismissal from service.

(ii) Copy of order of the punishment shall invariably be given to the employee concerned and entry to this effect shall be made in the service record of the employee.

(iii) No penalty except censure shall be imposed unless a show cause notice has been given to the employee and he has either failed to reply within the specified time or his reply has been found to be unsatisfactory by the punishing authority.

(iv) (a) The charge-sheeted employee shall be awarded punishment by the appropriate authority according to the seriousness of the offence:

Provided that no penalty under sub-clause (e), (f) or (g) of clause (i) shall be imposed without recourse to disciplinary proceedings.

(b) No employee shall be removed or dismissed by an authority other than by which he was appointed unless the appointing authority has made prior delegation of such authority to such other person or authority in writing.

(v) The appointing authority or person authorised by him while passing orders for stoppage of increments shall state the period for which it is stopped and whether it shall have effect of postponing future increments or promotion."

15. The question, if it was open to an establishment, the terms and conditions of whose employees are governed by the

Regulations to impose more than one punishment, bearing in mind the provisions of Regulation 84 of the Regulations, received consideration of this Court in **Vijay Bahadur Yadav (supra)**. In **Vijay Bahadur Yadav**, the learned Single Judge of this Court in the context of imposition of three penalties on the employee, whose terms and conditions of service were governed by Regulation 84, held:

"4.

Under the aforesaid Regulation, the punishing authority is authorised to impose any one of the penalties provided there under. Censure, withholding of increment and recovery from pay are the penalties provided under the aforesaid Regulation."

16. There was thereafter much conflict of opinion on the issue, which led to a reference being made to a larger Bench by a Division Bench of this Court. The matter came up before the Full Bench in **Pancham Ram Yadav (supra)**. The questions referred to the Full Bench were:

"1. Whether Regulation 84 of the U.P. Co-operative Societies Employees' Service Regulation 1975 read with Rule 83 of the U.P. Co-operative Federation Limited Karmchari Seva Niyamawali, 1980 services can be harmonized so as to uphold the punishment by way of dismissal of an employee coupled with an order directing recovery of an amount on the charge of a financial embezzlement or misappropriation to be included within the fold of Regulation 84?

2. Whether the law laid down in the case of *Virendra Kumar Gupta v. State of U.P. and others (Supra)* in respect of the true import of Regulation 84 read with Rule 83 aforesaid does not state the correct

position of law as against the reasoning given by the learned Single Judge in paragraph No. 13 in the case of Satya Narain Mishra v. Praband Nideshak and another (Supra) and alternatively as to whether the statement of law in that regard as explained in the judgment of Satya Narain Mishra v. Praband Nideshak and another (Supra) should be accepted as the correct position of law ?"

17. Their Lordships of the Full Bench answered the reference in the following terms:

"42. We, therefore, answer the questions referred to us as under:

(1) Since evident contradiction in the language of Regulation 84 of Regulations, 1975 and Rule 83 of Rules, 1980, the aforesaid provisions cannot be harmonized, hence Regulation 84 of Regulations, 1975 shall prevail over Rule 83 of Rules, 1980 and only one of the punishments prescribed can be imposed as specifically stated in Regulation 84 of Regulations, 1975.

(2) The Division Bench judgment in Virendra Kumar Gupta's case (supra) lays down correct law and otherwise view expressed by learned Single Judge in Satya Narain Mishra's case (supra) as also expressed in the Reference order is not correct position of law."

18. The aforesaid position of the law makes it clear that Regulation 84 of the Regulations limits the power of the establishment to the award of one of the enumerated punishments. The establishment cannot award more than one of the punishments enumerated under Regulation 84 at the same time.

19. In this view of the matter, so far as the first point goes, it has to be answered

in favour of the petitioner, inasmuch as the order impugned awards distinctly two of the enumerated punishments under Regulation 84, to wit, one under clause (d) of Regulation 84(1) and the other under clause (e).

20. The next point, that is urged on behalf of the petitioner, is that even if an employee does not file a written statement to the charge-sheet or appear at the inquiry, it does not entitle the respondents to assume the charges to be true. It is the establishment's burden, particularly, in a case where a major penalty may be the outcome, to produce evidence, both documentary and oral in support of the charges before the Inquiry Officer. A perusal of the supplementary counter affidavit shows that the respondents say that the date, time and place of hearing was fixed by the Inquiry Officer, but the petitioner did not appear. He did not file a reply to the two charge-sheets, including the supplementary. Repeat opportunities were given and documents that he demanded supplied. The fact, however, is not denied that the establishment did not produce any witnesses in support of the charges, though a copy of the inquiry report has not been annexed by either party. A perusal of the averments in the counter affidavit, and more particularly, the impugned order as also the resolution of the Committee of Management dated 27.04.2023, show that the Inquiry Officer submitted an appraisal note on the two charge-sheets, described in Hindi as 'समीक्षात्मक टिप्पणी', holding the petitioner guilty. There is no reference in the resolution of the Committee of Management or the impugned order about the Inquiry Officer having had before him any evidence produced in a formal proceeding on behalf of the establishment

through a Presenting Officer on charges, which in this case on the own showing of the respondents, ran into as many as thirty-six in the first charge-sheet, and another five, in the supplementary. The tenor of the resolution passed by the Committee of Management dated 27.04.2023 and the impugned order clearly show that the Inquiry Officer dealt with the matter through an appraisal note, based on a perusal of the papers annexed to the charge-sheet and handed over by the establishment to him.

21. It is settled for a salutary principle that in an enquiry involving the imposition of a major penalty, it is imperative for the Inquiry Officer, even if he is otherwise an officer of the establishment, to distance himself and convene formal proceedings acting as an impartial arbiter. It is the burden of the establishment to produce evidence before the Inquiry Officer through a Presenting Officer, both documentary and oral, particularly, oral, that is to say, witnesses in support of the charges, where a major penalty may be imposed. It is open to the delinquent at the inquiry to appear and cross-examine witnesses produced by the establishment. After the establishment have produced their evidence, both documentary and oral, and the stage of cross-examination of the establishment's witnesses is over, the delinquent is to be given opportunity to produce evidence in his defence. If the delinquent does not file a reply to the charge-sheet or does not appear before the Inquiry Officer at all, that does not relieve the establishment of their burden to prove the charges. It also does not license the Inquiry Officer to think that the charges set forth in the charge-sheet are proved because the delinquent has not appeared to explain himself. The Inquiry Officer has to direct the establishment to

produce evidence and cannot hold the delinquent guilty by default. The delinquent can also not be held guilty by the Inquiry Officer by merely going through the charge-sheet and the papers annexed therewith. May not be the formality of evidence, as done in a Court of law, where procedure is regulated by the Indian Evidence Act, basic fairness in procedure requires that the establishment must produce both documentary evidence and witnesses in the first instance to establish the truth of the charges. This is quite independent of the fact, whether the delinquent defends himself or abstains from the beginning or at any later stage of the inquiry. In this regard, reference may be made to the decision of the Supreme Court in **State of U.P. v. T.P. Lal Srivastava, (1996) 10 SCC 702**, where it has been held by their Lordships:

“4. This appeal by special leave arises from the judgment of the Allahabad High Court made on 15-3-1993 in Writ Petition No. 12480 of 1987. The admitted position is that while the respondent was working as a Senior Marketing Inspector, a charge-sheet was served on him on 23-11-1984 calling upon him to explain the charges for committing gross irregularities in the movement of wheat outside the State of U.P. Instead of submitting reply to the charge-sheet, he went on dilly-dallying in submitting the reply. Several letters addressed to the respondent proved ineffective. Resultantly, the appellants took a decision on 26-6-1987 holding that the respondent was found guilty of misappropriation. Consequently, he came to be dismissed from service. The respondent challenged the same in the writ petition. The High Court has set aside the order in the impugned order holding that the documents have not been supplied to

the respondent and, therefore, the action was vitiated by error of law. We do not find any justification in the view taken by the High Court; the substratum of the result is that the appellants have not conducted any enquiry though the respondent had been avoiding to give the reply. Since the respondent had avoided to submit the reply, he has forgone his right to submit his reply. Nonetheless, the appellants are not absolved of the duty to hold an ex parte enquiry to find out whether or not the charge has been proved. In the event of the Enquiry Officer finding that the charge is proved, he would submit his report to the disciplinary authority. The disciplinary authority should communicate the copy of the enquiry report to the respondent and seek an explanation for the proposed action thereon. If the respondent submits any explanation, the same may be taken into consideration and appropriate order may be passed according to law. Until then, the respondent must be deemed to be under suspension.”

22. So far as the salutary procedure governing inquiries, where a major penalty may be imposed is concerned, the law that it is the establishment's burden to prove the charges in the first instance not only by formally producing evidence before the Inquiry Officer through a Presenting Officer, but also to examine witnesses imperatively, is well settled in view of the authority of the Supreme Court in **State of Uttar Pradesh and others v. Saroj Kumar Sinha**, (2010) 2 SCC 772, **Roop Singh Negi v. Punjab National Bank and others**, (2009) 2 SCC 570, **State of Uttaranchal and others v. Kharak Singh**, (2008) 8 SCC 236 and the Bench decisions of this Court in **State of U.P. and another v. Kishori Lal and another**, 2018 (9) ADJ 397 (DB)(LB), **Smt. Karuna Jaiswal v. State of U.P.**, 2018 (9) ADJ 107 (DB)(LB) and **State of U.P. v.**

Aditya Prasad Srivastava and another, 2017 (2) ADJ 554 (DB)(LB).

23. In the result, this petition succeeds and is **allowed**. The impugned order dated 26.07.2023 passed by the Secretary/ Chief Executive Officer, Mainpuri District Cooperative Bank Ltd., Mainpuri and the resolution of the Committee of Management dated 27.04.2023 are hereby **quashed**. It will be open to the respondents, if they so elect, to proceed against the petitioner afresh from the stage of charge-sheet, granting due opportunity to him and bearing in mind the guidance in this judgment about the procedure to hold an inquiry. It is further ordered that if the respondents elect to initiate fresh proceedings, not more than one of the penalties, enumerated under Regulation 84 of the Regulations, shall be imposed. It is also ordered that in case of fresh proceedings being taken, no punishment higher than that which was imposed by the impugned order, since quashed by this judgment, shall be awarded.

24. There shall be no order to costs.

(2024) 4 ILRA 384
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.03.2023

BEFORE

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

Writ A No. 13570 of 2023

Manohar Singh	...Petitioner
Versus	
State of U.P. & Ors.	...Respondents

Counsel for the Petitioner:

Sri Abhishek Singh, Sri Ifran Raza Khan, Sri Niyaz Ahmad Khan (Sr. Advocate)

Counsel for the Respondents:

C.S.C., Sri Abhishek Srivastava, Sri Manu Ghildyal

Civil Law - Uttar Pradesh Power Corporation Limited – Disciplinary Proceedings – Principles of Natural Justice – Departmental Inquiry – Medical Condition – Suspension and Dismissal – Embezzlement Allegations – Right to Fair Hearing

The petitioner, Manohar Singh, a Technician Grade-II/Cashier with Dakshinanchal Vidyut Vitran Nigam Limited, challenged his dismissal from service and recovery order dated 27.04.2022 by the Managing Director and the appellate order dated 16.05.2023 by the Chairman, Uttar Pradesh Power Corporation Limited, following allegations of embezzlement. The petitioner, bedridden since 2018 due to a brain haemorrhage and paralysis, argued that the disciplinary inquiry violated natural justice as no witnesses were examined, and his medical condition was not considered, rendering him unable to defend himself. The respondents contended that the inquiry followed rules and the charges were serious. **Held:** (1) The petition was allowed, and the impugned orders dated 27.04.2022 and 16.05.2023 were quashed. (2) The inquiry was vitiated due to the respondents' failure to ascertain the petitioner's claimed paralytic condition, which, if true, rendered him unable to participate in the inquiry, violating principles of natural justice. (3) No formal inquiry was conducted, as the establishment failed to produce evidence or examine witnesses to prove the charges, a mandatory requirement for major penalties, as per *St. of Uttar Pradesh Vs Saroj Kumar Sinha* and other precedents. (4) The respondents were directed to constitute a Medical Board to ascertain the petitioner's medical condition before resuming any fresh inquiry, which can only proceed if the petitioner is medically fit. (5) If the petitioner is found unfit or no fresh inquiry is initiated, consequences of quashing the impugned orders shall follow, with the petitioner's case governed by relevant service rules for medical leave or disability.

List of Cases cited:

1. *St. of Uttar Pradesh & ors. Vs Saroj Kumar Sinha*, (2010) 2 SCC 772;
2. *Roop Singh Negi Vs Punjab National Bank & ors.*, (2009) 2 SCC 570;
3. *St. of Uttaranchal & ors. Vs Kharak Singh*, (2008) 8 SCC 236;
4. *St. of U.P. & anr. Vs Kishori Lal & anr.*, 2018 (9) ADJ 397 (DB)(LB); *Smt. Karuna Jaiswal Vs St. of U.P.*, 2018 (9) ADJ 107 (DB)(LB);
5. *St. of U.P. Vs Aditya Prasad Srivastava & anr.*, 2017 (2) ADJ 554 (DB)(LB);
6. *Syed Amirul Haq Vs St. of U.P. & ors.*, 2016 (2) ADJ 107 (LB);
7. *Anil Kumar @ Anil Kumar Lakada Vs St. of Bihar & ors.*, 2022 (1) BLJ 558.

(Delivered by Hon'ble J.J. Munir, J.)

1. Manohar Singh, the petitioner was a Technician Grade-II, working with the Dakshinanchal Vidyut Vitran Nigam Limited and posted in the establishment of the Executive Engineer, Electricity Distribution Division-VI, Dakshinanchal Vidyut Vitran Nigam Limited, Aligarh. He was initially appointed on 30.07.1999 as a Coolie with the Electricity Distribution Division, Dakshinanchal Vidyut Vitran Nigam Limited, Aligarh, after following the procedure prescribed. In the year 2010, Manohar Singh was promoted to the position of a Technician Grade-II/ Cashier in accordance with rules. He says that he has been working with devotion and sincerity, appreciated by his superiors. For the present, he was posted as Technician Grade-II/ Cashier at the 33/11 KV Electricity Substation, Akarabad, Aligarh. His service record, until the event subject matter of this petition, is said to be unblemished.

2. Manohar Singh says that while posted at the Electricity Distribution

Division-VI, Aligarh, on the 8th of March, 2010, he suffered from some heart ailment and took his treatment at the Metro Hospital and Heart Institute, New Delhi. He underwent a surgery. Once fit, he joined his duties. Much later, on 10.01.2018, when he was transferred to the Electricity Distribution Division-VI, Aligarh, he suffered another setback to his health. On the 12th of January, 2018, he had a brain haemorrhage that led to paralysis in the right side of his body. He was again admitted to the care of the Metro Hospital and Multi-Speciality Wing, Sector 11, NOIDA. He is confined to bed ever since.

3. The petitioner was transferred once more to the Electricity Distribution Division, 33/11 KV Substation, Akarabad, Aligarh in the month of January, 2020. He says that there, a certain cashier, Dhanesh Singh Yadav, an Assistant Accountant Ram Prakash, besides a Junior Engineer and an Executive Engineer, in collusion with each other, made an ID of the petitioner's for revenue collection. After suffering paralysis, the petitioner is unable to move anywhere. This gave opportunity to Dhanesh Singh, Ram Prakash, the Junior Engineer and the Executive Engineer to collect revenues under the one-time settlement scheme, utilising the petitioner's ID. Later on, they came up with allegations of embezzlement against the petitioner, on the basis of which, the Executive Engineer passed an order of suspension pending inquiry against him on 18.05.2021.

4. It is the petitioner's case that during this period of time, on the same allegations as those subject matter of the contemplated departmental inquiry, at that stage, a First Information Report was also lodged against him on 23.05.2021. The petitioner says that he is bedridden since the year 2018 till the

date he instituted this petition. He cannot speak, move or take care of his daily routine. He has not discharged his duties since the year 2018. It is this non-ambulatory condition of the petitioner, which has given opportunity to Dhanesh Yadav, the Cashier, the Assistant Accountant Ram Prakash, the Junior Engineer and the Executive Engineer to perpetrate embezzlement of revenue collections belonging to the Dakshinanchal Vidyut Vitran Nigam Limited (for short, 'the Distribution Corporation'). There is some reference to the police case, regarding which investigation seems to have been carried on while the petitioner lay in a vegetative state, as he says, but that is not of much relevance for the purpose of the present writ petition.

5. The petitioner challenged his suspension from service by means of Writ-A No.15568 of 2021, which was disposed of with a direction to the Disciplinary Authority, the Executive Engineer, Electricity Distribution Division-VI of the Distribution Corporation to conclude the pending disciplinary proceedings against the petitioner within a period of three months from the date of production of a certified copy of this Court's order. The petitioner was served with a charge sheet, to which he submitted a reply.

6. It is the petitioner's case that without considering his reply or affording him any opportunity of hearing, the Disciplinary Authority, to wit, the Managing Director of the Distribution Corporation, passed an order dated 27.04.2022, dismissing the petitioner from service and further ordering recovery of a sum of 50,44,673/-. The petitioner appealed the order to the Chairman of the Uttar Pradesh Power Corporation Limited,

Lucknow (for short, 'the Corporation'). The departmental appeal was not decided, forcing the petitioner to move this Court again through Writ-A No.11303 of 2022. This Court vide order dated 03.08.2022, directed the appeal to be decided within a period of two months of the date of production of a certified copy of this Court's order. The petitioner's appeal was dismissed by the Appellate Authority vide order dated 16.05.2023.

7. Aggrieved, this writ petition has been instituted.

8. A counter affidavit has been filed on behalf of respondent No.4 and another on the behalf respondent No.2, that is to say, the Executive Engineer, Electricity Distribution Division-VI, Dakshinanchal Vidyut Vitran Nigam Limited, Aligarh and the Corporation. A further counter affidavit on behalf of respondent No.4 dated 17.10.2023 was filed in answer to the amended pleas in the writ petition. A supplementary counter affidavit was filed on behalf of respondent No.2 on 15.10.2023. The petitioner filed a rejoinder affidavit. This petition was admitted to hearing on 18.10.2023 and heard forthwith. Judgment was reserved.

9. Heard Mr. Niyaz Ahmad Khan, learned Senior Advocate assisted by Mr. Abhishek Singh, learned Counsel for the petitioner, Mr. Abhishek Srivastava, learned Counsel for respondent No.2, Mr. Manu Ghildyal, learned Counsel for respondent Nos.3 and 4 and Ms. Amrita Singh, learned Additional Chief Standing Counsel on behalf of respondent No.1.

10. The petitioner has raised two points in support of his petition. The first is that during the departmental inquiry, no

witness was examined on behalf of the establishment to prove the charges, though the matter involved the imposition of a major penalty. It is the burden of the establishment, according to the learned Counsel for the petitioner, to prove the charges by their own evidence *aliunde*. They cannot rely on the lacunae in the employee's defence to hold the charges proved. The learned Senior Advocate for the petitioner has extensively argued that in any departmental inquiry, where a major penalty is likely to be imposed, if the charges are proved, it is the bounden duty of the Inquiry Officer to convene himself as an Inquiry Tribunal, an impartial arbiter, distanced from the employers' establishment. The charges then have to be proved by the establishment by leading evidence, both documentary and oral in the first instance. The examination of witnesses is essential in case where a major penalty is involved. After the employers have led their evidence through a Presenting Officer, it is the delinquent's right to cross-examine the establishment's witnesses. After this stage is over, the delinquent/ employee is to be given opportunity to produce evidence in his defence, both documentary and oral. It is submitted that nothing of this kind has been done and the Inquiry Officer has submitted a report, treating the charges to be proof of themselves.

11. The other submission, that has been made with much emphasis, is that since the year 2018, the petitioner, who had suffered a brain haemorrhage, is paralysed. In that condition, apart from the fact that the charge against him of embezzling funds of the Distribution Corporation, seems incredible, the petitioner was utterly unable to defend himself. It is pointed out that the respondents did refer the petitioner for his medical examination by a panel of doctors,

that may include a Neurologist and submit a report regarding his medical condition. A reference was made by the Chief Medical Officer, Aligarh at the instance of the respondents, to the Sanjay Gandhi Post Graduate Institute of Medical Sciences, Lucknow (for short, 'the SGPGI'). It is pointed out that there is on record a letter dated 01.04.2023, addressed to the Chief Medical Officer, Aligarh by the Medical Superintendent, SGPGI, saying that the institute constitutes Medical Board for its own employees only, and also does so for others, on orders of Courts, declining the respondents' request. It is pointed out further by the learned Senior Advocate for the petitioner that nothing was done thereafter by the respondents to ascertain the petitioner's medical condition, whereas he was, during the course of inquiry, lying bedridden, unable to move or even sign.

12. Attention of this Court is also drawn by the learned Senior Advocate to an application dated 01.09.2022 moved by the petitioner under his thumb impression, because he could not sign. It is signed by his wife, saying that he has suffered a brain stroke and paralysis. He is lying in a vegetative state. This application seems to have been moved while the petitioner's appeal was pending. A copy of this application is on record as Annexure No.7 to the writ petition. There is also on record a slew of medical treatment papers from the Metro Hospital and Heart Institute, New Delhi, which show that the petitioner was in a seriously impaired condition of health. The submission, on the foot of these facts, is that the entire disciplinary proceedings, that were undertaken while the petitioner was bedridden, constitute gross violation of the principles of natural justice, so much so

that the inquiry against the petitioner or the orders of punishment made, must be held bad on this count alone.

13. Mr. Manu Ghildyal and Mr. Abhishek Srivastava appearing on behalf of the respondents have refuted the petitioner's submission and said that the charges against him are very serious, involving embezzlement of huge funds of the Distribution Corporation. It is argued by them that the inquiry proceedings were held in accordance with rules, giving full opportunity to the petitioner. They submit that this is a case where the petitioner is not entitled to invoke this Court's equitable jurisdiction under Article 226 of the Constitution.

14. We have carefully considered the submissions advanced on behalf of both parties and perused the record. There is a categorical averment in paragraph No.14 of the writ petition that the petitioner, on account of suffering a brain stroke, is bedridden since the year 2018. He cannot speak, move or carry on his daily routine. It is this disability of the petitioner's that has led four of the employees, including the Executive Engineer, to perpetrate a fraud misusing his ID. As remarked earlier, we are not concerned with the petitioner's defence on this score. However, the fact that the petitioner is bedridden since the year 2018, asserted in paragraph No.14 of the writ petition, has been denied rather unsatisfactorily in paragraphs Nos.13 and 14 of the counter affidavit filed on behalf of respondent No.4, where it is said that the petitioner was given a medical fitness certificate and he signed the attendance register, which would show that it is misleading to say that the petitioner is unable to move anywhere or carry on his daily routine. This denial is far from

satisfactory. The letter of reference by the Chief Medical Officer, Aligarh at the instance of the respondents to constitute a Medical Board in order to undertake a medical examination of the petitioner, addressed to the SGPGI, Lucknow shows that, may be later in the day, the respondents did harbour doubts, regarding the petitioner's health and medical condition, which they wanted ascertained.

15. The kind of medical condition, that the petitioner has described in paragraph No.14 of the writ petition, did not require a Medical Board to broadly ascertain the truth of it. If a man, facing disciplinary proceedings, says that he is bedridden, non-ambulatory and almost in a vegetative state, it is incumbent upon the Inquiry Officer to go over to the place, wherever the delinquent is, and see for himself the physical condition that the employee is in. It is true that the Inquiry Officer, not being a doctor, cannot evaluate the delinquent's medical condition or his claimed ailment, but he can certainly ascertain from a look at the person, if indeed he is in an utterly paralysed state, almost vegetative, as the petitioner claims. He may straightaway seek medical assistance to ascertain the fact if the delinquent is truly paralysed and non-ambulatory.

16. Here, the Inquiry Officer and the respondents have been utterly insensitive to this issue. They have failed to discharge their obligation to ascertain, in the face of repeat information and applications made on behalf of the petitioner, that he was non-ambulatory, to ascertain the fact physically, by visiting the delinquent. They have also not taken any steps to ascertain the veracity of the petitioner's claim that he was in a paralysed state, unable to move. The

condition described by the petitioner is one which did not require a Medical Board from an institution like the SGPGI, Lucknow or the AIIMS, New Delhi to ascertain its truth. The Chief Medical Officer could have been detailed to the task or asked to constitute a Medical Board, who could have medically evaluated the petitioner. This is quite apart from the Inquiry Officer's own obligation in the face of such allegations to find out if the delinquent, that is to say, the petitioner here, was indeed a paralysed man. If he was indeed apparently a paralysed man, who could not move at all, the inquiry that the Inquiry Officer conducted or the orders that the Disciplinary and the Appellate Authorities have passed, would all be nullity.

17. This is quite apart from the issue about the merits of the petitioner's defence, founded on his allegation of being paralysed since the year 2018, which would if proved, may be a complete answer to the charges against him. That aspect of the matter, this Court is not inclined to go into. But, so far as the issue that neither the Inquiry Officer nor the establishment took the slightest pain to ascertain if indeed the man they were proceeding against in a departmental inquiry was paralysed, utterly unable to defend himself, is concerned, must be answered for the petitioner. We think that it was incumbent upon the respondents, including the Inquiry Officer, to inquire into the fact, before commencing disciplinary proceedings, if indeed on the date they commenced inquiry and concluded or passed subsequent orders, the petitioner was a paralysed man, non-ambulatory and unable to do anything for himself. There is no evidence to show, except an inchoate effort on the respondents' part to ascertain the state of

the petitioner's health, which too came at a very late stage after the inquiry was over. For the respondents' failure to ascertain the petitioner's state of health, on the day they issued a charge sheet to him and thereafter when the inquiry was scheduled or held, we think the proceedings of the inquiry and the resultant orders must be held bad.

18. In this regard, though not on facts as drastic as those alleged here, about the delinquent's medical condition, and on a different point, about the validity of the charge regarding unauthorized absence, where the employee claimed to have suffered a paralytic attack, it was held by this Court in **Syed Amirul Haq v. State of U.P. and others, 2016 (2) ADJ 107 (LB)**:

“13. In the instant case, on perusal of the averments made in the counter-affidavit, it comes out that no reason has been indicated as to why the medical certificate issued by the doctor was not accepted by the authorities. There is no whisper as to how the authorities came to the conclusion that the medical certificates were fabricated one. The Inquiry Officer/Disciplinary Authority had neither summoned the doctor nor otherwise made an efforts to verify the genuineness of the medical certificate. Thus the Inquiry Officer/disciplinary authority has violated the principle of natural justice. A perusal of relevant record reveals that it is the definite stand of the petitioner before the Inquiry Officer to summon the three doctors who had treated him to prove the factum of his illness and the genuineness of the medical certificates submitted by him but the Inquiry Officer did not summon the aforesaid witnesses causing serious prejudice to the petitioner. No documents have been brought on record on the basis of which genuineness of the Medical

Certificates produced by the petitioner were doubted by the Inquiry Officer and believed by other authorities. Without summoning and examining the Doctor, the conclusion of the authorities that the Medical certificates are not genuine documents, is wholly erroneous and unjustified. No finding could have been recorded by the Inquiry Officer with regard to certificates or the factum of illness of the petitioner without summoning the doctors, and denial by them with regard to illness and treatment given to the petitioner by them. As regard the finding recorded by the Inquiry Officer that the petitioner did not inform the authorities of his illness, the record which have been produced by the respondents, shows that there are various applications and medical certificates available on the record submitted by the petitioner with regard to grant of leave and extension of leave. The different doctors like, In-charge Medical Officer, State Unani Hospital, Musafirkhana, Sultanpur and Medical Officer GHMC and Hospital, Ghazipur had diagnosed the petitioner as a patient of paralysis on right side of the body. Apart from above, the petitioner had attacked the impugned orders on the ground of various defects in the disciplinary proceedings.”

19. Now, the decision in **Syed Amirul Haq (supra)** takes the medical disability on account of the paralytic attacks, two in number, suffered by the employee in that case as a defence that had to be examined seriously to the charge of unauthorized absence from duty, which may also be one of the aspects here to be examined. But, the more important part is that the principle is acknowledged that if an employee, facing disciplinary proceedings, says that he is bedridden or non-ambulatory with a serious medical condition, it is the

duty of the establishment to ascertain his condition through their own resources, including doctors of their own or summoning the doctor, who had certified the ailment, to verify the genuineness of the employee's medical condition. Quite apart from the fact, if the medical condition of the petitioner claimed, upon due inquiry into its veracity and resultant affirmation, which is one of the possibilities, may lead to his exculpation on the charge, which is the Inquiry Officer's province, it would certainly vitiate the inquiry on grounds of violation of principles of natural justice.

20. To like effect is the holding in a Bench decision of the Patna High Court in **Anil Kumar @ Anil Kumar Lakada v. State of Bihar and others, 2022 (1) BLJ 558**, where it was observed:

“14. However, when at the appellate and memorial stage, the appellant had specifically raised issues, both on facts as well as in law and had also enclosed supporting documents, especially with regard to his illness, giving doctors' certificates, in the considered opinion of the Court, the same were required to be looked into as the purpose of giving a person a chance to file an appeal/memorial is that there is no miscarriage of justice and if there has been any omission at the previous stage, the superior authorities are able to correct such mistake. The State being a model employer and the purpose and the spirit of law being that no injustice should be caused to anyone, required, at the very least, consideration of the issues raised by the appellant, both factual as well as legal. In the present case, the issue that there was no Presenting Officer appointed and the appellant, in his Memo of Appeal, giving specific details of the circular of the Director General of Police, by which all

departmental proceedings had been negated only on the ground that there was no Presenting Officer appointed by the Department, has not been dealt with. Furthermore, the issue that the certificates given by the doctors, just because they were not from an authorized hospital, is, in our opinion, a non-est ground, for every doctor who has got a licence to practice, being registered with the Medical Council of India, is supposed to be, in law, competent as a professional to give such certificate with regard to the medical condition of a person. Thus, the onus was on the authorities to negate those reports on grounds of them being, for instance, collusive or forged and fabricated. This has, admittedly, not been done.....”

21. The other issue, if the inquiry is otherwise valid because the establishment did not produce any evidence in a formally convened inquiry, must now be considered. It is a salutary principle that in any departmental inquiry, where there is likelihood of the imposition of a major penalty, it is imperative for the Inquiry Officer to convene a formal inquiry, where he acts as an impartial arbiter. It is the establishment's burden to prove the charges against the delinquent in the first instance by producing before the Inquiry Officer evidence, both documentary and oral. It is also imperative to examine witnesses, if the penalty is likely to be a major one. The charges cannot be held proved because the employee has not defended himself or proved his defence. The Inquiry Officer cannot assume the charges to be true, because they figure in the charge sheet. The Inquiry Officer also cannot hold the charges proved by perusing the charge sheet and the delinquent's reply together with papers supplied by the establishment in support of the charge sheet. It is for the

establishment to prove the charges by producing evidence. Once evidence is produced before the Inquiry Officer on behalf of the establishment, which would include witnesses, the delinquent is entitled to cross-examine witnesses. After the establishment have led all their evidence, the delinquent must be called upon to produce evidence in his defence. For his failure to produce evidence, the charges cannot be held proved. These must be held proved by the establishment's evidence, may be by standards of preponderant probability.

22. Here, this Court does not find that any formal inquiry was convened or the establishment led evidence to prove the charges. Admittedly, no witnesses were examined. That witnesses were not examined, is a fact admitted in the counter affidavit dated 17.10.2023, filed on behalf of respondent No.4, in answer to the amended pleas. In paragraph No.5 of this affidavit, it is averred:

“5. That, however, from perusal of the record it is evident that no witness was proposed either in the charge sheet or any witness was named by the petitioner to examine during the departmental enquiry, therefore, no witness was examined to prove the charges during the course of departmental enquiry in the present case. Further to remove all these anomalies an Office Memorandum dated 14.8.23 has been issued by the Corporation wherein it has been directed to all the authorities of the Corporation and the discoms that they should strictly adhere to the provisions of Rule 7 of the Regulations 2020 and during the departmental enquiry they must first examine the officers on behalf of the Corporation to prove the charges and only thereafter they should provide opportunity

to the employees to either cross examine them or to produce any witness on behalf of his defense.”

23. The said averment shows that the respondents have admitted their lapse in not examining witnesses and for the future rectified course as well. That would not redeem the respondents of the flaw that has crept into the impugned proceedings against the petitioner, vitiating them beyond the charge sheet. The principles that in a case involving the imposition of a major penalty, it is imperative for the employer to produce evidence in support of the charges before the Inquiry Officer, which must include oral evidence, to wit, witnesses, are salutary and well established. In this regard, reference may be made to the decisions of the Supreme Court in **State of Uttar Pradesh and others v. Saroj Kumar Sinha**, (2010) 2 SCC 772, **Roop Singh Negi v. Punjab National Bank and others**, (2009) 2 SCC 570, **State of Uttaranchal and others v. Kharak Singh**, (2008) 8 SCC 236 and the Bench decisions of this Court in **State of U.P. and another v. Kishori Lal and another**, 2018 (9) ADJ 397 (DB)(LB), **Smt. Karuna Jaiswal v. State of U.P.**, 2018 (9) ADJ 107 (DB)(LB) and **State of U.P. v. Aditya Prasad Srivastava and another**, 2017 (2) ADJ 554 (DB)(LB).

24. This case is rather unusual and does present some difficulty for the respondents, but these facts would not lead this Court to dither about what must be done and what must follow.

25. In the result, this petition succeeds and is **allowed**. The impugned order dated 16.05.2023 passed by the Chairman of the Corporation and the order dated 27.04.2022 passed by the Managing Director of the

Distribution Corporation are hereby **quashed**. The respondents would, of course, be at liberty to proceed against the petitioner afresh from the stage of issue of the charge sheet against him, strictly in the manner indicated in this judgment and the law. But, before going ahead with the proceedings of inquiry against the petitioner, the respondents will immediately get a Medical Board constituted by the Chief Medical Officer of the district, wherever the petitioner is currently staying. The members of the Medical Board shall proceed to the petitioner's residence and ascertain his medical condition, particularly, if he is paralysed, non-ambulatory and unable to communicate. If that be his medical condition, fresh proceedings of inquiry will not be taken against him, until the petitioner is in a medically certified fit condition to understand the consequences of the charges against him and face the inquiry. If, however, the petitioner is found medically fit, the Medical Board will examine all his certificates and medical history, and inquiry proceedings, if elected to be pursued, would be resumed as above directed, taking into account the opinion about his medical condition during the relevant period of time. In the event the respondents do not elect to resume fresh proceedings against the petitioner, or his subsisting medical condition does not permit the resumption of such proceedings, in either case the consequences of quashing of the orders impugned shall follow. It is clarified that if the petitioner be irredeemably indisposed, he would be dealt with according to the relevant service rules as to medical leave, medically incurred disability by employees, as the case may be.

26. There shall be no order as to costs.

(2024) 4 ILRA 393
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.03.2024

BEFORE

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

Writ A No. 13605 of 2023

Rajesh Kumar Yadav **...Petitioner**
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:
Sri Rajpal Singh

Counsel for the Respondents:
C.S.C.

Civil Law - U.P. Municipalities Act, 1916 – Section 34 – Constitution of India, 1950 – Part IX-A – District Magistrate's Authority – Local Self-Governance – Service Matters – Medical Leave – Salary Disbursement – Principles of Natural Justice

The petitioner, Rajesh Kumar Yadav, a Zonal Sanitary Officer, challenged the District Magistrate, Hapur's order dated 06.04.2022, stopping his salary for March and April 2022, alleging unauthorized absence during medical leave for a spinal condition and cataract surgery. The petitioner sought quashing of the order, release of withheld salary, and forwarding of his medical leave applications to the Commissioner, Meerut Division. The District Magistrate claimed general administrative oversight, citing government orders and the U.P. Public Health and Epidemic Diseases Control Act, 2020. **Held:** (1) The petition was allowed with costs, and the District Magistrate's order dated 06.04.2022 was quashed as ultra vires. (2) The District Magistrate lacked jurisdiction under Section 34 of the U.P. Municipalities Act, 1916, to interfere in the Nagar Palika Parishad's service matters, as such powers are limited to prohibiting resolutions causing public obstruction, injury, or danger to life, health, safety, or public order. (3) The

petitioner's absence was supported by medical evidence, negating unauthorized absence claims. (4) The District Magistrate's actions violated principles of natural justice by failing to consider the petitioner's medical condition. (5) The autonomy of local self-governance bodies under Part IX-A of the Constitution was emphasized, restricting executive interference. (6) A mandamus was issued to the Executive Officer, Nagar Palika Parishad, Hapur, to release the petitioner's withheld salary with 6% interest and forward medical leave papers to the Commissioner, Meerut Division, for sanction within 15 days.

List of Cases cited:

1. Vimlesh Lal Vs St. of U.P. & ors., 2023:AHC:242348;
2. President, Nagar Palika Parishad, Sultanpur, Babita Jaiswal Vs St. of U.P., AIR OnLine 2019 All 2407;
3. Subodh Kumar Gupta & ors. Vs St. of U.P. through Principal Secretary & ors., 2016 SCC OnLine All 1358.

(Delivered by Hon'ble J.J. Munir, J.)

1. The District Magistrate of the district is not the Master of all that he/she surveys. But, this case, in the company of a variety of contemporary experience, tends to show that the District Magistrate acts that way. In a government, functioning under the Constitution and the laws, there is a division and consequential limitation on authority, which in this case seems not to be there on the functioning of the District Magistrate of Hapur. The District Magistrate, seems to have acted in the way he has done and a successor in office, despite being called upon to justify the exercise of an *ultra vires* authority, has attempted to support it because, conventionally not only the ordinary citizen, but independent officers of other departments of the Government or even

independent bodies of local self-governance established by the Constitution, pay habitual obedience to the District Magistrate. This phenomena is a surviving relic of the colonial era when the District Magistrate and the Collector was the Government's representative at the district headquarters. This ought not to be so any longer.

2. The petitioner, Rajesh Kumar Yadav, is a Zonal Sanitary Officer, currently posted at the Nagar Nigam, Bareilly. He was earlier posted at the Nagar Palika Parishad, Hapur as the Chief Sanitary and Food Inspector until 27.07.2022. While posted at Hapur on the 4th of May, 2022, he was at his residence. He experienced dizziness while using the restroom and collapsed. He was taken to Dr. Jeevottam Narang and the doctor advised an MRI for his spine. The MRI was done and a perusal of the MRI report led the doctor to advise the petitioner to take bed rest. The MRI report dated 04.05.2022 from the Dev Nandini Imaging Centre records the following impressions:

“IMPRESSION

- Broad-based posterior disc bulge at L4-L5 level causing Indentation of the thecal sac bilateral neural foraminal narrowing.
- Mild broad-based disc bulge at L1-L2 and L5-S1 levels without significant neural compression.”

3. The petitioner asserts that he was next examined at a higher centre, to wit, the Indian Spinal Injuries Centre, Vasant Kunj, New Delhi and advised bed rest. In this regard, a letter dated 09.06.2022 was addressed by the petitioner to the Executive Officer, Nagar Palika Parishad Hapur, District Hapur (for short, 'the Nagar

Palika), with a request to sanction medical leave for him during the period 09.06.2022 to 23.06.2022. During this period, the petitioner underwent medical treatment and sent applications to the Executive Officer of the Nagar Palika, seeking an extension of his leave up to 26.07.2022. A copy of the application dated 12.07.2022 sent by speed post as well as email to the Executive Officer are on record.

4. On the 27th of July, 2022, the petitioner was once again examined by Dr. Aparna Gupta of the Indian Spinal Injuries Centre, Vasant Kunj, New Delhi, who certified him fit. He was advised to take regular and proper treatment. The petitioner went to his office at the Nagar Palika and submitted a joining report dated 27.07.2022 addressed to the Executive Officer.

5. On the 30th of June, 2022, the Government issued a transfer list for employees, who are members of the Uttar Pradesh Palika (Centralized) Health Service, of which the petitioner is a member. The petitioner's name was shown at serial No.4. He was transferred from the Nagar Palika Parishad, Hapur to the Nagar Nigam, Bareilly. The petitioner was relieved on 30.06.2022 to join his new posting at Bareilly. On the 29th of July, 2022, the petitioner joined the office of the Nagar Nigam, Bareilly, as a Zonal Sanitary Officer, a promotion posting. The petitioner then addressed a memo dated 12.09.2022 to the Executive Officer of the Nagar Palika, Hapur, seeking sanction of medical leave for the period 1st March, 2022 to 10th May, 2022, so that his salary for the relevant period could be drawn. The petitioner says that he personally met the Executive Officer of the Nagar Palika and requested him to forward all requisite papers to the Commissioner of the Division

for approval of his medical leave. The Executive Officer is said to have extended assurance in this regard to the petitioner orally.

6. On the 3rd of November, 2022, the petitioner made a representation to the Executive Officer of the Nagar Palika, requesting him to send all requisite papers to the Divisional Commissioner for approval of his medical leave, a copy whereof was addressed to the District Magistrate, Hapur, whom the petitioner himself calls a higher authority. The petitioner, while posted at the Nagar Palika, on the 11th of March, 2022 was doing some work on a computer, when he experienced sudden pain in his eyes and his vision got blurred. It was then that on 11th of March 2022, he was rushed to the Eye Hospital, Meerut, where the doctor advised him an eye surgery. It was performed on 14th of March, 2022. The petitioner informed the Executive Officer of the Nagar Palika in this regard. A copy of the petitioner's application dated 14.03.2022, addressed to the Executive Officer of the Nagar Palika with a copy endorsed to the Chairman, seeking sanction of medical leave on account of the eye surgery from 14.03.2022 to 19.03.2022 is on record. It shows that the petitioner underwent a surgical procedure at the Roop Netralaya, Meerut. Later on, through an application of 6th April, 2022, addressed to the Executive Officer of the Nagar Palika, the petitioner sought extension of medical leave until 14th April, 2022. There are medical documents annexed to these two applications. In fact, the second one, seems to show that the petitioner underwent a surgery for his cataract in the right eye and advised rest for a month from 14.03.2022 to 14.04.2022. A medical certificate in this regard dated 15.04.2022 issued by Dr.

Roop of Acura Vision Clinics, Meerut is on record at Page 67 of the paper-book.

7. On the 15th of April, 2022, the petitioner was declared fit to join his duties by the Eye Hospital, where he was treated. On the 16th of April, 2022, the petitioner moved an application to the Executive Officer for sanction of medical leave from 14.03.2022 to 15.04.2022. This leave was sanctioned to the petitioner in terms of a letter of the Chairman of the Nagar Palika dated 14.04.2022 and forwarded to the Executive Officer to take follow-up steps.

8. On the 6th of April, 2022, while the petitioner was away on medical leave, the District Magistrate, Hapur, visited the office of the Nagar Palika and issued a letter dated 06.04.2022 saying that the petitioner was absent. It was also said that there was no information about his absence from duty available with the Nagar Palika. A show cause notice was addressed by the District Magistrate directly to the petitioner, an employee of the Nagar Palika, where he was asked, on account of his unauthorized absence, to show cause within three days why for his act in neglecting government work, appropriate action be not recommended against him to the Department of Urban Development. Attached to this show cause notice, which is on record as Annexure No.13, is a report by the District Magistrate, also dated 06.04.2022, which shows that he inspected the Establishment Counter, the Water Works Department and the Health Department of the Nagar Palika. He undertook an inspection of all these Departments, as if he were the supervising authority of the Nagar Palika. This show cause notice and the report was issued/

drawn up by an officer, going by the name Anuj Singh, the then incumbent District Magistrate of Hapur. This inspection report dated 06.04.2022 carries an order by the District Magistrate to the effect that the petitioner's salary shall not be drawn. It is this direction by the District Magistrate, carried in the inspection report together with the show cause notice, that has impelled the petitioner to move this Court through the present writ petition under Article 226 of the Constitution.

9. The petitioner has prayed that the inspection report of the District Magistrate, Hapur dated 06.04.2022 be quashed, by which this Court understands that the petitioner means to seek quashing of that part of the report, by which the drawing and disbursement of his salary has been stopped by the District Magistrate by a direction to that effect issued to the Executive Officer of the Nagar Palika. The petitioner has also prayed that a *mandamus* be issued to the respondents to release the petitioner's salary for the month of March and April, 2022. A further direction has been sought to the Executive Officer of the Nagar Palika to forward the petitioner's medical leave papers to the Commissioner, Meerut Division, Meerut for the sanction of his leave.

10. Heard Mr. Rajpal Singh, learned Counsel for the petitioner and Mr. Girijesh Kumar Tripathi, learned Additional Chief Standing Counsel appearing on behalf of the State-respondents, to wit, respondent Nos. 1, 2, 3 and 4.

11. No notice was issued to the Nagar Palika Parishad, Hapur in this case, because the action that is challenged, including the

impugned order, is not one made by the Nagar Palika, but the District Magistrate, Hapur.

12. This Court must say at once that the petitioner by his pleadings in the writ petition blamed the District Magistrate for violating the principles of natural justice, in ordering the stoppage of his salary as also unfair action. It is also one of the objections that the District Magistrate inspected the Nagar Palika on the 6th of April, 2022, and, therefore, there was no occasion for him to order non-disbursement of the petitioner's salary for the month of March, 2022. The petitioner has said that there were a host of his ailments that led him to apply for medical leave, which on account of not being forwarded to the Commissioner of the Division, the competent authority, could not be sanctioned. He has, in short, said that there was no unauthorized absence on his part, but compelling medical and health issues, that kept him away from work.

13. Interestingly, the petitioner too has thought that the District Magistrate had jurisdiction to walk into the Nagar Palika's establishment, undertake a wholesome inspection of different Departments of theirs and pass orders, affecting service interest of employees of the Nagar Palika. Even in his grievance, the petitioner did not think that the District Magistrate was nobody to do that and he was not the petitioner's employer. When this question was put by this Court to the learned Counsel for the petitioner, if the District Magistrate would at all have jurisdiction to pass orders in relation to a service matter of an employee of the Nagar Palika, he answered in the negative. This Court then called upon the learned Additional Chief Standing Counsel to disclose his stand. The

learned Additional Chief Standing Counsel attempted to justify the District Magistrate's action, whereupon this Court called upon the District Magistrate to justify his jurisdiction in passing the order impugned, stopping the petitioner's salary, including doing an inspection of the Nagar Palika etc., by his personal affidavit. This order was passed on the 18th of August, 2023. The District Magistrate, Hapur, now a changed incumbent, Ms. Purna Sharma, filed a personal affidavit dated 22nd of August, 2023.

14. Sadly, in the affidavit filed by the incumbent District Magistrate, who responded for her predecessor, not a solitary provision of the law, that is to say, the statute or the rules framed under the U.P. Municipalities Act, 1916 (for short, 'the Act of 1916'), or some other law was cited, to justify the District Magistrate's jurisdiction in intermeddling with the affairs of the Nagar Palika and passing orders affecting service interest of the Palika employees. What the District Magistrate has said, makes this Court think that it is her belief that the Government and all their Departments function dehors the laws and by the authority of Government Orders or policy directions. The relevant part of the District Magistrate's affidavit, in justification of the jurisdiction to intermeddle in the service matters of employees of the Nagar Palika and pass an order of the kind that is impugned, reads:

“6. That for the purpose of redressal of the grievance of the public at large the State Government has initiated IGRS portal. For effective and quality disposal of the complaints received from the public at large the State Government directs several administrative offices of the district and for smooth functioning of the

offices at district level, District Magistrate and Divisional Commissioner have been held responsible to review their works, planning, projects etc. of the offices at district level vide Government Order No.540/Chautish-Lo.Sh.-05/2021 dated 20.10.2021. For kind perusal of this Hon'ble Court, Copy of the Government Order dated 20.10.2021 is being filed herewith and marked as **Annexure No.1** to this affidavit.

7. That the Chief Secretary, Government of Uttar Pradesh, Karmik Anubhag-1 has issued office memorandum No.4/2022/ 19 Samanya/ Ka-4-2022/303/2020 dated 12.02.2022 for determination of work arrangement in Government offices during Covid-19 with direction that all the offices will function cent percent w.e.f. 14.02.2022. However, for the purpose of checking infection it was also directed to avoid crowding and all the office staff were expected to use sanitization, face mask, maintain social distance and protective measures. For the kind perusal of this Hon'ble Court copy of the aforesaid office memorandum dated 12.02.2022 is being filed herewith and marked as **Annexure No.2** to this affidavit.

8. That under the Uttar Pradesh Public Health and Epidemic Diseases Control Act, 2020 (hereinafter referred to as Act, 2020' for short) a committee has been constituted in the name of District Epidemic Control Authority to be headed by the District Magistrate. Under the aforesaid Act, 2020 the District Magistrate has been conferred following powers:

(a) महामारी के रोकथाम एवं नियंत्रण के लिए जिला में विभिन्न विभाग के क्रियाकलापों के साथ समन्वय स्थापित करना,

(b) यह सुनिश्चित करना कि सामुदायिक कार्य के लिए आवश्यक सेवायें सुगमतापूर्वक तथा पर्याप्त रूप में की जाय,

(c) समस्त सरकारी या राज्य प्राधिकरण के आदेशों को सुगमतापूर्वक क्रियान्वित किया जाय।

For the kind perusal of this Hon'ble Court copy of the relevant extract of the Act, 2020 is being filed herewith and marked as **Annexure No.3** to this affidavit.

That for the welfare of the public at large, the District Magistrate has been nominated chairman of the several district committees constituted under different schemes floated by the State Government and the Central Government in view of financial aid to be extended by the Government for implementation of the schemes. In this regard, for the purpose of removing certain difficulties, the State Government has issued letter No.677/Nau-9- 16-193Ja/13 dated 18.05.2016. By the said Government Order the District Magistrate has been given power to give administrative and financial approval and to ensure the quality of the development works at district level. For kind perusal of this Hon'ble Court, copy of the Government order dated 18.05.2016 is being filed herewith and marked as **Annexure No.4** to this affidavit.

9. That from the perusal of above facts and details stated hereinabove it is apparent that the District Magistrate has been conferred power from different sources to implement and make successful the schemes of the State Government as well as Central Government floated in public interest at large."

(emphasis by Court)

15. There is not a word said by the District Magistrate in her affidavit about the source of her authority flowing from any statute or statutory rule to interfere with the affairs of the Nagar Palika and issue directions in relation to the service interests of the servants and officers of the

Nagar Palika. After a wholesome reference to the steps taken by the Government for redressal of public grievances and smooth functioning of government offices at the district level, all that the District Magistrate has to say is that the District Magistrate is the *chargé d'affaires* at the District Headquarters and the Commissioner at the Divisional Headquarters, who can interfere with anything and everything; with any establishment, whether independent, autonomous or elected. There is then a reference to some directions by the Chief Secretary relating to control of the Covid-19 pandemic, which is absolutely an irrelevant reference. There is then a vague and useless assertion in Paragraph No.9 of the District Magistrate's personal affidavit, which says that the District Magistrate has been conferred power from different sources to implement and make successful government schemes. None of these answer the Court's specific question put to the District Magistrate, to wit, the source of the District Magistrate's authority to interfere in the functioning of an autonomous and elected local body, and, that too service matters of the Nagar Palika's employees.

16. This Court is of opinion that the District Magistrate has very limited say in the matters of a Nagar Palika governed by the Act of 1916. Section 34 is the only source of power that the District Magistrate has to interfere with the decisions of a Nagar Palika Parishad. Section 34 reads:

“34. Power of the State Government or the Prescribed Authority or the District Magistrate to prohibit execution or further execution of resolution or order of Municipality. - (1) The Prescribed Authority may, by order in writing, prohibit the execution or further execution of a resolution or order passed or

made under this or any other enactment by a Municipality or a committee of a Municipality or a Joint Committee or any officer or servant of a Municipality or of a Joint Committee if in its opinion such resolution or order is of a nature to cause or tend to cause obstruction, annoyance or injury to the public or to any class or body of persons lawfully employed and may prohibit the doing or continuance by any person of any act in pursuance for or under cover of such resolution or order.

(1A) The District Magistrate may, within the limits of his district, by order in writing, prohibit the execution or further execution of a resolution or order passed or made under this or any other enactment by a Municipality or a committee of a Municipality or a Joint Committee or any officer or servant of a Municipality or of a Joint Committee if in his opinion such resolution or order is of a nature to cause or tend to cause danger to human life, health or safety, or a riot or affray, and may prohibit the doing or continuance by any person of any act, in pursuance of or under cover of such resolution or order.

(1B) the State Government may, on its own motion or on report or complaint received by order prohibit the execution or further execution of a resolution or order passed or made under this or any other enactment by a Municipality or a committee of a Municipality or a Joint Committee or any officer or servant of a Municipality or of a Joint Committee, if in its opinion such resolution or order is prejudicial to the public interest, or has been passed or made in abuse of powers or in flagrant breach of any provision of any law for the time being in force, and may prohibit the doing or continuance by any person of any act in pursuance of or under cover of such resolution or order.

(2) Where an order is made under sub-section (1) or (1-A), a copy thereof with a statement of the reasons for making it, shall forthwith be forwarded by the Prescribed Authority or the District Magistrate through the Prescribed Authority, as the case may be, to the State Government which may thereupon, if it thinks fit, rescind or modify the order.

(3) [* * *]

(4) Where the execution or further execution of a resolution or order is prohibited by an order made under sub-section (1), (1-A) or (1-B) and continuing in force, it shall be the duty of the Municipality, if so required by the authority making the order under the said sub-sections to take any action which it would have been entitled to take, if the resolution or order had never been made or passed, and which is necessary for preventing any person from doing or continuing to do anything under cover of the resolution or order of which the further execution is prohibited.”

17. I had occasion to consider this issue in **Vimlesh Lal v. State of U.P. and others, 2023:AHC:242348**, where I held:

“16. The District Magistrate’s power is traceable to sub-Section (1-A) of Section 34 alone, which authorizes him to prohibit the execution of a resolution passed by a Municipality or a Committee or an Officer etc., if he is of opinion that the resolution or the order is of a nature that may cause or tend to cause danger to human life, health or safety, or a riot or affray. That is the limited authority of the District Magistrate to interfere in the affairs of a Nagar Palika or a Municipality, as it was formerly called. There is no other power vested in the District Magistrate to interfere with any decision made by the

Nagar Palika Board, its Chairman or the Executive Officer or a Committee or an Officer thereof. Rather, this Court is inclined to think that the autonomy and independence of a Nagar Palika is far more strengthened and requires to be more zealously protected in view of inclusion of Part IX-A in the Constitution by the Constitution (Seventy-fourth Amendment) Act, 1992. This amendment elevates local bodies to a constitutional status and attempts to effect decentralization of democratic power. It provides a constitutional bulwark to strengthen local self-government, more answerable to its electorate than a supervising agent of the State Government. Part IX-A of the Constitution and all its provisions would require Section 34 of the Act of 1916 to be understood very differently from the way it was in the day of its enactment. The powers of the District Magistrate must, therefore, be held limited to Section 34 and not expanded in any manner.”

18. The issue has been answered authoritatively by a Bench decision of this Court in **President, Nagar Palika Parishad, Sultanpur, Babita Jaiswal v. State of U.P., AIR OnLine 2019 All 2407**. In *Babita Jaiswal (supra)*, it was held:

“(24) From a bare reading of said Section 34, it is clear that the District Magistrate has power to interfere with only such resolutions or orders of the Nagar Palika Parishad if the same are likely to cause or tend to cause 'obstruction, annoyance or injury to the public.....' or 'danger to human life, health or safety or a riot or affray'. Awarding a contract in favour of a person cannot be matter, which may cause obstruction, annoyance or injury to the public or danger to human life, health or safety etc. Even directions to make

payment with regard to contract given by the Nagar Palika Parishad or execution of resolutions passed by the Nagar Palika Parishad, which include cleaning of drains and repairing of roads etc. also would not fall in the category of cases enumerated under Section 34 of the Act under which the District Magistrate can invoke the powers under Section 34 of the Act.

(25) The Constitution of India as well as the Uttar Pradesh Municipalities Act, 1916 envisage that the Nagar Palika Parishads are to work independently and carry on the functions and duties, which it is obliged in law to perform. Interference by the District Magistrate or the State Government would only be permissible if the circumstances enumerated under Section 34 of the Act prevail.

(26) The bye-laws dated 24.09.1994, as annexed with the writ petition as Annexure no.10, providing for registration and execution of works was published under Section 301 of the Act, 1916 inviting objections which is the previous publication envisaged under Section 300 of the Act, 1916. In the counter affidavit, it has been stated that the bye-laws in question was never published in the official gazette as required under Section 301 of the Act, 1916. This fact is not correct. The previous publication as envisaged under the aforesaid provision has been complied with and publication was made in the official Gazette inviting objections/suggestions from the general public. The State has failed proved that thereafter no final publication was made in the Official Gazette under Section 301 (2) of the Act, 1916.

(27) In our considered opinion, the power, which has been exercised by the District Magistrate in the present case, would not fall within the ambit of provisions of Section 34 of the Act. The

members of the Nagar Palika Parishad are duly elected and interference by the executive would only be to the extent permissible in law. Since we are of the opinion that the orders passed by the District Magistrate are outside the purview of the provisions of Section 34 of the Act, 1916 and the learned Standing Counsel has not placed any other provision of law under which the District Magistrate could have passed the said orders, which clearly interfere with the functioning of the Nagar Palika Parishad, the said orders would be liable to be quashed.”

19. In **Subodh Kumar Gupta and others v. State of U.P. through Principal Secretary and others**, 2016 SCC OnLine All 1358, the issue was considered by this Court in the context of an order made by the District Magistrate, Farrukhabad, terminating the service of the petitioners there, all of whom were Class-III and IV employees of the Nagar Palika Parishad, appointed after the Chairman's approval. The appointments were terminated by the District Magistrate, purporting to exercise his powers under Section 34 of the Act of 1916. In the aforesaid circumstances, it was held by this Court in **Subodh Kumar Gupta (supra)**:

“16. From a bare reading of Section 34 of the Act, it is clear that the District Magistrate has power to interfere with only such resolutions or orders of the Nagar Palika Parishad if the same are likely to cause or tend to cause ‘obstruction, annoyance or injury to the public.....’ or ‘danger to human life, health or safety or a riot or affray’. Awarding a contract in favour of a person cannot be matter, which may cause obstruction, annoyance or injury to the public or danger to human life, health or safety etc. Even directions to make

payment with regard to contract given by the Nagar Palika Parishad or execution of resolutions passed by the Nagar Palika Parishad, which include cleaning of drains and repairing of roads etc. also would not fall in the category of cases enumerated under Section 34 of the Act under which the District Magistrate can invoke the powers under Section 34 of the Act. The Constitution of India as well as the Act envisage that the Nagar Palika Parishads are to work independently and carry on the functions and duties, which it is obliged in law to perform. Interference by the District Magistrate or the State Government would only be permissible, if the circumstances enumerated under Section 34 of the Act prevail.”

20. In **Vimlesh Lal** (*supra*), where the District Magistrate was confronted with the patent lack of authority with him to interfere in service matters of the Nagar Palika, he conceded to the lack of his authority in the matter. Here, the District Magistrate has taken a stand about an assumed authority and jurisdiction, not possessed by the holder of that office.

21. In plurality of governance, like other pluralities, powers are exercised concerning different bodies and establishments by no unity of authority. Sometimes, within the establishment, the laws may invest a particular Authority with a specific power that the other, may be a higher up in the hierarchy, cannot exercise. This Court cannot ignore much misconception, prevalent about the omniscience of the District Magistrate, which does not exist. Heads of independent elected bodies, as already remarked, or independent departments, are often seen succumbing to orders of the District Magistrate, which the District Magistrate

has no business to issue. The acceptability of the District Magistrate's jurisdiction, where he/ she possesses none, is an unfortunate shadow of the colonial past, again as already remarked. The sooner this misconception is given up in favour of the plurality of powers exercised by various authorities functioning under different laws, the better. All District Magistrates in the State will, therefore, bear caution, limiting their interference in the Nagar Palika strictly to what the Act of 1916 permits.

22. In the result, this petition succeeds and is **allowed with costs**. The order of the District Magistrate, Hapur carried in the inspection note dated 06.04.2022, ordering the Executive Officer of the Nagar Palika Parishad not to draw and disburse the petitioner's salary, is hereby **quashed**. A mandamus is issued to the Executive Officer, Nagar Palika Parishad, Hapur to ensure payment of all such dues on account of salary/ emoluments to the petitioner that have been withheld under orders of the District Magistrate, Hapur, since quashed, together with simple interest @ 6% per annum till date of payment. A mandamus is further issued to the Executive Officer, Nagar Palika Parishad, Hapur to forward the medical leave papers to the Commissioner, Meerut Division, Meerut. The Commissioner, Meerut Division, Meerut shall be under a command to decide the petitioner's application for sanction of medical leave in accordance with law within a period of 15 days of the receipt of a copy of this order.

23. Let a copy of this order be communicated to the District Magistrate, Hapur and the Commissioner, Meerut Division, Meerut by the Registrar (Compliance).

(2024) 4 ILRA 403
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.03.2024

BEFORE

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

Writ A No. 13670 of 2023

Mahesh Kumar ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:

Sri Harish Chandra

Counsel for the Respondents:

C.S.C., Sri Manu Saxena, Sri Radhamani Saxena

**Civil law - U.P. Municipalities Act, 1916 –
Uttar Pradesh Government Servant
Conduct Rules, 1956 – Rule 5 –
Contractual Employment – Termination of
Service – Election Candidature – Principles
of Natural Justice – Article 226
Jurisdiction**

The petitioner, Mahesh Kumar, a contractual Safai Karmchari with Nagar Palika Parishad, Modi Nagar, challenged the termination of his services vide order dated 29.04.2023 by the Executive Officer, citing his candidature for the Chairman's post in the 2023 Nagar Palika elections as a violation of service conditions under the U.P. Government Servant Conduct Rules, 1956. The petitioner claimed he had obtained a No Objection Certificate (NOC) and leave, and argued the termination was arbitrary, lacking an opportunity for hearing. The respondents contended the appointment was purely contractual, no NOC was issued for contesting elections, and the petitioner was warned against violating Rule 5. **Held:** (1) The petition was dismissed. (2) The petitioner, as a contractual employee, had no lien on the post, and his service was governed solely by the contract, not the U.P. Municipalities Act, 1916, or the Rules of 1956. (3) The termination did

not violate Article 14 or 16, as it arose from a non-statutory contract, and disputes regarding contract breaches were outside Article 226 jurisdiction, per *St. of U.P. Vs Kaushal Kishore Shukla*. (4) The petitioner's claim of an NOC was incorrect, as he was explicitly warned against contesting elections. (5) No opportunity for hearing was required, as the termination was not punitive but based on contract terms. (6) The petitioner was granted liberty to raise an industrial dispute under the U.P. Industrial Disputes Act, 1947.

List of Cases cited:

1. *St. of U.P. & anr. Vs Kaushal Kishore Shukla*, (1991) 1 SCC 691;
2. *Parshotam Lal Dhingra Vs U.O.I.*, AIR 1958 SC 36;
3. *St. of Orissa Vs Ram Narayan Dass*, (1961) 1 SCR 606; *R.C. Lacy Vs St. of Bihar*, C.A. No. 590/62 (SC);
4. *Champaklal Chimanlal Shah Vs U.O.I.*, (1964) 5 SCR 190;
5. *Jagdish Mitter Vs U.O.I.*, AIR 1964 SC 449;
6. *A.G. Benjamin Vs U.O.I.*, (1967) 1 LLJ 718;
7. *Shamsher Singh Vs St. of Punjab*, (1974) 2 SCC 831;
8. *St. of Punjab Vs Sukh Raj Bahadur*, (1968) 3 SCR 234.

(Delivered by Hon'ble J.J. Munir, J.)

1. The petitioner, a Safai Karmchhari, engaged on contract by the Nagar Palika Parishad, Modi Nagar, Ghaziabad, assails the order dated 29.04.2023, determining the contract and in consequence terminating his services. The order aforesaid has been passed by the Executive Officer, Nagar Palika Parishad, Modi Nagar, Ghaziabad, and, shall hereinafter be referred to as the 'impugned order'.

2. The petitioner was appointed on the basis of a contract as a *Safai Karmi* (*Sweeper*) with the Nagar Palika Parishad, Modi Nagar, Ghaziabad, in terms of a letter of appointment dated 25.07.2006. The letter of appointment was issued by the Executive Officer, Nagar Palika Parishad, Modi Nagar, Ghaziabad (for short, 'the Nagar Palika'). The appointment as aforesaid was made in terms of Government Orders dated 26.08.2005 and 09.05.2006, after selection by a selection committee, constituted for the purpose by the District Magistrate, Ghaziabad. The letter of appointment says that the petitioner was appointed on contract as a Safai Karmi on a pay of Rs.2130/-. It was made explicit that the appointment is entirely contractual and made subject to the condition that in case the candidate's work is not found satisfactory, his appointment would be terminated.

3. It is the petitioner's case that though appointed as a Safai Karmi on contract basis, the Nagar Palika have assigned him the duties of a driver. The petitioner has been paid salary of a safai karmi on contract basis. A pay slip relating to the petitioner has been annexed as Annexure No.2 to the writ petition, which shows that it relates to the month of September, 2021. Reference to this pay slip would be made later in this judgment. The petitioner acknowledges the fact that though he is working on the post of a Safai Karmi since 25.07.2006, he has not been confirmed or regularized in service. It is averred in the writ petition that the letter of appointment shows that the petitioner's services can be terminated if his work is not found satisfactory. It appears that the elections to the Nagar Palika were notified and the petitioner staked his candidature for the post of the Chairman of the Nagar Palika Parishad. He made an application, seeking sanction of leave from 15.04.2023

to 26.04.2023, in order to enable him to contest the said elections. It is the petitioner's case that since there was a condition to submit a No Objection Certificate, he secured one from the Tehsildar, Tehsil Modi Nagar (Ghaziabad) and duly submitted it. It is the petitioner's further case that a 'no dues certificate' was secured on 18.04.2023, also from the Tehsildar, showing that there were no dues against the petitioner for the year 2022-23. After all formalities were completed, the petitioner contested the elections to the post of the Chairman, Nagar Palika, but lost at the hustings. On 29.04.2023, the Executive Officer of the Nagar Palika terminated the petitioner's services on ground that he had contested elections to the office of the President of the Nagar Palika in the elections of 2023, which was in violation of the service conditions under the Uttar Pradesh Municipalities Act, 1916 (for short, 'the Act'). It was mentioned that the petitioner's contract was being determined on that ground. The petitioner moved an application on 26.05.2023 to revoke the order of his termination from service, addressed to the Executive Officer. Nothing came out of it. Accordingly, this writ petition has been instituted by the petitioner, assailing the order impugned.

4. Parties have exchanged affidavits.

5. Heard Mr. Harish Chandra, learned Counsel for the petitioner, Ms. Amrita Singh, learned Additional Chief Standing Counsel on behalf of respondent No.1 and Mr. Radhamani Saxena, Advocate holding brief of Mr. Manu Saxena, learned Counsel appearing on behalf of the Nagar Palika.

6. The learned Counsel for the petitioner submits that the petitioner is a low paid employee of the Nagar Palika and

applied for a no objection certificate (NOC) to contest the elections and also sought leave for the purpose. He was granted an NOC and leave by the Executive Officer. Therefore, it is no longer open to the Executive Officer to terminate his services on ground that he contested elections to the office of the Chairman. It is submitted that the petitioner has no knowledge about the provisions of the Act nor was he informed about its prohibitory provisions at the time when a no objection certificate and leave without pay was granted. It is urged that the impugned order is, therefore, manifestly illegal and arbitrary. It is also argued that no opportunity of hearing or showing cause has been given to the petitioner before the order terminating his services was passed.

7. Mr. Radhamani Saxena and Ms. Amrita Singh, on the other hand, have submitted in one voice that the petitioner's appointment was entirely contractual. He does not hold lien on any post. His services have been determined in terms of the contract as his act in running for the elections to the office of the Chairman of the Nagar Palika is not only prohibited under the Uttar Pradesh Government Servant Conduct Rules, 1956 (for short, 'the Rules of 1956') vide Rule 5, but also constitutes an act that may be viewed by the Nagar Palika as one which renders the petitioner's work and conduct unsatisfactory, entitling the Nagar Palika to terminate the contract. It is particularly emphasized by the learned Counsel for the Nagar Palika that a no objection was never given to the petitioner, entitling him to contest elections for the post of Chairman of the Nagar Palika. Instead, an order dated 26.04.2023 was passed, informing the petitioner with reference to his application dated 26.04.2023 that contesting an

election to any Local Body or the Legislative Assembly is prohibited for a government servant by virtue of Rule 5 of the Rules of 1956. The petitioner was particularly informed that he may not do any act which may constitute violation of the Rules of 1956, else action would be taken against him, in accordance with the Act. The aforesaid notice, a photostat copy of which is annexed as Annexure No.CA-1 to the counter affidavit, shows on its face an endorsement made by the concerned peon or employee of the Nagar Palika, who went to deliver it to the petitioner, which reads:

“पढ़कर लेने से इन्कार किया”
Sd/- illegible.”

8. It is submitted, therefore, that it cannot be said by the petitioner that he had no knowledge of the prohibition. In fact, the petitioner was informed by the Executive Officer of the Nagar Palika that he was not permitted to run for elections to the office that he wanted to. The learned Counsel for the Nagar Palika, particularly, says that a no objection certificate permitting the petitioner to contest elections was never issued by the Executive Officer of the Nagar Palika. It is also pointed out that the NOC, referred to by the petitioner in paragraph No.19 of the writ petition, was a certificate by the Executive Officer of the Nagar Palika about the petitioner not being obliged to the Nagar Palika on account of any outstandings in their favour. The learned Counsel, therefore, submits that the petitioner contested elections to the office of the Chairman of the Nagar Palika not only without permission of the Executive Officer, but in the face of a memo inviting his attention to the Rules of 1956 that prohibited him from doing so.

9. The learned Counsel for the petitioner in his rejoinder submits of that the edifice of the respondents' action is essentially flawed, because the Rules of 1956 do not apply to the petitioner as he was a contractual employee, and the order impugned has been passed in contravention of the terms of his contract. It is emphasized that the only condition, on the foot of which the petitioner's service can be terminated, is unsatisfactory work, which is not the respondents' case at all.

10. This Court must note one submission that was forcefully made by the learned Counsel for the petitioner and that was that the petitioner's services could not be terminated on the basis of a misconduct in contesting elections, contrary to the Rules of 1956, without affording him an opportunity of hearing. In support of this contention of his, learned Counsel for the petitioner placed reliance upon the decision of the Supreme Court in **State of U.P. and another v. Kaushal Kishore Shukla, (1991) 1 SCC 691**. He invited the Court's attention to the holding of their Lordships in paragraph No.7 of the report, which reads:

“7. A temporary government servant has no right to hold the post, his services are liable to be terminated by giving him one month's notice without assigning any reason either under the terms of the contract providing for such termination or under the relevant statutory rules regulating the terms and conditions of temporary government servants. A temporary government servant can, however, be dismissed from service by way of punishment. Whenever, the competent authority is satisfied that the work and conduct of a temporary servant is not satisfactory or that his continuance in

service is not in public interest on account of his unsuitability, misconduct or inefficiency, it may either terminate his services in accordance with the terms and conditions of the service or the relevant rules or it may decide to take punitive action against the temporary government servant. If it decides to take punitive action it may hold a formal inquiry by framing charges and giving opportunity to the government servant in accordance with the provisions of Article 311 of the Constitution. Since, a temporary government servant is also entitled to the protection of Article 311(2) in the same manner as a permanent government servant, very often, the question arises whether an order of termination is in accordance with the contract of service and relevant rules regulating the temporary employment or it is by way of punishment. It is now well settled that the form of the order is not conclusive and it is open to the court to determine the true nature of the order. In *Parshotam Lal Dhingra v. Union of India* [1958 SCR 828 : AIR 1958 SC 36 : (1958) 1 LLJ 544], a Constitution Bench of this Court held that the mere use of expressions like ‘terminate’ or ‘discharge’ is not conclusive and in spite of the use of such expressions, the court may determine the true nature of the order to ascertain whether the action taken against the government servant is punitive in nature. The court further held that in determining the true nature of the order the court should apply two tests namely: (1) whether the temporary government servant had a right to the post or the rank or (2) whether he has been visited with evil consequences; and if either of the tests is satisfied, it must be held that the order of termination of a temporary government servant is by way of punishment. It must be borne in mind that a temporary government servant has no right

to hold the post and termination of such a government servant does not visit him with any evil consequences. The evil consequences as held in Parshotam Lal Dhingra case [1958 SCR 828 : AIR 1958 SC 36 : (1958) 1 LLJ 544] do not include the termination of services of a temporary government servant in accordance with the terms and conditions of service. The view taken by the Constitution Bench in Dhingra case [1958 SCR 828 : AIR 1958 SC 36 : (1958) 1 LLJ 544] has been reiterated and affirmed by the Constitution Bench decisions of this Court in State of Orissa v. Ram Narayan Dass [(1961) 1 SCR 606 : AIR 1961 SC 177 : (1961) 1 LLJ 552] ; R.C. Lacy v. State of Bihar [C.A. No. 590/62 decided on October 23, 1963 (SC)] ; Champaklal Chimanlal Shah v. Union of India [(1964) 5 SCR 190 : AIR 1964 SC 1854 : (1964) 1 LLJ 752] ; Jagdish Mitter v. Union of India [AIR 1964 SC 449 : (1964) 1 LLJ 418 : 1964 Cur LJ (SC) 66] ; A.G. Benjamin v. Union of India [(1967) 1 LLJ 718] ; Shamsheer Singh v. State of Punjab [(1974) 2 SCC 831 : 1974 SCC (L&S) 550 : (1975) 1 SCR 814] . These decisions have been discussed and followed by a three Judge Bench in State of Punjab v. Sukh Raj Bahadur [(1968) 3 SCR 234 : AIR 1968 SC 1089 : (1970) 1 LLJ 373 : 1968 Cri LJ 687].”

11. This Court must say at the outset that this stand of the petitioner, based on the principle in **Kaushal Kishore Shukla** (*supra*), about the provision of an opportunity in case of termination of service, founded on a charge, is inconsistent with the petitioner's stand, otherwise taken, that he is not a regular employee of the Nagar Palika, to whom the Rules of 1956 or the Act apply.

12. Assuming for a moment that the Rules of 1956 and the Act apply, and the petitioner's services have been terminated

for his misconduct in contesting elections without the permission of the Executive Officer, the principle in **Kaushal Kishore Shukla** would not come to the petitioner's rescue at all. It is so for more than one reason. The foremost is that the principle in **Kaushal Kishore Shukla** has been laid down in the context of an employee appointed on ad hoc basis for a fixed period that was extended from time to time, but not a contractual employee, whose conditions of service were governed by contract. The law has been laid down on principles governing the rights of temporary government servants, to whom the Uttar Pradesh Temporary Government Servants (Termination of Services) Rules, 1975 are applicable. This is certainly not the case here.

13. The other is that their Lordships in **Kaushal Kishore Shukla** held that even a temporary government servant has no right to the post and his services can be terminated by a month's notice without assigning any reason, either in terms of the contract or the relevant statutory rules. It is observed there that a temporary government servant also can be dismissed from service by way of punishment. It is only if the competent Authority decides to take punitive action that a formal inquiry may be held by framing charges and giving opportunity to the government servant in accordance with Article 311 of the Constitution. If the order is punitive in nature, the government servant is certainly entitled to opportunity. The Court went into the question, what order of termination may be regarded as punitive or stigmatic and what a termination simpliciter in terms of the contract or rules means.

14. The twin tests suggested to determine the nature of the order, if it is

stigmatic or not is, if the temporary government servant had a right to the post or rank, and, secondly, if he has been visited with 'evil consequences', in the words of their Lordships. It has been held that if either of the two conditions exists, the order of termination relating to a temporary government servant must be held penal in nature. It has also been clarified that termination of services of a temporary government servant in accordance with the terms and conditions of service do not entail evil consequences, as held by the Constitution Bench in case of **Parshotam Lal Dhingra v. Union of India**, AIR 1958 SC 36.

15. In this case, the petitioner, as already remarked, is not remotely a temporary employee. He is an employee, whose services are entirely contractual. Once that is the case, even if he has been selected through some kind of a mechanism to select under a Government Order and appointed on contract, he has no right to the post. There is no lien. In fact, that is precisely the petitioner's case that the Rules of 1956 and the Act would not apply to him because he is not an employee of the Nagar Palika, governed by those statutes or statutory rules. His terms of service are governed by the contract alone.

16. If then that is the case, the petitioner's rights are governed exclusively by a contract that does not have any statutory flavour. It is a purely contractual appointment accepted by the petitioner dehors the rules and without a lien on any post. The issue whether the termination is in accordance with the contract or contrary to it in the absence of violation of any statute or statutory rules, or at least a statutory contract, is not fit to be determined by this Court in the exercise of

our writ jurisdiction under Article 226 of the Constitution.

17. The dispute between the petitioner and the Nagar Palika arises out of a contract of service simpliciter, which cannot be determined in the present proceedings. The determination of the petitioner's employment in terms of the contract of service or in violation thereof, given the terms of the contract and its nature, does not involve any arbitrariness, as may make it fall foul of the petitioner's right under Article 14 or 16 of the Constitution.

18. If the petitioner thinks that his services have been determined in violation of the contract between him and the Nagar Palika, or otherwise the Nagar Palika have indulged in any unfair labour practice in dispensing with the petitioner's services, it would be open to the petitioner to raise an industrial dispute under the Uttar Pradesh Industrial Disputes Act, 1947. No relief, however, can be afforded to the petitioner in the present writ petition.

19. Subject to the above liberty, this petition fails and is **dismissed**.

20. There shall be no order as to costs.

(2024) 4 ILRA 408

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 02.04.2024

BEFORE

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

Writ A No. 13833 of 2023

Akhtari Khatoon

...Petitioner

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioner:

Sri Balendra Deo Misra, Sri Ram Ji Singh

Counsel for the Respondents:

C.S.C., Sri Shrawan Kumar Tripathi

Civil Law - Uttar Pradesh State Electricity Board Recruitment of Dependants of Board's Servants Dying in Harness Rules, 1975 – Rule 2(c)(3) – Uttar Pradesh Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 – Rule 2(c)(iii) – Compassionate Appointment – Family Pension – Married Daughter – Dependency – Succession Certificate

The petitioner, Akhtari Khatoon, a divorced daughter of the deceased employee Nasir Ahmad, sought compassionate appointment and family pension, claiming dependency on her father after her alleged divorce in 2008, supported by a Talaqnama. She also obtained a succession certificate for her father's retiral dues, which were paid, but her pension was stopped. The respondents argued that the petitioner, as a married daughter, was not eligible under Rule 2(c)(3) of the Rules of 1975, and her divorce was not substantiated by a court decree.

Held: (1) The petition was dismissed. (2) The petitioner was not entitled to compassionate appointment, as Rule 2(c)(3) of the Rules of 1975, applicable to the respondents, excludes married daughters, and its vires were not challenged, distinguishing *Smt. Vimla Srivastava Vs St. of U.P.* (3) The petitioner failed to prove dependency on her deceased father or provide details of other dependents, such as her father's widow or minor children, to justify her claim. (4) The Talaqnama lacked authenticity, and no court decree verified the divorce, undermining her claim of dependency. (5) At 50 years of age, the petitioner was presumed to have settled and was ineligible for appointment due to age limits. (6) The claim for family pension was untenable, as no specific rule or statutory provision was cited to establish eligibility. (7) The Executive Engineer's failure to comply with the court's prior order dated 21.10.2019 to pass a reasoned order was admonished, with directions to convey this to the Chairman, U.P. Power Corporation.

List of Cases cited:

1. *Smt. Vimla Srivastava Vs St. of U.P. & anr., 2016 (1) ADJ 21 (DB);*
2. *St. of U.P. & anr. Vs Madhavi Mishra & ors., 2021 (9) ADJ 529 (DB);*
3. *Director of Treasuries in Karnataka & anr. Vs VS Somyashree, (2021) 12 SCC 20;*
4. *Sunithakumari Vs K.S.E.B. & ors., 1992 SCC OnLine Ker 145;*
5. *U.O.I. & ors. Vs Manjurani Routray & ors., (2023) 9 SCC 144;*
6. *Kanhai Ram & ors. Vs St. of U.P. & ors.,*

(Delivered by Hon'ble J.J. Munir, J.)

1. The petitioner's father, the late Nasir Ahmad, was a Centrifugal Mechanic in the employ of the Purvanchal Vidyut Vitran Nigam Limited (short, 'the Corporation'), and last posted in the establishment of the Executive Engineer, Electricity Distribution Phase-III, Malviya Road, Basti. The petitioner was married to one Nisar Ahmad, who is said to have divorced her through a *Talaqnama* dated 01.01.2008, pronouncing a Talaq upon his wife, in accordance with the Shariat Law, applicable to parties. The divorce, according to the *Talaqnama* was pronounced in the presence of two competent witnesses. After the petitioner's divorce, it is her case that she came back to her father's house at Village Tilauli, Post Sohnaag, District Deoria and is living there since January, 2008. A copy of the certificate of residence dated 12.04.2010 issued by the Deputy Collector on behalf of the Collector is on record.

2. The petitioner says that she is the only legal heir of the late Nasir Ahmad and

for the said reason, has staked claim to a compassionate appointment. It is also said that for the same reason, she has applied for the payment of her father's retiral dues vide a representation dated 21.09.2010. The respondents directed the petitioner to produce a succession certificate issued by a Court of competent jurisdiction, entitling her to the dues. Accordingly, the petitioner moved the District Judge, Deoria for the grant of a succession certificate under the Indian Succession Act, 1925. The petitioner's petition for succession was registered as Succession Case No.597 of 2010 and assigned to the Additional District Judge, Court No.5, Deoria. The learned Additional District Judge granted a succession certificate in the petitioner's favour, holding her entitled to receive from the Executive Engineer, Electricity Distribution Division-I, Basti, gratuity in the sum of Rs.4,02,501/-, leave encashment in the sum of Rs.84,159/-, an ex gratia sum of Rs.30,000/-, besides dues on account of GPF in the sum of Rs.1,73,559/-, totalling a figure of Rs.6,90,219/-.

3. The petitioner points out that the Executive Engineer, Electricity Distribution Division Phase-I, District Basti, sought legal opinion in the matter and the Corporation's Counsel at Basti vide his opinion dated 31.12.2014, opined that all the documents produced by the petitioner have been verified from the Civil Court at Deoria as well as the Collectorate, which are genuine. It was further opined that the petitioner is entitled to all dues on account of the deceased employee's services, which she claims.

4. It is the petitioner's case that in order to delay processing of her claim for compassionate appointment, the Executive

Engineer last mentioned sought information once again vide letter dated 21.03.2018, addressed to the petitioner, to the effect if the petitioner made her claim for compassionate appointment within five years of death of the employee, and, secondly, if the *Talaqnama* produced has been authenticated or verified by an institution, recognized by the Government of India or the State Government, or established by the said Governments. The petitioner says that she has the liability of three unemployed sons on her shoulders and there is no other source of income for the family to survive. This Court must remark that it has not been clarified in paragraph No.14 of the writ petition if the responsibility of 'unemployed sons' spoken of, refers to the petitioner's sons or those of her deceased father's sons, to wit, her brothers.

5. The petitioner says that for one she is entitled to receive post retiral dues on account of her father's services, a fact authenticated by orders made by the Additional District Judge granting a succession certificate in her favour. She further says that she is entitled to a compassionate appointment, inasmuch as by virtue of the law now declared, 'married daughters' are also entitled to compassionate appointment under Rule 2(c)(iii) of the Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 (for short, 'the Rules of 1974'). The petitioner further avers in paragraph No.17 that though she has been paid her father's retiral dues and also her pension in the year 2019-20 for some period of time, it has been stopped without any rhyme or reason.

6. Accordingly, the petitioner has moved this Court, seeking family pension

for herself on account of her deceased father's services and also a direction to the respondents to offer her a compassionate appointment.

7. A counter affidavit has been filed on behalf of respondents Nos.2 and 3 jointly, to which the petitioner has filed a rejoinder.

8. This petition was admitted to hearing on 04.10.2023, which proceeded forthwith. Judgment was reserved.

9. Heard Mr. Balendra Deo Misra, learned Counsel for the petitioner, Mr. Shrawan Kumar Tripathi, learned Counsel appearing on behalf of respondent Nos. 2 and 3, and Ms. Monika Arya, learned Additional Chief Standing Counsel appearing on behalf of the State, respondent No.1.

10. This Court must remark at the outset that the petitioner had earlier approached this Court by means of Writ-A No.16500 of 2019, which was disposed of by an order dated 21.10.2019, ordering the respondents in the following terms:

“As the claim of the petitioner has yet not been considered by the competent authority, without expressing any opinion as to the merits of claim of the petitioner, the present writ petition is being disposed of with the direction to the respondent no. 2 namely the Executive Engineer, Purvanchal Vidyut Vitaran Nigam Ltd., Electricity Distribution Phase-III, District Basti to decide the claim of the petitioner both for grant of family pension and other retiral dues and for compassionate ground being divorced daughter of the deceased employee, by passing a reasoned and speaking order, in

accordance with law, preferably, within a period of two months from the date of submission of certified copy of this order, after completion of necessary formalities.”

11. It appears that out of the claims directed to be decided by this Court vide order dated 21.10.2019, the respondents have paid post retiral dues on account of the petitioner's father's services, authorized by the succession certificate dated 27.07.2014, issued by the Additional District Judges, Deoria. The directions carried in this Court's order dated 21.10.2019 about consideration of the petitioner's claim for compassionate appointment and her entitlement to receive family pension, has decidedly been observed in breach in the sense that the Executive Engineer, Electricity Distribution Phase-III, Basti has not passed any reasoned and speaking orders, deciding the petitioner's claim for the grant of family pension or compassionate appointment, as ordered by this Court. There is an averment in paragraph No.1 of the writ petition, specifically to the effect that the orders of this Court dated 21.10.2019, passed in Writ-A No. 16500 of 2019, directing the Executive Engineer aforesaid to pass orders on the petitioner's claim for the grant of family pension as well as compassionate appointment, has been knowingly flouted. In the counter affidavit filed on behalf of respondent Nos.2 and 3, which is an affidavit by Kedarnath Mishra, the incumbent Executive Engineer, Electricity Distribution Phase-III, Basti, it is averred in paragraph No.4, in answer to paragraph No.1 of the writ petition:

“4. That the contents of paragraph No.1 of the writ petition being matter of record which can verify there from, in reply there to it is respectfully submitted that

allegation made in paragraph is wrong hence denied, retire benefits has been paid to the petitioner, for other benefit petitioner is not entitle, petitioner has not given necessary documents, which is require under the law therefore representation of the petitioner has not been decided.”

12. It is one thing to say that the petitioner is not entitled to the family pension, she claims, or the compassionate appointment, and quite another, not to pass orders in regard to these claims, despite a mandamus by this Court to decide those claims by reasoned and speaking orders. Ex facie, the Executive Engineer has acted in disobedience of this Court's orders dated 21.10.2019 passed in Writ-A No. 16500 of 2019, by failing to pass a speaking order, deciding the petitioner's claim in regard to family pension and compassionate appointment.

13. This Court is of opinion that by the aforesaid act of disobedience, apart from the question of contempt, with which we are not concerned in this petition, the Executive Engineer, respondent No.2, has forced the writ petitioner to move this Court again for a writ of mandamus to consider those very claims, regarding which he is under a command to decide. This is an act of causing unnecessary litigation to be generated, taxing both the petitioner and the public exchequer. For the said reason, we are of opinion that irrespective of the event in this case, which we propose to decide finally on merits, the Executive Engineer, Electricity Distribution Phase-III, Basti ought to be admonished for his action in disobeying the earlier orders of this Court. The admonition will be conveyed to the concerned incumbents in the office of the Executive Engineer, through the

Chairman, U.P. Power Corporation, Lucknow.

14. The respondents have resisted the petitioner's claim to receive both the family pension on account of her father's services as well as the compassionate appointment due to his demise in harness. We could have sent back the matter to the third respondent, compelling him to comply with the earlier directions and decide those claims, but in view of the stand taken in the counter affidavit, we think that it would be a wasteful expenditure of the parties' resources as well as those of the Court. The matter, therefore, ought to be determined finally now, which we proceed to do hereby.

15. It is not in dispute that the petitioner is a married daughter of the deceased employee, Nasir Ahmad. She claims a divorce sometime in the year before her father's death. The deceased employee's widow is not alive and no other family members of the deceased has applied. The petitioner says that she is entitled to a consideration of her claim, because this Court in the case of **Smt. Vimla Srivastava v. State of U.P. and another, 2016 (1) ADJ 21 (DB)** has struck down Rule 2(c)(iii) of the Rules of 1974 to the extent that it has excluded married daughters from the definition of the family as violative of Articles 14 and 15 of the Constitution. It is pointed out that it has been done by striking down the word 'unmarried' in Rule 2(c)(iii) of the Rules of 1974, so that the expression that survives in Rule 2(c)(iii) is 'daughter' without any qualification as to marital status.

16. The learned Counsel for the petitioner submits that once the word 'unmarried' has been struck down in Rule

2(c)(iii) of the Rules of 1974, the stand of the respondents taken in the counter affidavit that the petitioner is not entitled, cannot be countenanced. On the other hand, the learned Counsel for the respondents submits that the Rules of 1974 are not applicable to the Corporation and they are governed by their own rules and regulations framed by the Board of Directors. The attention of this Court in this regard has been invited to the amended provisions of Rule 2 of the Uttar Pradesh State Electricity Board Recruitment of Dependents of Board's Servants Dying in Harness Rules, 1975 (for short, 'the Rules of 1975'), amended on 5th July, 2012. The said amendment has been carried out in keeping with the amendment to the Rules of 1974, then made by the 9th Amendment in the year 2011. Amended Rule 2 as well as the pre-amended provisions of the said Rule would indicate, according to the learned Counsel for the respondents, that it is the unmarried daughters, including unmarried adopted daughters, widowed daughters and widowed daughters-in-law, who qualify as members of the family under Rule 2(c) of the Rules of 1975 (as amended in the year 2012).

17. It is also submitted by the learned Counsel for the respondents that the various circumstances pointed out in the counter affidavit indicate that the petitioner was not at all a dependent of her father at the time of his demise. It is urged that the factum of her divorce is not established because she has not produced any decree of divorce from a Court of competent jurisdiction. It is also said that the petitioner was aged 34 years in the year 2010 and would now be 47 years of age. Now, the presumption is that she is capable of earning for herself and not entitled for the said reason to family pension.

18. The learned Counsel for the respondents, Mr. Shrawan Tripathi and Ms. Monika Arya, learned Additional Chief Standing Counsel have placed reliance in support of their case upon a Bench Decision of this Court in **State of U.P. and another v. Madhavi Mishra and others, 2021(9) ADJ 529 (DB)**, where following the Supreme Court in **Director of Treasuries in Karnataka and another v. V. Somyashree, (2021) 12 SCC 20 and the Kerala High Court in V. Sunithakumari v. K.S.E.B. and others, 1992 SCC OnLine Ker 145**, it has been held that a married daughter is not included in the definition of 'family' under the Rules of 1975. It is also submitted by the learned Counsel appearing for the respondents that the petitioner is not entitled to claim compassionate appointment as a matter of right, specially when she has deliberately omitted to mention her mother's eligibility to receive family pension.

19. We have carefully considered the submissions advanced on behalf of learned Counsel appearing for the parties and perused the record.

20. It is no doubt true that in Rule 2(c) (iii) of the Rules of 1974, the word 'unmarried' qualifying the word 'daughter' has been struck down as unconstitutional by the Court in Smt. **Vimla Srivastava (supra)**. But, that by itself would not entitle the petitioner to a striking down of Rule 2(c) (3) of the Rules of 1975, which apply to the respondents' establishment. The respondents are not governed by the Rules of 1974, but their own rules, to wit, the Rules of 1975, as amended. The petitioner has not challenged the vires of Rule 2(c) (3) of the Rules of 1975, where the Court could have gone into the issue if the said Rule was *ultra vires* Articles 14 and 15 of

the Constitution. Howsoever extendable in its logic, the principle laid down in **Smt. Vimla Srivastava**, cannot of itself result in the striking down of another rule without its vires being properly challenged. In **Smt. Vimla Srivastava** the vires of Rule 2(c) (iii) of the Rules of 1974 was under challenge, which is not the case here. The Rules of 1975 have been amended on 5th of July, 2012 by a memo of the said date issued by the Director of the Corporation acting under an order of the Corporation's Board. The amended and the pre-amended Rule 2 of the Rules of 1975, which no doubt has followed the amendment then made to Rule 2 of the Rules of 1974, is being quoted in extenso:

"संख्या-2018-औस/ 2012-27-एफ0 /80
दिनांक 5 जुलाई, 2012

कार्यालय ज्ञाप

उत्तर प्रदेश सरकार का अधिसूचना संख्या-6/12/73/कार्मिक-2/ 2011-टी0सी0-IV, दिनांक 22.12.2011 द्वारा उत्तर प्रदेश सेवाकाल में मृत सरकारी सेवकों के आश्रितों की भर्ती (नवा संशोधन) नियमावली 2011 के नियम-2 में किये गये संशोधन को अंगीकार किये जाने का पावर कारपोरेशन ने निर्णय लिया है।

उपरोक्त अधिसूचना अंगीकृत किये जाने के फलस्वरूप एतद्वारा उ0प्र0 राज्य विद्युत परिषद सेवाकाल में मृत सेवकों के आश्रितों की भर्ती नियमावली 1975 (यथा संशोधित) के नियम- 2 में नीचे स्तम्भ-1 में दिये गये वर्तमान खण्ड (ग) के स्थान पर स्तम्भ-2 में दिया गया खण्ड प्रतिस्थापित किया जाता है:-

स्तम्भ-1	स्तम्भ - 2
विद्यमान खण्ड (ग) कुटुम्ब के अन्तर्गत मृत सरकारी सेवक के निम्नलिखित सम्बन्धी होंगे:-	एतद्वारा प्रतिस्थापित खण्ड (ग) कुटुम्ब के अन्तर्गत मृत सरकारी सेवक के निम्नलिखित सम्बन्धी होंगे:-

1. पत्नी या पति, 2. पुत्र 3. अविवाहित पुत्रियां तथा विधवा पुत्रियां, 4. मृत सरकारी सेवक पर आश्रित अविवाहित भाई, अविवाहित बहन और विधवा माता यदि मृत सरकारी सेवक अविवाहित था। परन्तु यदि मृत सरकारी सेवक के उपरिउल्लिखित सम्बन्धियों में से किसी से सम्बन्धित कोई व्यक्ति उपलब्ध नहीं है या वह शारीरिक और मानसिक रूप से अनुपयुक्त पाया जाय और इस प्रकार सरकारी सेवा में नियोजन के लिये अपात्र हो तो केवल ऐसी स्थिति में शब्द "कुटुम्ब" के अन्तर्गत मृत सरकारी सेवक पर आश्रित पौत्र और अविवाहित पौत्रियाँ भी सम्मिलित होंगी।	1. पत्नी या पति 2. पुत्र / दत्तक पुत्र 3. अविवाहित पुत्रियां अविवाहित दत्तक पुत्रियां, विधवा पुत्रियां और विधवा पुत्र वधुएँ, 4. मृत सरकारी सेवक पर आश्रित अविवाहित भाई. अविवाहित बहन और विधवा माता यदि मृत सरकारी सेवक अविवाहित था। 5. ऐसे लापता सरकारी सेवक, जिसे सक्षम न्यायालय द्वारा 'मृत' के रूप में घोषित किया गया है, के उपरिउल्लिखित सम्बन्धी, परन्तु यदि मृत सरकारी सेवक के उपरिउल्लिखित सम्बन्धियों में से किसी से सम्बन्धित कोई व्यक्ति उपलब्ध नहीं है या वह शारीरिक और मानसिक रूप से अनुपयुक्त पाया जाय और इस प्रकार सरकारी सेवा में नियोजन के लिए अपात्र हो तो केवल ऐसी स्थिति में शब्द "कुटुम्ब" के अन्तर्गत मृत सरकारी सेवक पर आश्रित पौत्र और अविवाहित पौत्रियाँ भी सम्मिलित होंगी।

नियमावली के अन्य प्राविधान यथावत् रहेंगे।

निदेशक मण्डल की आज्ञा से,
निदेशक (का0प्रब0 एवं प्रशा0)

संख्या: 2018- (1) औस/2012 -

तददिनांक

प्रतिलिपि सूचनार्थ एवं आवश्यक कार्यवाही हेतु निम्नलिखित को प्रेषित :-

1- प्रबन्ध निदेशक, पूर्वांचल / पश्चिमांचल / मध्यांचल / दक्षिणांचल विद्युत

वितरण निगम लिमिटेड, वाराणसी / मेरठ / लखनऊ / आगरा एवं केस्को, कानपुर।

2- निदेशक (आपरेशन), उ०प्र० पावर ट्रांसमिशन कारपोरेशन लिमिटेड शक्ति भवन विस्तार, लखनऊ।

3- मुख्य अभियन्ता (जल-विद्युत)/ अध्यक्ष, विद्युत सेवा आयोग/ जॉच समिति, उ०प्र० पावर कारपोरेशन लि०।

4- समस्त मुख्य अभियन्ता वितरण क्षेत्र एवं पारेषण क्षेत्र, उ०प्र० पावर कारपोरेशन लि०।

5- समस्त अधीक्षण अभियन्ता / अधिशासी अभियन्ता, उ०प्र० पावर कारपोरेशन लिमिटेड।

6- समस्त मुख्य महाप्रबन्धक (लेखा) / महाप्रबन्धक (लेखा) / उप महाप्रबन्धक (लेखा) / उप मुख्य लेखाधिकारी, उ०प्र० पावर कारपोरेशन लिमिटेड।

7- समस्त उप महाप्रबन्धक (औस)/ वरिष्ठ कार्मिक अधिकारी/ कार्मिक अधिकारी, उ०प्र० पावर कारपोरेशन लि०।

8- उपसचिव (विनियम), उ०प्र० पावर कारपोरेशन लि०, शक्ति भवन, लखनऊ।

9- समस्त अनुभाग अधिकारी / निजी सचिव, प्रशासनिक एवं लेखा स्कन्ध, उ०प्र० पावर कारपोरेशन लि०।

10- अधिशासी अभियन्ता (वेब), कक्ष संख्या-407, शक्ति भवन को इस अनुरोध के साथ प्रेषित कि वे वेबसाइट www.uppcl.org पर लोड करने हेतु।

11- कम्पनी सचिव, उ०प्र० पावर कारपोरेशन लिमिटेड, शक्ति भवन, लखनऊ को निदेशक मण्डल की बैठक नम्बे(28) / 12, दिनांक 15.06.2012

12- कट फाइल।

ह० अपठित
(कौशल चन्द्र सक्सेना)
उप महाप्रबन्धक (औस)''

21. It would be important to note that neither under the pre-amended Rules nor post amendment, married daughters have been included in the definition of family under Rule 2(c) (3) of the Rules of 1975. The principle that unless the provisions of a statute or statutory rule is challenged through a duly framed writ petition, it cannot be struck down by the Court, is well settled in view of the law laid down in **Union of India and others v. Manjurani Routray and others, (2023) 9 SCC 144. In Manjurani Routray (supra)**, it was observed:

“10. After hearing the learned counsel for the parties and considering the prayer made in the writ petition, it is luculent that Respondent 1 did not set out any grounds to declare Rule 4(b) of the Rules as ultra vires. No such relief was even prayed for in the writ petition. Respondent 1 in the writ petition merely sought a writ in the nature of certiorari to set aside the order of CAT. Therefore in the given facts, there was no occasion for the High Court to declare Rule 4(b) as ultra vires.

11. While hearing the learned counsel appearing for the parties, we asked Shri B.H. Marlapalle, learned Senior Counsel along with Shri Shibashish Mishra appearing on behalf of the respondents and intervenors, as to how, in absence of any pleading setting out grounds challenging the vires of Rule 4(b) and in the absence of seeking any relief to that effect, the High Court was justified in exercising jurisdiction to declare Rule 4(b) as ultra vires? In response, the learned Senior Counsel has fairly stated that it is a defect in the pleadings as well as in the relief sought before CAT and in the writ petition. But still, they made an unsuccessful attempt to satisfy this Court that the said

rule appears to be discriminatory and therefore the High Court has rightly exercised the jurisdiction while passing the impugned order. It is a trite law that for striking down the provisions of law or for declaring any rules as *ultra vires*, specific pleading to challenge the rules and asking of such relief ought to be made, that is conspicuously missing in the present case. In the absence of such a pleading, the Union of India did not have an opportunity to rebut the same. The other side had no opportunity to bring on record the object, if any, behind the Rules that were brought into force. We are also of the considered view that, in the writ petition seeking a writ of certiorari challenging the order of CAT, the High Court ought not to have declared Rule 4(b) as *ultra vires* in the above fact situation. Therefore, the High Court was not justified to declare Rule 4(b) as *ultra vires*.”

22. Now, the other question that remains is if there is so striking a similarity between the “unconstitutional” provisions of Rule 2(c) (iii) of the Rules of 1974 and those of Rule 2(c) (3) of the Rules of 1975, should this Court not ‘read down’ the provisions of Rule 2(c) (3) of the Rules of 1975, to save it from the peril of unconstitutionality.

23. This Court in **Kanhai Ram and others v. State of U.P. and others**, Neutral Citation No. - 2024:AHC:52835 has referred a question, amongst others, for consideration by a larger Bench, if the Court, in the absence of a challenge to the *vires* of a statute can ‘read down’ its provisions, that appear to be *ultra vires*. We would have made a reference of the question in the present matter also or awaited answer to the pending reference, but we do not think that the question really

arises in this case. We have also taken note of an opinion contrary to that in **Smt. Vimla Srivastava**, expressed by another Division Bench of this Court, later in point of time, in **Madhavi Mishra** (supra), which is expressed in the following words:

“15. It is settled principle of law that the object of the scheme is not to provide employment to the unemployed among the dependent relatives of the employee, who died in harness, but to enable one of the dependents to get some employment so as to eke out a livelihood for the members of the family of the deceased. The intention of the scheme can only be to provide immediate relief to the family of the deceased employee for their sustenance. A married daughter is excluded from that category and the exclusion is not without reason that married daughter goes out of the family and is dependent on her husband of her necessities. The father could render financial assistance to his married daughter, if he is in position to give assistance, but that is not reason to hold that married daughter still continues to dependent on her father specially when law enjoins a duty on the husband to maintain his wife and enables her to claim alimony in case he refuses to pay. Therefore, the dependency on the father ceases the moment the daughter is given in carriage and that is the justification for excluding married daughter from the category of dependents and to include only unmarried daughters. This aspect has been considered by the High Court of Kerala in minutest details in case of **V. Sunithakumari v. K.S.E.B. and others**, 1992 SCC OnLine Ker 145.

16. Thus, in the light of the law laid down by Hon'ble Supreme Court in case of **Director of Treasuries in Karnataka and another** (supra) and Kerala High Court

in case of V. Sunithakumari (supra), we are of the opinion that petitioner is not entitled to compassionate appointment firstly on the ground that a married daughter is not included in the definition of a family under the Regulations of 1995 and secondly petitioner cannot claim compassionate appointment as a matter of right specially when she has deliberately omitted to mention eligibility of her mother to get family pension, thus not leaving her in penury and also not making her dependent on the present applicant and thirdly because both as per the law and the tradition, a married daughter is dependent on her husband and not on her father.”

24. The impact of the decisions of the Supreme Court would also have to be considered, as referred to by the Division Bench in **Madhavi Mishra** as also certain other decisions, on which learned Counsel for the respondents have placed reliance. This, however, would be necessary if for the decision of the case, it was imperative to go into the question about the validity of Rule 2(c) (3) of the Rules of 1975. That is neither under challenge nor do we think that in the facts of the present case, the question of the rule being suitably ‘read down’, necessarily arises in order to decide the cause. The reason why it is not necessary to go into the question of vires of Rule 2(c) (3) of the Rules of 1975, or exploring the possibility of a ‘reading down’ thereof, is that assuming that the petitioner is entitled to stake her claim for compassionate appointment, the facts here do not entitle her to it on reputed criteria to judge such claims.

25. The petitioner has not shown with full particulars, how she was dependent upon her father at the time of his demise. This case is not about a discrimination on

the ground of sex alone, but something very different. If in the petitioner’s stead, a son of the deceased, placed in the circumstances that she is, had applied, his claim too would not have been accepted. It is a dependent son, who can claim for himself and for the benefit of supporting the deceased’s widow and minor children, a consideration for compassionate appointment. Likewise, if on the date of demise of the employee in harness, it can be shown that a married daughter is dependent upon him, or his widow and minor family members could be taken care of by the married daughter, if granted compassionate appointment, it may be a case for considering the claim and judging the validity of the prohibitive rule.

26. Here, the petitioner has not pleaded material facts and particulars to show how she was herself dependent on her deceased father at the time of his demise. There is a vague allegation that in the year 2008, her husband, Nisar Ahmad has divorced the petitioner. The evidence produced in this regard is a *Talaqnama*, written in Urdu on a plain paper and dated 1st January, 2008. It purports to have effected a divorce between the petitioner and her husband. Another document is a Hindi transliteration of the *Talaqnama*, written on a general stamp worth Rs.10/-. The Hindi transliteration shows that her husband has divorced the petitioner by pronouncing a triple Talaq in accordance with Shariat Law applicable to parties in the presence of two competent witnesses. The document to its face is a surreptitious one, which does not inspire confidence with this Court. The document has no authenticity about its record, even so much as a postal dispatch to the petitioner or its service being effected upon her through some dependable and ascertainable mode.

It is also not pleaded by the petitioner or established by the so-called *Talaqnama* for how long the petitioner was married, and if she had children of her own. There is one telltale circumstance about the deceased's marital status, which cannot be ignored. In her affidavit filed in support of the writ petition she has chosen to describe herself as wife of Nisar Ahmad, instead of saying daughter of the late Nasir Ahmad, as said elsewhere, such as the cause title and her applications made to the respondents. The contents of an affidavit signed and sworn by the petitioner cannot be lightly brushed aside.

27. This Court is of opinion that in the circumstances, the respondents were perfectly justified in asking the petitioner to produce evidence of her claimed divorce by a decree of a Court of competent jurisdiction, or some dependable evidence about it. If the *factum* of divorce is not believable, the petitioner cannot be regarded a dependent of the deceased at all. Still, taking the principle that she is eligible on assumption, if it was the petitioner's case fully pleaded and established that the deceased left behind him his widow and minor children, whom the petitioner was willing to support, there might have been a case worth consideration, of course, subject to be relevant rule being struck down or read down in accordance with law. But, that is not the case here, because the petitioner has not pleaded the full particulars of the deceased's dependents, except saying in paragraph No.14 that she bears the liability of three unemployed sons on her shoulders. It is not said by even as much as a hint as to who are the sons referred to in paragraph No.14. Whether they are sons of the deceased or the petitioner's sons, is not at all clear. If they are the deceased's sons, their ages and

competence to apply for themselves ought to have been disclosed in order to ascertain whether it was necessary for the petitioner to be offered a compassionate appointment in order to support the deceased's sons, who would qualify as his dependents. If the reference is to the petitioner's sons, they are certainly not the deceased's dependents and to support them, the petitioner cannot stake her claim to compassionate appointment on account of her father's demise in harness.

28. Besides the above facts, the affidavit filed by the petitioner in support of this petition shows that she is now 50 years of age. At this age, if she can be granted an appointment at all, compassionate or otherwise, by the respondents, has to be answered against her. The reason is for one that she would no longer be eligible for appointment in terms of the maximum age of prescribed. The other is that by this time, it would be assumed that she has managed to find her way in life and settled down, where the deceased's demise in harness has not destituted her.

29. So far as the other claim about the family pension is concerned, the respondents have denied it saying that the petitioner is not eligible under the Rules to receive family pension on account of services rendered by the deceased. It is for the petitioner to establish under what rule about pension and family pension, she is eligible. Not a word has been said in the writ petition or the rejoinder affidavit, except that it was paid for some time and then stopped. The right to receive both pension and family pension has to flow from some statute, statutory instrument or rules. Nothing of that kind has been pointed out by the petitioner in order to entitle her to receive family pension for her father's

service. This part of the petitioner's claim is, therefore, also untenable.

30. In the circumstances, this Court is of the opinion that no *mandamus* can be issued to the respondents either to consider the petitioner's claim for compassionate appointment or for the grant of family pension on account of her deceased father's services

31. In the result, this writ petition fails and is **dismissed**.

32. There shall be no order as to costs.

33. Let this order be communicated to the Chairman, U.P. Power Corporation Limited, Lucknow by the the Registrar (Compliance) with the remark that he will carry out the direction in paragraph No.13 of this judgment.

(2024) 4 ILRA 419
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.04.2024

BEFORE

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

Writ A No. 13858 of 2023

Shri Pal **...Petitioner**
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:

Sri Agnihotri Kumar Tripathi, Si Rajesh Kumar Pandey

Counsel for the Respondents:

C.S.C., Sri Pankaj Srivastava

Civil Law - U.P. Municipalities Act, 1916 – Annual Increment – Retirement – Notional

Increment – Article 14 – Pensionary Benefits

The petitioner, Shri Pal, a retired Clerk from Nagar Nigam, Meerut, challenged the Nagar Ayukt's order dated 28.12.2019, denying his annual increment for the period 01.07.2018 to 30.06.2019, due on 01.07.2019, post-retirement on 30.06.2019, citing no government order or rule permitting post-retirement increments.

Held: (1) The petition was allowed with costs of Rs. 10,000/-. (2) The impugned order was quashed as contrary to *Director (Admn. HR) KPTCL Vs C.P. Mundinamani*, which held that denying an increment earned for a year's satisfactory service due to retirement on 30.06 before the increment date (01.07) is arbitrary and violates Article 14. (3) The petitioner, having completed a full year of service, was entitled to a notional increment for pensionary benefits. (4) A mandamus was issued to grant the increment notionally from 01.07.2019, revise the pension, and pay arrears within eight weeks with 6% interest for delays. (5) The Nagar Ayukt's reliance on government orders over judicial precedents was disapproved, cautioning against pedantic adherence to rules conflicting with court rulings. (6) The Nagar Ayukt's failure to justify the order and improper affidavit verification were criticized.

List of Cases cited:

1. Director (Admn. HR) KPTCL & ors. Vs C.P. Mundinamani & ors., 2023 SCC OnLine SC 401; P. Ayyamperumal Vs The Registrar, Central Administrative Tribunal & ors., Writ Petition No. 15732 of 2017 (Madras HC, 15.09.2017);

2. St. of Tamil Nadu Vs M. Balasubramaniam, CDJ 2012 MHC 6525;

3. U.O.I. & ors. Vs Shiv Balak & ors., Writ-A No. 14527 of 2022 (Allahabad HC, 15.12.2022);

4. Gopal Singh Vs U.O.I., Writ Petition (C) No. 10509/2019 (Delhi HC, 23.01.2020);

5. Nand Vijay Singh Vs U.O.I., Writ A No. 13299/2020 (Allahabad HC, 29.06.2021);

6. Yogendra Singh Bhadauria Vs St. of Madhya Pradesh (Madhya Pradesh HC);

7. Arun Kumar Biswal Vs St. of Odisha, Writ Petition No. 17715/2020 (Orissa HC, 30.07.2021);

8. St. of Gujarat Vs Takhatsinh Udesinh Songara, Letters Patent Appeal No. 868/2021 (Gujarat HC);

9. Principal Accountant-General, Andhra Pradesh (Andhra Pradesh HC, Full Bench);

10. U.O.I. Vs Pavithran, O.P. (CAT) No. 111/2020 (Kerala HC, 22.11.2022); Hari Prakash Vs St. of Himachal Pradesh, CWP No. 2503/2016 (Himachal Pradesh HC, 06.11.2020).

(Delivered by Hon'ble J.J. Munir, J.)

1. This writ petition is directed against the order dated 28.12.2019 passed by the Nagar Ayukt, Nagar Nigam, Meerut declining to grant the petitioner annual increment for the period 1st July, 2018 to 30th June, 2019. The petitioner prays that a *mandamus* be issued to the respondent-Nagar Nigam to pay his due increment for the period 01.07.2018 to 30.06.2019, payable on 01.07.2019.

2. When this petition came up for admission on 22.08.2023, this Court passed the following order:

“The grievance of the petitioner is that he retired on 30.06.2019. He has been denied his increments from 01.07.2018 to 30.06.2019, which was due on 01.07.2018, The petitioner's claim has been rejected by the order impugned dated 28.12.2019 passed by the Nagar Aayukt, Nagar Nigam, Meerut.

The Nagar Aayukt, Nagar Nigam, Meerut will file an affidavit, showing cause why his order dated 28.12.2019 be not quashed being prima facie in the teeth of holding of the Supreme Court in **Director (Admn. HR) KPTCL and others v. C.P.**

Mundinamani and others, 2023 SCC OnLine SC 401.

The affidavit shall be filed within ten days indicating how he has denied the petitioner's increments in the teeth of the holding of the Supreme Court in Re: **C.P. Mundinamani** (supra).

Lay this writ petition as fresh on **04.09.2023.**

Let this order be communicated to the Nagar Aayukt, Nagar Nigam, Meerut by the Registrar (Compliance) **within 48 hours.”**

3. On the next date, that is 04.09.2023, the following order was made which effectively granted time to the Nagar Ayukt, Nagar Nigam, Meerut to comply with the order dated 22.08.2023 and show cause why the order impugned be not held contrary to the law laid down by the Supreme Court in **Director (Admn. HR) KPTCL and others v. C.P. Mundinamani and others, 2023 SCC OnLine SC 401:**

“This matter was heard on 22.08.2023 and order of date recorded.

Today when the matter is called on, no one is present on behalf of the petitioner and the private respondents.

Mr. Yashwant Singh, learned Counsel is present on behalf of the State.

This matter is adjourned as fresh to **14.09.2023.**

In the meantime, the order dated 22.08.2023 shall be complied with and the Registrar (Compliance) shall submit a report regarding service of the order dated 22.08.2023. ”

4. Since, there was no affidavit filed by 04.09.2023, while adjourning the matter, this Court called for a report from the Registrar (Compliance) in the matter.

5. The matter next came up on 14.09.2023, when this Court recorded the following order which also makes a verbatim reference to the report of the Registrar (Compliance):

“Perused the report dated 13.09.2023 submitted by the Registrar (Compliance) and the office report dated 14.09.2023. The relevant part of the report submitted in compliance with this Court's order dated 04.09.2023 and in turn, the earlier order dated 22.08.2023, reads:

As per the direction contained in Hon'ble Court's order dated 22.08.2023 (copy at flag 'A'), the order dated 22.08.2023 was duly communicated to the Nagar Ayukt, Nagar Nigam, Meerut, Through, The District Magistrate, Meerut for ensuring strict compliance, via email and Speed Post as well along-with D.O. letter No. 7909/RC (Civil) dated 24.08.2023 (copy at flag 'B'). The email receipt and Speed Post Track regarding the communication of the order dated 22.08.2023 is enclosed herewith (flag 'C') for Hon'ble Court's kind perusal.

The District Magistrate, Meerut, vide his letter No. 3478/O.S.D.-Camp/2023 dated 12.09.2023 (flag 'D') has submitted a report mentioning that the aforesaid Hon'ble Court's order dated 22.08.2023, has been communicated to the Nagar Ayukt, Nagar Nigam, Meerut in due course.

Mr. Pankaj Srivastava, learned Counsel for respondent No. 4, has appeared via video conferencing, but, due to slow internet speed, his voice could not been heard. Mr. Srivastava, however, conveyed through a text message that this matter may be taken up in the next week.

Lay as fresh on 28.09.2023, by which time the requisite personal affidavit shall be filed. ”

6. A reading of the order dated 14.09.2023 shows that Mr. Pankaj Srivastava, learned Counsel appearing on behalf of the Nagar Nigam, again sought time in the matter praying that it may be taken up in the next week. It was then posted on 28.09.2023 with a direction that by the said date the requisite personal affidavit (of the Nagar Ayukt, Nagar Nigam, Meerut) shall be filed.

7. When the matter was taken up on the fourth occasion on 03.10.2023, a reconstructed copy of the affidavit of compliance was placed on record by Mr. Pankaj Srivastava. It was accepted on record and treated as the original. A statement was made by Mr. Pankaj Srivastava that he does not want to file any further affidavit on behalf of the respondents. Learned Counsel for the petitioner stated that he does not wish to file a rejoinder. Accordingly, this petition was admitted to hearing which proceeded forthwith. Judgment was reserved.

8. Heard Mr. Agnihotri Kumar Tripathi, learned Counsel for the petitioner, Mr. Pankaj Srivastava, learned Counsel appearing on behalf of respondent nos. 2, 3 and 4 and Mr. Girijesh Kumar Tripathi, learned Additional Chief Standing Counsel appearing on behalf of respondent no.1.

9. The petitioner was appointed a Clerk in the one time Municipality of Meerut, since upgraded to a Nagar Nigam. The petitioner says that he discharged his duties honestly and to the best of his abilities throughout his career, retiring from service on 30.06.2019. The petitioner says that he attained the age of superannuation on 03.06.2019 and served with a notice of retirement dated 26.02.2019 which said that he would retire on 30.06.2019. The date of

retirement is apparently a little later than the petitioner's superannuation, going by the rule providing for retirement on the last day of the month.

10. The petitioner says that upon receipt of the notice of retirement he submitted an application to the Nagar Ayukt, received by his office on 17.05.2019, requesting that he may be paid his increment for the period 01.07.2018 to 30.06.2019. All his retirement dues were paid except his annual increment for the period 01.07.2018 to 30.06.2019. In these circumstances, the petitioner moved this Court by means of Writ-A No. 18405 of 2019 with a prayer that going by the settled law, to which allusion would shortly be made, the respondent-Nagar Ayukt be directed to pay the petitioner's increment for the period 01.07.2018 to 30.06.2019.

11. This Court, upon hearing learned Counsel for the petitioner, passed an order on 19.11.2019, disposing of Writ-A No. 18405 of 2019 in terms of directions that would be evident from the order, quoted in extenso:

“Petitioner submits that he is entitled to notional increment for the period 1.7.2018 to 30.6.2019, in light of the judgment of the Madras High Court dated 15.9.2017 passed in Writ Petition No.15732 of 2017 (P. Ayyamperumal Vs. The Registrar, Central Administrative Tribunal and others), against which a special leave petition filed before the Supreme Court has been rejected on 23rd July, 2018. It is stated that denial of annual increment to the petitioner, in the facts and circumstances, is wholly arbitrary. It is also urged that various representation made in that regard have not been bestowed any consideration and hence this writ petition.

Learned Standing Counsel submits that claim of petitioner shall be examined in accordance with law by the authority concerned.

In the facts and circumstances, noticed above, this writ petition stands disposed of with a direction upon the respondent no.2 to accord consideration to petitioner's claim for grant of notional increment w.e.f. 1.7.2018 to 30.6.2019, keeping in view the law laid down in the matter, by passing a reasoned order, within a period of two months from the date of presentation of certified copy of this order.”

12. The Nagar Ayukt, Nagar Nigam, Meerut, one Arvind Kumar Chaurasia, proceeded to pass an order dated 28.12.2019, that is to say, the impugned order rejecting the petitioner's claim, on ground that the petitioner had retired from service on 30.06.2019 whereas increments are payable to employees who are in service. After retirement from service, there is no provision for the award of increment. This is particularly so as no Government Order has been issued by the Government of Uttar Pradesh. It has also been said in the impugned order, most inappropriately, that since there is no Rule or Government Order authorising the payment of increment after retirement, the petitioner is not entitled to it. The increment for the period 01.07.2018 to 30.06.2019 would fall due on 01.07.2019 and the petitioner had retired a day earlier.

13. The Madras High Court, in a Bench decision of their Lordships in **P. Ayammerumal v. The Registrar, Central Administrative Tribunal and others** in Writ Petition No. 15732 of 2017 decided on 15.09.2017, to which reference was made in this Court's order dated

19.11.2019 passed in Writ-A No. 18405 of 2019, had squarely dealt with the issue in a writ petition arising out of an order passed by the Central Administrative Tribunal.

14. In **P. Ayammperumal** (*supra*), the short facts were that the petitioner had joined the Indian Revenue Service in the Customs and Excise Department in the year 1982 and retired as the Additional Director General, Chennai on 30.06.2013 upon attaining the age of superannuation. The 6th Pay Commission came in and the Central Government fixed 1st of July as the date on which increment for all employees would be payable, amending Rule 10 of the Central Civil Services (Revised Pay) Rules, 2008. It was in view of the said amendment that the petitioner was denied his last increment though he had completed a full year in service from 01.07.2012 to 30.06.2013. The petitioner moved the Central Administrative Tribunal, Madras Bench which rejected the petitioner's claim going by the book, like the *Nagar Ayuk* there, that the increment fell due on the 1st of July and since the petitioner had retired a day prior to that date, he was not entitled. This order was challenged before the Madras High Court. The Division Bench allowed the writ petition referring to an earlier judgment of the High Court in **State of Tamil Nadu, represented by its Secretary to Government, Finance Department and others v. M. Balasubramaniam, CDJ 2012 MHC 6525**, holding:

“6. In the case on hand, the petitioner got retired on 30.06.2013.

As per the Central Civil Services (Revised Pay) Rules, 2008, the increment has to be given only on 01.07.2013, but he had been superannuated on 30.06.2013 itself. The judgment referred to by the

petitioner in **State of Tamil Nadu, rep. by its Secretary to Government, Finance Department and others v. M. Balasubramaniam, reported in CDJ 2012 MHC 6525**, was passed under similar circumstances on 20.09.2012, wherein this Court confirmed the order passed in W.P.No.8440 of 2011 allowing the writ petition filed by the employee, by observing that the employee had completed one full year of service from 01.04.2002 to 31.03.2003, which entitled him to the benefit of increment which accrued to him during that period.

7. The petitioner herein had completed one full year service as on 30.06.2013, but the increment fell due on 01.07.2013, on which date he was not in service. In view of the above judgment of this Court, naturally he has to be treated as having completed one full year of service, though though the date of increment falls on the next day of his retirement. Applying the said judgment to the present case, the writ petition is allowed and the impugned order passed by the first respondent-Tribunal dated 21.03.2017 is quashed. The petitioner shall be given one notional increment for the period from 01.07.2012 to 30.06.2013, as he has completed one full year of service, though his increment fell on 01.07.2013, for the purpose of pensionary benefits and not for any other purpose. No costs.”

15. A Special Leave Petition, carried against the said decision, was dismissed by the Supreme Court on 23rd July, 2018. This judgment of the Madras High Court, against which Special Leave had been declined by the Supreme Court, was clearly referred to by the learned Single Judge in his order dated 19.11.2019 passed in Writ-A No. 18405 of 2019, when his Lordship issued a direction to the *Nagar Ayuk* to

consider the petitioner's claim for the grant of notional increment, with effect from 01.07.2018 to 30.06.2019. Now, the position of the law was well settled by time **P. Ayammperumal** was decided and that should have put an end to the controversy.

16. It appears that the issue arose before the Bombay High Court, the Delhi High Court and the Armed Forces Tribunal, Regional Bench, Lucknow, besides the Madras High Court who were unanimous in saying that the increment earned up to 30th June of a given year but falling due under the rules on 1st of July is already earned and has to be paid to the retired employee notionally, to be accounted towards the reckoning of his pension.

17. The issue arose before a Division Bench of this Court in a bunch of writ petitions entitled **Writ-A No. 14527 of 2022**, Union of India and 3 others v. Shiv Balak and 2 others decided on 15.12.2022 preferred by the Union of India from various judgments of the Central Administrative Tribunal, challenging similar orders, directing the grant of notional increment that had been earned up to the 30th of June of a particular year involved and where the employees had retired on 30th June before the increment actually fell due on the 1st of July. A Division Bench of this Court formulated the question involved in paragraph no. 2 of the judgement in **Shiv Balak** (*supra*) thus:

“The short **question involved** in this bunch of writ petitions is as under:

“Whether employees who retired on 30th June are entitled to the last annual increment made effective from on 1st July?””

18. After noticing the consistent opinion of the Madras High Court, the

Bombay High Court, the Delhi High Court and the Armed Forces Tribunal, Regional Bench, Lucknow, all affirmed by the Supreme Court, their Lordships held:

“18. In view of the facts and legal position noted above, since the controversy/question involved in the present writ petitions is squarely covered by the judgments/orders of Hon'ble Supreme Court affirming the judgment of Madras High Court, Bombay High Court, Delhi High Court and the Armed Forces Tribunal, Regional Bench, Lucknow, therefore, all the Writ Petitions deserve to be dismissed and the impugned orders of the Tribunal deserve to be affirmed.

20. For all the reasons aforesaid all the writ petitions are **dismissed** and it is held that the employees who retired on 30th June are entitled to the last increment made effective on 1st July.”

19. Still later, the issue again arose before the Supreme Court in **C.P. Mundinamani** (*supra*) where the employers, who had joined a similar issue with employees, lost before the Division Bench of the Karnataka High Court and moved the Supreme Court by Special Leave.

20. In **C.P. Mundinamani**, the facts show that the employees of the Karnataka Power Transmission Corporation Limited, the writ petitioners-respondents in that case, had retired a day before the annual increment accrued in accordance with Regulation 40(1) of the Karnataka Electricity Board Employees Service Regulations, 1977. The said Regulation made provision that an increment earned would accrue on the day following and since the employees in that case had retired on the day it was earned, the Karnataka

Power Transmission Corporation Limited, going by the book, denied the increment that the retiring employees had earned up to the last day of their service.

21. Their Lordships of the Supreme Court, as the report in **C.P. Mundinamani** would show, formulated the following question:

“13. The short question which is posed for the consideration of this Court is whether an employee who has earned the annual increment is entitled to the same despite the fact that he has retired on the very next day of earning the increment?”

22. In answering the question, their Lordships surveyed the divergent opinions of the Full Bench of the Andhra Pradesh High Court, the Himachal Pradesh High Court and the Kerala High Court, that would support the employer's contention and the other views favouring the employees expressed by the Madras High Court, the Delhi High Court, this Court, the Madhya Pradesh High Court, the Orissa High Court and the Gujarat High Court, and held:

“15. It is the case on behalf of the appellants that the word used in Regulation 40(1) is that an increment accrues from the day following that on which it is earned and in the present case the increment accrued on the day when they retired and therefore, on that day they were not in service and therefore, not entitled to the annual increment which they might have earned one day earlier. It is also the case on behalf of the appellants that as the increment is in the form of incentive and therefore, when the employees are not in service there is no

question of granting them any annual increment which as such is in the form of incentive.

16. At this stage, it is required to be noted that there are divergent views of various High Courts on the issue involved. The Full Bench of the Andhra Pradesh High Court, the Himachal Pradesh High Court and the Kerala High Court have taken a contrary view and have taken the view canvassed on behalf of the appellants. On the other hand, the Madras High Court in the case of *P. Ayyamperumal (supra)*; the Delhi High Court in the case of *Gopal Singh v. Union of India (Writ Petition (C) No. 10509/2019 decided on 23.01.2020)*; the Allahabad High Court in the case of *Nand Vijay Singh v. Union of India (Writ A No. 13299/2020 decided on 29.06.2021)*; the Madhya Pradesh High Court in the case of *Yogendra Singh Bhadauria v. State of Madhya Pradesh; the Orissa High Court in the case of AFR Arun Kumar Biswal v. State of Odisha (Writ Petition No. 17715/2020 decided on 30.07.2021)*; and the Gujarat High Court in the case of *State of Gujarat v. Takhtsinh Udesinh Songara (Letters Patent Appeal No. 868/2021)* have taken a divergent view than the view taken by the Full Bench of the Andhra Pradesh High Court and have taken the view that once an employee has earned the increment on completing one year service he cannot be denied the benefit of such annual increment on his attaining the age of superannuation and/or the day of retirement on the very next day.

17. Now so far as the submission on behalf of the appellants that the annual increment is in the form of incentive and to encourage an employee to perform well and therefore, once he is not in service, there is no question of grant of annual increment is concerned, the aforesaid has no substance. In a given case, it may

happen that the employee earns the increment three days before his date of superannuation and therefore, even according to the Regulation 40(1) increment is accrued on the next day in that case also such an employee would not have one year service thereafter. It is to be noted that increment is earned on one year past service rendered in a time scale. Therefore, the aforesaid submission is not to be accepted.

18. Now, so far as the submission on behalf of the appellants that as the increment has accrued on the next day on which it is earned and therefore, even in a case where an employee has earned the increment one day prior to his retirement but he is not in service the day on which the increment is accrued is concerned, while considering the aforesaid issue, the object and purpose of grant of annual increment is required to be considered. A government servant is granted the annual increment on the basis of his good conduct while rendering one year service. Increments are given annually to officers with good conduct unless such increments are withheld as a measure of punishment or linked with efficiency. Therefore, the increment is earned for rendering service with good conduct in a year/specified period. Therefore, the moment a government servant has rendered service for a specified period with good conduct, in a time scale, he is entitled to the annual increment and it can be said that he has earned the annual increment for rendering the specified period of service with good conduct. Therefore, as such, he is entitled to the benefit of the annual increment on the eventuality of having served for a specified period (one year) with good conduct efficiently. Merely because, the government servant has retired on the very next day, how can he be denied the annual

increment which he has earned and/or is entitled to for rendering the service with good conduct and efficiently in the preceding one year. In the case of Gopal Singh (supra) in paragraphs 20, 23 and 24, the Delhi High Court has observed and held as under:-

(para 20)

"Payment of salary and increment to a central government servant is regulated by the provisions of F.R., CSR and Central Civil Services (Pension) Rules. Pay defined in F.R. 9(21) means the amount drawn monthly by a central government servant and includes the increment. A plain composite reading of applicable provisions leaves no ambiguity that annual increment is given to a government servant to enable him to discharge duties of the post and that pay and allowances are also attached to the post. Article 43 of the CSR defines progressive appointment to mean an appointment wherein the pay is progressive, subject to good behaviour of an officer. It connotes that pay rises, by periodical increments from a minimum to a maximum. The increment in case of progressive appointment is specified in Article 151 of the CSR to mean that increment accrues from the date following that on which it is earned. The scheme, taken cumulatively, clearly suggests that appointment of a central government servant is a progressive appointment and periodical increment in pay from a minimum to maximum is part of the pay structure. Article 151 of CSR contemplates that increment accrues from the day following which it is earned. This increment is not a matter of course but is dependent upon good conduct of the central government servant. It is, therefore, apparent that central government employee earns increment on the basis of his good conduct for specified period i.e. a year in

case of annual increment. Increment in pay is thus an integral part of progressive appointment and accrues from the day following which it is earned."

(para 23)

"Annual increment though is attached to the post & becomes payable on a day following which it is earned but the day on which increment accrues or becomes payable is not conclusive or determinative. In the statutory scheme governing progressive appointment increment becomes due for the services rendered over a year by the government servant subject to his good behaviour. The pay of a central government servant rises, by periodical increments, from a minimum to the maximum in the prescribed scale. The entitlement to receive increment therefore crystallises when the government servant completes requisite length of service with good conduct and becomes payable on the succeeding day."

(para 24)

"In isolation of the purpose it serves the fixation of day succeeding the date of entitlement has no intelligible differentia nor any object is to be achieved by it. The central government servant retiring on 30th June has already completed a year of service and the increment has been earned provided his conduct was good. It would thus be wholly arbitrary if the increment earned by the central government employee on the basis of his good conduct for a year is denied only on the ground that he was not in employment on the succeeding day when increment became payable."

"In the case of a government servant retiring on 30th of June the next day on which increment falls due/becomes payable loses significance and must give way to the right of the government servant to receive increment due to satisfactory

services of a year so that the scheme is not construed in a manner that it offends the spirit of reasonableness enshrined in Article 14 of the Constitution of India. The scheme for payment of increment would have to be read as whole and one part of Article 151 of CSR cannot be read in isolation so as to frustrate the other part particularly when the other part creates right in the central government servant to receive increment. This would ensure that scheme of progressive appointment remains intact and the rights earned by a government servant remains protected and are not denied due to a fortuitous circumstance."

19. The Allahabad High Court in the case of Nand Vijay Singh (supra) while dealing with the same issue has observed and held in paragraph 24 as under: -

"24. Law is settled that where entitlement to receive a benefit crystallises in law its denial would be arbitrary unless it is for a valid reason. The only reason for denying benefit of increment, culled out from the scheme is that the central government servant is not holding the post on the day when the increment becomes payable. This cannot be a valid ground for denying increment since the day following the date on which increment is earned only serves the purpose of ensuring completion of a year's service with good conduct and no other purpose can be culled out for it. The concept of day following which the increment is earned has otherwise no purpose to achieve. In isolation of the purpose it serves the fixation of day succeeding the date of entitlement has no intelligible differentia nor any object is to be achieved by it. The central government servant retiring on 30th June has already completed a year of service and the Increment has been earned provided his conduct was good. It would thus be wholly arbitrary if the increment earned by the

central government employee on the basis of his good conduct for a year is denied only on the ground that he was not in employment on the succeeding day when Increment became payable. In the case of a government servant retiring on 30th of June the next day on which increment falls due/becomes payable loses significance and must give way to the right of the government servant to receive increment due to satisfactory services of a year so that the scheme is not construed in a manner that it offends the spirit of reasonableness enshrined in Article 14 of the Constitution of India. The scheme for payment of increment would have to be read as whole and one part of Article 151 of CSR cannot be read in isolation so as to frustrate the other part particularly when the other part creates right in the central government servant to receive increment. This would ensure that scheme of progressive appointment remains intact and the rights earned by a government servant remains protected and are not denied due to a fortuitous circumstance."

20. Similar view has also been expressed by different High Courts, namely, the Gujarat High Court, the Madhya Pradesh High Court, the Orissa High Court and the Madras High Court. As observed hereinabove, to interpret Regulation 40(1) of the Regulations in the manner in which the appellants have understood and/or interpreted would lead to arbitrariness and denying a government servant the benefit of annual increment which he has already earned while rendering specified period of service with good conduct and efficiently in the last preceding year. It would be punishing a person for no fault of him. As observed hereinabove, the increment can be withheld only by way of punishment or he has not performed the duty efficiently. Any

interpretation which would lead to arbitrariness and/or unreasonableness should be avoided. If the interpretation as suggested on behalf of the appellants and the view taken by the Full Bench of the Andhra Pradesh High Court is accepted, in that case it would tantamount to denying a government servant the annual increment which he has earned for the services he has rendered over a year subject to his good behaviour. The entitlement to receive increment therefore crystallises when the government servant completes requisite length of service with good conduct and becomes payable on the succeeding day. In the present case the word "accrue" should be understood liberally and would mean payable on the succeeding day. Any contrary view would lead to arbitrariness and unreasonableness and denying a government servant legitimate one annual increment though he is entitled to for rendering the services over a year with good behaviour and efficiently and therefore, such a narrow interpretation should be avoided. We are in complete agreement with the view taken by the Madras High Court in the case of *P. Ayyamperumal (supra)*; the Delhi High Court in the case of *Gopal Singh (supra)*; the Allahabad High Court in the case of *Nand Vijay Singh (supra)*; the Madhya Pradesh High Court in the case of *Yogendra Singh Bhadauria (supra)*; the Orissa High Court in the case of *AFR Arun Kumar Biswal (supra)*; and the Gujarat High Court in the case of *Takhatsinh Udesinh Songara (supra)*. We do not approve the contrary view taken by the Full Bench of the Andhra Pradesh High Court in the case of *Principal Accountant-General, Andhra Pradesh (supra)* and the decisions of the Kerala High Court in the case of *Union of India v. Pavithran (O.P. (CAT) No. 111/2020 decided on 22.11.2022)* and

the Himachal Pradesh High Court in the case of Hari Prakash v. State of Himachal Pradesh (CWP No. 2503/2016 decided on 06.11.2020)."

23. It is in view of the law laid down by the supreme Court in **C.P. Mundinamani** that this Court required the Nagar Ayukt, Nagar Nigam, Meerut to file an affidavit of compliance showing cause why the impugned order be not quashed as it decides in the teeth of what their Lordships of the Supreme Court have held in **C.P. Mundinamani**. Instead of showing cause, in the affidavit of compliance that has been filed, all that is said finds mention in paragraph nos. 4 and 5, which read:

"4. That pursuant to the aforesaid directions of this Hon'ble Court the deponent had sent a communication on 12.09.2023 to the Director, Local Bodies, U.P. at Lucknow for issuing appropriate direction so that the order of this Hon'ble Court may be complied in letter and spirit. True copy of the communication dated 12.09.2023 sent by the deponent to the Director, Local Bodies, U.P. at Lucknow is being filed herewith and marked as **ANNEXURE NO. AOC-1** to this affidavit of compliance.

5. That till this date no direction has been issued by the Director, Local Bodies, U.P. The deponent is ready to comply any direction of this Hon'ble Court issued in this case."

24. It is interesting to notice that these two paragraphs of the affidavit, sworn by the *Nagar Ayukt*, Nagar Nigam, Meerut himself, have been verified on the basis of "information received from the records". The communication to the Director, Local Bodies, U.P. dated 12.09.2023, that had been sent by the *Nagar Ayukt*, Nagar

Nigam, Meerut, is a document that the *Nagar Ayukt* sent himself to the Director, Local Bodies. One is left to wonder why this averment would be sworn on the basis of information received from records. That apart an averment in an affidavit is sworn either on the 'basis of record' or 'information received from a person'. There is no swearing on the basis of 'information received from records'. These kinds of things happen where official respondents intermeddle with learned Counsel's draft and attempt vetting draft pleadings or affidavits by applying their 'common sense' to the expert field of the law.

25. The other noticeable feature is that the *Nagar Ayukt* is the man competent on behalf of the Nagar Nigam to sanction and grant increment to the petitioner. Why has he then made a reference of the matter to the Director, Local Bodies is difficult to explain. If, under the law, the Nagar Ayukt, Nagar Nigam could reject the petitioner's claim for grant of the annual increment for the period 01.07.2018 to 30.06.2019, notionally, it was for him to explain why his order be not quashed and a *mandamus*, as prayed, issued. The *Nagar Ayukt* is not a child or a ward sitting in the Director's lap seeking directions, as if it were, from his guardian or a parent figure, what to do in the matter. We strongly disapprove of the aforesaid course of action adopted by the Nagar Ayukt, Nagar Nigam, Meerut and caution him to be careful in future.

26. The merits of the matter now lie beyond the realm of cavil. Once the majority of the Constitutional Courts of the country, including the Supreme Court of India, have unequivocally held that a Regulation, that denies the benefit of an increment earned by an employee for the

year merely because it technically accrues on the day following his retirement, would be arbitrary and unreasonable, there is no option for the *Nagar Ayukt* but to notionally grant the increment. This is what has been held by the Supreme Court in **C.P. Mundinamani**, as also the majority of the High Courts in the country. In the face of the holding of the Constitutional Courts, including the Supreme Court of India, no Government Order or Rule to the contrary can be given effect to. It is not open to the *Nagar Ayukt* to have referred to Government Orders in the face of the law laid down by High Courts across the country, which at the time the impugned order was passed, had met with approval of the Supreme Court, may be by a summary refusal of leave.

27. The *Nagar Ayukt* as well as the State Government are cautioned in the matter not to act pedantically following Government Orders on issues that are governed by judgments of the High Court or the Supreme Court, rendered after considering such Government Orders or Rules holding them to be arbitrary. Apparently, it seems that the *Nagar Ayukt* has thought it safer to go by a Government Order and seek instructions from the Government, ignoring judgments of this Court and the Supreme Court. This kind of an impression as well as course of action has to be firmly discouraged and put down. The impugned order being clearly one in the teeth of the consistent law laid down by the High Courts and finally approved by the Supreme Court in **C.P. Mundinamani**, it cannot be sustained.

28. In the result, this petition **succeeds** and is **allowed**. The impugned order dated 28.12.2019 passed by the

Nagar Ayukt, Nagar Nigam, Meerut is hereby **quashed**. A *mandamus* is issued to the respondents to grant annual increment to the petitioner for the period 01.07.2018 to 30.06.2019 notionally with effect from 01.07.2019. The petitioner's pension shall be revised accordingly and arrears of pension paid to the petitioner within a period of eight weeks of the receipt of a copy of this judgment, failing which the arrears will carry simple interest at the rate of 6% per annum for the period of delay. A revised Pension Payment Order shall be issued within the aforesaid period of time. The petitioner will be entitled to costs in the sum of Rs. 10,000/- payable by the *Nagar Ayukt*, Nagar Nigam, Meerut. It will be open to the Nagar Nigam, Meerut to recover these costs from the *Nagar Ayukt* who passed the impugned order.

29. Let this judgment be communicated to the *Nagar Ayukt*, Nagar Nigam, Meerut by the Registrar (Compliance).

(2024) 4 ILRA 430
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.02.2024

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ A No. 15439 of 2022

Indramani Rao	...Petitioner
Versus	
State of U.P. & Ors.	...Respondents

Counsel for the Petitioner:
 Sri Ramesh Chandra Dwivedi

Counsel for the Respondents:
 C.S.C., Sri Kushmondeya Shahi

U.P. Intermediate Education Act, 1921 – Sections 16-E(10) & 16G(3)(q) – Pension – Disciplinary Action – Retired Employee – Verification of Academic Qualifications – Third-Party Complaint

The petitioner, Indramani Rao, an Assistant Teacher who voluntarily retired on 31.03.2022, challenged the orders dated 05.05.2022, 03.09.2022 (Deputy Director of Education), and 13.09.2022 (District Inspector of Schools) directing verification of his B.Ed. degree (Shiksha Alankar, 1991) based on a third-party complaint, potentially affecting his pension.

Held: (1) The writ petition was allowed, and the impugned orders were quashed. (2) No provision under the U.P. Intermediate Education Act, 1921, or its regulations permits disciplinary action or inquiry into the academic qualifications of a retired employee, as Sections 16-E(10) and 16G(3)(q) apply only to serving teachers. (3) The petitioner, having served since 1978 and retired voluntarily, could not be subjected to post-retirement inquiry absent specific legal provisions, rendering such actions futile and burdensome to the public exchequer. (4) The petitioner was entitled to exemption from B.Ed. training under a 1994 Government Order, and his qualifications were never misrepresented. (5) The third-party complaint, previously dismissed in a related writ petition, lacked merit to trigger such verification. (6) A mandamus was issued to clear all post-retiral dues within one month, with 8% interest for delays beyond 30 days. (7) The Supreme Court's ruling in *Chandra Singh Vs St. of Rajasthan* and coordinate bench decisions reinforced that disciplinary proceedings cannot continue post-retirement without explicit rules.

List of Cases cited:

1. Chandra Singh Vs St. of Rajasthan & anr.,
2. JT 2003 (6) SC 20; Ravindra Singh Rathor Vs District Inspector of Schools, 2003 Lawsuit (All) 950;
3. Bal Krishna Pandey Vs St. of U.P. & ors., Writ-A No. 20488 of 2007 (Allahabad HC, 30.04.2007).

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

1. Heard Sri R.C. Dwivedi, learned counsel for the petitioner, Sri K. Shahi, learned counsel appearing for respondent no. 5 and learned Standing Counsel for State-respondents.

2. Petitioner before this Court is aggrieved by notice dated 13th September, 2022, issued by District Inspector of Schools questioning his B.Ed. degree furnished by him at the time of his initial appointment in the institution in the year 1978 as Assistant Teacher in C.T. grade in junior high school.

3. Briefly stated facts of the case are that the petitioner was initially appointed as Assistant Teacher C.T. grade on 1st July, 1978. Later on, the institution was upgraded as high school in the year 1985 and on 30th March, 1983 by means of a Government Order, the institution was brought on grant-in-aid list. Since, the petitioner's name was there and the institution was brought on grant-in-aid upto junior high school, it was also brought on grant-in-aid list on 8th February, 1996 and the provisions of the U.P. High Schools and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1971, was made applicable, w.e.f., 1st April, 1996. Petitioner's name figured both at the level of junior high school and when the institution was brought on grant-in-aid as high schools and the petitioner continued to receive salary. Subsequently, since the institution had been recognized upto high school and was also brought on grant-in-aid and C.T. grade got declared a dying cadre under the Government Order issued in the year 1999, the petitioner, who continued to work as Assistant Teacher was automatically accorded with the status of Assistant Teacher L.T. grade. Petitioner seems to have also acquired B.Ed. degree

of Shiksha Alankar from Rashtriya Patrachar Sanasthan, Kanpur in the year 1991. It is pleaded in the writ petition that since the Government Order was also issued for granting exemption from training to the teachers, who were untrained teachers, petitioner would also be entitled for exemption from training of B.Ed., in the event Shiksha Alankar degree were not be taken at par with the B.Ed. The petitioner's pay fixation had also been done by the District Inspector of Schools under order dated 10.10.2005 w.e.f. 19.02.1991 and the petitioner has been granted annual increments accordingly and further selection grade and pay fixation as per 7th pay commission recommendations. Since as per the date of birth recorded in the service book of the petitioner, he was to retire on 30.4.2022 but for his personal problems he made an application to the Manager for voluntary retirement from the institution on 30.10.2021, the Committee of Management adopted a resolution on 31.10.2021 accepting the request of the petitioner for voluntary retirement. In view of the provisions as contained under the Government Order dated 24.06.1983, the District Inspector of Schools Siddharth Nagar, approved the resolution of Committee of Management under his order dated 20th January, 2022 and petitioner stood retired voluntarily, w.e.f., 31st March, 2022. Upon his retirement petitioner has also been paid GPF, group insurance gratuity etc. Since he was also entitled to pension, so the papers were also forwarded by the Committee of Management for the said purpose, however, in the meanwhile it appears, on account of some village rivalry, one private person, namely, Brijesh Pratap Rao, who was envious of him made a complaint against the petitioner regarding his B.Ed. degree. Taking cognizance upon a third party

complaint, the Deputy Director of Education vide letter dated 5.5.2022 and 3.9.2022, directed for verification of the B.Ed. degree of the petitioner and if found not correct then for lodging of F.I.R. against him and this is how a consequential order has come to be passed by District Inspector of Schools.

4. Argument advanced by learned counsel for the petitioner is that once the petitioner has finally retired from service now at the time of his claim for pension, his original qualification while working as an employee, cannot be gone into. He is no more a member of service and pension is his statutory right for the service, which he has already rendered with the department, inasmuch, he having never concealed material facts regarding his academic documents submitted with the authorities, he cannot be said to have mis-representated at all. Insofar as, the B.Ed. degree is concerned, it is submitted that through out he has shown the degree of Shiksha Alankar obtained from a institute, which according to him, he had obtained bonafidely, however, even if, that degree was not admissible, technically he stood exempted from training on account of Government Order issued by the State Government.

5. Learned Standing Counsel appearing for the State respondents submits that there was no harm in the verification being done but he could not demonstrate any relevant provisions in the Intermediate Education Act, 1921, which provide for scrutiny in appointment of a retired employee. He could not show any provision that empowers the authorities to take any disciplinary action against a retired employee. Learned Standing Counsel also could not dispute that under

the relevant Government Order dated 21.10.1994, the petitioner would have been entitled to exemption from training. He also could not dispute the fact that it was a third party complaint upon which, the authorities have acted. One more factor also important to notice is that the writ petition was filed by Brijesh Pratap Rao being Writ-A No. 6179 of 2022, questioning the appointment of the petitioner and seeking a writ in the nature of quo warranto, was got dismissed as withdrawn on 25.4.2022.

6. Having heard the submissions made by learned counsel for the respective parties and having perused the records, in my considered view, once the petitioner has attained the age of superannuation as he has admittedly been granted voluntary retirement under the order passed by the District Inspector of Schools dated 20th January, 2022, there remained no occasion now for the Education authorities to have gone into the verification of the academic records of petitioner so as to deny him pension and that too upon a third party private complaint more especially when the writ petition filed by the third party questioning the appointment of the petitioner, had been dismissed on 26.4.2022. The relevant provisions under the Intermediate Education Act, 1961 wherein the power could have been exercised to question the appointment in Section 6-E (10) of the Intermediate Education Act, but power is to be exercised only in respect of head of the institution and teachers, who are in service. The punishments that are required to be imposed under Section 16G (3) (q) are meant only in respect of working teachers. The regulations that have been framed for the purpose of enquiry/disciplinary proceedings are also in respect of teachers and employees working in the institution.

Nothing has been pointed out at the instance of learned Standing Counsel that any of the regulations provides for any disciplinary action against a retired employee. All that is written is vide regulation 30, 35 relates to employees working. Thus, in my considered view in the absence of any provisions to undertake a disciplinary proceeding in respect of retired employee, no action can be taken. If any such enquiry is held into the academic record of such teacher, like the petitioner, it would all lead to a futile exercise burdening the public exchequer additionally. In matters of service, there is a contract of employment, which ends with the employee retiring from service unless the rules permit departmental enquiry or action against employees even after their retirement for a certain period of time. This Court as well as Supreme Court has repeatedly held that legality of appointment should not be questioned after a lapse of substantial period of time.

7. In the case of **Chandra Singh vs. State of Rajasthan and another; JT 2003 (6) SC 20, vide paragraph-37**, the Supreme Court has held thus:-

37..... A departmental proceeding can continue so long as the employee is in service. In the event, a disciplinary proceeding is kept pending by the employer the employee cannot be made to retire. There must exist specific provision in the pension rules in terms whereof, whole or a part of the pension can be withheld or withdrawn wherefor a proceeding has to be initiated. Further more, no rule has also been brought to our notice providing for continuation of such proceeding despite permitting the employee concerned to retire. In absence of such a proceeding, the High Court or the State cannot contend

that the departmental proceedings against the appellant Mata Deen Garg could continue"

8. This judgment has been subsequently followed by two Co-ordinate Benches of this Court in the case of *Ravindra Singh Rathor vs. District Inspector of Schools; 2003 Lawsuit (All) 950 and Bal Krishna Pandey vs. State of U.P. and others passed in Writ-A No. 20488 of 2007 decided on 30th April, 2007.*

9. Beside the above learned Standing Counsel has not been able to show any government order or any law that entitles the State to withhold and deny pension to a retired employee by embarking upon an enquiry into the qualification of a retired teacher at the time of his or her entry into service decades ago.

10. In view of the above, the writ petition succeeds and is allowed.

11. The order passed by Deputy Director of Education dated 05.05.2022 and 03.09.2022 as well as the consequential order dated 13th September, 2022 passed by District Inspector of Schools, are, accordingly, hereby quashed. The respondents are directed to clear all post retiral dues of the petitioner within a period of one month of production of certified copy of this order, failing which respondents shall have to pay interest @ 8% for the period payment is delayed beyond 30 days as prescribed above.

(2024) 4 ILRA 434
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.03.2024

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ A No. 15593 of 2019

Shail Kumar Chaube ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sri Udai Chandani, Sri G.K. Singh (Sr. Advocate)

Counsel for the Respondents:

Sri Krishna Raj Singh Jadaun, Sri Ritvik Upadhya, Sri Vikram D. Chauhan, Sri V.K. Upadhya (Sr. Advocate)

A. Service Law – Banaras Hindu University Act, 1915 – Central Civil Services (Classification, Control and Appeal) Rules, 1965 – Rules 11, 14 & 15 – Disciplinary proceeding – Compulsory retirement – Working as a Professor in Banaras Hindu University – Charge of making vulgar remarks U.P. on the students was leveled – Earlier, the penalty of 'censure' was imposed by Executive Council, but later on U.P. on reference of Vice Chancellor, major penalty of 'compulsory retirement' was imposed – Review power of disciplinary authority was challenged – Held, the disciplinary authority in the matter of imposition of punishment after due enquiry held, in the absence of provision to review its decision and to change penalty from minor to major cannot be justified and deserves to be quashed – Original Act, 1915 did not provide for compulsory retirement by way of punishment – Since there is no power available to review a penalty imposed, it was beyond competence of Executive Council of the University to have resisted its penalty. (Para 6, 8, 21 and 41)

B. Service Law – Banaras Hindu University Act, 1915 – Statute 31 (d) – CCS Rules, 1965 – Disciplinary proceeding – Compulsory retirement – No show cause notice was issued – Effect – Held, whenever the University proposes to

remove a person from employment on the ground of misconduct, he would be entitled to opportunity of show cause in respect to the decision taken – The Executive Council has not even issued a notice much less a show cause as required under Statute 31 (d) or under the CCS Rules before firing him by way of compulsory retirement from the University – Resolution adopted by the Executive Council now impugned in the present writ petition is liable to be quashed on this ground alone. (Para 34 and 37)

Writ petition allowed. (E-1)

List of Cases cited:

1. Gajadhar Prasad Mishra Vs Vice Chancellor, University of Allahabad & ors.; 1966 All LJ 324 (FB) :1965 SCC Online All 345
2. Neelima Mishra Vs Harindar Kaur Paintal; 1990 (2) SCC 746
3. Roop Singh Negi Vs P.N.B.& ors.; 2009 (2) SCC 570
4. Apparel Export Promotion Council Vs A.K. Chopra; (1999) 1 SCC 759
5. Calcutta Dock Labour Board Vs Jafar Immam; 1965 : 1965 (2) LLJ 112 (SC)
6. M.V. Bijlani Vs U.O.I.; (2006) 5 SCC 88

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

1. Heard Sri G.K. Singh, learned Senior Advocate assisted by Sri Udai Chandani, learned counsel for the petitioner and Sri V.K. Upadhya, learned Senior Advocate assisted by Sri Ritvik Upadhya, learned counsel for the Respondent-University.

2. At the very outset, learned counsel for the petitioner submits that petitioner is confining his writ petition only to the resolution adopted by the Executive

Council dated 27.09.2019 and the consequential order of Registrar dated 21.10.2019.

3. Petitioner while working as a professor in the Department of Zoology Institute of Science, Banaras Hindu University was awarded with the punishment in the nature of compulsory retirement from service vide resolution adopted by the Executive Council in its meeting held on 27.09.2019 (Item No.19) and the consequential order passed by Registrar of the University dated 21.10.2019. It is this resolution of the Executive Council and the consequential order passed by the Registrar that are put to challenge before this Court in the present petition on the ground that the Executive Council being the disciplinary authority under Banaras Hindu University Act, 1915 and the statute framed thereunder exercises a quasi judicial power and, therefore, in the absence of any provision of law permitting it to review its decision, such review was bad for want of lawful authority. Learned Senior Advocate has also placed a judgment of this Court in the case of *Gajadhar Prasad Mishra vs. Vice Chancellor, University of Allahabad and others: 1966 All LJ 324 (FB):1965 SCC Online All 345*.

4. Yet another argument has been advanced by learned Senior Advocate appearing for the petitioner that even on the principle of fraud and misrepresentation as twin factors to entitle an authority to review its decision, were also not available with the respondents so as to charge the delinquent employee with fraud and misrepresentation in obtaining such an order which has been reviewed. Learned Advocate has also relied upon two authorities of Supreme Court in the case of

Neelima Mishra vs. Harindar Kaur Paintal: 1990 (2) SCC 746 and Roop Singh Negi vs. Punjab National Bank and others: 2009 (2) SCC 570.

5. Sri V.K. Upadhyay, learned Senior Advocate, appearing for the University has sought to urge before the Court that matter is of such gravity involving misconduct on the part of the delinquent employee that this Court may not like to exercise its discretion in equitable jurisdiction under Article 226 of the Constitution to interfere with the order of punishment of compulsory retirement. He has further urged that in the matter of imposition of penalty in the nature of compulsory retirement more especially when the petitioner has already attained the age of 58 years, would not go on to result in any irreparable loss or injury so as to lead to any miscarriage of justice. He has also argued that continuance of such teachers in faculty is against the interest of students community especially where a large number of female students are there and even otherwise it will not be conducive to the academic environment on the campus of the University to continue such an employee any further. He submits that the punishment of compulsory retirement is factored for various reasons not necessarily a punishment but in the nature of an action which discourages such conduct on the part of the faculty and non faculty members of the University from showing this kind of conduct. In respect of his argument, learned Senior advocate, Mr. Upadhya has placed reliance on authority of Supreme Court in the case of ***Apparel Export Promotion Council vs. A.K. Chopra: (1999) 1 SCC 759.***

6. Briefly stated facts of the case are that on the basis of complaint by students

regarding his alleged misconduct in making vague remarks upon the students that escalated to the degrading and in the nature of undignified comments termed as vulgar in nature that taking recourse to the provisions of Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (hereinafter referred to as 'the Act of 2013') university proceeded to hold enquiry by an internal complaint committee into the charges. The internal complaint committee after holding due enquiry, submitted its report on 21.12.2018 which was served upon the petitioner by the Registrar in his letter dated 24/25.01.2019 providing him an opportunity to prefer an appeal. Petitioner preferred an appeal on 22.02.2019 contending therein that he never misused or abused his position in any manner whatsoever while dealing with the students. The entire matter was placed before the Executive Council which considered the entire material placed before it including the enquiry report and the complaints on the basis of which the enquiry under the Special Act was initiated and after deliberating upon the findings of the complaint committee the Executive Council in its wisdom and discretion thought it more appropriate to resolve to impose penalty in the nature of 'censure' only with further direction that the petitioner may not be entrusted with any such responsibilities in future. The Executive Council also resolved to observe that a teacher must ensure a proper and appropriate behaviour. Interesting to notice here that this meeting of the Executive Council was held at Vice Chancellor Lodge, BHU on 07.06.2019 with the Vice Chancellor in chair. So it was a conscious decision taken by the Executive Council with the Vice Chancellor in chair to impose penalty in the nature of censure upon the

petitioner with a further resolution not to entrust him with any such task in future. The Registrar issued a consequential order on 16.07.2019 with a further order passed on 28.08.2019 that the period between 23.10.2019 and 16.07.2019 shall be treated as a period spent on duty and accordingly allowed petitioner to draw full pay and allowances for the aforesaid period after deducting the subsistence allowance.

7. It transpires that upon some representation being made by the students' union, the Vice Chancellor proceeded to refer the matter back to the Executive Council for review of its decision taken in its earlier meeting regarding imposition of penalty in the nature of censure. With the approval of Vice Chancellor the Registrar informed the petitioner about the same vide letter dated 16.09.2019 asking him to remain on leave with immediate effect until the matter is reconsidered by the Executive Council under reference order of the Vice Chancellor.

8. It is at this stage that the present petition was filed questioning the decision of the Vice Chancellor to refer the matter for reconsideration and also challenging the decision of the Executive Council dated 16.07.2019 and the consequential communication made to the petitioner on 17.07.2019. During the pendency of this petition, the Executive Council reviewed its earlier decision in its meeting held on 17.09.2019 by resolving that the petitioner shall be visited with the major penalty of compulsory retirement. This resolution adopted by the Executive Council again with the Vice Chancellor in chair, as Item No. 19. The petitioner was issued with a consequential order by the Registrar retiring him compulsorily on 21.10.2019. This resolution clearly stated the resolution

of the Executive Council compulsorily retiring him was in supersession to its earlier resolution dated 16.07.2019. The petitioner amended the writ petition and challenged the resolution of the Executive Council dated 27.09.2019 as well as the consequential order passed by the Registrar dated 21.10.2019. The following admitted position emerges out in the case from the pleadings raised by the respective parties and discussions made above.

(i) Upon a proper enquiry held under the Act of 1988, the Executive Council with the Vice Chancellor in chair deliberated the entire complaint issue threadbare and the enquiry report and it is upon due consideration of the total circumspect of the case resolved to impose minor penalty of censure upon the petitioner vide resolution dated 07.06.2019, which is reproduced as under:

"ECR 99

ITEM 11

CONSIDERED the report of the Complaints Committee to inquire into the facts of the charges levelled against Prof. Shail Kumar Chaube, Department of Zoology, Institute of Science.

The Executive Council perused the report of the Complaints Committee on the complaint of 36 students of B.Sc. (hons.), Semester V Session 2018-19, Department of Zoology, Institute of Science, Banaras Hindu University against Prof. Shail Kumar Chaube, Department of Zoology, Institute of Science for their sexual harassment by Prof. Chaube which inter-alia conclude as under:

"It needs to be remembered and recorded that it was only due to the immediate initial cognizance taken by the supreme authority of the university, Hon'ble Vice-Chancellor, in this case, even

when the letteer was apparently unsigned, that the victimized students could take courage in their hands and appear before the committee to record their statements and what was revealed eventually, was not a single instance of misconduct but a series of such unworthy behaviour by the same person going continuing through a number of year."

The Executive Council also perused the representation of Prof. Shail Kumar Chaub, Department of Zoology, Institute of Science on the report of the Complaint Committee sent to him vide letter no. R/V&CS/203/2019/709 dated January 24/25, 2019 refuting the findings of the Complaint Committee and inter-alia praying the following:

"It is therefore most respectfully prayed that in the interest of justice the esteemed appellate authority may allow the present appeal and dismiss/decline the report of the Internal Complaint Committee and the suspension order of the Respondent may be revoked with immediate effect.

In the alternative it is respectfully submitted that some impartial inquiry officer may be appointed by your esteemed authority to conduct proper investigation/inquiry relating to the charges leveled against the Respondent for the proper appraisal of the case, so that a just conclusion can be drawn by your authority concerned.

It is further prayed that all the respective records consisting of documentary and electronic records may be summoned at the earliest and be kept in a safe custody till the final disposal of the present appeal from the office of Internal Complaint Committee."

After deliberating over the findings of the Complaint Committee in the matter and the points put forward in the representation of Prof. Shail Kumar

Chaub thereon in detail, the Executive Council was of the opinion that a teacher must insure a proper and appropriate behavior and conduct during his interactions with the students in the classroom or outside on an educational tour to avoid giving rise to such complaints which not only spread wrong image of the Institution but also give rise to the suspicion in the mind of students and their parents. The Executive Council therefore resolved as under:

RESOLVED THAT the acts and conduct of Prof. Shail Kumar Chaube be censured and he be not entrusted with any such responsibilities in future.

RESOLVED FURTHER THAT a proper guideline on the conduct of students and teachers and staff accompanying them on study/excursion/ visit be prepared and strictly followed by all concerned."

(ii) Upon complaint of the students' union the Vice Chancellor proceeded to refer the matter back to the Executive Council for review without putting the petitioner to notice and seeking his explanation vide resolution dated 27.09.2019, which is reproduced hereunder:

"ECR 129

ITEM 19

CONSIDERED the order of the Vice-Chancellor for placing the matter related to the complaint of students against Professor Shail Kumar Chaube, Department of Zoology, Institute of Science, BHU before the Executive Council for review of its decision in the matter.

The Executive Council noted that some students namely Mr. Abhishek, Ms. Ranjana Saroj, Mr. Anant Shukla, Ms. Rashmi & Mr. Neeraj Rai wrote a letter dated 13.9.2019 and a joint representation dated 14.9.2019 of the same nature by some other students was made to the Vice-

Chancellor. The Vice-Chancellor considered the matter and found that the matter needed review and ordered on 19.9.2019 for placing the matter before Executive Council for a review.

The Executive Council reconsidered the matter. The then Chairperson of the Internal Complaints Committee (ICC) of the University was invited in the meeting and she presented the report of the committee in the case with minute details. All aspects of the charges were inquired from her in detail and each point was clarified by her. The representations of Professor Shail Kumar Chaube to the Vice-Chancellor was also presented in the Executive Council meeting and the then Chairperson of ICC clarified on the points raised in the letter by Professor S.K. Chaube. She explained that he has given ample opportunity to defend his case and submit whatever evidences he wanted to produce before the ICC in this behalf. All such points and evidences submitted by him were considered and deliberated over by the ICC minutely before arriving at its conclusion in the matter.

After detailed deliberation in the light of the above, it was finally decided to impose the penalty of compulsory retirement on Professor S.K. Chaube as per the CCS (CCA) Rules which was considered appropriate in the case, by reviewing the earlier decision in the matter, taken vide ECR No.99 dated 07.6.2019.

RESOLVED THAT the major penalty of compulsory retirement be imposed on Professor Shail Kumar Chaube, Department of Zoology, Institute of Science, BHU as per the CCS (CCA) Rules, by reviewing the earlier decision in the matter taken vide ECR No. 99 dated 07.6.2019."

(iii) The Executive Council with the same Vice Chancellor in chair this time ignoring the suggestion of Prof. Anand Mohan Member to refer the matter for enquiry afresh proceeded to review its earlier decision and to impose major penalty of compulsory retirement.

(iv) The Executive Council did not discuss either the earlier resolution and reasons during review proceedings, nor did it refer to the contents of the letter of the Vice Chancellor by which the matter was referred to be reviewed, nor the Vice Chancellors' view has come to be discussed in the matter. It is a case of review by the Executive Council of its decision earlier taken to impose penalty of censure and replace it by major penalty of compulsory retirement and that too without any notice and opportunity of hearing to the petitioner.

9. It is upon the arguments advanced by learned Senior Advocate appearing for the respective contesting parties to this lis, I find the only issue required to be addressed is whether the Executive Council would have reviewed its earlier resolution and thereby could have changed the nature of penalty from minor to major. The legal proposition with regard to the power of review is that unless and until statute or the law dealing in the field provides for power of review, no judicial or quasi judicial authority can exercise this power. Power to recall an order is of course there if the order has been obtained by fraud or misrepresentation as in such event the order would be a nullity. Similar proposition would prevail in matters of exercise of administrative authority as no order can be justified based upon fraud or forgery.

10. In view of the above proposition of law qua power of review it is to be examined i.e. as to whether the Executive

Council acting as a disciplinary authority or Vice Chancellor as such exercises a quasi judicial power or administrative power.

11. The Full Bench of this Court in the case of Gajadhar Prasad Mishra v. Vice Chancellor, University of Allahabad (supra) had already answered a reference that Vice Chancellor of Allahabad University while exercising functions in reflecting punishments upon students for breach of discipline would be required to perform quasi judicial functions. The reference before full bench was thus:

"Whether the Vice-Chancellor of the Allahabad University is required to perform quasi-judicial functions in inflicting punishments upon students for breach of discipline?"

12. Thus Full Bench of this Court very categorically held that exercising disciplinary action/power by an authority would be in the nature of a quasi judicial power and not a pure administrative power as it has traces of adjudication of same issue by the authority. The Full Bench relied upon the decision of the Supreme Court in the case of **Calcutta Dock Labour Board v. Jafar Immam (Civil Appeal No.560 of 1964 decided on March 22, 1965)** reported in **1965 (2) LLJ 112**. The Court vide paragraph nos.55 and 56 referred to the judgment and made analysis thereof as under:

"55. In Calcutta Dock Labour Board v. Jaffar Imam, 1965-2 Lab LJ 112: (AIR 1966 SC 282), the Supreme Court again made reference to the decision of Lord Reid in 1964 AC 40. In this case, the question that arose for consideration was whether the Calcutta Dock Labour Board, in exercising its powers to dismiss a dock

worker under Clause 36 (2) of the Scheme made by the Central Government under the Dock Workers (Regulation of Employment) Act, 1948, was required to observe principles of natural justice or not. It may be mentioned that Clause 36(3) lays down that, before any action is taken under Clause 36 (2), the person concerned shall be given an opportunity to show cause why the proposed action should not be taken against him. Clause 36 (2) empowers the Board to take action against a registered dock worker in the reserve pool who is available for work and fails to comply with any of the provisions of the Scheme or does any act of indiscipline or misconduct and enumerates several punishments that may be inflicted. Clauses 38 and 39 provide for appeals against orders of the Board.

In this case, the Supreme Court observed:--

"There can be no doubt that when the appellant purports to exercise its authority to terminate the employment of its employees such as the respondents in the present case, it is exercising authority and power of a quasi-judicial character. In case where a statutory body or authority is empowered to terminate the employment of its employees, the said authority or body cannot be heard to say that it will exercise powers without due regard to the principles of natural justice. The nature or the character of the proceedings which such a statutory authority or body must adopt in exercising its disciplinary power for the purpose of terminating the employment of its employees, has been recently considered by this Court in several cases, vide, 1965-1 Lab LJ 433: (AIR 1965 SC 1595) and (Civil Appeal No. 764 of 1964, dated 1-3-1965: (AIR 1965 SC 1767) and it has been held that in ascertaining the nature of such proceedings with a view to decide whether the principles of natural justice ought to be

followed or not, the tests laid down by Lord Reid in 1964 AC 40 are relevant in view of these decisions, Sri Sen has not disputed this position and we think, rightly."

56. This case lays down firstly, that, in taking disciplinary action against a dock worker, the Board has to act quasi judicially and, secondly, that, in determining whether an authority has to follow principles of natural Justice, the tests laid down by Lord Reid in 1964 AC 40 are relevant. There can be no doubt that from the nature of the power conferred upon an administrative body it can be inferred that it is required to observe principles of natural justice. Lord Hodson has observed in 1964 AC 40 that where a statute confers power to take action against a subject for misconduct, the authority exercising the power must observe principles of natural justice otherwise it will result in denial of justice. It is well settled that even where a statutory authority acts in a purely administrative capacity, it must act fairly; and when its action is likely to seriously affect the rights of others, it must observe principles of natural justice. But merely because an authority must observe principles of natural justice, it does not necessarily follow that it has to act quasi judicially also. In this reference, we have not to decide whether the Vice Chancellor has to observe principles of natural justice or not but whether he is required to act quasi judicially. The decision of the Supreme Court in this case, in my opinion, does not lay down that simply because an authority is empowered to take disciplinary action, it must necessarily act quasi judicially. That an authority, which is empowered to decide some question of fact and whose decision seriously affects the rights of the subject, is not necessarily required to act quasi judicially also appears from another line of

decisions of the Supreme Court. In Champaklal Chimanlal Shah v. The Union of India, AIR 1964 SC 1854, it has been held that the Government may, on a report of bad work or misconduct, hold a preliminary inquiry to satisfy itself that there is reason to dispense with the services of a temporary employee or to revert him to his substantive post. Now, in such cases, the Government has to decide whether the employee is guilty of bad work or misconduct and then to take action against him which may seriously affect him, in this case and other cases, the Supreme Court has held that the Government need not give the employee an opportunity of being heard before an order terminating his service or reverting him is passed. It could not, therefore, possibly be argued that the Government was, in such cases, required to act quasi judicially, even though it had to decide a question of fact and to take action which affected the employee."

13. Ultimately the ratio laid down by the Court was in paragraph no.60 for arriving at a conclusion which runs as under:

"It is contended by the appellant that the nature of the functions exercised by the Vice-Chancellor, when taking disciplinary proceedings against a student, is identical to those exercised by the Examinations Committee taking action against an examinee and, since the Supreme Court has held that the Examinations Committee must act quasi-judicially, it must also be held that the Vice-Chancellor must equally act quasi-judicially. I am unable to agree with this. Wanchoo, J. has approved of the tests laid down by S. R. Das, J. In Advani's case, 1950 SCR 621: (AIR 1950 SC 222) and he has applied those tests to the facts of the

case before him. He has not laid down any new general principle or test different from or inconsistent with that laid down and followed in the earlier decisions of the Supreme Court. This decision cannot be read as laying down a rule of law that, even where the statute or rules made thereunder do not cast a duty upon an authority to act quasi-judicially, such a duty can be inferred merely from the nature of the powers conferred upon the authority. In the facts and circumstances of that case the Supreme Court was of the view that the Examinations Committee was required to act quasi-judicially. The question cannot be decided merely on the basis of similarity of functions of the Examinations Committee and of the Vice-Chancellor but it has to be decided on the basis of the statutes and rules governing the powers of these two authorities. The provisions of the regulations made under the Intermediate Education Act regarding exercise of powers by the Examinations Committee are different from those of the Allahabad University Act and the statutes made thereunder relating to the exercise of powers by the Vice-Chancellor. The regulations cast a duty upon the Examinations Committee to take action against an examinee if it finds that certain facts specified in R. 1(1) are established. The Examinations Committee has to determine these facts objectively upon materials placed before it. The nature of the action that may be taken is also specified. On the other hand, the Allahabad University Act and the statutes made thereunder leave the matter of taking disciplinary action against a student entirely to the discretion of the Vice-Chancellor. He is not required to find whether any specified facts are established or not. Even where certain facts are established, no duty is cast upon the Vice-

Chancellor to take disciplinary action. The discretion of the Vice-Chancellor is not fettered even in respect of the nature of the disciplinary action which may be taken. Therefore, the decision of the Supreme Court holding that the Examinations Committee was required to act quasi-judicially is not applicable to the present case in view of the very different provisions of the Act and the statutes which govern the exercise of powers by the Vice-Chancellor. The facts that the Vice-Chancellor may take assistance of the Proctor and of the Dean of the Students Welfare in the exercise of his disciplinary authority and that the Vice-Chancellor is required by the statutes to consult the Dean of the Students Welfare before taking disciplinary action against a student cannot have any bearing on the question whether the power is to be exercised by him quasi-judicially or not."

14. Emphasizing upon the principle behind quasi judicial power and administrative power, learned Senior Advocate has asserted that the test is to see whether there is an obligation to adopt quasi judicial approach is cast upon authority or not. It is submitted that this would be necessary ingredient for exercise of power where the justice so requires and if there is no such obligation then the order would be purely administrative. He submits that where the order requires to be passed not upon any administrative policy but to adjudicate upon an issue to evaluate the evidence to arrive at a conclusion would have traces of quasi judicial power. In Neelima Mishra's case, Supreme Court has considered this aspect of the matter vide paragraph nos. 21 and 22 thus:

"21. Prof. Wade says "A judicial decision is made according to law. An administrative decision is made according

to administrative policy. A quasi-judicial function is an administrative function which the law requires to be exercised in some respects as if it were judicial. A quasi-judicial decision is, therefore, an administrative decision which is subject to some measure of judicial procedure, such as the principles of natural justice."

22. *An administrative order which involves civil consequences must be made consistently with the rule expressed in the Latin Maxim audi alteram partem. It means that the decision maker should afford to any party to a dispute an opportunity to present his case. A large number of authorities are on this point and we will not travel over the field of authorities. What is now not in dispute is that the person concerned must be informed of the case against him and the evidence support thereof and must be given a fair opportunity to meet the case before an adverse decision is taken."*

15. In the case of **Roop Singh Negi v. Punjab National Bank and others:(2009) 2 SCC 570**, the Court had relied upon its earlier judgment in the case of *Moni Shankar v. Union of India* wherein the departmental proceedings was held to be quasi judicial one. Vide paragraph nos. 17 and 18 the Court referred to the two judgments that are reproduced hereunder:

17. *The departmental proceeding is a quasi judicial one. Although the provisions of the Evidence Act are not applicable in the said proceeding, principles of natural justice are required to be complied with. The Court exercising power of judicial review are entitled to consider as to whether while inferring commission of misconduct on the part of a delinquent officer relevant piece of evidence has been taken into consideration*

and irrelevant facts have been excluded therefrom. Inference on facts must be based on evidence which meet the requirements of legal principles. The Tribunal was, thus, entitled to arrive at its own conclusion on the premise that the evidence adduced by the department, even if it is taken on its face value to be correct in its entirety, meet the requirements of burden of proof, namely, preponderance of probability. If on such evidences, the test of the doctrine of proportionality has not been satisfied, the Tribunal was within its domain to interfere. We must place on record that the doctrine of unreasonableness is giving way to the doctrine of proportionality."

18. In *Narinder Mohan Arya vs. United India Insurance Co. Ltd. & ors.* (supra), whereupon both the learned counsel relied upon, this Court held:

"26. In our opinion the learned Single Judge and consequently the Division Bench of the High Court did not pose unto themselves the correct question. The matter can be viewed from two angles. Despite limited jurisdiction a civil court, it was entitled to interfere in a case where the report of the Enquiry Officer is based on no evidence. In a suit filed by a delinquent employee in a civil court as also a writ court, in the event the findings arrived at in the departmental proceedings are questioned before it should keep in mind the following: (1) the enquiry officer is not permitted to collect any material from outside sources during the conduct of the enquiry. [See *State of Assam and Anr. v. Mahendra Kumar Das and Ors.* [(1970) 1 SCC 709] (2) In a domestic enquiry fairness in the procedure is a part of the principles of natural justice [See *Khem Chand v. Union of India and Ors.* (1958 SCR 1080) and *State of Uttar Pradesh v. Om Prakash Gupta* (1969) 3 SCC 775]. (3) Exercise of discretionary power involve

two elements (i) Objective and (ii) subjective and existence of the exercise of an objective element is a condition precedent for exercise of the subjective element. [See *K.L. Tripathi v. State of Bank of India and Ors.* (1984) 1 SCC 43]. (4) It is not possible to lay down any rigid rules of the principles of natural justice which depends on the facts and circumstances of each case but the concept of fair play in action is the basis. [See *Sawai Singh v. State of Rajasthan* (1986) 3 SCC 454] (5) The enquiry officer is not permitted to travel beyond the charges and any punishment imposed on the basis of a finding which was not the subject matter of the charges is wholly illegal. [See *Director (Inspection & quality Control) Export Inspection Council of India and Ors. v. Kalyan Kumar Mitra and Ors.* 1987 (2) Cal. LJ 344. (6) Suspicion or presumption cannot take the place of proof even in a domestic enquiry. The writ court is entitled to interfere with the findings of the fact of any tribunal or authority in certain circumstances.?

16. The Court also referred to another judgment in the case of ***M.V. Bijlani v. Union of India: (2006) 5 SCC 88*** in which the Court held that the enquiry officer performed a quasi judicial function and the Court in another judgment of *Jasbir Singh* did not approve decision of the disciplinary authority which was not couched with the reasons. The Court held that a decision to be arrived at must be based upon some evidence which is legally admissible. Vide paragraph nos.21 and 22, the Court held thus:

"Yet again in M.V. Bijlani vs. Union of India & ors. (2006) 5 SCC 88, this Court held:

"....Although the charges in a departmental proceedings are not required to be proved like a criminal trial, i.e.,

beyond all reasonable doubts, we cannot lose sight of the fact that the Enquiry Officer performs a quasi-judicial function, who upon analysing the documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on record. While doing so, he cannot take into consideration any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmises and conjectures. He cannot enquire into the allegations with which the delinquent officer had not been charged with."

16. Yet again in *Jasbir Singh vs. Punjab & Sind Bank & ors.* [(2007) 1 SCC 566], this court followed *Narinder Mohan Arya vs. United India Insurance Co. Ltd. & ors.* (*supra*), stating:

"12. In a case of this nature, therefore, the High Court should have applied its mind to the fact of the matter with reference to the materials brought on records. It failed to do so."

17. Thus it is clear that the Executive Council being a disciplinary authority in the case in hand was performing a quasi judicial function while deliberating upon an enquiry report and adopting a resolution to impose punishment upon the petitioner under the relevant Act and rules.

18. It is admitted to the parties that University being Central University has approved CCS (Classification, Control and Appeal) Rules, 1965 (CCS Rules) that provide for different penalties, both minor and major. Vide paragraph 8 of the counter affidavit it has been stated that 'the disciplinary proceeding was initiated under Rule 14 of CCS(CCA) Rules, 1965 against the petitioner'. Rule 11 prescribes minor as

well as major penalties. Vide Clause VII of Rule 11, compulsory retirement has been prescribed as major penalty.

19. Now coming to Rule 14 of CCS Rules that lays down procedure for imposition of major penalty upon the employees, it provides for a detailed enquiry to be held evaluating both oral and documentary evidence led before the enquiry officer and pursuant to the enquiry report led before the disciplinary authority, it is to take action thereupon to punish or not to punish the delinquent employee.

20. Rule 15 of CCS Rules provides procedure for taking action on the enquiry report which prescribes opportunity of representation being afforded to the delinquent employee in respect of the proposed action and then Rule 17 thereof prescribes for communication of the order/decision taken by the disciplinary authority in the matter.

21. I do not see any provision contained under the CCS Rules that provides for review of the decision taken by the disciplinary authority suo moto as has been done in the present case. Thus the disciplinary authority in the matter of imposition of punishment after due enquiry held, in the absence of provision to review its decision and to change penalty from minor to major cannot be justified and deserves to be quashed.

22. Before testing the resolutions in question passed by the Executive Council, it is also necessary here to refer to the relevant provisions of the Banaras Hindu University Act, 1915 (hereinafter referred to as 'University's Act, 1915') and the statute framed thereunder. Section 6 of the University's Act 1915 which provides for

different Officers of the University runs as under:

"6. The following shall be the officers of the University, namely :-

- (a) The Chancellor*
- (b) The Vice-Chancellor*
- (c) The Rector*
- (d) The Registrar*
- (e) The Finance Officer*
- (f) The Deans of Faculties*
- (h) The Librarian*
- (i) The Chief Proctor*
- (j) such other persons in the*

service of the University as may be declared by the Statutes to be the officers of the University."

(Emphasis added)

23. Section 7 (c)(1) provides the Vice Chancellor to be Principle Executive and Academic Officer of the University and Section 7 (c)(2) provides him to be ex officio Chairman of the Executive Council. Section 7(c)(3) vests general power of Superintendence with the Vice Chancellor and Section 7(c)(5) vest with the Vice Chancellor an extra ordinary power to take action in any emergency which may ex post facto be approved by the authority namely, the Executive Council or the Visitor as the case may be. Relevant Section 7 (c)(1)(2)(3) and (5) are reproduced hereunder:

"7C. Powers and duties of Vice-Chancellor

(1) The Vice-Chancellor who shall be the principal executive and academic officer of the University, shall take rank next to the Chancellor and shall exercise general supervision and control over the affairs of the University and give effect to the decisions of its authorities.

(2) The Vice-Chancellor shall be the ex-officio Chairman of the Executive Council, the Academic Council, and the Finance Committee and shall, in the absence of the Chancellor, preside at any convocation of the University for conferring degrees and also at any meeting of the Court; he shall be entitled to be present at and to address any meeting of any authority or board or a committee of the University but shall not be entitled to vote there at unless he is a member of such authority or board or committee.

(3) It shall be the duty of the Vice-Chancellor to see that the provisions of this Act, the Statutes, the Ordinances and the Regulations are duly observed.

(5) If, in the opinion of the Vice-Chancellor, any emergency has arisen which requires immediate action to be taken, the Vice-Chancellor shall take such action as he deems necessary and shall report the same for approval at the next meeting to the authority which, in the ordinary course, would have dealt with the matter :

Provided that, if the action taken by the Vice-Chancellor is not approved by the authority concerned, he may refer the matter to the Visitor, whose decision thereon shall be final:

Provided further that, where any such action taken by the Vice-Chancellor affects any person in the service of the University, such person shall be entitled to prefer, within thirty days from the date on which he receives notice of such action, an appeal to the executive Council."

(Emphasis added)

24. Section 8A provides for various authorities of the University which includes Executive Council. Section 8A is reproduced hereunder:

"The following shall be the authorities of the University, namely:

(a) The Court,

(b) The Executive Council,

(c) The Academic Council,

(d) (Omitted)

(e) The Finance Committee,

(f) The Faculties,

(g) such other authorities as may be declared by the Statutes to be the authorities of the University."

(Emphasis added)□

25. Section 10 (1) gives all the administrative powers relating to management and administration of the properties of the University and administrative affairs of the University as a chief executive body of the University and further Section 10 (2) provides that the Executive Council shall exercise such powers and perform such duties as may be conferred upon it by the statutes or the ordinances. Section 10 (1) and (2) are reproduced hereunder:

"10. (1) The Executive Council shall, subject to the control of the Visitor, be the executive body of the University and shall have charge of the management and administration of the revenue and property of the University and the conduct of all administrative affairs of the University not otherwise provided for.

(2) Subject to the provisions of this Act, the Executive Council shall exercise such other powers and perform such other duties as may be conferred or imposed on it by the Statutes or the Ordinances."

26. Section 16 (b)(1) provides for conditions of service of officers and teachers of the University. However, the

provisions deal with only the contract of employment between the teacher/employees with the University and any dispute being raised, the same would be adjudicated by the Tribunal of arbitration whose decisions would be final.

27. Section 18 (1) of the Universities Act provides for framing of the ordinances in relation to various matters including the emoluments and terms and conditions of service of the employees of the University. Section 18 (1) (k) is reproduced hereunder:

"18.(1) Subject to the provisions of this Act and the Statutes, the Ordinances may provide for all or any of the following matters, namely :-

.....

(k) the emoluments and terms and conditions of service of employees of the University;"

28. Section 19 (1) of the Act also authorizes University to make regulations consistent with the Act, Statutes and Ordinances in respect of all such matters which are covered by the Act, Statutes or the Ordinances. Statute 31 of the Act of 1915 vests final power with the executive council of the University to remove a teacher on the ground of misconduct. It also provides the procedure as per which the power is to be exercised. Statute 31 is reproduced hereunder:

"31. Removal of Teachers

(a) Where there is an allegation of misconduct against a teacher, the Vice-Chancellor may, if he thinks fit, by order in writing, place the teacher under suspension and shall forthwith report to the Executive Council the circumstances in which the order was made :

Provided that the Executive Council may, if it is of the opinion, that the circumstances of the case do not warrant the suspension of the teacher, revoke that order.

(b) Notwithstanding anything contained in the terms of his contract of service or of his appointment, the Executive Council shall be entitled to remove a teacher on the ground of misconduct.

(c) Save as aforesaid, the Executive Council shall not be entitled to remove a teacher except for good cause and after giving three months' notice in writing or payment of three months' salary in lieu of notice.

(d) No teacher shall be removed under clause (b) or under clause (c) until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him.

(e) The removal of a teacher shall require a two-thirds majority of the members of the Executive Council present and voting.

(f) The removal of a teacher shall take effect from the date on which the order of removal is made : Provided that where a teacher is under suspension at the time of his removal, the removal shall take effect on the date on which he was placed under suspension.

(g) Notwithstanding anything contained in the Statutes, the employees of the University, being a teacher shall be entitled to resign :

(i) in the case of the permanent teacher only after giving three months' notice in writing to the appointing authority or paying to the University three months' salary in lieu thereof.

(ii) in any other case, only after giving one months' notice in writing to the appointing authority or paying to the

University one months' salary in lieu thereof."

(Emphasis added)

29. Upon bare reading of the provisions as contained under Statute 31, I find that suspension power of the Vice Chancellor is subject to ratification by the Executive Council under Clause (a). Clause (b) provides power with the Executive Council to remove a teacher on the ground of misconduct.

30. However Clause (c) provides that such power would be exercised only for a good cause. Clause (c) vest with the power of the Executive Council to remove a teacher for good cause with three month's notice or payment of three months salary in advance.

31. Clause (d) very specifically provides that power under Clause (b) and (c) would be exercised after giving reasonable opportunity of show cause in respect of the proposed action to be taken by the Executive Council.

32. Clause (e) provides that 2/3rd majority of the members present and voting in the Executive Council will be necessary to adopt a resolution in regard to removal.

33. Similarly clause (g) entitles a teacher to submit his voluntary resignation with three months' notice in advance or payment of three month's salary in lieu thereof.

34. In case of permanent teacher and in case of any other teacher only one month's notice or salary thereof would be sufficient to render voluntary resignation. Thus it is clear that whenever the University proposes to remove a person

from employment on the ground of misconduct, he would be entitled to opportunity of show cause in respect to the decision taken. On the question of punishment to a teacher for misconduct, it is stated that the provisions as contained under Central Civil Services Rules would apply.

35. Now coming to the facts of this case I find that when the first resolution was adopted by the Executive Council with Vice Chancellor in chair, the University threadbare discussed the complaints committee report on the complaint of 36 students and also the representation of professor Salil Kumar Chaube (petitioner) in the matter of complaint and then after holding due deliberation to which the Vice Chancellor himself was a party resolved that a teacher must ensure a proper and appropriate behavior and conduct during his interactions with the students in the classroom or even outside on an educational tour to avoid giving rise to such complaints and thus thought it more appropriate in its wisdom to impose a minor penalty of censure and further to relieve him from any such responsibilities in future like taking tour of the students outside. But soon after the petitioner was reinstated revoking the suspension order or holding him entitled for salary etc. under the order issued on behalf of the University on 28/29 August, 2019 upon some complaint of the University students' union the Vice Chancellor proceeded to refer the matter to the Executive Council back for a review. The order issued by the Registrar does mention the decision taken by the Vice Chancellor as an executive head of the University but does not mention as to why and under what considerations the Vice Chancellor decided to refer the matter to the Executive Council for review. The

order passed by the Registrar dated 16.09.2010 is reproduced hereunder:

"This is in continuation to this office order No. R/V & CS/2019/203/1171-1181 dated 16-07-2019 whereby the penalty 'Censure' was imposed upon you as per decision of the Executive Council vide ECR No.99 dated 07.06.2019.

On reconsideration of the aforesaid decision with regards to the nature of the charges, it has been decided to review the matter. This issue is therefore being referred to the Executive Council for the review of the decision.

In view of the above, I am directed to inform you that till the time the matter is reconsidered by the Executive Council you shall remain on leave with immediate effect.

This issues under the approval of the Vice Chancellor."

36. From the recitals contained in the letter/order of the Registrar directing the petitioner to proceed on leave vide letter dated 16.09.2019 does not ask the petitioner to furnish any explanation or representation in that regard. As a matter of fact this order of the Registrar was not preceded with any notice much less a show cause notice to the petitioner.

37. Again I find that the resolution adopted by the Executive Council was again chaired by the same Vice Chancellor on 27.09.2019 but it does not discuss the reasons for which it had earlier taken stand were not sufficient and warranted a review, nor does the resolution discuss the letter of the Vice Chancellor or reasons assigned therein for review of the earlier resolution. The Executive Council has not even issued a

notice much less a show cause as required under Statute 31 (d) or under the CCS Rules before firing him by way of compulsory retirement from the University. The entire counter affidavit is silent about that and therefore, in my considered view resolution adopted by the Executive Council now impugned in the present writ petition is liable to be quashed on this ground alone.

38. Here it is pertinent to notice that petitioner was not compulsorily retired for any such reason that he had become deadwood and University did not want to continue him on some report of expert Committee that his services were no more required, instead, here is a case where an employee is being fired by way of compulsory retirement for a mis-conduct, a disciplinary action for being indicted in enquiry and by way of major penalty under CCS Rules. So notice of proposed punishment was a must.

39. Coming to the main argument advanced by learned Senior Advocate for the petitioner that the Executive Council being the disciplinary authority exercised quasi judicial function and, therefore, in the absence of any provision under the Act or the Statute of the University could not have reviewed its decision, I proceed to find answer to this from two angles:

(A) Whether the Executive Council exercises quasi judicial function and so in the absence of provision could not have reviewed its earlier resolution.

(B) Even assuming that power was administrative in nature or exercised of it to review its decision was in the interest of the institution as the earlier resolution suffered from vice of due application of mind to the records available before it.

40. In so far as point A is concerned, the legal proposition as has emerged out from the judgments cited hereinabove in this judgment, the Executive Council admittedly being the disciplinary authority under the relevant statute and having also the power to rectify the Act of the Vice Chancellor, in the matter of suspension, the Executive Council would be taken to be the sole disciplinary authority to be exercising quasi judicial function. Neither the provisions contained under the Universities Act, 2015 nor the relevant provisions contained under the statute of the University discussed above do provide any power with the Executive Council to review its decision taken under Statute 31 nor does the Vice Chancellor can be said to be enjoying any such power over and above the power already exercised by the Executive Council.

41. I may hasten to add here that original Act, 1915 did not provide for compulsory retirement by way of punishment and if taken it as removal as the same has been imposed in the instant case, it must have preceded with proper notice. However, that stage is gone. Since there is no power available to review a penalty imposed, it was beyond competence of Executive Council of the University to have resisted its penalty.

42. Thus, no reference could have been made by the Vice Chancellor to the Executive Council to review its decision already taken under Statute 31 of the statutes and I do not see any such power being vested with the Vice Chancellor under Section 7(c) of the Universities Act, 2015. As *ex officio* Chairman of the Executive Council the only duty of the Vice Chancellor is to see that provisions of the Act, the statutes and the ordinances and

regulations are duly observed in discharge of function by the Executive Council and to convene its meeting only for carrying out the provisions of the Act, Statute and the Ordinances.

43. In the circumstances, therefore the very letter of the Registrar referring the matter to the Executive Council for review was *per se* bad for want of lawful authority as no such provision as contained under the entire University Act and the first statute of the University which may have required its performance and for which the Vice Chancellor can be said to have been compelled to make such reference on a mere letter of the students union. In the circumstances, therefore, the Executive Council's decision being final under statute 31, there being no power to reconsider or revisit the decision the Executive Council having exercise quasi judicial function in imposing penalty may be minor in nature it could not have reviewed its decision by convening another meeting. Thus, the impugned resolution adopted by the University dated 27.09.2019 and the consequential order passed by the Registrar with the approval of the Vice Chancellor dated 21.10.2019 is liable to be quashed. Point 'A' thus stands answered accordingly.

44. Coming to point 'B' on the score of exercise of administrative power or the power in larger public interest or in the interest of the institution, in my considered view such a power could have been exercised only in the event the earlier resolution passed by the University was based upon any mis-representation or forgery in the documents. The deliberations of the Executive Council in its meeting held on 27.09.2023 do not refer to any such mis-representation or fraud committed at the end of any authority or person which

could be said to have mislead it earlier in inflicting minor punishment and, therefore, the conclusion drawn by it and the decision arrived by it was void and so warranted reconsideration or review. The deliberations in the earlier meeting are more exhaustive touching the complaints etc. and the findings of the complaint committee whereas the second resolution which was again chaired by the same Vice Chancellor does not discuss at all any such thing.

45. As a matter of fact while the Executive Council was deliberating upon the reference of the Vice Chancellor for review, it was required to discuss threadbare as to why the earlier decision taken by it to impose penalty of 'censure' was bad and why the petitioner deserved major penalty. Even the letter of the Vice Chancellor has not been brought on record in the counter affidavit by which the reference for review was made. This letter also does not find reference in the order of the Registrar dated 16.09.2019 according to which the matter was to be placed before the Executive Council for review of its earlier decision. The question could be whether this power could be exercised by the Executive Council suo moto, in my considered view such a power is not vested with the Executive Council for the purposes of review of nature of penalty. Once the penalty has been imposed by the disciplinary authority in administrative law, such a penalty can be altered or modified only in appeal or revision by the higher authority. The service jurisprudence does not vest any power with the disciplinary authority to keep on changing the nature of penalty suo moto, more especially when the matter becomes subjudice before a Court of law as has been in the case in hand. The present writ petition was pending when the

Executive Council proceeded to review its earlier decision.

46. The decision cited by Mr. Upadhyaya on the question of interference by this Court in the matter of sexual harassment, looking to the exceptional cases of misconduct for which the special law has been enacted, suffice it to say that Court would certainly be not interfering in the matter of nature of penalty or quantum of punishment. There is no quarrel about the principle that the Courts or Tribunal would not become the disciplinary authority to embark upon an enquiry into the sufficiency of evidence so as to judge the nature of penalty. It is, of course, the sole discretion of the disciplinary authority to decide in the given facts and circumstances and the material before it what kind of penalty should be imposed.

47. Mr. Upadhyaya is right in arguing that the power of judicial review cannot be stretched to test the quantum of punishment and only thing that has to be examined, is the decision making process and compliance with the principles of natural justice and fairness etc. The Court would certainly not be substituting its opinion or view over and above opinion of the disciplinary authority. However, I find this case to be one where the power did not lay with the authority to review a punishment and, therefore, the decision taken by the Executive Council was per se bad. Once the proposition of law has been laid down by this Court that a disciplinary authority exercises a quasi judicial function in the matter of disciplinary proceedings and imposition of penalty, any attempt to circumvent the proposition by such authority would certainly lead to miscarriage of justice. Wherever there is miscarriage of justice,

the power of Judicial Review would intervene and the Court would ensure that no authority exercises any power in the name of statute which does not vest in it any such power especially in the circumstances where such exercise of power results in adverse civil consequences. This is one such case. Point 'B' is decided accordingly.

48. In view of the above, writ petition succeeds and is **allowed**. The resolution adopted by the Executive Council dated 27.09.2019 is hereby quashed. The consequential order to the resolution passed by the Registrar dated 21.10.2019 is also hereby quashed.

49. Petitioner shall be reinstated in service and shall be paid salary regularly including the entire arrears of salary for the period he has remained out of job for the impugned resolution adopted by the Executive Council and the consequential order passed by the Registrar.

50. However, since there is no challenge to the earlier resolution adopted by the University dated 07.06.2019, the same shall stand and so also the consequential order passed by the Registrar dated 16.07.2019 shall stand and shall be implemented accordingly.

51. There will be no order as to cost.

(2024) 4 ILRA 452

**ORIGINAL JURISDICTION
CIVIL SIDE**

DATED: LUCKNOW 16.04.2024

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Writ A No. 15838 of 2020

Anita Devi & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Rohit Tripathi, Syed Zulfiqar Husain Naqv

Counsel for the Respondents:

C.S.C., Abhay Raj Singh

A. Service Law – U.P. Board of Secondary Sanskrit Education Act, 2000 – Sections 2(F) & 25 – Payment of salary – Petitioner's appointment was made under compelling circumstances that after bifurcation, entire staff was transferred to the section, imparting education U.P.to Acharya and Sastri level, and no teachers or employees were left for the section, imparting the Sankrit education U.P. to Uttar Madhyamik level – Identically situated candidates have been paid salary, however the petitioners were denied – Validity challenged – Held, the opposite parties have failed to establish that the present matter is not identical to the petitioners of the writ petition no. 8253/SS/2007 and writ petition no. 6250/SS/2013 – The petitioners of the aforesaid writ petitions are getting salary from the St.-Exchequer as the St. has taken decision positively on the claim raised by those petitioners. The case of the present petitioners are ditto identical to those petitioners of writ petition no. 8253 of 2007 and thus, the present petitioners are entitled for same relief. (Para 15, 24 and 28)

Writ petition allowed. (E-1)

List of Cases cited:

1. Special Appeal No. 122 of 2010; Rajiv Ahmad & anr. Vs St. of U.P. & ors. decided on 12.09.2016

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

1. Heard Sri Rohit Tripath, learned counsel for the petitioners, Sri Raj Kumar Singh, advocate, holding brief of Sri Abhay

Raj Singh, counsel for opposite party no. 5, Sri Shailendra Kumar Singh, Chief Standing Counsel and Sri Vivek Shukla, learned additional chief standing counsel for the State.

2. Under challenge is the order dated 18.12.2019, whereby the claim of the petitioners for payment of salary from State exchequer, has been been rejected.

3. Counsel for the petitioners submits that the institution was established in year 1978 as Sanskrit College Imparting Education from class-VI (Prathma) to Post-Graduate (Acharya) level and it was affiliated to Sampurnanad Sanskrit University, Varanasi and started receiving financial grant from the State Government and the integrated system from School to Post Graduate level continued for almost 20 years, but later on, for regulating the system of Sanskrit Education and to maintain the standards of such institution, the U.P. Board of Secondary Sanskrit Education Ordinance, 2000, subsequently Uttar Pradesh Board of Secondary Sanskrit Education Act, 2000 (hereinafter, referred to as 'Act 2000'), was promulgated wherein, five categories were classified as Prathmik, Purva Madhyamik, Uttar Madhyamik, Shashtri and Acharya.

4. After the aforesaid enactment, looking into the vacancies, the institution started the process of recruitment against the post of Teaching and Non-Teaching staff and thereafter, the petitioners applied for and were duly selected. The details of the petitioners with the description of their post and appointment are given herein under:-

Petitioner No.	Name	Post	Date of Appointment

1.	Anita Devi	Asstt. Teacher (Modern Studies)	03.07.2000
2.	Anita Singh	Asstt. Teacher	05.08.2001
3.	Narvadeshwar Nath Sharma	Principal	03.07.2000
4.	Rajeev Bhatt	Asstt. Teacher (Litt)	03.07.2000
5.	Krishna Pratap Pandey	Asstt. Teacher (Litt)	22.01.2000
6.	Karunesh Chaturvedi	Asstt. Teacher	08.08.2005
7.	Akhilesh Kumar Pandey	Asstt. Teacher (Litt.)	13.07.2006
8.	Vinod Kumar Pandey	Clerk	15.07.2000
9.	Nagesh Tripathi	Clerk	22.07.2000
10.	Krishna Deo Pathak	Peon	02.07.2000
11.	Hari Ram Mishra	Peon	02.07.2000

5. After the recruitment, the petitioners joined and they are continuously working on their respective posts up till date. He submits that by means of option letter dated 17.07.2002, the classification of institution was resolved/decided to run the institution for two levels and the option indicated in the letter dated 17.07.2002, shows that the state Government approved/recognized two sections uptill Prathama to Uttar Madhyama section and this was segregated from Graduate and Post Graduate sections i.e. Shastri and Acharya and thereafter, the petitioners became employees of the intermediate section by virtue of operation of the Act, 2000, but once they sought payment of salary from the State Exchequer, their claims were rejected while giving the reasons that since they are not duly appointed, therefore, and their appointments are irregular.

6. Further contention of learned counsel for the petitioners is that since section 25 of the Act, 2000 itself speaks

that 'Subject to provision of this Act, the head of the institution and teachers and other employees of an institution shall be appointed in accordance with the regulation'.

7. Referring the aforesaid provision, the counsel for the petitioners submits that since the regulation is admittedly came in to the existence on 15.01.2010 and the appointments which were done likewise appointments of the petitioners from the date of promulgation of the Act, 2000 and up till the promulgation of the regulation in year 2010, the State has denied to make payment of salary to such appointments. He added that the aforesaid view is not justified as the petitioners were appointed to impart education by duly constituted selection committee and further since, there was no regulation came into effect uptill 2010, therefore, the only source remains for appointment in such institution with respect to Teaching and Non-Teaching Staff was Committee of Management, having administrative control over the institution concerned.

8. He further argued that it is not the case, where there is any denial with respect to the appointment by the Committee of Management, but the reasons for denial of payment of salary is that the source of appointment is not as per the law. He submits that in fact the question arises that once the provision of section 25 of the Act, 2000 itself, speaks that the appointment of teachers and other employees of institution shall be done in accordance with the regulations and the regulations do not come into existence uptill 2010, then the students cannot be thrown to suffer, therefore, the only mechanism of appointment was, by the Committee of Management.

9. Adding his arguments, he submits that in the identically situated circumstances, the coordinate bench of this Court in case of Shiva Kant Mishra and others versus State of U.P. and others in Writ Petition No. 8253 (SS) of 2007 passed the judgment and order on 05.05.2009, for taking decision with respect to payment of salary from the State Exchequer, whereafter, the State Government took decision and those petitioners are being paid salary. He next submits that not only to this, but the ratio of judgment and order was also followed in the subsequent judgment in the case of Sushil Kumar Pandey and 13 others versus State of U.P. and others in Writ Petition No. 6520 (SS) of 2013 and the order was passed on 12.11.2013, whereafter, the same was complied with vide order dated 17.01.2017, by the State Government and all those petitioners/employees are also getting salary from the State Exchequer. Further submits that the case of the present petitioners are ditto identical to the case of those petitioners and therefore, they are also entitled for the same relief.

10. Concluding his arguments, he submits that the reasons which are assigned for non-payment of salary to the petitioners from State Exchequer is infact shows that the there is non-application of mind and the exigency which has arisen, after the promulgation of the Act, 2000 and uptill regulation in 2010 came into existence therefore, submission is that the impugned order dated 18.12.2019 may be quashed and the opposite parties may be directed to make payment of salary to the petitioners from the State Exchequer.

11. On the other hand, Sri Vivek Shukla, learned Additional Chief Standing

counsel for the State has refuted the aforesaid contention of counsel for the petitioners, vehemently and submitted that the Act, 2000 is very clear in its terms as section 25 provides the mechanism with respect to the appointment of Teaching and Non-Teaching Staff of such institutions.

12. Submission is that in fact the regulation came into existence in year 2010 and therefore, any appointment contrary to the regulation is always against the law and therefore, such employees are not entitled for any salary from the State exchequer. He added that those teaching and non-teaching employees, appointed by Committee of Management are liable to be paid from its own resources. He submits that the settled proposition of law is that if, there is specific provision in the Act with respect to anything to be done in a particular manner that is to be done in a particular manner not otherwise.

13. Further contention is that so far as the judgment and order passed in the Writ Petition No. 8253 (SS) of 2007 as well as the judgment and order passed in Writ No. 6520 (SS) of 2013 are concerned, in both the orders, it was left open to the State to take decision and no ratio is drawn thereof, and therefore, the petitioners could not seek any benefit of ratio of judgments as above-said, thus, submitted that the order dated 18.12.2019 does not suffer from any illegality and therefore, no interference is warranted.

14. It is replied in rejoinder by counsel for the petitioners that in writ petition no. 8253/SS/2007, the same objection was also raised and considering that objection, this Court passed the order and that is complied with by the State, thus, the objection is unsustainable.

15. Having heard learned counsel for the parties and after perusal of material placed on record, it emerges that the consequence of the bifurcation of the institution in two sections i.e. one section is education up to Uttar Madhyamik and the other up to Acharya and Sastri level and the Teaching and Non-Teaching Staff of the institution existing prior to its division was transferred to the section of the institution, imparting education upto Acharya and Sastri level and no teachers or employees were left for working in the school in the section, imparting the Sankrit Education up to Uttar Madhyamik level. Under aforesaid compelling circumstances the appointment of the petitioner was done to impart the education.

16. It is undisputed that prior to the bifurcation, the institution was receiving grant in aid from the State Government and the Teaching and Non-Teaching staff working in the section of institution imparting education upto Sastri and Acharya level is being paid by the State Government and the counsel for the State could not substantiate that the payment of salary of Teachers and Employees of the institution imparting education upto Uttar Madhyamik is governed by the payment of Salaries Act, 1971 and further he has failed to bring any material on record that any regulation framed by the Board under the Act, 2000.

17. Undisputedly, the institution was established in year 1978 for imparting education from class VI (Prathama) to post graduate (Acharya) level and it was affiliated to Sampurnanand University, Varanasi and it was receiving in aid, but once it is bifurcated in between Uttar Madhyamik and Acharya and Sastri level vide the Act, 2000, but uptill 2010, no

regulation was framed and under the compelling circumstances, the committee of management for imparting the education running the institution appointed the Teachers and it is not in dispute that Teachers who were appointed are not imparting education, but they are not getting their salary from State Exchequer. It is also a fact that after the bifurcation, the Teaching and Non-Teaching Staff of the institution which is running the Acharya and Sastri Level, they are getting salary from State Exchequer.

18. This Court is also not unmindful to the judgment and order dated 05.05.2009 passed in Writ Petition No. 8253 (SS) 2007, wherein, it has categorically been held that those petitioners were appointed under the provisions of U.P. Act No. 32 of 2000 and the direction was given to the State to take necessary decision on the representation wherein, the claim of the payment of salary was made and as a result, the representation were decided infavour of those petitioners and they are getting salary from State Exchequer.

19. Further, in judgment and order dated 12.11.2013, passed in Writ Petition No. 6520 (SS) of 2013 (Sushil Kumar Pandey and 13 other versus State of U.P. and others), the benefit granted in the writ petition no. 8253(SS) of 2007 was also accorded to the aforesaid petitioners and the same was also complied with vide the order dated 17.01.2017 and they are also getting payment of salary.

20. So far section 25 read with 2(F) of the U.P. Board of Secondary Sanskrit Education, Act 2000 is concerned that specifically provides the procedure with respect to the appointment of the Head of the Institution and Teachers and other

employees in accordance with the regulations.

21. The provisions with respect to framing of the regulation, envisaged under section 21 and 22 of the 'Act, 2000', whereby, the Board was empowered to make regulations with the previous approval of the State Government, while publishing it in the Gazette and the same could be approved with or without the modification by the State Government.

22. Section 2(f), 21, 22, 25 and 26 of the 'Act 2000' are quoted herein under:-

2(f) "Institution" means a Sanskrit school imparting Sanskrit education upto Uttar Madhayama recognized by the Board;

21- (1) The Board may make regulations for carrying out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing powers, the Board may make regulations providing for all or any of the following matters, namely :-

(a) constitution, powers and duties of committees and sub-committees;

(b) the conferment of diplomas and certificates;

(c) the conditions of recognition of intuitions;

(d) the course of study to be laid down for all certificates and diplomas.

(e) the conditions under which candidates shall be admitted to the examinations of the Board and shall be eligible for diplomas and certificates;

(f) the fees for admission to the examination of the Board;

(g) the conduct of examinations;

(h) the appointment of examiners, moderators, collators, scrutinisers,

tabulators, centre inspectors, Superintendents of Centers and invigilators and their duties and Powers in relation to the Board's examinations and the rates of their remuneration;

(i) the admission of institutions to the privileges of recognition and the withdrawal of recognition;

(j) all matters which are to be, or may be, provided for by regulations.

22- (1) Regulations under section 21 shall be made only with the previous approval of the State Government and shall be published in the Gazette.

(2) The State Government may approve any such regulation proposed by the Board with or without modification.

25- Subject to the provision of this Act, the Head of institution and teachers and other employees of an institution shall be appointed in accordance with the regulations.

26- (1) Every person employed in an institution shall be governed by such conditions of service as may be prescribed by regulations and any agreement between the Management and such employees in so far as it is inconsistent with the provisions of this Act or with the regulations, shall be void.

(2) Without prejudice to the generality of the powers conferred by sub-section (1) the regulations may provide for, -

(a) the code of conduct, the period of probation, the conditions of confirmation and the procedure and the procedure and conditions for promotion and punishment including suspension pending or in contemplation of inquiry or during the pendency of investigation, inquiry or trial in any criminal case for an offence involving moral turpitude and the emoluments for the period of

suspension and termination of service with notice;

(b) the scales of pay and payment of salaries;

(c) transfer of service from one recognized institution to another;

(d) grant of leave and provident fund and other benefits; and

(e) maintenance of record of work and service.

(3) (a) No Head of institution or teacher may be discharged or removed or dismissed from service or reduced in rank or subjected to any diminution in emoluments, or served with notice of termination of service except with the prior approval in writing of the Regional Joint Director.

(b) Regional Joint Director may approve or disapprove or reduce or chance the punishment or approve or disapprove of the notice for termination of service proposed by the Management;

Provided that in the cases of punishment, before passing order, the Regional Joint Director shall give, an opportunity to the Head of institution or the teacher to show cause within a fortnight of the receipt of the notice why the proposed punishment should not be inflicted.

(c) Any party may prefer an appeal to the Director against an order of the Regional Joint Director under clause (b) within one month from the date of communication of the order to that party and the Director may, after such further enquiry as he considers necessary, confirm, set-aside or modify the order and the order passed by the Director shall be final.

(4) No Head of institution or teacher shall be suspended by the Management, unless in the opinion of the Management, -

(a) the charges against him are serious enough to merit his dismissal, removal or reduction in rank; or

(b) his continuance in office is likely to hamper or prejudice the conduct of disciplinary proceedings against him; or

(c) any criminal case for an offence involving moral turpitude against him is under investigation, enquiry or trial.

(5) Where any Head of institution or teacher is suspended by the Committee of Management it shall be reported to the Regional Joint Director within seven days from the date of order of suspension and the report shall contain such particulars as may be prescribed by regulations and accompanied by all relevant documents.

(6) No such order of suspension shall, unless approved in writing by the Regional Joint Director, remain in force, for more than sixty days from the date of such order and the order of the Regional Joint Director shall be final and shall not be questioned in any court.

(7) If at any time the Regional Joint Director is satisfied that disciplinary proceedings against the Head of institution or teacher are being delayed for no fault of the Head of institution or the teacher, the Regional Joint Director may after affording opportunity to the Management to make representation, revoke any order of suspension passed under this section."

23. Bare reading of the provisions, indicates that a mechanism was proposed to be developed for appointment of teaching and non-teaching staff of such institution by way of framing regulations, but about ten years nothing was done and therefore, looking into the exigency of imparting education to the students, the appointments are done.

24. I have also noticed that the opposite parties have failed to establish that

the present matter is not identical to the petitioners of the writ petition no. 8253/SS/2007 and writ petition no. 6250/SS/2013.

25. This Court is also aware about the order passed in Special Appeal No. 122 of 2010, wherein, the Division Bench of this Court has also directed that the petitioners of Writ Petition No. 8253/SS/2007, shall be paid salary as per the order passed by the Learned Single Judge.

26. The order passed in Special Appeal No. 122 of 2010 and Special Appeal No. 80 of 2010, is quoted hereinunder:-

Order (Oral)

Application with affidavit of apology filed in Court is taken on record.

Learned counsel for respondents prays for and is granted a week's time to file reply to the application.

Operation of further proceedings towards the charge drawn for committing contempt of this Court shall remain deferred till the next date of hearing.

These two Special Appeals namely Special Appeal No.84 of 2010 and Special Appeal No.122 of 2010 arise out of judgments and orders passed by learned Single Judges in Writ Petition No.8253 (SS) of 2007 (dated 5.5.2009) and Contempt Petition No.2111 of 2009 (dated 16.03.2010) respectively. The main reason that has given rise to these litigations seems to be the operative portion of the order passed by learned Single Judge in the Writ Petition. Last two paragraphs of the said judgment, on reproduction, would read as:

".....It is not in dispute that the Section of the Institution imparting education upto Shastri and Acharya level is

receiving grant-in-aid from the State Government and the salaries, of the teaching and non-teaching staff of that Section of the Institution is being paid by the State Government. The State Government by its Office Memorandum dated 20.02.2004 had granted permission to the Management of the Institution to run classes upto Acharya and Shastri level and Uttar Madhyama level subject to the conditions mentioned in the said Office Memorandum and Management of the Institution having fulfilled all the conditions mentioned in the Office Memorandum dated 20.02.2004, the State Government is bound to make payment of the petitioners' salary. The submission made by the learned counsel for the opposite parties that the State Government is not liable to pay the petitioners' salary for the reason that the posts against which the petitioners have been appointed have not been sanctioned by the opposite party No.5 is totally misconceived and unacceptable. The petitioners have been appointed under the provisions of U.P. Act No.32 of 2000, which is self contained Act and there is nothing in the Act which may indicate that the provisions of Payment of Salary Act, 1971 shall apply to the persons appointed as Assistant Teachers in the Institution imparting education upto Uttar Madhyama for the purpose of payment of their salary. Since the State Government is paying salary of the teachers and the non-teaching employees working in the section of the Institution in which education upto Acharya and Shastri level is being imparted, the State Government, in my opinion, cannot deny its liability to make payment of the petitioners' salary w.e.f. the date of their appointments.

In the result, the writ petition is finally disposed of with a direction to the

opposite parties No.1 to 5 to take necessary decision on the representations dated 23.10.2007 submitted by the Manager of Srimat Param Hans Sanskrit Mahavidyalaya Tikarmafi, Sultanpur (Annexures No.4 to 8 to the writ petition) and on the petitioners' claim for payment of their salary from the date of their respective appointments in the Institution 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 this order."

As the learned Single Judge rejected the arguments of learned counsel for State and concluded by expressing opinion inter alia that the State Government cannot deny its liability to make payment of petitioners' salary from the date of their appointments, then perhaps there was no reason to direct the State to consider the representation.

The earlier Secretary, Secondary Education, Sri Jitendra Kumar while deciding the representation proceeded in the ignorance of the above findings which though the Court has referred as observations are in the nature of mandate of the judgment.

Thus, we hold that irrespective of rejection of representation submitted by the Manager dated 23.10.2007 by the Secretary, the teachers and non teaching staff as directed vide the impugned judgment, would be entitled to get their salary. Nonetheless we cannot ignore the apathy of the State as well as the Union of India towards the institutions which are imparting education in Sanskrit, It appears that the State as well as the Central Government has forgotten the theme and mandate as contained in Article 351 of the Constitution. The said Article on reproduction would read as:

"351. Directive for development of the Hindi language.- *It shall be the duty of the Union to promote the spread of the Hindi language, to develop it so that it may serve as a medium of expression for all the elements of the composite culture of India and to secure its enrichment by assimilating without interfering with its genius, the forms, style and expressions used in Hindustani and in the other languages of India specified in the Eighth Schedule, and by drawing, wherever necessary or desirable, for its vocabulary, primarily on Sanskrit and secondarily on other languages"*

Accordingly, we issue notice to the Secretary, Human Resources, Government of India, to file reply as to why the Central Government has not made provision for grant in aid or some similar type of financial help to such institutions in the light of mandate of the Article as aforesaid.

Let the reply be filed by the Central Government as well as the State through their Secretaries before the next date of hearing.

Issuance of this notice is necessitated in the light of grouse that for the past many years after bifurcation of this institution, it has not been provided sufficient number of teachers and non teaching staff in the absence of grant in aid.

List on 05.03.2013.

27. Referring the aforesaid, he submits that the Hon'ble Division Bench has held that irrespective of rejection of representation submitted by the Manager, the teacher and non-teaching staff would be entitled to get their salary and it has also been observed that 'nonetheless we cannot ignore the apathy of the State as

well as Union of India towards the institution which are imparting education in Sanskrit.'

28. It is noteworthy that the petitioners of the aforesaid writ petitions are getting salary from the State-Exchequer as the State has taken decision positively on the claim raised by those petitioners. The case of the present petitioners are ditto identical to those petitioners of writ petition no. 8253 of 2007 and thus, the present petitioners are entitled for same relief.

29. In view of the above-said submissions and discussions, the Writ Petition is hereby **allowed**.

30. The State Government i.e. opposite party no. 1 is hereby directed to consider and decide the claim of the petitioners regarding their payment of salary, in light of the judgment and orders dated 05.05.2009 passed in Writ Petition No. 8253 (SS) 2007 (Shiva Kant Mishra and others versus State of U.P. and others) and order dated 12.11.2013 passed in Writ Petition No. 6520 (SS) of 2013 (Sushil Kumar Pandey and 13 others versus State of U.P. and others) and the benefit of the said judgments shall also be extended to the present petitioners, within a period of eight weeks, from the date of certified copy of this order produced before it.

31. Needless to say that identical question is subjudice in Special Appeal No. 122 of 2010 connected with Special Appeal No. 80 of 2010 and therefore, the decision taken by the State Government shall be subject matter of final outcome of the special appeals.

(2024) 4 ILRA 461
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.04.2024

BEFORE

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

Writ A No. 16977 of 2023

Rahul Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sri Prabhat Kumar Singh

Counsel for the Respondents:

C.S.C., Sri Abhay Srivastava, Sri Abhay Singh Tomar, Sri Adarsh Bhushan

A. Service Law – Disciplinary proceeding – Punishment – Censure – Withholding of two increments with cumulative effect – Charge of slackness of control over subordinates and failure in taking firm disciplinary action against the employees, who used unparliamentary language against one another and indulging in partaking liquor in the office – No witnesses were produced on behalf of the Corporation to prove the charges against the petitioner – Effect – Held, non-adherence to the salutary principles governing the conduct of a departmental inquiry in matters involving the imposition of a major penalty may not have prejudiced the petitioner – A finding about any of the charges could not have been validly recorded by the Inquiry Committee, without the Establishment producing evidence, including witnesses. (Para 6, 9, 14, 15, 16 and 17)

Writ petition allowed. (E-1)

List of Cases cited:

1. St. of U.P.& ors. Vs Saroj Kumar Sinha;
(2010) 2 SCC 772

2. Roop Singh Negi Vs P.N.B.& ors.; (2009) 2 SCC 570
3. St. of Uttaranchal & ors. Vs Kharak Singh; (2008) 8 SCC 236
4. St. of U.P. & anr. Vs Kishori Lal & anr.; 2018 (9) ADJ 397 (DB)(LB)
5. Smt. Karuna Jaiswal Vs St. of U.P.; 2018 (9) ADJ 107 (DB)(LB)
6. St. of U.P. Vs Aditya Prasad Srivastava & anr.; 2017 (2) ADJ 554 (DB)(LB)

(Delivered by Hon'ble J.J. Munir, J.)

This writ petition is directed against an order dated 16.11.2022 passed by the Chairman, Uttar Pradesh Power Corporation Limited, Lucknow¹, punishing the petitioner, an Executive Engineer, with a censure and withholding of two increments with cumulative effect. Also under challenge is an appellate order dated 26.07.2023 passed by the Board of Directors of the Corporation, rejecting the petitioner's departmental appeal against the punishment awarded by the Chairman of the Corporation.

2. The succinct facts giving rise to this petition are that the petitioner was selected by the Uttar Pradesh Electricity Service Commission and appointed a Sub-Divisional Officer on 23.05.2012 in the employ of the Corporation. The petitioner was promoted to the post of an Executive Engineer in due course. He is currently posted in the District of Varanasi. The petitioner was earlier posted at Prayagraj during the years 2020-21. At the time he was posted at Prayagraj, an order dated 24.07.2021 was issued by the Managing Director of the Purvanchal Vidyut Vitran Nigam Limited, Varanasi², directing the petitioner, who then held charge as the

Executive Engineer, Electricity Stores Division, Prayagraj, to physically verify the work being done under the Asian Development Bank Project in fifteen villages of District Pratapgarh by the Works Contractor, described in a word of recent coinage as the “Executing Agency”. The works contractor in this case was M/s. Larsen & Toubro, Chennai. The direction, as aforesaid, was issued by the Managing Director of the Corporation at the instance of the Chairman of the Corporation, as the order would show to its face. It would also appear from the letter dated 14.04.2021 that the work contracted out to M/s. Larsen & Toubro was a changeover in the specified villages from Low-tension Bare Conductors, to something described as “L.T.A.B.”. In compliance with the order of 24.07.2021, the petitioner says that he visited sites on 27.07.2021. While the petitioner was away to do inspection of work sites, as directed, on 27.07.2021, in his absence, the Divisional Accountant, one Jai Prakash, is said to have abused an assistant, Ashutosh Kumar, in the office of the Executive Engineer, Electricity Stores Division, Prayagraj, then under the petitioner’s charge. The matter appears to have been taken up by the Workers’ Union and a preliminary inquiry was ordered in the matter.

3. The petitioner, upon coming to know what had happened in his absence on 27.07.2021, issued a notice to the Divisional Accountant, Jai Prakash, besides four other employees in the Establishment, to report to him on the happenings of the day and facts relating to the incident. The incident was also reported to the Chief Engineer and the Superintending Engineer, who called a report from the petitioner in the matter. The Superintending Engineer addressed a memo dated 30.07.2021 to the

petitioner, mentioning a report of the incident by the Union concerned and saying that the petitioner ought to inquire into the matter, so that it may not lead to eruption of an industrial dispute. The petitioner, by a separate order, was appointed the Inquiry Officer to hold a preliminary inquiry in the matter. This order was passed on 9th August, 2021 by the Superintending Engineer, Electricity Stores Division, Prayagraj.

4. The petitioner submitted a report about the details of the incident to the Chief Engineer on 18.08.2021. The petitioner says that on 06.10.2021, another incident happened in the office, of which the petitioner was in-charge, which came to notice through a video clip sent by the Superintending Engineer to the petitioner. The incident was about a event organized in the office, where liquor was partaken. A report regarding this incident too was directed to be submitted by the petitioner.

5. Immediately upon receipt of this information, the petitioner identified the employees responsible for the violation as one Santosh Shukla, an Office Assistant and Jai Prakash, the Divisional Accountant. The petitioner submitted his report in the matter to the Superintending Engineer. In the report submitted by the petitioner, it is indicated that he had warned the employees concerned, but no disciplinary action could be taken by him, inasmuch as jurisdiction, according to Departmental Circular/Instructions dated 08.08.2018 in this regard, vested in the Managing Director or the Chief Engineer. There is a reference made by the petitioner to a Circular dated 02.01.2019, which empowers the Chief Engineer to award minor punishment, perhaps to certain classes of employees. It is, therefore, the

petitioner's case that his responsibility in the matter was to post the authorities with whatever had transpired and it does not lie within his jurisdiction to take any further action against any employee, exercising disciplinary powers.

6. The petitioner was served with a charge-sheet dated 14.09.2022, carrying two charges. The first charge is about the incident dated 27.07.2021 in the office of the Executive Engineer, Electricity Stores Division, Prayagraj and the other about the incident dated 06.10.2021, both related to misconduct by employees posted in the office. The substance of the first charge is that the petitioner was directed by the Chief Engineer, vide his order dated 30.07.2021, to hold a preliminary inquiry in the matter and submit a report, but the petitioner, by his report dated 18.08.2021, submitted to the Chief Engineer, not only reported on the incident dated 30.07.2021, the happening of which he affirmed, but instead of making recommendations for strict disciplinary action to be taken against the two employees, closed the matter himself by administering them a severe warning. The charge further says that in the absence of any severe action being taken against the two employees on 06.10.2021, the two of them resorted to partaking liquor in the office, which was captured on a video and made viral on the social media, harming the Corporation's reputation. The petitioner was, therefore, charged with slackness of control over his subordinates by failing to take firm disciplinary action in the matter of employees using unparliamentary language against one another, permitting a bad tradition and culture to flourish in the office, leading to the Corporation's image being tarnished, besides neglecting to perform his duties.

7. The other charge relates to the incident dated 06.10.2021 and the gravamen of this charge is that after the incident about Jai Prakash, the former Divisional Accountant went viral on the social media, the Inquiry Officer appointed by the Distribution Corporation to inquire in the matter, was confronted by Jai Prakash, with his Annual Confidential Report³ for the year 2021-21 awarded by the petitioner, rating him an outstanding employee. The petitioner was, therefore, charged with the misconduct of awarding an outstanding entry to the employee concerned, ignoring his moral values and his behaviour with subordinates, and further, for the act of disclosing the contents of the ACR to the employee concerned, breaching confidentiality.

8. The petitioner says that an inquiry commenced against him and he was given opportunity for a personal hearing, regarding which, a notice dated 26.03.2022 was issued to him. The petitioner further says that he sought time in the matter, which was granted to him by an order dated 12.04.2022. The petitioner submitted his reply to the charge-sheet on 13.04.2022. He appeared for personal hearing on 19.04.2022 before the Inquiry Officer. An Inquiry Report was submitted on 20.05.2022, holding the petitioner guilty on the first charge in part, and finding the second charge not proved at all. A show-cause notice was issued to the petitioner on 16.06.2022, requiring him to submit his reply. The petitioner answered the show cause in terms of his reply dated 15.07.2022, again dispelling the charges. It is the petitioner's case that he has been exonerated on the second charge, because it was found that he had never written the ACR relating to Jai Prakash. He was punished with the award of a censure and

withholding of two increments on the basis of partial proof of the first charge about not recommending appropriate action against the two employees, who used unparliamentary language in the office. It is the petitioner's case that he held a preliminary inquiry into the matter and at his level, he gave them a severe warning and making a report to the higher authorities in the Distribution Corporation, who could, on facts, reported to them, initiate appropriate disciplinary action. It is also the petitioner's case that he never intended, by his report dated 18.08.2021, to close the disciplinary matter. The petitioner has specifically pleaded in paragraph No. 25 that his report dated 18.08.2021 has, later on, been made basis by the Managing Director of the Corporation to place the Office Assistant, Santosh Shukla and the Divisional Accountant, Jai Prakash, under suspension, and later on, terminate their services.

9. In the supplementary affidavit filed on behalf of the petitioners, it is averred that during the inquiry held, no witnesses were produced on behalf of the Corporation to prove the charges against the petitioner, which is an imperative, by salutary principle, in matters governing the award of a major penalty. A counter affidavit has been filed on behalf of respondents Nos. 2, 3 and 4, to which a rejoinder affidavit has been filed. This petition was admitted to hearing on 04.12.2023, which proceeded forthwith. Judgment was reserved.

10. Heard Mr. Prabhat Kumar Singh, learned Counsel for the petitioner, Mr. Abhishek Srivastava, learned Counsel for respondents Nos. 2, 3 and 4 and Mr. Abhay Singh Tomar, Advocate holding brief of Mr. Adarsh Bhushan, learned Counsel for respondent No. 5.

11. It is submitted by Mr. Prabhat Kumar Singh, learned Counsel for the petitioner that the impugned orders passed by the Disciplinary Authority and the Appellate Authority, as well as the Inquiry Report, on which these are founded, are vitiated, for reasons that the Inquiry Committee held the first charge proved, without the salutary procedure for the Establishment to prove the charges, leading to the imposition of a major penalty being, at all, observed. It is pointed out that the Inquiry Committee have not convened themselves properly into an Inquiry Tribunal and required the Establishment to produce their evidence in support of the charge through a Presenting Officer. It was imperative, according to the learned Counsel for the petitioner, in an inquiry involving the imposition of a major penalty, for the Establishment to produce not only documentary evidence, but also examining witnesses. In the absence of documentary evidence led according to the aforesaid principle, the Authorities could not have relied upon the report to pass the orders impugned. It is next submitted, with much emphasis by learned Counsel for the petitioner, that the punishment imposed, for a part of the first charge that was proved, is shockingly disproportionate, which this Court must quash on that count alone.

12. Mr. Abhishek Srivastava, learned Counsel for respondents Nos. 2, 3 and 4, on the other hand, submits that the salutary principle that in an inquiry leading to imposition of a major penalty, it is imperative for the Establishment to prove the charge(s) by leading both documentary and oral evidence, as well as examining witnesses, may not apply in this case, for the reason that the said principle is, after all, a facet of procedural fairness. Here, Mr. Srivastava submits that there is no

procedural unfairness involved, even if it is assumed that the Establishment failed to lead evidence in the manner necessary in a departmental inquiry, involving the imposition of a major penalty, for reason that all that has been found against the petitioner is the act of exceeding his jurisdiction and letting off the two employees with a severe warning, a jurisdiction he did not possess. The petitioner does not dispute the contents of his report dated 18.08.2021.

13. Upon hearing learned Counsel for parties and perusing the record, this Court finds that it is, no doubt true that the Establishment have not, at all, produced documentary or oral evidence in the manner imperative in a departmental inquiry, likely to lead to the imposition of a major penalty. Also, a reading of the Inquiry Report shows that the Inquiry Committee comprising the Chief Engineer and the Senior Accounts Officer have not convened themselves into an Inquiry Tribunal, distancing themselves from the Establishment, of which they are employees, and requiring the Establishment to prove the charges by producing evidence, both documentary and oral. The Inquiry Committee seem to have sat in their office, and amidst the routine of other business, gleaned through the papers produced along with the charge-sheet and the petitioner's reply and recorded their conclusions. This is certainly not the manner in which a departmental inquiry into a matter, where there is the likelihood of imposition of a major penalty involved, ought be held. The Inquiry Committee, after all, in a matter involving the imposition of a major penalty, must sit as an impartial arbiter and start with a clean slate. They must look at the charges with an impartial eye, and not regarding the charges

as proof of themselves. The Establishment must be required to produce evidence at a properly convened hearing, even if the delinquent does not appear, which must include both documentary evidence as well as witnesses to prove the charge(s). This has not been done at all in the present case.

14. This Court thinks that there could have been some force in Mr. Srivastava's submissions, in the peculiar facts here, that non-adherence to the salutary principles governing the conduct of a departmental inquiry in matters involving the imposition of a major penalty may not have prejudiced the petitioner. This line of reasoning emanates from the fact that the Inquiry Committee has held the petitioner guilty of one part of the first charge, which says that in disposing of the disciplinary matter against the employees, instead of merely making a report to his superiors, the petitioner exceeded his jurisdiction. The said finding is based on the petitioner's report dated 18.08.2021, which the petitioner does not deny at all, and the terms of it are explicit. If that was all, the angle of procedural unfairness on account of deviation from the salutary principles governing the holding of a departmental inquiry in a matter where the imposition of a major penalty was involved, holding it to be a case of no prejudice at all to the petitioner, may not have vitiated the result. But, the finding of the Inquiry Officer and the Disciplinary Authority are just not about the petitioner's transgressing his jurisdiction in disposing of the disciplinary matter by his report dated 18.08.2021, which he was not permitted by law to do. The remarks of the Inquiry Committee in respect of the first charge, that has been formally found proved, are far-reaching and are just not limited to a transgression of the petitioner's jurisdiction in disposing of

the disciplinary matter against two employees with a warning. These read :

उक्त आख्या के अवलोकन से दर्शित होता है कि आरोपित सेवक द्वारा अपनी आख्या में श्री जय प्रकाश यादव को बचाते हुए संदर्भित घटना हेतु श्री आशुतोष कुमार को उत्तरदायी बताते हुए मात्र कड़ी चेतावनी का दण्ड निर्गत करते हुए प्रकरण को रफा-दफा कर दिया गया, जबकि उक्त घटना की शिकायत विद्युत कार्यालय सहायक संघ द्वारा आरोपित सेवक के साथ-साथ अन्य उच्चाधिकारियों एवं प्रबंध निदेशक, पूर्वांचल विद्युत वितरण निगम लि० से भी की गयी थी तथा आरोपित सेवक के संत्रांक 373 दिनांक 28.07.2021 के अनुक्रम में उनके अधीनस्थों द्वारा उक्त घटना की पुष्टि भी की गयी (५०५०००-64 से 68)। साथ ही श्री आशुतोष कुमार, कार्यकारी सहायक के साथ की गयी अभद्रता एवं कार्यालय परिसर में मदिरापान करने संबंधी कदाचरण में भी उक्त दोनों कार्मिकों की संलिप्तता पाये जाने से खण्डीय कार्यालय के कार्मिकों द्वारा दिये गये बयान / शपथ पत्र में अंकित तथ्यों की पुष्टि होती है। प्राथमिक जाँच में विद्युत भण्डार खण्ड, प्रयागराज के कार्यालय में शराब की एक ब्रांड के ग्लास का प्रचलन आम/सामान्य पाया गया। यहाँ तक कि प्राथमिक जाँच अधिकारी को पानी भी शराब की ब्रांड के ग्लास में ही परोसा गया। साथ ही प्राथमिक जाँच में, संदर्भित वीडियो वायरल होने के पश्चात् विद्युत भण्डार खण्ड, प्रयागराज के कार्यालय में शराब की बोतलों के जखीरे की सफाई आरोपित सेवक द्वारा स्वयं अपने निर्देशन में कराये जाने का तथ्य भी अंकित है। अतः तर्क कि श्री जय प्रकाश एवं श्री संतोष कुमार के आचरण एवं कार्यालय परिसर में मदिरापान की जानकारी खण्डीय कार्यालय के समस्त कार्मिकों को थी तथा उनमें भय का माहौल था, किन्तु आरोपित सेवक को नहीं थी, व्यवहारिक एवं मानने योग्य नहीं है।

आरोपित सेवक के, कार्यालय में प्रथम बार अमर्यादित आचरण एवं व्यवहार में सुधार करने के उद्देश्य से चेतावनी का दण्ड ही उपयुक्त होने संबंधी अभिकथन से जाँच समिति सहमत नहीं है तथा जाँच समिति का मत है कि किसी भी घटना/अनियमितता हेतु दण्ड का निर्धारण अनियमितता के प्रथम बार होने अथवा पुनरावृत्ति होने पर निर्भर नहीं करता है, अपितु दण्ड का निर्धारण अनियमितता की गंभीरता से प्रभावित होता है। साथ ही अभिलेखीय साक्ष्यों के अभाव में आरोपित सेवक के प्रथम बार अनियमितता घटित होने के तथ्य की पुष्टि नहीं होती है, जबकि आरोपित सेवक के अधीनस्थों द्वारा प्रस्तुत पत्रों एवं शपथ पत्रों के (५०५०००-69 से 80) अवलोकन से स्पष्ट दर्शित है कि श्री जय प्रकाश, लेखाकार एवं श्री संतोष कुमार शुक्ला, कार्यकारी सहायक द्वारा कार्यालय में ही मीट बनवाकर खुले आम शराब एवं मीट का सेवन किया जाता था तथा कार्यालय के कार्मिकों के साथ अभद्र व्यवहार एवं गाली-गलौज की जाती थी, जिसके कारण कर्मचारियों में भय का माहौल व्याप्त था।

अतः आरोपित सेवक का दायित्व था कि संदर्भित घटना को गंभीरता से लेते हुए उसकी निष्पक्ष जाँच करते हुए प्रकरण से सम्बन्धित सभी वास्तविक तथ्यों में दोषी कार्मिकों के सक्षम दण्डाधिकारी को अवगत कराते हुए उनसे अपेक्षित अनुशासनात्मक कार्यवाही किये जाने का अनुरोध करते, किन्तु आरोपित सेवक द्वारा उक्त के विपरीत कार्य करते हुए दोषी कार्मिकों के संदर्भ में सक्षम दण्डाधिकारी न होने के बावजूद कड़ी चेतावनी का दण्ड निर्गत करते हुए प्रकरण को समाप्त कर दिया गया। आरोपित सेवक द्वारा स्पष्ट रूप से अपने अधिकारों का अतिक्रमण किया गया, किन्तु आरोपित सेवक द्वारा दोषी कार्मिकों के विरुद्ध कठोर अनुशासनात्मक कार्यवाही की संस्तुति किया जाना बांछित होने सम्बन्धी तथ्य से जाँच समिति सहमत नहीं है, क्योंकि जाँच

समिति का मत है कि किसी भी कार्मिक को दण्ड देने का अधिकार उसके नियुक्ति अधिकारी का होता है तथा कार्मिक को किस अनियमितता हेतु क्या दण्ड दिया जाना है, इसके निर्धारण का अधिकार भी नियुक्ति अधिकारी में ही निहित होता है। संदर्भित प्रकरण में दोषी पाये गये लेखाकार के नियुक्ति अधिकारी निदेशक (का० प्र० एवं प्रशा०), पू०वि०वि०नि०लिए वाराणसी एवं कार्यकारी सहायक के नियुक्ति अधिकारी संबंधित मण्डल के अधीक्षण अभियन्ता है। ऐसी स्थिति में आरोपित सेवक का दायित्व था कि संबंधित तथ्यों से दोषी कार्मिकों के उपरोक्त अंकित नियुक्ति अधिकारी को अवगत कराते हुए अनुशासनात्मक कार्यवाही का अनुरोध करते, किन्तु आरोपित सेवक द्वारा स्वयं अपने स्तर से दण्डादेश निर्गत करते हुए प्रकरण को रफा-दफा कर दिया गया। साथ ही आरोपित सेवक के उच्चाधिकारियों, जिन्हें आरोपित सेवक द्वारा पत्रांक 413 दिनांक 18.08.2021 (प० पृ०च्छे-09) प्रेषित / अग्रसारित किया गया, का भी दायित्व था कि संज्ञानित होने पर आरोपित सेवक को नियमानुसार कार्यवाही करने हेतु निर्देशित करते।

अतः आरोपित सेवक को दोषी कार्मिकों के विरूद्ध कठोर अनुशासनात्मक कार्यवाही की संस्तुति न करने हेतु दोषी नहीं माना जा सकृती, किन्तु अपने अधिकारों का अतिक्रमण करते हुए प्रकरण को रफा-दफा करने हेतु आरोपित सेवक दोषी है।

(emphasis by Court)

15. A reading of the above remarks would show that the petitioner was held guilty of maintaining slack control over his office, where there was indiscipline rife amongst employees, who were partaking liquor in the office. There are also remarks to the effect that the two employees concerned, that is to say, Jai Prakash and Santosh Shukla, had some kind of a fear

struck amongst the other employees, on account of which, they were able to carry on these activities in the office. It is on the basis of these remarks that the Disciplinary Authority, the Chairman of the Corporation, while holding the petitioner guilty of a part of the first charge, and choosing the punishment to impose, has recorded his findings in the following words :

मेरे द्वारा श्री राहुल सिंह (2014035), तत्कालीन अधिशासी अभियन्ता, विद्युत भण्डार खण्ड प्रयागराज के अभ्यावेदन का पत्रावली में उपलब्ध संगत अभिलेखों के साथ अध्ययन किया गया। श्री सिंह के अपने कार्यालय के कार्मिकों पर नियंत्रण नहीं किये जाने के कारण उनके अधीनस्थ कार्यालय के कार्मिकों में अनुशासनहीनता की स्थिति हुयी तथा कार्यालय में मदिरा सेवन करने का कुकृत्य करने का दुत्साहस उत्पन्न हुआ। जाँच अधिकारी की आख्या के अनुसार उक्त कार्मिकों के द्वारा नियमित रूप से कार्यालय में मदिरा पान किया जा रहा था तथा श्री राहुल के यह संज्ञान में होते हुए भी उन्होंने इस प्रवृत्ति पर नियंत्रण रखने की प्रभावी कार्यवाही नहीं की गयी, जिससे ऐसी घटना घटित हुई एवं कारपोरेशन की छवि भी धूमिल हुई। उनके अभ्यावेदन में ऐसा कोई तथ्य नहीं पाया जा रहा है जो उनपर आंशिक सिद्ध पाये गये आरोप में शिथिलता प्रदान कर सके। वर्णित परिस्थितियों में श्री राहुल सिंह (2014035), तत्कालीन अधिशासी अभियन्ता पर उ०प्र० पावर कारपोरेशन लिमिटेड कार्मिक (अनुशासन एवं अपील) विनियमावली, 2020 के नियम 3 में विनिर्दिष्ट दीर्घ शास्ति प्रदान किये जाने की स्थिति पा रहा हूँ।

(emphasis by Court)

16. The Disciplinary Authority has concluded that the petitioner has slack control over his subordinates, who were

regularly indulging in partaking liquor in the office premises, a fact that was within the petitioner's cognizance. The Disciplinary Authority has observed that the petitioner could not contain these tendencies or initiate action to control the employees working under him, leading to an event which portrayed the Corporation in poor light.

17. Now, the charge is just not about committing a technical folly in disposing of the complaint against the two employees concerned by the petitioner at his level, regarding which, he had no jurisdiction. It is more about the slackness of control, which the petitioner has been held generally to have had over his subordinates in the office, who were, over a period of time, indulging in the misconduct of partaking liquor during office hours and striking fear amongst their colleagues, who would not speak out. If these are matters which have entered the consideration of the Inquiry Committee, the Disciplinary Authority and the Appellate Authority, a finding about any of them could not have been validly recorded by the Inquiry Committee, without the Establishment producing evidence, including witnesses, to prove the facts of slackness of control over subordinates on the petitioner's part, the employees consuming liquor and indulging in general indiscipline in the office over a long period of time by striking fear amongst their colleagues. These are matters, regarding which, salutary principles governing the holding of a departmental inquiry, in the manner that the Establishment have to first prove the charges by formally producing evidence, both documentary and oral, that is to say, witnesses, has to be adhered to. The Inquiry Committee could just not look at the petitioner's report dated 18.08.2021 and

draw all these inferences. For the same reason, the Chairman of the Corporation, the Disciplinary Authority, could not have drawn the inferences that he did, on the foot of an Inquiry Report written by a Committee that did not adhere to the salutary procedure of requiring the Establishment to prove the charges by producing documentary as well as oral evidence. The law, that in a matter leading to award of a major penalty, it is the obligation of the Establishment to prove the charge(s) in the first instance, by producing documentary evidence as well as witnesses, is far too well settled to brook doubt. In this connection, reference may be made to the guidance of the Supreme Court in **State of Uttar Pradesh and others v. Saroj Kumar Sinha**⁴, **Roop Singh Negi v. Punjab National Bank and others**⁵, **State of Uttaranchal and others v. Kharak Singh**⁶ and the Bench decisions of this Court in **State of U.P. and another v. Kishori Lal and another**⁷, **Smt. Karuna Jaiswal v. State of U.P.**⁸ and **State of U.P. v. Aditya Prasad Srivastava and another**⁹.

18. This Court is, therefore, of opinion that the impugned orders cannot be sustained. Of course, the respondents would have liberty to proceed afresh against the petitioner from the stage of issue of the charge-sheet, if they so elect, but, in the event, the respondents elect to proceed afresh against the petitioner, they shall not impose a penalty higher than that imposed by the impugned orders.

19. In the result, this writ petition **succeeds** and stands **allowed**. The impugned order dated 16.11.2022 passed by the Chairman of the Corporation and the Appellate Order dated 26.07.2023 passed by the Board of Directors of the

Corporation are hereby **quashed**. The respondents will have liberty to proceed afresh against the petitioner from the stage of the charge-sheet, subject to the condition that a penalty higher than that awarded by the impugned orders shall not be awarded.

20. There shall be no order as to costs.

21. Let the Registrar (Compliance) communicate this judgment and order to the Chairman, Uttar Pradesh Power Corporation Limited, Lucknow and the Board of Directors, Uttar Pradesh Power Corporation Limited, Lucknow.

(2024) 4 ILRA 469

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 15.02.2024

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ A No. 17113 of 2018

Dr. Rama Kant & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:

Sri Pradeep Kumar, Sri Anil Kumar Singh, Sri Dharmendra Kumar Srivastava, Sri Gaurav Singh, Sri Praveen Kumar, Sri Uma Nath Pandey

Counsel for the Respondents:

C.S.C., Sri Ashish Mohan Srivastava, Sri Rohit Pandey, Sri Uma Dutt Shukla

A. Service Law – U.P. St. Universities Act, 1973 – Section 35(2) – Lecturer for self-finance course – Appointment was put in abeyance – No prior approval of Vice Chancellor was taken – Effect – Held, the provision of Sub Section 2 of Section 35 relating to prior approval of Vice

Chancellor before dismissal or removal or reduction in rank or any punishment do not make any distinction between aided/St. financed course and self financed course – Statute 17.06 (3) is *pari materia* to the provisions as contained under Section 35(2) of the Act of 1973 – The power of the Management is conditioned by the prior approval of the Vice Chancellor. It is a prerequisite and without that the college/Committee of Management of the Institution is not at all entitled in any manner to pass any resolution and give it effect which may have adverse civil consequences – The Committee of Management was not justified in putting the appointment of the petitioners in abeyance. (Para 9, 10, 11 and 18)

Writ petition allowed. (E-1)

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

1. Heard Sri D.K. Srivastava, learned counsel for the petitioners, Sri Ashish Mohan Srivastava, learned counsel for the Committee of Management of the college concerned and Sri Rohit Pandey, learned counsel for the University.

2. Petitioners before this Court were initially engaged in a self-financed course as a Lecturer in the subject of Sociology with the approval of the Vice Chancellor vide orders dated 22.10.2003 and 19.09.2007 respectively and continued as such until the order impugned came to be passed on 24.07.2018 putting their appointment in the self finance course of the college, in abeyance.

3. The argument advanced by learned counsel for the petitioner is that the Committee of Management of the college concerned was not legally authorized to pass such kind of orders without seeking prior approval from the Vice Chancellor as

is indicated under Section 35(2) of the U.P. State Universities Act, 1973 (hereinafter referred to as 'the Act of 1973'). The provisions require every appointment, according to him, and the termination of appointment as well, to be subject to the prior approval by the Vice Chancellor. He has also taken the Court to the Government Order dated 09.05.2000 to advance a submission that in the event a Committee of Management was having any complaint against the petitioners regarding their work and conduct or otherwise then such order would amount to be punitive in nature and, therefore, was also to have preceded by the approval of the Vice Chancellor.

4. *Per contra*, it is argued by learned counsel for the Committee of Management, Sri Ashish Mohan Srivastava, that though the self finance course in question is being run by the institution but because of the number of students getting down/reduced there remained no further requirement of having two faculty members in addition to those who were already employed in the institution and so the order putting in abeyance appointment of petitioners have been passed on the principle of last come first go. He submits that in 2019 around only nine students were enrolled in the subject of Sociology and the first semester and second semester there were only 10 students and likewise in the subject of Geography there were only 24 and 25 students respectively and since a class consists of atleast 40 students, therefore, the management cannot be faulted with in putting the continuance of the petitioner's services on hold.

5. It is further argued that since the Committee of Management did not proceed

to dispense with the services of the petitioner, therefore, there arose no question for seeking any prior approval from the Vice Chancellor. He submits that it would have been necessary had the Management proceeded to terminated their services. Another argument advanced by Sri Srivastava is that there were serious complaints against the petitioners regarding their act and conduct in the institution against the management inasmuch as there were other serious complaints from the students against them and therefore, the management got compelled to put in abeyance their continuance in college as teachers.

6. Sri Rohit Pandey, learned Advocate appearing for the University submits that as per the Act of 1973 which is applicable to the institution in question, the services of such teachers cannot be dispensed with without prior approval of the Vice Chancellor as their appointments are also done with the prior approval of the Vice Chancellor. He further submits that since there was no proceeding drawn by the Committee of Management against the petitioners, nor there is any justification shown in the order that services of the petitioners were discontinued only for the reason that there were serious complaints, there was all the more no reason to order petitioners to sit back. It is further submitted that on the University portal that contains a dash board with details of faculty in the college does show the name of these two teachers on the roll of the faculty of the college even today. He has also placed before the Court the current status of the strength of students in the subject of Sociology and Geography and according to which he submits that there are sufficient number of students for which the petitioners can be gainfully engaged.

7. Having heard learned counsel for the respective parties, their arguments raised across the bar and having perused the pleadings raised in the writ petition, order of appointment and orders putting their appointments in abeyance, Government Order dated 09.05.2000 as well as relevant statute of the University, two points emerge out for consideration:

a) Whether the Committee of Management was justified and legally entitled to put in abeyance the appointment of the petitioners which was offered to them after prior approval of the Vice Chancellor, and

b) Whether such power to put on hold on appointment duly made, is vested with the college and that too without prior approval of the Vice Chancellor of the University.

8. It is nobody's case that the institution in question is not affiliated with the University in question, namely, Chhatrapati Sahu Ji Maharaj University, Kalyanpur, Kanpur which is governed under the Act of 1973. It is also nobody's case that the first statute of the University do not provide for any prior approval of the Vice Chancellor in the matter of appointment or termination of services of the teachers of the affiliated/associated colleges. The petitioners' institution being admittedly affiliated to the University in question also stands governed by the Statute. The relevant statute 35.1 and 35.2 of the Act of 1973 are reproduced hereunder:

"35. Conditions of service of teachers of affiliated or associated colleges other than those maintained by Government or local authority. - (1) Every teacher in an affiliated or associated college (other than a college maintained exclusively by the

State Government) 2[* *] shall be appointed under a written contract which shall contain such terms and conditions as may be prescribed. The contract shall be lodged with the University and a copy thereof shall be given to the teacher concerned, and another copy thereof shall be retained by the college concerned.*

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

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

(Emphasis added)

9. From bare reading of Sub Section 2 of Section 35 of the Act of 1973 it is quite explicit that only order of dismissal or removal of a teacher or to reduction in rank or to punish him in any other manner shall have to be reported first to the Vice Chancellor and shall not be given effect to unless and until it is approved by the Vice Chancellor. The provisions do not make any distinction between aided/State financed course and self financed course.

10. The terms and conditions upon which a teacher has to be appointed are not only governed under the Act of 1973 but

also have to be as per procedure as may be prescribed. The first Statute of the University concerned has come to be framed taking aid of Section 49 of the Act of 1973 and it prescribes vide Statute 17.06 that any resolution contemplating removal, dismissal or termination of services of a teacher shall in the first instance be placed before the Vice Chancellor for his approval and shall not be operative unless so approved. This Statute 17.06 (3) is *pari materia* to the provisions as contained under Section 35(2) of the Act of 1973. Further I find that Clause 4 of Statute 17.06 also provides that no resolution of the Management qua reduction of pay, stoppage of any annual increments for a specified period or deprivation of his pay not including subsistence allowance etc. shall be given effect to without prior approval of the Vice Chancellor. Statute 17.06 is reproduced hereunder:

"17.06. (1) No order dismissing, removing, or terminating the services of a teacher on any ground mentioned in clause (1) or clause (2) of Statute 16.04 (except in the case of a conviction for an offence involving moral turpitude or of abolition of post) shall be passed unless a charge has been framed against the teacher and communicated to him with a statement of the grounds on which it is proposed to take action and he has been given adequate opportunity ?

i) of submitting a written statement of his defense;

ii) of being heard in person, if he so desires; and

iii) of calling and examining such witnesses in his defense as he may desire;

Provided that the Management or the officer authorised by it to conduct the inquiry may, for sufficient reasons to be

recorded in writing, refuse to call any witness.

(2) The Management may, at the time, ordinarily within two months from the date of the inquiry officer's report, pass a resolution dismissing or removing the teacher concerned from service, or terminating his service mentioning the grounds of such dismissal, removal or termination.

(3) The resolution shall forthwith be communicated to the teacher concerned and also be reported to the Vice Chancellor for approval and shall not be operative unless so approved by the Vice-Chancellor.

(4) The Management may instead of dismissing, removing, or terminating services of the teacher pass a resolution inflicting one or more of the following lesser punishments, namely—

i. reduction of pay for a specified period;

ii. stoppage of annual increments for a specified period not exceeding three years;

iii. deprivation of his pay not including subsistence allowance during the period of his suspension, if any.

the resolution by the Management inflicting such punishment shall be reported to the Vice Chancellor and shall be operative only when and to the extent, approved by the Vice Chancellor."

(Emphasis added)

11. It is thus absolutely clear that the power of the Management is conditioned by the prior approval of the Vice Chancellor. It is a prerequisite and without that the college/Committee of Management of the Institution is not at all entitled in any manner to pass any resolution and give it effect which may have adverse civil consequences and which may include both

major action of removal/dismissal/termination of service or in any manner reduction of pay or withholding payment of salary.

12. Here an argument could be that in view of the provisions as contained under statute 17.04(4) a teacher appointed in temporary or officiating capacity can be removed from the employment by giving one month's notice or payment of one month's salary in lieu thereof in advance. This provision also authorizes such a teacher to resign from the employment in a similar fashion. Provisions as contained under statute 17.04(4) are reproduced hereunder:

"(4) In the case of any other teacher appointed in a temporary or officiating capacity his services shall be terminated, by one month notice or on payment of salary in lieu thereof on either side."

13. Statute 17.06 bars termination of service of a teacher on any ground mentioned in clause (1) or clause (2) of statute 17.04 except with prior approval of the Vice Chancellor in view of Clause (3) of statute 17.06. The petitioners having been appointed on a contract basis in a self finance course can claim to be falling in such category of teachers as mentioned in clause (4) of statute 17.04 (supra). The statute if taken to be totally silent qua the appointment of teachers in self finance course and their conditions of service. It is the Government Order issued by the State Government in that behalf on 09.05.2000 shall then have to be applied. Para 2(1) of the Government Order provides that appointments of teachers under self finance course have to be made from the panel prepared by the University Executive

Council and the Vice Chancellor and para 2(2) says that upon contract, an appointment coming to end, fresh process for appointment shall be undertaken but prior to that, candidature of already working teachers have to be accorded due consideration. Such a teacher vested with the power to resign by giving three months' notice in advance and the Management is equally empowered to draw disciplinary proceedings against teachers, if it is not satisfied with the work and conduct of such teachers, but then prior approval of such final action by the management has to be obtained from the Vice Chancellor.

14. Para 2(1) and 2(2) of the Government Order dated 09.05.2000 are reproduced hereunder:

"2- उपर्युक्त शासनादेश विहित शिक्षकों की चयन प्रक्रिया उनका वेतन निर्धारण एवं अर्हताओं के सम्बन्ध में राज्य सरकार द्वारा सम्यक विचार करने के उपरान्त निम्नानुसार निर्णय लिया गया है-

(1) स्वावित पोषित महाविद्यालयों में अध्यापकों के चयन के लिए विशेषज्ञ का नामांकन विश्वविद्यालय द्वारा किया जायेगा। चयन का अनुमोदन विश्वविद्यालय से कराया जायेगा. जिससे चयनित व्यक्ति के सम्बन्ध में सूचना विश्वविद्यालय में भी उपलब्ध हो जायेगी। विश्वविद्यालय के कुलपति कार्यपरिषद् के अनुमोदन से प्रत्येक विषय के लिए विशेषज्ञों का एक पैनल बनायेंगे, जो तीन वर्षों तक प्रभावी होगा। प्रबंध तंत्र को जिस विषय में अध्यापक का चयन हो इस पैनल में से विशेषज्ञों का चयन प्रबंध तंत्र द्वारा कर लिया जायेगा।

(2) स्ववित्त पोषित महाविद्यालयों में प्रबंधकों की नियुक्ति तीन वर्ष अथवा पांच वर्ष

की संविदा पर की जायेगी। संविदा की अवधि समाप्त हो जाने के बाद प्रबंध तंत्र द्वारा फिर से चयन की कार्यवाही प्रारम्भ करने पर पूर्व से कार्यरत व्यक्ति के नाम पर निश्चित रूप से विचार किया जायेगा। इन महाविद्यालयों में नियुक्त शिक्षक सस्था के प्रबंध तंत्र को तीन माह का नोटिस देकर सेवा का त्यागपत्र दे सकता है। परन्तु यदि प्रबंध तंत्र शिक्षक कार्य से सतुष्ट न हो तो प्रबंध तंत्र अनुशासनात्मक कार्यवाही कर सम्बन्धित शिक्षक को सेवा से हटा सकते हैं परन्तु अनुशासनिक कार्यवाही की स्थिति में कुलपति का अनुमोदन प्राप्त करना आवश्यक होगा।"

15. There is no other provision under the Government Order that may empower to Committee of Management to place appointment of a teacher in a suspended animation. Thus, even in case of temporary teachers and teachers appointed on contract basis, the power of Management are not absolute.

16. Now applying the above law to the order impugned, I find that the petitioner's services have been put in abeyance on 24.07.2018 in following terms:

"प्रापक,

डॉ० रमाकान्त प्रवक्ता

- भूगोल

वि० ग्रा० महा० दिबियापुर

विषय: सेवा स्थगित के संबंध में।

महोदय,

एतदर्थ सूचित किया जाता है कि आपके विषय में सत्र 2018-19 में छात्रों का

अभाव होने के कारण आपकी सेवायें अगले आदेश तक स्थगित की जाती हैं।

भवदीय

(रामशंकर गुप्त)

मंत्री/प्रबन्धक"

17. In respect of petitioner no.2 an identical order has been passed as quoted above. This order clearly states that the services of the teacher concerned is being put in abeyance. This order even does not refer to any resolution of the Committee of Management, nor does it show that any kind of communication preceded with the University. Now looking to the Clause 4 of the Statute 17.06 of first statute this order is clearly unsustainable because it puts the payment of salary of the petitioner also on hold. Naturally, if a teacher is not continued in employment may be is kept in suspended animation, he/she will equally be not entitled for the payment of salary on the principle of ' NO WORK NO PAY'. Thus order dated 24.07.2018 passed in respect of the petitioners brought on record as Annexure-1 to the writ petition is clearly unsustainable and deserves quashment.

18. Coming to the second question as to whether the Committee of Management could have put an appointment in abeyance like the case in question, I find that only provision that empowers the Committee of Management to take such decision is contained under Statute 17.06 as far as statute is concerned. The various clauses of the said statute only deal with the management's power to put a teacher under termination, dismissal or removal or even can subject him to an order which may amount to any kind of stoppage of annual increment allowances or salary, but the first statute 17.06 vide its clause 3 puts a rider

upon this exercise of power of Management which according to the Statute requires prior approval of the Vice Chancellor. This provision being *pari materia* as I have already observed, to Sub Section 2 of Section 35, therefore, the Manager's power is also held to be not absolute one. There is no other power vested with the Committee of the Management under the Statute of the University or of the Act of 1973 by which a teacher duly appointed with the prior approval of the Vice Chancellor can be placed in suspended animation except where management intends to hold disciplinary proceedings vide statute 17.04. Therefore, in my considered view the Committee of Management was not justified in putting the appointment of the petitioners in abeyance. Even the Government Order (supra) that deals with the conditions of service of teachers in self-finance course, does not authorize management to place working of teacher in a suspended animation and then not to pay salary to such teachers. This exercise of power is held to be absolutely without any authority vested in law and hence null and void.

19. Now coming to another argument advanced by learned counsel appearing for the Committee of Management that the number of students have got reduced and, therefore, it became necessary to put the appointment of the petitioners on hold, suffice it to observe that even in such matters where the number of students had gone down and that the college did not require any more services of such teachers, the matter was required to be communicated to the University in the first instance to seek approval of the Vice Chancellor but in any case putting in abeyance the appointment of any teacher is

not contemplated either under Section 35 of the Act of 1973 or the first Statute of the University.

20. Besides the above, considering the current status of the strength of the students which are more than 60 taking both the semesters together in both the subjects and the fact that the college is continuing with the courses, there is no justification to keep the petitioner's appointment in abeyance.

21. So far as the argument of learned counsel appearing for the Committee of Management, Sri Ashish Mohan Srivastava, as to the complaints by the student are concerned, the Government Order dated 09.05.2000 empowers the Committee of Management for this purpose to hold an enquiry and then take appropriate action. While pleadings have been raised in the counter affidavit regarding complaints but the pleadings are absolutely silent about any enquiry being held in the matter as contemplated under the Government Order and even if such an enquiry was held the enquiry report was liable to be communicated to the petitioner and then to the University in compliance of the principles of natural justice. On this count also, I do not find the orders passed to be sustainable.

22. In view of the above, the writ petition succeeds and is *allowed*.

23. The order passed by the Committee of Management dated 24.07.2018 putting the appointments of respective petitioners in abeyance by two separate orders are hereby quashed.

24. Consequences to follow.

(2024) 4 ILRA 476
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.03.2024

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ A No. 19126 of 2023

Ram Pratap Singh & Anr. ...Petitioners
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioners:

Sri Avneesh Tripathi

Counsel for the Respondents:

A.S.G.I., Sri Rohan Gupta, Sri Vijay Kuamr Mishra

A. Service Law – Institute of Technology Act, 1961 – Sections 13(1), 13(2)(c) & 33(1)(b) – Recruitment and Promotion Rules, 2018, as modified on 28.05.2021 – Rule 6 – Post of Executive Engineer – Advertisement for direct recruitment issued – Power of Board of Governor to frame Rules was challenged – Held, Board has been vested with power to provide for direct recruitment even U.P.on post that are prescribed not at entry level but by way of lateral entry – Residuary power lies with Board, which is not provided elsewhere – Taking recourse to the harmonious constructions of the provisions as contained under Section 13(1) and 13(2)(c) and 33(1)(b) and 38(c) of the IT Act, 1961, it can safely be concluded that Board of Governors being Apex Body of the IIT Kanpur under the Act, 1961 is fully empowered to frame recruitment and promotions rules. (Para 16, 21 and 22)

B. Service Law – Recruitment and Promotion Rules, 2018, as modified on 28.05.2021 – Rule 6 – Post of Executive Engineer – Departmental promotion claimed – Petitioner possessed no

eligibility – Entitlement to claim promotion – Held, Rules vide P-19 to the schedule make post of Executive Engineer at pay matrix level- 11 in the GroU.P.-A to be filled U.P. by promotion only from Assistant Executive Engineer, pay matrix level 10 – Petitioners cannot question the advertisement as far as post of Executive Engineer is concerned because they have nothing to put on stake, being not eligible even by way of promotion U.P.on the posts in question. (Para 26 and 27)

Writ petition dismissed. (E-1)

List of Cases cited:

1. Dr. Thingujam Achouba Singh & ors. Vs Dr. H. N. Nabachandra Singh & ors.; (2020) 20 SCC 312

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

1. Heard Sri Avneesh Tripathi, learned counsel for the petitioners, Sri V.K.Mishra, learned counsel for the Union of India and Sri Rohan Gupta, learned counsel for respondents nos. 2,3 4.

2. The petitioner no. 1 who is presently working as Senior Assistant Engineer (Special Grade) in a pay band-2 with Grade Pay 5400/- at pay matrix level 9 and petitioner no. 2 who is working as Senior Assistant Engineer, pay band-2 with grade Pay- 4800/- at pay matrix level-8 in the Indian Institute of Technology, Kanpur (IIT, Kanpur) seek to challenge an advertisement issued by IIT Kanpur advertising 5 posts of Executive Engineer of which three posts are in unreserved category, vide advertisement no. 1 of 2023.

3. Both the petitioners claim that they deserved promotion at much earlier point of time to a higher post of Assistant Executive Engineer, pay band-3 with grade pay 5400/- at pay matrix level 10 as the

feeding cadre for promotion was either Senior Assistant Engineer, pay band-2, with grade pay 4800/- at pay matrix level 8, or Senior Assistant Engineer (S.G.) in pay band-2 with grade pay 5400/- at pay matrix level-9. According to them, the post of Assistant Executive Engineer with grade pay 5400/- at pay matrix level-10 is not only post for direct recruitment at entry level of Group-A post, but is equally a promotional post from Group-B to Group A as per rules, and therefore, according to them they would have been entitled to be promoted as Executive Engineer, pay band 3 with grade pay 6600/- at pay matrix level-11, a Group-A post, which is subject to advertisement by direct recruitment. Their basic contention is that post of Executive Engineer advertised, is a promotional post and not a post meant for direct recruitment. It is submitted that as per recruitment and promotion rules that have come to be notified and reframed on 27th November, 2018 in suppression to 2013 Rules by the Board of Governors, the Apex Body of the institute with further modification in the year 2021.

4. According to learned Advocate Mr. Tripathi, appearing for the petitioners, the post in the field of engineering like from Junior Engineer upto Executive Engineer fall in the maintenance staff category of the Institute and are non faculty position. P-19 of the schedule appended to the rules provide for only two positions at entry level. In Group-A, it is the Assistant Executive Engineer which is an entry level post whereas in the Group-B category post of Junior Engineer provided at entry level and all other posts at higher level, therefrom should be filled up by promotion except otherwise provided under the Rules. He emphatically submits that as far as post of Executive Engineer in the category of

Group-A with pay band 3 and 4 are concerned, these posts are only meant to be filled up by promotion whereas the post of Assistant Executive Engineer which is a group-A post can be filled up both by way of direct recruitment as well as promotion with 50 per cent quota each, vide P-40 of the schedule to the rules.

5. Mr. Tripathi also submits that in view of P-33 of the schedule, post of Assistant Engineer pay band-2 is also to be filled up by promotion and direct recruitment with 50 percent quota each. He further submits that even earlier also the IIT Kanpur had committed this error of advertising the post of Executive Engineer under the advertisement issued on 16th September, 2023 being advertisement no. 1 of 2023, but upon correct facts being brought to the notice, the said post was withdrawn from the advertisement vide Corrigendum issued on 20.09.2023 by recruitment section, copy of which has been brought on record as Annexure 16 to the writ petition.

6. Mr. Tripathi in support of his argument has also relied upon the recruitment and promotion policy issued by the Indian Institute of Technology Ropad, dated 20th November, 2016 in which post of Executive Engineer in the engineering cadre is shown to be 50 per cent by promotion. He asserts that similarly Administrative Section of IIT Bombay has issued its recruitment and promotion policy on 22nd September, 2017 that provide for only post of Junior Engineer at entry level, the higher post of Assistant Engineer and Assistant Executive Engineer are for the purposes of first and second advancement.

7. Mr. Tripathi, has next submitted that as per guidelines issued by the

Ministry of Human Resources and Development, Department of Higher Education dated 20th February, 2019, the post of Executive Engineer was suggested to be filled up 75 percent by direct recruitment and 25 percent by promotion. So in any view of the matter, according to him, some promotion quota was liable to be assigned to the post like Executive Engineer if not all and since now IIT Kanpur has proceeded to fill up this post by direct recruitment, petitioners would be denied their chance of further progress in the establishment. It is submitted that in the above regard, petitioners had earlier moved a representation before the Higher Authority, but instead of taking any action to consider the claim of petitioners for providing promotional avenues, respondent Director of Institute proceeded to pass an order dated 28.2.2022 to the effect that petitioner may apply as and when posts are advertised, however this order remained illusive for the simple reason, according to Mr. Tripathi, as post advertised for the purpose of direct recruitments provides for such qualification which ousts petitioners from eligibility zone. According to him, respondents while have put a bar of maximum age of 55 years on one hand, on the other hand the essential qualification is that one should have three years of regular clear service at Assistant Executive Engineer level whereas petitioners are only working as Assistant Engineer and Assistant Engineer (SG).

8. In view of above, the writ of certiorari is prayed for quashing the advertisement so far as post of Executive Engineer is concerned.

9. Countering the above submissions raised on behalf of the petitioner, Mr.

Rohan Gupta, learned counsel for the IIT Kanpur has made two fold arguments:

(i) In 2018 recruitment promotion rules notified on 27th November, 2018 as amended and modified on 28.5.2021 do provide for direct recruitment upon vacancies falling even in lateral entries by external candidates in both A and B groups, inasmuch as, new vacant positions can be created by the Board of Governors, the Apex body, by adopting resolution if contingency so arises as is in the present case, it was a mission mode recruitment drive to expedite a dedicated task. This power, according to Mr. Gupta, the board enjoys both under the recruitment rules and under the provisions of Institutes of Technology Act, 1961 that governs all the IITs in the country including IIT Kanpur in question;

(ii) The relevant rule under the recruitment and promotion rules that gave such power to the Apex Body, namely Board of Governors and relevant provisions of the institutes of Technology Act, 1961 and consequential resolution adopted by the Board of Governors dated 23rd December, 2022 have not been challenged, and therefore, in the absence of any challenge, the rules and resolution, the consequential advertisement issued for direct recruitment on the post of Senior Superintending Engineer, Executive Engineer, therefore, cannot be faulted with.

10. Yet another argument has been advanced by Mr. Gupta that prescribing essential qualifications and age falls within the domain of the employer and the recruiting authority as employer is in a best position to assess the suitability for the job for which selection and appointments have to be made and, the Court cannot embark upon any enquiry by way of judicial review

to prescribe which qualifications would be better qualification for the employer to provide as an essential qualification for the post upon which selection and appointment has to be made. This area according to Mr. Gupta, is an area of Technical Experts of field and the Court does not have those expertise and skills to assess exact suitability and eligibility vis-a-vis requirement for which selection and appointments have to be made.

11. In the above regard, Mr. Gupta has heavily relied upon the authority of the Supreme Court in the case of **Dr. Thingujam Achouba Singh and Others v. Dr. H.N.Nabachandra Singh and Others, (2020) 20 SCC 312.**

12. Having heard learned counsel appearing for the respective parties and noticing arguments advanced on behalf of the respective parties to the lis, I find there to be arising following points and issues to be addressed:

a). Whether Board of Governors, IIT Kanpur is justified in adopting resolution dated 23rd December, 2022 to hold direct recruitment drive in respect of 5 posts of Executive Engineer to the disadvantage of the petitioners who claim departmental promotion;

b). Whether in absence of any challenge to the rules taking aid of which resolution dated 23rd December, 2022 has been adopted and whether in the absence of challenge to the resolution, the same can be held bad; and

c). Whether five posts of Executive Engineer advertised by respondents do fall under promotion quota.

13. The first and second points are interrelated in the sense that, if there is an

authority vested under the rules with the Board of Governors, whether challenge or no challenge, the resolution will be valid and conversely if the Court finds there to be no such power under the rules vested with Board of Governors, resolution would get rendered null and void and the Court even in the absence of any challenge hold that to be so and consequential action even if not under challenge would become bad and can be struck down.

14. I proceed to examine the relevant recruitment and promotions rules to record findings as to the claim of the petitioners that there lies no such power with Board of Governors. Both the learned Advocates appearing for the respective parties do agree that recruitment and promotion rules, 2018, modifying earlier Rules, 2013 notified on 27th November, 2018 are the rules in existence and parties do agree that these rules came to be further modified and notified on 28th May, 2021 brought on record as Annexures CA 1,2 and 3 respectively).

15. The plea taken in the rejoinder affidavit is that Board of Governors is responsible only for general Superintendence and Control *qua affairs* of the institute but is not vested with powers to formulate or approve rules including rules and regulation for recruitment and laying down accordingly eligibility criteria etc. for selection and appointment upon faculty and non-faculty positions in the institute. A further plea taken in the rejoinder affidavit is that recruitment and Career Progression Scheme floated by the IIT Council, the top composite body for different IITs, wayback in the year 1999, would prevail as this authority is superior to the Board. Thus, it is pleaded that neither rules framed by the Board of the

Governors, nor its resolution is enforceable. However, interestingly, in the writ petition, there is no such plea as to the validity of the rules and powers of the Board of Governors even though reliance has been placed and reference has been made to the Promotion Committee and chart of maintenance Staff of IWD (P-19), which is provided under the schedule of the promotion rules. It is equally important to notice that 2018 Rules have been only modified in a minor way vide notification issued on 28th May, 2021. The rules as notified on 28th May, 2021 vide its Rule 6 gives power to the Board to make direct recruitment upon posts falling in lateral entries both in Group-A and B category. Rules 6 of the rules referring to the 'vacancies' runs as under :

*"6. Vacancies: All the non-teacher/ non-academic posts in the institute are categorized into three groups (Group A, Group B and Group C). Categorization of various post into different groups is as given in **Schedule-1**. Under each group there will be a number of cadres, each cadre having a ladder with multiple levels of posts. The lowest post in a ladder will be called the entry post and the remaining posts within a ladder will be called selection posts. The direct recruitment will normally be done at the entry post in a ladder. **However, in the interest of Institute work, lateral entry of external candidates may sometimes be permitted by Board for special needs under Groups A and B posts. Promotions of institute employees can be done to both entry and selection posts. However, promotions of institute employees to entry level posts will be vacancy based.**"*

(emphasis added)

16. Upon bare reading of the aforesaid provisions, I find that Board has been vested with power to provide for

direct recruitment even upon post that are prescribed not at entry level but by way of lateral entry. In this connection, it is necessary to refer to P-19 of the schedule of the Rules. The chart is reproduced:

MAINTENANCE STAFF (IWD)

ENTRY LEVEL					
Asst. Exe. Engg PB-3 Rs. 15600-39100) Grade Pay 5400 Matrix Level 11	Executive Engg PB-3 (Rs. 15600-39100) Grade Pay 6600 Matrix Level 11	Executive Engg PB-3 (Rs. 15600-39100) Grade Pay 7600 Matrix Level 12	PAY BAND CHANGE	Executive Engg PB-4 (Rs. 37400-67000) Grade Pay 8700 Matrix Level 13	Executive Engg PB-4 (Rs. 37400-67000) Grade Pay 8900 Matrix Level 13 A
Group-A Group-A					

ENTRY LEVEL					
Junior Engineer PB-2 (Rs. 9300-34800) Grade Pay 4200 Matrix Level 6	Senior Assistant Engineer (SG) PB-2 (Rs. 9300-34800) Grade Pay 5400 Matrix Level 9	Senior Assistant Engineer PB-2 (Rs. 9300-34800) Grade Pay 4800 Matrix Level 8 OR Senior Assistant Engineer	GROUP CHANGE (FROM B TO A)	Asst. Exe. Engg PB-3 Rs. 15600-39100) Grade Pay 5400 Matrix Level 10	Executive Engg PB-3 (Rs. 15600-39100) Grade Pay 6600 Matrix Level 11

		eer (SG) PB-2 (Rs. 9300- 34800) Grade Pay 5400 Pay Matrix Level 9			
Group B					Group A

17. The above chart shows that in Group-A category, the only entry level post is Assistant Executive Engineer, pay band 3, grade pay, 5400/- at pay matrix Level 10, and likewise in Group- B category, the Junior Engineer post at pay matrix level-6 is the post provided for entry level. The chart makes it clear that while Junior Engineer Level post is exclusively filled up by direct recruitment but post of Assistant Executive Engineer, which is an entry level post at pay matrix level-10 in group A can also be filled up by promotion from Group-B post. This is further supported by P-40 of the first schedule of the rules that provides for 50 per cent of the vacancies of Assistant Executive Engineer at pay matrix level 10 to be filled up by way of promotion from those Senior Assistant Engineers working at pay matrix level-8/9 with grade pay 4800/5400- respectively. Both these posts of Senior Assistant Engineer and Senior Assistant Engineer (SG) which are occupied by the petitioners presently, fall in pay band-2 category. One more thing is very clear from P-33 to the first schedule that even post of Assistant Engineer which is a lateral entry of Group-B category at pay matrix level -7 shall also be filled up both by way of direct recruitment and by way of promotion from lower grade. The

chart does not show that post of Executive Engineer of pay band 3 at pay matrix level 11 and onwards upto pay matrix level 13-A are to be filled up by direct recruitment under the rules. Thus, in order to fill up these vacancies, if otherwise than promotion, the Board has to adopt a resolution in suppression to the rules for which power is very much prescribed under rule 6 (supra). Board has adopted resolution on 23rd December, 2022 to fill up 5 posts of Executive Engineer by direct recruitment. The power very much lies with Board and there should be no quarrel about. The only question is whether these rules framed are valid or not.

18. In support of his argument questioning competence of the Board of Governors to frame rules, learned counsel for the petitioner Mr. Tripathi has heavily relied upon Section 33 1 (b) of the IT Act, 1961 which is reproduced hereunder:

“33. (1) It shall be the general duty of the Council to co- ordinate the activities of all the Institutes.

(2) Without prejudice to the provisions of sub. section (1), the Council shall perform the following functions, namely: -

a) to advise on matters relating to the duration of the courses, the degrees and other academic distinctions to be conferred by the Institutes, admission standards and other academic matters;

b) to lay down policy regarding cadres, methods of recruitment and conditions of service of employees, institution of scholarships and freeships, levying of fees and other matters of common interest;

c) to examine the development plans of each Institute and to approve such of them as are considered necessary and

also to indicate broadly the financial implications of such approved plans;

d) to examine the annual budget estimates of each Institute and to recommend to the Central Government the allocation of funds for that purpose;

e) to advise the Visitor, if so required, in respect of any function to be performed by him under this Act; and

f) to perform such other functions as are assigned to it by or under this Act.”

(emphasis added)

19. The above provisions as contained under section 33-(1)(b) do provided for laying down policy regarding entries methods of recruitment conditions of service of employees etc. but question is what would be the legal position, if there are no such policies laid down.

20. I may here refer to Section 10,11 and 13 of the IT Act, 1961 that provide for Board of Governors, Senate and such other authorities as may be prescribed and declared by statutes. The constitution of Board and powers of Board under the relevant provisions are reproduced hereunder:

10. The following shall be the authorities of an Institute,

- a) a Board of Governors;
- b) a Senate; and
- c) Such other authorities as may be declared by the Statutes to be the authorities of the Institute.

11. The Board of an Institute shall consist of the following persons, namely:-

- a) the Chairman, to be nominated by the Visitor;
- b) the Director, ex officio,
- (c) one person to be nominated by the Government of each of the States

comprising the zone in which the Institute is situated, from among persons who, in the opinion of that Government, are technologists or industrialists of repute;

(d) four persons having special knowledge or practical experience in respect of education, engineering or science, to be nominated by the Council; and

(e) two professors of the Institute, to be nominated by the Senate.

Explanation:- In this section, the expression "zone" means a zone as for the time being demarcated by the All-India Council for Technical Education for the purposes of this Act.

13. (1) Subject to the provisions of this Act, the Board of any Institute shall be responsible for the general superintendence, direction and control of the affairs of the Institute and shall exercise all the powers of the Institute not otherwise provided for by this Act, the Statutes and the Ordinances, and shall have the power to review the acts of the Senate.

(2) Without prejudice to the provisions of sub- section (1), the Board of any Institute shall-

(a) take decisions on questions of policy relating to the administration and working of the Institute;

(b) institute courses of study at the Institute;

(c) make Statutes;

(d) institute and appoint persons to academic as well as other posts in the Institute;

(e) consider and modify or cancel Ordinances;

(f) consider and pass resolutions on the annual report, the annual accounts and the budget estimates of the Institute for the next financial year as it thinks fit and submit them to the Council together with a statement of its developments plans;

(g) exercise such other powers and perform such other duties as may be conferred or imposed upon it by this Act or the Statutes.

(3) The Board shall have the power to appoint such committees as it considers necessary for the exercise of its powers and the performance of its duties under this Act.

(emphasis added)

21. According to aforesaid provisions, residuary power lies with Board, which is not provided elsewhere. The first statute and ordinances have to be framed vide Section 6(1) of the IT Act, 1961 and that power lies with both the Board and the Council both. Section 38-(c) provides that so long as statutes and ordinances are not framed for each of the institutes of colleges, the statute and ordinance of the Indian Institute of Technology, Kharagpur will prevail.

22. In total circumspect of the provisions as discussed above, it is clear that either rules are framed by the council as Apex Body on all India basis or Board for the IIT Kanpur, the provisions of the IIT Kharagpur provide for such conditions to which Rule 6 of the recruitment and promotion rules can be said to be repugnant, the rules as framed by the Board of Governors exercising power under Section 13(1) would prevail. 13(2)-c also empower the Board to frame statutes, therefore, taking recourse to the harmonious constructions of the provisions as contained under Section 13(1) and 13(2) c and 33(1) (b) and 38-(C) of the IT Act, 1961, it can safely be concluded that Board of Governors being Apex Body of the IIT Kanpur under the Act, 1961 is fully empowered to frame recruitment and promotions rules and since it has framed

such rules right from 2013 onwards as amended Rules 2021, such rules are held to be valid.

23. As the argument has been advanced that All India Council has the general powers over and above institutes of Technology and the Act, 1961 does vest power in the IITs to inform Ministry of Human Resources and Development to create post by virtue of delegated power, executing this power a resolution as adopted by All India Council as item no. 40.4 placed before the Board date 19th October, 2009 is reproduced hereunder:

“Item No. 40.4: Autonomy of the Institutes - financial, functional and managerial:

The issue of autonomy is closely linked with the capacity of the institutions to raise their own resources. In order to suggest ways and means of achieving more autonomy, it was decided to constitute a Committee comprising Dr. Anil Kakodkar, Chairman, BoG, IIT Bombay and four other members to be nominated by the Chairman to suggest a roadmap for the autonomy and future of the IITs. The Committee would inter alia examine the issue of increase in fees by the IITS in a gradual manner. While doing so, the interest of weaker sections of society i.e. SCs/STs/OBCs would be taken care of. It should be ensured that any student entering the IIT system should be able to avail educational loan and the same must be facilitated by the Institutes. The Committee could suggest an interest loan waiver scheme for students who continue to do research and take up teaching assignments. In fact a portion of the loan could be even considered for being written off for every year of teaching in a publicly funded institution in such a way that the entire loan

could be written off if one has served in publicly funded institutions for more than 30 years or so. Any person who does Ph.D. must be supported. The Non Plan grants to be given to the IITs, which are in the process of being raised through the Block Grant scheme, should be linked to the actual students' strength. The ratio of B.Tech

Post Graduate and Research students in the Institutes should be maintained at optimum levels, while affecting increase in students' strength. The Institutes should be entitled for matching grants from the Government in case they generate more resources through research projects from the industry, consultancy, donations from alumni and others etc. All these issues will be examined by the above Committee which will submit its report within 4 months and will also follow up on the implementation of its recommendations.

It was also decided that flexibility would be given to the IITs for creation of posts. ITs may be delegated the power to create posts subject to the ratio of 10:1:1.1 between students, faculty and non-faculty. However the ITs would be required to inform the Ministry while creating the posts under these delegated powers. Addl. Secretary (MHRD) was asked to get this processed for issue of appropriate orders in this regard, after obtaining the approval of the Ministry of Finance.

The Directors of IITs expressed that there was a need for more laboratory staff. AS & FA stated that clarifications have been issued to the ITs that requirement of increased number of technical staff due to OSC expansion only could be allowed even if the ratio exceeds the norms of 1:1.1 between faculty to non-faculty staff.

It was also clarified that for the purpose of new cars for the Directors of new IITs, the BoG of the concerned Institute was competent to approve.

It was also decided that every IIT would present its vision document at the Retreat proposed in January, 2010."

24. Mr. Gupta, has argued that rules does not provide post of Superintendent Engineer under, and therefore, resolution was rightly adopted by the Board to create a post as required. He has argued that besides there being residuary power with the Board by virtue of which it provided resolution dated 23rd December, 2022 there being residuary power with the Council under the IT Act, 1961, by virtue of Section 2-b of Section 33 of the IT Act, 1961 and so it rightly adopted resolution. So even creation of post of Superintending Engineer under the resolution adopted by the Board of Governors is a valid act within the ambit and scope of powers vested in it.

25. In view of above, in respect of both point nos. 1 and 2, I hold that Board of Governors of IIT Kanpur is justified in framing recruitment Rules 2018 as modified/ amended in 2021 and since Rule 6 of rules provides for powers for the direct recruitment even upon post falling in lateral entries (P-19) that includes post of Executive Engineer, the resolution adopted by it to make a direct recruitment upon such post dated 23rd December, 2022 is also valid. Besides the above, I also find that petitioners are not eligible for the post of Executive Engineer for the simple reason that they are not working as Assistant Executive Engineer .

26. So for the post of Executive Engineer is concerned, there should be no quarrel because Rules vide P-19 to the schedule make post of Executive Engineer at pay matrix level- 11 in the Group- A to be filled up by promotion only from Assistant Executive Engineer, pay matrix

level 10 and the essential qualification under the advertisement is also three years of regular clear service at Assistant Executive Engineer, level- 10 or equivalent level. So essential qualification prescribed under the advertisement, rules are same.

27. Under the circumstances, therefore, petitioners cannot question the advertisement as far as post of Executive Engineer is concerned because they have nothing to put on stake, being not eligible even by way of promotion upon the posts in question. There is no prayer in the writ petition seeking promotion to the post of Assistant Executive Engineer, so no relief as such can be granted to promote them first as Assistant Executive Engineer if lying vacant then to direct to consider their claim for the post of Executive Engineer.

28. The question of consideration of age would have arisen had petitioners been working at pay matrix level-10 which is not a case in hand even otherwise prescribed qualification is a pure administrative policy decision of employer either by framing rules or otherwise by executing instructions to be meet requirements as per suitability required.

29. In my above view, I find support from paragraph 16 of the judgment of the Supreme Court in the case of Dr. Thingujam Achouba Singh and Others (Supra) Paragraph 16 runs as under:

“16. So far as relaxation of upper age-limit, as sought by the petitioners in one of the writ petitions is concerned, the High Court has directed the competent authority and Executive Council of the Society to consider for providing such relaxation clause. We fail to understand as to how such direction can be given by the

High Court for providing a relaxation which is not notified in the advertisement. While it is open for the employer to notify such criteria for relaxation when sufficient candidates are not available, at the same time nobody can claim such relaxation as a matter of right. The eligibility criteria will be within the domain of the employer and no candidate can seek as a matter of right, to provide relaxation clause.”

30. Admittedly, there is no challenge to the rules. The pleading in the writ petition are absolutely silent about validity of these rules. In fact these rules have though been not annexed with writ petition but a particular table has been annexed which is P-19, which is provided under the schedule of the recruitment and selection Rules 2018 amended in 2021. This table has been relied upon by the petitioner to take the plea that post in question is a promoted post.

31. In the rejoinder affidavit although plea has been taken vide paragraph 8 that IIT Council shall be laying down the rules of recruitment shall be providing for conditions of service as per Institutes of Technology Act, 1961, but neither any policy has been annexed or even referred to by the petitioner in the rejoinder affidavit, nor even recruitment and Career Progression Scheme as referred to in paragraph 8 of the rejoinder affidavit has been brought on record.

32. In the same judgment of Dr. Thingujam Achouba Singh and Others (Supra), the Court has held merely because rules are not in public domain notifying it, cannot itself be a ground to challenge and further if the rules are not challenged the Court will not embark upon an enquiry as to the validity of such rules. Vide

paragraph 13 and 14, the Court has held thus:

“13. At the outset, it is to be noticed that though, in none of the writ petitions, Rules governing appointment to the post of Director was under challenge, the High Court has gone into the validity of the Rules, as amended, and held that amendments to the Rules were not carried out by following the Rules, Regulations and Bye-laws of the Society. The specific plea of the respondent authorities in the writ petitions, that there is no challenge to validity of the Rules but same has been brushed aside by the High Court by merely stating that such an objection is of technical nature. At this stage, it is relevant to note that such objection raised should not have been brushed aside by the High Court by holding that such objection is of a technical nature. In all these writ petitions in which common order [H. Nabachandra Singh v. Union of India, 2017 SCC OnLine Mani 52] is passed by the High Court, validity of advertisement dated 16-8-2016 alone was under challenge. We are of the view that the High Court has committed an error in going into the validity of the Rules, in absence of any challenge to the same. In any event, it was the case of the respondent authorities that the Rules governing appointment were amended by following the Rules and such amendment was also approved by the competent authority, of Ministry of Health & Family Welfare.

14. Further, the fact of not notifying the amended Rules has also been made basis for grant of relief by the High Court. In this regard, the High Court has held that not notifying the amended Rules would strike at the root of the amendment process of the recruitment rules, as such, unless such Rules are notified, the same cannot be enforced. It appears from the impugned order

itself that it was the specific plea in the counter-affidavit filed before the High Court that the said Rules were not framed under Article 309 of the Constitution of India and further there is no specific provision in the Rules, Regulations and Bye-laws of RIMS for notifying the same. It is true that in a public institution, rules are required to be made available, but at the same time not notifying to public at large cannot be the ground to invalidate the notification, in the absence of any provision to that effect in the Bye-laws of the Society or the Rules and Regulations framed for recruitment to the post of Director.”

33. Coming to second point as to whether these five posts would have fallen in promotion quota, suffice it to say that since these are lateral positions and the Board of Governors is vested with power to fill up within vacancies by direct recruitment regarding, under rule 6, even if these vacancies were meant to be filled up by promotion, the resolutions adopted by the Board to meet special exigency cannot be faulted with.

34. Thus, I do not find any good ground to quash the advertisement in question. Writ petition fails and is accordingly dismissed with no order as to cost.

(2024) 4 ILRA 486

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 18.03.2024

BEFORE

THE HON'BLE NEERAJ TIWARI, J.

Writ A No. 19256 of 2023

Prem Kumar Tripathi

...Petitioner

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioner:

Sri Anupam Kulshreshtha, Sri Sanjay Mishra

Counsel for the Respondents:

C.S.C., Sri Chandra Bhan Gupta, Sri Sanjai Singh

A. Service Law – U.P. Rajya Sahkari Bhumi Vikas Bank Employees Service Rules, 1976 – U.P. Co-operative Society Employees Service Regulation, 1975 – Disciplinary proceeding – Punished ment – Rs. 2,74,380/- was directed to be recovered – Show cause notice was issued after 15 months from the retirement in 2014 – Reply was filed within one month, however no action was taken & anr. show cause notice was issued in 2022 – Legality challenged – Held, in lack of provisions in rules and regulations, after retirement, no show cause notice or departmental proceeding can be initiated against any employee – In case a show cause notice has been issued by the department, duly replied by the employee and no action has been taken for a long time, it is not open for the department to issue another show cause notice at a very belated stage for same cause of action after. (Para 15 and 16)

Writ petition allowed. (E-1)

List of Cases cited:

1. Dev Prakash Tewari Vs U.P. Cooperative Institutional Service Board; (2014) 7 SCC 260,
2. Smt. Luxmi Devi & anr. Vs St. of U.P. & ors.; 2022 (11) ADJ 170
3. Brahamnad Tyagi Vs St. of U.P. & ors.; 2022 (8) ADJ 624
4. U.P. St. Sugar Corp. Ltd. Vs Kamal Swaroop Tondon; (2008) 2 SCC 41

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

1. Supplementary counter affidavit filed today be taken on record.

2. Heard Sri Anupam Kulshreshtha, learned counsel for petitioner, Sri Devesh Vikram, learned Additional Chief Standing Counsel for State-respondents and Sri Chandra Bhan Gupta, learned counsel for respondent no. 2.

3. Present petition has been filed seeking following reliefs:-

“a) To issue a writ, order or direction in the nature of certiorari quashing the impugned show cause notice dated 07.11.2014, served by the petitioner on 25.11.2014 (Annexure No. 1 to the writ petition) as well as the impugned show cause notice dated 08.08.2022 (Annexure No. 4 to the writ petition);

b) To issue a writ, order or direction in the nature of Mandamus directing the respondents to drop the disciplinary proceedings initiate against the petitioner pursuant to the impugned show cause notices dated 07.11.2014 and 08.08.2022, in view of the fact that the disciplinary proceedings are not permissible to be initiated under the provisions of Uttar Pradesh Rajya Sahkari Bhumi Vikas Bank Employees Service Rules, 1976 after retirement of an employee;

c) To issue a writ, order or direction in the nature of Mandamus directing the respondents to pay all post-retirement dues, namely; earned leave encashment, gratuity, security, etc., along with interest @ 8% per annum accruing to the petitioner.”

4. Brief facts of the case are that petitioner was working as Assistant Field Officer in Uttar Pradesh Sahkari Gram Vikas Bank Ltd. at Bhogaon Branch, Mainpuri and he was superannuated on 31.07.2013.

5. Learned counsel for petitioner submitted that after retirement of petitioner, a show cause notice dated 07.11.2014 (served on 25.11.2014) was issued to the petitioner proposing the punishment of recovery of Rs. 2,74,380/- from him. The service of petitioner is governed by Uttar Pradesh Rajya Sahkari Bhumi Vikas Bank Employees Service Rules, 1976 (hereinafter referred to as, 'Rules, 1976'). Apart from other grounds, in his reply dated 05.12.2014, petitioner has taken specific ground that after retirement, no such show cause notice may be issued as Rules, 1976 is having no such provisions for issuance of show cause notice or departmental proceeding against a retired employee. After submission of reply, no action has been taken against the petitioner by the respondent-Bank. Again, a show cause notice dated 08.08.2022 i.e. after around eight years was issued to the petitioner for recovery of 50% of Rs. 6,47,187/-. Petitioner has replied the same vide letters dated 06.09.2022 & 11.03.2023. In these replies too, petitioner has taken specific ground that after retirement, no such show cause notice may be issued. Pursuant to the show cause notices dated 07.11.2014 & 08.08.2022, till date, no decision has been taken and gratuity has also been paid to the petitioner retaining the amount of leave encashment and security. He pointed out that service of petitioner is not pensionable. In lack of provisions of Rules, 1976, impugned order is bad and liable to be set aside. In support of his contention, he has placed reliance upon the judgments of Apex Court as well as this Court in the matters of ***Dev Prakash Tewari vs. U.P. Cooperative Institutional Service Board; (2014) 7 SCC 260, Smt. Luxmi Devi and another vs. State of U.P. and others; 2022 (11) ADJ 170,***

Brahmnaad Tyagi vs. State of U.P. and others; 2022 (8) ADJ 624.

6. Per contra, Sri Chandra Bhan Gupta, learned counsel for respondent-Bank submitted that service of petitioner is governed under the provisions of Uttar Pradesh Co-operative Society Employees Service Regulation, 1975 (hereinafter referred to as, 'Regulation, 1975'), but he could not demonstrate any provision in Regulation, 1975 authorizing the respondent-Bank to initiate departmental proceeding or show cause notice after retirement. He further submitted in light of judgment of Apex Court in the matter of ***U.P. State Sugar Corp. Ltd. vs. Kamal Swaroop Tondon; (2008) 2 SCC 41***, even after retirement, show cause notice may be issued, but he could not dispute that in the present case, no departmental proceeding has ever been initiated against the petitioner till his retirement and the impugned show cause notices are based upon general inquiry against some other persons.

7. I have considered rival submissions advanced by learned counsel for parties and perused the records as well as judgment cited above. It is undisputed that in Rules, 1976 as well as Regulation, 1975, there is no provision for initiating any disciplinary proceeding or issuing show cause notice against the employee after retirement. This fact is also undisputed that against the petitioner, no inquiry has ever been instituted till his retirement. Now, by two show cause notices dated 07.11.2014 & 08.08.2022, direction has been issued to recover Rs. 2,74,380/- and 50% of Rs. 6,47,187/- from the petitioner. The question is as to whether, such show cause notices can be issued to petitioner in absence of

any provisions in Rules, 1976 and Regulations, 1975.

8. Learned counsel for petitioner has placed reliance upon the judgment of Apex Court in the matter of **Dev Prakash Tewari (Supra)**. Relevant paragraphs of the said judgment is quoted below:-

“9. Once the appellant had retired from service on 31.3.2009, there was no authority vested with the respondents for continuing the disciplinary proceeding even for the purpose of imposing any reduction in the retiral benefits payable to the appellant. In the absence of such an authority it must be held that the enquiry had lapsed and the appellant was entitled to get full retiral benefits.

10. The question has also been raised in the appeal with regard to arrears of salary and allowances payable to the appellant during the period of his dismissal and upto the date of reinstatement. Inasmuch as the inquiry had lapsed, it is, in our opinion, obvious that the appellant would have to get the balance of the emoluments payable to him.

11. The appeals are, therefore, allowed and the judgment and order of the High Court are set aside and the respondents are directed to pay arrears of salary and allowances payable to the appellant and also to pay him his all the retiral benefits in accordance with the rules and regulations as if there had been no disciplinary proceeding or order passed therein. No costs.”

9. In the matter of **Smt. Luxmi Devi (Supra)**, this Court after following the law laid down by Apex Court in the matter of **Dev Prakash Tewari (Supra)**, has taken the same view. Relevant paragraphs of the said judgment is quoted below:-

“10. This Court has carefully considered the judgment rendered by the Supreme Court in **Dev Prakash Tewari (supra)** where the Supreme Court had followed the judgment rendered by it earlier in **Bhagirathi Jena Vs. Orissa State Financial Corporation [(1999) 3 SCC 666]** where it was held that in the absence of any provision in the Regulations governing the service of an employee providing for continuation of disciplinary proceedings after retirement, the respondent cannot continue the disciplinary proceedings after the employee's superannuation.

11. The State of U.P., no doubt notified the XXII Amendment to the Regulations of 1975 but it provided the date of enforcement as the date of publication in the Gazette. Publication was made only on 27.08.2018 in the official Gazette. Hence, no retrospective operation can be given to the Regulations and the Registrar could not have given sanction on 09.02.2021 for initiation of disciplinary proceedings against the husband of the petitioner no.1.

12. This Court has also considered the Division Bench judgment in the case of **Rajya Krishi Utpadan Mandi Parishad (supra)**, while placing reliance upon the judgment rendered in **Bhagirathi Jena (supra)**, the Division Bench observed that the post of contesting respondent being non pensionable, Article 351-A of Civil Services Regulation was not applicable. After the date of superannuation, the disciplinary proceedings could not go on in the absence of any specific provision. The Court also held that contesting respondent was entitled to interest on the amount payable to him.

13. Having considered the judgments rendered by this Court and by the Supreme Court and the facts as

mentioned in the pleadings on record regarding which there is no dispute, this Court is of the considered opinion that the disciplinary proceedings initiated against late husband of the petitioner no.1 is without jurisdiction as he retired on 31.07.2018 much before the amendment in the Regulation was notified with prospective effect.

14. The proceedings initiated against late Ram Nazar Singh being without jurisdiction are liable to be quashed and are quashed. The writ petition is allowed.

15. Consequential benefits shall be available to the petitioners. Recovery of Rs.11,80,363/- from the gratuity and other services benefits of late Ram Nazar Singh, if the same has been deducted, shall be refunded to the petitioners along with 6% compound interest as had the amount been deposited in a Bank by the petitioners on its receipt in time, they would have been entitled to bank's rate of interest on such deposit. ”

10. I have perused the judgment of this Court passed in ***Brahmannad Tyagi(Supra)***. Relevant paragraphs of the said judgment is quoted below:-

“From perusal of the judgments of the Apex Court as well as this Court, it is very much clear that once there is no rule occupying the field for disciplinary proceeding against an employee after retirement, proceeding so initiated or continued after retirement, is not sustainable as it de-hors the rules and liable to be set aside.

In the present case too, petitioner was retired on 30.04.2018 thereafter disciplinary proceeding was initiated vide order dated 07.07.2021 and charge sheet was served upon him on 07.04.2022 i.e.

undisputedly disciplinary proceeding was initiated after retirement of the petitioner whereas Regulations 1984 does not provide any disciplinary proceeding against a retired employee. Even in case of adoption of rules applicable to the State Government employees under Regulation 43 of Regulations 1984, once the service is not pensionable under Regulation 47 of Regulations 1984, no action can be taken against him under Article 351-A of CSR or any other rule adopted by respondents under Regulation 43 of Regulations 1984. Therefore, impugned order dated 07.07.2021 and subsequent charge sheet dated 07.07.2022 are bad in law and liable to be set aside. ”

11. I have also perused the judgment of Apex Court passed in ***Kamal Swaroop Tondon(Supra)*** relied by Sri Chandra Bhan Gupta, learned counsel for respondent no. 2. The facts of the case is summarized in paragraph no. 13 of the said judgment, which is quoted below:-

“The learned counsel for the appellant is right when he submitted that show cause notice was issued to the respondent-employee on January 13, 2000 when he was very much in service. The respondent submitted his explanation on January 15, 2000 which was not found to be satisfactory. A regular show cause notice was, therefore, issued by the Corporation on January 31, 2000 and was served upon the respondent-employee on the same day. The notice was also sent by registered post which was received by the employee on February 11, 2000. But it is clear from the documents that show cause notice was issued and replied. A regular show cause notice as to departmental inquiry was also served upon the respondent- employee on the last day of his

service which was January 31, 2000. In our opinion, therefore, it could not be said that the proceedings had been initiated against the respondent-employee after he retired from service.”

12. Now, Court has expressed its view in paragraph nos. 28, 29 & 40, which are also quoted below:-

“If it is so, the appellant-Corporation, in our opinion, is right in submitting that the proceedings could have been continued after the retirement of the respondent-employee as far as the financial loss caused to the Corporation because of negligence on the part of employee and the benefit claimed by the respondent-workman on his terminal benefits.

Strong reliance was placed by the learned counsel for the respondent on P.V. Mahadevan v. MD. T.N. Housing Board, (2005) 6 SCC 636 : JT 2005 (7) SC 417. In that case, there was inordinate delay of ten years in initiating departmental proceedings against an employee. In absence of convincing explanation by the employer for such inordinate delay, this Court held that the proceedings were liable to be quashed.

Considering the facts and circumstances in their entirety, in our considered opinion, the High Court was wrong in holding that the proceedings were initiated after the respondent retired and there was no power, authority or jurisdiction with the Corporation to take any action against the writ-petitioner and in setting aside the orders passed against him. In our judgment, proceedings could have been taken for the recovery of financial loss suffered by the Corporation due to negligence and carelessness attributable to the respondent-employee. The impugned action, therefore, cannot be said to be illegal or without jurisdiction and the High

Court was not right in quashing the proceedings as also the orders issued by the Corporation. The appeal, therefore, deserves to be allowed by setting aside the order of the High Court.”

13. From the perusal of judgments relied upon by learned counsel for petitioner, it is apparently clear that after retirement, in case of lack of provisions in Rules or Regulations, neither departmental proceeding nor any show cause notice can be issued for recovery of any amount. Present case, during the course of service, no inquiry has even been initiated against the petitioner fixing the liability.

14. The judgment of **Kamal Swaroop Tondon (Supra)** relied by learned counsel for respondents is based upon entirely different facts. In that case, show cause notice was issued to petitioner on 13.01.2000 when he was in service, reply was also submitted on 15.01.2000, which was not found satisfactory. Thereafter, regular show cause notice was issued on 31.01.2000 and served upon the employee on the very same date, therefore, Court was of the view that proceeding had been initiated against the employee before his retirement. So far as present case is concerned, without any dispute, first and second show cause notices have been issued to the petitioner much after his retirement, therefore, ratio of law of **Kamal Swaroop Tondon (Supra)** shall not be applicable in the present case.

15. Here the case is entirely different as undisputedly, after 15 months from the date of retirement, first show cause notice dated 07.11.2014 has been issued to the petitioner proposing the punishment of recovery of Rs. 2,74,380/- and surprisingly, even after submission of reply of show

cause notice on 05.12.2014, no action had been taken by the respondent-Bank. Now, after around eight years, in the year 2022, again a show cause notice dated 08.08.2022 was issued to the petitioner directing to submit his reply as to why 50% of Rs. 6,47,187/- may not be recovered from him, but till date, final decision has not been taken except detaining the leave encashment and security amount.

16. In the light of facts of law discussed hereinabove, this Court is of the considered view that in lack of provisions in rules and regulations, after retirement, no show cause notice or departmental proceeding can be initiated against any employee. Further, in case a show cause notice has been issued by the department, duly replied by the employee and no action has been taken for a long time, it is not open for the department to issue another show cause notice at a very belated stage for same cause of action after.

17. In the present case, under Rules, 1976 and Regulation, 1975, there is no provision to issue show cause notice or initiate departmental proceeding after retirement, therefore, issuance of show cause notice in lack of provisions is bad after retirement. Further, first show cause notice was issued in the year 2014 and for the same cause of action, another show cause notice was issued in the year 2022, which is also not permissible. Therefore, in view of aforesaid facts and circumstances, impugned show cause notices dated 07.11.2014 and 08.08.2022 are bad and hereby quashed.

18. With the aforesaid observations, writ petition is *allowed*.

19. No order as to costs.

20. Respondents are directed to pay all post-retirement dues, namely; earned leave encashment, security, etc., along with interest @ 7% per annum from due date to the date of actual payment.

(2024) 4 ILRA 492

**ORIGINAL JURISDICTION
CIVIL SIDE**

DATED: ALLAHABAD 01.04.2024

BEFORE

THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Writ A No. 20193 of 2023

Shiv Sewak Kashyap	...Petitioner
Veerendra Singh	...Respondents
Versus	

Counsel for the Petitioner:
Sri Prakhar Tandon

Counsel for the Respondents:
Sri Deepak Singh, Ms. Shreya Gupta

A. Tenancy Law – U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 – Section 21(1)(a) – Release of premises – Bona fide need claimed – After the death of applicant/landlord, the heirs were substituted and application was also amended by substituting their need for the shop – Amendment granted at the appellate stage, how far, would relate back to the date of filing of the release application – Held, the reasoning adopted by the Appellate Authority in reading the amendment in the release application retrospectively relying U.P. on the ratio of the Apex Court's decision reported in 2002 (7) SCC 559 is perfectly justified and does not suffer from any infirmity – No illegality or perversity has been committed by the learned Appellate Authority while passing the order dated 18.10.2023. (Para 9, 20 and 22)

B. Tenancy Law – U.P. Urban Buildings (Regulations of Letting, Rent and Eviction) Rules, 1972 – Rule 18 – Bar of second release application – Tenant claimed that new bona fide need pleaded at appellate stage would tantamount the application as second application, which is barred under Rule 18 – Permissibility – Held, Rule 18 would be attracted only when the first release application of the landlord has been rejected on merits and the second Release Application is filed on the same grounds within one year of the rejection of the earlier Release Application – In the case at hand it is not the case. The Release Application had not been rejected on merits or otherwise and as such there is no question of filing a second Release Application. The amendment made in the pending release application on the death of the original release applicant cannot be contrued to give rise to a second release application so as to attract Rule 18 (2) of the Rules. (Para 21)

13. 1999(6) SCC 222
14. 2019: AHC:19470
15. 2019 (7) ADJ 784
16. 2002 (7) SCC 559
17. 1997 (11) SCC 411
18. 2020 (1) ADJ 766
19. 2002 (7) SCC 559

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

1. Heard Sri Prakhar Tandon, learned counsel for the petitioner and Ms. Shreya Gupta along with Sri Deepak Singh, learned counsels for the contesting plaintiff-respondents.

2. The writ petition at the instance of the tenant petitioner has been filed assailing the judgment and order dated 18.10.2023 passed by the learned Additional District and Sessions Judge, Court No. 19, Kanpur Nagar in Rent Appeal No. 80 of 2022 (Virendra Singh (since deceased) & others vs. Shiv Sewak Kashyap) whereby and whereunder the Rent Appeal has been allowed and the judgment and order dated 01.07.2022 passed by the Prescribed Authority/Civil Judge (Sr. Div.) Kanpur Nagar in Rent Case No. 02 of 2014 rejecting the release application under Section 21(1) (a) of the U.P. Act No. 13 of 1972 has been set aside and the release application has been allowed, the petitioner has been directed to handover the actual physical vacant possession of the shop in dispute to the respondent landlords. The respondent landlords in turn have been directed to compensate the petitioner with a sum equivalent to two years rent.

Writ petition dismissed. (E-1)

List of Cases cited:

1. 2004 (8) SCC 76
2. 2013 (3) ARC 247 (SC)
3. Sumpath Kumar Vs Auja Kannu & ors.; (2002 (7) SCC 559: 2002 SAR (civil) 854 (SC)
4. 2013 (97) ALR 184
5. 1993 U.P.TC 407
6. 1995 U.P.TC 1035
7. AIR 1999 SC 1125
8. AIR 2004 SC 1239
9. 2013 (97) ALR 817 (SC)
10. 2010 (83) ALR 809
11. 2007 (2) ARC 851
12. 2001 SCFBR 397

3. The admitted facts shorn of unnecessary details essential for deciding the controversy between the parties is that the petitioner is a tenant in a shop number 33-A situate on the ground floor of a building no. 33 Lakhanpur, Kanpur Nagar at monthly rent of Rs. 400/-. A release application under Section 21(1)(a) of the U.P. Act No. 13 of 1972 was filed by one Virendra Singh the predecessor in interest of the respondent no. 1/1 to 1/3 herein setting up a bona fide need for the shop under the tenancy of the petitioner. In the release application, it was averred that the original landlord of the building no. 33C on the ground floor of which the shop under the tenancy of the petitioner is situate was Smt. Kamla Devi. On the death of Smt. Kamla Devi the building devolved upon her 3 sons (respondent Virendra and his two brothers). A mutual partition took place amongst the co-owners and the applicant Virendra Singh became the owner of the portion under which the shop under the tenancy fell. It was also averred in the release application that he has superannuated from the U.P. Power Corporation, Lucknow on 30.06.2013 and wants to set up his own business in the shop under the tenancy of the petitioner. It was also stated that the rent of the shop is Rs. 800 per month but the tenant has not paid rent since August 2013. In Para 9 of the release application, it was specifically stated that if the shop is released in his favour, the same would be utilized for carrying on business by self and would not be let out to any third party. It was further stated that the tenant petitioner is not carrying on business in the shop in question and infact is carrying on the business of his father in another shop.

4. The release application was opposed by the tenant petitioner primarily

on the ground that on the own showing of the landlord respondent no. 1 the building no. 33C came to their share but the shop of the petitioner was 33A which came to the share of other co-owners and as such there existed no landlord-tenant relationship between him and the landlords. The tenant-petitioner filed the GST registration of the shop as also the electricity bills of the shop to demonstrate that the shop under his tenancy was numbered 33A.

5. During the pendency of the rent case before the Prescribed Authority the landlord Virendra Singh expired on 11.09.2018 and his heirs and legal representatives (respondent nos. 1/1 to 1/3 herein) were brought on record. Though the release application was amended but it was alleged by the tenant petitioner that no amendment regarding the need of the substituted heirs was done and consequently no need of the shop for the heirs was claimed. The respondent no. 1/1 however filed an affidavit before the Prescribed Authority clearly stating that the premises was required for starting a cosmetic business.

6. The learned Prescribed Authority on the materials on record rejected the release application vide its order dated 01.07.2022. It proceeded to record specific findings that there existed a relationship of landlord and tenant between the tenant petitioner and the landlord respondents. The Prescribed Authority took note of the fact that the relationship of landlord and tenant had not been disputed as was evident from para 1 of the written statement (paper no. 14) as also in the evidence affidavit (paper no. 38A). On the question of bona fide need the learned Prescribed Authority taking note of the fact that the applicant/landlord at whose instance the

release application was filed had expired and the heirs could get themselves substituted under Section 21(7) of the Act and press their own need for the premises under the tenancy relying upon the law laid down in **2004 (8) SCC 76 and 2013 (3) ARC 247 (SC)** came to the conclusion that though the heirs had got themselves impleaded in the place of the original applicant/landlord but did not plead their bona fide need for the premises under the tenancy of the petitioner. It also took note of the fact that the heirs after getting themselves substituted filed an affidavit stating that the premises was required for starting a cosmetic business in the shop in question but the same could not be looked into in the absence of any pleading. It accordingly proceeded to conclude that there was no bona fide need of the landlord/respondents for the shop under the tenancy of the petitioner and rejected the release application.

7. The landlord/respondents assailed the order of the Prescribed Authority in Rent Appeal No. 80 of 2022. At the stage of the appeal they moved an amendment application seeking amendment in the release application which amendment was allowed on an ex parte motion when the tenant/petitioner did not appear nor filed any objections to the amendment despite time having been granted. The tenant petitioner was however permitted to file his additional objections.

8. The Appellate Authority proceeded to frame the following points & determination for disposal of the appeal.

i. Whether the provisions of the U.P. Act No. 13 of 1972 are applicable to the premises in question.

ii. Whether the amendment allowed at the appellate stage would relate back or be read from the date being allowed.

iii. Whether the need of the applicants is pressing and bona fide.

iv. Comparative hardship lies in whose favour.

v. What relief the appellants/applicant are entitled to.

9. The Appellate Authority on the appreciation of the material on record returned a finding that the provisions of the U.P. Act No. 13 of 1972 were applicable and the tenant-petitioner failed to prove otherwise. On the question as to whether the amendment granted at the appellate stage would relate back to the date of filing of the release application the Appellate Authority ruled that in the absence of any observation that it would relate from the date the amendment stood allowed, it would relate back to the date of the release application relying upon the ratio of the decision of the Apex Court reported in **2002 SAR (civil) 854 (SC) Sumpath Kumar Vs. Auja Kannu and others (2002 (7) SCC 559)**.

10. On the question of bona fide need the Appellate Authority took note of the fact that the original applicant Virendra Singh who had set up a need of the premises in question for starting a business as he had retired from U.P. Power Corporation expired during the pendency of the release application. His legal representatives got substituted and amended the release application by substituting their need for the shop in question. The Appellate Authority found that an affidavit (paper no. 95) was filed by the landlord respondent 1/1 before the prescribed authority. The Appellate

Authority further found that in the objection filed to the evidence affidavit of the respondent no. 1/1 in the court below the tenant petitioner had filed his objections (paper No. 100) and did not controvert the averments made in para 3 and 4 of the evidence affidavit (paper no. 95) which clearly set out the need for starting cosmetic business in the shop in dispute. The Appellate Authority relying upon the ratio of the Case laws **2013 (97) ALR 184, 1993 UPTC 407, 1995 UPTC 1035, AIR 1999 SC 1125 and AIR 2004 SC 1239** being of the view that no useful purpose would be served to remand the matter back for consideration by the Prescribed Authority afresh as the materials to evaluate /consider the bona fide need and comparative hardships of the parties were very much on record, considered the materials and returned a finding upholding the bona fide need on the ground that the bona fide need of the landlord respondent 1/1 has not been controverted and further the tenant petitioner cannot dictate the landlord in what manner he may put to use the premises relying on the ratio of the decision of the Apex Court in the Case reported in **2013 (97) ALR 817 (SC), 2010 (83) ALR 809, 2007 (2) ARC 851, 2001 SCFBRC 397 and 1999(6) SCC 222.**

11. On the question of Comparative hardship, the Appellate Authority found that besides the shop under his tenancy the tenant petitioner is possessed with two other commercial accommodations in which the tenant/petitioner carrying on his business while the respondent/landlords have no other accommodation to carry on their business. Accordingly the Appellate Authority held that the respondent landlords would suffer greater hardship as compared to the tenant petitioner if the shop is not released. Consequently, the

Appellate Authority proceeded to allow the appeal and the release application.

12. Sri Prakhar Tandon, learned counsel for the tenant petitioner has vehemently argued that the order of the Appellate Authority allowing the appeal of the landlord respondents suffers from manifest illegality on the ground that:

I. The appellate authority failed to decide the question whether the landlord tenant relationship existed between the parties before proceeding to consider the question of bona fide need in the admitted facts and failed to adhere to the ratio of the decision reported in **2020 (1) ADJ 766 (Shri Shiv Prakash Vs. ADJ, Court No. 24, Kanpur Nagar & others).**

II. The Appellate Authority proceeded on the erroneous assumption that the tenanted shop existed in the house No. 33C Lakhnpur, Kanpur Nagar though it was established that the shop number under the tenancy of the petitioner was 33A.

III. The learned Prescribed Authority had returned finding that the landlord/respondent though moved amendment consequent to the death of the original landlord applicant but did not amend the bona fide need, yet the Appellate Authority proceeded to allow the appeal and the release application.

IV. The Appellate Authority committed grave illegality by not affording opportunity to tenant petitioner to file evidence in support of his amended pleadings and relied upon the amended para of the release application which was not supported by affidavit in evidence.

V. The Appellate Authority ought not to have read the amendment in the release application retrospectively.

VI. The findings of the Appellate Authority on the question of Comparative

hardship and the tenant petitioner having alternate shops and running his business is misleading and could not form the basis of the finding as both shops have different registration and distinct proprietorships.

VII. The release application of the landlord respondents would tantamount to a second release application on new bona fide need pleaded at the appellate stage and thus barred under Section 18 of the U.P. Urban Buildings (Regulations of Letting, Rent and Eviction) Rules, 1972. The Appellate Authority has not applied its mind to this aspect of the matter.

13. Per contra, Ms. Shreya Gupta, learned counsel for the plaintiff/respondents has supported the impugned orders passed by the Appellate Authority by submitting that the Appellate Authority has appreciated the materials on record in the correct perspective and noticed the errors committed by the Prescribed Authority in rejecting the release application and has rightly proceeded to set aside the order, allow the Appeal as also the Release Application. She submits that the question of title to the tenanted premises is not germane for the decision of the eviction proceedings and what is to be established is the relationship of landlord and tenant between the parties and the grounds on which the eviction has been sought under the rent Act. Reliance has been placed upon the decision reported in *Neutral Citation No. 2019 :AHC:19470 and 2019 (7) ADJ 784*.

14. It is next contended that the Appellate Authority was perfectly justified to have treated the Amendment Application to have related back to the date of the release application by placing reliance upon the decision reported in *2002 (7) SCC 559*. It is further contended that after the death

of Virendra Singh the Original Applicant in the release application the learned Prescribed Authority permitted amendment of the Release Application and the word 'Wadi' wherever occurring in the Release Application was permitted to be replaced by the word 'Wadigan'. Thus the need for the demised property for starting business was made and there was no necessity to indicate what business was to be undertaken in the demised property. Reliance has been placed upon the decision reported in *1997 (11) SCC 411*.

15. I have heard the learned counsels for the parties and have perused the record and have also gone through the decisions cited by the respective counsels in support of their cases.

16. So far as the submission of learned counsel for the petitioner as regards non adherence to the ratio of the decision reported in *2020 (1) ADJ 766* by the Appellate Authority is concerned the Court finds no merit in the submission. The petitioner has admitted that he is a tenant in the shop in dispute in the written statement filed by him (paper no. 14) as also in the Additional Evidence Affidavit (Paper No. 38-A). The learned Prescribed Authority also took note of the said admission and returned a finding that there existed landlord tenant relationship between the petitioner and the respondent landlords. It appears that while contesting the Appeal the Tenant petitioner did not press this point in as much as no point of determination in this regards was framed. In the opinion of the Court the point cannot now be agitated before this Court.

17. There is also no merit in the submission that the Appellate Authority proceeded on the assumption that the

demised property existed in House No. 33 C whereas it existed in 33A. The records particularly the Additional Evidence affidavit filed by the tenant/ petitioner before the Prescribed Authority (Paper No. 38A) clearly reveals that the tenancy in House No. 32 was admitted. Para 1 of the affidavit (Paper No. 38A) is being reproduced hereunder:

"यहकि शपथकर्ता भवन सं०- 33 सी लखनपुर कानपुरनगर के भूमिखण्ड पर स्थित एक दुकान का वैधानिक किरायेदार है, दौरान विचारण वाद याची भवनस्वामी का देहान्त दिनांक-11-09-2018 को हो गया है।"

18. The Court further finds that the Release Application under Section 21 (1) (a) of the UP Act No. 13 of 1972 was filed in respect of a shop 9x8 feet situate in House No. 33 C, Jakhanpur, Police Station-Kalyanpur, Kanpur Nagar, on the ground floor. The averments made in the release application clearly states how the building no. 33 Jakhanpur, Kanpur Nagar, earlier owned by Shri Shivpal Singh S/o Gurdalay Singh devolved upon Smt. Kamla Devi and after her death on 20.06.2007 that part of the Building No. 33, containing the shop in question which fell to the share of the plaintiff/ respondent and was numbered as 33-C and fully described in Schedule A x B of the Release Application. In para 3 of the Release Application it was specifically stated that the shop under the tenancy of the petitioner has come to the share of the Release Applicant which is situated on the main road and the residential portion is behind the shop in dispute. The averments in para 3 of the Release Application has not been specifically denied by the tenant petitioner. In the wake of the above the submissions do not merit consideration.

19. In respect of the contention of learned counsel for the tenant petitioner that the Appellate Authority did not afford any opportunity to the tenant petitioner to file evidence in support of his amended pleadings and relied upon the amended para of the release application which was not supported by affidavit, it is borne out from the order sheet of the proceedings of the Rent Appeal which has been brought on record as Annexure 12 to the writ petition that the amendment application (paper no. 24-C) dated 30.05.2023 was filed on which the order was passed to file reply and 01.07.2023 was fixed for its disposal. On 01.07.2023 one more opportunity was granted to petitioner to file reply and 04.07.2023 was fixed. On 04.07.2023 the Tenant petitioner did not appear nor filed reply and the Appeal was directed to proceed exparte. The amendment was allowed exparte vide detailed order dated 08.08.2023 taking note of the fact that copy of the amendment had been served upon the petitioner on 30.05.2023 but till date no objections/ reply had been filed. Time was granted to the tenant petitioner to file additional written statement by 18.08.2023. On 18.08.2023 the Appellate Authority noted that additional reply had not been filed and after closing the opportunity fixed the Appeal for arguments on 31.08.2023. The order dated 18.08.2023 was however subsequently recalled vide order dated 25.09.2023 and the additional reply of the petitioner was taken on record. Thereafter the Appeal was adjourned at the instance of the Tenant petitioner and final arguments were advanced on 09.10.2023 and the order was delivered on 18.10.2023. There was thus ample time for the tenant petitioner to file evidence but he choose not to do so and advanced his arguments. In the opinion of the Court the tenant petitioner in the above circumstances cannot insist that time to file

evidence was liable to be afforded to him and the order of the Appellate Authority is bad on that count.

20. The submissions of learned counsel for the petitioner that the Appellate Authority ought not to have read the amendment in the release application retrospectively does not merit consideration and the Court finds that the reasoning adopted by the Appellate Authority in reading the amendment in the release application retrospectively relying upon the ratio of the Apex Court's decision reported in **2002 (7) SCC 559** is perfectly justified and does not suffer from any infirmity.

21. The last submission of learned counsel for the tenant petitioner that the release application of the landlord respondents would tantamount to a second release application on new bonafide need pleaded at the Appellate Stage and thus barred under Rule 18 of the Rules is thoroughly misplaced. The Rule 18 of the Rules in the opinion of the Court would be attracted only when the first release application of the landlord has been rejected on merits and the second Release Application is filed on the same grounds within one year of the rejection of the earlier Release Application. In the case at hand it is not the case. The Release Application had not been rejected on merits or otherwise and as such there is no question of filing a second Release Application. The amendment made in the pending release application on the death of the original release applicant cannot be contrued to give rise to a second release application so as to attract Rule 18 (2) of the Rules particularly in view of Section 21 (7) of the act which permits the heirs and legal representatives of the deceased landlord to prosecute the release

application further on the basis of their own need in substitution of the need of the deceased. The contention is liable to be rejected and is hereby rejected as misconceived.

22. In view of the above the Court finds that the learned Prescribed Authority had committed patent illegality in rejecting the Release Application of the landlord respondents. The Appellate Authority, however on a thorough consideration of all aspects has found that the need of the premises under the tenancy of the petitioner is bonafide, genuine and pressing and has rightly allowed the Appeal after setting aside the order of the learned Prescribed Authority dated 01.07.2022 and has directed the release of the shop in favour of the landlord respondents. No illegality or perversity has been committed by the learned Appellate Authority while passing the order dated 18.10.2023 warranting any interference by this Court under Article 226 of the Constitution of India. The writ petition is devoid of merits and is accordingly *dismissed*.

23. Learned counsel for the tenant petitioner submits that the petitioner has been a tenant in the shop in question since the year 1990 and considering the length of the tenancy some reasonable time be granted to vacate the premises. A period of 1 year to vacate has been prayed for.

24. Ms. Shreya Gupta, learned counsel for the respondent landlords has opposed the prayer for grant of time to vacate. She however submits that a period of 2 months would be sufficient. The Court has considered the request of the petitioner for time to vacate and finds that a period of 4 months from today would be more than sufficient for the petitioner to look for

alternate accommodation and handover vacant possession of the shop to the landlord respondents within 4 months from today i.e. on or before *31st July, 2024*. The petitioner shall continue to deposit the rent of the premises @ of Rs. 800/- per month till the date of handing over of the possession and shall not sublet the shop or change its nature.

25. Parties to bear their own costs.

(2024) 4 ILRA 500
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.04.2024

BEFORE

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

Writ A No. 26538 of 2014

Santosh Kumar Mishra **...Petitioner**
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:

Sri Rajesh Kumar Namdev, Sri Anand Kumar Srivastava

Counsel for the Respondents:

Sri Yashwant Singh (S.C.)

A. Service Law – U.P. Government Servant (Discipline and Appeal) Rules. 1999 – Rule 7(vii) – Disciplinary proceeding – Termination – Charge of visiting Bank and facilitating pensioners for their pension was leveled against the petitioner, a Peon – Petitioner denied charges – Inquiry Officer did not convene any proceedings of the inquiry, fixing a date, time and venue – He never called U.P.on the Establishment to produce their evidence – Effect – Earlier petitioner made complaint against STO for taking duty of Clerk, consequently STO threatened for termination of his services – Relevance –

Held, all the findings have been recorded on a presumption that the charges, read together with the documents relied U.P.on by the Establishment, are proof of themselves – If the petitioner was avoiding appearance before the Inquiry Officer, that did not relieve the Establishment of the burden to prove the charges – The kind of procedure the Inquiry Officer adopted in this case could never be the lawful procedure to be followed in a departmental inquiry, involving the imposition of a major penalty. (Para 2, 21, 22, 23 and 27)

Writ petition allowed. (E-1)

List of Cases cited:

1. St. of U.P.& ors. Vs Saroj Kumar Sinha; (2010) 2 SCC 772
2. Roop Singh Negi Vs P.N.B.& ors.; (2009) 2 SCC 570
3. St. of Uttaranchal & ors. Vs Kharak Singh; 2008) 8 SCC 236
4. St. of U.P. & anr. Vs Kishori Lal & anr.; 2018 (9) ADJ 397 (DB)(LB)
5. Smt. Karuna Jaiswal Vs St. of U.P.; 2018 (9) ADJ 107 (DB)(LB)
6. St. of U.P. Vs Aditya Prasad Srivastava & anr.; 2017 (2) ADJ 554 (DB)(LB)

(Delivered by Hon'ble J.J. Munir, J.)

The petitioner, a Class IV employee, a Peon in the Establishment of the District Treasury, Budaun, is aggrieved by an order dated 31.07.1993 passed by the District Magistrate, Budaun, terminating his services after disciplinary proceedings, and the appellate order dated 13.02.2014, passed by the Commissioner, Bareilly Division, Bareilly, dismissing his departmental appeal and affirming the order of the District Magistrate.

2. The petitioner was appointed as a Class IV employee (Peon) with the District Treasury, Budaun in the year 1975 by the District Magistrate, Budaun. He was, later on, confirmed in service. Upon the establishment of a sub-treasury at Ujhani, District Budaun, the petitioner was transferred from headquarters to the sub-treasury at Ujhani on 09.12.1989. It is the petitioner's case that after rendering a few years of service at Ujhani, the Sub Treasury Officer¹ passed an order dated 08.11.1991, providing that the petitioner will discharge all duties at the sub-treasury relating to drawing up of accounts, pension vouchers, clearance of bills, all of which he would do as in the past, under the STO's oral directions. The petitioner says he was a Peon, but the STO illegally and arbitrarily, passed the order dated 08.11.1991, directing him to discharge the duties of a Clerk. It is the petitioner's case that the STO threatened the petitioner that his services would be terminated if he did not carry out his directions, detailed in the order dated 08.11.1991. The petitioner says that the order dated 08.11.1991 could never have been made by the STO, because it was illegal to take the work of a Clerk from a Class IV employee.

3. The petitioner wrote a letter to the Sub Treasury Officer, Budaun with a request that though a Peon, he had been directed to undertake the duties of a Clerk, under the oral directions of the STO; and therefore, if any mistake occurs on the petitioner's part, he cannot be held responsible, for obvious reasons. The STO, upon coming to know of the letter dated 08.11.1991, passed a further order, which reads :

श्री संतोष कुमार मिश्रा चपरासी के
प्रार्थना पत्र दि० - 8-11-1991 के सम्बन्ध मे

आदेशित किया जाता है की उपकोषाकार कार्यालय की अधिकता को देखते हुए मेरे मौखिक बोलने पर ही सभी राजकीय कार्य पूर्व की भांति रहेंगे।

जिसकी संपूर्ण जिम्मेदारी उपकोषाधिकारी उझानी की होगी।

Sd/- (Illegible)

S.T.O. Ujhani

8-11-91

4. The Treasury Officer, Budaun issued a show-cause notice dated December the 14th, 1991 to the petitioner, saying that the STO vide his memo number 286/कोष-111/91-92 dated 09.12.1991, had informed the Treasury Officer that the petitioner was absent from duties since the forenoon, without prior information or permission, and that according to the report dated 05.12.1991 received from the Branch Manager, State Bank of India, Ujhani, the petitioner had collected the scroll for the 4th of December, 1991. The notice further said that the petitioner, along with the scroll, had been handed over all the relative vouchers, but two out of these were missing. On the aforesaid premise, the petitioner was required to explain, within three days, the circumstances in which he was absent from duty and further, to whom did he entrust the missing vouchers.

5. The petitioner submitted his explanation to the show-cause vide his reply dated 27.12.1991. In his reply, the petitioner said that on 04.12.1991, he reached the Sub Treasury Office at Ujhani, but a short while later, he fell very sick. He, therefore, made an application for sanction of Casual Leave, which he handed over to the Assistant Accountant, Madan Pal Singh and took leave of him. It was also said that moments after the petitioner had reached the Sub Treasury Office on 04.12.1991, the

Bank Peon arrived, carrying the scroll. At that time, the petitioner was the only functionary available at the Sub-Treasury, and therefore, the scroll was accepted by him. This was done particularly in view of the fact that the STO had authorized the petitioner, under his oral directions, to discharge clerical duties, of which, receipt of daily scroll was a part. It was also the petitioner's defence in the show-cause that after receiving the scroll, he could not look into the number of vouchers, because the STO had instructed him that the scroll comes attached with a small slip from the Bank, which mentions the money deposited and that disbursed on it. This money is entered in the register on a daily basis. If the scroll, the money mentioned in the slip and the bank record register all tally, the petitioner should receive the scroll. The petitioner compared the deposited and the disbursed money figures on the attached slip and received the scroll. In the past also, it was precisely this way that the scroll was being received by the petitioner from the Bank. The STO had never directed the petitioner to account for the voucher numbers, nor did he have any knowledge about the requirement. Whenever the daily scroll was received, it would be placed in a small almirah, that does not have a lock to secure it. The petitioner would place the scroll there and the Assistant Accountant, upon arrival, would take it out and process it.

6. The petitioner's explanation also said that on 05.12.1991, he sent a leave application to the STO through a friend of his. The petitioner, during this period of time being indisposed, was under the treatment of Dr. Parashari, but there was no relief. Therefore, the petitioner, on 06.12.1991, went to a certain Gangu Vaidh (Pandit Ganga Vallabh Mishra) for his

treatment. He addressed his leave application to the STO, Ujhani sent by registered post, bearing number RL-3271 dated 06.12.1991. The said registered cover was delivered to the STO on 07.12.1991, but surprisingly, the STO refused to receive it. This application carried a request for sanction of Casual Leave of five days. Since the petitioner did not get relief from the changed medical treatment that he took, he moved to Mori Nagar, Ghaziabad, where he went to Dr. A.K. Dubey's Nursing Home. He was treated there from 11.12.1991 to 17.12.1991. A medical certificate was issued in this behalf by Dr. A.K. Dubey. The petitioner sent a leave application by registered post to the STO, Ujhani, annexing therewith the medical certificate. It is not known to the petitioner if the STO received the application by registered post or declined it. Upon his return home, he received a registered cover, bearing P.L. No. 3271. The reply to the show-cause said that his health was severely impaired and he was not in a position to discharge his duties. He made a request that he may be sanctioned medical leave from 18.12.1991 to 08.01.1992. It was said in the reply that the petitioner, upon reporting at the office, would produce the original medical certificates.

7. On 19.12.1991, the petitioner received an order of his suspension from service pending inquiry passed by the District Magistrate, Budaun. It mentioned a summary of five charges against him. This was followed by the Inquiry Officer issuing a charge-sheet dated 31.01.1992/03.02.1991 to the petitioner, carrying five charges. The petitioner was given fifteen days to submit his reply. The last mentioned charge-sheet was followed by another charge-sheet dated 15.02.1992, also issued by the Inquiry Officer, carrying the

same five charges as those in the earlier charge-sheet dated 31.01.1992/03.02.1991.

8. The petitioner submitted his reply to the charge-sheet dated 31.01.1992/03.02.1992, denying the charges. It is the petitioner's case that no other document was given to the petitioner, despite several and repeated demands, except the three annexures to the charge-sheet dated 31.01.1992. These were an application dated 08.01.1992 from a certain Tikola Devi and an application by one Bhola Nath dated 05.12.1991/10.01.1992. There was another complaint dated 05.12.1991 annexed to the first charge-sheet, a handwritten document. It is the petitioner's case that an inquiry into the charges was not being concluded on one hand, and on the other, the petitioner was suffering suspension and paid 50% of his pay towards subsistence allowance. The petitioner, therefore, by his letter dated 20.03.1993, requested the District Magistrate, Budaun to revoke his suspension and permit him to join duties.

9. On 07.04.1993, the Inquiry Officer informed the petitioner that he would appear before the Inquiry Officer on 15.04.1993 at 03:00 p.m., On 15.04.1993, the petitioner appeared before the Inquiry Officer, but nothing was done that day. Instead, the Inquiry Officer passed an order, saying that due to his engagement that day in an anti-encroachment drive, he could not take down the statement of the petitioner's. He further said in his order that until the conclusion of the petitioner's evidence, the petitioner would remain attached to the Inquiry Officer's office. It is the petitioner's case that the Inquiry Officer did not record the petitioner's testimony, nor any further date was fixed, nor the petitioner informed about any date that the

Inquiry Officer might have fixed. All of a sudden, the petitioner was surprised to receive a show-cause notice dated 09.07.1993 from the District Magistrate, Budaun saying that a detailed inquiry report dated 06.07.1993 had been submitted by the Inquiry Officer, one K.K. Chaudhary, an Additional District Magistrate at Budaun, where all charges against him were found proved. He was required to show cause and submit his explanation to the Inquiry Report within a period of 45 days by the District Magistrate. The petitioner was not supplied relevant documents and other materials that were referred to in the show cause. Therefore, the petitioner made an applications dated 20.07.1993 and 24.07.1993, demanding relevant copies of documents and further requested time to show-cause, which he prayed, may be suitably extended. No information was then given to the petitioner, nor a reply in answer to his application dated 20.07.1993 and 24.07.1993. The petitioner was also not intimated or informed about any subsequent date and the matter remained pending.

10. The petitioner, after waiting for a substantial period of time, bereft of the copies of documents that he had requested, but never given, submitted his reply dated 03.08.1993 to the show-cause notice dated 09.07.1993. The petitioner was served with the impugned order of termination of service dated 31.07.1993 passed by the District Magistrate, Budaun. It is the petitioner's case that a perusal of the Inquiry Report would show that no inquiry was ever held, in the sense that no proceedings of inquiry were scheduled, where the Establishment would be required to produce their evidence to prove the charges. It is averred in paragraph No. 26

of the writ petition that no witness was examined and no document produced by the Establishment to prove the charges against the petitioner. It is also averred that the petitioner was not given any opportunity to appear before the Inquiry Officer, nor any relevant document, which he demanded, was supplied to him. The petitioner's services were terminated without a lawful inquiry being held.

11. The petitioner challenged the impugned order of termination dated 31.07.1993 before this Court by means of Civil Misc. Writ Petition No. 21681 of 1994. The aforesaid writ petition was dismissed on ground of availability of a statutory alternative remedy of appeal under the service rules. The petitioner, accordingly, preferred his appeal under Rule 11 of the Uttar Pradesh Government Servants (Discipline and Appeal) Rules, 1992 to the Commissioner of the Division. The Divisional Commissioner, vide his order dated 13.02.2014, has dismissed the appeal and affirmed the order of termination from service passed by the District Magistrate, Budaun.

12. Disillusioned by the aforesaid orders, the petitioner has instituted the present writ petition.

13. A counter affidavit was filed on behalf of the respondents, dated 16.07.2014, to which, a rejoinder affidavit was filed on 25.07.2016. On 30.11.2023, when the petition came up, it was admitted to hearing, which proceeded forthwith. Judgment was reserved.

14. Heard Mr. Rajesh Kumar Namdev, learned Counsel for the petitioner and Mr. Yashwant Singh, learned Standing

Counsel appearing on behalf of the respondents.

15. It is argued by the learned Counsel for the petitioner that the impugned orders passed against the petitioner are much flawed by procedural unfairness, in that, that the inquiry, on the foot of which the Disciplinary Authority and the Appellate Authority have proceeded to punish the petitioner, is no inquiry at all. Learned Counsel for the petitioner emphasizes that in any departmental inquiry, where there is the likelihood of imposition of a major penalty, inquiry proceedings have to be formal in nature. Inquires involving the possible imposition of a major penalty, the Inquiry Officer has to distance himself from the Establishment and convene himself as an impartial Tribunal. It is not that, that the Inquiry Officer can assume the charges to be proof of themselves and hold the delinquent guilty; nor can the delinquent be held guilty by going through the charge-sheet, the delinquent's reply and the documents supplied by the Establishment, annexed to the charge-sheet. At a properly convened inquiry, in all major penalty matters, the Establishment has to be called upon by the Inquiry Officer to prove charges, both by documentary and oral evidence, that is to say, by producing witnesses. The production of witnesses is an imperative in all major penalty matters. Here, nothing of the kind, according to the learned Counsel for the petitioner, has been done and the inquiry has been an extremely informal affair.

16. On the other hand, Mr. Yashwant Singh, the learned Standing Counsel has said that the charges against the petitioner are very serious and involve defalcation of funds of the State by practice of forgery

and manipulation of record. He submits that the documents enclosed with the charge-sheet are sufficient by themselves to bring home the charges, which have been held established by the Inquiry Officer and accepted by the Disciplinary Authority as well as the Appellate Authority. Mr. Singh says that in these circumstances, it is not a case where this Court should disturb the findings recorded by the Inquiry Officer or the Disciplinary and the Appellate Authorities.

17. We have considered the rival submissions advanced by parties. A perusal of the Inquiry Report shows that the charges laid against the petitioner involve the payment of a sum of ₹65,783 due to government pensioners to fictitious persons, leading to defalcation of government funds. A perusal of the Inquiry Report shows that the inquiry proceeded against the former Sub-Treasury Officer, Mahesh Babu Saxena, the Accountant, Tulsi Das, the Sub Treasury Officer Madan Pal and the petitioner, a Peon. It is not the province of this Court to go into the merits of the charges, but we think that we should venture to refer to so much of the findings of the Inquiry Officer, with reference to the crux of the charges, as may enable us to fathom if the inquiry held was one that is procedurally fair and according to the salutary principle governing departmental inquiries, in matters where a major penalty may be imposed. The Inquiry Officer says in support of the charges against the petitioner, that the evidence appearing against him is :

1. "आप बैंक जाकर पेंशनर को पेंशन का भुगतान कराते थे ।"

Translated into English, it would read :

"You would go over to the bank and facilitate payment of pension to the pensioners."

2. "आप दिनांक 4.12.1992 को सभी पेंशनर के साथ बैंक गए थे ।"

This would read (translated to English) as follows :

"You went along with all the pensioners to the Bank on 04.12.1991."

18. Now, the two shortlisted matters, hereinabove detailed, and said to be evidence against the petitioner in support of the charges, are, by no means, evidence of any kind. These are facts, or may be, some relevant part of facts that may go to constitute the charges against the petitioner. What has been shortlisted as evidence by the Inquiry Officer is neither documentary nor oral evidence, or any other kind of evidence. It is assertion of facts and nothing more. The Inquiry Officer proceeds to say that the petitioner obstructed the proceedings taken to scrutinize the vouchers and pressurized the Bank Cashier to quickly pay off the pensioners.

19. The petitioner signed the vouchers for the STO, forging his signatures, and upon a repeat objection by the Bank, the petitioner fled the Bank along with the relative voucher and the pensioner. It is recorded that the petitioner himself forges the pension vouchers and if he has any authority from the STO in this behalf, he must produce the same. These and some further remarks in the Inquiry Report are more or less repetition of the charges against the petitioner, the substance of which has been indicated hereinabove. It is then remarked by the Inquiry Officer that in his reply to the charge-sheet, the petitioner has denied the charges and said that he has

not violated any rule or done any act that may constitute embezzlement. He is a Peon and has not done any monetary transaction. The Inquiry Officer has remarked that the petitioner has blamed the STO, the Accountant and the others charged at the inquiry for the embezzlement and said that he has been made a scapegoat by threatening two pensioners, who moved applications against him.

20. The Inquiry Officer then goes on to remark that answering the evidence against him, the petitioner has said that he never went to the Bank to ensure disbursement of pension to the beneficiaries. The occurrence dated 04.12.1991 is incorrect. He never went to the Bank on the said date, nor did he ask the cashier to quickly pay off the pensioners. The Inquiry Officer has also remarked that the petitioner has said that he has not drawn up any forged vouchers, nor has he drawn up additional *syaha*, or changed the pensioner's name in the *syaha*. The Inquiry Officer goes on to observe that the pensioner, Smt. Tikola Devi, has said in her complaint that the petitioner, on 09.07.2011, after she was paid her pension of ₹1074, took a sum of ₹500 in loan and had not repaid her so far. There is also a reference to complaint by another pensioner, Bhola Nath, who too says that a sum of ₹1800, that he had received in arrears, was taken in loan by the petitioner. The Inquiry Officer has recorded that on the basis of details of the forged pension vouchers available on record, the pensioner, Bhola Nath was paid a sum of ₹1908 on 11.11.1991 and a sum of ₹1847 on 05.12.1991. The Inquiry Officer has also recorded that the Branch Manager, State Bank of India, Ujhani had written a letter dated 04.12.1991 to the STO, Ujhani, a copy of which is available on record. It is

observed that this letter lays a complaint against the petitioner that he put pressure on the officials of the Bank to pay off pension to an imposter, a man called Rampal, and when the Bank officials refused to pay, asking the STO to come over to the Bank, the petitioner, along with the imposter pensioner, took to their heels. Upon arrival of the STO, it was revealed that the petitioner was attempting to get the pension due to a pensioner by the name Rampal fraudulently, and by that date, the said pensioner's bill had not yet been passed. This discovery led the matter to be probed, and the embezzlement of a sum of ₹65,783 came to light, all of which was paid off to bogus pensioners in place of the genuine beneficiaries. There are then findings how all these facts constituting the charges are proved.

21. It is observed that across the length and breadth of the Inquiry Report, one does not find any evidence, documentary or oral, produced before the Inquiry Officer on behalf of the Establishment in a duly convened inquiry. All the findings have been recorded on a presumption that the charges, read together with the documents relied upon by the Establishment, are proof of themselves. The Inquiry Officer has gleaned through the charge-sheet, the petitioner's reply and the annexed documents, sitting casually during the course of his ordinary duties in the Establishment, and without convening a formal inquiry, fixing a date, time and place, where the Establishment would be first required to produce their evidence, both documentary and oral, to prove the charges against the petitioner.

22. It must be remembered for a salutary principle that in a departmental inquiry, the Inquiry Officer cannot

identify himself with the Establishment or accord any weightage to the charges, merely because some documents are annexed. The Inquiry Officer must start with a clean slate, placing burden upon the Establishment, with which he must distance himself in the role of the Inquiry Officer, and assume that the charges are neither proved nor dispelled. He must then require the Establishment to prove the charges by formally producing evidence, documentary and oral, which much include witnesses in a case where a major penalty may be imposed. The witnesses may give testimony of facts constituting the charges and also prove the documents relied upon by the Establishment. The witnesses must then be exposed to the delinquent's cross-examination. After this stage is over, the delinquent can be called upon to produce evidence in his defence, which, again, can be both documentary and oral. This is a salutary principle, and in this case also, the mandate of Rule 7(vii) of the Rules of 1999. The Inquiry Report, in this case, reveals that after the petitioner denied the charges, the Inquiry Officer did not convene any proceedings of the inquiry, fixing a date, time and venue. He never called upon the Establishment to produce their evidence, which would be done through a Presenting Officer and include both documentary evidence and oral, that is to say, witnesses. This fact, which is otherwise unmistakably discernible from the Inquiry Report, is admitted in paragraph No. 22 of the counter affidavit, where, in answer to paragraph No. 26 of the writ petition, it is averred :

22. That the contents of paragraph 26 of the writ petition are denied. It is stated that when the charge-sheet was given by the City Magistrate then in support thereof

all the documents were attached, and he attached the petitioner in his Court till the written statement but he always absconded from his court and did not attend for the statement. It is wrong to say that he was not given the opportunity.

23. This clinches the issue that no evidence, whatsoever, was ever produced by the Establishment, in support of the charges. It is also to be noted that if the petitioner was avoiding appearance before the Inquiry Officer, that did not relieve the Establishment of the burden to prove the charges, which they would have to do even if the inquiry was set down *ex-parte*. The furnishing of opportunity to the petitioner to defend himself does not relieve the Establishment of their own burden to prove the charges by evidence, both documentary and oral, which has not been done in this case at all.

24. It must also be remarked that a perusal of the order dated 15.04.1993 shows that on that date, the petitioner was asked to appear before the Inquiry Officer, but the proceedings were adjourned, because the Inquiry Officer was busy with some anti-encroachment drive. What is relevant is that the said date was fixed for recording the petitioner's evidence. It is surprising that the petitioner's evidence was scheduled to be recorded on 15.04.1993 by the Inquiry Officer in a proceeding where no evidence was ever produced on behalf of the Establishment; no witness was produced to prove the Establishment's case. The order dated 15.04.1993 shows the understanding of the Inquiry Officer about the procedure of holding a departmental proceeding, is flawed beyond redemption, for reasons that we have indicated both hereinbefore and hereinafter.

25. The Inquiry Officer has sat back in his office and in the routine of his daily work, as already remarked, shuffled through the charge-sheet, the petitioner's reply and the documents annexed, which nobody proved or established the truth of, and proceeded to hold the charges proved on a supposition as if the charges were proof of themselves. It appears that the Inquiry Officer assumed that the charges read together with the papers annexed to the charge-sheet were not explained away by the petitioner in his reply, and, therefore, proved.

26. To add to all this is the fact that the nature and the particulars of the charge are such that it was imperative for the Establishment to produce witnesses in the first instance to prove it. If the Establishment had to prove that the petitioner put pressure on Bank officials to pay off pension to one or the other pensioners, or to pay off an imposter, it was necessary to produce officials of the Bank to prove the allegation in the first instance. Nothing of the kind of was done.

27. This Court may dare say that the kind of procedure the Inquiry Officer adopted in this case could never be the lawful procedure to be followed in a departmental inquiry, involving the imposition of a major penalty. This kind of procedure could be associated with a preliminary inquiry or a fact-finding inquiry, but not one, which was part of disciplinary proceedings likely to lead to the imposition of major penalty. The principle about the manner in which the inquiry is to be held, where the Establishment bear the burden of producing evidence before the Inquiry Officer, documentary and oral, particularly witnesses, is so well established that it can

hardly brook doubt. It is also the mandate of Rule 7(vii) of the Rules of 1999 that this principle, as a salutary one, governing the procedure to be adopted in departmental inquiries involving the likelihood of imposition of a major penalty, is to be followed, is well established, in view of the holding of the Supreme Court in **State of Uttar Pradesh and others v. Saroj Kumar Sinha**³, **Roop Singh Negi v. Punjab National Bank and others**⁴, **State of Uttaranchal and others v. Kharak Singh**⁵ and the Bench decisions of this Court in **State of U.P. and another v. Kishori Lal and another**⁶, **Smt. Karuna Jaiswal v. State of U.P.**⁷ and **State of U.P. v. Aditya Prasad Srivastava and another**⁸.

28. The Authorities below have proceeded to pass the impugned orders, punishing the petitioner on the basis of an inquiry that is so procedurally flawed that it is a nullity and no inquiry in the eyes of law. Therefore, the impugned orders cannot be sustained.

29. It goes without saying that these orders being flawed on account of procedural infirmities, in the ordinary course of things, would entitle the respondents to proceed afresh with the inquiry from the stage of the charge-sheet. The only distinguishing feature, perhaps, in this case is that the petitioner was aged 56 years in the year 2014 and would have reached the age of superannuation somewhere in the year 2018. This is a fact which the respondents would bear in mind before electing to pursue fresh proceedings against the petitioner. This Court may not be understood to say that there is any lack of jurisdiction with the respondents in initiating fresh proceedings against the petitioner, but it would now certainly

impose some limitations on the punishment that the respondents can award the petitioner in case he is again found guilty.

30. In the result, this writ petition **succeeds** and stands **allowed**. The impugned order dated 31.07.1993 passed by the District Magistrate, Budaun and the Appellate Order dated 13.02.2014 passed by the Commissioner, Bareilly Division, Bareilly are hereby **quashed**. The petitioner shall be deemed to be in service until the date of his superannuation in the ordinary course. It would be open to the respondents to resume proceedings against the petitioner from the stage of the charge-sheet, and if they elect so to do, neither emoluments due to the petitioner until his superannuation nor any part thereof or other post-retiral benefits, to which the petitioner would be entitled upon superannuation, would be payable to him, until final orders are passed. The entitlement of the petitioner to emoluments until the date of his superannuation and his post-retiral benefits would be subject to the outcome of fresh proceedings, if elected to be pursued. If, however, no proceedings afresh are elected to be pursued, the petitioner would be entitled to 50% of his emoluments from the date of the impugned order passed by the District Magistrate until his superannuation, and all other post-retiral benefits would be payable, as if the orders impugned had never been made.

31. There shall be no order as to costs.

32. Let the Registrar (Compliance) communicate this judgment and order to the Commissioner, Bareilly Division, Bareilly and the District Magistrate, Budaun.

(2024) 4 ILRA 509
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.03.2024

BEFORE

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

Writ A No. 41897 of 2014

Dev Prakash Tripathi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sri N.L. Pandey, Sri V.K. Mishra

Counsel for the Respondents:

C.S.C., Sri Ashok Kumar Singh, Sri D.D. Chauhan

A. Service Law – Termination – Service as a Shiksha Mitra – Charges of unsatisfactory service and of making off with Attendance Register were leveled – No material particular was on record – Effect – Held, there is nothing said in the impugned order, even vaguely, apart from one fact as to how the petitioner's work and conduct were unsatisfactory or obstructive of work in the institution. Before allegations of this kind can be sustained, they have to be definitive in the sense that particulars and facts have to be set out as to how the petitioner's work is unsatisfactory, citing instances of it, and how his conduct is blameworthy – The District Magistrate has granted an approval without application of mind to any of the glaring infirmities – No act of the St. or its officials, can be so uncertain and so full of contradictions. The BSA, who passed the impugned order and the District Magistrate, who granted approval to it on 20.06.2014, shall stand duly cautioned to be careful in matters dealing with rights of citizens. (Para 10, 11, 13 and 15)

Writ petition allowed. (E-1)

(Delivered by Hon'ble J.J. Munir, J.)

1. This writ petition is directed against the order dated 30.06.2014 passed by the District Basic Education Officer, Siddharth Nagar (for short, 'the BSA'), terminating the services/ contract of service of the petitioner as a Shiksha Mitra with immediate effect as also the order of the District Magistrate, Siddharth Nagar dated 20.06.2014, granting approval to the proposal for termination of the petitioner's services/ contract of service.

2. The petitioner was appointed a Shiksha Mitra at the Primary Vidyalaya, Rasiyawal Khurd, Development Block Lotan, District Siddharth Nagar (for short, 'the institution') in accordance with law and after following the procedure for selection and appointment of a Shiksha Mitra, provided by Government Orders issued on the subject from time to time. The petitioner says that he was discharging his duties as a Shiksha Mitra faithfully and to the satisfaction of his superiors since the year 2001.

3. In substance, the case of the petitioner is that the allegations against him are the outcome of machinations of the Village Pradhan at the relevant time, one Brahma Yadav and another Veenu Pandey, the daughter-in-law of a retired teacher, through whom a sum of Rs.59,500/- were drawn by the Headmistress of the institution, the Pradhan and Veenu Pandey, illegally depriving the State exchequer. This offence was reported to the Police at the instance of the petitioner, leading to animosity and the immediate cause for the Pradhan to lay false reports against the petitioner through the Gram Shiksha Samiti about non-provision of the mid-day meal to children in the institution. Based on the

complaints against the petitioner, he was issued a notice by the BSA on 18.02.2014, which the petitioner answered by his reply dated 26.02.2014. It was mentioned that the food grains are not supplied by the local fair price shop dealer, who sends foodgrains to the Pradhan and these are not provided to the institution for cooking the mid-day meal. The BSA did not pass any orders after receiving the petitioner's reply dated 26.02.2014. The petitioner submitted a complaint in the matter dated 04.06.2013 to the District Magistrate, apprising him of illegal actions of the Pradhan. A complaint about victimization by the Pradhan on false charges was also made to the Commissioner of the Basti Division by the petitioner. There is an assertion in paragraph No.12 of the writ petition that the officiating Headmistress of the institution apprised the District Magistrate on 26.04.2013 that food grains are not being provided for cooking the mid-day meal by the fair price shop dealer. A copy of the said complaint by the officiating Headmaster of the institution is on record.

4. The petitioner's case is that the Gram Shiksha Samiti under the stewardship of the Village Pradhan, without giving any notice to the petitioner, forwarded a resolution dated 31.03.2014 to terminate the petitioner's contract of service. It is stated in paragraph No.13 of the writ petition that the BSA, while passing the impugned order dated 30.06.2014, terminating the petitioner's service, has remarked that he was issued with a notice dated 29.04.2014, providing him opportunity to have his say, which he did not satisfactorily reply. It is averred in paragraph No.13 of the writ petition that no such notice was ever served by the BSA. According to the petitioner, he was served with a notice dated 21.05.2014, asking him

to show cause within three days in regard to the allegations carried in the notice.

5. The petitioner submitted his reply on 22.05.2014, denying the allegations in the notice. It was said by the petitioner in his reply that on 22.05.2014 at 11 a.m., the Block Education Officer came over to the institution and took away the attendance register, which he handed over to the Gram Pradhan along with other registers. The petitioner was asked to sign the attendance register at the Gram Pradhan's house everyday. The petitioner has asserted that the BSA has not passed any orders taking into consideration the petitioner's reply. Rather, he has forwarded the proposal to terminate the petitioner's services for consent of the District Magistrate and against renewing his service contract for the next session, without reference to his reply or defence.

6. The District Magistrate has granted approval regarding termination of the petitioner's services/ contract of service on the basis of the resolution of the Gram Shiksha Samiti forwarded by the BSA. Consequent upon the said approval, the BSA, falling back on the provisions of the Government Order dated 12.11.2008, has terminated the petitioner's services by the impugned order dated 30.06.2014. It is averred in paragraph No.19 of the writ petition that the order dated 30.06.2014 is bad in law because the BSA has recorded an incorrect finding there that a notice dated 29.04.2014 was served upon the petitioner, besides another dated 21.05.2014, to both of which the petitioner did not reply. The finding is incorrect because the notice dated 29.04.2014 was never served, whereas the notice dated 21.05.2014 was answered on 22.05.2014 and duly received in the BSA's office. The

further case pleaded by the petitioner is that the District Magistrate should have given opportunity to the petitioner before he granted approval to act in terms of the Gram Shiksha Samiti's resolution, said to have been passed on 31.03.2014. It is the further case of the petitioner that the District Magistrate has committed a patent illegality in passing the impugned order dated 30.06.2014, without considering the petitioner's reply, which in any case has been passed without affording the petitioner opportunity of hearing.

7. A counter affidavit has been filed on behalf of the BSA sworn by Block Education Officer. It is averred in paragraph Nos.4, 5 and 6 of the counter affidavit that the work and conduct of the petitioner was not satisfactory, and, therefore, the Gram Shiksha Samiti did not recommend renewal of the petitioner's contract for the session 2008-09. The Gram Shiksha Samiti has sent a proposal for a new appointment. Copies of the resolution are annexed as Annexure Nos. CA-1 and 2. In paragraph No.10 of the counter affidavit, paragraph Nos.19, 20, 21, 22, 23 and 24 have been answered in the following terms:

“10. That the contents of para no. 19, 20, 21, 22, 23 & 24 of the writ petition are incorrect as stated therein hence denied in reply it is submitted that the notice was served upon the petitioner, but he failed to give satisfactory reply, reply of petitioner was not satisfactory, therefore the District Basic Education Officer terminated the service of petitioner. Gram Shiksha Samiti has sent a proposal for removal of the petitioner, because his work and conduct was not satisfactory, the Gram Shiksha Samiti has submitted all evidence before the District Magistrate who has accepted the proposal of removal/termination of

petitioner. The impugned order is just, proper and sustainable in the eye of law. The petitioner had made hindrance/obstruction in Mid-day-mill, due to his conduct no person are interested to take charge of Head Master in the institution.”

8. This Court by an order dated 30.08.2014 had required learned Counsel for the BSA, Mr. Ashok Kumar Singh, to seek instructions particularly in regard to allegations in paragraph No.19 of the writ petition. Notice on behalf of respondent No.4 was accepted by Mr. D.D. Chauhan, learned Counsel, but there has been no representation on behalf of the said respondent or a return. Notice was issued to respondent No.5 by RP AD on 03.09.2014 and steps were taken on 19.11.2014. The office report shows that neither acknowledgment nor the undelivered cover had been received back. The service upon respondent No.5 is, therefore, held sufficient.

9. Heard Mr. N.L. Pandey, learned Counsel for the petitioner and Mr. Akhilesh Kumar Tripathi, learned Standing Counsel appearing on behalf of respondent Nos. 1, 2 and 3.

10. Upon hearing learned Counsel for the parties, this Court finds that the impugned order dated 30.06.2014 cannot be sustained for more than one reason. These are: firstly, that it is vague and imputes to the petitioner unsatisfactory service in uncertain terms without any material particulars, capable of being answered or asserted. Secondly, it says that the petitioner was asked to submit a reply to the notice dated 29.04.2014, which he did not do, but in the face of the petitioner's denial that the said notice was not served, there is nothing said in the impugned order

or the return filed, how that notice was served upon the petitioner. Thirdly, the impugned order says that a repeat notice was issued to the petitioner on 21.05.2014 to show cause in respect of whatever the case against him is, but he did not submit a satisfactory reply or explanation. It is not mentioned by even as much as a single sentence, what the allegation was and how the petitioner's explanation was not satisfactory. Ex facie, it shows non-consideration of the petitioner's explanation to the notice dated 21.05.2014. Fourthly, the only definitive allegation, of whatever worth, is a complaint attributed to Veenu Pandey dated 08.05.2014 that the petitioner has made of with the Shiksha Mitra Attendance Register and the Students Attendance Register, which he keeps with himself and himself remains untraceable. The petitioner has said that the Attendance Register relating to the Shiksha Mitra was taken away by the Block Education Officer and kept with the Pradhan with instructions to the petitioner to sign the Attendance Register there. The impugned order does not record any finding about the truth of the matter in this regard. It just mentions the allegation and rests content with it. Fifthly, the impugned order says that in view of a number of resolutions passed by the Gram Shiksha Samiti mentioned in the opening of the order, the BSA, after obtaining the District Magistrate's approval on 20.06.2014, had decided to terminate his contract of service on grounds of his work and conduct being unsatisfactory, besides his non-cooperation and obstructive ways.

11. As already remarked, there is nothing said in the impugned order, even vaguely, apart from one fact as to how the petitioner's work and conduct were unsatisfactory or obstructive of work in the institution. Before allegations of this kind

can be sustained, they have to be definitive in the sense that particulars and facts have to be set out as to how the petitioner's work is unsatisfactory, citing instances of it, and how his conduct is blameworthy. What the impugned order does is merely to cite labels without the content. A mere incantation of the words that the work and conduct of a person is unsatisfactory, would not imbue them with life or efficacy, unless the particular acts, facts and instances of poor work and bad conduct are mentioned. Then an order that proceeds on the basis of some definitive allegation has to record some kind of a finding, which must proceed on some material to infer that the allegations hold some truth to them.

12. Across the entire length and breadth of the impugned order, there is just one allegation about making off with the Shiksha Mitra Attendance Register and the Students Attendance Register, about which the only material cited is a complaint by Veenu Pandey. Ignoring the fact that there are allegations of animosity against Veenu Pandey, there is no finding with reference to any objective material on record that in fact the petitioner made off with the Shiksha Mitra Attendance Register or that of the students. To the contrary, there are allegations about some representations made by the petitioner that it was the BSA, who had kept the Attendance Registers at the Pradhan's home. There is no categorical finding about the petitioner's guilt regarding the 'attendance register's issue'. To put it shortly, the impugned order is utterly bad for the vagueness of it. The District Magistrate's order dated 20.06.2014, granting approval to termination of the petitioner's contract service, has not been placed on record in the return filed on

behalf of respondent Nos.1, 2 and 3. The petitioner has asserted that it was not made available to him.

13. This Court is inclined to believe the petitioner because the fashion in which the District Magistrates generally function in the State, it is difficult for an ordinary or a humble man, like a Shiksha Mitra, to secure a copy of an order of this kind passed by the District Magistrate on the administrative files. It was the duty of the respondents to have placed the District Magistrate's order on record. In the absence of the copy of the District Magistrate's order being placed on record, this Court is inclined to believe that the District Magistrate has granted an approval without application of mind to any of the glaring infirmities that we have found hereinabove. The District Magistrate's order is, therefore, liable to be ignored.

14. To add to all this, this Court notices another feature, vitiating the order impugned, which goes utterly unexplained. In paragraph No.4 of the counter affidavit, the respondents have taken a stand that the petitioner's work and conduct was not found satisfactory and a recommendation for renewal of his contract had not been made since the year 2006-07 and also that the petitioner had brought pressure on the department without basis to pay his honorarium. The said stand is evident from a perusal of paragraph No.4, which says that a proposal for a new appointment has been sent by the Gram Shiksha Samiti on 14.02.2009. A perusal of the report of the Gram Shiksha Samiti dated 15/18.02.2010, annexed as Annexure No. CA-1 to the counter affidavit, also shows respondent Nos.1, 2 and 3 saying that the petitioner's contract of service has not been renewed after the year 2006-07, and a proposal for

appointment made in favour of somebody else. The said stand of the respondents is utterly irreconcilable with the impugned order dated 30.06.2014, where it is said in the opening part of the order that dissatisfied with the petitioner's conduct, the Gram Shiksha Samiti had passed resolutions dated 25.07.2013, 14.08.2013, 30.09.2013, 02.10.2013, 03.11.2013, 09.12.2013, 25.01.2014 and 26.02.2014, cautioning the petitioner to bring about improvement in his work and conduct. It is further said in the impugned order that finding no improvement in the petitioner's work and conduct, the Gram Shiksha Samiti had passed a resolution dated 31.03.2014, proposing to terminate the petitioner's contract of service, on the basis of which the BSA had issued a notice dated 29.04.2014 to the petitioner. If the petitioner's services/ contract of service had not been renewed after the year 2006-07 as per stand of the respondents in the counter affidavit and the proposal of the Gram Shiksha Samiti dated 15/18.02.2010, annexed as Annexure No.CA-1 to the counter affidavit, the occasion could not have arisen for the Gram Shiksha Samiti to pass the multiple resolutions, referred to in the impugned order, in the years 2013 and 2014, cautioning the petitioner and then resolving to propose the termination of his contract of service on 31.03.2014.

15. The aforesaid facts show that both the BSA and the District Magistrate have proceeded to terminate the petitioner's services/ contract of service, firstly on vague allegations of unsatisfactory work and conduct, which are utterly unascertainable. It further shows that both the BSA and the District Magistrate have acted to dispense with the petitioner's services and brought an end to his contract in some surreptitious manner, without

themselves being sure when the petitioner's services or contract of service was determined. No act of the State or its officials, can be so uncertain and so full of contradictions. The BSA, who passed the impugned order and the District Magistrate, who granted approval to it on 20.06.2014, shall stand duly cautioned to be careful in matters dealing with rights of citizens in whatever form these may fall for consideration. They will bear in mind that business of the State must not just claim a presumption about its regularity; it should exhibit regularity and predictability. For all the reasons indicated above, this petition deserves to succeed.

16. In the result, this petition **succeeds** and is **allowed**. The impugned order dated 30.06.2014 passed by the BSA and the approval to it, in whatever form accorded by the District Magistrate, Siddharth Nagar are hereby **quashed**. A *mandamus* is issued to the BSA and the District Magistrate, Siddharth Nagar, to pass fresh orders, regarding the petitioner's claim to continue as a Shiksha Mitra, within **four weeks** of the receipt of a copy of this order after, examining the records carefully and affording the petitioner due opportunity of being heard. This order will be communicated to the BSA concerned, who passed the order impugned dated 30.06.2014, through the Principal Secretary, Basic Education, Government of U.P., Lucknow and the District Magistrate concerned, who granted approval to that order, through the Secretary (Personnel), Government of U.P., Lucknow, **within a week** of receipt of a copy of this judgment.

17. There shall be no order as to costs.

18. Let a copy of this judgment be forwarded for the purpose of

communication to the Principal Secretary, Basic Education, Government of U.P., Lucknow and the Secretary (Personnel), Government of U.P., Lucknow by the Registrar (Compliance).

(2024) 4 ILRA 515
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.03.2024

BEFORE

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

Writ A No. 59654 of 2015

Udai Singh & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:

Sri Yogesh Kumar Saxena

Counsel for the Respondents:

Ms. Monika Arya (Addl. C.S.C.)

A. Service Law – Intermediate Education Act, 1921 – Appointment – Class IV post in private aided college – On complaint, the District Magistrate directed to conduct enquiry on validity of appointment – Authority of District Magistrate questioned – Held, there is a complete hierarchy of officers in the Department of Secondary Education to take care of such matters – All of them are answerable to the Principal Secretary – One finds it difficult to understand why the District Magistrate entertained a complaint regarding a private aided college and asked the DIOS to inquire – We disapprove this practice of District Magistrates intermeddling in the affairs of other departments and autonomous bodies, where, by the law, they have no say or jurisdiction. (Para 7, 8 and 9)

B. Service Law – Intermediate Education Act, 1921 – Ch. III, Reg. 101 of the Regulations – Appointment – Class IV post –

Financial approval – Arising out of complaint, matter went U.P.to High Court and after remand back, the Regional Level Committee rejected the approval – Validity challenged – Amendment was made in Reg. 101 on 31.12.2009 – Prior to amendment, DIOS can permit to fill U.P. a Class IV post, but after amendment, it is only after order of Director of Education, DIOS can do it – DIOS granted permission on 10.07.2008 and recruitment was made on 10.01.2009 – Applicability of Amendment – Held, when Regulation 101 was finally amended to give effect to the policy, it would not affect a recruitment process already initiated before the earliest introduction of the policy through GOs, with due permission of the DIOS, that had already been granted and the process of selection completed on 27.02.2009 and appointment letters issued on 01.03.2009. (Para 7, 12, 13, 31 and 32)

C. Service Law – Appointment – Class IV post in private aided college – Financial approval – Selection, appointment and joining was made U.P.to 01.03.2009 – Subsequently policy of engagement through outsourcing was brought – After declaration of GO dated 06.11.2011 providing engagement through outsourcing as unconstitutional by the High Court, Reg. 101 was amended on 24.04.2014 providing filling U.P. of Class IV vacancies through outsourcing, which was declared valid by the S.U.P.reme Court in Principal, Abhay Nandan's case – Effect on the validity of the appointment already made – Held, any process of recruitment commenced before 08.09.2010 would have to be carried to its logical conclusion, irrespective of the policy decision taken on 08.09.2010, the GO dated 06.01.2011 or the ultimate amendment made to Regulation 101 with effect from 24.04.2014. (Para 32, 34 and 43)

Writ petition allowed. (E-1)

List of Cases cited:

1. Writ A No. 26307 of 2010; Dhruv Narain Singh Vs St. of U.P. & ors. decided on 13.01.2017

2. Mohindhr Singh Gill & anr. Vs The Chief Election Commissioner, New Delhi & ors.; (1978) 1 SCC 405

3. Committee of Management, Lala Babu Baijal Memorial Inter College, Lodipur, Ghaziabad & anr. Vs St. of U.P. & ors.; 2012 (4) ADJ 586

4. St. of U.P. & ors. Vs Principal, Abhay Nandan Inter College & ors.; (2021) 15 SCC 600

5. Santosh Kumar Singh Vs St. of U.P. & ors.; 2015 (7) ADJ 179 (FB)

(Delivered by Hon'ble J.J. Munir, J.)

This writ petition is directed against an order dated 15.09.2015 passed by the Regional Level Committee, Kanpur Region, Kanpur, rejecting the petitioners' claim for grant of financial approval to the petitioners' selection and appointment as Class IV employees with the Janta Inter College, Ajitmal, Auraiya.

2. The petitioners, who are a thirteen strong, have moved this Court, saying that though selected to Class IV posts in accordance with rules at the Janta Inter College, Ajitmal, Auraiya¹ way back on 27.02.2009, the Regional Level Committee, Kanpur Region, Kanpur have denied sanction to their selection and appointment, leading them to go without their salaries. They say that they have joined the Institution and are discharging their duties regularly.

3. The petitioners' case has somewhat of a chequered history. The Institution is a recognized intermediate college under the Uttar Pradesh Education Act, 1921². The provisions of U.P. Act No. 5 of 1982 as well as U.P. Act No. 24 of 1971, including the rules and regulations framed under all these statutes are applicable to the Institution. According to the petitioners,

prior to the year 1970, there were 18 posts of Class IV employees sanctioned for the Institution. With an increase in the strength of scholars, a minimum of 20 Class IV posts were required. This requirement went with the number of sanctioned sections for each class that the Institution had. By an order of 2nd November, 1970, 30 extra Class IV posts were sanctioned. On the 14th August, 1981, the then District Inspector of Schools³ issued a notice to the Institution, calling upon them to justify the strength of teachers and employees, going by the strength of scholars enrolled. The notice dated 14.08.2021 was replied to, whereafter, it is said that it was withdrawn by an order dated 21.09.1981. It is the petitioners' case that the strength of Class IV employees in the Institution, duly sanctioned, is a figure of 31. The petitioners say that according to the Government Order dated 10.02.2005, a copy whereof has been annexed, it is provided that the posts that were sanctioned prior to 09.12.1986 shall not be abolished by any officer, except under orders issued by the Director of Education, Madhyamik, U.P., Lucknow. The said order dated 10.02.2005, this Court may notice, is not a Government order⁴, but an order issued by the Director of Education aforesaid. In the year 2008, the Principal of the Institution applied for permission to fill up 13 posts of Class IV employees that were lying vacant. The DIOS granted permission vide order dated 05.05.2008, but in an action soon to follow, stayed his order granting permission on 28.05.2008. He again granted permission to fill up these Class IV posts on 20.07.2008. The petitioners assert that there were objections by outsiders to these posts being filled up, which compelled the Institution to clarify their staff position by submitting all documents relevant to the issue.

4. This done, an advertisement was issued in Hindi dailies *Swatantra Bharat* and *Desh Dharam* issues dated 10.01.2009 and 09.01.2009, respectively. In response to the advertisement aforesaid, the petitioners made an application for consideration of their candidature against one or the other Class IV posts in the Institution. The date of interview was scheduled as 01.02.2009. A duly constituted Selection Committee sat and held interviews. It found the petitioners to be eligible and suitable for appointment to Class IV posts with the Institution. All papers after selection were submitted to the education authorities for their approval. The management of the Institution waited for the requisite period of time, whereafter, appointment letters were issued to the petitioners, subject to orders of approval by the DIOS. All the appointment letters were issued by the Principal of the Institution on the same day, that is to say, 27th February, 2009.

5. Acting on the letters of appointment, the petitioners joined the Institution on 01.03.2009. They were permitted by the Principal to join. It is the petitioners' case that since 1st March, 2009, they are continuously working with the Institution on whatever posts in Class IV they have respectively been appointed. The petitioners say that they have rendered unblemished and satisfactory service. It is their further case that they were appointed after following the due procedure prescribed by law. The process to select the petitioners had commenced with the permission of the DIOS and after due advertisement, completing all formalities, the petitioners were selected by a validly constituted Selection Committee.

6. There was some strife amongst members of the Committee of Management of the Institution, which led to false

complaints being addressed to the education authorities. These complaints led the education authorities to dither in granting sanction to the petitioners' appointment. The petitioners say that though the Committee of Management have nothing to do with the appointment of a Class IV employee, but complaints were addressed about the petitioners' appointment, because, as already said, there was strife amongst members of the Committee of Management.

7. An inquiry into the validity of the petitioners' appointment seems to have been ordered by the District Magistrate, Auraiya. Here, this Court may remark, as we have often found to our dismay, that the District Magistrates in this State have assumed the role of busy bodies, almost knight errants, who are all too willing to intermeddle in the affairs of any department of the government at the drop of a hat. Little do they ponder about their jurisdiction to interfere in a matter relating to a department or an autonomous statutory body set up by law or a local body, where, they may not have the slightest of business to interfere.

8. Here also, the matter pertains to a privately managed and aided intermediate institution regarding employment of their Class IV employees, with the sanction of the DIOS. There is a complete hierarchy of officers in the Department of Secondary Education to take care of such matters. At the helm of affairs in the district relating to secondary education is the DIOS. He functions under a hierarchy of officials, including the Deputy Director of Education (Secondary), the Joint Director of Education (Secondary) and the Director of Education (Secondary). All of them are answerable to the Principal Secretary or the

Additional Chief Secretary to the Government in the Department of Secondary Education. It goes without saying that the Secretary too is not a sovereign functionary and works under the command of the Hon'ble Minister of this Department.

9. In this set up of things, one finds it difficult to understand why the District Magistrate entertained a complaint regarding a private aided college and asked the DIOS to inquire. All the more intriguing is the fact that the DIOS complied with the District Magistrate's order and submitted a report to him, dated 15.02.2010. All that is relevant is that copies of this report by the DIOS were addressed to the Director of Education, Madhyamik, Allahabad and the Joint Director of Education, Kanpur Region, Kanpur. It was, again, quite irrelevantly marked for a copy to the Divisional Commissioner of the Revenue Division of Kanpur. It seems that the DIOS submitted a report to the District Magistrate by an act of habitual obedience. We disapprove this practice of District Magistrates intermeddling in the affairs of other departments and autonomous bodies, where, by the law, they have no say or jurisdiction.

10. Still, since a copy of this report was marked to some of the education authorities, including the Director of Education (Secondary), it would be relevant to note that the report, a very detailed one, on all aspects of the complaint, clearly said that the petitioners' appointments were made against substantive and vacant posts, after due permission by the education authorities, due advertisement and selection done by a competent selection committee,

transparently done. No irregularity was found in the selection process. The petitioners point out that a further report dated 15.03.2010 was submitted by the DIOS, Auraiya to the Joint Director of Education, Kanpur Region, Kanpur, carrying all details of the sanctioned posts, how each post was created and how many of these posts were duly sanctioned. This report was submitted in answer to some complaint. It was specifically said in the report of the DIOS dated 15.03.2010 that the petitioners were appointed against substantive and vacant posts advertised after permission by the competent education authority and selected in accordance with rules. So, there was no irregularity about their appointment.

11. It appears that nothing moved for the petitioners regarding financial sanction to their appointments for a considerable period of time. The petitioners, therefore, instituted Writ - A No. 5294 of 2010 before this Court. This Court, by an order dated 02.02.2010 made in the aforesaid writ petition, directed the Joint Director of Education to take a decision relating to the petitioners' appointment and payment of salary by a reasoned and speaking order, in accordance with law, on the basis of the recommendations made by the DIOS within a period of three weeks of the date of production of a certified copy of the order. The Joint Director of Education, in compliance with the orders of this Court dated 02.02.2010 last mentioned, passed an order dated 16.03.2010, rejecting the petitioners' claim for approval of their appointments. The petitioners impugned the said decision of the Joint Director of Education by means of Writ - A No. 35208 of 2010, wherein, an interim order was passed on 16.03.2010, directing that the petitioners' services shall not be terminated.

However, this Court said that the order shall not entitle the petitioners to payment of salary till a final decision of the writ petition. Pending this petition, the Government carried out an exercise to verify the sanctioned strength of employees in private aided institutions across the State. This was done under the directions of this Court made in **Dhruv Narain Singh v. State of U.P. and others**⁵. To comply with the order, a committee was constituted by the Government on 15.06.2012, dedicated to the task of determining the sanctioned strength of teachers and other employees in private aided intermediate institutions, like the Institution. This Committee was headed by the Additional Director of Education (Secondary). The Committee submitted a report dated 22.02.2013. In their inquiry report with regard to the institutions in District Auraiya, the sanctioned strength was determined for all private aided institutions. It was reported that the sanctioned strength of Class IV employees for the Institution was 31. It is asserted by the petitioners that the name of the Institution finds place at Serial No. 33 of the list for the District of Auraiya. Whether the report submitted by the committee was just a report or something more would be alluded to a little later in this judgment.

12. Writ - A No. 35208 of 2010, which was earlier filed by the petitioners, was heard and allowed by a judgment and order dated 18.05.2015, setting aside the order dated 16.03.2010 passed by the Joint Director of Education and the matter was remanded to the said officer to consider and pass fresh orders. In reaching the conclusion that the order of the Joint Director of Education deserves to be set aside, there are certain remarks of this

Court in the judgment and order dated 15.05.2015 last mentioned, which are relevant. These will be referred to a little later in this judgment.

13. This is how the matter came up before the Regional Level Committee headed by the Joint Director of Education, Kanpur Region, Kanpur and comprising, besides that officer, the Deputy Director of Education, Kanpur Region, Kanpur and the DIOS, Auraiya. The Regional Level Committee again proceeded to reject the petitioners' claim. The reasons assigned are more than one. These too would be enumerated a little afterwards, when testing the petitioners' challenge to the impugned order.

14. Aggrieved by the order dated 15.09.2015 passed by the Regional Level Committee, Kanpur Region, Kanpur, who are impleaded as respondent No. 3 to this petition, this writ petition has been instituted.

15. A supplementary affidavit was filed alongside the writ petition. A counter affidavit dated 23.12.2015 was filed by the DIOS, Auraiya, respondent No. 4 on behalf of the Joint Director of Education, Kanpur Region, Kanpur, respondent No. 2. A rejoinder affidavit dated 18.01.2016, to the aforesaid counter affidavit, was filed. In compliance with the order dated 26.10.2015, by which notice was issued, Rajendra Prasad, the then Joint Director of Education, Kanpur Region, Kanpur, filed his personal affidavit. A counter affidavit to the aforesaid personal affidavit was filed on behalf of the petitioner. This is an affidavit dated 24.01.2015. It was on this state of pleadings that this petition was admitted to hearing on 21.09.2023 and heard forthwith. Judgment was reserved.

16. Heard Mr. Yogesh Kumar Saxena, learned Counsel for the petitioners and Ms. Monika Arya, learned Additional Chief Standing Counsel appearing on behalf of respondents Nos. 1 to 5. No one appeared on behalf of respondents Nos. 6 and 7.

17. It is argued by Mr. Yogesh Kumar Saxena, learned Counsel for the petitioners that in the report of the Committee constituted pursuant to the orders of this Court in **Dhruv Narain Singh** (*supra*), the strength of Class IV employees in the Institution was determined as 31 on 22.05.2013. It is submitted that this was the strength of Class IV employees based on the GO dated 22.02.2013, taking note whereof, this Court had set aside the earlier order dated 16.03.2010 passed by the Joint Director of Education, doubting the number of Class IV posts with the Institution as 31 and ordered him to decide the matter afresh, taking into account the GO last mentioned. The submission, therefore, proceeds that the determination of strength made by the Regional Level Committee is not only contrary to the GO dated 22.02.2013, but also orders of this Court dated 18.05.2015 passed in Writ - A No. 35208 of 2010.

18. On the other hand, Ms. Monika Arya, the learned Additional Chief Standing Counsel has submitted that the sanctioned strength of Class IV employees in the Institution is not a static figure and can very well be reviewed, depending upon the strength of students at the time when the process of recruitment commences. In this regard, she has referred to the terms of the GO dated 20.11.1976, which not only prescribes the number of posts for a high-school and intermediate institution, but also, by the note appended relating to the staff sanctioned for an intermediate college,

upwards and downwards revision of the sanctioned strength of Class IV employees is permissible, depending upon the increase or decrease of the strength of students in an Institution. In addition, the learned Additional Chief Standing Counsel has argued that in this case, a report dated 22.10.2010, annexed as Annexure CA-1 to the counter affidavit, was submitted by the DIOS to the Joint Director of Education, where, the entire process of recruitment was reported to be suspect on account of the involvement of relatives of employees in the Office of the DIOS and the Deputy Director of Education (Secondary), Kanpur Region, Kanpur. It was also reported that a candidate named Kamlesh Babu, petitioner No. 12, a candidate of the then DIOS, was also amongst the selectees. The learned Additional Chief Standing Counsel says that there is a detailed reference to the contents of this report in paragraph No. 11 of the counter affidavit. She has further argued that the contents of paragraph No. 11 of the counter affidavit have not been denied about this report submitted by the DIOS or the truth of its contents in paragraph No. 16 of the rejoinder affidavit. The submission is, therefore, that the selection proceedings are clearly tainted with favouritism and, therefore, refusal of financial sanction by the Regional Level Committee is well-founded.

19. We have considered the submissions advanced on behalf of learned Counsel for parties and perused the record.

20. There is a reference to the provisions of Regulation 101 of Chapter III of the regulations framed under the Act of 1921. What the Regional Level Committee endeavour to say, by reference to the provisions of Regulation 101 aforesaid, as these stood after the amendment dated 31st

December, 2009, is shrouded in a mystery of silence.

21. It is then observed, which would be the first count to reject the petitioners' claim, that the GO bearing number बे०आ०-2-27 / दस59(एम) / 2008 dated 06.11.2011, makes it imperative, except in cases of junior technical positions to appoint all Class IV employees by outsourcing.

22. The second count of reasoning is rather elaborate. It says that in terms of the judgment and order of this Court in **Dhruv Narain Singh**, three parameters to determine the approved strength of staff in an institution are postulated. The first is the original posts created, the second, the first pay-bill, and the third, the number of posts determined in the financial survey of the year 1985, minus the number of posts based on the current student strength. It is remarked that in the first pay-bill relating to the Institution, 31 posts of Class IV employees were sanctioned. In the current selection/interview, there is a recommendation to fill up one post of Clerk and thirteen posts of Class IV employees, for which, financial approval was sought from the DIOS, Auraiya on 20.02.2009. The DIOS referred the matter to the Joint Director of Education by letter dated 27.06.2009. In compliance with the directions issued by this Court on 02.02.2010 in Writ - A No. 5294 of 2010, Udai Singh and others v. State of U.P. and others, the then Regional Level Committee, vide an order dated 23.03.2010, disposed of the matter. This Court, vide an order dated 18.05.2015 passed in Writ - A No. 35208 of 2010, Udai Singh and others v. State of U.P. and others, directed the matter of financial approval to be considered afresh on the foot of there being 31 posts of Class

IV employees. There is then a reference to some GO dated 20th November, 1976, regarding determination of the sanctioned strength for aided high-schools and intermediate colleges, separately referring to the sanctioned strength for a high-school and intermediate college. The GO aforesaid details the sanctioned strength :

(a) For a High-school :- 1- *Chowkidar* : One, 2 - *Farrash* : One, 3 - *Jamadar* : One, 4 - *Paniwala* : One, 5 - *Principal Orderly* : One, 6 - *Science Lab Peon* : One, 7 - *Daftari* : One, 8 - *Library Peon* (where there is a separate and regular library in existence) : One, 9 - *Office Peon* : One, 10 - *Gardener* (wherever a garden compound is available) : One.

Note - Upon the student strength being more than 500, one additional post of Office Peon would be available.

(b) For an Intermediate College :- In additional to the aforesaid employees in a High-school, the following posts according to the requirement would be available - 1 - *Physics Lab Peon* : One, 2 - *Chemistry Lab Peon* : One, 3 - *Biology Lab Peon* : One, 4 - *Book Binder* : One, 5 - *Tailoring Peon* : One, 6 - *Home Science Peon* : One, 7 - A man to look after the farm (if there is a farm) : One.

Note - In any institution (routine) Clerks' and Office Peons' additional posts would be created or the number of posts evaluated, in the event of their being continuous increase or loss in student strength over a period of two years.

It is then said that in accordance with the aforesaid GO dated 20.11.1976, the sanctioned strength of students on the date of advertisement was 1765, on the foot of which, 17 Class IV employees, described as Peons in this part of the impugned order, would be required. It is remarked that Regulation 101, as it now

stands, would show that the permission to fill up thirteen posts of Class IV employees was granted on the basis of the student strength, which is not appropriate.

23. The third count, on which financial approval has been declined, goes to the effect that the DIOS had permitted the thirteen posts to be filled up vide his order dated 05.05.2008, which, by his later order dated 28.05.2008, he cancelled until further orders (a description about the terms of the order, which is either incorrect or the order itself is strange). It is then remarked that later on, the DIOS, by his order dated 10.07.2008, permitted the posts to be filled up. After about six months of the permission being granted, the recruitment process commenced by advertisements published on 09.01.2009 and 10.01.2009. Serious complaints with regard to irregularities were received, where, it was said that there was appointment of relatives (of the Management etc.), but despite these complaints, the Principal/Manager issued letters of appointment to all the selected candidates and made them join duties on 01.03.2009. These proceedings were held to be arbitrary and against Regulation 101 of the Regulations framed under the Act of 1921. It is remarked that the aforesaid Regulation provides that without the permission of the DIOS, the Principal shall not fill up any Class IV vacancy.

24. The fourth count, on which financial approval has been declined for two of the petitioners on added ground, that is to say, petitioner No. 1, Udai Singh and petitioner No. 6, Brijesh Kumar Singh, is that, whereas petitioner No. 1, on the date of commencement of the academic session i.e. on 01.07.2009 was 36 years, 1 month

and 16 days old, petitioner No. 6 was 38 years, 8 months and 11 days old. It has been opined that according to the "Government Order", for candidates of the general class, the upper age limit for appointment is 35 years. Going by the provisions of the "Government Order", the proposal to appoint both these candidates is irregular. In this manner, the selection process is vitiated.

25. For a fifth count, the order condemns the selection to the solitary post of Clerk filled up in the same recruitment exercise on grounds of violation of the law embodying the reservation policy of the State. This petition is not about the validity of appointment to the solitary post of Clerk and is limited in its office to the validity of selection and appointment of the thirteen Class IV employees, the petitioners. Nothing is said in particular about the violation of the Reservation Act or the policy in relation to appointment of Class IV employees under this count.

26. In the concluding part, it is remarked that the selection was without necessity, one made in violation of the reservation policy, involving selection and appointment of candidates overage, and all of it has been done in an arbitrary fashion. It is for these reasons that the Committee said that the appointments cannot be accepted as valid in law. To add to all this, particular emphasis is laid on the GO dated 06.11.2011 (supra), which provides that all Class IV posts have to be filled up through outsourcing. It is also said that the said GO is currently in force, and another GO bearing number 891/15-12-39 of 2012 dated 23.05.2012 is in force as well (perhaps to the same effect, though not said explicitly). It is on all these grounds that financial approval to the petitioners'

appointment has been declined by the Regional Level Committee.

27. We think that the report that the DIOS has submitted to the Joint Director of Education, a copy whereof is annexed as Annexure CA-1 to the counter affidavit filed on behalf of respondents Nos. 2 and 4, which seeks to taint the entire selection process with extraneous considerations and favouritism on ground that the candidates selected, at least to the extent of three, are either relatives or favourites of someone in the Office of the DIOS or the Deputy Director of Education or the DIOS himself, does not carry much force. The foremost reason is that this is not one of the reasons at all that have weighed with the Regional Level Committee in passing the impugned order. It is far too well-settled to brook doubt that the validity of an order under challenge must be adjudged by what it says. Of course, submissions in law can be advanced to buttress the order, but, that would not entitle the respondents to add to the grounds or the facts on which the order is founded by way of affidavit. The principle is that the impugned order cannot be supplemented for its reasons or grounds by an affidavit. In this connection, reference may be made to the decision of the Supreme Court in **Mohindhr Singh Gill and another v. The Chief Election Commissioner, New Delhi and others**⁶, where their Lordships of the Constitution Bench stated the principle thus :

8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to

court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in *Gordhandas Bhanji [Commr. of Police, Bombay v. Gordhandas Bhanji]*, 1951 SCC 1088 : AIR 1952 SC 16] :

“Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.”

Orders are not like old wine becoming better as they grow older.

28. For this reason, this Court is not inclined to affirm the order on a ground that has not figured in the order itself.

29. The foremost to be considered, therefore, is the point if the number of sanctioned posts were indeed 31, or going by the GO dated 20.11.1976, the number of posts on the date when the recruitment process was initiated could be reduced from the initial sanctioned 31 to a lower number, dependent upon the strength of students contemporaneously enrolled in the Institution. The GO dated 20.11.1976, for one, appears to be quite an ancient standard for determining the strength of Class IV employees. Between the year 1976 and the time of issue of the advertisement, through which, process of selection was initiated, many events would have gone by. The advertisement in this case was published on 09.01.2009 and 10.01.2009. After the

advertisement was issued, there was a searching determination of the sanctioned strength undertaken for all private aided institutions of Auraiya, under orders of this Court in **Dhruv Narain Singh**. Based on the report of the Committee that was submitted, a GO bearing number 425 / 15-12-2013-1601(250) / 2010 dated 22.02.2013 was issued by the Secretary to the Government of U.P. and the Department of Secondary Education, addressed to the Director of Education (Secondary), U.P., Lucknow. To the said order, though not made part of the record of the writ petition, there is no quarrel between parties that the sanctioned strength of Class IV employees in the Institution was shown in an appended list at Serial No. 33. The sanctioned strength determined by this GO in the appended list for the Institution was 31. After this determination was made for the Institution by the GO dated 22.02.2013, this Court is of considered opinion that the respondents cannot take a stand that the sanctioned strength was not 31, falling back upon an antiquated GO of the year 1976. More than that, when the same matter came up before this Court in Writ - A No. 35208 of 2010, directed against the order dated 16.03.2010, passed by the Joint Director of Education, rejecting the petitioners' claim on ground of lack of sanction for the 31 posts, this Court set aside the order of the Director of Education dated 16.03.2010 and remanded the matter to the Director aforesaid for decision afresh on grounds that are expressed in the following remarks :

Learned counsel for the petitioner has drawn the attention of the Court to the aforesaid order of the State Government. The name of the Institution finds place at Serial No. 33 of the said order, wherein the State Government has recorded that there

are 31 post of Class IV employee in the Institution.

Having regards to the facts and circumstances of the case, I am of the view that the finding recorded by the Joint Director of Education doubting the correctness of the comment of the District Inspector of Schools and the Committee of Management with regard to 31 sanctioned post is vitiated on the ground that the material facts have not been considered by the Joint Director of Education.

In view of the supervening event that the State Government has determined the sanctioned strength on 22.2.2013 the order of the Joint Director needs reconsideration in the light of the order of the State Government.

30. This Court did not hold that 31 posts are the sanctioned strength for Class IV employees of the Institution. We did say that it was a material fact, which ought to have been considered by the Joint Director. This Court is inclined to think that it was the most material fact and could hardly be brushed aside. In writing the impugned order, the Regional Level Committee on the point under consideration, did notice the order of this Court dated 18.05.2015 passed in Writ - A No. 35208 of 2010 regarding the existence of 31 sanctioned posts of Class IV, but did not consider it at all. Rather, the Regional Level Committee chose to ignore the effect of the GO dated 22.02.2013, as well as the order of this Court dated 18.05.2015, and instead, harped upon the GO of 20th November, 1976, which does not seem to be material to the question in hand at the point of time that it arose. This Court is inclined to think that in view of the GO dated 22.02.2013, there is no reason to doubt the fact that the Institution had a sanctioned strength of 31 at the time when the recruitment process

was initiated, in terms of the advertisements published on 09.01.2009 and 10.01.2009.

31. The most important point that has been mooted before this Court is if on the date when the recruitment process was commenced, it was no longer open to the Institution to select and appoint Class IV employees and instead, the option left to them because of the GO dated 06.01.2011 was to engage employees through outsourcing. It is, no doubt, true that before the amendment made to Regulation 101 of the Regulations framed under the Act of 1921 with effect from 31.12.2009, the DIOS could grant permission to fill up a Class IV post, but, after amendment of Regulation 101 as aforesaid, the DIOS had to submit the total number of vacancies to the Director of Secondary Education and showing the number of students, give justification to fill up the existing vacancies. It was only upon receipt of orders permitting the vacancies to be filled up from the Director of Education (Secondary) that the DIOS could permit the Institution to fill up any kind of non-teaching posts, of course, following the rules for reservation made by the Government. Here, the selection process commenced prior to the amendment of Regulation 101 vide Notification dated 31.12.2009, when it could be initiated by the Institution with the permission of the DIOS, which, in this case, was granted on 10.07.2008. The hurdle that was mooted was the GO dated 06.01.2011, that had forbidden appointment to Class IV posts, except junior technical posts, and instead, provided for engagement of employees through outsourcing.

32. This GO dated 06.01.2011, to the extent of paragraph No. 2 thereof, was

struck down as unconstitutional by a learned Single Judge of this Court in **Committee of Management, Lala Babu Baijal Memorial Inter College, Lodipur, Ghaziabad and another v. State of U.P. and others**⁷. It is not in dispute that the judgment of the learned Single Judge in **Committee of Management, Lala Babu Baijal Memorial Inter College** (*supra*) was never challenged and became final. It would have the effect of effacing, therefore, the GO dated 06.01.2011. Therefore, prior to the amendment made to Regulation 101, Chapter III of the Regulations framed under the Act of 1921 on 24.04.2014, there was no embargo on filling up sanctioned posts of Class IV employees with permission of the DIOS. In fact, prior to 31.12.2009, permission of the DIOS would have sufficed and justification to fill up any non-teaching posts, including Class IV posts, was not required to be offered to the Director of Education (Secondary) by the DIOS and his orders obtained for filling up such vacancies. Here, as already said, the process of recruitment commenced with the publication of the advertisement on 09.01.2009 and 10.01.2009, much before the amendment to Regulation 101 with effect from 31.12.2009 and long before the amendment brought about with effect from 24.04.2014. Much was, therefore, argued before this Court on the strength of well established principle that the amendment would not have retrospective operation. Since, in this case, the recruitment process was initiated on 09.01.2009 and 10.01.2009, it is submitted on behalf of the petitioners that assuming that the GO dated 06.01.2011, which introduced the system of outsourcing through paragraph No. 2 and since struck down by this Court, was an antecedent step to give effect to a policy decision of the Government, that ultimately

took shape on 24.04.2014, when Regulation 101 was finally amended to give effect to the policy, it would not affect a recruitment process already initiated before the earliest introduction of the policy through GOs, with due permission of the DIOS, that had already been granted and the process of selection completed on 27.02.2009 and appointment letters issued on 01.03.2009. The rights of the petitioner, according to the contention advanced, would be governed by the position, as existed, before the amended Regulation 101 came into force with effect from 24.04.2014 as also the antecedent policy decision of the Government in this regard, expressed in different Government Orders, one of which relating to the Department of Secondary Education was struck down by this Court in **Committee of Management, Lala Babu Baijal Memorial Inter College**.

33. We may notice that though the GO dated 06.01.2011 was struck down by this Court, a position which attained finality with no challenge, the underlying policy about the changeover with regard to the recruitment of Class IV employees in intermediate institutions from regular appointments on posts funded by the State to contractual appointments through service providers had become a firm resolve with the Government, who had to fund these institutions for the posts of Class IV employees sanctioned. The Government had decided to changeover to a system of contractual employment of Class IV employees through service providers. Therefore, notwithstanding the GO dated 06.01.2011 being struck down, Regulation 101 came to be amended with effect from 24.04.2014, making provision for filling up of Class IV vacancies through outsourcing alone, except in

cases where a Dying-in-Harness appointee had to be accommodated. The amendment to Regulation 101 of Chapter III of the Regulations framed under the Act of 1921 introduced with effect from 24.01.2014 was challenged before this Court by managements of colleges, who were deprived of posts supported by State grant and relegated to a system of engaging Class IV employees through service providers. The writ petitions were heard by a Division Bench of this Court and allowed vide judgment and order dated 19.11.2001, holding Regulation 101, as amended on 24.04.2014, unconstitutional.

34. The State appealed the judgment of this Court by Special Leave to the Supreme Court. The Supreme Court allowed the appeals preferred by the State of U.P. in **State of Uttar Pradesh and others v. Principal, Abhay Nandan Inter College and others**⁸, holding the amendment to Regulation 101 valid. Their Lordships addressed the history of Regulation 101 and how and why did it change, which is very apposite to quote in extenso :

Regulation 101

6.Regulation 101 was inserted vide Parishad 9/592 dated 28-8-1992 and was notified by way of Government Notification No. 400/15-7-2(1)-90 dated 30-7-1992 in the following manner:

“Appointing authority except with prior approval of Inspector shall not fill up any vacancy of non-teaching post of any recognised aided institution.”

7. It was substituted through Notification No. 300/XV-7-2(1)/90 dated 2-2-1995 as under:

“Appointing authority except with prior approval of Inspector shall not

fill up any vacancy of non-teaching post of any recognised aided institution:

Provided that filling of the vacancy on the post of Jamadar may be granted by the Inspector.”

8. On 23-1-2008 with a view to regulate and curtail staff expenditure a policy decision was taken by the State of Uttar Pradesh (the first appellant) to not create any new post in Class IV category and wherever it may be necessary, the work may be carried out through “outsourcing”. Thereafter, the recommendation was made by the Sixth Central Pay Commission in the month of March 2008 to the effect that it would only be appropriate to have “outsourcing” of Class IV employees instead of seeking any new recruitment.

9. Regulation 101 once again went through an amendment by way of Notification No. 9/898 dated 31-12-2009, which reads as under:

“The appointing authority shall not fill any vacancy of the non-teaching staff of recognised aided institutions, except with the approval of Inspector, subject to a restriction that District Inspector of Schools shall make available total number of vacancies to Director of Education (Secondary Education), and showing the number of students put forth justification for the filling of the vacancies. On receipt of order from the Director of Education (Secondary Education), the District Inspector of Schools shall, for filling said vacancies, give permission to the appointing authority; and while giving such permission he shall ensure to follow the reservation rules specified by the Government and the prescribed norms in justification for the posts.

The aforesaid amendment in the Regulation shall come into force with immediate effect.”

10. Taking into consideration the recommendations made by the Sixth Central Pay Commission, Government Orders were passed on 8-9-2010 and 6-1-2011 making it applicable to all Government Departments and aided schools, thus, deciding not to go for fresh recruitment of Class IV employees and further directing that any arrangement concerning the post to be vacated may be made only through “outsourcing”. Appropriate communications were sent to all the stakeholders intimating them of the decision taken.

11. Following the said decision, Regulation 101 was once again amended by the Government Order dated 4-9-2013, which was accordingly notified on 24-4-2014. The effect of the said amendment is to make the post of Class IV employees which was hitherto supposed to be filled up by the institutions through “outsourcing”. Therefore, the permanent posts were accordingly abolished, thereby, replacing the method of appointment by way of “outsourcing”. An exception has been carved out only for the dependants of those employees dying in harness during employment.

Amended Regulation:

“101. The appointing authority, except for the prior approval of the Inspector, shall not fill any vacant post of non-teaching staff (clerical cadre) in any recognised or aided institution; with the restriction that the District Inspector of Schools shall make available the total number of vacancies to the Director of Education (Secondary Education) and also put forth justification for filling of the posts, showing the strength of the students in the institution. On receipt of the order from Director of Education (Secondary Education), the District Inspector of Schools shall give permission to the

appointing authority for filling the said vacancies (except the vacancies of Class IV posts) and while giving the permission, he shall ensure compliance of the Reservation Rules specified by the Government as also of the prescribed norms in justification for the posts.

With respect to the Class IV vacancies, arrangements shall be made by way of outsourcing only; but the relevant Rules, 1981, as amended from time to time, for recruitment of dependants of teaching or non-teaching staff of the non-government aided institutions dying in harness shall be applicable in relation to the appointments to be made on the vacant posts of Class IV category.”

Seventh Central Pay Commission

12. By the Seventh Central Pay Commission Report, the recommendations made in the Sixth Central Pay Commission were reiterated with a word of “caution” in its implementation. Accordingly, the need to go for “outsourcing”, keeping in view of the financial constraints and efficiency, was once again reiterated:

Paras 3.72 and 3.83 of the Report

“3.72. The General Financial Rules provide for outsourcing of services in the interest of economy and efficiency. Broad guidance is provided in the Rules on identification of contractors and the tendering process.

There are three kinds of contractual appointments:

(i) Tasks of a routine nature, typically those relating to housekeeping, maintenance, related activities, data entry, driving, and so on, which are normally bundled and entrusted to agencies. These agencies then depute the necessary persons to carry out these tasks...

* * *

3.83. The following are the conclusions and recommendations:

* * *

(vii) The Commission is of the view that a clear guidance from the Government on jobs that can and should be contracted out would be appropriate. While doing so the concerns of confidentiality and accountability may be kept in view. Further, to bring about continuity and to address the concerns regarding exploitation of contractual manpower, uniform guidelines/model contract agreements may be devised by the Government...”

13. From the aforesaid facts it is abundantly clear that a decision was made way back on 8-9-2010 to do away with the recruitment to the post of Class IV employees, by replacing the process with the utilisation of the service through “outsourcing”. It was accordingly made by taking note of the recommendations of the Pay Commission, with the primary concern being financial difficulty, followed by efficiency. The Regulation was brought forthwith as an abundant caution by way of a subsequent act to complete the formalities. Institutions were being put on notice about the decision to withhold any fresh recruitment. However, recruitments have been made de hors the same either with or without the court orders, by the institutions. It was also done without obtaining the prior permission as per the mandate of the unamended Regulation 101 except in one case which is the subject-matter of Civil Appeal No. 2753 of 2021. In Civil Appeal No. 2754 of 2021 a direction to grant prior permission was obtained from the High Court.

35. In disposing of some of the principle contention of parties, ignoring

those that are not relevant to the issue here, it was observed by their Lordships :

Discussion and conclusion

Right to aid

28. We will first take up the right of institutions qua the aid. A decision to grant aid is by way of policy. While doing so, the Government is not only concerned with the interest of the institutions but the ability to undertake such an exercise. There are factors which the Government is expected to consider before taking such a decision. Financial constraints and deficiencies are the factors which are considered relevant in taking any decision qua aid, including both the decision to grant aid and the manner of disbursement of an aid.

29. Once we hold that right to get an aid is not a fundamental right, the challenge to a decision made in implementing it, shall only be on restricted grounds. Therefore, even in a case where a policy decision is made to withdraw the aid, an institution cannot question it as a matter of right. Maybe, such a challenge would still be available to an institution, when a grant is given to one institution as against the other institution which is similarly placed. Therefore, with the grant of an aid, the conditions come. If an institution does not want to accept and comply with the conditions accompanying such aid, it is well open to it to decline the grant and move in its own way. On the contrary, an institution can never be allowed to say that the grant of aid should be on its own terms.

30. We are dealing with a case where aid is not denied in toto but sought to be given in different form. The reason for such a decision is both efficiency and economy. When such a decision is made as

a matter of policy and is being applied not only to educational institutions but spanning across the entire State in every department, one cannot question it and that too when there is no express arbitrariness seen on the face of it.

.....

..... Policy decision

35. The challenge before us is the amendment to the Regulation 101. This Regulation is in the form of a subordinate legislation. A subordinate legislation can also be in the form of a policy decision. We have already noted that a policy decision has come into force in the year 2010 itself.

36. A policy decision is presumed to be in public interest, and such a decision once made is not amenable to challenge, until and unless there is manifest or extreme arbitrariness, a constitutional court is expected to keep its hands off.

37. A challenge to a Regulation stands on a different footing than the one that can be made to an enactment. However, when the Regulation is nothing but a reiteration of a policy reinforcing the decision of the Government made earlier, then the parameters required for testing the validity of an Act are expected to be followed by the Court.

38. An executive power is residue of a legislative one, therefore the exercise of said power i.e. the amendment of the impugned Regulation, cannot be challenged on the basis of mere presumption. Once a rule is introduced by way of a policy decision, a demonstration on the existence of manifest, excessive and extreme arbitrariness is needed.

Other contentions

39. Section 9(4) of the Act is certainly of a wider import. The power conferred to the State Government to give effect to the Act is unbridled. It is the very

same Regulation, based upon which, recruitments have been made by the management. One has to understand the impugned Regulation in the context along with the setting. It is only by way of abundant caution, that the amendment has come into force. The existence of the power under Section 9(4) of the Act has been dealt with by this Court in *Ramji Dwivedi* [*Ramji Dwivedi v. State of U.P.*, (1983) 3 SCC 52 : 1983 SCC (L&S) 361] : (SCC pp. 58-59, paras 12 & 14)

“12. Sub-section (4) of Section 9 which has been extracted hereinbefore confers power on the State Government without making any reference to the Board to make an order or take such other action consistent with the provisions of the Act as it deems necessary and in particular, may by such order modify or rescind or make any Regulation in respect of any matter. It would thus unquestionably transpire that while enacting the Regulations prior sanction of the State Government is necessary and under sub-section (4) of Section 9 the State Government enjoys the power to make, modify or rescind any Regulation. Armed with this power the State Government issued an order dated 7-7-1981 stopping all fresh selections and appointments of Principals, etc. in all non-government-aided schools. Shrinath Intermediate College is a non-government-aided school. The effect of the order conveyed by the radiogram would be to rescind the Regulation conferring power on the Committee of Management to make appointment and withdrawing and/or suspending power of appointment of Principal and teachers. The issuance of the order is not in dispute. The argument, in the High Court [*Ramji Dwivedi v. State of U.P.*, 1982 SCC OnLine All 1392] , was that the State Government had no such power and that even if sub-section (4) is deemed to confer such a power it has to be read in

juxtaposition with the power conferred on the State Government by sub-sections (1), (2), (3) preceding sub-section (4) of Section 9. The High Court therefore had to examine the width and ambit of the executive power of the State Government in exercise of which, according to the High Court, the order contained in the radiogram was issued. We need not go that far because in our opinion sub-section (4) specifically confers power on the State Government without making any reference to the Board to make, modify or rescind any Regulation as also make such other order consistent with the provisions of the Act. This power of wide amplitude will comprehend the power to stop all appointments for the time being. And the power appears to have been exercised as Government was contemplating taking away the power of private management of non-government-aided schools to make appointment of teachers including Principals. In order to avoid forestalling of governmental action by private managements, the power to make appointments was suspended for the time being. As pointed out earlier, the Regulation confers power on the Committee of Management to make appointment. That Regulation was enacted by the Board with the prior sanction of the State Government. The State Government could be said to have rescinded that Regulation conferring power of appointment or at any rate suspended the power conferred on the Committee of Management to make appointment. The order became effective the moment it is issued. The effect of this order is that the Selection Committee had no right to select the appellant nor the Committee of Management had any power to make the appointment.

14. In view of the finding that sub-section (4) of Section 9 did confer

power on the State Government to make, modify or rescind the Regulation or make any other order consistent with the provisions of the Act, the second contention of Mr Sanghi is equally bound to fail.”

40. Section 9(4) of the Act is to be read in conjunction with Section 16-G, as the provisions will have to be read keeping in view all the objects of the enactment. In this connection, we need to point out that if the practice of recruitment, prior to the amendment of the impugned Regulation, was done by tracing the power under it, then it is not open to the respondents to contend to the contrary.

41. Regulation 101, prior to the amendment, imposes strict compliance of getting prior approval. We find that except in Civil Appeal No. 2753 of 2021, no such approval has been granted. Obviously, it only indicates the real intention of the respondents/management which is to have their own recruitment other than anything else.

42. The Division Bench in considering the view has entered into an arena which was not required to be done. Much labouring was done in interpreting the word “outsourcing”, however, such an exercise ought to have been avoided as it stands outside the scope of judicial review. We have already noted the fact that “outsourcing” as a matter of policy is being introduced throughout the State. It is one thing to say that it has to be given effect to with caution as recommended by the Seventh Central Pay Commission, and another to strike it down as unconstitutional. “Outsourcing” per se is not prohibited in law. It is clear that a recruitment by way of “outsourcing” may have its own deficiencies and pitfalls, however, a decision to take “Outsourcing” cannot be declared as ultra vires the

Constitution on the basis of mere presumption and assumption. Obviously, we do not know the nature of the scheme and safeguards attached to it.

.....
44. We are also not dealing with the scheme per se, and therefore, are in dark on the conditions of service. The challenge in the present case is not by the employee, recruited by way of “outsourcing”, and hence, we hold the said decision on which much reliance is sought to be made by the respondents will not be of any help. One cannot simply presume that “outsourcing” as a method of recruitment would necessarily be adopting contract labour and that there exists an element of unfair trade practice, as sought to be contended by the respondents.

.....
46. The entire issue has to be looked at from different perspective as well. By the policy decision made, the appellants have abolished the post though in an indirect way by providing for “outsourcing”. Now, a court cannot create or sustain the aforesaid post. There is nothing on record to hold that the decision made is extraneous as it is obviously made applicable not only to the aided institutions but also to all Government Departments as well.

.....
48. Whenever a lis is raised before the Court the grievance along with interest of the party concerned while laying a challenge has to be kept in mind. The aforesaid principle is expected to be kept in mind. More so, while invoking Article 226 of the Constitution of India being extraordinary and discretionary in nature. The aforesaid principle would help the Court to understand the actual reason behind seeking a relief by a party. Keeping the said principle in mind we could only

say that the respondents/petitioners, being the institutions endowed with the power of recruitment, do not wish to let go of their hold.

36. Having laid down the above principles, the appeals were allowed by the Supreme Court in terms of the following orders :

57. Accordingly, we have no difficulty in setting aside the judgment of the Division Bench dated 19-11-2018 [Abhay Nandan Inter College v. State of U.P., 2018 SCC OnLine All 5685] and the consequential orders passed while upholding the impugned Regulation. The appeals are allowed with the following directions:

57.1. The respondents/writ petitioners in Civil Appeal No. 2753 of 2021 are directed to be confirmed by granting adequate approval as Class IV employees, having given prior approval.

57.2. The respondents/writ petitioners and similarly placed persons who are recruited by the institutions including the respondents shall be continued with the same scale of pay as if they are recruited prior to 8-9-2010 for which the entire disbursement will have to be made by the institutions alone.

57.3. The appellants shall undertake the necessary exercise to see to it that there is a mechanism available for the proper implementation of “outsourcing” with specific reference to the conditions of service of those who are employed while taking note of the recommendations made in the Seventh Central Pay Commission.

37. So far as the validity of the amended Regulation 101 with effect from 24.04.2014 is concerned, the same stands upheld by the last Court and there cannot be any quarrel about its validity anymore. The law laid down by their Lordships of

the Supreme Court in **Principal, Abhay Nandan Inter College** (*supra*) would most certainly apply to all appointments made on or after amendment of Regulation 101 with effect from 24.04.2014. In view of the remarks of their Lordships in paragraph No. 13 of the report in **Principal, Abhay Nandan Inter College**, the most retrospective effect that the policy to discontinue recruitment to Class IV posts can be given is 08.09.2010, when a decision was taken to abolish recruitment on Class IV posts, replacing it by recruitment through outsourcing.

38. Now, therefore, if a process of recruitment had commenced before 08.09.2010, and still more, concluded well ahead of that date by issue of appointment letters and the appointees joining with the Institution, can the policy be held to effect their appointments? We do not think so. This issue squarely arose for consideration in the context of a different Statute, together with the Act of 1921, that is to say, the Uttar Pradesh Secondary Education Services Selection Board Act, 1982 (UP. Act no. 5 of 1982)⁹ before a Full Bench of this Court in **Santosh Kumar Singh v. State of U.P. and others**¹⁰.

39. The facts giving rise to the reference before the Full Bench cannot be better recapitulated than in the words of their Lordships in **Santosh Kumar Singh** (*supra*). The facts and the background of the reference have been thus stated by their Lordships :

2. The Act established the Secondary Education Services Selection Board (Board) for selection of teachers in institutions recognized under the Act of 1921. Section 16 of the Act provides that notwithstanding anything to the contrary

contained in the Act of 1921 or the regulations made thereunder but subject to certain specified provisions of the Act, every appointment of a teacher shall on or after the date of the commencement of the Uttar Pradesh Secondary Education Services Selection Board (Amendment) Act, 2001 be made by the Management only on the recommendation of the Board. Section 32 provides that the provisions of the Act of 1921 and the regulations made thereunder, insofar as they are not inconsistent with the provisions of the Act or its regulations, shall continue to be in force for the purposes of selection, appointment, promotion, dismissal, removal, termination or reduction in rank of a teacher. Section 33 of the Act provides that the State Government may, for the purposes of removing any difficulty, by a notified order, direct that the provisions of the Act shall, during such period as may be specified in the order, have effect subject to such adaptations, whether by way of modification, addition or omission as it may deem to be necessary or expedient. Section 33-E was introduced into the Act by U.P. Act No.13 of 1999 so as to provide for the rescission of the Removal of Difficulties Orders made under Section 33 of the Act and is in the following terms:

"33-E. Rescission of Orders.-The Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) Order, 1981, the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981, the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) (Third) Order, 1982 and the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) (Fourth) Order, 1982 are hereby rescinded."

3. Section 33-E was introduced with effect from 25 January 1999. Prior to the introduction of Section 33-E, the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) Order, 1981 (Removal of Difficulties Order) was issued in exercise of the power conferred by Section 33 to remove difficulties. Para 2 of the Removal of Difficulties Order provided for the vacancies on which ad hoc appointments could be made while Para 3 referred to the duration of ad hoc appointments. The Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981 was thereafter notified. Para 2 of Removal of Difficulties (Second) Order provided the procedure for filling up short term vacancies, while Para 3 provided for the duration of ad hoc appointments.

4. The issue which has been referred to for adjudication before the Full Bench relates to a situation where the process of selection for making an ad hoc appointment had commenced prior to 25 January 1999 when the Removal of Difficulties Orders stood rescinded as a result of the insertion of Section 33-E.

40. Based on the aforesaid facts, the following questions were referred to the Full Bench by a Division Bench :

(a) Whether even after the rescission of Removal of Difficulties Orders under Section 33-E of the Uttar Pradesh Secondary Education Services Selection Board Act, 1982 (Act) (U.P. Act No. 5 of 1982), with effect from 25 January 1999, the Committee of Management retains the power to make ad hoc appointment against short term vacancies only because it had published an

advertisement for the purpose prior to 25 January 1999;

(b) Whether on enforcement of Section 33-E of the Act rescinding the Removal of Difficulties Orders issued earlier, the Committee of Management has lost all powers to make ad hoc appointment against short term vacancies;

(c) Whether under Section 16-E of the Intermediate Education Act 1921 (Act of 1921), there is a power with the Committee of Management to make ad hoc appointment against short term vacancies and if so then for what period; and

(d) Whether the Division Bench in the case of Subhash Chandra Tripathi v. State of U.P., Writ-A No. 70721 of 2010, decided on 14 July, 2014, has laid down the correct law.

41. In answering the relevant question, which would be Question (a), their Lordships in **Santosh Kumar Singh** observed :

10. The decision in *A A Calton* (supra) is, therefore, an authority for the proposition that once a process of selection has been initiated, a subsequent amendment of the law by which the power to make an appointment has specifically been taken away from a statutory authority - in that case from the Director - would have no application to a pending selection process which must be governed by the law as it stood when the selection process was initiated. Undoubtedly, the Legislature does have the power to make a law with retrospective effect but unless the law is made expressly retrospective or retrospective by necessary implication, the position of law as it stood when the selection process was initiated, would govern the selection.

11. In certain other contexts, the Supreme Court has held, for instance, that a

selection process has to be governed by the Rules and Government Orders in existence on the date on which the process is initiated. In *N.T. Devin Katti v. Karnataka Public Service Commission*, (1990) 3 SCC 157, the Supreme Court held as follows:

"...Where proceedings are initiated for selection by issuing advertisement, the selection should normally be regulated by the then existing rules and Government orders and any amendment of the rules or the Government order pending the selection should not affect the validity of the selection made by the selecting authority or the Public Service Commission unless the amended Rules or the amended Government orders, issued in exercise of its statutory power either by express provision or by necessary intendment indicate the amended Rules shall be applicable to the pending selections. See *P Mahendran v. State of Karnataka*, (1990) 1 SCC 411 : *JT* (1989) 4 SC 459."

12. In *State of Bihar v. Mithilesh Kumar*, (2010) 13 SCC 467, the Supreme Court held that a change in the norms of recruitment could be applied prospectively and could not affect those who have been selected for being recommended for appointment after following the norms which were in place at the time when the selection process was commenced. The submission to the contrary was based on the decision in *Shankarsan Dash v. Union of India*, AIR 1991 SC 1612, to the effect that mere inclusion in a select panel did not confer indefeasible right to appointment. The Supreme Court explained the position in law as follows:

"The decisions which have been cited on behalf of the respondent have clearly explained the law with regard to the applicability of the rules which are amended and/or altered during the selection

process. They all say in one voice that the norms or rules as existing on the date when the process of selection begins will control such selection and any alteration to such norms would not affect the continuing process, unless specifically the same were given retrospective effect...While a person may not acquire an indefeasible right to appointment merely on the basis of selection, in the instant case the fact situation is different since the claim of the respondent to be appointed had been negated by a change in policy after the selection process had begun."

13. In a subsequent decision in *Government of Andhra Pradesh v. Sri Sevasdas Vidyamandir High School*, (2011) 9 SCC 613, the Supreme Court held that a ban on recruitment to grant-in-aid posts had been issued after the school in question had been permitted by the State to fill up vacant posts. The Supreme Court held that in these circumstances, the State could not contend that the process of rationalization which was introduced subsequently, would also apply to private aided schools, where the process of recruitment had already been commenced pursuant to the approval granted earlier.

14. The judgment in *A A Calton* (supra) has been recently followed in a decision of the Supreme Court in *Kulwant Singh v. Daya Ram*, (2015) 3 SCC 177, in the context of the principle that vacancies which had occurred prior to an amendment of rules would be governed by the unamended rules and not by the amended rules where the amended rules are not made retrospective either expressly or by implication.

15. The judgment of the Division Bench in *Subhash Chandra Tripathi's* case was based on the law laid down by the Supreme Court in *A A Calton* (supra). In the referring judgment, the Division Bench

has doubted the correctness of that view based on a judgment of the Supreme Court in *Shankarsan Dash* (supra). In the view of the Division Bench, the Supreme Court has held that even a selection does not confer a right of appointment. Hence, the view which has been taken by the Division Bench is that a mere initiation of the process of selection will not result in the retention of the power of appointment by the authority concerned even when the power of appointment had been withdrawn under a statutory provision, in this case Section 33-E. The decision in *Shankarsan Dash* (supra) of a Constitution Bench of the Supreme Court dealt with the issue as to whether a candidate whose name appears in the merit list on the basis of a competitive examination acquires an indefeasible right of appointment as a Government servant merely because a vacancy exists. In that context, the Supreme Court held as follows:

"7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been

consistently followed by this Court, and we do not find any discordant note in the decisions in *State of Haryana v. Subhash Chander Marwaha*, (1974) 1 SCR 165 : (AIR 1973 SC 2216), *Miss Neelim Shangla v. State of Haryana*, (1986) 4 SCC 268 : AIR 1987 SC 169, or *Jitendra Kumar v. State of Punjab*, (1985) 1 SCR 899 : (AIR 1984 SC 1850)"

16. These observations of the Supreme Court would indicate that the issue in *Shankarsan Dash* (supra) was completely distinct. A candidate who is on a select list does not have an indefeasible right to appointment merely because a vacancy exists. That is not the issue in the present case. The issue in the present case is whether a process of selection which was initiated prior to the insertion of Section 33-E which rescinded the Removal of Difficulties Orders must be governed by the law as it then stood at the time when the process was initiated by the issuance of an advertisement. Plainly, the issue is not about the right of a particular candidate to appointment but whether the selection process should be governed by the law as it stood when the selection process was initiated. On this aspect, the consistent position of law has been laid down in the judgment of the Supreme Court in *A A Calton* (supra).

42. The questions referred to the Full Bench were answered by their Lordships in the following terms :

(a) Despite the rescission of the Removal of Difficulties Orders by Section 33-E of U.P. Act No.13 of 1999 with effect from 25 January 1999, the power of the Committee of Management to make appointments against short term vacancies, where the process of appointment had been initiated prior to 25 January 1999 by the

publication of an advertisement, would continue to be preserved;

(b) On the enforcement of the provisions of Section 33-E, the power of a Committee of Management to make ad hoc appointments against short term vacancies would not stand abrogated in a case where the process of selection had been initiated prior to 25 January 1999;

(c) Under Section 16-E of the Intermediate Education Act, 1921, the Committee of Management is empowered to make an appointment against a temporary vacancy caused by the grant of leave to an incumbent for a period not exceeding six months or in the case of death, termination or otherwise, of an incumbent occurring during an educational session. An appointment made under sub-section (11) of Section 16-E as provided in the proviso thereto shall, in any case, not continue beyond the end of educational session during which the appointment was made; and

(d) The judgment of the Division Bench in *Subhash Chandra Tripathi* (supra) is affirmed as laying down a correct interpretation of the judgment in *A A Calton* (supra).

(emphasis by Court)

43. The aforesaid enunciation of the law, therefore, makes it vivid that in a case where the process of recruitment has commenced before a change to the law governing recruitment, the process already commenced does not abate or get rescinded. It has to be carried forward to its logical conclusion. Here, the advertisement was issued on 09.01.2009 and 10.01.2009, whereas, the earliest that the change in policy of recruitment to Class IV posts was brought about was on 08.09.2010. It was followed by the GO dated 06.01.2011, which, though quashed by this Court, and

technically dead, now has the imprimatur of the Supreme Court in Principal, **Abhay Nandan Inter College**. We do not wish to go into that question, but all that we say is that any process of recruitment commenced before 08.09.2010 would have to be carried to its logical conclusion, irrespective of the policy decision taken on 08.09.2010, the GO dated 06.01.2011 or the ultimate amendment made to Regulation 101 with effect from 24.04.2014. Here, the advertisement was admittedly issued and the process of recruitment commenced as per the then prevalent Regulation 101 by the Management with the publication of the advertisement on 09.01.2009 and 10.01.2009. The process of selection was completed on 27.02.2009 and letters of appointment were issued to the petitioners on 01.03.2009, the date on which they joined their duties also with the Institution. This then being the calendar of events governing the rights of the petitioners, it is very difficult to accept the contention of the respondents, howsoever stretched, to uphold their policy decision, now embodied in Regulation 101, to undo a recruitment process commenced well before the policy decision was taken on 08.09.2010. There is no way the recruitment process, commenced much earlier than the change of policy and much before the amendment to Regulation 101 brought about on 24.04.2014, can be subjected to the changed law or policy and held invalid.

44. In the result, this writ petition **succeeds** and stands **allowed**. The impugned order dated 15.09.2015 passed by the Regional Level Committee, Kanpur Region, Kanpur is hereby **quashed**. A mandamus is issued to the Joint Director of Education, Kanpur Region, Kanpur or the Regional Level Committee, whosoever be

the authority competent as per assignment of business in the Department of Secondary Education to pass fresh orders considering the grant of financial sanction to the petitioners' appointment, bearing in mind the directions in this judgment. Necessary orders shall be passed within a month of receipt of a copy of this judgment by the Joint Director of Education, Kanpur Region, Kanpur.

45. There shall be no order as to costs.

46. The Registrar (Compliance) is directed to communicate this order to the Joint Director of Education, Kanpur Region, Kanpur.

(2024) 4 ILRA 537
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.01.2024

BEFORE

THE HON'BLE AJIT KUMAR, J.

Writ A No. 62165 of 2015

Dr. Meenakshi Agarwal & Ors.

...Petitioners

Versus

Union of India & Ors.

...Respondents

Counsel for the Petitioner:

Sri Ashish Mishra

Counsel for the Respondents:

A.S.G.I., Sri Bal Mukund, C.S.C., Sri Gyan
Prakash

A. Service Law – Pension – C.P.F. Scheme and G.P.F. cum Pension Scheme (Old Pension Scheme) – Retirement from the post of Faculty Members of Kendriya Hindi Sansthan, Agra – Old Pension Scheme claimed – Entitlement – All the employees under the CPF Scheme were directed to be

govern under the GPF Scheme except those who consciously opted for CPF Scheme before the cut off dated 30.09.1987 – Effect – Held, all such employees who did not opt for a change prior to 1987, should be taken to have become member of GPF Scheme on principle of 'deemed switch over' – Shashi Kiran's case relied U.P.on – Central Government were not justified in refusing to consider the claim in the year 1999 by writing back to the Sansthan that no such scheme to switch over was available any more – High Court found good reason to give benefit of Old Pension Scheme, and directed the respondent to convert petitioners' C.P.F. scheme to G.P.F. cum Pension scheme. (Para 13, 14, 15 and 16)

Writ petition allowed. (E-1)

List of Cases cited:

1. Shashi Kiran Vs U.O.I.; 2016 SCC Online 4819

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

1. Heard Sri Ashish Mishra, learned counsel for the petitioners and Sri Bal Mukund, learned counsel appearing for all the respondents.

2. Petitioners before this Court are erstwhile faculty members of Kendriya Hindi Sansthan, Agra, a Central Government Organisation controlled and funded by it through its own sets of rules and by-laws framed with the approval of Government of India. While petitioner no.1 had already retired by the time present petition was presented before this Court on 30.11.2015, the other two petitioners were working and ultimately retired on 30.06.2019, during pendency of the writ petition.

3. All the three petitioners claim a writ in the nature of mandamus to command the respondents including Union of India to

award them benefit of the Old Pension Scheme popularly known as G.P.F. Scheme by permitting them to opt for G.P.F. cum Pension Scheme (In short G.P.F. Scheme) in view of the subsequent orders issued by the Delhi University with the consent of Central Government, to permit the employees having C.P.F. Scheme to switch over to G.P.F. Scheme as late as in the year 2003. During the pendency of this petition, a judgment of Supreme Court in the case of *Shashi Kiran versus Union of India: 2016 SCC Online 4819* intervened as per which even those employees of such institutions who had already opted for C.P.F. Scheme and were not permitted to switch to G.P.F. Scheme on the principle that they could not gaze into the crystal ball the benefits of the Old Pension Scheme, and to speculate whether the existing state of affairs would continue especially the rate of interest that one would get on the accumulated fund as compared to benefits given to the pension optees at the stage of superannuation. Petitioner herein claim to be the last category of petitioners as came to be mentioned in paragraph 23 of the judgment who had opted for C.P.F. benefits.

4. It is argued on behalf of the petitioners that petitioners' application remained pending consideration before the authorities since 2013 i.e. prior to their date of superannuation and even if the higher authorities of the Government of India refused to consider that application on the plea that there was no further option available in the year 1999, after 31.12.2003 now they can be benefited under the judgment of the Supreme Court as they were the third category of the petitioners who were similarly circumstanced.

5. Per contra, learned counsel for the respondents, Sri Bal Mukund has argued,

firstly that petitioners having attained the age of superannuation were no more the employees of the institute and, therefore, there is no question of giving them any option to switch over as this option could be exercised by working employees only; and secondly act and conduct in opting for C.P.F. scheme was a result of a conscious decision by the petitioners and they having not chosen to opt for C.P.F. Scheme prior to 30.09.1989 when the last opportunity was given by the Central Government, there was no question now to reopen the option in favour of retired employees. Meeting the judgment of the Supreme Court in the case of Shashi Kiran (supra), Sri Bal Mukund has argued that judgment would operate in personem and not in rem. He has argued that judgment having been delivered in particular cases that were being pursued in the Delhi High Court and the Supreme Court extended the benefit even to the third category of such employees approaching it and these appeals arose out of the said judgment of the Delhi High Court, whereas in the present case petitioners have chosen to approach this Court much after the expiry of last date to exercise option in the year 2003 made by the Delhi University. He submits, as far as petitioner no.1 is concerned, he himself had opted to retire and take post retirement benefit as per the C.P.F. Scheme even prior to filing of his present petition. Sri Bal Mukund has also not denied the resolution of Board of Governors on date as was in the year 1999 making recommendations for permitting its employees another chance to switch over to C.P.F. Scheme.

6. Meeting the above three arguments as advanced by learned counsel Sri Bal Mukund appearing for the respondents, Sri Ashish Mishra has submitted in rejoinder

that once the Government gave the above option as late as 2003, it could not be said that since petitioners had already exercised the option, they could not switch over. He submitted that the principle upon which the judgment has been delivered is equally applicable to the present case. It is also submitted that petitioners had moved their application to switch over in the year 1999 itself when all the petitioners were in service and, therefore, their right to claim benefit continued even if they had retired.

7. Meeting the argument further, learned Advocate submits that the respondents themselves made the petitioners to retire under the C.P.F. scheme with a rider that their claim for switching over from C.P.F. to G.P.F. scheme would depend upon the outcome of the pending litigation before this Court vide letters dated 12.07.2019 and 20.08.2019 brought on record as annexure to the supplementary rejoinder affidavit.

8. To the argument of learned counsel for the respondent on the point of letter of the Additional Secretary, Ministry of Human Affairs and Development (Secondary and Higher Education Department) dated 18.11.1999, it is argued that this internal communication is between the first respondent and the third respondent and it refuses to consider the claim on the ground that there was no proposal, whereas there was a proposal to exercise open upto the year 2003 and, therefore, this letter has no significance and relevance.

9. Still further it is argued that in view of the judgment of the Supreme Court in Shashi Kiran's case, benefit would be applicable to the present case and petitioners cannot be denied benefit of such

judgment which has been delivered during pendency of the writ petition.

10. Having heard learned counsel for the respective parties, perused the records and judgment of the Supreme Court cited before this Court, firstly I find that the petitioners cannot be said to have failed to exercise option by the last day i.e. 31.12.2003 wishing to switch over from C.P.F. to G.P.F. as they had applied way back in 1999. The admitted position between the parties is that petitioners had admittedly exercised their option to remain under C.P.F. scheme as much before their retirement they had applied for switching over. The third respondent though made recommendations in their favour but the first respondent refused to entertain such application on the plea that there was no such option open in the year 1999. It is also an admitted position that the respondents themselves observed in the letter of the Deputy Registrar dated 12.07.2019 and 20.08.2019 that their claim from C.P.F. to G.P.F. scheme would depend upon the outcome of the pending litigation but of course there is no such letter in respect of petitioner no.1, it appears since he had already retired at the time of filing of this writ petition.

11. Under the above facts and circumstances in my considered view, the letter of the Union of India dated 16.11.1999 becomes irrelevant and insignificant as the option to switch over had remain opened till 31.12.2003 as has come to be so recorded in the judgment of the Supreme Court in Shashi Kiran (supra) vide its paragraph 29.

12. Coming to the judgment cited, I find that of the three batches in terms of category of cases namely (i) R.N. Virmani

Batch of cases, (ii) N.C. Bakshi batch of cases (iii) Shashi Kiran Batch of cases, the learned Single Judge of Delhi High Court allowed both Virmani Batch of cases and N.C. Batch of cases giving benefit of the office memorandum to the former and to the later on the ground that former had not opted but continued with contribution towards C.P.F. Scheme as if tacitly opted for C.P.F. by their conduct and latter ones, who though had consciously opted for C.P.F. Scheme but after the last cut off date 30.09.1987. Both these batches were given benefit of the G.P.F. cum Pension Scheme on the principle that last cut off date 30.09.1987 would not come in their way of opting for old G.P.F. Scheme as exception was to opt for C.P.F. Scheme. However, in respect of the Shashi Kiran Batch of cases the learned Single Judge refused the relief on the ground that they had exercised their option prior to the last cut off and that too cautiously and therefore, there was no room available to them for any "come back situation". Thus the learned Single Judge of the Delhi High Court classified the otherwise homogeneous group of employees seeking pension into two categories. Upon a Letters Patent Appeal being filed, while the Division Bench of the Delhi High Court upheld the judgment of the learned Single Judge in respect of Virmani Batch and N.C. Bakshi Batch dismissing the appeal of the University of Delhi, reversed the judgment of the learned Single Judge in respect of Shashi Kiran Batch of cases by giving them relief on the principle that if the relief could have been granted to those 2469 employees who had consciously opted for C.P.F. Scheme may be after the last cut off date, the petitioners appellants of the Shashi Kiran Batch should not have been discriminated against and as they were 75 in numbers. So, even though they had applied to the High Court in the

year 2010, the relief to switch over to G.P.F. Scheme/ OPS was granted. Supreme Court of India upon Special Leave Petition filed by the University of Delhi affirmed the judgment of the Division Bench of the Delhi High Court by making observations in their favour after discussing the legal aspects involved therein vide paragraph nos. 22 to 37 that are reproduced hereunder:

"22. We now turn to Shashi Kiran batch of cases.

23. As indicated by the University in its affidavit filed after the Order dated 02.03.2020 was passed by this Court, 2611 employees had opted to be under CPF Scheme by the cut-off date, i.e. by 30.09.1987. Additionally, 626 employees exercised the option to be under CPF after the original cut-off, but within initial two extensions granted by the University. Thus, as against the entire body of employees of the University, 3237 (2611+626) employees had exercised the option to be under CPF. Out of these 3237 employees, by virtue of further extensions granted by the University, about 2469 employees exercised the reverse option and opted to come over to GPF, leaving only 768 (3237-2469) employees to be under CPF. The answers to queries d? and e? given by the University in its affidavit indicate that the number of employees in CPF Scheme was 86 while the petitioners in Shashi Kiran batch were 75. We are, thus, concerned with 75 original petitioners in Shashi Kiran batch of cases.

24. In Krishena Kumar, the distinction between the Provident Fund Scheme and the Pension Scheme was considered by the Constitution Bench of this Court. In that case, the employees who had joined the service on or after 01.04.1957 were to get covered

automatically by the Pension Scheme and insofar as employees who were already in service on 01.04.1957, they were given an option either to retain the Provident Fund benefits or to switchover to the pensionary benefits. About 12 extensions were thereafter granted so that the options could be exercised by the employees within the extended time. Those who had chosen not to exercise such option, were before this Court. The basic nature of the Scheme was discussed in paragraph 7 of the decision as under:-

"7. We may now examine these options. The Railway Board's letter No. F(E) 50-RTI/6 dated November 16, 1957 introduced the pension scheme for railway servants. It said that the President had been pleased to decide that the pension rules, as liberalised vide Railway Board's Memo No. E-48 OPC-208 dated July 8, 1950 as amended or clarified from time to time should apply (a) to all Railway servants who entered service on or after issue of that letter and (b) to all non-pensionable railway servants who were in service on April 1, 1957 or have joined railway service between that date and the date of issue of the order?. The Railway servants referred to in para (b) were required to exercise an unconditional and unambiguous option on the prescribed form on or before March 31, 1958 electing for the pensionary benefits or retaining their existing retirement benefits under the State Railway Provident Fund Rules. It further said that any such employee from whom an option form prescribed for the employee's option was not received within the above time limit or whose option was incomplete or conditional or ambiguous shall be deemed to have opted for the pensionary benefits and if any such employee had died by that date or on or after April 1, 1957 without exercising option for the

pensionary scheme, his dues would be paid on the provident fund system. The period of validity of this option was first extended up to June 30, 1958, December 31, 1958, March 31, 1959 and lastly up to September 30, 1959. There could, therefore, be no doubt that those who did not opt for the pension scheme had ample opportunity to choose between the two."

25. Reliance was placed by the petitioners before this Court on the decision in D.S. Nakara vs. Union of India. Paragraphs 16, 29 and 30 of the decision in Krishena Kumar dealt with the issue as under:-

"16. As the basis or justification for striking or reading down paragraph 3.1 on Nakara ratio, it is urged that all the Railway employees numbering about 22 lakhs comprising 16,22,000 in service and about 6 lakhs pensioners constitute one family and must be treated as one class as the government's obligation to look after the retired Railway employees both under the pension scheme and the provident fund scheme being the same, they could not be treated differently. Any differential treatment will be discriminatory and violative of Article 14 of the Constitution of India. In Nakara case the date arbitrarily chosen was struck down and as a result the revised formula for computing pension was made applicable to all the retired pensioners. The same principle, it is urged, has to be extended to the Provident Fund retirees also otherwise there would be discrimination. It is stated that though at the time of choosing between Provident Fund and Pension Scheme both the alternatives appeared to be more or less equal and the retired provident funders took their lump sum yet subsequently stage by stage the pensioners' benefits were increased in such ways and to such extent that it became more and more

discriminatory against the provident funders old and new. It was because of this discrimination that successive options were given by the Railway Board for the provident funders to become pensioners. Hence the submission that this limitation must go, and all the provident funders must be deemed to have become pensioners subject to the condition that the government contribution received by them along with interest thereon is refunded or adjusted. Obviously this gives no importance to the condition in the notifications that option once exercised shall be final and binding and to the fact that in each option a cut-off date was there related to the purpose of giving that option.

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29. The court in Nakara was not satisfied with the explanation that the legislation had defined the class with clarity and precision and it would not be the function of this Court to enlarge the class. The court held in paragraph 65 of the report : (SCC pp. 344-45, para 65)

"With the expanding horizons of socio-economic justice, the Socialist Republic and Welfare State which we endeavour to set up and largely influenced by the fact that the old men who retired when emoluments were comparatively low and are exposed to vagaries of continuously rising prices, the falling value of the rupee consequent upon inflationary inputs, we are satisfied that by introducing an arbitrary eligibility criterion :?being in service and retiring subsequent to the specified date? for being eligible for the liberalised pension scheme and thereby dividing a homogeneous class, the classification being not based on any discernible rational principle and having been found wholly unrelated to the objects sought to be achieved by grant of liberalised pension and the eligibility

criteria devised being thoroughly arbitrary, we are of the view that the eligibility for liberalised pension scheme of "being in service on the specified date and retiring subsequent to that date" in impugned memoranda, Exs. P-1 and P-2, violates Article 14 and is unconstitutional and is struck down. Both the memoranda shall be enforced and implemented as read down as under : In other words, Ex. P- 1, the words : "that in respect of the government servants who were in service on March 31, 1979 and retiring from service on or after that date"; and in Ex. P-2, the words : "the new rates of pension are effective from April 1, 1979 and will be applicable to all service officers who became/become non- effective on or after that date" are unconstitutional and are struck down with this specification that the date mentioned therein will be relevant as being one from which the liberalised pension scheme becomes operative to all pensioners governed by 1972 Rules irrespective of the date of retirement. Omitting the unconstitutional part it is declared that all pensioners governed by the 1972 Rules and Army Pension Regulations shall be entitled to pension as computed under the liberalised pension scheme from the specified date, irrespective of the date of retirement. Arrears of pension prior to the specified date as per fresh computation is not admissible."

30. Thus the court treated the pension retirees only as a homogeneous class. The PF retirees were not in mind. The court also clearly observed that while so reading down it was not dealing with any fund and there was no question of the same cake being divided amongst larger number of the pensioners than would have been under the notification with respect to the specified date. All the pensioners

governed by the 1972 Rules were treated as a class because payment of pension was a continuing obligation on the part of the State till the death of each of the pensioners and, unlike the case of Contributory Provident Fund, there was no question of a fund in liberalising pension."

26. The distinction between two Schemes was dealt with in Paragraph 32 of the decision as under:-

"32. In *Nakara* it was never held that both the pension retirees and the PF retirees formed a homogeneous class and that any further classification among them would be violative of Article 14. On the other hand the court clearly observed that it was not dealing with the problem of a 'fund'. The Railway Contributory Provident Fund is by definition a fund. Besides, the government's obligation towards an employee under CPF Scheme to give the matching contribution begins as soon as his account is opened and ends with his retirement when his rights qua the government in respect of the Provident Fund is finally crystallized and thereafter no statutory obligation continues. Whether there still remained a moral obligation is a different matter. On the other hand under the Pension Scheme the government's obligation does not begin until the employee retires when only it begins and it continues till the death of the employee. Thus, on the retirement of an employee government's legal obligation under the Provident Fund account ends while under the Pension Scheme it begins. The rules governing the Provident Fund and its contribution are entirely different from the rules governing pension. It would not, therefore, be reasonable to argue that what is applicable to the pension retirees must also equally be applicable to PF retirees. This being the legal position the rights of each individual PF retiree finally

crystallized on his retirement whereafter no continuing obligation remained while, on the other hand, as regard Pension retirees, the obligation continued till their death. The continuing obligation of the State in respect of pension retirees is adversely affected by fall in rupee value and rising prices which, considering the corpus already received by the PF retirees they would not be so adversely affected ipso facto. It cannot, therefore, be said that it was the ratio decidendi in Nakara⁶ that the State's obligation towards its PF retirees must be the same as that towards the pension retirees. An imaginary definition of obligation to include all the government retirees in a class was not decided and could not form the basis for any classification for the purpose of this case. Nakara cannot, therefore, be an authority for this case."

27. Having observed that the Pension Scheme and the Provident Fund Scheme were structurally different, it was then concluded that the retirees in both categories did not belong to the same class and that there was no discrimination. The challenge was, therefore, rejected.

28. At this stage we must also consider that in *Rajasthan Rajya Vidyut Vitran Nigam Limited vs. Dwarka Prasad Koolwal and others*⁷, a Bench of two Judges of this Court found that an employee had no inherent right to demand extension for exercising the switchover option. It was observed:-

"58. When the Pension Regulations and the GPF Scheme are read together, the necessary conclusion is that an employee must give his option for either continuing to be a member of the CPF Scheme or to switch over to the Pension and GPF Scheme. This option had to be exercised within a period of 90

days from the cut-off date, that is, 28-11-1988. But RSEB, in its wisdom, chose to extend the time for exercising the switch-over option over a period of 8 years by giving several opportunities to the employees through its notices. The right of an employee to switch over was, therefore, limited in time by the Pension and GPF Scheme. However, administrative orders issued by RSEB from time to time extended the period for exercising the option. No employee had any inherent right to either demand an extension of the period for exercising the switch-over option or claim a right to exercise the switch-over option at any time prior to his retirement, and no such right has been shown to us."

29. Krishena Kumar was a case where the retirees from two categories namely Pension Fund and Provident Fund, were taken to be distinct and different and as such the plea on the ground of discrimination was rejected. As the Judgment of the Division Bench discloses, the matter was considered by it from the standpoint of discrimination between the same category of persons, that is to say, those who had opted to be under CPF. The different groups in the same category were:-

a) Those who had not exercised any option but continued to make payment of contribution towards CPF (R.K. Virmani batch of cases).

b) Those who exercised the option to be under CPF but the option was exercised after the cut-off. Since the option was exercised after the cut-off, they were deemed to have 'come over to GPF and were granted benefit (N.C. Bakshi batch of cases).

c) Those who consciously exercised the option to be under CPF; but taking advantage of further options granted through 11 extensions to switchover, had

been allowed to 'come over' to GPF (2469 employees).

30. It was against these three sub categories coming from the same category of employees that the argument of discrimination was considered by the Division Bench. Such was not the case in Krishena Kumar⁵ or Rajasthan Rajya Vidyut Vitran.

31. The matter was further considered by the Division Bench in the context of the employees of educational institutions such as IITs, who are directly under the Central Government, just as the employees of the University, which is a Central University. If the option was allowed to be exercised by granting extension to the employees of the other educational institutions, the Division Bench did not find any reason why similar choice/option could not be given to the employees in Shashi Kiran batch of cases.

32. Additionally, the feature that has been presented through the documents which have subsequently come on record is that even with respect to the employees of Insurance Corporations similar options and extensions were granted.

33. The differential treatment afforded to those 2469 employees as against the employees in Shashi Kiran batch of cases, was not founded on any rationale. No justifiable reason was coming forth. If those 2469 employees could be afforded chance to exercise an option of switchover to GPF, even though they had consciously opted to be under CPF, on principle of parity or equality, the case was certainly made out.

34. We may now consider the matter from the perspective of financial impact if the decision of the Division Bench is affirmed.

35. According to the notification dated 01.05.1987, the employees joining the service after 01.01.1986 would always be under GPF. With respect to those who were in service on 01.01.1986, said employees would be deemed to have 'come over' to GPF unless an option to continue to be under CPF was consciously exercised before the cut-off date. Thus, when the Scheme was framed and was sought to be implemented, the concerned authorities must have taken into account the entire magnitude such as, the number of employees and the likelihood of impact on the management of the fund, so that reasonable returns can be effected by way of pension upon retirement of such persons. Going by the intent of the notification, those who were to opt for CPF, were an exception and the general rule was that everybody after 01.01.1986 would normally be covered by GPF. It is in this context that the number of original petitioners in Shashi Kiran batch of cases has to be seen. We are concerned with only 75 persons. On the other hand, the bulk of people namely 2469 employees were granted the choice of reverse switchover and they were allowed all the benefits under GPF. It can reasonably be said that when the notification dated 01.05.1987 was issued, the authorities were conscious of the possibility that all the employees may 'come over' to GPF. With that possibility in mind, the fund was constituted and the affairs were arranged. The shift of those 75 employees would not in any way affect the strength and the character of the fund if a direction that the entire contribution made by the authorities be returned with reasonable rate of interest is issued. These 75 petitioners had approached the Court in the year 2010. At this length of time, it is not as if any floodgates are going to open and there will be drain on the resources of

the State. A direction can, therefore, be issued, as was done by the learned Single Judge in paragraph 20 of his Judgment in R.N. Virmani batch of cases and which aspect was mentioned in the letter dated 23.01.2017 referred to in paragraph 8 hereinabove, for recouping the contribution under CPF with 8% simple interest per annum.

36. Considering the circumstances on record, in our view, the decision rendered by the Division Bench of the High Court in Shashi Kiran batch of cases does not call for any interference except to the extent of direction for recouping of the contribution under CPF with 8% simple interest per annum. It is possible that at this length of time, some of the employees in Shashi Kiran batch of cases may not be interested in switchover to GPF. But an option must be afforded to them in such manner as the authorities deem appropriate.

37. All these appeals are therefore disposed of in aforesaid terms, with no order as to costs."

(Emphasis added)

13. From the discussion as has been held by Supreme Court dealing with the Shashi Kiran batch of cases, it clearly emerges out that when employees of such institution as petitioner's institution, the general rule was that all the employees under the CPF Scheme were directed to be governed under the GPF Scheme except those who consciously opted for CPF Scheme before the cut off dated 30.09.1987, there arose an issue for those who switched over from GPF to CPF Scheme, I would call it a reverse switching and those who exercised option for GPF scheme by administrative order by the respective institutions after the cut off date. The ratio of the judgment in Shashi Kiran's case (Supra) is, switching

over to GPF or not, all those in CPF Scheme became member of GPF Scheme automatically and so all such employees who did not opt for a change prior to 1987, should be taken to have become member of GPF Scheme on principle of 'deemed switch over' a fiction created by asking for option to remain in CPF Scheme. Now it has to be seen as to whether this fiction of 'deemed switch over' shall apply to the case in hand. Now in order to find answer to the above question it is to be seen what options were available to the petitioners in their institutions and whether petitioners had ever opted for CPF Scheme before or after cut off date i.e. 13.09.1987. If no options were available then deeming fiction would apply as there was no option to go for GPF, and instead, it was a reverse option that was made available. All those were made to be governed under 1972 rules irrespective of the date of retirement. The Court also considered the aspect of consistent fall in rupee value and the rates of interest upon a corpus that may be received by a retired employee under the C.P.F. scheme. The judgment of the Division Bench since has been upheld by the Supreme Court I find the principle of crystal ball emerging through the judgment at that point of time to be very genuine principle to make this benefit available to all the employees. Petitioners before this Court are only three in numbers and while two retired during pendency of this petition, one had already retired on the date of presentation of this writ petition. Thus two petitioners were in service when the judgment of the Supreme Court had intervened. The principle upon which Shashi Kiran batch has been given benefit to switch over from C.P.F. scheme to G.P.G. cum Pension scheme even on filing of the writ petition in year 2010 while the last offer was made in the year 2003 only, can be made applicable to the

case in hand as well. Shashi Kiran batch employees had consciously opted for C.P.F. Scheme even before the last cut-off date as petitioners herein.

14. In the present case, the respondents-Union of India/Central Government, in my considered view, were certainly not justified in refusing to consider the claim in the year 1999 by writing back to the Sansthan that no such scheme to switch over was available any more. The third respondent is very well funded by the Central Government and the contributions have been made by the Central Government under the C.P.F. scheme. The petitioners though have received the same but would certainly be refunding back at the same rate of interest as has been directed by the Supreme Court in its judgment (supra). It is claimed that no other employee of the Hindi Sansthan falls in this category and if their claims are accepted that will not open any flood gates of litigations.

15. In the circumstances, therefore, I find good reasons to allow this petition and give benefits of old pension scheme to the petitioners. In so far as petitioner no.1 is concerned, he though had retired already but had of course moved an application to permit him to switch over from C.P.F. scheme to G.P.F. cum Pension scheme in the year 1999 and then in 2013 itself and recommendations were made sometime much before his retirement. Although his case could have fallen in the category of those cases where one can say that not much protest was made in accepting the funds etc. under the C.P.F. scheme at the time of retirement, but in view of the fact that in Shashi Kiran batch of cases Supreme Court had allowed petition even for retired employees subject to refund of

fund obtained by them with 8 per cent interest to cover up the financial loss that otherwise government may suffer in giving pension under the old pension scheme, I do find justification to allow this benefit to petitioner no.1 as well.

16. In view of the above, writ petition succeeds and is **allowed**. The respondents are directed to convert petitioners' C.P.F. scheme to G.P.F. cum Pension scheme. The fund that has been received under the C.P.F. scheme shall be refunded by the petitioner except their own share of contribution at the rate of 8 per cent simple interest as has been directed by the Supreme Court in its judgment (supra). They will be furnishing an affidavit of this undertaking and thereafter the respondents shall fix the time limit or any other modality to receive refund from the petitioners.

17. It is made clear that this will be one time opportunity and if the petitioners fail to pay back the contribution with 8 percent interest per annum as per modality prescribed for, no further opportunity will be afforded for the same and petitioners will have to remain satisfied with whatever they have gained under the C.P.F. Scheme.

(2024) 4 ILRA 547

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 05.04.2024

BEFORE

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

Writ A No. 66273 of 2014

Smt. Madhu Yadav

...Petitioner

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioner:

Sri Pradeep Kumar Dwivedi, Sri Sanjay Kumar, Sri Devesh Mishra, Sri Jata Shankar pandey, Sri Man Bahadur Singh, Sri Rajendra Kumar Dubey, Sri Rajendra Pal Singh, Sri Santosh Kumar Pandey, Sri Vijay Gautam, Sri Vinod Kumar Mishra

Counsel for the Respondents:

Sri Girijesh Kumar Tripathi, Addl. C.S.C.

A. Service Law – Constitution of India – Article 226 – Writ – Equitable relief – Entitlement to seek it – Dismissal – Widow challenged dismissal order passed against her husband in a disciplinary proceeding initiated under Rule 14(1) of the U.P. Police Officers of Subordinate Ranks (Punishment and Appeal) Rules, 1991 – Criminal and disciplinary proceeding was initiated against the deceased on the complaint of the petitioner herself – Deceased also confessed the charge and he was found guilty of indulging in an illicit relationship and in conduct unbecoming of a member of disciplinary force being adversely affected in the eyes of the public – Appeal and Revision was also dismissed – Revision order confirming dismissal was never challenged by the employee for about three years U.P.to his death – After employee's death, the validity of dismissal order was challenged by the widow/complainant – Entitlement of widow to seek writ – Held, in order to be entitled to the issue of a writ under Article 226 of the Constitution, the petitioner must not only establish his/her right in law, but also a case in equity – High Court found the petitioner disentitled to seek equitable relief. (Para 16, 17, 20, 23 and 25)

Writ petition dismissed. (E-1)

List of Cases cited:

1. Writ A No. 21010 of 2011; Kuber Singh Vs St. of U.P. decided on 14.02.2020

2. Shahjahan Khan Vs St. of U.P.& ors.; 2002 SCC OnLine All 46

3. Joseph Shine Vs U.O.I.; (2019) 2 SCC 39

4. Ex-Constable Kishori Lal Sharma Vs U.P. Public Service Tribunal & ors.; 2004 (2) AWC 1434 : (2004) 2 U.P.LBEC 1201

5. Prem Chandra Vs St. of U.P.; 2005 SCC OnLine All 987

6. Dukh Haran Verma Vs St. of U.P. & ors.; (2004) 2 AWC 1147

7. Central Council for Research in Ayurvedic Sciences & anr. Vs Bikartan Das & ors.; 2023 SCC OnLine SC 996

(Delivered by Hon'ble J.J. Munir, J.)

The petitioner is the widow of the late Mahesh Chand, a dismissed Constable of the Police, who seeks to challenge the dismissal of her deceased husband from service and its affirmation in departmental appeal and revision.

2. The petitioner's husband, the late Mahesh Chand, was recruited in the Civil Police in the year 2006. She and Mahesh Chand were married on 24.06.2007, according to Hindu rites. In the year 2007, he was removed from service in consequence of a general order passed by the Government in the recruitment matter, but reinstated in service in the year 2009, after Supreme Court's judgment. The petitioner, Smt. Madhu Yadav, moved an application on 09.06.2009 before the Senior Superintendent of Police, Aligarh, saying that she was married to Mahesh Chand on 24.06.2007, according to Hindu rites, but Mahesh Chand had married another woman by the name 'X'. She said in her complaint that she had lodged a First Information Report against her husband, giving rise to Case Crime No. 121 of 2008, under

Sections 498A, 323, 506, 494 of the Indian Penal Code, 18602.

3. After investigation, a charge-sheet was said to be submitted against Mahesh Chand. A preliminary inquiry in the matter was conducted by the Circle Officer, Civil Lines, Aligarh. The Circle Officer found evidence against Mahesh Chand. On the basis of the preliminary inquiry report, the Senior Superintendent of Police, Aligarh decided to initiate departmental proceedings against Mahesh Chand under Rule 14(1) of the Uttar Pradesh Police Officers of Subordinate Ranks (Punishment and Appeal) Rules, 19913. The departmental inquiry was entrusted to the Circle Officer, City-II, Aligarh. The petitioner, Smt. Madhu Yadav and her father, Mahendra Pal Singh were examined on behalf of the Establishment. They supported the allegations against the late Mahesh Chand. In the departmental inquiry, the petitioner was held guilty and recommendation made for dismissal from service.

4. The Senior Superintendent of Police, Aligarh issued a show-cause notice dated 05.02.2010 along with a copy of the inquiry report, which was received by the late Mahesh Chand on 26.02.2010. The Constable was granted fifteen days' time to submit his reply to the show-cause, which he chose not to do. The Senior Superintendent of Police, accordingly, dismissed him from service vide an order dated 19.06.2010. The deceased constable then preferred an appeal to the Deputy Inspector General of Police, Aligarh Range, Aligarh. The appeal was dismissed on 08.11.2010. Mahesh Chand carried a revision to the Additional Director General of Police, Uttar Pradesh, Lucknow, which was rejected by means of an order dated 30.08.2011.

5. Mahesh Chand died on 17.06.2014. After his demise, the petitioner, that is to say, Smt. Madhu Yadav, his wife, filed a writ petition before this Court, being Writ - A No. 43101 of 2014, with a case that the revision preferred by her late husband to the Additional Director General of Police is still pending and may be directed to be decided. The aforesaid writ petition was disposed of by this Court vide an order dated 22.08.2014, directing the Additional Director General of Police to decide the revision against the order dated 08.11.2010 in accordance with law, expeditiously and preferably within a period of three months from the date of production of a certified copy of the order, along with a photostat copy of the memo of revision before the officer seized of the revision.

6. It was the respondents' case that the revision was already decided by the Additional Director General of Police, Lucknow vide an order dated 30.08.2011. So, a communication in this regard was made by the Senior Superintendent of Police, Aligarh on 30.10.2014, communicating the revisional order to the petitioner. In fact, in the order dated 30.10.2014, it was mentioned that a copy of the revisional order dated 30.08.2011 was communicated to the deceased constable at his address of permanent residence, but he was not found there. The Senior Superintendent of Police has mentioned that the order was communicated through a constable, Rajbir Singh, from the Police Lines, Aligarh. He affixed the order on the wall of Mahesh Chand's residence in the presence of his father and two residents of the village. At this stage, when the petitioner was communicated with a copy of the revisional order dated 30.08.2011 passed during the lifetime of her husband by the Senior Superintendent of Police,

Aligarh, in consequence of the directions issued by this Court on the assumption that it was not decided. The petitioner moved this Court through the present writ petition, for the first time, challenging the orders of dismissal from service passed against her late husband and its affirmation in departmental appeal and revision.

7. It is not in dispute that the petitioner's husband never challenged the revisional order dated 30.08.2011, or the order of dismissal, or for that matter, the appellate order before this Court during his lifetime. He lived a little shy of two years after the revisional order was made, but never chose to challenge it. This petition was entertained by an order dated 11.12.2014, when a notice of motion was issued, asking the respondents to file a counter affidavit. In course of time, a counter affidavit dated 26.03.2015 was filed on behalf of the respondents and a supplementary affidavit dated 31.08.2015 was filed on behalf of the petitioner. A rejoinder affidavit was filed by the petitioner on 31.08.2015. A supplementary counter affidavit dated 22.09.2018 was filed on behalf of respondent No. 4. Much later when the petition came up before the Court in the month of May, 2023, still at the admission stage, another supplementary affidavit was filed by the petitioner dated 22.05.2023. In answer to this affidavit, a supplementary counter affidavit dated 28.08.2023 was filed. With exchange of so much of pleadings, except the supplementary counter affidavit last filed, which came in later on, this petition was admitted to hearing on 05.07.2023. The matter was heard on 24.07.2023, 07.08.2023, 21.08.2023 and lastly, on 06.10.2023, when judgment was reserved.

8. Heard Mr. Pradeep Kumar Dwivedi, learned Counsel for the petitioner and Mr. Girijesh Kumar Tripathi, learned

Additional Chief Standing Counsel appearing on behalf of respondent No. 1.

9. The petitioner was charge-sheeted on a solitary charge, which, from a perusal of the inquiry report dated 27.01.2010, is found to read as follows :

आपकी शादी श्रीमती मधु पुत्री महेन्द्र सिंह निवासी खलवारा थाना मेरापुर जनपद फर्रुखाबाद के साथ हिन्दु रीति रिवाज से दोनो पक्षों की सहमती से हुई थी शादी के बाद से आपके अवैध सम्बन्ध उमा उर्फ शपना पुत्री मोहनलाल निवासी आमिलपुर थाना मेरापुर मऊ दरवाजा जनपद फर्रुखाबाद से कायम हो गये और आपने उमा उर्फ सपना को भगाकर अपने साथ रख लिया जिससे एक पुत्री पैदा होने की जानकारी आयी है जिसके सम्बन्ध में आपके एवं आपके परिवारीजनों के विरुद्ध थाना मेरापुर में आवेदिका श्रीमती मधू ने मु0अ0सं0 121/2008 धारा 498ए/323/506/494 भादवि व 3/4 दहेज अधिनियम का अभियोग पंजीकृत कराया गया था। अभियोग में आरोप सत्य पाये जाने पर विवेचक द्वारा आरोप पत्र दिनांक 20.06.2008 को न्यायालय में प्रेषित कर दिया गया और अभियोग वर्तमान में विचाराधीन न्यायालय है।

10. The charge against deceased, on the basis of which the inquiry proceeded, on a reading of it, appears to be inchoate and inconsequential, but later on, in the proceedings and in the inquiry report, the conclusion drawn is that the deceased, by indulging in an illicit relationship while married to the petitioner, has led to the image of the police force being adversely affected in the eyes of the public and his conduct is one unbecoming of a member of a disciplined force. It is for the said reason that the learned Counsel for the petitioner has relied upon the judgement of this Court in **Kuber Singh v. State of U.P. and**

others⁴ to submit that there was no charge of solemnizing a bigamous marriage against the late Mahesh Chand in violation of Rule 29 of the Uttar Pradesh Government Servants Conduct Rules, 1956. In **Kuber Singh** (*supra*) reliance was placed on a Bench decision of this Court in **Shahjahan Khan v. State of Uttar Pradesh and others**⁶ to more or less conclude that adultery was not defined as “misconduct” under the Rules of 1956. To add to it, **Kuber Singh** has reasoned that adultery is no longer a crime, after the decision of the Constitution Bench of the Supreme Court in **Joseph Shine v. Union of India**⁷. Learned Counsel for the petitioner has heavily relied on the decision in **Kuber Singh** to say that there was, in the end, on all facts proved, no case of misconduct made out against the deceased constable, for which he could validly be dismissed from service.

11. To the contrary, Mr. Girijesh Kumar Tripathi, learned Additional Chief Standing Counsel submits that this is a case where the petitioner ought not to be granted relief, for reason that equity heavily weighs against her. He further submits that the petitioner is disentitled to relief on the principle of approbate and reprobate. Mr. Tripathi submits that the petitioner, in equity, is not entitled to challenge the impugned orders, even if she is in law. Mahesh Chand, when alive, had suffered the impugned order, with the exhaustion of his last departmental remedy, that is to say, the revision being turned down on 30.08.2011. He lived for a period as long as three years approximately, but never challenged the orders impugned in his lifetime. Mr. Tripathi submits that it has to be borne in mind that it was the petitioner who was the person setting into motion the process of disciplinary proceedings against

Mahesh Chand, her husband. It is emphasized that she supported the charges against her deceased husband before the Inquiry Officer, leading to findings against him, on the foot of which, the departmental authorities have passed the orders impugned. Now that he is dead, three years after his demise, the petitioner has instituted this writ petition, seeking to impugn the orders of dismissal from service that were passed against Mahesh Chand at her instance, because it is she who would now benefit from the orders being quashed. Mr. Girijesh Kumar Tripathi points out that not only has the petitioner sought quashing of the orders of dismissal from service passed against Mahesh Chand and the approval thereof by the Appellate and Revisional Authorities, but also has further sought a *mandamus* to consider her claim for compassionate appointment. He says, therefore, that the petitioner, in fact, is a person who seeks to approbate and reprobate for her benefit. In addition, Mr. Girijesh Kumar Tripathi places reliance upon decision of this Court in **Ex-Constable Kishori Lal Sharma v. U.P. Public Service Tribunal and others**⁸ and another decision of this Court in **Prem Chandra v. State of U.P.**⁹

12. Upon hearing learned Counsel for the parties, as already remarked, this Court finds that the charge is somewhat awkwardly worded, towards the close of the report, the late Mahesh Chand has been held guilty of conduct unbecoming of a member of a disciplined force by indulging in an illicit relationship with a woman, while married to the petitioner. The inquiry report also shows that at the hearing before the Inquiry Officer, the deceased, Mahesh Chand, had not filed any written statement, but the Inquiry Officer, adopting a procedure countenanced by law and

proceeded ex-parte. He called witnesses for the Establishment. The first date fixed before the Inquiry Officer was 30.11.2009, when no witness or the complainant appeared. It also appears that the date for hearing before the Inquiry Officer on 30.11.2009 was fixed by a notice bearing number 6 of 2009 dated 23.11.2009, sent to both parties. On 30.11.2009, the proceedings of the inquiry were adjourned to 07.12.2009 and both sides were informed. On the adjourned date, Mahendra Pal Singh, a witness for the Establishment, appeared along with the petitioner as the other witness in support of the charge. Still another witness who appeared for the Establishment was Satya Prakash, a Deputy Superintendent of Police. On the said date also, the petitioner did not appear.

13. The testimony of witnesses for the Establishment were recorded by the Inquiry Officer. The first to depose was Mahendra Pal Sharma. He testified to the fact of the petitioner's marriage with the deceased, Mahesh Chand, on 24.06.2007, according to Hindu rites. He then testified to the fact that his son-in-law, Mahesh Chand, had indulged in illicit relations with a certain woman, whom he named with her parentage and residence and said that the said woman would stay with his son-in-law as a second wife. No maintenance was being paid to his daughter. There is also a mention in his testimony to the registration of a case against the deceased by this witness, giving rise to Crime No. 121 of 2008, under Sections 498A, 323, 506, 494 of the Penal Code and Section 3/4 of the Dowry Prohibition Act, 1961, Police Station Merapur, District Farrukhabad, wherein, after investigation, a charge-sheet had been filed in Court. There is testimony further to the effect that the proceedings were impugned before this Court and got

referred to the Mediation Centre. Here, it is also said in this witness's testimony that the deceased had tricked his daughter into entering a settlement and an undertaking not to proceed against him in the present inquiry, but, later on, there was no change in his behaviour. The deceased still stays with the other woman at some unknown place. He still tortures the witness's daughter, that is to say, the petitioner. The witness demanded that in order to render justice to him, the deceased should be dismissed from service.

14. A further perusal of the inquiry report shows that the next witness to be examined before the Inquiry Officer was the petitioner herself. She testified to her marriage with the deceased and the fact that just two months into their matrimony, her husband had entered into an illicit relationship with a named woman, with whom he was carrying on, for 1½-2 years past. She also reiterated the fact about her being tricked into a compromise not to pursue these proceedings, but later on the deceased did not reform and stays with the other woman. The petitioner said that the deceased tortures her. She also said that after taking necessary legal proceedings against her husband, she be given justice. The Inquiry Officer then recorded that since the deceased was not present he could not cross examine the witnesses or make his submissions.

15. The last witness to be called on behalf of the Establishment was Satya Prakash, the Deputy Superintendent of Police and an Assistant Commandant with the 15th Battalion of the Provincial Armed Constabulary. He was the officer who had held the preliminary inquiry against the deceased and submitted the preliminary inquiry report dated 09.08.2009, on the foot

of which, the disciplinary proceedings were drawn. He proved his report and other facts mentioned in the inquiry report. This witness was also not cross examined because the deceased was not present.

16. Later it seems that the deceased appeared before the Inquiry Officer and testified that he was married to the petitioner. He said that he would stay with his wife and rent a premises at Aligarh, where he would stay with her. He also said that he and his wife would file for a compromise in all pending cases. There is now no dispute between parties. He also stated that in future, he would never torture his wife. The deceased was cross examined by the petitioner herself and her father. The following questions were put to the deceased by the petitioner :

प्रश्न:- क्या आप भविष्य में पुनः अ उर्फ ब से सम्बन्ध रखेंगे और का प्रायाश्चित या पश्चाताप कर रहे हैं ?

उत्तर:- मैं अ उर्फ ब से सम्बन्ध नहीं रखूंगा और पूर्व में रखे गये सम्बन्ध के लिये पश्चाताप या प्रायाश्चित कर रहा हूँ ।

प्रश्न:- यदि आपके अ उर्फ ब से भविष्य में सम्बन्ध पाया जाते है तो आपके विरुद्ध कानूननी कार्यवाही / विभागीय कार्यवाही के लिये तैयार है ?

उत्तर:- जी हाँ ।

17. The petitioner, virtually, by her prowess at cross examination, made the deceased say that he was living in adultery with another woman and would not do so in future. The petitioner made the deceased confess to the charge. It was on these facts that the Inquiry Officer concluded against the deceased and held him guilty of indulging in conduct unbecoming of a member a disciplined force, that led to the

image of the Police force being adversely affected in the eyes of the general public. Towards the conclusion of the inquiry report, the Inquiry Officer, who was a Circle Officer of the Police, has made quaint remarks. He has said :

अतः आरोपी कान्स0 1211 ना0पु0 महेश चन्द्र को उक्तानुसार पूर्णतः दोषी पाते हुए आरक्षी पद से पदच्युत (डिसमिस) बर्खास्त किये जाने की संस्तुती करता हूँ मेरा यह आदेश वरिष्ठ पुलिस अधीक्षक की सहमती से ही प्रभावी माना जाएगा।

(emphasis by Court)

18. Now, it is not the law that the Inquiry Officer ought even to recommend punishment to be imposed. Here the Inquiry Officer has not only held the petitioner guilty of the charge which was well within his province, but also said that he recommends the petitioner's dismissal from service and that his order would be "effective from the date of consent of the Senior Superintendent of Police". This part of the inquiry report is indeed something which is absolutely perverse and without jurisdiction. But, the event in the disciplinary proceedings has not turned upon this piece of his ignorance that the Inquiry Officer has introduced to the record. The substance of the findings that the Inquiry Officer has otherwise recorded is based on sound evidence produced by the Establishment, particularly, the testimony of witnesses, which includes the petitioner.

19. There could still be an area of doubt about the findings of the Inquiry Officer, because the question of the deceased staying in adultery with another woman might be a fact to which the witnesses of fact, to wit, the petitioner and her father, would not have had any direct

knowledge, except hearsay, suspicion or circumstantial inferences. The clincher, nevertheless, came from the petitioner herself, when, by the dexterity of her cross examination, she made the deceased confess to the fact that he was staying in adultery with another woman, whom he named. The questions are recorded verbatim by the Inquiry Officer. It is on the foot of these findings that the impugned order of dismissal was passed by the Senior Superintendent of Police and upheld in appeal and revision.

20. This Court was minded to look into the validity of those orders as well, but what cannot be ignored is the well settled principle that in order to be entitled to the issue of a writ under Article 226 of the Constitution, the petitioner must not only establish his/her right in law, but also a case in equity. In this connection, reference may be made to the Bench decision of this Court in **Dukh Haran Verma v. State of U.P. and others**¹⁰. In **Dukh Haran Verma (supra)** it was observed :

4. It must be remembered that writ is discretionary remedy vide *Chandra Stngh v. State of Rajasthan*, 2003 (3) SCCD 1078 : JT 2003 (6) SC 20. In a writ petition the petitioner has not only to show violation of law, he must also show that equity is in his favour. Thus, to obtain a writ the petitioner must satisfy the Court about both law and equity. If the petitioner has only satisfied the Court that the law has been violated but equity is not in his favour the Court shall not issue a writ.

5. In the present case, admittedly the resolution for no-confidence was passed by $\frac{2}{3}$ rd of the members of the Board of Directors of the Bank as required by Rule 460. Hence assuming that initiation of the proceedings by means of the notice was

bad as the notice was not valid yet the resolution has validly been passed by $\frac{2}{3}$ rd members of the Board of Directors of the Bank. It must be remembered that if $\frac{2}{3}$ rd members of the Board are against the petitioner then as provided under the Rules he has to quit his office.

21. The principle has been wholesomely approved by the Supreme Court in **Central Council for Research in Ayurvedic Sciences and another v. Bikartan Das and others**¹¹ where it is held :

52. The second cardinal principle of exercise of extraordinary jurisdiction under Article 226 of the Constitution is that in a given case, even if some action or order challenged in the writ petition is found to be illegal and invalid, the High Court while exercising its extraordinary jurisdiction thereunder can refuse to upset it with a view to doing substantial justice between the parties. Article 226 of the Constitution grants an extraordinary remedy, which is essentially discretionary, although founded on legal injury. It is perfectly open for the writ court, exercising this flexible power to pass such orders as public interest dictates & equity projects. The legal formulations cannot be enforced divorced from the realities of the fact situation of the case. While administering law, it is to be tempered with equity and if the equitable situation demands after setting right the legal formulations, not to take it to the logical end, the High Court would be failing in its duty if it does not notice equitable consideration and mould the final order in exercise of its extraordinary jurisdiction. Any other approach would render the High Court a normal court of appeal which it is not.

22. Here what this Court finds from the sequence of events is that the petitioner, for her part, while the deceased was alive, was prosecuting both the criminal matter and the disciplinary proceedings, charging him inter alia with a case of living in adultery, while being married to her. She reported him to the Police, supported her First Information Report leading to the institution of criminal proceedings against the deceased for the offence of adultery punishable under Section 494 of the Penal Code. If that too were discounted, the proceedings that she now impugns, commenced on her complaint to the Senior Superintendent of Police, Aligarh. She pursued her complaint in the preliminary inquiry, leading to the initiation of disciplinary proceedings. Before the Inquiry Officer, the petitioner testified as an Establishment witness, supporting the charge of adulterous conduct by her husband, the deceased constable. Her father too testified in support of the Establishment's case. We have already noticed that the petitioner cross examined the deceased, when he testified in his defence, though without a written statement, and made him confess to the charge of adultery before the Inquiry Officer. It was as a result of whatever proof the petitioner mustered against the deceased in disciplinary inquiry that the orders impugned were passed, dismissing the late constable, her husband, from service.

23. The deceased filed a departmental appeal and revision, both of which were filed during his lifetime. The last departmental remedy was a revision, which was exhausted while Mahesh Chand was alive. The revision preferred by the late constable was dismissed by the Additional Director General of Police vide order dated

30.08.2011. Mahesh Chand passed away on 17.06.2014, two months shy of three years after the date that his last departmental remedy had ended in failure. During his lifetime, he never challenged the order of dismissal or its affirmation by the higher departmental fora before this Court or any other judicial forum.

24. After Mahesh Chand's demise, the deceased seems to have worked with much machination. The revisional order had been served on the deceased by pasting a copy of the order on the wall of his residence in the presence of his father and two witnesses. The enthusiasm with which the petitioner was pursuing proceedings against the deceased, it is hard to believe that she would not have known the fate of his revision. Nevertheless, she moved this Court, saying that the revision was still pending. She made this Court pass orders directing a decision of the deceased's revision, which, by then, had already been decided. The Senior Superintendent of Police, Aligarh vide his communication dated 20.10.2014, recounted the entire calendar of events and said that the revision had been decided way back on 30.08.2011. Apparently, this device was resorted to overcome laches on the petitioner's part, or so she might have thought. Even if this vantage of looking at the matter is ignored, the fact remains that it was the petitioner who moved the entire process against the deceased, leading to his dismissal from service. Now, in the present writ petition she has come up with a prayer, apart from seeking quashing of the orders of dismissal passed against her late husband, that she be given compassionate appointment. This is, without doubt, telltale of the petitioner's unholy motives in moving this Court, a year after her husband's demise and four years after her husband lost his remedy before the departmental forum. Indeed this is a case

25. Therefore, quite apart from the legal validity of the proceedings taken against the petitioner's deceased-husband and the orders made against him, given all the facts noticed hereinabove, regarding the

28. Let a copy of this order be communicated to the Commissioner of Police, Aligarh by the office **within a fortnight.**

A. Service Law – Termination of Appointment – Suppression of

Information – Petitioner Ravendra Singh's appointment as Junior Engineer-II (Tele) cancelled vide order dated 10/25.04.2012 for suppressing involvement in a criminal case (Sections 323, 324, 504 IPC) in attestation form – Acquitted in 2005 before submitting form – Central Administrative Tribunal quashed cancellation, directed reinstatement without back wages – Held, suppression of trivial, acquitted criminal case not fatal – *Avtar Singh Vs U.O.I.* and *Ravindra Kumar Vs St. of U.P.* followed, emphasizing employer's discretion to consider special circumstances and antecedents – *Director General of Police, Tamilnadu Vs J. Raghunees* distinguished – Tribunal's order upheld, no back wages for period not served – Both writ petitions (by petitioner and U.O.I.) dismissed. (Para 12-18)

Writ petitions dismissed.

List of Cases cited:

1. The Director General of Police, Tamilnadu, Mylapore Vs J. Raghunees; 2023 SCC OnLine SC 1379
2. Ravindra Kumar Vs St. of U.P.; 2024 SCC OnLine SC 180
3. Avtar Singh Vs U.O.I.; (2016) 8 SCC 471
4. Pawan Kumar Vs U.O.I.; (2022) SCC OnLine SC 532
5. Mohammed Imran Vs St. of Maharashtra; (2019) 17 SCC 696
6. Satish Chandra Yadav Vs U.O.I.; (2023) 7 SCC 530
7. Ram Kumar Vs St. of U.P.; (2011) 14 SCC 709

(Delivered by Hon'ble Vivek Kumar Birla, J.
&
Hon'ble Donadi Ramesh, J.)

1. Heard Shri Punit Kumar Gupta, learned counsel for the petitioner in Writ - A No. 68541 of 2015 and respondent no.2

in connected Writ-A No.41433 of 2015 as well as Shri A.K.Gaur, learned Senior Counsel assisted by Shri Anil Kumar, learned counsel appearing for Union of India in both writ petitions.

2. Writ - A No. 68541 of 2015 has been filed with the following prayer:-

"I. Issue a writ or direction in the nature of certiorari quashing the impugned order dated 27.05.2015 passed by the respondent no.4 (Annexure No.1 to this writ petition) to the extent denying full wages, allowances and other service benefit to the petitioner, from the date when Junior to the petitioner in merit/selection list as given appointment by the respondent No.1 to 3.

II. Issue a writ or direction in the nature of mandamus to the respondent No.1 to 3 to treat the petitioner in service and pay salary and other allowances etc. admissible to the post from date Junior in the merit/select list was given appointment in service, till the date petitioner is taken on duty by the respondents."

3. Writ-A No.41433 of 2015 has been filed with the following prayer:

"(a) issue a writ, order or direction in the nature of Certiorari, calling for the records and quashing the order dated 27.05.2015 (Annexure No.1 of the writ petition) passed by the learned Central Administrative Tribunal, Allahabad, respondent No.1."

4. The facts in both writ petitions are similar, therefore, they are being decided finally with a common judgment.

5. Facts in brief are that pursuant to the advertisement issued by Railway

Recruitment Board, petitioner/respondent no.2-Ravendra Singh applied for the post of Junior Engineer-II (Tele). He appeared in the written test and declared successful, subsequently, he was called for interview and after being selected, his name was sent to General Manager, North Western Railway, Jaipur vide Railway Recruitment Board, Ajmer letter dated 31.08.2011. Thereafter, he joined in the respondent organization on 02.11.2011. Subsequently, the respondent no.3 issued a show cause notice to Ravendra Singh on 12.03.2012 for concealment of fact in replying Item No.11(b) in the Attestation Form. Thereafter, he submitted his reply on 23.03.2011, Annexure-4 to the writ petition. Considering the said reply the respondents have passed an order on 10/25.05.2012, cancelling the appointment of the petitioner. Assailing the said order, petitioner- Ravendra Singh filed Original Application No.1592 of 2012 before the Central Administrative Tribunal, with a consequential prayer to treat the petitioner in service from the date when junior in merit in the select list was given appointment and pay the salary and other consequential benefits including seniority etc.

6. In the counter reply filed on behalf of the respondents before the Tribunal, the facts of the case have not been disputed. It has been submitted that the panel dated 31.08.2011 supplied by R.R.B. has expired on 31.08.2012 in terms of Railway Board Letter dated 15.03.2012 and it will not be feasible to give appointment to those candidates who have furnished false information and suppressed any factual information. And the said warning is also contained in Railway Board's Letter dated 20.10.2013 at Item No.1 in the Attestation Form. It was further stated that the

applicant has furnished false information in his Attestation Form and deliberately concealed the fact regarding his prosecution in a criminal matter. It was further contended that earlier the petitioner was prosecuted in a criminal case registered under Section 323/504/325 IPC.

7. The submission of the learned counsel appearing on behalf of petitioner/respondent no.2-Ravendra Singh is that due to ignorance and mistake, Ravendra Singh has not given true answer to the question relating to prosecution. It is submitted that in the year 2001, an N.C.R. under Section 323, 504 IPC was registered against him and subsequently a chargesheet under Section 323, 324 and 504 IPC was submitted. In the said case, complainant as well as injured Virvati did not support the prosecution version and stated that they named the applicant -Ravendra Singh on saying of villagers and based on the said statement Ravendra Singh was acquitted from charges vide judgment and order passed by the Additional Chief Judicial Magistrate, Court No.5, Aligarh dated 04.03.2005. It was further submitted that at the time of incident Ravendra Singh was aged about 18 years and at the time of filling the Attestation Form, he was 25 years old, submission therefore is that such minor indiscretions should be condoned.

8. Both the learned counsel have relied upon several judgments passed by Hon'ble Apex Court.

9. Considering the facts and circumstances of the case, submissions advanced by the learned counsel for the parties as well as the law laid down by the Hon'ble Apex Court the Central Administrative Tribunal has allowed the Original Application filed by the applicant-

Ravendra Singh with the following observation:-

“11. Accordingly, O.A. is allowed. The impugned order dated 10/25.04.2012 passed by Respondent No.3 is set aside and quashed. The respondents are directed to take a lenient view in the matter and take his joining on the post, he was selected. Respondents are also directed to treat him in service from the date his junior has been given appointment but he will not be entitled to the payment of salary for the period he was not actually worked. No order as to costs.”

10. Assailing the said order, Union of India as well as petitioner in Writ A No.68541 of 2015 and respondent no.2 in Writ A No.41433 of 2015-Ravendra Singh both filed separate writ petitions before this Court.

11. Learned Senior Counsel appearing on behalf of Union of India has contended that the order dated 10/25.04.2012 cancelling the appointment of the petitioner was in accordance with the legislation which is in vogue and he has placed reliance upon warning given in the Attestation Form, which reads as under:-

“1. साक्षांकन प्रपत्र में झूठी सूचना देना अथवा किसी भी प्रकार की तथ्यात्मक सूचना को छिपाना अनर्हता मानी जायेगी और ऐसा करने से अभ्यर्थी सरकार के अधीन नौकरी के लिए अयोग्य ठहराया जा सकता है।

The furnishing of false information or suppression of any factual information in the Attestation Form would be a disqualification and is likely to render the candidate unfit for employment under the Government.

2. यदि इस प्रपत्र को भरने तथा भेजने के पश्चात् हवालात में रखा जाये, दोषी ठहराया जाये, वर्जित आदि किया जाये, तो उसके बारे में यथास्थिती संघ लोक सेवा आयोग अथवा रेल भर्ती बोर्ड अथवा उस प्राधिकारी, जिसे पहले साक्षांकन प्रपत्र भेजा गया है, को ब्यौरे की तुरंत सूचना दी जाय। ऐसा न करने पर यह समझा जायेगा कि तथ्यात्मक सूचना छिपायी गयी है।

If detained, convicted, debarred etc. Subsequent to the completion and submission of this form, the details should be communicated immediately to the Union Public Service Commission or the Railway Recruitment Board or the Authority to whom to Attestation Form has been sent earlier as the case may be, failing which it will be deemed to be a suppression of factual information.

3. यदि किसी व्यक्ति के सेवा-काल में, किसी भी समय यह तथ्य नोटिस में आता है कि इस साक्षांकन प्रपत्र में झूठी सूचना दी गयी है अथवा तथ्यात्मक सूचना छिपायी गयी है तो उसकी सेवाएँ समाप्त की जा सकती हैं।

If the fact that false information has been furnished or that there has been suppression of any factual information in the Attestation Form comes to notice at any time during the service of a person, his services would be liable to be terminated.”

12. However, the information given by the petitioner in the Attestation Form on question that “have you ever been prosecuted”, he replied “No”, which is contrary to the warning given in the Attestation Form. Learned Senior Counsel further contended that as the respondent no.2-Ravendra Singh has concealed

material facts by giving wrong information, therefore, the respondent no.3 has rightly passed the order dated 10/25.04.2012 cancelling the appointment of Ravendra Singh. In support of his argument, learned Senior Counsel has relied upon the judgment of Hon'ble Apex Court in the case of **The Director General of Police, Tamilnadu, Mylapore Vs. J. Raghunees, 2023 SCC OnLine SC 1379**, wherein also the respondent-candidate has not disclosed the complete information with his involvement in criminal case and his appointment was also rejected. Paragraphs 13, 14, 15 and 16 of the said judgment read as under:-

"13. The issue in the matter is not of eligibility of the respondent to the post in the light of Rule 14(b) of the Tamil Nadu Special Police Subordinate Service Rules, 1978 rather that of suppression of material information which was required to be disclosed in column 15 of the verification roll. The respondent has certainly not disclosed the correct information. His honorable acquittal or acquittal by giving benefit of doubt is not material and relevant but what is relevant is the full and complete disclosure of the information regarding his involvement in a criminal case which has been suppressed by him.

14. In Avtar Singh case, a three-Judge Bench of this Court while dealing with a similar kind of situation summarised the legal position by stating that (i) Information given by the candidate to the employer as to his conviction, acquittal, arrest or pendency of a criminal case, whether before or after entering into service must be true and there should be no suppression or false mention of required information. (ii) In cases where conviction or acquittal had already taken place before

filling the application/verification form, the employer may consider all relevant facts available as to antecedents and may take appropriate decision as to the continuance of the employee. (iii) and even if the employee had made truthful declaration of a concluded criminal case, the employer still has the right to consider antecedents of the candidate/employee and cannot be compelled to appoint him/her.

15. In other words, the candidate in the first instance is obliged to give correct information as to his conviction, acquittal or arrest or pendency of the criminal case and there should be no suppression or false mention of required information. Secondly, even if truthful declaration is made by him, he would not be entitled to appointment as a matter of right and that the employer still has the right to consider his antecedents.

16. In the case at hand, though the respondent may be eligible for appointment but since he has not disclosed the complete information with regard to his involvement in a criminal case, wherein he might have been acquitted earlier even before verification, he cannot escape the guilt of suppressing the material information as required by column 15 of the verification roll. Keeping in mind that the respondent was a candidate for recruitment to a disciplined force, the non-disclosure of the information of his involvement in the criminal case and subsequent acquittal therefrom cast a serious doubt upon his character and the antecedents which is sufficient enough to disentitle him from employment."

13. Shri Punit Kumar Gupta, learned counsel appearing for the petitioner in Writ- A No. 68541 of 2015 and respondent no.2 in connected Writ-A No.41433 of 2015 contended that on the date of

submitting the Attestation Form the petitioner/respondent no.2-Ravendra Singh had already acquitted from charges and no case was pending against him, therefore, replying the question in the Attestation Form that “have you ever been prosecuted” he answered “No”. He further argued that in the year 2001 an N.C.R. under Section 323, 504 IPC was registered against the applicant and in trial chargesheet has been submitted against him under Section 323, 324 and 504 IPC, out of which two offences, namely, offence under section 323 and 504 IPC is compoundable in nature and Section 324 IPC provided for imprisonment for a period of three years only. In support of his argument he has relied upon the judgment passed by Hon’ble Apex Court in the case of **Ravindra Kumar Vs. State of U.P. and Others, 2024 SCC OnLine SC 180,** paragraphs 24, 25, 26, 27 and 29 whereof are quoted as under:

“24. More recently in ***Pawan Kumar vs. Union of India and Another, (2022) SCC OnLine SC 532,*** involving appointment to the post of Constable in Railway Protection Force and setting aside the order of discharge due to alleged suppression in the verification form, this Court, after noticing ***Avtar Singh (Supra)*** held as under:-

“11. This cannot be disputed that the candidate who intends to participate in the selection process is always required to furnish correct information relating to his character and antecedents in the verification/attestation form before and after induction into service.

It is also equally true that the person who has suppressed the material information or has made false declaration indeed has no unfettered right of seeking appointment or continuity in service, but at

least has a right not to be dealt with arbitrarily and power has to be judiciously exercised by the competent authority in a reasonable manner with objectivity having due regard to the facts of the case on hand.

It goes without saying that the yardstick/standard which has to be applied with regard to adjudging suitability of the incumbent always depends upon the nature of post, nature of duties, effect of suppression over suitability to be considered by the authority on due diligence of various aspects but no hard and fast rule of thumb can be laid down in this regard.

13. What emerges from the exposition as laid down by this Court is that by mere suppression of material/false information regardless of the fact whether there is a conviction or acquittal has been recorded, the employee/recruit is not to be discharged/terminated axiomatically from service just by a stroke of pen.

At the same time, the effect of suppression of material/false information involving in a criminal case, if any, is left for the employer to consider all the relevant facts and circumstances available as to antecedents and keeping in view the objective criteria and the relevant service rules into consideration, while taking appropriate decision regarding continuance/suitability of the employee into service. What being noticed by this Court is that mere suppression of material/false information in a given case does not mean that the employer can arbitrarily discharge/terminate the employee from service.

19. Consequently, the appeal succeeds and is allowed. The judgment of the Division Bench of the High Court dated 17th November, 2015 and the order of discharge dated 24th April, 2015 and dated 23rd December, 2021 are hereby quashed

and set aside. The Respondents are directed to reinstate the appellant in service on the post of Constable on which he was selected pursuant to his participation in reference to employment notice no. 1/2011 dated 27th February, 2011.

We make it clear that the appellant will not be entitled for the arrears of salary for the period during which he has not served the force and at the same time he will be entitled for all notional benefits, including pay, seniority and other consequential benefits, etc. Necessary orders shall be passed within a period of one month from today. No costs."

25. In Mohammed Imran vs. State of Maharashtra and Others, (2019) 17 SCC 696, no doubt, a case where a candidate made the disclosure of criminal case, this Court speaking through Navin Sinha, J. made the following telling observation which resonates with the hard realities of everyday existence:

"5. Employment opportunities are a scarce commodity in our country. Every advertisement invites a large number of aspirants for limited number of vacancies. But that may not suffice to invoke sympathy for grant of relief where the credentials of the candidate may raise serious questions regarding suitability, irrespective of eligibility. Undoubtedly, judicial service is very different from other services and the yardstick of suitability that may apply to other services, may not be the same for a judicial service.

But there cannot be any mechanical or rhetorical incantation of moral turpitude, to deny appointment in judicial service simpliciter. Much will depend on the facts of a case. Every individual deserves an opportunity to improve, learn from the past and move ahead in life by self-improvement. To make

past conduct, irrespective of all considerations, an albatross around the neck of the candidate, may not always constitute justice. Much will, however depend on the fact situation of a case."

26. We have also kept in mind the recent judgment of this Court in Satish Chandra Yadav vs. Union of India and Others, (2023) 7 SCC 530 and the broad principles set out by this Court in para 93, especially, paras 93.1, 93.3 & 93.7. Even the broad principles set out therein recognize that each case should be scrutinized thoroughly by the public employer concerned and the Court is obliged to examine whether the procedure of enquiry adopted by the authority concerned was fair and reasonable. Avtar Singh (Supra) in para 38.2 has held that while passing the order of cancellation of candidature for giving false information, the employer may take notice of special circumstances of the case, if any, while giving such information. Further, in para 38.4.3 of Avtar Singh (Supra) the principle that, in case of suppression or false information of involvement of criminal case, where acquittal has already been recorded, the employer can still consider all relevant facts available as to antecedents and may take appropriate decision as to the continuance of the employee. We have read and understood the broad principles laid down in Satish Chandra Yadav (supra) with the following crucial para in Avtar Singh (Supra):

"35. Suppression of "material" information presupposes that what is suppressed that "matters" not every technical or trivial matter. The employer has to act on due consideration of rules/instructions, if any, in exercise of powers in order to cancel candidature or for terminating the services of employee. Though a person who has suppressed the

material information cannot claim unfettered right for appointment or continuity in service but he has a right not to be dealt with arbitrarily and exercise of power has to be in reasonable manner with objectivity having due regard to facts of cases."

27. We have also examined the judgment in **Director General of Police, Tamilnadu, Mylapore vs. J. Raghunees**, (2023) SCC OnLine SC 1379 and we find that the case of the appellant is more aligned with the facts in the judgment of this Court in **Pawan Kumar (supra), Sandeep (supra) and Ram Kumar (supra)**. Hence, we find that the judgment in **J. Raghunees (supra)** is clearly distinguishable.

28. The nature of the office, the timing and nature of the criminal case; the overall consideration of the judgement of acquittal; the nature of the query in the application/verification form; the contents of the character verification reports; the socio economic strata of the individual applying; the other antecedents of the candidate; the nature of consideration and the contents of the cancellation/termination order are some of the crucial aspects which should enter the judicial verdict in adjudging suitability and in determining the nature of relief to be ordered.

29. Having discussed the legal position above, it is necessary to set out certain special features that obtain in the case at hand.

i. The appellant hails from the small village Bagapar, P.O. Kataura, Police Station Gauri Bazar, District Deoria, U.P.

ii. On the date of the application, there was no criminal case pending and there was no suppression in the application form.

iii. The criminal case was registered when he was 21 years of age for the offences very similar to the one referred to in *Sandeep Kumar (supra)* and even in the criminal case he was acquitted.

iv. No doubt, the multiple columns in the verification affidavit, questions were asked from him in different permutations and combinations. He must have been in a deep dilemma as there was an imminent prospect of losing his employment.

v. Most importantly, we find from the verification documents fairly and candidly made available by the learned Additional Advocate General, that the verification report after noticing the criminal case and the subsequent acquittal stated that his character was good, that no complaints were found against him and that his general reputation was good.

vi. Not stopping there, the person who visited the spot even wished him a bright future in the report.

vii. The SHO, Gauri Bazar Police Station, who forwarded the report to the Superintendent of Police after reiterating the contents of the report observed that he was acquitted and no appeal was filed. Further, there was no other case pending and nor was any case registered against the candidate.

viii. The SHO certified the character of the candidate as excellent and that he was eligible to do Government Service under the State Government. He annexed the report of the Police Station as well as the report of the Gram Pradhan and the Court documents.

ix. The Superintendent of Police, in his letter to the Commandant, endorsed the report and reiterated that the character of the candidate was excellent.

x. While examining whether the procedure adopted for enquiry by the

*authority was fair and reasonable, we find that the order of cancellation of 12.04.2005 does not even follow the mandate prescribed in Clause 4 of the Form of verification of character set out in the earlier part of this judgment. Like it was found in **Ram Kumar (supra)** instead of considering whether the appellant was suitable for appointment, the Appointing Authority has mechanically held his selection was irregular and illegal because the appellant had furnished an affidavit with incorrect facts. Hence, even applying the broad principles set out in para 93.7 of **Satish Chandra Yadav (supra)**, we find that the order of cancellation dated 12.04.2005 is neither fair nor reasonable. Clause 9 of the recruitment notification has to be read in the context of the law laid down in the cases set out hereinabove.”*

14. Learned counsel for the petitioner has also relied upon the judgment of Hon’ble Supreme Court passed in **Ram Kumar vs. State of U.P. and Others, (2011) 14 SCC 709**

15. In fact, both the counsel appearing for petitioner- Ravindra Singh as well as appearing for Union India have agreed with the observations made in **Ravindra Kumar (supra)**, paragraph 30 whereof reads as under:-

30. On the facts of the case and in the backdrop of the special circumstances set out hereinabove, where does the non disclosure of the unfortunate criminal case, (which too ended in acquittal), stand in the scheme of things? In our opinion on the peculiar facts of the case, we do not think it can be deemed fatal for the appellant. Broad-brushing every non-disclosure as a disqualification, will be unjust and the same will tantamount to being completely

oblivious to the ground realities obtaining in this great, vast and diverse country. Each case will depend on the facts and circumstances that prevail thereon, and the court will have to take a holistic view, based on objective criteria, with the available precedents serving as a guide. It can never be a one size fits all scenario.

16. Considering the contentions raised by both the learned counsels, and also the observations made by the Hon’ble Apex Court in **J. Raghunees (supra)** as well as in **Ravindra Kumar (supra)**. In fact, in **Ravindra Kumar (supra)** the Hon’ble Apex Court has also considered the observations made in **J. Raghunees (supra)** as well as considering the ratio decided in **Avtar Singh vs. Union of India and Others, (2016) 8 SCC 471**. In para 38 of **Avtar Singh (supra)** it has been categorically held that while passing the order of cancellation of candidature for giving false information, the employer may take notice of special circumstances of the case, if any, while giving such information, and further held in para 38.4.3 that suppression or false information of involvement in a criminal case where acquittal had already been recorded, the employer can consider all relevant facts available as to antecedents, and can take appropriate decision. No doubt, on perusal of the facts of this case that crime registered against the petitioner/respondent no.2-Ravendra Singh, under Sections 323, 324 and 504 IPC is trivial in nature, and the facts remains that he was acquitted from charges before submitting his Attestation Form.

17. Taking into consideration the facts and circumstances of the case, and the law laid down by the Hon’ble Apex Court in **J. Raghunees (supra)**, **Ravindra Kumar**

(supra) as well as in Avtar Singh (supra), we do not find any good ground to interfere in the order passed by the Tribunal.

18. However, as observed by the Hon'ble Apex Court in the case of Ravindra Kumar (supra) that employee is not entitled for any arrears of salary for the period during which he has not served, and the same was also taken care by the Tribunal in its order, accordingly, both writ petitions are dismissed.

(2024) 4 ILRA 565

**ORIGINAL JURISDICTION
CRIMINAL SIDE**

DATED: LUCKNOW 01.04.2024

BEFORE

THE HON'BLE SUBASH VIDYARTHI, J.

Application U/S 482. No. 2399 of 2024

Jamin & Anr. ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Sheikh Wali Uz Zaman

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Sections 319, 397, 401 & 482 - Inherent power - Indian Penal Code, 1860 - Sections 147, 148 & 302/149 - Summoning of additional accused - Revisional powers - Ends of justice - Trial court's power to summon additional accused under Section 319 Cr.P.C. not limited by conclusion of trial against original accused - High Court's revisional powers to secure ends of justice. (Para 24-30)

(B) Criminal Procedure Code, 1973 (Cr.P.C.) - Section 319 - Scope and Power of Summoning Additional Accused - Power

under Section 319 Cr.P.C. is to be exercised only during the pendency of trial before the pronouncement of conviction or acquittal - If the trial against the originally summoned accused is concluded, a summoning order under Section 319 is not sustainable. (Para -12)

(C) Criminal Procedure Code, 1973 (Cr.P.C.) - Section 319(4) - Fresh Trial and Rehearing of Witnesses - Once a person is summoned under Section 319 Cr.P.C., the proceedings against them shall commence afresh, and witnesses will be re-heard - held - Conclusion of trial against the other accused persons, who had been summoned originally, does not cause any prejudice to the applicant, as the trial against the applicants would be held afresh and they will have the right to defend themselves in accordance with the law. (Para 24)

Applicants summoned to face trial in connection with an FIR - for murder of complainant's brother - Initially, charges were filed only against two accused - investigation against applicants was pending - Several applications under Section 319 Cr.P.C. were filed to summon applicants - which were rejected - revision allowed application to be reconsidered - leading to impugned order summoning applicants in 2024 - trial against others had concluded - Applicants cannot be summoned now - Court upheld trial court's decision - finding no jurisdictional error and noting sufficient evidence against the applicants.(Para 1 - 23)

HELD: - Impugned order does not stand vitiated merely because trial against other accused persons stands concluded. Non-summoning of accused persons against whom there was ample evidence warranting their trial, would defeat the ends of justice. Order rejecting application under Section 319 Cr.P.C. was set aside by this Court in exercise of its revisional jurisdiction and it is only thereafter, that the trial Court has summoned the applicants under Section 319 Cr.P.C. Any interference with the order summoning the applicants to face trial would in fact defeat the ends of justice, which would be contrary to the object for which the inherent powers of this Court are meant to be exercised. (Para - 25 ,29,30)

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

List of Cases cited:

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

2. Krishnan Vs Krishnaveni, (1997) 4 SCC 241

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

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

1. Heard Sri Sheikh Wali Uz Zaman, the learned counsel for the applicants and Sri Gyanendra Singh, the learned AGA for the State and perused the record.

2. By means of the instant application filed under Section 482 Cr.P.C., the applicants have prayed for quashing of the order dated 21.02.2024 passed by the learned Additional Session Judge, Court No. 4, Hardoi in Misc. Case No. 448 of 2021 in Session Trial No. 582 of 2009, summoning the applicants to face trial of the offence alleged in F.I.R. No. 523 of 2009 under Sections 147, 148, 302/149 IPC, Police Station Bilgram, District Hardoi.

3. Briefly stated, facts of the case are that on 14.04.2009 one Waris (father of the opposite party no. 2) had lodged F.I.R. No. 523 of 2009 under Sections 147, 148, 302/149 IPC, in Police Station Bilgram, District Hardoi against 5 persons, including the applicants, stating that when the complainant was going to his fields at about 02:15 p.m. with his brother Arif, the accused persons met them on the way and on the exhortation of the applicants and one Irfan alias Munna, the other accused persons Irshad and Abdul Aziz fired shots by pistols. The complainant's brother got

injured and he fell down on the spot. Upon hearing the gun-shot and the cries of the complainant, Zaheer Khan and Jaipal reached on the spot and challenged the accused persons whereupon they ran away.

4. After investigation, a charge-sheet was submitted on 14.07.2009 against Irshad and Irfan for offences under Sections 147, 148, 149 and 302 IPC and the investigation against the applicants remained pending. The trial Court took cognizance of the offences and summoned Irshad and Irfan to face the trial.

5. An application under Section 319 Cr.P.C. was filed for summoning the other named accused persons also, but it was rejected by means of an order dated 29.01.2010 for the reason that the witnesses PW-1 and PW-2 were yet to be cross-examined.

6. The complainant challenged the order dated 29.01.2010 by filing Criminal Revision No. 203 of 2010 and this Court disposed off the revision by means of an order dated 14.05.2010 by observing that the prayer for summoning the accused persons be considered after the cross-examination of the witnesses was over.

7. After cross-examination of PW-1 and PW-2, the complainant again filed an application for summoning the rest of the accused persons under section 319 Cr.P.C., but this too was rejected by means of an order dated 19.07.2010. The complainant filed Criminal Revision No. 400 of 2010, challenging the order dated 19.07.2010.

8. During pendency of Criminal Revision No. 400 of 2010 before this Court, the trial was concluded by the judgment and order dated 19.10.2011

wherein it was held that the accused persons Irshad and Irfan created an unlawful assembly with the other accused persons and they killed the deceased Arif by shooting at him with a firearm. The accused persons Irshad and Irfan were convicted for offences under Sections 147, 148, 302/149 I.P.C. and they were acquitted of rest of the charges by means of a judgment and order dated 19.10.2011 passed by the trial Court. They were sentenced to undergo rigorous imprisonment for a period of one year for the offence under Section 147 I.P.C., two years for the offence under Section 148 I.P.C. and life imprisonment and payment of Rs.5,000/- fine for the offence under Section 302/149 I.P.C. and to undergo imprisonment for six months in case of failure to pay fine.

9. Irshad and Irfan filed Criminal Appeal No. 1886 of 2011 challenging the aforesaid judgment and order of conviction and sentence, which is still pending.

10. Criminal Revision No. 400 of 2010 was allowed by means of a judgment and order dated 14.09.2021 passed by this Court whereby the order dated 19.07.2010 was set aside and the application was directed to be decided afresh. On 22.09.2021, the complainant again filed an application under Section 319 Cr.P.C. in compliance of the order dated 14.09.2021 passed by this Court in Criminal Revision No. 200 of 2021. This application was allowed by means of the impugned order dated 21.02.2024.

11. The trial Court has held in the impugned order dated 21.02.2024 that the prosecution witnesses have stated that the incident was given effect to by the convicted persons along with the applicants

and Abdul Aziz under a common intention. Abdul Aziz has died. A prima facie case was made out against the applicants for their trial.

12. Challenging validity of the aforesaid order summoning the applicants under Section 319 Cr.P.C., the learned Counsel for the applicants has submitted that the trial Court can summon any person under section 319 Cr.P.C. only during pendency of the trial whereas in the present case, the trial stood concluded long before passing of the order under Section 319 Cr.P.C. and, therefore, the order is without jurisdiction. In support of this submission, the learned Counsel for the applicant has placed reliance upon a judgment of the Hon'ble Supreme Court in **Sukhpal Singh Khaira v. State of Punjab**, (2023) 1 SCC 289, wherein it was held that: -

“39.(I) Whether the trial court has the power under Section 319CrPC 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?”

The power under Section 319 CrPC 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.

40.(II) Whether the trial court has the power under Section 319 CrPC for summoning additional accused when the trial in respect of certain other absconding accused (whose presence is subsequently secured) is ongoing/pending, having been bifurcated from the main trial?

The trial court has the power to summon additional accused when the trial is proceeded in respect of the absconding accused after securing his presence, subject to the evidence recorded in the split-up (bifurcated) trial pointing to the involvement of the accused sought to be summoned. But the evidence recorded in the main concluded trial cannot be the basis of the summoning order if such power has not been exercised in the main trial till its conclusion.

41.(III) What are the guidelines that the competent court must follow while exercising power under Section 319 CrPC?

41.1. If the competent court finds evidence or if application under Section 319 CrPC is filed regarding involvement of any other person in committing the offence based on evidence recorded at any stage in the trial before passing of the order on acquittal or sentence, it shall pause the trial at that stage.

41.2. The court shall thereupon first decide the need or otherwise to summon the additional accused and pass orders thereon.

41.3. If the decision of the court is to exercise the power under Section 319 CrPC and summon the accused, such

summoning order shall be passed before proceeding further with the trial in the main case.

41.4. If the summoning order of additional accused is passed, depending on the stage at which it is passed, the court shall also apply its mind to the fact as to whether such summoned accused is to be tried along with the other accused or separately.

41.5. If the decision is for joint trial, the fresh trial shall be commenced only after securing the presence of the summoned accused.

41.6. If the decision is that the summoned accused can be tried separately, on such order being made, there will be no impediment for the court to continue and conclude the trial against the accused who were being proceeded with.

41.7. If the proceeding paused as in para 41.1 above, is in a case where the accused who were tried are to be acquitted, and the decision is that the summoned accused can be tried afresh separately, there will be no impediment to pass the judgment of acquittal in the main case.

41.8. If the power is not invoked or exercised in the main trial till its conclusion and if there is a split-up (bifurcated) case, the power under Section 319 CrPC can be invoked or exercised only if there is evidence to that effect, pointing to the involvement of the additional accused to be summoned in the split-up (bifurcated) trial.

41.9. If, after arguments are heard and the case is reserved for judgment the occasion arises for the Court to invoke

and exercise the power under Section 319CrPC, the appropriate course for the court is to set it down for re-hearing.

41.10. On setting it down for re-hearing, the above laid down procedure to decide about summoning; holding of joint trial or otherwise shall be decided and proceeded with accordingly.

41.11. Even in such a case, at that stage, if the decision is to summon additional accused and hold a joint trial the trial shall be conducted afresh and de novo proceedings be held.

mmoned accused as indicated earlier:

(a) The main case may be decided by pronouncing the conviction and sentence and then proceed afresh against summoned accused.

(b) In the case of acquittal the order shall be passed to that effect in the main case and then proceed afresh against summoned accused.”

13. Before proceeding any further, it would be appropriate to have a look at the statutory provision contained in Section 319 Cr.P.C., which reads as follows: -

“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 afresh, 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.”*

14. The limitations put by the words “*in the course of any inquiry into, or trial of, an offence*” used in Section 319 Cr.P.C. and explained in **Sukhpar Singh Khaira** (Supra), are in respect of the powers of the trial Court to summon an accused person under this power.

15. In the present case, the applicants were named in the F.I.R. and it was alleged that when the complainant was going to his fields with his brother, on the exhortation of the applicants, the other accused persons Irshad and Abdul Aziz had killed the complainant’s brother by firing shots with pistols. The investigating officer had submitted a charge-sheet against Irshad and

Irfan on 14.07.2009 and the investigation remained pending against the applicant and it was never concluded. The complainant had filed an application under Section 319 Cr.P.C. for summoning the applicants during pendency of the trial, after recording of examination-in-chief of prosecution witnesses PW-1 and PW-2, but it was rejected on 29.01.2010 for the reason that the witnesses were yet to be cross-examined. After cross-examination of PW-1 and PW-2, the complainant again filed an application for summoning the rest of the accused persons under section 319 Cr.P.C., but this too was rejected by means of an order dated 19.07.2010. The complainant filed Criminal Revision No. 400 of 2010, challenging the order dated 19.07.2010.

16. During pendency of Criminal Revision No. 400 of 2010 before this Court, the trial was concluded by the judgment and order dated 19.10.2011 wherein it was held that the accused persons Irshad and Irfan created an unlawful assembly with the other accused persons and they killed the deceased Arif by shooting at him with a firearm. The accused persons Irshad and Irfan were convicted and sentenced for offences under Sections 147, 148, 302/149 I.P.C. and they were acquitted of rest of the charges by means of a judgment and order dated 19.10.2011 passed by the trial Court.

17. It appears that the fact of pendency of Criminal Revision No. 400 of 2010 was not brought to the notice of the trial Court.

18. Irshad and Irfan filed Criminal Appeal No. 1886 of 2011 challenging the aforesaid judgment and order of

conviction and sentence, which is still pending.

19. Criminal Revision No. 400 of 2010 was allowed by means of a judgment and order dated 14.09.2021 passed by this Court whereby the order dated 19.07.2010 was set aside and the application was directed to be decided afresh. Although the applicant was represented through an Advocate in Criminal Revision No. 400 of 2010, it appears that the applicant's Counsel did not appear to assist the Court at the time of decision of the revision and the fact of the trial having been concluded and the accused persons having been convicted and sentenced, was not brought to the notice of this Court while it was deciding the revision.

20. It is in compliance of the order dated 14.09.2021 passed by this Court in exercise of its revisional jurisdiction, that the trial Court has passed the impugned order deciding the application under Section 319 Cr.P.C.

21. The power of revision is conferred by Section 319 Cr.P.C. which reads thus: -

“397. Calling for records to exercise of powers of revision.—(1) The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be

released on bail or on his own bond pending the examination of the record.

Explanation.—All Magistrates, whether Executive or Judicial, and whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of Section 398.

(2) The powers of revision conferred by sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding.

(3) If an application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them."

22. **In Krishnan v. Krishnaveni**, (1997) 4 SCC 241, the Hon'ble Supreme Court explained the scope of revisional powers of this Court in the following words: -

"7... Ordinarily, in the matter of exercise of power of revision by any High Court, Section 397 and Section 401 are required to be read together. Section 397 gives powers to the High Court to call for the records as also suo motu power under Section 401 to exercise the revisional power on the grounds mentioned therein, i.e., to examine the correctness, legality or propriety of any finding, sentence or order, recorded or passed and as to the regularity of any proceedings of such inferior court, and to dispose of the revision in the manner indicated under Section 401 of the Code. The revisional power of the High Court merely conserves the power of the High Court to see that justice is done in

accordance with the recognised rules of criminal jurisprudence and that its subordinate courts do not exceed the jurisdiction or abuse the power vested in them under the Code or to prevent abuse of the process of the inferior criminal courts or to prevent miscarriage of justice."

23. The ultimate aim of every investigation and inquiry, whether by the police or by the Magistrate, is to ensure that the actual perpetrators of the crime are correctly booked and the innocents are not arraigned to stand trial. If the police does not conclude investigation against some of the accused persons and the trial Court also does not summon the accused persons after enquiry or during trial and it wrongly rejects an application under Section 319 Cr.P.C., there are no limitations on the powers of this Court under Section 397/401 Cr.P.C. to revise and reverse an order passed rejecting an application under Section 319 Cr.P.C. merely because the trial against the originally summoned accused persons stood concluded during pendency of the revision and has resulted in conviction and sentence of those accused persons, more particularly when the trial Court has recorded that incident was given effect to at the exhortation of the persons sought to be summoned under Section 319 Cr.P.C.

24. Section 319 (4) Cr.P.C. provides that where the Court proceeds against any person under sub-section (1) of Section 319 then the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard. Therefore, the conclusion of trial against the other accused persons, who had been summoned originally, does not cause any prejudice to the applicant, as the trial against the applicants would be held afresh and they

will have the right to defend themselves in accordance with the law.

25. Therefore, keeping in view the peculiar facts and circumstances of the case, I am of the considered view that the impugned order dated 21.02.2024 does not stand vitiated merely because the trial against the other accused persons stands concluded.

26. The learned Counsel for the applicant next submitted that a person cannot be summoned under Section 319 Cr.P.C. on the basis of a mere probability of complicity and the crucial test is that the evidence would lead to his conviction if it goes unrebutted. In support of this contention, he has placed reliance on the Constitution Bench judgment in the case of **Hardeep Singh v. State of Punjab**, (2014) 3 SCC 92, wherein it was held that: -

“117.5. Though under Section 319(4)(b) CrPC the accused subsequently impleaded is to be treated as if he had been an accused when the court initially took cognizance of the offence, the degree of satisfaction that will be required for summoning a person under Section 319 CrPC would be the same as for framing a charge. The difference in the degree of satisfaction for summoning the original accused and a subsequent accused is on account of the fact that the trial may have already commenced against the original accused and it is in the course of such trial that materials are disclosed against the newly summoned accused. Fresh summoning of an accused will result in delay of the trial therefore the degree of satisfaction for summoning the accused (original and subsequent) has to be different.”

27. In the present case, the witnesses PW-1 and PW-2 have stated about that the previously tried accused had shot at the victim at the exhortation of the applicant. The trial stands concluded by the judgment and order dated 19.10.2011 wherein it was held that the accused persons Irshad and Irfan created an unlawful assembly with the other accused persons and they killed the deceased Arif by shooting at him with a firearm. In case the aforesaid evidence remains unrebutted, the same would lead to conviction of the applicant.

28. Therefore, there is no illegality in the order summoning the applicant under Section 319 Cr.P.C.

29. Section 482 Cr.P.C. saves the inherent powers of the High Court to make such orders as may be necessary to secure the ends of justice. Non-summoning of accused persons against whom there was ample evidence warranting their trial, would defeat the ends of justice. The order rejecting the application under Section 319 Cr.P.C. was set aside by this Court in exercise of its revisional jurisdiction and it is only thereafter, that the trial Court has summoned the applicants under Section 319 Cr.P.C. Any interference with the order summoning the applicants to face trial would in fact defeat the ends of justice, which would be contrary to the object for which the inherent powers of this Court are meant to be exercised.

30. In view of the foregoing discussion, the application filed under Section 482 Cr.P.C. lacks merit and the same is hereby **dismissed**.

(2024) 4 ILRA 573
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 08.04.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482. No. 2713 of 2024

Ms. Sapna @ Sapna Choudhary ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
 Sri Keshav Prasad

Counsel for the Opposite Parties:
 G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Indian Penal Code, 1860 - Section 406, 420 - Constitutional Law - Fundamental Rights - Passport Act - Articles 19(1)(d), 19(1)(g), 21; Right to travel abroad as part of personal liberty guaranteed under Article 21 and 19(1)(g) Notification dated 25.08.1993; Office Memorandum dated 10.10.2019 - Passport - Personal Liberty - Travel Abroad - Fundamental Right - Right to a passport is a fundamental right of Indian citizens - Right to travel abroad as part of personal liberty guaranteed under Article 21 and 19(1)(g) - No statutory bar for granting no objection for passport renewal/issue during pendency of criminal case; discretion with court. (Para - 10,11,12)

Applicant's passport renewal/re-issue rejected by trial court; applicant filed Section 482 Cr.P.C. application.(Para 10-13)

HELD: - Impugned order rejecting passport renewal/re-issue set aside; fresh application to be decided within one month. (Para 12-13)

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

List of Cases cited:

1. Maneka Gandhi Vs U.O.I. ,1978 (1) SCC 248

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

1. Heard Ms Priti Singh, Advocate assisted by Sri Pramod K. Tiwari, Sanklan Porwal and Sri Keshav Prasad, learned counsel for the petitioner as well as Sri Surya Bhan Pandey, learned Sr. Advocate and Deputy Solicitor General of India assisted by Sri Varun Pandey, learned counsel for the Union of India and Sri Ashok Kumar Srivastava, learned A.G.A. for the State and perused the record.

2. The instant application under Section 482 Cr.P.C. has been for grant of permission/No objection for issuance of Passport to the applicant Mrs. Sapna @ Sapna Choudhary D/o Sh. Bhupender @ Bhupender Attri presently residing at: ATS Kocoon, Flat No. 5041, Section 109, Gurugram, Haryana in Case Crime No. 621/2018, under Section 406/420 I.P.C., Police Sattion Ashiyana, District Lucknow in so far it relates to the applicant, pending in the court of Additional Chief Judicial Magistrate, Court No. 29, District Lucknow be setting aside order dated 21.12.2023.

3. Learned counsel for the applicant submits that on 13.10.2018, the respondent No.2 who is posed as Sub-Inspector at Police Station Ashiyana, District Lucknow lodged a compaint/application against the applicant and others. Upon the aforesaid application on 14.10.2018, an F.I.R. got registered in Case Crime No. 0621 of 2018, under Section 406/420 I.P.C. Police Station Ashiyana, District Lucknow

4. Learned counsel for the applicant submits that passport was issued to the applicant by Regisional Passport Office

concerned. The validity of the said passport has been expired. Learned counsel for the applicant further submits that the applicant is an artist/actress and is required to travel to various destinations/countries for her performances and she is required to move application seeking permission to travel abroad every time she travels. The entire process is not only causing difficulty to the petitioner but also putting burden upon the trial court and due to the issuance of the short validity passport to the applicant, the applicant is unable to get visas for many host countries where she is required to perform or to attend functions, which is resulting in loss of business and income to the applicant and she prays for permission/NOC to get her passport renewed for the period of 10 years.

5. Learned counsel for the applicant further submits that an application was filed by the applicant before the court of Additional Chief Judicial Magistrate, Court No. 29, District Lucknow for grant of permission for renewal of passport, which was rejected by means of order dated 21.12.2023 observing therein that this Court has no jurisdiction for granting the permission of renewal of passport.

6. Learned counsel for the applicant further submits that the applicant has been falsely implicated in Crime No. 621/2018, under Sections 406 and 420 I.P.C., Police Station Ashiyana, District Lucknow and in that case, the applicant is already on bail. It is submitted that, though the criminal case pending against the present applicant is petty in nature, but now a days such criminal cases are also take a long time to be decided finally and till then it will not be proper either to withhold no objection or to refuse the renewal/reissue of passport to the applicant. She further submitted that in case

applicant, is acquitted in future, then loss, which the applicant may suffer by not going abroad for the purpose of her professional work can not be compensated in any manner. Such refusal also infringes the applicant's constitutional right available to her under Article 19 & 21 of the Constitution of India.

7. In support of her argument, learned counsel for the applicant has relied upon the notification of Ministry of External Affairs, New Delhi dated 25.08.1993, which

"G.S.R. 570(E).--In exercise of the powers conferred by clause (a) of Section 22 of the Passports Act 1967 (15 of 1967) and in supersession of the notification of the Government of India in the Ministry of External Affairs No. G.S.R. 298(E), dated the 14th April, 1976, the Central Government, being of the opinion that it is necessary in public interest to do so, hereby exempts citizens of India against whom proceedings in respect of an offence alleged to have been committed by them are pending before a criminal court in India and who produce orders from the court concerned permitting them to depart from India, from the operation of the provisions of Clause (f) of sub-section (2) of Section 6 of the said Act, subject to the following conditions, namely:-

(a) the passport to be issued to every such citizen shall be issued -

(i) for the period specified in order of the court referred to above, if the court specified a period for which the passport has to be issued; or

(ii) if no period either for the issue of the passport for the travel abroad

is specified in such order, the passport shall be issued for a period of one year;

(iii) if such order gives permission to travel abroad for a period less than one year, but does not specify the period of validity of the passport, the passport shall be issued for one year; or

(iv) if such order gives permission to travel abroad for a period exceeding one year, and does not specify the validity of the passport, then the passport shall be issued for the period of travel abroad specified in the order;

(b) any passport issued in terms of (a)(ii) and (a)(iii) above can be further renewed for one year at a time, provided the applicant has not travelled abroad for the period sanctioned by the court; and provided further that, in the meantime, the order of the court is not cancelled or modified.

(c) any passport issued in terms of (a)(i) above can be further renewed only on the basis of a fresh court order specifying a further period of validity of the passport or specifying a period for travel abroad;

(d) the said citizen shall give an undertaking in writing to the passport-issuing authority that he shall, if required by the court concerned, appear before it at any time during the continuance in force of the passport so issued."

8. Thus, learned counsel for the applicant submits that the impugned order dated 21.12.2023 is totally illegal, perverse and arbitrary as the same is passed without application of judicial mind and also without considering the

notification of Ministry of External Affairs, Government of India, New Delhi, therefore, the same is liable to be quashed.

9. On the other hand, learned counsel for the Union of India has placed a notification of the Government of India dated 25.08.1993 (which has already been quoted above) and an Office Memorandum dated 10.10.2019 (which is being quoted hereunder) issued by the Ministry of External Affairs, Government of India, New Delhi. He has also placed an order passed by co-ordinate Bench of this Court dated 02.02.2024 passed in Application under Section 482 Cr.P.C. No.839 of 2024 and submits that there is no restriction to the learned trial court to direct for grant of permission for renewal of passport. He further submits that as per aforesaid notification and order passed by the co-ordinate Bench of this Court, the impugned order dated 21.12.2023 passed by Additional Chief Judicial Magistrate, Court No. 29, District Lucknow, on its face appears to be passed without application of judicial mind and without considering the aforesaid notification. Thus, the impugned order is liable to be quashed and authorities may be directed to consider the case for renewal of her passport. The Office Memorandum dated 10.10.2019 is being quoted hereunder:

**Office Memorandum dated 10.10.2019
issued by the Ministry of External
Affairs, Government of India, New
Delhi:-**

**No. VI/401/1/5/2019
Government of India
Ministry of External Affairs
PSP Division**

Patiala House Annexe, Tilak Marg
New Delhi, the 10th October 2019

OFFICE MEMORANDUM

Subject: Issue of passports to applicants against whom criminal cases are pending before a court of law in India.

Reference is invited to Notification No. GSR 570(E) dated 25.8.1993 regarding issuance of passports to applicants who have criminal proceedings pending against them and whose applications would attract the provisions of clause (f) of sub-section (2) of Section 6 of the Passports Act, 1967.

2. GSR 570(E) dated 25.8.1993 is reproduced below for reference:

"G.S.R. 570(E).--In exercise of the powers conferred by clause (a) of Section 22 of the Passports Act 1967 (15 of 1967) and in supersession of the notification of the Government of India in the Ministry of External Affairs No. G.S.R. 298(E), dated the 14th April, 1976, the Central Government, being of the opinion that it is necessary in public interest to do so, hereby exempts citizens of India against whom proceedings in respect of an offence alleged to have been committed by them are pending before a criminal court in India and who produce orders from the court concerned permitting them to depart from India, from the operation of the provisions of Clause (f) of sub-section (2) of Section 6 of the said Act, subject to the following conditions, namely:-

(a) the passport to be issued to every such citizen shall be issued -

(i) for the period specified in order of the court referred to above, if the court specified a period for which the passport has to be issued; or

(ii) if no period either for the issue of the passport for the travel abroad is specified in such order, the passport shall be issued for a period of one year;

(iii) if such order gives permission to travel abroad for a period less than one year, but does not specify the period of validity of the passport, the passport shall be issued for one year; or

(iv) if such order gives permission to travel abroad for a period exceeding one year, and does not specify the validity of the passport, then the passport shall be issued for the period of travel abroad specified in the order;

(b) any passport issued in terms of (a)(ii) and (a)(iii) above can be further renewed for one year at a time, provided the applicant has not travelled abroad for the period sanctioned by the court; and provided further that, in the meantime, the order of the court is not cancelled or modified.

(c) any passport issued in terms of (a)(i) above can be further renewed only on the basis of a fresh court order specifying a further period of validity of the passport or specifying a period for travel abroad;

(d) the said citizen shall give an undertaking in writing to the passport-issuing authority that he shall, if required by the court concerned, appear before it at any time during the continuance in force of the passport so issued."

3. It may be noted that applicants may be refused passports only on grounds mentioned under Section 6(2) of the Passports Act, 1967. Section 6(2)(f) of the Act states that the passport authority shall refuse to issue a passport or travel document to an applicant on the ground that proceedings in respect of an offence alleged to have been committed by the applicant are pending before a criminal court in India. GSR 570(E) dated 25.8.1993 was introduced to give relief to such applicants against whom criminal proceedings are pending before any Court of law in India but who may need to travel abroad for some urgent business. With an undertaking under GSR 570(E) and an order from the Court, an applicant could be issued a short validity passport of one year validity for the period specified by the Court.

4. It has been noticed that there are an increasing number of references being received regarding passport applications attracting Section 6(2)(f). It has also been brought to Ministry's notice that there are a number of complex issues involved while processing such applications. During the proceedings in a recent court case, the Hon'ble High Court of Delhi in W.P. (CRL) No. 2844/2018 /CRL.M.A. 48674/2018 has directed that guidelines be issued by the Ministry reiterating the procedure for processing of such applications and emphasizing that such applications need to be processed with due care and diligence.

5. In view of the above, the following instructions may be adopted while processing the passport applications in respect of those applicants who may have criminal proceedings pending before a criminal court in India:

(i) The provisions of GSR 570 (E) may be strictly applied in all case. GSR 570 (E) is a statutory notification and hence, forms part of the Rules. It is to be noted that as per Section 5 (2) of the Passports Act, 1967, the passport authority shall be order in writing take a decision whether to issue or refuse a passport, after making such inquiry, if any, as it may consider necessary. Moreover, Section 7 of the Passports Act, provides that a passport or travel document may be issued for a shorter period than the prescribed period if the passport authority, for reasons to be communicated in writing to the applicant, considers in any case that the passport or travel document should be issued for a shorter period. Rule 12 of the Passport Rules, 1980 only states that an ordinary passport shall be in force for a period of 10 years which implies that an ordinary passport cannot be issued beyond a period of 10 years.

(ii) Whenever an applicant is submitting a 'No Objection Certificate' (NOC) from a Court of law in India, the applicant should be advised that undertaking as per GSR 570(E) should be complete in all respects and should mention all the pending criminal cases against the applicant. The undertaking will have a not clearly stating that if any false or incomplete information is submitted by an applicant, then his passport application is liable to be rejected.

(iii) Extant instructions clearly lay down that such applications should be processed on pre- Police Verification (PV) mode. "Pre-PV" would be mandatory in all cases of applications submitted with GSR 570(E) to ensure that the undertaking submitted by the applicant is properly matched with the criminal cases mentioned

in the Police Verification Report (PVR). Hence, such applications should not be accepted under Tatkaal nor such applications be moved to “post-PV” mode or “No-PV” mode without proper justification and approval to be recorded in writing.

(iv) If an undertaking is incomplete or misleading and the applicant is found to have suppressed details of other criminal cases against the applicant, a Show Cause Notice should be issued to the applicant and action initiated against that applicant as per provisions of Section 12 of the Passports Act, 1967. If information that an applicant has obtained a passport by making a false submission or by suppressing material facts comes to light after the passport has been issued, the passport may be impounded or revoked as per provision of Section 10 (3) (b) of the Passports Act, 1967 after following the due procedure.

(v) In case where the first police verification (PV) is 'Adverse', secondary police verification may be generated. While a secondary PV is generated, it should be accompanied by a detailed letter seeking clarification regarding the pending criminal cases against the applicant and the status of these cases. Apart from generating secondary PVR, the passport officers may, if considered necessary, call for discreet enquiry through the police authorities by sending the court order submitted by the applicant or even seek verification from other government agencies/departments, as the case may be.

(vi) In case where the secondary Police Verification is also 'Adverse', it may be examined whether the details brought out in the police report match the undertaking submitted by the applicant. It may be noted that mere filing of FIRs and cases under investigation do not come

under the purview of Section 6(2)(f) and that criminal proceedings would only be considered pending against an applicant if a case has been registered before any Court of law and the court has taken cognizance of the same.

(vii) If the details given in the police report and the undertaking submitted by the applicant are matching, then the 'No Objection Certificate' issued by a Court of law submitted by the applicant would take precedence over any 'Adverse' report submitted by the police. In such cases, the 'Adverse' report may be overruled with the written approval of the Passport Officer.

(viii) If the details given in the PVR and the undertaking submitted by the applicant are at variance, then a notice may be issued to the applicant calling for clarification and advising the applicant to submit details of all pending criminal cases as well as to submit a revised No Objection Certificate (NOC).

(ix) If it is brought to the notice of the authority that an applicant has criminal proceedings arrayed against applicant before several courts of law, then the applicant may be advised to get NOC from all the concerned court (s). Normally, the Court Order would make a mention of the cases pending against the applicant as well as the prayer made by the applicant. This may be examined along with the undertaking submitted by the applicant and complaints or other court orders, if any, that have been received against the applicant.

(x) It may be noted that GSR 570(E) only exempts and applicant from the operation of Section 6 (2)(f) and none of the other sub-sections of Section 6(2) of the Passports Act, 1967.

(xi) A revised Undertaking under GSR 570(E) is attached at Annexure 'A'.

(xii) Passport Officers may issue an internal SOP along the above lines so that there is no confusion in handling of applications that would attract provisions of section 6(2)(f) of the Passports Act, 1967.

6. The above instructions may be noted for strict compliance with immediate effect.

**Annexure 'A' UNDERTAKING
(to be submitted on plain paper as per provisions of GSR-570(E) dated 25.08.1993)**

I am applying/have applied for passport with the following details:-

- (a) Name :
- (b) Date of Birth :
- (c) Father's Name :
- (d) Mother's Name :
- (e) Present Address :

2. The Criminal case(s) with following details is/are pending against me:

(if more than one case is pending, details of all cases may be provided.

Additional sheet giving complete information may be attached)

- (a) Case No. :
- (b) Name of Court :
- (c) Details of Investigating Agency (Please provide details of Police station Investigating Officer, etc.) :
- (d) Last date of hearing :
- (e) Next date of hearing :

3. I hereby undertake that I shall, if required by the Court concerned, appear before it at any time during the continuance in force of the passport so issued.

4. I am aware that it is an offence under the Passports Act, 1967 to furnish any false information or to suppress any

material information with a view to obtaining a passport or any other travel document.

5. The above information given by me in this undertaking and enclosures is true and I am solely responsible for its accuracy.

(Signature of the Passport applicant)

Name.....

Mobile No.....

Date:.....

Place:.....

10. After considering the arguments as advanced by learned counsel for the parties as well as after perusal of record, this Court finds that Under Article 19(1)(d) and Article 21 of the Constitution of India, the citizens of the country are entitled for passport. In **Maneka Gandhi Vs. Union of India 1978 (1) SCC 248**, the Apex Court has held that having passport is a fundamental right of the citizen of India and a citizen can not be deprived of such fundamental right and the Hon'ble Supreme Court in paragraph Nos. 214 and 215 was pleased to observe as under:

214. In India, at any rate, we are all certainly governed by our Constitution. The fact that the affected petitioner may not, as a result of a particular order, be able to do something intended to be done by her abroad cannot possibly make the governmental action in India either ineffective or immune from judicial scrutiny or from an attack made on the ground of a violation of a fundamental right which inheres in an Indian citizen. The consequences or effects upon the petitioner's possible actions or future activities in other countries may be a factor which may be weighed, where relevant, with other relevant facts in a particular

case in judging the merits of the restriction imposed. It will be relevant insofar as it can be shown to have some connection with public or national interests when determining the merits of an order passed. It may show how she has become a "person aggrieved" with a cause of action, by a particular order involving her personal freedom. But, such considerations cannot curtail or impair the scope or operation of fundamental rights of citizens as protections against unjustifiable actions of their own Government. Nor can they, by their own force, protect legally unjustifiable actions of the Government of our country against attacks in our own courts.

215. In order to apply the tests contained in Articles 14 and 19 of the Constitution, we have to consider the objects for which the exercise of inherent rights recognised by Article 21 of the Constitution are restricted as well as the procedure by which these restrictions are sought to be imposed. Both substantive and procedural laws and actions taken under them will have to pass tests imposed by Articles 14 and 19 whenever facts justifying the invocation of either of these articles may be disclosed. For example, an international singer or dancer may well be able to complain of an unjustifiable restriction on professional activity by a denial of a passport. In such a case, violations of both Articles 21 and 19(1)(g) may both be put forward making it necessary for the authorities concerned to justify the restriction imposed, by showing satisfaction of tests of validity contemplated by each of these two articles."

11. Thus, this Court after considering the aforesaid judgment of Hon'ble the Supreme Court in the case of **Maneka**

Gandhi (Supra) this court is of the view that right to travel abroad is a part of the personal liberty guaranteed under Article 21 and 19 (1) (g) of the Constitution of India and in addition thereto a careful reading of provisions of the Passport Act and the Notification dated 25.08.1993 alongwith the Office Memorandum dated 10.10.2019 in the light of it's legislative backgrounds as mentioned above, it is clear that passport or travel document of a person, who is facing trial can be refused by the authority concerned during pendency of his criminal case, but there is no statutory bar for giving no objection by the court concerned. No hard and fast straight jacket formula can be laid down regarding issuance of permission or giving no objection by the court concerned for issuance of passport. It is always discretion of the court concerned and depend upon the facts and circumstances of each case, act and conduct of the accused as well as nature of alleged offence committed by him/her and stage of trial, etc. Some time on account of enmity or ill will one party enmesh the other party in a frivolous criminal case to settle his personal score, therefore, in the interest of justice, it is necessary to consider all aspects of the matter and surrounding circumstances while granting or refusing the no objection for renewal or reissue of passport or travel documents by the court concerned or by the authorities concerned and the trial in the above case is not likely to conclude very soon. These were relevant factors to be considered by the learned Trial Court while passing the impugned order.

The learned trial court had completely ignored the Notification issued by Ministry of External Affairs, New Delhi dated 25.08.1993 as well as Office Memorandum dated 10.10.2019 issued by

the Ministry of External Affairs, Government of India, New Delhi (referred above) while passing the impugned order and had rejected the application of the applicant for grant of permission for renewal/re-issue of passport, thus, the impugned order is not sustainable in the eyes of law, therefore, the same is liable to be set aside/reversed.

12. In view of above, in the light of the notification dated 25.08.1993 and the Office Memorandum dated 10.10.2019 as well as the judgment passed by Hon'ble the Supreme Court in the case of Maneka Gandhi (Supra) and considering the larger mandate of the Article 19 and 21 of the Constitution of India, the impugned order dated 21.12.2023 passed by Additional Chief Judicial Magistrate, Court No. 29, District Lucknow, by means of which application for renewal/re-issue of passport of applicant was rejected, is hereby set aside and reversed.

13. Accordingly, the instant application under Section 482 Cr.P.C. is **allowed** with following directions:

(i) The applicant shall move a fresh application along with certified copy of this order for renewal/re-issue of her passport before the concerned Regional Passport Officer within 20 days from the date of this order.

(ii) In case such application is moved by the applicant, within the time stipulated by this Court, the concerned Regional Passport Officer/authority shall decide the application and pass an order for renewal/re-issue of the passport of the applicant within 01 month from the date of production of certified copy of this

order, after completing the due formalities in accordance with law.

(iii) The applicant shall inform and take permission from the trial court concerned before going abroad and she shall appear before the trial Court on the date fixed as directed by the trial Court and she shall be bound by the terms and conditions imposed by the trial court.

(iv) Let a copy of this order be given to Sri Surya Bhan Pandey, learned Sr. Advocate and Deputy Solicitor General of India appearing for Union of India and Sri Ashok Kumar Srivastava, learned A.G.A. for the State for information and communication to the authorities concerned.

(2024) 4 ILRA 581

**ORIGINAL JURISDICTION
CRIMINAL SIDE**

DATED: LUCKNOW 09.04.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482. No. 3163 of 2024

**Rupesh Kumar Srivastava @ Nirmal
Srivastava** **...Applicant**

Versus

State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:

Sri Mukesh Kumar Tewari

Counsel for the Opposite Parties:

G.A.

(A) Criminal Law - Quashing of Order - Fair Trial - The Code of Criminal Procedure, 1973 - Sections 207 & ,482 - Inherent power - Section 311 - Power to summon material witness, or examine person present, Section 233 - Entering

upon defence - Cross-Examination - Plenary Power - Ends of Justice - Recall of Witness - Accused's Right - Indian Penal Code, 1860 - Section 307 - Court distinguished between discretionary power of courts under Section 311 Cr.P.C. and the limited right of an accused under Section 233 Cr.P.C. - Under section 311 Cr.P.C., the power lies in the courts only and under section 233 Cr.P.C., the right lies with the accused and the court's interference is limited - Court has plenary power to summon witness at any stage - fair trial includes adducing evidence - Adducing evidence in support of the defence is a valuable right - Rules of procedure designed to ensure justice should be scrupulously followed, and the courts should be jealous in seeing that there is no breach of them. (Para - 13,15)

Applicant sought to quash order rejecting his application to cross-examine a key witness, P.W.-1 - after multiple missed opportunities - partly due to COVID-19 pandemic - applicant argued that denial of cross-examination impeded a fair trial.(Para 2-10)

HELD: - Trial court failed to apply the law in right perspective and ignored the difference in scope and implications in which the provisions of section 311 Cr.P.C. and section 233(3) Cr.P.C. are meant to be applied. Impugned order passed under Section 307 I.P.C., suffers from legal flaw was set aside & reversed. Applicant given last opportunity for cross-examination. (Para 16 - 20)

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

List of Cases cited:

1. Kalyani Baskar Vs M.S. Sampooram, (2007) 2 SCC 258

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

1. Heard Sri Satish Chandra Mishra, learned Senior Advocate assisted by Sri Mukesh Kumar Tewari, learned counsel for the applicant and Sri Awadhesh Kumar

Pandey, learned A.G.A. for the State as well as perused the record.

2. The instant application under Section 482 Cr.P.C. has been moved by the applicant, namely, Rupesh Kumar Srivastava Alias Nirmal Srivastava with a prayer to quash the impugned order dated 22.03.2024 passed by learned Additional Sessions Judge, Court No.9, Gonda in Sessions Trial No.53/2016, arising out of Case Crime No.203 of 2012, under Section 307 I.P.C., Police Station Motiganj, District Gonda.

3. Learned senior counsel for the applicant submits that final report was submitted in the case of applicant and one co-accused by the Investigating Officer on 30.07.2013 on the ground that the complicity of the applicant and co-accused was not found in the alleged crime. Thereafter, the complainant had filed an application on 14.09.2014 before the Superintendent of Police, Gonda for further investigation of the matter, wherein further investigation was carried out and the charge sheet was submitted against the applicant on 22.01.2016 under Section 307 I.P.C. in a mechanical manner without considering the evidence.

4. Learned senior counsel further submits that cognizance upon the charge sheet was taken and the trial of the case was started wherein the complainant was summoned for examination as witness. On 01.08.2017, the complainant Sushil Shukla/P.W.-1 was examined in chief, however, the cross-examination of this witness could not be completed due to paucity of time, therefore, the matter was postponed for cross-examination.

5. Learned senior counsel further submits that on 09.08.2017, the applicant has filed an application under Section 207 Cr.P.C. before the learned trial court for providing certain documents which had been collected during investigation, however, the same was refused and application was rejected by the learned trial court vide order dated 20.02.2020. Thereafter, the P.W.-1 was summoned for cross-examination on 10.03.2021, 23.03.2021, 01.11.2021, 24.11.2021 and 23.12.2021 but due to pandemic of COVID-19, the cross-examination could not be concluded. On 05.04.2022, the matter was fixed for cross-examination but an application for adjournment was filed by the applicant, which was rejected by the learned trial court vide order dated 05.04.2022 closing the opportunity of cross examination.

6. Learned senior counsel further submits that on 18.08.2022, the applicant has filed an application for grant of permission for cross examination of P.W.-1/Sushil Shukla, however, the same was rejected by the learned trial court vide order dated 06.09.2022 and on 15.02.2024, the learned trial court has passed an order whereby the P.W.-1 Sushil Shukla was summoned for 27.02.2024 for cross-examination in respect of the co-accused Triyugi Narain Gupta. In the meantime, the applicant has moved an application under Section 482 Cr.P.C. No.5258 of 2023 before this Hon'ble Court in the month of May, 2023 for quashing of the order dated 06.09.2022 passed by the learned trial court whereby the application for grant of permission for cross-examination of P.W.-1 was rejected, however, during the pendency of the aforesaid case before this Hon'ble Court, the learned trial court had passed the order dated 15.02.2024 whereby the P.W.-1

Sushil Shukla was summoned for cross-examination in respect of co-accused Triyugi Narain Gupta, therefore, the applicant has withdrawn the aforesaid case i.e. application under Section 482 Cr.P.C. No.5258 of 2023 on 01.03.2024.

7. Learned senior counsel further submits that the applicant had filed an application under Section 311 Cr.P.C. before the learned trial court on 06.03.2024 for grant of permission for cross-examination of P.W.-1 Sushil Shukla, which has been rejected by the learned trial court vide order dated 22.03.2024 on the ground that the opportunity of cross-examination in respect of the applicant has already been closed on 05.04.2022 as the applicant had already been afforded the opportunities of cross-examination of P.W.-1 Sushil Shukla. The same has been challenged in the present case before this Court.

8. Thus, learned senior counsel for the applicant submits that the learned trial court had illegally closed the opportunity of cross-examination. The trial of the present applicant as well as of the co-accused have been arisen from the same case crime and are running together and once the P.W.-1 Sushil Shukla had already been summoned for cross examination on 01.04.2024 in respect of co-accused Triyugi Narain Gupta then there is no legal impediment if the applicant is allowed to cross examine the said witness on the date fixed in order to secure the ends of justice by holding an unbiased and fair trial which will also be in consonance of the principle construed under Article 21 of the Constitution of India. Learned senior counsel further submits that while passing the impugned order, the learned trial court has not considered the fact that the cross-

examination of the informant P.W.-1, who is the prime witness of the case, is necessary and in absence of cross-examination of the informant, it is not possible to deliver the justice in good sense and hold an unbiased and fair trial which is mandate to be followed in view of the provisions of Article 21 of the Constitution of India.

9. Learned senior counsel for the applicant lastly submits that in the interest of justice as well as to secure the ends of justice in judicial manner, one last opportunity of cross-examination of P.W.-1 Sushil Shukla should be afforded to the applicant. The applicant undertakes that he will not misuse the liberty of cross-examination of P.W.-1 Sushil Shukla and will definitely conclude the same within a day without seeking any adjournment. Thus, the instant application may be allowed and the impugned order dated 22.03.2024 may be quashed.

10. On the other hand, SriAwadhesh Kumar Pandey, learned A.G.A. for the State submits that the learned trial court had rightly passed the impugned order dated 22.03.2024 whereby the application for summoning the P.W.-1 Sushil Shukla for cross-examination was rejected. The applicant was provided ample opportunities to cross examine the P.W.-1, however, he was just lingering on the matter on one and another ground, which is a ploy to get the proceedings delayed. He further submits that the learned trial court had rightly closed the opportunity of the applicant for cross-examining the P.W.-1 Sushil Shukla.

11. After considering the arguments advanced by learned counsel for the respective parties and after perusal of material placed before this Court, this

Court is of the view that it will be relevant to quote Section 311 Cr.P.C., which reads as under:-

"311. Power to summon material witness, or examine person present. - Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."

12. Under the provisions of section 311 Cr.P.C., the court has a plenary power to summon any person at any stage of the proceedings as a witness. This power includes recall and re-examination of any person who has already been examined. This power is to be exercised when the court finds it necessary to summon/recall any witness for just decision of the case. The law puts no fetters on the powers of the courts to call for any witness to attain the highest goal of justice. In my opinion this provision of law gives expression to the inherent power of the courts which is available to them by virtue of being the supreme authority who has been entrusted with responsibility to do justice. The power lies with the Court alone as juxtaposed to rights or powers of parties. The others stake holders whether prosecution or defence, have a limited role of drawing the attention of the court and putting the relevant material before it which may assist it in arriving at a correct inference. On the other hand, section 233 Cr.P.C. works in a different plane altogether. For better understanding of difference between the two sections, I find it appropriate to reproduce section 233 Cr.P.C. as below:-

"233. Entering upon defence. (1)

Where the accused is not acquitted under Section 232, he shall be called upon to enter on his defence and adduce any evidence he may have in support thereof.

(2) If the accused puts in any written statement, the Judge shall file it with the record.

(3) If the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice."

13. Section 233 Cr.P.C. finds place under Chapter XVIII titled as 'trial before a court of session'. This provision is essential part of session trial and is applicable when the prosecution evidence is complete and the accused is given an opportunity to produce the evidence in its defence. Undoubtedly this right has been given to the defence to produce its witnesses as part of fair trial and as part of legal principle of hearing both the sides. In my opinion, here the right belongs to the accused and not to the court concerned, in the sense that the court concerned shall ordinarily issue process and can decline to summon the witness only for the reason that the request is made for the purpose of vexation or delay or for defeating the ends of justice. The difference between the powers of the court and the right of the accused is too obvious. Under section 311 Cr.P.C., the power lies in the courts only and under section 233 Cr.P.C., the right lies with the accused and the court's interference is

limited. The court can only refuse to issue summons where it ought to have refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice only.

14. In my view, if the application is refused on the grounds which are not covered by three excluding clauses, as provided in latter part of section 233(3) Cr.P.C. such approach shall be alien as far as scope of section 233 Cr.P.C. is concerned.

15. In **Kalyani Baskar vs. M.S. Sampooranam; (2007) 2 SCC 258**, the Hon'ble Supreme Court while elaborating the meaning of fair trial observed as below:-

"Fair trial" includes fair and proper opportunities allowed by law to prove her innocence. Adducing evidence in support of the defence is a valuable right. Denial of that right means denial of fair trial. It is essential that rules of procedure designed to ensure justice should be scrupulously followed, and the courts should be jealous in seeing that there is no breach of them."

16. I have gone through the impugned order dated 22.03.2024 passed by learned Additional Sessions Judge, Court No.9, Gonda. The trial court had failed to apply the law in right perspective and ignored the difference in scope and implications in which the provisions of section 311 Cr.P.C. and section 233(3) Cr.P.C. are meant to be applied. Hence the order of the trial court suffers from legal flaw and is not sustainable which is liable to be set aside.

17. Accordingly, the impugned order dated 22.03.2024 passed by learned

Additional Sessions Judge, Court No.9, Gonda in Sessions Trial No.53/2016, arising out of Case Crime No.203 of 2012, under Section 307 I.P.C., Police Station Motiganj, District Gonda is hereby **set aside** and **reversed**.

18. Accordingly, in the interest of justice, the applicant is given a last opportunity to appear before the learned concerned trial court on or before 15.04.2024 alongwith certified copy of this order and move an application for cross examination of the witness P.W.-1 Sushil Shukla and the learned trial court is directed to summon the witness P.W.-1 Sushil Shukla for cross examination on 19.04.2024, the date fixed or any other date fixed by the learned trial court.

19. It is made clear that it is the last opportunity provided to the applicant to cross examine the P.W.-1 Sushil Shukla, failing which, the benefit of this order will come to an end.

20. With the aforesaid observation and direction, the instant application stands **allowed**.

(2024) 4 ILRA 586
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 09.04.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482. No. 3307 of 2024

Sushri Shreya Verma & Ors. ...Applicants
Versus
State of U.P. & Ors. ...Opposite Parties

Counsel for the Applicants:

Sri Mukesh Kumar Tewari, Sri Bhupender Pal Singh

Counsel for the Opposite Parties:
 G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Sections 155(2), 190, 195(1) & 482 - Inherent power - Indian Penal Code, 1860 - Section 171-H - Illegal payments in connection with an election, Section 188 - Disobedience to order duly promulgated by public servant - Non-cognizable offence - Prior permission - Prima facie case - Abuse of process - Quashing of proceedings - Police have no right or jurisdiction to investigate the matter, without prior permission of the Magistrate, who has got jurisdiction to try those offences - when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontroverted allegations as made prima facie establish the offence - Quashing of the criminal proceedings is an exception than a rule - Power of High Court is very wide but should be exercised very cautiously to do real and substantial justice for which the court alone exists. (Para - 26, 28, 35)

Applicant No.1's father was contesting Vidhanshabha Election, 2022 - 50 persons, including applicant Nos. 1 and 2, were canvassing in support of without prior permission - FIR lodged against applicants for alleged offences under Sections 171H and 188 IPC - Applicants sought quashing of charge sheet and summoning order. (Para 3, 12-13)

HELD: - Trial court while summoning the applicants by impugned order has totally failed to appreciate the factual and legal aspect of the matter. Entire charge sheet filed by police vitiated by serious incurable defects and procedural irregularities. Impugned charge sheet and summoning order quashed due to lack of jurisdiction and non-compliance with statutory requirements. (Para 28, 36-38)

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

List of Cases cited:

1. Sachida Nand Singh & anr. Vs St. of Bihar & anr., (1998) 2 SCC 493
2. Daulat Ram Vs St. of Punj., AIR 1962 SC 1206
3. M.S. Ahlawat Vs St. of Har. & anr.; AIR 2000 SC 168
4. Inder Mohan Goswami Vs St. of Uttaranchal (2007)12 SCC 1
5. Lalankumar Singh & ors. Vs St. of Maha., 2022 SCC Online SC 1383
6. St. of Ha. Vs Bhajan Lal, 1992 Supp (1) SCC 335
7. R.P. Kapoor Vs St. of Punj., AIR 1960 S.C. 866
8. St. of Bihar Vs P.P. Sharma, 1992 SCC (Cri.)192
9. Zandu Pharmaceutical Works Ltd. Vs Mohd. Saraful Haq & anr., (Para-10) 2005 SCC (Cri.) 283
10. Neeharika Infrastructure Pvt. Ltd. Vs St. of Maha., AIR 2021 SC 1918
11. S.W. Palankattkar & ors. Vs St. of Bihar, 2002 (44) ACC 168

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

1. Heard Shri Mukesh Kumar Tewari, learned counsel for the applicants, Shri Ashok Kumar Singh, learned A.G.A-I for the State-opposite parties and perused the material placed on record.

2. The instant application under Section 482 Cr.P.C. has been filed on behalf of the applicants with a prayer to quash the impugned charge sheet dated 27.03.2022 alongwith impugned summoning order dated 22.09.2023 arising out of Case Crime no.0045/2022 under Section 188, 171-H I.P.C., Police Station-

Mohammadpur Khala, District-Barabanki as well as the entire proceeding of Criminal Case No.3149/2023 (State vs. Sushri Sherya Verma and others) pending before the court of Additional Chief Judicial Magistrate/F.T.C. Court No.38, Barabanki with a further prayer to stay the proceedings of the aforesaid case.

3. Learned counsel for the applicants submits that the father of the applicant No.1 was contesting on the post of Member of Legislative Assembly in Vidhansabha Elections, 2022 from the constituency of Kursi District-Barabanki. During that period on 29.01.2022, an F.I.R. was lodged by the opposite party no.3, the then In-charge, Mobile Squad Vidhansabha Kursi, District-Barabanki against the applicants alleging therein that due to ongoing elections of Vidhansabha in District-Barabanki, the model code of conduct was enforced and on 28.01.2022 the applicant Nos.1 and 2 and about 50 other persons were canvassing in the election in Village Bhund Hamlet Sewali Gram Sabha Aalhemau and Jyoti without permission and the video of the canvassing programme went viral, which has been organized by applicants and others.

4. Learned counsel for the applicants further submits that on 01.02.2022, the Investigating Officer recorded the statement of the complainant, wherein he reiterated the same version of the F.I.R. and from perusal of the same no offence is made out against the applicants and the statements given by the complainant are not trust worthy and same is based on false and concocted facts.

5. Learned counsel for the applicants further submits that the Investigating Officer prepared the impugned charge sheet

dated 27.03.2022 and on 22.09.2023, the learned trial court without applying its judicial mind, took cognizance and summoned the applicants to face trial on the basis of police report.

6. Learned counsel for the applicants further submits that the F.I.R. was registered under Sections 171 H and 188 I.P.C., which is without jurisdiction as Section 171 H of I.P.C. is described as non cognizable offence in the penal code and Section 195(1) Cr.P.C. specifically provides that no court shall take cognizance of any offence under Sections 172 to 188 except upon a complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate. Thus, taking cognizance under Section 188 I.P.C. is also without jurisdiction.

7. Learned counsel for the applicants further submits that as per Section 2(d) Cr.P.C., the opposite party no.3 had no right to lodge the F.I.R. for offences as mentioned above rather he had to file the complaint only before the concerned court. He further submitted that not only the F.I.R. was registered but also the investigation was carried out and charge sheet was submitted without any jurisdiction.

8. Learned counsel for the applicants further submits that even if the entire story of the prosecution is accepted as true (only for the sake of argument though not admitted), Section 171 H of I.P.C. is not made out against the applicants.

9. Learned counsel for the applicants further submits that as per Section 190 Cr.P.C., it is evident that the concerned Magistrate can take cognizance of any

offence on three conditions i.e. (i) Upon receiving a complaint of facts, (ii) Upon a police report, and (iii) Suo-moto.

10. Learned counsel for the applicants further submits that the impugned order dated 22.09.2023 passed by the learned Additional Chief Judicial Magistrate/F.T.C. Court No.38, Barabanki, by which the applicants were summoned, is also non speaking as the Magistrate has not considered any material available before him while summoning the applicants to face the trial. As such, the impugned order dated 22.09.2023 on the face of record appears to be unjustified, arbitrary, illegal and is passed without application of judicial mind, therefore, the same is liable to be set aside by this Court and the present application under Section 482 Cr.P.C. is liable to be allowed.

11. On the other hand, learned A.G.A. for the State opposed the argument advanced by learned counsel for the applicants and submits that the impugned summoning order dated 22.09.2023 is rightly passed and no interference by this Court is required in the instant matter, therefore, the instant application is liable to be dismissed at this stage only.

12. On careful perusal of the averments made in this application under Section 482 Cr.P.C. as well as after hearing the learned counsel for the parties, the factual matrix disclose that the o the opposite party no.3, the then In-charge, Mobile Squad Vidhansabha Kursi, District-Barabanki had lodged an F.I.R. against the applicants alleging therein that applicant No.1 whose father, namely-Rakesh Verma was contesting election for the post of Member of Legislative Assembly in the Vidhanshabha Election, 2022 and model

code of conduct was enforced in the area. On 28.01.2022 the applicant Nos. 1 and 2 alongwith 50 persons were canvassing in support of Rakesh Verma without any prior permission.

13. First of all, it would be relevant to quote Section 195(1) Cr.P.C., which is being reproduced hereunder:-

“195(1) Cr.P.C. :- No Court shall take cognizance -

(a)

(I) of any offence punishable under sections 172 to 188 (both inclusive) of the Indian Penal Code (45 of 1860), or

(ii) of any abetment of, or attempt to commit, such offence, or

(iii) of any criminal conspiracy to commit such offence, except on the complaint in writing of the public servant concerned or other public servant to whom he is administratively subordinate;

(b)

(I) of any offence punishable under any of the following sections of the Indian Penal Code (45 of 1860), namely, sections 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, or

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

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

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

[except on the complaint in writing of that Court or by such officer of the Court as that Court may authorise in writing in this behalf, or of some other Court to which that Court is subordinate.] [Substituted by Act 2 of 2006, Section 3 for "except on the complaint in writing of that Court, of of some other Court to which that Court is subordinate" (w.e.f. 16-4-2006).]"

14. From perusal of the aforesaid Section 195 (1) Cr.P.C., it is clear that the F.I.R. was registered without jurisdiction as Section 171 H of I.P.C. is described as a non-cognizable offence in the penal code whereas it is specifically mentioned that no Court shall take cognizance of any offence under Sections 172 to 188 I.P.C. except upon a complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate. Thus, taking cognizance under Section 188 I.P.C. is also without jurisdiction.

15. It would further be relevant to quote Section 2(d) Cr.P.C. which is being reproduced hereunder:-

“"complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.”

16. From perusal of the aforesaid Section 2(d) Cr.P.C., it is clear that the opposite party no.2 had no right to lodge the F.I.R. for offences as mentioned above rather he had to file the complaint only before the concerned Magistrate.

17. It would also be relevant to quote Section 171 H of IPC, which is being reproduced hereunder:-

"171H. Illegal payments in connection with an election "Whoever without the general or special authority in writing of candidate incurs or authorises expenses on account of the holding of any public meeting, or upon any advertisement, circular or publication, or in any other way whatsoever for the purpose of promoting or procuring the election of such candidate, shall be punished with fine which may extend to five hundred rupees.

PROVIDED that if any person having incurred any such expenses not exceeding the amount of ten rupees without authority obtains within ten days from the date on which such expenses were incurred the approval in writing of the candidate, he shall be deemed to have incurred such expenses with the authority of the candidate."

18. From perusal of the aforesaid Section 171 H of I.P.C., it is clear that only a person other than the candidate of an election, can be made accused under Section 171 H of I.P.C. Therefore, there is substantial merit in the contention of the learned counsel for the applicant that the offence under Section 171 H of I.P.C. as made out would not lie.

19. It would also be relevant to quote Section 190 Cr.P.C., which is being reproduced hereunder:-

"190. Cognizance of offences by Magistrates.

(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence -

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

(b) upon a police report of such facts;

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

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

20. From perusal of the aforesaid Section 190 Cr.P.C., it is clear that the concerned magistrate can take cognizance of any offence on three conditions i.e. (i) Upon receiving a complaint of facts, (ii) Upon a police report, and (iii) Suo-moto.

21. Hon'ble the Supreme Court in the case of **Sachida Nand Singh and Another Vs. State of Bihar and Another; (1998) 2 SCC 493** was pleased to observe at para 7 as under:-

"Even if the clause is capable of two interpretation we are inclined to choose the narrower interpretation for obvious reasons. Section 190 of the Code empowers "any magistrate of the first

class" to take cognizance of "any offence" upon receiving a complaint, or police report or information or upon his own knowledge. Section 195 restricts such general powers of the magistrate, and the general right of a person to move the Court with a complaint is to that extent curtailed. It is a well-recognised canon of interpretation that provision curbing the general jurisdiction of the court must normally receive strict interpretation unless the statute or the context requires otherwise."

22. Further, Hon'ble the Supreme Court in the case of **Daulat Ram Vs. State of Punjab; AIR 1962 SC 1206** was pleased to observe at para 4 as under:-

"Now the offence under s. 182 of the Penal Code, if any, was undoubtedly complete when the appellant had moved the Tehsildar for action. Section 182 does not require that action must always be taken if the person who moves the public servant knows or believes that action would be taken. In making his report to the Tehsildar therefore, if the appellant believed that some action would be taken (and he had no reason to doubt that it would not) the offence under that section was complete. It was therefore incumbent, if the prosecution was to be launched, that the complaint in writing should be made by the Tehsildar as the public servant concerned in this case. On the other hand what we find is that a complaint by the Tehsildar was not filed at all, but a charge sheet was put in by the Station House Officer. The learned counsel for the State Government tries to support the action by submitting that s. 195 had been complied with inasmuch as when the allegations had been disproved, the letter of the Superintendent of Police was forwarded to the Tehsildar and he asked

for "a calendar". This paper was filed along with the charge sheet and it is stated that this satisfies the requirements of s. 195. In our opinion, this is not a due compliance with the provisions of that section. What the section contemplates is that the complaint must be in writing by the public servant concerned and there is no such compliance in the present case. The cognizance of the case was therefore wrongly assumed by the court without the complaint in writing of the public servant namely the Tehsildar in this case. The trial was thus without jurisdiction ab initio and the conviction cannot be maintained."

23. Further, Hon'ble the Supreme Court in the case of **M.S. Ahlawat Vs. State of Haryana and Another; AIR 2000 SC 168** was pleased to observe at para 5 as under:-

"Chapter XI of IPC deals with false evidence and offences against public justice' and Section 193 occurring therein provides for punishment for giving or fabricating false evidence in a judicial proceeding. Section 195 of the Criminal Procedure Code (Cr.P.C.) provides that where an act amounts to an offence of contempt of the lawful authority of public servants or to an offence against public justice such as giving false evidence under Section 193 IPC, etc. or to an offence relating to documents actually used in a court, private prosecutions are barred absolutely and only the court in relation to which the offence was committed may initiate proceedings. Provisions of Section 195 Cr.P.C. are mandatory and no court has jurisdiction to take cognizance of any of the offences mentioned therein unless there is a complaint in writing as required under that Section. It is settled law that every incorrect or false statement does not

make it incumbent upon the court to order prosecution, but to exercise judicial discretion to order prosecution only in the larger interest of the administration of justice."

24. Now coming to the provision of first schedule of Cr.P.C., Section 171 H of Indian Penal Code is covered under the said provision which is declared as non-cognizable and bailable offence, and triable by the Magistrate of the First Class. Like wise classification of offence against other laws in Cr.P.C., it also describes, if any offence under any other law, if punishable for less than three years or with fine which shall be considered as non-cognizable, bailable and triable by the Magistrate of First Class.

25. On perusal of the above said provisions, it is abundantly clear that the offence registered against the applicant under Section 171H of IPC is non-cognizable in nature. Now, coming to Section 155(2) of Cr.P.C. which reads as follows:

"No police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial"

26. Particularly, Section 155(2) mandates the police concerned that such police officer shall investigate the non-cognizable offence with the permission of the Magistrate only. This Section describes that no Police Officer shall investigate a non-cognizable case without the order of the Magistrate having power to try such case for trial.

27. The provision in sub Section (2) of Section 155 of Cr.P.C., for asking

permission of the Court to investigate a non-cognizable offence is mandatory in nature. Therefore, the investigation of non-cognizable offence by the police without prior permission of the competent Magistrate is illegal. Even mere accepting the charge sheet by the Magistrate and taking the cognizance of the offence does not validate the proceeding. Even subsequent permission by the Magistrate also cannot cure the illegality. As could be seen from Section 460 of Cr.P.C. these defects of non-taking permission before investigating a non-cognizable offence is also not curable. Though the charge sheet is filed after due investigation without prior permission of the Court and that the Magistrate has accepted the charge sheet and taken the cognizance, it does not mean to show permission is granted by the Magistrate to investigate such non-cognizable offence. Therefore, investigation into the non-cognizable offence without written order of the Magistrate is strictly contrary to the provision of this Section.

28. This Court further finds that the above said two offences are non-cognizable offences. Therefore, as per Section 155(2) of Cr.P.C., the police have no right or jurisdiction to investigate the matter, without prior permission of the Magistrate, who has got jurisdiction to try those offences. Therefore, the entire charge sheet filed by the police is vitiated by serious incurable defects and procedural irregularities.

29. This Court further finds that the F.I.R. as well as the charge sheet, do not disclose that there was any cognizable offence made by the applicant, so as to enable the police to investigate both the cognizable and non-cognizable offences

together and to file the charge sheet. Therefore, the entire charge sheet papers and on the basis of which the criminal case is registered is liable to be quashed.

30. This Court also finds that the trial court while summoning the applicants by impugned order has totally failed to appreciate the factual and legal aspect of the matter. The legal position is well-settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontroverted allegations as made *prima facie* establish the offence. It is also for the court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the court cannot be utilised for any oblique purpose and where in the opinion of the court chances of an ultimate conviction is bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage.

31. Further, the Hon'ble Supreme Court of India in the case **Inder Mohan Goswami v. State of Uttaranchal (2007)12 SCC 1** has held that it would be relevant to keep into mind the scope and ambit of section 482 Cr.PC and circumstances under which the extra ordinary power of the court inherent therein as provisioned in the said section of the Cr.P.C. can be exercised, para 23 is being quoted here under:-

"23. This court in a number of cases has laid down the scope and ambit of courts powers under section 482 Cr.P.C. Every High Court has inherent power to act ex debito justitiae to do real and substantial justice, for the administration of which alone it exists, or to prevent abuse of the process of the court. Inherent power under section 482 Cr.P.C. can be exercised:

(i) to give effect to an order under the Code;

(ii) to prevent abuse of the process of court, and

(iii) to otherwise secure the ends of justice."

32. Further, Hon'ble the Supreme Court of India in the case of **Lalankumar Singh and Others vs. State of Maharashtra reported in 2022 SCC Online SC 1383** has specifically held in paragraph No.38 that the order of issuance of process is not an empty formality. The Magistrate is required to apply his mind as to whether sufficient ground for proceeding exists in the case or not. Paragraph No.38 of **Lalankumar Singh and Others (supra)** is being quoted hereunder:-

"38. The order of issuance of process is not an empty formality. The Magistrate is required to apply his mind as to whether sufficient ground for proceeding exists in the case or not. The formation of such an opinion is required to be stated in the order itself. The order is liable to be set aside if no reasons are given therein while coming to the conclusion that there is a prima facie case against the accused. No doubt, that the order need not contain detailed reasons. A reference in this respect

could be made to the judgment of this Court in the case of *Sunil Bharti Mittal v. Central Bureau of Investigation*, which reads thus:

“51. On the other hand, Section 204 of the Code deals with the issue of process, if in the opinion of the Magistrate taking cognizance of an offence, there is sufficient ground for proceeding. This section relates to commencement of a criminal proceeding. If the Magistrate taking cognizance of a case (it may be the Magistrate receiving the complaint or to whom it has been transferred under Section 192), upon a consideration of the materials before him (i.e. the complaint, examination of the complainant and his witnesses, if present, or report of inquiry, if any), thinks that there is a *prima facie* case for proceeding in respect of an offence, he shall issue process against the accused.

52. A wide discretion has been given as to grant or refusal of process and it must be judicially exercised. A person ought not to be dragged into court merely because a complaint has been filed. If a *prima facie* case has been made out, the Magistrate ought to issue process and it cannot be refused merely because he thinks that it is unlikely to result in a conviction.

53. However, the words “sufficient ground for proceeding” appearing in Section 204 are of immense importance. It is these words which amply suggest that an opinion is to be formed only after due application of mind that there is sufficient basis for proceeding against the said accused and formation of such an opinion is to be stated in the order itself. The order is

liable to be set aside if no reason is given therein while coming to the conclusion that there is *prima facie* case against the accused, though the order need not contain detailed reasons. *A fortiori*, the order would be bad in law if the reason given turns out to be *ex facie* incorrect.”

33. Further, Hon’ble the Supreme Court of India has provided guidelines in case of **State of Haryana Vs. Bhajan Lal** reported in 1992 Supp (1) SCC 335 for the exercise of power under Section 482 Cr.P.C. which is extraordinary power and used separately in following conditions:-

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

(2) 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."

34. Further the Apex Court has also laid down the guidelines where the criminal proceedings could be interfered and quashed in exercise of its power by the High Court in the following cases:- **(i) R.P. Kapoor Vs. State of Punjab, AIR 1960 S.C. 866, (ii) State of Bihar Vs. P.P. Sharma, 1992 SCC (Cri.)192, (iii) Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another, (Para-10) 2005 SCC (Cri.) 283 and (iv) Neeharika Infrastructure Pvt. Ltd. Vs. State of Maharashtra, AIR 2021 SC 1918.**

35. In **S.W. Palankatkar & others Vs. State of Bihar, 2002 (44) ACC 168**, it

has been held by the Hon'ble Apex Court that quashing of the criminal proceedings is an exception than a rule. The inherent powers of the High Court itself envisages three circumstances under which the inherent jurisdiction may be exercised:- (i) to give effect an order under the Code, (ii) to prevent abuse of the process of the court ; (iii) to otherwise secure the ends of justice. The power of High Court is very wide but should be exercised very cautiously to do real and substantial justice for which the court alone exists.

36. In view of the above said facts and circumstances of the case, the investigation done by the police in this case is without jurisdiction and based on such invalid investigation report, the cognizance taken by the learned Magistrate is also illegal. Secondly, the entire proceeding before the learned Magistrate is vitiated by serious incurable defects.

37. Thus, in view of the law laid down by the Hon'ble Apex Court and the facts and circumstances, as narrated above and from the perusal of the record, the impugned charge sheet dated 27.03.2022 alongwith impugned summoning order dated 22.09.2023 passed by learned Additional Chief Judicial Magistrate/F.T.C. Court No.38, Barabanki in Criminal Case No.3149/2023 (State vs. Sushri Shreya Verma and others), arising out of Case Crime No.0045/2022, under Sections 171 H and 188 of I.P.C., Police Station Mohammadpur Khala, District-Barabanki., as well as the entire criminal proceedings in pursuance thereof are against the spirit and directions issued by the Hon'ble Apex Court and are liable to be set aside.

38. Accordingly, the impugned charge sheet dated 27.03.2022 alongwith

impugned summoning order dated 22.09.2023 passed by Additional Chief Judicial Magistrate/F.T.C. Court No.38, Barabanki in Criminal Case No.3149/2023 (State vs. Sherya Verma and others), arising out of Case Crime No.0045/2022, under Sections 171 H and 188 of I.P.C., Police Station Mohammadpur Khala, District-Barabanki as well as the entire criminal proceedings in pursuance thereof are hereby **quashed**.

39. For the reasons discussed above, the instant application under Section 482 Cr.P.C. is **allowed** in respect of the instant applicants.

40. Learned Senior Registrar of this Court is directed to transmit a copy of this order to the trial court concerned for its necessary compliance.

(2024) 4 ILRA 596

**ORIGINAL JURISDICTION
CRIMINAL SIDE**

DATED: LUCKNOW 15.04.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482. No. 3438 of 2024

**Gyaneshwar Katiyar & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties**

Counsel for the Applicants:
Sri Amit Kumar Singh

Counsel for the Opposite Parties:
G.A.

(A) Criminal Law - The Code of Criminal Procedure, 1973 - Section 482 - Inherent power - The Negotiable instruments Act, 1981- Sections 138 & 141 - Negotiable Instruments - Cheque Dishonour - Legal position for quashing of proceedings at

the initial stage - test to be applied by court - whether uncontroverted allegations as made prima facie establish the offence - and whether the chances of ultimate conviction are bleak - such that no useful purpose is likely to be served by allowing the criminal proceedings to continue - Quashing of the criminal proceedings is an exception than a rule - Power of High Court is very wide but should be exercised very cautiously to do real and substantial justice for which the court alone exists.(Para - 17,18)

Applicants, members of an Association of Persons (AOP) - were summoned in complaint under Sections 138 and 141 of NI Act - for dishonour of cheques amounting to ₹60,00,000 – allegation - cheques were issued towards repayment of investments made by him in the AOP – contention - cheques were stolen and misused by complainant after they sent a legal notice demanding repayment of borrowed funds - applicants neither denied their signatures on the cheques nor lodged any complaint regarding the alleged theft. (Paras 2, 4, 5)

HELD: - Court would not embark into an inquiry, as this is Trial Court's function. Since a prima facie offence is disclosed, quashing the complaint, summoning order, and proceedings is unwarranted. Applicants can raise objections at the appropriate stage. Prayer for quashing is denied. (Para - 19,20)

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

List of Cases cited:

1. Mohd. Allauddin Khan Vs St. of Bihar & ors., (2019) 6 SCC 107
2. R.P. Kapoor Vs St. of Punj., AIR 1960 S.C. 866
3. St. of Haryana Vs Bhajanlal, 1992 SCC (Cri.)426
4. St. of Bihar Vs P.P. Sharma, 1992 SCC (Cri.)192
5. Zandu Pharmaceutical Works Ltd. Vs Mohd. Saraful Haq & anr., 2005 SCC (Cri.)283

6. Neeharika Infrastructure Pvt. Ltd. Vs St. of Maha., AIR 2021 SC 1918

7. S.W. Palankattkar & ors. Vs St. of Bihar, 2002 (44) ACC 168

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

1. Vakalatnama filed today in the Court by Shri Lalit Kishore Pandey, Advocate on behalf of opposite party No.2 is taken on record.

2. Heard Shri Amit Kumar Singh, learned Counsel for the applicants, Shri Lalit Kishore Pandey, learned Counsel for the opposite party No.2, Shri S.P. Tiwari, learned A.G.A. for the State-opposite party No.1 and perused the material placed on record.

3. The present application under Section 482 Cr.P.C. has been filed on behalf of the applicants seeking quashing/setting aside of the summoning order dated 12.10.2023 passed by learned Presiding Officer, Additional Court No.5, Lucknow in Complaint Case No.87472/2023 vide filing No.105314/2023 instituted against the applicants under Section 138 and 141 of Negotiable Instruments Act, 1881 as well as entire proceedings of the aforesaid case so far it relates to the present applicants. A further prayer has been made by the applicants to call for the records of Complaint Case No.87472/2023 vide filing No.105314/2023 under Sections 138 and 141 of Negotiable Instruments Act, 1881.

4. Learned Counsel for the applicants submits that the applicants are innocent persons and have been falsely implicated in the present case due to enmity. He further submits that the applicants are into the business of trading of Indian-made foreign

liquor and beer in the State of Uttar Pradesh and to effectively manage the business and operations they had formed an Association of Persons (hereinafter referred as "AOP") in the name and style of BKS Associates and the applicants are the Member of the AOP. He further submits that the opposite party No.2's mother, namely-Poonam Jaiswal was the licensee of a retail shop of country liquor situated at Mohamadpur, Sariya, Bankey Nagar Chauraha(A), District-Lucknow since the opposite party No.2 and his mother did not have any prior experience of operation of retail shop of country liquor, they joined AOP formed by the applicants on 17.07.2020 in which opposite party No.2 was given share of 5% only. He further submits that after joining the AOP, the opposite party No.2 borrowed/withdrew various sums from the AOP from time to time with a promise that he would return the same very soon but when the amounts were not returned the applicants issued a legal notice dated 03.07.2023 to opposite party No.2 demanding therein the return of capital withdrawn/borrowed by him from the AOP. Thereafter, the opposite party No.2 on 05.07.2023 issued a legal notice to the applicants demanding an amount of Rs.25,00,000/- (Rupees Twenty Five Lakh Only) in lieu of two cheques obtained by him bearing No.1364 dated 29.05.2023 of Rs.25,00,000/- (Rupees Twenty Five Lakh Only) and bearing No.1365 dated 19.06.2023 of Rs.35,00,000/-, Bank-ICICI Bank, Branch-Vikas Nagar, Lucknow alleging therein that the said cheques were given by the applicants to the opposite party No.2 for capital inducted by opposite party No.2 and profit accrued thereof.

5. Learned Counsel for the applicant further submits that since the applicants were demanding the amount, which was

borrowed by the opposite party No.2 from the AOP through legal notice dated 03.07.2023, therefore, the opposite party No.2, who was also the In-charge of day to day activities of AOP, stole the said two cheques as he had the access of signed cheques and other security documents of AOP and misused them by putting them in the bank for encashment in order to implicate the present applicants in false complaint case under the provisions of Negotiable Instruments Act, 1881.

6. The overall contention of the learned counsel for the applicants is that no offence against the applicants is disclosed and the present prosecution has been instituted with a malafide intention for the purposes of harassment, thus, he submits that the present case is nothing but an abuse of process of law, therefore, the present application may be allowed and the proceedings of the present case may be quashed.

7. Per contra, learned Counsel for the opposite party No.2 vehemently opposes the contentions made by learned Counsel for the applicants and submits that the opposite party No.2 was running his business in the name of his mother and the business was giving him profits but the applicants persuaded the opposite party No.2 to join their AOP only with the intention to commit forgery and misappropriation of funds. The opposite party No.2 in order to gain profits by joining the AOP of which the applicants are founder Members, started putting more and more money with the hope and trust given by the existing members of the AOP and made an investment of about Rs.50,00,000/- (Rupees Fifty Lakh Only) and they also promised after all these investments, the business will flourish all

over the State of U.P. and then we will calculate all the profits gained together and will split it as per the share of each of the members but when the same did not happen, then the opposite party No.2 asked the applicants to return his money, which was earlier denied and later on, the applicants issued two cheques bearing No.1364 dated 29.05.2023 of Rs.25,00,000/- (Rupees Twenty Five Lakh Only) and bearing No.1365 dated 19.06.2023 of Rs.35,00,000/-, Bank-ICICI Bank, Branch-Vikas Nagar, Lucknow in the name of opposite party No.2 but when the cheque bearing No.1364 dated 29.05.2023 amounting to Rs.25,00,000/- (Rupees Twenty Five Lacs Only) was presented before the Bank of Baroda, Branch Aliganj, Lucknow for withdrawal of the said amount, the same was dishonored with remark 'Funds Insufficient' on 26.06.2023.

8. Learned Counsel for the opposite party No.2 further submits that thereafter, the opposite party No.2 issued legal notice to the applicants on 05.07.2023 stating therein all the facts and circumstances of the case. He further submits that in reply to the legal notice dated 05.07.2023, the applicants on 15.07.2023 sent a reply of the aforesaid notice to the opposite party No.2, wherein they have not denied the signatures which were done on the two cheques. He further submits that in their reply to the legal notice, they did not mention anything about them making any complaint to any authority regarding the lost two cheques, which itself weaken their case, thus, he submits that the impugned summoning order dated 12.10.2023 has been rightly passed by the learned trial court in accordance with law, therefore, the same is not liable to be quashed and the instant application is liable to be rejected.

9. Learned A.G.A. for the State-opposite party No.1 contends that from the allegations made in the complaint filed by the opposite party No.2, prima facie offence is made out against the applicants. The innocence of the applicants cannot be adjudged at the pre trial stage. Therefore, the applicants do not deserve any indulgence.

10. After hearing learned Counsel for the parties and after perusal of records, this Court finds that towards the discharge of above mentioned financial liabilities, the accused-applicants provided the opposite party No.2 with two post dated cheques worth Rs.60,00,000/- (Rupees Sixty Lakhs Only) of different values payable on different dates. Out of those two cheques, one cheque bearing No.1364 dated 29.05.2023 of Rs.25,00,000/- (Rupees Twenty Five Lakh Only) was deposited by the opposite party No.2 with its banker for encashment but the said cheque was unpaid with the remark 'funds insufficient'. The opposite party No.2 informed the applicants regarding the dishonour of the cheque and asked them to pay the amount. However, the applicants did not pay any heed to the request of the opposite party No.2. Thereafter, a legal notice was sent and despite that applicants failed to make payment against the said cheques. It is further alleged in the complaint that the applicants were at the time of commission of the offence were Founder Members of the BKS Associates and were solely responsible for the conduct of the business of the AOP, therefore, the applicants are liable for offence committed under Section 138 and 141 of the Negotiable Instruments Act, 1881, thus, the opposite party No.2 has initiated the proceedings against the applicants under the provisions of the Negotiable Instruments Act, 1881.

11. It would relevant here to go through Sections 138 and 141 of the Negotiable Instruments Act, 1881. Section 138 and 141 of the Negotiable Instruments Act, 1881 would read as under:-

"Section 138 in The Negotiable Instruments Act, 1881

138. Dishonour of cheque for insufficiency, etc., of funds in the account.?

Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless?

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in

writing, to the drawer of the cheque, [within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.

Section 141 in The Negotiable Instruments Act, 1881

141. Offences by companies. ?

(1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:

Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.

(2) Notwithstanding anything contained in sub-section (1), where any

offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly."

11. It is further observed here that according to the reply sent by the applicants, execution of the cheques in question has nowhere been disputed and as per the reply of the applicants, the cheques in question were stolen from their possession but in this regard they did not file any complaint with the authorities concerned. This question as to whether the cheques in question were only stolen or not, is a matter of evidence to be decided later on during the course of the trial. Moreover, the applicants have no where taken up this plea in their reply that the they were neither In-charge of or responsible to the AOP for the conduct of business of the AOP.

12. It is further observed here that in their reply of the legal notice, the applicants did not dispute the signatures made on the aforesaid two cheques, thus, it can be transpired that the cheques in question were duly signed and issued by the applicants against their liabilities towards the opposite party No.2.

13. Further in the case in hand, reading the complaint as a whole, it is clear that the allegations in the complaint are that the cheques which were dishonoured were issued by the Founder Members of the AOP i.e. the applicants and the applicants

were In-charge of the affairs of the AOP. It is not proper to split hairs in reading the complaint so as to come to a conclusion that the allegation as a whole is not sufficient to show that at the relevant point of time the applicants are not alleged to be persons In-charge of the affairs of the AOP. Obviously, the complaint refers to the point of time, when the two cheques were issued, their presentation, dishonour and failure to pay in spite of notice of dishonour. Reading the complaint as a whole, this Court is satisfied that it is a case where the contentions raised by the applicants can only be dealt after the conclusion of the trial.

14. Further, the Hon'ble Supreme Court in the case of **Mohd. Allauddin Khan vs. State of Bihar and Others reported in (2019) 6 SCC 107** has been pleased to observe paragraph Nos.9 and 12, which are reproduced hereinunder:-

"9. First error is that the High Court did not examine the case with a view to find out as to whether the allegations made in the complaint prima facie make out the offences falling under Sections 323 and 379 read with Section 34 IPC or not. Instead the High Court in para 6 gave importance to the fact that since there was a dispute pending between the parties in the civil court in relation to a shop as being landlord and tenant, it is essentially a civil dispute between the parties. It is on this ground, the High Court proceeded to quash the complaint. This approach of the High Court, in our view, is faulty.

12 The High Court should have seen that when a specific grievance of the appellant in his complaint was that

Respondents 2 and 3 have committed the offences punishable under Sections 323 and 379 read with Section 34 IPC, then the question to be examined is as to whether there are allegations of commission of these two offences in the complaint or not. In other words, in order to see whether any prima facie case against the accused for taking its cognizance is made out or not, the Court is only required to see the allegations made in the complaint. In the absence of any finding recorded by the High Court on this material question, the impugned order [Prem Prakash Gupta v. State of Bihar, 2017 SCC OnLine Pat 3618] is legally unsustainable."

15. Thus, from the perusal of the materials on record and looking into the facts of the case and after considering the arguments made at the bar and the judgment referred above, it does not appear that no offence has been made out against the applicant.

16. At the stage of issuing process the trial court is not expected to examine and assess in detail the material placed on record, only this has to be seen whether prima facie cognizable offence is disclosed or not. The Apex Court has also laid down the guidelines where the criminal proceedings could be interfered and quashed in exercise of its power by the High Court in the following cases:-**(i) R.P. Kapoor Vs. State of Punjab, AIR 1960 S.C. 866, (ii) State of Haryana Vs. Bhajanlal, 1992 SCC (CrL.)426, (iii) State of Bihar Vs. P.P. Sharma, 1992 SCC (CrL.)192 and (iv) Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another, (Para-10) 2005 SCC (Cr.)283 and (v) Neeharika Infrastructure Pvt. Ltd. Vs. State of Maharashtra, AIR 2021 SC 1918.**

17. From the aforesaid decisions the Apex Court has settled the legal position for quashing of the proceedings at the initial stage. The test to be applied by the court is to whether uncontroverted allegation as made prima facie establishes the offence and the chances of ultimate conviction is bleak and no useful purpose is likely to be served by allowing criminal proceedings to be continue.

18. In *S.W. Palankattkar & others Vs. State of Bihar, 2002 (44) ACC 168*, it has been held by the Hon'ble Apex Court that quashing of the criminal proceedings is an exception than a rule. The inherent powers of the High Court under Section 482 Cr.P.C itself envisages three circumstances under which the inherent jurisdiction may be exercised:-(i) to give effect an order under the Code, (ii) to prevent abuse of the process of the court ; (iii) to otherwise secure the ends of justice. The power of High Court is very wide but should be exercised very cautiously to do real and substantial justice for which the court alone exists.

19. The High Court would not embark upon an inquiry as it is the function of the Trial Judge/Court. The interference at the threshold of quashing of the complaint case, summoning order and the criminal proceedings in case in hand cannot be said to be exceptional as it discloses prima facie commission of an offence. In the result, the prayer made for quashing is refused. The applicant has ample opportunity to raise all the objections at the appropriate stage.

20. In view thereof, the present application lacks merit and substance and is hereby rejected.

(2024) 4 ILRA 602
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 23.04.2024

BEFORE

THE HON'BLE SHAMIM AHMED, J.

Application U/S 482. No. 3694 of 2024

Rajnu

...Applicant

Versus

State of U.P. & Ors.

...Opposite Parties

Counsel for the Applicant:

Sri Sushil Kumar Singh

Counsel for the Opposite Parties:

G.A.

Criminal Law - Code of Criminal Procedure, 1973 – Section 482 – Indian Penal Code, 1860 – Sections 363, 366, 504 & 376 – Protection of Children from Sexual Offences Act, 2012 – Sections 3/4
 – Application for Quashing Proceedings – Compromise in POCSO Case – Non-Compoundable Offences

The applicant, Rajnu, filed an application under Section 482 Cr.P.C. to quash proceedings in Criminal Case No. 1177 of 2022 arising out of Case Crime No. 236/2021 under Sections 363, 366, 504, 376 IPC and Sections 3/4 POCSO Act, Police Station Mall, District Lucknow, based on a compromise between the parties. The applicant, previously denied quashing of the charge sheet and summoning order by a Coordinate Bench on 14.12.2022, claimed false implication due to village rivalry. The St. opposed, citing the Supreme Court's ruling in *Parbatbhai Aahir Vs St. of Gujarat ((2017) 9 SCC 641)*, which prohibits quashing serious offenses like those under the POCSO Act on the basis of compromise. Held: The court rejected the application, finding that the allegations prima facie disclosed a cognizable offense and that quashing based on compromise was impermissible under *Parbatbhai Aahir*. The court reiterated that inherent powers under Section 482 Cr.P.C. are to be exercised cautiously to prevent abuse of process or secure justice, and

no exceptional grounds existed for interference. The applicant was directed to raise defenses during trial.

List of Cases cited:

1. Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur Vs St. of Guj., (2017) 9 SCC 641
2. R.P. Kapoor Vs St. of Punj., AIR 1960 SC 866
3. St. of Har. Vs Bhajan Lal, 1992 SCC (Cri) 426
4. St. of Bihar Vs P.P. Sharma, 1992 SCC (Cri) 192
5. Zandu Pharmaceutical Works Ltd. Vs Mohd. Saraful Haq, (2005) SCC (Cri) 283
6. S.W. Palankattkar Vs St. of Bihar, 2002 (44) ACC 168

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

1. Heard Shri Sushil Kumar Singh, learned Counsel for the applicant, Shri Om Prakash, learned A.G.A. for the State-opposite party No.1 and perused the material placed on record.

2. The present application under Section 482 Cr.P.C. has been filed on behalf of the applicant, namely-Rajnu, seeking quashing of the entire proceedings of Crl. Case No.1177 of 2022; State vs. Rajnu arising out of Crime No.236/2021 under Section 363, 366, 504 and 376 I.P.C. and Section 3/4 Protection of Children From Sexual Offences Act, 2012, Police Station-Mall, District-Lucknow pending before the Additional District and Sessions Judge/ Special Judge POCSO Act, Court No.1, Lucknow and allow the instant application in terms of the compromise entered into between the parties.

3. Learned Counsel for the applicant submits that the applicant is an innocent person and has been falsely implicated in the present case due village rivalry. He further submits that the applicant had earlier approached this Court by filing an Application U/S 482 Cr.P.C. No.9387/2022 for quashing of the charge sheet, summoning order and entire proceedings of the aforesaid case, which was disposed of by the Coordinate Bench of this Court vide order dated 14.12.2022. He further submits that now the parties have entered into a compromise and do not want to prosecute the present case on the basis of compromise entered into parties, thus, he submits that the present application may be allowed and the proceedings of the aforesaid case may be quashed.

4. Per contra, learned A.G.A. for the State-opposite party No.1 vehemently opposed the contentions made by learned Counsel for the applicant and submits that the parties are praying for quashing of the aforesaid case which has been registered under Section 363, 366, 504 and 376 I.P.C. and Section 3/4 Protection of Children From Sexual Offences Act, 2012, which is against the mandate given by Hon'ble Supreme Court of India in the case of Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur & Ors. Vs. State of Gujarat & Anr.; reported in (2017) 9 SCC 641, thus, he submits that the proceedings registered under the provisions of the POCSO Act cannot be quashed on the basis of compromise. He further submits that case is pending in the concerned trial court and it is making endeavors to conclude the same, thus, this application is misconceived and is liable to be rejected.

5. From the perusal of the materials on record and looking into the facts of the case and after considering the arguments made at the bar, it does not appear that no offence has been made out against the applicant.

6. At the stage of issuing process the trial court is not expected to examine and assess in detail the material placed on record, only this has to be seen whether prima facie cognizable offence is disclosed or not. The Apex Court has also laid down the guidelines where the criminal proceedings could be interfered and quashed in exercise of its power by the High Court in the following cases:-(i) **R.P. Kapoor Vs. State of Punjab, AIR 1960 S.C. 866**, (ii) **State of Haryana Vs. Bhajanlal, 1992 SCC (Cri.)426**, (iii) **State of Bihar Vs. P.P. Sharma, 1992 SCC (Cri.)192** and (iv) **Zandu Pharmaceutical Works Ltd. Vs. Mohd. Saraful Haq and another, (Para-10) 2005 SCC (Cri.)283**.

7. From the aforesaid decisions the Apex Court has settled the legal position for quashing of the proceedings at the initial stage. The test to be applied by the court is to whether uncontroverted allegation as made prima facie establishes the offence and the chances of ultimate conviction is bleak and no useful purpose is likely to be served by allowing criminal proceedings to be continue. In **S.W. Palankattkar & others Vs. State of Bihar, 2002 (44) ACC 168**, it has been held by the Hon'ble Apex Court that quashing of the criminal proceedings is an exception than a rule. The inherent powers of the High Court under Section 482 Cr.P.C itself envisages three circumstances under which the inherent jurisdiction may be exercised:-(i) to give

effect an order under the Code, (ii) to prevent abuse of the process of the court ; (iii) to otherwise secure the ends of justice. The power of High Court is very wide but should be exercised very cautiously to do real and substantial justice for which the court alone exists.

8. The High Court would not embark upon an inquiry as it is the function of the Trial Judge/Court. The interference at the threshold of quashing of criminal proceedings in case in hand cannot be said to be exceptional as it discloses prima facie commission of an offence. In the result, the prayer for quashing of charge sheet/summoning order/impugned proceedings is refused. There is no merit in this case. The applicants have ample opportunity to raise all the objections at the appropriate stage.

9. Thus, after considering the submissions advanced by learned Counsel for the parties and perusal of record, this Court finds that the objection raised by learned A.G.A. for the State-opposite party No.1 appears to justified, the compromise on the basis of which, the parties are praying for quashing of the aforesaid proceedings is against the mandate given by Hon'ble Supreme Court of India in the case of **Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur (Supra)**. Further, there is no other ground/avement made in this application by the applicant to quash the aforesaid proceedings, thus, this application lacks merit and substance and is liable to be rejected.

10. In view thereof, the present application is hereby **rejected**.

(2024) 4 ILRA 605
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.02.2024

BEFORE

THE HON'BLE PRASHANT KUMAR, J.

Application U/S 482. No. 5786 of 2016

Yashpaul Chail **...Applicant**
Versus
State of U.P. **...Opposite Party**

Counsel for the Applicant:
Sri Akhilaeh Chandra Shukla

Counsel for the Opposite Party:
G.A.

Criminal Law - Code of Criminal Procedure, 1973 – Section 482 – Drugs and Cosmetics Act, 1940 – Sections 18, 18A, 23(3), 23(4), 25(3), 27, 32 & 34 – Application for Quashing Proceedings – Non-Compliance with Mandatory Sampling Provisions – Non-Liability of Former Director

The applicant, Yashpaul Chail, filed an application under Section 482 Cr.P.C. to quash proceedings in Complaint Case No. 1036 of 2014 under Sections 18/27 of the Drugs and Cosmetics Act, 1940, Police Station Kotwali, District Muzaffarnagar, pending before the Chief Judicial Magistrate. A Drug Inspector's complaint alleged that samples of Ofloxacin Tablets (Eloflox-200) taken on 21.01.2013 from M/s Kumar Medicine Distributors were substandard, as per the Government Analyst's report dated 09.07.2013. The applicant argued non-compliance with mandatory sampling provisions under Sections 23(3) and 23(4), and that he had resigned as director of M/s Elmac Remedies Pvt. Ltd. on 01.06.2009, before the alleged offense, thus not liable under Section 34. The St. countered that the applicant did not deny directorship in response to the show cause notice and that directors are responsible for substandard drugs. Held: The court, relying on *Medicamen Biotech Ltd. Vs Rubina Bose* ((2008) 7 SCC 196), *St. of Rajasthan Vs Cadila Health Care Ltd.*, *Cheminova India Ltd. Vs St. of Punj.* ((2011) 17 SCC 275), *Sunil Bharti Mittal Vs CBI* ((2015) 4 SCC

609), Mehmood Ul Rehman, and Birla Corporation Ltd. Vs Adventz Investments ((2020) 4 SCC 211), quashed the proceedings against the applicant. The court found non-compliance with Sections 23(3) and 23(4), depriving the applicant of the right to challenge the Analyst's report, and confirmed his resignation absolved him of liability under Section 34. The proceedings were deemed an abuse of process.

List of Cases cited:

1. *Medicamen Biotech Ltd. Vs Rubina Bose*, (2008) 7 SCC 196
2. *St. of Rajasthan Vs Cadila Health Care Ltd.*, (2008) 7 SCC 196 (referenced in judgment)
3. *Cheminova India Ltd. Vs St. of Punj.*, (2018) 17 SCC 275
4. *Sunil Bharti Mittal Vs Central Bureau of Investigation*, (2015) 4 SCC 609
5. *Mehmood Ul Rehman*, (2016) SCC OnLine SC 1152
6. *Birla Corporation Ltd. Vs Adventz Investments and Holdings Ltd.*, (2020) 4 SCC 211
7. *Amery Pharmaceuticals Vs St. of Rajasthan*, (2001) 4 SCC 382
8. *Maharashtra St. Electricity Distribution Co. Ltd. Vs St. of Maharashtra*, (2014) 3 SCC 528
9. *S.K. Alagh Vs St. of U.P.*, (2008) 5 SCC 662
10. *Jethsur Surangbhai Vs St. of Guj.*, (1984) SCC (Cri) 466
11. *Re: Expeditious Trial of Cases under Section 138 of N.I. Act, 1881 (Suo Motu Writ Petition (Crl.) No. 2 of 2020)*

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

1. Heard Sri Akhilesh Chandra Shukla, learned counsel for the applicant, Sri Sudhir Kumar Chandraul, learned AGA for the State and perused the record.

2. The instant application under Section 482 Cr.P.C. has been filed for quashing the entire proceedings of Complaint Case No.1036 of 2014 (State Vs. Yashpal Chail and others) under sections 18/27 of the Drugs and Cosmetic Act, P.S. Kotwali, District Muzaffar Nagar pending in the Court of C.J.M., Muzaffarnagar.

3. Facts of the case are that a complaint under Section 32 of the Drugs and Cosmetics Act, 1940 (for short "Drugs and Cosmetics Act") was filed in the Court of Chief Judicial Magistrate, Muzaffar Nagar on 25.02.2014 alleging that while discharging official duties the complainant took samples of three drugs for test and analysis from the premises of M/s Kumar Medicine Distributors and the Government Analyst vide report dated 09.07.2013 declared that the sample of the drug was not of standard quality. For ready reference relevant portion of the report is quoted hereunder:-

"Sample No.-GS/MZN/2013/Jan/07

Ofloxacin Tablets I.P. (Eloflox-200) B. No.-B123445, M/D-11/2012, E/D-10/2014, Mfd by - M/s Elmac Remedies Pvt. Ltd., Plot No.-202-3, Vill - Kotha, Post Lalitpur, Kichha Road, Rudrapur, Uttrakhand.

"The sample does not conform to the declared formula in respect of Assay."

Assa- Content of Ofloxacin 81.56%w/w/ of the stated amount of drug in each tablet of average weight which is less than the minimum I.P. limit of 90% w/w."

4. On being asked he stated that he has purchased medicines from the distributor, M/s Onida Health Care, C-7, Meerut Road, Industrial Estate Ghaziabad

and on being asked from this distributor, it was informed that the medicines were manufactured by M/s Elmac Remedies Private Limited.

5. After investigation was completed, the report along with the recommendation of the Drug Licensing Authority was filed. Since there was a breach of Section 18A of Drugs and Cosmetics Act, the complaint under Section 32 of the Drugs and Cosmetics Act was filed before the Chief Judicial Magistrate, Muzaffarnagar, who took cognizance on the complaint and issued summons on 27.02.2014 against the accused including the applicant.

6. Learned counsel for the applicants submitted that, the show cause notice was sent to the manufacturing company on 23.08.2013 but no compliance of Section 23 (3), (4) and 25(3) of the Drugs and Cosmetics Act was made as the Drug Inspector was supposed to make four samples, but he failed to do so. For ready reference Section 23 (3), (4) and 25(3) of the Drugs and Cosmetics Act are quoted hereunder:-

"Section 23 (3) 1

Where an Inspector takes a sample of a drug or cosmetic for the purpose of test or analysis, he shall intimate such purpose in writing in the prescribed form to the person from whom he takes it and, in the presence of such person unless he wilfully absents himself, shall divide the sample into four portions and effectively seal and suitably mark the same and permit such person to add his own seal and mark to all or any of the portions so sealed and marked:

Provided that where the sample is taken from premises whereon the drug or cosmetic is being manufactured, it shall be

necessary to divide the sample into three portions only:

Provided further that where the drug or cosmetic is made up in containers of small volume, instead of dividing a sample as aforesaid, the Inspector may, and if the drug or cosmetic be such that it is likely to deteriorate or be otherwise damaged by exposure shall, take three or four, as the case may be, of the said containers after suitably marking the same and, where necessary, sealing them.

Section 23 (4)

The Inspector shall restore one portion of a sample so divided or one container, as the case may be, to the person from whom he takes it, and shall retain the remainder and dispose of the same as follows:—

(i) one portion or container he shall forthwith send to the Government Analyst for test or analysis;

(ii) the second he shall produce to the Court before which proceedings, if any, are instituted in respect of the drug or cosmetic; and

(iii) the third, where taken, he shall send to the person, if any, whose name, address and other particulars have been disclosed under section 18A.

Section 25(3)

Any document purporting to be a report signed by a Government Analyst under this Chapter shall be evidence of the facts stated therein, and such evidence shall be conclusive unless the person from whom the sample was taken or the person

whose name, address and other particulars have been disclosed under section 18A has, within twenty-eight days of the receipt of a copy of the report, notified in writing the Inspector or the Court before which any proceedings in respect of the sample are pending that he intends to adduce evidence in controversion of the report."

7. He further submitted that compliance of this provision is mandatory and thus, any complaint without following the aforesaid provisions would be illegal. To buttress his argument, learned counsel for the applicant is relying on the judgement of Hon'ble Apex Court in the case of **M/s Medicamen Biotech Ltd. & Anor. vs. Rubina Bose, Drug Inspector2**. For ready reference paragraph nos.6, 9 & 10 of the said judgment are quoted hereunder:-

"6. A reading of the aforesaid provisions would reveal that they lay certain obligations as well as provide safeguards for a person from whom a drug has been seized for analysis or testing as Section 25 (3) specifies that unless such a person controverts the correctness of the report submitted by the Government Analyst within 28 days in writing that he intends to adduce evidence to controvert the report of the Analyst, it would be deemed to be conclusive evidence of the quality of the drug whereas sub-section (4) of Section 25 obliges the Magistrate on the request of the complainant or the accused or on in his own motion to send the fourth sample which has been disputed for fresh testing to the Director of the Central Drugs Laboratory. It is the case of the appellant that despite the fact that the appellant had repeatedly controverted the accuracy of the report of the Government Analyst the fourth sample had still not been sent to the

Director for re-testing and analysis. We find that the argument raised by the learned counsel for the respondent that the appellant had never expressed a desire to controvert the report of the Drug Analyst is not correct as is clear from the letter dated 28th August 2001 addressed to the Assistant Director General, Government Medical Stores Depot in which it was stated as under:

"On receipt of your letter, we have got the control sample of same batch analysed from an approved test house, namely Industrial Testing Laboratory, Delhi. The test house has reported our control samples to be of standard quality and conforming to IP with respect to content of Enalapril Maleate. Copy of test report No. F- 405/8- 01 dt. 25.8.2001 enclosed.

In the light of above facts, we do not agree with the Govt. analyst report that the sample is not of standard quality and request you to kindly get the sample retested at your end."

9. In Unique Farmaid's case (supra) which was a case under the Insecticides Act which has provisions analogous to Section 25 (4) of the Act, the court found that the accused had indeed made a request to the Inspector for sending the sample for re-testing within the prescribed time limit and as this request had not been accepted an important right given to an accused had been rendered ineffective on which the proceedings could be quashed. This is what the Court had to say:

"It cannot be gainsaid, therefore, that the respondents in these appeals have been deprived of their valuable right to

have the sample tested from the Central Insecticides Laboratory under sub-section (4) of Section 24 of the Act. Under sub-section (3) of Section 24 report signed by the Insecticides Analyst shall be evidence of the facts stated therein and shall be conclusive evidence against the accused only if the accused do not, within 28 days of the receipt of the report, notify in writing to the Insecticide Inspector or the court before which proceedings are pending that they intend to adduce evidence to controvert the report. In the present cases the Insecticides Inspector was notified that the accused intended to adduce evidence to controvert the report. By the time the matter reached the Court, the shelf life of the sample had already expired and no purpose would have been served informing the Court of such an intention. The report of the Insecticide Analyst was, therefore, not conclusive. A valuable right had been conferred on the accused to have the sample tested from the Central Insecticides Laboratory and in the circumstances of the case the accused have been deprived of that right, thus, prejudicing them in their defence.

In these circumstances, the High Court was right in concluding that if will be an abuse of the process of the court if the prosecution is continued against the respondents, the accused persons. The High Court rightly quashed the criminal complaint. We uphold the order of the High Court and would dismiss the appeals."

10. We find that this judgment helps the case of the appellant rather than that of the respondent because in spite of two communications from the appellant that it intended to adduce evidence to controvert the facts given in the report of the Government Analyst, the fourth sample

with the Magistrate had not been sent for re-analysis. The observations in Amery Pharmaceuticals's case (supra) are also to the same effect. We find that the aforesaid interpretation supports the case of the appellants inasmuch they had been deprived of the right to have the fourth sample tested from the Central Drugs Laboratory. It is also clear that the complaint had been filed on the 2nd July 2002 which is about a month short of the expiry date of the drug and as such had the accused appellant appeared before the Magistrate even on 2nd July 2002 it would have been well nigh impossible to get the sample tested before its expiry. In the affidavit filed to the petition by Dr. D. Rao, Deputy Drugs Controller, and in arguments before us, it has been repeatedly stressed that the delay in sending of the sample to the Central Drugs Laboratory had occurred as the appellant had avoided service of summons on it till 9th May 2005. This is begging the question. We find that there is no explanation as to why the complaint itself had been filed about a month before the expiry of the shelf life of the drug and concededly the filing of the complaint had nothing to do with the appearance of the accused in response to the notices which were to be issued by the Court after the complaint had been filed. Likewise, we observe that the requests for retesting of the drug had been made by the appellant in August/September 2001 as would be clear from the facts already given above and there is absolutely no reason as to why the complaint could not have been filed earlier and the fourth sample sent for retesting well within time. We are, therefore, of the opinion that the facts of the case suggest that the appellants have been deprived of a valuable right under Section 25 (3) and 25 (4) of the Act which

must necessitate the quashing of the proceedings against them."

8. Next argument of learned counsel for the applicant is that the applicant was not the director of the company at the relevant time (when the drug/medicine was manufactured or supplied) as he had tendered his resignation from the post of directorship of the company on 14.06.2009, which is evident from form-32, hence, he is not responsible for any act done by the company. Further, it cannot be said that the medicines were manufactured while he was director of the company. He further relies on Section 34 of Drugs and Cosmetics Act. For ready reference Section 34 of Drugs and Cosmetics Act is quoted hereunder:-

"Section 34

Offences by companies.—

(1) Where an offence under this Act has been committed by a company, every person who at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly: Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence. (2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable

to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. Explanation.—For the purposes of this section— (a) “company” means a body corporate, and includes a firm or other association of individuals; and (b) “director” in relation to a firm means a partner in the firm.”

9. Relying on the above-mentioned Section, learned counsel for the applicant submits that only those persons, who at the time of offence was in charge of, and was responsible to the company for the conduct of the business of the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

10. He further submits that if there is no allegation against the accused-director averred in the complaint, in absence of the same no prosecution can be initiated against such director. To buttress his argument, he has placed reliance on the judgement of Hon'ble Apex Court in **State of Rajasthan v. Cadila Health Care Limited**³, relevant paragraphs of which are quoted hereunder:-

"2. As regards the second ground which commended to the High Court, the law is well settled. Reliance has been placed on the decision in the case of *Medicamen Biotech Limited* and another versus *Rubina Bose*, Drug Inspector, reported in (2008) 7 SCC 196 and also in *Amery Pharmaceuticals* and another versus *State of Rajasthan*, reported in (2001) 4 SCC 382. It is held in these decisions that the manufacturer should be afforded an

opportunity to controvert the correctness of the Government Analyst's report and if objection is raised by the manufacturer within 28 days specified under Section 25 (3) of the Act, the preserved sample is required to be forwarded to the Central Drugs Laboratory for its independent report in terms of Section 25 (4) of the Act. That is a valuable right of the manufacturer.

5. Even on the first ground which weighed with the High Court, we find merit therein, as no averment in the complaint has been brought to our notice, which would even remotely suggest the involvement of the private respondents as in-charge of and responsible to the company for the conduct of business of the Company as such."

11. He further placed reliance on the judgement of Hon'ble Apex Court in **M/s Cheminova India Ltd. v. State of Punjab**⁴, relevant paragraphs of which are quoted hereunder:-

"6. *Learned Counsel for the appellants by referring to Section 33 of the Act has submitted that appellants have already filed an undertaking dated 22.01.2013 before the respondents, nominating the incharge and responsible officers of the Company to maintain quality of the pesticides manufactured by the Company along with the resolution of the Company's meeting held on 28.12.2012. Learned Counsel has submitted that by making vague and bald allegations, the appellants, who were the Company and the Managing Director, are also sought to be prosecuted.*

6(a). *It is submitted that unless there is a clear and categorical averment in the complaint, indicating the role played by*

the appellants, there cannot be any vicarious liability on the 1st Appellant – Company and the 2nd Appellant–Managing Director for commission of the alleged offence. In support of his arguments, learned Senior Counsel has placed reliance on the judgment of this Court in the case of Managing Director, Castrol India Limited vs. State of Karnataka & Anr.1, and also another judgment of this Court in the case of Shiv Kumar Jatia vs. State of NCT of Delhi.

6(b). It is also further contended by the learned Counsel that before taking cognizance of the offence on the complaint, learned Magistrate has not followed the procedure, contemplated under Section 24 (4) of the Act and Section 202 of the Code of Criminal Procedure. It is submitted that though, the 2018 (17) SCC 275 2019 (17) SCC 193 appellants are not residing within the jurisdiction of the Magistrate, without making proper inquiry and ordering investigation, cognizance of the offence is taken. Further, it is submitted that the prosecution against the appellants, is nothing but abuse of the process of law. The High Court has not considered various grounds raised by the appellants in proper perspective and dismissed their application for quashing the complaint. In support of his argument that the Magistrate has not followed the procedure under Section 202 of the Code of Criminal Procedure, learned Senior Counsel has placed reliance on the judgment of this Court in Re: Expeditious Trial of Cases under Section 138 of N.I. Act, 1881 (Suo Motu Writ Petition (Crl.) No.2 of 2020).

19. Section 33 of the Act deals with ‘offences by companies’. A reading of Section 33 (1) of the Act, makes it clear that whenever an offence under this Act has

been committed by a company, every person who at the time the offence was committed, was in charge of, or was responsible to the company for the conduct of the business of, the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. In the case on hand, it is not in dispute that on behalf of the 1st Appellant – Company, 2nd Appellant – Managing Director has furnished an undertaking dated 22.01.2013, indicating that Shri Madhukar R. Gite, Manager of the Company, has been nominated in the resolution passed by the Company on 28.12.2012 to be in charge of and responsible to the said Company, to maintain the quality of the pesticides manufactured by the said Company and he was authorized to exercise all such powers and to take all such steps, as may be necessary or expedient to prevent the commission of any offence under the Act. Filing of such undertaking with the respondent is not disputed. Even, at Para 5.10 in the counter affidavit filed before this Court, it is pleaded by the Respondents that by appointing persons responsible for affairs of the Company, quality control, etc., 2nd Appellant – Managing Director cannot escape his liability from offences committed by 1st Appellant – Company. In view of the specific provision in the Act dealing with the offences by companies, which fixes the responsibility and the responsible person of the Company for conduct of its business, by making bald and vague allegations, 2nd Appellant – Managing Director cannot be prosecuted on vague allegation that he being the Managing Director of the 1st Appellant – Company, is overall responsible person for the conduct of the business of the Company and of quality control, etc. In the instant

case, the Company has passed a resolution, fixing responsibility of one of the Managers namely Mr. Madhukar R. Gite by way of a resolution and the same was furnished to the respondents by the 2nd Appellant in shape of an undertaking on 22.01.2013. When furnishing of such undertaking fixing the responsibility of the quality control of the products is not in dispute, there is no reason or justification for prosecuting the 2nd Appellant – Managing Director, on the vague and spacious plea that he was the Managing Director of the Company at the relevant time. A reading of Section 33 of the Act also makes it clear that only responsible person of the Company, as well as the Company alone shall be deemed to be guilty of the offence and shall be liable to be proceeded against. Though, the Managing Director is overall incharge of the affairs of the company, whether such officer is to be prosecuted or not, depends on the facts and circumstances of each case and the relevant provisions of law. Having regard to specific provision under Section 33 of the Act, and the undertaking filed in the present case, respondent cannot prosecute the 2nd Appellant herein. Thus, we find force in the contention of Mr. Sidharth Luthra, learned Senior Counsel, that allowing the prosecution against 2nd Appellant – Managing Director is nothing but, abuse of the process of law. At the same time, we do not find any ground at this stage to quash the proceedings against the 1st Appellant – Company"

12. He further submits that the Magistrate while issuing summons has failed to apply its mind as the impugned order is non-speaking order and the Hon'ble Apex Court in *Sunil Bharti Mittal v. Central Bureau of Investigation*⁵ deprecated this practice where the summons are being issued in most

mechanical manner without applying mind, relevant paragraphs of which are quoted hereunder:-

"39. When the company is the offender, vicarious liability of the Directors cannot be imputed automatically, in the absence of any statutory provision to this effect. One such example is Section 141 of the Negotiable Instruments Act, 1881. In *Aneeta Hada (supra)*, the Court noted that if a group of persons that guide the business of the company have the criminal intent, that would be imputed to the body corporate and it is in this backdrop, Section 141 of the Negotiable Instruments Act has to be understood. Such a position is, therefore, because of statutory intendment making it a deeming fiction. Here also, the principle of "alter ego", was applied only in one direction namely where a group of persons that guide the business had criminal intent, that is to be imputed to the body corporate and not the vice versa. Otherwise, there has to be a specific act attributed to the Director or any other person allegedly in control and management of the company, to the effect that such a person was responsible for the acts committed by or on behalf of the company. This very principle is elaborated in various other judgments. We have already taken note of *Maharashtra State Electricity Distribution Co. Ltd. (supra)* and *S.K. Alagh (supra)*. Few other judgments reiterating this principle are the following:

1. Jethsur Surangbhai v. State of Gujarat

"9. With due respect what the High Court seems to have missed is that in a case like this where there was serious defalcation of the properties of the Sangh,

unless the prosecution proved that there was a close cohesion and collusion between all the accused which formed the subject matter of a conspiracy, it would be difficult to prove the dual charges particularly against the appellant (A-1).

47. *However, the words "sufficient grounds for proceeding" appearing in the Section are of immense importance. It is these words which amply suggest that an opinion is to be formed only after due application of mind that there is sufficient basis for proceeding against the said accused and formation of such an opinion is to be stated in the order itself. The order is liable to be set aside if no reason is given therein while coming to the conclusion that there is prima facie case against accused, though the order need not contain detailed reasons. A fortiori, the order would be bad in law if the reason given turns out to be ex facie incorrect.*

48. *However, there has to be a proper satisfaction in this behalf which should be duly recorded by the Special Judge on the basis of material on record. No such exercise is done. In this scenario, having regard to the aforesaid aspects coupled with the legal position explained above, it is difficult to sustain the impugned order dated 19.03.2013 in its present form insofar as it relates to implicating the appellants and summoning them as accused persons. The appeals arising out of SLP (Crl.) No. 2961 of 2013 and SLP (Crl.) No. 3161 of 2013 filed by Mr. Sunil Bharti Mittal and Ravi Ruia respectively are, accordingly, allowed and order summoning these appellants is set aside. The appeals arising out of SLP (Crl.) Nos. 3326-3327 of 2013 filed by Telecom Watchdog are dismissed."*

13. To further buttress his argument, learned counsel for the applicant relied on the judgement of Hon'ble Apex Court in *Mehmood Ul Rehman*⁶ wherein it has been held there must be sufficient indication in the order passed by the Magistrate that he is satisfied that the allegations in the complaint constitute an offence and when considered along with the statements recorded and the result of inquiry or report of investigation under Section 202 Cr.P.C., if any, the accused is answerable before the criminal court, there is ground for proceeding against the accused under Section 204 Cr.P.C., by issuing process for appearance. The application of mind is best demonstrated by disclosure of mind on the satisfaction. Further, the Hon'ble Supreme Court in the matter of *Birla Corporation Limited vs. Adventz Investments and Holdings Limited and others*⁷ has held that the order of the Magistrate summoning the accused must reflect that he has applied his mind to facts of the case and the law applicable thereto. The application of mind has to be indicated by disclosure of mind on the satisfaction. Considering the duties on the part of the Magistrate for issuance of summons to accused in a complaint case and that there must be sufficient indication as to the application of mind and observing that the Magistrate is not to act as a post office in taking cognizance of the complaint.

14. Learned counsel for the applicant further submits that the summons have been issued in a very mechanical manner without considering the fact that the applicant, who has resigned way back in 2009.

15. Per contra, learned AGA appears and submits that the complainant was competent to lodge the complaint as per

Act and after taking the sample one sample was handed over to the shop keeper and the second sample was sent for testing. He further submits that the averment of non-compliance of Section 23(4) and 25(3) of Drugs and Cosmetics Act was not taken in the pleadings. He further submits that the drug was of sub-standard, which would cause great health hazard to the patients, who are taking the medicine. He further submits that when the show cause notice was issued he did not deny that he is no more a director. He further submits that no letter of any competent authority was placed on record to show that the applicant had resigned as a director. He further submits that the directors are responsible for the conduct and act of the company and also for the sub-standard medicines, which were being manufactured and sold by the company.

16. In reply of the argument made by learned AGA, learned counsel for the applicant submits that it is always open for the applicant to raise any legal issues at any point of time. The provisions of Section 23 (4) of Drugs and Cosmetics Act were not followed, its a pure legal issue and it can be raised at any time. He further submitted that no show cause notice was ever upon the applicant and the same was only served upon the company and the company had informed the Drug Inspector that the applicant was no longer a director of the company.

17. I have carefully considered the submissions advanced by learned counsel for the respective parties. With the able assistance, I have perused the pleadings, affidavits and annexures thereto and the reply filed by concerned parties.

18. The plain reading of Section 23 (3) of Drugs and Cosmetics Act clearly shows that when an Inspector takes a sample of a

drug or cosmetic for the purpose of test or analysis, he shall intimate such purpose in writing in the prescribed form to the person from whom he takes it and, in the presence of such person unless he wilfully absents himself, shall divide the sample into four portions and effectively seal and suitably mark the same and permit such person to add his own seal and mark to all or any of the portions so sealed and marked. Section 23 (4) of the Drugs and Cosmetics Act further lays-down that the Inspector shall restore one portion of the sample to the person from whom he takes and the second sample should be sent to the Government and third should be produced in the Court before which the proceedings are initiated and the fourth would be sent to a person who are defined under Section 18 A of the Act.

19. It is evidently clear that the Inspector while taking the sample has not followed the mandatory provisions of Section 23 (3) and (4) of the Act. Moreover, from the record of the ROC it is clear that the applicant had resigned from the post of directorship of the company, M/S Elmac Remedies Pvt. Ltd. with effect from 01.06.2009. Since the alleged offence is said to have been committed and the samples were collected on 21.01.2013, at that point of time the applicant had nothing to do with the company neither he was involved in the affairs of the company nor was the in-charge or key personnel running the company. The applicant has no difficulty if the prosecution is continued against the company or the directors, who were responsible for the day to day affairs of the company. Asfar as the applicant is concerned, he was not a director, and hence, cannot be fastened with the liability of the company.

20. Considering the above facts and circumstances, it is clear that the

proceeding initiated against the applicant under the Drugs and Cosmetics Act is a pure abuse of legal process, and to secure ends of justice the entire proceedings of Complaint Case No.1036 of 2014 (State Vs. Yashpal Chail and others) under Sections 18/27 of the Drugs and Cosmetic Act, P.S. Kotwali, District Muzaffar Nagar pending in the Court of C.J.M., Muzaffarnagar are hereby quashed.

21 . The instant Application U/S 482 Cr.P.C. is allowed.

(2024) 4 ILRA 615
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.11.2023

BEFORE

**THE HON'BLE UMESH CHANDRA SHARMA,
 J.**

Application U/S 482. No. 6818 of 2002

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

Counsel for the Applicant:

Sri K.K. Dwivedi, Sri R.P. Dwivedi, Sri Dharendra Bahadur Singh

Counsel for the Opposite Parties:

G.A.

Criminal Law - Code of Criminal Procedure, 1973 – Section 482 – Indian Penal Code, 1860 – Sections 147, 148, 149, 307, 352 & 436 – Criminal Law Amendment Act – Section 7 – Application for Quashing Charge-Sheet and Proceedings – Allegations of False Implication – Prima Facie Offense – Scope of Inherent Powers
 The applicants, Mukhiya Gurjar and others, filed an application under Section 482 Cr.P.C. to quash the charge-sheet and proceedings in Case No. 881 of 2001 under Sections 147, 148, 149, 307, 352, 436 IPC and Section 7 of the Criminal Law Amendment

Act, Police Station Loni, District Ghaziabad, pending before the 5th Additional Chief Judicial Magistrate. The FIR alleged that the applicants, part of a mob, attacked a police outpost, set government property on fire, and attempted to harm police personnel, prompted by the police's alleged negligence in addressing local crimes like dacoity, murder, and rape. The applicants claimed the allegations were false, motivated by political rivalry targeting Samajwadi Party supporters, and unsupported by independent witnesses or injuries. The St. countered that the incident involved damage to government property, eight arrests on the spot, and sufficient evidence via police Statements to justify the charge-sheet. Held: The court, citing Pramod Kumar Vs St. (NCT) of Delhi (AIR 2013 SC 3344), Govindaraju Vs St. (AIR 2012 SC 1292), CBI Vs Ravi Shankar Srivastava (AIR 2006 SC 2872), Kamal Shivaji Pokarnekar Vs St. of Maharashtra (AIR 2019 SC 847), Dhruvaram Murlidhar Sonar Vs St. of Maharashtra (AIR 2019 SC 327), St. of Bihar Vs P.P. Sharma (1991 CrLJ 1438), and Kaptan Singh Vs St. of U.P. (AIR 2021 SC 3931), dismissed the application. The court held that a prima facie offense was established, and Section 482 powers cannot be used for roving inquiries into factual disputes or evidence sufficiency, which are matters for trial. The absence of injuries did not negate the offense under Section 307 IPC, and police testimony was deemed reliable absent contrary evidence. The court directed the trial court to proceed expeditiously.

List of Cases cited:

1. Pramod Kumar Vs St. (NCT) of Delhi, AIR 2013 SC 3344
2. Govindaraju @ Govinda Vs St. by Srirampuram Police Station, AIR 2012 SC 1292
3. CBI Vs Ravi Shankar Srivastava, AIR 2006 SC 2872
4. Kamal Shivaji Pokarnekar Vs St. of Maharashtra, AIR 2019 SC 847
5. Dhruvaram Murlidhar Sonar Vs St. of Maharashtra, AIR 2019 SC 327
6. St. of Bihar Vs P.P. Sharma, 1991 CrLJ 1438

7. Kaptan Singh Vs St. of U.P., AIR 2021 SC 3931

8. Joseph M. Puthussery Vs T.S. John, AIR 2011 SC 906

9. Laxmi Raj Shetty Vs St. of T.N., AIR 1988 SC 1274

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

1. Heard Sri Dharendra Bahadur Singh, Advocate, holding brief of Sri K.K. Dwivedi learned counsel for the applicants, Sri Mithilesh Kumar, learned A.G.A for the State and perused the record.

2. This application under Section 482 Cr.P.C has been moved by the applicants to quash the Charge-sheet and entire Criminal Proceeding of Case No. 881 of 2001 (State Versus Tak Chandra and others under Sections 147, 148, 149, 307, 352 and 436 I.P.C and 7 Criminal Law Amendment Act, Police Station Loni, District Ghaziabad, pending in the Court of 05th Additional Chief Judicial Magistrate, Ghaziabad.

3. The applicants has taken ground that the entire allegations of the F.I.R are totally false, fabricated and concocted. It is alleged in the F.I.R that some persons, who were armed with county made pistol, lathi, sticks, etc. attacked on the police chauki and destroyed by way of fire also but no person received any injury and no police constable or police employee was medically examined in any hospital. The present case is of no injury. Prior to the alleged incident the local public informed the concerned Chauki In-Charge regarding the incident of Dacoity, murder and rape in the concerned area, due to negligence of the local police. When the opposite party no. 2 did not consider the matter and did

not take any necessary action, the local public organized/held a Panchayat headed by applicant no. 1, who was an active member and a strong supporter of Samajwadi Party, who had also contested Parliamentary elections two times from Baghpat Constituency and also participated in election of M.L.A. He was the President of All India Pathik Sena. In this regard a public meeting was held near the Police Chauki, in which an ultimatum regarding Dharana and hunger strike was also given to the higher authorities, due to which the opposite party no. 2 lodged a false report with some allegations against the applicants. Some News items were also published in Daily Amar Ujala and some others News Papers from which it is fully proved that due to the negligence of local police, the incidents had occurred in the concerned area. Several persons and several parties were also present, but the F.I.R has been lodged only against the applicants and some others, who belong to Samajwadi Party due to mala fide intention to save the opposite party no. 2 and some police personnels.

4. In the aforesaid *Panchayat*, *Tak Chandra Pradhan*, who has contested Parliamentary Election under the Symbol of B.S.P, one Mr. Shyam Sunder Sharma, President of Lok Dal, District Ghaziabad and one Kartar Hithora, Member Zila Panchayat, who belong to Lok Dal Party, Jai Bhagwan, Block Pramukh, Loni, of B.S.P., Rajendra Singh, Up-Pramukh, of Lok Dal Party, Madhu Sharma, of B.J.P., Daya Nand real brothers of Roop Chaudhary, Present M.L.A. were also present at the alleged place of occurrence, but the F.I.R has been lodged only against the persons, who are active member and supporter of Samajwadi Party. The police personnels themselves destroyed the old

vehicle in concerned police Chauki by way of firing and a false report has been lodged against the applicants. The Police *Chauki* was fully safe and no article/material has been destroyed in the concerned Police *Chauki* by the applicants.

5. When the F.I.R. was lodged, the applicants filed a Criminal Misc. Writ Petition No. 7362 of 1999 - Mukhiya Gurjar And Others Vs. State of U.P., in which the Hon'ble Court stayed the arrest of the applicants on 07.12.1999 and when the then S.H.O. had taken necessary action against the accused persons relating to Crime No. 626 of 1999, under Sections 394 / 302 I.P.C and also other matters relating to POCSO/rape, dacoity etc, then the applicant no. 2 constituted a Committee and demanded compensation in this regard. The Committee also moved a representation to the Chief Minister of the State of U.P. The higher authority admitted the fact that due to negligence of the police personnels three persons were murdered in Nithora and after concluding the investigation the police has submitted charge-sheet against the applicants, which is annexed as Annexure No. 5 to the application.

6. The learned A.C.J.M 5th, Ghaziabad, vide his order dated 30.05.2002, issued N.B.W against the applicants and fixed 20th July, 2002 for appearance. The I.O. of the case has submitted a charge-sheet without any evidence and all the police personnels have given similar statement. It is alleged that about 100-150 persons armed with different type of weapons attacked on the police party, but no police personnel received any grievous injury. The I.O of the case has recorded the statement of Sri U.P.S Chauhan, the then *Chauki* In-Charge, who

repeated the same version as stated in the F.I.R. Except the police personnel, no public witness was present and supported the prosecution version. The entire criminal proceeding is being concocted by the local police only to save themselves from the mass demand made by the said committee. On the basis of the charge-sheet, the learned Magistrate has taken cognizance, which is unjustified and it is also an abuse of process.

7. One Sri Brijendra Singh has given a reminder to the Chief Minister, State of UP. regarding bad administration and corruption of local police, in which it is clarified that three family members lost their lives due to loose administration and negligence of local police of Loni. The complaint was also moved before the National Human Rights Commission and notices were issued to the Chief Secretary and D.G.P, U.P. Since there is not a single evidence against the applicants regarding commission of the alleged offence/crime, therefore, the entire criminal proceedings initiated against the applicants is wholly illegal and is an abuse of process.

8. From the perusal of the F.I.R and the relevant documents, no offence under the aforesaid Sections are made out, therefore the charge-sheet and the entire criminal proceedings in Case Crime No. 881 of 2001 – *State Vs. Tek Chand & others* in the aforesaid Sections, Police Station Loni, District Ghaziabad, pending in the Court of A.C.J.M. 5th, Ghaziabad be set aside.

9. All the relevant papers have been annexed with the affidavit.

10. From the side of respondents a counter affidavit has been filed against the

contentions and prayer of the application, in which allegations of the applicants made in the application and the affidavit have been denied and it has been submitted that the incident had taken place at the police out post Banthala, P.S Loni, Ghaziabad, on 02.12.1999 for which an F.I.R under Sections 147, 148, 149, 307, 352, 436 I.P.C and Section 7 Criminal Law Amendment Act was registered at P.S Loni, Ghaziabad in respect of the offence committed by the accused persons. In connection of the said offences eight persons were arrested on the spot and another persons managed to escape. In the aforesaid incident the vehicles belonging to the police personnels, Government property was set on fire by the accused persons. After completion of the investigation, a charge-sheet has been submitted. The accused-applicants have not filed the entire records, which are collected during the course of investigation, which amounts to concealment of material facts from the Hon'ble Court and as such the present application is liable to be rejected.

11. Apart from this, the applicants have remedy to raise all the points before the concerned court at the time of framing of charge, which can easily be decided there. In view of availability of alternative remedy before the trial court, the present application is not maintainable and is liable to be rejected. If a lawful meeting is held, the Police has nothing to do, but since the mob gathered there at the instance of the applicants and other persons, took the law in their own hands by setting ablaze the Government property, the present action has been taken in accordance with law.

12. It is wrong to say that the police has lodged a false and frivolous report and has also set the articles on fire. There are as

may as seven witnesses of the facts. The news items are not the substantial piece of evidence, hence, no reliance can be placed on the same.

13. The F.I.R has been lodged against those persons, who have taken law in their own hands without any ill-will or *malafide* intention.

14. The contention of para 12 of the affidavit is totally false and denied. In fact the government records, such as case diary, wireless set etc. have been damaged by the miscreants. It is also wrong to say that the Police himself has destroyed the old vehicles. There is nothing on record before this Hon'ble Court to substantiate the contents of the application. The statutory right of hearing may be afforded by the applicants at the time of framing of charge.

15. The accused persons have failed to appear before the concerned court, hence, non-bailable warrants were issued against them in accordance with law.

16. The incident which has taken place at Police out post Banthala, P.S. Loni, District Ghaziabad has been witnessed by the Police Party and their statements have also been recorded.

17. In view of the submission of the charge-sheet, the alleged reminder was of no avail. At the time of incident the applicants were also the member of unlawful assembly who in furtherance of common object have committed the offence in question and they cannot escape their liability of being prosecuted. In view of availability of alternative remedy before the trial court at the time of framing of charge, the present application is premature and is liable to be dismissed.

18. No rejoinder affidavit has been filed by the applicants.

19. The learned counsel for the applicant and learned A.G.A have already advanced their arguments.

20. It has been averred by the learned counsel for the applicants that there is no injury to any of the Police Personnel. In this regard it is argued by the learned A.G.A that to constitute an offence under Section 307 I.P.C, there is no need of injury.

21. Section 307 I.P.C is as under:

“307. Attempt to murder.—
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 murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to [imprisonment for life], or to such punishment as is herein before mentioned. Attempts by life convicts.—When any person offending under this section is under sentence of imprisonment for life, he may, if hurt is caused, be punished with death.

Illustrations :-

(a) *A shoots at Z with intention to kill him, under such circumstances that, if death ensued. A would be guilty of murder. A is liable to punishment under this section.*

(b) *A, with the intention of causing the death of a child of tender years, exposes it in a desert place. A has*

committed the offence defined by this section, though the death of the child does not ensue.

(c) A, intending to murder Z, buys a gun and loads it. A has not yet committed the offence. A fires the gun at Z. He has committed the offence defined in this section, and if by such firing he wounds Z, he is liable to the punishment provided by the latter part of 3[the first paragraph of] this section.”

22. According to this Court, injury is not necessary. If an attempt to kill a person is made, the same is also sufficient to attract Section 307 I.P.C. In this case from the evidence on record, it has been prima facie established that the applicants and the mob tried their best to damage the property, to cause injuries to the Police personnels, but if the Police personnels any how managed to escape, the same would not absolve the applicants from their criminal liability in the eyes of Law.

23. If any dacoity, murder and rape had taken place, a complaint could be made to the Higher Authorities for taking departmental action against the responsible policemen which had already been made and Panchayats have already been held. Demands had already been sent. The matter has already been in the knowledge of Higher Police and Executive Authorities. Under Article 19 of the Constitution of India, a peaceful demonstration is permissible, but in the garb of peaceful demonstration, one cannot take law in his own hand. If Police did not take action or the action taken by the Police was not satisfactory, the applicants had right to raise the same through their Political representatives in Legislative Assembly and Council or in High Court or the Apex

Court. It is nowhere mentioned that any permission was taken from the local authorities for the alleged gathering or meeting. It is true that the news of the News Papers are not the authentic proof of any fact. It is mere hearsay evidence which are not admissible as held in Joseph M. Puthussery Vs. T.S. John, AIR 2011 S.C. 906, Laxmi Raj Shetty Vs. State of T.N AIR 1988 S.C. 1274.

24. There is no *prima-facie* proof that the Police personnels themselves set ablaze fire and damaged the alleged properties. It appears that the applicants forgot that any such demand could be made in right way. There are documentary and oral evidence on record to *prima-facie* establish the guilt of the applicants. When all the influential political and social persons were involved in the matter, it is beyond imagination that any public person would come forward in support of the Policemen. In such a circumstance when there is only evidence of Police personnels, the same would be considered as to whether it is cogent, credible and reliable or not. In such a circumstance, evidence of public persons cannot be sought for.

25. In *Pramod Kumar Vs. State (NCT) of Delhi, AIR 2013 SC 3344, Govindaraju @ Govinda Vs. State by Srirampuram Police Station and another AIR 2012 SC 1292*, it has been held that the testimony of Police personnels should be treated in the same manner as testimony of any other witness. There is no principle of law that without corroboration by independent witnesses the testimony of police personnels cannot be relied on. The presumption that a person acts honestly applies as much in favour of a police personnel as of other persons and it is not a proper judicial approach to distrust and

suspect them without good reasons. As a rule it cannot be stated that Police officer can or cannot be sole eye witness in criminal cases. Statement of Police Officer can be relied upon and even form basis of conviction when it is reliable, trustworthy and is preferably corroborated by other evidence on record.

26. This application has been moved under Section 482 Cr.P.C, which is as under:-

“482. Saving of inherent powers of High Court. Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.”

27. From the above it is very much clear that a High Court can exercise its inherent power only to give effect any order under this Code or to prevent abuse of the process of any court or otherwise to secure the ends of Justice.

28. The powers under Section 482 Cr.P.C cannot be liberally exercised and it has to be sparingly exercised, in cases, there is a dire need of exercise of this power.

29. In *CBI Vs. Ravi Shankar Srivastava, AIR 2006 SC 2872* it is held that while exercising jurisdiction under Section 482 Cr.P.C, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on reasonable appreciation of it accusation would not be sustained. That is the function of trial judge. The same reason and ground has

been taken by the State through counter affidavit.

30. In *Kamal Shivaji Pokarnekar Vs. State of Maharashtra*, AIR 2019 SC 847, it has been held that the correctness of the allegations against accused has to be decided only in trial. Criminal complaints cannot be quashed at initial stage of issuance of process only on ground that allegations made therein appear to be of civil nature.

31. In *Dhruvaram Murlidhar Sonar Vs. State of Maharashtra*, AIR 2019 SC 327, it has been held that the expression “abuse of process of law” or “to secure the ends of justice” do not confer unlimited jurisdiction on High Court.

32. In *State of Bihar Vs. P.P Sharma*, 1991 CrLJ 1438/ 1448 SC it is held that the allegations of malafide against the informant based on the facts after the lodging of the FIR are of no consequence and cannot be the basis of quashing the proceedings. Simply because the IO, while acting bonafide, ruled out certain documents as irrelevant, it is no ground to assume that he acted malafide. In the case in hand, the applicants have blamed the IO that he has not investigated properly the old vehicles were set on fire by the policemen and not by the applicants which cannot be decided under section 482 Cr.P.C.

33. In *Kaptan Singh Vs. State of U.P.*, AIR 2021 SC 3931, it is held that if petition under section 482 Cr.P.C was at the stage of FIR, in that case the allegations in FIR/complaint only are required to be considered and it has to be considered as to whether a cognizable offence is disclosed or not. However, thereafter when statements are recorded, evidence is

collected and charge-sheet is filed after conclusion of investigation/ inquiry, matters stands on different footing and court is required to consider material/evidence collected during investigation. Even at this stage also the High Court is not required to go into merits of the allegations and / or enter into merits of the case as if High Court is excising appellate jurisdiction. In the cited case the High Court quashed the criminal proceedings even after the submission of the charge-sheet and even magistrate had taken cognizance. The Apex court held that the High Court did not take into consideration material collected during investigation/ inquiry and even statements recorded. The order of High Court regarding quashing the proceedings of the criminal case was set aside. Similarly in this case, the IO has submitted the charge-sheet long ago after collecting the oral and documentary evidences and the concerned court after taking cognizance has also issued the process against the applicants. According to this court the principle laid down in this case is fully applicable in the case in hand.

34. On the basis of the above discussion, this Court is of the considered view that the questions raised in the present application cannot be decided by this Court under Section 482 Cr.P.C.

35. After investigation, a charge-sheet has been submitted against the applicants, they are summoned in due course of law. They have to face the trial. The trial court has to decide the case according to the evidence adduced by the prosecution and the defence. The proceeding under Section 482 Cr.P.C is not an alternative remedy of the trial. When there was enough material before the magistrate for the purposes of

issuing process, the accused is not entitled to challenge that order under this section. In this application it is not denied that the properties were not damaged and the vehicles etc. were not set ablaze. Therefore, the High Court cannot exercise its power under section 482 Cr.P.C if the prima-facie offence has been made out on the basis of the allegations made in the complaint without going into the truth or otherwise of those allegations. The truthfulness or otherwise of the allegations made in the complaint, cannot be dealt with at this stage. If some offence is made out on a bare perusal of the complaint or FIR, then such a complaint or FIR cannot be quashed by invoking inherent jurisdiction under section 482 of the code. The sufficiency of evidence or material cannot also be gone into, at this stage. In a proceeding under this section, it is not open to the High Court to go into the question of fact. It is settled law that the High Court in exercise of its inherent jurisdiction would not make any roving inquiry into the questions of facts and record any findings. The High Court will not enter into inquiry of disputed facts and thereafter hold in favour of the accused.

36. Thus this application under Section 482 Cr.P.C is devoid of merit and is liable to be dismissed accordingly.

ORDER

37. The application under Section 482 Cr.P.C is accordingly dismissed. Stay order, if any, stands vacated.

38. Let a copy of this order be sent to the Trial Court to proceed with trial in accordance with law.

(2024) 4 ILRA 622

**ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 18.04.2024**

BEFORE

THE HON'BLE OM PRAKASH SHUKLA, J.

Application U/S 482. No. 7324 of 2023

**Shankar Nath Pnadey & Anr. ...Applicants
Versus
State of U.P. & Ors. ...Opposite Parties**

Counsel for the Applicants:
Sri Gopal Pandey

Counsel for the Opposite Parties:
G.A.

Criminal Law - Code of Criminal Procedure, 1973 -Section 482- Quashing of Summoning Order – The applicants sought to quash the summoning order and criminal proceedings under Section 3 of the Prevention of Damage to Public Property Act, 1984 (PDPP Act) for alleged encroachment on Gaon Sabha land – Held, the High Court's inherent powers under Code of Criminal Procedure, 1973 -Section 482 can quash proceedings when they constitute an abuse of process, particularly when the allegations do not establish an offence under the charged provisions. (Paras 2, 6, 19, 20)

B. Applicability of PDPP Act, 1984 – Scope and Purpose – The applicants were charged for erecting barbed wire fencing on Gaon Sabha land to protect crops – Held, the PDPP Act is intended to curb vandalism and damage to public property during riots or public commotion, not minor encroachments like fencing, which are governed by specific provisions under the U.P. Revenue Code, 2006. (Paras 5, 9, 10, 11)

C. U.P. Revenue Code, 2006 – Remedy for Encroachment – The applicants removed the alleged encroachment after objection by the Lekhpal, as confirmed by a report dated 30.10.2019 – Held, Section 67 of the U.P. Revenue Code provides a comprehensive mechanism for addressing encroachments on

Gaon Sabha land, including demarcation and eviction by revenue authorities, rendering criminal prosecution under the PDPP Act inappropriate. (Paras 4, 12, 14, 17)

D. Investigation and Charge-Sheet – Procedural Irregularities – The Investigating Officer submitted a charge-sheet within 20 days of the FIR without awaiting the Lekhpal's report or conducting proper demarcation – Held, the hasty investigation, lacking Statements from villagers or independent witnesses, was arbitrary and potentially mala fide, influenced by enmity with the Gaon Pradhan. (Paras 4, 8, 18)

E. Absence of Criminality – Quashing Justified – The applicants, senior citizens, removed the fencing voluntarily, and no damage to public property was established – Held, in the absence of criminal intent or vandalism as required under the PDPP Act, and given the resolution of the encroachment, continuing the prosecution was an abuse of process, warranting quashing of the summoning order and proceedings. (Paras 6, 8, 18, 20)

Application Allowed.

List of Cases cited:

1. In Re. Destruction of Public and Private Properties Vs St. of Andhra Pradesh, (2009) 5 SCC 212
2. Kodungallur Film Society Vs U.O.I., (2018) 10 SCC 713

(Delivered by Hon'ble Om Prakash Shukla, J.)

(1) Heard learned counsel for the applicant as well as the learned Additional Government Advocate.

(2) The present application under Section 482 of the Code of Criminal Procedure, 1973 has been filed by the applicants, Shankar Nath Pandey and Shambhu Nath Pandey, seeking to quash the summoning order dated 15.03.2021 passed by the Judicial Magistrate-I,

Faizabad in Criminal Case No.137 of 2021 : State Vs. Shankar Nath Pandey & others arising out of Case Crime No. 335 of 2019, under Section 3 of the Prevention of Damage to Public Property Act, 1984, Police Station Khandasa, District Ayodhya and also to quash the entire proceedings initiated against the applicants.

(3) The records of the case indicate that criminal proceedings were initiated pursuant to an FIR dated 01.09.2019 lodged against the applicants and one Kaushal Kishore, which was registered as Case Crime No.335 of 2019, under Section 3 of the Prevention of Damage to Public Property Act, 1984 (hereinafter referred to as PDPP Act), Police Station Khandasa, District Ayodhya. The case was investigated and a charge sheet dated 21.09.2019 was submitted, whereupon cognizance was taken by the Judicial Magistrate-I, Faizabad and on 15.03.2021, an order for summoning the applicants was passed. It is this order, which has been challenged before this Court in the instant application.

(4) It is submitted by the learned counsel for the applicants that the applicants are recorded co-tenure holder of Gata Nos.2727 adjacent to Gata No.2722 and 2729 (chak road of Gaon Sabha) situated in Village Kotiya, Pargana Khandasa Tehsil Milkpur. These Gatas belonging to the applicants are connected with the said chak road. The applicants for the purpose of safety of their crops, which were cultivated on the aforesaid gatas from the wild animals, had made fencing with the barbed wire (sparked wire), however, on raising objection by the Lekhpal on the said fencing on inspection, the applicants have removed the said fencing. In this regard, Lekhpal has also submitted its

report dated 30.10.2019 to the Sub-Divisional Officer to the effect that the applicants themselves have removed the said encroachment and at present, there is no encroachment on the land in question of the Gaon Sabha. However, the Investigating Officer, in the meantime, in a hasty manner, has submitted a charge-sheet dated 21.09.2019 under Section 3 of the Prevention of Damage to Public Property Act, 1984 against the applicants i.e. within 20 days from the date of lodging the F.I.R. without taking any statement of any of the villagers nor any independent witness and as such the whole exercise made by the Investigating Officer has been done under the influence of the then Gaon Pradhan, who has enmity with the applicants.

(5) Learned Counsel for the applicants has, thus, submitted that cognizance taken in the matter is illegal and without application of judicial mind. The disputed plot/land, for which encroachment is said to have been made, is related to Gaon Sabha land (chak road) for which specific provisions have been provided under the Uttar Pradesh Zamindari Abolition and Land Reforms Act and Revenue Code to remove such type of encroachment. It is further submitted that since there is specific provisions under U.P.Z.A. and L.R. Act/Revenue Code for eviction/removal of encroachment/unauthorized occupation of plot/land in question, provisions of Prevention of Damage to Public Property Act are not applicable in the matter.

(6) Referring to provisions of Sections 3 of the Prevention of Damages to Public Property Act, learned counsel for the applicants submitted that continuation of prosecution against applicants in this matter is nothing but an abuse of process of law.

According to the learned Counsel, the applicants are senior citizens aged about more than 70 years and as no offence under Section 3 of the Prevention of Damage of Public Property Act, 1984 as alleged in the F.I.R., charge-sheet as well as in summoning order against the applicants is made out, hence the impugned summoning order as well as entire proceedings initiated against the applicants are liable to be quashed.

(7) On the other hand, referring to provisions of U.P. Panchayat Raj Act, learned Additional Government Advocate appearing for State submitted that F.I.R. in the matter was lodged against the applicants taking recourse to the provisions of Sections 3 of the Prevention of Damages to Public Property Act, which is equally applicable in the present matter. There is no illegality or infirmity in the impugned order. It is further submitted that F.I.R. for such type of criminal act can be lodged under the provisions of Prevention of Damages to Public Property Act irrespective of the fact that there is specific provisions under U.P.Z.A. & L.R. Act / Revenue Code for eviction/removal of encroachment/unauthorized occupation from the plot/land in question.

(8) Having regard to the submissions advanced by the learned Counsel for the parties and going through the record available before this Court, this Court finds that the allegations made in the F.I.R. against the applicants that they are in wrongful occupation of the land in dispute belonging to the Goan Sabha, cannot come within the realm of mischief or wrongful occupation, till such time its actual physical measurement is not conducted by the authority concerned. Site plan prepared by the Investigating officer, which has been

placed before this Court by the applicants by means of the supplementary affidavit, is only a narration of the fact that the applicants are conducting their farming and cultivating over their land and only in order to safeguard their crops from the wild animals, they have made fencing with the barbed wire (sparked wire), but the Investigating Officer cannot decide it unless and until actual demarcation is being done by the competent revenue authority after holding the exercise of measurement and establishing its identity. In absence of this vital link, it cannot be said with certainty that charge-sheeted accused persons including the applicants have swelled their limits and encroached upon the land of the Gaon Sabha, particularly the fact that on the pointing out of the Lekhpal, the applicants themselves have removed the encroachment as is evident from the report of the Lekhpal dated 30.10.2019 annexed as Annexure No. 4 to the instant application.

(9) At this juncture, it would be apt to mention that the underline object and idea of enacting the Prevention of Damages to Public Property Act, 1984 is to curb acts of vandalism and damage to public property including destruction and damage caused during riots and public commotion. The “public property” as defined under Section 2(b) of the Prevention of Damage to Public Property Act, 1984 means any property, whether immovable or movable (including any machinery) which is owned by or in possession of or under the control of the Central or State Government or any local authority or any Corporation or any institution established by the Central, Provincial or State Act or its undertaking. Section 3 of the P.D.P.P. Act, 1984 provides that anyone who commits mischief by doing any act in respect of any

‘public property’ including the nature referred in subsection (2) in the said section shall be punished with imprisonment and a fine depending upon the nature of the property as per sub-section (1) and subsection (2) of Section 3 of the P.D.P.P. Act, 1984. Thus, the P.D.P.P. Act, 1984 is a Special Act enacted to punish for the offence committed under Sections 3 and 4 of the said Act by doing 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. The “Mischief” has been defined under Section 2(a) of the P.D.P.P. Act, 1984 having the same meaning as in Section 425 of the Indian Penal Code (45 of 1860). Section 6 is the saving clause which says that the Act, 1984 covers the offence committed under it and the provisions of it are in addition to any other law which provides for any proceeding (whether by way of investigation or otherwise) which may be instituted or taken against the offender, apart from this Act. Special provisions with regard to disposal of a prayer for bail made by a person accused or commission of offence under the Act, 1984 has been provided under Section 5 of the P.D.P.P. Act, 1984. The provisions oblige a person found guilty of commission of offence to pay the damage or loss caused to the public property. Thus, this Act covers the specific area of damage or loss or destruction of public property and recovery of such damages from the person(s) who is/are found guilty of such damage during the course of any public demonstration in the name of agitations, bandhs, hartals and the like.

(10) In **Re. Destruction of Public and Private Properties, In Re vs. State of Andhra Pradesh and others**, 2009 (5)

SCC 212, taking a serious note of various instances where there was a large scale destruction of public and private properties in the name of agitations, bandhs, hartals and the like, suo motu proceedings had been initiated by the Apex Court and two Committees were appointed to give suggestions on strengthening of the legal provisions of P.D.P.P. Act to effectively deal with such instances. The recommendation of two Committees were considered and it was observed that the suggestions were extremely important and they constitute sufficient guidelines which need to be adopted. It was left open to the appropriate authorities to take effective steps for their implementation.

(11) In **Kodungallur Film Society and another vs. Union of India and others**, 2018 (10) SCC 713, the relief was sought to issue a mandamus to the appropriate authorities to strictly follow and implement the guidelines formulated by the Apex Court in *Re: Destruction of Public & Private Properties* (supra), with regard to measures to be taken to prevent destruction of public and private properties in mass protests and demonstrations and also regarding the modalities of fixing liability and recovering compensation for damages caused to public and private properties during such demonstration and protests. It was observed in **Kodungallur Film Society** (Supra) that the recommendations of the Committee noted in the said judgment traversed the length and breadth of the issue at hand and, if implemented in their entirety, would go a long way in removing the bane of violence caused against persons and property. As far as implementation of the said recommendations, the Union had advised the States to follow the same in its letter and spirit. Issuing directions to implement

recommendations made by the Apex Court in both the above decisions. Direction was issued in **Kodungallur Film Society** (supra) to both the Central and the State Government to do the same at the earliest. Accordingly, the State of Uttar Pradesh too has notified “Uttar Pradesh Recovery of Damages to Public and Private Property Rules, 2020” with a view to provide for recovery of damages to public and private property during hartal, bundh, riots, public commotion, protests etc. in regard to property and imposition of fine. The said Rules provides for constitution of the claims tribunal to investigate the damages caused and to award compensation related thereto.

(12) Learned Counsel for the applicants has also drawn attention of the Court to the provisions of Section 67 of the U.P. Revenue Code which speaks about the power to prevent damages, misappropriation and wrongful occupation of Gram Panchayat property:-

“(i) 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.

(ii) Where from the information received under sub-section (i) or otherwise, the Assistant Collector is satisfied that any

property referred to in sub-section (i) 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.

(iii) If the person to whom a notice has been issued under sub-section (ii) 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.

(iv) 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 (ii), he shall discharge the notice.

(v) Any person aggrieved by an order of the Assistant Collector under Sub-section (iii) or Sub-Section (iv), may within thirty days from the date of such order, prefer an appeal to the Collector.

(vi) 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.

(vii) 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."

(13) Rule 67 (1) of U.P. Revenue Code, 2016 reveals that it is incumbent upon the Assistant Collector to make an inquiry as he deems proper and obtain further information regarding the following issues :-

"(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."

(14) Thus, from the above, it is crystal clear that as per the U.P. Revenue Code, it is the Assistant Collector of the area who is the authority concerned to act a pivotal role

in demarcation and holding and declaring the land in dispute is encroached by the applicants. However, the Investigating Officer of criminal cases is not even remotely connected to conduct this exercise. The entire procedure has been laid down in Section 67 (2) of the U.P. Revenue Code that only after getting a reply from the alleged encroacher, the Assistant Commissioner/Sub Divisional Officer has to pass an order giving reasons for not exceeding the explanation, if so offered by the person concerned. The eviction from the land in dispute can only be recorded after disposal of the explanation offered by the person concerned keeping in line with the cardinal principle of natural justice by passing a well reasoned and speaking order while disposing of the said explanation. The Act is itself contained the amount of compensation of damage or misappropriation of the property or for wrongful occupation, as the case may be, may be recovered from such person as arrears of land revenue. Section 210 of the Revenue Code, 2006 confers supervisory power on the Board or the Commissioner to call for the record of any proceeding decided by the 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.

(15) A careful reading of the provisions of the Revenue Code, 2006, thus, makes it clear that the proceeding for causing damage to the public property can be undertaken against any person who is in wrongful occupation of the same or causes damage or misappropriations to the said property. The nature of eviction proceeding under Section 67 of the Revenue Code, 2006, is, however, summary in nature. The rights of the parties claimed, if gives rise to

a dispute requiring adjudication on the questions of fact, a suit for declaration has to be instituted against such person. The Gram Sabha may institute a suit under Section 145 of the U.P. Revenue Code, 2006 for declaration of its right or to seek any further relief. In case of institution of such a suit, a temporary injunction may be granted by the Court concerned to prevent wastage, damage or alienation of the suit property. The Revenue Code, 2006 is a Special enactment providing for the law relating to the 'land' defined under Section 4(14) of the Code.

(16) As far as criminal proceeding 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.

(17) Thus, taking into account the gravity of offence and its nature in which there is no criminality as such, the apt remedy would be to proceed against the erring so called encroacher under Section 67 of the U.P. Revenue Code and get the land in dispute demarcated. It is the case exclusively falls within the domain of concerned revenue authority to impose the fine, if any, after taking the whole exercise as per the provisions of law contained under Section 67 of the U.P. Revenue Code.

(18) In the instant case, the applicants have specifically pleaded before this Court in this application under Section 482 Cr.P.C. that they have moved an application duly supported by an affidavit regarding the alleged encroachment before the Sub-Divisional Officer on 09.09.2019

i.e. prior to filing the charge-sheet dated 21.09.2019, upon which the Sub-Divisional Officer directed the area Lekhpal to submit its report. In compliance thereof, the Area Lekhpal had visited the site and prepared its report dated 30.10.2019 and submitted the same before the Sub-Divisional Officer. As per the said report dated 30.10.2019, the applicants themselves have removed the encroachment and now there is no encroachment over the chak road of the Gaon Sabha. Though the action of the revenue authorities on the application of the applicants appears to have in the knowledge of the Investigating Officer, however, without waiting for the outcome of the decision of the revenue authorities, the Investigating Officer had proceeded with the investigation and submitted charge-sheet dated 21.09.2019 i.e. within 20 days of lodging of the F.I.R. and before submission of the report of the Lekhpal dated 30.10.2019, which smacks the action of the Investigating Officer arbitrary and mala fide.

(19) Thus, taking note of the law laid down by the Hon'ble Apex Court in abovementioned cases and also keeping in view the totality of facts and circumstances of the case, this Court has no hesitation to allow this application under Section 482 Cr.P.C. and quash the impugned summoning/cognizance orders as well as proceedings challenged therein.

(20) Accordingly, the impugned summoning order dated 15.03.2021 as well as entire criminal proceeding of Criminal Case No. 137 of 2021 : State Vs. Shankar Nath Pandey and others, arising out of Case Crime No.335 of 2019, under Section 3 of Prevention of Damages to Public Property Act, Police

Station Khandasa, District Ayodhya,
pending in the Court of Judicial
Magistrate-I, Faizabad are hereby
quashed.

(21) As the Area Lekhpal vide report dated 30.10.2019 (Annexure No. 4), which is not disputed by the State Counsel, itself reported that now there is no encroachment of the land of the Goan Sabha as alleged in the F.I.R., therefore, no fruitful purpose would be served in remitting the matter to the concerned authority for fresh consideration.

(22) The instant application under Section 482 Cr.P.C. is, accordingly, **allowed.**

(2024) 4 ILRA 629
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.04.2024

BEFORE

**THE HON'BLE ARUN KUMAR SINGH
DESHWAL, J.**

Application U/S 482. No. 8732 of 2024

Amardeep Sonkar ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:
Sri Shivam Agarwal, Ms. Tanu Shree

Counsel for the Opposite Parties:
G.A.

Criminal Law - Code of Criminal Procedure, 1973 -Section 482– Protection of Women from Domestic Violence Act, 2005- Section 12 - Quashing of Summoning Order Dismissed – The applicant sought to quash the summoning order and proceedings under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (DV Act) –

Held, the application under Code of Criminal Procedure, 1973 -Section 482 was dismissed as the proceedings under Section 12 are civil in nature and do not require strict adherence to CrPC procedures for complaints, rendering the quashing unwarranted. (Paras 2, 21, 23)

B. Nature of Proceedings under DV Act – Civil Character – The applicant argued that the Magistrate failed to follow CrPC procedures under Sections 200 and 202 before issuing notice – Held, proceedings under Section 12 of the DV Act are civil, aimed at providing remedies like protection, residence, and monetary relief, not criminal prosecution, unless a protection order is breached under Section 31. (Paras 8, 10, 12, 19, 22)

C. Application under Section 12 DV Act – Not a Complaint – The applicant contended that the Magistrate's order lacked judicial application due to non-compliance with CrPC complaint procedures – Held, an application under Section 12 is not a complaint under Section 2(d) CrPC, as it seeks civil remedies without alleging an offence, and thus, Sections 200 and 202 CrPC are inapplicable. (Paras 4, 12, 20, 21)

D. Section 28 DV Act – Procedural Flexibility – The applicant relied on Section 28(1) DV Act, which references CrPC procedures – Held, Section 28(2) grants courts discretion to adopt their own procedures for disposing of applications under Sections 12 or 23, exempting strict compliance with CrPC, as the notice under Section 12 is not a summons under Section 61 CrPC. (Paras 5, 16, 17, 22)

E. Purpose of DV Act – Civil Remedies for Women – The opposite party emphasized the civil nature of DV Act proceedings – Held, the DV Act, enacted to protect women from domestic violence under Articles 14, 15, and 21 of the Constitution, provides civil remedies like protection and residence orders, transforming into criminal proceedings only upon breach of such orders, as per *Kunapareddy Vs Kunapareddy*. (Paras 8, 9, 10, 15)

Application Dismissed.

List of Cases cited:

1. Kunapareddy @ Nookala Shanka Balaji Vs Kunapareddy Swarna Kumar, (2016) 11 SCC 774

2. S.A.L. Narayan Row Vs Ishwarlal Bhagwandas, AIR 1965 SC 1818

3. Hamid Ali Vs St. of U.P., Application U/S 482 No. 11135 of 2020

4. Smt. Geeta Vs St. of U.P., 2022 8 ADJ 523

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

1. Heard Sri Shivam Agarwal, learned counsel for the applicant and Sri Anish Kr. Upadhyay, learned AGA for the State.

2. The instant Application has been filed seeking quashing of the summoning order dated 22.5.2023 as well as entire proceeding of Complaint Case No. 227 of 2023 (*Smt. Gunja Sonkar vs. Amardeep Sonkar and others*), u/s 12 of Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as "Domestic Violence Act"), P.S. Kothwali Katra, District Mirzapur, pending before Civil Judge (J.D.)/FTC, Mirzapur.

3. The fact giving rise to the present case is that opposite party No.2, who is the wife of the applicant, has filed an application u/s 12 Domestic Violence Act. However, after getting the report from the Protection Officer, the learned Magistrate issued notice to the applicant by order dated 22.5.2023 to reply to the same.

4. learned counsel for the applicant contends that while passing the impugned order dated 22.5.2023, the learned Magistrate has failed to consider that as per Section 28 of the Domestic Violence Act, the procedure of complaint case for the Application filed u/s 12 Domestic Violence

Act is to be followed as per Cr.PC.. Before passing the impugned order, he did not record the statement under Section 200 Cr.P C.. As the applicant resides beyond the Magistrate's territorial jurisdiction, the Magistrate had to conduct the enquiry u/s 202(1) Cr.P.C. before proceeding further. It is lastly submitted that the impugned order itself shows that there is complete non-application of mind. Learned counsel for the applicant has relied upon the judgement of the coordinate Bench of this Court in the case of *Hamid Ali vs. State of UP and another, Application U/s 482 No. 11135 of 2020, as well as Smt. Geeta vs. State of U.P. ; 2022 8 ADJ 523*.

5. Per contra, learned AGA submits that Section 28(2) of the Domestic Violence Act itself provides that notwithstanding anything contained in Section 28(1) of the Domestic Violence Act, the Court can lay down its procedure for the disposal of the Application u/s 12 or Section 23(2) of Domestic Violence Act. It is further submitted that there is no allegation in the complaint regarding the commission of any offence. Therefore, the present complaint is simply an application and not a complaint. It is also submitted that the Court is not bound to strictly follow the procedure of the complaint case as mentioned in the Cr. P.C.

6. After hearing the submissions of learned counsel for the parties as well as on perusal of the record, the following questions have arisen for determination: (i) What is the nature of the proceeding of the Domestic Violence Act; (ii) whether the Application u/s 12 Domestic Violence Act is complaint or simply an application; (iii) whether before issuing

notice to opposite parties, the procedure of complaint has to be followed as required u/s 200 and 202 Cr.P.C.

7. Before proceeding further, it would be appropriate to discuss the object of the Domestic Violence Act.

8 . The very purpose of enacting the Domestic Violence Act was to provide a remedy that is an amalgamation of the civil rights of the complaint, i.e., the aggrieved person. The intention was to protect women against violence of any kind, especially that occurring within the family. As the civil law does not address this phenomenon in its entirety. It is treated as an offence u/s 498-A of IPC. The purpose of enacting the law was to provide a remedy in civil law for the protection of women from being victims of domestic violence and to prevent the occurrence of domestic violence in society. It is for this reason that the scheme of the Act provides that in the first instance, the order that the Magistrate would pass on an application by the aggrieved person would be of a civil nature, and if the said order is violated, it assumes the character of criminality. In order to demonstrate it, it would be appropriate to reproduce the introduction as well as the relevant portion of the statement of objects and the reasons for the said Act as follows:

"Introduction

The Vienna Accord of 1994, the Beijing Declaration, and the Platform for Action (1995) have acknowledged that domestic violence is undoubtedly a human rights issue. The United Nations Committee on Convention on Elimination of All Forms of Discrimination Against Women, in its General Recommendations, has recommended that State parties should act

to protect women against violence of any kind, especially that occurring within the family. The phenomenon of domestic violence in India is widely prevalent but has remained invisible in the public domain. The civil law does not address this phenomenon in its entirety. Presently, when a woman is subjected to cruelty by her husband or his relatives, it is an offence under Section 498-A of the Penal Code, 1860. In order to provide a remedy in the civil law for the protection of women from being victims of domestic violence and to prevent the occurrence of domestic violence in society, the Protection of Women from Domestic Violence Bill was introduced in Parliament.

Statement of Objects and Reasons

1. Domestic violence is undoubtedly a human rights issue and a serious deterrent to development. The Vienna Accord of 1994, the Beijing Declaration and the Platform for Action (1995) have acknowledged this. The United Nations Committee on Convention on Elimination of All Forms of Discrimination Against Women (Cedaw), in its General Recommendation No. XII (1989) has recommended that State parties should act to protect women against violence of any kind, especially that occurring within the family.

3. It is, therefore, proposed to enact a law keeping in view the rights guaranteed under Articles 14, 15 and 21 of the Constitution to provide for a remedy under the civil law, which is intended to protect women from being victims of domestic violence and to

4. The Bill, inter alia, seeks to provide for the following?

(ii) It defines the expression "domestic violence" to include actual abuse or threat or abuse that is physical, sexual, verbal, emotional or economic. Harassment by way of unlawful dowry demands to the woman or her relatives would also be covered under this definition.

(iii) It provides for the rights of women to secure housing. It also provides for the right of a woman to reside in her matrimonial home or shared household, whether or not she has any title or rights in such home or household. This right is secured by a residence order, which is passed by the Magistrate.

(iv) It empowers the Magistrate to pass protection orders in favour of the aggrieved person to prevent the respondent from aiding or committing an act of domestic violence or any other specified act, entering a workplace or any other place frequented by the aggrieved person, attempting to communicate with her, isolating any assets used by both the parties and causing violence to the aggrieved person, her relatives or others who provide her assistance from the domestic violence."

9. From the object and reason of the Domestic Violence Act, it is clear that the purpose of this Act is to provide a remedy in civil law for the protection of women from being victims of Domestic Violence.

*10. Hon'ble Apex Court, in the case of **Kunapareddy @ Nookala Shanka Balaji vs. Kunapareddy Swarna Kumar and another (2016) 11 SCC 774**, has already observed that all reliefs, contemplated*

under Chapter IV of the Domestic Violence Act, are civil in nature. The relevant part of paragraph No.12 of the Kunapareddy @ Nookala Shanka Balaji (supra) case is quoted as under:-

"12. In fact, the very purpose of enacting the DV Act was to provide for a remedy which is an amalgamation of civil rights of the complainant i.e. aggrieved person. Intention was to protect women against violence of any kind, especially that occurring within the family as the civil law does not address this phenomenon in its entirety. It is treated as an offence under Section 498-A of the Penal Code, 1860. The purpose of enacting the law was to provide a remedy in the civil law for the protection of women from being victims of domestic violence and to prevent the occurrence of domestic violence in the society. It is for this reason, that the scheme of the Act provides that in the first instance, the order that would be passed by the Magistrate, on a complaint by the aggrieved person, would be of a civil nature and if the said order is violated, it assumes the character of criminality."

11. Under the Domestic Violence Act, various reliefs that the Magistrate can grant are set out in Chapter-IV of the Domestic Violence Act, and the same can be summarized as follows:-

- "(i) Protection orders (Section 18)*
- (ii) Residence orders (Section 19)*
- (iii) Monetary reliefs (Section 20)*
- (v) Compensation orders (Section 22)"*

12. All the aforesaid reliefs are civil in nature, but the breach of a protection

order or an interim protection order alone is a cognizable and non-bailable offence u/s 31 and 32 of the Domestic Violence Act. The proceeding before the Magistrate is in the nature of civil proceeding while deciding the Application under Chapter IV of the Domestic Violence Act, but it may transform into a criminal proceeding while trying an offence under Chapter V of the Domestic Violence Act. Section 12 of the Domestic Violence Act provides the Application on behalf of the aggrieved person or protection officers and not the complaint. The format of the Application u/s 12 of the Domestic Violence Act is also provided in Protection of Women from Domestic Violence Rules, 2006 (hereinafter referred to as "Rules, 2006"). Section 12(4) of the Domestic Violence Act further mandates that the Magistrate, on receiving the Application, will fix the first date of hearing not ordinarily beyond three days, and Section 13 of the Domestic Violence Act provides that the notice of hearing shall be given to the protection officer not in the form of any summon as mentioned in Section 61 of Cr.P.C. It is further mentioned in Rule 6(5) of the Rules, 2006 that the procedure for the Application u/s 12 of the Domestic Violence Act shall be dealt with in the same manner as laid down u/s 125 Cr.P.C. Sections 12 & 13 of the Domestic Violence Act as well as Rules 6 of the Rules, 2006 are being quoted below:-

"Section 12. Application of Magistrate.

(1) An aggrieved person or a Protection Officer or any other person on behalf of the aggrieved person may present an application to the Magistrate seeking one or more reliefs under this Act:

Provided that before passing any order on such Application, the Magistrate shall take into consideration any domestic incident report received by him from the Protection Officer or the service provider.

(2) The relief sought for under sub-section (1) may include a relief for issuance of an order for payment of compensation or damages without prejudice to the right of such person to institute a suit for compensation or damages for the injuries caused by the acts of domestic violence committed by the respondent:

Provided that where a decree for any amount as compensation or damages has been passed by any court in favour of the aggrieved person, the amount, if any, paid or payable in pursuance of the order made by the Magistrate under this Act shall be set off against the amount payable under such decree and the decree shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), or any other law for the time being in force, be executable for the balance amount, if any, left after such set off.

(3) Every Application under sub-section (1) shall be in such form and contain such particulars as may be prescribed or as nearly as possible thereto.

(4) The Magistrate shall fix the first date of hearing, which shall not ordinarily be beyond three days from the date of receipt of the Application by the Court.

(5) The Magistrate shall Endeavour to dispose of every Application made under sub-section (1) within a period

of sixty days from the date of its first hearing.

Section 13. Service of notice.

(1) A notice of the date of hearing fixed under section 12 shall be given by the Magistrate to the Protection Officer, who shall get it served by such means as may be prescribed on the respondent, and on any other person, as directed by the Magistrate within a maximum period of two days or such further reasonable time as may be allowed by the Magistrate from the date of its receipt.

(2) A declaration of service of notice made by the Protection Officer in such form as may be prescribed shall be the proof that such notice was served upon the respondent and on any other person as directed by the Magistrate unless the contrary is proved.

Rule 6. Applications to the Magistrate-

(1) Every Application of the aggrieved person under section 12 shall be in Form II or as nearly as possible thereto.

(2) An aggrieved person may seek the assistance of the Protection Officer in preparing her Application under sub-rule (1) and forwarding the same to the concerned Magistrate.

(3) In case the aggrieved person is illiterate, the Protection Officer shall read over the Application and explain to her the contents thereof.

(4) The affidavit to be filed under sub-section (2) of section 23 shall be filed in Form III.

(5) The applications under section 12 shall be dealt with and the orders enforced in the same manner laid down under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974)."

13. Notice under Section 12 of the Domestic Violence Act has been prescribed in Form VII (Rule 11(1)) of the Rules, 2006, while the format of summons has been prescribed in Form I of the Second Schedule of Cr.P.C. Both these formats show that notice u/s 12 of the Domestic Violence Act is sent to appear and answer for civil relief claimed by the applicant while summons is sent to appear and reply to the charge of offence. Therefore, this notice is like any suit or civil proceeding notice.

14. When the protection order is breached, then the proceeding u/s 31 of the Domestic Violence Act will be as per Rule 15(6) of the Rules, 2006. Rule 15(6) of the Rules, 2006 provides that the proceeding u/s 31 of the Domestic Violence Act should proceed summarily in accordance with the procedure of Chapter XXI of Cr.P.C. Section 31 of the Domestic Violence Act as well as Rule 15 of the Rules, 2006 are being quoted as under:-

"Section 31. Penalty for breach of protection order by respondent.

(1) A breach of protection order, or of an interim protection order, by the respondent shall be an offence under this Act and shall be punishable with imprisonment of either description for a term which may extend to one year, or with fine which may extend to twenty thousand rupees, or with both.

(2) The offence under sub-section (1) shall as far as practicable be tried by

the Magistrate who had passed the order, the breach of which has been alleged to have been caused by the accused.

(3) While framing charges under sub-section (1), the Magistrate may also frame charges under section 498A of the Indian Penal Code (45 of 1860) or any other provision of that Code or the Dowry Prohibition Act, 1961 (28 of 1961), as the case may be, if the facts disclose the commission of an offence under those provisions.

Rule 15. Breach of Protection Orders-

(1) An aggrieved person may report a breach of protection order or an interim protection order to the Protection Officer.

(2) Every report referred to in sub-rule (1) shall be in writing by the informant and duly signed by her.

(3) The Protection Officer shall forward a copy of such complaint with a copy of the protection order of which a breach is alleged to have taken place to the concerned Magistrate for appropriate orders.

(4) The aggrieved person may, if she so desires, make a complaint of breach of protection order or interim protection order directly to the Magistrate or the Police, if she so chooses.

(5) If, at any time after a protection order has been breached, the aggrieved person seeks his assistance, the Protection Officer shall immediately rescue her by seeking help from the local police station and assist the aggrieved person to

lodge a report to the local police authorities in appropriate cases.

(6) When charges are framed under section 31 or in respect of offences under section 498-A of the Indian Penal Code (45 of 1860), or any other offence not summarily triable, the Court may separate the proceedings for such offences to be tried in the manner prescribed under Code of Criminal Procedure, 1973 (2 of 1974) and proceed to summarily try the offence of the breach of protection order under section 31, in accordance with the provisions of Chapter XXI of the Code of Criminal Procedure, 1973 (2 of 1974).

(7) Any resistance to the enforcement of the orders of the Court under the Act by the respondent or any other person purportedly acting on his behalf shall be deemed to be a breach of protection order or an interim protection order covered under the Act.

(8) A breach of a protection order or an interim protection order shall immediately be reported to the local police station having territorial jurisdiction and shall be dealt with as a cognizable offence as provided under sections 31 and 32.

(9) While enlarging the person on bail arrested under the Act, the Court may, by order, impose the following conditions to protect the aggrieved person and to ensure the presence of the accused before the Court, which may include-

(a) an order restraining the accused from threatening to commit or committing an act of domestic violence;

(b) an order preventing the accused from harassing, telephoning or

making any contact with the aggrieved person;

(c) an order directing the accused to vacate and stay away from the residence of the aggrieved person or any place she is likely to visit;

(d) an order prohibiting the possession or use of a firearm or any other dangerous weapon;

(e) an order prohibiting the consumption of alcohol or other drugs;

(f) any other order required for protection, safety and adequate relief to the aggrieved person."

15. Section 14 of the Domestic Violence Act further provides that after service of notice upon the respondent, the Magistrate may try to arrange counseling between the parties. Therefore, it is clear that the proceeding of Application u/s 12 of the Domestic Violence Act, as well as the order, passed therein u/s 18, 19, 20, 21, and 22 of the Domestic Violence Act, are essentially civil in nature. Therefore, the provision of appeal is itself provided u/s 29 of the Domestic Violence Act.

16. Even though Section 28(1) of the Domestic Violence Act provides that except the procedure provided under this Act all other proceedings u/s 18, 19, 20, 21, 22, 23 of Domestic Violence Act and also the offence u/s 31 of Domestic Violence Act shall be governed by the provision of Cr.P.C. with further exception u/s 28(2) of Domestic Violence Act which grants discretion to Court to lay down its procedure for the disposal of Application under Section 12 or Section 23 of Domestic Violence Act. In view of the discretion u/s

28(2) of the Domestic Violence Act, court is not bound to follow the provision of Cr.P.C. in stricto sensu while deciding the application u/s 12 of the Domestic Violence Act. For reference, Section 28 of the Domestic Violence Act is quoted as under:-

"Section 28. Procedure.

(1) Save as otherwise provided in this Act, all proceedings under sections 12, 18, 19, 20, 21, 22 and 23 and offences under section 31 shall be governed by the provisions of the Code of Criminal Procedure, 1973 (2 of 1974).

(2) Nothing in sub-section (1) shall prevent the Court from laying down its own procedure for disposal of an application under section 12 or under sub-section (2) of section 23."

17. As the procedure for sending and service of the notice itself provided in the Domestic Violence Act to provide an opportunity to the respondent before passing any order u/s 18, 19, 20, 21, 22 of the Domestic Violence Act and also to try the offence u/s 31 of the Domestic Violence Act, but merely because the criminal Court is deciding the issues which are of civil nature will not itself make the proceeding as criminal.

18. The Apex Court, in the case of **S.A.L. Narayan Row vs. Ishwarlal Bhagwandas; AIR 1965 SC 1818**, explained the distinction between the civil and criminal proceedings and also observed that the character of the proceeding does not depend upon the nature of the Tribunal, which is invested with the authority grant leave but depends upon the rights violated and appropriate relief which may be

claimed. The relevant extract of the judgement of S.A.L. Narayan Row (supra) is quoted as under:-

"The expression "civil proceeding" is not defined in the Constitution, nor in the General Clauses Act. The expression in our judgment covers all proceedings in which a party asserts the existence of a civil right conferred by the civil law or by statute, and claims relief for breach thereof. A criminal proceeding on the other hand is ordinarily one in which if carried to its conclusion it may result in the imposition of sentences such as death, imprisonment, fine or forfeiture of property. It also includes proceedings in which in the larger interest of the State, orders to prevent apprehended breach of the peace, orders to bind down persons who are a danger to the maintenance of peace and order, or orders aimed at preventing vagrancy are contemplated to be passed....."

.....The character of the proceeding, in our judgment, depends not upon the nature of the Tribunal which is invested with authority to grant relief, but upon the nature of the right violated and the appropriate relief which may be claimed. A civil proceeding is, therefore, one in which a person seeks to enforce by appropriate relief the alleged infringement of his civil rights against another person or the State, and which if the claim is proved would result in the declaration express or implied of the right claimed and relief such as payment of debt, damages, compensation, delivery of specific property, enforcement of personal rights, determination of status etc."

19. Therefore, in view of the observation of the Apex Court in the case

of **S.A.L. Narayan Row (supra)**, it is clear that judging the character of the proceeding depends upon the nature of the violated right and relief claimed and not the Court which is adjudicating such a proceeding. Merely because the Magistrate is called upon to adjudicate and enforce civil rights, an application under Chapter IV of the Domestic Violence Act will not be sufficient to presume that it is of criminal character. A Magistrate not exercising function or determining cases of criminal character cannot be said to be a criminal court. The purpose of sending a notice to the respondent through protection officer u/s 12 of the Domestic Violence Act instead of sending a summons as per Section 61 of Cr.P.C. is to grant the opportunity of hearing to the respondent before passing any order and not to accuse him of any offence. Even otherwise, none of the provisions providing relief to the aggrieved person is in the nature of the offence. It is only when the protection or interim protection order was breached only then the criminal proceeding commences u/s 31 & 32 of the Domestic Violence Act. The word "complaint" is defined u/s 2(d) of Cr.P.C. and the same is quoted as under:-

"2(d)."complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report."

20. From the perusal of Section 2(d) of Cr.P.C., it appears that where in an application allegations are made against a person who has committed an offence, but in the case of notice issued u/s 12 of the Domestic Violence Act, no allegation of

commission of an offence is made out. It simply asks the respondent to reply to the averments of the Application filed u/s 12 of the Domestic Violence Act so that appropriate civil remedy could be granted to the aggrieved person. Rule 16(1) of Rules, 2006 provides the format of Application u/s 12 of the Domestic Violence Act. This format (Form II) nowhere provides any allegation to take action on the part of the Magistrate for committing any offence by the respondent.

21. From the above analysis, it is clear that Application u/s 12 of the Domestic Violence Act is not a complaint as defined u/s 2(d) of Cr.P.C., the procedure for the cognizance set out u/s 190(1)(a) of Cr.P.C. followed by the procedure set out in Chapter XV of Cr.P.C. for taking cognizance will have no application to the proceeding under the Domestic Violence Act. Therefore, Section 190(1)(a) of Cr.P.C. and the procedure mentioned in Chapter XV of Cr.P.C. will apply only in the cases of complaints u/s 2(d) Cr.P.C., filed before a Magistrate and not an application u/s 12 of the Domestic Violence Act. Therefore, the stage of the issuing process contemplated u/s 204 Cr.P.C. has no application to the proceeding u/s 12 of the Domestic Violence Act as the Court, while dealing with the Application u/s 12 of the Domestic Violence Act, is not taking cognizance of any offence but simply dealing with an application for civil relief. Consequently, the procedure of Sections 200 & 202 Cr.P.C. will not be applicable for an application u/s 12 of the Domestic Violence Act.

22. After the aforementioned discussion, this Court comes to the following conclusion:-

(i) Nature of proceeding u/s 12 of the Domestic Violence Act is a civil proceeding, and Application u/s 12 of the Domestic Violence Act is not the complaint as mentioned u/s 2(d) Cr.P.C., therefore, proceeding under the Domestic Violence Act as well as order passed u/s 18, 19, 20, 21, 22 of the Domestic Violence Act are civil in nature except the violation of protection order which is punishable u/s 31 of the Domestic Violence Act;

(ii) Issuance of notice u/s 12 of the Domestic Violence Act is not a summon as mentioned u/s 61 of Cr.P.C., and while issuing such notice, the Magistrate does not take cognizance for any offence as in the case of complaint defined u/s 2(d) Cr.P.C. Therefore, procedure of Sections 200 & 202 Cr.P.C. does not apply in the proceeding u/s 12 the Domestic Violence Act.

23. In view of the foregoing conclusion, the present Application is **dismissed**.

24. The Registrar (Compliance) is directed to circulate a copy of this order to all the District Judges in the State of Uttar Pradesh, who in turn will circulate the same to all the judicial officers who are dealing with applications u/s 12 of the Domestic Violence Act.

(2024) 4 ILRA 639

**ORIGINAL JURISDICTION
CRIMINAL SIDE**

DATED: ALLAHABAD 28.11.2023

BEFORE

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

Application U/S 482. No. 11714 of 2023

Sheshnath Singh @ Shishu ...Applicant

Versus

State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:

Sri Abhishek Pandey, Sri Raghvendra Pratap Singh

Counsel for the Opposite Parties:

G.A.

Criminal Law - Code of Criminal Procedure, 1973 -Section 482- Quashing of

Order Closing Prosecution Evidence – The applicant challenged the order closing prosecution evidence without deciding his application for copies of case documents – Held, the Trial Judge's failure to address the application dated 21.11.2022 before closing evidence violated the applicant's rights, warranting quashing of the order. (Paras 1, 10, 29, 32)

B. Section 207 CrPC – Right to Documents –

The applicant, an accused in a murder trial, sought copies of the case diary, inquest, postmortem reports, and charge-sheet – Held, Section 207 mandates furnishing Statements recorded under Section 161 CrPC to the accused, and non-compliance prejudiced the applicant's right to cross-examine witnesses. (Paras 11, 23, 24, 29)

C. Section 172 CrPC – Limited Access to Case Diary –

The St. argued the accused has no right to case diary entries under Section 172 – Held, the prohibition under Section 172(3) applies to the Investigating Officer's observations, not to witness Statements under Section 161, which must be provided under Section 207. (Paras 13, 24, 26, 27)

D. Fair Trial and Natural Justice –

The applicant was denied the opportunity to cross-examine witnesses due to non-availability of documents – Held, closing prosecution evidence without providing mandated documents and deciding the applicant's application infringed the right to a fair trial, necessitating recall of witnesses if required. (Paras 9, 10, 29, 32)

E. Judicial Discretion and Case Diary Use –

The applicant relied on precedents allowing

limited use of case diary entries – Held, courts may use case diaries under Section 172(2) to aid trials, and accused may access Section 161 Statements for cross-examination under Sections 145 and 161 of the Evidence Act, subject to legal restrictions. (Paras 12, 17, 20, 26)

Application Allowed.

List of Cases cited:

1. St. of Kerala Vs Babu, (1999) 4 SCC 621
2. St. of NCT of Delhi Vs Ravi Kant Sharma, (2007) 2 SCC 764
3. Balakram Vs St. of Uttarakhand, (2017) 7 SCC 668
4. Shamshul Kanwar Vs St. of U.P., (1995) 4 SCC 430
5. Asian Resurfacing of Road Agency Pvt. Ltd. Vs CBI, (2018) 16 SCC 299

(Delivered by Hon'ble J.J. Munir, J.)

1. This application under Section 482 Cr.P.C. ('Code' for short) seeks to quash an order dated 16.03.2023, by which the prosecution evidence has been regarded closed and a direction given that the case may come up for recording the statement of the accused under Section 313 of the Code. It is not this order that substantially aggrieves the applicant. The applicant is aggrieved by the non decision of his application dated 21.11.2022, before passing the order impugned. The applicant, in substance, therefore, seeks that before the Court would direct that the prosecution case is over and the accused's statement under Section 313 of the Code recorded, the applicant, who is an accused at the trial, is entitled to a decision on his application, above referred.

2. The applicant is one of the accused facing trial before the learned Additional Sessions Judge, Court No. 4, Ghazipur in

S.T. No. 219 of 1987, State vs. Kanhaiya and others (arising out of Case Crime No. 227 of 1986), under Sections 147, 148, 149, 302 IPC, P.S. Dildarnagar, District Ghazipur.

3. According to the applicant, the first information report giving rise to the crime was lodged on 25.09.1986 at 11:30 a.m., while the incident took place on 25.09.1986 earlier in the day at 08:30 a.m. There are three nominated accused in the FIR, to wit, Kanhaiya Singh, Hridaya Narayan Singh and Sheshnath Singh alias Shishu, besides two men unnamed. The first information version is that the informant, Satish Kumar, was a resident of Ward No.5, P.S. Dildarnagar, District Ghazipur. In one of his houses, about 7-8 years ago, Brij Narayan Singh of Village Gohda, P.S. Dildar Nagar, District Ghazipur used to live. Brij Narayan was a Goonda and a man of criminal propensities. In the neighbourhood, people were scared of him. The informant's father asked Brij Narayan Singh to vacate his house, upon which, the former refused.

4. About 5-6 years antedating the FIR under reference, Brij Narayan Singh was murdered. The informant's father was arraigned in the case relating to Brij Narayan Singh's murder, but upon trial, was acquitted. The informant's house, nevertheless, remained in the occupation of Kanhaiya Singh, Brij Narayan Singh's brother.

5. About 7-8 days prior to the occurrence, the informant's father locked the house aforesaid. Kanhaiya Singh threatened the informant's father over locking the house, telling him that he better open the lock, else he would be done to death. The informant's father did not yield

and refused to remove the lock. On 25.09.1986, the informant's father, Murat Sahu and his uncle Madan Lal were proceeding to the District Magistrate's office to complain regarding the threat held out by Kanhaiya Singh and also to buy supplies for their shop. They had proceeded from Dildarnagar to the railway station, reaching there at 08:30 in the morning and boarded the train. Kanhaiya Singh, Hridaya Narayan Singh, Sheshnath Singh alias Shishu and two other men, whom the informant did not know, but said that he could identify them if confronted, entered the railway coach. Kanhaiya Singh, Hridaya Narayan Singh and Sheshnath Singh alias Shishu were armed with guns and the two other men, who belonged to Kanhaiya's family, were unarmed. Kanhaiya Singh came forward abusing the informant's father, caught hold of him, dragging him out of the coach. The passengers on board objected. Kanhaiya Singh warned the passengers that if they attempted to resist, they would be shot. This abated all resistance from the passengers, out of fear. In the meanwhile, the train moved. Kanhaiya Singh exhorted his companions to shoot the informant's father, whereupon Seshnath Singh *alias* Shishu shot the victim. All the five men jumped off the train and made good their escape. The informant's father collapsed and after a little while, passed away. Some passengers on board were nominated as witnesses, whose names figure in the FIR. As soon as the applicant came to know that he was nominated in the case, he surrendered in Court three days after the occurrence and released on bail by the learned Sessions Judge of Ghazipur on 19.02.1987.

6. The applicant says that according to the bail order, it is recorded that there

were memos issued by the Guard to the Stationmaster, Tarighat and the Stationmaster of Dildarnagar, who, in turn, sent a message of the occurrence to P.S. G.R.P., Dildarnagar. The said message does not mention the name of the deceased or the accused. The dead body of the deceased reached P.S. Dildarnagar at 09.35 a.m., where the FIR was lodged at about 11:30 a.m. by the complainant, Satish Kumar against the applicant and other members of his family, as the applicant says, on account of animosity. Interestingly, there is much reliance placed on the remarks of the learned Sessions Judge, apparently while granting bail to the effect that the report by the Stationmaster to the G.R.P. should be treated the FIR.

7. The most interesting feature of the case appears to be that a transfer application was made by the informant before this Court being Criminal Misc. Transfer Application No. 810 of 1988, where this Court, vide order dated 28.01.1988, admitted the application, issued notice to the other side and stayed the trial. It is on account of the said order that the trial remained pending from the year 1988 to 2022.

8. The proceedings of the trial were resumed under an order of the learned Additional Sessions Judge, Court No. 4, Ghazipur dated 29.10.2022, who proceeded with it relying upon directions of the Supreme Court in **Asian Resurfacing of Road Agency Private Limited and another v. Central Bureau of Investigation, (2018) 16 SCC 299**.

9. The applicant, upon acquisition of knowledge, that proceedings in the trial had commenced, appeared before the Trial Court on 29.10.2022 and 01.11.2022. On

01.11.2022, the testimony of PW-1 Satish Kumar was recorded before the Trial Judge and time was sought by the applicant to cross-examine him. The applicant was trying to collect relevant documents, including copies of the case diary, inquest report, postmortem report and the charge-sheet, but could not succeed in securing these, as the same were reported to be unavailable. The applicant then made an application before the Trial Judge, seeking a direction to the prosecution to provide him copies of the necessary documents, including the case diary, which would enable him to undertake the prosecution witnesses' cross-examination.

10. The applicant's grievance is that no orders have been made by the Trial Judge on the application dated 21.11.2022, which is still pending. Nevertheless, the testimony of the prosecution witnesses has been heard and recorded in a cursory manner, depriving the applicant of his right to cross-examine them.

11. It is the applicant's case that without following the mandatory provisions of Section 207 of the Code, which obliges the Court to ensure that documents including the case diary, inquest report, the postmortem report and the charge-sheet are provided to the accused free of cost, the trial is proceeding against him. In support of his submission that the conduct of trial in the absence of compliance with Section 207 of the Code is not one held in accordance with law, learned Counsel for the applicant has placed reliance upon a decision of the Supreme Court in **State of Kerala v. Babu and others, AIR 1999 SC 2161**. Allusion would be made to the

principle in **Babu** (supra), and how it bears upon the applicant's case, during the course of this judgment.

12. Learned Counsel for the applicant has further placed reliance upon the guidance of the Supreme Court in **State of NCT of Delhi v. Ravi Kant Sharma and others, (2007) 2 SCC 764**, which, according to the learned Counsel, is an authority that supports his right to have copies of the statement of witnesses and other documents, part of the case diary, supplied to him before the prosecution witnesses were examined.

13. Mr. D.K. Srivastava, learned Additional Government Advocate, on the other hand, submits that the applicant has no right to ask for a copy of the case diary or the statements recorded by the Police, in view of the provisions of Section 172(2) and 173(3) of the Code, as that right is very limited. He has placed reliance upon the decision of the Supreme Court in **Balakram v. State of Uttarakhand and others, (2017) 7 SCC 668**.

14. Heard Mr. Abhishek Pandey, learned Counsel for the applicant and Mr. D.K. Srivastava, learned Additional Government Advocate on behalf of the State.

15. After hearing learned Counsel for the parties and perusing the record, this Court is minded to think that Mr. Pandey and Mr. Srivastava have advanced their submissions relying on very different provisions of the Code, dealing with the same right of the accused, but with regard to a right to access very different kinds of the record of investigation under the Code.

16. Before the issue is elucidated upon, it would be profitable to refer to authorities that are in point.

17. **Balakram** (supra), upon which Mr. Srivastava has reposed faith, was a case that arose out of an application to submit certain documents before the Trial Judge in a sessions trial on a charge of murder, where the accused proposed to confront a prosecution witness in that case on the basis of those documents. The documents that the accused wanted to bring on record were part of the case diary, maintained by the Police during investigation, under Section 172 of the Code. The witness, who was proposed to be confronted with the documents from the case diary, was the Investigating Officer (PW-15). Copies of the documents in question were secured by the accused by invoking the provisions of the Right to Information Act, 2005. The application was opposed by the complainant on the ground that fresh documents cannot be allowed to be produced on behalf of the accused at a premature stage - premature in the sense that the stage was one where the prosecution testimony was being heard. It was contended on behalf of the complainant opposing the application that the documents could be produced during the stage when the statements of the accused under Section 313 of the Code were recorded. It was also the complainant's contention that after the statements under Section 313 of the Code were recorded, the accused could produce these documents when it was time to lead defence evidence. The application was rejected by the learned Sessions Judge. Aggrieved, the accused moved the High Court under Section 482 of the Code. The High Court allowed the application under Section 482 of the Code, and this,

apparently, made the complainant appeal to their Lordships of the Supreme Court by seeking special leave. The Supreme Court, after referring to the provisions of Section 172 of the Code and Section 145 of the Indian Evidence Act, 1872 ('the Act of 1872' for short) observed :

“9. *The aforementioned provisions are to be read conjointly and homogenously. It is evident from sub-section (2) of Section 172 CrPC, that the trial court has unfettered power to call for and examine the entries in the police diaries maintained by the investigating officer. This is a very important safeguard. The legislature has reposed complete trust in the Court which is conducting the inquiry or the trial. If there is any inconsistency or contradiction arising in the evidence, the Court can use the entries made in the diaries for the purposes of contradicting the police officer as provided in sub-section (3) of Section 172 CrPC. It cannot be denied that the Court trying the case is the best guardian of interest of justice. Under sub-section (2) the criminal court may send for diaries and may use them not as evidence, but to aid it in an inquiry or trial. The information which the Court may get from the entries in such diaries usually will be utilised as foundation for questions to be put to the police witness and the court may, if necessary in its discretion use the entries to contradict the police officer, who made them. But the entries in the police diary are neither substantive nor corroborative evidence, and that they cannot be used against any other witness than against the police officer that too for the limited extent indicated above.*

10. *Coming to the use of police diary by the accused, sub-section (3) of*

Section 172 clearly lays down that neither the accused nor his agents shall be entitled to call for such diaries nor he or they may be entitled to see them merely because they are referred to by the Court. But, in case the police officer uses the entries in the diaries to refresh his memory or if the Court uses them for the purpose of contradicting such police officer, then the provisions of Sections 145 and 161, as the case may be, of the Evidence Act would apply. Section 145 of the Evidence Act provides for cross-examination of a witness as to the previous statements made by him in writing or reduced into writing and if it was intended to contradict him in writing, his attention must be called to those portions which are to be used for the purpose of contradiction. Section 161 deals with the adverse party's right as to the writing used to refresh memory. It can, therefore, be seen that, the right of the accused to cross-examine the police officer with reference to the entries in the police diary is very much limited in extent and even that limited scope arises only when the Court uses the entries to contradict the police officer or when the police officer uses it for refreshing his memory.

11. In other words, in case if the Court does not use such entries for the purpose of contradicting the police officer or if the police officer does not use the same for refreshing his memory, then the question of the accused getting any right to use entries even to that limited extent does not arise. The accused persons cannot force the police officer to refresh his memory during his examination in the Court by referring to the entries in the police diary.

13. Be that as it may, as mentioned supra, right of the accused to

cross-examine the police officer with reference to the entries in the police diary is very much limited in extent and even that limited scope arises only when the Court uses such entries to contradict the police officer or when the police officer uses it for refreshing his memory and that again is subject to the provisions of Sections 145 and 161 of the Evidence Act. Thus, a witness may be cross-examined as to his previous statements made by him as contemplated under Section 145 of the Evidence Act if such previous statements are brought on record, in accordance with law, before the Court and if the contingencies as contemplated under Section 172(3) CrPC are fulfilled. Section 145 of the Evidence Act does not either extend or control the provisions of Section 172 CrPC. We may hasten to add here itself that there is no scope in Section 172 CrPC to enable the Court, the prosecution or the accused to use the police diary for the purpose of contradicting any witness other than the police officer who made it.

15. The police diary is only a record of day-to-day investigation made by the investigating officer. Neither the accused nor his agent is entitled to call for such case diary and also are not entitled to see them during the course of inquiry or trial. The unfettered power conferred by the statute under Section 172(2) CrPC on the court to examine the entries of the police diary would not allow the accused to claim similar unfettered right to inspect the case diary.

17. From the aforementioned, it is clear that the denial of right to the accused to inspect the case diary cannot be characterised as unreasonable or arbitrary. The confidentiality is always kept in the matter of investigation and it is not

desirable to make available the police diary to the accused on his demand.

18. Since we are not called upon to decide the question as to whether the copy of the case diary or a portion thereof can be provided to the accused under the provisions of the Right to Information Act, we are not deciding the said question in the matter on hand. In *Sidharth v. State of Bihar* [*Sidharth v. State of Bihar*, (2005) 12 SCC 545 : (2006) 1 SCC (Cri) 175 : AIR 2005 SC 4352] , the entire case diary maintained by the police was made available to the accused by the trial court. In that context certain observations were made by this Court which read thus : (SCC p. 561, para 27)

“27. ... But if the entire case diary is made available to the accused, it may cause serious prejudice to others and even affect the safety and security of those who may have given statements to the police. The confidentiality is always kept in the matter of criminal investigation and it is not desirable to make available the entire case diary to the accused. In the instant case, we have noticed that the entire case diary was given to the accused and the investigating officer was extensively cross-examined on many facts which were not very much relevant for the purpose of the case. The learned Sessions Judge should have been careful in seeing that the trial of the case was conducted in accordance with the provisions of CrPC.”

19. Since in the matter on hand, neither the police officer has refreshed his memory with reference to entries in the police diary nor has the trial court used the entries in the diary for the purposes of contradicting the police officer (PW 15), it is not open for the accused to produce

certain pages of police diary obtained by him under the provisions of the Right to Information Act for the purpose of contradicting the police officer.”

18. The question about the right of the accused or the power of the Court to utilize the entries in the case diary for the purpose of testing the veracity of the police witnesses arose in **Shamshul Kanwar v. State of U.P.**, (1995) 4 SCC 430. The issue in that case arose in the context of the particulars of entries made in the G.D. Entry, Ex. Ka-124 which was referred to, with the accused saying that the G.D. Entry should carry more details, and the absence of the names of the accused there and the witnesses rendered the presence of the witnesses doubtful. It was in the context of what details of the occurrence should be mentioned in the G.D. that the Court examined the question of how and in what manner and to what extent entries in the case diary, envisaged under Section 172 of the Code, can be utilized by the Court and the accused, and subject to what conditions used to contradict, confront or test the veracity of a police witness. After referring to the provisions of Section 172 of the Code, their Lordships of the Supreme Court held in **Shamshul Kanwar** (supra):

“10.

This section firstly lays down that every police officer making an investigation should maintain a diary of his investigation. It is well-known that each State has its own police regulations or otherwise known as police standing orders and some of them provide as to the manner in which such diaries are to be maintained. These diaries are called case diaries or special diaries. The section itself indicates as to the nature of the entries that have to

be made and what is intended to be recorded is what the police officer did, the places where he went and the places which he visited etc. and in general it should contain a statement of the circumstances ascertained through his investigation. Sub-section (2) is to the effect that a criminal court may send for the diaries and may use them not as evidence but only to aid in such inquiry or trial. The aid which the court can receive from the entries in such a diary usually is confined to utilising the information given therein as foundation for questions to be put to the witnesses particularly the police witnesses and the court may, if necessary, in its discretion use the entries to contradict the police officer who made them. Coming to their use by the accused, sub-section (3) clearly lays down that neither the accused nor his agents shall be entitled to call for such diaries nor he or they may be entitled to see them merely because they are referred to by the courts. But in case the police officer uses the entries to refresh his memory or if the court uses them for the purpose of contradicting such police officer then provisions of Section 161 or Section 145, as the case may be, of the Evidence Act would apply. Section 145 of the Evidence Act provides for cross-examination of a witness as to the previous statements made by him in writing or reduced into writing and if it is intended to contradict him by the writing, his attention must be called to those parts of it which are to be used for the purpose of contradiction. Section 161 deals with the adverse party's rights as to the production, inspection and cross-examination when a document is used to refresh the memory of the witness. It can therefore be seen that the right of accused to cross-examine the police officer with reference to the entries in the general diary is very much limited in extent and even that

limited scope arises only when the court uses the entries to contradict the police officer or when the police officer uses it for refreshing his memory and that again is subject to the limitations of Sections 145 and 161 of the Evidence Act and for that limited purpose only the accused in the discretion of the court may be permitted to peruse the particular entry and in case if the court does not use such entries for the purpose of contradicting the police officer or if the police officer does not use the same for refreshing his memory, then the question of accused getting any right to use the entries even to that limited extent does not arise. The accused person is not entitled to require a police officer to refresh his memory during his examination in court by referring to the diary. At the most the accused can on a reasonable basis seek the court to look into the diary and do the needful within the limits of Section 172 CrPC. However, the court is not bound to compel the police witness to look at the diary in order to refresh his memory nor the accused is entitled to insist that he should do so. If there is such a refusal what inference should be drawn depends on the facts and circumstances of each case. Section 172 does not deal with any recording of statements made by witnesses and what is intended to be recorded is what the police officer did namely the places where he went, the people he visited and what he saw etc. It is Section 161 CrPC which provides for recording of such statements. Assuming that there is failure to keep a diary as required by Section 172 CrPC, the same cannot have the effect of making the evidence of such police officer inadmissible and what inference should be drawn in such a situation depends upon the facts of each case. It is well-settled that the entries of the police diary are neither substantive nor corroborating evidence and

they cannot be used by or against any other witness than the police officer and can only be used to the limited extent indicated above. The above-stated principles are reiterated in many decisions rendered by the courts.

18. *With regard to the nature of the entries to be made in the diary as required under Section 172 CrPC and the limited permissible use by the court or by the accused indicated therein have been the subject-matter of decisions of a number of High Courts over the years. It may not be necessary to refer to them. However, we have noticed that there is vagueness as to the nature of the diary contemplated under this section. In some States the diary referred to in Section 172 CrPC is known as ‘special diary’ or ‘case diary’ and in some other States like Andhra Pradesh, J & K and Kerala there is a provision in the Police Acts that a “general diary” is to be maintained in the police station thereby indicating it to be different from the case diary. In some States there are police standing orders to the effect that the diary contemplated under Section 172 CrPC can be of two parts; the first one relating to the steps taken during the course of investigation by the police officer with particular reference to time at which the police received the information and the further steps taken during the investigation like visiting the places etc. and the second part contains statement of the circumstances ascertained during the investigation which obviously relate to the statements recorded by the officer in terms of Section 161 CrPC and other relevant materials gathered during the investigation. The copies of the second part which mainly contains the statements of the witnesses as a matter of course are supplied to the accused persons.*

20. Therefore it is clear that the diary referred to in Section 172 and which the court may call for and which can be used to the limited extent mentioned therein obviously refers to the first part and to the copies of which the accused is not entitled to and the entries of which can be used to the limited extent by the court as well as by the accused as contained in Section 172 CrPC. If by virtue of such police standing orders, the second part also forms, compendiously, part of the diary as a whole and if that also is before the court, the use of the entries in such second part which contains the statements of the witnesses recorded, would be of different nature. In some States for instance Uttar Pradesh there are regulations regarding the maintenance of general and case diaries. Section 161 CrPC provides for examination of witnesses by police. It further lays down that the police officer during investigation may examine the witnesses and may reduce into writing any statement made to him in the course of such examination and if he does so he shall “make a separate and true record” of the statement of each such person. Section 162 lays down that no such statement made by any person to a police officer shall if reduced to writing be signed “nor shall any such statement or any record thereof whether in a ‘police diary’ or otherwise” be used for any purpose at any inquiry or trial save as provided under that section. The words “police diary or otherwise” used in this section have perhaps been the basis for dividing the diary into two parts. Section 167, an important provision, deals with the procedure when investigation is not completed within 24 hours and provides for production of the accused before a magistrate for seeking remand. This provision also lays down that the officer-in-charge of a police station or the police

officer making the investigation “shall forthwith transmit to the nearest judicial magistrate a copy of the entries in the diary hereinafter prescribed relating to the case” and at the same time forward the accused to such magistrate. Likewise sub-section (2-a) of Section 167 which provides for production of the accused before an executive magistrate lays down that the copy of the entry in the diary ‘hereinafter’ prescribed relating to the case shall be transmitted while forwarding the accused. The object underlying is that the magistrate before remanding the accused to custody should satisfy himself that there is a *prima facie* case for doing so after a perusal of the copies of the entries “in the diary”. We are referring to this aspect only to point out that some vagueness or confusion is there in respect of the meaning of the word ‘diary’ used in Section 172 and other sections of CrPC and we suggest that a legislative change is necessary providing for framing of appropriate and uniform regulations regarding the maintenance of the diaries by the police for the purpose contemplated by Section 172 CrPC vis-à-vis the other sections referred to above.

21. We are constrained to go into this aspect in an elaborate manner as even today we are coming across a number of cases where there has been a patent misuse of the case diaries to be maintained as per Section 172 CrPC. The Full Court in Mannu case [ILR (1897) 19 All 390 : 17 Awn 174] observed, as long back as 1897, as under:

“It is within the experience of every Judge of this Court that much misconception exists in these Provinces as to the use which can be made by a court or by an accused person or his agents of the diaries which are kept by police officers under Section 172 of the Code of Criminal

Procedure, and which in these Provinces are known as special diaries. It is within our judicial knowledge that some Sessions Judges and some Magistrates have decided criminal cases by conviction or by acquittal of the accused on statements which are found in the special diary relating to the case....”

To the same effect are the observations by Privy Council in Dal Singh case [AIR 1917 PC 25]. But as pointed out by this Court in Malkiat Singh case [(1991) 4 SCC 341 : 1991 SCC (Cri) 976] that the courts even in recent times are not keeping in view the true scope of Section 172 and the use to which the diaries should be put to.”

(emphasis by Court)

19. The question, again, engaged the attention of the Supreme Court in State of Kerala v. Babu and others, (1999) 4 SCC 621. The facts and the proceedings, in the context of which the three questions that arose for consideration before the Court, can best be recapitulated in the words of their Lordships, as these figure in the opening part of the report in **Babu** (*supra*):

“1. In a pending sessions case, on behalf of the accused persons, applications were made to summon the case diary of a case registered as Crime No. 81 of 1991 for confronting a witness with his previous statement as found in the said case diary and to recall the said PW 5. The learned Sessions Judge allowed the said applications which came to be challenged in criminal petitions filed before the High Court of Kerala by the State as well as the brother of the deceased. These petitions came to be dismissed by an order of the High Court dated 17-8-1993. Both the

Sessions Court and the High Court held that there is no bar in law to summon the case diary of a case even other than the one which is being tried, for the purpose of contradicting the evidence of the prosecution witnesses. In this appeal by special leave, the State of Kerala has raised the following questions of law:

(a) Whether the statement of a witness recorded under Section 161 of the CrPC in one particular crime could be used against that witness in any other trial, enquiry or proceedings by the accused.

(b) Whether the learned Sessions Judge can call for the police diaries of a case which is not under enquiry or trial before him and permit it to be used by the accused for contradicting a witness examined in another case under trial before him.

(c) Whether Section 162 of the CrPC permits the use of statement recorded under Section 161 of the CrPC in any other proceeding other than the enquiry or trial in respect of the offence for which the investigation was conducted.”

20. It must be remarked that the context in **Babu** was slightly different, because it was about the permissibility of use of statements recorded under Section 161 of the Code in a different crime than the one that was subject matter of trial before the Court. Nevertheless, the Court examined the question in the context of the right of the accused to make use of a witness’s previous statements recorded during the course of investigation for the purpose of impeaching his veracity during trial. Their Lordships in **Babu** observed :

“8. Therefore, on a reading of Section 162 of the Code bearing in mind

the object of the said section and Section 145 of the Evidence Act, it is clear that an accused in a criminal trial has the right to make use of the previous statements of a witness including the statements recorded by the investigating agency during the course of an investigation for the purpose of establishing a contradiction in the evidence of a witness or to discredit the witness. The question then arises, how does the accused confront the previous statement made by a witness in the course of an investigation to establish the contradiction in the evidence given by the witness in the trial? So far as the statements made during the course of investigation of the case being tried is concerned, there is no difficulty because an accused is entitled under Section 207 of the Code for the supply of free copies of the documents referred to in the said section which includes the previous statement recorded under sub-section (3) of Section 161 of the Code. The accused does not have such a right as a matter of course in regard to other previous statements; more so, in regard to the statements recorded by the investigating agency under Section 161 in a case other than the one that is being tried by the court. Therefore, in the instant case, the accused made an application for summoning the case diary of Crime No. 81 of 1991 invoking the provisions of Section 172 of the Code. But the State contends that this section does not apply to summoning the case diary of cases other than the one that is being tried. Therefore, we will now examine the contention of the State with reference to Section 172 of the Code which reads thus:

“172. Diary of proceedings in investigation.—(1) Every police officer making an investigation under this Chapter shall day by day enter his proceedings in

the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation.

(2) Any criminal court may send for the police diaries of a case under enquiry or trial in such court, and may use such diaries, not as evidence in the case, but to aid it in such enquiry or trial.

(3) Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the court; but, if they are used by the police officer who made them to refresh his memory, or if the court uses them for the purpose of contradicting such police officer, the provisions of Section 161 or Section 145, as the case may be, of the Indian Evidence Act, 1872 (1 of 1872), shall apply."

9. Sub-section (1) of the above section mandates that every police officer making an investigation shall maintain a case diary of that case in which among other entries, he shall maintain the statements of the witnesses examined by him during the course of his investigation. Sub-section (2) of the same section empowers a criminal court to send for such police diaries of a case under enquiry or trial in such court, (emphasis supplied) and permits the use of such diaries, not as evidence in the case, but to aid it in such an enquiry or trial. The words used in sub-section (2) of Section 172, more particularly "police diaries of a case under enquiry or trial in such court," indicate it is only that police diary in which the investigating officer concerned had made

entries of his investigation and which pertains to the case being tried by the court alone can be sent for. Sub-section (3) of Section 172 further imposes restrictions in the manner in which such diaries can be used by the court. It also specifically bars the right of an accused or his agent to call for such diaries. Thus, on a plain language of this section, it is clear that this section cannot be used for the purpose of summoning a case diary which does not pertain to the investigation of the case which is being tried by the court. It also stands to reason because so far as the accused is concerned in the case in which he is being tried, he would have been supplied with all the documents referred to under Section 207 of the Code. Therefore, the question of he using the entries in the case diary would not arise. Section 172 is specifically meant for the contingencies when the court finds it necessary to look into the case diary for the purpose of finding an aid in the trial or for the purpose of assisting the police officer to refresh his memory. Therefore, Section 172 does not contemplate summoning of the case diary for the purpose of assisting the accused to have a look at the previous statements of the witness for using it for his benefit, as contemplated in Section 162 of the Code. The trial court and the High Court in this case proceeded on the footing that there is no bar under the Code to summon the case diary relating to the cases other than the one that is being tried. Hence, they placed reliance on Section 172 of the Code. We are unable to subscribe to that part of the finding of the courts below that the source of power to summon the case diary of a case other than the one that is being tried, emanates from Section 172 of the Code. The respondents have sought to place reliance on a Division Bench judgment of the High Court of Calcutta in the case of

Ahmed Mia v. Emperor [AIR 1944 Cal 243 : 46 Cri LJ 28] wherein the High Court observed thus: (AIR Headnote)

“Section 172 relates to the police diary made in respect of a case under enquiry or trial by the court which calls for it and therefore does not in terms apply where the diary relates not to the case which was actually being tried by the court but to the counter-case, but the principles set out in the section apply. There is no provision in the Criminal Procedure Code which would prevent the court from looking into the diary of the counter-case, or from using the diary in the counter-case in the way laid down in Section 172(2).”

11. The High Court in the impugned judgment proceeded on the basis that a statement recorded by an investigating officer in any case which was under investigation, being a statement made under Section 161 of the Code, the same can be used for the limited purpose provided under Section 162 of the Code read with Section 145 of the Evidence Act. There can be no quarrel with this approach of the High Court in regard to the use of the previous statements of a witness made in the course of another investigation being used in the course of another criminal trial. This is because as seen from the observations of this Court in the case of Tahsildar Singh [AIR 1959 SC 1012] the very object of enactment of Section 161 of the Code and Section 145 of the Evidence Act is to create a right in the accused to make use of the previous statements of the witnesses for the purpose of contradiction and for impeaching the merit of the witness. This right has not been taken away by Section 172 of the Code and, as noticed above, there is no prohibition in regard to this right of the accused either under the

Code or under the Evidence Act. But the question for consideration is, how does the accused exercise this right with reference to a previous statement of a witness made in another case which is recorded by the investigating officer in that case under the provisions of Section 161 of the Code? In our opinion, this right certainly does not flow under Section 172 of the Code nor is the accused entitled to these previous statements under Section 207 of the Code. But, this does not mean that the accused is denied of his limited benefit of using the said previous statements recorded during the course of another investigation. The answer to this question, in our considered view, lies in Section 91(1) of the Code which reads thus:

“91. Summons to produce document or other thing.—(1) Whenever any court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, enquiry, trial or other proceeding under this Code by or before such court or officer, such court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed—

(a) to affect Sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), or the Bankers' Books Evidence Act, 1891 (13 of 1891), or

(b) to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the postal or telegraph authority.”

12. The language of Section 91 is much wider than the language of Section 172 and by no stretch of imagination it could be contended that the case diary maintained under Section 172 of the Code is not a document as contemplated under Section 91(1) of the Code. If that be so and if the court comes to the conclusion that the production of such a document is necessary or desirable then, in our opinion, the court is entitled to summon the case diary of another case under Section 91 of the Code dehors the provisions of Section 172 of the Code for the purpose of using the statements made in the said diary, for contradicting a witness. When a case diary, as stated above, is summoned under Section 91(1) of the Code then the restrictions imposed under sub-sections (2) and (3) of Section 172 would not apply to the use of such case diary but we hasten to add that while using a previous statement recorded in the said case diary, the court should bear in mind the restrictions imposed under Section 162 of the Code and Section 145 of the Evidence Act because what is sought to be used from the case diary so produced are the previous statements recorded under Section 161 of the Code.”

21. The question involved here again fell for consideration in **Ravi Kant Sharma** (*supra*). As would appear from the report of the decision in **Ravi Kant**

Sharma, some directions were issued by the Delhi High Court, directing provision of the gists of interrogation by the Police as statements under Section 161(3) of the Code. It appears that these gists of interrogation were recorded in summary form. If the gists of the interrogation of the accused done by the Investigating Officer, that were his own remarks in the case diary, qualified for statements under Section 161 of the Code, not referable to Section 172 thereof, was the issue that their Lordships of the Supreme Court considered and held :

“11. Under Section 161 CrPC the police officer may reduce into writing any statement made to him in the course of examination under that provision and if he does so he shall make separate and true record of the statement of each such person whose statement he records. The provision in other words authorises the police officer to reduce into writing any statement made by a witness. In a given case the investigating officer may record circumstances ascertained during investigation in the case diary in terms of Section 172 CrPC. It is only when the investigating officer decides to record the statement of witnesses under Section 161 CrPC that he becomes obliged to make a true record of the statement which obviously will not include the interpretation of the investigating officer of the statements or the gists of statement. At this stage it will be necessary to take note of sub-section (b) of Section 173 CrPC which authorises the police officer to claim a sort of privilege in respect of any statement recorded under Section 161 CrPC after giving reasons as to why such statement may not be provided to the accused. Such privilege can only be claimed in respect of statement recorded under Section 161 CrPC and not in respect of what the officer

records in the case diary i.e. the gist of the statement under Section 172 CrPC. It will also be necessary to take note of Section 207 CrPC. The Magistrate has to, in terms of that provision, provide to the accused, free of cost, copies of statements recorded under Section 161(3) subject to the exceptions in terms of Section 173(6). A categorical statement has been made by the learned counsel for the appellant that the gist of the statement has not been produced by the prosecution to prove the guilt of the accused and the gists of the statements were not recorded in terms of Section 161 CrPC and the accused has no right to ask for the gists of such statements if recorded under Section 172.

12. At this juncture it would be necessary to take note of sub-section (3) of Section 172 which provides that neither the accused nor his agents shall be entitled to call for such diaries meaning diary of proceedings in investigation nor shall he or they be entitled to see them merely because they are referred to by the court.

13. As rightly submitted by learned counsel for the appellant, in different States case diaries are maintained in different ways. Some States have a composite case diary which includes the statements recorded under Section 161 CrPC as well as the observations of the investigating officer under Section 172 CrPC. This Court, therefore, in Shamshul Kanwar case [(1995) 4 SCC 430 : 1995 SCC (Cri) 753] held that the statements under Section 161 need to be separated from observations which are recorded under Section 172 in order to make available the statement under Section 161(3) to the accused. The position is entirely different here. Certain observations made by this Court in two recent cases also

need to be noted. In *Sunita Devi v. State of Bihar* [(2005) 1 SCC 608 : 2005 SCC (Cri) 435] it was observed at para 27 as follows : (SCC p. 617)

“27. The supervision notes can in no count be called. They are not a part of the papers which are supplied to the accused. Moreover, the informant is not entitled to the copy of the supervision notes. The supervision notes are recorded by the supervising officer. The documents in terms of Sections 207 and 208 are supplied to make the accused aware of the materials which are sought to be utilised against him. The object is to enable the accused to defend himself properly. The idea behind the supply of copies is to put him on notice of what he has to meet at the trial. The effect of non-supply of copies has been considered by this Court in *Noor Khan v. State of Rajasthan* [AIR 1964 SC 286 : (1964) 1 Cri LJ 167] and *Shakila Abdul Gafar Khan v. Vasant Raghunath Dhoble* [(2003) 7 SCC 749 : 2003 SCC (Cri) 1918]. It was held that non-supply is not necessarily prejudicial to the accused. The court has to give a definite finding about the prejudice or otherwise. The supervision notes cannot be utilised by the prosecution as a piece of material or evidence against the accused. At the same time the accused cannot make any reference to them for any purpose. If any reference is made before any court to the supervision notes, as has been noted above, they are not to be taken note of by the court concerned. As many instances have come to light when the parties, as in the present case, make reference to the supervision notes, the inevitable conclusion is that they have unauthorised access to the official records. We, therefore, direct the Chief Secretary of each State and Union Territory and the Director Generals of Police

concerned to ensure that the supervision notes are not made available to any person and to ensure that confidentiality of the supervision notes is protected. If it comes to light that any official is involved in enabling any person to get the same, appropriate action should be taken against such official. Due care and caution should be taken to see that while supplying police papers supervision notes are not given.”

15. The direction of the High Court as contained in the impugned order is not a definite one. It only refers to Shamshul Kanwar case [(1995) 4 SCC 430 : 1995 SCC (Cri) 753] and concludes that if the “gists” can be regarded as statements under Section 161 CrPC although in summary form they would have to be made over to the accused. It does not factually find out that as to whether the gists can be regarded as statements in view of the position of law stated above. It did not take note of the specific stand of the appellant about separate maintenance of case diaries.”

22 . It would be noticed that in this case, the application dated 21.11.2022 moved by the applicant has not been decided before hearing the prosecution’s testimony, which has been closed by the impugned order dated 16.03.2023, posting the trial for recording the statements under Section 313 of the Code. The application dated 21.11.2022 carries the following material facts and prayer :

“लेकिन मुकदमा वादी द्वारा दी गयी तहरीर के आधार पर अभियोजन साक्षी / मुकदमा वादी का बयान हुआ तथा बचाव पक्ष द्वारा प्रतिपरीक्षा की गयी आज उपरोक्त सत्र परीक्षण साक्ष्य हेतु नियत है तथा अभियोजन साक्षी के रूप में साक्षियों को परिक्षित होना है

ऐसी स्थिति में बिना केस डायरी के मुख्य परीक्षा होना सम्भव नहीं है और प्रार्थी के पास भी उपरोक्त प्रकरण की केस डायरी उपलब्ध नहीं है । ऐसी स्थिति में अभियोजन साक्षी नं0-3 कि मुख्य परीक्षा के पूर्व प्रार्थी के अधिवक्ता को भी उपरोक्त प्रकरण की केस डायरी में अंकित गवाहों का बयान का अवलोकन किया जाना आवश्यक है।

अतः प्रार्थना है कि सहायक जिला शासकीय अधिवक्ता फौजदारी महोदय को आदेशित करने की कृपा करे कि वे जिला शासकीय अधिवक्ता फौजदारी अथवा सम्बन्धित थाने से उपरोक्त प्रकरण की केस डायरी न्यायालय में गवाही के समय उपलब्ध करावे।”

23. This is a case where there has been no compliance with the provisions of Section 207 of the Code and the documents postulated under the aforesaid provision of the Code have never been supplied to the applicant. There are assertions to this effect in paragraph Nos.14, 15, and, particularly, paragraph No.18 of the affidavit filed in support of the application. In Paragraph Nos.11, 13 and 14 of the counter affidavit, while answering the assertions in the relative paragraphs above mentioned, it is not disputed for a fact that there has been non-compliance with the provisions of Section 207 of the Code. For a fact, therefore, there is no cavil that the statements recorded by the Police during investigation under Section 161 of the Code have not been provided to the applicant, an accused at the trial. The provisions of Section 207 of the Code read:

“207. Supply to the accused of copy of police report and other documents.—In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay

furnish to the accused, free of cost, a copy of each of the following:—

- (i) the police report;
- (ii) the first information report recorded under Section 154;
- (iii) the statements recorded under sub-section (3) of Section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub-section (6) of Section 173;
- (iv) the confessions and statements, if any, recorded under Section 164;
- (v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of Section 173:

Provided that the Magistrate may, after perusing any such part of a statement as is referred to in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused:

Provided further that if the Magistrate is satisfied that any document referred to in clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court.”

24. From a conjoint reading of the provisions of Sections 207, 173 and 172 of

the Code and the way these have been interpreted by high authority, it is evident that the accused has a right to receive all statements recorded under Section 161(3) of the Code by the Investigating Officer, except those regarding which there is a note made by the Police, requesting the Magistrate to exclude from the copies to be granted to the accused, stating his reasons founded on interest of justice or public interest, or still more, their non-relevance to the subject matter. Here, there is no case about any statement recorded under Section 161(3) being requested by the Police to be excluded from the copies granted to the accused in compliance with the provisions of Section 207 of the Code. As the Authorities already considered hold, there is a seminal distinction between those entries made in the case diary by the Investigating Officer that are based on his own observations on one hand, and the statements of witnesses recorded during investigation under Section 161 of the Code, on the other. The prohibition upon the accused or his agents calling for such diaries have been held by the Supreme Court to apply to that part of the diary, where the Investigating Officer may have recorded his own observations, impressions or the gist of investigation. It does not apply to the statements of witnesses that are reduced to writing, under Section 161(3) of the Code, during investigation. This distinction has been elucidated by their Lordships in **Shamshul Kanwar** and followed in **Ravi Kant Sharma**. In **Shamshul Kanwar**, their Lordships spoke of two parts of the case diary, with the first relating to steps taken during the course of investigation, and, the second, carrying statements of witnesses examined during investigation that bear reference to statements reduced to writing under Section 161(3) of the Code.

25. It may also be noticed that these two distinct parts of the case diary, one relating to statements reduced to writing under Section 161(3) of the Code, and the other, relating to the facts and observations of the Investigating Officer, were found to be differently provided for in different States of the country. In fact, the employment of the expression 'diary' in Section 172 of the Code was opined to have sum vagueness or confusion about it in **Shamshul Kanwar**. The remarks of their Lordships in the said decision carry a suggestion about some legislative change by framing appropriate uniform regulation relating to maintenance of these diaries contemplated under Section 172 of the Code. It would be apposite to note that Section 172 of the Code, since the decisions in **Shamshul Kanwar**, **Ravi Kant Sharma** and **Babu** as well, on a slightly different aspect, has undergone amendment vide Act No.5 of 2009 w.e.f. 13.12.2009. Sub-Sections (1-A) and (1-B) of Section 172 of the Code have been added and the amended provisions read :

“172. Diary of proceedings in investigation.—(1) x x x x

(1-A) The statements of witnesses recorded during the course of investigation under Section 161 shall be inserted in the case diary.

(1-B) The diary referred to in sub-section (1) shall be a volume and duly paginated.”

26. It would be noticed that sub-Section (1-A) provides that statement(s) of witness(es) recorded during the course of investigation under Section 161 of the Code shall be inserted in the case diary. This legislative change perhaps takes note

of the 'diary' under Section 172 of the Code being in two parts, as observed by the Supreme Court - one relating to steps taken by the Investigating Officer during investigation, which may also carry his own notes and impressions, and the other, carrying statements of persons acquainted with the facts of the case, recorded during investigation under Section 161(3) of the Code. There is, thus, a statutory acknowledgement of the statements of witnesses existing as a separate part of the diary. The prohibition carried in sub-Section (3) of Section 172 of the Code, which does not permit the accused or his agent to call for the case diary, in the considered opinion of this Court, would have no bearing upon the right of the accused to receive copies of statements recorded under Section 161, which he enjoys as a right under Section 207 of the Code. The only limitation on that right is the one mentioned in Section 207(3) read with Section 173(6) of the Code. The prohibition in sub-Section (3) of Section 172 of the Code relates to parts of the case diary that record other matters, other than statements under Section 163(3).

27. Likewise, the applicant would also have a right to receive all other documents mentioned under Section 207 of the Code, even if these were included in the case diary or the diary as postulated in Section 172 of the Code. If the submissions of Mr. Srivastava were accepted, it would lead to an abnegation of the accused's right under Section 207 of the Code. The expression 'diary' postulated in Section 172 and to which part of the 'diary' or the case diary, the embargo on the right of the accused to call for it would attach, can harmoniously be construed with the right of the accused under Section 207 of the Code to receive statements recorded under

Section 161(3) by confining the restriction envisaged under sub-Section (3) of Section 172 to that part of the case diary, which contain other details of investigation, other than statements recoded under Section 161 of the Code. This, otherwise too, is the clear legislative intent, which, in this Court's opinion, has been made more explicit with the introduction of sub-Section (1-A) in Section 172 of the Code.

28. The principle in *Balakram* harped upon much by Mr. Srivastava does, in no way, detract from the view that this Court takes. In that case, the question about the right of the accused to receive statements under Section 161 of the Code never arose. Rather, the issue in *Balakram* arose out of refusal of an application by the Trial Court to accept on record some pages of the case diary secured by the accused under the Right to Information Act, 2005 at a stage when the prosecution testimony was being heard. The complainant opposed it saying that the documents that were sought to be produced by the accused could be done at the stage when he led defence evidence. It was in this context that the sacrosanctity of the case diary under Section 172 of the Code was pronounced upon by their Lordships of the Supreme Court, noting that the accused had no right to call for the diary. It could be done for a very limited purpose in the two contingencies envisaged under sub-Section (3) of Section 172 of the Code, and that too, for the limited purpose envisaged under Section 161 or 145 of the Act of 1872. The principle in **Balakram**, therefore, has no bearing on the issue that is involved here.

29. In this conspectus of the law and the state of proceedings in the trial, this Court is of opinion that it was imperative for the learned Sessions Judge to have

disposed of the applicant's application dated 21.11.2022 before closing the prosecution evidence. The applicant is entitled to copies of the statements recorded under Section 161, so that he has the liberty of cross-examining the prosecution witnesses in the exercise of his right, and, in the manner specified, under Section 145 and 161 of the Act of 1872. The impugned order closing the prosecution evidence without provision of copies of the statements under Section 161, forecloses the applicant's valuable rights under Sections 145 and 161 of the Act of 1872, that may prejudice him seriously in his defence.

30. For the said reasons, the impugned order cannot be sustained and the Trial Judge deserves to be appropriately directed in the matter in order to secure the ends of justice.

31. Before parting with the matter, this Court places on record our appreciation for the very fair and able assistance rendered in this case by Mr. D.K. Srivastava, learned Additional Government Advocate.

32. In this result, this application **succeeds** and shall stand **allowed**. The impugned order dated 16.03.2023 is hereby **quashed**. Before proceeding further in the matter, the learned Trial Judge shall decide the applicant's application dated 21.11.2022 within the period of 15 days of receipt of a copy of this order, after hearing learned Counsel for parties and bearing in mind the guidance in this judgment. If the applicant is found entitled to provision of copies of the statements under Section 161 of the Code, which he has not yet been furnished and seeks to cross-examine any of the prosecution witness(es), the

witness(es) concerned, shall be recalled for the purpose and opportunity to cross-examine given. The trial shall be expedited and concluded early.

(2024) 4 ILRA 658

**ORIGINAL JURISDICTION
CRIMINAL SIDE**

DATED: ALLAHABAD 22.12.2023

BEFORE

THE HON'BLE DINESH PATHAK, J.

Application U/S 482. No. 17003 of 2023

Om Prakash @ Jani **...Applicant**
Versus
State of U.P. & Anr. **...Opposite Parties**

Counsel for the Applicant:

Sri Chandra Mishra, Sri Abhishek Kumar Mishra, Sri Daya Shankar Mishra (Sr. Adv.)

Counsel for the Opposite Parties:

G.A., Sri Raj Kumar Kesari

Criminal Law - Code of Criminal Procedure, 1973 -Section 482—

No Interference with Order Allowing Additional Charge – The applicant challenged the order dated 23.11.2022 allowing an application to frame an additional charge under Section 376 IPC – Held, the order was lawful, as the trial court rightly entertained the application as a piece of information to rectify a defect in framing charges, and no prejudice to the applicant was demonstrated. (Paras 3, 16, 17, 20, 21)

B. Section 216 CrPC – Court's Power to Alter Charges –

The prosecution's application to add a charge under Section 376 IPC was based on the victim's Statement under Section 161 CrPC – Held, Section 216 CrPC empowers courts to alter or add charges at any stage before judgment, and the trial court's decision to allow the application was within its discretion to ensure a fair trial. (Paras 10, 14, 16, 17)

C. Maintainability of Prosecution's Application –

The applicant argued that no

party has a right to move an application under Section 216 CrPC – Held, the prosecution's application was a legitimate means to highlight an omission in framing charges, and the court could act on such information to correct defects, as supported by *Anant Prakash Sinha* and *Soundarajan*. (Paras 5, 11, 13, 16)

D. Sufficiency of Material for Additional Charge –

The applicant challenged the adequacy of evidence for framing a charge under Section 376 IPC – Held, the victim's Statement under Section 161 CrPC provided prima facie material for the additional charge, and the applicant could contest its sufficiency at the trial stage. (Paras 8, 18)

E. Validity of Victim's Statement under Section 161 CrPC –

The applicant questioned the sanctity of the victim's Statement recorded by a lady constable during reinvestigation – Held, issues regarding the Statement's genuineness or procedural compliance under the Immoral Traffic (Prevention) Act, 1956, should be raised before the trial court, not under Section 482 CrPC. (Paras 5, 7, 19)

Application Dismissed.

List of Cases cited:

1. P. Kartikalakshmi Vs Sri Ganesh, (2017) 3 SCC 347
2. Anant Prakash Sinha Vs St. of Har., (2016) 6 SCC 105
3. Dr. Nallapareddy Sridhar Reddy Vs St. of Andhra Pradesh, (2020) 12 SCC 467
4. Soundarajan Vs St., 2023 SCC Online SC 242
5. Sushil Dhameja Vs St. of U.P., Application U/S 482 No. 12344 of 2023
6. Kuldeep Vs St. of U.P., 2019 2 ACR 1947
7. Delhi Administration Vs Ram Singh, 1962 AIR (SC) 63
8. Krishnammal Vs Revenue Divisional Officer, (2008) 0 CrLJ 2845

(Delivered by Hon'ble Dinesh Pathak, J.)

1. Heard Sri Daya Shankar Mishra, learned Senior Counsel assisted by Sri Abhishek Kumar Mishra, learned counsel for applicant and Sri Raj Kumar Kesari learned counsel for opposite party No.2 as well as learned AGA for the State.

2. Learned counsel for opposite party No.2 has refused to file any counter affidavit in the instant matter, therefore, present application is being decided on merits with the consent of learned counsel for the parties.

3. The applicant has invoked the inherent jurisdiction of this Court under Section 482 Cr.P.C. assailing the order dated 23.11.2022 passed by Additional District & Sessions Judge, Court No.3, Varanasi in Sessions Trial No. 651 of 2020 arising out of Case Crime No. 300 of 2005, under Sections 372, 373 I.P.C. and Sections 3, 4, 5, 6, 9 of Immoral Traffic (Prevention) Act, 1956, Police Station Manduwadih, District Varanasi.

4. An FIR, being Case Crime No. 300 of 2005, under Sections 373, 373 I.P.C. and under Sections 3, 4, 5, 6, and 9 of Immoral Traffick (Prevention) Act, 1956 has been lodged by the Police Inspector. Some young girls have been recovered from two different places. Charge sheet has been submitted against two accused persons, however, present applicant was neither named in the FIR nor arraigned in the charge sheet as an accused. Ultimately, Sessions Trial No. 161 of 2006 was concluded convicting both accused and the same was affirmed by this Court in Crl. Appeal No. 5583 of 2016 vide order dated 05.08.2019. During this period an application dated 22.06.2010 (Annexure-2)

has been moved under Section 319 Cr.P.C. to call upon the eight persons including present applicant as an accused for trial together with other co-accused. The said application was rejected by the trial court vide order dated 24.05.2021. High Court, on application being filed under Section 482 Cr.P.C. No. 29267 of 2011, has relegated the parties before the trial court with a direction to reconsider the application under Section 319 Cr.P.C., vide order dated 14.09.2011. Learned trial court, after remand, has passed the order dated 07.01.2012 with a direction that the matter may be reinvestigated under Section 173(8) Cr.P.C. In pursuance thereof, after due investigation, Investigating Officer has submitted the supplementary charge sheet dated 17.07.2020 (Annexure No.22) arraigning the present applicant under Sections 3, 4, 5, 6 and 9 of Immoral Traffic (Prevention) Act, 1956 and under sections 372 and 373 I.P.C. Considering the supplementary charge sheet dated 17.07.2020, learned trial court has framed the charges against the present applicant vide order dated 20.10.2020 (Annexure No.15). At later stage, prosecution has moved an application dated 12.03.2021 (Paper No.10 Kha) (Annexure-20) beseeching frame one additional charge under Section 376 I.P.C. against the present applicant. Learned trial court, vide order impugned dated 23.11.2022 (Anneuxre-21), has allowed the aforesaid application (Paper No.10 Kha) and fix next date 18.12.2022 for framing of additional charge against the present applicant. On the pointed query raised to the learned counsel for the parties they have stated that till date charge has not been framed under Section 376 I.P.C. Having been aggrieved, with order dated 23.11.2022, allowing the application (Paper No.10 Kha), applicant (accused) has invoked the inherent

jurisdiction of this Court by moving the present application.

5. Learned counsel for the applicant has advanced three fold submissions before this Court. First relating to the maintainability of the application dated 12.03.2021 (Paper No.10 Kha) on the ground that the prosecution or any other interested persons have no locus standi to move any application before the court concerned for alteration or addition of charges under Section 216 Cr.P.C. In support of this submission, learned counsel for the applicant placed reliance upon the judgment of Hon'ble Supreme Court in the case of *P. Kartiklakshmi Vs. Sri Ganesh and Another reported in (2017) 3 SCC 347, Sushil Dhameja and Another Vs. State of U.P. and Another decided by co-ordinate Bench of this Court vide order dated 18.04.2023 passed in Application U/s 482 Cr.P.C. No. 12344 of 2023 and Kuldeep Vs. State of U.P. decided by co-ordinate Bench of this Court reported in 2019 2 ACR 1947*. He has placed reliance as well upon the judgment of Madras High Court in the case of *Krishnammal Vs. The Revenue Divisional Officer and others reported in (2008) 0 CrLJ2845*. Second submission raised by learned counsel for applicant is that no additional material is available on record to frame additional charge indicting the present applicant under Section 376 I.P.C. Thirdly, learned counsel for the applicant has tried to challenge the sanctity and genuineness of statement made by victim u/s 161 Cr.P.C. during re-investigation and submits that the statement of victim under Section 161 Cr.P.C. as referred in the order dated 23.11.2022 was not recorded, in accordance with law, during re-investigation. It is further submitted that from perusal of the record, prima facie, it appears that alleged

statement of victim was got recorded by some lady Constable namely, Poonam Verma. It was not recorded by Investigating Officer, therefore, same cannot be treated to be part of the re-investigation. It is next submitted that under Section 13(2) of Immoral Traffic (Prevention) Act, 1956, the Special Police Officer shall not be below the rank of an Inspector of Police, whereas instant matter statement was get recorded by the police constable which has got no sanctity in the eye of law. In support of his submission learned counsel for applicant has cited the case of *Delhi Administration Vs. Ram Singh 1962 0 AIR (SC) 63*. It is further submitted that learned trial court has illegally made an observation in its order dated 23.11.2022 that the victim in her statement recorded under Section 161 Cr.P.C. has made allegations of rape against the present applicant. However, in her initial statement recorded under Section 164 Cr.P.C. no such allegation was made by the victim against the present applicant. Lastly, it is submitted that the order dated 23.11.2022 passed by learned trial court is liable to be quashed being illegal, unwarranted under the law and tainted with irregularities.

6. Per contra, learned counsel for the respondent no. 2 has contended that in present application, applicant has not challenged the entire criminal proceeding except an order impugned dated 23.11.2022 by which application (Paper No. 10Kha) has been allowed for the purposes of indicting the accused under Section 376 I.P.C. It is further contended that the application (Paper No. 10Kha) cannot be treated to be an independent application rather it is a piece of information given to the court concerned for the irregularity in the proceedings wherein statement under

Section 161 Cr.P.C. has not properly been appraised by the the Court concerned, consequently offence under Section 376 I.P.C. has been left out to be considered. It is further contended that the victim/prosecutrix being a lady has to be examined by the lady officer, therefore, her statement has rightly been recorded by lady constable namely, Poonam Verma on the instructions of the Investigating Officer. Learned counsel for the respondent has drawn attention of the Court towards the second proviso to sub-section 3 of Section 161 Cr.P.C. wherein lady police officer has been entrusted to record the statement of a woman against whom offence under several sections of I.P.C. including Section 376 I.P.C. has been committed. He has also placed reliance on the provisions as enunciated under Section 15, sub-Section 6-A, of the Immoral Traffic Act wherein victim is required to be interrogated by the woman police officer. Lastly it is contended that learned trial court has rightly passed order impugned dated 23.11.2022, which does not warrant any indulgence of this Court in exercise of inherent jurisdiction under Section 482 Cr.P.C., therefore, the instant application is liable to be rejected being misconceived and devoid of merits.

7. In reply, learned counsel for the applicant submits that the copy of statement of victim under section 161 Cr.P.C., as referred in the order impugned, has not been supplied/given to the present applicant (accused), therefore, he was not in a position to go through the aforesaid statement. He has further submitted that it appears that alleged statement under Section 161 Cr.P.C. dated 05.02.2020, as referred by the respondents in his impleadment application has been planted subsequently for the purpose of framing

additional charge u/s 376 I.P.C. It is further submitted that for the purposes of investigation under the Immoral Traffic Act a Special Police Officer not below the rank of Inspector of Police is authorised to investigate or record the statement of the victim, therefore, in the instant matter statement recorded by the concerned lady constable vitiates the process of the entire statement under Section 161 Cr.P.C.

8. Having considered the rival submissions advanced by learned counsel for parties and perusal of record, it manifested that the name of the present applicant was emerged during re-investigation under Section 173(8) Cr.P.C. and he has been arraigned in the supplementary charge sheet dated 17.07.2020. During re-investigation victim has made her statement under Section 161 Cr.P.C. which is evident from the copy of the supplementary charge sheet (Annexure No.5) wherein name of victim has find placed at serial No.2. Having considered the material on record filed along with the subsequent charge sheet dated 17.07.2020, learned trial court has framed as many as seven charges, vide order dated 20.10.2020, against the present applicant. At later stage, prosecution has moved a miscellaneous application to frame additional charge under Section 376 I.P.C. inasmuch as same has been left to be considered whereas specific allegations has been made by the victim in her statement under Section 161 Cr.P.C. in this regard.

9. Learned counsel for the applicant in his first submission has raised question qua maintainability of the application (Paper No.10 Kha) moved on behalf of the prosecution with a submission that there is no provision under the law to move such application before the trial court who

himself competent to subtract or addition of charges in exercise of power under Section 216 Cr.P.C. On the contrary learned counsel for opposite party No.2 has contended that application (Paper No. 10 Kha) under Section 216 Cr.P.C. moved by the prosecution was nothing but a piece of information to bring the relevant fact in the notice of learned trial court, which has been over cited by the concerned court, to eliminate defect in framing of the charge.

10. For analyzing the divergent submissions made by the counsel for the rival parties it would be befitting to consider the scope of Section 216 Cr.P.C., which is quoted herein below :-

"(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 had been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded."

11. Bare perusal of Section 216 Cr.P.C. clearly denotes that the court is empowered to alter charges at any stage of trial before the delivery of judgment. Question with respect to the maintainability of miscellaneous application (Paper No. Kha) moved by prosecution or any other party for framing of additional charges under Section 216 Cr.P.C. is relevant for the purposes of deciding the instant matter. In the case of **P. Kartikalakshmi (Supra)** Hon'ble Supreme Court has expounded that there is no right to any party to seek for a subtraction or addition of charges by filing any miscellaneous application as a matter of right. The relevant paragraph Nos. 6 and 7 of the judgment is quoted herein below :-

"6. Having heard the learned counsel for the respective parties, we find force in the submission of the learned Senior Counsel for Respondent No.1. Section 216 Cr.P.C. 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 Cr.P.C. 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.

7. We were taken through Sections 221 and 222 Cr.P.C. in this context. In the light of the facts involved in this case, we are only concerned with Section 216 Cr.P.C. We, therefore, do not propose to examine the implications of the other provisions to the case on hand. We wish to confine ourselves to the invocation of Section 216 and rest with that. In the light of our conclusion that the power of invocation of Section 216 Cr.P.C. is exclusively confined with the Court as an enabling provision for the purpose of alteration or addition of any charge at any time before pronouncement of the judgment, we make it clear that no party neither de facto complainant nor the accused or for that matter the prosecution has any vested right to seek any addition or alteration of charge, because it is not provided under Section 216 Cr.P.C. If such a course to be adopted by the parties is allowed, then it will be well-nigh impossible for the criminal court to conclude its proceedings and the concept of speedy trial will get jeopardised."

12. Hon'ble Supreme Court has further clarified in the case of **Anant**

Prakash Sinha @ Anant Sinha Vs. State of Haryana and Another (2016) 6 SCC 105 that it is obligatory at the part of the court to see that no prejudiced cause to the accused and he is allowed to have a fair trial and court can change or alter the charges if there is no defect or something is left out. Relevant paragraph No.18 of the aforesaid judgment is quoted herein below :-

"8. The controversy as raised rests on two aspects. The first aspect that has emanated for consideration is whether without evidence being adduced another charge could be added. In this context, we may usefully refer to Section 216 CrPC which reads as follows:-

"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."

13. In the aforesaid judgment Hon'ble Supreme Court has also examined the maintainability of the application moved by the private party for alteration of charge. Parting with the matter Hon'ble Supreme Court has expounded that by way of application relevant fact has brought to the knowledge of learned Magistrate about the defect in framing the charges, therefore, Magistrate has not committed any error in entertaining the said application. Relevant paragraph Nos. 21 and 22 of the aforesaid judgment is quoted herein below :-

"21. Presently to the second aspect. Submission of Mr. Sharan is that the learned Magistrate could not have entertained the application preferred by the informant, for such an application is incompetent because it has to be filed by the public prosecutor. In this regard, he has laid stress on the decision in Shiv Kumar v. Jukam Chand and another²³. In the said case, the grievance of the appellant was that counsel engaged by him was not allowed by the High Court to conduct the prosecution in spite of obtaining a consent from the concerned Public Prosecutor. The trial court had passed an order to the extent that the advocate engaged by the informant shall conduct the case under the supervision, guidance and control of the Public Prosecutor. He had further directed that the Public Prosecutor shall retain with

himself the control over the proceedings. The said order was challenged before the High Court and the learned single Judge allowing the revision had directed that the lawyer appointed by the complainant or private person shall act under the directions from the Public Prosecutor and may with the permission of the court submit written arguments after evidence is closed and the Public Prosecutor in-charge of the case shall conduct the prosecution. This Court referred to Sections 301, 302(2), 225 CrPC and various other provisions and came to hold as follows:- "

"13. From the scheme of the Code the legislative intention is manifestly clear that prosecution in a Sessions Court cannot be conducted by anyone other than the Public Prosecutor. The legislature reminds the State that the policy must strictly conform to fairness in the trial of an accused in a Sessions Court. A Public Prosecutor is not expected to show a thirst to reach the case in the conviction of the accused somehow or the other irrespective of the true facts involved in the case. The expected attitude of the Public Prosecutor while conducting prosecution must be couched in fairness not only to the court and to the investigating agencies but to the accused as well. If an accused is entitled to any legitimate benefit during trial the Public Prosecutor should not scuttle/conceal it. On the contrary, it is the duty of the Public Prosecutor to winch it to the fore and make it available to the accused. Even if the defence counsel overlooked it, the Public Prosecutor has the added responsibility to bring it to the notice of the court if it comes to his knowledge. A private counsel, if allowed a free hand to conduct prosecution would focus on bringing the case to conviction even if it is not a fit case to be so convicted.

That is the reason why Parliament applied a bridle on him and subjected his role strictly to the instructions given by the Public Prosecutor.

14. It is not merely an overall supervision which the Public Prosecutor is expected to perform in such cases when a privately engaged counsel is permitted to act on his behalf. The role which a private counsel in such a situation can play is, perhaps, comparable with that of a junior advocate conducting the case of his senior in a court. The private counsel is to act on behalf of the Public Prosecutor albeit the fact that he is engaged in the case by a private party. If the role of the Public Prosecutor is allowed to shrink to a mere supervisory role the trial would become a combat between the private party and the accused which would render the legislative mandate in Section 225 of the Code a dead letter."

22. Being of this view, this Court upheld the order passed by the High Court. The said decision in Shiv Kumar v. Jukam Chand and another²³ is, in our opinion, is distinguishable on facts. The instant case does not pertain to trial or any area by which a private lawyer takes control of the proceedings. As is evident, an application was filed by the informant to add a charge under Section 406 IPC as there were allegations against the husband about the criminal breach of trust as far as her stridhan is concerned. It was, in a way, bringing to the notice of the learned Magistrate about the defect in framing of the charge. The court could have done it suo motu. In such a situation, we do not find any fault on the part of learned Magistrate in entertaining the said application. It may be stated that the learned Magistrate has referred to the

materials and recorded his prima facie satisfaction. There is no error in the said prima facie view. We also do not perceive any error in the revisional order by which it has set aside the charge framed against the mother-in-law. Accordingly, we affirm the order of the High Court in expressing its disinclination to interfere with the order passed in revision. We may clarify that the entire scrutiny is only for the purpose of framing of charge and nothing else. The learned Magistrate will proceed with the trial and decide the matter as per the evidence brought on record and shall not be influenced by any observations made as the same have to be restricted for the purpose of testing the legal defensibility of the impugned order."

*14. Discussing the wide power of the trial court under Section 216 Cr.P.C. Hon'ble Supreme Court has held in the matter of **Dr. Nallapareddy Sridhar Reddy Vs. State of Andhra Pradesh and Others (2020) 12 SCC 467**, that the court has immense power to change or altering the charges at any stage. The relevant paragraph No.21 of the aforesaid judgment is quoted herein below :-*

"21. From the above line of precedents, it is clear that Section 216 provides the court an exclusive and wide-ranging power to change or alter any charge. The use of the words "at any time before judgment is pronounced" in Sub-Section (1) empowers the court to exercise its powers of altering or adding charges even after the completion of evidence, arguments and reserving of the judgment. The alteration or addition of a charge may be done if in the opinion of the court there was an omission in the framing of charge or if upon prima facie examination of the material brought on record, it leads the

court to form a presumptive opinion as to the existence of the factual ingredients constituting the alleged offence. The test to be adopted by the court while deciding upon an addition or alteration of a charge is that the material brought on record needs to have a direct link or nexus with the ingredients of the alleged offence. Addition of a charge merely commences the trial for the additional charges, whereupon, based on the evidence, it is to be determined whether the accused may be convicted for the additional charges. The court must exercise its powers under Section 216 judiciously and ensure that no prejudice is caused to the accused and that he is allowed to have a fair trial. The only constraint on the court's power is the prejudice likely to be caused to the accused by the addition or alteration of charges. Sub-Section (4) accordingly prescribes the approach to be adopted by the courts where prejudice may be caused."

15. Learned counsel for the applicant has emphasized the judgment passed by coordinate Bench of this Court in the matter of **Sushil Dhameja and Another (Supra)** wherein this Court has quashed order passed by the trial court by which miscellaneous application u/s 216 Cr.P.C. moved on behalf of the prosecution has been entertained and allowed. While passing the order, coordinate Bench of this Court has referred the dictum of Hon'ble Supreme Court in the matter of **P. Kartikalakshmi (Supra)** and in the light of the said judgment quashed the order passed by the court below and granted liberty to the trial court to pass fresh order in the light of the provisions as enunciated under Section 216 Cr.P.C. Learned counsel for applicant has also placed reliance upon the case of **Kuldeep (Supra)** decided by coordinate Bench of this Court. The facts

of the cited case are distinguishable in the given circumstances of the present case. In the cited case application to alter the charges was moved on 30.01.2018 under Section 216 Cr.P.C. and the same was kept pending which lead to file an application under Section 482 Cr.P.C. for a direction to expeditious disposal of the said application. Hon'ble Judge has dismissed the application with an observation that separate application under Section 216 Cr.P.C. for subtraction or addition of charges is not maintainable in the eye of law, accordingly, refused to issue direction for expeditious disposal of said application. In the recent judgment of **Soundarajan Vs. State Rep. by Inspector of Vigilance Anti Corruption Dindigul, 2023 SCC Online SC 242**. Hon'ble Supreme Court has expounded that even a public prosecutor has a duty to be vigilant and if a proper charge is not framed it is his duty to apply to the court to frame an appropriate charge. Relevant paragraph No.16 of the said judgment is quoted herein below :-

"We find that, in this case, the charge has been framed very casually. The Trial Courts ought to be very meticulous Criminal Appeal No.1592 of 2022 when it comes to the framing of charges. In a given case, any such error or omission may lead to acquittal and/or a long delay in trial due to an order of remand which can be passed under subsection (2) of Section 464 of CrPC. Apart from the duty of the Trial Court, even the public prosecutor has a duty to be vigilant, and if a proper charge is not framed, it is his duty to apply to the Court to frame an appropriate charge."

16. Having considered the matter in hand, in light of the guidelines of Hon'ble Supreme Court as discussed above, I am of the considered opinion that learned trial

court has rightly entertained the Misc. Application (Paper No.10Kha) as a piece of information moved on behalf of prosecution. While deciding the said application, learned trial court has specifically considered the allegation of forceful sexual assault made by victim which was left to be noticed at the time of framing charges. In her statement u/s 161 Cr.P.C. she has made specific allegation, as highlighted by learned trial court, of rape. Statement of victim under Section 161 Cr.P.C. was recorded by the Investigating Officer during re-investigation under Section 173(8) Cr.P.C. The right of accused to have a fair trial and no prejudiced beget to him while conducting the trial is an obligatory at the part of the court, however, said right of the accused cannot be seen in isolation and same would be considered in conjunction with the provisions as enunciated under Section 216 Cr.P.C., Therefore, any defect in framing charges which begot due to lack of proper consideration of the material on record can be rectified at any stage of trial even before the delivery of judgment in exercise of power under Section 216 Cr.P.C. It might possible that court misled in framing of charges, the Public Prosecutor has a duty to be vigilant and apprise the court qua correct facts of the case in the light of the material on record and, accordingly, take an appropriate steps for subtraction or addition of charges under the provisions of law as enunciated under Section 216 Cr.P.C. In this respect Hon'ble Supreme Court has clearly held in the matter **Soundarajan (Supra)** that the Public Prosecutor is entrusted with duty to apprise the court qua defect, if any, in framing charges. In the matter in hand, ADGC (Public Prosecutor) has moved application dated 15.03.2021 (Paper No.10Kha) to frame additional charge under Section 376

I.P.C. against the present applicant. Learned trial court, vide order impugned dated 10.11.2022, has entertained the said application as a piece of information and acknowledged the defect in framing of charges, wherein allegation of rape made by the victim under Section 161 Cr.P.C. has been left to be considered. Learned trial court by order impugned has simply allowed the application and deferred the hearing of the case for the next date to frame additional charge and, accordingly, accused has been directed to be present on the next date. It is admitted position to both the parties that till date additional charge under Section 376 I.P.C. has not been framed by the trial court in pursuance of the order impugned dated 23.11.2022.

17. As discussed above, there is no iota of doubt qua wide power of the courts for subtraction or addition of charges under Section 216 Cr.P.C. Miscellaneous application dated 12.3.2021 (Paper no.10Kha) moved on behalf of the prosecution cannot be treated to be an independent initiation rather than a piece of information which is pious duty of the prosecution (Public Prosecutor) to bring the correct fact to the notice of the court concerned so that correct charges could be framed for the purposes of fair trial sans begetting prejudiced to any party. Even assuming for the sake of argument, as raised by learned counsel for the applicant, that no party has vested right to seek any addition or alteration of charge by moving an application, the power vested in the court would not be affected owing to entertaining such application as a piece of information to alter the charges, in case, there is any omission or defect in framing of charges due to ignorance of the relevant event which is already on the record. Once the defect has been brought to the

knowledge of the court it would not be befitting for him oblivious to the allegation as levelled by the victim against the present applicant. Even otherwise, having considered the material on record learned court is competent enough to pass an order suo moto to substract or addition of the charges. Therefore, in my considered opinion learned trial court has not committed any error in entertaining the application (Paper No.10Kha) and fixed dated for framing of charge in the light of the fact which has been brought to his knowledge in the said application.

18. Second submission raised by learned counsel for the applicant questioning the availability of inadequate material for framing of additional charge u/s 376 I.P.C. is unfounded at this stage. Statement of victim u/s 161 Cr.P.C., priam facie, is suficient to alter the charges in exercise of jurisdiction u/s 216 Cr.P.C. Trial court by order impugned has simply allowed the application acknowledging the relevant fact for the purposes of framing of charge, however, he has deferred the matter for framing of charge on the next date fixed. Therefore, in may opinion opportunity is still open for the applicant to raise question qua adequate material on record with respect to the framing of additional charge, if any.

19. Third submission raised by learned counsel for the applicant questioning the genuineness and sanctity of the statement dated 05.02.2020 made by victim under Section 161 Cr.P.C. is unfounded as well. At this juncture, wherein trial commenced after framing of charges vide order dated 20.10.2020 and, at later stage, next date fixed for addition of charge under Section 376 I.P.C. it would not be befitting for this Court to examine

the sanctity, genuineness and correctness of the statement made by the victim under Section 161 Cr.P.C. during reinvestigation, whereas same can be examined by the trial court at the appropriate stage of trial. So far as the allegation made by the applicant in his rejoinder affidavit that the statement made by victim under Section 161 Cr.P.C. during reinvestigation has not been supplied to him, same can be raised before the trial court as well at the relevant stage. At this stage of trial, for the procedural glitch, if any, this Court cannot assume inherent jurisdiction to quash the proceedings. Genuineness and sanctity of the statement made by victim under Section 161 Cr.P.C. in the light of the provision as enunciated under Section 13(2) Immoral Traffic (Prevention) Act, 1956 and not recording her statement by the authority competent, as pointed out by learned counsel for the applicant, is a matter of scrutiny which can more appropriately be adjudicated upon by the trial court while examining the relevance and admissibility of the evidence during trial. At this juncture, this Court, in exercise of it's inherent jurisdiction, cannot assume the power to examine the correctness and validity of the statement of witness under Section 161 Cr.P.C. in the light of procedural glitch, if any, more particularly for want of recording the statement by authority competent as allegedly required under the Immoral Traffic (Prevention) Act, 1956.

20. In this conspectus, as above, I do not find any justifiable ground to entertain the instant application at this juncture. There is no illegality, perversity, ambiguity or infirmity in the order under challenge. I found neither any abuse of process of court in the order impugned dated 23.11.2022 nor is there any valid ground to interfere in

1. A.C. Narayanan Vs St. of Maharashtra, (2014) & (2015)

2. TRL Krosaki Reractories Ltd. Vs SMS Asia Pvt. Ltd., Criminal Appeal No. 270 of 2022

3. Samrat Shipping Co. Pvt. Ltd. Vs Dolly George, (2002)

4. National Small Industries Corp. Ltd. Vs St. (NCT of Delhi), (2009)

5. Sunil Bharti Mittal Vs CBI, (2015)

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

1. Heard Sri Amit Daga, learned counsel for applicant, Sri Swetashwa Agarwal, learned counsel for opposite party no.2 and Sri Shashidhar Pandey, learned AGA for the State.

2. By means of this application under Section 482 Cr.P.C. the applicant has prayed for quashing the summoning order dated 16.02.2016 passed by Additional Chief Judicial Magistrate, Court No.1, Muzaffarnagar in Criminal Complaint Case No.49/9 of 2016 (whereby the trial court summoned accused applicant for the offence punishable under Section 138 of Negotiable Instruments Act) as well as entire proceedings of Criminal Complaint Case No.49/9 of 2016 (Uttarakhand Engineering Products Pvt. Ltd. Vs. M/s. Trimurti Concast Pvt. Ltd. and others), under Section 138 of N.I.Act, Police Station New Mandi, District Muzaffarnagar, pending in the Court of Additional Chief Judicial Magistrate, Court No.1, Muzaffarnagar.

3. Brief facts of the case are that Uttarakhand Engineering Products Private Limited (here-in-after for the sake of brevity has been referred to as "Complainant") is engaged in the business

of Sponge Iron and Silicon Manganese. M/s Trimurti Concast Pvt. Ltd. placed an order for supply of Sponge Iron and Silicon Manganese, the complainant supplied the product, thereafter, M/s Trimurti Concast Pvt. Ltd gave a cheque of Rs.1,07,05,318.00 on 16.07.2015 bearing cheque no.000441 drawn in HDFC Bank, 53/4-A, Bagh Kambalwala, Jansath Road, New Mandi Muzaffarnagar. This cheque was presented on 12.10.2015 and the same was bounced because of insufficiency of funds, thereafter, the complainant gave a legal notice on 23.10.2015 within stipulated time. When, M/s Trimurti Concast Pvt. Ltd did not pay the said amount the complainant was left with no option but to file a complaint under Section 138 of Negotiable Instruments Act before Chief Judicial Magistrate, Muzaffarnagar. The evidence was filed by way of an affidavit and also filed all relevant documents, thereafter, the Court was pleased to issue summons on 16.02.2016.

4. Once the summons were issued, the applicant herein, Ashok Sharma, who was signatory of the cheque filed the instant application under Section 482 Cr.P.C. in which this Court vide order dated 05.07.2016 issued notices to the opposite party no.2 and stayed the further proceedings of the aforesaid complaint case, therefore, the trial could not proceed since last 8 years. Now the pleadings are complete and the matter is ripe for hearing.

ARGUMENT ON BEHALF OF THE APPLICANT

5. Learned counsel for the applicant submits that prosecution, initiated under Section 138 of N.I.Act by and on behalf of the company cannot be initiated through power of attorne. It is initiated by power of

attorney HOLDER, then the power of attorney and letter of authorized signatory must be on record of trial court. There was not even a single authorization letter, power of attorney or letter bearing seal and signatures of the Board of Directors of the Company, which authorize to institute complaint on behalf of the complainant is available before the trial Court, therefore, the complaint filed by the complainant is not maintainable

6. He further submits that complaint does not fulfil the basic ingredients of Section 141 of N.I.Act. The complaint as well as the statements are absolutely silent on the point, that on the date of issuance of the cheque or on the date on which the cheque was dishonoured, who was in charge or responsible, and looking after day to day affairs of the company. Hence, the complaint against the applicant is not maintainable.

7. In support of his argument learned counsel for the applicant placed reliance on the judgement of Hon'ble Supreme Court in the case of **A.C. Narayan vs. State of Maharashtra and another¹** wherein the Court had held as follows:-

“In the light of the discussion, we are of the view that the power of attorney holder may be allowed to file, appear and depose for the purpose of issue of process for the offence punishable under Section 138 of the N.I. Act. An exception to the above is when the power of attorney holder of the complainant does not have a personal knowledge about the transactions then he cannot be examined. However, where the attorney holder of the complainant is in charge of the business of the complainant payee and the attorney holder alone is personally aware of the transactions, there

is no reason why the attorney holder cannot depose as a witness. Nevertheless, an explicit assertion as to the knowledge of the Power of Attorney holder about the transaction in question must be specified in the complaint. On this count, the fourth question becomes infructuous.

In view of the discussion, we are of the opinion that the attorney holder cannot file a complaint in his own name as if he was the complainant, but he can initiate criminal proceedings on behalf of his principal. We also reiterate that where the payee is a proprietary concern, the complaint can be filed (i) by the proprietor of the proprietary concern, describing himself as the sole proprietor of the “payee”; (ii) the Page 13 13 proprietary concern, describing itself as a sole proprietary concern, represented by its sole proprietor; and (iii) the proprietor or the proprietary concern represented by the attorney holder under a power of attorney executed by the sole proprietor.”

8. Learned counsel for the applicant further placed reliance on the judgement of Hon'ble Supreme Court **A.C. Narayanan vs. State of Maharashtra and another²** wherein the Court held as follows:-

“From the bare perusal of the said complaint, it can be seen that except mentioning in the cause title there is no mention of, or a reference to the Power of Attorney in the body of the said complaint nor was it exhibited as part of the said complaint. Further, in the list of evidence there is just a mere mention of the words at serial no.6 viz. “Power of Attorney”, however there is no date or any other particulars of the Power of Attorney mentioned in the complaint. Even in the verification statement made by the

respondent no.2, there is not even a whisper that she is filing the complaint as the Power of Attorney holder of the complainant. Even the order of issue of process dated 20th February, 1998 does not mention that the Magistrate had perused any Power of Attorney for issuing process.

The appellant has stated that his Advocate conducted search and inspection of the papers and proceedings of the criminal complaint and found that no Power of Attorney was found to be a part of that record. This has not been disputed by the respondents. In that view of the matter and in light of decision of the larger Bench, as referred above, we hold that the Magistrate wrongly took cognizance in the matter and the Court below erred in putting the onus on the appellant rather than the complainant. The aforesaid fact has also been overlooked by the High Court while passing the impugned judgment dated 12th August, 2005."

9. He further submits that in the complaint it is not stated that the complaint has been filed through the power of attorney holder. He further submits that there is no averment in the complaint nor in the counter affidavit where the authorized signatory is said to have knowledge about the business transactions between the accused and company. If it is not so, it is a directors alone who should be deposed before the trial Court.

10. He further submits that it has not been averred in the complaint or in the counter affidavit that the director, Mr. Ashok Sharma was responsible for the day to day affairs of the company. He

further submits that only allegation against the applicant is that he (Ashok Sharma) was the signatory and has issued the cheque.

11. He further submits that applicant, Ashok Sharma is not an active director of the company; he is a sleeping director of the company and not actively involved in the day to day affairs of the company and not authorized to conduct day to day affairs of the company, nor had the authority to sign or issue the cheque.

ARGUMENT ON BEHALF OF OPPOSITE PARTY NO.2

12. Per contra, Mr. Shwetashwa Agarwal, learned counsel for the opposite party no.2 submits that the averment made by the applicant that the applicant, Ashok Sharma was a sleeping director is just a fig of imagination. He cannot be a sleeping director when he himself is signing the cheque. As regards to, whether he has no authority to sign the cheque, Mr. Agarwal states, if he has no authority to sign the cheque then signing a cheque amounts to a criminal breach of trust. It was that situation why the other directors have not initiated any criminal proceedings against him.

13. In response to the first submission, learned counsel for opposite party no.2 submits that the law cited by counsel for the applicant has been watered down and clarified in the latest judgement of Hon'ble Supreme Court in the case of **M/s TRL Krosaki Reractories Ltd. Vs. M/s SMS Asia Private Limited and another (Criminal Appeal No.270 of 2022 arising out of SLP (Crl.) No.3113 of 2016)**³ he relies on paragraph no.25, which is quoted hereunder:-

“In that view, the position that would emerge is that when a company is the payee of the cheque based on which a complaint is filed under Section 138 of N.I. Act, the complainant necessarily should be the Company which would be represented by an employee who is authorized. Prima facie, in such a situation the indication in the complaint and the sworn statement (either orally or by affidavit) to the effect that the complainant (Company) is represented by an authorized person who has knowledge, would be sufficient. The employment of the terms “specific assertion as to the knowledge of the power of attorney holder” and such assertion about knowledge should be “said explicitly” as stated in A.C. Narayanan (supra) cannot be understood to mean that the assertion should be in any particular manner, much less only in the manner understood by the accused in the case. All that is necessary is to demonstrate before the learned Magistrate that the complaint filed is in the name of the “payee” and if the person who is prosecuting the complaint is different from the payee, the authorisation therefor and that the contents of the complaint are within his knowledge. When, the complainant/payee is a company, an authorized employee can represent the company. Such averment and prima facie material is sufficient for the learned Magistrate to take cognizance and issue process. If at all, there is any serious dispute with regard to the person prosecuting the complaint not being authorized or if it is to be demonstrated that the person who filed the complaint has no knowledge of the transaction and, as such that person could not have instituted and prosecuted the complaint, it would be open for the accused to dispute the position and establish the same during the course of the trial. As noted in Samrat Shipping Co.

Pvt. Ltd. 4dismissal of a complaint at the threshold by the Magistrate on the question of authorisation, would not be justified. Similarly, we are of the view that in such circumstances entertaining a petition under Section 482 to quash the order taking cognizance by the Magistrate would be unjustified when the issue of proper authorisation and knowledge can only be an issue for trial.”

14. He further submits that **A.C. Narayanan** case was between two individuals and the Hon’ble Supreme Court was appreciating the facts of that particular case vis a vis the powers of a principal and an agent inter se and now that law has been clarified because in the cases of company, a company is a corporeal personality it is a de jure complainant and the person, who is representing the company is a defacto complainant, so those parameters of specific assertions, specific words cannot be put into a strait-jacket formula and those specific words are not required to be mentioned. The only thing, which has to be appreciated by the Court at the time of summoning of accused is as to whether the complaint has been filed by a payee or a holder in due course, which in the case is a company so obviously the company has filed the complaint but through a defacto complainant, who is authorized signatory duly authorized by the resolution of the Board of Directors of the company. He further submits that it is a sufficient requirement to meet out the ingredients of Section 141 of N.I.Act. He further submits that it has also been held by the Hon’ble Supreme Court that these arguments as to whether he had the authority or not cannot be appreciated at the time of summoning and there is a full-fledged trial to follow to adjudicate these issues. The accused has the liberty to raise these questions during the

course of trial but at the stage of summoning this burden cannot be put upon the magistrate to scan through the entire evidence and conduct a mini trial prior to the summoning of the accused.

15. He further submits that in the complaint if a specific word is not used that would not defeat the substantive right for prosecution. Once he has specifically alleged the specific acts and the role played to the accused persons.

16. He further submits that the complaint qualifies the threshold of the complaint as per the ingredient of Sections 138 and 142 of N.I.Act. The legally enforceable debt is there it is not disputed, the cheque has been dishonoured on the ground of insufficient funds, it cannot be disputed. The legal notice was sent in time, it is not disputed and the complaint has been filed as per the provisions of Section 138 of N.I.Act. is not disputed.

17. He further submits that the arguments advanced by the counsel for the applicant are squarely covered by the judgment of Hon'ble Supreme Court in the matter of **M/s TRL Krosaki Reractories Ltd. (supra)**.

18. He further refers on Section 168 of the Companies Act, which lays down that even upon resignation of a director he would be liable for the acts performed during the course of his directorship. For ready reference Section 168 (1) and (2) of the Companies Act are quoted hereunder:-

(1) A director may resign from his office by giving a notice in writing to the company and the Board shall on receipt of such notice take note of the same and the company shall intimate the Registrar in

such manner, within such time and in such form as may be prescribed and shall also place the fact of such resignation in the report of directors laid in the immediately following general meeting by the company:

Provided that director shall also forward director may also forward a copy of his resignation along with detailed reasons for the resignation to the Registrar within thirty days of resignation in such manner as may be prescribed.

(2) The resignation of a director shall take effect from the date on which the notice is received by the company or the date, if any, specified by the director in the notice, whichever is later:

Provided that the director who has resigned shall be liable even after his resignation for the offences which occurred during his tenure.

19. He further submits that scope of judicial enquiry is limited at this stage would be very limited, moreover, there are catina of judgements, which says that the inherent power of Section 482 Cr.P.C. should sparingly be used.

CASE NO.12652 OF 2016 (NARENDRA SINGH PAWAR)

20. Learned counsel for the applicant submits that the applicant, Narendra Singh Pawar is not signatory of the cheque and there was no allegation that he was looking after day to day affairs of the company.

21. Per contra Mr. Shwetaashwa Agarwal, learned counsel for opposite party no.2 submits that as per provisions of Section 141 of N.I. Act the vicarious liability flows from the company to the

directors, who are involved in the transaction in question. Here in the facts of the present case their involvement in the transaction has been shown in the complaint right from the very inception. The complaint and the statement on oath submitted by the complainant undisputedly discloses specific allegations of participation and the specific acts attributed to all the directors of the company, who were involved in the transaction. They placed the orders on behalf of the company, and the opposite party no.2 was pursuing the payment from the company through them. There is specific assertion against the directors of the Company. The cheque was issued on behalf of the company in which the accused/applicant herein are the directors and also responsible for the day to day affairs of the company, and the signatory was one of the director, Mr. Ashok Sharma, towards the discharge of the legally enforceable debt. Legal notice was sent to all of them. No reply was given by them. Thereafter, a complaint was filed that is sufficient compliance of their participation.

22. Learned counsel for the opposite party no.2 submits that the this concept of vicarious liability is alien to criminal jurisprudence, however, the same was introduced in the N.I.Act for the reasons of dealing with corporeal entities because in a company the directors and its representatives and signatories are the persons who run the company. Since the company is juristic personality and cannot be prosecuted, hence, the normal criminal law will not be applicable in that case, it is for this reason the vicarious liability was first recognized and introduced by the law makers while drafting N.I.Act.

23. Learned counsel for the opposite party no.2 further submits that keeping this in mind Section 141 was enacted wherein just now the company, the key personnels, directors was to be held liable for such kind of criminal offence.

CASE NO.9430 OF 2016
(YATINDRA SINGH PAWAR)

24. Learned counsel for the applicant submits that the cheque was issued on 16.07.2015 and Mr. Yatindra Singh Pawar was appointed as director of the company on 24.11.2005 resigned from the company on 02.05.2015 and the same came in effect on 13.05.2015.

25. In reply Mr. Agarwal, submits that even assuming that he has resigned on 02.05.2015 still he cannot get out of the liabilities as the order was placed while he was a whole time director of the company. The material was supplied while he was a whole time director of the company, it seems if he has resigned only for the sake of getting away from the civil and criminal liabilities then such kind of resignation cannot absolve him of such liabilities.

CONCLUSION

26. It is undisputed that M/s. Trimurti Concast Pvt. Ltd. placed an order for supply of Sponge Iron and Silicon Manganese, which the complainant company had supplied against which a cheque was given on behalf of M/s. Trimurti Concast Pvt. Ltd. and the signatory of the cheque was one of its directors of the company, Mr. Ashok Sharma.

27. The cheque was presented on 12.10.2015 and the same was returned back due to insufficiency of funds. A legal

notice as contemplated under Negotiable Instruments Act was issued on 23.10.2015 within time. When no payment was made to the complainant, he filed a complaint under Section 138 of Negotiable Instruments Act before the Chief Judicial Magistrate, Muzaffarnagar, who being satisfied had issued summons vide order dated 05.07.2016.

28. The counsel for the applicant has argued that the proceedings under Section 138 of Negotiable Instruments is not maintainable as the complaint has been filed by a power of attorney holder and the power of attorney was not placed before the trial court neither the power of attorney holder had averred in the complaint that he had a personal knowledge about the alleged transactions.

29. To buttress his argument, the counsel for the applicant has relied on a decision passed by Hon'ble Supreme Court in the case of **A.C. Narayan vs. State of Maharashtra and another**, (2014) (supra).

30. He further placed reliance on another judgement of Hon'ble Supreme Court in the case of **A.C. Narayanan vs. State of Maharashtra and another**, (2015) (supra) wherein the Hon'ble Supreme Court had set aside the proceedings initiated under Section 138 of N.I. Act on the ground that there is no whisper in the complaint that the same was being filed through a power of attorney holder.

31. Per contra, learned counsel for the opposite party no.2 has placed reliance in one of the latest judgement of Hon'ble Supreme Court in the case of **M/s TRL Krosaki Reractories Ltd. Vs. M/s SMS**

Asia Private Limited and another (supra) in which the Hon'ble Supreme Court has clearly held that the ratio laid down in the matter of **A.C. Naraynan** cannot be understood to mean that the assertion should be in any particular manner much less only in the manner understood by the accused in the case. All that is necessary is to demonstrate before the learned Magistrate that the complaint filed is in the name of the "payee" and if the person who is prosecuting the complaint is different from the payee, the authorisation therefor and that the contents of the complaint are within his knowledge. When, the complainant/payee is a company, an authorized employee can represent the company. Such averment and prima facie material is sufficient for the learned Magistrate to take cognizance and issue process. If at all, there is any serious dispute with regard to the person prosecuting the complaint not being authorized or if it is to be demonstrated that the person who filed the complaint has no knowledge of the transaction and, as such that person could not have instituted and prosecuted the complaint, it would be open for the accused to dispute the position and establish the same during the course of the trial.

32. The Hon'ble Supreme Court in the matter of **Samrat Shipping Co.Pvt. Ltd. Vs. Dolly George**⁵ has held as under:-

Having heard both sides we find it difficult to support the orders challenged before us. A Company can file a complaint only through human agency. The person who presented the complaint on behalf of the Company claimed that he is the authorised representative of the company. Prima facie, the trial court should have accepted it at the time when a complaint

was presented. If it is a matter of evidence when the accused disputed the authority of the said individual to present the complaint, opportunity should have been given to the complainant to prove the same, but that opportunity need be given only when the trial commences. The dismissal of the complaint at the threshold on the premise that the individual has not produced certified copy of the resolution appears to be too hasty an action. We, therefore, set aside the impugned orders and direct the trial court to proceed with the trial and dispose it off in accordance with law. Parties are directed to appear before the trial court on 31.01.2000.

33. The Hon'ble Supreme Court in the matter of **National Small Industries Corporation Limited vs. State (NCT of Delhi)**⁶ has held as follows:-

“The term ‘complainant’ is not defined under the Code. Section 142 NI Act requires a complaint under section 138 of that Act, to be made by the payee (or by the holder in due course). It is thus evident that in a complaint relating to dishonour of a cheque (which has not been endorsed by the payee in favour of anyone), it is the payee alone who can be the complainant. The NI Act only provides that dishonour of a cheque would be an offence and the manner of taking cognizance of offences punishable under section 138 of that Act. However, the procedure relating to initiation of proceedings, trial and disposal of such complaints, is governed by the Code. Section 200 of the Code requires that the Magistrate, on taking cognizance of an offence on complaint, shall examine upon oath the complainant and the witnesses present and the substance of such examination shall be reduced to writing and shall be signed by the complainant and

the witnesses. The requirement of section 142 of NI Act that payee should be the complainant, is met if the complaint is in the name of the payee. If the payee is a company, necessarily the complaint should be filed in the name of the company. Section 142 of NI Act does not specify who should represent the company, if a company is the complainant. A company can be represented by an employee or even by a non-employee authorized and empowered to represent the company either by a resolution or by a power of attorney.

Section 142 only requires that the complaint should be in the name of the payee. Where the complainant is a company, who will represent the company and how the company will be represented in such proceedings, is not governed by the Code but by the relevant law relating to companies. Section 200 of the Code mandatorily requires an examination of the complainant; and where the complainant is an incorporeal body, evidently only an employee or representative can be examined on its behalf. As a result, the company becomes a de jure complainant and its employee or other representative, representing it in the criminal proceedings, becomes the de facto complainant. Thus in every complaint, where the complainant is an incorporeal body, there is a complainant -- de jure, and a complainant - - de facto. Clause (a) of the proviso to section 200 provides that where the complainant is a public servant, it will not be necessary to examine the complainant and his witnesses. Where the complainant is an incorporeal body represented by one of its employees, the employee who is a public servant is the de facto complainant and in signing and presenting the complaint, he acts in the discharge of his official duties. Therefore, it follows that in

such cases, the exemption under clause (a) of the first proviso to section 200 of the Code will be available.

Resultantly, when in a complaint in regard to dishonour of a cheque issued in favour of a company or corporation, for the purpose of section 142 NI Act, the company will be the complainant, and for purposes of section 200 of the Code, its employee who represents the company or corporation, will be the de facto complainant. In such a complaint, the de jure complainant, namely, the company or corporation will remain the same but the de facto complainant (employee) representing such de jure complainant can change, from time to time. And if the de facto complainant is a public servant, the benefit of exemption under clause (a) of proviso to section 200 of the Code will be available, even though the complaint is made in the name of a company or corporation.

34. The Hon'ble Supreme Court in the matter of **Sunil Bharti Mittal Vs. Central Bureau of Investigation**⁷ has held as follows:-

In the present case, however, this principle is applied in an exactly reverse scenario. Here, company is the accused person and the learned Special Magistrate has observed in the impugned order that since the appellants represent the directing mind and will of each company, their state of mind is the state of mind of the company and, therefore, on this premise, acts of the company is Criminal Appeal No. of 2015 & Ors. Page 41 of 58 (arising out of SLP (Crl.) No. 2961 of 2013 & Ors.) Page 42 attributed and imputed to the appellants. It is difficult to accept it as the correct principle of law. As demonstrated

hereinafter, this proposition would run contrary to the principle of vicarious liability detailing the circumstances under which a direction of a company can be held liable.

(iii) Circumstances when Director/Person in charge of the affairs of the company can also be prosecuted, when the company is an accused person:

No doubt, a corporate entity is an artificial person which acts through its officers, directors, managing director, chairman etc. If such a company commits an offence involving mens rea, it would normally be the intent and action of that individual who would act on behalf of the company. It would be more so, when the criminal act is that of conspiracy. However, at the same time, it is the cardinal principle of criminal jurisprudence that there is no vicarious liability unless the statute specifically provides so.

Thus, an individual who has perpetrated the commission of an offence on behalf of a company can be made accused, along with the company, if there is sufficient evidence of his active role coupled with criminal intent. Second situation in which he can be implicated is in those cases where the statutory regime itself attracts the doctrine of vicarious liability, by specifically incorporating such a provision.

When the company is the offender, vicarious liability of the Directors cannot be imputed automatically, in the absence of any statutory provision to this effect. One such example is Section 141 of the Negotiable Instruments Act, 1881. In Aneeta Hada (supra), the Court noted that

if a group of persons that guide the business of the company have the criminal intent, that would be imputed to the body corporate and it is in this backdrop, Section 141 of the Negotiable Instruments Act has to be understood. Such a position is, therefore, because of statutory intendment making it a deeming fiction. Here also, the principle of “alter ego”, was applied only in one direction namely where a group of persons that guide the business had criminal intent, that is to be imputed to the body corporate and not the vice versa. Otherwise, there has to be a specific act attributed to the Director or any other person allegedly in control and management of the company, to the effect that such a person was responsible for the acts committed by or on behalf of the company.”

35. In view of the aforesaid facts and circumstances and the ratio laid down by the Hon’ble Supreme Court in the judgement of **A.C. Naraynan (supra)**, that the power of attorney holder, who filed the complaint clearly needs to aver that he has knowledge of the complete transaction has been watered down by Hon’ble Supreme Court in the matter of **M/s TRL Krosaki Reractories Ltd. (supra)** wherein it is held that when a complainant is a company and authorized representative can represent the company, such averment and prima facie material is sufficient for the Magistrate to take cognizance in such cases.

36. Undoubtedly, a company is a separate legal entity, which can only be represented through its officers, directors, managing directors, chairman etc. if such a company commits an offence, it would normally be taken as an action of that individual, who has acted on behalf of the company.

37. The argument advanced by the counsel for the applicant that the other director, Narendra Singh Pawar had nothing to do with the transaction is also not correct. All the directors are equally responsible for the act done on behalf of the company.

38. As far as, the third director, Mr. Yatindra Singh Pawar is concerned, it has been alleged that he has resigned few days before the cheque was given. It can only be seen during the trial whether he was responsible in placing the order getting the material and, thereafter, resigning to absolve himself from any kind of liability. This issue cannot be adjudicated upon in the present proceedings.

39. 37A. It is a settled principle that if the payee is a company the complaint has to be filed in the name of the company. Section 142 of the N.I. Act does not specify as to who should represent the company, if the company is the complainant. A company can be represented by an employee or even by a known employee, who is duly authorized and empowered to represent the company either by resolution or by a power of attorney.

40. Further, where the company is a complainant, who will represent the company, and how the company will be represented in 138 proceedings is not covered by the Code. Section 200 of the Code mandatory requires an examination of the complaint, and whether the complainant is an incorporeal body, it is only one of its employee or authorized representative can be examined on behalf of the company. With the result, the company becomes a de jure complainant and the person, who is representing the company whether it is employee or the authorized representative

becomes de facto complainant, thus, in every complaint lodged by a company, which is a separate juristic personality, there is a complainant de jure and a complainant de facto.

41. This application has been pending since last 8 years and the trial could not proceed, it is in the interest of justice that the trial may be concluded expeditiously in accordance with law, preferably within a period of six months from the date of receipt of certified copy of this order without granting any unnecessary adjournments to either side.

42. In view of the aforesaid facts and circumstances, the instant application filed by the directions of the company is devoid of merit, and is, accordingly, *dismissed*.

(2024) 4 ILRA 680

**ORIGINAL JURISDICTION
CRIMINAL SIDE**

DATED: ALLAHABAD 28.10.2023

BEFORE

THE HON'BLE GAJENDRA KUMAR, J.

Application U/S 482. No. 20183 of 2013

Smt. Kirti **...Applicant**

Versus

State of U.P. & Anr. **...Opposite Parties**

Counsel for the Applicant:

Sri Santosh Tripathi, Sri Manas Bhargava

Counsel for the Opposite Parties:

G.A., Sri Satish Kumar Tyagi, Sri Devesh Mishra, Sri Harsh Kumar Anand

Criminal Law - Code of Criminal Procedure, 1973 -Section 482- The Dowry Prohibition Act, 1961 - Sections 3/4 - Indian Penal Code, 1860- Sections 498-A, 323, 504, 506, 406 -The applicants sought to quash the

proceedings in Case No. 1643 of 2012 under Sections 498-A, 323, 504, 506, 406 IPC and Sections 3/4 of the Dowry Prohibition Act – Held, the proceedings were quashed as the allegations were omnibus, vague, and lacked specific evidence, indicating an abuse of process with ulterior motives. (Paras 3, 14, 16, 23)

B. Section 498-A IPC – Misuse of Provisions –

The FIR alleged cruelty and dowry demands against the applicants, including the husband and his sister – Held, general and omnibus allegations without specific instances of cruelty or dowry demands, as deprecated in *Kahkashan Kausar* and *Varala Bharath Kumar*, do not justify prosecution and warrant quashing to prevent misuse of law. (Paras 15, 16, 17)

C. Abuse of Process and Ulterior Motive –

The opposite party no. 2 filed the FIR after marital disputes and a divorce petition in the USA, with a delay in reporting – Held, the FIR appeared to be a tool to harass and coerce the applicants, falling under categories (1) and (5) of *St. of Har. Vs Bhajan Lal* for quashing due to lack of prima facie offence and inherent improbability. (Paras 14, 18, 23)

D. Inherent Powers of High Court –

The court emphasized the cautious exercise of Code of Criminal Procedure, 1973 -Section 482 powers to prevent abuse of process and secure justice – Held, the court must examine attending circumstances beyond FIR averments to identify frivolous or vexatious proceedings, as guided by *Salif @ Shalu* and *Neeharika Infrastructure*. (Paras 19, 20, 22)

E. Fraud and False Allegations –

The applicants argued the FIR was lodged with mala fide intent and false allegations – Held, proceedings based on fraud or unclean hands, as per *S.P. Chengalvaraya Naidu* and *A.VS Papayya Sastry*, are null and void, justifying quashing to prevent injustice. (Paras 5, 6, 7, 9)

Applications Allowed.

List of Cases cited:

1. S.P. Chengalvaraya Naidu Vs Jagannath, 1994 AIR 853

2. A.VS Papayya Sastry Vs Government of A.P., Appeal (Civil) No. 5097 of 2004

3. R.P. Kapur Vs St. of Punj., AIR 1960 SC 866

4. St. of Karnataka Vs L. Muniswamy, (1977) 2 SCC 699

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

6. Varala Bharath Kumar Vs St. of Telangana, (2017) 9 SCC 413

7. Kahkashan Kausar Vs St. of Bihar, 2022 LiveLaw (SC) 141

8. K. Subba Rao Vs St. of Telangana, (2018) 14 SCC 452

9. Salif @ Shalu Vs St. of U.P., Criminal Appeal No. 2344 of 2023

10. Neeharika Infrastructure Pvt. Ltd. Vs St. of Maharashtra, AIR 2021 SC 1918

11. Preeti Gupta Vs St. of Jharkhand, (2010) 7 SCC 667

12. Neelu Chopra Vs Bharti, (2009) 10 SCC 184

13. Mahmood Ali Vs St. of U.P., Criminal Appeal No. 2341 of 2023

14. Prabhatbhai Aahir Vs St. of Gujarat, (2017) 9 SCC 641

15. Kapil Agarwal Vs Sanjay Sharma, (2021) 5 SCC 524

16. Sundar Babu Vs St. of Tamil Nadu, (2009) 3 SCR 326

17. Mukesh Bansal Vs St. of U.P., Cri. Revision No. 1126 of 2022

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

1. Since these applications arising out of same case crime number, they have been heard together and are being decided by a common order.

2. Heard learned counsel for the applicants, learned counsel for the first informant/opposite party no.2 and learned AGA for the State-respondents.

3. The instant Application U/S 482 Cr.P.C. has been filed with a request to quash the Case No.1643 of 2012 arising out of Case Crime No. 2/2012, under Sections 498-A, 323, 504, 506, 406 I.P.C. & 3/4 D.P. Act, pending in the Court of A.C.J.M.-VIII, Ghaziabad.

4. The prosecution story in brief of the instant case are as follows:-

Marriage of applicant (Dr. Kalind Parashar) with the opposite party no.2 was solemnized on 14.02.2019 at Destination Resort, Solan, Himanchal Pradesh according to Hindu Rites and Rituals. Thereafter, on 24.02.2019, the applicant (Dr. Kalind Parashar) along with opposite party no.2 left for USA, where they have blessed with a son on 02.02.2010 in USA and all were living there happily, but due to some difference of opinion, the relationship between applicant (Dr. Kalind Parashar) and opposite party no.2 became strained, thereafter, applicant (Dr. Kalind Parashar) filed a complaint for divorce on 09.02.2012 before Oakland County, Circuit Court, Family Division, State of Michigan. In the said case, an ex-parte interim order regarding custody and parenting time was passed on 10.02.2012 by the concerned Judge of Family Court directing the applicant (Dr. Kalind Parashar) and opposite party no.2 not to change the domicile and residence of the minor child from the State of Michigan without a written order from the Court. Thereafter, on 23.03.2012, an Application under Section 156(3) Cr.P.C. was moved by the opposite party no.2, though, an FIR has been lodged

by the opposite party no.2 against the applicants and three other co-accused persons with false and frivolous allegations, which was registered as Case Crime No.02 of 2012, under Sections 498-A, 323, 504, 506 and 406 IPC and Section 3/4 of D.P. Act, Police Station-Mahila Thana, District-Ghaziabad. Prior to filing of application under Section 156(3) Cr.P.C., the opposite party no.2 had made a complaint before S.S.P., Ghaziabad, in which the SHO was directed to conduct an inquiry and submit a report, thereafter, making a thorough enquiry by SHO concerned, submitted the report mentioning therein that there is no truth in the complaint of opposite party no.2 and no further legal action is required in the complaint. Opposite party no.2 had also moved an application before the Metropolitan Magistrate, Tees Hazari Court, Delhi under the Protection of Women From Domestic Violence Act, 2005, which is still pending consideration. On 26.04.2012, the American Court has issued warrant of arrest of opposite party no.2 as she has violated order of the Court in relation to carrying away minor child, who is U.S. citizen by virtue of his birth in U.S.A. and carried him to India. On 26.05.2012, I.O. without conducting a proper and fair investigation, has submitted the charge-sheet against the applicant and three other co-accused persons under the aforesaid sections. On 29.05.2012, in the divorce petition filed by the applicant (Dr. Kalind Parashar) against the opposite party no.2, even the concerned Judge of Family Court, State of Michigan has passed an order dissolving the marriage between the parties.

4. It has been contended by the learned counsel for the applicants that the

malicious proceedings have been lodged by opposite party no.2 against the entire family members including the present applicants, who are 'Nanand' and husband of opposite party no.2. It is submitted by the learned counsel for the applicants that they are innocent and have been falsely implicated in the present case due to ulterior motive. Applicant (Dr. Kalind Parashar) left for USA along with his wife (opposite party no.2) as applicant (Dr. Kalind Parashar) was residing in New York (USA) and was working as a Post Doctorate Fellowship in Nuclear Medicine in Memorial Sloan Katering Hospital, New York (USA). He further submitted that father-in-law and mother-in-law of opposite party no.2 have already been granted bail by the court below and they are facing criminal prosecution. Further submission is that there is contradictions in the F.I.R. version and statement of witnesses. Further submission is that after completing the investigation, the Investigating Officer has submitted charge sheet in a perfunctory manner and the concerned Magistrate has taken cognizance in a mechanical way without application of judicial mind. Further submission is that only intension behind lodging of the impugned F.I.R. of opposite party no.2 was to blackmail the husband and his family and to create undue pressure upon them, as such, the present criminal proceedings against the applicants is nothing but an abuse of process of law, which is liable to be quashed.

5. In this regard, reliance is placed by the learned counsel for the applicants upon the judgement of Hon'ble Apex Court passed in **S.P. Chengalvaraya Naidu vs. Jagannath; 1994 AIR 853, 1994 (1) 1**, wherein Hon'ble Apex Court has held as under:-

"The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loandodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation."

6. Further reliance is placed on the judgement of the Apex Court passed in **A.V. Papayya Sastry & others vs. Governmnet of A.P. & Others Appeal (Civil) No. 5097 of 2004** , wherein Hon'ble Apex Court has held as under:-

"It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the Court, Tribunal or Authority is a nullity and non-existent in the eye of law. Even the Chief Justice Edward Coke proclaimed "Fraud avoids all judicial acts, ecclesiastical or temporal".

7. Therefore, it is settled principle of law that, decree or order obtained by fraud by the first Court or by the final court has to be treated as a nullity by every Court, superior or inferior. It can be challenged in any Court at any time, in appeal, revision, writ or even in collateral proceedings. Lord Denning had observed that in the leading case of **Lazarus Estates Ltd. v. Beasley,**

(1956) 1 All ER 341 : (1956) 1 QB 702 : (1956) 2 WLR 502, that "No judgment of a court, no order of a Minister, can be allowed to stand, if it has been obtained by fraud."

8. In support of his contention, learned counsel for the applicant has further relied upon the judgments of Apex Court in the cases of **R.P. Kapur Vs. State of Punjab, A.I.R.; 1960 S.C. 866, State of Karnataka vs. L. Muniswamy and Ors.; (1977) 2 SCC 699 and State of Haryana and Ors. vs. Bhajan Lal and Ors; 1992 SCC (Cr.) 426** and submits that whole proceedings have been re-initiated with ulterior and oblique motive to harass the applicants and to tarnish their image in the society and use the process of Court to permeate injustice.

9. Learned counsel for the applicants further submits that as Opposite Party No.2 has lodged the First Information Report with unclean hands and has made material concealment, in order to mislead the police as well as the learned trial court, therefore, the cognizance order being obtained through fraud renders the same untenable in the eyes of law. On the cumulative strength of the aforesaid submissions, it is submitted by learned counsel for the applicants that the proceedings of the above-mentioned criminal case against the applicants in nothing but an abuse of process of law, which are liable to be quashed.

10. On the other hand, learned counsel for the opposite party No.2 has opposed the submissions made by the learned counsel for the applicants and submitted that due to non-fulfillment of additional dowry demand, the victim/Opposite party number 2 was

harassed and tortured by the applicants and his family members. Learned counsel for the opposite party no.2 has further submitted that at the stage of taking cognizance by the Magistrate as per the provisions contained in Section 190(1)(b) of Cr.P.C., the concerned Magistrate has to see as to whether prima facie case is being made out or not against the applicants and, as such, the concerned Magistrate has rightly taken the cognizance on the basis of the chargesheet dated 26.05.2012 filed by the Investigating Officer including the statements of the witnesses and documents collected during the investigation, as such, this Court may not exercise its inherent power under Section 482 Cr.P.C. in the present case, and, hence, the present application is liable to be rejected.

11. Per contra, learned A.G.A. for the State has opposed the aforesaid contentions made by the learned counsel for the applicants and submits that applicants were involved in committing the aforesaid offence as has been alleged in the impugned FIR and chargesheet were also submitted by the Investigating Officer against them. In case, applicants have any grievance, they may raise their grievances at appropriate forum, as such, there is no illegality or infirmity in the impugned cognizance order passed by the learned court below and the same cannot be quashed at this stage.

12. In response to the notice issued to the respondents, a counter affidavit on behalf of opposite party no.2 Reeta Kapoor (mother of opposite party no.2) wife of Bhavnesht Dutt Kapoor, aged about 67 years have been filed mentioning therein that applicants and their family members always causes cruelty with the opposite party no.2 and several times tortured

mentally and physically, which is evident from the doctor's report. It has also been mentioned that after the birth of the baby boy, mother-in-law and husband did not allow the opposite party no.2 to breastfeed the child. Upon the protest by the opposite party no.2, her husband and his mother tried to choke her throat by inserting almonds in her mouth, one of the attending medical personnel at hospital heard the noise and came running to attend her, as such, due to repeated acts of cruelty the opposite party no.2 reported to the domestic assaults in Planned Parenthood.

13. In reply to the counter affidavit filed on behalf of opposite party no.2, rejoinder affidavit has been filed on behalf of the applicant (Smt. Kirti), by Kailash Prashar (father of the applicant) son of Kishori Lal Parashar, Aged 69 years, wherein he has denied all the allegations made in the counter affidavit as well as in the impugned FIR and mentioned that only with a view to harass the applicants and his family members, impugned criminal proceedings have been launched by the opposite party no.2.

14. Having heard the submissions made by the learned counsel for the rival parties and perusal of the records as well as impugned FIR, it is evident that Opposite party no.2 was married with applicant (Dr. Kalind Parashar) on 10.02.2019 and she remained with her-in-laws in India for a period of ten days and left for USA on 24.02.2019 and after remaining there, delivered a baby boy out of the wedlock. Some differences arose between the parties as both are mature, educated and well qualified. Proceedings for divorce were undertaken in the Family Court in USA and certain orders were passed by the Family Court regarding the parenting and

non-shifting of domicile/residence of the child who is the citizen of USA, but she obtained duplicate passport left for India and herein Ghaziabad lodged FIR against her husband and entire family members. There is no plausible explanation of the delay in lodging the FIR. It appears that simply omnibus and vague allegations of cruelty are made against the husband and his family members only in order to harass and coerce them.

15. The Court has occasion to go through the judgment of Hon'ble Apex court in the case of **Varala Bharath Kumar vs. State of Telangana reported in (2017)9 SCC 413**. Relevant paragraph of the aforesaid order reads as follows:-

"8. We are conscious of the fact that, Section 498A was added to the Code with a view to punish the husband or any of his relatives, who harass or torture the wife to coerce her or her relatives to satisfy unlawful demands of dowry. Keeping the afore-mentioned object in mind, we have dealt with the matter. We do not find any allegation of subjecting the complainant to cruelty within the meaning of Section 498A of IPC. The records at hand could not disclose any willful conduct which is of such a nature as is likely to drive the complainant to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the complainant. So also, there is nothing on record to show that there was a demand of dowry by the appellants or any of their relatives, either prior to the marriage, during the marriage or after the marriage. The record also does not disclose anywhere that the husband of the complainant acted, with a view to coerce her or any person related to her to meet any unlawful demand of any property or valuable security."

16 . Further in the present case, it is also seen that only omnibus and general allegations of cruelty and demand of dowry have been made, against the husband and his family members. Further it is seen that only general and omnibus allegation of demand of dowry has been made in the First Information Report which is in the teeth of the decision of the Hon'ble Supreme Court in the case of **Kahkashan Kausar @ Sonam vs. State of Bihar (2022 LiveLaw (SC) 141** whereby such practice by the Hon'ble Apex Court has been deprecated and it has been held that the accused cannot be prosecuted on the basis of such allegations. Relevant paragraph of the aforesaid order reads as follows:-

"18. The above-mentioned decisions clearly demonstrate that this court has at numerous instances expressed concern over the misuse of section 498A IPC and the increased tendency of implicating relatives of the husband in matrimonial disputes, without analysing the long term ramifications of a trial on the complainant as well as the accused. It is further manifest from the said judgments that false implication by way of general omnibus allegations made in the course of matrimonial dispute, if left unchecked would result in misuse of the process of law. Therefore, this court by way of its judgments has warned the courts from proceeding against the relatives and in-laws of the husband when no prima facie case is made out against them."

17. A co-ordinate Bench of this Court in the case of **Mukesh Bansal vs. State of U.P. & Anr (Cri. Revision No. 1126 of 2022)** has given its opinion on the growing tendency of misusing the provisions of Section 498A IPC has held as under:-

"Now, coming to the precise question involved in the present case has to level the omnibus allegations of dowry related harassment of all the family members connected with the husband in recent judgment of Hon'ble the Apex Court in the case of K. Subba Rao Vs. State of Telangana reported in 2018 (14) SCC 452 , it was observed by Hon'ble the Apex Court that the Court should be extremely careful and vigilant in proceeding against the distant relative of the husband in the crimes pertaining to the dispute even in dowry deaths. All the relatives of the husband should not be roped in on the basis of omnibus allegations unless Specific Instances of the involvement in the crime as alleged and surfaced during investigation with materials certainty. The sweeping and general allegations are very frequent now-a-days and if such people are put to trial on such a casual and omnibus allegations, it would bound to lead the disastrous result and unwarranted hardships to those persons."

18. The powers conferred by section 482 CrPc was widely discussed in various cases as in the Case of **State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335**, wherein the Hon'ble Apex Court in paragraph no.102 has held as follows:

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration

wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

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

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

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

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

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a

just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the Act concerned (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."

19. Recently In the case of **Salif @ Shalu @ Salim Vs. State of U.P. and others in Criminal Appeal No.2344 of 2023 (arising out of S.L.P. (Criminal) No. 3152 of 2023)** vide order dated 08.08.23 Hon'ble Apex Court has held as under:-

"26. At this stage, we would like to observe something important. Whenever an accused comes before the Court invoking either the inherent powers under Section 482 of the Code of Criminal Procedure (CrPC) or extraordinary jurisdiction under Article 226 of the Constitution to get the FIR or the criminal proceedings quashed essentially on the ground that such proceedings are manifestly frivolous or vexatious or instituted with the ulterior motive for wreaking vengeance, then in such circumstances the Court owes a duty to look into the FIR with care and a little

more closely. We say so because once the complainant decides to proceed against the accused with an ulterior motive for wreaking personal vengeance, etc., then he would ensure that the FIR/complaint is very well drafted with all the necessary pleadings. The complainant would ensure that the averments made in the FIR/complaint are such that they disclose the necessary ingredients to constitute the alleged offence. Therefore, it will not be just enough for the Court to look into the averments made in the FIR/complaint alone for the purpose of ascertaining whether the necessary ingredients to constitute the alleged offence are disclosed or not. In frivolous or vexatious proceedings, the Court owes a duty to look into many other attending circumstances emerging from the record of the case over and above the averments and, if need be, with due care and circumspection try to read in between the lines. The Court while exercising its jurisdiction under Section 482 of the CrPC or Article 226 of the Constitution need not restrict itself only to the stage of a case but is empowered to take into account the overall circumstances leading to the initiation/registration of the case as well as the materials collected in the course of investigation"

20. In case of **M/s Neeharika Infrastructure Pvt. Ltd. Vs. State of Maharashtra and others AIR (2021) SC 1918**, the Hon'ble Apex Court defined the scope of Section 482 Cr.P.C. and Article 226 of Constitution of India and observed that if a case falls under the parameters of **R.P. Kapur case (supra)** and **Bhajan Lal case (supra)** then this Court is having jurisdiction to quash the proceedings by invoking its jurisdiction under Section 482 Cr.P.C.

21. In **Preeti Gupta and another vs. State of Jharkhand and another [(2010) 7 SCC 667]**, the Hon'ble Apex Court has held as under:-

"The tendency to implicate the husband and all his immediate relations is also not uncommon in complaints filed under Section 498A IPC. It was observed that the Courts have to be extremely careful and cautious in dealing with these complaints and must take pragmatic realities into consideration while dealing with matrimonial cases, as allegations of harassment by husband's close relations, who were living in different cities and never visited or rarely visited the place where the complainant resided, would add an entirely different complexion and such allegations would have to be scrutinised with great care and circumspection."

22. In **Neelu Chopra and another vs. Bharti [(2009) 10 SCC 184]**, the Hon'ble Apex Court has held as under:-

"The mere mention of statutory provisions and the language thereof, for lodging a complaint, is not the 'be all and end all' of the matter, as what is required to be brought to the notice of the Court is the 12 particulars of the offence committed by each and every accused and the role played by each and every accused in the commission of that offence. These observations were made in the context of a matrimonial dispute involving Section 498A IPC."

23. In **Mahmood Ali and others vs. State of U.P. and others (Criminal Appeal No. 2341 of 2023)**, decided on 08.08.2023), the Hon'ble Apex Court has held as under:-

"On the legal principles applicable apropos Section 482 Cr.P.C. Therein, it was observed that when an accused comes before the High Court, invoking either the inherent power under Section 482 Cr.P.C. or the extraordinary jurisdiction under Article 226 of the Constitution, to get the FIR or the criminal proceedings quashed, essentially on the ground that such proceedings are manifestly frivolous or vexatious or instituted with the ulterior motive of wreaking vengeance, then in such circumstances, the High Court owes a duty to look into the FIR with care and a little more closely. It was further observed that it will not be enough for the Court to look into the averments made in the FIR/complaint alone for the purpose of ascertaining whether the necessary ingredients to constitute the alleged offence are disclosed or not as, in frivolous or vexatious proceedings, the Court owes a duty to look into many other attending circumstances emerging from the record of the case over and above the averments and, if need be, with due care and circumspection, to try and read between the lines".

24. In case of **Prabhatbhai Aahir alias Parbatbai Bhimsinhbhai Karmur and others Vs. State of Gujarat and another (2017) 9 SCC 641**, a three three Judges Bench of Hon'ble Apex Court has observed that Section 482 Cr.P.C. is pre-faced with an overriding provision and this Court being a superior Court has the inherent power to make such order as necessary;

"(i) to prevent an abuse of the process of any Court; or

(ii) otherwise to secure the ends of justice."

22. In case of **Kapil Agarwal and others Vs. Sanjay Sharma and others**

(2021) 5 SCC 524 also Hon'ble Apex Court has held as follows:

"As observed and held by this Court in catena of decisions, inherent jurisdiction under Section 482 Cr.P.C. and/or under Article 226 of the Constitution is designed to achieve salutary purpose that criminal proceedings ought not to be permitted to degenerate into weapon of harassment. When the Court is satisfied that criminal proceedings amount to an abuse of process of law or that it amounts to bringing pressure upon accused, in exercise of inherent powers, such proceedings can be quashed."

22. Finally, in a similar case, a Bench of Three Judges of Hon'ble Apex Court in the case of **(Sundar Babu and another Vs. State of Tamil Nadu)**; **(2009) 3 S.C.R. 326**, has observed as under:-

HELD: 1.1. Though the scope for interference while exercising jurisdiction under Sec.482 CrPC is limited, but it can be made in cases as spelt out in the case of Bhajan Lal. The illustrative examples laid down therein are as follows: 1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused; 2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Sec.156(1) of the Code except under an order of a Magistrate within the purview of Sec.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 Sec. 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 an 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. [Para 6] [332-8-H; 333-A-C].

1.2. Section 482 CrPC does not confer any new power on the High Court. It only saves the inherent power which the Court possessed before the enactment of the Code. It envisages three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of court, and (iii) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. No

legislative enactment dealing with procedure can provide for all cases that may possibly arise. Courts, therefore, have inherent powers apart from express provisions of law which are necessary for proper discharge of functions and duties imposed upon them by law. That is the doctrine which finds expression in the section which merely recognizes and preserves inherent powers of the High Courts. All courts, whether civil or criminal possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in course of administration of justice on the principle "*quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsae esse non potest*" (when the law gives a person anything it gives him that without which it cannot exist). [Para 9] [333-E-H; 334-A-B].

1.3. While exercising powers under section 482, the court does not function as a court of appeal or revision. 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. It is to be exercised *ex debito justitiae* to do real and substantial justice for the administration of which alone courts exist. Authority of the court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent abuse. It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to

abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. [Para 9] [334-8-E].

1.4. The powers possessed by the High Court under Sec.482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. The High Court being the highest court of a State should normally refrain from giving a *prima facie* decision in a case where the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material. Of course, no hard-and-fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceeding at any stage. [Para 10J [334-E-H; 335-A].

1.5. In the present case, even a cursory perusal of the complaint shows that the case at hand falls within the category (7) of the illustrative parameters highlighted in Bhajan Lal's case. The proceedings in Criminal Petition pending before the Judicial Magistrate are consequently quashed. [Paras 7 and 10] [333-D].

23. For all the reasons recorded above and considering the facts and circumstances of the case as well as the case-laws cited above and the case on hand falls squarely in categories (1) and (5) set out in Bhajan Lal (*supra*), the entire criminal proceedings against the applicants namely Smt. Kirti

6. Professor R.K. Vijayasathy Vs Sudha Seetharam, Criminal Appeal No. 238 of 2019

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

1. Heard Sri Upendra Vikram Singh, learned counsel for the applicant and Sri Uday Bhan, learned AGA for the State.

2. The present 482 Cr.P.C. application has been filed to quash the summoning order dated 31.05.2014, under Section-465 IPC, Police Station-Chamanganj, District-Kanpur Nagar and the entire proceeding of Complaint Case No.356 of 2014 (Om Prakash Agrawal Vs. V.P. Govil and others), pending in the court of MM-IV, Kanpur Nagar.

3. Learned counsel for the applicant submits that the applicant had retired as an Executive Engineer in 2010, and after his retirement, the impugned complaint was filed In 2014, the summoning order was passed on 15.04.2014. Thereafter, the applicant, after obtaining bail, filed an application dated 19.06.2015 that complaint itself is barred for want of proper sanction u/s 197 Cr.P.C., which was heard on 01.09.2015, but disposal of same was postponed till the evidence stage. Now, after almost four years, the applicant has challenged the impugned criminal proceeding on the ground that prior sanction u/s 197 IPC was not taken before lodging the complaint above or before taking cognizance of the aforesaid complaint.

4. Learned counsel for the applicant submits that the allegation in the complaint against the applicant is that while discharging his duty as an Executive Engineer, he had produced a forged

disconnection slip dated 03.11.2008. Therefore, without prior sanction u/s 197 Cr.P.C., the proceeding of the complaint case cannot be initiated. In support of his contention, learned counsel for the applicant has also relied upon the judgement of a coordinate Bench of this Court passed in **APPLICATION U/S 482 No. - 17421 of 2011 (Ayush Kumar And Others Vs. State of U.P. And Another)** vide order dated **10.04.2019**, as well as the judgement of the Apex Court in Criminal Appeal No.238 of 2019 (**Professor R.K. Vijayasathy & Anr. Vs. Sudha Seetharam & Anr.**) decided on **15.02.2019** as well as the judgement of **Punjab State Warehousing Corporation Vs. Bhushan Chander And Another** reported in 2016 (13) SCC 44.

5. Per contra, learned counsel for opposite party no.2 has submitted that once the applicant's application for dropping the proceeding on the ground want of prior sanction u/s 197 Cr.P.C. was rejected, that order has become final. The applicant cannot challenge the impugned proceeding on the same ground.

6. Learned AGA also adopted the argument of opposite party no.2 and furthermore submitted that the impugned proceeding itself is at the evidence stage, and the applicant also obtained bail in the impugned proceeding, he can raise this objection at the appropriate stage.

7. After considering the submission of the parties and on perusal of the record, it is clear that the applicant moved an application for dropping the proceeding on the ground that prior sanction u/s 197 Cr.P.C. was not obtained before filing the complaint. Though that application was heard by the court on 01.09.2015, but

disposal of same was adjourned on the grounds of whether applicant's act of producing the allegedly forged disconnection slip dated 03.11.2008 is in the discharge of his official duty, which can be decided on the basis of evidence. The order sheet shows that this application is still pending.

8. Hon'ble Supreme Court in the case of **State of Orissa Vs. Ganesh Chandra Jew reported in 2004 (8) SCC 40** observed that protection u/s 197 Cr.P.C. had certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing objectionable acts. The question is not as to the nature of the offence such as whether the alleged offence contained an element that necessarily depends upon the offender being a public servant, but whether it was committed by a public servant acting or purporting to act as such in the discharge of his official capacity. Paragraph no.7 of the above judgement is being quoted as under:

"7. The protection given under Section 197 is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting or purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause, and if sanction is granted, to confer on the Government, if they choose to exercise it, complete control of the prosecution. This protection has certain limits and is available only when the alleged act done by the public servant

is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant of the protection. The question is not as to the nature of the offence such as whether the alleged offence contained an element necessarily dependent upon the offender being a public servant, but whether it was committed by a public servant acting or purporting to act as such in the discharge of his official capacity. Before Section 197 can be invoked, it must be shown that the official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties. It is not the duty which requires examination so much as the act, because the official act can be performed both in the discharge of the official duty as well as in dereliction of it. The act must fall within the scope and range of the official duties of the public servant concerned. It is the quality of the act which is important and the protection of this section is available if the act falls within the scope and range of his official duty. There cannot be any universal rule to determine whether there is a reasonable connection between the act done and the official duty, nor is it possible to lay down any such rule. One safe and sure test in this regard would be to consider if the omission or neglect on the part of the public servant to commit the act complained of could have made him answerable for a charge of dereliction of his official duty. If the answer to this question is in the affirmative, it may be said that such act was committed by the public servant while acting in the discharge of his

official duty and there was every connection with the act complained of and the official duty of the public servant. This aspect makes it clear that the concept of Section 197 does not get immediately attracted on institution of the complaint case."

9. Similarly, in the case of **Shambhoo Nath Mishra Vs. State of U.P. & Others** reported in **1997 (5) SCC 326** observed that whether a public servant who allegedly commits the offence of fabrication of records or misappropriation of public funds can be said to have acted in the discharge of his official duty and further observed that it is not the official duty to fabricate records or to misappropriate public funds. Paragraph no.5 of the judgement above are being quoted as under:

"5. The question is when the public servant is alleged to have committed the offence of fabrication of record or misappropriation of public fund etc. can he be said to have acted in discharge of his official duties. It is not the official duty of the public servant to fabricate the false records and misappropriate the public funds etc. in furtherance of or in the discharge of his official duties. The official capacity only enables him to fabricate the record or misappropriate the public fund etc. It does not mean that it is integrally connected or inseparably interlinked with the crime committed in the course of the same transaction, as was believed by the learned Judge. Under these circumstances, we are of the opinion that the view expressed by the High Court as well as by the trial court on the question of sanction is clearly illegal and cannot be sustained."

10. Similarly, the Hon'ble Supreme Court, in the case of **Shadakshari Vs. State**

of Karnataka & Another in Criminal Appeal No.256 of 2024 decided on **07.01.2024**. Hon'ble Supreme Court observed in paragraph no.25 that **the question of whether respondent no.2 was involved in fabricating official documents by misusing his official position as a public servant is a matter of trial** and further observed that manufacturing of such documents or fabrication of records cannot be a part of the official duty of a public servant. Paragraph no.25 of the judgement above are being quoted as under:

"25. The question whether respondent No.2 was involved in fabricating official documents by misusing his official position as a public servant is a matter of trial. Certainly, a view can be taken that manufacturing of such documents or fabrication of records cannot be a part of the official duty of a public servant. If that be the position, the High Court was not justified in quashing the complaint as well as the chargesheet in its entirety, more so when there are two other accused persons besides respondent No.2.

There is another aspect of the matter. Respondent No.2 had unsuccessfully challenged the complaint in an earlier proceeding under Section 482 Cr.PC. Though liberty was granted by the High Court to respondent No.2 to challenge any adverse report if filed subsequent to the lodging of the complaint, instead of confining the challenge to the chargesheet, respondent No.2 also assailed the complaint as well which he could not have done."

11. The legal position as mentioned above is clear that whether the particular act of fabricating official documents is a

part of the official duty of a public servant or not, is a matter of trial and the proceeding cannot be quashed on that basis.

12. So far as the judgement of Punjab State Warehousing Corporation (supra) relied upon by the learned counsel for the applicant is concerned, in that judgement Hon'ble Supreme Court observed that there has to be the reasonable connection between the omission or commission and discharge of official duty or the act committed was under the colour of office held by the officials. If the act of omission or commission aligns to the discharge of official duty, then the question of invoking Section-197 Cr.P.C. does not arise. This legal position is correct and does not support the applicant because it is yet to be decided whether the act of producing a forged disconnection certificate on the part of the applicant can be said to be the act in the discharge of the official duty, which can be considered after adducing the evidence during the trial. Paragraph no.20 of the above judgement is being quoted as below:

"20. A survey of the precedents makes it absolutely clear that there has to be a reasonable connection between the omission or commission and the discharge of official duty or the act committed was under the colour of the office held by the official. If the act(s), omission or commission of which is totally alien to the discharge of the official duty, question of invoking Section 197 CrPC does not arise. We have already reproduced few passages from the impugned order from which it is discernible that to arrive at the said conclusion the learned Single Judge has placed reliance on the authority in B. Saha [B. Saha v. M.S. Kochar, (1979) 4 SCC 177 : 1979 SCC (Cri) 939] . The conclusion is

based on the assumption that the allegation is that while being a public servant, the alleged criminal breach of trust was committed while he was in public service. Perhaps the learned Judge has kept in his mind some kind of concept relating to dereliction of duty. The issue was basically entrustment and missing of the entrusted items. There is no dispute that the prosecution had to prove the case. But the public servant cannot put forth a plea that he was doing the whole act as a public servant. Therefore, it is extremely difficult to appreciate the reasoning of the High Court. As is noticeable he has observed that under normal circumstances the offences under Sections 467, 468 and 471 IPC may be of such nature that obtaining of sanction under Section 197 CrPC is not necessary but when the said offences are interlinked with an offence under Section 409 IPC sanction under Section 197 for launching the prosecution for the offence under Section 409 is a condition precedent. The approach and the analysis are absolutely fallacious. We are afraid, though the High Court has referred to all the relevant decisions in the field, yet, it has erroneously applied the principle in an absolute fallacious manner. No official can put forth a claim that breach of trust is connected with his official duty. Be it noted the three-Judge Bench in B. Saha [B. Saha v. M.S. Kochar, (1979) 4 SCC 177 : 1979 SCC (Cri) 939] has distinguished Shreekantiah Ramayya Munipalli [Shreekantiah Ramayya Munipalli v. State of Bombay, AIR 1955 SC 287 : 1955 Cri LJ 857] keeping in view the facts of the case. It had also treated the ratio in Amrik Singh [Amrik Singh v. State of Pepsu, AIR 1955 SC 309 : 1955 Cri LJ 865] to be confined to its own peculiar facts. The test to be applied, is as has been stated by Chandrasekhara Aiyar, J. in the

Constitution Bench in Matajog Dobey [Matajog Dobey v. H.C. Bhari, AIR 1956 SC 44 : 1956 Cri LJ 140] which we have reproduced hereinbefore. The three-Judge Bench in B. Saha [B. Saha v. M.S. Kochar, (1979) 4 SCC 177 : 1979 SCC (Cri) 939] applied the test laid down in Gill case [Gill v. R., (1948) 10 FCR 19 : AIR 1948 PC 128 : (1947-48) 75 IA 41 : 1948 SCC OnLine PC 10] wherein Lord Simonds has reiterated that the test may well be whether the public servant, if challenged, can reasonably claim, that what he does, he does in virtue of his office."

13. So far as the judgement of **Ayush Kumar And Others (supra)**, relied upon by the applicant is concerned, in that case, the dispute was only about incorrectly mentioning the C.T. ratio of metering cubicle during the check-in drive. Subsequently, C.T. ratio of the metering cubical was corrected from 20/5 to 30/5, the applicant did not dispute the facts in that case. Therefore, from the evidence available before the court, it was undisputed that the preparation of sealing certificate mentioning the C.T. ratio metering cubical was in discharge of official duty, therefore, the Hon'ble Court on being satisfied that the act of the officer was in discharge of official duty; consequently, he is entitled to protection u/s 197 IPC but in the present case, the dispute is yet to be ascertained whether the preparation and producing the forged disconnection slip on the part of the applicant can be said to be the preparation of documents in the discharge of official duty; therefore this judgement also does not help the applicant.

14. So far as the judgement of **Professor R.K. Vijayasathya (supra)**, relied upon by the applicant is concerned,

that judgement does not apply in the present case because in that case, the dispute was whether the civil dispute had been converted into criminal dispute.

15. This court holds on the basis of the legal position discussed above that whenever there is a slight doubt whether the act or omission on the part of a public servant was in discharge of his official duty or not. Unless that issue was decided on the basis of evidence during trial, the criminal proceeding cannot be quashed in the exercise of power u/s 482 Cr.P.C., mainly because a person claiming himself to be a public servant alleges that his act was in discharge of his official duty. Protection u/s 197 IPC is given to protect the public servant who bonafide performed any act in the discharge of his official duty not for all the act whether that act was part or not his official duty as there are number of acts which has been declared by the Apex Court which cannot be said to be part of the official duty like fabricating the document or misappropriation of funds.

16. From the perusal of the record, it appears that against the entry in 2009 in the register of the electricity department, the alleged disconnection slip, which was produced as a defence by the applicant, was itself prepared in 2008. Therefore, prima facie, the accused's act cannot be said to be in discharge of his official duty. Even otherwise, it is a matter of evidence. This issue can be decided during the trial whether the applicant, while producing the forged disconnection slip, was performing his duty or it was beyond his duty to produce the forged disconnection slip as a defence in the proceeding before the consumer forum. The issue is still open for the applicant to take this defence during the trial. Therefore, this court **does not find**

any good ground for quashing the impugned proceeding.

17. From the perusal of the order sheet, it appears that this case has been pending since 2014, therefore, it would be appropriate to direct the court below to conclude the proceeding of **Complaint Case No.356 of 2014 (Om Prakash Agrawal Vs. V.P. Govil and others), under Section-465 IPC, Police Station-Chamanganj, District-Kanpur Nagar, pending in the court of MM-IV, Kanpur Nagar, as expeditiously as possible, preferably within one year from today.**

18. Accordingly, the present application is rejected, with the aforesaid observation.

(2024) 4 ILRA 697

**ORIGINAL JURISDICTION
CRIMINAL SIDE**

DATED: ALLAHABAD 28.03.2022

BEFORE

THE HON'BLE SYED AFTAB HUSAIN RIZVI, J.

Application U/S 482. No. 26271 of 2021
Connected with
Application U/S 482. No. 10551 of 2020

**Fazlur Rahman & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opposite Parties**

Counsel for the Applicants:

Sri Sushil Shukla, Sri Aditya Prakash Singh

Counsel for the Opposite Parties:

G.A.

Criminal Law - Code of Criminal Procedure, 1973 -Section 482- Indian Penal Code, 1860 - Sections 153-A, 153-B, 124-A, 298, 505 & 120-B IPC - Quashing of Order Dated 18.01.2020 - The

applicants sought to quash the order dated 18.01.2020 by the Additional Sessions Judge, rejecting their applications, and related orders granting prosecution sanction under Section 196 CrPC – Held, the order dated 18.01.2020 was unsustainable due to non-compliance with prior High Court directions and failure to address legal objections, warranting partial quashing. (Paras 2, 3, 8, 9)

B. Section 196 CrPC – Requirement of Prosecution Sanction – The charge sheets were filed without prior sanction under Section 196 CrPC, mandatory for offences under Sections 153-A, 153-B, 124-A, 298, 505, and 120-B IPC – Held, the Magistrate's failure to ensure sanction before taking cognizance and committing the case to the sessions court violated High Court's directions dated 08.05.2003, rendering subsequent proceedings flawed. (Paras 5, 6, 8)

C. Delay in Obtaining Sanction and Right to Speedy Trial – The prosecution sanctions were granted in 2018 and 2019, 17 years after the charge sheets, with no explanation for the delay – Held, this delay violated the applicants' right to a speedy trial under Article 21 of the Constitution, but the issue requires further adjudication by the trial court. (Para 6)

D. Non-Compliance with High Court Directions – The Magistrate ignored the High Court's order dated 08.05.2003 to verify sanction before proceeding and committed the case to the sessions court without compliance – Held, such non-compliance was contemptuous, and the sessions court erred in not addressing this illegality while rejecting the applicants' applications. (Paras 5, 8)

E. Opportunity for Hearing and Discharge – The sessions court rejected the applicants' applications without considering legal objections or providing a hearing on the point of charge – Held, the trial court must reconsider all legal objections, including discharge, with a reasoned order after providing a hearing. (Paras 8, 10)

Application Partly Allowed.

List of Cases cited:

1. Mahendra Lal Das Vs St. of Bihar, (2002) 1 SCC 149
2. Vakil Prasad Singh Vs St. of Bihar, (2009) 3 SCC 355
3. Gokulchand Dwarkadas Morarka Vs King Emperor, ILR 1978 Bom 316
4. Basdeo Aggarwalla Vs King Emperor, (1945) 58 LW 313 (FB)
5. Manoj Rai Vs St. of MP, (1999) 6 SCC 728
6. Abdul Mian Vs The King, (1951) CrLJ 710 (Patna HC)
7. St. of U.P. Vs Gayur, 2019 SCC Online All 4920 (Allahabad HC)
8. Arun Jaitley Vs St. of U.P., 2015 SCC Online All 9413 (Allahabad HC)
9. Balwant Singh Vs St. of Punj., (1995) 3 SCC 214
10. Manzar Sayeed Khan Vs St. of Maharashtra, (2007) 5 SCC 1
11. Common Cause Vs UOI, WP (C) No. 683 of 2016
12. Patricia Mukhim Vs St. of Meghalaya, 2021 SCC Online SC 258
13. Chakra Behara Vs Balakrishna Mohapatra, AIR 1963 Ori 23

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

1. Heard Sri Sushil Shukla, learned counsel for the applicants Sri Siddharth Luthra, learned Senior Counsel, assisted by Sri Rajiv Lochan Shukla & Ravikant Shukla, learned counsel for the applicant learned A.G.A. for the State and perused the record.

2. Criminal misc. application under section 482 Cr.P.C. No.26271 of 2021 has

been filed by the accused-applicants to quash the impugned order dated 18.01.2020, as passed by the Additional Sessions Judge, Court No.6, Gorakhpur, in Sessions Trial No.385 of 2019, arising out of Case Crime No.609 of 2001, under sections 153-A, 153-B, 124-A, 298, 505, 120-B, IPC, Police Station Kotwali, District Gorakhpur (State Vs. Shahid Badr Falahi & others), as well as the impugned orders dated 19.11.2018 and 16.11.2019, passed by the State Government, granting sanction under section 196 Cr.P.C. against the accused-applicants for their prosecution in the aforesaid criminal case, and consequently to quash the impugned criminal proceeding.

3. Another application under section 482 Cr.P.C. No.10551 of 2020 is filed by the co-accused Human Ahmad Siddiqui with a prayer to quash the impugned order dated 18.01.2020, passed by Additional District Judge, Court No.6, Gorakhpur, in S.T. No.386 of 2019 (State Vs. Hamam Ahmad Siddiqui), arising out of Case Crime No.609 of 2001, under sections 153-A, 153-B, 124-A, 505, 298, 120-B, IPC, Police Station Kotwali, District Gorakhpur, as well as sanctioning order dated 19.11.2018.

4. Both the cases are connected to each other and related to same matter, hence being disposed of by a common judgment.

5. An FIR, Case Crime No.609 of 2001, under sections 153-A, 153-B, 124-A, 298, 505, 120-B, IPC, was lodged at Police Station Kotwali City, District Gorakhpur, on 21.09.2001 regarding the incident dated 15.09.2001, naming Shahid Badra Falahi, Hamam Mohammed. During the investigation the name of other co-accused

persons also came into light. After investigation one charge sheet dated 23.01.2002 filed against the accused-applicants Shahid Badra Falahi, Fazlur Rahman, Daud Husain Khan & Rashid Husain and another charge sheet dated 30.07.2002 was filed in absconder against Humam @ Humam Ahmad Siddiqui.

Learned Magistrate taken cognizance on the first charge sheet on 04.05.2002. The accused-applicants of the aforesaid charge sheet challenged the cognizance order in Criminal Misc. Application under section 482 Cr.P.C. No.2524 of 2003, and this Court, disposed of the aforesaid application vide order dated 08.05.2003, directing the court, taking cognizance, to examine whether the previous sanction of the appropriate Government, has been obtained or not, which is condition precedent for taking cognizance. It further directed that the court, before proceeding further in the matter shall first decide this point and thereafter pass the order according to law, keeping in view section 196 of the Cr.P.C., within one month from the date of production of certified copy of this order.

The learned Magistrate without making compliance of the aforesaid order committed the case to the court of sessions on 27.07.2006. The accused-applicants moved an application before the court of sessions under section 227 Cr.P.C. for discharge on the ground that cognizance has been taken and case has been committed without any prosecution sanction, which is a condition precedent under section 196 Cr.P.C. The sessions court on the aforesaid application passed an order on 29.09.2007 and remitted the matter back to the learned Magistrate to ensure the compliance of the order passed

by the High Court and pass appropriate order thereupon and proceed according to law. The matter remain pending in the court of learned Magistrate and ultimately on 02.09.2019 the learned Magistrate again committed the case to the court of sessions. Copies of the prosecution sanction dated 19.11.2018 and 16.11.2019 are on record, but it is not clear, when this prosecution sanction was filed in the court by prosecution.

On the charge sheet filed against co-accused Humam Ahmad Siddiqui, cognizance was taken on 16.08.2002. As the charge sheet was in absconder, he was declared as absconder, and the case was fixed for proceeding under section 299 Cr.P.C. The same proceeding continued till 10.03.2008. On 23.06.2008 the accused was arrested and produced before the learned Magistrate, later on he was enlarged on bail. The case remain pending for supplying copies and thereafter fixed for committal proceeding and ultimately this case was also committed to the court of sessions vide order dated 02.09.2019.

In Sessions Trial No.386 of 2019 and Sessions Trial No.385 of 2019 separate applications were moved by the accused-applicants, alleging therein that direction be issued to the learned Magistrate in the light of the order of Hon'ble High Court dated 08.05.2003 and further order of Additional Sessions Judge/F.T.C., Court No.2, Gorakhpur. It is also alleged that the High Court vide order dated 08.05.2003 has given some directions to the learned Magistrate, but the learned Magistrate without making compliance of the directions of the High Court has committed the case to the court of sessions. The court of Additional Sessions Judge, directed the learned Magistrate vide order dated

29.08.2007 to consider, whether sanction under section 196 Cr.P.C has been obtained or not. Thereafter, after obtaining prosecution sanction the case has been again committed to the court of sessions. Both the above applications have been rejected by the Additional Sessions Judge, Court No.6, Gorakhpur, vide order dated 18.01.2020, passed separately in both the sessions trial.

6. Learned counsel for the applicants vehemently contended that charge sheet was filed without obtaining requisite prosecution sanction of section 196 Cr.P.C., which is mandatory for taking cognizance of the offence complained of, but the learned Magistrate failed to consider it and taken cognizance on the charge sheet. This order was challenged before the High Court and the Hon'ble High Court vide order dated 08.05.2003 directed the learned Magistrate to consider the necessity of the prosecution sanction required under section 196 Cr.P.C. and pass an appropriate order on it within a month. The learned Magistrate failed to comply this order and without making compliance of the aforesaid order has committed the case to the court of sessions. The matter was raised before the court of sessions and vide order dated 29.09.2007 the court of sessions remitted the matter to the learned Magistrate for ensuring compliance of the order of Hon'ble High Court dated 08.05.2003. The learned Magistrate kept the matter pending for nearly 17 years. Ultimately, prosecution sanction orders dated 19.11.2018 and 16.11.2019 were passed by the State Government. The learned Magistrate without ensuring the compliance of the Hon'ble High Court order dated 08.05.2003, committed the case

again to the court of sessions. The learned counsel for the applicant contended that post cognizance sanction cannot cure the illegality. It is also contended that learned trial court has clearly failed to notice that the delay in obtaining the requisite sanction for prosecution for the last 17 years was attributable to the prosecuting agency and no fault left with accused-applicants, who are facing that proceeding since last 19 years causing irreparable loss to the social esteem and reputation. The impugned criminal proceeding, therefore, are clear abuse of the process of the court.

It is further contended that the learned Sessions Judge also failed to notice that the constitutional guarantee of speedy trial and justice under Article 21 of the Constitution of the accused-applicants has been clearly violated in the instant case as the prosecuting agency has failed to offer any plausible explanation whatsoever for the delay of 17 years in obtaining requisite sanction for their prosecution. The learned Judge also failed to notice that in such situation permitting further prosecution against the accused-applicants after 17 years would be a travesty of justice and a mere ritual or formality, which will burden unnecessarily the court. A period of nearly 20 years have passed since the registration of the FIR against the accused-applicants, now the trial proceedings according to law have yet to be commenced as the State Govt. without any explanation of delay of 17 years since submission of charge-sheet has granted requisite sanction, the accused-applicants have been deprived of their constitutional right to speedy trial flowing from Article 21 of the Constitution therefore further continuation of the impugned criminal proceedings pending against them are clearly unwarranted and abuse of process of court.

The learned counsel for the applicants placed reliance on the case of '**Mahendra Lal Das Vs. State of Bihar and others**', (2002) 1 SCC 149 and '**Vakil Prasad Singh Vs. State of Bihar**', (2009) 3 SCC 355.

It is also contended on the part of the accused Humam Ahmad Siddiqui that Humam Ahmad @ Hamam Ahmad has been mentioned in the FIR as Humam Mohammad. Similarly sanction order also speaks of Humam Mohammad. The real name of applicant is Humam Ahmad Siddiqui son of Ansarul Hassan, resident of Hanif Nagar, Near Masjid Belal, Pyare Patti Road, District Sultanpur. The applicant has no alias. A deliberate attempt has been made to implicate the applicant by using alias, on the identity of the applicant without any basis or material. For the last 35 years, the applicant is not residing in Village Teari, Police Station Gosaiganj, District Sultanpur and is residing at 49, Khairabad (Lucknow Naka) Sultanpur. After the year 2000 applicant is residing at Hanif Nagar, Near Masjid Belal, Pyare Patti Road, District Sultanpur. The applicant is registered with the Bar Council of U.P. as an advocate in the year 2000 on the aforesaid address. Due to deliberate inclusion of the name of applicant on an address, where the applicant did not reside, he never knew about the pendency of the any proceeding against him. For the first time he came to know the proceeding in the year 2008. Thereafter he was arrested and produced before the concerned court and he was bailed out on 25.07.2008. Since then the proceeding is continuing against him. It is also submitted that applicant has moved applications dated 26.05.2009 and 29.03.2021 seeking indulgence of the learned Magistrate to return the charge sheet and discharge the applicant in

absence of compliance of section 196 Cr.P.C. The applicant has been denied an opportunity to seek discharge and the learned trial court misinterpreting the application filed before it straightaway directed framing of charges against the applicant. Even otherwise, on the fact of the case, FIR is taken at its face value, does not constitute any offence, much less a cognizable offence punishable under sections 153-A, 153-B, 124-A, IPC alongwith sections 505 and 506, IPC. There is no material on record to demonstrate that the applicant was member of any unlawful/illegal organization. It is further contended that prosecution sanction with regard to accused-applicants Fazlur Rahman, Daud Husain and Rashid Husain have been granted by the Government vide order dated 16.11.2019, while the learned Magistrate has committed the entire case to the court of sessions before it on 02.09.2019, which includes the case of aforesaid three accused also.

Learned counsel for the applicants placed reliance on the following decisions of Hon'ble Apex Court as well as High Court:-

"(i) Gokulchand Dwarkadas Morarka Vs. Kind Emperor, ILR 1978 Bom 316.

(ii) Basdeo Aggarwalla Vs Kind Emperor (1945 58 LW 313 (FB).

(iii) Manoj Rai & Ors Vs. State of MP (1999) 6 SCC 728.

(iv) Abdul Mian & Ors Vs. The King (1951 CrLJ 710 Patna HC.

(v) State of U.P. Vs. Gayur & Ors 2019 SCC Online All 4920 Allahabad HC.

(vi) Arun Jaitley Vs. State of U.P., 2015 SCC Online All 9413 Allahabad HC.

(vii) Balwant Singh Vs. State of Punjab (1995), 3 SCC 214,

(viii) Manzar Sayeed Khan Vs. State of Maharashtra, (2007) 5 SCC 1.

(ix) Common Cause & Anr Vs. UOI, WP (C) No.683 of 2016.

(x) Patricia Mukhim Vs. State of Meghalaya, 2021 SCC Online SC 258,

(xi) Chakra Behara & Ors Vs. Balakrishna Mohapatra, AIR 1963 Ori 23.

(xii) State of Haryana Vs. Bhajan Lal, 1992 Supp(1) SCC 336."

7. It is undisputed that both the charge sheets were filed without compliance of section 196 Cr.P.C., regarding prosecution sanction, which was necessary for taking cognizance for offence complained of. Cognizance order was challenged before this Court. Following directions was given vide order dated 08.05.2003:-

"It is hereby directed to the court taking cognizance to examine whether the previous sanction of the appropriate Government has been obtained or not which is a condition precedent for taking cognizance. The court below proceeding further in the matter shall first decide this point and thereafter pass the order according to law, keeping in view Section 196 of the Code of Criminal procedure, within one month from the date of production of a certified copy of this order.

With this direction the application is disposed of finally."

8. Unfortunately the learned Magistrate without making any compliance of the aforesaid order, committed the case to the court of sessions. When the matter was raised before the court of sessions, it remitted the matter to learned Magistrate to pass appropriate order in compliance of the direction of the High Court. The most unfortunate aspects is that the learned Magistrate kept the matter pending for years. The applications were moved before

him by the accused persons, but the learned Magistrate failed to pass any order on it. He also failed to comply the order of this Court dated 08.05.2003, within stipulated period of one month, rather he ignored it completely and kept the matter pending till he finally committed the case to the court of sessions on 02.09.2019, without complying the order of High Court. The aforesaid act of the learned Magistrate is contemptuous as well. When the matter was again committed to the court of sessions, the accused-applicants moved applications before the sessions court, but the learned sessions court without appreciating the facts and law on the point and without taking into consideration the legal provision on flimsy ground has rejected the application making observation that the case is at its preliminary stage, even after more than 16 years have lapsed since 2003, which is an example that how a case can be prolonged on technical point. The aforesaid comments of the learned sessions court is wholly unwarranted. In the delay of the proceeding, clearly there is no role of the accused-applicants. The cause of the delay is apparent, which is latches on the part of the prosecution itself as well as on the part of the learned Magistrate, who has failed to comply the order of High Court dated 08.05.2003. The learned sessions court should have considered the consequences of the non compliance of the order of the High Court dated 08.05.2003 and further the effect of post cognizance prosecution sanction and further the prosecution sanction of three accused is post committal proceeding. It should have also considered the legality and validity of the entire proceeding from the very beginning that of from the cognizance stage. It is also evident that while rejecting the application moved by the accuse-applicants, the learned sessions court has

posted the matter for framing charge, without giving any opportunity of hearing on the point of charge to the accused-applicant. As the legal points raised by the accused-applicants have not been decided by the sessions court, it will not be proper for this Court to enter into merits of the arguments advanced by the learned counsels for the parties. It will be just and proper to direct the trial court i.e. the concerned court of sessions where cases are pending to consider all the legal aspects and the legal objections, raised by the accused-applicants, provide them opportunity for hearing on the point of charge and then pass an appropriate order in accordance with the provisions of law.

9. From the aforesaid discussion it is clear that order dated 18.01.2020 is not sustainable in the eye of law and liable to be quashed.

10. The application under section 482 Cr.P.C. is hereby partly allowed only in respect of quashing the order dated 18.01.2020 passed by the Additional Sessions Judge, Court No.6, Gorakhpur. The applicants may move a fresh application within 15 days after obtaining a certified copy, raising all their legal objections and legal points against the prosecution and may also pray for discharge. The sessions court after providing opportunity of hearing to both the parties will dispose of the same with a reasoned order in accordance with the provisions of law, within one month from the date of filing of the such applications before it.

(2024) 4 ILRA 703
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.02.2024

BEFORE

THE HON'BLE ANISH KUMAR GUPTA, J.

Application U/S 482. No. 27063 of 2023

Anshul Kumar **...Applicant**
Versus
State of U.P. & Anr. **...Opposite Parties**

Counsel for the Applicant:

Sri Gulab Chandra, Sri Rupesh Kumar Singh

Counsel for the Opposite Parties:

G.A., Sri Satish Kumar Tyagi

Criminal Law - Code of Criminal Procedure, 1973 - Section 482 - Indian Penal Code, 1860 - Sections 376, 377, 393, 504, 506, 323, 427 - Quashing of Charge-Sheet and Cognizance Order Denied -
The applicant sought to quash the charge-sheet dated 25.05.2023 and cognizance order dated 05.06.2023 in Criminal Case No. 46985 of 2023 under Sections 376, 377, 393, 504, 506, 323, 427 IPC – Held, a prima facie case of rape and related offences was established based on the allegations and Section 164 CrPC Statement, warranting trial and not quashing. (Paras 2, 15, 16)

B. Section 376 IPC – Rape on False Promise of Marriage – The opposite party no. 2 alleged that the applicant, a police officer, forcibly raped her after administering a contaminated cold drink and maintained a physical relationship under a false promise of marriage – Held, as per *Shambhu Kharwar*, a false promise of marriage known to be false from inception vitiates consent, making out a prima facie case of rape. (Paras 9, 14, 15, 16)

C. Abuse of Position by Police Officer – The applicant, as the Investigating Officer in a prior case, allegedly exploited his authority to coerce the opposite party no. 2 into a physical relationship – Held, the misuse of official position to exploit the victim strengthens the prima facie case against the applicant. (Paras 13, 16)

D. Previous FIR and Final Report – The opposite party no. 2 had lodged a prior FIR (Case Crime No. 392 of 2022) against the applicant, which

ended in a final report due to her coerced Section 164 CrPC Statement – Held, her explanation of coercion and false promises by the applicant justifies the fresh FIR, and the issue requires trial adjudication. (Paras 5, 6, 9, 16)

E. Consensual Relationship Defence Rejected – The applicant claimed the relationship was consensual and the opposite party no. 2 was aware of his marital status – Held, the allegations of initial forcible rape and subsequent false promise of marriage negate the consensual relationship defence, as per *Vinod Kumar* and *Jiyaullah*, requiring trial to ascertain facts. (Paras 11, 15, 16)

Application Dismissed.

List of Cases cited:

1. *Vinod Kumar Vs St. of Kerala*, (2014) 5 SCC 678
2. *Shambhu Kharwar Vs St. of U.P.*, 2022 SCC Online
3. *Vineet Kumar Vs St. of U.P.*, (2017) 13 SCC 369
4. *Jiyaullah Vs St. of U.P.*, [2023 (10) ADJ 438]
5. *St. of Har. Vs Bhajan Lal*, 1992 Supp (1) SCC 335
6. *Neeharika Infrastructure Pvt. Ltd. Vs St. of Maharashtra*, 2021 SCC OnLine SC 315
7. *R.P. Kapur Vs St. of Punj.*, AIR 1960 SC 866

(Delivered by Hon'ble Anish Kumar Gupta, J.)

1. Heard Sri Gulab Chandra, learned counsel for the applicant, Sri Satish Kumar Tyagi, learned counsel for the opposite party no.2 and Sri Vibhav Anand, learned A.G.A. for the State.

2. The instant application under Section 482 Cr.P.C. has been filed seeking

quashing of the charge-sheet no.01 of 2023 dated 25.05.2023 as well as impugned cognizance order dated 05.06.2023 and entire criminal proceedings in Criminal Case No.46985 of 2023 (State of U.P. vs. Anshul Kumar), arising out of Case Crime No.0109 of 2023 u/S 376, 377, 393, 504, 506, 323, 427 I.P.C., P.S.- Madhuban Bapudham, District- Ghaziabad, pending in the court of learned Additional Chief Judicial Magistrate, .

3. The brief facts of the case are that the opposite party no.2, Shivani Dube, was previously married with one Prashant Sharma. She obtained divorce by mutual consent from said Prashant Sharma on 22.09.2020. Subsequently, the opposite party no.2 had lodged an F.I.R. under Sections 507, 376, 504, 508, 420 and 406 I.P.C. being Case Crime No. 31 of 2022 on 22.01.2022. In the said F.I.R. which was registered by the opposite party no.2 against the said Jishan Hashim, the applicant herein was the Investigation Officer (IO). During the investigation of the said F.I.R. against Jishan Hashim, the opposite party no.2 came in contact with the applicant herein. In the meantime on 27.03.2022 the applicant herein has prepared the charge-sheet against the said Jishan Hashim, which was forwarded on 19.04.2022.

4. Subsequently, on 26.04.2022, the opposite party no.2 lodged an N.C.R. against Amita Rani (the wife of the applicant herein), her brother (Rajat) and her two sisters (Vimal and Mrs. Rakam Singh). Subsequently, on 13.06.2022, the opposite party no.2 allegedly submitted an application to the Station House Officer (S.H.O.), P.S. - Link Road, District- Ghaziabad, stating that she doesn't want any action on the N.C.R. No. 18 of 2022

dated 26.04.2022, registered by her against Amita Rani and her other relatives. Since, the opposite party no.2 used to visit the house of the applicant herein in connection of her case against Jishan Hashim, the said Amita Rani had developed suspicion over her and there was some altercation with Amita Rani and she has further stated in her application that she had filed this N.C.R. to create a pressure on the applicant herein, so that the applicant may take stringent action in the F.I.R. registered against Jishan Hashim. In the said case, Jishan Hashim was granted bail on 11.07.2022.

5. Thereafter, on 15.10.2022, the opposite party no.2 herein had lodged an F.I.R. being Case Crime No. 392 of 2022 against the applicant herein, alleging that when the applicant herein was the Beat Incharge at Surya Nagar, Ghaziabad, she came in his contact in connection to her case wherein the applicant was the IO. During the investigation, the applicant had proposed her to which the opposite party no.2 did not agree and on 05.01.2022, she had made a call to the Women Cell and complained about the applicant. Subsequently, she was afraid as it was her first case and the applicant used to take her on lonely places. Slowly, he made her to believe that he will take divorce from his wife and today when, as per his promise, he did not come, then she went to his house where he had abused her, broken her phone and beaten her with fist. She further stated that on the promise of marriage, the applicant had made physical relations with her at Hotel Country Inn Red - Kvelvet, Ghaziabad, due to which she became pregnant and after the confirmation of pregnancy at Max Hospital, Vaishali. Subsequently, her pregnancy was aborted between 24-27, March. She further stated

in the F.I.R. that the applicant is such an officer who promises to marry and then breaks his own promise, therefore, strict action be taken against such officer. During the investigation in the instant F.I.R., the opposite party no.2 refused to undergo the medical examination on 15.10.2022 itself. Subsequently, her statement under Section 164 Cr.P.C. was recorded and she has stated that during the investigation of the case lodged by her against the said Jishan Hashim, she came in contact with the applicant and both have developed a good friendly relationship with each other and due to some altercation she had lodged this false F.I.R. against the applicant herein. On the basis of such statement under Section 164 Cr.P.C., the final report in Case Crime No. 392 of 2022 was submitted by the Investigation Officer in the instant case on 02.12.2022 and vide order dated 12.12.2022, the said final report was accepted by the court below as same was admitted by the applicant herself before the court.

6. Subsequent thereto, the opposite party no.2 filed an application under Section 156 (3) Cr.P.C. alleging that earlier she had lodged an F.I.R. being Case Crime No. 392 of 2022 against the applicant herein, wherein, the entire details have been given. Subsequent to lodging of the said F.I.R., the applicant herein had another chance to correct his mistake and as per the promise he again assured the opposite party no.2 that he will take divorce from his wife and will marry her. Thereupon, after four days of registration of the said F.I.R., the applicant took the opposite party no.2 to Hotel Country Inn Kvelvet, P.S. Kavi Nagar, Ghaziabad, where he had established consensual physical relationship with the opposite party no.2 on the pretext of promise of marriage from

19.10.2022 till 31.10.2022 and subsequently, from 01.11.2022 till 15.12.2022, he kept the opposite party no.2 in a flat which he had taken on rent. On 28.10.2022, when her statement under Section 164 Cr.P.C., was to be recorded, then, the applicant through her advocate had allured her with the promise of marriage and stated that if she will not make statement under Section 164 Cr.P.C. as per their advice, then, the applicant will go to jail and life of both the applicant and the opposite party no.2 will be spoiled. After such assurance, he took a flat on rent and kept the opposite party no.2 as his wife and continued physical relationship with her under the promise of marriage. When the opposite party no.2 realized that he is just trying to be good only for the purpose of getting her statement recorded and he has no intention to marry the opposite party no.2 then the opposite party no.2 objected to such relationship with the applicant, then, the applicant assaulted the opposite party no.2 and locked her inside the flat. When the opposite party no.2 tried to contact the guard then the applicant broke the intercom telephone and also took the phone of the opposite party no.2. When the guard came after hearing the noise, the gate was opened by him and he told the guard that there are some personal disputes between them, thereupon, the guard had went away. Thereafter, the applicant again assaulted the opposite party no.2 and threaten her that if she will not follow the instructions given by the applicant then he will kill her. It is further alleged that her signatures were taken on blank papers, which were later used as affidavits in the proceedings and with regard to the final report being accepted by the Magistrate.

7. The said application under Section 156(3) Cr.P.C., was dismissed with the

observation that opposite party no.2 should approach at the first instance to the senior police officials and thereupon if no action is taken then she can again approach the court.

8. In pursuance thereof, she approached the higher police official and thereupon on 28.03.2023, the instant F.I.R., was registered being Case Crime No. 109 of 2023 under Sections 376, 377, 493, 504, 506, 323, 427 I.P.C.

9. After this F.I.R., on 03.04.2023 a medical examination of the opposite party no.2 was conducted and her statement under Section 164 Cr.P.C. was recorded before the trial court again wherein she has categorically stated that she came in contact with the applicant herein with regard to her case when he was Beat Incharge and the applicant used to keep her in the Police Beat till late night for the purpose of the investigation of the case but due to fear she could not oppose. After sometime, he stalled the opposite party no.2 and on 28.02.2022 when she was sitting with the applicant in his vehicle, then, the applicant gave her cold-drink, infiltrated with something, therefore, she lost her consciousness, then the applicant forcibly raped the opposite party no.2 in his vehicle. Subsequently, he said sorry about the same and on 29.02.2022, he called her in his house where again the applicant raped the opposite party no.2. In April, 2022, the opposite party no.2 realised that she is pregnant then the applicant took her to the doctor and when the doctor confirmed that she is four weeks pregnant then abortion pills were given and pregnancy was aborted. Though, the applicant was married he used to promise that everything will be alright and on 13.10.2022 the applicant called her in his house and then the

applicant assaulted her. Thereupon, she lodged the Case Crime No. 392 of 2022 against the applicant. When her statement under Section 164 Cr.P.C. was to be recorded then the applicant threaten her that if she did not come within five minutes then he will use very bad words for her mother. Her advocate, namely Dilshad who was also known to the applicant, has also told her that if she will not say what she is instructed in her 164 Cr.P.C. statement, then it will be very bad for her. Thereupon, in her 164 Cr.P.C. statement she told the falsehood. After the statement, the said Dilshad took her to Anshul, the applicant. Thereupon, Anshul took her to Nilaya Greens Tower, Rajnagar Extension, Ghaziabad where they lived together and maintain physical relationship and on 14.12.2022, when there was a date fixed in her previous case which she has lodged against the applicant, then, her advocate told her to sign the attendance slip. On 12.12.2022, the said Dilshad obtained signatures in his chamber and she could not read such papers as she was doing some work of her office and on 12.12.2022, Dilshad took her to the court where he assured that he was going to submit the papers related to divorce of Anshul where she heard something like FR, but she did not know what FR means, therefore, she signed it and on 16.12.2022, Anshul came to her in a drunkard position then abused and assaulted the opposite party no.2 and then she called the guard, the guard came but when the applicant told the guard that nothing had happened then the guard went away. Again, the applicant tried to have anal sex with her and raped her and since thereafter from 16.12.2022, the applicant did not come to her.

10. On the basis of this statement the charge-sheet was filed against the applicant

herein. Thereupon, the cognizance was taken on 05.06.2023. The instant application has been filed challenging the charge-sheet as well as the order taking cognizance against the applicant.

11. Learned counsel for the applicant submits that there was a long-standing consensual physical relationship between the applicant and the opposite party no.2 who was a person of well understanding of all the consequences of such relationship. The applicant herein is a married man with children and the opposite party no.2 was well-aware of all the aforesaid facts. Despite that she continued her relationship with the applicant. Now, the opposite party no.2 is trying to blackmail the applicant herein for such consensual relationship and in the earlier F.I.R. lodged by the opposite party no.2, on her own statement under Section 164 Cr.P.C., the final report was filed. Thereupon, the instant F.I.R. has been lodged. After four months of the final report submitted in the earlier cases with the same allegations, the said final report was also accepted in her presence before the court. She has not raised any objection to the said final report before the court concerned. Learned counsel for the applicant further submits that the instant F.I.R. is nothing but a counterblast to the F.I.R. lodged by the mother of the applicant herein against the opposite party no.2, under the provisions of S.C./S.T. Act. Since, the opposite party no.2 is an adult person and it was a consensual relationship between the applicant and the opposite party no.2, therefore, no offence of rape is made out against the applicant herein and the instant case is nothing but a malicious prosecution on behalf of the applicant.

12. Learned counsel for the the applicant has relied upon the judgements of

the Apex Court in *Vinod Kumar v. State of Kerala*, (2014) 5 SCC 678, *Shambhu Kharwar v. State of U.P. : 2022 SCC Online and Vineet Kumar v. State of U.P., : (2017) 13 SCC 369* and the judgement of this Court in *Jiyaullah vs. State of U.P. and Another : [2023 (10) ADJ 438]*.

13. Per contra, the learned A.G.A. for the State submits that the applicant was a Police Officer and was under obligation to protect the opposite party no.2, who has registered a case against Jishan Hashim and under the garb of that investigation he had established physical relationship by forcing the opposite party no.2 to consume a contaminated cold-drink, therefore, when she become unconscious, he has committed a forcible physical relationship with the opposite party no.2 without her consent, which clearly tantamounts to an offence of rape. In the earlier F.I.R. lodged by the opposite party no.2, the applicant in connivance with the Advocate of the opposite party no.2 had threatening to an ill treatment of her mother, had got her statement recorded under Section 164 Cr.P.C., under coercion and again she had lodged the application under Section 156(3) Cr.P.C., through her mother against the applicant for the charges under the provisions of the S.C./S.T. Act and in the instant case, since, the applicant herein was already married, there was, from the very beginning, an element of force and subsequently thereto, the false promise of marriage by the applicant. Therefore, the subsequent relationship on such false promise of marriage which the applicant knew from the very beginning that the same is false, therefore, the offence is categorically made out against the applicant. Since, his promise to marry the opposite party no.2 was false since its inception, therefore, prima facie a case has

been made out against the applicant and the same cannot be quashed in exercise of power under Section 482 Cr.P.C.

14. Learned counsel for the opposite party no.2 has relied upon the judgement of *Shambhu Kharwar (supra)* to submit that since from the inception the applicant knew that he has no intention to marry the opposite party no.2 and initially he had established forcible physical relationship by making the opposite party no.2 to consume contaminated cold drink and thereupon under the garb of false promise to marry, he had maintained the relationship, therefore, a prima facie case has been made out.

15. Having heard the submissions made by learned counsels for the parties, this Court has carefully gone through the record of the case. In *Vinod Kumar (supra)*, the Apex Court having regard to the facts of that case wherein the victim was fully aware that the relationship of marriage, which she has performed with the accused in that case was a nullity and continued with such relations and had physical relationship with the accused. In that circumstances, the Apex Court has held that such consensual relationship would not amount to rape, as the victim was fully aware about such relationship. In *Shambhu Kharwar (supra)*, the Apex Court has held that once it is established that the promise of marriage under the garb of which the accused had made relationship with the victim was false from its inception and on such promise if the accused has induced the victim into a sexual relationship, then, the offence of rape shall be made out. If initially the promise of marriage was made in good faith and the parties have entered into a consensual physical relationship and on subsequent

breach of such promise, no offence of rape shall be made out. In **Vineet Kumar (supra)**, the Apex Court having found that the prosecution of the accused by the victim was a malicious prosecution, has allowed the appeal and quashed criminal proceedings against the accused persons. In **Jiyaullah (supra)**, this Court having regard to the peculiar facts and circumstances of the case wherein the parties were having long-standing consensual physical relationship for more than 15 years and initially there was promise of marriage in good faith and subsequently on such breach of promise to marry, no offence of rape is made out. Therefore, the criminal proceedings were quashed.

16. In the instant case from the statement as made under Section 164 Cr.P.C., it is clear that in the first instance the applicant herein has raped the opposite party no.2 by making her to consume a contaminated cold-drinks, thereby, making her unconscious. Therefore, it was prima facie an act of force without consent. Thereafter, looking at the authority of the applicant, she could not resist such relationship. Subsequent thereto, the applicant had established the physical relationship with the opposite party no.2 under the garb of promise to marry her by divorcing his previous wife. However, from the allegation it is crystal clear that the applicant herein knew that such a promise which is made by the applicant was nothing but a false promise and he had no intention to marry the opposite party no.2. When the opposite party no.2 herein had tried to create pressure on the opposite party no.2 to keep his promise and divorce his wife and marry the opposite party no.2, then, the applicant as

being a Police Officer filed an Application under Section 156(3) Cr.P.C., upon which an F.I.R. was registered under the provisions of the S.C./S.T. Act through his mother. The Police Officers are duty bound to protect the victims. However, in the instant case, as per the allegations made, the applicant herein appears to have misutilized his position and has exploited the opposite party no.2. Therefore, in the considered opinion of this Court a prima facie case has been established against the applicant from the charge-sheet as well as statement under Section 164 Cr.P.C. of the opposite party no.2 in the instant case. With regard to the previous F.I.R. and the final report submitted in the previous F.I.R., the opposite party no.2 has categorically explained her conduct as to under what circumstances and on the pressure created by the applicant, the opposite party no.2 did not make true statement under Section 164 Cr.P.C. and did not oppose the final report as the applicant herein was continuously making false promise of marriage and continuing his relationship with opposite party no.2. Therefore, all the allegations made in the instant case are subject to evidence during the trial in the instant case. Since, a prima facie case has been found against the applicant, therefore, this Court do not find any good ground to interfere in the charge-sheet or in the order taking cognizance against the applicant herein. Accordingly, the instant application is dismissed in the light of the judgements of Apex Court in **State of Haryana v. Bhajan Lal : 1992 Supp (1) SCC 335, Neeharika Infrastructure Pvt. Ltd. vs. State of Maharashtra and Others : 2021 SCC OnLine SC 315 and R. P. Kapoor Vs. State of Punjab, AIR 1960 S.C. 866.**

(2024) 4 ILRA 710
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.12.2023

BEFORE

THE HON'BLE ANISH KUMAR GUPTA, J.

Application U/S 482. No. 29205 of 2023

Shree Om & Ors. ...Applicant
Versus
State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:

Sri Vipul Kumar Singh, Sri Amit Daga, Sri Digvijay Singh

Counsel for the Opposite Parties:

G.A.

Criminal Law - Code of Criminal Procedure, 1973 -Section 482- Indian Penal Code, 1860 - Sections 147, 149, 307, 436, 120-B - Quashing of Cognizance Order Denied – The applicants sought to quash the order dated 17.01.2020 by the Chief Judicial Magistrate, rejecting the final report and taking cognizance under Sections 147, 149, 307, 436, 120-B IPC – Held, the Magistrate validly took cognizance under Section 190(1)(b) CrPC based on material in the police report, and no infirmity was found in the order. (Paras 2, 15, 16, 18)

B. Section 190(1)(b) CrPC – Cognizance on Police Report – The Magistrate rejected the final report and took cognizance based on the material in the police report – Held, as per *H.S. Bains*, *India Carat Pvt. Ltd.*, and other precedents, a Magistrate can take cognizance under Section 190(1)(b) CrPC, ignoring the police's conclusion, if the material supports a prima facie case. (Paras 7, 8, 9, 11, 15)

C. Rejection of Final Report – The investigating agency submitted final reports on 16.02.2018 and 19.11.2018, both rejected by the Magistrate after considering

protest petitions and material evidence – Held, the Magistrate's rejection of the final report and cognizance based on police report evidence was lawful, as per *Vishnu Kumar Tiwari*. (Paras 3, 12, 13, 16)

D. Magistrate's Discretion in Cognizance – The applicants argued that cognizance could not be taken after rejecting the final report – Held, the Magistrate is not bound by the police's conclusion and can independently take cognizance under Section 190(1)(b) CrPC without treating the protest petition as a complaint under Section 200 CrPC, as clarified in *Gangadhar Janardan Mhatre* and *Asif Ahmad Siddiqui*. (Paras 9, 11, 14, 15)

E. Conflict with Coordinate Bench Judgment – The applicants relied on *Shahid and Others*, which held that cognizance cannot be taken after rejecting a final report – Held, this judgment is inconsistent with Supreme Court precedents and does not aid the applicants. (Para 17)

Application Dismissed.

List of Cases cited:

1. *H.S. Bains Vs St.*, (1980) 4 SCC 631
2. *India Carat Pvt. Ltd. Vs St. of Karn.*, (1989) 2 SCC 132
3. *U.O.I. Vs Prakash P. Hinduja*, (2003) 6 SCC 195
4. *Gangadhar Janardan Mhatre Vs St. of Mah.*, (2004) 7 SCC 768
5. *Vishnu Kumar Tiwari Vs St. of U.P.*, (2019) 8 SCC 27
6. *Shahid and Others Vs St. of U.P.*, Application u/s 482 No. 10032 of 2022
7. *Asif Ahmad Siddiqui Vs St. of U.P.*, Application u/s 482 No. 5500 of 2023
8. *Tula Ram Vs Kishore Singh*, (1977) 4 SCC 459

(Delivered by Hon'ble Anish Kumar Gupta, J.)

1. Heard Shri Amit Daga, learned counsel for the applicant and Shri Pankaj Srivastava, learned A.G.A. for the State.

2. The instant application under section 482 Cr.P.C. has been filed seeking quashing of the order dated 17.1.2020 passed by Chief Judicial Magistrate, Hathras in Criminal Case No. 470/12 of 2018 (now numbered as Criminal Case No. 453 of 2020) "State of U.P. Vs. Shree Om and others" arising out of Case Crime No. 1481 of 2017 under sections 147, 149, 307, 436, 120-B I.P.C. police station Sadabad, District Hathras.

3. The facts, in brief, of the instant case are that the applicant no. 1 and the opposite party no. 2 are the real brothers and the applicants no. 2 and 3 are the sons of applicant no. 1. There was property dispute between the applicant no. 1 and the opposite party no. 2 and various litigation with regard to property dispute between them are already pending. In the night intervening 16/17.12.2017, the fire took place in the shops owned by the opposite party no. 2 which were let out to somebody else. Taking the advantage of the said fire incident, the instant FIR has been registered by the opposite party no.2 against the applicants as well as other co-accused, namely, Dalveer Singh who is the Advocate of the applicants herein and pursuing their cases before the trial court. For the same incident another FIR was registered by the tenant of the shop on 18.12.2017 stating that fire has taken place in which they have suffered huge loss. During the investigation, the opposite party no. 2 and some of the witnesses have been produced and they have stated that they

have seen the applicants running away after the fire took place in the shops. After due and proper investigation of the case a final report was filed by the investigating agency on 16.2.2018. On protest petition being filed by the opposite party no. 2 the said final report dated 16.2.2018 was rejected on 26.7.2018 and the C.J.M. Hathras directed for further investigation in the matter. The matter was again investigated and further final report dated 19.11.2018 was filed by the investigating agency. Thereupon again the protest petition was filed by the opposite party no. 2. Thereafter, considering the entire material in the final report, learned Magistrate vide order dated 17.1.2020 rejected the said final report. However, summoned the applicants herein as well as the co-accused Dalveer Singh for the offences under sections 147, 149, 307, 436, 120-B I.P.C. Against the said order dated 17.1.2020 one of the co-accused, namely, Dalveer Singh, who was the Advocate and representing the applicants in the trial court, filed a Revision No. 57 of 2021, which was disposed of by the Sessions Judge, Hathras vide order dated 11.10.2021 whereby the learned Sessions Judge remanded back the matter directing the revisionist to approach for discharge before the Magistrate, which shall be decided on merit. Against the said order, the opposite party no. 2 filed a petition under Article 227 No. 238 of 2022 which was disposed of vide order dated 25.1.2022 by this Court holding that since the offences under sections 147, 149, 307, 436, 120-B I.P.C. are triable by Sessions Court, therefore, the matter could not have been remanded back and the other co-accused could not have been directed to approach the C.J.M. for discharge, therefore, in the light of the aforesaid observation the order dated 11.10.2022 was set aside and the matter was remanded back

to the Sessions Judge for fresh decision. Thereupon the learned Sessions Judge, Hathras vide order dated 6.7.2022 has allowed the said revision and set aside the order dated 17.1.2020 in respect of the cognizance taken against the revisionist, who is one of the co-accused in the instant case. Now the instant application has been filed by the applicants challenging the order dated 17.1.2020 passed by the learned Magistrate.

4. Learned counsel for the applicants submits that vide order dated 17.1.2020 the C.J.M. Hathras has rejected the final report submitted by the investigating agency and at the same time the learned Magistrate has taken cognizance against the applicants as well as against the co-accused person for the offences under sections 147, 149, 307, 436, 120-B I.P.C. under section 190(1)(b) Cr.P.C. Learned counsel for the applicant, therefore, submits that as per section 190(1)(b) Cr.P.C. the cognizance can be taken by the learned Magistrate only on a police report of such facts. However, since the police report in the instant case has already been rejected, therefore, there was no material before the Magistrate on which the Magistrate could have taken the cognizance. In support of his submission learned counsel for the applicant has relied upon the judgement of the Apex Court in the case of *Vishnu Kumar Tiwari Vs. State of U.P. and another (2019) 8 SCC 27*. Learned counsel for the applicant has also relied upon a judgement passed by this Court in *Application u/s 482 No. 10032 of 2022 (Shahid and others Vs. State of U.P. and others)*, wherein this Court has held as under:

"Having heard the learned counsel for applicants, the learned A.G.A.

for State and upon perusal of record, this Court finds that once Court below rejected the police report (final report) then Court below could not have taken cognizance upon aforesaid Police report. The course of action open to court below was to disapprove (Aswikar) the report. This having not been done, the impugned order is illegal perverse and unsustainable in law."

5. Per contra, learned A.G.A. for the State submits that the Magistrate disagreeing with the conclusion drawn by the investigating agency rejected the final report and has rightly taken the cognizance under section 190(1)(b) Cr.P.C. therefore, there is no error in the order passed by the Magistrate.

6. Having heard the rival submission made by learned counsel for the parties, this court has carefully gone through the record of the case. Therefore, the limited question involved in the instant case is as to whether while rejecting the final report submitted after due investigation by the investigating agency, the Magistrate can take cognizance under section 190(1)(b) Cr.P.C. ? Section 190(1)(b) reads as under:

"190. Cognizance of offences by Magistrates. (1) *Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub- section (2), may take cognizance of any offence-*

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

(b) upon a police report of such facts;

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

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

7. From bare reading of the aforesaid provision it is clear that as per section 190(1)(b) Cr.P.C. it is open for the Magistrate to take cognizance on a police report irrespective of the conclusion drawn by the investigating officer.

8. The Apex Court in the case **H.S. Bains Vs. State (1980) 4 SCC 631**, in paragraph 7 has held as under:

"7. In Abhinandan Jha v. Dinesh Mishra [AIR 1968 SC 117 : (1967) 3 SCR 668 : 1968 Cri LJ 97] , the question arose whether a Magistrate to whom a report under Section 173(1) had been submitted to the effect that no case had been made out against the accused, could direct the police to file a charge-sheet, on his disagreeing with the report submitted by the police. This Court held that the Magistrate had no jurisdiction to direct the police to submit a charge-sheet. It was open to the Magistrate to agree or disagree with the police report. If he agreed with the report that there was no case made out for issuing process to the accused, he might accept the report and close the proceedings. If he came to the conclusion that further investigation was necessary he might make an order to that effect under Section 156(3). If ultimately the Magistrate was of the opinion that the fact set out in the police report constituted an

offence he could take cognizance of the offence, notwithstanding the contrary opinion of the police expressed in the report. We find it impossible to say that a Magistrate who takes cognizance of an offence on the basis of the facts disclosed in a police report must be said to have taken cognizance of the offence on suspicion and not upon a police report merely because the Magistrate and the police arrived at different conclusions from the facts. The Magistrate is not bound by the conclusions arrived at by the police even as he is not bound by the conclusions arrived at by the complainant in a complaint."

(emphasis supplied)

9. In the case of **M/s India Carat Pvt. Ltd. Vs. State of Karnataka and another, (1989) 2 SCC 132** the Apex Court in paragraph 16 and 17 has held as under:

"16. The position is, therefore, now well settled that upon receipt of a police report under Section 173(2) a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the investigating officer and independently apply his mind to the facts emerging from

the investigation and take cognizance of the case, if he thinks fit, in exercise of his powers under Section 190(1)(b) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of a case under Section 190(1)(a) though it is open to him to act under Section 200 or Section 202 also.

.....

17. It has been held in *Tula Ram v. Kishore Singh* [(1977) 4 SCC 459 : 1977 SCC (Cri) 621 : (1978) 1 SCR 615] that if the police, after making an investigation, send a report that no case was made out against the accused, the Magistrate could ignore the conclusion drawn by the police and take cognizance of a case under Section 190(1)(b) and issue process or in the alternative he can take cognizance of the original complaint and examine the complainant and his witnesses and thereafter issue process to the accused, if he is of opinion that the case should be proceeded with."

10. The Apex Court in the case of ***Union of India Vs. Prakash P. Hinduja and another*** (2003) 6 SCC 195 in paragraph 14 has held as under:

"14. The Magistrate is no doubt not bound to accept the final report (sometimes called as closer report) submitted by the police and if he feels that the evidence and material collected during investigation justify prosecution of the accused, he may not accept the final report and take cognizance of the offence and summon the accused but this does not mean that he would be interfering with the investigation as such. He would be doing so in exercise of powers conferred by

Section 190 CrPC. The statutory provisions are, therefore, absolutely clear that the court cannot interfere with the investigation."

11. In ***Gangadhar Janardan Mhatre v. State of Maharashtra*** (2004) 7 SCC 768, the Apex Court in paragraph 9 has held as under:

"9. The Magistrate can ignore the conclusion arrived at by the investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, exercise his powers under Section 190(1)(b) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of a case under Section 190(1)(a) though it is open to him to act under section 200 or Section 202 also."

12. Paragraph 27 of the judgment in the case of ***Vishnu Kumar Tiwari*** (*supra*) relied by learned counsel for the applicant reads as under:

"27. It is undoubtedly true that before a Magistrate proceeds to accept a final report under Section 173 and exonerate the accused, it is incumbent upon the Magistrate to apply his mind to the contents of the protest petition and arrive at a conclusion thereafter. While the investigating officer may rest content by producing the final report, which, according to him, is the culmination of his efforts, **the duty of the Magistrate is not one limited to readily accepting the final report. It is incumbent upon him to go through the materials, and after hearing the complainant and considering the**

contents of the protest petition, finally decide the future course of action to be, whether to continue with the matter or to bring the curtains down.”

(emphasis supplied)

13. In the same judgement of ***Vishnu Kumar Tiwari (supra)*** it is worth mentioning that the Apex Court has held in paragraph 18 and 42 as under:

“18. Thus, when he proceeds to take action by way of cognizance by disagreeing with the conclusions arrived at in the police report, he would be taking cognizance on the basis of the police report and not on the complaint. And, therefore, the question of examining the complainant or his witnesses under Section 200 of the Code would not arise. This was the view clearly enunciated.

42. In the facts of this case, having regard to the nature of the allegations contained in the protest petition and the annexures which essentially consisted of affidavits, if the Magistrate was convinced on the basis of the consideration of the final report, the statements under Section 161 of the Code that no prima facie case is made out, certainly the Magistrate could not be compelled to take cognizance by treating the protest petition as a complaint. The fact that he may have jurisdiction in a case to treat the protest petition as a complaint, is a different matter. Undoubtedly, if he treats the protest petition as a complaint, he would have to follow the procedure prescribed under Sections 200 and 202 of the Code if the latter section also commends itself to the Magistrate. In other words, necessarily, the complainant and his witnesses would have to be examined. No

doubt, depending upon the material which is made available to a Magistrate by the complainant in the protest petition, it may be capable of being relied on in a particular case having regard to its inherent nature and impact on the conclusions in the final report. That is, if the material is such that it persuades the court to disagree with the conclusions arrived at by the investigating officer, cognizance could be taken under Section 190(1)(b) of the Code for which there is no necessity to examine the witnesses under Section 200 of the Code. But as the Magistrate could not be compelled to treat the protest petition as a complaint, the remedy of the complainant would be to file a fresh complaint and invite the Magistrate to follow the procedure under Section 200 of the Code or Section 200 read with Section 202 of the Code. Therefore, we are of the view that in the facts of this case, we cannot support the decision of the High Court.”

14. A coordinate Bench of this Court in ***Application u/s 482 No. - 5500 of 2023 (Asif Ahmad Siddiqui Vs. State of U.P. and another)*** decided on 26.4.2023 has held in paragraphs 19, 20 and 21 as under:

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

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

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer,

or upon his own knowledge, that such offence has been committed.

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

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

to act under Section 200 or Section 202 also."

15. Therefore, from the above noted judgements it is crystal clear that where an FIR has been filed and the Magistrate chooses to take cognizance of the matter disagreeing with the conclusion arrived at in the police report then such cognizance is taken on the basis of the police report and it is not mandatory for him to treat the protest petition so filed by the complainant as a complaint and then proceed in accordance with the provisions of Section 200 Cr.P.C. If the Magistrate take cognizance on the police report itself, then the procedure under section 200 Cr.P.C. is not required to be followed. From the aforesaid observations made in the judgements referred above it is crystal clear that when a final report is submitted by the police the Magistrate may agree or disagree with such police report and if he wants to agree with such final report filed by the police then it is mandatory for him to issue notice to the complainant and consider the protest petition after giving the opportunity to the complainant and if he found that the conclusion drawn by the police in its report is wrong or not sustainable then he may straight away proceed to take cognizance in the matter under section 190(1)(b) Cr.P.C. on the basis of the material brought on record alongwith the police report.

16. Therefore, in the instant case the learned Magistrate has considered the final report submitted by the police and entire material available before him even on the initial investigation and on the further investigation as directed by the Magistrate and on the basis of the material available before Magistrate he has found that the conclusion drawn by the investigating agency are not sustainable and thereupon

he has rejected the said final report and has taken cognizance against the applicants herein. Therefore, in the considered opinion of this Court there is no infirmity in the order passed by the learned Magistrate rejecting the final report and taking the cognizance against the applicants herein.

17. So far as the judgement of another Coordinate Bench of this Court in the case of *Shahid and other (supra)* relied upon by the learned counsel for the applicant is concerned, in the light of the judgements of the Apex Court, referred to herein above, the same is not in conformity with the aforesaid judgments of the Apex Court and, therefore, is of no help to the applicants herein.

18. For the reasons afore stated, the instant application is devoid of merit and is hereby **dismissed**.

(2024) 4 ILRA 717
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.10.2023

BEFORE

THE HON'BLE ANISH KUMAR GUPTA, J.

Application U/S 482. No. 30784 of 2023

Karam Allahi **..Applicant**
Versus
State of U.P. & Anr. **...Opposite Parties**

Counsel for the Applicant:
 Sri Anurag Vajpeyi, Sri Aushim Luthra, Sri Manish Tiwari (Sr. Adv.)

Counsel for the Opposite Parties:
 G.A.

Criminal Law - Code of Criminal Procedure, 1973 - Section 482 - Indian Penal Code, 1860 - Sections 420, 467, 468,

471, 120-B - Quashing of Bail Rejection Order Denied – The applicant sought to set aside the order dated 19.07.2023 rejecting his bail application under Section 437(6) CrPC in Case No. 6781 of 2021 for offences under Sections 420, 467, 468, 471, 120-B IPC and Sections 4/20/21/25 of the Indian Telegraph Act – Held, the Magistrate's rejection was justified due to the serious nature of the offence, and no illegality was found in the order. (Paras 2, 20, 22)

B. Section 437(6) CrPC – Mandatory but Not Absolute – The applicant argued that Section 437(6) CrPC mandates bail if a trial for a non-bailable offence is not concluded within 60 days from the first date fixed for evidence – Held, while the provision is mandatory, it is not absolute like Section 167(2) CrPC, and the Magistrate can reject bail by recording exceptional reasons, as clarified in *Chhabi Vs St. of Orissa* and *Didar Singh Vs St. of Jharkhand*. (Paras 8, 11, 16, 19)

C. Reasons for Bail Rejection – The Magistrate rejected the bail application citing the grievous nature of the offence involving an illegal international telephone exchange – Held, the reasons were sufficient, as the offence posed a threat to national security and caused significant loss to the exchequer, justifying the exceptional rejection under Section 437(6) CrPC. (Paras 20, 21)

D. Nature of Offence and National Security – The applicant was charged with running an illegal telephone exchange, causing financial loss and posing a threat to national security – Held, such serious allegations, involving unmonitored international calls and potential anti-national activities, constituted exceptional circumstances for denying bail. (Para 21)

E. Judicial Discretion in Bail Rejection – The court distinguished the applicant's case from co-accused who were granted bail, noting the applicant's distinct role – Held, the Magistrate's limited discretion under Section 437(6) CrPC was exercised judicially, and the rejection was not arbitrary, as supported by *Ram Kumar Vs St. of M.P.* and *Bhikhaji Chaturji Thakore*. (Paras 19, 21, 22)

Application Dismissed.

List of Cases cited:

1. Chandraswami Vs Central Bureau of Investigation, (1996) 6 SCC 715
2. Chhabi Vs St. of Orissa, 1995 (2) Crimes 622
3. Ram Kumar @ Raj Kumar Rathore Vs St. of M.P., 2000 (3) Crimes 388
4. Rajendra Rajaram Pal Vs St. of M.P., (2002) 4 MPHT 186
5. Re: 122 Prisoners, 2007 CriLJ 3241
6. Lakki Chakhbeer Singh Vs St., 2006 CriLJ (NOC) 95 (Raj.)
7. Didar Singh Vs St. of Jharkhand, 2006 (1) JCR 283 : 2006 CriLJ 1594
8. Bhikhaji Chaturji Thakore Vs St. of Gujarat, 2007 CriLJ 3433
9. Suresh Vs St. of U.P., Application u/S 482 No. 5136 of 2013
10. Saritadevi Vs St. of Himachal Pradesh, 2000 (2) Crimes 543
11. Mohd. Abdul Vs St. of West Bengal, 1991 (2) Crimes 741
12. Robert Lendy, 1987 CriLJ 55
13. Nageshwar Bhagat Vs St. of Jharkhand, (2004) 4 LJLR 3

(Delivered by Hon'ble Anish Kumar
Gupta, J.)

1. Heard Sri Manish Tiwari, learned Senior Counsel assisted by Sri Aushim Luthra and Sri Anurag Vajpeyi, learned counsel for the applicant and Sri Pankaj Srivastava, learned A.G.A. for the State.

2. By way of the instant application u/S 482 Cr.P.C.(hereinafter referred as 'the Code'), the applicant has prayed for setting-

aside the order dated 19.07.2023, passed by the Court of Civil Judge, Sr. Division, Fast Track Court, Additional Judicial Magistrate, Gautam Buddh Nagar, in Case No. 6781 of 2021 (State of U.P. vs. Karam Allahi and others), arising out of the Case Crime No. 129 of 2021 u/S 420, 467, 648, 471, 120-B I.P.C. and 4/20/21/25 of Indian Telegraph Act, P.S.- Phase-3 Noida, District- Gautam Buddh Nagar.

3. Learned Senior Counsel appearing for the applicant submits that in the instant case, the applicant herein was arrested on 10.02.2021. Since then, he is in custody. His earlier bail application was initially rejected on 09.07.2021 and the second bail application moved by the applicant was rejected by a detailed order dated 18.11.2022. The instant application has been filed by the applicant herein u/S 437(6) of the Code, which provides that if in a case triable by a Magistrate, if the trial of a person accused of any non-bailable offence is not concluded within a period of 60 days from the first date fixed for taking evidence, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for the reasons to be recorded in writing, the Magistrate otherwise directs.

4. Learned Senior Counsel further submits that in the instant case, the charges were framed on 25.04.2023 and the first date for evidence was fixed as 19.05.2023. The period of 60 days from the first date fixed for taking evidence has expired on 19.07.2023. Thereafter, the applicant herein had moved an application u/S 437(6) of the Code on 19.07.2023, which has been rejected by the learned Magistrate on the same day. The only reason recorded for the rejection of the said application is the

matter relates to grievous nature. Learned Senior Counsel further submits that provisions of Section 437(6) of the Code, are mandatory and the learned Magistrate while rejecting the bail application is required to record its reason in writing.

5. Learned Senior Counsel has further submits that all other co-accused persons have already been released on bail. Learned Senior Counsel for the applicant submits that the provisions of Sub-section (6) of Section 437 of the Code, are in the nature of safeguard provided to the accused persons and while rejecting the bail application moved by the applicant herein under the provisions of Sub-section (6) of Section 437 of the Code, the learned Magistrate has not assigned any reason as was required nor has adverted to the provisions of the said Section. Therefore, learned Senior Counsel prays for setting-aside the said order passed by the learned Magistrate and grant bail in terms of Sub-section (6) of Section 437 of the Code.

6. Sri Pankaj Srivastava, learned A.G.A. for the State submits that while rejecting the application, the learned Magistrate has categorically recorded his reason stating that since the matter is of grievous nature and the earlier bail applications have already been rejected by the Sessions Court as well as by the High Court, therefore, the said application has been rejected. Therefore, learned counsel for the State submits that reasons aforesaid have already been assigned in the order, there is no illegality in the order.

7. Having heard the rival submissions made by learned counsel for the parties, this Court has carefully perused the record of the case.

8. Provisions of Sub-section (6) of Section 437 of the Code, reads as under:

"(6) If, in any case triable by a Magistrate, the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs."

9. From the plain reading of the said Sub-section, the following ingredients are required to be looked into:

(i) Whether the case is triable by the Magistrate and the offence involved is of a non-bailable offence;

(ii) Whether the period of 60 days has expired from first date fixed for taking evidence in the case; and

(iii) the accused is in custody during the whole of the said period. Unless there are some compelling reasons which are required to be recorded in writing the bail has to be granted under the said provisions.

10. With regard to nature of right of the accused to be released on bail u/S 437(6) of the Code, there are divergent views of different High Courts and no direct judgement of the Apex Court is available with regard to the right of the accused to be released on bail u/S 437(6) of the Code. Though, there is a reference to the provisions of Section 437(6) of the Code, in a judgement of the Apex Court in ***Chandraswami and Others vs. Central Bureau of Investigation : (1996) 6 SCC***

715, wherein the argument was raised with regard to the entitlement of the accused persons for bail u/S 437(6) of the Code. However, the Hon'ble Apex Court had considered the grant of bail, looking at the totality of the facts and circumstances of the case, without going into the question of interpretation or applicability of Section 437(6) of the Code.

11. The first judgement which is available is that of the Odisha High Court, on the issue in *Chhabi vs. State of Orissa : 1995(2) Crimes 622*, wherein Justice Pasayat, J., has held under:

"3. A Magistrate while dealing with a case under sub-section (6) of section 437 of the Code has to record reasons for making an exception. The said provision deals with cases where the trial of a person accused of any non-bailable offence is not concluded within a period of a sixty days from the first day fixed for taking evidence in the case, and it provides that such person shall, if he is in custody during the whole of the said period be released on bail unless for reasons to be recorded in writing the Magistrate otherwise directs. It is the right of an accused person to demand that the charge against him should be tried without any unreasonable delay and such delay entitles the accused to get bail. That right is statutorily recognised and puts a time limit. In a case falling under this sub-section if the Magistrate for reasons to be recorded, holds that the accused shall not be released, then the accused will not be released on bail. It is stated that merits of the case should not be considered at that stage. There is no force in this place. An overall view cannot be equated with prejudging the case. The Court is not precluded from considering the nature of

allegations, while dealing with a case under sub-section (6) of section 437 of the Code. "

12. The next judgement available on the point is that of the Gwalior Bench of Madhya Pradesh High Court in *Ram Kumar @ Raj Kumar Rathore vs. State of M.P. : 2000 (3) Crimes 388*, wherein Justice Dr. Maithli Sharan, J., has observed as under:

"5. Looking to the provision referred to above it is but clear that it is mandatory in nature, and the mandate is that if the Magistrate is trying a case in which the accused has been charged for a non-bailable offence and the trial has not concluded within a period of sixty days from the first date of recording the evidence in the case and that the accused had remained in custody during the whole of such period of sixty days, then he becomes entitled to be released on bail, provided of course, the Magistrate does not reject the same recording in writing his reasons therefor. Circumscribing the undisputed factual circumstances in the ambit of the provisions of section 437(6) of the Code of Criminal Procedure, 1973 it is apparent that they hold the field and apply here from all four corners. In rejecting the bail application of the petitioner the learned trial Magistrate and the learned Fourth Additional Sessions Judge, Gwalior, have no doubt given their reasoning as required under the above provisions of the Code of Criminal Procedure but they are simply to the effect that if the petitioner were to be released then it is doubtful that he would be attending the Court on each and every date fixed by the Magistrate. These reasoning's indicating the apprehension of the learned Courts below, by no stretch of

imagination, could be termed as judicious, and therefore, they are not of such a nature as to thwart and wash off the mandatory character of the provisions of section 437(6) of the Code of Criminal Procedure, 1973. I am of the considered view that the statutory right given to the accused by the above provisions cannot be taken away in such a fashion. Since the petitioner had although remained in custody during the said period of more than sixty days from the first date fixed for recording the evidence, he would be deemed to have been clothed with the right to be released on bail. The rejection of his application under section 437(6) of the Code of Criminal Procedure, 1973 by the learned trial Magistrate and later the dismissal of his revision petition by the learned Fourth Additional Sessions Judge, Gwalior, was nothing but the abuse of the process of Court and had given rise to the miscarriage of justice."

13 . The other judgement of the **Madhya Pradesh High Court in Rajendra Rajaram Pal vs. State of M.P. : (2002) 4 MPHT 186**, wherein Justice S.L. Kochar, has observed as under:

*"9. This Provision is showing that if the trial is not completed within a period of 60 days from the date fixed for recording evidence then the accused, who is in custody, is entitled to be released on bail. If the Court is of the opinion that the accused is not entitled for bail then it is obligatory on the part of the Court to assign reason for refusing the bail. In view of **mandatory** Provision of Section 437 Sub-section (6), Criminal Procedure Code, the applicant is entitled to be released on bail. There is no special reason on the basis of which his prayer may be refused. Similar view has been taken in the case of Saritadevi v. State*

of Himachal Pradesh [2000 (2) Crimes 543] and in the case of Mohd. Abdul v. State of West Bengal [1991 (2) Crimes 741]."

14. The next judgement is that of the High Court of Kerala in **Re: 122 Prisoners : 2007 CriLJ 3241**, wherein Justice K. Hema, has observed as under:

*"10. It is also relevant to make reference to Section 437(6) of the Code, in this context. As per sub-section (6) of Section 437 of the Code, in any case triable by a Magistrate, if the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs. So, the normal rule is to release a prisoner on bail, who has completed such sixty days of detention as specified above unless the court otherwise directs. **The rule is mandatory in nature, as indicated by the expression "shall" in the provision itself.***

11. But, if any such prisoner is to be detained any further in prison, it shall be done only as per a specific order passed by the Magistrate in writing, recording reasons for the continued detention. Thus, it follows that if any prisoner is detained in any of the prisons in the State for more than the period stated in section 437(6) of the code, without any reasoned order in writing for the continued detention, such detention is unauthorised and illegal. Such prisoner deserves immediate release from prison, subject to what has been laid down in Section 437(6) of the Code."

15. In case of **Lakki Chakhbeer Singh vs. State : 2006 CRI.L.J. (NOC) 95 (RAJ.)**, Justice Narendra Kumar Jain, speaking for the Rajasthan High Court, has observed as under:

"4. A bare perusal of Sub-section (6) of Section 437, Cr.P.C. will show that it is not necessary that in each and every case, an accused in a case triable by Magistrate has to be released on bail if trial is not concluded within a period of sixty days from the first date fixed for taking evidence in the case. A Magistrate is required to record the reasons in writing for refusal of the bail."

16. In the case of **Didar Singh vs. State of Jharkhand : 2006(1) J.C.R. 283 : 2006 CriLJ 1594**, the Jharkhand High Court has held that the right of the accused u/S 437(6) of the Code and has compared with the right of the accused u/S 167(2) of the Code and has held that u/S 167(2) of the Code the accused has absolute right to be released on bail, in default of submissions of charge-sheet within time prescribed in the said sections and held that the right of the accused to be released on bail u/S 437(6) of the Code, is not an absolute right and the learned Magistrate has power to deny the bail for the reasons to be recorded. Justice Amareshwar Sayay has held as under:

"10. From plain reading of the aforesaid quoted provision, it appears that the intention of the legislature is to speed up trial without unnecessarily detaining a person as an under-trial prisoner. This provision applies only to a case triable by a Magistrate and not to a case committed to the Sessions for trial.

The intention behind the provision is that the trial should be concluded within period of sixty days from the first date fixed for evidence.

11. The contention advanced on behalf of the petitioner that if the trial Court is not concluded within a period of sixty days from fixed date for evidence then accused who is in custody has to be released on bail cannot be accepted as from the plain reading of the aforesaid provision. It is clear that the said provision under Section 437(6) is not mandatory in nature as Section 167(2) of the Criminal Procedure Code which provides that if the investigation is not completed within a period of ninety days or sixty days as the case may be then the accused is entitled to be released on bail mandatorily irrespective of the merit of the case. Under Section 167(2) Criminal Procedure Code, the right to be released on bail is absolute under the provision of Section 437(6) of the Criminal Procedure Code which is not mandatory in nature, the entitlement of the accused to be released on bail is dependent upon the reasons to be recorded in writing by the Magistrate for refusal to release him on bail. The reasons may be several, therefore, it is the discretion of the trial Court either to release or not to release an accused under the aforesaid provision for the reasons to be recorded in writing. There is no doubt that discretion of the trial Court has to be exercised judicially and not arbitrarily. It is found that the trial Court has exercised its discretion either refusing or granting bail in exercise of power under Section 437(6) of the Criminal Procedure Code is justifiable in the facts and circumstances of a particular case then such exercise of discretion is not liable to be interfered with unless it is found that discretion so

*exercised by the trial Court is wholly improper, unjustified and arbitrary. The Division Bench of Delhi High Court in the case of Robert Lendy (1987 Cri LJ 55) (supra) has held that the procedural law is essentially meant to safeguard the interest of justice. **The twin objects, namely, to reject the delay in trial and to achieve the ends of justice are necessarily, to be harmonized.** It is in that context, one has to find out whether the discretion exercised by the Magistrate in withholding bail after sixty days, has been properly and judicially exercised.*

12. It is further held in the aforesaid decision of the Delhi High Court that the considerations for refusing bail under this provision can be the reasons which are generally invoked and understood in law as the grounds for refusing bail. All that is required of a Magistrate is that if he decides to decline to grant bail, he must record his reason in writing. The decision of Supreme Court cited by the learned counsel for the petitioner in the case of Chandra Swami (AIR 1997 Supreme Court 2576) (supra) is of no avail for this case, as it appears that the Supreme Court did not go into question of interpretation or applicability of Section 437(6), Criminal Procedure Code.

13. In the decision in the case of Ram Kumar alias Raj Kumar Rathore (supra), the Madhya Pradesh High Court has held that the provisions of Section 437(6), Criminal Procedure Code is mandatory in nature and after the expiry of sixty days from the first date fixed for recording evidence, the accused acquires statutory right of being released on bail, if the trial is not concluded within the said period. With all due respect, I differ with the view of the Single Judge of Madhya

Pradesh High Court, because in my view the provisions of Section 437(6) is not mandatory in nature and the accused does not get absolute right to be released on bail under Section 437(6) of the Criminal Procedure Code, if the period of sixty days expires from the first date fixed for recording evidence and the trial is not concluded within the said period.

14. In the case of Nageshwar Bhagat v. State of Jharkhand reported in (2004 (4) LJ 3) it appears that the learned single Judge of this Court has not laid down any law nor has interpreted Section 437(6), Criminal Procedure Code but has only held that rejection of bail by High Court at an earlier stage cannot be a ground for not invoking the power as vested in Section 437, Clause (6), Criminal Procedure Code. It further appears that in the said case, not a single witness was examined on behalf of the prosecution within a period of sixty days from the first date for recording evidence, therefore, the aforesaid decision of this Court cited on behalf of the petitioner is not applicable in the facts and circumstances of the case. "

*17. In the case of **Bhikhaji Chaturji Thakore vs. State of Gujarat : 2007 0 CrLJ 3433**, the Gujarat High Court has held that by holding that the provisions of section 437(6) of the Code are mandatory, has held as under:*

"(23) SECTION 437 (6) provides that if, in any case triable by a Magistrate, the trial of a person accused of any non-bailable offence is not concluded, within a period of sixty days from the first date fixed for taking the evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate,

unless for reasons to be recorded in writing, the magistrate otherwise directs. Sub-section (6) clearly uses the mandatory word "shall" because the scheme of the Act is that if you cannot conclude the trial at least within sixty days from the date of starting of the recording of the evidence, then, such an apathy shown by the Court or by the prosecution would pave the path of the accused to walk out of the jail. The mandate under the law is to release the accused on bail. The rejection is an exception and for such D rejection, the Court is required to record the reasons in writing. The word "shall" is to be read as "shall" and not as "may". If it is read as "may", then, there would be reason to give reasons for rejection. When the liberty of a person is involved the mandate of law cannot be diluted by reading the word "shall" as "may".

18. In ***Application u/S 482 No. 5136 of 2013 (Suresh vs. State of U.P. and Another)***, the Co-ordinate Bench of this Court has held that the provisions of Section 437(6) of the Code, are mandatory in nature without discussing the said provisions in detail.

19. From the aforesaid judgements, the proposition of law emerges is that the provisions of Section 437(6) of the Code, are mandatory in nature but are not absolute as the provisions of Section 167(2) of the Code is. The right of the accused to be released on bail u/S 437(6) of the Code, is in the nature of a statutory protection granted under the Code. However, such protection is not an absolute protection. Looking at the facts and circumstances of each case, the Magistrate has a discretion to reject such application by recording the reason. Therefore, from the discretion of Magistrate while exercising the bail

applications u/S 437(6) of the Code, if it is compared with the discretion of the Magistrate to grant bail u/S 437(1) of the Code, then while rejecting the the bail Application u/S 437(6) of the Code, the learned Magistrate has very limited discretion to reject the bail application and it should be exercised in exceptional cases. In the normal course, when the Magistrate is trying a case where the accused has been charged for a non-bailable offence and the trial has not been concluded within a period of 60 days from the first date fixed for recording the evidence, then, normally the learned Magistrate is required to grant bail. It is only in exceptional cases where the exceptional reasons are to be recorded in writing when such bail Applications u/S 437(6) of the Code, can be rejected by the learned Magistrate.

20. Having considered the position of law as enumerated from the aforesaid judgements, if we test the impugned order passed by the learned Magistrate, rejecting the bail application, the learned Magistrate has rejected the instant bail application recording the reason that in the instant case the charges against the applicant herein is of very serious in nature, where the applicant herein has been charged for running an international telephone exchange, which is a threat to the national security of the country. Therefore, the said offence was of a serious nature. Therefore, the learned Magistrate has rejected the bail application of the applicant herein.

21. Looking at the nature of allegations against the applicant herein, which are serious in nature and the modus operandi of the applicant was to cause a huge loss to the Government exchequer and the accused gain advantage for themselves dishonestly through the fraudulent means

and such type of international calls pose a great threat to the national security as the international calls remain unmonitored by the law enforcement agencies and the public at large is affected by such calls and which are mostly used for cheating the public at large and such calls are often involved in illegal activities and anti-national activities and thus, this is a serious threat to the national security. Therefore, in the considered view of this Court, the instant case is of an exceptional nature, where, though this Court has granted bail to the other co-accused persons, has rejected the bail applications of the applicant herein twice as the case against the applicant herein was found distinguishable with the other co-accused persons.

22. Therefore, in the considered view of this case, the learned Magistrate is justified in rejecting the bail application filed by the applicant u/S 437(6) of the Code, considering the exceptional circumstances involved in the case against the applicant herein. Therefore, there is no illegality in the impugned order dated 19.07.2022, passed by the learned Magistrate. Therefore, the application is devoid of merits and is hereby **dismissed**.

(2024) 4 ILRA 725
ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.02.2024

BEFORE

THE HON'BLE VINOD DIWAKAR, J.

Application U/S 482. No. 31760 of 2023

Shanu Raja **...Applicant**
Versus
State of U.P. **...Opposite Party**

Counsel for the Applicant:

Sri Saurabh Gour, Sri A.B.L. Gour (Sr. Adv.), Sri Pradeep Kumar Bhardwaj

Counsel for the Opposite Party:
 G.A.

Criminal Law - Code of Criminal Procedure, 1973 - Section 482- Juvenile Justice (Care and Protection of Children) Act, 2015 - Section 14(3) - Quashing of Juvenile Justice Board Order – The applicant sought to set aside the order dated 19.07.2019 by the Juvenile Justice Board (JJB), Lalitpur, transferring his case to the Children's Court under the Juvenile Justice (Care and Protection of Children) Act, 2015 – Held, the order was set aside due to non-compliance with the mandatory time limit under Section 14(3) of the Act, and the case was remanded to the JJB for trial. (Paras 4, 38, 39)

B. Section 14(3) of JJ Act, 2015 – Mandatory Time Limit for Preliminary Assessment – The JJB conducted a preliminary assessment under Section 15 for a heinous offence after a delay of over two years from the first production of the juvenile, contrary to the three-month limit prescribed by Section 14(3) – Held, the provision is mandatory, and non-compliance renders the assessment non-est, as it prejudices the juvenile's rights. (Paras 12, 25, 34, 36, 37)

C. Section 15 of JJ Act, 2015 – Preliminary Assessment for Heinous Offences – The JJB assessed the applicant's mental and physical capacity to commit murder, concluding he could understand the consequences – Held, the assessment was invalid due to the delay beyond the statutory period, violating the principles of best interest and non-waiver of rights under Sections 3 and 8 of the Act. (Paras 4, 29, 34, 35)

D. Best Interest and Non-Waiver of Rights – The Juvenile Justice Act emphasizes the best interest of the child and prohibits waiver of rights – Held, the delay in conducting the preliminary assessment violated these principles, causing prejudice to the juvenile and undermining the Act's objective of child-friendly justice. (Paras 9, 10, 23, 33, 37)

E. Mandatory vs. Directory Provisions –

The court analyzed whether Section 14(3) is mandatory or directory, relying on *Bhavnagar University Vs Palitana Sugar Mills* and *Sharif-ud-Din Vs Abdul Gani Lone* – Held, the time limit is mandatory due to its impact on the juvenile's rights and the legislative intent to ensure timely justice. (Paras 12, 13, 18, 34)

Application Allowed.**List of Cases cited:**

1. Bhavnagar University Vs Palitana Sugar Mills Pvt. Ltd., (2003) 2 SCC 111
2. Dattatraya Moreshwar Vs St. of Bombay, AIR 1952 SC 181
3. Sharif-ud-Din Vs Abdul Gani Lone, AIR 1980 SC 303
4. D A Koregaonkar Vs St. of Bombay, AIR 1958 Bom 167
5. Ramkrishnamma Vs Lakshmibayamma, AIR 1958 AP 497
6. Raza Buland Sugar Co. Vs Municipal Board, Rampur, AIR 1965 SC 895

(Delivered by Hon'ble Vinod Diwakar, J.)

1. This judgment is being structured in the following conceptual framework to facilitate the discussion:

I	Prosecution Case in Brief
II	Issue before this Court
III	Submissions
IV	Broad Reasons and Objectives for the Enactment of the Juvenile Justice (Care and Protection of Children) Act, 2015
V	Factual Analysis of the Case
VI	Conclusion

2. I heard Shri A.B.L. Gour, learned Senior Counsel, assisted by Shri Pradeep Kumar Bhardwaj, learned counsel for the

applicant, and Shri Vaibhav Anand Singh, learned A.G.A. for the State Respondent and perused the record.

I. Prosecution Case in Brief

3. As per the prosecution's case, while the complainant party was sowing in the field, the accused party attacked them with a sharp-edged weapon and also resorted to fire. One of the injured died in hospital, whereas three victims sustained serious injuries. The petitioner is also arrayed one of the accused along with six others. On reporting to the police on 11.10.2016, an FIR No.0484 of 2016 under sections 302, 147, 148, 149, 307, 504 & 506 IPC was registered at P.S. Pali, District Lalitpur. After concluding the investigation, the police filed a charge sheet in the instant case on 21.7.2017 before the Juvenile Justice Board qua petitioner.

4. The petitioner claims to be minor at the time of the offence and placed reliance on the High School Certificate dated 15.5.2016 issued by the Board of High School and Intermediate Education, Uttar Pradesh, in which the applicant's date of birth is mentioned as 19.9.1999. The petitioner was 17 years and 22 days old at the time of the incident. In essence, the petitioner was over sixteen years old but less than eighteen years of age; therefore, claim rescue of section 15 read with section 14(3) of the Juvenile Justice (Care and Protection of Children) Act, 2015. The core argument of the petitioner is that the order dated 19.7.2019 passed by the Juvenile Justice Board, Lalitpur, is defective in law and, thus, has no legal sanctity, therefore, the Children's Court, has no competent jurisdiction. Notably, the Juvenile Justice Board, Lalitpur, initially tried the matter, and after it, vide impugned order dated

19.7.2019, holding the juvenile (petitioner) has the physical capacity to commit the murder and could understand the consequence of the offence and the circumstances in which the murder has been committed referred the matter to the Children's Court (POCSO Act), Lalitpur for further trial

II. Issue before this Court

5. Aggrieved by the impugned order dated 19.7.2019, the petitioner has preferred the instant petition to transfer the case to the Juvenile Justice Board, Lalitpur, for further trial in accordance with the provisions of the Act1. In essence, whether the Board was right to invoke the provision of section 15 of the Act in utter disregard of section 14(3) of the Act1 and justified in transferring the case in question for further trial to the Children's Court having jurisdiction to try such offences.

III. Submissions

6. In this background, Shri A.B.L. Gour, learned Senior Counsel assisted by Shri Pradeep Kumar Bhardwaj, learned counsel for the petitioner, outlined his arguments as under:

6.1 On completion of the investigation, when it was revealed that the applicant was less than 18 years of age at the time of the incident, the Investigating Officer submitted the charge sheet before the Juvenile Justice Board qua petitioner and Chief Judicial Magistrate qua other accused persons.

6.2 The petitioner was a juvenile at the time of occurrence of the crime, and therefore, his case shall be tried before the Juvenile Justice Board.

6.3 On 2.2.2017, the petitioner filed an application before the Juvenile Justice Board, Lalitpur, to declare him a juvenile, and therefore, vide order dated 13.4.2017, the Juvenile Justice Board, after considering; a) the petitioner's mother's statement, b) statement of the Principal of Thakur Raghubir Singh Inter College, Lalitpur, c) the record brought by the Principal containing the 10th Class Mark-sheet, and d) Transfer Certificate declared the petitioner as a juvenile in accordance with the Act.

6.4 Almost after a delay of two and half years, by the time the petitioner had completed 18 years, taking recourse of section 14 of the Act1 on the application of the prosecution, the Juvenile Justice Board held an inquiry and based on the primary assessment with regard to the petitioner's mental and physical capacity to commit murder observed that the petitioner had the ability to understand the consequences of the offence and circumstances in which the murder was committed. The preliminary assessment of the Board is in defiance of section 14(3) of the Act1, which mandates the preliminary assessment in cases of heinous offences within a period of three months from the date of the first production of the child before the Board. In the instant case, the child was first produced before the Board on 23.11.2016, and the impugned order was passed on 19.7.2019, after a delay of two years, seven months and twenty seven days. Therefore, the preliminary assessment is erroneous and is bad in law.

6.5 The impugned order is passed mechanically without the application of the judicial mind.

6.6 The mandatory requirement of section 14(3) must be addressed harmoniously with section 15 of the Act1.

7. *Per contra*, learned AGA states that the petitioner is facing a trial in a case in which one person has been brutally murdered in broad daylight, and the assailant party has seriously injured three persons. The preliminary inquiry conducted in pursuance to section 14 of the Act1 is infallible, and the Board has taken all necessary steps to ensure a fair and speedy inquiry. He next contends that the provision of section 14(5) of the Act1 has been followed in letter and spirit, and the preliminary assessment into heinous offences by the Board as contemplated under section 15 of the Act1 has no legally sustainable flaw.

IV. Broad Reasons and Objectives for the Enactment of the Juvenile Justice (Care and Protection of Children) Act, 2015

8. It is judicious to take a comprehensive overview of the statement of objectives and reasons, in addition to the relevant provision of the Act1, before dealing with the facts of the case, which are delineated hereafter in the succeeding paragraphs.

8.1 It was opportune by the parliament to re-enact the Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000) to formulate comprehensive regulations for children entangled in legal conflicts and those requiring care and protection. This initiative meticulously considered the standards delineated in the Convention on the Rights of the Child, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990), and the Hague

Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993) additionally the constitutional scheme guaranteed in Article 15 of the Constitution, besides other provisions, empowers the State to enact specific measures for children under Articles 39(e) and (f), 45, and 47 further ensuring the fulfilment of all children's needs and the protection of their fundamental human rights.

8.2 India's ratification of the United Nations Convention on the Rights of Children on 11th December 1992 obligates state parties to undertake appropriate measures when a child is alleged or accused of violating any penal law. These measures include treating the child in a manner consistent with promoting their sense of dignity and worth, reinforcing respect for the human rights of others, and considering the child's age and the desirability of promoting their reintegration into society.

8.3 The enactment of the Juvenile Justice (Care and Protection of Children) Act in 2000 aimed to safeguard children, subsequently amended in 2006 and 2011 to address implementation gaps and enhance child-friendliness. However, challenges emerged during its implementation, such as increasing incidents of institutional abuse, inadequate facilities, rehabilitation shortcomings, delays in adoption, and ambiguity in roles and responsibilities. These issues underscore the imperative to review the existing law.

8.4 Furthermore, the surge in crimes committed by children aged 16-18 highlights the inadequacy of current provisions under the Juvenile Justice (Care and Protection of Children) Act, 2000.

National Crime Records Bureau data reveals a notable increase in such offences, particularly in heinous categories.

8.5 Addressing the above issues necessitates substantial amendments to the Juvenile Justice (Care and Protection of Children) Act, 2000. Consequently, Act of 2000 was re-enacted and the Juvenile Justice Act, 2015 came into existence. This legislation is designed to encompass general principles for the care and protection of children, procedures for those in need of care and protection or in conflict with the law, rehabilitation measures, social reintegration strategies, adoption processes for orphaned, abandoned, and surrendered children, and provisions against offences targeting children. The overarching goal is to ensure children's proper care, protection, development, treatment, and social reintegration in challenging circumstances, adopting a child-friendly approach with the child's best interest at its core.

9. Section 2 (9) of the Act¹ espouses the definition of the "*best interest of the child*" means the basis for any decision taken regarding the child to ensure the fulfilment of the child's fundamental rights and needs, identity, social well-being and physical, emotional and intellectual development who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence.

10. Section 3 of the Act¹ addresses the inclusive general principles governing the administration of the Act. The relevant excerpt of the general principles which shall have a bearing on the facts of the instant case are reproduced hereinafter,

namely (i) ***Principle of presumption of innocence.***- Any child shall be presumed to be innocent of any mala fide or criminal intent up to the age of eighteen years; (ii) ***Principle of best interest.***- All decisions regarding the child shall be based on the primary consideration that they are in the best interest of the child and to help the child to develop full potential; (iii) ***Positive measures.***- All resources are to be mobilised, including those of family and community, for promoting the well-being, facilitating the development of identity and providing an inclusive and enabling environment to reduce vulnerabilities of children and the need for intervention under this Act; (iv) ***Principle of non-stigmatising semantics.***- Adversarial or accusatory words are not to be used in the processes pertaining to a child; (v) ***Principle of non-waiver of rights.***- No waiver of any of the rights of the child is permissible or valid, whether sought by the child or person acting on behalf of the child, or a Board or a Committee and any non-exercise of a fundamental right shall not amount to waiver; (vi) ***Principle of diversion.***- Measures for dealing with children in conflict with law without resorting to judicial proceedings shall be promoted unless it is in the best interest of the child or the society as a whole; (vii) ***Principles of natural justice.***- Basic procedural standards of fairness shall be adhered to, including the right to a fair hearing, rule against bias and the right to review by all persons or bodies acting in a judicial capacity under this Act¹ besides other fundamental grounds.

11. It is the function and responsibility of the Board to adjudicate and dispose of cases of children in conflict with the law in accordance with the process of inquiry specified in section 14 of the

Act1 in alignment with the Model Rules2. The relevant rules of the Model Rules are reproduced hereinafter:

10. Post-production processes by the Board.- (1) *On production of the child before the Board, the report containing the social background of the child, circumstances of apprehending the child and offence alleged to have been committed by the child as provided by the officers, individuals, agencies producing the child shall be reviewed by the Board and the Board may pass such orders in relation to the child as it deems fit, including orders under sections 17 and 18 of the Act, namely:*

(i) *disposing of the case, if on the consideration of the documents and record submitted at the time of his first appearance, his being in conflict with law appears to be unfounded or where the child is alleged to be involved in petty offenses;*

(5) *In cases of heinous offenses alleged to have been committed by a child, who has completed the age of sixteen years, the Child Welfare Police Officer shall produce the statement of witnesses recorded by him and other documents prepared during the course of investigation within a period of one month from the date of first production of the child before the Board, a copy of which shall also be given to the child or parent or guardian of the child.*

(8) *While examining a child alleged to be in conflict with law and recording his statement during the inquiry under section 14 of the Act, the Board shall address the child in a child-friendly manner in order to put the child at ease and to encourage him to state the facts and circumstances without any fear, not only in respect of the offense which has been*

alleged against the child, but also in respect of the home and social surroundings, and the influence or the offenses to which the child might have been subjected to.

(9) *The Board shall take into account the report containing circumstances of apprehending the child and the offense alleged to have been committed by him and the social investigation report in Form-6 prepared by the Probation Officer or the voluntary or non- governmental organisation, along with the evidence produced by the parties for arriving at a conclusion.*

10A. Preliminary assessment into heinous offenses by Board.

(1) *The Board shall in the first instance determine whether the child is of sixteen years of age or above; if not, it shall proceed as per provisions of section 14 of the Act.*

(2) *For the purpose of conducting a preliminary assessment in case of heinous offenses, the Board may take the assistance of psychologists or psycho-social workers or other experts who have experience of working with children in difficult circumstances. A panel of such experts may be made available by the District Child Protection Unit, whose assistance can be taken by the Board or could be accessed independently.*

(3) *While making the preliminary assessment, the child shall be presumed to be innocent unless proved otherwise.*

(4) *Where the Board, after preliminary assessment under section 15 of the Act, passes an order that there is a need*

for trial of the said child as an adult, it shall assign reasons for the same and the copy of the order shall be provided to the child forthwith.

11. Completion of Inquiry.- (1) *Where after preliminary assessment under section 15 of the Act, in cases of heinous offenses allegedly committed by a child, the Board decides to dispose of the matter, the Board may pass any of the dispositional orders as specified in section 18 of the Act.*

(2) *Before passing an order, the Board shall obtain a social investigation report in Form-6 prepared by the Probation Officer or Child Welfare Officer or social worker as ordered, and take the findings of the report into account.*

(3) *All dispositional orders passed by the Board shall necessarily include an individual care plan in Form-7 for the child in conflict with law concerned, prepared by a Probation Officer or Child Welfare Officer or a recognised voluntary organisation on the basis of interaction with the child and his family, where possible.*

12. Pendency of Inquiry (1) *For the purpose of sub-section (3) of section 16 of the Act, the Board shall maintain a 'Case Monitoring Sheet' of every case and every child in Form-11. The said Form shall be kept at the top of each case file and shall be updated from time to time. The following points shall be considered so far as 'progress of inquiry' mentioned in Form-11 is concerned:*

(i) *time schedule for disposal of the case shall be fixed on the first date of hearing;*

(ii) *scheduled date given in column No.(2) of 'progress of inquiry' shall be the outer limit within which the steps indicated in column (1) are to be completed.*

12. The principal issue before this Court is whether the requirement of section 14(3) of the Act¹ is mandatory or directory. We are not oblivious of the law that when a public functionary is required to do certain things within a specified time, the same is ordinarily directory, but it is equally well settled that when consequences for inaction on the part of the statutory authorities within such specified time is specially provided it must be held to be imperative. The three-judge Bench of the Supreme Court in **Bhavnagar University v. Palitana Sugar Mills Pvt. Ltd. and others**³, held that;

43. *In Sutherland's Statutory Construction, 3rd Edn., Vol. 3, at p. 102 the law is stated as follows:*

"... unless the nature of the act to be performed, or the phraseology of the statute is such that the designation of time must be considered a limitation of the power of the officer".

At p. 107 it is pointed out that a statutory direction to private individuals should generally be considered as mandatory and that the rule is just the opposite to that which obtains with respect to public officers. Again, at p. 109, it is pointed out that often the question as to whether a mandatory or directory construction should be given to a statutory provision may be determined by an expression in the statute itself of the result that shall follow non-compliance with the provision. At p. 111 it is stated as follows:

“As a corollary of the rule outlined above, the fact that no consequences of non-compliance are stated in the statute, has been considered as a factor tending towards a directory construction. But this is only an element to be considered, and is by no means conclusive.”

(See also Crawford on Statutory Construction, Article 269 at p. 535.)

44. In *Dattatraya Moreshwar v. State of Bombay* [(1952) 1 SCC 372 : AIR 1952 SC 181] it was held as under: (AIR p. 185, para 7)

“[G]enerally speaking the provisions of a statute creating public duties are directory and those conferring private rights are imperative. When the provisions of statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and at the same time would not promote the main object of the legislature, it has been the practice of the courts to hold such provisions to be directory only, the neglect of them not affecting the validity of the acts done.”

45. In *Craies on Statute Law*, 8th Edn., at p. 262, it is stated thus:

“... It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed.’ ... that in each case you must look to the subject-matter, consider the importance of the provision and the relation of that provision to the general object intended to

be secured by the Act, and upon a review of the case in that aspect decide whether the enactment is what is called imperative or only directory.”

13. In *Sharif-ud-Din v. Abdul Gani Lone*⁴, the Supreme Court has delineated the difference between a mandatory and directory rule. It was observed by the court that the fact that the statute uses the word shall while laying down a duty is not conclusive on the question whether it is a mandatory or a directory provision. The court has to ascertain the object which the provision of law in question is to subserve its design and the context in which it is enacted. If the object of the law will be defeated by non-compliance with it, it has to be regarded as mandatory. But when a provision of law related to the performance of any public duty and the invalidation of any act done in disregard of that provision causes serious prejudice to those for whose benefit it is enacted and at the same time who have no control over the performance of the duty, such provision should be treated as a directory.

14. The question of whether the statute is mandatory or directory is not capable of generalisation, and in each case, the court should try to understand the legislature's intention by analysing the entire provisions of the enactment and the schemes outlying it.

15. In *D A Koregaonkar v. State of Bombay*⁵, it was held that one of the important tests that must always be employed in order to determine whether a provision is mandatory or directory in character is to consider whether the non-compliance of a particular provision causes inconvenience or injustice and, if it does, then the court would say that, the provision

must be complied with and that it is obligatory in its character.

16. In determining whether a provision of law is directory or mandatory, the prime object must be to ascertain the legislative intent from a consideration of the entire statute, its nature, its object, and the consequences that would result from construing it in one way or the other or in connection with other related statutes. The determination does not depend on the form of the statute.

17. In *Ramkrishnamma v. Lakshmibayamma*⁶, it was held that, in order to determine whether a particular provision is mandatory or directory, it would be necessary to ascertain whether the failure to comply with the requirement affects the very foundation of being validated. It is always difficult to demarcate with any degree of accuracy in a particular case what is mandatory and what is directory, or what is irregularity and what is a nullity. When a question arises as to how far the proceedings are affected by the contravention of any provision, it is necessary to see the scope and object of the particular provision which is said to be violated.

18. The word 'shall' is not always decisive. Regard must be had to the context, subject matter and object of the statutory provision in question in determining whether the same is mandatory or directory. No universal principle of law could be laid on that behalf as to whether a particular provision or enactment shall be considered mandatory or directory. It is the duty of the court to try to get at the real intention of the legislature by carefully analysing the whole scope of the statute /section or phrase under consideration.

19. The central idea for enacting the Act¹ is to make State responsible for ensuring that all needs of children are met and their fundamental human rights are protected, and secondly, as the provisions of Juvenile Justice (Care and Protection of Children) Act, 2000 were ill-equipped to tackle child offenders between the age group of 16-18 years, whose involvement has been increased especially in certain categories of heinous offences to make the provision more rational and to meet the requirement of the society.

20. In *Raza Buland Sugar Co v. Municipal Board, Rampur*⁷, the Supreme Court considered section 131 (3) of the U.P. Municipalities Act, 1916, which read as follows- "The Board shall, thereupon, publish in the manner prescribed in section 94 the proposal framed under sub-section (2) along with a notice in the form set forth in Schedule III". The Supreme Court decided whether the expression 'shall' in the provision was mandatory or directory. The court held that as long as publication was made in substantial compliance with the manner provided in section 94 (3), it would serve the purpose of the mandatory part of the section which provided for publication. It would, therefore, be improper to hold that the manner of publication provided in section 94 (3) was a directory, and so long as there is substantial compliance with that purpose, the mandatory part of section 131 (3) would be served. In arriving at the decision, the Supreme Court observed as follows:

"The question whether a particular provision of a statute which on the face of it appears mandatory, inasmuch as it used the word 'shall' as in the present case, is merely directory cannot be resolved by laying down any general rule

and depends upon the facts of each case and for that purpose the object of the statute in making the provision is the determining factor. The purpose for which the provision has been made and its nature, the intention of the legislature in making the provision, the serious general inconvenience or injustice to a person resulting from whether the provision is read one way or the other, the relation of the particular provision to other provisions dealing with the same subject and other considerations which may arise on the facts of a particular case including the language of the provision, have all to be taken into account in arriving at the conclusion whether a particular provision is mandatory or directory”.

21. The best interest of the child means the basis for any decision taken regarding the child to ensure the fulfilment of his fundamental rights and needs, identity, social well-being, and physical, emotional, and intellectual development shall be taken into consideration when a child is alleged or found to have committed an offence and who was not completed 18 years of age on the date of commission of such offence.

22. A person in conflict with the law is considered a juvenile when a person is below the age of eighteen years, whereas heinous offences include the offences for which the minimum punishment under the Indian Penal Code or any other law for the time being in force is imprisonment for seven years or more.

23. A combined interpretation of section 3 with 8 of the Act1 makes it clear that the principle of best interest and principle of no-waiver of rights shall have the paramount consideration while dealing

with the administration of the Act1. All decisions regarding the child shall be based on the primary consideration that they are in the best interest of the child and to help the child to develop full potential, and no-waiver of any of the rights of the child is permissible or valid, whether sought by the child or person acting on behalf of the child, or a Board or a Committee and any non-exercise of a fundamental right shall not amount to waiver. The child is to be presumed innocent of any malafide or criminal intent until the age of eighteen.

24 . It is the utmost responsibility of the Board, as mandated by section 8(3) of the Act1, to adjudicate and dispose of the case of the children in conflict in accordance with the process of inquiry specified in section 14 of the Act1 and disposing of the matter within three months from the date of the first production of the child before the Juvenile Justice Board. It is the equal responsibility of the court of Magistrate if the court finds that a person has committed an offence and was a child on the date of commission of the offence, it shall forward the child to the Board for passing the appropriate order under section 15 of the Act1.

25. It is a mandatory requirement under section 14 of the Act1 that a preliminary assessment of heinous offences as contemplated under section 15 of the Act1 shall be conducted by the Board within three months from the date of the first production of the child before the Board. Section 15 of the Act1 contemplates that the preliminary assessment into the heinous offences by the Board of a child who has completed or is about the age of sixteen years to have a preliminary assessment with regard to the person's mental and physical capacity to commit

such offence and ability to understand the consequences of the offence, and the Board shall consider the circumstances in which the child in conflict allegedly committed the offence. The Board may take the assistance of experienced psychologists or, psycho-social workers or other experts as it may deem necessary. It's being provided explicitly that the assessment under section 15 of the Act1 shall be completed within the period specified in section 14 of the Act1. The Explanation appended with section 15 of the Act1 clarifies that the preliminary assessment is not a trial, but it is to assess the capacity of such a child to commit and understand the consequences of the alleged offence. In essence, the tenets of a fair trial is the consideration of the best interest of the child and no-waiver of any rights of a child is permissible or valid, whether sought by the child or a Board and maintaining a child-friendly atmosphere are integral parts of the core principles outlined in the Act1.

26. The Model Rules2, framed under the Act1, ponders all the procedural aspects of the provisions of the Act1 to be taken into consideration during the administration of the provisions of the Act1. Rule 9 of the Model Rules2 mandates the production of the child alleged to be in conflict with the law within 24 hours of his being apprehended by the police, along with the report explaining the reasons for the child besides other procedural aspects in this regard.

27. Rule 10 of the Model Rules2 establishes the post-production process by the Board on the production of the child before the Board. In cases of heinous offences alleged to have been committed by the child, who has completed the age of sixteen years, it mandates that the Child

Welfare Police Officer shall produce the statements of witnesses and other documents prepared during the course of investigation within a period of one month from the first production of the child before the Board. The Board shall ensure that if the inquiry is not conducted in alignment with the spirit and object of the Act1, it shall use the power conferred by section 165 of the Evidence Act, 1872 so as to interrogate the child and proceed with the presumptions in favour of the child8. While conducting the preliminary inquiry under section 17 of the Act1, the Board shall address the child in a child-friendly manner in order to put the child at ease and to encourage him to state the facts and circumstances without any fear, not only with respect to the offence but also in respect of the home and social surroundings and influence. The Board shall also take into consideration the report containing the circumstances of apprehending the child and the offence alleged to have been committed by him and the social investigation report prepared by the Probation Officer or the voluntarily non-government organisations9. Before passing an order on preliminary assessment under section 15 of the Act, the Board shall obtain a social investigation report in accordance with **Form-610**.

V. Factual Analysis of the Case

28. In the background of the law discussed hereinabove, the facts of the case are being examined herein after. The documents annexed with the petition were not adequately sufficient to decide the instant case; therefore, the petitioner's counsel was called upon to file the proceedings conducted by the Juvenile Justice Board, Lalitpur, by way of supplementary affidavit, and accordingly,

three supplementary affidavits were filed on i) 5.11.2023, ii) 10.12.2023 & iii) 13.12.2023.

29. The first affidavit dated 5.11.2023, appendices a report dated 19.7.2019 prepared under section 15 of the Act1 by a panel comprised of Assistant Professor, Psychology, Nehru Mahavidyalay, Lalitpur and Associate Professor, Sociology, Nehru Mahavidyalay, Lalitpur to assess the mental and physical capacity of the petitioner to commit murder and an ability to understand the consequences of murder and circumstances of which the alleged crime has been committed. On scrutiny of the preliminary assessment, it's observed that the petitioner was asked about the circumstances in which the alleged offence was committed. It was further observed that the petitioner was mentally and psychologically capable of answering the question posed by the panel. In response to the queries raised by the panel, the petitioner stated that he had been falsely implicated because of the hostility and he was not present at the place of the occurrence when the alleged offence was committed, and finally concluded that the petitioner has the ability to understand the consequence of offence and the circumstances in which he allegedly committed the offence.

30. On perusal of affidavit dated 10.12.2023, it revealed that the Juvenile Justice Board, vide order dated 13.4.2017, declared the petitioner minor in accordance with the Act1 after taking evidence of mother of the petitioner and the Principal of Thakur Raghubir Singh Inter College, Lalitpur, and observed that the petitioner was seventeen years and twenty-two days on the date of commission of alleged offence, and proceeded with the trial.

31. On examination of the affidavit dated 13.12.2023, it outlines that the petitioner was taken into first remand on 23.11.2016; after that, on 21.2.2017, the Board took cognisance of the matter, and after that, on 13.4.2017, the petitioner was declared juvenile. It further stipulates that the matter was listed fifty-seven times before the Juvenile Justice Board, and seven prosecution witnesses were examined during this period. On 28.6.2019, the Assistant Public Prosecutor filed an application stating that the petitioner was over sixteen years old at the time of the commission of the heinous offence, therefore, his psychological evaluation is necessary in the facts- circumstances of the case. The said application was allowed vide order dated 5.7.2019 by the Principal Magistrate, Juvenile Justice Board, Lalitpur, with a finding that in compliance with section 15 of the Act1, the preliminary assessment with regard to the mental and psychological capacity and the ability to understand the consequences of offence has not been conducted by the Board. The Board examined the report submitted by the Panel of Experts and referred the petitioner's case to the Children's Court.

VI. Conclusion

32. As discussed in forgoing paragraphs, section 14(3) of the Act1 statutorily mandates that the preliminary inquiry in case of heinous offences under section 15 of the Act1 shall be concluded by the Board within a period of three months from the date of first production of the child before the Board, even though, if the Board requires further extension of time for completion of inquiry, the same shall be granted by the Chief Judicial Magistrate or, Chief Metropolitan Magistrate, for the reasons recorded in writing. For conducting

the preliminary assessment, Rule 10(5) of the Model Rules² prescribes that the Child Welfare Police Officer shall produce all documents collected during the investigation within a period of one month from the date of the first production of the child before the Board, additionally, Rule 10(8) & (9) of the Model Rules² sets-forth that the Board shall take into consideration the facts and circumstances, surroundings and influences which the child might have been subjected to along with the social investigation report prepared in accordance with **Form-6** by the Probation Officer or voluntarily or Non-Government Organizations along with the evidence produced by the parties for arriving at a just conclusion.

33. Chapter-II of the Act¹ outlines the general principles to be followed in the administration of the Act. The fourth principle indicates that all decisions regarding the child shall be based on the primary consideration that they shall be in the best interest of the child and to help the child to develop full potential. Principle-9 articulates the principle of non-waiver of rights, which stipulates that non-waiver of any child's right is not permissible or valid whether sought by the child or person acting on behalf of the child, a Board or a Committee. Conjoint reading of the principle of best interest and principle of non-waiver of rights articulates that the paramount consideration is the welfare of the child while conducting the proceedings by the Board.

34. On the collective harmonious interpretation of section 14(3) along with sections 3(iv) & (ix), and in conjoint reading with Rule 10(5), (6), (7) & (8), 10(A) and Rule 11(1) & (3) of the Model Rules², it could safely be established that

the proceeding under section 14(3) of the Act¹ shall strictly carry out within the statutory time frame, and if the Board does after three months from the first remand, the same shall be treated as non-est in the eye of law subject to section 14(4) of the Act¹. The Juvenile Justice Board has also failed to take into account the provision provided at the bottom of section 15 of the Act¹, which dictates that the assessment under this section shall be completed within a period specified in section 14 of the Act¹. For the sake of clarity, section 14 of the Act¹ and relevant portion of section 15 of the Act¹ is extracted herein under:

“Section 14. Inquiry by Board regarding child in conflict with law.

(1) Where a child alleged to be in conflict with law is produced before Board, the Board shall hold an inquiry in accordance with the provisions of this Act and may pass such orders in relation to such child as it deems fit under sections 17 and 18 of this Act.

(2) The inquiry under this section shall be completed within a period of four months from the date of first production of the child before the Board, unless the period is extended, for a maximum period of two more months by the Board, having regard to the circumstances of the case and after recording the reasons in writing for such extension.

(3) A preliminary assessment in case of heinous offences under section 15 shall be disposed of by the Board within a period of three months from the date of first production of the child before the Board.

(4) If inquiry by the Board under sub-section (2) for petty offences remains

inconclusive even after the extended period, the proceedings shall stand terminated:

Provided that for serious or heinous offences, in case the Board requires further extension of time for completion of inquiry, the same shall be granted by the Chief Judicial Magistrate or, as the case may be, the Chief Metropolitan Magistrate, for reasons to be recorded in writing.

(5) The Board shall take the following steps to ensure fair and speedy inquiry, namely:-

(a) at the time of initiating the inquiry, the Board shall satisfy itself that the child in conflict with law has not been subjected to any ill-treatment by the police or by any other person, including a lawyer or probation officer and take corrective steps in case of such ill-treatment;

(b) in all cases under the Act, the proceedings shall be conducted in simple manner as possible and care shall be taken to ensure that the child, against whom the proceedings have been instituted, is given child-friendly atmosphere during the proceedings;

(c) every child brought before the Board shall be given the opportunity of being heard and participate in the inquiry;

(d) cases of petty offences, shall be disposed of by the Board through summary proceedings, as per the procedure prescribed under the Code of Criminal Procedure, 1973 (2 of 1974);

(e) inquiry of serious offences shall be disposed of by the Board, by

following the procedure, for trial in summons cases under the Code of Criminal Procedure, 1973 (2 of 1974);

(f) inquiry of heinous offences,-

(i) for child below the age of sixteen years as on the date of commission of an offence shall be disposed of by the Board under clause (e);

(ii) for child above the age of sixteen years as on the date of commission of an offence shall be dealt with in the manner prescribed under section 15."

Section 15.- Preliminary Assessment into the heinous offence by Board

Provided further that the assessment under this section shall be completed within the period specified in section 14.

Emphases Supplied

35. The above-referred clause clarifies that in case of heinous offences committed by a child above the age of 16 years, the Board shall conduct the assessment under section 15 of the Act1 within a period specified under section 14 of the Act1.

36. In the facts stated herein above, the Board has erroneously allowed the application filed by the prosecution for assessing the mental and psychological health of the petitioner after a delay of almost two and half years from the first remand of the petitioner before the Board. Notably, seven prosecution witnesses were

already examined, and the matter had been listed fifty-seven times before the Board; no cogent reason has been assigned in the impugned order, and in fact, the impugned order has been passed on a gross misinterpretation of section 14(4) of the Act1.

37. In the instant case, failure to comply with the provisions of sections 14(3) and 15 of the Act1 would result in an injury or prejudice to the substantial rights of the child and shall occasion a failure of justice. It would result in a serious inconvenience for the promotion of the real aim and objective of the legislation for which the Juvenile Justice (Care and Protection of the Children) Act, 2000 is amended from time to time.

38. In the foregoing discussions, the petition is **allowed**, and the impugned order dated 19.7.2019 is set aside.

39. The petitioner's case shall be tried before the Juvenile Justice Board in accordance with law. The Additional District Judge (POCSO), Lalitpur, is directed, through the District Judge, to remand **Sessions Trial No.01 of 2019** titled as **State v. Shanu Raja**, to the concerned Juvenile Justice Board immediately after receipt of a copy of this order for completion of the trial.

(2024) 4 ILRA 739

**ORIGINAL JURISDICTION
CRIMINAL SIDE**

DATED: ALLAHABAD 01.02.2024

BEFORE

THE HON'BLE ANISH KUMAR GUPTA, J.

Application U/S 482. No. 34899 of 2022

Pushpendra Singh

...Applicant

Versus

State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicant:

SriBinod Kumar Tripathi

Counsel for the Opposite Parties:

G.A., Sri Geetam Singh, Ms. Shweta Singh Rana

Criminal Law - Code of Criminal Procedure,1973 -Section 482- The Protection of Children from Sexual Offences (POCSO) Act 2012 - Section 5/6 - Indian Penal Code,1860 - Sections 363, 366, 376 - Quashing of Charge-Sheet and Cognizance Order Denied - The applicant sought to quash the charge-sheet dated 16.03.2022 and cognizance order dated 13.05.2022 under Sections 363, 366, 376 IPC and Section 5/6 of the POCSO Act - Held, prima facie offence was made out as the victim was a minor on the date of the incident, and no grounds existed for quashing the proceedings. (Paras 2, 27, 28)

B. Determination of Victim's Age - Section 94 of JJ Act, 2015 - The School Leaving Certificate indicated the victim's date of birth as 19.01.2005, establishing her as a minor on 26.12.2021 - Held, under Section 94(2) of the JJ Act, the school certificate takes precedence over the ossification test, which showed the victim's age as about 20 years, rendering the medical examination irrelevant. (Paras 5, 7, 18, 26)

C. Consent of Minor Irrelevant under POCSO Act and IPC - The victim, though claiming to have gone with the applicant willingly and married him, was a minor - Held, as per *Independent Thought Vs U.O.I.*, consent of a minor has no legal consequence for offences under Section 375 IPC (Exception 2) and the POCSO Act, even if married. (Paras 12, 14, 27)

D. Presumption under Section 29 of POCSO Act - The prosecution established a prima facie case under Sections 363, 366, 376 IPC and Section 5/6 of the POCSO Act - Held, Section 29 of the POCSO Act creates a

presumption of guilt against the accused, which the applicant failed to rebut at this stage. (Paras 6, 10, 27)

E. Reliability of Documents for Age Determination – The applicant's reliance on a birth certificate registered post-incident (17.02.2022) was rejected – Held, as per *Jarnail Singh Vs St. of Har.* and *Rishipal Singh Solanki Vs St. of U.P.*, the School Leaving Certificate is prioritized over a belated birth certificate or ossification test for age determination. (Paras 18, 20, 26, 27)

Application Dismissed.

List of Cases cited:

1. Independent Thought Vs U.O.I., (2017) 10 SCC 800
2. P. Yuvaprakash Vs St., 2023 SCC OnLine SC 846
3. Ravinder Singh Gorkhi Vs St. of U.P., (2006) 5 SCC 584
4. Jarnail Singh Vs St. of Har., (2013) 7 SCC 263
5. Rishipal Singh Solanki Vs St. of U.P., (2022) 8 SCC 602
6. Manoj @ Monu @ Vishal Chaudhary Vs St. of Har., (2022) 6 SCC 187
7. Sanjay Vs St. of U.P., 2020 SCC OnLine All 1397
8. Bajrang Lal Vs St. of Rajasthan, 2006 SCC OnLine Raj 1392
9. Madan Gopal Kakkad Vs Naval Dubey, (1992) 3 SCC 204
10. Neeharika Infrastructure Pvt. Ltd. Vs St. of Maharashtra, 2021 SCC OnLine SC 315
11. St. of Har. Vs Bhajan Lal, 1992 Supp (1) SCC 335
12. R.P. Kapoor Vs St. of Punj., AIR 1960 SC 866

13. Praveen Kumar Singh @ Pravin Kumar Vs St. of U.P., Application U/S 482 No. 2941 of 2023

(Delivered by Hon'ble Anish Kumar Gupta, J.)

1. Heard Sri Binod Kumar Tripathi, learned counsel for the applicant, Sri Geetam Singh, learned counsel for opposite party no.2 and Sri Pankaj Srivastava, learned A.G.A. for the State.

2. The instant application under Section 482 Cr.P.C. has been filed seeking quashing the charge-sheet no.33 of 2022 dated 16.03.2022, arising out of Case Crime No.27 of 2022, under Sections 363, 366, 376 I.P.C. and Section 5/6 Protection of Children from Sexual Offences Act, 2012 (hereinafter referred as 'the POCSO Act') Police Station Dholna, District Kasganj.

3. The facts in brief in the instant case are that the opposite party no.2, the father of the victim, had lodged an F.I.R. on 12.02.2022, alleging that on 26.12.2021 when his daughter went to the tubewell, in the evening at 5:00 P.M., from where the accused/applicant herein, namely Puspendra Singh, took away the daughter of the opposite party no.2, in which his brothers Prem Singh and Rajendra Singh have also assisted the applicant herein. On the basis of the aforesaid F.I.R., the investigation was started and the victim was recovered. In her statement under Section 161 Cr.P.C., the victim stated that her age is 17 years and she is educated upto Class VIII and she stated that she had gone alongwith the applicant out of her own free will and thereafter they went to Mathura and from there they went to Allahabad and she has solemnized the court marriage and both are living together as husband and

wife. She further stated that she is pregnant for two months. This statement was recorded on 28.02.2022. In her statement she has further stated that she still want to live with the the applicant herein. In her medical examination, she was found pregnant and her age, as per the X-Ray Examination, was stated to be about 20 years. Such medical examination was conducted on 02.03.2022. During her medical examination, she has stated that her father used to shout at her, therefore, she ran away with the applicant. Subsequently, in her statement under Section 164 Cr.P.C., she claimed that she is 19 years old and had gone with the applicant out of her own free will and she knew Puspendra Singh for about 45 months. Now, she is pregnant and she further stated that she don't want go with her father but she want to go with her husband, namely the applicant herein. After due investigation, having found the victim being minor on the date of incident, the charge-sheet was filed on 16.03.2022 against the applicant for offences under Sections 363, 366 and 376 I.P.C. and Section 5/6 of the POCSO Act. The instant application has been filed challenging the aforesaid charge-sheet dated 16.03.2022 as well as the order dated 13.05.2022 passed by the learned Additional District and Sessions Judge/Special Judge, POCSO Act, Kashganj, whereby the cognizance has been taken by the learned Special Judge on the aforesaid charge-sheet.

4. Learned counsel for the applicant submits that as per the Ossification Report, the age of the victim at the time of incident has been found to be about 20 years and in her statements under Section 161 and 164 Cr.P.C., the victim has categorically stated that she has gone with

the applicant out of her own free will and she has married with the applicant and she is pregnant. After her 164 Cr.P.C., statement, she was sent alongwith her father. However, she has again left the house of her father and came to the applicant and both are living as husband and wife. Therefore, learned counsel for the applicant submits that as per the Ossification Report the victim was found to be a major, therefore, no offence whatsoever is made out against the applicant, as the victim has come alongwith the applicant out of her own free will and there was no force used by the applicant herein and both are adults and they are married and living together as husband and wife. Therefore, learned counsel for the applicant prays for quashing of the entire proceedings of the case. In support of his arguments, learned counsel for the applicant relied upon the judgement of the Apex Court dated 18.07.2023 in the case of P. Yuvaprakash v. State : 2023 SCC OnLine SC 846.

5. Per Contra, learned counsel for the opposite party no.2 submits that as per the school records the date of birth of the victim is 19.01.2005. In support of the same, the opposite party no.2 has filed the counter affidavit annexing School Leaving Certificate issued by Primary Junior High School- Athaiya, District- Kasanj, in which the date of birth of the victim is mentioned as 19.01.2005. The said Certificate has been annexed as CA-1 to the counter affidavit filed by the opposite party no.2. In view of the same, learned counsel for the opposite party no.2 submits that on the date of first incident i.e., 26.12.2021, the victim was minor, therefore, prima facie a case under Sections 363, 366 and 376 I.P.C. and under Section 5/6 of the POCSO Act, has been made out against the applicant herein.

6. Learned counsel for the opposite party no.2 has also relied upon Section 29 of the POCSO Act and submits that as per the provision of Section 29 of the POCSO Act, where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and 9 of this Act, there is a presumption that such person has committed the said offence unless the contrary is proved. Therefore, a presumption against the applicant in view of Section 29 of the POCSO Act is made out. However, it is further submitted that in the instant case when the statement of the victim was to be recorded before the Special Judge, the applicant and the other accused persons have again took away the victim forcibly at the gun point and by assaulting the other family members and making them unconscious, for which another F.I.R. No. 82 of 2023 was lodged by the opposite party no.2 on 01.04.2023, PS- Dholna, District- Kasganj, wherein it has been apprehended that the applicants are threatening to kill the victim if the opposite party no.2 proceeds against them. However, learned counsel for the applicant submits that so far as the second F.I.R., is concerned, the same has already been quashed by this Hon'ble Court in Criminal Misc. Writ Petition No. 15211 of 2023, filed by the applicant and 3 others, vide judgement and order dated 31.10.2023, on the basis of the fact that on the second date of incident the victim had become major which could not be disputed by the opposite party no.2.

7. Learned counsel for opposite party no.2 further submits that as per Section 94 of Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred as 'the Act, 2015'), in the presence of the School Certificate, the age determination

through medical examination is not permissible and such determination of age on the medical examination is of no consequence. Therefore, so far as the instant case is concerned prima facie the victim has been found to be a minor as per the School Leaving Certificate as she was less than 18 years of age on 26.12.2021, and therefore, the charge-sheet has rightly been filed against the applicant herein. Therefore, since a prima facie case has been made out against the applicant in the instant case, there is no ground for quashing of the proceedings before conclusion of the trial at this stage.

8. In the rejoinder affidavit, the applicant has stated that now the marriage between the applicant and the victim has already been registered on 15.04.2023, and admittedly even as per the School Certificate the victim was a major girl and she has duly married to applicant as per her choice. Therefore, the applicant and the victim are adult and they have solemnized their marriage out of their own choice, therefore, no offence can be alleged to have been made against the applicant herein.

9. Learned counsel for opposite party no.2 has relied upon the judgments of this Court dated 29.03.2023 passed in ***Application U/S 482 No.2941 of 2023 (Praveen Kumar Singh @ Pravin Kumar and 2 others Vs. State of U.P. Thru. Prin. Secy Home Deptt, Lko. and another)*** and also the judgment of Apex Court in the case of ***Independent Thought Vs. Union of India and another : 2017 10 SCC 800***.

10. Learned counsel for the State has also submitted that since prima facie on the date of incident in the instant case i.e., on 26.12.2021, the victim was minor as per the school records and prima facie a case has

been made out against the applicant. The charge-sheet has rightly been filed against the applicant for the offences under Sections 363, 366, 376 I.P.C., and Section 5/6 of POCSO Act. Therefore, as per Section 29 of the POCSO Act, there is presumptions against the applicant and prima facie a case has been made out against the applicant. Therefore, there is no ground available for quashing of the instant proceedings at the behest of the applicant.

11. Having heard the submissions made by learned counsels for the parties, this Court has carefully gone through the record of the case.

12. In the case of ***Independent Thought Vs. Union of India and another : (2017) 10 SCC 800***, the Apex Court has observed as under:

20. *As a first step in this direction, child marriages were criminalised by enacting the PCMA in 2006 but no corresponding amendment was made in Section 375 IPC, as it existed in 2006, to decriminalise marital rape of a girl child.*

21. *The National Charter was followed by the National Policy for Children notified on 26-4-2013. The National Policy explicitly recognised in Clause 2.1 that every person below the age of 18 years is a child. Among the Guiding Principles for the National Policy was the recognition that every child has universal, inalienable and indivisible human rights; every child has the right to life, survival, development, education, protection and participation; the best interest of a child is the primary concern in all decisions and actions affecting the child, whether taken by legislative bodies, courts of law,*

administrative authorities, public, private, social, religious or cultural institutions.

23. *The National Plan of Action for Children recognises that the early marriage of girls is one of the factors for neo-natal deaths; early marriage poses various risk for the survival, health and development of young girls and to children born to them and most unfortunately it is also used as a means of trafficking.*

(Emphasis Supplied)

13. While, dealing with the conflict with the provisions of the POCSO Act and the Exception -2 to Section 375 I.P.C., the Apex Court has held as under:-

"107. On a complete assessment of the law and the documentary material, it appears that there are really five options before us : (i) To let the incongruity remain as it is — this does not seem a viable option to us, given that the lives of thousands of young girls are at stake; (ii) To strike down as unconstitutional Exception 2 to Section 375 IPC — in the present case this is also not a viable option since this relief was given up and no such issue was raised; (iii) To reduce the age of consent from 18 years to 15 years — this too is not a viable option and would ultimately be for Parliament to decide; (iv) To bring the Pocso Act in consonance with Exception 2 to Section 375 IPC — this is also not a viable option since it would require not only a retrograde amendment to the Pocso Act but also to several other pro-child statutes; (v) To read Exception 2 to Section 375 IPC in a purposive manner to make it in consonance with the Pocso Act, the spirit of other pro-child legislations and the human rights of a married girl child. Being purposive and harmonious constructionists,

*we are of opinion that this is the only pragmatic option available. Therefore, **we are left with absolutely no other option but to harmonise the system of laws relating to children and require Exception 2 to Section 375 IPC to now be meaningfully read as: "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape."** It is only through this reading that the intent of social justice to the married girl child and the constitutional vision of the Framers of our Constitution can be preserved and protected and perhaps given impetus.*

Relief

88. In view of the above discussion, I am clearly of the opinion that Exception 2 to Section 375 IPC in so far as it relates to a girl Child below 18 years is liable to be struck down on the following grounds:-

iii.....

Sexual intercourse or sexual act by a man with his own wife, the wife not being under 18 years, is not rape."

(Emphasis Supplied)

14. Thus, from the aforesaid declaration of law any sexual relations with a girl of less than 18 years of age would amount to rape, by any person, whether he is her husband or otherwise would amount to offence of rape in terms of Exception -2 to Section 375 I.P.C, as has been laid down by the Apex Court.

15. Therefore, in the instant case, if it is found that the victim was minor on the date of incident, when the first sexual

intercourse (with or without her consent) was committed by the applicant, then the offence of rape shall be made out against the applicant herein.

16. Thus, the primary question arises in the instant case is with regard to the determination of age of the victim and what should be the procedure to determine the age as there is no provision in the POCSO Act or under the I.P.C. for determination of the age of the victim.

17. In **Ravinder Singh Gorkhi v. State of U.P. : (2006) 5 SCC 584**, the Apex Court has observed as under:

21. Determination of the date of birth of a person before a court of law, whether in a civil proceeding or a criminal proceeding, would depend upon the facts and circumstances of each case. **Such a date of birth has to be determined on the basis of the materials on records. It will be a matter of appreciation of evidence adduced by the parties.** Different standards having regard to the provision of Section 35 of the Evidence Act cannot be applied in a civil case or a criminal case.

38. **The age of a person as recorded in the school register or otherwise may be used for various purposes, namely, for obtaining admission; for obtaining an appointment; for contesting election; registration of marriage; obtaining a separate unit under the ceiling laws; and even for the purpose of litigating before a civil forum e.g. necessity of being represented in a court of law by a guardian or where a suit is filed on the ground that the plaintiff being a minor he was not appropriately represented therein or any transaction made on his behalf was void as he was a**

minor. A court of law for the purpose of determining the age of a party to the lis, having regard to the provisions of Section 35 of the Evidence Act will have to apply the same standard. No different standard can be applied in case of an accused as in a case of abduction or rape, or similar offence where the victim or the prosecutrix although might have consented with the accused, if on the basis of the entries made in the register maintained by the school, a judgment of conviction is recorded, the accused would be deprived of his constitutional right under Article 21 of the Constitution, as in that case the accused may unjustly be convicted.

39. We are, therefore, of the opinion that until the age of a person is required to be determined in a manner laid down under a statute, different standard of proof should not be adopted. It is no doubt true that the court must strike a balance. In case of a dispute, the court may appreciate the evidence having regard to the facts and circumstances of the case. It would be a duty of the court of law to accord the benefit to a juvenile, provided he is one. To give the same benefit to a person who in fact is not a juvenile may cause injustice to the victim. In this case, the appellant had never been serious in projecting his plea that he on the date of commission of the offence was a minor. He made such statement for the first time while he was examined under Section 313 of the Code of Criminal Procedure.

(Emphasis Supplied)

18. The Apex Court in **Jarnail Singh vs. State of Haryana : (2013) 7 SCC 263**, has relied upon the provisions of Juvenile Justice (Care and Protection of Children)

Model Rules, 2007, for determination of age of the victim as well. The Apex Court in para '23' has held as under:

"23. Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even of a child who is a victim of crime. For, in our view, there is hardly any difference insofar as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW, PW 6. The manner of determining age conclusively has been expressed in sub-rule (3) of Rule 12 extracted above. Under the aforesaid provision, the age of a child is ascertained by adopting the first available basis out of a number of options postulated in Rule 12(3). If, in the scheme of options under Rule 12(3), an option is expressed in a preceding clause, it has overriding effect over an option expressed in a subsequent clause. The highest rated option available would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation (or equivalent) certificate of the child concerned is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate, Rule 12(3) envisages consideration of the date of birth entered in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive, and no other material is to be relied upon. Only in the absence of such

entry, Rule 12(3) postulates reliance on a birth certificate issued by a corporation or a municipal authority or a panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12(3) postulates the determination of age of the child concerned, on the basis of medical opinion."

(Emphasis Supplied)

19. Thus, the aforesaid opinion expressed by the Apex Court in *Jarnail Singh (supra)*, in the absence of any specific provision for determination of the age of the victim of the offences under the POCSO Act or under the provisions of Indian Penal Code, the provisions of the Juvenile Justice Act, 2015 for the determination of the age of the victim can safely be applied.

20 . In *Rishipal Singh Solanki vs. State of Uttar Pradesh and Others : (2022) 8 SCC 602*, the Apex Court had laid down the following principles with regard to the determination of age of the child in conflict of laws, which reads as under:

"33.6. That it is neither feasible nor desirable to lay down an abstract formula to determine the age of a person. It has to be on the basis of the material on record and on appreciation of evidence adduced by the parties in each case.

33.7. This Court has observed that a hypertechnical approach should not be adopted when evidence is adduced on behalf of the accused in support of the plea that he was a juvenile.

33.8. If two views are possible on the same evidence, the court should lean in favour of holding the accused to be a juvenile in borderline cases. This is in order to ensure that the benefit of the JJ Act, 2015 is made applicable to the juvenile in conflict with law. At the same time, the court should ensure that the JJ Act, 2015 is not misused by persons to escape punishment after having committed serious offences.

33.9. That when the determination of age is on the basis of evidence such as school records, it is necessary that the same would have to be considered as per Section 35 of the Evidence Act, inasmuch as any public or official document maintained in the discharge of official duty would have greater credibility than private documents.

33.10. Any document which is in consonance with public documents, such as matriculation certificate, could be accepted by the court or the JJ Board provided such public document is credible and authentic as per the provisions of the Evidence Act viz. Section 35 and other provisions.

33.11. Ossification test cannot be the sole criterion for age determination and a mechanical view regarding the age of a person cannot be adopted solely on the basis of medical opinion by radiological examination. Such evidence is not conclusive evidence but only a very useful guiding factor to be considered in the absence of documents mentioned in Section 94(2) of the JJ Act, 2015."

(Emphasis Supplied)

21. In *Manoj Alias Monu Alias Vishal Chaudhary vs. State of Haryana*

and Another : (2022) 6 SCC 187, the Apex Court has interpreted the procedure to be followed for determination of the age of a child, in conflict of laws, which reads as under:

"7. The appellant relies upon three documents such as a birth certificate; school leaving certificate and the report of the ossification test in support of his plea of being a juvenile, whereas the State relies upon the family register prescribed by the Family Register Rules.

(i) Birth Certificate

8. First, we shall examine the truthfulness of the birth certificate issued by the Government of Uttar Pradesh wherein the date of birth is mentioned as 13-5-1993. Such date of birth was registered on 19-11-2014 after the filing of the application under Section 7-A of the Act on 7-10-2014.

9. We find that such date of birth certificate has been arranged to claim benefit under the 2000 Act. The date of birth certificate produced by the appellant cannot be relied upon as it was obtained after filing of the application under Section 7-A of the Act on 7-10-2014. As per the birth certificate, the appellant was born at house. Therefore, in terms of Sections 8(1)(a) and 10(1)(i) of the Registration of Births and Deaths Act, 1969 ("the Registration Act"), birth had to be reported to the Registrar by the head of the household or by the nearest relative of the head present in the house or by the oldest adult male person present. In case birth is reported within 30 days, it shall be registered on payment of such late fee as may be prescribed.

There are other conditions for registration of birth after 30 days as well.

10. The relevant provisions of the Act read thus:

"8. Persons required to register births and deaths.—(1) *It shall be the duty of the persons specified below to give or cause to be given, either orally or in writing, according to the best of their knowledge and belief, within such time as may be prescribed, information to the Registrar of the several particulars required to be entered in the forms prescribed by the State Government under sub-section (1) of Section 16,—*

(a) in respect of births and deaths in a house, whether residential or non-residential, not being any place referred to in clauses (b) to (e), the head of the house or, in case more than one household live in the house, the head of the household, the head being the person, who is so recognised by the house or the household, and if he is not present in the house at any time during the period within which the birth or death has to be reported, the nearest relative of the head present in the house, and in the absence of any such person, the oldest adult male person present therein during the said period;

10. Duty of certain persons to notify births and deaths and to certify cause of death.—(1) *It shall be the duty of—*

(i) the midwife or any other medical or health attendant at a birth or death,

(ii) the keeper or the owner of a place set apart for the disposal of dead bodies or any person required by a local authority to be present at such place, or

(iii) any other person whom the State Government may specify in this behalf by his designation.

to notify every birth or death or both at which he or she attended or was present, or which occurred in such areas as may be prescribed, to the Registrar within such time and in such manner as may be prescribed.”

(ii) School leaving certificate

11. Therefore, the courts have rightly not relied upon date of birth certificate which was granted on 19-11-2014 as it was obtained after filing of the application and registered many years after the birth and not immediately or within the prescribed time period.

12. The school leaving certificate (Ext. A-3) has been proved by examining Umesh Kumar, Head Teacher of Adarsh Siksha Sadan, Pinna. As per the statement of the witness, the school was functioning in the year 1999 in Village Kheri, Dudadhari and was shifted to Village Pinna in the year 2009-2010 where he had been working as Head Teacher from the year 2000. As per the certificate, the appellant was a student of such school from 12-7-1999 till 2-7-2003. In cross-examination, he admits that the school is a private school and the father of the appellant has not produced any certificate of the appellant attending the first class. The appellant was admitted directly in the 2nd standard. He admits that Ext. A-1, the admission form, is a loose sheet prepared in his handwriting and it does not bear any

counter-signature of any higher authority. He has not even produced any proof of registration of the school with the Education Department.

(iii) Ossification test report

16. The Medical Board has opined the age of the appellant between 23 to 24 years, when the appellant was examined on 13-5-2016. This report has been relied upon by the learned Additional Sessions Judge to allow the plea of juvenility raised by the appellant. However, it is to be noted that ossification test varies based on individual characteristics and hence its reliability has to be examined in each case.

17. A textbook of Medical Jurisprudence and Toxicology by Modi, 26th Edn., p. 221, delineates the factors relevant to determining the age:

(1) Height and weight.—It is opined that progressive increase in height and weight according to age varies so greatly in individuals that it cannot be depended upon in estimating age in medico-legal cases.

(2) Ossification of bones.—This sign is helpful for determining the age until ossification is completed, for skiagraphy has now made it possible to determine even in living persons, the extent of ossification, and the union of epiphysis in bones.

18. Hence, it cannot be reasonably expected to formulate a uniform standard for determination of the age of the union of epiphysis on account of variations in climatic, dietetic, hereditary and other factors affecting the people of the different States of India.

19. Furthermore, this Court in a judgment in *Jyoti Prakash Rai v. State of Bihar* [*Jyoti Prakash Rai v. State of Bihar*, (2008) 15 SCC 223 : (2009) 3 SCC (Cri) 796] held that the medical report determining the age of a person has never been considered by courts of law as also by the medical scientist to be conclusive in nature. It was also found that though the Act is a beneficial legislation but principles of beneficial legislation are to be applied only for the purpose of interpretation of the statute and not for arriving at a conclusion as to whether a person is juvenile or not."

(Emphasis Supplied)

22. In the judgement of *P. Yuvaprakash (supra)*, which has been heavily relied upon by learned counsel for the applicant, the Apex Court has observed as under:

14. Section 94(2)(iii) of the JJ Act clearly indicates that the date of birth certificate from the school or matriculation or equivalent certificate by the concerned examination board has to be firstly preferred in the absence of which the birth certificate issued by the Corporation or Municipal Authority or Panchayat and it is only thereafter in the absence of these such documents the age is to be determined through "an ossification test" or "any other latest medical age determination test" conducted on the orders of the concerned authority, i.e. Committee or Board or Court. In the present case, concededly, only a transfer certificate and not the date of birth certificate or matriculation or equivalent certificate was considered. Ex. C1, i.e., the school transfer certificate showed the date of birth of the victim as 11.07.1997.

Significantly, the transfer certificate was produced not by the prosecution but instead by the court summoned witness, i.e., CW-1. The burden is always upon the prosecution to establish what it alleges; therefore, the prosecution could not have been fallen back upon a document which it had never relied upon. Furthermore, DW-3, the concerned Revenue Official (Deputy Tahsildar) had stated on oath that the records for the year 1997 in respect to the births and deaths were missing. Since it did not answer to the description of any class of documents mentioned in Section 94(2)(i) as it was a mere transfer certificate, Ex C-1 could not have been relied upon to hold that M was below 18 years at the time of commission of the offence.

19. It is clear from the above narrative that none of the documents produced during the trial answered the description of "the date of birth certificate from the school" or "the matriculation or equivalent certificate" from the concerned examination board or certificate by a corporation, municipal authority or a Panchayat. In these circumstances, it was incumbent for the prosecution to prove through acceptable medical tests/examination that the victim's age was below 18 years as per Section 94(2)(iii) of the JJ Act.

(Emphasis Supplied)

23. The Co-ordinate Bench of this Court in *Sanjay v. State of U.P., : 2020 SCC OnLine All 1397*, has observed as under:

"25. Thus it is clear that for the determination of age of victim, primacy shall be given to Date of Birth (hereinafter referred to as 'DoB') mention in matriculation (or equivalent) certificate, in

absence thereof DoB mention in the school first attended by the victim shall be taken into consideration, in absence of both, the entries made by a corporation or a municipal authority or a panchayat regarding DoB shall be taken into account and finally if none of the aforesaid document containing DoB is available, medical evidence regarding age of victim, shall be taken into consideration. It is further clear that neither merely ocular evidence nor any other document shall be considered for determination of age."

(Emphasis Supplied)

24. With regard to the determination of age of a prosecutrix, the Rajasthan High Court in ***Bajrang Lal v. State of Rajasthan*** : 2006 SCC OnLine Raj 1392, has observed as under:

"19. So far, as the present case is concerned, as mentioned above, there are three types of evidence in respect of the age of the prosecutrix Manohari. Her parents have stated her age to be 12 years at the time of occurrence whereas as per the school certificates, which have been proved by the Headmaster of the Government School, the age of the victim approximately comes to 13 years and 7 months on the date of incident, whereas as per the ossification test it comes in between 15 to 17. years. The trial Court, after considering the evidence relating to her age, as referred above, determined the age of the prosecutrix Manohari as 15 years on the date of occurrence. I have also considered the statements of the parents of the prosecutrix Manohari, who have stated her age as 12 years but (hey have also admitted in their cross-examination that they do not remember her exact date of birth. So far as the documents Exhibit P-12 and Exhibit P-18 are concerned, the age of the victim

from 15 to 17 years is based on ossification test, which cannot be said to be a conclusive evidence but, in fact, it is an evidence of advisory character as observed by the Hon'ble Supreme Court in Madan Gopal Kakkad v. Naval Dubey, (1992) 3 SCC 204. In the present case the date of birth entered in the school certificates of the prosecutrix Manohari has been proved by PW. 10 Shivpal Nai, the Headmaster of the school where the prosecutrix studied. PW. 10 Shivpal Nai, the Headmaster, also brought the originals of Exhibit P-14A to Exhibit P-17. If the statements of the parents of the prosecutrix Manohari are read with the documentary evidence Exhibit P-14A to Exhibit P-17 (her school certificates) relating to the age of the prosecutrix, then certainly her age approximately comes in between 12 to 14 years. As per ossification test of the victim, her age comes from 15 to 17 years. This Court in Ganga Ram's case (Supra), has observed that of-course the ossification test of bones is helpful but even that is not also very sure test as owing to the variations in climatic, dietetic, hereditary and other factors affecting the people of the different States of India. There is not a uniform standard for determination of age of the union of epiphysis for the whole of India. According to Modi the range of error in ossification test may be upto three years. In Narendra Singh's case (Supra), the Madhya Pradesh High Court has also observed that margin of three years could be on either side. As per Exhibit P-12 and Exhibit P-18 the age of the victim is from 15 to 17 years and it can vary on either side to three years. If 15 years age varies to 12 to 15 years then it is corroborated with the statement of her parents as well as school certificates, therefore, school certificates are more reliable. The exact date of birth was not known to the parents

as they are illiterate villagers and it is not possible for each and every such person, who resides in interior parts of the country to know and remember the exact date of birth of their kids but approximate years of age stated by them is nearer to the date of birth of victim i.e., 31.12.1985 mentioned in the school certificates proved by PW. 10 Shivpal Nai, the Headmaster of the school in which the prosecutrix studied. The learned trial Court has not determined the age of the victim taking her date of birth as 31.12.1985 but it determined her age as about 15 years and after considering all the facts and circumstances of the case I do not find any illegality or perversity in the finding of the learned trial Court regarding the age of the prosecutrix Manohari whereby her age has been determined as about 15 years and in view of it, the consent of victim becomes immaterial."

(Emphasis Supplied)

25. Thus, from the aforesaid observations and principles as laid down by the Apex Court and the different High Courts, it is crystal clear that the provisions of the Juvenile Justice Act, 2015, can also safely be applied for determination of the age of a victim of crime, specifically the crimes with regard to sexual offences, which are covered under the provisions of the POCSO Act as well as under the Indian Penal Code. The Act, 2015, provides a complete machinery in Section 94 with regard to the presumption and determination of age, which reads as under:

"Section 94. Presumption and determination of age

(1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other

than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.

(2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining—

*(i) the date of **birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination** Board, if available; **and in the absence thereof;***

(ii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board:

Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person."

(Emphasis Supplied)

26. As per the aforesaid provisions, specifically, the provisions of sub-section (2) of Section 94 of J.J. Act, in the instant case, a prima facie document i.e., the School Leaving Certificate, which has been issued by the Primary Junior High School, Athaiya, Kasganj, according to which the date of birth of the victim is stated to be 19.01.2005. Therefore, once the Date of Birth Certificate from school is available, the requirement of Ossification Test in the instant case is unwarranted. However, if the prosecution ultimately fails to prove the said Birth Certificate issued by school during trial, the Ossification Test would be relevant for determination of the age of the victim. Since, this Court is exercising the powers under Section 482 Cr.P.C., the limitations are that whether prima facie a case, as has been alleged against the applicant is made out or not. From the School Leaving Certificate, which has been produced by the opposite party no.2 as CA-1 to the counter affidavit, it prima facie appears that the date of birth of the victim is 19.01.2005. Therefore, the age determined by the Ossification Test by the medical examination loses its significance. Therefore, on 26.12.2021, undisputedly, on the basis of the aforesaid School Leaving Certificate, the victim was minor, which has also been alleged in her statements under Section 161 as well as 164 Cr.P.C. by the victim that she was minor on the date of incident.

27. In the instant case, the applicant has annexed as Annexure-6, the Birth Certificate of the victim. However, the date of registration of the birth of the victim is 17.02.2022, after the date of incident. Therefore, it appears that the said Birth Certificate has been purposefully obtained by the applicant to get away from the clutches of law and the offence against the

victim, who was minor at the time of the incident. Therefore, the Birth Certificate which has been obtained by the applicant in considered opinion of this Court, is of not much relevance at this stage. Therefore, on the basis of the School Leaving Certificate, the date of birth of the victim is prima facie established to be 19.01.2005. Otherwise also, as per the scheme of Section 94 of the Act, 2015 once the school certificate is available, the other certificates such as the Birth Certificate issued by the Municipal Corporation becomes a secondary evidence. Therefore, it is concluded that on the date of incident the victim was prima facie a minor. The consent of a minor, has no consequence for the offences under the POCSO Act as well as Section 375 I.P.C. Exception- 2, irrespective of the fact that such minor victim had married to the applicant herein. Thus, prima facie offence as alleged against the applicant has been made out. Therefore, there is no ground for interference in the impugned charge-sheet as well as the cognizance order at this stage.

28. For all the reasons stated above and in the light of the judgements of the Apex Court in **Neeharika Infrastructure Pvt. Ltd. vs. State of Maharashtra and Others : 2021 SCC OnLine SC 315, State of Haryana v. Bhajan Lal [State of Haryana v. Bhajan Lal, 1992 Supp (1) SCC 335 : 1992 SCC (Cri) 426] and R. P. Kapoor Vs. State of Punjab, AIR 1960 S.C. 866,** the instant application under Section 482 Cr.P.C. is ***dismissed***

29. However, it is made clear that the observation made herein above shall have no bearing on the trial of the case, which shall be concluded on the basis of the evidence led during trial

19412 of 2022 (*Ramdhari Pal vs Ajay Yadav*), u/s 138 N.I. Act, P.S. Kotwali, District Jaunpur

3. Contention of learned counsel for the applicant is that though this complaint under N.I. Act was filed in the year 2022, but the trial could not yet be concluded. It is further submitted that as per Section 143(2) of N.I. Act, the trial for the offence under N.I. Act should be conducted on day to day basis and it is further provided u/s 143(3) that the trial should be concluded within six months from the date of filing of the complaint.

4. The Apex Court in the case of ***Indian Bank Association and others vs. Union of India and others; (2014) 5 SCC 590***, has issued direction for expeditious disposal of the cases under N.I. Act. Paragraph Nos. 22, 23 and 24 of the aforesaid judgement are being

"22. We notice, considering all those aspects, few High Courts of the country have laid down certain procedures for speedy disposal of cases under Section 138 of the Negotiable Instruments Act. Reference, in this connection, may be made to the judgments of the Bombay High Court in *KSL and Industries Ltd. v. Mannalal Khandelwal, Indo International Ltd. v. State of Maharashtra (2005) 44 Civil CC and Harischandra Biyani v. Stock Holding Corpn. of India Ltd. (2006) 4 MhLJ 381*, the judgment of the Calcutta High Court in *Magma Leasing Ltd. v. State of West Bengal and others (2007) 3 CHN 574* and the judgment of the Delhi High Court in *Rajesh Agarwal v. State and another (2010) ILR 6 Delhi 610*.

Directions

23. Many of the directions given by the various High Courts, in our view,

are worthy of emulation by the Criminal Courts all over the country dealing with cases under Section 138 of the Negotiable Instruments Act, for which the following directions are being given :-

23.1. The Metropolitan Magistrate/Judicial Magistrate (MM/JM), on the day when the complaint under Section 138 of the Act is presented, shall scrutinize the complaint and, if the complaint is accompanied by the affidavit, and the affidavit and the documents, if any, are found to be in order, take cognizance and direct issuance of summons.

23.2. The MM/JM should adopt a pragmatic and realistic approach while issuing summons. Summons must be properly addressed and sent by post as well as by e-mail address got from the complainant. The court, in appropriate cases, may take the assistance of the police or the nearby court to serve notice to the accused. For notice of appearance, a short date be fixed. If the summons is received back unserved, immediate follow-up action be taken.

23.3. The court may indicate in the summon that if the accused makes an application for compounding of offences at the first hearing of the case and, if such an application is made, the court may pass appropriate orders at the earliest.

23.4. The court should direct the accused, when he appears to furnish a bail bond, to ensure his appearance during trial and ask him to take notice under Section 251 Cr.P.C. to enable him to enter his plea of defence and fix the case for defence evidence, unless an application is made by the accused under Section 145(2) for recalling a witness for cross-examination.

23.5. *The court concerned must ensure that examination-in-chief, cross-examination and re-examination of the complainant must be conducted within three months of assigning the case. The court has option of accepting affidavits of the witnesses, instead of examining them in the court. The witnesses to the complaint and accused must be available for cross-examination as and when there is direction to this effect by the court.*

24. *We, therefore, direct all the criminal courts in the country dealing with Section 138 cases to follow the above-mentioned procedures for speedy and expeditious disposal of cases falling under Section 138 of the Negotiable Instruments Act. Writ Petition is, accordingly, disposed of, as above."*

5. The Apex Court in the case of ***In Re: Expeditious Trial of Cases under Section 138 N.I. Act, 1881, reported in 2021 SCC Online 325*** has already issued following directions for expeditious trial u/s 138 N.I. Act as under:-

24. The upshot of the above discussion leads us to the following conclusions:

1) *The High Courts are requested to issue practice directions to the Magistrates to record reasons before converting trial of complaints under Section 138 of the Act from summary trial to summons trial.*

2) *Inquiry shall be conducted on receipt of complaints under Section 138 of the Act to arrive at sufficient grounds to proceed against the accused, when such accused resides beyond the territorial jurisdiction of the court.*

3) *For the conduct of inquiry under Section 202 of the Code, evidence of witnesses on behalf of the complainant shall be permitted to be taken on affidavit. In suitable cases, the Magistrate can restrict the inquiry to examination of documents without insisting for examination of witnesses.*

4) *We recommend that suitable amendments be made to the Act for provision of one trial against a person for multiple offences under Section 138 of the Act committed within a period of 12 months, notwithstanding the restriction in Section 219 of the Code.*

5) *The High Courts are requested to issue practice directions to the Trial Courts to treat service of summons in one complaint under Section 138 forming part of a transaction, as deemed service in respect of all the complaints filed before the same court relating to dishonour of cheques issued as part of the said transaction.*

6) *Judgments of this Court in Adalat Prasad (supra) and Subramaniam Sethuraman (supra) have interpreted the law correctly and we reiterate that there is no inherent power of Trial Courts to review or recall the issue of summons. This does not affect the power of the Trial Court under Section 322 of the Code to revisit the order of issue of process in case it is brought to the court's notice that it lacks jurisdiction to try the complaint.*

7) *Section 258 of the Code is not applicable to complaints under Section 138 of the Act and findings to the contrary in Meters and Instruments (supra) do not lay down correct law. To conclusively deal with this aspect, amendment to the Act*

empowering the Trial Courts to reconsider/recall summons in respect of complaints under Section 138 shall be considered by the Committee constituted by an order of this Court dated 10.03.2021.

8) All other points, which have been raised by the Amici Curiae in their preliminary report and written submissions and not considered herein, shall be the subject matter of deliberation by the aforementioned Committee. Any other issue relating to expeditious disposal of complaints under Section 138 of the Act shall also be considered by the Committee.

6. From the above mentioned judgements of Hon'ble Apex Court, it is clear that the Apex Court for expeditious disposal of cases under N.I. Act, has issued several directions which the concerned court/Magistrate has to follow while deciding the cases under N.I. Act. From the observations of the Apex Court as well as analysis of Sections 138 & 143 of N.I. Act, it is expedient that all the proceedings under N.I. Act should be concluded expeditiously without going into unnecessary technicality.

7. Considering the aforesaid judgements, this Court directs the Additional Civil Judge (J.D.) Ist/Judicial Magistrate, Jaunpur to conclude the trial of complaint case No. 19412 of 2022 (Ramdhari Pal vs Ajay Yadav), u/s 138 N.I. Act, P.S. Kotwali, District Jaunpur, keeping in mind the direction of the Apex Court in above mentioned cases, expeditiously preferably within a period of six months from the date of receipt of certified copy of this order, strictly in accordance with statutory provision of Sections 143(2) and 143(3) of the N.I. Act.

8. With the aforesaid direction, the application is **disposed of**.

(2024) 4 ILRA 756

**ORIGINAL JURISDICTION
CRIMINAL SIDE**

DATED: ALLAHABAD 22.12.2023

BEFORE

THE HON'BLE GAJENDRA KUMAR, J.

Application U/S 482. No. 40581 of 2023

**M/s Shiv Shakti Infra Vision Pvt. Ltd. &
Anr. ...Applicants**

Versus

State of U.P. & Anr. ...Opposite Parties

Counsel for the Applicants:

Sri Rahul Chaudhary, Sri Aman Kumar Dwivedi

Counsel for the Opposite Parties:

G.A.

Criminal Law - Code of Criminal Procedure, 1973 -Section 482- Quashing of Summoning Order Denied – The applicants sought to quash the summoning order dated 13.06.2022, non-bailable warrant issued on 18.04.2023, and proceedings in Complaint Case No. 4147 of 2019 (now No. 208 of 2023) under Section 138 of the Negotiable Instruments Act, 1881 – Held, no illegality or abuse of process was found in the impugned order, and the application was dismissed. (Paras 2, 19, 20)

B. Section 138 and 141 of N.I. Act – Liability of Authorized Signatory – The applicant company (drawer) and its authorized signatory were summoned for dishonour of a cheque – Held, as per *Aneeta Hada Vs Godfather Travels and Tours Pvt. Ltd.*, the authorized signatory of a company is considered a “drawer” under Section 7, and specific averments under Section 141 are not required for their liability. (Paras 6, 7, 13, 14)

C. Section 141 of N.I. Act – Vicarious Liability – The complaint did not explicitly

invoke Section 141 or make specific averments against the authorized signatory – Held, as per *S.M.S. Pharmaceuticals Ltd. Vs Neeta Bhalla* and *K.K. Ahuja Vs VSK. Vora*, no specific averments are needed for the signatory of a dishonoured cheque, who is prima facie liable under Section 141(2). (Paras 8, 9, 10, 11, 13)

D. Prima Facie Case under Section 138 –

The court found that a prima facie case was established against the applicants based on the dishonour of a cheque for Rs. 20,90,770/- and failure to pay after demand notice – Held, the summoning order was justified, and the applicants could rebut the presumption under Section 139 during trial. (Paras 14, 15)

E. Judicial Application of Mind – The applicants failed to demonstrate any illegality or perversity in the summoning order – Held, the court below applied judicial mind, and no grounds existed to interfere with the order under Section 482 Cr.P.C. (Paras 18, 19)

Application Dismissed.

List of Cases cited:

1. Aneeta Hada Vs Godfather Travels and Tours Pvt. Ltd., (2012) 5 SCC 661
2. S.M.S. Pharmaceuticals Ltd. Vs Neeta Bhalla, 2005 SCC (Cri) 1975
3. K.K. Ahuja Vs VSK. Vora, (2009) 10 SCC 48
4. National Small Industries Corp. Ltd. Vs Harmeet Singh Paintal, (2010) 3 SCC 330
5. Sunita Palita Vs M/s Panchami Stone Quarry, 2022 LiveLaw (SC) 647
6. GHCL Employees Stock Option Trust Vs Indian Infoline Ltd., (2013) 4 SCC 505
7. S.K. Alagh Vs St. of U.P., (2008) 5 SCC 662
8. Sarad Kumar Sanghi Vs Sangita Rane, (2015) 12 SCC 781
9. Sushil Seth Vs St. of Arunachal Pradesh, (2020) 3 SCC 240

10. Roop Mani Pandey Vs St. of U.P., Application u/s 482 Cr.P.C. No. 3336 of 2014, order dated 16.02.2016

11. Dayle De'Souza Vs Government of India, Criminal Appeal a/o S.L.P. (Crl.) No. 3913 of 2020, order dated 29.10.2021

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

1. Heard learned counsel for the applicants and learned AGA for the State.

2. The present application u/s 482 Cr.P.C. has been filed by the applicants with the prayer to quash the summoning order dated 13.06.2022 and order dated 18.04.2023 which continued till 16.10.2023 where by non bailable warrant was issued as well as the entire proceeding of Complaint Case No.4147 of 2019 (New Complaint Case No.208 of 2023), under Section 138 of N.I. Act, pending in the court of Additional Court No.1, Gautam Buddh Nagar.

3. In brief, facts of the case are as that the opposite party no.2 filed a complaint against the applicant no.1, the company i.e. M/S. Shiv Shakti Infra Vision Private Limited and applicant no.2 as the Authorized Signatory of the said company, on account of dishonour of cheque being Cheque no.014022 dated 1st June, 2019 for the sum of Rs.20,90,770/- drawn by the applicant no.1. The said cheque was given to opposite party no.2 in discharge of liability pursuant to an agreement entered into between the applicants and opposite party no.2 and the said cheque was also returned unpaid for the reason that “payment stopped by the drawer”. It is further alleged that despite receipt of demand/legal notice, the drawer of the cheque failed to make the payment and thus a complaint under Section 138 N.I. Act was

filed by the opposite party no.2. In support of the complaint, the opposite party no.2 filed his statement under Section 200 Cr.P.C. dated 06.12.2019 in form of an affidavit. The court of Additional Chief Judicial Magistrate, Court No.2, Gautam Buddh Nagar vide order dated 13th June, 2022 took cognizance of the offence under Section 138 of N.I. Act against the applicants and issued summons to the applicants. It is further alleged that opposite party no.2 provided the wrong address in the complaint which was rectified by him in the month of June, 2023 by seeking an amendment in the complaint regarding the correct address, which was allowed by the court on 16.06.2023. When the applicants came to know about the present proceeding without further delay, the applicant company approached the Court by means of application under Section 305 Cr.P.C. and further made an application for the cancellation of N.B.W. and without further delay this application under Section 482 Cr.P.C. has been filed whereby summoning order dated 13.06.2022 is challenged.

4. Learned counsel for the applicants submits that the applicants are innocent and have been falsely implicated in the present matter due to ulterior motive. Further submission is that as per the opposite party no.2, the applicant no.2 is the Authorized Signatory of the applicant no.1 the company namely M/S. Shiv Shakti Infra Vision Private Limited and applicant no.2 admittedly is not the drawer of the cheque. Further submission is that the applicant no.2 has neither been prosecuted nor summoned in his capacity as a director of the applicant no.1, the company since there are no averments or pleadings in the complaint in accordance with Section 141 of N.I. Act. Further submission is that applicants being aggrieved by the

summoning order dated 13th June, 2022 and the pleadings emanating therefrom are preferring the present application for quashing the summoning order. Further submission is that the court below has erred in law in not appreciating that the applicant no.2 is not the drawer of the cheque in question and thus no criminal liability can be fastened upon him under Section 138 of N.I. Act. Further submission is that as the opposite party no.2/complainant has not made the directors of applicant no.1/accused no.1 as accused and has not pleaded essential ingredients of Section 141 of N.I. Act, thus, the summoning order should not have been passed against the applicants. The opposite party no.2/complainant has not even invoked Section 141 of N.I. Act and the complaint lacks essential ingredients of Section 141 of N.I. Act and in view of this, the summoning order against the applicants is bad in law. Even in summoning order dated 13th June, 2022 there is no reference to Section 141 of N.I. Act, thus, the applicants should not have been summoned, merely because the applicant no.2 is the Signatory to the cheque and is neither the drawer of the cheque nor any allegations have been made against him in accordance with Section 141 of N.I. Act. It is further submitted that it is a settled proposition of law that the offence under Section 138 of N.I. Act is capable of being committed only by the drawer of the cheque and every person signing a cheque on behalf of the company on whose account the cheque is drawn does not become the drawer of the cheque. Such a signatory only a person duly authorized to sign the cheque on behalf of the company/drawer of the cheque. It is further submitted that criminal liability on account of dishonour of cheque primarily falls on the drawer of the cheque and if the drawer is a company, then drawer

company and is extended to the officers of the company in view of Section 141 of N.I. Act but does not extended to the authorized signatory of the cheque, who is merely authorized to sign the cheque on behalf of the drawer company. It is further submitted that the opposite party no.2/complainant has not made specific averments as contemplated by Section 141 of N.I. Act against the applicant no.2 and in absence of specific averments, the cognizance of the offence under Section 138 of N.I. Act against the applicant no.2 is bad in law. The vicarious liability on the officer of the company can be fastened only under Section 141 of N.I. Act and non-invocation of Section 141 of N.I. Act renders the summoning order, bad in law as against the applicants. In support of his submissions, learned counsel for the applicants has placed reliance upon the judgements of Hon'ble Apex Court in the cases of ***GHCL Employees Stock Option Trust Vs. Indian Infoline Ltd., (2013) 4 Supreme Court Cases 505, S.K. Alagh Vs. State of U.P. And others (2008) 5 Supreme Court Cases 662, Sarad Kumar Sanghi Vs. Sangita Rane (2015) 12 Supreme Court Cases 781, Sushil Seth and another Vs. State of Arunachal Pradesh and others, (2020) 3 Supreme Court Cases 240, Roop Mani Pandey Vs. State of U.P. and another passed in Application u/s 482 Cr.P.C. No.3336 of 2014 vide order dated 16.02.2016, Dayle De'souza Vs. Government of India passed in Criminal Appeal a/o S.L.P. (Crl.) No.3913 of 2020 dated 29th October, 2021 and Aneeta Hada Vs Godfather Travels and Tours Pvt. Ltd, (2012) 5 Supreme Court Cases 661.***

5. On the other hand, learned AGA has opposed the prayer and submitted that there is no illegality and perversity in the

impugned order. A prima facie case is made out against the applicants. Applicant no.1 is the company, who has been summoned by virtue of its role as a drawer of cheque and applicant no.2 is a signatory of the cheque. Signatory of the cheque is included in the definition of drawer as given in Section 7 of the N.I. Act. So far as the specific averments in the complaint are concerned, there is no need for the same as it is apparent that authorized signatory of the cheque is vicariously liable for the act of the company i.e. applicant no.1.

6. From the perusal of the record and submissions made by the rival parties, it is apparent that so far as the argument of the learned counsel for the applicants is concerned with regard to the effect that applicant no.2 is not drawer of the cheque but merely an authorized signatory of the cheque, under the scheme of Section 141 of N.I. Act only drawer of the cheque i.e company is liable and signatory is not liable as he has merely signed the cheque for no debt/liability of his own. In this respect, it will be pertinent to refer to the case law, Aneeta Hada (supra), in which in paragraph no.20 it has been clarified that an authorized signatory of a company is a drawer, which read as under:-

“20. The section 7 of the Act defines “drawer” to mean the maker of a bill of exchange or a cheque. An authorized signatory of a company becomes a drawer as he has been authorized to do so in respect of the account maintained by the company.”

7. In view of the above, as held by the Hon'ble Supreme Court that the expression “drawer” under Section 7 and Section 141 of N.I. Act covers “the

authorized signatory” of a company, thus the argument in this regard is not sustainable.

8. So far as the argument regarding the specific averments have not been made in the complaint which are necessary for fastening vicarious liability upon the authorized signatory of the cheque is concerned, in this regard it will be pertinent to refer to ***S.M.S. Pharmaceutical Ltd. Vs. Neeta Bhalla and another 2005 SCC (CrL) 1975***, in which the Hon'ble Apex Court has held and observed that:-

*“To sum up, there is almost unanimous judicial opinion that necessary averments ought to be contained in a complaint before a persons can be subjected to criminal process. A liability under Section141 of the Act is sought to be fastened vicariously on a person connected with a Company, the principal accused being the company itself. It is a departure from the rule in criminal law against vicarious liability. A clear case should be spelled out in the complaint against the person sought to be made liable Section141 of the Act contains the requirements for making a person liable under the said provision. That respondent falls within parameters of Section141 has to be spelled out. A complaint has to be examined by the Magistrate in the first instance on the basis of averments contained therein. If the Magistrate is satisfied that there are averments which bring the case within Section141 he would issue the process. We have seen that merely being described as a director in a company is not sufficient to satisfy the requirement of Section141. Even a non director can be liable under Section141 of the Act. **The averments in the complaint would also serve the purpose that the person sought to be made***

liable would know what is the case which is alleged against him. This will enable him to meet the case at the trial.

In view of the above discussion, our answers to the questions posed in the Reference are as under:

(a) It is necessary to specifically aver in a complaint under Section141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential requirement of Section141 and has to be made in a complaint. Without this averment being made in a complaint, the requirements of Section141 cannot be said to be satisfied.

(b) The answer to question posed in sub-para (b) has to be in negative. Merely being a director of a company is not sufficient to make the person liable under Section141 of the Act. A director in a company cannot be deemed to be in charge of and responsible to the company for conduct of its business. The requirement of Section141 is that the person sought to be made liable should be in charge of and responsible for the conduct of the business of the company at the relevant time. This has to be averred as a fact as there is no deemed liability of a director in such cases.

(c) The answer to question (c) has to be in affirmative. The question notes that the Managing Director or Joint Managing Director would be admittedly in charge of the company and responsible to the company for conduct of its business. When that is so, holders of such positions in a company become liable under Section141 of the Act. By virtue of the office they hold as Managing Director or

*Joint Managing Director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered under Section 141. **So far as signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under sub-section (2) of Section 141.***

9. In the case of **K.K. Ahuja Vs. V.K. Vora and another, 2 (2009) 10 SCC 48**, it has been held that:-

10. The position under Section 141 of the N.I. Act can be summarized thus:-

“(ii) In the case of a director or an officer of the company who signed the cheque on behalf of the company, there is no need to make a specific averment that he was in charge of and was responsible to the company, for the conduct of the business of the company or make any specific allegation about consent, connivance or negligence. The very fact that the dishonoured cheque was signed by him on behalf of the company, would give rise to responsibility under sub-section (2) of Section 141.”

11. In the case of **National Small Industries Corp. Ltd. Vs. Harmeet Singh Paintal and another, (2010) 3 SCC 330**, it has been held that:-

“25) From the above discussion, the following principles emerge:-

(vi) If accused is a Director or an Officer of a company who signed the cheques on behalf of the company then also it is not necessary to make specific averment in complaint.”

12. In the case of **Sunita Palita and others Vs. M/s Panchami Stone Quarry,**

2022 Livelaw (SC) 647, it has been held as under:-

*“43. Liability depends on the role one plays in the affairs of a company and not on designation or status alone as held by this Court in S.M.S. Pharmaceuticals Ltd. (supra). The materials on record clearly show that these Appellants were independent, non-executive Directors of the company. As held by this Court in Pooja Ravinder Devidasani v.State of Maharashtra and Anr. (supra) a non-Executive Director is not involved in the day-to-day affairs of the company or in the running of its business. Such Director is in no way responsible for the day-to-day running of the Accused Company. **Moreover, when a complaint is filed against a Director of the company, who is not the signatory of the dishonoured cheque, specific averments have to be made in the pleadings to substantiate the contention in the complaint, that such Director was in charge of and responsible for conduct of the business of the Company or the Company, unless such Director is the designated Managing Director or Joint Managing Director who would obviously be responsible for the company and/or its business and affairs.***

44. The High Court correctly observed that three categories of persons were covered by Section 141 of the NI Act – the company who committed the offence as alleged; everyone who was in-charge of or was responsible for the business of the company and any other person who was a Director or a Manager or a Secretary or Officer of the Company with whose connivance or due to whose neglect the company had committed the offence.

49. *For the reasons discussed above, the appeal is allowed. The judgment and order of the High Court is set aside. Criminal Case No. AC/121/2017 pending under Section 138/141 of the NI Act in the Court of Judicial Magistrate, 2nd Court, Suri Birbhum is quashed in so far as these Appellants are concerned. It is made clear that the proceedings may continue against the other accused in the criminal case, including in particular the Accused Company, its Managing Director/ Additional Managing Director and/or the signatory of the cheque in question."*

13. In view of the above, legal position is settled and certain that in respect of authorized signatory of the cheque, specific averments are not necessary to be made in the complaint as the very objective/purpose of averments to be made in the complaint is that the person sought to be made liable would know, what is the case, which is alleged against him and this will enable him to meet the case at trial.

14. In this complaint, the applicant no.2 has been shown as an authorized signatory of the company i.e. applicant no.1. There is no confusion regarding his role/act in drawing/signing the cheque for which he has been prima facie found liable and resultantly has been summoned for the offence under Section 138 of N.I. Act. It is needless to emphasize that the Court taking cognizance of the complaint under Section 138 of the Act is required to be satisfied as to whether a prima facie case is made out under the said provision. The drawer of the cheque undoubtedly gets an opportunity under Section 139 of the Act to rebut the presumption at the trial.

15. So far as the non invoking of section 141 of N.I. Act is concerned, it is

made clear that in case of dishonour of cheque Section 138 of N.I. Act is charging/penal section and Section 141 of the N.I. Act is only enabling section for fastening the vicarious liability upon the accused in case where the offence under Section 138 of N.I. Act is committed by the company. As such offence under Section 138 of N.I. Act is committed by the company. It is a penal provision wherein if a person draws a cheque on an account maintained by him with the Banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part of any debt or other liability, is returned by the Bank unpaid, on the ground either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence.

16. At this juncture, it may be referred to Section 141 of N.I. Act, which deals with offences by companies. As the spine of the controversy rests on the said provision, it is reproduced below:

"141. Offences by companies. –

(1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly;

Provided that nothing contained in this sub-section shall render any person

liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:

Provided further that where a person is nominated as a Director of a Company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act, has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

17. On a reading of the said provision, it is plain as day that if a person who commits offence under Section 138 of the Act is a company, the company as well as every person/officer in charge of and responsible to the company for the conduct of business of the company at the time of commission of offence is deemed to be guilty of the offence. The first proviso carves out under what circumstances the criminal liability would not be fastened. Sub-section (2) enlarges the criminal liability by incorporating the concepts of connivance, negligence and consent that engulfs many categories of officers. It is

worth noting that in both the provisions, there is a 'deemed' concept of criminal liability.

18. Counsel for the applicants has not been able to point out any such illegality much less than any abuse of court's process which may persuade this Court to interfere in the impugned order. The impugned order reflects judicial application of mind. There appears no good ground to castigate the impugned order. The view taken by the court below seems to be correct and even this Court does not have reason to take a different view in the matter.

19. Having regard to the facts and circumstances of the case, after perusing the impugned order as well as the materials brought on record and having considered the submissions made by the learned counsel for the parties, I do not find any good ground to quash the impugned order. Hence, the prayer made in the application is refused.

20. With the aforesaid observations, the present application u/s 482 Cr.P.C. is devoid of merits and is, accordingly, dismissed.

(2024) 4 ILRA 763

ORIGINAL JURISDICTION
CIVIL SIDE

DATED: ALLAHABAD 12.03.2024
BEFORE

THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Matters U/A 227 No.602 of 2024 (Civil)

Piyush Shukla

...Petitioner

Versus

Ram Kumar Gupta

...Respondent

Counsel for the Petitioner:
Sri Prakhar Tandon

Counsel for the Respondent:

Sri Shivkant Singh

(A) Civil Law - The Code of Civil Procedure, 1908 - Order 15 Rule 5 - Revision - Provincial Small Causes Court Act, 1887 - Section 25 - Revision of decrees and orders of Courts of Small Causes - Order of the Revisional Court suffers from patent illegality and irregularity if it decides the revision without addressing objections regarding its maintainability. (Para 9-10)

Landlord filed SCC Suit - Tenant ejectment - Recovery of arrears and damages of rent for use and occupation - Tenant accused of rent default - Objection to landlord's application under Order 15 Rule 5 CPC - Initial ex parte proceedings - Disputes regarding rent deposits and interests - hence petition. (Para 3, 4, 5)

HELD: - Revisional Court misconstrued and misinterpreted the order of this Court and ignored its mandate. Order dated 19.12.2023 by the Revisional Court set aside due to non-compliance with procedural mandates. Revisional Court is directed to decide the objections regarding maintainability before addressing the merits within three months. (Para 9-10)

Petition allowed. (E-7)

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

1. Heard Shri Prakhar Tandon, learned counsel for the petitioner and Shri Shivakant Singh, learned counsel for the respondent.

2. This petition under Article 227 of the Constitution of India has been filed for setting aside the order dated 19.12.2023 passed by the learned Addl. District Judge, Court No. 1, Kanpur Nagar in SCC Revision No. 240 of 2022 (Ram Kumar Gupta versus Piyush Shukla) whereby and whereunder, the revision has been allowed

and the order dated 17.8.2022 passed by the learned Judge, Small Causes Court whereby deferring the consideration of the application under Order 15 Rule 5 CPC moved by the landlord/respondent after receipt of evidence at the time of final judgment has been set aside and direction has been issued to proceed with the suit only after deciding the application under Order 15 Rule 5 CPC.

3. The facts giving rise to the controversy involved between the parties lie in a narrow compass. The plaintiff/respondent has instituted a SCC Suit No. 280 of 2017 for ejectment of the tenant/petitioner and for recovery of arrears of rent and damages for use and occupation. The rate of rent alleged by the landlord/respondent in the plaint is Rs.1500/- per month. The tenant/petitioner has appeared in the suit proceedings and has filed his written statement on 27.10.2018. The landlord/respondent filed an application under Order 15 Rule 5 CPC alleging that the tenant/petitioner has committed default in the payment of extra rent and prayed for striking off the defence of the tenant/petitioner. The said application under Order 15 Rule 5 CPC was objected to by the tenant/petitioner by filing objections. In the objections, it was clearly stated that the suit was instituted on 9.11.2017. When the tenant/petitioner appeared in the proceedings, the suit was proceeding exparte against him. After recall of the order to proceed exparte, the tenant/petitioner on 31.8.2018 submitted the tender of Rs.57,250/- to be passed. The tender was passed on 27.9.2018 and the amount was deposited by the tenant/petitioner on 1.10.2018. It was also stated that the landlord/respondent had demanded rent from 1.2.2016 to 31.12.2018 i.e. 35 months. The rent works

out to Rs.52,500/-. Interest @ 9% per annum works out to Rs.4,725/- total works out to Rs.57,225/- and a sum of Rs.57,250/- was got deposited. The plaintiff/respondent calculated the amount of interest on Rs.52,500/- incorrectly. The tenant/petitioner is also regularly depositing the monthly rent of Rs.1500/-.

4. The learned Judge, Small Causes Court vide its order dated 17.8.2022 being of the view that there was a dispute regarding the amount tendered, which could be adjudicated only after receipt of evidence of the parties deferred the consideration of the application under Order 15 Rule 5 CPC at the time of final decision of the suit.

5. The order dated 17.8.2022 was assailed in SCC Revision under Section 25 of the Provincial Small Causes Court Act, 1887 by the landlord/respondent. The tenant/petitioner filed his objections to the maintainability of the revision itself on the ground that the order did not decide the application under Order 15 Rule 5 CPC and was interlocutory in nature and as such, the Revision under Section 25 was not maintainable. The Revisional Court ignoring the objection of the tenant/petitioner allowed the revision by the order dated 15.10.2022 and set aside the order dated 17.8.2022 and directed the Trial Court to first decide the application under Order 15 Rule 5 CPC and then, proceed with the SCC Suit. The order dated 15.10.2022 was put to challenge before this Court by the tenant/petitioner in a petition under Article 227 of the Constitution of India No. 325 of 2023. This Court after hearing the counsels of the parties and taking note of the fact that the objections to the maintainability of the revision was not considered by the Revisional Court while

allowing the revision, set aside the order dated 15.10.2022 passed in the revision and directed the Revisional Court to pass the order strictly in accordance with law within a period of three months vide order dated 7.8.2023. The Revisional Court by its order dated 19.12.2023 has again passed the order allowing the revision and setting aside the order dated 17.8.2022 and directions have been issued to the learned Judge, Small Causes Court to decide the application under Order 15 Rule 5 CPC first and thereafter proceed with the SCC Suit.

6. Shri Prakhar Tandon, learned counsel for the tenant/petitioner has vehemently argued that the Revisional Court has completely misconstrued and misinterpreted the order of this Court dated 7.8.2023 passed on the petition under Article 227 of the Constitution of India No. 325 of 2023, which required it to decide the objections of the tenant/petitioner regarding the maintainability of the revision. The impugned revisional order suffers from patent illegality and deserves to be set aside. The Revisional Court has proceeded to pass orders on merit without deciding the objections. It is contended that the revision itself was not maintainable in law as it was preferred against an interlocutory order by which no rights of the parties were decided. The revision was also decided without granting the petitioner any opportunity to file his response to the revision. It is also contended that the objections of the petitioner to the maintainability of the revision is pending as on date and has not been decided.

7. Per contra, Shri Shivakant Singh, learned counsel for the respondent submits that the order of the Revisional Court is just and proper and does not suffer from any

illegality or infirmity. This Court had directed the Revisional Court to pass the order strictly in accordance with law without being influenced by the observations made by this Court in its order dated 7.8.2023. The Revisional Court has thus proceeded to decide the revision in accordance with law.

8. I have heard learned counsels for the parties and have perused the record.

9. Having heard the submissions of the learned counsel for the parties and having gone through the order dated 7.8.2023 passed by this Court in the earlier round of litigation, I find that the Revisional Court while passing the impugned order dated 19.12.2023 has misconstrued and misinterpreted the order of this Court dated 7.8.2023 and has completely ignored its mandate. This Court had set aside the order dated 15.10.2022 passed in SCC Revision No. 240 of 2022 (Ram Kumar Gupta versus Piyush Shukla), being of the view that admittedly the order had been passed without deciding the preliminary objection as raised regarding the jurisdiction of the Revisional Court to entertain the revision. The tenor of the order of this Court was that the objections regarding the maintainability of the revision was required to be addressed first before proceeding to decide the revision on merits. This having not been done, the order suffers from patent illegality and irregularity.

10. Accordingly, the order dated 19.12.2023 passed by the Addl. District Judge, Court No. 1, Kanpur Nagar in SCC Revision No. 240 of 2022 (Raj Kumar Gupta versus Piyush Shukla) is set aside. The petition stands *allowed*. The Revisional Court is directed to first decide

the objections of the petitioner regarding the maintainability of the revision and then proceed to decide the revision on merits within a period of three months from the date of service of certified copy of the order of this Court.

11. Parties to bear their own costs.

(2024) 4 ILRA 766

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 09.04.2024

BEFORE

THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Matters U/A 227 No.2912 of 2018 (Civil)

Maqsood Ahmad

...Petitioner

Versus

Kumari Salma Bano & Ors. ...Respondents

Counsel for the Petitioner:

Sri Ashwani Kumar Mishra

Counsel for the Respondents:

Sri Narendra Kumar Chaturvedi

(A) Civil Law - Rectification of Typographical Errors - Code of Civil Procedure, 1908 - Section 152 - Amendments of judgements, 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 - In case of any type of bonafide error including typographical error in the order, same can be rectified at any stage under the provisions of Section 152 of CPC (Para 10 -13)

Petitioner challenged an order rectifying a typographical error in earlier order - application 97(c), initially allowed with costs - was later rectified to reflect rejection due to typographical

error - Respondents filed application 119(c) for rectification - claiming error was apparent - trial court corrected typographical error under Section 152 CPC - upheld by Revisional Court - petitioner contended - acceptance of costs barred such rectification under the principle of estoppel – hence petition.(Para - 2,3,4,5)

HELD: - Typographical error in the order was rightly rectified. Respondents were directed to refund double the costs imposed earlier. (Para 15,18)

Petition dismissed. (E-7)

List of Cases cited:

1. Krishan Kumar Khanna Vs International Society For Krishna Consciousness, 2000 LawSuit (SC) 1371

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

1. Heard Sri Ashwani Kumar Mishra, learned counsel for petitioner and Sri

2. Present petition has been filed seeking following relief:-

“(i) Issue an order or direction in exercise of power conferred under Article 227 of the constitution of India setting aside the order dated 16.03.2017 passed by the court of Small Cause in Suit of Small Cause No. 17 of 2017 and order dated 14.11.2017 passed by the District Judge, Gorakhpur in Revision No. 26 of 2017.”

3. Learned counsel for petitioner submitted that earlier petitioner has moved an application 97(c) dated 07.01.2016 in Small Cause No. 17 of 2017 for a direction to the plaintiff/respondents to produce some evidence in respect of material alteration in tenanted house.

4. It is next submitted that the said application was allowed vide order dated 09.12.2016 imposing the cost of Rs. 500/- to the applicant/defendant and the cost was also accepted by the plaintiff/respondents. Later on, plaintiff/respondents have moved application 119(c) dated 25.02.2017 for rectification of order dated 09.12.2016. In the said application, it is stated that from the perusal of order dated 09.12.2016, it is apparently clear that Court was inclined to 'reject' the application, but in operative portion, it has wrongly been typed as 'allowed'. The said application was considered by the Court concerned and the same was allowed vide order dated 16.03.2017 rectifying the typographical error in the earlier order dated 09.12.2016.

5. He firmly submitted that once an application is allowed imposing certain costs and costs is also accepted by the opposite party, the said order cannot be challenged and is barred by the principle of estoppel.

6. He further submitted that petitioner has challenged the order dated 16.03.2017 by filing Revision No. 26 of 2017, which was also rejected by the Revisional Court vide order dated 14.11.2017. In support of his contention, he has placed reliance upon the judgment of Apex Court in the matter of **Krishan Kumar Khanna vs. International Society For Krishna Consciousness; 2000 LawSuit(SC) 1371.**

7. Per contra, Sri Narendra Kumar Chaturvedi, learned counsel for respondents submitted that from the perusal of order dated 09.12.2016, it is very much clear that since beginning to last, except in operative portion, Court was inclined to reject the application. Even in last line before the operative portion, Court has held

that application 97(C) is liable to be rejected on cost, but due to typographical error in operative part, in place of 'rejection', word 'allowed' has been mentioned. Therefore, respondents have filed application 119(c) and Court concerned vide reasoned order dated 16.03.2017 accepted that it was typographical error and rectified the same exercising its power under Section 152 of CPC, 1908. After considering both the orders, Revisional Court has also opined that Court is having power to rectify its mistake at any stage. He lastly submitted that there is no illegality in both orders dated 16.03.2017 & 14.11.2017.

8. I have considered rival submissions advanced by learned counsel for parties and perused the records as well as judgment cited above.

9. Controversy before this Court is as to whether order dated 09.12.2016 is having typographical error or not and further Court can rectify the same or not. To conclude the controversy, it is required to quote complete order in question dated 09.12.2016 and the same is quoted below:-

"09-12-2016

एस सी सी वाद संख्या-17/2009

पत्रावली वास्ते आदेश प्रार्थनापत्र 97ग एवं आपत्ति 111ग हेतु प्रस्तुत हुई। जिस पर पक्षकारों को पूर्व में सुना जा चुका है।

प्रार्थनापत्र 97ग द्वारा विपक्षी मकसूद की ओर से इस आशय का प्रस्तुत किया गया है कि प्रस्तुत मामले में दौरान तैयारी मुकदमा पत्रावली के अवलोकन से यह ज्ञात हुआ कि वादी अपने वादपत्र की धारा-15 में मटेरिएल

अल्टरनेसन की बात कहा है अतः इस बात की सत्यता को न्यायालय के समक्ष लाने के लिए वादी को निर्देशित किया जाय कि वह मकान निर्माण से सम्बन्धित कागजात दाखिल करे। जिसके सम्बन्ध में आपत्तिकर्ता द्वारा अपनी आपत्ति 111ग प्रस्तुत की गयी और यह कहा गया कि प्रार्थनापत्र खिलाफ कानून व मैलाफाइड है और प्रस्तुत मामले में दावा धारा-20 ऐक्ट नम्बर-13, 1972 के तहत किरायेदारी समाप्त होने के बाद किरायेदारी समाप्त करने के सम्बन्ध में दिये जाने वाले धारा-106 टी पी ऐक्ट की नोटिस के पश्चात दाखिल किया गया है और वादी का साक्ष्य तथा जिरह 2014 में समाप्त होकर प्रतिवादी के साक्ष्य के लिए लगा हुआ है और वह साक्ष्य अपना न देते हुए बार बार वाद की कार्यवाही विलम्बित करने के उद्देश्य से त्रुटिपूर्ण एवं अविधिक प्रार्थनापत्र प्रस्तुत किया है जिसे निरस्त किया जाय।

इस सम्बन्ध में संगत विधिक प्रावधान एवं सम्पूर्ण पत्रावली का सम्यक परिशीलन किया गया। वादी द्वारा जिन आधारों पर दावा दाखिल किया गया है उसे साबित करने का भार उस पर है और प्रतिवादी न्यायालय से यह निर्देश नहीं जारी करा सकता कि वादी अमुक साक्ष्य प्रस्तुत करे और ना ही इस सम्बन्ध में कोई विधिक प्रावधान है क्योंकि उक्त साक्ष्य न तो प्रस्तुत वाद में तात्विक है और ना ही वाद के आधार स्वरूप है जिससे स्पष्ट है कि प्रतिवादी अपने साक्ष्य देने से बचने के गरज से यह प्रार्थना पत्र मात्र कार्यवाही को विलम्बित करने के उद्देश्य से प्रस्तुत किया है जो किसी भी रूप में पोषणीय नहीं है अतः प्रार्थनापत्र 97ग हर्जे पर निरस्त किये जाने योग्य है।

आदेश

प्रार्थनापत्र 97ग मु. 500/-रु० हर्जे पर स्वीकार किया जाता है। प्रतिवादी को साक्ष्य हेतु

एक अन्तिम अवसर दिनांक 17-01-2017 के लिए दिया जाता है।

लघुवाद न्यायाधीश/सिविल जज सी०डि०"

10. From the perusal of order dated 09.12.2016, it is apparently clear that Court was inclined to reject the application 97(c), but due to typographical error in operative portion, in place of word 'निरस्त', word, 'स्वीकार' has been typed and while correcting the same vide order dated 16.03.2017, Court concerned has held that if there is typographical error in the order, it can be rectified under the provisions of Section 152 CPC. Further, after going through the application 97(c) as well as order dated 09.12.2016, Revisional Court has also held that at any stage, order may be rectified.

11. Impugned order has been passed exercising power under Section 152 of CPC. For ready reference, Section 152 of CPC is quoted below:-

"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."

12. After going through Section 152 of CPC, this Court is of the considered view that in case of any type of bonafide error including typographical error in the order, same can be rectified at any stage under the provisions of Section 152 of CPC.

13. So far as acceptance of cost is concerned, in present facts of case, that will not create any estoppel in favour of petitioner

for detailed reasons given in foregoing paragraph.

14. Learned counsel for petitioner has placed reliance upon the judgment of *Krishna Kumar Khanna(Supra)* which is not applicable in the present case as the facts are entirely different as in that matter, complete order has been challenged, but here in this case, only application has been filed for rectification of typographical error of order dated 09.12.2016.

15. Therefore, under such circumstances, this Court is of the firm view that earlier order dated 09.12.2016 is having typographical error and same has been rightly rectified vide order dated 16.03.2017 which was also affirmed by the Revisional Court vide its order dated 14.11.2017.

16. Accordingly, writ petition lacks merit and is *dismissed*.

17. No order as to costs.

18. Respondents are directed to refund double amount of cost i.e. Rs. 1,000/- to the petitioner within two weeks from the date of this order, which was earlier imposed vide order dated 09.12.2016.

(2024) 4 ILRA 769

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 21.03.2024

BEFORE

THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Matters U/A 227 No.3635 of 2024 (Civil)

Shiv Ji Agrahari

...Petitioner

Versus

Smt. Urmila Srivastava. & Anr.

...Respondents

Counsel for the Petitioner:

Sri Syed Wajid Ali

3. 2007 ACJ 2278

4. 2008 ACJ 2219

Counsel for the Respondents:

Sri Ashwani Kumar Pathak

5. 1996 (1) ACJ 454

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

(A) Civil Law - The Code of Civil Procedure, 1908 - Amendment in Written Statement - Constitution of India - Article 227 - The Transfer of Property Act 1882 - Sections 106 - Notice to Quit, Section 114 - Relief Against Forfeiture for Non-Payment of Rent, Provincial Small Cause Courts Act - Section 25 - Relief under Section 114 of the Transfer of Property Act applies only where the lease is determined by forfeiture due to non-payment of rent, and not where tenancy is terminated by a simple notice under Section 106 of the Act. (Para 9, 10)

Petitioner (Tenant) faced eviction and recovery proceedings - filed a written statement - denying plaint averments - later sought to amend written statement - to incorporate a plea of protection under Section 114 of Transfer of Property Act - claiming arrears of rent and damages following termination of tenancy by a notice under Section 106 of Transfer of Property Act - claiming protection based on arrear deposits - revisional court - rejecting amendment application as unnecessary - prompted petitioner to challenge the order. (Paras - 2, 3, 4, 8)

HELD: - Proposed amendment being totally misconceived and unnecessary was rightly rejected by Revisional Court. There was no requirement of mentioning the Section 114 in the written statement. It was only essential to plead complete deposit as required under the Section. Complete pleadings had already been taken in the written statement filed by the petitioner. (Para -11,12)

Petition dismissed. (E-7)

List of Cases cited:

1. 2006 (3) ARC 329

2. 2000 (2) ACJ 1021

1. Heard Shri Syed Wajid Ali, learned counsel for the petitioner and Shri A.K. Pathak, learned counsel for the caveator-respondent no. 2.

2. The challenge in this petition, under Article 227 of the Constitution of India, is to the order dated 08.01.2024 passed by the learned Additional District Judge/Court No. 6, Gorakhpur, in SCC Revision No. 38 of 2022 whereby and whereunder the amendment application moved by the petitioner seeking amendment in the written statement at the Revisional Stage has been rejected.

3. It is the case of the petitioner that he is a tenant in a premises let out to his deceased father in the year 2004 initially at Rs. 680/- per month subsequently enhanced to Rs. 1800/- per month. The premises is newly constructed and the provisions of the UP Act No. 13 of 1972 are not applicable. The landlord/respondents have instituted a SCC Suit, being SCC Suit No. 4 of 2015 for his eviction and recovery for arrears of rent and damages. The petitioner put in appearance in the proceedings and filed his written statement denying the plaint averments and specifically stating in para 22 of the written statement that on 28.03.2016 with the permission of the Court a sum of Rs. 33,000/- has been deposited and he has been depositing the rent for further months which is not being accepted by the landlord/respondents. Since the amount of Rs. 33,000/- stands deposited the petitioner is entitled to benefit of Section 20 (4) of the

Act. The learned Judge Small Cause Court vide the judgment and order dated 12.04.2022 has decreed the suit directing the petitioner to handover vacant possession of the tenanted premises within 30 days and also pay rent @ Rs. 1080/- per month from the date of filing of the suit till the date of handing over of possession. The learned Judge Small Cause Court has also held that the provisions of U.P. Act No. 13 of 1972 does not apply. Aggrieved, the petitioner has filed a SCC Revision under Section 25 of the Provincial Small Cause Courts Act which has been registered as SCC Revision No. 38 of 2022.

4. It is contended by learned counsel for the petitioner that the petitioner has moved an application seeking amendment in the written statement by incorporating the plea that his tenancy is protected under Section 114 of the Transfer of Property Act as the entire arrears of rent and damages together with interest thereon amounting to Rs. 33,000/- has been got deposited. The amendment application has been rejected by the impugned order after contest by the landlord/respondents.

5. Learned counsel for the petitioner has vehemently argued that the rejection of the amendment application (paper No. 9A2) by the Revisional Court is patently erroneous and the same is liable to be set aside. The amendment sought for is purely legal in nature and does not change the nature of the relief sought in the suit or the stand taken in the written statement. The Revisional Court while rejecting the Amendment has simply rejected the amendment application only on the ground that it ought to have been filed before the Court of first instance and what ever reason that has been stated in the amendment application are not liable to be accepted, without recording any findings regarding any reasons that the proposed amendment was withdrawing an admission or that it was not necessary for deciding the real

controversy involved in the matter between the parties. It is accordingly prayed that the impugned order be set aside and the amendment application be allowed. Reliance has been placed upon a decision of coordinate Bench reported in **2006 (3) ARC 329**.

6. Per contra, Shri A.K. Pathak, learned counsel for the caveator/ landlord/respondents has opposed the petition by submitting that the petition as framed is misconceived and is liable to be dismissed at the threshold. No illegality or irregularity has been committed by the Revisional Court in rejecting the amendment application. The petition is devoid of merits and is liable to be rejected.

7. I have heard the learned counsel for the parties and have perused the records.

8. From the averments made in the plaint it is borne out that the SCC Suit has been filed for eviction and for recovery of damages for use and occupation after terminating the tenancy by registered notice dated 04.03.2015 under Section 106 of the Transfer of Property Act. The eviction has not been sought on the basis of default. The Provisions of the UP Act No. 13 of 1972 is stated to be not applicable and the learned Judge Small Cause Court has also proceeded to hold as such. In the written statement filed a defence has been taken in para 22 that a sum of Rs. 33,000/- vide Challan No. G-0300602 dated 28.03.2015 regarding the rent along with cost of the suit, interest etc. for the period April 2015 to April 2016 has been deposited. In para 27 of the written statement it has been stated that the provisions of UP Act No. 13 of 1972 are applicable and the tenant/petitioner is entitled to the benefit of section 20 (4) of the Act. In the memo of Revision the finding of the learned Judge Small Cause Court that the provisions of UP Act No. 13 of 1972 are not applicable has not been challenged though a ground has been

taken that on the first date of hearing a sum of Rs. 33,000/- towards rent and cost of suit, interest has been got deposited and the rent every month is being deposited, no default has been committed and petitioner is entitled to the benefit of Section 20 (4) of the Act. By way of the amendment at the Revisional stage the tenant/ petitioner intended to incorporate the plea of protection of Section 114 of the Transfer of Property Act.

9. This takes the Court to dwell into the question as to whether benefit of Section 114 of Transfer of Property Act as sought to be claimed by the petitioner can be granted. Section 114 of the Transfer of Property Act is reads as under:

"114. Relief against forfeiture for non-payment of rent.-

Where a lease of immoveable property has determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee, if, at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, or gives such security as the Court thinks sufficient for making such payment within fifteen days, the Court may, in lieu of making a decree for ejectment, pass an order relieving the lessee against the forfeiture; and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred."

10. From the perusal of the Provision 114 of the Transfer of Property Act it is apparent that it is attracted only where a lease of immovable property is determined by forfeiture and not otherwise. In the case at hand, the tenancy of the petitioner has been determined by means of a simple notice under Section 106 of Transfer of Property Act. There is neither a case for forfeiture of tenancy nor there is an agreement which is a prerequisite condition for the applicability of Section 114 of Transfer of Property Act. In the opinion of the Court and as

is also borne out from the import of Section 114 of Transfer of Property Act itself Section 114 applies to those cases where the landlord invokes his rights under a forfeiture clause under the agreement and determines the lease by forfeiture and sues to eject the tenant on the ground of forfeiture of lease. Admittedly this is not the case at hand. The law in this regard has been laid down in numerous decisions of this Court some of them being **2000 (2) ACJ 1021, 2007 ACJ 2278, 2008 ACJ 2219 and 1996 (1) ACJ 454.**

11. Thus the proposed amendment being totally misconceived and unnecessary was rightly rejected by the Revisional Court.

12. There is yet one other aspect of the matter. In the opinion of the Court there is no requirement of mentioning the Section 114 in the written statement and it is only essential to plead complete deposit as required under the Section. The Court finds that complete pleadings in this regard has already been taken in the written statement filed by the petitioner.

13. In this view of the matter also the proposed amendment is totally unwarranted.

14. For the above reasons the Court finds no merit in the petition. It is accordingly **dismissed.**

15. No order as to costs.

(2024) 4 ILRA 772

**ORIGINAL JURISDICTION
CIVIL SIDE**

**DATED: ALLAHABAD 12.03.2024
BEFORE**

THE HON'BLE SHEKHAR B. SARAF, J.

Matters U/A 227 No. 6346 of 2022 (Civil)

State of U.P. & Ors.

...Petitioners

Versus

Shri Raj Veer Singh

...Respondent

Counsel for the Petitioners:

Sri Manish Goyal (Addl. A.G.), Sri Ashok Kumar Goyal (Addl. C.S.C.)

Counsel for the Respondent:

Sri Anurag Khanna (Sr. Adv), Sri Punit Kumar Gupta, Ms. Poorva Agarwal

(A) Civil Law - Arbitration & Conciliation - Execution of Arbitral Award - Arbitration & Conciliation Act, 1996 - Section 34 - Application for Setting Aside Arbitral Awards, Section 36 - Enforcement of Arbitral Awards, Section 37 - Appealable Orders, Code of Civil Procedure, 1908 - Section 47 - Questions to be determined by the Court executing decree, The Constitution of India - Article 227 - Supervisory jurisdiction - Limits of Executing Court's Jurisdiction - Abuse of Process - Frivolous Litigation - Limited Jurisdiction of Executing Court - executing court's role is limited to executing the decree, not re-examining its validity - Role of an executing court is akin to a microscopic inspection hole - Limited Scope of Writ Jurisdiction - Writ jurisdiction cannot be used to challenge the validity of a final arbitral award, except in exceptional circumstances.(Para -42)

(B) Civil Law - Code of Civil Procedure, 1908 - Scope of Objections under Section 47 CPC : Objections should be strictly related to execution, discharge, or fulfillment of the decree, not substantive rights - Frivolous objections under Section 47 CPC can be dealt with strongly, including imposition of costs - Legal Fiction of "As if it were a Decree" : This fiction is for the limited purpose of execution and does not equate an arbitral award to a court decree.(Para -42)

(C) Civil Law - Code of Civil Procedure, 1908 - Finality of Arbitral Awards: Once an arbitral award is finalized through Sections 34 and 37 of the Arbitration Act, objections under Section 47 CPC are not permissible. (Para -42)

Disputes arose between Petitioner No. 1(State) and Respondent regarding a construction contract - Arbitral award was passed in 2013 - State filed an application under Section 34 of Arbitration Act - rejected in 2014 - First appeal against rejection - dismissed in 2016 - SLP before SC - dismissed – on grounds of delay in 2018 - Respondent initiated execution proceedings in 2019 under Section 36 of Act - State raised objections under Section 47 of CPC in 2022 - dismissed by Commercial Court - award holder facing delays in enforcing decree due to award debtor's tactics - debtor abusing execution process to obstruct justice - harmful to judicial system and warrants exemplary costs to deter similar behavior by other debtors - Aggrieved by orders in execution proceedings - Petitioners filed writ petition in 2022 - challenging the execution orders.(Paras 2(a)-(h) ,41)

HELD: - Writ petition dismissed as frivolous, vexatious, motivated and being an abuse of the process of Court, imposing costs of Rs. 5,00,000 for misuse of judicial process and delay tactics.(Paras 43, 48, 52)

Petition dismissed. (E-7)

List of Cases cited:

1. Sundaram Finance Ltd. Vs Abdul Samad & anr., (2018) 3 SCC 622
2. BCCI Vs Kochi Cricket Pvt. Ltd. & ors., (2018) 6 SCC 287
3. Kanpur Jal Sansthan & anr. Vs Bapu Constructions, (2015) 5 SCC 267,
4. Leela Hotels Ltd. Vs HUD Corp. Ltd., (2012) 1 SCC 302
5. MTNL Vs Applied Electronics Ltd., (2017) 2 SCC 37
6. ITI Ltd. Vs SPCN Ltd., (2002) 5 SCC 510
7. M. Anasuya Devi & anr. Vs M. Manik Reddy & ors., (2003) (8) SCC 565
8. N.S.S. Narayana Sarma & Ors. Vs M/s. Goldstone Export (P) Ltd. & Ors., AIR 2022 SC 251

9. U.O.I. & Ors. Vs Manager, M/s. Jain & Associates, (2001) 3 SCC 277
10. Magma Leasing Vs Badri Vishal & Ors., 2021 SCC OnLine All
11. GE Money Financial Services Ltd. Vs Mohd. Azaz & Anr., 2013(7) ADJ (DB-LB)
12. Jaiman Shah Vs Ilia Pandya, 2001(2) MHLJ 297
13. M/s. R.S. Bajwa & Co. Vs St. of Chhatt. & M/s. ICC Ltd. Vs William & Ors., 2015 SCC OnLine Ker 24805
14. Shreenath & Anr. Vs Rajesh & Ors., AIR 1998 SC 1827
15. UII Co. Ltd. Vs Rajendra Singh & Ors. (2000) 3 SCC 581
16. Kohinoor Transporters Vs St. of U.P., (2018) 18 SCC 165
17. BOB Vs Kotak Mahindra Bank Ltd., (2020) 17 SCC 798
18. PSCS Corp. Ltd. & Anr. Vs Atwal Rice & General Mills, (2017) 8 SCC 116
19. Paramjeet Singh Patheja Vs ICDS Ltd., (2006) 13 SCC 322
20. UOI Vs Vedanta, (2020) 10 SCC 1
21. St. of Karn. Vs St. of T.N., (2017) 3 SCC 274
22. Pam Developments Pvt. Ltd. Vs St. of W.B., (2019) 8 SCC 112
23. M/s. M.S.R. Enterprises Vs M/s. Pooja Enterprises, Civil Revision Petition No. 1571 of 2021
24. Pradeep Mehra Vs Harjivan J. Jethwa, 2023 SCC OnLine SC 1395
25. Dhurandhar Prasad Singh Vs Jai Prakash University, (2001) 6 SCC 534
26. Nagar Palika Nigam Vs Krishi Upaj Mandi Samiti & Ors., (2008) 12 SCC 364
27. I.O.C. Ltd. & Anr. Vs Commercial Court & Anr., 2023 SCC OnLine All 809
28. Hindustan Zinc Ltd. Vs NRDC, 2023 SCC OnLine Del 330
29. Sanjay Agarwal Vs Rahul Agarwal, 2024 SCC OnLine All 149
30. Bellary Nirmithi Kendra Vs M/s Capital Metal Industries, C.R.P. No. 100067 of 2022
31. C.I.F. Co. Ltd. Vs Amrapali Enterprises & Anr., 2023 SCC OnLine Cal
32. Rahul S. Shah Vs Jinendra Kumar Gandhi; (2021) 6 SCC 418
33. Vinod Seth Vs Devinder Bajar & Anr., (2010) 8 SCC 1
34. Ramrameshwari Devi & Ors. Vs Nirmala Devi & Ors., (2011) 8 SCC 249
35. Maria Margarida Sequeira Fernandes Vs Erasmo Jack de Sequeira, (2012) 5 SCC 370

(Delivered by Hon'ble Shekhar B. Saraf, J.)

1. The instant writ application under Article 227 of the Constitution of India has been filed by the State of Uttar Pradesh (hereinafter referred to as the 'Petitioner No. 1') against the order dated May 17, 2022 passed by the Additional District & Sessions Judge, Bijnor. A further challenge has been laid to the orders dated July 21, 2022 and August 2, 2022 passed by the Commercial Court, Moradabad.

FACTS

2. I have laid down the factual matrix leading to the instant appeal below:

a. Petitioner No. 1 and Shri Raj Veer Singh (hereinafter referred to as the 'Respondent') entered into a contract for construction of cross drainage, siphon at

Km 5.355 of main canal under Madhya Ganga Canal Phase-II Project in District Bijnor.

b. Disputes arose between the parties in terms of the aforesaid contract. Accordingly, in term of the Clause 42 & 43 of the contract between the parties, these disputes were referred to arbitration.

c. Shri A.K. Gupta, Sole Arbitrator passed the arbitral award on December 12, 2013. Against the said arbitral award, the Petitioner No. 1 preferred an application under Section 34 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the 'Act') before the District Judge, Bijnor. The said application was rejected vide order dated April 9, 2014.

d. The Petitioner No. 1 filed a first appeal before this Court against the order of the District Judge, Bijnor. However, the said first appeal was dismissed by this Court vide order dated December 22, 2016. A Special Leave Petition under Article 136 of the Constitution of India was also preferred by the Petitioner No. 1 before the Hon'ble Supreme Court which was dismissed on the ground of delay vide order dated November 2, 2018. Review petition filed by the Petitioner No. 1 against the order dated November 2, 2018 was dismissed by the Hon'ble Supreme Court on January 15, 2019.

e. Thereafter, an execution application was filed in the year 2019 by the Respondent under Section 36 of the Act. On May 17, 2022, the Additional District and Sessions Judge, Bijnor passed an order in the said execution application directing the State Bank of India, Main

Branch Nazeebababad, Bijnor to cease the bank account of Executive Engineer, Madhya Ganga Canal Construction Division – 7 Bijnor and not to permit withdrawal from the said account.

f. Subsequently, the execution application filed by the Respondent was transferred to Commercial Court, Moradabad. The Commercial Court, Moradabad vide its order dated July 21, 2022 directed the Petitioner No. 1 to ensure the payment of the awarded amount along with interest on or before August 10, 2022.

g. Petitioner No. 1 preferred an objection in under Section 47 of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC, 1908') in the year 2022 before the Commercial Court, Moradabad which was rejected vide order dated August 2, 2022.

h. Aggrieved by the order dated May 17, 2022 passed by the Additional District and Sessions Judge, Bijnor and the orders dated July 21, 2022, and August 2, 2022 passed by the Commercial Court, Moradabad, the Petitioners have filed the instant writ petition under Article 227 of the Constitution of India before this Court.

CONTENTIONS OF THE PETITIONERS

3. Sri Manish Goyal, learned Additional Advocate General appearing for the petitioners has made the following submissions on behalf of the Petitioners:

i. The Chief Engineer vide letter dated July 26, 2011 had forward the names of three superintending engineers who were not associated with the work under the contract to the Respondent for choosing

anyone of them to be appointed as the sole arbitrator. However, the Respondent vide its letters dated August 4, 2011, and August 8, 2011 informed the Petitioner No. 1 that it has chosen the name of the Shri A.K. Singh to be appointed as the Sole Arbitrator from its own list which was sent by it to the Petitioner No. 1 on July 23, 2011.

ii. The said action of the Respondent of nominating the name of Sole Arbitrator of its own choice and from its own list was contrary to the arbitration clause contained between the parties. The name of Shri A.K. Singh was neither mentioned in the list sent by the Chief Engineer vide its letter dated July 26, 2011, nor was it accepted by the Petitioner No. 1 at any stage. Several objections were raised before Shri A.K. Singh, Sole Arbitrator with regard to his appointment but the same were rejected by him. Thereafter, the Sole Arbitrator continued to proceed with the arbitration in an arbitrary manner and gave the final award on December 12, 2013 in favour of the Respondent.

iii. The Award passed on December 12, 2013 by Shri A.K. Singh, Sole Arbitrator is without jurisdiction, tainted with fraud and unexecutable. The Commercial Court, Moradabad committed a manifest error in not deciding the objection filed by the Petitioners No. 1 under Section 47 of the CPC, 1908 on its merit.

iv. Even though an arbitral award may not be a decree passed by a court but it is to be enforced in accordance with the provisions of the CPC, 1908. Therefore, for the limited purpose of the enforcement under Section 36 of the Act, an arbitral award has to be executed like a decree of the Court. Reliance is placed in this regard on the judgments of the Hon'ble Supreme

Court in **Sundaram Finance Ltd. v. Abdul Samad and Another** reported in (2018) 3 SCC 622, **Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd. and Ors.** reported in (2018) 6 SCC 287, **Kanpur Jal Sansthan and Anr. v. Bapu Constructions** reported in (2015) 5 SCC 267, **Leela Hotels Limited v. Housing and Urban Development Corporation Ltd.** reported in (2012) 1 SCC 302, **Mahangar Telephone Nigam Ltd. v. Applied Electronics Ltd.** reported in (2017) 2 SCC 37, **ITI Ltd. v. Seimens Public Communication Network Ltd.** reported in (2002) 5 SCC 510, **M. Anasuya Devi and Anr. v. M. Manik Reddy and Ors.** reported in (2003) (8) SCC 565, **N.S.S. Narayana Sarma and Ors. v. M/s. Goldstone Export (P) Ltd. and Ors.** reported in AIR 2022 SC 251, **Union of India and Ors. v. Manager, M/s. Jain and Associates** reported in (2001) 3 SCC 277, the Allahabad High Court in **Magma Leasing v. Badri Vishal and Ors.** reported in 2021 SCC OnLine All and GE Money Financial Services Ltd. v. Mohd. Azaz and Another reported in 2013(7) ADJ (DB-LB), the Bombay High Court in **Jaiman Shah v. Ilia Pandya** reported in 2001(2) MHLJ 297, the Chattisgarh High Court in **M/s. R.S. Bajwa & Co. v. State of Chhattisgarh**, and the Kerala High Court in **M/s. India Cement Capital Ltd. v. William and Ors.** reported in 2015 SCC OnLine Ker 24805.

v. Whenever objections are filed under Section 47 of the CPC, 1908 then the same are required to be decided on merits. It is a settled proposition of law that fraud cannot be waived and neither the Court under Section 34 of the Act and nor this Court under Section 37 of the Act decided the issue of fraud. It is correct that

Explanation-1 to Section 34(2)(b) of the Act treats fraud to be as an element against public policy of India but when the Court under Section 34 of the Act has not dealt with the said objection, it is trite that the same requires examination at any stage of the proceedings. Therefore, in terms of the settled law by the Hon'ble Supreme Court the issue of fraud can be brought before the Hon'ble Court at any stage of the proceedings in as much as the same is based upon the principle that fraud vitiates even the most solemn acts. Fraud coupled with corruption is an insignia of disentitlement under a decree thereby making it unexecutable. Hence, objections under Section 47 of the CPC, 1908 are required to be decided on merits and so long as the said objections are not decided on merit neither the account can remain frozen nor assets of the Petitioner No. 1 can remain under attachment. Public at large cannot be made to suffer and that too when it is more than evident that the Respondent colluded with not only the officers of the Petitioner No. 1 but nominated a Senior Officer of the Petitioner No. 1 as the Sole Arbitrator who passed the award of his choice. Reliance is placed upon the judgments of the Hon'ble Supreme Court in **Shreenath and Anr. v. Rajesh and Ors. reported in AIR 1998 SC 1827 and United India Insurance Co. Ltd. v. Rajendra Singh and Ors. reported in (2000) 3 SCC 581.**

vi. It is a well settled law that if a decree is tainted by fraud and is without jurisdiction, the objection under Section 47 of the CPC, 1908 stating that the decree is not executable ought to be decided on merit so that justice can be done. Reliance is placed upon the judgments of the Hon'ble Supreme Court in **Kohinoor Transporters v. State of U.P. reported in (2018) 18**

SCC 165, Bank of Baroda v. Kotak Mahindra Bank Ltd. reported in (2020) 17 SCC 798, and Punjab State Civil Supplies Corporation Ltd. and Anr. v. Atwal Rice and General Mills reported in (2017) 8 SCC 116.

vii. In view of the aforesaid the instant writ petition must be allowed and the impugned orders must be set aside by this Court.

CONTENTIONS OF THE RESPONDENT

4. Sri Anurag Khanna, learned Senior Advocate appearing on behalf of the Respondent has made the following submissions:

i. Execution proceedings under Section 36 of the Act are for the enforcement of an arbitral award and since an arbitral award cannot be treated as a decree passed by a civil court, hence objections under Section 47 of the CPC, 1908 are not maintainable under Section 36 of the Act. Reliance is placed upon the judgments of the Hon'ble Supreme Court in **Paramjeet Singh Patheja v. ICDS Ltd. reported in (2006) 13 SCC 322, Union of India v. Vedanta reported in (2020) 10 SCC 1, State of Karnataka v. State of Tamil Nadu reported in (2017) 3 SCC 274, Pam Developments Pvt. Ltd. v. State of West Bengal reported in (2019) 8 SCC 112, and the High Court for the State of Telangana in M/s. M.S.R. Enterprises v. M/s. Pooja Enterprises (Civil Revision Petition No. 1571 of 2021).**

ii. All objections with regard to fraud or jurisdiction can be decided by an appropriate court under Section 34 of the

Act. Moreover, once all the issues have been decided by an appropriate court under Section 34 of the Act and the same having attained finality after rejection of appeal under Section 37 of the Act, the award cannot be objected or reconsidered at the stage of enforcement under Section 36 of the Act.

ANALYSIS

5. I have heard the learned counsel appearing for the parties and perused the materials on record.

6. Since the primary question involved in the instant writ petition revolves around the applicability of Section 47 of the CPC, 1908 to execution proceedings under Section 36 of the Act, I shall deal with the same first. Section 47 of the CPC, 1908 is extracted below:

“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.

(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.]”

7. What is evident from the bare text of Section 47 of the CPC, 1908 is that, it delineates the jurisdiction of the court executing a decree and outlines the scope within which questions relating to the parties to the suit, or their representatives, or relating to the execution, discharge, or satisfaction of the decree, are to be determined.

8. The scope of Section 47 of the CPC, 1908 was explained by the Hon’ble Supreme Court recently in its judgment in **Pradeep Mehra v. Harjivan J. Jethwa reported in 2023 SCC OnLine SC 1395** (Coram: Sanjay Kishan Kaul and Sudhanshu Dhulia, JJ.). Relevant paragraphs have been extracted below:

“10. A bare perusal of the aforesaid provision shows that all questions between the parties can be decided by the executing court. But the important aspect to remember is that these questions are limited to the “execution of the decree”. The executing court can never go behind the decree. Under Section 47, CPC the executing court cannot examine the validity of the order of the court which had allowed the execution of the decree in 2013, unless the court's order is itself without jurisdiction. More importantly this order (the order dated

12.02.2013), was never challenged by the tenants/judgment debtors before any forum.

11. The multiple stages a civil suit invariably has to go through before it reaches finality, is to ensure that any error in law is cured by the higher court. The appellate court, the second appellate court and the revisional court do not have the same powers, as the powers of the executing court, which are extremely limited. This was explained by this Court in *Dhurandhar Prasad Singh v. Jai Prakash University*, (2001) 6 SCC 534, in para 24, it had stated thus:

“24. The exercise of powers under Section 47 of the Code is microscopic and lies in a very narrow inspection hole. Thus, it is plain that executing court can allow objection under Section 47 of the Code to the executability of the decree if it is found that the same is void ab initio and a nullity, apart from the ground that the decree is not capable of execution under law either because the same was passed in ignorance of such a provision of law or the law was promulgated making a decree inexecutable after its passing.”

12. This Court noted further:

“..... The validity or otherwise of a decree may be challenged by filing a properly constituted suit or taking any other remedy available under law on the ground that the original defendant absented himself from the proceeding of the suit after appearance as he had no longer any interest in the subject of dispute or did not purposely take interest in the proceeding or colluded with the adversary or any other ground permissible under law.

13. The reality is that pure civil matters take a long time to be decided, and regretfully it does not end with a decision, as execution of a decree is an entirely new phase in the long life of a civil litigation. The inordinate delay, which is universally caused throughout India in the execution of a decree, has been a cause of concern with this Court for several years. In *Rahul S. Shah v. Jinendra Kumar Gandhi*, (2021) 6 SCC 418, this Court had observed that a remedy which is provided for preventing injustice (in the Civil Procedure Code) is in fact being misused to cause injustice by preventing timely implementation of orders and execution of decrees. Then, it had observed as under:

“23. The execution proceedings which are supposed to be a handmaid of justice and subserve the cause of justice are, in effect, becoming tools which are being easily misused to obstruct justice.”

14. The above judgment is an important judgment in respect of Section 47 as well as Order XXI, CPC as the three Judge Bench decision of this Court not only condemned the abuse of process done in the garb of exercise of powers under Section 47 read with Order XXI, CPC, but also gave certain directions to be followed by all Civil Courts in their exercise of powers in the execution of a decree. It further directed all the High Courts to update and amend their Rules relating to the execution of decrees so that the decrees are executed in a timely manner. As far as Section 47 is concerned, this Court had stated as under:

“24. In respect of execution of a decree, Section 47 CPC contemplates adjudication of limited nature of issues

relating to execution i.e. discharge or satisfaction of the decree and is aligned with the consequential provisions of Order 21 CPC. Section 47 is intended to prevent multiplicity of suits. It simply lays down the procedure and the form whereby the court reaches a decision. For the applicability of the section, two essential requisites have to be kept in mind. Firstly, the question must be the one arising between the parties and secondly, the dispute relates to the execution, discharge or satisfaction of the decree. Thus, the objective of Section 47 is to prevent unwanted litigation and dispose of all objections as expeditiously as possible.

25. These provisions contemplate that for execution of decrees, executing court must not go beyond the decree. However, there is steady rise of proceedings akin to a retrial at the time of execution causing failure of realisation of fruits of decree and relief which the party seeks from the courts despite there being a decree in their favour. Experience has shown that various objections are filed before the executing court and the decree-holder is deprived of the fruits of the litigation and the judgment-debtor, in abuse of process of law, is allowed to benefit from the subject-matter which he is otherwise not entitled to.

26. The general practice prevailing in the subordinate courts is that invariably in all execution applications, the courts first issue show-cause notice asking the judgment-debtor as to why the decree should not be executed as is given under Order 21 Rule 22 for certain class of cases. However, this is often misconstrued as the beginning of a new trial. For example, the judgment-debtor sometimes misuses the provisions of Order 21 Rule 2 and Order

21 Rule 11 to set up an oral plea, which invariably leaves no option with the court but to record oral evidence which may be frivolous. This drags the execution proceedings indefinitely.”

15. This Court then gave certain directions, which were to be mandatorily followed by all Courts dealing with civil suits and execution proceedings. Two of its directions were as follows:

“42.8. The court exercising jurisdiction under Section 47 or under Order 21 CPC, must not issue notice on an application of third party claiming rights in a mechanical manner. Further, the court should refrain from entertaining any such application(s) that has already been considered by the court while adjudicating the suit or which raises any such issue which otherwise could have been raised and determined during adjudication of suit if due diligence was exercised by the applicant.

42.12. The executing court must dispose of the execution proceedings within six months from the date of filing, which may be extended only by recording reasons in writing for such delay.”

16. It further directed all the High Courts to update their Rules relating to execution of decrees. It was as under:

“43. We further direct all the High Courts to reconsider and update all the Rules relating to execution of decrees, made under exercise of its powers under Article 227 of the Constitution of India and Section 122 CPC, within one year of the date of this order. The High Courts must ensure that the Rules are in consonance

with CPC and the above directions, with an endeavour to expedite the process of execution with the use of information technology tools. Until such time these Rules are brought into existence, the above directions shall remain enforceable.”

9. Through various judicial pronouncements, the Hon’ble Supreme Court has underscored that while the executing court has authority to decide all questions arising between the parties, its jurisdiction is confined to matters pertaining to the execution of the decree. An executing court cannot delve in the validity of a decree unless it lacks jurisdiction. This principle is crucial in maintaining the finality of decrees. Powers of the executing court are inherently limited compared to appellate or revisional courts. As elucidated by the Hon’ble Supreme Court in **Dhurandhar Prasad Singh v. Jai Prakash University reported in (2001) 6 SCC 534** (Coram: G.B. Pattanaik and B.N. Agrawal, JJ.) the executing court’s role is akin to “a microscopic inspection hole” focusing solely on the executability of the decree.

10. Courts must exercise caution and diligence when adjudicating objections under Section 47 of the CPC, 1908. The consequences of erroneously allowing or disallowing objections can have far-reaching implications for the parties involved and may undermine the integrity of the execution process. The limited scope of the executing court’s jurisdiction under Section 47 of the CPC, 1908 requires a precise delineation of the issues that fall within its purview. Courts must ensure that objections pertain solely to matters concerning execution, discharge, or satisfaction of the decree and do not encroach upon substantive rights or legal

issues beyond the decree’s scope. Courts must also be mindful of the principle of finality of decrees when adjudicating objections under Section 47 of the CPC, 1908. Decrees represent the final determination of the rights and liabilities of the parties, and objections seeking to reopen issues already decided may undermine the principle of finality.

11. Courts need to balance the need for expeditious resolution of execution proceedings with the principles of fairness and due process. While efficiency is essential in the administration of justice, courts must afford parties a reasonable opportunity to present their case and be heard on matters relevant to the execution process. Rushing through objections without adequate consideration of the parties’ submissions may result in miscarriage of justice and undermine the credibility of the judicial process.

12. However, there is also a need to guard against the misuse of objections under Section 47 of the CPC, 1908 as a means to delay or obstruct the execution process. Parties may resort to frivolous or dilatory objections in an attempt to prolong proceedings or gain tactical advantage. Courts must exercise vigilance in identifying and dismissing such objections to ensure expeditious and effective enforcement of decrees.

13. Having dealt with the scope of Section 47 of the CPC, 1908, this Court will now deal with the applicability of Section 47 of the CPC, 1908 to execution of arbitral awards under Section 36 of the Act.

14. Section 36 of the Act which governs the execution of the arbitral awards is extracted below for ease of reference:

“36. Enforcement.—(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):]

[Provided further that where the Court is satisfied that a prima facie case is made out that,—

(a) 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.]”*

15. The phrase that lies at the centre of the instant dispute is the one which provides that an arbitral award will 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.” The question which arises is that although Section 36 of the Act, provides for the execution of arbitral awards as if they were a decree of the court, do they acquire the similar status as that of a decree passed by a civil court?

16. The language of a statute serves as the cornerstone of statutory interpretation, providing the framework within which courts must construe and apply the law. It is through the words and phrases used in a statute that the Legislature communicates its intentions. The principle that the language of a statute is the determinative factor of legislative intent reflects the fundamental tenet of statutory interpretation that courts must give effect to the plain meaning of the statutory language. This principle is rooted in the doctrine of legislative supremacy, which holds that the Legislature is the supreme authority in the enactment of laws. As such, courts are obligated to interpret statutes in accordance with the ordinary and natural meaning of

the words used, absent clear evidence of legislative intent to the contrary.

17. Moreover, the plain meaning rule serves to safeguard the separation of powers and preserve the integrity of the legislative process. By respecting the language chosen by the Legislature, courts refrain from encroaching upon the legislative domain and usurping the role of the legislature. Instead, they defer to the democratic process and give effect to the will of the legislature as expressed through the text of the statute.

18. In **Nagar Palika Nigam v. Krishi Upaj Mandi Samiti and Ors.** reported in **(2008) 12 SCC 364** (Coram: Dr Arijit Pasayat, P. Sathasivam and Aftab Alam, JJ.) the Hon'ble Supreme Court propounded that the intention of the legislature is to be gauged from the language used in a statute and attention must be paid to what has been said and also to what has not been said. Relevant portion from the aforesaid judgment is extracted below –

“17. Words and phrases are symbols that stimulate mental references to referents. The object of interpreting a statute is to ascertain the intention of the legislature enacting it. (See Institute of Chartered Accountants of India v. Price Waterhouse [(1997) 6 SCC 312 : AIR 1998 SC 74] .) The intention of the legislature 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 Moo PC

1 : 13 ER 582] , 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. (See State of Gujarat v. Dilipbhai Nathjibhai Patel [(1998) 3 SCC 234 : 1998 SCC (Cri) 737 : 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 (Tipton) Ltd. [(1978) 1 WLR 231 : (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 444 (HL)] quoted in Jumma Masjid v. Kodimaniandra Deviah [AIR 1962 SC 847] .)

18. 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 reiterated in Union of India v. Filip Tiago De Gama of Vedem Vasco De Gama [(1990) 1 SCC 277 : AIR 1990 SC 981] (SCC p. 284, para 16).

19. In *D.R. Venkatachalam v. Transport Commr.* [(1977) 2 SCC 273 : 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 preconceived 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.

20. 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 the process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary. (See *CST v. Popular Trading Co.* [(2000) 5 SCC 511]) The legislative *casus omissus* cannot be supplied by judicial interpretative process.

21. Two principles of construction—one relating to *casus omissus* and the other in regard to reading the statute as a whole—appear to be well settled. Under the first principle a *casus omissus* cannot be supplied by the court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself but at the same time a *casus omissus* should not be readily inferred and for that purpose all the parts of a statute or section must be construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular provision makes a consistent enactment of the whole statute. This would be more so if literal construction of a particular clause leads to manifestly absurd or anomalous results which could not have been intended by the legislature. ‘An intention to produce an unreasonable result’, said Danckwerts, L.J., in *Artemiou v. Procopiou* [(1966) 1 QB 878 : (1965) 3 WLR 1011 : (1965) 3 All ER 539 (CA)] (All ER p. 544 I), ‘is not to be imputed to a statute if there is some other construction

available’. Where to apply words literally would ‘defeat the obvious intention of the legislation and produce a wholly unreasonable result’, we must ‘do some violence to the words’ and so achieve that obvious intention and produce a rational construction. [Per Lord Reid in *Luke v. IRC* [1963 AC 557 : (1963) 2 WLR 559 : (1963) 1 All ER 655 (HL)] where at AC p. 577 he also observed (All ER p. 664 I): ‘This is not a new problem, though our standard of drafting is such that it rarely emerges.’]

22. It is then true that, ‘when the words of a law extend not to an inconvenience rarely happening, but due to those which often happen, it is good reason not to strain the words further than they reach, by saying it is *casus omissus*, and that the law intended *quae frequentius accidunt*’. ‘But’, on the other hand, ‘it is no reason, when the words of a law do enough extend to an inconvenience seldom happening, that they should not extend to it as well as if it happened more frequently, because it happens but seldom’ (see *Fenton v. Hampton* [(1858) 11 Moo PC 347 : 14 ER 727]).

A *casus omissus* ought not to be created by interpretation, save in some case of strong necessity. Where, however, a *casus omissus* does really occur, either through the inadvertence of the legislature, or on the principle *quod semel aut bis existit proetereunt leges*, the rule is that the particular case, thus left unprovided for, must be disposed of according to the law as it existed before such statute — *casus omissus et oblivioni datus dispositioni communis juris relinquitur*; ‘a *casus omissus*’, observed Buller, J. in *Jones v. Smart* [(1785) 1 TR 44 : 99 ER 963] (ER p. 967), ‘can in no case

be supplied by a court of law, for that would be to make laws'.

23. *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 or inconsistency, but no further.' (See *Grey v. Pearson* [(1843-60) All ER Rep 21 : (1857) 6 HL Cas 61] , All ER p. 36 H-I.)

*The latter part of this 'golden rule' must, however, be applied with much caution. 'If', remarked Jervis, C.J., 'the precise words used are plain and unambiguous, in our judgment, we are bound to construe them in their ordinary sense, even though it do lead, in our view of the case, to an absurdity or manifest injustice. 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* [(1851) 11 CB 378 : 138 ER 519] , ER p. 525.)*

24. *At this juncture, it would be necessary to take note of a maxim 'ad ea quae frequentius accidunt jura adaptantur' (the laws are adapted to those cases which more frequently occur)."*

The above position was highlighted in Maulavi Hussein Haji

Abraham Umarji v. State of Gujarat [(2004) 6 SCC 672 : 2004 SCC (Cri) 1815] (SCC pp. 679-82, paras 10-24)."

19. While the plain meaning rule provides a starting point for statutory interpretation, it is not an absolute principle and must be applied judiciously in light of the broader context and purpose of the statute. As Justice Oliver Wendell Holmes famously remarked, "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used."

20. To conclude, while the language of a statute serves as the primary means by which legislative intent is communicated and realized, this principle must be applied judiciously in light of the broader context and purpose of the statute, recognizing that statutes are part of a larger legal framework shaped by legislative purpose and policy objectives.

21. The phrase "as if it were a decree of the Court" occurring in Section 36 of the Act needs to be interpreted in light of the principles discussed above. The phrase "as if it were" is a construction used in language to suggest a hypothetical scenario or condition, implying that something is being treated or considered in a manner akin to a particular situation, even if it is not actually the case. It is often employed to convey a comparison or analogy between two different states or circumstances. When used in legal or formal contexts, "as if it were" indicates that a particular statement or action is being treated as if it were true, even though it may not be factually accurate. This can be useful in scenarios where a hypothetical

situation needs to be imagined or simulated for analytical or augmentative purposes. The phrase “as if it were” might be used to establish a legal fiction or presumption, where a certain condition or event is deemed to exist for the purpose of legal analysis, even if it does not actually exist in reality.

22. Under Section 36 of the Act, the phrase “as if it were” conveys the idea of treating the arbitral award in a manner analogous to a court decree, despite the fact that it is not actually a decree issued by a court. By employing this language, Section 36 of the Act establishes a legal fiction or presumption, whereby the arbitral award is deemed to possess certain characteristics and legal effects akin to those of a court decree. Essentially, it means that once the time limit for challenging the arbitral award has expired, the award is to be enforced through the same procedures and mechanisms as a court decree under the CPC, 1908. This includes the execution of the award through the court’s enforcement powers, such as attachment of property, or other coercive measures. By equating the arbitral award with a court decree, “as if it were” one, Section 36 of the Act extends certain privileges and protections afforded to court decrees to arbitral awards. For example, the arbitral award becomes immune from collateral attack or challenge on the grounds that could have been raised during the arbitration proceedings or in a subsequent application to set aside the arbitral award under Section 34 of the Act. By affording arbitral awards a status akin to court decrees for enforcement purposes, Section 36 of the Act encourages parties to arbitration agreements to abide by the arbitration process and accept the resulting awards as binding and enforceable.

23. In **India Oil Corporation Ltd. and Anr. v. Commercial Court and Anr. reported in 2023 SCC OnLine All 809** (Coram: Neeraj Tiwari, J.) this Court held that an arbitral award is not a decree and objections under Section 47 of the CPC, 1908 would not be maintainable against an arbitral award. Relevant paragraphs have been extracted herein:

“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 challenging the appointment of an Arbitrator. The revisionist never challenged appointment of the Arbitrator under section 20 thereof. Sections 30/33 and 37 of the Arbitration Act, 1940, read with Article 119 of the Limitation Act, give provision for an application to be filed within 30 days of notice of award; however, no such application within the said period was filed by the revisionist.

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.”

47. *This Court has again taken view that arbitral award is not a decree under Section 2(2) of CPC, therefore, objection filed under Section 47 of CPC is not maintainable.*

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.”*

24. In *Hindustan Zinc Ltd. v. National Research Development Corporation* reported in 2023 SCC OnLine Del 330 (Coram: Yashwant Varma, J.) the Delhi High Court held that since objections under Section 47 of the CPC, 1908 are not available in proceedings under Section 36 of the Act, challenge to an arbitral award on its merits cannot be permitted under Section 36 of the Act:

“20. Mahanagar Telephone, assumes significance in light of the emphasis which was laid by the Supreme Court on Section 5 of the Act and the enactment itself being liable to be construed and understood as being a comprehensive legislation governing all aspects of arbitral proceedings. The Court deems it apposite to lay emphasis on the above since the acceptance of the contention as advanced by learned counsel for the objector would essentially amount to recognizing a right inhering in the objector to challenge or question the award on its merits in proceedings which stand restricted to enforcement and execution. That cannot possibly be permitted in light

of the plain command of Section 36 of the Act. It would be pertinent to note that the Act envisages a challenge to an arbitral award being mounted solely within the contours of Section 34. Section 34 not only constructs the forum but also creates the right to question an arbitral award on grounds specified in that provision itself. This is manifest from the use of the expression “only if....” as occurring in Section 34(2). Accepting the contention of learned counsel for the objector that a challenge to the award on merits would also be permissible in proceedings referable to Section 36 would clearly amount to recognizing the same being an avenue available to be invoked in addition to the limited right which stands conferred by Section 34. Bearing in mind the principal objectives of the Act as well as the legislative policy underlying Sections 34 and 36, the Court finds itself unable to countenance the submission as addressed at the behest of the objector.

21. *It would be pertinent to note that Order XXI of the Code compendiously deals with the subject relating to execution of decrees. Those provisions extend from attachment of properties to sale and auction thereof. It also envisages the trial of questions that may arise in the course of execution as would be evident from the various provisions contained in that chapter such as Order XXI Rule 46C as well as Rules 58 to 63 and 101. As this Court reads those provisions, they clearly appear to be restricted to questions that would be indelibly connected with actions and steps that may be taken by a court in the course of execution of a decree. Even those provisions cannot possibly be construed as extending to a challenge to the validity or correctness of the original judgment and decree that may be rendered.*

While it may be open the Court to draw sustenance and guidance from the principles underlying the provisions contained in Order XXI in the course of enforcement of an arbitral award, it would be wholly incorrect to understand or interpret Section 36 as envisaging the adoption of its various provisions. The principles which inform the various provisions of Order XXI can at best only act as a guide for the trial of various questions that may arise in the span of enforcement of an arbitral award.

22. In summation, it must be held that a challenge to an award on the ground that it is a “nullity” or is otherwise illegal can be addressed only in proceedings that may be initiated in accordance with Section 34 of the Act. The grounds on which an award can possibly be assailed are comprehensively set out in Section 34(2). A challenge mounted on those lines in proceedings duly instituted under Section 34 alone can be recognised to be the remedy available to a judgment debtor. The Act neither envisages nor sanctions a dual or independent challenge to an award based on the various facets of nullity as legally recognised being laid in enforcement proceedings. The conclusion of the Court in this respect stands fortified from a conjoint reading of Sections 5, 35 and 36 of the Act as well as the precedents noticed hereinabove. The aforesaid statement of the law would necessarily be subject to the caveat which is liable to be entered in respect of foreign awards and which are governed by Part II of the Act. Insofar as enforcement proceedings are concerned, while the Court would be obliged to deal with all questions that may relate to or arise out of steps that may be taken in the course of execution, it would be wholly incorrect to understand the scope

of those proceedings as extending to the trial of questions touching upon the merits of the award.

23. Accordingly, and for all the aforesaid reasons, the Court comes to conclude that the challenge to the award on merits as is sought to be raised by learned counsel for the objector cannot be countenanced in these enforcement proceedings in light of the observations as made hereinabove. The objection to the enforcement of the arbitral award on that score is consequently negated.”

25. Recently, in **Sanjay Agarwal v. Rahul Agarwal reported in 2024 SCC OnLine All 149** (Coram: Alok Mathur, J.) this Court reiterated that a party aggrieved by an arbitral award is barred in law to challenge the validity or legality of the award at the stage of execution under Section 36 of the Act. Relevant paragraphs are extracted below:

“31. Analyzing the above decisions, it is now well settled that once an award is passed by the Arbitrator, any party aggrieved by the award is required to challenge the award in accordance with the procedure provided under the Act of 1996 including the issue relating to the jurisdiction of the Arbitrator, which such issue however, should be raised before the Arbitrator under Section 16 of the Act, 1996. Therefore, a party, aggrieved by the award, not having taken any of the measures provided in the Act, 1996, is barred in law to challenge the validity or legality of the award at the execution stage when such award is put into execution under Section 36 of the Act, 1996. Thus, the application filed by the opposite party under Section 47 of the Code of Civil Procedure challenging the legality and/or

validity of the award on diverse grounds, was not maintainable, and thus the District Judge did not commit any illegality by rejecting the same.”

26. In **Bellary Nirmithi Kendra v. M/s Capital Metal Industries (C.R.P. No. 100067 of 2022)** (Coram: C.M. Poonacha, J.) the Kerala High Court held that recourse to Section 47 of the CPC, 1908 cannot be taken in execution proceedings under Section 36 of the Act. Relevant paragraphs are extracted below:

“30. Although it is the vehement contention of the learned counsel for the petitioner that having regard to Section 36 of the Act of 1996 the award passed under the provisions of the Act of 1996 is to be treated as a decree and Section 47 of the CPC could be invoked, it is relevant to note that having regard to Section 36(1) of the Act of 1996, the award passed under the provisions of the said Act is required to be construed as a decree only for the purpose of enforcement of the same and it is not open to the petitioner to invoke Section 47 of the CPC before the executing Court.

31. Having regard to the judgments of the Hon’ble Supreme Court in the cases of Paramjeet Singh Patheja , Morgan Securities , Vedanta Limited, this Court is in complete agreement with the view expressed in Larsen and Tubro as well as State of Tripura and in view of the said authoritative pronouncements, it is clear that the petitioner cannot take recourse of Section 47 of the CPC in the execution proceedings initiated by the respondent.”

27. In **Cholamandalam Investment and Finance Company Ltd. -v- Amrapali**

Enterprises and Another reported in 2023 SCC OnLine Cal, I had outlined that there is no scope for adverse interference with an arbitral award under Section 36 of the Act. Relevant paragraph reads as under:

“18. There is no denying the fact that the Act is a complete code in itself and at the same time, it is equally true that Section 36 provides no scope of adverse interference with an arbitral award except executing it as a decree of the court. While Section 47 of the Civil Procedure Code, 1908 (hereinafter referred to as the ‘CPC’) governs the challenge to a court decree at the execution stage, there is no such similar provision provided in the Act.....”

What emerges from the aforesaid judgments is that an arbitral award is not a decree as defined under Section 2(2) of the CPC, 1908. Therefore, objections under Section 47 of the CPC, 1908 which are specifically applicable to execution of decrees, are not maintainable against arbitral awards. The Courts have constantly emphasized the self-contained nature of the Act, which provides a comprehensive framework for challenging arbitral awards, including provisions for challenging the appointment of arbitrators. Section 36 of the Act deals with enforcement and does not provide for challenges to the merits of the arbitral awards. Challenges on the grounds of nullity or illegality can only be raised in proceedings under Section 34 of the Act, which sets forth specific grounds for challenging arbitral awards. Allowing challenges on the merits in enforcement proceedings would undermine the legislative intent and the procedural framework established by the Act. Any party aggrieved by an arbitral award is required to challenge the arbitral award within the framework provided by the Act,

including raising jurisdictional issues before the arbitrator under Section 16 of the Act.

28. Though, the legal fiction of equating arbitral awards to court decrees serves pragmatic purposes, it is important to acknowledge that, it does not alter the fundamental nature or origin of arbitral awards. Arbitral awards are distinct from court judgments in that they arise from private contractual agreements between the parties and are issued by private arbitrators rather than state-appointed judges. Moreover, while arbitral awards are enforceable “as if they were” court decrees, they are not actually court decrees. Execution of an arbitral award, although happens in a manner “as if they were” court decrees, they are subject to specific limitations under the Act.

29. Therefore, to conclude, it can be said, that objections available under Section 47 of the Code of Civil Procedure, 1908 will not be available under Section 36 of the Act since an arbitral award is not in reality a decree of the court but is merely treated as one for the limited purpose of enforcement. The key distinction between court decrees and arbitral awards lies in their origin and nature. Court decrees are orders or judgments issued by a court of law, following adversarial proceedings and adjudication by a judge. They carry the imprimatur of the State and are enforceable as such through the coercive powers of the Court. In contrast, arbitral awards are decisions rendered by private arbitrators chosen by the parties to a dispute, pursuant to an arbitration agreement. They arise from contractual agreements between the parties and are not issued by a court of law. While they may have the same legal effect as court decrees once enforced, they are

fundamentally different in origin and nature.

30. Allowing objections under Section 47 of the CPC, 1908 to be raised against arbitral awards would undermine the finality and binding nature of arbitration awards. It would subject arbitral awards to same procedural complexities and delays associated with court proceedings, defeating the purpose of choosing arbitration as an alternative dispute resolution mechanism.

31. Accordingly, this Court holds that the objections which were sought to be raised by the Petitioners under Section 47 of the CPC, 1908 before the Commercial Court, Moradabad were not maintainable and the rejection of the Petitioners’ objections filed under Section 47 of the CPC, 1908 by the Commercial Court, Moradabad on grounds of maintainability warrants no interference by this Court.

32. In any case, the objections sought to be raised by the Petitioners under Section 47 of the CPC, 1908 before the Commercial Court, Moradabad and also before me under the instant application under Article 227 of the Constitution of India had previously been raised before and considered by the Learned District Judge, Bijnor under Section 34 of the Act. The Learned District Judge, Bijnor under Section 34 of the Act specifically recorded the Petitioner’s contention regarding the challenge to the appointment of Sri A.K. Gupta, Sole Arbitrator –

“Learned counsel for the applicants State of U.P. & others vehemently contended that the appointment of Sole Arbitrator Sri A.K. Gupta (O.P. no. 2) by OP no.1(Contractor) is quite illegal

being against the agreement Clause 43 of the General Conditions of Contract. Learned counsel drew the attention of the court to clause 43 (GCC) of the contract/agreement. Learned counsel submitted that the Chief Engineer Madhya Ganga (CEMG) in respondent of OP no. 1 (Contractor)'s letter dated 22-06-2011, had informed to OP no. 1 (Contractor) vide its letter No. 7092 dated 16-07-2011 and referred three names of its employees for the appointment of Sole Arbitrator. This letter dated 16-07-2011 by CEMG was sent to OP no. 1 (Contractor) by speed post which he returned with the endorsement "refused" dated 25-07-2011. The applicants again sent the same letter dated 16-07-2011 to OP no. 1 (Contractor) on 22-07-2011 which returned unserved with the endorsement "out of station" dated 12-08-2011. Thus the applicants in view of Clause 43 (GCC) had referred the three names of its employees to be selected as Sole Arbitrator by OP no. 1 (Contractor) but OP no. 1 (Contractor) deliberately avoided the service of letter dated 16-07-011 and 22-07-2011 and illegally appointed Sri A.K. Gupta (O.P. No. 2) as Sole Arbitrator. Learned counsel further argued that Sri A.K. Gupta (OP no.2) was concerned with the work assigned to OP no. 1 (Contractor) through the said contract/agreement. So his appointment being against the procedure laid down in Clause 43 (GCC) is illegal and consequently the arbitral award either interim or final passed by him are liable to be set aside."

33. The Learned District Judge, Bijnor under Section 34 of the Act specifically dealt with the Petitioners contentions regarding the appointment of Sri A.K. Gupta as Sole Arbitrator and concluded as follows:

"23- In the case in hand, OP no. 1 (Contractor) invoked arbitration as per Clause 43 with the request that the names of 3 officers to select the Sole Arbitrator to be sent to him within 30 days from the date of receipt of his letter dated 22-06-2011. This letter was handed over to Chief Engineer Madhya Ganga Aligarh (CEMG)'s office on the same day i.e. 22-06-2011. Thus his time to send the list of 3 officers was to expire on 22-07-2011. This letter dated 22-06-2011 of OP no. 1 (Contractor) also constituted a notice for the commencement of arbitration u/s 21 of the Arbitration & Conciliation Act 1996. As no communication within the prescribed period of 30 days from the date of receipt of notice/letter dated 22-06-2011 was received by OP no. 1 (Contractor) upto 22-07-2011 from the office of CEMG, hence his (CEMG)'s right to send the list stood forfeited entitling OP No. 1 (Contractor) to exercise his consequential right under Clause 43 (GCC). OP no. 1 (Contractor) in exercise of his right accrued to him sent the list of 3 Competent Departmental Officers including the name of Sole Arbitrator Sri A.K. Gupta to CEMG vide letter dated 23-07-2011 so that he could select one name out of them and appoint him as Sole Arbitrator in according with Clause 43. This letter was received in the office of CEMG on the same day i.e. 23-07-2011 itself. Thus CEMG had a time period for 15 days to exercise his right to select and appoint a Sole Arbitrator from the list sent by OP no. 1 (Contractor). This period was to lapse on 07-08-2011 in accordance with the provisions of Clause 43 (GCC) but CEMG did not exercise his right within prescribed 15 days period to chose Sole Arbitrator from the list sent by OP no. 1 (Contractor) vide his letter dated 23-07-2011. Consequently, OP no. 1 (Contractor) attained a right to appoint Sole Arbitrator

in accordance with Clause 43 from the list of officers send by him on 23-07-2011 and he exercised his right and appointed Sri A.K. Gupta (OP no. 2) Sole Arbitrator in this matter and informed CEMG's office vide letter dated 08-08-2011 which was received in CEMG's office on the same day i.e. 08-08-2011. This process of appointment of Sole Arbitrator completed in accordance with contractual clause 43 (GCC) and Section 11 of the Act 1996.

24- The alleged letter dated 16-07-2011 sent by CEMG whereby the list of 3 officers was allegedly sent to OP no. 1 (Contractor) is denied by OP no. 1 and OP no. 1 (Contractor) has stated that the alleged letter dated 16-07-2011 was never tendered to him by Post Office authorities for delivery. However, even as per applicants' own admission the alleged letter dated 16-07-2011 is marked to have been refused by OP no. 1 (Contractor) on 25-07-2011. Thus admittedly, OP no. 1 (Contractor) did not receive any communication from CEMG within the prescribed period of 30 days which expired on 22-07-2011 as stated above.

25 – According to Section 3(a) of the Act 1996, unless otherwise agreed by the parties any written communication is deemed to have been received if it is delivered to the addressee (personally or at his place of business, habitual residence or mailing address. Section 3(2) says that the communication is deemed to have been received on the day it is so delivered.

26 – Subsequent letter dated 27-7-2011 (copy of letter dated 16-07-2011) sent by CEMG's office which allegedly returned unserved with the endorsement "out of station" was also of no significance and useless being against the provisions of

Clause 43(GCC). CEMG's letter dated 09-08-2011 written subsequent to appointment of Sole Arbitrator by OP No. 1 (Contractor) on 08-08-2011 is non-est in the eye of law. Even otherwise, this letter was never delivered to OP no. 1 (Contractor).

27- Thus, the appointment of Sole Arbitrator Sri A.K. Gupta (OP no. 2) by OP no. 1 (Contractor) was completely in accordance with the provisions of 43 (GCC) and does not suffer from any procedural error. Moreover, when CEMG abandoned his right to send list of officers by 22-07-2011 and subsequently to select one name from the list send by OP no. 1 (Contractor) by 07-08-2011, his right stood forfeited and his this right cannot be revived under the contract and shall be deemed to have been waived by the applicants u/s 4 of the Act of 1996 and such waiver cannot be revived by this court in view of bar created u/s 5 of the Act of 1996."

34. The principles enshrined in Section 34 of the Act underscore that interference with arbitral awards should only occur in exceptional cases, where the grounds specified in the Act are met. The Petitioner's attempts to circumvent the procedural and substantive framework established by the Act, and to re-litigate matters already addressed under Section 34 of the Act, undermine the efficiency and finality of arbitration proceedings. The Section 34 Court meticulously examined the sequence of events leading to the appointment of the Sole Arbitrator, Sri A.K. Gupta, and determined that the appointment was made in strict compliance with the contractual provisions. Once the Petitioners had already forfeited their right to appoint an arbitrator, they were not

entitled to seek the Court's leave to revive the same. Mere allegations or suspicions of impropriety in appointment of the Sole Arbitrator, Sri A.K. Gupta are not enough in absence of any evidence to support such accusations.

35 . Under the First Appeal filed by the Petitioners under Section 37 of the Act against the order of the Court under Section 34 of the Act, a Division Bench of this Court (Coram: Sudhir Agarwal, J. and Dr. Kaushal Jayendra Thaker, J.) concluded that there was no error in the decision of the Learned District Judge, Bijnor below under Section 34 of the Act. Relevant paragraph is extracted below:

“These findings could not be shown perverse or contrary to record. In these circumstances, it cannot be said that Court below has erred in rejecting appellants' objection under Section 34 of the Act, 1996. We, therefore, find no factual, legal or otherwise error in the impugned order. Appeal is accordingly dismissed at the stage of hearing under Order 41 Rule 11 C.P.C.”

36. The Petitioners in their objections filed under Section 47 of the CPC, 1908 primarily contended before the Commercial Court, Moradabad that Sri A.K. Gupta, Sole Arbitrator acted in a biased manner to pass an award in favour of the Respondent and the arbitral award passed on December 12, 2013, was against the law. These objections under Section 47 of the CPC, 1908 could not have been entertained under Section 36 of the Act. In any case, these objections were already considered and disposed of by the Learned District Judge, Bijnor under Section 34 of the Act. The only permissible ground for interference under Section 47 of the CPC, 1908 in case

of an arbitral award is that if the arbitral award was passed with inherent lack of jurisdiction, which is not the case here. The Petitioners' attempt to resurrect their objections under Section 47 of the CPC, 1908 which were already adjudicated upon by the Learned District Judge under Section 34 of the Act and this Court under Section 37 of the Act runs counter to the principle of judicial finality.

37. Section 34 of the Act provides grounds for setting aside an arbitral award, including allegations of bias, illegality or contravention of public policy. Once objections under Section 34 of the Act are adjudicated and dismissed, and the appeal under Section 37 of the Act stands rejected, the arbitral award achieves finality. Once the Court under Section 34 of the Act had already adjudicated and dismissed the Petitioner's objections under Section 34 of the Act, those issues could not have been relitigated in execution proceedings under Section 36 of the Act under Section 47 of the CPC, 1908. Sanctity of an arbitral award cannot be undermined by attempts at revisiting settled matters. Execution proceedings, far from being a battleground for a rematch on the merits of the arbitral award, serve as the denouement of the legal drama – a final act in which the award holder claims their just reward. Like the closing scene of a play, execution proceedings bring the curtain down on the dispute, allowing the parties to turn the page and move forward. To raise objections under Section 47 of the CPC, 1908 in the execution proceedings would be akin to attempting to rewrite the script of a play after the final curtain call – a futile endeavour that serves only to prolong the agony of litigation and delay the inevitable conclusion. Allowing parties to raise objections under Section 36 of the Act

would be akin to opening a Pandora's box. In the theatre of arbitration, objections under Section 36 of the Act are like unexpected plot twists that threaten to derail the carefully crafted storyline of dispute resolution. Objections under Section 36 of the Act can be likened to the director's cut of a film, where deleted scenes and alternate endings threaten to overshadow the final product. Like deleted scenes that were left on the cutting room floor for a reason, objections under Section 36 of the Act represent arguments and challenges that have already been considered and dismissed. Allowing parties to resurrect these arguments during execution proceedings would be akin to reopening old wounds and revisiting scenes that were meant to remain in the past.

38. Objections raised by the Petitioner have traversed a substantial legal journey, having been previously considered by both the arbitral tribunal and the Courts under Section 34 and Section 37 of the Act. Furthermore, the Special Leave Application filed before the Supreme Court was also dismissed. In light of these exhaustive considerations and the subsequent dismissal by the Hon'ble Supreme Court, it becomes apparent that the Petitioners are merely engaging in dilatory tactics, needlessly prolonging judicial proceedings and squandering the valuable time and resources of this Court. It is evident that the Petitioner's actions amount to a blatant misuse of the judicial system, aimed at causing unnecessary delay and harassment to the other party. By needlessly burdening the Courts with repetitive and meritless objections, the Petition is squandering judicial time.

39. The objections raised by the Petitioners regarding alleged coercion and compulsion by the Sole Arbitrator found no

mention in the application filed under Section 34 of the Act or the subsequent appeal under Section 37 of the Act. If these objections were not raised under these provisions, they cannot now be resurrected under a writ application under Article 227 of the Constitution of India. To permit such objections to be raised in this forum would undermine the finality of arbitral awards and circumvent the statutory scheme established by the Act. Once parties have availed themselves of the statutory remedies available under Section 34 of the Act and have exhausted the appellate process under Section 37 of the Act, the award attains finality, akin to a judgment of a court of law. Just as a judgment of a court cannot be challenged *ad infinitum* through collateral proceedings, an arbitral award cannot be subjected to endless re-litigation through writ petitions under Article 226 or Article 227 of the Constitution of India. Moreover, the invocation of Article 227 of the Constitution of India to challenge arbitral proceedings after the dismissal of objections under Section 34 and Section 37 of the Act would amount to an abuse of process and a disregard for the principle of issue estoppel. Issue estoppel precludes parties from re-litigating issues that have been conclusively determined in earlier proceedings. Petitioners' failure to raise these objections earlier suggests either a lack of diligence or a tactical decision to withhold objections until a later stage – a tactic that cannot be countenanced in the interest of fairness and procedural regularity. The principles of finality and judicial economy demand that parties abide by the decisions of arbitral tribunals and exhaust the statutory remedies available under the Act before seeking recourse to collateral challenges through writ petitions under Article 226 or Article 227 of the Constitution of India.

40. The tactics employed by the Petitioners characterized by their persistent delay and obstructionist behaviour, merit unequivocal condemnation and necessitate the imposition of substantial costs. Delay tactics serve to perpetuate injustice by denying parties their rightful entitlements. In the context of arbitration proceedings, the purpose of arbitration is to provide a swift and cost-effective alternative to traditional litigation. By resorting to delay tactics, the Petitioners have sought to frustrate this objective and deny the Respondent the benefits of a timely resolution. This not only prolongs the uncertainty and financial strain but also undermines the effectiveness of arbitration as a dispute resolution mechanism.

41. It has been pronounced in umpteen Supreme Court judgments that costs serve as a deterrent to ensure that the overburdened judicial system of our country is not saddled with frivolous cases. The Petitioners in the instant case have invoked the writ jurisdiction of this Court in an attempt to have another chance at their matter without disclosing any cause of action. The arguments made by the Petitioners are a mere repletion of the grounds taken before the Learned District Judge under Section 34 of the Act, and this Court in first appeal under Section 37 of the Act. Moreover, as has been conclusively established by the Hon'ble Supreme Court and the High Courts, including this Court, execution proceedings under Section 36 of the Act cannot be used to challenge an arbitral award and objections under Section 47 of the CPC, 1908 cannot be invoked. In the present case, the award was passed in the year 2013, the order under Section 34 of the Act rejecting the appeal of the petitioners was passed on April 9, 2014, the appeal filed by

the petitioners under Section 37 of the Act was dismissed on December 22, 2016 and the Special Leave Petition was dismissed on November 2, 2018. The execution application was filed in the year 2019 and the objection under Section 47 of the CPC filed in the year 2022. Unfortunaytely, till date the award holder has not been able to realise the fruits of the decree on account of procrastinating tactics being adopted by the award debtor. Clearly, the execution proceedings, which are supposed to be handmaid of justice and subserve the cause of justice has been used by the award debtor as tools to misuse, abuse and obstruct justice. Such dialatory tactics are obloquy to the judicial system and exemplary costs are required to be imposed to ensure that similar tactics are not employed by other award debtors.

SALIENT PRINCIPLES

42. I have highlighted the key principles that emerge from the aforesaid discussions below:

a. The jurisdiction of an executing court under Section 47 of the CPC, 1908 is limited to matters pertaining to execution of the decree. Validity of a decree cannot be looked into by the executing court unless the decree suffers from inherent lack of jurisdiction. Role of an executing court is akin to a microscopic inspection hole, as held by the Hon'ble Supreme Court in *Dhurandhar Prasad Singh (supra)*.

b. The repercussions of either wrongly accepting or rejecting objections can significantly impact the parties involved and potentially compromise the integrity of the execution procedure. Given the limited jurisdiction of the executing

court under Section 47 of the CPC, 1908, it is crucial to precisely define the issues falling within its domain. Courts should ensure that objections raised under Section 47 of the CPC, 1908 relate strictly to matters concerning the execution, discharge, or fulfillment of the decree and do not overstep into substantive rights or legal matters beyond the decree's boundaries. Moreover, courts should uphold the principle of finality when dealing with objections under Section 47 of the CPC, 1908.

c. Courts must be mindful of execution proceedings under Section 47 of the CPC, 1908 being used as a means to unnecessarily obstruct the execution proceedings. Meritless, and frivolous objections under Section 47 of the CPC, 1908 must be dealt with strongly.

d. Language of a statute is the primary consideration while interpreting a statute. Words used in a statute are the expression of the will of the legislature. Courts are obligated to give effect to the literal meaning of the words used in a particular provision unless the same leads to absurdity.

e. The intent behind plain meaning rule is to respect the separation of powers. By adhering to the literal meaning of the words used in a statute, courts refrain from encroaching upon the domain of the legislature. Intention of legislature is best reflected in the words used by it as propounded by the Hon'ble Supreme Court in *Nagar Palika Nigam (supra)*.

f. Plain meaning rule is not an absolute principle and must be used in light of the broader context and purpose of the statute.

g. The phrase "as if it were" is used to suggest a hypothetical scenario implying that something is being treated in a manner akin to a particular situation even if it is not actually the case. It is used to establish a legal fiction or create a presumption, where a condition is deemed to exist for the purpose of legal analysis, even if it does not actually exist.

h. In Section 36 of the Act, the phrase providing for the execution of an arbitral award as if it were "a decree of the court" indicates that an arbitral award is to be executed in a similar manner as a decree passed by a court. This legal fiction is created for the limited purpose of executing an arbitral award through the court's enforcement powers.

i. An arbitral award is not in reality a decree of the Court as defined under Section 2(2) of the CPC, 1908. Therefore, objections under Section 47 of the CPC, 1908 cannot be allowed in proceedings under Section 36 of the Act. Allowing objections under Section 47 of the CPC, 1908 to be raised in execution proceedings under Section 36 of the Act will undermine the finality and binding nature of arbitral awards.

j. Once objections are dismissed under Section 34 of the Act, and appeal under Section 37 of the Act also stands adjudicated, an arbitral award attains finality. Any objections regarding the validity of an arbitral award are impermissible under Section 36 of the Act.

k. Execution proceedings, far from being a battleground for a rematch on the merits of the arbitral award, serve as the denouement of the legal drama – a final act in which the award holder claims their just

reward. Like the closing scene of a play, execution proceedings bring the curtain down on the dispute, allowing the parties to turn the page and move forward. To raise objections under Section 47 of the CPC, 1908 in the execution proceedings would be akin to attempting to rewrite the script of a play after the final curtain call – a futile endeavour that serves only to prolong the agony of litigation and delay the inevitable conclusion.

l. Writ jurisdiction under Article 226 and Article 227 of the Constitution of India cannot be invoked to challenge an arbitral award. The Act is a complete code in itself and any challenge to the validity of an arbitral award has to be raised within the mechanisms provided by the Act itself. Only under exceptional circumstances, a writ court can interfere with an arbitral award or execution proceedings under Article 226 and Article 227 of the Constitution of India.

m. Parties' failure to raise timely objections under Section 34 and Section 37 of the Act will not entitle them to raise these grounds at a later stage by invoking the writ jurisdiction under Constitution of India. Writ jurisdiction is extremely limited and cannot be treated as a second chance at the cherry.

n. As pointed out in *Rahul S. Shah v. Jinendra Kumar Gandhi*; (2021) 6 SCC 418, there is steady rise of proceedings akin to a retrial at the time of execution causing failure of realisation of fruits of decree and relief which the party seeks from the courts despite there being a decree in their favour. Experience has shown that various objections are filed before the executing court and the decree-holder is deprived of the fruits of the

litigation and the judgment-debtor, in abuse of process of law, is allowed to benefit from the subject-matter which he is otherwise not entitled to. In such cases, courts are duty bound to impose costs as a deterrent in order to ensure that litigants do not abuse the judicial system with frivolous and vexatious matters. Judicial resources are extremely limited and frivolous matters which unnecessarily take up the valuable time of the court deserve to be dealt with stringently.

Conclusion and Directions

43. Accordingly, for the reasons discussed above, the instant writ petition is dismissed as frivolous, vexatious, motivated and being an abuse of the process of this Court. Costs of Rs.5,00,000/- are imposed to be paid by the Petitioners to the Respondent within four weeks from the date of this Judgment.

44. The Petitioners are further directed to file an affidavit of compliance after making the payment in aforesaid terms within five weeks from date. On failure of the Petitioners to deposit such costs and file an affidavit of compliance as directed; the Registry of this Court is directed to list the matter for appropriate orders.

45. I would sincerely like to thank counsel appearing for the parties for their able assistance in the matter. Furthermore, I would go amiss if I do not put in a word of appreciation for my Research Associate Mr. Aman Deep Sharma and my Law Intern Mr. Jaspreet Singh for their dexterity in research and superlative assistance in drafting of this judgment.

(Shekhar B. Saraf, J.)

EPILOGUE

46. The judicial system exists to provide a fair and impartial resolution to disputes, ensuring that individuals have access to a forum where their rights can be protected and grievances redressed. Frivolous litigation undermines this fundamental principle by clogging the courts with baseless claims, thereby delaying the resolution of legitimate disputes. As a result, individuals with valid claims may be forced to endure prolonged legal battles, often at great personal and financial cost, simply because the system is overwhelmed by frivolous cases.

47. Imposition of costs in cases of frivolous litigation is not intended to discourage legitimate claims but rather to deter abuse of the legal system. Courts have discretion to differentiate between cases where parties genuinely believe in the merit of their claims and those where litigation is pursued for ulterior motives or without any reasonable basis. By imposing costs in cases where litigation is found to be frivolous or vexatious, courts strike a balance between deterring abuse and ensuring access to justice for legitimate claimants.

48. Imposition of costs in cases of frivolous litigation is essential to maintain the integrity, efficiency, and fairness of the judicial system. By deterring abuse of the legal process, promoting judicial efficiency, and upholding the principles of fairness and justice, cost imposition serves to safeguard the rights of individuals, protect the integrity of the legal system, and bolster public confidence in the administration of justice.

49. In *Vinod Seth v Devinder Bajar and Anr.* reported in (2010) 8 SCC 1

(Coram: R.V. Raveendran and R.M. Lodha, JJ.) the Hon'ble Supreme Court held that the provisions of costs should act as a deterrent to frivolous litigation. Relevant part from the aforesaid judgment is reproduced herein:

“48. The provision for costs is intended to achieve the following goals:

(a) It should act as a deterrent to vexatious, frivolous and speculative litigations or defences. The spectre of being made liable to pay actual costs should be such, as to make every litigant think twice before putting forth a vexatious, frivolous or speculative claim or defence.....”

50. In *Ramrameshwari Devi and Ors. v. Nirmala Devi and Ors.* reported in (2011) 8 SCC 249 (Coram: Dalveer Bhandari and Deepak Verma, JJ.) the Hon'ble Supreme Court propounded that frivolous litigation has to be controlled and courts have to ensure that that there is no incentive for such litigation. Relevant portion has been extracted below:

“43. We have carefully examined the written submissions of the learned amicus curiae and the learned counsel for the parties. We are clearly of the view that unless we ensure that wrongdoers are denied profit or undue benefit from the frivolous litigation, it would be difficult to control frivolous and uncalled for litigations. In order to curb uncalled for and frivolous litigation, the courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that court's otherwise scarce and valuable time is consumed or more appropriately, wasted in a large number of uncalled for cases.”

51. Making a reference to its judgment in *Ramrameshwari Devi (supra)*, the Hon'ble Supreme Court in *Maria*

Margarida Sequeira Fernandes v. Erasmo Jack de Sequeira, reported in **(2012) 5 SCC 370** (Before: Dalveer Bhandari, H.L. Dattu and Deepak Verma, JJ.) espoused that in order to prevent the court's time from being consumed in frivolous cases and to restrain or minimise the institution of such litigation, exemplary costs must be imposed. Relevant paragraphs are extracted below:

“82. This Court in a recent judgment in Ramrameshwari Devi [(2011) 8 SCC 249 : (2011) 3 SCC (Cri) 481 : (2011) 4 SCC (Civ) 1] aptly observed at p. 266, para 43 that unless wrongdoers are denied profit from frivolous litigation, it would be difficult to prevent it. In order to curb uncalled for and frivolous litigation, the courts have to ensure that there is no incentive or motive for uncalled for litigation. It is a matter of common experience that the court's otherwise scarce time is consumed or more appropriately, wasted in a large number of uncalled for cases. In this very judgment, the Court provided that this problem can be solved or at least can be minimised if exemplary costs is imposed for instituting frivolous litigation. The Court observed at pp. 267-68, para 58 that imposition of actual, realistic or proper costs and/or ordering prosecution in appropriate cases would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary adjournments by the parties. In appropriate cases, the courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings.”

52. In conclusion, the imposition of costs in cases of frivolous litigation is not merely a punitive measure but rather an essential tool for maintaining the integrity of

the judicial system, deterring abuse of legal processes, and promoting access to justice. By holding litigants accountable for their actions and imposing costs when warranted, the legal system reaffirms its commitment to upholding the principles of justice, fairness, and equity for all members of the society.

(2024) 4 ILRA 799

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 28.02.2023

BEFORE

THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Matters U/A 227 No.9446 of 2023 (Civil)

Sri Rameshwar Devi & Anr. ...Petitioners
Versus

Rakesh Mishra ...Respondent

Counsel for the Petitioners:

Sri Arpit Agarwal

Counsel for the Respondent:

Sri Rahul Saxena, Sri Vivek Saran

(A) Civil Law - The Code of Civil Procedure, 1908 - Section 151 - Order 41 - Rule 27 - Production of additional evidence in Appellate Court -Appellate courts can allow additional evidence under exceptional circumstances as specified in Order 41 Rule 27 CPC, provided the evidence is necessary to pronounce judgment or for other substantial reasons - Discretion must be judicially exercised - Application for additional evidence under Order 41 Rule 27 CPC should be considered at the time of hearing of the appeal on merits - Court must determine whether additional evidence is essential to pronounce judgment - Pre-hearing rejection of such applications, without proper consideration, is contrary to established legal principles. (Para 8-11)

Petitioners - Tenants of shop purchased by respondent - Sought to adduce additional evidence at the appellate stage - Application

under Order 41 Rule 27 CPC rejected by Appellate Authority on grounds of unnecessary evidence - Petitioners contended inability to file evidence earlier due to counsel's illness and retirement – hence petition. (Para 2-5)

HELD: - Order of Appellate Authority rejecting petitioners' application under Order 41 Rule 27 CPC at the Appellate Stage was set aside. Appellate authority was directed to reconsider the application as per the guidelines laid down by the Supreme Court in *Ibrahim Uddin v. Union of India (2012)* and to decide the appeal expeditiously. (Para -13)

Petition allowed. (E-7)

List of Cases cited:

1. Ram Karan Vs Jagdeep Singh, 2016 (2) ARC 479
2. Smt. Anita Sharma Vs Om Prakash Batra, 2015 (2) ARC 615
3. Lekhraj Bansal Vs St. of Raj. & anr., 2014 (15) SCC 686
4. U.O.I. Vs Ibrahim Uddin & anr., 2012 (8) SCC 148

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

1. Heard Sri Arpit Agarwal, learned counsel for the petitioners and Shri Vivek Saran, learned counsel for the respondents.'

2. The instant petition under Article 227 of the Constitution of `India has been filed for setting aside the judgment and order `dated 08.08.2023, passed by the Appellate Authority/ Additional District Judge, Court No. 4 / Special Judge (EC Act) Pilibhit, in P.A. Appeal No. 8 of 2023 (Rameshwari Devi and another vs. Rakesh Mishra) whereby and whereunder the `Application filed by the petitioner for adducing additional evidence under Order 41 Rule 27 read with Section 151 CPC has been rejected.

`3. It is the case of the petitioners that they are tenants of a `shop situated in Mohalla Bazar Katra, Tehsil and Town Area Bisalpur, Pilibhti and are conducting the business of Bangles from the shop in question. Originally, the tenancy of the shop was in the name of Shri Radheyshyam the late husband of the petitioner no. 1 and father of petitioner no. 2. After the death 1 of 9 `of Shri Radheshyam the tenancy devolved upon the petitioners. The shop was originally owned by one Sushil Kumar and was purchased by the respondent herein vide Sale Deed dated 21.07.2015. A Release Application under Section 21(1)(a) of the UP Act No. 13 of 1972 was filed by the respondent without issuing notice to the petitioners as contemplated under the 1st Proviso to Section 21(1) of the Act which proceedings were registered as PA Case No. 114 of 2018. The petitioners appeared in the Case and filed their objections taking a specific plea in their objections that the plaintiff/ respondent had not served any notice upon the petitioners/ tenants that he had purchased the shop. The learned Prescribed Authority, vide judgment and order dated 20.01.2023 allowed the Release Application. The petitioners being aggrieved by the order of the Prescribed Authority, have preferred an Appeal being Appeal No. 8 of 2023. During the pendency of the Appeal the original Counsel of the petitioners, conducting the Appeal, namely Shri V.S. Ashok took retirement from the profession and the petitioners had to engage another counsel namely Shri Ishan Gupta. Shri Ishan Gupta, Advocate on going through the file opined that certain relevant documents had not been brought on record and accordingly the petitioners preferred an Application under Order 41 Rule 27 CPC dated 09.05.2023 annexing the documents/evidence to be brought on record for consideration of the Appellate Authority in seisin of the Appeal. The documents sought to be filed as Additional Evidence were (i) certified copy of order

dated 13.02.2020 passed in Original Suit No. 113 of 2016 (ii) certified copy of the Commission Report (iii) certified copy of the extract of the House Tax 2 of 9 Assessment pertaining to the year 2017-18 pertaining to the plaintiff/ respondent and his wife, photographs of the disputed shop and original invitation Card. The landlord/respondent filed objections to the Application under Order 41 Rule 27 CPC. The Appellate Authority vide order dated 08.08.2023 has rejected the Application under Order 41 Rule 27 CPC which order has been impugned in the instant petition. .

4. Shri Arpit Agarwal, learned counsel for the tenant/petitioners has argued that the Appellate Authority has committed manifest error of law in rejecting the Application to bring on record the Additional Evidence. He has invited the attention of this Court to the provisions of Order 41 Rule 27 (1) (b) CPC and submits that Order 41 Rule 27 assigns discretion to the Appellate Court to require any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause. For the exercise of discretion under Order 41 Rule 27 (1) (b) CPC an application is required to be considered along with hearing of the Appeal on merits. It was not open for the Appellate Authority to have exercised the discretion vested in it before deciding the Appeal and the Application was liable to be considered at the time of hearing of the Appeal. Reliance has been placed upon decisions of a Coordinate Bench of this Court reported in **2016 (2) ARC 479 (Ram Karan Vs. Jagdeep Singh) and 2015 (2) ARC 615 (Smt. Anita Sharma Vs. Om Prakash Batra)**.

5. It is further argued by Shri Arpit Agarwal that in the case at hand it was specifically pleaded in the Application for 3 of 9 Additional Evidence that the evidence sought to be brought on record could not be

filed earlier on account of the earlier counsel Shri V.S. Ashok withdrawing himself from the case on account of his illness and retirement from the profession and when another counsel Shri Ishan Gupta was engaged he at the time of preparation of the Case opined that the documents were required to be filed on record as Additional Evidence. In the peculiar circumstances of the case the documents were liable to be accepted on record. This Court in almost similar circumstances in a case reported in **2019 (2) ARC 155** set aside the order rejecting the Application under Order 41 Rule 27 CPC and directing the Court below to decide the Application within a time frame taking into consideration the relevant law.

6. Per contra, Shri Vivek Saran, learned counsel for the respondent submits that the Appellate Authority committed no error or illegality in rejecting the Application of the petitioner under order 41 Rule 27 CPC. Placing reliance upon the decision of the Apex Court in the Case of **Lekhraj Bansal Vs. State of Rajasthan and Another Reported in 2014 (15) SCC 686** it is submitted that parties to an Appeal shall not be entitled to produce additional evidence in the Appellate Court unless the conditions stipulated under Order 41 Rule 27 CPC are satisfied. It is not the case of the petitioner that the Trial Court had refused to admit the said evidence which ought to have been admitted. It is also not the case of the petitioner that the said evidence was not within his knowledge or could not, after the exercise of due diligence be produced by him during pendency of the PA case before the Prescribed Authority. On the other hand it is vehemently contended that the Appellate Authority has expressed its observation that the documents sought to be brought on record are not necessary for enabling it to pronounce judgment in the Appeal. He thus submits that the petition is liable to be dismissed at the threshold.

7. I, have heard learned counsel for the parties and have perused the record.

8. Order 41 Rule 27 CPC provides for production of additional evidence in Appellate Court. The Appellate Court in exercise of the discretionary jurisdiction and subject of fulfilment of the conditions laid down under Order 41 Rule 27 CPC may allow the parties to adduce additional evidence. Order 41 Rule 27 CPC reads as under:

Order 41 Rule 27. Production of additional evidence in Appellate Court:

1. The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if-

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

[(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed]

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any of the other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Whenever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.

9. A perusal of the above provisions shows that it is an exception to the general principle that the Appellate Court should not travel outside the record of the lower Court and

cannot take any evidence in Appeal. Order 41 Rule 27 enables the Appellate Court to take Additional Evidence in exceptional circumstances if and only if the conditions laid down in this provision are found to exist. A certain discretion is permitted to be exercised by the Appellate Court while considering any application under Order 41 Rule 27 which is required to be exercised judicially. The question regarding the exercise of discretion and at what stage by the Appellate Court while considering an Application under Order 41 Rule 27 CPC came up for consideration before the Apex Court in the case of *Union of India vs. Ibrahim Uddin and Another*, reported in 2012 (8) SCC 148. The Apex Court after considering all aspects of the matter summed up the Issue in para 48 of its judgment which is being reproduced hereunder:

“48. To sum up on the issue, it may be held that application for taking additional evidence on record at a belated stage cannot be filed as a matter of right. The court can consider such an application with circumspection, provided it is covered under either of the prerequisite condition incorporated in the statutory provisions itself. The discretion is to be exercised by the court judicially taking into consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the court below and as to whether the applicant had prosecuted his case before the court below diligently and as to whether such evidence is required to pronounce the judgment by the appellate court. In case the court comes to the conclusion that the application filed comes within the four

corners of the statutory provisions itself, the evidence may be taken on record, however, the court must record reasons as on what basis such an application has been allowed. However, the application should not be moved at a belated stage.”.

10. As regards the stage of consideration of the Application the Apex Court was of the view that the Application under Order 41 Rule 27 was liable to be considered at the time of hearing of the Appeal on merits so as to find out whether the evidence sought to be adduced have any relevance/ bearing on the issue involved. It observed that the admissibility of the Additional Evidence does not depend upon the relevance to the issue at hand or on the fact, whether the Applicant had an opportunity for adducing such evidence at an earlier stage or not but it depends upon whether or not the Appellate Court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. The true test is whether the Appellate Court is able to pronounce judgment on the materials before it without taking into consideration the Additional Evidence sought to be adduced. It accordingly held in para 52 of the judgment as under: “ 52. Thus, from the above, it is crystal clear that application for taking additional evidence on record at an appellate stage, even if filed during the pendency of the appeal, is to be heard at the time of final hearing of the appeal at a stage when after appreciating the evidence on record, the court reaches the conclusion that additional evidence was required to be taken on record in order to pronounce the judgment or for any other substantial cause. In case, application for taking additional evidence on record 7 of 9 has been considered and allowed prior to the hearing of the appeal, the order being a product of total and complete non-application of mind, as to whether such evidence is required to be taken on record to pronounce

the judgment or not, remains inconsequential/inexecutable and is liable to be ignored.”

11. Now coming to the impugned order date 08.08.2023, passed by the Appellate Authority, the Court finds that in substance the Application under Order 41 Rule 27 CPC has been rejected on the ground that the conditions laid down under Order 41 Rule 27 were not satisfied and further that in its opinion the Additional Evidence sought to be brought on record was not required to pronounce judgment or for any other substantial cause. The discretion has been exercised by the Appellate Court against the petitioners (Appellant) even without discussing as to whether the documents sought to be brought on record were necessary or not for deciding the real controversy at hand. Besides, the Application has been rejected even prior to hearing of the Appeal. In the opinion of the Court, the order of the Appellate Authority rejecting the Application is contrary to the ratio of the decision of the Apex Court in the Case of **Ibrahim Uddin** (Supra) inasmuch as the Application under Order 41 Rule 27 CPC is required to be considered at the time of hearing of the Appeal on merits so as to find out whether the documents/evidence sought to be adduced have any relevance/bearing on the issue involved and the true test being whether the Appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced. 8 of 9

12. In the result, the petition succeeds and is **allowed**.

13. The impugned order dated 08.08.2023, passed by the Appellate Authority/Additional District Judge (Court No. 4)/Special Judge (EC Act) Pilibhit in PA

2. In view of the order proposed to be passed, notice to opposite party No.2 is

hereby dispensed with as purely legal question is involved in this case, however, learned A.G.A-I for the State has accepted notice on behalf of State-opposite party No.1.

3. The instant writ petition has been filed with following main prayer:-

"1. Issue an order or direction setting aside the impugned order dated 29.02.2024 passed by learned Sessions Judge, Faizabad in Criminal Appeal No.12 of 2024 (Mangla Prasad Singh Vs. Shanti Roller Mills Ltd. to the extent by which the learned Appellate Court despite admitting the appeal has declined to stay the operation of the impugned order dated 16.02.2024 passed by the learned Trial Court and thereby has rejected the stay application (Paper No. 5-B) as contained in Annexure No.1 to the petition."

4. Learned Counsel for the petitioner submitted that initially, the present opp. party no. 2 filed a complaint U/S 138 of Negotiable Instruments Act, 1881 read with Section 406/420 I.P.C against the petitioner in the Court of Additional Chief Judicial Magistrate-Ist Faizabad on 25.02.2014 with allegations that complainant was a company registered under the provisions of Indian Companies Act 1956, which was carrying out the business of manufacturing and sales of Poultry Feed through their unit situated at Plot No. B-1 to B-6 Industrial Area Site No.-1 Post-Haripur Jalalabad, Lucknow Road, P.S-Cantt Distt.-Faizabad (Now Ayodhya). It was further alleged that the present petitioner Mangal Prasad Singh purchased the Poultry Feed with the complainant company as per terms settled between the parties and handed over a cheque bearing number "394990" dated 15.12.2013 amounting to Rs. 300000/-

drawn on State Bank of India Babatpur, Varanasi but when the same was presented for clearing by the complainant company in HDFC Bank Ltd. Faizabad, then the same was dishonoured by State Bank of India, Branch-Babatpur Varanasi on the ground of insufficient fund. It was also alleged that despite giving notice on 13.01.2014, the accused/petitioner failed to make payment of due amount, thereafter, the complainant filed the complaint U/S 138 of Negotiable Instruments Act read with Section 406/420 I.P.C in the Trial Court on 25.02.2014.

5. Learned Counsel for the petitioner further submitted that the petitioner contested the matter before the Trial Court and also filed his written submission on 15.02.2017 in the Trial Court stating therein the true and full facts it was also averred that initially, a Saving Bank account pertaining to the petitioner State Bank of India, Branch-Babatpur Varanasi in respect of which a cheque was issued by the petitioner to the present opp. party no. 2 towards guarantee/security money but when the said account was closed and the petitioner opened new account in State Bank of Bikaner & Jaipur, Branch Babatpur Varanasi, then the petitioner made payments to the present opp. party no. 2 from his new account on 14.05.2013 of Rs. 200028/-, on 03.06.2013 of Rs. 40000/-, on 17.07.2013 of Rs. 25000/-, on 19.08.2013 of Rs. 30000/-, on 27.09.2013 of Rs. 25000/-, on 11.11.2013 of Rs. 25000/- on 24.10.2014 of Rs. 35000/-, on 21.04.2014 of Rs. 20000/- & on 03.07.2014 of Rs. 20000/- but the opp. party no. 2 despite having full knowledge of closure of the first account, submitted the previous cheque which was given by the petitioner towards guarantee/security money. Although, the petitioner had issued a cheque towards guarantee/security money

from his new account to opp. party no.2 and as such there was no malafide intention on the part of the petitioner.

6. Learned Counsel for the petitioner further submitted that the Trial Court i.e. First Additional Chief Judicial Magistrate Ayodhya without considering the legal and factual aspects of the matter, illegally and erroneously vide impugned judgment and order dated 16.02.2024 convicted the petitioner and awarded sentence of three months simple imprisonment U/S 138 of Negotiable Instruments Act 1881 and also imposed fine of Rs. 4,00,000/-. The Trial Court further provided that out of total fine an amount of Rs. 390000/- shall be given to the complainant/present opp. party no. 2 U/S 357 of Cr.P.C as damages and rest of the amount of fine of Rs. 10000/- shall be deposited in Court and in case of non deposition of amount of fine the accused shall serve one month further imprisonment.

7. Learned Counsel for the petitioner further submitted that against the order of conviction passed by the Trial Court remedy of filing Statutory Appeal is provided to the accused person U/S 374 Cr.P.C and as such the petitioner/accused preferred Statutory Appeal on 29.02.2024 in the Court of District & Sessions Judge Faizabad. It is further stated that along with the Memo of Appeal the petitioner/appellant moved two applications one for granting bail to the appellant/accused during pendency of the appeal and other for staying the operation of the order dated 16.02.2024 passed by the Trial Court.

8. Learned Counsel for the petitioner further submitted that as per Section 148(1)

of The Negotiable Instruments Act 1881, which has been inserted in the Act through Negotiable Instruments (Amendment) Act, 2018 (Act No 20 of 2018) it has been provided that notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), in an appeal by the drawer against conviction U/S 138, the Appellate Court may order the Appellant to deposit such sum which may shall be a minimum of twenty percent of the fine or compensation awarded by the Trial Court, provided that the amount payable under this sub-section shall be in addition to any interim compensation paid by the appellant U/S 143A.

9. Learned Counsel for the petitioner further submitted that in Section 148(2) it has also been provided that the amount referred to in sub-section (1) shall be deposited within sixty days from the date of the order, or within such period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the appellant.

10. Learned Counsel for the petitioner further submitted that the Learned Appellate Court although vide order dated 29.02.2024 has been pleased to admit the appeal and also to allow the Bail Application but by the same order despite admitting the appeal erroneously decline to stay the operation of the impugned order dated 16.02.2024 passed by the Trial Court and thereby, rejected the Stay Application (Paper No. 5B) and further directed the appellant to deposit the amount of fine imposed by the Trial Court within a period of 10 days from the date of the order and also provided that in case non-deposition of fine by the appellant, the bail order shall stand automatically cancelled.

11. Learned Counsel for the appellant further submitted that the Appellate Court while passing the impugned order dated 29.02.2024 by which it has declined to stay the operation of the order passed by the Trial Court, has failed to consider the Statutory Provisions as enshrined U/S 148(1) & 148 (2) of The Negotiable Instruments Act 1881, which resulted in miscarriage of justice.

12. Learned Counsel for the petitioner further submitted that the impugned order dated 29.02.2024 by which the Appellate Court has provided that in case of failure of deposition of fine by the appellant, the Bail Order shall stand automatically cancelled is punitive in nature and is against the settled proposition of law as it is settled propositions of law, that if any appeal is presented by the appellant and the same is admitted by the Appellate Court, in that event it is also obligatory for the Appellate Court to stay the operation of the impugned order under appeal during pendency of the appeal, thus, if any order is challenged and the appeal is pending, one cannot permit a swinging pendulum continuously taking place during pendency of the appeal. He further submitted that by non staying the operation of the impugned order by the Appellate Court, serious far reaching Civil Consequences may arise and the same may be detrimental to the interest of the appellant/petitioner, for which there is no justification.

13. Learned Counsel for the petitioner further submitted that the impugned order dated 29.02.2024 to the extent by which the Appellate Court has declined to grant stay order has caused serious prejudice to the petitioner and as such the necessity of filing the present petition invoking the Supervisory Jurisdiction conferred under

Article 227 of The Constitution of India has arisen, thus, he submitted that it is necessary and expedient in the interest of justice that the operation of the impugned order dated 29.02.2024 passed by the Appellate Court as well as the recovery of fine to the tune of Rs. 400000/- as imposed by the Trial Court may kindly be stayed during pendency of the present petition in the Hon'ble Court, otherwise the petitioner would suffer an irreparable loss.

14. Learned A.G.A-I for the State-opposite party No.1 did not oppose the contentions made on behalf of the petitioner as learned Counsel for the petitioner has rightly pointed out illegality in the impugned order and has supported his contentions with the laws laid down by Hon'ble the Supreme Court of India and submits that the Appellate Court has failed to consider the Statutory Provisions as enshrined U/S 148(1) & 148 (2) of The Negotiable Instruments Act 1881, which resulted in miscarriage of justice.

15. I have heard learned Counsel for the parties and perused the material placed on record.

16. Before entering into the merits of the case, it would be relevant to discuss Section 148 of The Negotiable Instruments Act 1881, which has been inserted in the Act through Negotiable Instruments (Amendment) Act, 2018 (Act No 20 of 2018) to provide, inter alia, speedy disposal of cases relating to dishonour of cheques so as to see that due to delay tactics by unscrupulous drawers of dishonoured cheques due to easy filing of appeals and obtaining stay in proceedings, injustice caused to payee of dishonoured cheque who has spent considerable time and resource in court proceedings to realise

value of cheque, thus, having observed that such delay has compromised sanctity of cheque transaction, Parliament thought it fit to amend Section 148 Purposive interpretation of Section 148 would be in furtherance of Objects and Reasons of amendment of Section 148 and also Section 138 of the Negotiable Instruments Act, 1881. Section 148 of The Negotiable Instruments Act 1881, which has been inserted in the Act through Negotiable Instruments (Amendment) Act, 2018 (Act No 20 of 2018) is reproduced hereunder:-

"Section-148 Power of Appellate Court to order payment pending appeal against conviction"

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, in an appeal by the drawer against conviction under section 138, the Appellate Court may order the appellant to deposit such sum which shall be a minimum of twenty percent of the fine or compensation awarded by the trial Court:

Provided that the amount payable under this sub-section shall be in addition to any interim compensation paid by the appellant under section 143A.

(2) The amount referred to in sub-section (1) shall be deposited within sixty days from the date of the order, or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the appellant.

(3) The Appellate Court may direct the release of the amount deposited by the appellant to the complainant at any time during the pendency of the appeal:

Provided that if the appellant is acquitted, the Court shall direct the complainant to repay to the appellant the amount so released, with interest at the bank rate as published by the Reserve Bank of India, prevalent at the beginning of the relevant financial year; within sixty days from the date of the order; or within such further period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the complainant."

17. As per Section 148(1) of the Negotiable Instruments Act 1881, which has been inserted in the Act through Negotiable Instruments (Amendment) Act, 2018 (Act No.20 of 2018) it has been provided that notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), in an appeal by the drawer against conviction U/S 138, the Appellate Court may order the Appellant to deposit such sum which may shall be a minimum of twenty percent of the fine or compensation awarded by the Trial Court, provided that the amount payable under this sub-section shall be in addition to any interim compensation paid by the appellant U/S 143A.

18. As per Section 148(2) it has also been provided that the amount referred to in Sub-section (1) shall be deposited within sixty days from the date of the order, or within such period not exceeding thirty days as may be directed by the Court on sufficient cause being shown by the appellant.

19. In the instant case, the Appellate court although vide order dated 29.02.2024 had admitted the appeal and also allowed the Bail Application moved by the appellant/petitioner but by the same order despite admitting the appeal preferred by

the appellant/petitioner had erroneously rejected the stay and operation of the impugned order dated 16.02.2024 passed by the trial court and thereby, rejected the stay application (Paper No.5B) and further directed him to deposit amount of fine imposed by the trial court within a period of ten days' from the date of the order and also provided that in case of non-deposition of fine by the appellant/petitioner, the order of granting bail to the appellant/petitioner shall stand automatically cancelled, thus, the appellate court while passing the impugned order dated 29.02.2024 by which it has rejected to stay the operation of the order dated 16.02.2024 passed by the trial court has failed to consider the Statutory Provisions as enshrined under Section 148(1) and 148(2) of the Negotiable Instrument Act, 1881 as discussed above, which resulted in miscarriage of justice.

20. It is further observed here that the impugned order dated 29.02.2024 passed by the Appellate Court, by which it was provided that in case of failure of deposition of fine by the appellant/petitioner, the Bail Order shall stand automatically cancelled appears to be punitive in nature and is against the settled proposition of law as it is a settled proposition of law, that if any appeal is presented by the appellant and the same is admitted by the Appellate Court, in that event, it is also obligatory for the Appellate Court to grant interim relief in the appeal during the pendency of the appeal, thus, any order challenged in the appeal and the said appeal was admitted and pending, thus, one cannot permit a swinging pendulum to continue swinging during the pendency of the appeal.

21. The issue involved in this petition has broadly been dealt by Hon'ble the

Supreme Court of India in the case of **Surinder Singh Deswal Alias Colonel S.S. Deswal and Others vs. Virender Gandhi** reported in (2019) SCC 341 wherein the Apex Court has been pleased to observe in paragraph No.8, which is reproduced hereinunder:-

"8. Now so far as the submission on behalf of the appellants that even considering the language used in Section 148 of the NI Act as amended, the appellate court "may" order the appellant to deposit such sum which shall be a minimum of 20% of the fine or compensation awarded by the trial court and the word used is not "shall" and therefore the discretion is vested with the first appellate court to direct the appellant-accused to deposit such sum and the appellate court has construed it as mandatory, which according to the learned Senior Advocate for the appellants would be contrary to the provisions of Section 148 of the NI Act as amended is concerned, considering the amended Section 148 of the NI Act as a whole to be read with the Statement of Objects and Reasons of the amending Section 148 of the NI Act, though it is true that in the amended Section 148 of the NI Act, the word used is "may", it is generally to be construed as a "rule" or "shall" and not to direct to deposit by the appellate court is an exception for which special reasons are to be assigned. Therefore amended Section 148 of the NI Act confers power upon the appellate court to pass an order pending appeal to direct the appellant-accused to deposit the sum which shall not be less than 20% of the fine or compensation either on an application filed by the original complainant or even on the application filed by the appellant-accused under Section 389 CrPC to suspend the sentence. The aforesaid is required to be construed considering the

fact that as per the amended Section 148 of the NI Act, a minimum of 20% of the fine or compensation awarded by the trial court is directed to be deposited and that such amount is to be deposited within a period of 60 days from the date of the order, or within such further period not exceeding 30 days as may be directed by the appellate court for sufficient cause shown by the appellant. Therefore, if amended Section 148 of the NI Act is purposively interpreted in such a manner it would serve the Objects and Reasons of not only amendment in Section 148 of the NI Act, but also Section 138 of the NI Act. The Negotiable Instruments Act has been amended from time to time so as to provide, inter alia, speedy disposal of cases relating to the offence of the dishonour of cheques. So as to see that due to delay tactics by the unscrupulous drawers of the dishonoured cheques due to easy filing of the appeals and obtaining stay in the proceedings, an injustice was caused to the payee of a dishonoured cheque who has to spend considerable time and resources in the court proceedings to realise the value of the cheque and having observed that such delay has compromised the sanctity of the cheque transactions, Parliament has thought it fit to amend Section 148 of the NI Act. Therefore, such a purposive interpretation would be in furtherance of the Objects and Reasons of the amendment in Section 148 of the NI Act and also Section 138 of the NI Act."

22. Further, the Hon'ble Supreme Court in the case of **Jamboo Bhandari vs. Madhya Pradesh State Industrial Development Corporation Limited and Others** reported in (2023) 10 SCC 446 has been pleased to observe in paragraph No.12, which is reproduced hereinunder:-

"12. In these circumstances, we set aside the impugned orders of the High Court and restore the revision petitions filed by the appellants before the High Court. We direct the parties to appear before the roster Bench of the High Court on 9-10-2023 in the morning to enable the High Court to fix a date for hearing of the revision petitions. As the contesting parties are before the Court, it will not be necessary for the High Court to issue a notice of the date fixed for hearing. The High Court, after hearing the parties, will consider whether 20% of the amount is already deposited or not. If the Court comes to the conclusion that 20% of the amount is not deposited, the Court will re-examine the revision petitions in the light of what we have observed in this judgment. Till the disposal of the restored revision petitions, the interim order passed by this Court ordering suspension of sentence will continue to operate."

23. Thus, in view of the law laid down by the Hon'ble Supreme Court and the facts and circumstances, as narrated above and from the perusal of the record, the impugned order dated 29.02.2024 passed by Sessions Judge Faizabad (now Ayodhya) in Criminal Appeal No.12 of 2024; Mangla Prasad Singh vs. Shanti Roller Mills Ltd to the extent by which the learned Appellate Court despite admitting the appeal has declined to stay the operation of the impugned order therein dated 16.02.2024 passed by the trial court and thereby has rejected the stay application (Paper No.5-B), is against the spirit and directions issued by the Hon'ble Supreme Court of India.

24. Keeping in view the discussions made above and the laws settled by Hon'ble the Supreme Court of India referred above,

this Court finds that the Appellate Court has erred in law while rejecting the stay application of the appellant/petitioner, by which it was prayed by the appellant/petitioner to stay the fine of Rs.4,00,000/- imposed by the trial court while convicting him under Section 138 of the Negotiable Instruments Act, 1881 till the disposal of the appeal preferred by the appellant/petitioner before the Appellate Court. Thus, this Court deems it appropriate to dispose of this petition with modification of the impugned order dated 29.02.2024 to the extent that the petitioner is directed to deposit 20% of the fine imposed upon him by the trial court within sixty days' from the date of delivery of this judgment by this Court and the bail already granted by the Appellate Court shall continue till the disposal of the appeal pending before the Appellate Court i.e. Sessions Judge Faizabad (now Ayodhya) bearing Criminal Appeal No.12 of 2024 ((Mangla Prasad Singh Vs. Shanti Roller Mills Ltd.).

25. It is further directed that the petitioner will be on bail as granted by the Appellate Court vide order dated 29.02.2024 with same terms and conditions as imposed by the Appellate Court while granting him bail.

26. It is hereby made clear that if 20% of the fine imposed is not deposited by the petitioner within the period of sixty days from the date of pronouncement of this judgment by this Court, then the bail already granted by the Appellate Court concerned shall stand automatically cancelled.

27. With the above observations/directions, the present petition is finally *disposed of*.

28. Let a copy of this judgment be communicated to the Appellate Court concerned for its immediate compliance, forthwith by the office of the Senior Registrar of this Court.

(2024) 4 ILRA 811
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.03.2024

BEFORE

THE HON'BLE MANISH KUMAR NIGAM, J.

Matters U/A 227 No. 1607 of 2024 (Civil)

Layak Singh		...Petitioner
	Versus	
Smt. Ekta Kumari		...Respondent

Counsel for the Petitioner:
 Sri Puneet Bhadauria

Counsel for the Respondent:

(A) Family Law - Waiver of Cooling Period in Divorce by Mutual Consent - Hindu Marriage Act, 1955 - Section 13-B (2) - Divorce by mutual consent - Irretrievable breakdown of marriage - cooling period - mutual consent divorce - discretionary powers - Statutory period of six months under Section 13-B (2) is not mandatory but directory, and courts can exercise discretion to waive this period if there's no possibility of reconciliation and the waiting period would only prolong the parties' agony.(Para -15,18,22)

Petitioner (Layak Singh) and respondent (Ekta Kumari) married on 29.06.2020 - separated shortly after on 28.10.2020 - Multiple efforts for reconciliation failed - Both parties mutually agreed to divorce - petitioner agreeing to pay ₹6,00,000/- to respondent - joint petition for divorce was filed under Section 13-B on 10.11.2023 - Application to waive cooling period was rejected by Family Court - Family Court held - only Supreme Court can waive the cooling

period under Article 142 leading to the present petition. (Para 2, 3, 20)

HELD: - Order of Family Court rejecting the waiver of the cooling period quashed. Family Court was directed to decide the matter within two months ensuring that no unnecessary delays are caused. (Para 25, 26, 27)

Petition allowed. (E-7)

List of Cases cited:

1. Amardeep Singh Vs Harveen Kaur, (2017) 8 SCC 466
2. Amit Kumar Vs Suman Beniwal, 2021 SCC Online SC 1270
3. Anil Kumar Jain Vs Maya Jain, (2009) 10 SCC 415
4. Smt. Pratibha Vs Gaurav, Matter Under Article 227 No. 1886 of 2020
5. Hari Vishnu Kamath Vs Syed Ahmad Ishaque & ors., 1954 (2) SCC 881
6. ICICI Ltd. Vs Grapco Industries Ltd. & ors., (1999) 4 SCC 710
7. Sureshta Devi Vs Om Prakash, (1991) 2 SCC 25

(Delivered by Hon'ble Manish Kumar Nigam, J.)

1. Heard learned counsel for the petitioner and perused the record.

2. This petition has been filed challenging the order dated 10.01.2014 passed by Principal Judge, Family Court, Agra rejecting the application filed by the petitioner as well as opposite party under Section 13-B(2) of the Hindu Marriage Act for waiving off the 'cooling period' in H.M.A. Case No. 2978 of 2023 (Layak Singh v. Smt. Ekta Kumari, under Section 13-B of the Hindu Marriage Act).

3. Brief facts of the case are that the petitioner Layak Singh was married to the opposite party Smt. Ekta Kumari on 29.06.2020 at Sundarpada Thana Nai Ki Mandi, District Agra. Soon after the marriage, both the parties found that it was not possible for them to live together and opposite party Ekta Kumari left the matrimonial home on 28.10.2020. Despite best efforts made by the family members and other members of the society, they failed to resolve their dispute and were adamant to take divorce. Both the parties lodged cases, against each other. The petitioner as well as the opposite party came to an agreement that the petitioner would pay a sum of ₹ 6,00,000/- to the opposite party and they would divorce each other. An application under Section 13-B of the Hindu Marriage Act was filed by the petitioner as well as opposite party on 10.11.2023 for divorce on the basis of compromise entered into between the parties. On 10.11.2023, the Principal Judge, Family Court, Agra, fixed 13.03.2024 for mediation and 13.05.2024 for second motion. On 09.01.2024, a joint application was moved by the petitioner as well as opposite party for early disposal of divorce petition on the ground that the petitioner had applied for service in various states outside the State of Uttar Pradesh but because of pendency of the case, the petitioner was unable to join the service. It was also mentioned that the opposite party also wants to get the petition decided expeditiously so that she may live separately. The application so filed by the petitioner was rejected by the Principal Judge, Family Court, Agra by its order dated 10.01.2024, hence the present petition.

4. Contentions of the learned counsel for the petitioner is that the petitioner and

opposite party are residing separately for more than three years and all the efforts of conciliation between them had already failed. Both the parties had decided to part ways and had agreed for dissolving their marriage. It is further contended by learned counsel for the petitioner that Principal Judge, Family Court, Agra had rejected the application on the ground that cooling period can be waived only by Supreme Court in exercise of power under Article 142 of Constitution of India. The view taken by the Principal Judge Family Court, Agra was erroneous. It is next contended by learned counsel for the petitioner that as per the agreement, the petitioner had paid a sum of ₹ 6,00,000/- by means of a bank draft to the opposite party and both the parties had agreed and are still agree for divorce by mutual consent. In this regard, learned counsel for the petitioner has relied upon the judgment of Supreme Court in case of **Amardeep Singh v. Harveen Kaur reported in (2017) 8 SCC 466**.

5 . Before considering the submissions made by the learned counsel for the petitioner, it would be appropriate to consider the relevant statutory provision.

6. Section 13-B of Hindu Marriage Act, 1955 is as follows:

"13-B. Divorce by mutual consent.-(1)Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district court by both the parties to a marriage together, whether such marriage was solemnised before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), on the ground that they have been living separately for a period of one year or more,

that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.

(2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnised and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree."

7. From the perusal of the order impugned, it reflects that the Principal Judge, Family Court, Agra after noting the facts of the case, considered various judgments of Supreme Court including the judgment of **Amardeep Singh v. Harveen Kaur (Supra)** and judgment in case of **Amit Kumar v. Suman Beniwal** reported in **2021 SCC Online SC 1270**, the Principal Judge, Family Court has held as under:

"In the facts and circumstances of this Case, it is not appropriate for this Court to waive the statutory period of six months as provided u/S, 13-B(2) of the Hindu Marriage Act, 1955 before completing the mediation/conciliation efforts, grounds mentioned in the instant application and as per law provided by the Hon'ble Supreme Court in Anil Kumar Jain Vs. Maya Jain (Supra)."

8. The Principal Judge, Family Court, Agra relied upon the judgment in case of **Anil Kumar Jain v. Maya Jain** reported in

(2009) 10 SCC 415 wherein following has been held:

"29. In the ultimate analysis the aforesaid discussion throws up two propositions. The first proposition is that although irretrievable break-down of marriage is not one of the grounds indicated whether under Sections 13 or 13-B of the Hindu Marriage Act, 1955, for grant of divorce, the said doctrine can be applied to a proceeding under either of the said two provisions only where the proceedings are before the Supreme Court. In exercise of its extraordinary powers under Article 142 of the Constitution the Supreme Court can grant relief to the parties without even waiting for the statutory period of six months stipulated in Section 13-B of the aforesaid Act. This doctrine of irretrievable break-down of marriage is not available even to the High Courts which do not have powers similar to those exercised by the Supreme Court under Article 142 of the Constitution. Neither the civil courts nor even the High Courts can, therefore, pass orders before the periods prescribed under the relevant provisions of the Act or on grounds not provided for in Section 13 and 13-B of the Hindu Marriage Act, 1955.

30. The second proposition is that although the Supreme Court can, in exercise of its extraordinary powers under Article 142 of the Constitution, convert a proceeding under Section 13 of the Hindu Marriage Act, 1955, into one under Section 13-B and pass a decree for mutual divorce, without waiting for the statutory period of six months, none of the other Courts can exercise such powers. The other Courts are not competent to pass a decree for mutual divorce if one of the consenting parties withdraws his/her consent before the

decree is passed. Under the existing laws, the consent given by the parties at the time of filing of the joint petition for divorce by mutual consent has to subsist till the second stage when the petition comes up for orders and a decree for divorce is finally passed and it is only the Supreme Court, which, in exercise of its extraordinary powers under Article 142 of the Constitution, can pass orders to do complete justice to the parties."

9. The provisions of the Hindu Marriage Act demonstrate an inherent respect for the institution of marriage, which contemplates the sacramental union of a man and a woman for life. However, there may be circumstances in which it may not reasonably be possible for the parties to the marriage to live together as husband and wife.

10. The Hindu Marriage Act, therefore has provisions for annulment of marriage in specified circumstances, which apply to marriages which are not valid in the eye of law and provisions of judicial separation and dissolution of marriage by decree of divorce on grounds provided in Section 13(1) of the said Act, which apply to cases where it is not reasonably possible for the parties to a marriage to live together as husband and wife.

11. Section 13B incorporated in the Hindu Marriage Act with effect from 27.5.1976, which provides for divorce by mutual consent, is not intended to weaken the institution of marriage. Section 13B puts an end to divorce proceedings between spouses, often undefended, but time consuming by reason of lengthy process of procedures. Section 13B also enables the parties to a marriage to avoid and/or shorten unnecessary bitter litigation, where

the marriage may have irretrievably broken down and both the spouses may have mutually decided to part. But for Section 13B, the defendant spouse would often be constrained to defend the litigation, not to save the marriage, but only to refute prejudicial allegations, which if accepted by Court, might adversely affect the defendant spouse.

12. Legislature has, in its wisdom, enacted Section 13B (2) of the Hindu Marriage Act to provide for a cooling period of six months from the date of filing of the divorce petition under Section 13B (1), in case the parties should change their mind and resolve their differences. After six months if the parties still wish to go ahead with the divorce, and make a motion, the Court has to grant a decree of divorce declaring the marriage dissolved with effect from the date of the decree, after making such enquiries as it considers fit.

13. The object of Section 13B(2) read with Section 14 is to save the institution of marriage, by preventing hasty dissolution of marriage. It is often said that "time is the best healer". With passage of time, tempers cool down and anger dissipates. The waiting period gives the spouses time to forgive and forget. If the spouses have children, they may, after some time, think of the consequences of divorce on their children, and reconsider their decision to separate. Even otherwise, the cooling period gives the couple time to think and reflect and take a considered decision as to whether they should really put an end to the marriage for all time to come.

14. In case of **Amardeep Singh v. Harveen Kaur (Supra)**, the question which arose for consideration before the Supreme Court was whether the minimum

period of six months stipulated under Section 13-B(2) of Hindu Marriage Act, 1955 for a motion for passing decree of divorce on the basis of mutual consent is mandatory or can be relaxed in any exceptional situation. After considering the relevant case law, the Supreme Court held as under in paragraph no. 9 of the judgment, which is as follows:

"9. After considering the above decisions, we are of the view that since Manish Goel (supra) holds the field, in absence of contrary decisions by a larger Bench, power under Article 142 of the Constitution cannot be exercised contrary to the statutory provisions, especially when no proceedings are pending before this Court and this Court is approached only for the purpose of waiver of the statute."

15. Thereafter, the Supreme Court considered the question whether Section 13-B (2) of the Hindu Marriage Act, 1955 is to be read as mandatory or discretionary and held that the period mentioned in Section 13-B(2) of the Hindu Marriage Act is not mandatory but directory. It will be open to the court to exercise its discretion is facts and circumstances of each case where there is no possibility of parties resuming cohabitation and there are chances of alternative rehabilitation.

16. In paragraph no. 18 & 19 of the **Amardeep Singh v. Harveen Kaur (Supra)**, the Apex Court held as under:

"18. Applying the above to the present situation, we are of the view that where the Court dealing with a matter is satisfied that a case is made out to waive the statutory period under Section 13B(2), it can do so after considering the following :

i) the statutory period of six months specified in Section 13B(2), in addition to the statutory period of one year under Section 13B(1) of separation of parties is already over before the first motion itself;

ii) all efforts for mediation/conciliation including efforts in terms of Order 32A Rule 3 CPC/Section 23(2) of the Act/Section 9 of the Family Courts Act to reunite the parties have failed and there is no likelihood of success in that direction by any further efforts;

iii) the parties have genuinely settled their differences including alimony, custody of child or any other pending issues between the parties;

iv) the waiting period will only prolong their agony."

19. The waiver application can be filed one week after the first motion giving reasons for the prayer for waiver."

17. In case **Smt. Pratibha v. Gaurav** passed in **Matter Under Article 227 No. 1886 of 2020 decided on 04.03.2020**, this Court held that the object of the provision is to enable the parties to dissolve a marriage by consent if the marriage has irretrievably broken down and to enable them to rehabilitate them as per available option. The amendment was inspired by a thought that forcible perpetuation of status of matrimony between unwilling partners did not serve any purpose. The object of cooling off the period was to safeguard against a hurried decision if there was otherwise possibility of differences being reconciled. The object was not to perpetuate a purposeless marriage or to prolong the agony of parties when there

was no chance of reconciliation. Though every effort has to be made to save a marriage, if there are no chances of reunion and there are chance of fresh rehabilitation, the Court should not be powerless in enabling the parties to have a better option.

18. The Apex Court in case of **Amit Kumar v. Suman Beniwal** reported in **2021 SCC Online SC 1270**, has held as under:

"21. The factors mentioned in Amardeep Singh v. Harveen Kaur (supra), in Paragraph 19 are illustrative and not exhaustive. These are factors which the Court is obliged to take note of. If all the four conditions mentioned above are fulfilled, the Court would necessarily have to exercise its discretion to waive the statutory waiting period under Section 13B (2) of the Marriage Act.

22. The Family Court, as well as the High Court, have misconstrued the judgment of this Court in Amardeep Singh v. Harveen Kaur (supra) and proceeded on the basis that this Court has held that the conditions specified in paragraph 19 of the said judgment, quoted hereinabove, are mandatory and that the statutory waiting period of six months under Section 13B (2) can only be waived if all the aforesaid conditions are fulfilled, including, in particular, the condition of separation of at least one and half year before making the motion for decree of divorce.

23. It is well settled that a judgment is a precedent for the issue of law that is raised and decided. A judgment is not to be read in the manner of a statute and construed with pedantic rigidity. In Amardeep Singh v. Harveen Kaur (supra), this Court held that the statutory waiting

period of at least six months mentioned in Section 13B (2) of the Hindu Marriage Act was not mandatory but directory and that it would be open to the Court to exercise its discretion to waive the requirement of Section 13B(2), having regard to the facts and circumstances of the case, if there was no possibility of reconciliation between the spouses, and the waiting period would serve no purpose except to prolong their agony.

27. For exercise of the discretion to waive the statutory waiting period of six months for moving the motion for divorce under Section 13B (2) of the Hindu Marriage Act, the Court would consider the following amongst other factors:

(i) the length of time for which the parties had been married;

(ii) how long the parties had stayed together as husband and wife;

(iii) the length of time the parties had been staying apart;

(iv) the length of time for which the litigation had been pending;

(v) whether there were any other proceedings between the parties;

(vi) whether there was any possibility of reconciliation;

(vii) whether there were any children born out of the wedlock;

(viii) whether the parties had freely, of their own accord, without any coercion or pressure, arrived at a genuine settlement which took care of alimony, if any, maintenance and custody of children, etc."

19. Where there is a chance of reconciliation, however slight, the cooling period of six months from the date of filing of the divorce petition should be enforced. However, if there is no possibility of reconciliation, it would be meaningless to prolong the agony of the parties to the marriage. Thus, if the marriage has broken down irretrievably, the spouses have been living apart for a long time, but not been able to reconcile their differences and have mutually decided to part, it is better to end the marriage, to enable both the spouses to move on with the life.

20. In the present case, the petitioner (husband) is aged about 34 years and the opposite party (wife) is aged about 32 years. They got married on 29.06.2020 and are living separately since 28.10.2020. It is the case of the parties that every effort to resolve their difference failed despite best efforts being made by their family members and other persons of the society. It is further admitted that since both the parties failed to reconcile their dispute they agreed for divorce by mutual consent and entered into a settlement according to which the husband had to pay a sum of Rs. 6,00,000/- to the wife. In the application which was jointly made by both the parties for waiving of the cooling period, it was stated that the husband was in lookout for a job outside of State of Uttar Pradesh and because of pendency of this proceeding, he was not able to join his new job and further the wife also wanted to restart her life after the divorce. In this case marriage was a non starter. Admittedly, the parties lived together only for few months. After which they have separated on account of irreconcilable differences. It is jointly stated by the parties that the efforts at reconciliation have failed. The parties are unwilling to live together as husband and

wife. Even after over three years of separation, the parties still wants to go ahead with divorce. As the parties are living separately for more than three years soon after their marriage and they have entered into a compromise to settle their dispute amicably and has agreed for divorce, specially considering the age of the parties, no useful purpose would be served by making the parties wait except to prolong their agony rather it will be useful that both the parties may be given a chance to restart their life afresh after the divorce. It is also admitted, in the present case, that there are no issues out of the wedlock of the parties.

21. The order passed by the Principal Judge, Family Court, Agra is not consistent with the judgment of Supreme Court in case of **Amardeep Singh v. Harveen Kaur (Supra)** and **Amit Kumar v. Suman Beniwal (Supra)**.

22. Learned counsel appearing for petitioner also submitted that the application filed by the petitioner as well as opposite party for waiving off the cooling period under Section 13-B(2) of Hindu Marriage Act, 1955 be itself allowed by this Court instead of remanding the matter back to the Principal Judge, Family Court, Agra after setting aside the order to decide the same afresh. In this connection learned counsel for the petitioner relied upon the judgment of Supreme Court in case of **Hari Vishnu Kamath v. Syed Ahmad Ishaque and others** reported in **1954 (2) SCC 881** wherein the Supreme Court held:

"We are also of opinion that the Election Tribunals are subject to the superintendence of the High Courts under article 227 of the Constitution, and that superintendence is both judicial and

administrative. That was held by this Court in Waryam Singh v. Amarnath (1954) 1 SCC 51, where it was observed that in this respect article 227 went further than section 224 of the Government of India Act, 1935, under which the superintendence was purely administrative, and that it restored the position under section 107 of the Government of India Act, 1915. It may also be noted that while in a certiorari under article 226 the High Court can only annul the decision of the Tribunal, it can, under article 227, do that, and also issue further directions in the matter. We must accordingly hold that the application of the appellant for a writ of certiorari and for other reliefs was maintainable under articles 226 and 227 of the Constitution. (para 23)"

23. In case of **Industrial Credit and Investment Corporation of India Ltd. v. Grapco Industries Ltd. and others** reported in **(1999) 4 SCC 710**, the Supreme Court has held as under:

"14. The High Court also said that on merits as well the Tribunal was wrong in granting an ex parte order. It is not that High Court itself considered the merits of the case. The objection of the High Court was twofold: (1) the Tribunal did not give any reasons, and (2) it was an omnibus order and that there was no reference even to prayers in the application and that the prayers stood allowed "in terms of entire hog". Criticism of the High Court appears to be correct on that account. Judgment of the High Court, however, does not refer at all to the facts of the case and it proceeds more on abstract principles of law. There was no bar on the High Court to itself examine the merits of the case in the exercise of its jurisdiction under Article 227 of the Constitution if the

circumstances so require. There is no doubt that High Court can even interfere with interim orders of the courts and tribunals under Article 227 of the Constitution if the order is made without jurisdiction. But then a too technical approach is to be avoided. When the facts of the case brought before the High Court are such that High Court can itself correct the error, then it should pass appropriate orders instead of merely setting aside the impugned order of the Tribunal and leaving everything in vacuum."

24. Though, the application under Section 13-B of Hindu Marriage Act has been filed jointly by both the parties and also that the application under Section 13-B(2) of Hindu Marriage Act has been filed by both the parties jointly. Since the opposite party has not appeared before this Court, it would be appropriate that a direction be issued to the Principal Judge, Family Court, Agra to pass appropriate orders keeping in view the dictum of the Supreme Court in case of **Sureshta Devi v. Om Prakash** reported in **(1991) 2 SCC 25** wherein the Apex Court has held that the consent given by the parties to the filing of a petition for a mutual divorce had to subsist till a decree was passed on the petition and that in the event, either of the party withdrew the consent before passing of the final decree, the petition under Section 13-B of Hindu Marriage Act, 1955 would not survive and would have to be dismissed.

25. In view of the discussion made above, the writ petition is **allowed** and the judgment and order dated 10.01.2014 passed by Principal Judge, Family Court, Agra in H.M.A. Case No. 2978 of 2023 (Layak Singh v. Smt. Ekta Kumari), is hereby **quashed**.

26. The application filed by the petitioner as well as opposite party jointly for waiving off the 'cooling period' under Section 13-B (2) of Hindu Marriage Act, is also ""

27. The Principal Judge, Family Court, Agra is directed to consider and decide application filed by the petitioner as well as opposite party under Section 13-B of Hindu Marriage Act registered as H.M.A. Case No. 2978 of 2023 (Layak Singh v. Smt. Ekta Kumari), in accordance with law, expeditiously, preferably within a period of two months from the date of production of a certified copy of this order after giving opportunity of hearing to the parties concerned and without granting unnecessary adjournments to either of the parties provided that there is no other legal impediment.

(2024) 4 ILRA 819
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.03.2024

BEFORE

THE HON'BLE MANISH KUMAR NIGAM, J.

Matters U/A 227 No. 5882 of 2018 (Civil)

Devraj Singh		...Petitioner
	Versus	
Smt. Babli Devi		...Respondent

Counsel for the Petitioner:
 Sri Mithilesh Kumar Tiwari

Counsel for the Respondent:
 Sri Pradyumn Kumar

(A) Civil Law - Filing written statement beyond 90-day limit - The Code of Civil Procedure, 1908 - Order 8 Rule 1 - Written Statement - Directory vs. Mandatory - Exceptional Circumstances - The Hindu Marriage Act, 1955 - Section 21-B - Special

provision relating to trial and disposal of petitions under the Act - Provision of Order 8 Rule 1 C.P.C. is discretionary and the trial court in exercise of discretion may permit the defendant to file a written statement even after the statutory period of 90 days, as provided by Order 8 Rule 1 of C.P.C. - Discretion has to be exercised reasonably for advancement of justice - Higher court while either setting an appeal or while exercising supervisory power under Article 227 of the Constitution of India should not readily interfere with the discretion exercised by the court below unless the discretion has been shown to have been exercised arbitrarily, capriciously or perversely or where the court has ignored the settled principles of law governing the exercise of discretion.(Para - 14,20,25-27)

Divorce petition filed under Section 13 of Hindu Marriage Act - defendant-respondent (Babli Devi) failed to file a written statement - within the stipulated 90-day period under Order 8 Rule 1 of the Code of Civil Procedure (CPC) - Trial court allowed defendant-respondent to file written statement with a delay - conditional upon payment of costs.- prompting petitioner (Devraj Singh) challenged decision - ground - trial court erred in exercising discretion under Order 8 Rule 1 CPC. (Paras 1-3,25)

HELD: - Petition challenging the acceptance of a delayed written statement was dismissed. Court upheld the lower court's decision to accept the respondent's written statement beyond the prescribed period in the interest of justice. Discretion was exercised properly, especially given the marital nature of the dispute. Trial court was directed to conclude the matter expeditiously under Section 21-B of the Hindu Marriage Act. (Paras 27-30, 32)

Petition dismissed. (E-7)

List of Cases cited:

1. Aditya Hotels (P) Ltd. Vs Bom. Swadesh Stores Ltd. & ors., A.I.R. 2007 SC 1574
2. Kailash Vs Nankhu & ors. (2005) 4 SCC 480.

3. Salem Advocate Bar Association T.N. Vs U.O.I., (2005) 6 SCC 344

4. Zolba Vs Keshao & ors., (2008) 11 SCC 769

5. Aligarh Development Authority & ors. Vs St. of U.P. & ors., 2011 (Volume 9) ADJ Page 810

6. Desh Raj Vs Balkishan (D) Through Proposed LR Ms. Rohini, 2020 (2) SCC 708

7. Sangram Singh Vs Election Tribunal Kotah & anr., AIR 1955 Supreme Court 425

8. Rajinder Tiwari Vs Kedar Nath (Deceased) Thr L.Rs. & ors. 2019 (14) SCC 286

9. Sau. Vanita Pravin Gaikwad V. Sri Pravin Pundlik Gaikwad, A.I.R. 2010 Bom. 62: 2010 (1) A.I.R. Bom. R 352

10. Usha Tripathi Vs Chakradhar Tripathi, A.I.R. 2009 Chhattisgarh 10

11. The Printers (Mysore) Private Ltd. Vs Pothan Joseph, A.I.R. 1960 Supreme Court 1156

12. Wander Ltd. & anr. Vs Antox India Pvt. Ltd., 1990 (Supp) SCC 727

13. Mohd. Mehtab Khan & ors. Vs Khushnuma Ibrahim & ors., A.I.R. 2013 Supreme Court Page 1099

(Delivered by Hon'ble Manish Kumar Nigam, J.)

1. Heard Sri Mithilesh Kumar Tiwari, learned counsel for the petitioner. No one is present on behalf of the respondent, even in the revised call.

2. This petition has been filed for following relief:

“ Set aside the impugned order dated 11.05.2018 passed by learned Additional District & Sessions Judge, FTC, Court No. 2, Bijnor in M.P. no. 340 of 2015 (Devraj Singh Vs. Babli Devi)

under section 13 Hindu Marriage Marriage Act”

3. Brief facts of the case as mentioned in the petition are that the plaintiff-petitioner filed a divorce petition being Divorce Petition No. 340 of 2015 on 05.05.2015. Notice was issued on 05.05.2015 to the defendant-respondent Babli Devi for filing written statement in the aforesaid divorce petition by the Principal Judge, Family Court, Bijnor. After receiving the notices issued in the aforesaid divorce petition, the defendant-respondent appeared and filed an application Ga-10 dated 18.01.2016 under Section 24 of the Hindu Marriage Act and prayed for amount of Rs. 25,000/- for expenses of the aforesaid litigation. After filing the aforesaid application dated 18.01.2016 under Section 24 of Hindu Marriage Act, the defendant-respondent has not filed the written statement and started delaying the disposal of the aforesaid divorce petition by seeking adjournments. On 04.01.2017, the case was directed to proceed ex-parte against the defendant-respondent fixing 16.03.2017. On 16.03.2017 defendant-respondent filed an application paper No. Ga-28 dated 16.03.2017 with the prayer that she may be given an opportunity to file written statement. The application filed by the defendant-respondent was allowed by the court. Thereafter, on 10.04.2018 the defendant-respondent Babli Devi filed an application (paper No. 44-Ga) in the aforementioned case and prayed for condonation of delay in filing the written statement and has also made a prayer to accept the written statement in the aforesaid case. Along with her application dated 10.04.2018, defendant-respondent has also filed his written statement paper No. 46-Ka. To the application (paper No.

44-Ga) filed by the defendant-respondent, petitioner filed his objections and has stated therein that under the provisions of Order 8 Rule 1 of C.P.C., written statement can be filed within maximum period of 90 days after receiving the notice of the case. The application filed by the defendant-respondent dated 10.04.2018, was filed after a lapse of two years and three months. The court below vide order dated 11.05.2018 allowed the application filed by the defendant-respondent paper No. 44-Ga on payment of cost of Rs. 1,500/- and has also accepted the written statement filed by the defendant-respondent paper No. 46 Ka. Hence the present petition.

4. Contention of learned counsel for the petitioner is that under Order 8 Rule 1 as amended by Act No. 22 of 2002 (w.e.f. 01.07.2022) written statement can be filed within a maximum period of 90 days from the date of service of summons on the defendant. It has been further contended by learned counsel for the petitioner that after the amendment in Order 8 Rule 1 of C.P.C., there is no scope for granting any further time for filing written statement. It has been next contended by learned counsel for the petitioner that the provisions of Order 8 Rule 1 C.P.C. are mandatory in nature and the court below has no option but to reject the written statement, if filed beyond the period of 90 days.

5. Before proceeding the matter any further, it will be useful to look into the statutory provisions.

6. Order 8 Rule 1 provides that defendant shall file the written statement within 30 days from the date of service of summons. Proviso to Rule 1 of Order 8 C.P.C provides, in case, defendant fails to file the written statement within said period

of 30 days, he shall be allowed to file the same on such other day as may be specified by the court, for reasons to be recorded in writing, but which shall not be later than 90 days from the date of service of summons.

Order 8 Rule 1 of C.P.C. is quoted as under:

“2[1. Written Statement.—The Defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence:

Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day, as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons.]”

7. Learned counsel for the petitioner relied upon the judgment of Apex Court in case of **Aditya Hotels (P) Ltd. Vs. Bombay Swadesh Stores Ltd. And Others reported in A.I.R. 2007 SC 1574** and also relied upon the judgment in case of **Kailash Vs. Nankhu & Others (2005) 4 SCC 480**.

8. In case of **Salem Advocate Bar Association Tamil Nadu Vs. Union of India (2005) 6 SCC 344**, Supreme Court has held that the provision of Order 8 Rule 1 providing for the upper limit of 90 days to file the written statement is discretionary. Paragraph nos. 20 and 21 of the judgment in Salem Advocate Bar Association (supra) is quoted as under:

“20. The use of the word 'shall' in Order VIII Rule 1 by itself is not conclusive to determine whether the provision is

mandatory or directory. We have to ascertain the object which is required to be served by this provision and its design and context in which it is enacted. The use of the word 'shall' is ordinarily indicative of mandatory nature of the provision but having regard to the context in which it is used or having regard to the intention of the legislation, the same can be construed as directory. The rule in question has to advance the cause of justice and not to defeat it. The rules of procedure are made to advance the cause of justice and not to defeat it. Construction of the rule or procedure which promotes justice and prevents miscarriage has to be preferred. The rules or procedure are handmaid of justice and not its mistress. In the present context, the strict interpretation would defeat justice.

21. In construing this provision, support can also be had from Order VIII Rule 10 which provides that where any party from whom a written statement is required under Rule 1 or Rule 9, fails to present the same within the time permitted or fixed by the Court, the Court shall pronounce judgment against him, or make such other order in relation to the suit as it thinks fit. On failure to file written statement under this provision, the Court has been given the discretion either to pronounce judgment against the defendant or make such other order in relation to suit as it thinks fit. In the context of the provision, despite use of the word 'shall', the court has been given the discretion to pronounce or not to pronounce the judgment against the defendant even if written statement is not filed and instead pass such order as it may think fit in relation to the suit. In construing the provision of Order VIII Rule 1 and Rule 10, the doctrine of harmonious construction is

required to be applied. The effect would be that under Rule 10 of Order VIII, the court in its discretion would have power to allow the defendant to file written statement even after expiry of period of 90 days provided in Order VIII Rule 1. There is no restriction in Order VIII Rule 10 that after expiry of ninety days, further time cannot be granted. The Court has wide power to 'make such order in relation to the suit as it thinks fit'. Clearly, therefore, the provision of Order VIII Rule 1 providing for upper limit of 90 days to file written statement is directory. Having said so, we wish to make it clear that the order extending time to file written statement cannot be made in routine. The time can be extended only in exceptionally hard cases. While extending time, it has to be borne in mind that the legislature has fixed the upper time limit of 90 days. The discretion of the Court to extend the time shall not be so frequently and routinely exercised so as to nullify the period fixed by Order VIII Rule 1."

9. Again in case of **Zolba Vs. Keshao and others reported in (2008) 11 SCC 769**, Supreme Court following the judgment of Salem Advocate Bar Association (supra) held in paragraph 15 as under:-

"15. Therefore, following the principles laid down in the decision, as noted hereinabove, it would be open to the court to permit the appellant to file his written statement if exceptional circumstances have been made out. It cannot also be forgotten that in an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Therefore, unless compelled by express and specific language of the statute, the provisions of Order 8 Rule 1 of

CPC or any procedural enactment should not be construed in a manner, which would leave the court helpless to meet extraordinary situations in the ends of justice."

10. This Court in case of **Aligarh Development Authority and others Vs. State of U.P. and Others reported in 2011 (Volume 9) ADJ Page 810** has held in paragraph no. 2 as under:

"2. The short submission of the petitioners is that the provision of Order VIII Rule 1 of the Code of Civil Procedure 1908 are not mandatory but directory in nature. Proviso to Order VIII Rule 1 provides the courts power to grant extension but not beyond 90 days. However, the rule does not indicate as to what consequences flow from the non extension of time. Courts have power to grant extension beyond period of 90 days. Filing of written statement is matter of procedure. Intended purpose of the provision is to expedite the hearing in the matter but not to scuttle the same. The very purpose of the procedural law is to sub serve the ends of justices and not to override the same. If the provision is to be construed strictly than it can lead to miscarriage of justice. There may be instances where the defendants for unavoidable reasons is not able to file his written statement. In such eventuality by operation of law the right to file written statement will be closed. The intend and purpose of the rule by its mere language cannot obliterate the dispensation of justice. It is in this context this provision has to be treated as directory and not mandatory. However, this will not clothe the Court's power to extend the time for filing written statement for unspecified period. If there is no good cause to extend

the time same shall be refused. Reliance has been placed on the judgement of Hon'ble Apex Court in Rani Kusum Vs Kanchan Devi and others reported in 2005 SAR (Civil) 694 in which in paragraph 11 it has been held that:-

"All the rules of procedure are the handmaid of justice. The language employed by the draftsman of procedural law may be liberal or stringent, but the act remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the Statute, the provisions of the CPC or any other procedural enactment ought not to be construed in a manner which would leave the Court helpless to meet extraordinary situations in the ends of justice."

11. Supreme Court in case of **Desh Raj Vs. Balkishan (D) Through Proposed LR Ms. Rohini; 2020 (2) SCC 708** held in paragraph no. 16 as under:-

"16. However, it would be gainsaid that although the unamended Order VIII Rule 1 of CPC is directory, it cannot be interpreted to bestow a free hand to on any litigant or lawyer to file written statement at their own sweetwill and/or to prolong the lis. The legislative objective behind prescription of timelines under the CPC must be given due weightage so that the disputes are resolved in a timebound manner. Inherent discretion of Courts, like the ability to condone delays under Order VIII Rule 1 is a fairly defined concept and its contours have been shaped through judicial decisions over the ages. Illustratively, extreme hardship or delays

occurring due to factors beyond control of parties despite proactive diligence, may be just and equitable instances for condonation of delay."

12. The Supreme Court in **Sangram Singh Vs. Election Tribunal Kotah & Anr. AIR 1955 Supreme Court 425** has held as under:-

"A code of procedure must be regarded as such. It is procedure, something designed to facilitate justice and further its ends: not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provided always that justice is done to both sides) lest the very means designed for the furtherance of justice be used to frustrate it. Our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle."

13. Again Supreme Court in case of **Rajinder Tiwari Vs. Kedar Nath (Deceased) Thr L.Rs. & Ors. ; 2019 (14) SCC 286** has held in paragraph 18 as under:

“18. It is a settled law that all the contesting parties to the suit must get fair opportunity to contest the suit on merits in accordance with law. A decision rendered by the Courts in an unsatisfactory conducting of the trial of the suit is not legally sustainable. It is regardless of the fact that in whose favour the decision in the trial may go.”

14. Thus, it is well settled that the provision of Order 8 Rule 1 C.P.C. is discretionary and the trial court in exercise of discretion may permit the defendant to file written statement even after the statutory period of 90 days, as provided by Order 8 Rule 1 of C.P.C. The discretion has to be exercised reasonably for advancement of justice.

15. I have perused the order impugned passed by Additional District and Sessions Judge/ Fast Track Court No. 2 Bijnor. Finding has been recorded by the court below that the defendant-respondent appeared on 18.01.2016 and moved an application under Section 24 of Hindu Marriage Act claiming lump-sum amount for expenses for contesting the suit and different dates were fixed till 04.01.2017 for hearing the application filed by the defendant-respondent under Section 24 of the Hindu Marriage Act. On 04.01.2017 date was fixed as 19.01.2017 and on that date the defendant was not present and therefore, the case was directed to proceed against the defendant-respondent ex-parte fixing 16.03.2017. On 16.03.2017 defendant-respondent moved an application for recalling the order dated 19.01.2017 which was decided on 23.10.2017 and 17.01.2018 was fixed for written statement and 16.02.2018 was fixed for framing of issues.

16. Another finding has been recorded by the court below that by order of the Principal Judge, Family Court dated 17.01.2018 the file was transferred to the present court i.e. Additional District and Sessions Judge/ FTC Court No. 2 and the matter was referred for mediation to the Mediation Centre and after the report of the mediation centre dated 05.04.2018, the matter recommenced. On 10.04.2018, the application paper no. 44 Ga was moved by the defendant-respondent along with the written statement.

17. It has also been held by the court below that the application filed by the defendant-respondent for maintenance pendente lite dated 18.01.2016 has yet not been decided and the defendant-respondent cannot be held responsible for not disposal of the application filed by her. Court below has also recorded finding that the defendant-respondent bonafidely contested the case and in view of the principles of natural justice, both the parties should have reasonable opportunity to contest the matter and therefore, the application (paper No. 44 Ga) filed by the defendant-respondent is allowed and written statement (paper No. 46 Ka) is taken on record on payment of cost of Rs. 1,500/-.

18. In case of **Sau. Vanita Pravin Gaikwad V. Sri Pravin Pundlik Gaikwad reported in A.I.R. 2010 Bombay 62:: 2010 (1) A.I.R. Bombay R 352**, Bombay High Court has held, in case where respondent has applied under Section 24 of the Hindu Marriage Act for grant of litigation expenses, the said respondent cannot be compelled to file written statement unless an order is passed on the said application. If an order is passed in favour of the respondent directing the petitioner to pay litigation expenses, the

respondent is expected to file written statement only after the amount is paid to the respondent. (para 13)

19. In case of **Usha Tripathi Vs. Chakradhar Tripathi** reported in **A.I.R. 2009 Chhattisgarh 10**, the Chhattisgarh High Court in paragraph nos. 2,3 and 6 of the judgment has held as under:

"2. Learned Counsel appearing for the petitioner submits that the petitioner and the respondent are wife and husband, respectively. Their marriage was solemnized on 22-5-1998 at Patthalgaon, District Jashpur and within the wedlock, one son was born on 15-3-1999. On 24-7-2007 the respondent/husband filed an application u/s 13 of The Hindu Marriage Act, 1955 (for short "The Act, 1955") for grant of a decree of divorce against the petitioner/wife, in the Family Court, Ambikapur. The application was registered as Civil Suit No. 36-A/2007. The notice was issued to the petitioner and the case was fixed for 18-9-2007 for conciliation. The petitioner appeared on 18-9-2007. In the conciliation proceeding, the petitioner had shown her desire to live with her husband/respondent. On 18-9-2007 the petitioner filed an application u/s 24 of the Act, 1955 and the case was fixed for 21-9-2007. Thereafter the case was fixed on various dates. On 16-1-2008 the petitioner filed an application for grant of time to file written statement. On 25-1-2008 the petitioner filed an application for grant of permission to engage a counsel, which was allowed and the case was fixed for 28-1-2008 for order on the application of the petitioner for grant of time to file written statement. By the impugned order dated 28-1-2008 the application of the petitioner for grant of time to file written statement was rejected by the trial Court. Being

aggrieved, the petitioner has filed this petition.

3. Shri Subhash Yadav, learned Counsel appearing for the petitioner submits that on 18-9-2007 the case was fixed only for conciliation proceeding between the parties and there was no order for filing written statement. Though the conciliation proceeding failed on 18-9-2007 but the case was not fixed for filing written statement. Learned trial Court has erred in holding that the time for filing written statement has expired. The petitioner could engage a counsel on 25-1-2008, as such learned trial Court ought to have granted time to the petitioner to file written statement.

6. Having regard to the facts situation of the case and taking into consideration that the case on hand relates to a marital dispute, the ends of justice would be subserved if the petitioner is granted liberty to file written statement in Civil Suit No. 36-A/2007, within a period of one month from the date of receipt of a copy of this order.

20. In view of the law laid down as noted above, it is clear that the provision of Order 8 Rule 1 C.P.C. is directory and not mandatory. Ordinarily, the time schedule prescribed by Order 8 Rule 1 has to be honoured. The defendant should be vigilant. No sooner the summons are served on him, the defendant should take steps for filing written statement on the appointed date of hearing without waiting for the arrival of the date appointed in the summons for his appearance in the court. The extension of the time sought by the defendant from the court whether within 30 days or 90 days as the case may be should not be granted just as a matter of routine

and merely for the asking, more so when the period of 90 days has expired. The extension can only be by way of exception and for reasons assigned by the defendant and recorded in writing by the court to its satisfaction.

21. Contention of learned counsel for the petitioner is that the court below have exercised the discretion arbitrarily in accepting the written statement filed by the defendant-respondent after the lapse of statutory period i.e. of 90 days.

22. So far as the contention of learned counsel for the petitioner that the court below has exercised the discretion arbitrarily is misconceived. The Supreme Court in case of **The Printers (Mysore) Private Ltd. Vs. Pothan Joseph reported in A.I.R. 1960 Supreme Court 1156** has held that the appellate court should be slow to interfere with the exercise of discretion by the trial court. Para 9 of the judgment in case of **The Printers (Mysore) Private Ltd. (Supra)** is quoted as under:-

“9. Where the discretion vested in the court under s. 34 has been exercised by the trial court the appellate court should be slow to interfere with the exercise of the said discretion. In dealing with the matter raised before it at the appellate stage the appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. As is often said, it is ordinarily not open to

the appellate court to substitute its own exercise of discretion for that of the trial judge; but if it appears to the appellate court that in exercising its discretion the trial court has acted unreasonably or capriciously or has ignored relevant facts and has adopted an unjudicial approach then it would certainly be open to the appellate court-and in many cases it may be its duty-to interfere with the trial court's exercise of discretion. In cases falling under this class the exercise of discretion by the trial court is in law wrongful and improper and that would certainly justify and call for interference from the appellate court. These principles are well established; but, as has been observed by Viscount Simon, L. C., in Charles Osenton & Co. v. Johnston (1) " the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case".

23. Again in case of **Wander Ltd. and Another Vs. Antox India Private Ltd. reported in 1990 (Supp) Supreme Court Cases 727** has reiterated the view and it is relevant to quote paragraph no. 14 of the judgment in case Wander Ltd. And another (supra)

“14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the Appellate Court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or

refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by the court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the Trial Court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion."

24. Again in case of **Mohd. Mehtab Khan and others Vs. Khushnuma Ibrahim and others reported in A.I.R. 2013** Supreme Court Page 1099, in paragraph no. 15 has held as under:

"15. In a situation where the learned Trial Court on a consideration of the respective cases of the parties and the documents laid before it was of the view that the entitlement of the plaintiffs to an order of interim mandatory injunction was in serious doubt, the Appellate Court could not have interfered with the exercise of discretion by the learned Trial Judge unless such exercise was found to be palpably incorrect or untenable. The reasons that weighed with the learned Trial Judge, as already noticed, according to us, do not indicate that the view taken is not a possible view. The Appellate Court, therefore, should not have substituted its views in the matter merely on the ground that in its opinion

the facts of the case call for a different conclusion. Such an exercise is not the correct parameter for exercise of jurisdiction while hearing an appeal against a discretionary order. While we must not be understood to have said that the Appellate Court was wrong in its conclusions what is sought to be emphasized is that as long as the view of the Trial Court was a possible view the Appellate Court should not have interfered with the same"

25. In the present case, the court below has recorded a finding that an application under Section 24 of Hindu Marriage Act was filed by the defendant-respondent for litigation expenses remained pending for no fault of the defendant respondent. The matter was sent for mediation and reconciliation, which ultimately failed and immediately thereafter, the petitioner moved an application for condoning the delay in filing the written statement and has filed the written statement along with the said application.

26. Thus in view of judgments referred above, it is settled that the higher court while either setting an appeal or even this Court while exercising supervisory power under Article 227 of the Constitution of India should not readily interfere with the discretion exercised by the court below unless the discretion has been shown to have been exercised arbitrarily, capriciously or perversely or where the court has ignored the settled principles of law governing the exercise of discretion.

27. In view of the discussion above, I find that discretion exercised by the court below cannot be said to be perverse or against the settled principles of law and

therefore, requires no interference by this Court.

28. So far as, judgment relied upon by the counsel for the petitioner in case of **Aditya Hotels Private Ltd. Vs. Bombay Swadesh Stores Ltd. And others (supra)**, the Supreme Court held that where the extension of time is granted under Order 8 Rule 1 of C.P.C., 1908 the reasons are to be recorded in writing, howsoever, the brief they may be, by the court.

29. In the present case, the court below has given reasons for allowing the application and accepting the written statement which was filed with delay by the defendant-respondent. In my considered opinion, no illegality has been committed by the court below in allowing the application filed by the defendant-respondent and taking the written statement filed by defendant-respondent on record.

30. From the perusal of order impugned, it is clear that the trial court while allowing the written statement filed by the defendant-respondent to be taken on record for deciding the suit on merits after affording the full opportunity to the defendants to contest the case and at the same time has also directed for payment of cost to the plaintiff, was in my view is in tune with the observations made by the Apex Court in case of **Sangram Singh Vs. Election Tribunal Kotah & Anr. (supra)** and did substantial justice to both the parties. In my view, order passed by the court below is just and no illegality is committed by the court below in passing the order impugned. Accordingly, the petition fails and is **dismissed**.

31. However, that since the present dispute is a marital dispute under Section

13 of the Hindu Marriage Act and is pending before the Family Court and both the parties has now appeared and filed their respective pleadings before the Family Court. In view of provision of Section 21-B of the Hindu Marriage Act, which contemplates to conclude the trial within six months from the date of service of notice of the petition on the respondent. Section 21-B of the Hindu Marriage Act is quoted as under:

"21-B. Special provision relating to trial and disposal of petitions under the Act.-(1) The trial of a petition under this Act shall, so far as is practicable consistently with the interest of justice in respect of the trial, be continued from day to day until its conclusion unless the Court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded.

(2) Every petition under this Act shall be tried as expeditiously as possible and endeavour shall be made to conclude the trial within six months from the date of service of notice of the petition on the respondent.

(3) Every appeal under this Act shall be tried as expeditiously as possible, and endeavour shall be made to conclude the hearing within three months from the date of service of notice of appeal on the respondent."

32. Additional District & Sessions Judge, F.T.C. Court No. 2, Bijnor is directed to consider and decide the aforesaid pending proceedings before him in accordance with law expeditiously after giving opportunity of hearing to the parties concerned as well as opportunity of leading evidence in respect of their

case and without granting unnecessary adjournments to either of the parties provided that there is no other legal impediment, keeping in view the statutory mandate of Section 21-B of the Hindu Marriage Act quoted above.

(2024) 4 ILRA 830
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.01.2024

BEFORE

THE HON'BLE MANISH KUMAR NIGAM, J.

Matters U/A 227 No.11299 of 2023 (Civil)

Mohd. Usman & Ors. ...Petitioners
Versus
Khurshid @ Bhoora ...Respondent

Counsel for the Petitioners:
 Sri Chetan Chatterjee

Counsel for the Respondent:

(A) Civil Law - Rejection of Complaint - The Code of Civil Procedure, 1908 - Order VII Rule 11 - The Limitation Act, 1963 - Article 59 - Court can reject a complaint under Order VII Rule 11 if it appears from the statements made in the complaint that the suit is barred by any law, including the law of limitation - Power to reject a complaint under Order VII Rule 11 is drastic and should be exercised only when the conditions enumerated in Order VII Rule 11 are strictly adhered to - It is only if the averments in the complaint ex facie do not disclose a cause of action or on a reading thereof the suit appears to be barred under any law, the complaint can be rejected - In all other situations the claims will have to be adjudicated in the course of trial. (Para -13,29)

(B) The Limitation Act, 1963 - Article 59 of the Schedule - Limitation for filing suit for cancellation or setting aside an

instrument or decree or for rescission of a contract is three years - it is the date of the knowledge of the instrument which is the material date for start of period of limitation and not the date of instrument. (Para - 7,17)

Plaintiff-respondent filed Original Suit - seeking cancellation of sale deed executed in 2008 - alleging they only became aware of the deed in 2019 through inspection of records - defendant filed for rejection of complaint under Order VII Rule 11 on grounds of limitation - suit was filed 11 years after the deed - Both the trial and revisional courts dismissed the application - Defendant-petitioner filed writ petition challenging the orders. (Para - 4,18,27)

HELD: - Courts below rightly rejected the application under Order VII Rule 11, as the issue of limitations is a mixed question of law and fact to be decided after considering evidence and hearing parties. Defendant-petitioners can raise the plea of limitation in their written statement and get an issue framed for consideration at trial. Section 3(1) of the Indian Limitation Act mandates the court to consider limitation even if not raised by parties. (Para 27, 30-32)

Petition dismissed. (E-7)

List of Cases cited:

1. Azhar Hussain Vs Rajiv Gandhi, 1986 Supp SCC 315
2. Madanuri Sri Rama Chandra Murthy Vs Syed Jalal, (2017) 13 SCC 174: (2017) 5 SCC (Civ) 602
3. P.C. Bhandari Vs New Victoria Mills, A.I.R. 1979 Allahabad Page 1
4. Dahiben Vs Arvindbhai Kalyanji Bhanusali (Gajra) Dead, (2020) 7 S.C.C. 366
5. P.V. Guru Raj Reddy & anr. Vs P. Neeradha Reddy & ors, (2015) 8 SCC 331

(Delivered by Hon'ble Manish Kumar Nigam, J.)

1. Heard learned counsel for the petitioners and perused the record.

2. The present petition has been filed for the following reliefs:

"(i) Issue an order or direction setting aside the order dated 21.10.2021 passed by the Court of Civil Judge (Junior Division/ Judicial Magistrate Deoband, Saharanpur in Original Suit No. 232 of 2019 title Khurshid alias Bhoora vs. Mohammad Usman and others.

ii) Issue an order or direction setting aside the order dated 06.10.2023 passed in Civil Revision No. 79 of 2021 titled Mohammad Usman and others Vs. Khurshid alias Bhoora passed by the Court of Additional District Judge Court No. 1, Saharanpur.

iii) Issue an order or direction directing that the plaint of Original Suit No. 232 of 2019 title Khurshid alias Bhoora vs. Mohammad Usman and others pending before the Civil Judge (Junior Division), Deoband Saharanpur may be rejected under Order VII Rule 11 C.P.C.

iv) Or, Issue an order or direction directing that the plea raised in the application under Order VII Rule 11 of C.P.C. may be decided as an issue without prejudice to the findings recorded in the impugned orders."

3. This writ petition has been filed challenging the order dated 21.10.2021 passed by Civil Judge (Junior Division) Deoband, Saharanpur rejecting the application filed by the defendant-petitioner under Order VII Rule 11 C.P.C. in Original Suit No. 232 of 2019 (Khurshid @ Bhoora Vs. Mohd. Usman and Others)

and the revisional order passed by the Additional District Judge Court No. 1, Saharanpur, dismissing the Civil Revision No. 79 of 2021 filed by defendant-petitioner (Mohd. Usman and others Vs. Khursid Alias Boora) vide judgment and order dated 06.10.2023.

4. Brief facts of the case are that Original Suit No. 232 of 2019 was instituted by the plaintiff-respondent for cancellation of sale-deed dated 22.01.2008 executed by the father of the plaintiff in favour of the defendants. The defendant-petitioners contested the suit by filing the written statement and taking a specific plea that the suit was barred by limitation. An application under Order VII Rule 11 C.P.C. was filed by the defendant-petitioners for rejection of plaint as being barred by limitation. The plaintiff-respondent filed their objection to the aforesaid application and the trial court after hearing both the parties by its order dated 21.10.2021 has rejected the application filed by the defendant-petitioners under Order VII Rule 11 on the ground that the question of limitation being a mixed question of law and fact and therefore, the same would be decided after the evidence of the parties. A revision filed by the petitioner was also dismissed by the revisional court by its order dated 06.10.2023, hence the present writ petition.

5. Contention of learned counsel for the petitioner is that from the perusal of the plaint averments as well as documents filed along with the plaint, it is apparent, that the suit was barred by limitation and the courts below had erred in law in rejecting the application filed by the petitioner under Order VII Rule 11 C.P.C. Learned counsel for the petitioner contended that in view of Article 59 of the Schedule appended with

the Limitation Act, 1963 the period of limitation for cancellation or setting aside an instrument is three years. The sale-deed executed by father of the plaintiff was of the year 2008 whereas, the present suit had been filed in the year 2019 much beyond the period of limitation. It has been further contended by learned counsel for the petitioner that from perusal of the Khatauni, which was filed along with the plaint by the plaintiff-respondent, it is clear that the plaintiff-respondent had knowledge of the sale deed dated 22.01.2008 and the suit was barred by limitation.

6. It will be useful to examine the provisions of Order VII Rule 11 C.P.C. as well as Article 59 of the Schedule appended along with Limitation Act, 1963 and other provisions as contained in the C.P.C. Order VII Rule 11 is quoted as under:

“11. Rejection of plaint — The plaint shall be rejected in the following cases:—

(a) where it does not disclose a cause of action;

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

(c) where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law;

[(e) where it is not filed in duplicate];

[(f) where the plaintiff fails to comply with the provisions of rule 9];

[Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-papers shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-papers, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.]”

7. Article 59 of Schedule appended to the Limitation Act, 1963 is contained in Part 4 of the Schedule 2, provides limitation for suits relating to cancellation of decree and instruments. Article 59 of Schedule appended to the Limitation Act is quoted as under:-

Part IV- Suits relating to Decrees and Instruments.

59. To cancel or set aside an instrument or decree or for the rescission of a contract.	Three years	When the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded first become known to him

8. From the reading of Clause 11(d) of Order VII C.P.C., it is clear where the suit appears from the statements in the plaint to be barred by any law, the Court shall reject the plaint.

9. Indeed, Order VII Rule 11 C.P.C. gives ample power to the Court to reject the

plaint, if from the averments in the plaint, it is evident that the suit is barred by any law including the law of limitation, this position is no more res integra.

10. The remedy under Order VII Rule 11 is an independent and special remedy, wherein the court is empowered to summarily dismiss a suit at the threshold, without proceeding to record evidence, and conducting a trial, on the basis of evidence adduced, if it is satisfied that the action should be terminated on any of the grounds contained in this provision.

11. The underlying object of Order VII Rule 11 is that if in a suit, no cause of action is disclosed or the suit is barred by limitation under Rule 11(d), the court would not permit the plaintiff to unnecessarily protract the proceedings in the suit. In such case, it would be necessary to put an end to the sham litigation, so that further judicial time is not wasted.

12. In **Azhar Hussain Vs. Rajiv Gandhi** reported in **1986 Supp SCC 315** this Court held that the whole purpose of conferment of powers under this provision is to ensure that a litigation which is meaningless, and bound to prove abortive, should not be permitted to waste judicial time of the court in the following words:

“12. ...The whole purpose of conferment of such power is to ensure that a litigation which is meaningless, and bound to prove abortive should not be permitted to occupy the time of the Court, and exercise the mind of the respondent. The sword of Damocles need not be kept hanging over his head unnecessarily without point or purpose. Even if an ordinary civil litigation, the Court readily

exercises the power to reject a plaint, if it does not disclose any cause of action.”

13. The power conferred on the court to terminate a civil action is, however, a drastic one, and the conditions enumerated in Order VII Rule 11 are required to be strictly adhered to.

14. Under Order VII Rule 11, a duty is cast on the Court to determine whether the plaint discloses a cause of action by scrutinizing the averments in the plaint, read in conjunction with the documents relied upon, or whether the suit is barred by any law.

15. Order VII Rule 11(d) CPC provides that the plaint shall be rejected “where the suit appears from the statement made in the plaint to be barred by any law”, hence, in order to decide whether the suit is barred by law, it is the statement in the plaint will have to be construed. The Court while deciding such an application under Order VII Rule 11 C.P.C. must have due regard only to the statements made in the plaint. Whether the suit is barred by any law must be determined from the statements in the plaint and it is not open to decide the issue on the basis of any other material including the written statement in the case.

16. In case of **Madanuri Sri Rama Chandra Murthy Vs. Syed Jalal; (2017) 13 SCC 174; (2017) 5 SCC (Civ) 602**; the Apex Court has summarized the legal position as follows :-

“The plaint can be rejected under Order VII Rule 11 if conditions enumerated in the said provision are fulfilled. It is needless to observe that the power under Order VII Rule 11 CPC be exercised by the

Court at any stage of the suit. The relevant facts which need to be looked into for deciding the application are the averments of the plaint only. If on an entire and meaningful reading of the plaint, it is found that the suit is manifestly vexatious and meritless in the sense of not disclosing any right to sue, the court should exercise power under Order VII Rule 11 CPC. Since the power conferred on the Court to terminate civil action at the threshold is drastic, the conditions enumerated under Order VII Rule 11 of CPC to the exercise of power of rejection of plaint have to be strictly adhered to. The averments of the plaint have to be read as a whole to find out whether the averments disclose a cause of action or whether the suit is barred by any law. It is needless to observe that the question as to whether the suit is barred by any law, would always depend upon the facts and circumstances of each case. The averments in the written statement as well as the contentions of the defendant are wholly immaterial while considering the prayer of the defendant for rejection of the plaint. Even when the allegations made in the plaint are taken to be correct as a whole on their face value, if they show that the suit is barred by any law, or do not disclose cause of action, the application for rejection of plaint can be entertained and the power under Order VII Rule 11 CPC can be exercised. If clever drafting of the plaint has created the illusion of a cause of action, the court will nip it in the bud at the earliest so that bogus litigation will end at the earlier stage."

17. Article 59 of the Schedule appended with Limitation Act, 1963, provides that limitation for filing suit for cancellation or setting aside an instrument or decree or for rescission of a contract is three years. Time from which the period of

limitation will start has also been provided in Article 59 and according to which when the facts entitling the plaintiff to have the instrument or the decree cancelled or set aside or the contract rescinded first become known to the plaintiff. Thus, from the Article 59 of the Schedule, it is clear that though the limitation have been provided for cancellation or setting aside an instrument is three years, but the limitation will start running only when the plaintiff comes to know about the facts entitling the plaintiff to have the instrument cancelled or set aside become first known to him. Thus, it is the date of the knowledge of the instrument which is the material date for start of period of limitation and not the date of instrument.

18. With the help of counsel for the petitioner, I have perused the plaint of O.S. No. 232 of 2019 filed by the plaintiff-respondent, which has been filed as Annexure No. 1 to this petition. In paragraph nos. 2 and 3 the plaintiff-respondent had made an averment to the effect that when the plaintiff-respondent obtained copy of Khatauni on 31.10.2019, the plaintiff-respondent came to know about the order dated 26.09.2019 by which the name of plaintiff-respondent was deleted from the revenue record. When the plaintiff-respondent moved an application for recalling the order dated 26.09.2019 and got the file inspected in the Registry Office, he came to know about the sale-deed dated 22.01.2008.

19. At this juncture, it would be relevant to refer the provisions of Order VII Rule 6 of C.P.C., which is quoted as under:-

"6. Grounds of exemption from limitation law.

Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaintiff shall show the ground upon which exemption from such law is claimed:

Provided that the Court may permit the plaintiff to claim exemption from the law of limitation on any ground not set out in the plaint, if such ground is not inconsistent with the grounds set out in the plaint."

20. Rule 6 of Order VII provides that where the suit is barred by limitation, it is necessary for the plaintiff to show the ground of exemption in the plaint. The provisions of Rule 6 are mandatory in nature, whenever the plaintiff seeks exemption from the operation of law of limitation, he must take grounds on which such exemption is sought. If no such ground is shown by the plaintiff, the plaint is liable to be rejected.

21. However, after the 1976 amendment a proviso was added to Rule 6. Proviso to the Rule as inserted by Amendment Act, 1976 enables the court to permit a plaintiff to rely on a new ground of exemption, if it is not inconsistent with the ground mentioned in the plaint. In case of **P.C. Bhandari Vs. New Victoria Mills** reported in **A.I.R. 1979 Allahabad Page 1**, it has been held by this Court where in a suit instituted for recovery of debt, the plaintiff sought exemption from limitation law relying on a letter of acknowledgement written by the defendant after the expiry of 3 years from the date of transaction and also referred to his two letters making conditional acknowledgement not pleaded in his statement of claim as saving limitation. It has been held that after the amendment in the Order VII Rule 6 of the

C.P.C., there can be no impediment in taking into consideration the two letters for the purpose referred to in the opening part of the proviso to Rule 6. The Rule 6 has to be liberally interpreted so as to advance the cause of justice since the proviso being procedural in nature.

22. From the averments as made in paragraph nos. 2 and 3 of the plaint referred above, it is clear that the plaintiff-respondent has claimed exemption from the law of limitation and has made necessary pleadings in this regard as contemplated by Rule 6 of Order VII and therefore, on the plain reading of the plaint, it cannot be said that the present suit is barred by limitation as contended by learned counsel for the petitioner.

23. Since at the stage of deciding an application under Order VII Rule 11, C.P.C., it is only the plaint averments has to be seen. In the present case, from the reading of the plaint as a whole and proceeding on the basis that the averments made therein are correct, which is that the court is required to do so, it cannot be said that the said pleadings ex-facie disclose that the suit is barred by limitation.

24. So far as contention raised by learned counsel for the petitioner that the suit itself was instituted after lapse of more than 11 years from the date of execution of the sale-deed and the plaintiff-respondent had knowledge of the sale-deed as stated by the petitioner in his application under Order VII Rule 11, cannot be looked into at this stage of considering the application moved by the petitioner under Order VII Rule 11(d) C.P.C.

25. Learned counsel for the petitioner further contended that it is not only the

plaint but also the documents filed by the petitioner along with the plaint has to be taken into consideration while deciding an application under Order VII Rule 11 of C.P.C. In this regard, the petitioner has relied upon judgment of the Supreme Court in case of **Dahiben Vs. Arvindbhai Kalyanji Bhanusali (Gajra) Dead** reported in **(2020) 7 S.C.C. 366**. In case of Dahiben (supra), the Apex Court in paragraph nos. 12.2, 12.3, 12.4, 12.5 and 12.6 had held as under:

"12.2 The power conferred on the court to terminate a civil action is, however, a drastic one, and the conditions enumerated in Order VII Rule 11 are required to be strictly adhered to.

12.3 Under Order VII Rule 11, a duty is cast on the Court to determine whether the plaint discloses a cause of action by scrutinizing the averments in the plaint, Liverpool & London S.P. & I Assn. Ltd. vs. M.V. Sea Success I & Anr., (2004) 9SCC 512, read in conjunction with the documents relied upon, or whether the suit is barred by any law.

12.4 Order VII Rule 14(1) provides for production of documents, on which the plaintiff places reliance in his suit, which reads as under :

*"Order VII Rule 14: **Production of document on which plaintiff sues or relies.**— (1)Where a plaintiff sues upon a document or relies upon document in his possession or power in support of his claim, he shall enter such documents in a list, and shall produce it in Court when the plaint is presented by him and shall, at the same time deliver the document and a copy thereof, to be filled with the plaint.*

(2)Where any such document is not in the possession or power of the plaintiff, he shall, wherever possible, state in whose possession or power it is.

(3)A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint but is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

(4)Nothing in this rule shall apply to document produced for the cross examination of the plaintiff's witnesses, or, handed over to a witness merely to refresh his memory." (emphasis supplied)

Having regard to Order VII Rule 14 CPC, the documents filed alongwith the plaint, are required to be taken into consideration for deciding the application under Order VII Rule 11 (a). When a document referred to in the plaint, forms the basis of the plaint, it should be treated as a part of the plaint.

12.5 In exercise of power under this provision, the Court would determine if the assertions made in the plaint are contrary to statutory law, or judicial dicta, for deciding whether a case for rejecting the plaint at the threshold is made out.

12.6 At this stage, the pleas taken by the defendant in the written statement and application for rejection of the plaint on the merits, would be irrelevant, and cannot be adverted to, or taken into consideration. Sopan Sukhdeo Sable vs. Assistant Charity Commissioner, (2004) 3 SCC 137."

26. I have also perused the revenue records filed by the plaintiff-respondent along with his plaint and which are annexed as Annexure no. 2 to the petition with the help of counsel for the petitioner, but could not find anything which may lead to a conclusion that the petitioner had knowledge of the impugned sale-deed and therefore, the suit is barred by limitation. Further stand taken and explained by counsel for the petitioner in his application under Order VII Rule 11 cannot be considered at this stage.

27. The courts below has rejected the application under Order VII Rule 11 filed by the petitioner on the ground the issue of limitation has to be decided after framing an issue in this regard and deciding the same after considering the evidence of the parties and hearing them.

28. Question of limitation is generally a mixed question of law and fact. In case of Ramesh B Desai and others vs. Vipin Vadilal Mehta and others; (2006) 5 SCC 638; the Apex Court while dealing with the issue of limitation held that a plea of limitation cannot be decided as an abstract principle of law divorced from facts, as in every case, the starting point of limitation has to be ascertained which is entirely a question of fact.

29. In case of **P.V. Guru Raj Reddy and Another Vs. P. Neeradha Reddy and others; (2015) 8 SCC 331**, the Apex Court held that rejection of the plaint under Order VII Rule 11 of CPC is a drastic power conferred in the Court to terminate a civil action at the threshold. The conditions precedent to the exercise of power under Order VII Rule 11 CPC, therefore, are stringent and have been consistently held to be so by the Court. It is the averments in

the plaint that have to be read as a whole to find out whether it discloses a cause of action or whether the suit is barred under any law. At the stage of exercise of power under Order VII Rule 11 CPC, the stand of the defendants in the written statement or in the application for rejection of the plaint is wholly immaterial. **It is only if the averments in the plaint ex facie do not disclose a cause of action or on a reading thereof the suit appears to be barred under any law, the plaint can be rejected. In all other situations the claims will have to be adjudicated in the course of trial.**

30. The courts below have rightly held that the issue of limitation being a mixed question of law and facts and has to be decided after considering the evidence of the parties and hearing them after framing an issue as to the limitation.

31. In my view no illegality has to be committed by the courts below in rejecting the application filed by the petitioner under Order VII Rule 11(d) of C.P.C. Petitioner will always have an opportunity to raise the plea of limitation in his written statement and to get an issue framed in this regard, which shall be considered and decided by the courts below at the time of hearing after considering the evidence of the parties.

32. Even otherwise, in view of Section 3(1) of the Indian Limitation Act, it is the duty of the Court or Tribunal to consider the issue of limitation of its own even though the issue of limitation has not been raised by either of the parties. In this regard, Section 3 of the Indian Limitation Act is quoted as under :-

“3. Bar of limitation.— (1) Subject to the provisions contained in

(2).....”

(2024) 4 ILRA 838
ORIGINAL JURISDICTION
CIVIL SIDE

BEFORE

Crl. Misc. Writ Petition No. 984 of 2024

Mohd. Anees ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Respondents:
G.A.

Transport Service Vs St. Transport Appellate Tribunal, AIR 1987 SC 88). (2) New grounds raised in the second petition, available during the first petition, indicated an attempt at bench hunting and abuse of process, as the Supreme Court's order dated 04.12.2023 in SLP (Crl.) Diary No. 45613/2023 permitted only an application, likely a review, not a fresh challenge. (3) Re-hearing on merits through a review application was impermissible, as it exceeded the scope of review (Vinod Kumar Vs St. of U.P., 2022 (11) ADJ 25 (DB)). Second writ petition dismissed with Rs. 20,000/- cost, to be deposited with the Registrar General for the Allahabad High Court Mediation and Conciliation Centre. (Paras 5-12)

Writ Petition Dismissed.

List of Cases cited:

1. Sarguja Transport Service Vs St. Transport Appellate Tribunal, AIR 1987 SC 88 (Para 6)
2. Vinod Kumar Vs St. of U.P., 2022 (11) ADJ 25 (DB) (Para 10)
3. Shraddha Gupta Vs The St. of U.P., Criminal Appeal No. 569-570 of 2022 (Para 3, cited in earlier petition)

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

1. Heard Sri Sandeep Shukla, learned counsel for the petitioner and Sri Ratan Singh, learned AGA for the State and perused the record.

2. Present petition has been filed with the following prayers:

“a. Issue a writ, order or direction in the nature of certiorari quashing the impugned First Information Report dated 22.05.2023 bearing Case Crime No. 185 of 2023, under Section 2/3 of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986, Police Station Partapur, District Meerut.

b. Issue a writ, order or direction in the nature of mandamus directing Investigation Officer not to arrest petitioner pursuant to impugned first information report.”

(Emphasis supplied)

3. Admittedly, earlier the petitioner approached this Court challenging the same First Information Report dated 22.5.2023 registered as Case Crime No. 185 of 2023, under Section 2/3 of the Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 by filing a writ petition being Criminal Misc. Writ Petition No. 10390 of 2023 (Mohammad Anees vs. State of UP and others), which was dismissed on 13.7.2023. The said order is quoted as under:

“1. Heard Sri Aditya Prasad Mishra, learned counsel for the petitioner and Sri Ratan Singh, learned AGA for the State respondents.

2. Present petition has been filed with a prayer for quashing the F.I.R. dated 22.5.2023 registered as Case Crime No. 185 of 2023 under Section 2/3 U.P. Gangster and Anti Social Activities (Prevention) Act, 1986, Police Station Partapur, District Meerut with a further prayer not to arrest the petitioner in pursuance of the impugned F.I.R.

3. Submission of the learned counsel for the petitioner is that in the base FIR the petitioner was not named and he was granted bail and only two cases have been mentioned in the gangster chart against the petitioner.

4. Learned A.G.A. submits that the petitioner has been chargesheeted in

the base FIR and there are two cases and provisions of Gangster Act can be imposed on the basis of solitary case, which issue has already been decided by Hon'ble Apex Court in the case of Shraddha Gupta vs The State Of Uttar Pradesh decided on 26 April, 2022 in Criminal Appeal No. 569-570 of 2022.

5. On perusal of the record and the first information report, we find that cognizable offence is made out. We further find that Criminal Writ Petition No. 10538 of 2023 filed by the co-accused has already been dismissed vide order dated 11.7.2023.

6. In view of the above, we do not find any good ground to take a different view in the matter.

7. Accordingly, the writ petition stands dismissed.”

(Emphasis supplied)

4. Against the aforesaid order dated 13.7.2024, the petitioner filed Special Leave Petition (Criminal) Diary No(s). 45613 of 2023 (Mohammed Anees vs. State of U.P. & Ors.), which, after arguing for some time, was got dismissed as withdrawn vide order dated 4.12.2023, and after permission having been granted, liberty was given to the petitioner to approach the High Court for appropriate relief. It was further pointed out that if such an application is filed, the same shall be considered and decided in accordance with law. The said order dated 4.12.2023 passed in the said SLP is quoted as under:

“After arguing for some time, learned counsel for the petitioner seeks leave to withdraw the special leave petition.

Permission granted.

Accordingly, the Special Leave Petition is dismissed as withdrawn with liberty to approach the High Court for appropriate relief. If such an application is filed, the same shall be considered and decided in accordance with law.”

(Emphasis supplied)

5. Perusal of the aforesaid order clearly reflects that the matter was argued for some time before the Hon’ble Apex court and it is only thereafter the Special Leave Petition was got dismissed as withdrawn. It is clear that no liberty to file a fresh writ petition challenging the first information report impugned herein was given by the Hon’ble Apex Court. It was, however, left open that “if such an application is filed, the same shall be considered and decided in accordance with law”. The word “application” clearly indicates that it is not the permission granted to file second writ petition for the same cause of action before this Court, but only an application in the decided petition could have been filed, which may be either review application, which obviously would have been placed before the same Bench decided the writ petition (Criminal Misc. Writ Petition No. 10390 of 2023) and as the second Judge has been transferred from this Court, the same would have been placed before the Bench presided over by the Senior Judge of that Bench. In that case, there is no occasion that present petition would have been placed before the regular Bench as the roster has changed and there is a different Bench to consider the fresh petition on merits afresh. We, however, find that appropriate Bench after perusal of the order dated 13.7.2023 passed by the Bench presided by one of us (Vivek Kumar

Birla, J.) passed the following order on 1.2.2024:

“The petitioner earlier filed a writ petition being Criminal Misc. Writ Petition No. 10390 of 2023 (Mohammad Anees Vs. State of U.P. and 2 Others) was dismissed on 23.07.2023 by the Bench comprising of Hon’ble Vivek Kumar Birla, J. and Hon’ble Rajendra Kumar-IV, J. Thereafter, the petitioner filed SLP being Special Leave Petition (Criminal) Dairy No(s). 45613 of 2023, which was dismissed as withdrawn with liberty to approach the High Court for appropriate relief.

In view of the same, let this case be listed on 20.02.2024 as fresh before the appropriate Bench after seeking nomination from Hon’ble The Acting Chief Justice.”

6. In pursuance of the aforesaid order, present petition has been placed before this Bench as another second Hon’ble Judge (Rajendra Kumar-IV, J.) has been transferred from this High Court. We find that filing of second petition challenging the same impugned FIR, unless the permission is granted, is not maintainable. The law has been settled long back by Hon’ble Apex Court in the case of Sarguja Transport Service vs. State Transport Appellate Tribunal, AIR 1987 SC 88. The filing of second petition afresh on absolutely different grounds is more glaring as a different counsel has put in appearance and has challenged the same impugned FIR on different grounds and is thus, clearly seeking re-hearing of the matter before a different Bench now having jurisdiction over such matters. The permission was granted by the Hon’ble Apex Court to file “an application”, which obviously would have been automatically placed before this

Bench. Therefore, we find that this is nothing but an attempt to avoid the Bench, which had earlier dismissed the petition and amounts to Bench hunting. The grounds taken in the earlier writ petition (Criminal Misc. Writ Petition No. 10390 of 2023) are quoted as under:

"I. Because the story of impugned F.I.R. dated 22.05.2023 is concocted having no truthfulness. In this case no offence is made out under Section 2/3 U.P. Gangster and Anti Social Activities (Prevention) Act 1986 against petitioner and impugned F.I.R. dated 22.05.2023 is liable to be quash by this Hon'ble Court.

II. Because the petitioner is innocent and he has no occasion to surrender and go behind the bar.

III. Because the petitioner is a peace loving and law abiding citizen of the society.

IV. Because both the cases mentioned in the Gang Chart of the present case imposed on the petitioner on the single day in a single instance.

V. Because so far as case of the Investigation of Case Crime No.110 of 2022 Under Section 3/8 Prevention of Cow Slaughter Act, Under Section 11 (Tha) Animal Cruelty Act and Under Section 34 IPC, Police Station Partapur District Meerut and Case Crime No.113 of 2022 Under Section 3/8 Prevention of Cow Slaughter Act and Under Section 34 I.P.C. Police Station Partapur District- Meerut is still pending.

VI. Because once the investigation of aforesaid both the cases is still pending, in the event there was no

occasion with the Respondent No.2/3 to get register the impugned F.I.R. dated 22.05.2023 against the petitioner.

VII. Because under the identical facts and circumstances, this Hon'ble Court has made interference under the Writ Jurisdiction and quash the F.I.R. of U/s 2/3 U.P. Gangster Act vide order dated 01.02.2023 passed in Criminal Misc. Writ Petition No.15593 of 2023.

VIII. Because under the aforementioned circumstances petitioner cannot be say as a "Gangster". His alleged act does not come under the purview of the "Gangster".

IX. Because once the investigation of aforesaid both the cases is still pending, in the event there was no occasion with the Respondent No.2/3 to get register the impugned F.I.R. dated 22.05.2023.

7. Present petition has been filed with the following grounds:

"A. BECAUSE from perusal of entire record, it is crystal clear that no joint meeting of respective authorities were done in compliance of Section 5(3)(a) of The Uttar Pradesh Gangster and Anti-Social Activities (Prevention) Rules, 2021, therefore, impugned first information report is liable to be set aside by this Hon'ble Court.

B. BECAUSE no separate list of criminal history was attached by the respondent number 4 while sending the gang chart for approval before respective authorities as required under Rule 5(3)(e) of The Uttar Pradesh Gangster and Anti-social Activities (Prevention) Rules, 2021,

hence impugned first information report is liable to be quashed by this Hon'ble Court.

C. BECAUSE no up-to-date status of cases mentioned against petitioner has been mentioned in the gang chart pursuant to Rule 8 of The Uttar Pradesh Gangster and Anti-social Activities (Prevention) Rules, 2021, therefore impugned first information report is liable to be quashed by this Hon'ble Court.

D. BECAUSE Rule 8(3) of The Uttar Pradesh Gangster and Anti-social Activities (Prevention) Rules, 2021 clearly says that the latest status of the cases against the gang, which are being shown in the gang-chart, regarding their pendency in the Special Court, the convictions or the state at which they are in the Court, must be clearly mentioned, the said mandatory provision has conveniently skipped by the respondent number 4, therefore, impugned first information report is liable to be set aside by this Hon'ble Court.

E. BECAUSE it is crystal clear from the undated cognizance and summoning order passed pursuant to the charge sheet dated 29.12.2022 arising out of Case Crime Number 113 of 2022 registered at Police Station Partapur, Meerut that the same was passed subsequent to the lodging of present first information report.

F. BECAUSE just to accommodate the police authorities in the impugned first information report, Learned Magistrate pass cognizance and summoning order without any date.

G. BECAUSE at the time of lodging of impugned first information report, no cognizance order in case arising

of Case Crime Number 113 of 2022 was passed, hence instant writ petition deserves to be allowed by this Hon'ble Court on this ground alone.

H. BECAUSE Rule 18 of The Uttar Pradesh Gangster and Anti-social Activities (Prevention) Rules, 2021 deals with Format of the Gang Chart and it clearly says that the "Gang Chart shall be sent only in the manner as given in Form No. 1 of these rules." From perusal of Form No. (1) Format of Gang Chart, column number 6 requires Details and current status of criminal cases.

I. BECAUSE from perusal of the gang chart enclosed herein above, the same is completely missing, hence the same is not according to Rule 18 of The Uttar Pradesh Gangster and Anti-social Activities (Prevention) Rules, 2021; therefore impugned first information report is liable to be set aside by this Hon'ble Court.

J. BECAUSE there is no strict compliance of Rule 16 and 17 of The Uttar Pradesh Gangster and Anti-social Activities (Prevention) Rules, 2021 in the present case and therefore, impugned first information report is nothing but a colorable exercise of power vested in respondent number 4, therefore impugned first information report is liable to be set aside by this Hon'ble Court.

K. BECAUSE respective authorities who are duty bound to look into as to whether the gang chart has been prepared according to The Uttar Pradesh Gangster and Anti-social Activities (Prevention) Rules, 2021 and further as to whether all the formalities have been fulfilled or not had clearly overlooked

relevant mandatory provision while approving gang chart resulting in impugned first information report, hence the same is liable to be set aside by this Hon'ble Court.

L. BECAUSE competent authorities has forwarded their recommendations in a very casual manner without applying their independent mind.

M. BECAUSE in the present case, approval of gang chart is nothing but a total non-application of independent mind of respective authorities involved in approval of gang chart against petitioner, therefore, the instant writ petition deserves to be allowed by this Hon'ble Court by quashing impugned first information report dated 22.05.2023.

N. BECAUSE from perusal of entire available with the petitioner, it is crystal clear that while approving the gang-chart, competent District Magistrate, Meerut did not hold any discussion that any joint meeting as required under Rule 5(3)(a) of The Uttar Pradesh Gangster and Anti-social Activities (Prevention) Rules, 2021 has been held, therefore the same is clear violation of mandatory provision implemented with the Rules of 2021.

O. BECAUSE the present first information report is nothing but an abuse of the process just to falsely implicate and humiliate petitioner pursuant to impugned first information report.

P. BECAUSE police of concerned police station is raiding the house of petitioner in order to arrest him; petitioner had an apprehension that he would be arrested in connection with the above false case.

Q. BECAUSE first informant/respondent number 4 has lodged impugned first information report with totally false and frivolous story only for the purpose to drag petitioner in the instant criminal case.

R. BECAUSE petitioner is ready and willing to cooperate with pending investigation with a prayer before this Hon'ble Court that he may not be arrested in the present case.

S. BECAUSE allegations leveled in impugned first information report, even if they are taken at their face value and accepted in their entirety, do not constitute the offence alleged, therefore this Hon'ble Court may be pleased to quash impugned first information report.

T. BECAUSE impugned first information report seriously hampered the right of petitioner enshrined under Article 14, 19 and 21 of the Constitution of India.

U. BECAUSE petitioner is legally advised that he had no other efficacious, equally, speedy, alternative remedy except to approach this Hon'ble Court by way of present writ petition under Article 226 of the Constitution of India."

8. Perusal of the grounds would clearly disclose that the same are entirely different in nature. This practice cannot be appreciated as present petition being second petition having been filed without there being any permission having been granted by Hon'ble Apex Court after hearing the arguments for some time to file fresh/second petition on different grounds and as such it is nothing but an abuse of process of law. We further find that all such grounds that have been taken in the present

petition were clearly available to the petitioner at the time of challenging the impugned order in the earlier petition (Criminal Misc. Writ Petition No. 10390 of 2023).

9. Although copy of the Special Leave Petition has not been annexed with present petition, however, presumably all such grounds that are now being taken, must have been advanced before the Hon'ble Apex Court and thereafter the petition was sought to be withdrawn for which permission was granted and in place of filing review application, second petition with full knowledge that it would not be placed before this Bench, was filed by a new counsel, which, in our opinion, is nothing but an attempt of Bench hunting and is thus, an abuse of process of law.

10. At this stage, a prayer was made that the petition may be permitted to be withdrawn with liberty to file review application. We are not inclined to accept the same, as we have already noticed the grounds taken in the present petition, which, as already observed, clearly reflect that the petitioner is seeking re-hearing of the matter on merits, which would be beyond the scope of review application as per settled law. A Division Bench of this Court (of which one of us, Vivek Kumar Birla, J. was the member) has considered the scope of review in detail in the case of Vinod Kumar vs. State of U.P. and others, reported in 2022 (11) ADJ 25 (DB).

11. Therefore, even if it is considered to be a review application, the re-hearing of matter is not permissible.

12. In such view of the matter, present petition filed under Article 226 of the Constitution of India being second writ

petition for the same relief stands **dismissed** with a cost of Rs. 20,000/- (Rs. Twenty Thousand), which the petitioner shall deposit with the Registrar General of this Court within a period of one month from today. On deposit of such cost, it shall be transmitted to the account of 'Allahabad High Court Mediation and Conciliation Centre, Allahabad'. If the petitioner fails to deposit the cost of Rs. 20,000/- (Rs. Twenty Thousand), the Registrar General of this Court shall inform the District Magistrate/Collector concerned 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 'Allahabad High Court Mediation and Conciliation Centre, Allahabad' within a further period of three months.

(2024) 4 ILRA 844
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.04.2024

BEFORE

THE HON'BLE SIDDHARTH, J.
THE HON'BLE SURENDRA SINGH-I, J.

Crl. Misc. Writ Petition No. 4874 of 2024

Umar @ Mohd. Umair ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
 Sri M. J. Akhtar

Counsel for the Respondents:
 G.A.

Criminal Law - U.P. Control of Goondas Act, 1970 - Sections 2(b), 3 - Indian Penal Code, 1860 - Section 376 - Indian Evidence Act, 1872 - Section 114 -

Constitution of India, 1950 - Article 21 -

Petitioner sought quashing of show cause notice dated 06.03.2024 issued under Section 3 for externment, based on one case under Section 376 I.P.C. and three beat reports. Court held: (1) A single case and beat reports do not establish habitual criminality required to classify petitioner as a "goonda" under Section 2(b), as habituality necessitates repeated offences (Shankar Ji Shukla Vs Ayukt Allahabad Mandal, 2005 (52) ACC 638). (2) Notice failed to specify general nature of material allegations, violating mandatory requirements under Section 3, rendering it defective (Ramji Pandey Vs St. of U.P., 1981 Cri LJ 1083). (3) Petitioner's bail in the solitary case, supported by victim's St.ment under Section 164 Cr.P.C. indicating consent, negated allegations of habitual criminality (Idu Ali Vs St. of U.P., CrI. Misc. Writ Petition No. 2895 of 2023). (4) Issuance of notice on insufficient grounds constituted abuse of power, rebutting presumption of regularity under Section 114 of Evidence Act, and violated petitioner's rights under Article 21 (Kailash Jaiswal Vs St. of U.P., CrI. Misc. Writ Petition No. 10241 of 2019). (5) St.'s failure to issue uniform guidelines for applying the Act, despite prior court directions, highlighted rampant misuse by authorities (Govardhan Vs St. of U.P., CrI. Misc. Writ Petition No. 12619 of 2023). Notice quashed; writ allowed with Rs. 1,00,000/- cost payable by St.; disciplinary action recommended against erring officials. (Paras 8-19)

Writ Petition Allowed.**List of Cases cited:**

1. Shankar Ji Shukla Vs Ayukt Allahabad Mandal, 2005 (52) ACC 638 (Para 10)
2. Lalani Pandey @ Vijay Shankar Vs St. of U.P., 2011 (1) ACrJ 207 (Para 10)
3. Idu Ali Vs St. of U.P., CrI. Misc. Writ Petition No. 2895 of 2023 (Para 11)
4. Ramji Pandey Vs St. of U.P., 1981 Cri LJ 1083 (Para 11)
5. Bhim Sen Tyagi Vs St. of U.P., 1999 (2) JIC 192 (All) (FB) (Para 11)

6. Kailash Jaiswal Vs St. of U.P., CrI. Misc. Writ Petition No. 10241 of 2019 (Para 12)

7. Suresh Tewari Vs St. of U.P., 2018 (5) ALJ 1 (Para 12)

8. Govardhan Vs St. of U.P., CrI. Misc. Writ Petition No. 12619 of 2023 (Para 14)

9. Satendra Kumar Antil Vs C.B.I., SLP (CrI.) No. 5191 of 2021 (Para 4)

(Delivered by Hon'ble Siddharth, J.
&
Hon'ble Surendra Singh-I, J.)

1. Heard learned counsel for the petitioner and learned A.G.A. for the State.

2. The petitioner has approached this Court with a prayer to quash the impugned showcause notice dated 06.03.2024 issued by respondent no. 2, Additional District Magistrate (Administration), District-Moradabad.

3. The petitioner has been implicated in the present proceedings on account of his implication in Case Crime No. 282 of 2023 u/s 376 I.P.C., P.S.- Mainather, District-Moradabad and three beat reports.

4. Learned counsel for the petitioner has submitted that in Case Crime No. 282 of 2023, he was granted bail by this Court vide order dated 08.11.2023 passed by this Court in Criminal Misc. Bail Application No. 47674 of 2023 which is reproduced hereinbelow :

"Heard learned counsel for the applicant; Ms. Ruchi Singh, learned counsel for the informant learned AGA for the State and perused the material placed on record.

The instant bail application has been filed on behalf of the applicant,

Umair, with a prayer to release him on bail in Case Crime No. 282 of 2023, under Section 376 IPC, Police Station Mainather, District- Moradabad during pendency of trial.

Learned counsel for the informant prays for and is granted two days' time to file counter affidavit.

Put up this case on 21.11.2023 as a fresh case.

Learned counsel for the applicant has submitted that in the statement of the victim recorded under section 164 Cr.P.C she has admitted her long physical relationship with applicant. Both are well known to each other. It is a case of consent. He has no criminal history to his credit and is languishing in jail since 26.9.2023.

Learned A.G.A. and learned counsel for the informant have opposed the prayer for bail of the applicant, but have not disputed the aforesaid statement made by learned counsel for the applicant.

Considering the rival submissions and totality of facts & circumstances of the case, applicant is directed to be enlarged on interim bail till the date fixed..

Having considered the submissions of the parties noted above, finding force in the submissions made by the learned counsel for the applicant; keeping in view uncertainty regarding conclusion of trial; one sided investigation by police, ignoring the case of accused side; applicant being under-trial having fundamental right to speedy; larger mandate of the Article 21 of the Constitution of India, considering the dictum of Apex Court in the case of Satendra Kumar Antil Vs. C.B.I. & Another, passed in S.L.P.(Crl.)

No. 5191 of 2021, judgement dated 11.7.2022 and considering 5-6 times overcrowding in jails over and above their capacity by under trials and without expressing any opinion on the merits of the case, let the applicant involved in the aforesaid crime be released on bail till the date fixed on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned with the following conditions that :-

(i) The applicant shall not tamper with the evidence or threaten the witnesses.

(ii) 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.

(iii) The applicant shall remain present before the Trial Court on each date fixed, either personally or as directed by the Court. In case of his absence, without sufficient cause, the Trial Court may proceed against him under Section 229-A of the Indian Penal Code.

(iv) In case the applicant misuse the liberty of bail during trial and in order to secure his presence, proclamation under Section 82 Cr.P.C. is issued and the applicants fail 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.

(v) 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.

In case, of breach of any of the above conditions, it shall be a ground for cancellation of interim bail.

Identity and residence proof of the applicant and sureties be verified by the court concerned before the bonds are accepted.

In failure to comply this order, the interim bail till the date fixed granted to the applicant shall stand cancelled and he shall be taken into custody forthwith."

5. Learned counsel for the petitioner has further submitted that apart from above case, there is no other implication of the petitioner of similar nature in any case. The impugned notice dated 06.03.2024 issued by respondent no. 2 is bad in law and deserves to be quashed. It does not contains the general nature of material allegations.

6. Learned A.G.A. has opposed the submissions and has stated that the petitioner has opportunity of making representation before the respondent no. 2 and therefore his writ petition does not deserves to be entertained by this Court. Petitioner has criminal history of one case and three beat reports are also against him as mentioned in the notice.

7. There are no disputed facts warranting call of counter-affidavit from the respondents.

8. After hearing the rival contentions a look at the definition of "Goonda" is required to be made as defined under section 2(b) of U.P. Control of Goondas Act, 170 which is as follows:-

"2[(b) 'Goonda' means a person who-

(i) either by himself or as a member or leader of a gang, habitually commits or attempts to commit, or abets the commission of an offence punishable under Section 153 or Section 153-B or Section 294 of the Indian Penal Code or Chapter XV, Chapter 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 indecent remarks or teasing women or girls; or

(vi) is a tout;

Explanation.- 'Tout' means a person who-

(a) accepts or obtains, or agrees to accept or attempts to obtain from any person for himself or for any other person,

any gratification whatever as a motive or reward for inducing, by corrupt or illegal means any public servant or member of Government, Parliament or of State Legislature, to do or forbear to do anything or to show favour or, disfavour to any person or to render or attempt to render any service or disservice to any person, with the Central or State Government, Parliament or State Legislature, any local authority, Corporation, Government Company or public servant; or

(b) procures, in consideration of any remuneration moving from any legal practitioner interested in any legal business, or proposes to any legal practitioner or to any person interested in legal business to procure, in consideration of any remuneration moving from either of them, the employment of legal practitioner in such business; or

(c) for the purposes mentioned in explanation (a) or (b), frequents the precincts of civil, criminal or revenue Courts, revenue or other offices, residential colonies or residences or vicinity of the aforesaid or railway or bus stations, landing stages, lodging places or other places of public resort; or

(vii) is a house-grabber.

Explanation. - 'House-grabber' means a person who takes or attempts to take or aids or abets in taking unauthorised possession or having lawfully entered unlawfully remains in possession, of a building including land, garden, garages or out-houses appurtenant to a building.]

(viii) is involved in offences punishable under the Regulation of Money Lending Act, 1976;

(ix) is involved in offences punishable under the Unlawful Activities(Prevention) Act, 1966 and the Indian Forest Act, 1927;

(x) is involved in illegally transporting and/or smuggling of cattle and indulging in acts in contravention of the provisions in the Prevention of cow Slaughter Act, 1955 and the Prevention of Cruelty of Animals Act, 1960;

(xi) is involved in human trafficking for purposes of commercial exploitation, forced labour, bonded labour, child labour, sexual exploitation, organ removing and trafficking, beggary and like activities.]

9. This Court finds that the petitioner is not alleged to be leader of or member of any gang or he himself habitually commits or attempts to commit or abets the commission of offences mentioned in the definition clause quoted above.

10. There is a solitary case registered against him and he was not found to be habitual of abduction of women or girls. This Court in the case of **Shankar Ji Shukla Vs. Ayukt Allahabad Mandal and others** reported in **2005 (52) ACC 638** and in the case of **Lalani Pandey @ Vijay Shankar Vs. State of U.P. and others, 2011(1) ACrJ 207** has held that a person cannot be held to be 'goonda' only on the basis of one or two acts. He can be held to be 'goonda' only when he is in the habit of committing repeated offences.

11. The Division Bench of this Court in the case of **Idu Ali Vs. State of U.P. (Criminal Misc. Writ Petition No. 2895 of 2023)** and others has held that where general nature of material allegations have

not been mentioned in the notice issued under section 3 of the Act, notice will not be considered to be in accordance with mandatory provision of law as follows:-

*"Learned counsel for the petitioner drew our attention to two Full Bench decisions in **Ramji Pandey Vs. State of U.P. and others; 1981 Cri LJ 1083** and **Bhim Sen Tyagi v. State of U.P. through D.M. Mahamaya Nagar, 1999 (2) JIG 192 (All) (FB)**.*

*In **Ramji Pandey's case (supra)**, it has specifically been observed in paragraph 7 of the judgment that although the expression "material allegations" has not been defined by that Act, according to the dictionary meanings, the word "material" means "important and essential", "of significance". The word "allegation" means statement or assertion of facts. Thus, the notice under Section 3(1) should contain the essential assertions of facts in relation to the matters set out in clauses (a), (b) and (c) of sub-section (1) of Section 3 of the Act. It needs not refer to any evidence or other particulars or details. The names of witnesses, and persons who may have made the complaint against the person against whom action is proposed to be taken or the time, date and place of the offence committed by the person needs not be mentioned in the notice. There is a distinction between the "general nature of material allegations" and "particulars of allegations". In accordance with the former expression, the notice needs not give any details of the allegations, instead the requirement of law would be satisfied if the notice contains a general statement of facts which need not contain any details or particulars. In **Ramji Pandey's case**, where there were allegations that, (a) the petitioner was a*

*goonda, (b) his movements were causing alarm, danger and harm to the lives and properties of the persons within the circle of P.S.-Sikandarpur and there was reasonable ground for believing that he was engaged in the commission and abetment of offences punishable under Chapters XI, XII and XXII of the Indian Penal Code, and (c) the witnesses were not willing to give evidence against him by reason of apprehension on their part as regards their safety and danger to their persons and personal property. Regarding the aforesaid sub-paragraphs (a), (b) and (c), the material allegations of general nature were that there were various cases pending against the petitioner and the crime numbers and sections of those cases had been given in the notice and it was mentioned therein whether the petitioner had been convicted or acquitted in the cases or they were pending. In spite of mention of the crime numbers and sections and status of those cases, the notice in **Ramji Pandey's case (supra)** was held not to contain the general nature of material allegations and it was struck down.*

*In the present case also, nothing more than mention of the crime number and sections is all that we find, instead of the general nature of material allegations. A list of case crimes/first information reports/beat report registered against the petitioner does not satisfy the test of a valid notice under Section 3(1) carrying the "general nature of material allegations". Truly, the notice, on the foundation of which the order impugned has been made, is strictly in the teeth of the law laid down consistently by this Court; particularly, the Full Bench decision in **Ramji Pandey (supra)** and reiterated in **Bhim Sain Tyagi (supra)**. A notice under Section 3(1) of the kind that is the foundation of proceedings*

here has been held in Bhim Sain Tyagi (supra) and in earlier decisions also, to violate the minimum guarantee of the opportunity that the Statute envisages for a person proceeded with/against under the Act of 1970. Thus, in this case, the impugned order, founded as it is, on a notice under Section 3(1) of the Act, stands vitiated by defects that go to the root of the matter."

12. In view of the above consideration, it is clear that the respondent no. 2 has issued the impugned notice without considering the provisions of law only on the basis of implication of the petitioner in a single case and on the basis of three beat reports. The implication of the petitioner in the Case Crime No. 282/2023 was not supported by victim herself in her statement recorded under section 164 Cr.P.C., and she had married the applicant as well. Therefore, the recital in the notice that the petitioner is a goonda and habitually commits the offences under Chapter XVI, XVII and XXII of the Indian Penal Code and witnesses are not willing to give evidence against him by reason of apprehension on their part regarding their safety etc., are absolutely false.

13. There is presumption in favour of performance of official acts under section 114, illustrations (e) of Evidence Act that they have been regularly performed. This Court finds that the presumption in favour of respondent no.2 of performance of his official acts in accordance with law stands rebutted by the undisputed facts of this case and relevant provisions of law.

14. This Court finds that the powers of the State vested in state authorities is being misused by issuing wanton and arbitrary notices under Section 3 of U.P.

Control of Goondas Act, 1970 by the public servants like respondent no. 2. Earlier this Court vide Criminal Misc. Writ Petition No. 12619 of 2023 had cautioned the State Government for forming uniform guidelines regarding the applicability of U.P. Control of Goondas Act and granted time by 31st October, 2023 for circulation of the same to all the District Magistrates of the State by the following order :

"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."

15. This Court finds that despite earlier order of this Court, the State Government has not bothered to issue any guidelines to the District Magistrates regarding applicability of the Act and the District Magistrates and their subordinates are continuously issuing illegal notices under Section 3 of the Act.

16. The present case is one such example. It is clear that respondent no. 2, Additional District Magistrate (Administration), District- Moradabad has issued showcause notice dated 06.03.2024 in abuse of power vested in him by law and has acted against the presumption of fairness in due discharge of his official duties.

17. This Court restrains itself from passing any further remarks against the respondent no. 2 but a direction is being issued to the respondent no.1, Secretary, Department of Home, Government of U.P., Lucknow that he should ensure that the public servants exercising powers of the State should remain within the bounds of law and violation of law may entail disciplinary proceedings against them.

18. The impugned showcause notice is hereby quashed.

19. The writ petition is, accordingly, allowed with cost of Rs. 1,00,000/- payable

to the petitioner by the State within two months.

20. Registrar (Compliance) is directed to communicate this order to respondent nos. 1 and 2 within two weeks.

21. Respondent no. 1 will report compliance of this order to the Registrar (Compliance) of this Court within ten weeks.

(2024) 4 ILRA 856

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 04.03.2024

BEFORE

THE HON'BLE MAHESH CHANDRA

TRIPATHI, J.

THE HON'BLE KSHITIJ SHAILENDRA, J.

Crl. Misc. Writ Petition No. 9074 of 2022

Aftab Alam

...Petitioner

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioner:

Sri Sandeep Kumar Dubey, Sri Manish Ojha

Counsel for the Respondents:

G.A.

Criminal Law - U.P. Police Regulations - Regulations 228, 232, 233, 234, 240 - Indian Penal Code, 1860 - Section 489 - Constitution of India, 1950 - Article 226 -

Petitioner sought quashing of Class B history sheet and cessation of surveillance, citing quashing of solitary case under Section 489 I.P.C. Court held: (1) History sheets under Regulation 228 are opened for persons likely to become habitual criminals; Class B history sheets are for confirmed professional criminals, but require special reasons for continuous surveillance until death per Regulation 232 (Krishna Chandra Singh Vs St. of U.P., 2015 (11) ADJ 219). (2) Quashing of petitioner's sole criminal case in 2018, with no

other cases pending, warranted review of continued surveillance, as Regulation 233 allows discontinuance of surveillance with a note in the history sheet, though the sheet itself remains open (Dhananjaya Reddy Vs St. of Karn., (2001) 4 SCC 9). (3) No provision exists under U.P. Police Regulations for quashing a Class B history sheet, but authorities must justify ongoing surveillance with special reasons, and surveillance must comply with constitutional privacy rights (St. of Tamil Nadu Vs K. Shyam Sunder, (2011) 8 SCC 737). (4) Writ of certiorari to quash history sheet was not maintainable, but petitioner was entitled to seek review of surveillance by representation to the Deputy Inspector General (D.I.G.) under Regulations 232 and 233. Petition disposed of; petitioner directed to file representation within one month, and D.I.G. to pass reasoned order within two months after hearing and record review. (Paras 26-36)

Writ Petition Disposed of.

List of Cases cited:

1. Krishna Chandra Singh Vs St. of U.P., 2015 (11) ADJ 219 (Para 24)
2. Mohammad Naeem @ Neem Babu, 2015 LawSuit (All) 3335 (Para 24)
3. Sanjay Karnwal Vs St. of U.P., 2010 (7) ADJ 510 (Para 24)
4. Mohd. Safi Vs St. of Uttarakhand, 2013 (2) UD 600 (Para 24)
5. Zaved Akhtar Vs St. of U.P., Crl. Misc. Writ Petition No. 14644 of 2019 (Para 24)
6. Dhananjaya Reddy Vs St. of Karn., (2001) 4 SCC 9 (Para 32)
7. Commissioner of Income Tax, Mumbai Vs Anjum M.H. Ghaswala, (2002) 1 SCC 633 (Para 32)
8. Captain Sube Singh Vs Lt. Governor of Delhi, (2004) 6 SCC 440 (Para 32)
9. St. of Jharkhand Vs Ambay Cements, (2005) 1 SCC 368 (Para 32)

(Delivered by Hon'ble Kshitij Shailendra, J.)

1. Heard learned counsel for the petitioner and Mrs. Manju Thakur, learned A.G.A.-I along with Sri G.P. Singh, learned A.G.A-1 for the State and perused the record.

THE WRIT PETITION

2. This writ petition has been filed seeking a writ, order or direction in the nature of certiorari quashing History Sheet No.21-B opened against the petitioner at Police Station Shahganj, District Allahabad with a further prayer to issue a writ in the nature of mandamus directing the respondents not to keep surveillance on the petitioner in pursuance of the said history sheet.

CONCEPT OF AND PHILOSOPHY BEHIND HISTORY SHEET

3. When the term "history-sheeter" is mentioned, it conjures an image of a seasoned criminal with an extensive record. The question arises: who exactly are these history-sheeters, and how does the police categorize someone as such? What disadvantages does a criminal face after being labeled a history-sheeter, and what consequences does it entail? These queries find answers in the following exploration.

4. In essence, a history sheeter is a designation employed by the police to identify individuals with a significant criminal history. This label is affixed to those who have been implicated in numerous offenses, with the details of their criminal activities duly recorded by the police. Before initiating the history sheet for any offender, the police verify the individual's current criminal status.

5. The process begins when an individual, already proven guilty in multiple cases and/or consistently engaging in criminal activities, attracts the attention of the police station's SHO. A report is subsequently sent to the SSP or SP, and upon receiving the necessary orders, the history sheet is opened. This comprehensive document contains detailed information about the criminal, including a criminal profile, associates, and known relatives. In certain scenarios, where individuals hesitate to report crimes related to organized rackets or extortion, the police, relying on local sources, maintain surveillance on such potential threats to society. The opening of history sheets is guided by calls, daily entries in the police control room, and the ongoing assessment of those posing a danger to society.

6. The presence of a history sheet serves as a deterrent, as it subjects the criminals to constant police scrutiny. Once a history sheet is opened, the criminals are required to regularly register their presence at the police station; failure to comply prompts the police authorities to visit their residences. Furthermore, a history sheet aids in tracing the source of income for criminals, enabling authorities to determine whether they have transitioned to legitimate means of earning. This scrutiny helps identify instances where an individual, previously engaged in illegal activities, displays signs of leading a luxurious lifestyle despite being unemployed.

7. The process of opening "History Sheet" is governed by the Police Rules of the concerned State or the Act governing habitual offenders.

8. Criminals often attempt to evade capture by frequently changing addresses.

To counter this, the police communicate with other districts or States, sharing information about potential areas of relocation and requesting vigilant monitoring. Employing various strategies like crime mapping and identifying hot spots, law enforcement aims to curb criminal activities and maintain public safety.

9. History sheets are analogous to our criminal intelligence databases, but are more subject to legal constraints. At the same time, they are more vulnerable to public disclosure because they call for intensive and frequently conspicuous monitoring both by police and civilian leaders.

10. Since the days of the British regime, Indian police departments have created history sheets for persons believed to pose a risk of future criminality. The “history-sheeters” may have been convicted, or have criminal charges pending. History sheeters are subject to monitoring and surveillance. In India, the system of maintaining criminal record varies from State to State. All States require automatic creation of a history sheet for persons with certain criminal records. For example, Tamil Nadu requires creation of a history sheet for a person convicted once of a serious violent crime, twice for house breaking, three times for theft and certain other offenses. The police generally also have discretion to create a history sheet on an individual who has not been convicted, but whom police consider “addicted to crime” or a threat to public order. The police must have an articulable reason for creating a history sheet and they must notify the record-subject that a history sheet has been opened.

11. The police, with the assistance of the village officials are obliged to surveil and record information about the activities and movements of history-sheeters who reside in their jurisdiction. There are court restrictions and police best practise guidelines, varying from State to State, on the level of permissible monitoring and surveillance. There are many factors regulating when a history sheet can be opened, how long it can be kept and the intensity of surveillance that it authorizes. Courts have held that surveillance of history-sheeters must not be excessive. For example, some State courts and some police agencies have issued guidelines stating that first-time history-sheeters should be especially closely watched; surveillance should be discrete; domiciliary visits are not permitted; family members must not be harassed; police officers should make periodic and routine inquiries about the history-sheeter’s habits, associations, income, expenses and occupation; the police officers shall record history-sheeter’s movements and absences from his domiciliary home or area where he lives, and the like guidelines.

12. The history sheet has been subject to constitutional challenge on privacy grounds. The Supreme Court has recognized that police surveillance based upon a history sheet implicates a limited right to privacy implicit in the Constitutional right to life and personal liberty. According to the Court, every individual’s autonomy should be respected; there is a right to be left alone. However, the right to privacy is not absolute and the creation of a history sheet and surveillance of the history-sheeter is not unconstitutional if carried out in compliance with legal standards or, in the absence of standards, if conducted

reasonably. In one case, the Hon'ble Supreme Court struck down home visits as infringing on the right to personal liberty and freedom of movement.

13. Police is supposed to update the file periodically with both favorable and unfavorable information gathered via routine police patrols and enquiries. Such information should be recorded impartially, not with an eye toward compiling a negative case against the record-subject. The history sheet, including a photo of the history-sheeter, is a confidential record. The police is not authorized to disclose to public or private employers whether a job applicant or employee is a history-sheeter, much less what information the history sheet contains. However, the surveillance/crime control purpose of the history sheet requires that police officers have easy access to the history sheet. Local police can only monitor and surveil record-subjects if they know who they are. The history sheet is supposed to be shared with the Railway Police. If the history-sheeter moves to another jurisdiction, the history sheet is transferred to the new jurisdiction's police department. Moreover, for proper reasons, the police may show the public a history-sheeter's photos, when necessary, to capture a fugitive or solve a crime.

14. In sum, Indian law and policy recognize that police records, though necessary for crime control, implicate privacy and individual autonomy. The courts have struggled to regulate the history sheet system by providing court review for individuals objecting to their history sheet designation and by limiting police discretion to open, maintain and conduct surveillance.

15. When above is the situation and philosophy behind opening of history sheets and to keep the history sheeters on surveillance depending on the circumstances, can it be said that opening of history sheet or continuing with the surveillance is stigmatic in so far as the individual is concerned and whether permanent closure of history sheet or its quashing by a court of law would at all be justified? The answer would be – No. The reason is that the police needs a mechanism to control the crime, both individual and organized. Surveillance of suspects, habitual and potential offenders, may be necessary and so the maintenance of history sheet and surveillance register for the purpose of prevention of crime. Permissible surveillance is only to the extent of a close watch over the movements of the person under surveillance and no more. Further, transfer of police officials from one place to other on frequent basis is a normal phenomenon in India. During their short tenure at a particular place of posting, concerned police officers may have some inputs about a criminal but after they leave that particular place and new officer joins, as to what would be the data available with the new incumbent to know about the criminal activities in a particular area, village or city, is a matter of significance. Past record, including a history sheet as well as record of keeping a history sheeter under surveillance, therefore, would then be a guiding factor. A history sheet, therefore, is simply a sacrosanct idea to have inputs and information about criminals and their past record for a better police administration.

MODERN AGE CHALLENGES FOR CRIME CONTROLLING AGENCIES

16. This is the era of 'Crime and Criminal Tracking Network and Systems' (in short 'CCTNS'). Criminal Tracking

System has not changed much since the days of British Rule in India. Most of the work is still done by the investigating agencies manually despite advancement in technology. The problem is compounded multifold with police stations across the country having gaps in technological co-ordination and harmony and lack of technical know-how itself. While some States are well equipped with the technological upgradation, others are still living in old era. Even the ones with advanced technology cannot handle the huge volume of criminal cases. Therefore, the objective is putting in place a comprehensive and integrated system for enhancing efficiency and effectiveness of policing at the police station level throughout the country and this is what CCTNS is meant for.

17. The objectives of CCTNS are to facilitate a citizen friendly functioning of the police, automating the functioning of police stations for greater accountability and transparency, to enhance the functioning of the police in several other zones such as law and order, traffic management etc, to maintain appropriate track of development of cases including in courts and decrease manual and redundant record keeping. In relation to the concept of history sheeters, the objective of CCTNS is to enable sharing of information and interaction among police stations, districts, State and Union Territory's Headquarters and other police agencies. CCTNS should be implemented by integrating all criminal data and records into a Central Software that will be installed in all police stations across India. It will help the agencies in detection of crime as well as those who have committed the crime. It is a faster and easier access to crime and criminals, particularly, when Cyber crimes are

expanding their branches throughout the country. Hence, electronification of history sheeters with the help of CCTNS would be a boon to the criminal investigation concept as a whole.

FACTS OF THE PRESENT CASE

18. A First Information Report dated 04.05.1998 was lodged against the petitioner and one Chhedi Lal Gupta that was registered at Case Crime No.118 of 1998, under Section 489 IPC at Police Station Audyogik Kshetra Naini, District Allahabad. The allegation against the accused persons was that they were found in possession of forged or counterfeit currency notes. Investigation was conducted by the police and a charge sheet dated 07.07.1999 was submitted against both the accused persons, on which, the Additional Chief Judicial Magistrate-VII, Allahabad took cognizance on 06.06.2000 and the petitioner was summoned to face trial of Criminal Case No.1087 of 2006 (State of U.P. Vs. Chhedi Lal and others).

19. Challenging the proceedings of aforesaid criminal case, the petitioner filed an Application U/S 482 No.9185 of 2009 (Aftab Alam Vs. State of U.P. and others) before this Court. The said application was allowed on 06.09.2018. It is pleaded in the writ petition that the petitioner filed a certified copy of the order dated 06.09.2018 before the concerned Magistrate, who, in compliance of the order of this Court, quashed the proceedings of Case Case No.1087 of 2006, vide Annexure No.4 to the writ petition.

20. The case of the petitioner, as pleaded in the writ petition, is that apart from the aforesaid solitary case registered at Crime No.118 of 1998, no other case is

pending against him, however, the history sheet is still being kept open, which is not just and proper. Application of Regulation 228 of 'U.P. Police Regulations' (for short 'the Regulations') has also been pleaded and the main ground for claiming reliefs is quashing of the proceedings of the solitary case No.1087 of 2006, as aforesaid.

COUNTER AFFIDAVIT

21. The counter affidavit filed on behalf of the State mainly contained that in view of registration of case at Crime No.118 of 1998, the petitioner is a criminal minded person named in the first information report under Section 489 IPC; that the history sheet has been opened as per Regulation 238 of the Regulations and that the petitioner's activities are under surveillance in accordance with law. It has not been disputed in the counter affidavit that except the aforesaid case registered at Crime No.118 of 1998, there is any other case registered or pending against the petitioner.

REJOINDER AFFIDAVIT

22. The rejoinder affidavit reiterates the stand taken in the writ petition and it has been pleaded that, as per Regulation 228, history sheets of a criminal should be opened only for persons who are likely to become habitual criminals or abettors of such criminals, whereas the petitioner is a well-educated person and not a criminal minded person and the proceedings of solitary case, registered at Crime No.118 of 1998, have already been quashed.

SUBMISSIONS ON BEHALF OF THE PETITIONER

23. The submission of learned counsel for the petitioner is primarily two fold:

(i) There being solitary case registered at Crime No.118 of 1998 against the petitioner, the proceedings whereof have already been quashed pursuant to the order dated 06.09.2018 passed in Application No. 482 No. 9185 of 2009 and the order of Magistrate dated 22.11.2018, there is no justification to keep the history sheet No.21-B open; and

(ii) As per Regulation 228 of the Regulations, history sheet can be opened only for persons who are or likely to become habitual criminals or abettors of such criminals and in so far as Class 'B' history sheets are concerned, they are issued for confirmed and professional criminals of the categories specified in the said Regulations, whereas the petitioner does not fall within any of the Clause/ sub-clauses of the said Regulations and, hence, the history sheet is liable to be quashed.

24. Learned counsel for the petitioner, in support of his submissions, has placed reliance on a Division Bench decision of this Court in the case of **Krishna Chandra Singh Vs. State of U.P.: 2015 (11) ADJ 219** and he submits that, under identical circumstances, this Court had quashed the history sheet of Class 'B' by relying upon Regulation 228. He has also placed reliance on other judgments of this Court pronounced in **Mohammad Naeem @ Neem Babu: 2015 LawSuit (All) 3335; Sanjay Karnwal Vs. State of U.P.: 2010(7) ADJ 510; Mohd. Safi Vs. State of Uttarakhand: 2013 (2) UD 600; and Zaved Akhtar Vs. State of U.P. and 3 others passed in Criminal Misc. Writ Petition No.14644 of 2019, decided on 21.11.2022**, rendered on the same issue.

SUBMISSIONS ON BEHALF OF THE STATE

25. Per contra, Mrs. Manju Thakur, learned AGA-1 along with Sri G.P. Singh, learned AGA-1, have vehemently opposed the writ petition and submitted that there being no provision under any law including U.P. Police Regulations whereunder the police authorities are under any obligation or compulsion to close the history sheet, the prayer for quashing the history sheet is thoroughly misconceived and cannot be granted. They further submitted that apart from Regulation 228, two more Regulations, i.e. Regulations 232 and 234 need to be looked into which provide that history sheet of Class 'B' will remain continuously open and the concerned history sheetee would remain under surveillance until his death.

U.P. POLICE REGULATIONS

26. Having heard the learned counsel for the parties, it is necessary to throw light on the provisions concerning history sheets, as applicable in the State of U.P., as contained under U.P. Police Regulations. Relevant Regulations are reproduced as under:-

228. Part V consists of history sheets. These are the personal records of criminals under surveillance. History-sheets should be opened only for persons who are or likely to become habitual criminal or abettors of such criminals. There will be two classes of history-sheets:

(1) Class A history-sheets for dacoits, burglars, cattle-thieves, railway-goods wagon thieves, and abettors thereof.

(2) Class B history-sheets for confirmed and professional criminals who commit crimes other than dacoity, burglary,

cattle-theft, and theft from railway goods wagons, e.g., professional cheats and other experts for whom criminal personal files are maintained by the Criminal Investigation Department, poisoners, cattle poisoners, railway passenger thieves, bicycle thieves, expert pick-pockets, forgers, coiners, cocaine and opium smugglers, hired ruffians and goondas, telegraph wire-cutters, habitual illicit distillers and abettors thereof.

History-sheets of both classes will be maintained in similar form, but those for class B will be distinguished by a red bar marked at the top of the first page. No history-sheet of class B may be converted into a history-sheet of class A, though should be the subject of a history-sheet of class B be found to be also addicted to dacoity, burglary, cattle-theft or theft from railway goods wagons. A class, as well as B class, surveillance may under paragraph 238 be applied to him. In the event of a class A history-sheet man becoming addicted to miscellaneous crime his history-sheet may be converted into a class B history-sheet with the sanction of the Superintendent.

229. This classification of history-sheets as A and B is based on the principle that, whereas there is always hope of a dacoit, burglar, or cattle thief or railway goods wagons thief mending his ways, the expert miscellaneous criminal is as a general rule incapable of reform. The classification, therefore, solely on the kind of crime to which suspects are addicted and is designed to regulate only-

(1) the length of time for which a suspect should ordinarily remain, under surveillance in the absence of complaints against him,

(2) the kind of surveillance which his activities require.

The degree of surveillance of the appropriate kind to be exercised over a suspect will depend not on his classification, but on the extent to which he is believed to be active at any particular time.

230. If the subject of an A class history-sheet is thought to be so dangerous or incorrigible as to require more protracted surveillance than the generality of his class, he may be 'starred' by the order of the Superintendent. Here, again, the fact that a history-sheet man is started will necessarily indicate only that he is to be kept under continuous surveillance for a longer period. It will not necessarily indicate that his surveillance while it lasts is to be more intense. The aim is to concentrate the most intense surveillance on the criminal, whether starred or unstarred, who is believed to be temporarily active.

Superintendent of district police may not give orders for the starring of or discontinuance of surveillance over any history-sheeter of a railway police suspect without the concurrence of the Superintendent of Government Railway Police.

231. The subjects of history-sheets of class A will unless they are 'starred' remain under surveillance for at least two consecutive year of which they have spent no part in jail. When the subject of a history-sheet of class A whose name has not been 'starred' who has never been convicted of cognizable offence and has not been in jail or suspected of any offence or absented himself in suspicious circumstances for two consecutive years his

surveillance will be discontinued, unless for special reasons to be recorded in the inspection book of the police station the Superintendent decides that it should continue.

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

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

232. 'B' Class History Sheets-
History-sheet of 'B' class will be continuously open records and the subjects of these sheets will, except for very special reasons remain under surveillance until death. This being so it is unnecessary to 'star' suspects of this class.

233. The discontinuance of surveillance of the subject of a history-sheet does not entail closing that history-sheet. A history-sheet which is only a record of information need never be considered closed. In the case of persons whose surveillance is discontinued a note should be made to this effect in the history-sheet, and thereafter no periodical or other entries need be made unless something comes to notice which it is desirable to enter in the sheet. Sheets persons whose surveillance has been discontinued should

remain in these village crime-note book but if the number is as much as to make the volume too bulky, they should be kept in a separate volume attached to the note-book. They will only be destroyed on the death of the subject of the sheet, or if, on opinion of the Superintendent their further retention is not likely to be of any value.

234. No history-sheet of class A may be discontinued without the sanction of the Superintendent of Police. If it is denied to discontinue the surveillance of the subject of a history sheet of class B, the sanction of the Deputy Inspector-General or Superintendent, Railway Police, must be obtained. Proposals from station officers for the discontinuance of history-sheets and for the 'starring or unstarring' of a class suspects must be made through the circle inspector unless dealt with directly by a gazetted officer in the course of an inspection.

240. History-sheets of both classes may be opened (1) on suspicion or (2) on conviction or acquittal. No history-sheet may be opened without the orders of the Superintendent of Police.

(1) On suspicion.- Whenever as a result of investigation into a case of dacoity, burglary, cattle theft from railway goods wagons or into a case of miscellaneous crime of a professional type, the officer-in-charge of a police station applies for the name of any person to be entered in the crime register as reasonably suspected, he must at the same time report whether the suspect is under surveillance, and if not, whether a history-sheet should in his opinion be opened for him. Should the gazetted officer-in-charge of a subdivision on receiving such a report and

after such further inquiry as he may think necessary consider that a history-sheet is required he will forward the report to the Superintendent who if he accepts the proposal will define the class of history-sheet to be opened and pass orders as to whether the suspect should be 'starred'. Similarly whenever an officer-in-charge of a police station finds reason to believe, otherwise than in the course of an investigation, that any resident of his circle is addicted to crime, or whenever a gazetted officer or circle inspector for any reason believes that a history-sheet for any person is necessary a report must be submitted to the Superintendent, who will pass orders on it as laid down above.

(2) On conviction or acquittal.- Whenever any person is sent for trial on a charge of dacoity, burglary, cattle theft or theft from a railway goods wagons or of miscellaneous crime of a professional type, the officer-in-charge of the police station must state in his diary whether the accused has a history-sheet and if not, whether he recommends that a history-sheet should be opened for him. It will be the duty of the public prosecutor, if the accused is acquitted to inform the Superintendent, in his report on the acquittal or otherwise, whether in his opinion a history-sheet is required. On this the Superintendent will pass any orders to the station officer that may be necessary. If the accused is convicted, the public prosecutor must, in the remarks column of the daily report of convictions and acquittals (Form No. 107) enter in red ink the words, 'On H.S.' if a history-sheet is already open, or the letters 'H.S.' if he recommends that one should be prepared. In either case he must prepare and attach to the daily report of convictions and acquittals a P.R. slip (Form No. 313). If a history-sheet is already open or if the

Superintendent agrees that a history-sheet should be opened he will sign this P.R. slip and initial the letters "H.S." or "On H.S." on the daily report of convictions and acquittals. The public prosecutor will then communicate the Superintendent's orders for the opening of a history-sheet to the police station concerned and will forward the P.R. slip to the Superintendent of Jail. If no history-sheet is opened and if the Superintendent does not agree that one should be prepared, he will not sign the P.R. slip, which will be cancelled.

ANALYSIS

27. While this Court is satisfied that opening of the history in the year 2009 against the petitioner was not illegal inasmuch as, by that time, there was a case registered against the petitioner at Crime No.118 of 1998 in which cognizance was also taken by the concerned Magistrate in the year 2000, however, the proceedings of said case were quashed after eighteen years in the year 2018, as aforesaid, and, therefore, this Court finds that the grounds for claiming reliefs as prayed in the present writ petition are based upon subsequent developments. The Court, therefore, proceeds to examine as to whether the history sheet can be closed or quashed or whether any other course recognized under the law is still open for the police authorities.

28. A bare perusal of Regulation 228 would show that the language used therein is unambiguous and there is a clear mandate that history sheet can be opened only for persons who are or likely to become habitual criminal or abettors of such criminals. Classification of history sheets in Class 'A' and Class 'B' is also clearly spelt out and since challenge in the

present writ petition has been laid to history sheet of Class 'B', sub-regulation (2) of Regulation 228 needs a look that clearly provides that such history sheet can be opened for 'confirmed and professional criminals' who commit crimes other than dacoity, burglary, cattle-theft etc etc, as described in the said sub-regulation.

29. Regulation 232, however, casts an obligation upon the authorities to keep history sheet continuously open and to keep the history sheet under surveillance until death. However, for such an action, the authorities have to record special reasons. Regulation 233 clearly provides that discontinuance of surveillance of the subject of a history sheet does not entail closing of the history sheet itself and the history sheet which is only a record of information need never be considered as closed. It casts a further obligation on the authorities to make a note as regards discontinuance of surveillance on the history sheet and, thereafter, no periodical or other entries need be made unless something comes to the notice of the authorities which is desirable to be entered in the sheet.

30. This Court has respectfully perused the judgments, relied upon by the petitioners, and it transpires that this Court in those cases took note of the circumstances under which history sheets were opened against the concerned offenders and, for the reasons stated in the judgments, history sheet was either directed to be closed or the authorities were directed to wipe out the name of the concerned offender from the surveillance register. However, in the present case, the question to be considered is as to whether the history sheet of Class- 'B' can be closed forever or can it be quashed in exercise of writ

jurisdiction under Article 226 of the Constitution of India.

31. This Court finds that there is no provision under U.P. Police Regulations for closure of a history sheet of Class-'B'. The Regulations, as noted above, however, cast an obligation upon the police authorities to record SPECIAL REASONS TO KEEP AN OFFENDER UNDER SURVEILLANCE UNTIL HIS DEATH. As a matter of fact, Regulation 233 clearly provides that a history sheet which is only a record of information need never be considered as closed. Nevertheless, making of various entries on the open history sheet is subject to periodical review, as noted above.

32. In **Dhananjaya Reddy Vs. State of Karnataka 2001 (4) SCC 9**, the Supreme Court held that where a power is given to do a certain thing in a certain manner, the thing must be done in that way or not at all. In **Commissioner of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala 2002 (1) SCC 633**, it was held that when a statute vests certain power in an authority to be exercised in a particular manner then the said authority has to exercise it only in the manner provided in the statute itself. The judgments in **Anjum M.H. Ghaswala (supra)** and **Dhananjaya Reddy (supra)** have been followed in **Captain Sube Singh & others Vs. Lt. Governor of Delhi & others 2004 (6) SCC 440**. Similar view was taken in **State of Jharkhand & others Vs. Ambay Cements & another 2005 (1) SCC 368** and **Competent Authority Vs. Barangore Jute Factory & others 2005 (13) SCC 477**.

33. The principle that what cannot be done directly cannot be achieved indirectly

is also well settled and was elaborated by the Supreme Court in **State of Tamil Nadu and Others v. K. Shyam Sunder and Others: (2011) 8 SCC 737** laying down that what cannot be done directly, is not permissible to be done obliquely, meaning thereby, whatever is prohibited by law to be done, cannot legally be effected by an indirect and circuitous contrivance on the principle of *quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud*. An authority cannot be permitted to evade a law by 'shift or contrivance'." (Also see **Jagir Singh v. Ranbir Singh: (1979) 1 SCC 560**, **M.C. Mehta v. Kamal Nath: (2000) 6 SCC 213** and **Sant Lal Gupta v. Modern Coop. Group Housing Society Ltd. (2010) 13 SCC 336**).

CONCLUSION

34. In view of the above discussion and the admitted position of fact that apart from solitary case registered at Crime No.118 of 1998, proceedings whereof have already been quashed, there being no other case registered against the petitioner, the Deputy Inspector General of Police of the Range (D.I.G. concerned) has to record special reasons as to why despite quashing of the solitary case, the petitioner is still required to be kept under continuous surveillance. For the said purpose, it is open for the petitioner to submit a representation before the D.I.G. concerned bringing on record all the facts and proceedings which are sufficient for the D.I.G. to form an opinion to keep or not to keep the petitioner under surveillance and to make relevant entry on the history sheet as per Regulations 232 and 233.

35. This Court also notices that apart from seeking a relief of certiorari requesting quashing of history sheet of

Class 'B', the petitioner has prayed for a direction for the respondents not to keep him under surveillance and the basis of petitioner's claim is apparently quashing of the solitary Criminal Case No.1087 of 2006, as noted above. While reserving the judgment in the present case on 06.02.2024, the learned counsel for the petitioner was permitted to implead the Deputy Inspector General of Police of the Range to the writ petition. Necessary impleadment was carried out on the same day.

36. In view of the above discussion, while no writ of certiorari can be issued quashing the history sheet opened against the petitioner, the petitioner is certainly entitled to submit a representation before the D.I.G. concerned, as noted above. Therefore, giving liberty to the petitioner to file a comprehensive representation before the D.I.G. concerned along with certified copy of this order, ventilating his grievance, as per the observations made in the present order, the petition stands **disposed off** with a direction that, in case, such a representation is filed within a period of one month from the date of delivery of this judgment, the D.I.G. concerned shall pass a reasoned and speaking order strictly in consonance with Regulations 232 and 233 and any other relevant Regulation of the U.P. Police Regulations, after dealing with each and every ground raised before him by the petitioner through his representation, within a period of next two months after providing opportunity of personal hearing to the petitioner and after summoning relevant records from the concerned police station.

(2024) 4 ILRA 867
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.03.2024

BEFORE

THE HON'BLE SURENDRA SINGH-I, J.

Criminal Revision No. 167 of 2023

Rakhi @ Rekha	...Revisionist
State of U.P. & Anr.	...Opp. Parties
Versus	

Counsel for the Revisionist:

Sri Jayant Kumar, Sri Kanhiya Lal Chauhan

Counsel for the Opp. Parties:

G.A., Sri Sandeep Kumar Srivastava

Criminal Law - Code of Criminal Procedure, 1973 - Section 127 - Maintenance - Enhancement of - Counsel for revisionist submitted that criminal revision has been filed challenging quantum of maintenance awarded, which is meagre considering monthly income of opposite party no.2. (husband) who is serving in Indian Navy and earning Rs.35,000 - 40,000 pm - Further contended that trial Court ought to have fixed at least 25% of net monthly income as maintenance, whereas it awarded only Rs.4,000/- till date of order and thereafter Rs.5,000/-, without assigning any reason - Earlier, trial Court had ex parte granted Rs.12,000/- pm as interim maintenance, later on opposite party no.2 filed recall application u/s 126(2) Cr.P.C., allowed, hence, there was no justification for awarding lesser amount - Held, salary slip of opposite party no.2 shows deduction of Rs.9,000/- towards personal loan, which is not permissible and should be added in his net monthly income. Hence, his net monthly income is Rs.43,020/- - Opposite party no.2 St.d in his reply and oral evidence that he incurs Rs.15,000-16,000/- monthly for his father's heart and blood pressure treatment and Rs.10,000-12,000/- for his mother's liver ailment - No documentary evidence, medical prescription, or medical receipts for purchase of medicines produced, contention rejected - Opposite party no.2 submitted that revisionist earns from

tuitions and as beautician, she has enough money to maintain herself, but produced no proof to substantiate claim - Impugned order set aside, thus, prayer for enhancement of maintenance allowed. (Para 3, 15 to 17, 22)

Revision allowed. (E-13)

List of Cases cited:

1. Anju Garg & anr. Vs Deepak Kumar Garg: (2022) SCC OnLine SC 1314, (Paras 9 to 11)
2. Dr. Kulbhushan Kumar Vs Smt. Raj Kumari: (1970) 3 SCC 129
3. Shailja & anr. Vs Khobbanna: (2018) 12 SCC 199
4. Kalyan Dey Chowdhury Vs Rita Dey Chowdhury Nee Nandy: (2017) 14 SCC 200

(Delivered by Hon'ble Surendra Singh-I, J.)

By means of the instant criminal revision, revisionist has assailed the judgement and order dated 01.11.2022 passed by Principal Judge, Family Court, Amroha in Case No.05 of 2019 (Smt. Rakhi vs. Amit Kumar), under Section 125 Cr.P.C., Police Station Amroha, District Amroha.

2. By the impugned order, the trial Court has granted monthly maintenance allowance of Rs.5,000/- to the revisionist from the date of presentation of application under Section 125 Cr.P.C. The revisionist has prayed for enhancement of maintenance allowance granted by the trial Court in her favour. The opposite party No.2 has not challenged the aforesaid impugned order, therefore, findings in the impugned judgment and findings regarding the marriage of the revisionist with opposite party No.2 as well as there being sufficient reason for her residing away

from the opposite party No.2, has become final.

3. It has been submitted by the learned counsel for the revisionist that this criminal revision has been filed on the point of quantum of maintenance payable to the revisionist contending that it is quite meagre considering the monthly net income of the opposite party No.2 (husband). The averments have been made on behalf of the revisionist that admittedly opposite party No.2 is working in Indian Navy and he is getting monthly salary of about Rs.35,000/- to 40,000/- per month. The trial Court may have fixed at-least 25 % of the net monthly salary of the opposite party No.2, but trial Court has awarded maintenance allowance of Rs.4000/- till date of order, and thereafter, Rs.5000/-, which is on the lower side. It has also been submitted that trial Court has not given any reason for fixing aforesaid monthly maintenance allowance payable to the revisionist. It has also been submitted that earlier trial Court vide judgment and order dated 11.02.2020 had ex-parte granted Rs.12,000/- per month as interim maintenance allowance to the revisionist. Later on, recall application under Section 126 (2) Cr.P.C. was filed by the opposite party No.2, which was allowed and there is no ground to provide the revisionist lesser monthly maintenance allowance than the interim one, since the trial Court passed the impugned judgment and order without considering the evidence on record and without applying judicial mind it should be enhanced.

4. Per contra, learned counsel for the opposite party No.2 has submitted that trial Court has passed the impugned judgment and order on the basis of oral and documentary evidence on record and there is no ground to make interference into it. It

has also been submitted that interim maintenance was passed ex-parte without considering the contentions raised by the opposite party No.2. The trial Court has rightly granted a reasonable maintenance allowance, which is not liable to be altered.

5. Learned counsel for the opposite party No.2 has raised objection about the maintainability of the criminal revision and contended that the revisionist should have filed an application under Section 127 Cr.P.C. in the trial Court itself for enhancement of the amount of monthly maintenance allowance. It has also contended that since there is a statutory provision for enhancement of the amount of maintenance allowance under Section 127 Cr.P.C., the criminal revision for such enhancement is not maintainable in this Court.

6. Heard Sri Jayant Kumar, learned counsel for the revisionist, learned A.G.A. for the State and Sri Sandeep Kumar Srivastava, learned counsel for opposite party no.2.

7. The revisionist has filed instant criminal revision for enhancement of the amount of monthly maintenance allowance not on the ground of change of circumstances, since the order was passed but on the ground that the trial court while fixing the amount of monthly maintenance allowance has not considered the evidence on record, therefore, order passed is illegal or liable to be altered.

8. Learned counsel for the opposite party No.2 has raised preliminary objection as per jurisdiction of this Court in view of the provision given in Section 127 Cr.P.C. for enhancement of maintenance allowance.

9. Section 127 Cr.P.C. provides for alteration of maintenance allowance or

interim maintenance allowance on the ground that circumstances have been changed since the order was passed.

10. Section 127 Cr.P.C., provides for alteration of maintenance allowance in the following circumstances:-

(i) The Magistrate finds that competent civil court has passed any order due to which maintenance allowance granted has to be cancelled or modified;

(ii) The woman in whose favour maintenance allowance has been provided, has remarried after obtaining divorce such order of maintenance can be cancelled from the date of her remarriage;

(iii) Such woman has received whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce;

(iv) The woman has obtained divorce from her husband and she had voluntarily surrendered her rights to maintenance or interim maintenance, as the case may be, after her divorce, cancel the order from the date thereof.

11. The alteration of maintenance allowance under Section 127 Cr.P.C. can be done by the trial Court on the ground of change of circumstances as mentioned in that section. In case, the person in whose favour maintenance allowance is passed, assailing the amount of maintenance allowance on the ground that it was fixed against the evidence on record, he/she can file criminal revision to this Court and Court shall have jurisdiction to decide it.

12. The opposite party No.2 has annexed his monthly salary slip as

Annexure-SA-I to his supplementary counter affidavit. According to his salary slip, after deducting other expenses, he gets Rs.34,020/- per month in hand. From the perusal of the pay slip filed by the opposite party No.2, which is annexed as Annexure No.S.A.1 to the supplementary counter affidavit, it is found that gross monthly salary of the opposite party No.2 is of Rs.54,684/-, in which total amount of Rs.20,664/- is deducted and balance of Rs.34,020 is credited in the account of opposite party No.2. In the statement of salary slip filed by the opposite party No.2, the amount deducted under different heads is not legible, only total deduction of Rs.20,664/- is legible. The opposite party No.2 submitted, in his counter affidavit, that he has taken personal loan of Rs.5 lakhs, for which he has to pay instalment of Rs.9000/- per month.

13. The Hon'ble Apex Court has held in paragraph No.9 and 10 of the judgement in **Anju Garg and Another vs. Deepak Kumar Garg: (2022) SCC OnLine SC 1314**, which is as follows:

"9., it may be noted that Section 125 of Cr.P.C. was conceived to ameliorate the agony, anguish and financial suffering of a woman who is required to leave the matrimonial home, so that some suitable arrangements could be made to enable her to sustain herself and the children, as observed by this Court in Bhuwan Mohan Singh v. Meena¹. This Court in the said case, after referring to the earlier decisions, has reiterated the principle of law as to how the proceedings under Section 125 Cr.P.C have to be dealt with by the Court. It held as under:

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

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

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

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

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

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

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

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

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

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

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

10. This Court had made the above observations as the Court felt that the Family Court in the said case had conducted the proceedings without being alive to the objects and reasons, and the spirit of the provisions under Section 125 of the Code. Such an impression has also been gathered by this Court in the case on hand. The Family Court had disregarded the basic canon of law that it is the sacrosanct duty of the husband to provide financial support to the wife and to the minor children. The husband is required to earn money even by physical labour, if he is an able-bodied, and could not avoid his obligation, except on the legally permissible grounds mentioned in the statute. In Chaturbhuj v. Sita Bai², it has been held that the object of maintenance proceedings is not to punish a person for his past neglect, but to prevent vagrancy and destitution of a deserted wife, by providing her food, clothing, and shelter by a speedy remedy. As settled by this Court, Section 125 Cr.P.C. is a measure of social justice and is specially enacted to protect women and children. It also falls within the Constitutional sweep of Article 15(3), reinforced by Article 39 of the Constitution of India.”

14. The Hon’ble Apex Court in Dr. Kulbhushan Kumar vs. Smt. Raj Kumari: (1970) 3 SCC 129 has held that only statutory deductions as income tax can be reduced from the gross salary, which have to be made compulsory. No deduction is permissible for payment of house rent, electricity charge, contribution of provident fund, instalments towards payment of loan and expenses for maintaining the car.

15. From the salary slip of opposite party No.2, it appears that deduction of Rs.20,664/- includes inter alia for house

rent, payment of instalment of personal loan of Rs.9000/- per month. Therefore, deduction of Rs.9000/- per month made for payment to the monthly instalment of personal loan is not permissible and it should be added in the net monthly income of the opposite party No.2. Thus, his net monthly income becomes Rs.34020 + Rs.9000/- i.e. Rs.43,020/-

16. In reply to the application filed under Section 125 Cr.P.C. as well as in the oral evidence produced by the opposite party No.2, he has submitted that his father is patient of heart and blood pressure, for which he has to spend Rs.15,000 to 16,000/- per month for medicine and he also submitted that his mother is also suffering from liver disease and her treatment is going on, for which, he has to spend Rs.10,000/- to 12,000/- per month. In this regard, no documentary evidence, prescription of doctor and medicine receipts for purchase of medicines have been filed by the opposite party No.2, therefore, this cannot be accepted that for treatment of his parents, he has spent aforesaid amount on medicine.

17. Opposite party No.2, in his reply as well as oral evidence, has submitted that revisionist is B.A. pass and earns Rs.10,000/- per month by taking tuition and she has done course of beautician, by which she can also earn money and she has enough money to maintain herself, but opposite party No.2 has not produced any documentary evidence in support of earning of the revisionist.

18. The Hon'ble Apex Court in the case of **Shailja And Another vs. Khobbanna: (2018) 12 SCC 199** has held:

“we find that the High Court has proceeded on the basis that Appellant 1/wife was capable of earning and that is one of the reasons for reducing the maintenance granted to her by the Family Court. Whether Appellant 1 is capable of earning or whether she is actually earning are two different requirements. Merely because Appellant 1 is capable of earning is not, in our opinion, sufficient reason to reduce the maintenance awarded by the Family Court.”

19. Considering the above law laid down by the Hon'ble Apex Court merely on the ground that revisionist is B.A. pass and has done some professional course, no presumption can be drawn that she is earning sufficient money to maintain herself. Thus the plea advanced on behalf of the opposite party No.2 (husband) is without any legal basis.

20. In **Kalyan Dey Chowdhury vs. Rita Dey Chowdhury Nee Nandy: (2017) 14 SCC 200**, the Hon'ble Apex Court has held that 25% of the husband's net salary would be just and proper to be awarded as maintenance to the wife. The amount of permanent alimony awarded to the wife must be befitting the status of the parties and the capacity of the spouse to pay maintenance.

21. In view of the aforesaid factual and legal aspect, I am of the view that the order impugned dated 01.11.2022 is erroneous and cannot survive in the eyes of law, therefore, I set aside the impugned order for the aforesaid reasons.

22. The prayer for enhancement of maintenance allowance made by revisionist is allowed and it is observed that she will be entitled for Rs.10,000/- per month,

which is approximately 25 % of the next monthly income of Rs.43,020/-, as maintenance allowance.

23. Thus, opposite party No.2 shall be bound to provide maintenance allowance of Rs.10,000/- per month to his wife (revisionist) from the date of application. The arrears of maintenance allowance shall be paid by the opposite party No.2 in four equal instalments within a period of four months. The monthly interim maintenance shall be paid regularly till 7th day of each month.

24. The present criminal revision is **allowed** in terms of above mentioned conditions.

25. The copy of the order be sent to the trial Court concerned for necessary compliance, forthwith.

(2024) 4 ILRA 873

REVISIONAL JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 20.03.2024

BEFORE

THE HON'BLE SURENDRA SINGH - I, J.

Criminal Revision No. 185 of 2023

Vishwanath		...Revisionist
	Versus	
State of U.P. & Ors.		...Opp. Parties

Counsel for the Revisionist:
Sri Ganesh Kumar

Counsel for the Opp. Parties:
Sri Alok Singh, G.A., Sri Phool Chandra Singh, Ms. Sumitra Singh

Criminal Law - Code of Criminal Procedure, 1973 - Sections 156(3) & 195 - Against rejection of application for

registering Criminal Case - Perusal of impugned order reveals that Trial Court rejected application u/s 156(3) Cr.P.C. on ground that revisionist sought registration of FIR against opposite parties Nos. 2 and 3 for fraud and forgery, alleging that despite cancellation of disputed Will by Civil Judge (Senior Division) they filed false affidavit and forged will before Tehsildar, Sadar and got their names mutated in revenue records - In impugned order, Trial Court held that registration of FIR for filing forged documents in Court proceedings is barred u/s 195(1)(b)(i) Cr.P.C., observing that for such offences, only complaint by concerned Court can be instituted, in whose judicial proceedings, false affidavit or forged documents have been filed, hence, no direction for registration of FIR could be passed - Perusal of application u/s 156(3) Cr.P.C. reveals that alleged forgery in affidavit and will deed was prepared outside Court, and forged documents were later filed in judicial proceedings in a case pending in Court - Hence, bar against taking cognizance of criminal case u/s 195(1)(b)(i) Cr.P.C. is not attracted in instant case - In view of law laid down by Apex Court in *Sachida Nand Singh* (infra), Magistrate erred in holding that Section 195(1)(b) Cr.P.C. bars registration of FIR even where alleged forgery committed outside Court and forged document subsequently filed in judicial proceedings - Magistrate neither assigned any other reason for rejecting application u/s 156(3) Cr.P.C. nor considered contention regarding registration of criminal case for alleged forged affidavit and false Will - Thus, impugned order set aside. (Para 8, 9, 11, 13, 14)

Revision allowed. (E-13)

List of Cases cited:

1. All Cargo Movers (I) Pvt. Ltd. & ors. Vs Dhanesh Badarmal Jain & anr.: (2007) 14 SCC 776

2. St. of Maharashtra Vs Sayed Mohammed Masood & anr.: (2009) 8 SCC 787

3. Mohammed Ibrahim & ors. Vs St. of Bihar & anr.: (2009) 8 SCC 751

4. Sachida Nand Singh Vs St. of Bihar: (1998) 2 SCC 493, (Paras 7 to 9, 13)

(Delivered by Hon'ble Surendra Singh - I, J.)

This criminal revision has been filed for challenging the impugned judgement and order dated 20.10.2022 passed by the Civil Judge (Senior Division), FTC, Basti in Criminal Misc. Application No.462/2012/2022 (Vishwanath vs. Shivnath), under Section 156 (3) Cr.P.C., Police Station Kotwali, District Basti.

2. By the impugned order, trial Court has rejected the application of the revisionist filed under Section 156 (3) Cr.P.C. for directing the Station House Officer, Police Station Kotwali, District Basti to register and investigate the criminal case against the opposite party No.2.

3. Learned counsel for the revisionist submitted that revisionist has filed an application under Section 156 (3) Cr.P.C. alleging that his younger brother, namely, Shivnath (opposite party No.2) committed forgery and obtained the registered will deed by his father-Drigpal on 16.05.1994. He further submitted that revisionist had filed Civil Suit before the Civil Judge (Senior Division), Basti, which was registered as Suit No.202 of 1995. In the aforesaid suit, revisionist had challenged the will deed dated 16.05.1994, which was executed in favour of opposite party No.2 (Shivnath). This suit has been decreed in favour of the revisionist vide order dated 04.04.1995 and will deed

executed in favour of the opposite party No.2 has been cancelled. After ten months of the decree of the aforesaid suit, opposite party No.2 instituted Original Suit No.127 of 1995 for cancellation of the aforesaid order dated 04.04.1995 passed in Original Suit No.202 of 1995. The aforesaid suit instituted by the opposite party no.2 was rejected by Civil Judge (Senior Division), Basti on 25.01.1997. Against the order dated 25.01.1997 passed by Civil Judge (Senior Division), opposite party No.2 filed revision i.e. Revision No.23 of 1997 before District Judge, Basti, which was also rejected vide order dated 12.11.1998. Against the aforesaid order of the Revisional Court, opposite party No.2 also filed a writ petitioner bearing Writ-C No.189 of 1999 before this Hon'ble Court, which was dismissed on merit vide order dated 08.01.1999. The opposite party No.2 after concealment of earlier order passed by competent Court cancelling the will deed, filed mutation proceedings with false affidavit and forged cancelled will dated 16.05.1994 before Tehsildar-Sadar, District Basti on the basis of aforesaid affidavit and will deed, the Court concerned passed order in favour of opposite party No.2 on 23.07.2007 and directed the Revenue Authority to record the name of opposite party No.2 in place of his father-Digpal on the basis of aforesaid will deed. After knowledge of the aforesaid order dated 23.07.2007, the revisionist filed recall application along with relevant details, Tahsildar, Sadar, District Basti vide order dated 04.02.2009 allowed the recall application of the revisionist and directed to record the name of revisionist and his real brother in place of their father in revenue record. Against the aforesaid order, opposite party No.2 also filed an appeal before the Sub Divisional Magistrate, Sadar, Basti under Section 210 of Land

Revenue Act, which was rejected vide order dated 30.03.2010. Subsequently, the opposite party No.2 concealing the earlier proceedings initiated before the authority concerned, instituted the further mutation proceedings under Section 34 of Land Revenue Act 1901 for recording his name over the property of his father, but it was rejected vide order dated 06.09.2022.

4. Learned counsel for the revisionist has submitted that from the averments made in the application under Section 156 (3) Cr.P.C. and affidavit filed in support thereof, *prima facie* offence under Sections 420, 467, 478 I.P.C. was made out against the opposite party No.2, but without considering the facts and evidence given therein, Magistrate concerned illegally rejected the application of the revisionist filed under Section 156 (3) Cr.P.C. and the same is liable to be quashed.

5. Per contra, learned counsel for the opposite party No.2 submitted that Digpal (father of the revisionist and opposite party No.2) was a Government Employee and has four sons, namely, Hanuman, Balram, Vishwanath (revisionist) and Shivnath (opposite party No.2). All three sons except Shivnath got good Government Service/Job, since opposite party No.2 was looking after him after retirement of Digpal (father of the revisionist and opposite party No.2), who executed registered will dated 17.05.1994 in his favour. The aforesaid will has not been cancelled or set aside by any Court. By filing the application under Section 156 (3) Cr.P.C., the revisionist wants to lodge FIR in a matter which is purely in civil nature, such act is not permissible under the law.

6. Learned counsel for the opposite party Nos.2 and 3 has placed

reliance on the following judgements of the Hon'ble Apex Court:-

(i). **All Cargo Movers (I) Pvt. Ltd. & Others vs. Dhanesh Badarmal Jain & Another: (2007) 14 SCC 776.**

(ii) **State of Maharashtra vs. Sayed Mohammed Masood & Another: (2009) 8 SCC 787.**

(iii) **Mohammed Ibrahim And Others vs. State of Bihar And Another: (2009) 8 SCC 751.**

7. Heard Sri Ganesh Kumar, learned counsel for the revisionist, learned A.G.A. for the State and Sri Phool Chandra Singh, learned counsel for opposite party No.2 and 3.

8. From the perusal of the impugned order, it is revealed that trial Court has rejected the application of the revisionist filed under Section 156 (3) Cr.P.C. on the ground that in his application, revisionist/applicant has prayed for lodging FIR against the opposite party Nos.2 and 3 for fraud and forgery. Although the disputed will dated 16.05.1994 was cancelled by the Civil Judge (Senior Division), Basti, but opposite party Nos.2 and 3 by filing false affidavit and aforesaid forged will in the Court of Tehsildar, Sadar, District Basti, vide order dated 04.02.2009 obtained their name mutated in the revenue record.

9. In the impugned order, trial Court has mentioned the registration of FIR regarding **filing of forged documents in a Court proceedings is barred under Section 195 (1) (b) (i) Cr.P.C.** The trial Court has given reason that for the alleged offences only a complaint case can be instituted by the Court, in whose judicial proceedings, false affidavit or forged

documents have been filed, therefore, for the alleged offences no order for registration of FIR under Section 156 (3) Cr.P.C. could be passed. The provision which bars registration of FIR for an offence of forgery committed in a Court proceedings is as follows:-

“195. Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence.---

(1) No Court shall take cognizance –

(a)(i) of any offence punishable under sections 172 to 188 (both inclusive) of the Indian Penal Code (45 of 1860), or

(ii) of any abetment of, or attempt to commit, such offence, or

(iii) of any criminal conspiracy to commit such offence, except on the complaint in writing of the public servant concerned or other public servant to whom he is administratively subordinate;

(b)(i) of any offence punishable under any of the following sections of the Indian Penal Code (45 of 1860), namely, sections 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, or

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

(iii) of any criminal conspiracy to commit, or attempt to commit, or the

abetment of, any offence specified in sub-clause (i) or sub-clause (ii),

except on the complaint in writing of that Court or by such officer of the Court as that Court may authorise in writing in this behalf, or of some other Court to which that Court is subordinate.] [Substituted by Act 2 of 2006, Section 3 for "except on the complaint in writing of that Court, of of some other Court to which that Court is subordinate"

10. Section 195 (I) (b) bars the Court taking cognizance of an offence, in which, forgery has been committed in a documents filed in case pending in any Civil, Criminal or Revenue Court, if such forgery has been made in any Court proceedings, then the concerned Court should file a complaint as provided under Section 340 Cr.P.C.

11. From the perusal of averments made in the application under Section 156 (3) Cr.P.C., it transpires that alleged forgery in affidavit and will deed was not done while they were already been filed in the case pending in different Courts. The alleged false affidavit or forged document were prepared out side the Court and same has been filed in the judicial proceedings in a case pending in a Court. Thus, the bar against taking cognizance of a criminal case is not applicable in the facts and circumstances given in the application under Section 156 (3) Cr.P.C.

12. The Hon'ble Apex Court has held in paragraph nos.7, 8, 9 and 13 of the judgement in **Sachida Nand Singh vs. State of Bihar: (1998) 2 SCC 493**, condition necessary for application of the bar under Section 195 (1) (B) Cr.P.C., which is as follows :-

7. Even if the clause is capable of two interpretations we are inclined to choose the narrower interpretation for obvious reasons. Section 190 of the Code empowers “any magistrate of the first class” to take cognizance of “any offence” upon receiving a complaint, or police report or information or upon his own knowledge. Section 195 restricts such general powers of the magistrate, and the general right of a person to move the court with a complaint is to that extent curtailed. It is a well-recognised canon of interpretation that provision curbing the general jurisdiction of the court must normally receive strict interpretation unless the statute or the context requires otherwise (*Abdul Waheed Khan v. Bhawani* [AIR 1966 SC 1718 : (1966) 3 SCR 617]).

8. That apart it is difficult to interpret Section 195(1)(b)(ii) as containing a bar against initiation of prosecution proceedings merely because the document concerned was produced in a court albeit the act of forgery was perpetrated prior to its production in the Court. Any such construction is likely to ensue unsavoury consequences. For instance, if rank forgery of a valuable document is detected and the forgerer is sure that he would imminently be embroiled in prosecution proceedings he can simply get that document produced in any long-drawn litigation which was either instituted by himself or somebody else who can be influenced by him and thereby pre-empt the prosecution for the entire long period of pendency of that litigation. It is a settled proposition that if the language of a legislation is capable of more than one interpretation, the one which is capable of causing mischievous consequences should be averted. Quoting from *Gill v. Donald*

Humberstone & Co. Ltd. [(1963) 1 WLR 929 : (1963) 3 All ER 1803] Maxwell has stated in his treatise (*Interpretation of Statutes*, 12th Edn., p. 105) that “if the language is capable of more than one interpretation we ought to discard the more natural meaning if it leads to unreasonable result and adopt that interpretation which leads to a reasonably practicable result”. The clause which we are now considering contains enough indication to show that the more natural meaning is that which leans in favour of a strict construction, and hence the aforesaid observation is eminently applicable here.

9. As Section 340(1) of the Code has an interlink with Section 195(1)(b) it is necessary to refer to that sub-section in the present context. The said sub-section reads as follows:

“340. When upon an application made to it in this behalf or otherwise, any Court is of opinion that it is expedient in the interest of justice that an inquiry should be made into any offence referred to in clause (b) of sub-section (1) of Section 195, which appears to have been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary,—

(a) record a finding to that effect;

(b) make a complaint thereof in writing;

(c) send it to a Magistrate of the first class having jurisdiction;

(d) take sufficient security for the appearance of the accused before such Magistrate, or if the alleged offence is non-bailable and the Court thinks it

necessary so to do, send the accused in custody to such Magistrate; and

(e) bind over any person to appear and give evidence before such Magistrate.”

13. The three-Judge Bench of this Court in Patel Laljibhai Somabhai case [(1971) 2 SCC 376 : 1971 SCC (Cri) 548 : AIR 1971 SC 1935] has interpreted the corresponding section in the old Code, [Section 195(1)(c)] in almost the same manner as indicated above. It is advantageous in this context to extract clause (c) of Section 195(1) of the old Code:

“195. (1)(c) No Court shall take cognizance.—

of any offence described in Section 463 or punishable under Section 471, Section 475 or Section 476 of the same Code, when such offence is alleged to have been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding, except on the complaint in writing of such Court, or of some other Court to which such Court is subordinate.” (emphasis supplied)

The issue involved in Patel Laljibhai Somabhai case [(1971) 2 SCC 376 : 1971 SCC (Cri) 548 : AIR 1971 SC 1935] related to the applicability of that sub-section to a case where forged document was produced in a suit by a party thereto, and subsequently a prosecution was launched against him for offences under Sections 467 and 471 of IPC through a private complaint. The ratio of the decision therein is the following: (SCC Headnote)

“The offences about which the court alone is clothed with the right to complain may, therefore, be appropriately considered to be only those offences committed by a party to a proceeding in

that court, the commission of which has a reasonably close nexus with the proceedings in that court so that it can without embarking upon a completely independent and fresh inquiry, satisfactorily consider by reference principally to its records the expediency of prosecuting the delinquent party. It, therefore, appears to be more appropriate to adopt the strict construction of confirming the prohibition contained in Section 195(1)(c) only to those cases in which the offences specified therein were committed by a party to the proceeding in the character as such party.”

13. Considering the law laid down by the Hon'ble Apex Court in **Sachida Nand Singh (supra)**, it is obvious that Magistrate has wrongly held that **Section 195 (1) (b) Cr.P.C.** bars registration of FIR even in a case where alleged forgery has been committed in the document out side the Court and thereafter, it has been filed in a judicial proceedings in a case pending in a Court.

14. Apart from this **Section 195 (1) (b) Cr.P.C.**, imposes no bar on registration of a criminal case relating to such forged documents, it merely bars that the Magistrate shall not take cognizance of an offence regarding such forged document unless the Court, in which, forgery has been committed, filed a complaint case in accordance with the provision of **Section 340 Cr.P.C.** The Magistrate has not discussed or given any other reason for rejecting the application filed under **Section 156 (3) Cr.P.C.** and also has not considered the other point raised in the application for registering a criminal case regarding alleged forged affidavit and false will.

15. From the above discussion, I am of the view that whiling passing the

impugned order, the Magistrate has committed illegality and has not exercised the jurisdiction vested in him, in accordance with law.

16. Accordingly, the present criminal revision is **allowed**. The impugned order dated 20.10.2022 passed by the Civil Judge (Senior Division), FTC, Basti in Criminal Misc. Application No.462/2012/2022 (Vishwanath vs. Shivnath) is set aside.

17. The Magistrate concerned shall pass a fresh order on the application of the revisionist filed under Section 156 (3) Cr.P.C. after giving opportunity of hearing to the revisionist/applicant.

18. However, it is hereby made clear that while making aforesaid observations, this Court is merely concerned with the illegality of impugned order and no observation or finding has been made on merit of the case.

19. The Magistrate shall dispose of the application under Section 156 (3) Cr.P.C. without being influenced by any observation made in this order except that relating to non-applicability of Section 195 (1) (b) Cr.P.C. to the facts of the case.

(2024) 4 ILRA 879

REVISIONAL JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 08.04.2024

BEFORE

THE HON'BLE SURENDRA SINGH-I, J.

Criminal Revision No. 324 of 2023

Vijay Shankar Verma **...Revisionist**
Versus
State of U.P. & Ors. **...Opp. Parties**

Counsel for the Revisionist:

Sri Ravindra Kumar Srivastava

Counsel for the Opp. Parties:

G.A., Sri Shesh Narain Mishra, Sri Sudhanshu Pratap Singh

Criminal Law - Indian Penal Code, 1860 - Section 306 - Code of Criminal Procedure, 1973 - Sections 161, 319 - Against rejection of Application for summoning opposite party - Revisionist's sister died due to dowry harassment, for which her father lodged FIR against her husband, mother-in-law, and opposite parties nos.2 to 4 - Investigating Officer illegally, expunged names of opposite parties nos.2 to 4 and filed charge-sheet only against husband and mother-in-law - During trial, P.W.-1 and P.W.-2 deposed regarding involvement of opposite parties nos.2 to 4 in commission of murder of revisionist's sister - Consequently, application u/s 319 Cr.P.C. filed by revisionist's father, trial court rejected - Opposite parties contended they were named in FIR only due to relation with deceased's husband, no specific role assigned against them, finding no evidence, Investigating Officer rightly exonerated them - Held, trial court, relied on St.ments, of independent witnesses - P.W.1 (father) and P.W.2 (uncle) of deceased were not eyewitnesses - P.W.-1 didn't visit place of occurrence, visited hospital after incident, where her daughter was undergoing treatment for her burn injuries, died thereafter - P.W.2 received information of burning and death of deceased from P.W.1 - P.W.1 and P.W.2 had neither earlier complained of harassment of deceased by in-laws or opposite parties nos.2 - 4, nor did they assign any specific role to them - On these grounds, trial court rejected application - Incident occurred over seven years after marriage of deceased - St.ments recorded indicate that opposite parties nos.2 - 4 were not present at place of occurrence, only deceased's husband and mother-in-law present - Witnesses St.d that deceased, depressed over not having a son, had quarrel with her

mother-in-law, who scolded her, after which she self-immolated using kerosene oil - Thus, no illegality in impugned order, revision dismissed. (Para 3, 4, 16, 17)

Revision dismissed. (E-13)

List of Cases cited:

1. Amit Kapoor Vs Ramesh Chander & anr., (2012) 9 SCC 460, (Paras 12, 13, 20)
2. Hardeep Singh Vs St. of Punj.; (2014) 3 SCC 92, (Paras 105, 106, 117.3 to 117.5)
3. S. Mohammad Ispahani Vs Yogendra Chandak (2017) 16 SCC 226, (Para 35)
4. Rajesh Vs St. of Har. (2019) 6 SCC 368
5. Yashodhan Singh & ors. Vs St. of U.P. & anr.; (2023) 9 SCC 108, (Paras 22.6 to 22.8)
6. Kahkashan Kausar @ Sonam Vs The St. of Bihar & ors., 2022(6) SCC 5991

(Delivered by Hon'ble Surendra Singh-I, J.)

1. By means of instant revision filed under Section 397/401 Cr.P.C., the revisionist has assailed the impugned order dated 11.5.2022 passed by the Ist Additional Sessions Judge Basti in Sessions Trial No. 35 of 2015 (State Vs. Ram Suresh and others)) under Section 306 IPC P.S. Paikoliya, District Basti. By the impugned order, the trial court has rejected the revisionist's application 52 (Kha) filed under Section 319 Cr.P.C. for summoning the opposite party no.2 to 4 as an accused for trial.

2. It is has been averred by learned counsel for the revisionist that the trial court has passed the impugned order against the weight of evidence on record and the without application of judicial mind, the order is illegal, improper and bad

in the eye of law and it is liable to be quashed by this Court.

3. It has been submitted that the revisionist's sister Chandrakanti was subjected to dowry death for which, revisionist's father Mani Ram Verma lodged the First Information Report against Ramsuresh husband of her daughter, her mother-in-law Mewati Devi and opposite party nos. 2 Gopal (devar), opposite party no.3 Umesh (devar) and opposite party no.4 Chotelal (father) under Sections- 498-A, 304-B and Section 3/4 of Dowry Prohibition Act. The Investigating Officer illegally expunged the names of the opposite party nos. 2 to 4 and filed a charge-sheet only against husband of the deceased Ramsuresh and her mother-in-law Mewati Devi under Section 306 IPC. During trial P.W.- 1 Mani Ram Verma and P.W.-2 Harish Chandra have deposed that apart from husband and mother-in-law the opposite party nos. 2 to 4 were also involved in the commission of murder of the revisionist's sister, therefore, revisionist moved an application under Section 319 Cr.P.C. against the opposite party nos. 2 to 4 for facing trial along with husband and mother-in-law of the deceased, thereafter, revisionist father Maniram Verma filed an application under Section 319 Cr.P.C. which was rejected vide its impugned order dated 11.5.2022 by the trial court without an application of judicial mind.

4. Per contra, learned counsel for opposite party no. 2 to 4 had opposed the criminal revision and submitted that the informant had named them in the FIR merely on the ground that they were relatives of deceased husband. No specific role were assigned against them in the FIR, during investigation, no evidence was found against them, the Investigating

Officer has rightly exonerated their names and did not filed charge-sheet against them.

5. I have heard learned counsel for the revisionist, learned counsel for the opposite party nos. 2 to 4 and learned AGA for the State as well as perused the material available on record.

6. Before considering the legality of the impugned order dated 11.5.2022 passed under Section 319 Cr.P.C. the statutory provisions under Section 319 Cr.P.C. and law relating to it as propounded by the Hon'ble Apex Court to be considered which is quoted as 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 afresh, and 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.

7. Section 319 Cr.P.C., the provisions of Section 319 empowers to court to proceed against any person not shown or mentioned as accused in charge-sheet if it appears from the evidence that such persons committed an offence for which he could be tried together with the main accused against whom he should have been charge sheeted and against whom trial is taken place.

8. The Hon'ble Apex Court in **Amit Kapoor Vs. Ramesh Chander and Another, (2012) 9 SCC 460** in paragraph nos.12 and 13 of its judgement has narrated the scope of revision by the High Court u/s 397 Cr.P.C. which is as follows :

“12. Section 397 of the Code vests the court with the power to call for and examine the records of an inferior court for the purposes of satisfying itself as to the legality and regularity of any proceedings or order made in a case. The object of this provision is to set right a patent defect or an error of jurisdiction or law. There has to be a well-founded error and it may not be appropriate for the court to scrutinise 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 CrPC.”

9. In paragraph nos.17 and 19 of the aforesaid judgement, the Hon’ble Apex Court has narrated that before framing a charge, what documents should be considered by the trial court. It has also provided about the extent of evidence required for framing of a charge. In paragraph no.20 of the aforesaid judgement, the Apex Court has compared the power and extent of jurisdiction of the High Court u/s 397 Cr.P.C. and Section 482 Cr.P.C. which is given hereunder:

“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 aliquid alicui concedit, concedere videtur id sine quo res ipsa esse non potest 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.”

10. The Hon’ble Apex Court in para 117.3 and 117.4 in the case of *Hardeep Singh vs. State of Punjab; (2014) 3 SCC 92* has explained the meaning of word ‘evidence’ as used under Section 319 Cr.P.C.. The relevant paragraphs of the judgement reads as under:-

“117.3. In view of the above position the word “evidence” in Section 319CrPC has to be broadly understood and not literally i.e. as evidence brought during a trial.

Question (ii)—Whether the word “evidence” used in Section 319(1)CrPC 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? Answer

117.4. Considering the fact that under Section 319CrPC a person against whom material is disclosed is only summoned to face the trial and in such an event under Section 319(4)CrPC the proceeding against such person is to commence from the stage of taking of cognizance, the court need not wait for the evidence against the accused proposed to be summoned to be tested by cross-examination.”

11. The Hon’ble Apex Court in para 117.5 of the case of Hardeep Singh (supra) has also explained the nature of satisfaction required to invoke the power under Section 319 Cr.P.C. to arraign an accused. The relevant paragraph of the judgement reads as under:-

“117.5. Though under Section 319(4)(b)CrPC the accused subsequently impleaded is to be treated as if he had been an accused when the court initially took cognizance of the offence, the degree of satisfaction that will be required for summoning a person under Section 319CrPC would be the same as for framing a charge. The difference in the degree of satisfaction for summoning the original accused and a subsequent accused is on account of the fact that the trial may have already commenced against the original accused and it is in the course of such trial that materials are disclosed against the newly summoned accused.

Fresh summoning of an accused will result in delay of the trial therefore the degree of satisfaction for summoning the accused (original and subsequent) has to be different.”

12. The scope and ambit of Section 319 Cr.P.C. has been well-settled by the pronouncement of Constitution Bench of the Hon'ble Apex Court in *Hardeep Singh Vs. State of Punjab and others*, (2014) 3 SCC 92 and paras 105 and 106 which are relevant for the purpose are reproduced hereunder :

“105. Power under Section 319 Cr.P.C, 1973 is a discretionary and an extraordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court, not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes un rebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 Cr.P.C., 1973. In

Section 319 Cr.P.C., 1973, the purpose of providing if "it appears from the evidence that any person not being the accused has committed any offence" is clear from the words "for which such person could be tried together with the accused". The words used are not "for which such person could be convicted". There is, therefore, no scope for the court acting under Section 319 Cr.P.C., 1973 to form any opinion as to the guilt of the accused."

13. In **S. Mohammad Ispahani Vs. Yogendra Chandak** (2017) 16 SCC 226, this Court has observed and held as under :

"35. It needs to be highlighted that when a person is named in the FIR by the complainant, but police, after investigation, finds no role of that particular person and files the charge-sheet without implicating him, the Court is not powerless, and at the stage of summoning, if the trial court finds that a particular person should be summoned as accused, even though not named in the charge-sheet, it can do so. At that stage, chance is given to the complainant also to file a protest petition urging upon the trial court to summon other persons as well who were named in the FIR but not implicated in the charge sheet. Once that stage has gone, the Court is still not powerless by virtue of Section 319 of the Cr.P.C. However, this section gets triggered when during the trial some evidence surfaces against the proposed accused."

14. In the case of **Rajesh Vs. State of Haryana** (2019) 6 SCC 368, after considering the observations made by this Court in **Hardeep Singh** (supra) referred to hereinabove, this Court has further

observed and held that even in a case where the stage of giving opportunity to the complainant to file a protest petition urging upon the trial court to summon other persons as well who were named in F.I.R. but not implicated in the charge-sheet has gone, in that case also, the Court is still not powerless by virtue of Section 319 Cr.P.c. and even those persons named in the F.I.R. but not implicated in charge-sheet can be summoned to face the trial provided during the trial some evidence surfaces against the proposed accused.

15. The Hon'ble Apex Court in the case of **Yashodhan Singh and others vs. State of Uttar Pradesh and Another;** (2023) 9 SCC 108 has explained the law purported by the Hon'ble Apex Court in the case of **Hardeep Singh** (supra) regarding the evidence required the satisfaction of the Court for summoning a person under Section 319 Cr.P.C. The paragraph Nos. 22.6, 22.7 and 22.8 which are relevant for the purpose are reproduced hereunder :

"22.6. It was also observed by this Court in Hardeep Singh [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] that apart from evidence in the strict legal sense recorded during trial, any material that has been received by the court after cognizance is taken and before the trial commences, can be utilised only for corroboration and to support the evidence recorded by the court to invoke the power under Section 319CrPC. Holding that the expression "evidence" must be given a broad meaning, it was observed that material which is not exactly evidence recorded before the court, but is a material collected by the court, can be utilised to corroborate evidence already recorded for the purpose of summoning any other

person, other than the accused. Such material would be supportive in nature to facilitate the exposition of any other accomplice whose complicity in the offence may have been suppressed or had escaped the notice of the court. Therefore, any material brought before the court even prior to the trial can be read within the meaning of the expression "evidence" for the purpose of Section 319CrPC. While considering the evidence that emanates during the trial, it was observed by this Court that evidence recorded by way of examination-in-chief and which is untested by cross-examination is nevertheless evidence which can be considered by the court for the exercise of power under Section 319CrPC so long as, it would appear to the court that some other person who is not facing the trial, may also have been involved in the offence.

22.7. Further, Section 319CrPC also uses the words "such person could be tried", which means not to have a mini-trial at the stage of Section 319CrPC by having examination and cross-examination and thereafter coming to a prima facie conclusion on the overt act of such person sought to be added. Such a mini-trial will affect the right of the person sought to be arraigned as an accused rather than not having any cross-examination at all. As under Section 319(4)CrPC, such a person has the right to cross-examine the prosecution witnesses and examine the defence witnesses and advance his arguments. It was further observed that the power under Section 319CrPC can be exercised even after completion of examination-in-chief and the court does not have to wait till the said evidence is tested on cross-examination, for it is the satisfaction of

the court which can be gathered from the reasons recorded by the court, in respect of complicity of some other persons, not facing the trial in the offence.

22.8. 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. Therefore, such satisfaction is sine qua non for exercise of power under Section 319CrPC. Ultimately, the exercise of power is for the trial of such persons summoned together with the accused already on trial and not for conviction with the accused. Therefore, at that stage, the court need not form any definite opinion as to the guilt of the accused."

16. The learned trial court has taken into consideration the statement under Section 161 Cr.P.C. of independent witnesses. The fact that P.W.-1 Maniram Verma father of the deceased and P.W.-2 Harishchandra who is deceased uncle were not eye witness in the incident, P.W.-1 Maniram Verma did not visit the place of occurrence but he visited the hospital where her daughter was under going treatment for her burn injuries and died thereafter. Hence, later on succumbed to the burn injuries on 1.9.2014, the trial court has given following other reasons for rejecting application filed under Section 319 Cr.P.C. P.W.-1 and P.W.2 were not eye witnesses in the incident. P.W.-1 Maniram Verma reached district Hospital after receiving information of his son-in-law RamSuresh. P.W.-2 Harishchandra got the information of burning and death of the deceased Chandrakanti from P.W.-1 Maniram Verma. P.Ws 1 and 2 have stated that earlier they have not made any

complaint regarding harassment of Chandkanti by her in-laws and O.P. No.2 to 4, the P.Ws. 1 and 2 have not assigned any specific role to the opposite party no. 2 to 4.

17. The incident had taken place after more than seven years of marriage of the deceased, the Investigating officer have collected the evidence of aforesaid witnesses under Section 161 Cr.P.C. to the effect that on the date of occasion, the Opposite party no.2 to 4 had not visited the place of occurrence only deceased's husband mother-in-law were present on the place of occurrence. The aforesaid witnesses have given the statement under Section 161 Cr.P.C. to the effect that deceased was under depression for not having a son, she had quarrel with her mother-in-law. Her mother-in-law scolded her, thereafter, she sprayed kerosene oil on herself and lit it with fire.

18. The opposite party No. 2 Gopal and opposite party No. 3 Umesh are devar and opposite party No. 4 Chotelal is the father-in-law of the deceased Chandrakanti. No specific allegations of involvement in the alleged crime is imputes against them.

19. The apex court held in the case of **Kahkashan Kausar @ Sonam vs The State of Bihar and Others, 2022(6) SCC 5991**, has held that in such cases relatives of husband should not be roped in on the basis of omnibus allegations unless specific instances of their involvement in the crime is made out.

20. The statutory provisions under Section 319 Cr.P.C. as has been explained by the judgments of Hon'ble Apex Court requires stronger quality of evidence then merely prima facie case against the

accused. The quality of evidence should be more stronger than prima facie case which is required for convicting the accused of any offence. The power provided in Section 319 Cr.P.C., it is extraordinary discretionary power which should be used sparingly and with due circumspection .

21. Considering the impugned order in light of evidence on record, the statutory provisions as interpreted by the Hon'ble Apex Court, I do not find any illegality or infirmity in the impugned order passed by the trial court .

22. The Criminal Revision is dismissed accordingly.

(2024) 4 ILRA 886

REVISIONAL JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 10.04.2024

BEFORE

THE HON'BLE SURENDRA SINGH - I, J.

Criminal Revision No. 402 of 2023

Smt. Aparna Kushwaha & Anr.

...Revisionists

Versus

State of U.P. & Anr.

...Respondents

Counsel for the Revisionists:

Sri Shashank Maurya

Counsel for the Respondents:

G.A., Sri Jitendra Prasad Mishra, Sri Prakhar Kumar Kushwaha, Sri Pramod Kumar

Criminal Law - Code of Criminal Procedure, 1973 - Sections 125 & 127 -

Criminal Revision - Revisionists challenged order dated 22.03.2022 granting interim maintenance of Rs.5,000/- p.m. to wife and Rs.3,000/- p.m. to daughter, seeking enhancement. Court held:

(1) Revision maintainable as challenge was to quantum of maintenance, not alteration under Section 127 due to changed circumstances. (2) Opposite party No. 2, a director and major shareholder of Koester Pharmaceuticals Pvt. Ltd., had an estimated annual income of Rs.7,50,000/- based on company's net worth, despite claims of reduced income without evidence. (3) Wife's educational qualifications (B.Ed, B.Com, T.E.T.) not sufficient to presume earning capacity to deny maintenance (Shailja Vs Khobbanna, (2018) 12 SCC 199). (4) Maintenance enhanced to Rs.18,500/- p.m. for wife and Rs.10,000/- p.m. for daughter, totaling Rs.28,500/- p.m., payable from date of application, with arrears in four instalments (Kalyan Dey Chowdhury Vs Rita Dey Chowdhury, (2017) 14 SCC 200). Impugned order modified. (Paras 9-21)

Criminal Revision Allowed.

List of Cases cited:

1. Anju Garg Vs Deepak Kumar Garg, (2022) SCC OnLine SC 1314 (Para 10)
2. Dukhtar Jahan Vs Mohd. Farooq, (1987) 1 SCC 624 (Para 10)
3. Vimala (K.) Vs Veeraswamy (K.), (1991) 2 SCC 375 (Para 10)
4. Kirtikant D. Vadodaria Vs St. of Guj., (1996) 4 SCC 479 (Para 10)
5. Chaturbhuji Vs Sita Bai, (2008) 2 SCC 316 (Para 10)
6. Capt. Ramesh Chander Kaushal Vs Veena Kaushal, (1978) 4 SCC 70 (Para 10)
7. Savitaben Somabhai Bhatiya Vs St. of Guj., (2005) 3 SCC 636 (Para 10)
8. Nagendrappa Natikar Vs Neelamma, (2014) 14 SCC 452 (Para 10)
9. Shailja Vs Khobbanna, (2018) 12 SCC 199 (Para 16)
10. Kalyan Dey Chowdhury Vs Rita Dey Chowdhury, (2017) 14 SCC 200 (Para 18)

(Delivered by Hon'ble Surendra Singh - I, J.)

By means of the instant criminal revision, revisionists have assailed the judgement and order dated 22.03.2022 passed by Additional Principal Judge, Family Judge Court, Court No.2, Kanpur Nagar in Case No.591 of 2015 (Smt. Aparna Kushwaha and another vs. Ashish Singh Kushwaha), under Section 125 Cr.P.C. viz a viz amount of maintenance allowance granted to them and has prayed for enhancement of the same.

2. By the impugned order, the trial Court has granted interim maintenance of Rs.5,000/- per month to the revisionist No.1 and of Rs.3,000/- per month to the revisionist No.2 per month, under Section 125 Cr.P.C. The revisionists have prayed for enhancement of maintenance allowance granted by the trial Court in their favour.

3. Learned counsel for the revisionists has submitted that marriage of revisionist No.1-Smt. Aparna Kushwaha was solemnized according to Hindu Rites and Rituals with opposite party No.2-Ashish Singh Kushwaha on 17.02.2012. Parents of the revisionist No.1 provided sufficient dowry to the opposite party No.2 in the aforesaid marriage. It has also been submitted that opposite party No.2 (husband) and his family members were physically and mentally tortured the revisionist No.1 for bringing of one Swift Car as additional dowry. The opposite party No.2 is a Director and Manager of the Koester Pharmaceuticals Private Limited Company and is earning Rs. 1,50,000/- per month. Revisionist No.2 (daughter) is studying in SKD Academy, 2D/HS-1, Vrindavan Yojna, Raibareilly Road, Lucknow, her tuition fees is about Rs.6000/- per month, but trial Court

without considering the income of opposite party No.2 passed the impugned order for granting meager amount of maintenance allowance. It has also been submitted that trial Court had passed the impugned order without considering the evidence on record and without application of judicial mind.

4. Per contra, learned counsel for the opposite party No.2 submitted that opposite party No.2 and his family members did not physically or mentally harass the revisionist No.1 for dowry and they have never demanded any kind of additional dowry. The opposite party No.2 had resigned in the year 2018 from the aforesaid company and he could not join his duty due to numerous cases filed against him by the revisionist No.1. The opposite party No.2 is only the founder of the aforesaid company and there are four other members, who owned the company. The trial Court has only considered the profit of the company. It has also been submitted that revisionist no.1 is well educated and has done B.Ed, B.com and T.E.T. and she can earn the money for the maintenance herself as well as her daughter. The revisionist No.1 is not prepared to live with the opposite party No.2. On 21.04.2015, she left her in-laws house and living in her parental home alongwith her daughter, since then she has not returned to her matrimonial home. Revisionist No.1 has also lodged an FIR against the opposite party No.2, under Sections 498A, 323, 504 and 506 I.P.C. and Section 3/4 D.P. Act. Lastly it has been submitted that trial Court had granted enough amount of maintenance allowance and there is no ground to enhance it.

5. Heard Sri Umesh Chandra Prajapati, learned counsel for the revisionists and Sri Prakhar Kumar

Kushwaha, learned counsel for opposite party no.2.

6. The opposite party No.2 has not instituted any criminal revision against the impugned order, thus the finding recorded by the trial Court regarding other issues i.e. revisionist Nos.1 and 2 being wife and daughter respectively of the opposite party No.2 and due to sufficient reason, she is living separately from her husband. Revisionist No.1 has no source of income for their livelihood. Opposite party No.2 being capable of maintaining the revisionists and he is negligent in providing maintenance to the revisionists has become final.

7. Learned counsel for the opposite party No.2 has raised preliminary objection to the jurisdiction of this Court in view of the provision given in Section 127 Cr.P.C. submitting that case can be filed in the Court of Principal Judge, Family Court for enhancement of maintenance allowance and criminal revision against impugned order is not maintainable in this Court. Section 127 Cr.P.C. provides for alteration of maintenance allowance or interim maintenance allowance on the ground that circumstances have been changed since the order was passed.

8. Section 127 Cr.P.C., provides for alteration of maintenance allowance in the following circumstances:-

(i) The Magistrate finds that competent civil court has passed any order due to which maintenance allowance granted has to be cancelled or modified;

(ii) The woman in whose favour maintenance allowance has been provided, has remarried after obtaining

divorce such order of maintenance can be cancelled from the date of her remarriage;

(iii) Such woman has received whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce;

(iv) The woman has obtained divorce from her husband and she had voluntarily surrendered her rights to maintenance or interim maintenance, as the case may be, after her divorce, cancel the order from the date thereof.

9. The alteration of maintenance allowance under Section 127 Cr.P.C. can be done by the trial Court on the ground of change of circumstances as mentioned in that section. In case, the person in whose favour maintenance allowance is passed, wants to assail the amount of maintenance allowance on the ground that it was fixed against the evidence on record, he/she can file criminal revision to this Court and Court shall have jurisdiction to decide it.

10. The Hon'ble Apex Court in paragraph No.9 and 10 of the judgement in **Anju Garg and Another vs. Deepak Kumar Garg: (2022) SCC OnLine SC 1314**, has explained the scope of Section 125 Cr.P.C. which is as follows:

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

have to be dealt with by the Court. It held as under:

*“In **Dukhtar Jahan v. Mohd. Farooq** [(1987) 1 SCC 624 : 1987 SCC (Cri) 237] the Court opined that : (SCC p. 631, para 16)*

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

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

3. “Section 125 of the Code of Criminal Procedure is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing, and shelter to the deserted wife.”

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

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

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

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

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

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

10. This Court had made the above observations as the Court felt that the Family Court in the said case had conducted the proceedings without being alive to the objects and reasons, and the

spirit of the provisions under Section 125 of the Code. Such an impression has also been gathered by this Court in the case on hand. The Family Court had disregarded the basic canon of law that it is the sacrosanct duty of the husband to provide financial support to the wife and to the minor children. The husband is required to earn money even by physical labour, if he is an able-bodied, and could not avoid his obligation, except on the legally permissible grounds mentioned in the statute. In Chaturbhuj v. Sita Bai², it has been held that the object of maintenance proceedings is not to punish a person for his past neglect, but to prevent vagrancy and destitution of a deserted wife, by providing her food, clothing, and shelter by a speedy remedy. As settled by this Court, Section 125 Cr.P.C. is a measure of social justice and is specially enacted to protect women and children. It also falls within the Constitutional sweep of Article 15(3), reinforced by Article 39 of the Constitution of India.”

11. As per the averments made by the revisionist No.1, in her affidavit filed in support of the criminal revision, submitted that earlier opposite party No.2 used to work as senior area manager in **Somatic Healthcare Pvt. Ltd. Company** and later on, same was named as **Koester Pharmaceuticals Private Limited Company** and earns about Rs.1,50,000/- per month. Revisionist No.1 has filed certificate of registration of company, which is annexed as Annexure-4 to the revision regarding Incorporation of Somatic Healthcare Pvt. Ltd. as Koester Pharmaceuticals Private Limited Company, which was registered.

12. From the perusal of the **Memorandum of Association** of aforesaid

company, it transpires that although this company has total five share-holders, but opposite party No.2 is **main share-holder** and **Director of the company**. The revisionist also filed statements, informations or particulars in respect of profit and loss of the aforesaid company, which is annexed as **Annexure-5**. The total revenue of the company has shown as Rs.77, 27,640.93/- from 01.04.2020 to 31.03.2021. In this aforesaid statements, profit of the company is shown as Rs.3,38,069.09/- and tax paid on the company as Rs.65,504/-, but in segment-III of the statement, which relates Reporting of Corporate Social Responsibility (CSR), the net worth of the company is shown as Rs.12,97,252.21/-. Thus, according to the statement relating to CSR, the net annual income of the company is of Rs.12,97, 252.21/-

13. Averments has been made by opposite party No.2, in his counter affidavit, that the actual profit of the aforesaid company for the year 2020 to 2021 is only of Rs.3,38,069/-.

14. Revisionist No.1, in her rejoinder affidavit, pleaded that her husband/opposite party No.2 has also agricultural land, for which, she has attached khatauni of 1378 fasli of seven plots of land total area 1.5020 hec. From the khatauni of the aforesaid land, which is annexed as Annexure-6 to the affidavit filed by the revisionist, it appears that total six co-tenure holders in the aforesaid land, whereas the averments has been made by the opposite party No.2, in his affidavit, that aforesaid land is on the name of his father alongwith other co-tenure holders. Revisionist has also stated, in her affidavit, that her daughter /revisionist No.2 is studying in SKD Academy, 2D/HS-1, Vrindavan Yojna, Raibareilly Road, Lucknow and fees and

other expenses of the aforesaid school is bear by father of the revisionist No.1 and opposite party No.2 does not pay any amount for it.

15. From the above discussion, it transpires that opposite party No.2 is a Director of the said company and big shareholder, therefore, 50% of the net profit of the company can be considered as annual income of the opposite party No.2 for the year 2020-2021. Hence, annual income of the opposite party No.2 can be presumed to have been increased and it can be fixed at Rs.7,50,000/- (approx). Although, opposite party No.2 has made averments, in his counter affidavit, that there was decline in his income from his company, but no documentary evidence has been submitted in support of this arguments. Apart from this aforesaid annual income of Rs.7,50,000/-, agricultural land is in the name of his father though presently he has no right or interest in that agricultural land.

16. The Hon'ble Apex Court in the case of **Shailja And Another vs. Khobbanna: (2018) 12 SCC 199** has held:

“We find that the High Court has proceeded on the basis that Appellant 1/wife was capable of earning and that is one of the reasons for reducing the maintenance granted to her by the Family Court. Whether Appellant 1 is capable of earning or whether she is actually earning are two different requirements. Merely because Appellant 1 is capable of earning is not, in our opinion, sufficient reason to reduce the maintenance awarded by the Family Court.”

17. Considering the above law laid down by the Hon'ble Apex Court merely

shall be paid regularly till 10th of each month. The amount of maintenance allowance already paid shall be set-off against this amount. The order impugned dated 22.03.2022 is modified.

18. In **Kalyan Dey Chowdhury vs. Rita Dey Chowdhury Nee Nandy: (2017) 14 SCC 200** has held that 25% of the husband's net salary would be just and proper to be awarded as maintenance to the wife.

23. The copy of the order be sent to the trial Court concerned forthwith for necessary compliance.

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THE HON'BLE SURENDRA SINGH - I, J.

20. From the above discussion, I am of the view that the maintenance allowance fixed by the trial Court in the impugned order should be modified and maintenance allowance provided by the trial Court to the revisionist Nos.1 and 2 should be enhanced. It is provided that revisionist No.1 (wife) shall be granted for Rs.18,500/- per month as maintenance allowance as well as Rs.10,000/- per month for her minor daughter.

Juvenile X **...Revisionist (In Jail)**
Versus
State of U.P. & Anr. **...Respondents**

Counsel for the Revisionist:
Sri Nafees Ahmad, Sri Jai Prakash

Counsel for the Respondents:
G.A., Sri Santosh Kumar Upadhyay, Sri
Rishabh Kumar Pandey, Sri Vinod Kumar
Upadhyay

Criminal Law - Indian Penal Code, 1860 - Sections 147, 148, 149, 323/34, 302, 504, 395 & 412 - Determination of Age - Revisionist was involved under aforesaid sections and produced before J.J.Board - Upon age determination inquiry, supported by evidence and medical opinion, two Board members held him to be 16 years and 6 months old on date of incident, while on same day, Principal Magistrate, on same material, found him above 18 years and directed transfer of

case to competent court - Both orders were challenged in Criminal Appeal by victim and juvenile respectively - By common order, appellate court allowed victim's appeal, dismissed that of juvenile, and held him to be adult - Aggrieved, juvenile preferred instant revision - Held, there was no good material before court concerned to corroborate or to calculate age by reducing it or increasing it with certain margins - In the facts of case, it is directed that J.J.Board shall obtain further evidence regarding age by recalling witnesses for examination or cross-examination and by summoning relevant documentary records, including *pariwar register* or any other material aiding proper determination - Board may also summon additional witnesses at its discretion - Impugned order, set aside - Matter remanded. (Para 3, 12, 13)

Revision allowed. (E-13)

List of Cases cited:

1. St. of U.P. Vs Chote Lal AIR 2011 SC 697
2. Jitendra Ram Vs St. of Jharkhand 2006 (9) SCC 428
3. Mukarrab Vs St. of U.P. 2017 (2) SCC 2010
4. Jyoti Prakash Rai Vs St. of Bihar 2008 (3) SCALE 348
5. Manoj Kumar @ Monu @ Vishal Chaudhary Vs St. of Har. & ors. AIR 2022 SC 1060
6. Parag Bhati Vs St. of U.P. 2016 (12) SCC 744
7. Ashwani Kumar Saxena Vs St. of M.P. 2012 (9) SCC 750
8. Sanjeev Gupta Vs St. of U.P. 2019 (12) SCC 370
9. Om Prakash Vs St. of Rajasthan 2012 (5) SCC 201
10. Juvenile X Vs St. of U.P & anr.), Criminal Revision No. 5477 of 2023, Neutral Citation No.

2024:AHC:14440 decided on 30.01.2024, (Para 9)

11. Rishipal Singh Solanki Vs St. of U.P. & ors.; 2021 (11) ADJ 489 decided on 18.11.2021, (Para 29)

(Delivered by Hon'ble Surendra Singh - I, J.)

1. Heard Sri Nafees Ahmad, learned counsel for the revisionist and Sri Rishabh Kumar Pandey, holding brief of Sri Santosh Kumar Pandey, learned counsel for the opposite party no. 2 and learned A.G.A. for the State and perused the record.

2. By means of this criminal revision, the revisionist has challenged an order dated 01.10.2022, passed by learned Sessions Judge/Special Judge (POCSO Act)/Children Court, District Meerut in Criminal Appeal No. 128 of 2022 arising out of case crime no. 55 of 2022 under sections 147, 148, 149, 323/34, 302, 504, 395 and 412 IPC, whereby the order dated 27.08.2022 passed by the Juvenile Justice Board, holding him as adult has been confirmed and the Criminal Appeal No. 118 of 2022, preferred by the juvenile has been dismissed.

3. The relevant facts are as below:-

The instant revisionist has been found involved in case crime no. 55 of 2022 under sections 147, 148, 149, 323/34, 302, 504, 395, 412 IPC and produced before the Juvenile Justice Board. In the age determination inquiry conducted by the Juvenile Justice Board, the evidence has been led and further the medical opinion has also been obtained. After conclusion of inquiry, two members of the Board passed an order on 27.08.2022 holding the juvenile as aged about 16 years and 6 months on the date of the incident. The same day, on the

basis of the same material, the Principal Magistrate passed a separate order holding him to be above 18 years and further directed that his case may be transferred to the court concerned for further proceeding. Both the orders, one passed by the Principal Magistrate and the other passed by the rest of two members of the Juvenile Justice Board, were separately challenged respectively on behalf of the juvenile (Criminal Appeal No. 128 of 2022) and on behalf of the victim (Criminal Appeal No. 118 of 2022). Both the appeals have been decided by a common order passed by the appellate court, on 01.10.2022 in which the Criminal Appeal No. 118 of 2022 filed by the victim was allowed and the Criminal Appeal No. 128 of 2022 filed on behalf of the juvenile was dismissed. Consequentially, he has been held as an 'adult'. Now the juvenile is before this Court in revision filed on his behalf.

4. The submission in brief are that his school leaving certificate showing his date of birth as 12.09.2005, has not been considered. His date of birth is 12.09.2005 and the same has been proved by the testimony of his father. Though the school leaving certificate was available but he was wrongly sent for medical examination. In the medical examination, his age has been found 19 years and therefore even on the basis of medical examination, taking into account probability of two years margin, he should have been held as below 18 years. Further the medical opinion said that he was not exactly 19 years but below 19 years, but his aspect has not been considered by the Principal Magistrate. Further submission is that the two members of the Board gave a different opinion, and that the majority opinion shall prevail, over the opinion of the Principal Magistrate. The

appellate court gave a contrary finding which is against the law.

5. As per the admitted case of the revisionist, he did not obtain any formal education from class 1 to 4 and directly took admission in class 5th in certain school at Mawana, Meerut and thereafter in class 6th at his bua's place at Daraula, Meerut and that he did not study any further. His date of birth is 12.09.2005 and the same has been shown in his T.C. of class 5th, a copy thereto is on record.

6. I perused the papers on record, the perusal of the T.C. shows that in that school he got admitted on 6.7.2015 and left that school next year in the month of March, 2016 i.e. he studied there only for 8 months. Two diverse orders have been passed by the J.J. Board, one by the Principal Magistrate alone and the other by rest of the two members. However, in both the orders it has been clearly observed that the T.C. of class 5th was a doubtful paper and that date of birth mentioned in T.C. could not be relied upon. Interestingly, the Principal Magistrate as well as the rest of the two members of the J.J. Board both have relied upon the medical opinion but with two different approach. The members expressed an opinion that the medical opinion as regard age is not conclusive and that there is probability of margin of two years on both the sides and therefore, giving benefit of such a margin, held him to be 16 and half on the date on the incident. On the other hand, the Principal Magistrate observed as below:

"प्रथम सूचना रिपोर्ट के अनुसार प्रश्नगत मामले की घटना दिनांक 31.01.2022 है। दिनांक 11.08.2022को (name hidden) पुत्र

प्रमोद कुमार का चिकित्सीय आयु परीक्षण किया गया जिसमें उसकी आयु लगभग 19 वर्ष अंकित की गई है। (name hidden) का आयु परीक्षण घटना के 06 माह 10 दिन बाद कराया गया है। चिकित्सीय आयु परीक्षण रिपोर्ट को आधार मानते हुए (name hidden) पुत्र प्रमोद कुमार घटना के समय 18 वर्ष से अधिक आयु का पाया जाता है। उपरोक्त तथ्य परिस्थितियों में साक्ष्य के विश्लेषण उपरान्त (name hidden) घटना की तिथि 31.01.2022 को अवयस्क होना नहीं पाया जाता है। तद्वसार आवेदक की ओर से (name hidden) को नाबालिग घोषित कराये जाने हेतु प्रस्तुत प्रार्थना पत्र निरस्त किया जाने योग्य है।"

7. I perused the order of the appellate court, the learned appellate court referred to a judgment of Supreme Court in *State of U.P. Vs. Chote Lal AIR 2011 SC 697*, *Jitendra Ram Vs. State of Jharkhand 2006 (9) SCC 428* and *Mukarrab Vs. State of U.P. 2017 (2) SCC 2010*, and observed that the two members of the J.J. Board while determining his age, reduced two years in the medical age without any basis or material before it for reduction of the same. Further, the appellate court referred to judgments of the Supreme Court in *Jyoti Prakash Rai Vs. State of Bihar 2008 (3) SCALE 348*, *Manoj Kumar @ Monu @ Vishal Chaudhary Vs. State of Haryana and Others AIR 2022 SC 1060*, *Parag Bhati Vs. State of U.P. 2016 (12) SCC 744*, *Ashwani Kumar Saxena Vs. State of M.P. 2012 (9) SCC 750*, *Sanjeev Gupta Vs. State of U.P. 2019 (12) SCC 370*, *Om Prakash Vs. State of Rajasthan 2012 (5) SCC 201* and observed that the offender had claimed juvenility on the basis of fabricated

documents. It may be noted at this point of time that the Principal of the concerned school who had issued the T.C., in his on oath statement first stated that the juvenile never studied in his school and that the T.C. is a fabricated paper however, subsequently he resiled from his earlier statement and said that the juvenile had studied in his school. Several discrepancies were found in papers produced by the juvenile and also in the oral testimony and therefore the papers produced on behalf of the juvenile were rightly not relied upon. The appellate court too found the evidence given on behalf of juvenile on this issue very suspicious and agreed with the findings of the Principal Magistrate as well as by two members of the J.J. Board as regard non-reliability of papers filed on behalf of juvenile. The appellate court agreed with such findings after its own assessment of the material produced on behalf of the juvenile. But as far as the determination of age on the basis of medical examination is concerned, the appellate court expressed an opinion that there was no question of reducing the age by one year or two years, from the medical age.

8. It appears that the appellate court has treated the medical evidence as conclusive proof of age. It may be noted that though the oral and documentary evidence produced on behalf of juvenile was rightly found unreliable and inadequate to be read in evidence and to form basis of age, however, in my opinion in such circumstances it was expected from the J.J. Board that it shall obtain further evidence by calling papers like copy of pariwar register, academic records of his siblings and other evidence of like nature besides medical opinion.

9. In Criminal Revision No. 5477 of 2023 (*Juvenile X Vs. State of U.P* and

Another) Neutral Citation No. 2024:AHC:14440 decided on 30.01.2024, the Allahabad High Court has observed in paragraph no. 9 as below:

“ 9. There is no strict law as regard lowering the age by two years from the medical age. Undoubtedly, the age determined on the basis of medical tests is merely an opinion. In view of probability of error, a general rule has evolved that there may be error of 2 year on either side. This is not to say that in all the cases, 2 year have to be deducted or added. A mechanical adherence to such law may entail failure of interest of justice. The courts ought to apply the judicial mind when it decides to lower the age by certain margin. The law on probable error in determining age on the basis of medical evidence has evolved and has a general application but the question is whether the Court is expected to go mathematically? or is it mandatory to consider the age of accused 2 years less than the medical age? The answer is 'No'. Possibility of error cannot be equated with actual error. Definitely in certain cases evidence might be available which may show the margin of error on the higher side rather than on lower side. This is well established that the medical age can act as a guideline only and not as a conclusive proof. This is an accepted fact that radiological age may not give precise or exact age. Other relevant facts and circumstances may assist the Court in arriving at the right conclusion.”

10. The Apex Court in *Rishipal Singh Solanki vs. State of U.P. and Others*; 2021 (11) ADJ 489 decided on 18.11.2021 has, after traversing through a number of judgments on the issue of determination of age, summed up the

conclusions in **Para 29** of the judgment which is as below:

"29. What emerges on a cumulative consideration of the aforesaid catena of judgments is as follows:

(i) A claim of juvenility may be raised at any stage of a criminal proceeding, even after a final disposal of the case. A delay in raising the claim of juvenility cannot be a ground for rejection of such claim. It can also be raised for the first time before this Court.

(ii) An application claiming juvenility could be made either before the Court or the JJ Board.

(ii-a) When the issue of juvenility arises before a Court, it would be under sub-section (2) and (3) of section 9 of the JJ Act, 2015 but when a person is brought before a Committee or JJ Board, section 94 of the JJ Act, 2015 applies.

(ii-b) If an application is filed before the Court claiming juvenility, the provision of sub-section (2) of section 94 of the JJ Act, 2015 would have to be applied or read along with sub-section (2) of section 9 so as to seek evidence for the purpose of recording a finding stating the age of the person as nearly as may be.

(ii-c) When an application claiming juvenility is made under section 94 of the JJ Act, 2015 before the JJ Board when the matter regarding the alleged commission of offence is pending before a Court, then the procedure contemplated under section 94 of the JJ Act, 2015 would apply. Under the said provision if the JJ Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Board shall undertake the process of age determination by seeking evidence and the age recorded by the JJ Board to be the age of the person so brought before it shall,

for the purpose of the JJ Act, 2015, be deemed to be true age of that person. Hence the degree of proof required in such a proceeding before the JJ Board, when an application is filed seeking a claim of juvenility when the trial is before the concerned criminal court, is higher than when an inquiry is made by a court before which the case regarding the commission of the offence is pending (vide section 9 of the JJ Act, 2015).

(iii) That when a claim for juvenility is raised, the burden is on the person raising the claim to satisfy the Court to discharge the initial burden. However, the documents mentioned in Rule 12(3)(a)(i), (ii), and (iii) of the JJ Rules 2007 made under the JJ Act, 2000 or sub-section (2) of section 94 of JJ Act, 2015, shall be sufficient for prima facie satisfaction of the Court. On the basis of the aforesaid documents a presumption of juvenility may be raised.

(iv) The said presumption is however not conclusive proof of the age of juvenility and the same may be rebutted by contra evidence let in by the opposite side.

(v) That the procedure of an inquiry by a Court is not the same thing as declaring the age of the person as a juvenile sought before the JJ Board when the case is pending for trial before the concerned criminal court. In case of an inquiry, the Court records a prima facie conclusion but when there is a determination of age as per sub-section (2) of section 94 of 2015 Act, a declaration is made on the basis of evidence. Also the age recorded by the JJ Board shall be deemed to be the true age of the person brought before it. Thus, the standard of proof in an inquiry is different from that required in a proceeding where the determination and declaration of the age of a person has to be made on the basis of

evidence scrutinised and accepted only if worthy of such acceptance.

(vi) That it is neither feasible nor desirable to lay down an abstract formula to determine the age of a person. It has to be on the basis of the material on record and on appreciation of evidence adduced by the parties in each case.

(vii) This Court has observed that a hyper-technical approach should not be adopted when evidence is adduced on behalf of the accused in support of the plea that he was a juvenile.

(viii) If two views are possible on the same evidence, the court should lean in favour of holding the accused to be a juvenile in borderline cases. This is in order to ensure that the benefit of the JJ Act, 2015 is made applicable to the juvenile in conflict with law. At the same time, the Court should ensure that the JJ Act, 2015 is not misused by persons to escape punishment after having committed serious offences.

(ix) That when the determination of age is on the basis of evidence such as school records, it is necessary that the same would have to be considered as per Section 35 of the Indian Evidence Act, inasmuch as any public or official document maintained in the discharge of official duty would have greater credibility than private documents.

(x) Any document which is in consonance with public documents, such as matriculation certificate, could be accepted by the Court or the JJ Board provided such public document is credible and authentic as per the provisions of the Indian Evidence Act viz., section 35 and other provisions.

(xi) Ossification Test cannot be the sole criterion for age determination and a mechanical view regarding the age of a person cannot be adopted solely on

the basis of medical opinion by radiological examination. Such evidence is not conclusive evidence but only a very useful guiding factor to be considered in the absence of documents mentioned in Section 94(2) of the JJ Act, 2015."

It appears that the Supreme Court has not put any fetters on the powers of the court to seek evidence of any other kind, if the evidence as mentioned in section 94 of the J.J. Act, 2015 is found inadequate, false, fabricated and unreliable. In several cases the Supreme Court has found the entries in pariwar register and other documentary evidence as relevant and having some value as far as the date of birth is concerned.

11. The court concerned may be impelled to determine the age considering the margin of error, in the background of other material available. There is no absolute law that in all the cases, two years or even one year is to be mandatorily reduced from the medical age, ignoring all other material whether that tended to rebut or tended to corroborate the medical age.

12. As far as the instant case is concerned, it appears that there was no good material before the court concerned to corroborate or to calculate the age by reducing it or increasing it with certain margins. In such circumstances, the proper course, which ought to have been adopted by the J.J. Board, is to probe further in the matter and to obtain other evidence as may be available. In my opinion, the J.J. Board should have sought evidence on its own initiative rather than depending upon the parties, as the ultimate responsibility lies on it only. The appellate court failed to notice the lack of material and treated the medical evidence as conclusive proof of age.

13. In the peculiar circumstances of the case, I am of the view that J.J. Board should be directed to obtain further evidence as regard age by recalling the witness for further examination or cross-examination and also call for documentary evidence as might be available in other records which may include the pariwar register, or any other document which may assist the court/the J.J. Board in arriving at the right conclusion. The J.J. Board can call for additional witnesses as per its discretion. In such cases, where attempts are made to mislead the court by producing suspicious and doubtful documents, the court ought to be more cautious and careful. No law bars the court to adopt a proactive approach and to look for truth.

14. In view of the above this revision is allowed. The impugned order dated **01.10.2022**, passed by learned Sessions Judge/Special Judge (POCSO Act)/Children Court, District Meerut, is hereby set aside.

15. The matter is remanded back to the J.J. Board to hold further inquiry and determine the age, in accordance with law.

(2024) 4 ILRA 898

**REVISIONAL JURISDICTION
CRIMINAL SIDE**

DATED: ALLAHABAD 10.04.2024

BEFORE

THE HON'BLE SURENDRA SINGH - I, J.

Criminal Revision No. 1516 of 2023

Smt. Shaily Mittal & Ors.	...Revisionists
Versus	
State of U.P. & Anr.	...Opp. Parties

Counsel for the Revisionists:
Sri Sumit Daga

Counsel for the Opp. Parties:

G.A., Sri Rajesh Yadav, Sri Rajavtar Singh,
Sri Pankaj Kumar

Criminal Law – Code of Criminal Procedure, 1973 – Sections 125 & 127 – Family Courts Act, 1984 – Section 19 – Maintenance to wife and children – Revisional jurisdiction of High Court – Determination of husband's income – Quantum of maintenance

Held: Maintainability of Revision Proceedings under Section 125 Cr.P.C. fall within Chapter IX of the Code. By virtue of Section 19(2) of the Family Courts Act, no appeal lies against orders passed under Chapter IX. Section 19(4) expressly preserves the High Court's revisional jurisdiction to examine the correctness, legality, propriety, or regularity of such orders. **Held**, a criminal revision before the High Court is maintainable; objection that only an appeal under Section 19(1) lies was rightly rejected.

Scope of Section 127 Cr.P.C. Section 127 Cr.P.C. applies where there is a subsequent change in circumstances warranting alteration of maintenance. Where the challenge is to the *original quantum* fixed as being contrary to the evidence on record, the proper remedy is a revision before the High Court. **Held**, the contention that enhancement could be sought only under Section 127 Cr.P.C. before the Family Court was misconceived.

Earning Capacity vs. Actual Income of Wife Mere educational qualification or capacity to earn does not amount to proof of actual income. Absence of evidence of real earning disentitles the husband from seeking reduction of maintenance on that ground alone. **Reiterated**, capability to earn is distinct from actual earning.

Assessment of Husband's Income Husband's financial capacity may be assessed on the basis of admissions, lifestyle, investments, bank accounts, fixed deposits, provident fund, property purchases, and regular filing of income tax returns. A bald plea of meagre income, when contradicted by financial conduct and assets, deserves rejection. **Held**,

husband's claimed income of ₹7,000–8,000/- per month was unbelievable; his income reasonably assessed at not less than ₹60,000/- per month.

Principles Governing Quantum of Maintenance Ordinarily, around 25% of the husband's income constitutes a just and reasonable share towards the wife's maintenance. Adequate provision must also be made for the education and future prospects of minor children, particularly where they are pursuing or preparing for professional courses.

Interference in Revision Where the Family Court fixes maintenance ignoring material evidence of the husband's financial capacity and grants an unjustly low amount, interference in revision is warranted. **Held**, the maintenance awarded was grossly inadequate and liable to enhancement.

Criminal Revision partly allowed.

List of Cases cited:

1. Shailja & Another v. Khobbanna (2018) 12 SCC 199

2. Kalyan Dey Chowdhury v. Rita Dey Chowdhury nee Nandy (2017) 14 SCC 200

(Delivered by Hon'ble Surendra Singh - I, J.)

Heard Sri Sumit Daga, learned counsel for the revisionists and Sri Rajavtar Singh, Advocate assisted by Sri Pankaj Kumar, learned counsel for the opposite party No.2.

2. By means of the instant criminal revision, revisionists have assailed the judgement and order dated 25.01.2023 passed by the Principal Judge, Family Court, Muzaffarnagar in Case No.269 of 2014 (Computerized No. UPMZ 0200184 62014) (Smt. Shaily Mittal & others vs. Brijesh Kumar), under Section 125 Cr.P.C.

3. By the impugned order, the trial Court has granted interim maintenance of

Rs.7,000/- to the revisionist No.1 and Rs.2,000/- to the revisionist Nos.2 and 3 per month each, under Section 125 Cr.P.C. The revisionists have prayed in the revision for enhancement of maintenance allowance granted by the trial Court in their favour.

4. It has been submitted by the learned counsel for the revisionists that before calculating the quantum of maintenance, the trial court has not taken into consideration the income of the opposite party No.2 (husband). It has also been submitted that opposite party No.2, in his cross-examination, has admitted that he has National Saving Certificates (N.S.C.), Rs.45,000/- in his PPF Account and F.D.R. of Rs.11,00,000/- but without considering the same, trial Court granted meagre amount of maintenance allowance to the revisionists.

5. It has been submitted by learned counsel for the revisionist that the trial Court illegally came to the conclusion that revisionist No.1 did not prove the income of the opposite party No.2, in fact the revisionist No.1 by her oral and documentary evidence has very well proved that opposite party No.2 has huge source of income and also many properties. Therefore, the trial Court had committed illegality in allowing maintenance allowance to the revisionists. It has also been submitted that opposite party No.2 is a co-partner in his family business of Saree and he is earning half of the total income arising out of aforesaid family business, but trial Court has wrongly considered that the owner of the aforesaid business was his brother, namely, Rajesh Kumar Mittal and opposite party No.2 was working there as salesman drawing salary of Rs.7000/- per month only. It has also been submitted that opposite party No.2 has not filed any

criminal revision against the impugned judgment and order, therefore, finding of the trial Court regarding the matter other than quantum of maintenance allowance to be payable to the revisionists has become final.

6. Learned counsel for the revisionists has placed reliance on the following judgments of the Hon'ble Apex Court as well as this Court:-

(i) Urvashi Aggarwal and Others vs. Inderpaul Aggarwal; (2021) SCC OnLine Del 4641.

(ii) Liaqat Hussain vs. Jainab Parveen and Another; (2020) (12) ADJ 638 (DB).

7. **Per contra**, learned counsel for the opposite party No.2 while opposing the criminal revision has submitted that under the provision of Section 19 of the Family Court Act, 1984, the revision should have been filed before the Division Bench of the High Court. He also raised objection that revisionists could have obtained the aforesaid relief for enhancement of monthly allowance from the trial Court, therefore, the present revision for the aforesaid relief is not maintainable and same is liable to be dismissed. It has also been submitted that revisionist No.1 is doing job and earning monthly salary and has filed income tax return. The opposite party No.2 had filed copy of income tax return since 2006 and credited of salary into her accounts, but trial Court has not taken into consideration to provide the maintenance allowance to the revisionist No.1 against the provisions of law.

8. It has been submitted by learned counsel for the opposite party No.2 that opposite party No.2 is ready to pay

educational and living expenses of his children provided it is directly paid into their accounts and he has already incurred expenses of Rs. 2,81,755/- towards Laptop, coaching fee, tuition fee, admission fee and other expenses of both the children and has made payment of Rs.24,000/- to the revisionist No.1 towards interim maintenance. It has also been submitted that revisionist No.1 is professionally qualified and had been gainfully employed, which is evident from the Bank statement of revisionist No.1. Apart from this, opposite party No.2 has submitted statement showing Rs.20,000/- as balance and copy of NSC of Rs.20 lakhs in the family Court proceedings, therefore, revisionist No.1 can maintain herself as well as her children from the interest accruing from the aforesaid accounts.

9. Learned counsel for the revisionist and learned counsel for the opposite party No.2 have been heard. Perused the evidence available on the record of the revision as well as the impugned order.

10. The opposite party No.2 has raised objection that under the provision of Section 19 of the Family Court Act, 1984 (hereinafter referred to as 'Act of 1984'), the criminal revision is not maintainable against the impugned judgment and order passed by trial Court, the aggrieved person can only file appeal in High Court and the same be heard by Division Bench. The provision regarding appeal is given in Section 19 of the Act, which is as follows:-

(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 (59 of 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.

11. Sub Section (1) of the Section 19 of the Act provides for appeal to High Court against every judgment and order passed by the Family Court. Sub Section (6) of Section 19 of the Act also provides

that an appeal preferred under Sub Section (1) of the Act shall be heard by a Bench consisting of two or more judges. Sub Section (2) of Section 19 of the Act provides an explanation to sub Section (1) of this Act. Accordingly, sub Section (2) of Section 19 of the Act provides no appeal shall lie from a decree and 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). The proceeding for maintenance under section 125 Cr.P.C. is included in Chapter IX of the Criminal Procedure Code, 1973. Thus, the provisions of Sub Section (1) of Section 19 of the Act which provides that judgment and order passed by Family Court shall be appealable to the High Court and heard by Division Bench of that Court is not applicable to the order passed by Family Court in case filed under Section 125 Cr.P.C. Sub Section (4) of Section 19 of the Family Courts Act, 1985 clearly provides that criminal revision shall be maintainable to the High Court against order passed under Chapter IX of Cr.P.C. i.e. Sections 125 to 128 Cr.P.C. Thus, objection raised by the opposite party No.2 in this regard has no merit and is liable to be rejected.

12. Learned counsel for the opposite party No.2 has also raised preliminary objection to the jurisdiction of this Court for enhancement of maintenance allowance in view of the specific provision given in Section 127 Cr.P.C.

13. Section 127 Cr.P.C. provides for alteration of maintenance allowance or interim maintenance allowance on the ground that circumstances have been changed since the order was passed.

14. Section 127 Cr.P.C., provides for alteration of maintenance allowance in the following circumstances:-

(i) The Magistrate finds that competent civil court has passed any order due to which maintenance allowance granted has to be cancelled or modified;

(ii) The woman in whose favour maintenance allowance has been provided, has remarried after obtaining divorce such order of maintenance can be cancelled from the date of her remarriage;

(iii) Such woman has received whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce;

(iv) The woman has obtained divorce from her husband and she had voluntarily surrendered her rights to maintenance or interim maintenance, as the case may be, after her divorce, cancel the order from the date thereof.

15. The alteration of maintenance allowance under Section 127 Cr.P.C. can be done by the trial Court on the ground of change of circumstances as mentioned in that section. In case, the person in whose favour maintenance allowance is passed wants to assail the amount of maintenance allowance on the ground that it was fixed against the evidence on record, he/she can file criminal revision to this Court and Court shall have jurisdiction to decide it. Thus, plea of opposite party No.2 against the jurisdiction of this Court *viz-a-viz* Section 127 Cr.P.C. is misconceived and is hereby rejected.

16. Admittedly, revisionist No.1 is the wife of opposite party No.2 and revisionist Nos.2 and 3 are their children, who are aged about 8 and 9 years on the date of filing of application under Section 125

Cr.P.C.. Both are carrying on their education and are residing with their mother at her parental house since 2013. From the pleadings/written statement of the opposite party No.2, it is clear that during this period, revisionist No.1 was residing away from him. Opposite party no.2 has provided lump sum amount of Rs.2,81,755/- towards expenses of Laptop, coaching fee, tuition fee, etc of revisionist Nos.2 and 3. He also provided a sum of Rs.24,000/- as interim maintenance to the revisionist No.1. Thus, it transpires that for more than 9 years revisionists are living separately from the opposite party No.2.

17. Revisionist No.1 has pleaded, in her application filed under Section 125 Cr.P.C., that though she is well educated but she does not have any job and also has no source of income for maintaining herself as well as her children. She further pleaded that some amount was deposited in her account i.e SBI and PNB, but passbook and other documents relating to it has been retained by the opposite party No.2, therefore, she is not able to operate those accounts. She further pleaded that opposite party No.2 has 400 square yard area (plot), which is situated in the main market of the city. She also pleaded that her children are studying in Muzaffarnagar and she has taken rented accommodation of Rs.4000/- per month near by her parental home where she residing with her children. The revisionist No.1 requires about 40,000/- per month as maintenance allowance regarding rent of accommodation, routine expenses, medical expenses of herself and her children including educational expenses of her both children.

18. The opposite party No.2 has pleaded, in his objection/written statement, that he has no business or other source of

income, he is simply working as a salesman in the business established by his elder brother. He also admitted that his brother has wholesale and retail business of Sarees and merely he is getting salary of Rs.7000/- as a salesman in the shop of his brother.

19. The revisionist No.1 has deposed, in her cross-examination, that although she has done MA and BEd and is only house wife and she has denied that she was working in S.D. Management College, Muzaffarnagar before her marriage. She also stated that earlier she used to reside in House No.76 Gher Khatti, Muzaffarnagar now she is residing in house No.75 in the same Mohalla and the house rent of her present accommodation is Rs.6000/- per month. The revisionist No.1 has shown her ignorance about income tax return and NSCs of total value of Rs.18 lakhs in her name. She has also expressed her ignorance about her purchasing of 225 square yard plot jointly with her husband. She has deposed that documents, if any, relating to her NSCs and plot of land is in the possession of her husband.

20. The opposite party No.2 has stated, in his cross-examination, that before 06.06.2013, he used to work in the shop of Mittal Sons, which is owned by his real brother, namely, Rajesh Kumar Mittal in 2013 and his salary was Rs.7000 to 8000/- per month. In the said shop including him there were four other employees and there was no deduction from his salary for credit in PPF accounts. The opposite party No.2 has admitted that he used to file income tax return for the period of 2003 to 2013. He also stated that he has filed income tax return for the year 2020, but he has no knowledge about income mentioned in it. He also admitted that he has saving bank account at PNB and PPF Account having

balance of Rs.45 lakhs. In the year 2006, there was a balance of only Rs.2 to 3 lakhs in his PPF account. He has admitted that his parental house no.147 Naya Bazar Shamli is double storied, one shop is situated in ground floor and residential house situated in first and second floor. He also admitted, in his cross-examination, that his wife is not doing regular job and she is only taking tuition.

21. The opposite party No.2 deposed, in his evidence, that there is a 225 square yard plot in C.B. Gupta Colony in the joint ownership of himself as well as his wife and one half of the price of the plot was paid from his account and remaining half from the account of his wife. He further admitted, in cross-examination, that entry in his passbook (35 ka/18) shows deduction of Rs.90,000/- which is transferred to his five years R.D. He also admitted that on 18.01.2021, the amount of Rs.1,50,000/- and 7,00,000/- has been withdrawn from his account, but he could not explain for which purpose that amount has been withdrawn. He also admitted that on 19.01.2022, he had credited Rs.11 lakhs in F.D. in his name. He also deposed, in his cross-examination, that his daughter Km. Iha has passed 12th and she is interested in taking admission in Engineering course, he is ready to give expenses for completing engineering course of his daughter. He further admitted that after his wife separated from him, he has not made any payment of maintenance allowance to her. He further admitted that his family is a reputed family of district Shamli.

22. Opposite party No.2, in his cross-examination, stated that in his marriage with revisionist No.1, his parents have given ornaments of about 20 tola gold and father of the revisionist no.1 has also given

ornaments about 10-12 tola gold. Opposite party No.2 has deposed that revisionist No.1 has NSC and PPF Accounts, but she has not given details of their value.

23. Admittedly, revisionist No.1 has one half share to the plot owned by the opposite party No.2, but from this plot, she is not earning any running income which she could utilise for maintenance of herself and her children.

24. From appreciation of the above mentioned oral evidence of revisionist No.1 and opposite party No.2, it transpires that revisionist No.1 is a well educated women but she is not doing any regular job and has no income of her own.

25. The Hon'ble Apex Court in the case of **Shailja And Another vs. Khobbanna: (2018) 12 SCC 199** has held:

“We find that the High Court has proceeded on the basis that Appellant 1/wife was capable of earning and that is one of the reasons for reducing the maintenance granted to her by the Family Court. Whether Appellant 1 is capable of earning or whether she is actually earning are two different requirements. Merely because Appellant 1 is capable of earning is not, in our opinion, sufficient reason to reduce the maintenance awarded by the Family Court.”

26. From the deposition of opposite party No.2, it transpires that he belongs to a reputed business family of Shamli District and his father and brother are the proprietor of Raj Cutpiece Centre and have a Saree shop. From his deposition, it is also obvious that he is continuously depositing money in his PPF Account, F.D. and R.D.s and Saving Bank

Account. The PPF account has been increased from 20 lakhs to 45 lakhs and he has also purchased plot of 240 square yard in the city of the value of Rs.20 lakhs. From the aforesaid discription of the patental property as well as business transtions of his shop relating to wholesale business of cutpiece and Saree of his father and brother respectively and regular deposits and investment by him in various accounts, it appears that he has a regular income and his montly income is fairly good.

27. From the above description, it is not believable that he is simply working as a salesman in his brother's shop and earning Rs.7000/- to 8000/- per month.

28. The Court has to do some guess work to determine the income of the husband and wife. From the above discussion, it can be safely concluded that his monthly income is not less than Rs.60,000/- per month. It is well settled law that income of the husband or wife cannot be calculated in mathematical terms because actual income cannot be brought on record as both the parties are interested in concealing their incomes.

29. In **Kalyan Dey Chowdhury vs. Rita Dey Chowdhury Nee Nandy: (2017) 14 SCC 200** has held that 25% of the husband's net salary would be just and proper to be awarded as maintenance to the wife.

30. The 25% of net earning of the husband should be granted as maintenance allowance to the wife. The revisionist No.2 (daughter) of the opposite party No.2 is doing engineering course and revisionist No.3 (son) completed 12th and is preparing for admission in professional course.

31. Under these circumstances, it will be fair and just to provide 25 % of the gross income of the opposite party No.2 to the revisionist No.1 (wife) and 20 % of his gross income as maintenance allowance to the revisionist No.2 and 3.

32. Considering the law propounded by the following decisions and facts and circumstances of the case, there is sufficient ground to allow the present criminal revision and enhance the amount of maintenance allowance to be paid to the revisionist Nos.1, 2 and 3.

33. In view of the aforesaid factual and legal aspect, I am of the view that the maintenance allowance granted by the impugned order dated 25.01.2023 is unjust and inadequate and should be modified and enhanced. The maintenance allowance granted by the impugned order is modified accordingly.

34. It is provided that revisionist no.1 shall be entitled for Rs.15,000/- per month as maintenance allowance. Revisionist Nos.2 and 3 (daughter and son of the opposite party No.2) each shall be paid Rs.6,000/--6,000/- per month as maintenance allowance.

35. Thus, opposite party No.2 shall be bound to provide maintenance allowance @ of Rs.15,000/- per month to his wife (revisionist No.1) and Rs.6,000/- - Rs.6,000/- to revisionist Nos.2 and 3 each till they attain the age of majority. This modified amount of maintenance allowance shall be paid to the revisionists from the date of application. The arrears of maintenance allowance shall be paid in four equal instalments at the gap of four months. The monthly maintenance allowance shall be paid regularly till 7th day of each month.

36. The present criminal revision is **partly allowed** in terms of above mentioned conditions. The order impugned dated 25.01.2023 is set aside in part and it is modified according to the observation made above.

37. The copy of the order be sent to the trial Court concerned for necessary compliance, forthwith.

(2024) 4 ILRA 906

REVISIONAL JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 29.03.2024

BEFORE

THE HON'BLE SURENDRA SINGH - I, J.

Criminal Revision No. 1762 of 2023

Rana Pratap Singh **...Revisionist**
Versus
Neetu Singh & Ors. **...Opp. Parties**

Counsel for the Revisionist:

Sri Ashok Kumar Shukla

Counsel for the Opp. Parties:

Sri Chandan Kumar Jaiswal

Criminal Law - Code of Criminal Procedure, 1973 - Sections 125(4) & 397 - Hindu Marriage Act, 1955 - Section 9 - Constitution of India, 1950 - Articles 15(3), 39 - Criminal Revision - Rana Pratap Singh Vs Neetu Singh & Ors., Criminal Revision No. 1762 of 2023 - Revisionist challenged order dated 01.03.2023 granting maintenance of Rs. 15,000/- per month to wife and Rs. 5,000/- each to two children under Section 125 Cr.P.C., alleging misappreciation of evidence and bar under Section 125(4) due to wife's non-compliance with restitution of conjugal rights decree. Court held: (1) Ex-parte decree under Section 9 of Hindu Marriage Act, set aside by Lok Adalat on 14.12.2019, was not in force, negating the bar under Section 125(4) Cr.P.C. (2) Allegations of wife's adultery or theft lacked

evidentiary support, as revisionist failed to produce FIR, application, or WhatsApp message screenshots, rendering claims unsubstantiated. (3) Wife's lack of independent income, despite B.Ed. qualification, and financial dependence on parents justified maintenance; revisionist's claim of her earning Rs. 40,000/- was unsupported (Rajnish Vs Neha, (2021) 2 SCC 324). (4) Revisionist's gross salary of Rs. 65,773/- per month (January 2023), as a CRPF constable, was correctly considered without deductions for non-statutory expenses like LIC premiums or loan instalments (Dr. Kulbhushan Kumar Vs Smt. Raj Kumari, (1970) 3 SCC 129). (5) Maintenance of Rs. 25,000/- total (Rs. 15,000/- for wife, Rs. 5,000/- each for children) was just, considering children's educational expenses (Rs. 37,700/- and Rs. 35,800/- annually) and other costs (Rajathi Vs C. Ganesan, (1999) 6 SCC 326). Impugned order upheld; no illegality or jurisdictional error found. (Paras 12-27)

Criminal Revision Dismissed.

List of Cases cited:

1. Dr. Kulbhushan Kumar Vs Smt. Raj Kumari, (1970) 3 SCC 129 (Para 20)
2. Rajathi Vs C. Ganesan, (1999) 6 SCC 326 (Para 23)
3. Rajnish Vs Neha, (2021) 2 SCC 324 (Para 24)
4. Chander Parkash Bodh Raj Vs Shila Rani Chander Prakash, 1968 SCC OnLine Del 52 (Para 25)
5. Amit Kumar Kachhap Vs Sangeeta Toppo, Criminal Revision No. 512 of 2023 (Ranchi HC) (Para 5)
6. Balaram Dash Vs Smt. Gitanjali Dash, 2000 Cri. L.J. 4175 (Para 5)

(Delivered by Hon'ble Surendra Singh - I, J.)

Heard Sri Ashok Kumar Shukla, learned counsel for the revisionist and Sri Chandan Kumar Jaiswal, learned counsel for the opposite parties.

2. By means of the instant criminal revision, the revisionist has assailed the impugned judgment and order dated 01.03.2023 passed by the Principal Judge, Family Court, Gorakhpur in Criminal Case No. 657 of 2018 (Neetu Singh and others Vs. Rana Pratap Singh) filed under Section 125 Cr.P.C.

3. By the impugned judgment and order, the trial court has allowed the criminal case instituted by the opposite party no.1 under Section 125 Cr.P.C. and granted maintenance allowance of Rs.15,000/- per month to the opposite party no. 1 (wife) and Rs. 5000/- each to her children i.e opposite party no. 2, Keerti Singh, and opposite party no. 3, Krishna Singh from the date of filing of the criminal case. The opposite party nos.2 and 3 were provided maintenance till they attain the age of majority.

4. It has been submitted by learned counsel for the revisionist that the trial Court has passed the impugned order against the weight of evidence on record as well as law applicable to the facts of the case. The trial court has misread and misinterpreted the documentary as well as oral evidence on record. The trial court has not taken into consideration the fact that without any fault of the revisionist, the opposite party no.1 was residing away from him. It has also been submitted that a decree for restitution of conjugal rights was passed by the concerned Family Court under Section 9 of the Hindu Marriage Act against the opposite party no.1 still she failed to live with the revisionist and perform her matrimonial duties, therefore her rights to maintenance allowance against the revisionist is barred under Section 125 (4) Cr.P.C. It has further been submitted that while determining the amount of

maintenance allowance, the trial Court has not taken into consideration the monthly income of the revisionist.

5. Learned counsel for the revisionist has relied on the following judgments of the different High Courts:

(i) Amit Kumar Kachhap vs. Sangeeta Toppo passed in Criminal Revision No.512 of 2023 (Ranchi High Court).

(ii) Balaram Dash vs. Smt. Gitanjali Dash and others; 2000 CRI. L.J. 4175.

6. **Per contra**, learned counsel for the opposite parties submits that the trial Court has passed the impugned order after proper appreciation of oral and documentary evidence on record and it should not be interfered with. It has also been submitted that the revisionist is a central government employee and was getting monthly salary of Rs.83,910/- per month in the year 2020 as it is mentioned in the trial court order. Now his salary has increased from that amount. It has also been submitted that the parents of opposite party no. 1 are bearing expenses of opposite party nos. 1 to 3. The opposite party no. 2, Keerti Singh, is studying in Class 7th, whose annual fees is Rs.37,700/- whereas opposite party no. 3, Krishna Singh, is studying in Class 5th and his annual fees is Rs. 35,800/-, their expenses for books stationary and transportation is in addition to this amount. The opposite party no. 1 has filed receipt of fees of opposite party nos. 2 and 3 with her counter affidavit. Learned counsel for the opposite parties has relied on the judgement of Hon'ble the Apex Court in **Rajnish vs. Neha and Another, (2021) 2 SCC 324.**

7. The opposite party no.1 had filed an application under Section 125 Cr.P.C. with the averments that the opposite party No.1, Neetu Singh, had married to the revisionist, Rana Pratap Singh on 26.02.2008 according to Hindu Rites and Rituals and from their wedlock, opposite party no.2 and 3 were born. In the said marriage, father of the opposite party no.1 had given gifts and cash as per his capacity. The revisionist/husband and her in-laws were not satisfied with the dowry given to them in the marriage, they started beating her and subjected her to physical and mental harassment for coercing her to bring a Honda City car from her parents in dowry. After the birth of children, the revisionist used to tell her that he is not able to bear the expenses, therefore the children should be kept in an orphanage or sold to some rich person. When the opposite party no.1 opposed the suggestion of the revisionist, she was beaten by her husband with kicks and fists and was also confined in the room. After living for some years in village, the revisionist took opposite party no.1 and his parents to Gandhinagar, Tamil Nadu where they stayed in their own house situated near CRPF camp. On 09.04.2018, the revisionist abused and severely beat the opposite party no. 1 and forcibly took her by train and left her near her parental home. The opposite party no. 1 told her mother about the conduct of his husband. She went with her mother to police station Gagaha but her first information report was not registered by the police. On 29.05.2018 she sent her complaint through registered post to S.S.P. Gorakhpur, but no action was taken by the police. While she is staying in her parental home, the revisionist has not provided maintenance allowance for her children. Further averment has been made that the revisionist has enough fertile agricultural

land from which he has enough income. The revisionist is a Constable in CRPF and is earning 40,000/- per month salary. The opposite party no. 1 has no source of income to maintain herself and her children.

8. The revisionist has admitted that the opposite party no.1 is legally wedded wife and opposite party nos.2 and 3 are his daughter and son. He has also admitted that he is doing job in CRPF. The revisionist has stated that he did not receive any dowry in the marriage. He has also denied that he or his parents are physically or mentally tortured her for getting a Honda City car in dowry. He has also admitted that after marriage, she started staying in Tamil Nadu where revisionist was doing his job. In his written statement, the revisionist has stated that he has purchased two plots in the name of opposite party no. 1 and one plot in the name of opposite party nos. 2 and 3. He has also taken Life Insurance Policy in their name and is paying premium of the policy. The revisionist has denied that on 09.04.2018, after beating the opposite party no. 1, he forcibly took her and left her at parental home and since then he has not provided any maintenance allowance to his wife and children. The revisionist has also stated that she has done B.Ed course and she is working in a private school as teacher and earns about Rs.40,000/- as salary as well as taking tuitions of children.

9. From the pleadings and documentary evidence of the parties, the Principal Judge, Family Court/trial court has framed following four issues:-

(i) Whether the applicant no. 1, Neetu Singh, is legally wedded wife of the revisionist and applicant nos. 2 and 3 are their children born from their wedlock ?

(ii) Whether the applicant no. 1 is residing away from the revisionist due to reasonable and justified cause ?

(iii) Whether the applicant No.1 does not have sufficient source of income to maintain herself and her children ?

(iv) Whether the applicants are entitled to any relief, if yes how much and from whom and from when ?

10. Regarding the issue no.1, there is no dispute between the parties, opposite party No.1 (Rana Pratap Singh) has admitted that applicant-Neetu Singh was married with him in the year 2008 and from their wedlock two children, namely, Keerti Singh and Krishna Singh were born. Regarding issue no.2, he has pleaded the rights of the applicant-Neetu Singh for maintenance allowance is barred under Section 125 (4) Cr.P.C.

11. Regarding the above mentioned issue no.2, revisionist has pressed the fact that he had filed Case No.264 of 2018, under Section 9 of the Hindu Marriage Act against his wife in the Family Court, Mau. The Family Court passed ex-parte judgment and order dated 24.01.2019 in favour of the revisionist, the opposite party No.1 did not comply with the same and has not resided with him in compliance of the aforesaid order, therefore, her right for maintenance is barred under Section 125 (4) Cr.P.C.

12. In rebuttal of the aforesaid averments of the revisionist, the opposite party No.1 has filed copy of order 14.12.2019, 'paper no. 33 kha to 35 kha' from which, it transpires that by instituting an application, the opposite party No.1 got the execution proceedings of aforesaid exparte judgement and decree set aside in the Lok Adalat.

13. The revisionist has also pleaded, in his written statement, that his wife has illicit relation with his younger brother, therefore, her right for maintenance is barred under the provision of Section 125 (4) Cr.P.C.

14. Regarding the existence of aforesaid ex-parte judgment and order dated 24.01.2019, the revisionist has pleaded, in his written statement, that opposite party No.1 had filed Misc Application for setting aside the aforesaid ex-parte judgment and order. This misc application was dismissed in default on 28.10.2021 and ex-parte order is still in force, but revisionist had not filed certified copy of the aforesaid order dated 28.10.2021, therefore, pleadings of the revisionist, in his written statement, in this regard cannot be accepted whereas opposite party No.1 had filed certified copy of the order passed in Lok Adalat by which ex-parte judgment and order passed under Section 9 of Hindu Marriage Act was set aside.

15. From the above discussion, it can be concluded that ex-parte judgement and order passed under Section 9 of the Hindu Marriage Act is not in force.

16. Revisionist has also pleaded that he had lodged FIR against his wife in Police Station Tank Factory, District Chenni for leaving his house after committed theft of cash, jewellery and documents related to property. He has also pleaded, in his written statement, that he had submitted application in Police Station Kant, District Gorakhpur regarding the conduct of his wife, but he has not filed the aforesaid FIR or application given to the police authority regarding the offence committed by his wife.

17. Thus, allegation regarding his wife fled from his house after stealing jewellery and other items has not been proved or substantiated by oral or documentary evidence adduced by him in the trial Court. He has also pleaded in his written statement that on 29.03.2018 at 9:00 A.M. a whatsapp message was sent through the mobile of his younger brother to his wife to leave her matrimonial home with him. He informed to his mother about the said message. On 29.03.2018, his wife, in conspiracy with his younger brother, left his house along with jewellery and cash etc. In this regard, revisionist has not filed screen short of the aforesaid whatsapp message. There is ground to accept the averments made by the revisionist that his wife has left his house with his younger brother and she is living in adultery with him. Therefore, it cannot be concluded that his wife is living in adultery with the younger brother of the revisionist. Thus, issue no.2 was rightly determined by the trial Court in affirmative against the revisionist.

18. Regarding issue no.3, the revisionist has pleaded, in his written statement filed against the application under Section 125 Cr.P.C. that his wife has done B.Ed., course in computer and beautician. He has also pleaded that that his wife earns about Rs.40,000/- per month by taking tuitions and other professional works, but he has not submitted any documentary or oral evidence in this regard. Opposite party No.1 has denied in her application filed under Section 125 Cr.P.C. that she has no earning and she is financially dependent on her parents.

19. Admittedly, revisionist is working as constable in CRPF. Opposite party No.1 has filed his salary slip for the month of

January, 2023, in which, his monthly salary has been shown as Rs.65,773/- The revisionist has pleaded in his written statement that his salary is only Rs.40,000/- per month and after deduction of instalment towards loan taken for purchasing land and paying premium of LIC, he is receiving only Rs. 28,446/- per month.

20. The Hon'ble Apex Court in **Dr. Kulbhushan Kumar vs. Smt. Raj Kumari: (1970) 3 SCC 129** has held that only compulsory statutory deductions as income tax can be reduced from the gross salary. No deduction is permissible for payment of LIC, home loan, instalments towards payment of loan for purchasing land or premium of policy of insurance.

21. Thus, the alleged deduction from the gross salary of the revisionist/husband due to payment for premium of insurance or instalment of plots purchased by him cannot be taken into consideration as no such deduction from gross salary is permissible under the law.

22. Under these facts and circumstances, the monthly salary of the revisionist is taken to be Rs.65,773/- in January, 2023 as evidenced by the salary slip filed by his wife in the trial Court.

23. The Hon'ble Apex Court in **Rajathi Vs. C. Ganesan, (1999) 6 SCC 326** has held that the words "unable to maintain herself" would mean the means available to the deserted wife while she was living with her husband and would not take within itself the efforts made by the wife after the desertion to survive somehow. Section 125 was enacted on the premise that it is the obligation of the husband to maintain his wife, children and parents. It will, therefore, be for him to show that he

has no monetary means to discharge his obligation and he did not neglect or refuse to maintain them or anyone of them. The statement of the wife that she was unable to maintain herself would be enough and it would be for the husband to prove otherwise.

24. The Hon'ble Apex Court in the case of **Rajesh vs. Neha and Another, (2021) 2 SCC 324** has held that maintenance laws have been enacted as a measure of social justice to provide succour to dependant wives and children for their financial support, so as to prevent them from falling into destitution and vagrancy. **Article 15(3)** of the Constitution of India provides that:-

“Nothing in this article shall prevent the State from making any special provision for women and children.

Article 15(3) reinforced by Article 39 of the Constitution of India, which envisages a positive role for the State in fostering change towards the empowerment of women, led to the enactment of various legislations from time to time.”

25. In the case of **Chander Parkash Bodh Raj vs. Shila Rani Chander Prakash: 1968 SCC Online Del 52**, the Delhi High Court has held that :

“an able-bodied young man has to be presumed to be capable of earning sufficient money so as to be able to reasonably maintain his wife and child and he cannot be heard to say that he is not in a position to earn enough to be able to maintain them according to the family standard. It is for such able-bodied person to show to the Court cogent grounds for holding that he is

unable, for reasons beyond his control, to earn enough to discharge his legal obligation of maintaining his wife and child.”

26. The Apex Court has held that while deciding the criminal revision against the order passed under Section 125 Cr.P.C. or corresponding section under Domestic Violence Act, Court shall take only consideration the present income of the husband and wife for determining maintenance payable to the wife and children. Apart from the fees for school of opposite party Nos.2 and 3, money is also required for purchasing books, stationery, conveyance to school and other expenses of opposite party Nos.2 and 3. In this regard, trial Court has provided Rs.15,000/- per month to the opposite party No.1 and Rs.5000/- each to the opposite party Nos.2 and 3, total of Rs.25,000/- per month, which cannot be considered to be excessive. Thus, the trial Court has rightly and justly fixed the maintenance allowance payable to the opposite party Nos.1 to 3.

27. From the above discussion, I am of the view that while passing the impugned judgement and order, the trial court has not committed any illegality, irregularity, jurisdictional error or impropriety.

28. There is no merit in the criminal revision and the same is liable to be dismissed.

29. Accordingly, the criminal revision is **dismissed**.

30. Let a copy of this order be sent to the concerned trial court for necessary action.

(2024) 4 ILRA 912
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.04.2024

BEFORE

THE HON'BLE SURENDRA SINGH-I, J.

Criminal Revision No. 3032 of 2023

Matapher	Versus	...Revisionist
State of U.P. & Anr.		...Opp. Parties

Counsel for the Revisionist:

Sri Praveen Kumar Tripathi, Sri Krishna Tripathi

Counsel for the Opp. Parties:

G.A., Sri Jitendra Kumar Pandey, Sri Pankaj Dwivedi

Criminal Law - Code of Criminal Procedure, 1973 - Sections 125, 127 & 397 - Indian Evidence Act, 1872 - Section 114 - Revisionist challenged orders dated 10.12.2019 granting Rs. 7,000/- monthly maintenance to opposite party no. 2 (wife) under Section 125 Cr.P.C. and dated 07.12.2022 rejecting his application under Section 127 Cr.P.C. for modification, alleging non-marital status and no liability for maintenance. Court held: (1) Trial court correctly established marital status based on oral testimony of wife, her brother, and revisionist's brother, corroborated by public documents (Aadhar card, family register, educational certificates) showing revisionist as husband and father, with presumption of genuineness under Section 114 of Indian Evidence Act (Anju Garg Vs Deepak Kumar Garg, 2022 SCC OnLine SC 1314). (2) Revisionist's claim of non-marriage and forged documents was unsupported, as he filed no FIR or complaint against alleged forgery, weakening his defence. (3) Maintenance of Rs. 7,000/-, based on revisionist's pension of Rs. 34,656/-, was reasonable and below 25% of net income as per precedent, even excluding disputed agricultural income (Kulbhushan Kumar Vs Raj Kumari, (1970) 3 SCC 129). (4) Rejection of Section 127 Cr.P.C. application was justified, as revisionist's claim of no agricultural income did not

alter his financial capacity to pay; wife's alleged cultivation income was irrelevant to his obligation (Rajnish Vs Neha, (2021) 2 SCC 324). (5) Section 125 Cr.P.C., a social legislation, aims to prevent destitution, and trial court's summary findings on marital status and financial need were sound (Chander Parkash Bodh Raj Vs Shila Rani Chander Prakash, 1968 SCC OnLine Del 52). Impugned orders upheld; maintenance payable from application date, with arrears in four instalments within six months. (Paras 8-24)

Criminal Revision Dismissed.

List of Cases cited:

1. Anju Garg Vs Deepak Kumar Garg, 2022 SCC OnLine SC 1314 (Para 15)
2. Bhuwan Mohan Singh Vs Meena, (2015) 6 SCC 353 (Para 15)
3. Dukhtar Jahan Vs Mohd. Farooq, (1987) 1 SCC 624 (Para 15)
4. Vimala (K.) Vs Veeraswamy (K.), (1991) 2 SCC 375 (Para 15)
5. Kirtikant D. Vadodaria Vs St. of Guj., (1996) 4 SCC 479 (Para 15)
6. Chaturbhuj Vs Sita Bai, (2008) 2 SCC 316 (Para 15)
7. Capt. Ramesh Chander Kaushal Vs Veena Kaushal, (1978) 4 SCC 70 (Para 15)
8. Savitaben Somabhai Bhatiya Vs St. of Guj., (2005) 3 SCC 636 (Para 15)
9. Nagendrappa Natikar Vs Neelamma, (2014) 14 SCC 452 (Para 15)
10. Chander Parkash Bodh Raj Vs Shila Rani Chander Prakash, 1968 SCC OnLine Del 52 (Para 16)
11. Rajnish Vs Neha, (2021) 2 SCC 324 (Para 17)
12. Kulbhushan Kumar Vs Raj Kumari, (1970) 3 SCC 129 (Para 19)

13. Kalyan Dey Chaudhary Vs Rita Dey Chaudhary Nee Nandy, (2017) 14 SCC 200 (Para 20)

(Delivered by Hon'ble Surendra Singh - I, J.)

Heard Sri Praveen Kumar Tripathi, learned counsel for the revisionist and Sri Pankaj Dwivedi, learned counsel for the opposite party no. 2.

2. By means of this criminal revision, the revisionist has challenged the impugned order dated 10.12.2019 passed by learned Additional Principal Judge, IIIrd, Family Court, Allahabad in Maintenance Case No. 506 of 2015, Smt. Durga Devi Vs. Matapher filed u/s 125 Cr.P.C. and impugned judgement and order dated 07.12.2022 passed by learned Additional Principal Judge, Family Court- 2, Allahabad in Misc. Case No. 02 of 2020 (Matapher Vs. Durga Devi) instituted u/s 127 Cr.P.C.

3. By the impugned judgement and order dated 10.12.2019, the Additional Principal Judge, IIIrd, Family Court, Allahabad had allowed the application filed u/s 125 Cr.P.C. and granted maintenance of Rs.7,000/- per month to opposite party no. 2, Smt. Durga Devi.

4. By the impugned judgement and order dated 07.12.2022, the Additional Principal Judge, Family Court- 2, Allahabad, had rejected application u/s 127 Cr.P.C. filed by the revisionist, Matapher.

5. Averment has been made by learned counsel for the revisionist that in the trial court, arguments were made on behalf of the revisionist that opposite party no. 2, Smt. Durga Devi was not his legally wedded wife and her both children, namely, Akansha and Alok were not his

children. He had requested the trial court for DNA test but the trial court did not pass any order on his application for DNA test. It has also been submitted that the trial court without application of judicial mind to the facts and circumstances of the case and the evidence on record, passed the impugned order dated 10.12.2019 and 07.12.2022 and allowed the application of opposite party no. 2 u/s 125 Cr.P.C. and rejected the application u/s 127 Cr.P.C. filed by the revisionist respectively. The aforesaid orders were illegally passed by the court against the provisions of law merely based on surmises and conjectures. Therefore, they are liable to be set-aside. It has also been submitted that revisionist's marriage was not solemnized with the opposite party no. 2, Smt. Durga Devi and the children of opposite party no. 2 are not born out of their wedlock. It has also been submitted that opposite party no. 2, Smt. Durga Devi is cultivating his farm and taking the income arising out of selling of crops. Her son has also been settled and her daughter has been married. Therefore, the trial court has provided maintenance allowance to the opposite party no. 2 without any justification. It has also been submitted that the revisionist left his village for his education in his childhood. After completing education, he came into government service and solemnized his marriage with Gayatri Devi. Two sons, namely, Saurav Pathak and Ashutosh Pathak were born out of their wedlock. In the year 2013, he retired from the government job. Since then he is residing in Allahabad along with his wife and children. His brother, Vansh Raj kept opposite party no. 2, Smt. Durga Devi and is residing in the village with her. In the year 2013, his son Saurav Pathak died. On that occasion, his brother Vansh Raj visited his house. He threatened the revisionist not

to move towards the agricultural land otherwise he will face dire consequences. It has also been submitted that on 03.11.2016, opposite party no. 2, Smt. Durga Devi lodged Case Crime No. 797 of 2016 u/s 420, 467, 468, 469, 471 I.P.C. in Police Station- Dhoomanganj, District- Allahabad, against the revisionist in collusion with his brother, Vansh Raj. She has also filed complaint case on 17.12.2015 u/s 12 of the Domestic Violence Act against him. His brother, Vansh Raj has illegally occupied the share of the revisionist in his parental agricultural land. It has also been submitted that the revisionist filed objection against the application u/s 125 Cr.P.C. and produced his oral and documentary evidence. He had filed application u/s 127 Cr.P.C. for alteration of maintenance allowance granted by the court concerned vide order dated 10.12.2019. The court concerned illegally allowed the application filed u/s 125 Cr.P.C. by the opposite party no. 2, Smt. Durga Devi and rejected the application of the revisionist filed u/s 127 Cr.P.C. It has also been submitted that the revisionist is 79 years old and suffering from old-age related diseases for which he is undergoing treatment at Medanta Hospital, Lucknow. It has also been submitted on behalf of the revisionist that he had filed application u/s 127 Cr.P.C. for modification of the maintenance allowance granted in favour of opposite party no. 2 by the trial court. The application was filed on the ground that the trial court while granting maintenance allowance u/s 125 Cr.P.C. had not only taken into consideration his monthly pension of Rs.34,656/- but also included in it income from agricultural land and had fixed the total monthly income as Rs.40,000/- per month. The trial court on the basis of his monthly income of Rs.40,000/- had granted Rs.7,000/- per month as maintenance

allowance to opposite party no. 2 whereas he is not in possession of the agricultural land and he is not getting any income from the crops grown on it. The cultivation of their agricultural land is being done by opposite party no. 2 and she is utilizing the income by selling the crops grown on it but the trial court while rejecting his application u/s 127 Cr.P.C. did not consider his pleadings in this regard.

6. Per contra, learned counsel for the opposite party no. 2 has opposed the criminal revision and has submitted that the trial court passed the impugned order in the case u/s 125 Cr.P.C. as well as 127 Cr.P.C. on the basis of the evidence available on the record and considering the statutory provisions of the law allowed by the Hon'ble Apex Court under the law applicable to it. It has also been submitted that while passing the aforesaid impugned order, the trial court had taken into consideration both the oral as well as documentary evidence produced by the revisionist. There is no illegality or irregularity in the impugned orders and no interference by the revisional court is warranted.

7. Learned counsel for the revisionist and learned counsel for the opposite party no. 2 have been heard. Perused the evidence available on the record of the revisional court including the impugned orders passed by the Additional Principal Judge, IIIrd, Family Court, Allahabad and Additional Principal Judge, Family Court-2, Allahabad.

8. The trial court in its impugned judgement and order dated 10.12.2019 has considered the averments made by the applicant, P.W.1 Smt. Durga Devi in her application u/s 125 Cr.P.C. as well as her

oral evidence and oral evidence of revisionist's brother, P.W.2 Vansh Raj and brother of opposite party no. 2, P.W.3 Ram Dular Dubey in detail. The trial court has also discussed the documentary evidence filed by the opposite party no. 2 in the case u/s 125 Cr.P.C.

9. The opposite party no. 2, Smt. Durga Devi had pleaded in her application u/s 125 Cr.P.C. that her marriage was solemnized in 1972 according to Hindu rites and customs with the revisionist Matapher. About 9-10 years after the marriage, a daughter, namely, Akansha and in the year 1992, a son, namely, Alok, were born from their wedlock. After the birth of their son in 1992, the revisionist left opposite party no. 2. He was working as Senior Marketing Officer in Regional Food Corporation and staying in the city. He started living with Gayatri Devi. In the year 2001, he finally refused to keep opposite party no. 2, Smt. Durga Devi with him. The opposite party no. 2, Smt. Durga Devi is a *pardahnasheen* lady of rural background. She is living in her matrimonial home with her son. Whereas revisionist in his written statement had denied that opposite party no. 2, Smt. Durga Devi is his legally wedded wife and Akansha and Alok are his children. He has submitted that he got government job in the year 1981 and married Gayatri Devi. From that marriage, two sons were born. His elder son died in the year 2014 and opposite party no. 2, Smt. Durga Devi in conspiracy with his brother Vansh Raj to grab his land illegally, has prepared forged document and filed a false case for maintenance.

10. P.W.1 Smt. Durga Devi in her evidence had supported the averments made by her in her pleadings. In her cross-examination, she had given details

regarding her father-in-law, mother-in-law, husband and brother-in-law as well as farming in her matrimonial home. She had deposed that she was living with her children in the village of the revisionist. The revisionist's elder brother, P.W.2 Vansh Raj Pathak has supported the averments made in the application u/s 125 Cr.P.C. as well as the deposition of P.W.1 Smt. Durga Devi. He has stated in his evidence that Smt. Durga Devi was married to his brother Matapher in 1972 and presently, she is living in her husband's parental house with her children. He has also deposed that his brother is living with a lady, namely, Gayatri Devi from whose relationship, he has two children. Through forgery, his brother has incorporated the name of Gayatri Devi in his service record. His brother was not married to Gayatri Devi.

11. P.W.3 Ram Dulare Dubey had also corroborated the evidence of P.W.1 Smt. Durga Devi and P.W.2 Vansh Raj Pathak regarding the marriage of Smt. Durga Devi with Matapher and from their marriage, birth of two children. In the cross-examination of P.W.1, P.W.2 and P.W.3, nothing is found which may raise doubt about the veracity of their deposition. Apart from aforesaid oral evidence, the trial court has also taken into consideration the deposition of D.W.1 Matapher and the documentary evidence filed by the opposite party no. 2, Smt. Durga Devi. No documentary evidence was filed by the revisionist in the trial court. In the documentary evidence paper no. 5 Kha/2, which is the aadhar card of Smt. Durga Devi, name of her husband is registered as M. Pathak. In paper no. 5 Kha/3 which is family register of village- Barasata Kalan, the revisionist Matapher is recorded as the head of the family and Smt. Durga Devi is

shown as his wife and Akansha and Alok as their daughter and son respectively. The other document filed by opposite party no. 2 in the trial court paper no. 20 Kha/2 is marksheet of High School examination, 2006 of Alok Kumar Pathak which has been issued by U.P. Board of High School and Intermediate Education in the year 2006 in which Smt. Durga Devi and Matapher are recorded as mother and father of Alok Kumar. The year of birth of Alok Kumar is recorded as 1992. The opposite party no. 2 had also filed the certificate of Intermediate and marksheet of Intermediate Examination, 2008 of Alok Kumar paper no. 20 Kha/4 and 20 Kha/5. In these documents also, his parents name is shown as Smt. Durga Devi and Matapher. Similarly, in the certificate of High School Examination, 2000 and Intermediate Examination, 2002 paper no. 20 Kha/6 and 20 Kha/7 of Kumari Akansha Pathak, Smt. Durga Devi and Matapher are shown as her mother and father respectively. Her date of birth is recorded as 1984. In paper no. 20 Kha/8 which is Akansha Pathak's marksheet of 2012 of Sampurnanand Sanskrit Vidyalaya, Smt. Durga Devi and Matapher are shown as her parents. These documents were issued before opposite party no. 2, Smt. Durga Devi filed her application u/s 125 Cr.P.C. for maintenance allowance against the revisionist Matapher. These documents corroborate the pleadings and deposition of opposite party no. 2 and her witnesses that the daughter was born 9-10 years after their marriage which was solemnized in the year 1972 as her year of birth is shown of the year 1984 and also the year of birth of their son, Alok Kumar Pathak is shown of the year 1992. The trial court has also examined the identity card of Smt. Durga Devi paper no. 20 Kha/11 in which her husband's name is recorded as Matapher. Similarly, in the ration card,

paper no. 20 Kha/12, Matapher is shown as the husband of Smt. Durga Devi and Alok Kumar Pathak as their son. Aforesaid papers filed by opposite party no. 2 are two public documents and under Indian Evidence Act, there is presumption of genuineness of the entries made in them.

12. D.W.1 Matapher has admitted in his deposition that after opposite party no. 2 filed these documents in her case u/s 125 Cr.P.C., in the year 2015, he came to know about them. He has admitted that he has not filed any first information report before police authority or complaint before any public authority in regard to the alleged forged documents. He has also admitted that he did not file any case in the Court.

13. From the deposition of D.W.1 Matapher, the trial court has concluded that in case, he had considered the documents forged, he would have definitely filed first information report or made complaint before police/public authorities and drawn inference that the documents are genuine. The trial court has also taken the fact into consideration that in the service record of revisionist, Matapher Pathak, the name of Gayatri Devi is mentioned as his wife. The name of Smt. Durga Devi is not mentioned in the column of wife. The trial court has also considered the documentary evidence filed by the revisionist, namely, medical prescription of the treatment of Gayatri Devi in which her husband's name is shown as Matapher. The trial court has rightly concluded that since revisionist, Matapher has not produced any oral evidence or documentary evidence regarding his marriage to Gayatri Devi and there is reliable evidence filed by opposite party no. 2, Smt. Durga Devi about her marriage with Matapher and birth of Akansha and Alok born from their

wedlock, the aforesaid entries of service book and medical papers of Gayatri Devi, cannot be relied upon. It merely corroborates the pleading and evidence of Smt. Durga Devi that sometime after birth of both the children, revisionist finally left her in the year 2001 and did not visit her anytime nor provided any maintenance to her.

14. The proceeding u/s 125 Cr.P.C. is summary in nature in which only prima facie it has to be seen that the applicant is the wife of opposite party. It is a social legislation enacted for protecting the wife, minor children and parents of a person from vagrancy and destitution.

15. In paragraph no. 9 of its judgement in **Anju Garg and Another Vs. Deepak Kumar Garg**, 2022 SCC Online SC 1314, the Apex Court has mentioned the purpose of Section 125 Cr.P.C. which is as follows :

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

“In Dukhtar Jahan v. Mohd. Farooq [(1987) 1 SCC 624 : 1987 SCC (Cri) 237] the Court opined that : (SCC p. 631, para 16)

16. “... Proceedings under Section 125 [of the Code], it must be

remembered, are of a summary nature and are intended to enable destitute wives and children, the latter whether they are legitimate or illegitimate, to get maintenance in a speedy manner.”

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

3. “Section 125 of the Code of Criminal Procedure is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing, and shelter to the deserted wife.”

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

15. “... While dealing with the ambit and scope of the provision contained in Section 125 of the Code, it has to be borne in mind that the dominant and primary object is to give social justice to the woman, child and infirm parents, etc. and to prevent destitution and vagrancy by compelling those who can support those who are unable to support themselves but have a moral claim for support. The provisions in Section 125 provide a speedy remedy to those women, children and destitute parents who are in distress. The provisions in Section 125 are intended to achieve this special purpose. The dominant purpose behind the benevolent provisions contained in Section 125 clearly is that the wife, child and parents should not be left in a helpless state of distress, destitution and starvation.”

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

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

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

16. In the case of *Chander Parkash Bodh Raj vs. Shila Rani Chander Prakash*: 1968 SCC Online Del 52, the Delhi High Court has held that :

“an able-bodied young man has to be presumed to be capable of earning sufficient money so as to be able to reasonably maintain his wife and child and he cannot be heard to say that he is

not in a position to earn enough to be able to maintain them according to the family standard. It is for such able-bodied person to show to the Court cogent grounds for holding that he is unable, for reasons beyond his control, to earn enough to discharge his legal obligation of maintaining his wife and child.”

17. The Hon’ble Apex Court in **Rajnesh vs. Neha (supra)** has approved the above law laid down by the Delhi High Court.

18. From the above analysis, I am of the opinion that the trial court has rightly concluded that opposite party no. 2 is the legally wedded wife of revisionist, Matapher. As far as quantum of maintenance determined by the trial court as Rs.7,000/- per month payable to the opposite party no. 2, Smt. Durga Devi, the monthly income of revisionist should be taken into consideration. The revisionist had admitted in his pleadings as well as deposition that he retired in the year 2013 and is getting Rs.34,656/- as monthly pension.

19. The Hon’ble Apex Court in **Kulbhushan Kumar Vs. Raj Kumari**, (1970) 3 SCC 129 has held that 25% of the husband’s net salary would be just and proper to be awarded as maintenance allowance to the wife. The amount of permanent alimony awarded to the wife must be befitting the status of the parties and the financial capacity of the husband to make the payment.

20. In **Kalyan Dey Chaudhary Vs. Rita Dey Chaudhary Nee Nandy**, (2017) 14 SCC 200, the Hon’ble Apex Court has followed the quantum of maintenance fixed by the Hon’ble Apex Court in **Kulbhushan**

Kumar (supra) that 25% of net income of the husband should be paid to the wife as maintenance.

21. The trial court has added Rs.5,344/- as agricultural income into the amount of monthly pension of Rs.34,656/- of the revisionist Matapher and has taken his monthly income as Rs.40,000/-. The objection of revisionist is that he is neither in the possession nor drawing any income from the agricultural land. Even if the income from agricultural land is excluded, admittedly revisionist is earning Rs.34,656/- as monthly pension.

22. Applying the law laid down by the Hon'ble Apex Court, 25% of monthly pension will be Rs.8,664/- whereas the trial court has granted Rs.7,000/- per month as monthly maintenance allowance to the opposite party no. 2, Smt. Durga Devi. Therefore, the maintenance allowance granted to the opposite party no. 2 cannot be considered as excessive vis-a-vis the monthly pension of the revisionist rather it is on the lower side. Therefore, the trial court has rightly rejected his application filed u/s 127 Cr.P.C. for reduction in the maintenance allowance on the ground that he is not drawing any income from the agricultural land.

23. From the above discussion, I am of the view that there is no illegality, irregularity, or jurisdictional error in the impugned orders dated 10.12.2019 and 07.12.2022 passed by the trial court. There is no merit in the criminal revision and is liable to be dismissed.

24. The monthly maintenance allowance provided by the trial court of Rs.7,000/- shall be payable to the opposite party no. 2, Smt. Durga Devi from the date

of her filing application u/s 125 Cr.P.C. which shall be payable till 10th of each calendar month. The arrears of maintenance allowance shall be paid by the revisionist in four equal amounts within a period of six months. The amount of maintenance allowance already paid to the opposite party no. 2 shall be set off against this amount.

25. The present criminal revision is **dismissed** in terms of above mentioned conditions.

26. The copy of the order be sent to the trial court concerned forthwith for necessary compliance.

(2024) 4 ILRA 919

REVISIONAL JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 13.03.2024

BEFORE

THE HON'BLE SURENDRA SINGH - I, J.

Criminal Revision No. 3102 of 2023

Shiv Mohan & Anr.	...Revisionists
Versus	
State of U.P. & Anr.	...Opp. Parties

Counsel for the Revisionists:

Sri Phool Singh Yadav, Sri Vaibhav Yadav

Counsel for the Opp. Parties:

G.A., Sri Ashutosh Mishra, Sri Yashdeep Rastogi

Criminal Law - Code of Criminal Procedure, 1973 - Sections 311 & 397 - Indian Penal Code, 1860 - Sections 323, 504 & 304 - Indian Evidence Act, 1872 - Section 138 - Revisionists challenged order dated 11.05.2023 rejecting their application under Section 311 Cr.P.C. to recall P.W.1 Balwant Singh for cross-examination in a trial for

offences under Sections 323, 504, 304 I.P.C. Court held: (1) Section 311 Cr.P.C. grants wide discretionary power to recall witnesses if essential for a just decision, to be exercised judiciously with caution to avoid filling prosecution lacunae or causing prejudice (*Rajaram Prasad Yadav Vs St. of Bihar, AIR 2013 SC 3081*). (2) P.W.1's cross-examination, concluded on 17.11.2021, did not cover injuries to revisionist's sons or N.C.R. No. 46 of 2020, which was relevant as both F.I.R. and N.C.R. arose from the same incident on 12.05.2020 (*Swapan Kumar Chatterjee Vs CBI, (2019) 14 SCC 328*). (3) Injury reports and x-ray confirming fracture to revisionist's son justified recalling P.W.1 for cross-examination on these points, as they were essential for a just decision, despite prior opportunity for cross-examination (*Mohanlal Shyam Ji Soni Vs U.O.I., 1991 Supp (1) SCC 271*). (4) Trial court's rejection of the application without considering the essentiality of evidence was an illegality, warranting recall subject to Rs. 10,000/- cost to prevent abuse of process (*St. (NCT of Delhi) Vs Shiv Kumar Yadav, (2016) 2 SCC 402*). Revision allowed; trial court directed to permit cross-examination on N.C.R. and injuries on a fixed date with no adjournment. (Paras 12-25)

Criminal Revision Allowed.

List of Cases cited:

1. Rajaram Prasad Yadav Vs St. of Bihar, AIR 2013 SC 3081 (Para 12)
2. Mohanlal Shyam Ji Soni Vs U.O.I., 1991 Supp (1) SCC 271 (Para 6)
3. Swapan Kumar Chatterjee Vs Central Bureau of Investigation, (2019) 14 SCC 328 (Para 14)
4. St. (NCT of Delhi) Vs Shiv Kumar Yadav, (2016) 2 SCC 402 (Para 15)
5. Rajendra Kumar Vs St. of U.P., *Application U/S 482 No. 25531 of 2022* (Para 6)

(Delivered by Hon'ble Surendra Singh - I, J.)

Heard learned counsel for the revisionists, learned counsel for the

opposite party No.2 and learned A.G.A. for the State.

2. The present criminal revision has been instituted against the impugned judgement and order dated 11.05.2023 passed by Special Judge (E.C. Act), Fatehpur in S.T. No. 679 of 2020 (State Vs. Shiv Mohan and others) arising out of Case Crime No. 88 of 2020 under sections 323, 504, 304 I.P.C., Police Station- Malwan, District- Fatehpur.

3. By the impugned order, the trial court has rejected the application 16-B filed by the revisionist no. 1 under section 311 Cr.P.C. to summon P.W.1 Balwant Singh for cross-examination.

4. Learned counsel for the revisionists submitted that regarding the incident, an N.C.R. against Raj Kumar and Gore Lal was registered by P.W.1 Balwant Singh. The accused, Shiv Mohan also got registered an F.I.R./N.C.R. No. 46 of 2020 under Section 323, 504 I.P.C., Police Station- Malwan, District- Fatehpur. In the F.I.R./N.C.R. of the alleged incident registered by the revisionist no. 1, his son had received serious injuries in the same incident. It has been also submitted that in the case registered by Balwant Singh, after investigation, charge-sheet has been filed in Case Crime No. 88 of 2020 under Sections 323, 504, 304 I.P.C. against revisionists and two other co-accused persons. It has also been submitted that the revisionist no. 1 has filed an application under Section 311 Cr.P.C. in the court concerned for examination of P.W.1 Balwant Singh, which was rejected. The record was not available and no investigation was done in the aforesaid N.C.R. No. 46 of 2020. In spite of the order passed in N.C.R., record has been lost in the police station. It

has been also submitted that both F.I.R. and N.C.R. relates to the same incident, in which, charge sheet was filed against the revisionists and others on his side. The revisionist no. 1 has received grievous injury on his parietal left skull. The defence was entitled to ask question to P.W.1 Balwant Singh regarding injury received by Raj Kumar and Gore Lal on the side of accused. It has also been submitted that the trial court has rejected the application filed under Section 311 Cr.P.C. without application of mind and ignoring the provision of law.

5. Per contra, learned counsel for opposite party No.2/ informant has submitted that the trial court has passed the impugned order considering the facts of the case and law applicable for summoning witnesses u/s 311 Cr.P.C. It has also been submitted that there is no illegality in the impugned order. It has also been submitted that the revisionists/ defence has not mentioned in the application under Section 311 Cr.P.C. any specific question to be asked to P.W.1 Balwant Singh in cross-examination. It has also been submitted that P.W.1 Balwant Singh is not named in the N.C.R. There is no occasion to summon P.W.1 for cross-examination. It has also been submitted that in the case relating to application under Section 311 Cr.P.C., the statement of P.W.1 Balwant Singh was recorded on 17.03.2011 and his cross-examination was concluded on 17.11.2021. The revisionists were granted sufficient time to cross-examine P.W.1 Balwant Singh. The revisionists have not filed copy of N.C.R. lodged by him against opposite party nos. 2 and persons of his side.

6. Learned counsel for the revisionists and learned counsel for the opposite party no. 2 have relied upon the

following rulings in support of their arguments :-

(i) Application U/S 482 No. 25531 of 2022, **Rajendra Kumar Vs. State of U.P.**

(ii) **Mohanlal Shyam Ji Soni Vs. Union of India and Another**, decided in 1991

(iii) **Rajaram Prasad Yadav Vs. State of Bihar and others**, AIR 2013 SC 3081

(iv) **State (NCT of Delhi) Vs. Shiv Kumar Yadav and Another**, (2016) 2 SCC 402

7. The learned counsels for both parties have been heard. Perused the record of criminal revision including the impugned order.

8. The revisionist, Shiv Mohan has filed application u/s 311 Cr.P.C. on 17.07.2022 for summoning P.W.1 Balwant Singh for cross-examination regarding the injuries received by his sons, Raj Kumar and Gore Lal in the cross case and on some other points.

9. In the application, it is stated that his previous counsel did not cross-examine P.W.1 on this point. Therefore, P.W.1 Balwant Singh may be summoned so that applicant's counsel may cross-examine him on this point. The application was rejected by the trial court by the impugned order dated 11.05.2023 on the ground that the examination-in-chief of P.W.1 Balwant Singh was recorded on 17.03.2021. On that date, his cross-examination was deferred due to the adjournment application of defence.

10. P.W.1 Balwant Singh was cross-examined about 8 months after his

examination-in-chief on 17.11.2021. In the impugned order, the trial court has also mentioned that the applicant/defence had not submitted any document relating to N.C.R. of the alleged cross case.

11. The statutory provisions relating to summoning of a person as a witness during trial is provided u/s 311 Cr.P.C. which is as follows :

**Section 311 of Code of Criminal
Procedure :**

311. Power to summon material witness, or examine person present – Any court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.

12. The Hon'ble Apex Court in **Rajaram Prasad Yadav (supra)**, has narrated several guidelines which the court should take into consideration while deciding the application u/s 311 Cr.P.C. After considering the earlier precedent, the Hon'ble Apex Court has explained and enumerated following principles regarding application u/s 311 Cr.P.C. which is as follows :

"14. A conspicuous reading of Section 311 Cr P C would show that widest of the powers have been invested with the courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression "any" has been

used as a prefix to "court", "inquiry", "trial", "other proceeding", "person as a witness", "person in attendance though not summoned as a witness", and "person already examined". By using the said expression "any" as a prefix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the court was only in relation to such evidence that appears to the court to be essential for the just decision of the case.

Section 138 of the Evidence Act, prescribed the order of examination of a witness in the court. The order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311 CrPC and Section 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 Cr.P.C. It is, therefore, imperative that the invocation of Section 311 Cr.P.C. and its application in a particular case can be ordered by the court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined, the court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the court to

be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution.

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23. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Cr P C read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the courts:

a) *Whether the court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the court for a just decision of a case?*

b) *The exercise of the widest discretionary power under Section 311 CrPC should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.*

c) *If evidence of any witness appears to the court to be essential to the just decision of the case, it is the power of the court to summon and examine or recall and re-examine any such person.*

d) *The exercise of power under Section 311 Cr P C should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.*

e) *The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it*

apparent that the exercise of power by the court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

f) *The wide discretionary power should be exercised judiciously and not arbitrarily.*

g) *The court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.*

h) *The object of Section 311 Cr P C simultaneously imposes a duty on the court to determine the truth and to render a just decision.*

i) *The court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.*

j) *Exigency of the situation, fair play and good sense should be the safeguard, while exercising the discretion. The court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified.*

k) *The court should be conscious of the position that after all the trial is basically for the prisoners and the court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The court should bear in mind that improper or capricious*

exercise of such a discretionary power, may lead to undesirable results.

l) The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

m) The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

n) The power under Section 311 Cr.P.C. must therefore, be invoked by the Court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right."

13. The primary factor for deciding the application u/s 311 Cr.P.C. is essentiality of the evidence to arrive at a just decision of the case. The resultant filling up the loopholes on account of allowing the application u/s 311 Cr.P.C. is merely subsidiary factor and the court's determination of the application should only be based on test of essentiality of evidence.

14. In **Swapan Kumar Chatterjee Vs. Central Bureau of Investigation, 2019 (14) SCC 328**, the Hon'ble Apex Court has observed as hereunder :

"It is well settled that the power conferred under Section 311 should be invoked by the court only to meet the ends

of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The court has vide power under this Section to even recall witnesses for re-examination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law."

15. In **State (NCT of Delhi) (supra)**, the Hon'ble Apex Court has discussed the question of re-summoning witness on the ground of change of defence counsel as follows :-

"While advancement of justice remains the prime object of law, it cannot be understood to mean that recall can be allowed for the asking or reasons related to mere convenience. It has normally to be presumed that a counsel conducting a case is competent particularly when a counsel is appointed by choice of a litigant. Taken to its logical end, the principle that a retrial must follow on every change of a counsel, can have serious consequences on conduct of trials and the criminal justice system. The witnesses cannot be expected to face the hardship of appearing in court repeatedly, particularly in sensitive cases such as the present one. It can result in undue hardship for the victims, especially so, of heinous crimes, if they are required to repeatedly appear in court to face cross-examination."

16. Now, it is desirable to examine the facts of the case in the light of law laid

down by the Apex Court for exercise of power u/s 311 Cr.P.C. From the perusal of the first information report relating to the present case and the N.C.R. lodged by the revisionist against the persons on the side of informant, Balwant Singh, it transpires that both F.I.R. and N.C.R. relates to the same incident which took place on 12.05.2020 at 7 p.m.

17. The revisionist has filed injury report of his sons, Raj Kumar and Gore Lal. Although, the revisionist, Shiv Mohan had lodged the N.C.R. No. 46 of 2020 under Section 323, 504 I.P.C. on the next day of the incident on 13.05.2020 in Police Station-Malwan, District- Fatehpur. The revisionist has filed injury reports of his sons, Raj Kumar and Gore Lal, allegedly injured in the same incident. Raj Kumar and Gore Lal were medically examined on 13.05.2020 at 4:05 p.m. and 4:16 p.m. at District Hospital, Fatehpur. The skull of injured Gore Lal was x-rayed in Department of Radiology and Ultrasound, Combined District Hospital, Kaushambi. According to his x-ray report, '*fracture of left sided parietal bone of skull seen*'. The injured Gore Lal has also submitted application u/s 155 (2) Cr.P.C. in the court of Chief Judicial Magistrate, Fatehpur for disposal.

18. In the above facts and circumstances of the case, it prima facie, appears that in the occurrence relating to the present sessions trial, sons of revisionist, Raj Kumar and Gore Lal, have also received injuries for which he had submitted written report which was registered as N.C.R. No. 46 of 2020 in Police Station- Malwan, District- Fatehpur.

19. From the perusal of evidence of P.W.1 Balwant Singh, it is conspicuous that on 17.03.2021, his examination-in-chief

was recorded and on 17.11.2021, his cross-examination was done by the defense.

20. Considering the above mentioned facts and circumstances of the case in the light of the law laid down by the Hon'ble Apex Court, it appears that it is essential in the interest of justice that the revisionist/defence is granted an opportunity on heavy costs to cross-examine P.W.1 Balwant Singh on the point of N.C.R. registered by the revisionist and the injuries received by Raj Kumar and Gore Lal.

21. P.W.1 Balwant Singh has not been examined on the point of N.C.R. registered by Shiv Mohan regarding the incident. He has also not been cross-examined about the injuries allegedly received by Raj Kumar and Gore Lal in the incident.

22. From the above discussion of the facts and circumstances of the case, I am of the considered view that it is essential in the interest of justice that the revisionist/defence is granted one opportunity to cross-examine at costs of Rs.10,000/- to be paid to the witness, Balwant Singh

23. On production of this order, the trial court shall get Rs.10,000/- deposited by the revisionists and then fix a date for cross-examination of P.W.1 Balwant Singh. On that date, the defense shall cross-examine P.W.1 Balwant Singh on the matter relating to N.C.R. registered by Shiv Mohan and the injuries received by his sons, Raj Kumar and Gore Lal. The defense shall conclude the cross-examination on the same day and they shall not be granted adjournment for further cross-examination of P.W.1 Balwant Singh.

24. From the above discussion, I am of the opinion that the trial court should have allowed the application u/s 311 Cr.P.C. subject to payment of heavy cost. The trial court has committed illegality in rejecting the aforesaid application.

25. The criminal revision is accordingly allowed subject to aforesaid conditions regarding payment of cost and completion of cross-examination of P.W.1 Balwant Singh on the same date.

26. The copy of the judgement be forthwith sent to the trial court for compliance.

(2024) 4 ILRA 926

REVISIONAL JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 29.03.2024

BEFORE

THE HON'BLE SURENDRA SINGH - I, J.

Criminal Revision No. 3560 of 2023

Purushottam Das & Ors. ...Revisionists
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Revisionists:

Sri Ray Sahab Yadav

Counsel for the Respondents:

G.A., Sri Umesh Chandra Prajapati

Criminal Law - Protection of Women from Domestic Violence Act, 2005 - Section 23 - Code of Criminal Procedure, 1973 - Section 125 - Against maintenance allowance - In impugned order, trial court noted that revisionist admitted in his written St.ment that opposite party no.2, as his wife and Master Harshit as their son, from their wedlock and residing with her parents for last two years, who bear their maintenance and educational

expenses - Trial court further observed that revisionist no. 1, employed as Field Officer in a nationalized bank, draws a gross monthly salary of Rs.97,227.45/-, and from that monthly salary, house rent recovery, furniture recovery, housing loan, car loan, income tax and contributory pension fund is deducted - It is well settled that only statutory deductions and income tax can be considered while computing net salary of Revisionist no. 1, other deductions cannot be deducted from gross salary - Considering maintenance of opposite party no.2 and her son's educational expenses, trial court rightly awarded interim maintenance allowance of Rs.3,000/- pm to opposite party no.2 and Rs.2,000/- pm to her minor son - Thus, no illegality in impugned order, criminal revision dismissed. (Para 20, 21)

Revision dismissed. (E-13)

List of Cases cited:

1. Ajay Kumar Vs Lata Alias Sharuti & ors., (2019) 15 SCC 352
2. Juveria Abdul Majid Patni Vs Atif Iqbal Mansoori & anr., (2014) 10 SCC 736, (Paras 23 to 31)
3. Rajat Johar Vs Divya Johar, 2017 SCC OnLine Del 11790, (Paras 21, 22)

(Delivered by Hon'ble Surendra Singh - I, J.)

Heard Sri Ray Sahab Yadav, learned counsel for the revisionists and Sri Umesh Chandra Prajapati, learned counsel for the opposite party no.2.

2. The instant criminal revision has been instituted against the impugned judgment and order dated 07.06.2023 passed by the Additional Sessions Judge, Court No. 1, Jhansi, in Criminal Appeal No2. 98 of 2022 (Smt. Bharti Devi Vs. State of U.P. and others) filed under Section 29 of the Protection of Women

from Domestic Violence Act, 2005 (hereinafter referred to as 'the Act No. 43 of 2005')

3. By the impugned order, the appellate court has set aside the order dated 01.11.2022 passed by the Civil Judge (Junior Division)/FTC (CAW)/J.M., Jhansi in Complaint Case No. 1023 of 2016 and directed the revisionist to pay maintenance allowance Rs. 3000/- per month to the opposite party no. 2 and Rs. 2000/- to her son, Harshit, till he attains the age of majority, from the date of order of the (Junior Division)/FTC (CAW)/J.M., Jhansi on 10th of each calendar month.

4. By the aforesaid order, the trial court has rejected the application under Section 23 of the Protection of Women from Domestic Violence Act, 2005 filed by the opposite party no. 2, Smt. Bharti Devi.

5. The averment has been made on behalf of the revisionist that the appellate court had passed the order against the weight of evidence on record and without taking into consideration the provisions of law. It has also been submitted that the opposite party no. 2 had left the house of the revisionist voluntarily without any domestic violence committed by the revisionist and his family members against her. It has also been submitted that the opposite party no. 2 did not fulfil her duties as a wife in the house of the revisionist and had misbehaved with the revisionist and his family members. It has also been submitted that the opposite party no. 2 has filed Maintenance Case No. 34 of 2015 (Smt. Bharti Devi Vs. Purushottam Das) under Section 125 CrPC in which the court has granted Rs. 9,000/- as maintenance allowance to the opposite parties. The opposite party no. 2 is not prepared to

reside with revisionist no. 1, therefore she is not entitled for maintenance.

6. Per contra, learned counsel for the opposite party no. 2 has opposed the criminal revision making averment that the appellate court has passed the impugned order considering the evidence on record as well as the law applicable to the facts of the case, therefore no interference in the impugned order by this Court is warranted.

7. Facts of this case which are necessary for disposal of the criminal revision are that the revisionist no. 1, Purushottam Das, was married to opposite party no. 2, Smt. Bharti Devi, on 26.02.2009 according to Hindu Rites and Customs in Jhansi. The revisionist no. 1, Purushottam Das, was an employee in a nationalized bank at Punjab. In the matrimonial home of Smt. Bharti Devi, the revisionist no. 1, her husband and other family members used to harass her for getting a four wheeler in dowry. Three four months after staying at her matrimonial home the revisionist took her to Punjab where he was in a bank job. Thereto, the revisionist no. 1 used to beat his wife and torture physically and mentally for getting a four wheeler in dowry and during her pregnancy, he did not look after her and the expenses of delivery was borne by the parents of Smt. Bharti Devi. When the opposite party no. 2 raised objection, the revisionist beat her with iron rod and on 05.12.2015 he expelled her along with her child from her matrimonial home. The revisionist no. 1 works as Field Officer in a nationalised bank and is getting Rs. 60,000/- as monthly salary.

8. The revisionist no.1 has admitted that the opposite party no. 2, Smt. Bharti Devi, is legally wedded wife and her minor

son, Harshit has been born from their wedlock. The revisionist no. 1 has also submitted that he is getting Rs. 36,000/- per month as salary

9. The opposite party no. 2, Smt. Bharti Devi, has submitted in her interim maintenance application filed under Section 23 of the Act No. 43 of 2005 that she is dependent on her parents for maintenance of herself and her minor son for the last two years. She also submitted that her husband is earning Rs. 60,000/- per month as salary, therefore maintenance allowance of Rs. 20,000/- be granted to herself and her minor son for educational expenses of tuition fees, school dress and conveyance charges.

10. In his objection, the revisionist no. 1 has stated that in the case filed by Smt. Bharti Devi under Section 125 CrPC, the trial court had granted maintenance allowance Rs. 5000/- and 4,000/- to the opposite party no. 2 and 3, respectively. The opposite party no. 2 is educated and double MA and is earning about Rs.10,000-15,000/- per month by taking tuition.

11. I have heard learned counsel for the revisionists, learned counsel for the opposite party no. 2 and learned AGA for the State and perused the record including the impugned order.

12. Section 23 of the Act No. 43 of 2005 empowers the Magistrate to pass such interim order as he deems just and proper. Section 23 of the Act No. 43 of 2005 reads as follows :-

23. Power to grant interim and ex parte orders.-

1. In any proceeding before him under this Act, the Magistrate may pass

such interim order as he deems just and proper.

2. If the Magistrate is satisfied that an application prima facie discloses that the respondent is committing, or has committed an act of domestic violence or that there is a likelihood that the respondent may commit an act of domestic violence, he may grant an ex parte order on the basis of the affidavit in such form, as may be prescribed, of the aggrieved person under section 18, section 19, section 20, section 21 or, as the case may be, section 22 against the respondent.

13. Section 23 read with Section 20 of the Act No. 43 of 2005 empowers the Magistrate to provide monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence. Section 20 of the Act No. 43 of 2005 empowers the Magistrate to direct the respondent to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence.

14. Section 12 read with Sections 20 and 23 of the Act No. 43 of 2005 reveals that in an application under Section 12 of the Act No. 43 of 2005, the Magistrate can provide the interim monetary relief for maintenance allowance granted to an aggrieved person by order passed under Section 125 CrPC or any other law for the time being in force.

15. In **Ajay Kumar Vs. Lata Alias Sharuti and others**, (2019) 15 SCC 352, the Apex Court held that considering the facts and circumstances of the case, the Magistrate is competent to provide interim

monetary relief to the aggrieved person of domestic violence. The quantum of the interim maintenance allowance shall be taken into consideration while deciding the case.

16. In **Juveria Abdul Majid Patni Vs. Atif Iqbal Mansoori and another**, (2014) 10 SCC 736, the Apex Court has propounded the law relating to interim maintenance as provided under Section 23 of the Act No. 43 of 2005. The Apex Court has observed as under :-

23. In the instant case, the appellant sought relief under Sections 18 to 23 of the Domestic Violence Act, 2005. It includes protection order under Section 18, monetary relief under Section 20, custody orders under Section 21, compensation under Section 22 and interim relief under Section 23. The relevant provisions read as follows:

“20.Monetary reliefs.—(1) While disposing of an application under sub-section (1) of Section 12, the Magistrate may direct the respondent to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence and such relief may include, but is not limited to—

- (a) the loss of earnings;*
- (b) the medical expenses;*
- (c) the loss caused due to the destruction, damage or removal of any property from the control of the aggrieved person; and*
- (d) the maintenance for the aggrieved person as well as her children, if any, including an order under or in addition to an order of maintenance under Section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force.*

(2) The monetary relief granted under this section shall be adequate, fair and reasonable and consistent with the standard of living to which the aggrieved person is accustomed.

(3) The Magistrate shall have the power to order an appropriate lump sum payment or monthly payments of maintenance, as the nature and circumstances of the case may require.

(4) The Magistrate shall send a copy of the order for monetary relief made under sub-section (1) to the parties to the application and to the in-charge of the police station within the local limits of whose jurisdiction the respondent resides.

(5) The respondent shall pay the monetary relief granted to the aggrieved person within the period specified in the order under sub-section (1).

(6) Upon the failure on the part of the respondent to make payment in terms of the order under sub-section (1), the Magistrate may direct the employer or a debtor of the respondent, to directly pay to the aggrieved person or to deposit with the court a portion of the wages or salaries or debt due to or accrued to the credit of the respondent, which amount may be adjusted towards the monetary relief payable by the respondent.”

The monetary relief as stipulated under Section 20 is different from maintenance, which can be in addition to an order of maintenance under Section 125 CrPC or any other law. Such monetary relief can be granted to meet the expenses incurred and losses suffered by the aggrieved person and child of the aggrieved person as a result of the domestic violence, which is not dependent on the question whether the aggrieved person, on the date of filing of the application under Section 12 is in a domestic relationship with the respondent.

24. *“22.Compensation orders.— In addition to other reliefs as may be granted under this Act, the Magistrate may on an application being made by the aggrieved person, pass an order directing the respondent to pay compensation and damages for the injuries, including mental torture and emotional distress, caused by the acts of domestic violence committed by that respondent.*

23.*Power to grant interim and ex parte orders.—(1) In any proceeding before him under this Act, the Magistrate may pass such interim order as he deems just and proper.*

(2) If the Magistrate is satisfied that an application prima facie discloses that the respondent is committing, or has committed an act of domestic violence or that there is a likelihood that the respondent may commit an act of domestic violence, he may grant an ex parte order on the basis of the affidavit in such form, as may be prescribed, of the aggrieved person under Section 18, Section 19, Section 20, Section 21 or, as the case may be, Section 22 against the respondent.”

Therefore, it is well within the jurisdiction of the Magistrate to grant the interim ex parte relief as he deems just and proper, if the Magistrate is satisfied that the application prima facie discloses that the respondent is committing, or has committed an act of domestic violence or that there is a likelihood that the respondent may commit an act of domestic violence.

25. *It is not necessary that relief available under Sections 18, 19, 20, 21 and 22 can only be sought for in a proceeding under the Domestic Violence Act, 2005. Any relief available under the aforesaid provisions may also be sought for in any legal proceeding even before a civil court and Family Court, apart from*

the criminal court, affecting the aggrieved person whether such proceeding was initiated before or after the commencement of the Domestic Violence Act. This is apparent from Section 26 of the Domestic Violence Act, 2005 as quoted hereunder:

“26.Relief in other suits and legal proceedings.—(1) Any relief available under Sections 18, 19, 20, 21 and 22 may also be sought in any legal proceeding, before a civil court, Family Court or a criminal court, affecting the aggrieved person and the respondent whether such proceeding was initiated before or after the commencement of this Act.

(2) Any relief referred to in sub-section (1) may be sought for in addition to and along with any other relief that the aggrieved person may seek in such suit or legal proceeding before a civil or criminal court.

(3) In case any relief has been obtained by the aggrieved person in any proceedings other than a proceeding under this Act, she shall be bound to inform the Magistrate of the grant of such relief.”

26. *The appellant has filed an FIR against the first respondent for the offence committed under Section 498-A IPC. The High Court refused to quash the FIR qua first respondent on the ground that prima facie case has been made out. Even before the criminal court where such case under Section 498-A is pending, if allegation is found genuine, it is always open to the appellant to ask for reliefs under Sections 18 to 22 of the Domestic Violence Act and interim relief under Section 23 of the said Act.*

27. *In V.D. Bhanot v. Savita Bhanot [(2012) 3 SCC 183 : (2012) 2 SCC (Civ) 53 : (2012) 2 SCC (Cri) 102] , this*

Court held that the conduct of the parties even prior to the coming into force of the Protection of Women from Domestic Violence Act, 2005 could be taken into consideration while passing an order under Sections 18, 19 and 20 thereof. The wife who had shared a household in the past, but was no longer residing with her husband can file a petition under Section 12 if subjected to any act of domestic violence. In V.D. Bhanot [(2012) 3 SCC 183 : (2012) 2 SCC (Civ) 53 : (2012) 2 SCC (Cri) 102] this Court held as follows: (SCC pp. 186-87, para 12)

“12. We agree with the view expressed by the High Court that in looking into a complaint under Section 12 of the PWD Act, 2005, the conduct of the parties even prior to the coming into force of the PWD Act, could be taken into consideration while passing an order under Sections 18, 19 and 20 thereof. In our view, the Delhi High Court has also rightly held that even if a wife, who had shared a household in the past, but was no longer doing so when the Act came into force, would still be entitled to the protection of the PWD Act, 2005.”

28. In Inderjit Singh Grewal [Inderjit Singh Grewal v. State of Punjab, (2011) 12 SCC 588 : (2012) 2 SCC (Civ) 742 : (2012) 2 SCC (Cri) 614] the appellant Inderjit Singh and Respondent 2 of the said case got married on 23-9-1998. The parties to the marriage could not pull on well together and decided to get divorce and, therefore, filed a case for divorce by mutual consent under Section 13-B of the Hindu Marriage Act, 1955. After recording the statement in the said case, the proceedings were adjourned for a period of more than six months to enable them to ponder over the issue. The parties again appeared before the Court on second motion and on the basis of their

statement, the District Judge, Ludhiana vide judgment and order dated 20-3-2008 allowed the petition and dissolved their marriage. After dissolution of marriage, the wife filed a complaint before the Senior Superintendent of Police, Ludhiana against Inderjit Singh under the provisions of the Domestic Violence Act alleging that the decree of divorce obtained by them was a sham transaction. It was further alleged that even after getting divorce both of them had been living together as husband and wife. In the said case, the Superintendent of Police, City I conducted the full-fledged inquiry and reported that the parties had been living separately after the dissolution of the marriage. Hence, no case was made out against Inderjit Singh. In this context, this Court held that Section 12 “application to Magistrate” under the Domestic Violence Act challenging the said divorce was not maintainable and in the interest of justice and to stop the abuse of process of court, the petition under Section 482 CrPC was allowed. The law laid down in the said case is not applicable for the purpose of determination of the present case.

29. In the present case, the alleged domestic violence took place between January 2006 and 6-9-2007 when FIR No. 224 of 2007 was lodged by the appellant under Sections 498-A and 406 IPC against the first respondent and his relatives. In a writ petition filed by the first respondent the High Court refused to quash the said FIR against him observing that prima facie case under Section 498-A was made out against him. Even if it is accepted that the appellant during the pendency of the SLP before this Court has obtained ex parte “khula” (divorce) under the Muslim Personal Law from the Mufti on 9-5-2008, the petition under Section 12

of the Domestic Violence Act, 2005 is maintainable.

30. An act of domestic violence once committed, subsequent decree of divorce will not absolve the liability of the respondent from the offence committed or to deny the benefit to which the aggrieved person is entitled under the Domestic Violence Act, 2005 including monetary relief under Section 20, child custody under Section 21, compensation under Section 22 and interim or ex parte order under Section 23 of the Domestic Violence Act, 2005.

31. Both the Sessions Judge and the High Court failed to notice the aforesaid provisions of the Act and the fact that the FIR was lodged much prior to the alleged divorce between the parties and erred in holding that the petition under Section 12 was not maintainable.

17. The Act No. 43 of 2005 provides monetary interim relief under Section 23 of the Act to aggrieved person including a child who has been subjected to domestic violence. It is not essential that at the time of claiming relief under Section 12 of the Act, the aggrieved person is in domestic relationship with the opposite party herein revisionist.

18. In **Rajat Johar Vs. Divya Johar**, 2017 SCC OnLine Del 11790, Delhi Court has observed as under :-

21. Since the respondent and her minor son are to be maintained by the petitioner, in the absence of denial of existence of the marriage and denial of paternity of the minor son, who is stated to be requires constant medical treatment and supervision, the petitioner cannot shy away from his statutory obligation of maintaining his legally wedded wife and his minor son.

22. The monetary relief as provided under the Protection of Women from Domestic Violence Act, 2005 is different from maintenance, which can be in addition to an order of maintenance under Section 125 Cr.P.C. or any other law, and can be granted to meet the expenses incurred and losses suffered by the aggrieved person and child of the aggrieved person as a result of the domestic violence, and the question whether the aggrieved person, on the date of filing of the application under Section 12 of DV Act was in a domestic relationship with the respondent is irrelevant.

19. Section 2 of the Act No. 43 of 2005 defines "aggrieved person" and "child" as follows :-

(a) "aggrieved person" means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent;

(b) "child" means any person below the age of eighteen years and includes any adopted, step or foster child;

20. In the impugned order, the trial court has considered the fact that the revisionist husband has admitted in his written statement that opposite party no. 2, Smt. Bharti Devi, is his wife and master Harshit is his son from their wedlock and for the last two years, Smt. Bharti Devi is living separately from the revisionist no. 1 at her parental home and their maintenance and educational expenses of child Harshit is borne by her parents. The trial court has also taken into consideration that the revisionist no. 1 is working as field officer in a nationalized bank and has taken into consideration the salary slip, paper no. 12-B filed by the revisionist no. 1, Purshottam

Das, according to which, his gross salary is Rs.97,227.45/- and from that monthly salary, house rent recovery, furniture recovery, housing loan, car loan, income tax, contributory pension fund and income tax is being deducted.

21. It is settled law that only statutory deductions as well as income tax can be taken into consideration while determining the net salary of the revisionist no. 1. The payments made on other heads cannot be deducted from his gross salary. Considering the maintenance of opposite party no. 2, Smt. Bharti Devi and educational expenses of her son, the trial court has fixed Rs.3000/- per month to the opposite party no. 2 and Rs. 2,000/- to her minor son as interim maintenance allowance.

22. From the above, the provision for interim maintenance is a social welfare measure. It is provided to protect the minor children and old parents from hunger destitution and vagrancy.

23. From above discussion, I am of the considered view that while granting Rs. 3000/- to opposite party no. 2, Smt. Bharti Devi and Rs. 2000/- to her son, Harshit, as maintenance allowance, the trial court has not committed any illegality or irregularity or jurisdictional error. There is no merit in the criminal revision. The criminal revision is dismissed. However, I clarify that the present order as well as orders which have been passed by the appellate court shall not come in the way of a final adjudication on the merits of the complaint by the Magistrate in accordance with law. The interim maintenance allowance shall be paid till 10th of each month. The arrears shall be paid over within a period of four months from today by equal monthly instalments.

24. Let the copy of this order be sent to the trial court/court concerned for communication.

(2024) 4 ILRA 933

REVISIONAL JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 08.04.2024

BEFORE

THE HON'BLE SURENDRA SINGH-I, J.

Criminal Revision No. 3867 of 2019

Smt. Mewati Devi & Anr. ...Revisionists
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Revisionists:

Sri Satyendra Narayan Singh, Sri Atmaram Nadiwal, Sri Dinesh Kumar Yadav, Sri Ravindra Prakash Srivastava, Sri Shesh Narain Mishra

Counsel for the Opp. Parties:

G.A.

Criminal Law - Indian Penal Code, 1860 - Sections 498-A & 304-B - Dowry Prohibition Act, 1961 - Section 3/4 - Code of Criminal Procedure, 1973 - Sections 161 & 227 - Against framing of charge - From perusal of trial court records, it transpired that on application of informant, trial court vide directed framing of charges u/s 498-A, 304-B IPC and Section 3/4 D.P. Act - Against this, accused filed Application U/s 482, wherein High Court directed applicants to file discharge application before trial court for decision as per law - In compliance of order of High Court, accused filed application for discharge from charge, trial court vide impugned order held that charge u/s 304-B is not made out and modified charge after dropping Section 304-B IPC and passed order by framing charge u/s 498-A and 302 IPC - Held, death of deceased took place after more than seven years of her marriage with

accused and trial court rightly dropped charge u/s 304-B and directed for framing charge u/s 302 IPC and in impugned order, trial court gave reasons for framing charge u/s 498-A against accused - Since trial court has not prima facie considered St.ment of witnesses and contents of postmortem report regarding death of deceased and nature of injuries of deceased given in postmortem report, trial court has not given sufficient reason for framing charge u/s 302 IPC - Thus, criminal revision partly allowed - Impugned order directing framing of charge u/s 302 IPC set aside, matter remanded. (Para 16,18,19)

Revision partly allowed. (E-13)

List of Cases cited:

1. Amit Kapoor Vs Ramesh Chander & anr., (2012) 9 SCC 460, (Paras 12, 13, 28 to 30)
2. Ghulam Hassan Beigh Vs Mohammad Maqbool Magrey & ors. in S.L.P. (Crl.) No. 4599 of 2021, (Paras 15 to 17, 25)
3. Union of India Vs Prafulla Kumar Samal & anr., (1979) 3 SCC 4, (Paras 10)
4. Dipakbhai Jagdishchandra Patel Vs St. of Guj., (2019) 16 SCC 547, (Paras 15, 23)
5. Sajjan Kumar Vs C.B.I, (2010) 9 SCC 368, (Para 21)
6. St. of Karn. Vs M.R. Hiremath, (2019) 7 SCC 515

(Delivered by Hon'ble Surendra Singh-I, J.)

1. The present criminal revision has been filed under Section 397/401 Cr.P.C., the revisionists have assailed the impugned order dated 3.9.2019 passed by the Ist Additional Sessions Judge Basti in Sessions Trial No. 35 of 2015 (State Vs. Ram Suresh and others) arising out of Case Crime No. 627 of 2014 under Section 498-A, 304-B

and Section 3/4 of D.P. Act P.S. Paikoliya, District- Basti. By the impugned order, the trial court has rejected the application under Section 227 Cr.P.C. of the revisionists Smt. Mewati Devi and Ram Suresh and has directed to frame charge under Section 498-A and 302 IPC against them.

2. It has been submitted by learned counsel for the revisionist that the Investigating Officer had found that the occurrence has taken place after more than seven years of marriage and therefore charge-sheet has been submitted under Section 306 IPC against them. The learned trial court vide order dated 20.5.2019 instead of Section 306 IPC altered the charge under Sections 498-A, 304-B and Section 3/4 of D.P. Act, subsequently, revisionist filed a discharge application under Section 227 Cr.P.C. in compliance of the order dated 27.6.2019 passed by the co-ordinate Bench of this court in Application u/s 482 No. 23601 of 2001, then the trial court vide impugned order dated 3.9.2019 held that charge under Section 304-B is not made out and modified the charge after dropping Section 304-B IPC and passed the order by framing the charge under Section 498-A and 302 IPC.

3. It has been further submitted that the trial court passed the impugned order against the weight of evidence on record and without application of judicial mind which is liable to be quashed.

4. Learned AGA as well as learned counsel for the informant have opposed the criminal revision and submitted that the revisionist no.1 is the mother-in-law and revisionist no.2 is husband of the deceased Chandrakanti. In the FIR their direct role has been assigned in committing the

murder of deceased-Chandrakani for not providing the additional demand of dowry. During investigation, the prosecution witnesses have also supported the prosecution case as well as during trial, P.W.-1 Mani Ram Verma and P.W.-2 Harishchandra . The revisionist harassed the deceased for obtaining additional dowry during non-fulfilment of the demand of additional dowry. They have murdered her by burning.

5. From the perusal of the FIR, which is annexed as annexure no.1 to the revision No. 324 of 2023, it transpires that the Maniram Verma submitted a written report in police station Paikoliya, District Basti on 9.9.2014 at 20:03 o'clock regarding occurrence dated 31.8.2014 alleging that her daughter Chandrakanti was married to RamSuresh s/o Chhotelal five years earlier. He had given dowry as per his status but her daughter's husband and his family member were not satisfied with the dowry and they used to harass his daughter to obtain golden chain and motorcycle. Her daughter had told him about the dowry demand made by her husband, mother-in-law, father-in-law and devars. Due to non-fulfilment of their demand for additional dowry, on 31.8.2014 her husband Ramsuresh, her father-in-law Chhotelal and mother-in-law Mewati Devi and Devar Umesh and Gopal sprinkled kerosene oil on the Chandrakali and brutally burned her. Due to the burn injury she died on 1.9.2014 at about 8 p.m. in Dr. Shyama Prasad Mukharji Hospital, Lucknow, and on receiving information the informant visited the hospital and to participated in postmortem and cremation ceremony of his daughter. He lodged an FIR on 9.9.2014.

6. Before examining the merits of the present case, the ambit, scope and power of

the Sessions Court as well as the High Court u/s 397 Cr.P.C. should be discussed and ascertained.

7. The Hon'ble Apex Court in *Amit Kapoor Vs. Ramesh Chander and Another, (2012) 9 SCC 460* in paragraph nos. 12 and 13 of its judgement has narrated the ambit and scope of revision by the High Court u/s 397 Cr.P.C. which are as follows :

12. Section 397 of the Code vests the court with the power to call for and examine the records of an inferior court for the purposes of satisfying itself as to the legality and regularity of any proceedings or order made in a case. The object of this provision is to set right a patent defect or an error of jurisdiction or law. There has to be a well-founded error and it may not be appropriate for the court to scrutinise 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 CrPC.

10. In paragraph nos. 17 and 19 of the aforesaid judgement, the Apex Court has narrated that before framing a charge, what documents should be considered by the trial court. It has also provided about the extent of evidence required for framing of a charge. In paragraph no. 20 of the aforesaid judgement, the Apex Court has compared the power and extent of jurisdiction of the High Court u/s 397 Cr.P.C. which is given hereunder: :

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 aliquid alicui concedit, concedere videtur id sine quo res ipsa esse non potest 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.

8. After comprehensive survey and discussion of the judgements of the Hon'ble Supreme Court has mentioned the factors to be considered by the trial court while disposing of application u/s 227 Cr.P.C. and framing charge u/s 228 Cr.P.C. The Apex Court in **Amit Kapoor (supra)** has given following directions :

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

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

27.9. Another very significant caution that the courts have to observe is that it cannot examine the facts, evidence

and materials on record to determine whether there is sufficient material on the basis of which the case would end in a conviction; the court is concerned primarily with the allegations taken as a whole whether they will constitute an offence and, if so, is it an abuse of the process of court leading to injustice.

27.10. *It is neither necessary nor is the court called upon to hold a full-fledged enquiry or to appreciate evidence collected by the investigating agencies to find out whether it is a case of acquittal or conviction.*

27.11. *Where allegations give rise to a civil claim and also amount to an offence, merely because a civil claim is maintainable, does not mean that a criminal complaint cannot be maintained.*

27.12. *In exercise of its jurisdiction under Section 228 and/or under Section 482, the Court cannot take into consideration external materials given by an accused for reaching the conclusion that no offence was disclosed or that there was possibility of his acquittal. The Court has to consider the record and documents annexed therewith by the prosecution.*

9. The statutory provisions to be considered in the case with a view to framing of charge or discharging the accused as given in Sections 226, 227 and 228 Cr.P.C. has been laid down by the Hon'ble Supreme Court in the case of **Ghulam Hassan Beigh Vs. Mohammad Maqbool Magrey & Ors.** in S.L.P. (Crl.) No. 4599 of 2021 :

15. Section 226 of the CrPC corresponds to sub-section (1) of the old

Section 286 with verbal changes owing to the abolition of the jury. Section 286 of the 1898 Code reads as under:-

“286.(1) In a case triable by jury, when the jurors have been in chosen or, in any other case, when the Judge is ready to hear the case, the prosecutor shall open his case by reading from the Indian Penal or other law the description of the offence charged, and stating shortly by what evidence he expects to prove the guilt of the accused. (2) The prosecutor shall then examine his witnesses.”

Section 226 of the 1973 Code reads thus:

“226. Opening case for prosecution.— When the accused appears or is brought before the Court in pursuance of a commitment of the case under section 209, the prosecutor shall open his case by describing the charge brought against the accused and stating by what evidence he proposes to prove the guilt of the accused.”

Section 226 of the CrPC permits the prosecution to make the first impression regards a case, one which might be difficult to dispel. In not insisting upon its right under Section 226 of the CrPC, the prosecution would be doing itself a disfavour. If the accused is to contend that the case against him has not been explained owing to the non-compliance with Section 226 of the CrPC, the answer would be that the Section 173(2) of the CrPC report in the case would give a fair idea thereof, and that the stage of framing of charges under Section 228 of the CrPC is reached after crossing the stage of Section 227 of the CrPC, which affords both the prosecution and accused a fair

opportunity to put forward their rival contentions.

16. Section 227 of the CrPC reads thus:

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

17. Section 228 of the CrPC reads thus:

“228. Framing of charge.- (1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which-

(a) is not exclusively triable by the Court of Session, he may frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate, or any other Judicial Magistrate of the first class and direct the accused to appear before the Chief Judicial Magistrate, or as the case may be, the Judicial Magistrate of the first class, on such date as he deems fit, and thereupon such Magistrate shall try the offence in accordance with the procedure for the trial of warrant cases instituted on a police report;

(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.

(2) Where the Judge frames any charge under clause (b) of sub-section (1),

the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried.”

10. While framing charge, the Court has to ensure that a prima facie case must be made out against the accused. The Hon'ble Apex Court in ***Union of India Vs. Prafulla Kumar Samal and another, (1979) 3 SCC 4***, considered the scope of enquiry a judge is required to make while considering the question of framing of charges. After an exhaustive survey of the case law on the point, in paragraph no. 10 of the judgement, has laid down the following principles :

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

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

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

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

11. The Hon'ble Apex Court in paragraph nos. 15 and 23 of its judgement in **Dipakbhai Jagdishchandra Patel Vs. State of Gujarat, (2019) 16 SCC 547**, has elaborately discussed the law relating to the framing of charge and discharge of the accused which is as under :

15. We may profitably, in this regard, refer to the judgment of this Court in **State of Bihar v. Ramesh Singh [State of Bihar v. Ramesh Singh, (1977) 4 SCC 39 : 1977 SCC (Cri) 533 : AIR 1977 SC 2018]** wherein this Court has laid down the principles relating to framing of charge and discharge as follows: (SCC pp. 41-42, para 4)

“4. ... Reading Sections 227 and 228 together in juxtaposition, as they have got to be, it would be clear that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and

weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Section 227 or Section 228 of the Code. At that stage the court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the court should proceed with the trial or not. If the evidence which the prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. ... If the scales of pan as to the guilt or innocence of the accused are something like even, at the conclusion of the trial, then, on the theory of benefit of doubt the case is to end in his acquittal.

But if, on the other hand, it is so at the initial stage of making an order under Section 227 or Section 228, then in such a situation ordinarily and generally the order which will have to be made will be one under Section 228 and not under Section 227.”

23. At the stage of framing the charge in accordance with the principles which have been laid down by this Court, what the court is expected to do is, it does not act as a mere post office. The court must indeed sift the material before it. The material to be sifted would be the material which is produced and relied upon by the prosecution. The sifting is not to be meticulous in the sense that the court dons the mantle of the trial Judge hearing arguments after the entire evidence has been adduced after a full-fledged trial and the question is not whether the prosecution has made out the case for the conviction of the accused. All that is required is, the court must be satisfied that with the materials available, a case is made out for the accused to stand trial. A strong suspicion suffices. However, a strong suspicion must be founded on some material. The material must be such as can be translated into evidence at the stage of trial. The strong suspicion cannot be the pure subjective satisfaction based on the moral notions of the Judge that here is a case where it is possible that the accused has committed the offence. Strong suspicion must be the suspicion which is premised on some material which commends itself to the court as sufficient to entertain the prima facie view that the accused has committed the offence.

12. In *Sajjan Kumar Vs. C.B.I.*, (2010) 9 SCC 368, the Hon'ble Apex Court after elaborately discussing the scope

29 of Sections 227 and 228 Cr.P.C. has laid down principles which emerge therefrom in paragraph no. 21 which is as under :

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

(i) The Judge while considering the question of framing the charges under Section 227 CrPC has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case.

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

(iii) The court cannot act merely as a post office or a mouthpiece of the 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.

(iv) If on the basis of the material on record, the court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.

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

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

(vii) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal.

13. In the case of **State of Karnataka Vs. M.R. Hiremath**, (2019) 7 SCC 515, the Hon'ble Apex Court has laid down principles to be considered by the Magistrate while dealing with discharge application of the accused u/s 239 Cr.P.C. in warrant trial case. The directions given by the Apex Court is equally applicable to the discharge of accused u/s 227 Cr.P.C.

14. In paragraph no. 25 of **Ghulam Hassan Beigh (supra)**, the Apex Court held as under :

25. In the case of **Asim Shariff v. National Investigation Agency**, (2019) 7 SCC 148, this Court, to which one of us (A.M. Khanwilkar, J.) was a party, in so many words has expressed that the trial court is not expected or supposed to hold a mini trial for the purpose of marshalling the evidence on record. We quote the relevant observations as under:-

“18. Taking note of the exposition of law on the subject laid down by this Court, it is settled that the Judge while considering the question of framing charge under Section 227 CrPC in sessions cases(which is akin to Section 239 CrPC pertaining to warrant cases) has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out; where the material placed before the Court discloses grave suspicion against the accused which has not been properly explained, the Court will be fully justified in framing the charge; by and large if two views are possible and one of them giving rise to suspicion only, as distinguished from grave suspicion against the accused, 3 2018(13) SCC 455 4 2019(6) SCALE 794 the trial Judge will be justified in discharging him. It is thus clear that while examining the discharge application filed under Section 227 CrPC, it is expected from the trial Judge to exercise its judicial mind to determine as to whether a case for trial has been made out or not. It is true that in such proceedings, the Court is not supposed to hold a mini trial by marshalling the evidence on record.

15. In paragraph nos. 28, 29 and 30 of the judgement in **Amit Kapoor (supra)**,

the Hon'ble Supreme Court has held as hereunder :

28. *At this stage, we may also notice that the principle stated by this Court in Madhavrao Jiwajirao Scindia[(1988) 1 SCC 692 : 1988 SCC (Cri) 234] was reconsidered and explained in two subsequent judgments of this Court in State of Bihar v. P.P. Sharma [1992 Supp (1) SCC 222 : 1992 SCC (Cri) 192 : AIR 1991 SC 1260] and M.N. Damani v. S.K. Sinha [(2001) 5 SCC 156 : 2001 SCC (Cri) 823 : AIR 2001 SC 2037] . In the subsequent judgment, the Court held that, that judgment did not declare a law of universal application and what was the principle relating to disputes involving cases of a predominantly civil nature with or without criminal intent.*

29. *In the light of the above principles, now if we examine the findings recorded by the High Court, then it is evident that what weighed with the High Court was that firstly it was an abuse of the process of court and, secondly, it was a case of civil nature and that the facts, as stated, would not constitute an offence under Section 306 read with Section 107 IPC. Interestingly and as is evident from the findings recorded by the High Court reproduced supra that “this aspect of the matter will get unravelled only after a full-fledged trial”, once the High Court itself was of the opinion that clear facts and correctness of the allegations made can be examined only upon full trial, where was the need for the Court to quash the charge under Section 306 at that stage. Framing of charge is a kind of tentative view that the trial court forms in terms of Section 228 which is subject to final culmination of the proceedings.*

30. *We have already noticed that the legislature in its wisdom has used the expression “there is ground for presuming that the accused has committed an offence”. This has an inbuilt element of presumption once the ingredients of an offence with reference to the allegations made are satisfied, the Court would not doubt the case of the prosecution unduly and extend its jurisdiction to quash the charge in haste. A Bench of this Court in State of Maharashtra v. Som Nath Thapa [(1996) 4 SCC 659 : 1996 SCC (Cri) 820] referred to the meaning of the word “presume” while relying upon Black's Law Dictionary. It was defined to mean “to believe or accept upon probable evidence”; “to take as proved until evidence to the contrary is forthcoming”. In other words, the truth of the matter has to come out when the prosecution evidence is led, the witnesses are cross-examined by the defence, the incriminating material and evidence is put to the accused in terms of Section 313 of the Code and then the accused is provided an opportunity to lead defence, if any. It is only upon completion of such steps that the trial concludes with the court forming its final opinion and delivering its judgment. Merely because there was a civil transaction between the parties would not by itself alter the status of the allegations constituting the criminal offence.*

16. From the perusal of the trial court records it transpired that on the application of informant the trial court vide order dated 20.5.2019 passed the order for framing the charge under Section 498-A 304-B and Section 3/4 D.P. Act. Against this order the accused filed an Application u/s 482 No. 23601 of 2019 (Ram Suresh Verma And Another Vs. State of U.P. And Another) in

this Court. The High Court vide its order dated 27.6.2019 directed the applicants/accused that since the charges under Sections- 304-B, 498-A and 3/4 of D.P. Act has not yet been framed, they shall submit discharge application before the trial court and the trial shall dispose of the application in accordance with law.

17. In compliance of the order of this Court dated 27.6.2019, the accused filed an application 72 (kha) for discharge from the charge under Sections- 304-B, 498-A and 3/4 of D.P. Act which was disposed of vide order dated 3.9.2019. In the impugned order, the trial court has mentioned that while passing the order dated 20.5.2019 the predecessor of the present judge had not considered the caste certificate, domicile certificate, marriage certificate and date of birth certificate, the inquest report of the deceased, Chandrakanti presuming that the deceased died within seven years of her marriage, the trial court has directed to frame charges against accused Ram Suresh under Sections- 304-B, 498-A and 3/4 of D.P. Act. In the impugned order dated 3.2.2019, the trial court has mentioned that Informant/P.W.1 Mani Ram Verma as well as P.W.-2 Harish Chandra were witness in the inquest report. The Investigating Officer has mentioned that the date of marriage of the deceased in the year 1999 and year of her Vidai ceremony to matrimonial home in 2004,. The deceased has a daughter of six years. The trial court has taken into consideration the caste certificate and domicile certificate of the deceased Chandrakanti which was issued in 2007 and the birth certificate dated 24.10.2008 of her daughter Sneha and the statement of the witnesses recorded under Section 161 CrP.C. to the effect that the deceased Chandrakanti had not conceived any child for sometime after marriage and

therefore, she was under depression and had committed suicide. She did after more than seven years of her marriage to O.P. No.2 and since no presumption under Section 113 B of Indian Evidence Act regarding dowry death can be made and altered the charge and directed that instead of Sections- 304-B, 498-A and 3/4 of D.P. Act. Charge under Sections 498-A, 302 IPC was framed against the accused. In the impugned order the trial court has mentioned that since that P.W. 1 Maniram Verma and P.W. -2 Harish Chandra in their deposition in the Court has stated that accused sprayed kerosene oil on the deceased resulting into her death and other evidence regarding death of the deceased is yet to be recorded. The trial court directed the charge under Section 302 IPC along Section 498-A IPC be framed against the accused. In the impugned order, the trial court has not discussed the statement of other witness recording under Section 161 Cr.P.C. regarding involvement of the accused in commission of murder of the deceased and also not discussed the postmortem report and whether postmortem report supports framing of charge under Section 302 IPC, the postmortem report of the deceased is not on record of the revision petition.

18. From the aforesaid discussion, I am of the considered view the death of the deceased took place after more than seven years of her marriage with the accused RamSuresh and the trial court has rightly dropped the charge under Section 304-B and directed for framing charge under Section 302 IPC and in the impugned, the trial court has given reasons for framing charge under Section 498-A against the accused. Since the trial court has not prima facie considered the statement of the witnesses under Section 161 Cr.P.C. and

the contents of postmortem report regarding death of the deceased and nature of injuries of the deceased given in the postmortem report, the trial court has not given sufficient reason for framing charge under Section 302 IPC.

19. From the above discussion, this Court is of the opinion that the criminal revision should be partially **allowed**. The criminal revision is partially allowed and the portion of the impugned order directing the framing of charge under Section 302 IPC is set aside. The trial court in light of the above discussion shall pass reasoned order observing that apart from Section 498-A, the charge against the accused should be framed under Section 306 IPC or 302 IPC.

20. Since much time has passed from the date of filing of the charge-sheet, the trial shall pass an order for framing of charges within a period of two months in accordance with law from the date of the productions of a certified copy of this order.

(2024) 4 ILRA 944

**REVISIONAL JURISDICTION
CRIMINAL SIDE**

DATED: ALLAHABAD 13.03.2024

BEFORE

THE HON'BLE SURENDRA SINGH - I, J.

Criminal Revision No. 3953 of 2023

Smt. Maya Devi	...Revisionist
Versus	
State of U.P. & Anr.	...Opp. Parties

Counsel for the Revisionist:
Sri Narendra Kumar

Counsel for the Respondents:

G.A., Sri Dev Prakash Sharma, G.A., Ms. Priyanka Devi

Criminal Law - Indian Penal Code, 1860 - 498-A, 323, 504 & 506 - Dowry Prohibition Act, 1961 - Section 3/4 - Code of Criminal Procedure, 1973 - Section 125 - Against maintenance order - From perusal of revisional court record disclosed that revisionist, filed complaint case against opposite party no.2 and his family members -Trial court, summoned opposite party no.2, his father, mother, elder brother, sister-in-law, and younger brother to face trial - Perusal of record further reveals that complaint was filed prior to impugned order - Trial court's finding denying dowry harassment is perverse - Unrebutted evidence of P.W.1 and P.W.2 proves revisionist was expelled from her matrimonial home for non - fulfillment of additional dowry demand - She had just and reasonable cause to live separately - Opposite party no. 2 has neither pleaded nor deposed any special circumstance disabling him from maintaining his wife and daughters, hence, it is inferred that his earnings from manual labour are enough to discharge his legal obligation - On perusal of evidence adduced by both parties, it emerges that revisionist has no independent source of income - P.W.1 and P.W.2 St.d that opposite party no. 2 is engaged as contractor, possesses about 15-16 bighas of agricultural land, and owns two houses - D.W.1 and D.W.2 deposed that opposite party no. 2 is not a contractor but a labourer and agricultural land stands in his father's name, yielding approximately Rs. 60,000/- p.a, on which three persons are dependent - However, neither party produced any documentary evidence substantiating their respective claims regarding earning - Hence, impugned order is erroneous, set aside - Directions accordingly. (Para 11, 12, 18, 19)

Revision allowed. (E-13)

List of Cases cited:

1. Pyla Mutyalamma @ Satyavathi Vs Pyla Suri Demudu & anr., (2011) 12 SCC 189

2. Anju Garg & anr. Vs Deepak Kumar Garg, 2022 SCC Online SC 1314, (Paras 9 to 11)

3. Rajathi Vs C. Ganesan, (1999) 6 SCC 326

4. Rajnesh Vs Neha & anr., (2021) 2 SCC 324

5. Chander Parkash Bodh Raj Vs Shila Rani Chander Prakash: 1968 SCC Online Del 52

6. Kulbhushan Kumar Vs Raj Kumari, (1970) 3 SCC 129

7. Kalyan Dey Chaudhary Vs Rita Dey Chaudhary Nee Nandy, (2017) 14 SCC 200

(Delivered by Hon'ble Surendra Singh - I, J.)

Heard Sri Narendra Kumar, learned counsel for the revisionist and Ms. Priyanka Devi Sharma, learned counsel for the opposite party no. 2.

2. By means of this instant criminal revision instituted u/s 397/401 Cr.P.C., the revisionist has assailed the impugned judgement and order dated 06.05.2023 passed by Principal Judge, Family Court, Mahoba in Case No. 263 of 2021 (Smt. Maya Devi Vs. Sunil @ Balendra) filed u/s 125 Cr.P.C., Police Station- Khanna, District- Mahoba.

3. By the impugned judgement and order, the trial court has rejected the revisionist's application for maintenance filed u/s 125 Cr.P.C.

4. Averment has been made by learned counsel for the revisionist that the trial court has passed the impugned order against the weight of the evidence on record and without application of judicial mind. It has also been submitted that in her matrimonial home, the revisionist was

subjected to physical and mental harassment for coercing her to bring additional dowry from her parents. In this regard, a Panchayat was held between the relatives of the revisionist and opposite party no. 2 about 15 days earlier from filing of the application u/s 125 Cr.P.C. but the opposite party no. 2 did not agree to keep her without fulfilling his demand of aforesaid additional dowry of Rs.1,00,000/- in cash. It has also been submitted that revisionist had instituted a complaint case against opposite party no. 2 and his family members for harassment and demand of dowry in which they were summoned by the trial court under Section 498-A, 323, 504, 506 I.P.C. & Section 3/4 of Dowry Prohibition Act. The revisionist had given oral and documentary evidence in this regard in the trial court but the trial court without considering it, rejected her application u/s 125 Cr.P.C. on the ground that she is staying separately from her husband without any reason and she is not entitled for maintenance.

5. Per contra, averment has been made by learned counsel for the opposite party no. 2 that the trial court has considered the facts of the case and the law applicable thereto and has passed a legal order in which there is no ground for interference. It has next been submitted that since the revisionist is staying separately from her husband without any sufficient reason, her right to maintenance is barred u/s 125 (4) Cr.P.C.

6. Learned counsel for the revisionist and learned counsel for the opposite party no. 2 have been heard. Perused the entire evidence present on the revision and the impugned judgement and order passed by the revisional court.

7. Both the parties have admitted in their pleadings that the revisionist was married to opposite party no. 2 on 09.12.2020 and after marriage, she stayed in her matrimonial home till March, 2021. In between, she visited her parental home for 2-3 times. The revisionist has no children from her marriage with opposite party no. 2. On the issue of the revisionist staying away from her husband in her paternal home, pleading has been made on behalf of the revisionist that in her matrimonial home, her husband and her in-laws used to physically and mentally harass her for bringing Rs.1,00,000/- in cash as additional dowry. When she failed to fulfil their demand for additional dowry after beating, they expelled her from her matrimonial home in March, 2021. Since then, she is living in her paternal home. It has also been pleaded that about 15 days before filing of application u/s 125 Cr.P.C., there was a Panchayat held between the relatives of the revisionist and opposite party no. 2 but the opposite party no. 2 refused to take her back to her matrimonial home unless his demand for additional dowry of Rs.1,00,000/- cash was fulfilled.

8. The revisionist, P.W.1 Smt. Maya Devi and P.W.2 Kiran have corroborated the pleadings through their deposition in this regard. On the issue of revisionist staying away from opposite party no. 2, opposite party no. 2 in his written statement has pleaded that since revisionist is B.A. pass and he is only Class- VIII pass, the revisionist was not prepared to stay with him and left him. The fact that revisionist was staying at her paternal home, he has denied that there was any demand for additional dowry of Rs.1,00,000/- against the revisionist nor she was physically or mentally harassed to compel her to bring aforesaid additional dowry.

9. Learned Family Court Judge in his impugned judgement and order has alluded that the revisionist has not filed any other evidence in support of her averment that she was physically and mentally harassed for bringing additional dowry and ultimately expelled from her matrimonial home on her failure to do so.

10. The Hon'ble Apex Court in the case of **Pyla Mutyalamma @ Satyavathi vs. Pyla Suri Demudu and Another, (2011) 12 SCC 189** has held that in the revision against the order passed under Section 125 Cr.P.C., the revisional Court is not required to enter into re-appreciation of evidence recorded in the order granting maintenance but where finding is a negative one, the High Court would entertain the revision reevaluate the evidence and come to a conclusion whether the finding reached by the Magistrate are legally sustainable or not. In case where the trial Court has rejected the claim of the wife, minor child and aged parents and dismissed their application under Section 125 Cr.P.C. for maintenance, the revisional Court has jurisdiction to consider the finding of facts recorded by the trial Court and come to a different conclusion for it.

11. From the perusal of the record of the revisional court, it is disclosed that the revisionist, Smt. Maya Devi has instituted a Complaint Case No. 3290 of 2022 (Smt. Maya Devi Vs. Sunil @ Balendra and others) against opposite party no. 2 and his family members. In this complaint case, the trial court vide order dated 07.07.2023 has summoned opposite party no. 2, Sunil @ Balendra, his father Daulat Khengar, mother Smt. Jai Devi, elder brother Shailendra Singh, sister-in-law and younger brother for trial u/s 498-A, 323, 504, 506 I.P.C. & Section 3/4 of Dowry Prohibition Act.

12. From the perusal of the complaint case, it transpires that the revisionist had filed the complaint case before passing of the impugned order dated 06.05.2023 by the learned Principal Judge, Family Court. Thus, the finding of trial court that there is no evidence that the revisionist, Smt. Maya Devi was physically and mentally harassed for bringing additional dowry, is perverse and against the evidence on record. The deposition of P.W.1 Smt. Maya Devi and P.W.2 Kiran which is unrebutted by their cross-examination by opposite party no. 2 shows that the revisionist was expelled from her matrimonial home for not being able to fulfil the demand of additional dowry of Rs.1,00,000/- in cash and is since then living with her parents. She has filed the aforesaid complaint case against opposite party no. 2 and her in-laws for harassing her to obtain additional dowry of Rs.1,00,000/- cash. Thus, from the evidence on record, it can be inferred that the revisionist was justified and had reasonable ground to stay away from her husband. The finding of the trial court in this regard being perverse to the evidence on record, cannot be accepted.

13. The Hon'ble Apex Court has held in paragraph no. 9 of the judgement in **Anju Garg and Another Vs. Deepak Kumar Garg**, 2022 SCC Online SC 1314 which is as follows :

9. it may be noted that Section 125 of Cr.P.C. was conceived to ameliorate the agony, anguish and financial suffering of a woman who is required to leave the matrimonial home, so that some suitable arrangements could be made to enable her to sustain herself and the children, as observed by this Court in Bhuwan Mohan Singh v. Meena.

This Court in the said case, after referring to the earlier decisions, has reiterated the principle of law as to how the proceedings under Section 125 Cr.P.C have to be dealt with by the Court. It held as under:

“In Dukhtar Jahan v. Mohd. Farooq [(1987) 1 SCC 624 : 1987 SCC (Cri) 237] the Court opined that : (SCC p. 631, para 16)

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

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

3. “Section 125 of the Code of Criminal Procedure is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing, and shelter to the deserted wife.”

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

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

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

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

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

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

14. The Hon’ble Apex Court in **Rajathi Vs. C. Ganesan, (1999) 6 SCC 326** has held that the words “unable to maintain herself” would mean the means available to the deserted wife while she was living with her husband and would not take within itself the efforts made by the wife after the desertion to survive somehow. Section 125 was enacted on the premise that it is the obligation of the husband to maintain his wife, children and parents. It will, therefore, be for him to show that he has no fresh means to discharge his obligation and he did not neglect or refuse to maintain them or anyone of them. The statement of the wife that she was unable to maintain herself would be enough and it would be for the husband to prove otherwise.

15. The Hon’ble Apex Court in the case of **Rajnesh vs. Neha and Another, (2021) 2 SCC 324** has held that maintenance laws have been enacted as a measure of social justice to provide recourse to dependant wives and children for their financial support, so as to prevent them from falling into destitution and vagrancy. **Article 15(3)** of the Constitution of India provides that:-

“Nothing in this article shall prevent the State from making any special provision for women and children.

Article 15(3) reinforced by Article 39 of the Constitution of India, which envisages a positive role for the State in fostering change towards the empowerment of women, led to the enactment of various legislations from time to time.”

16. In the case of **Chander Parkash Bodh Raj vs. Shila Rani Chander Prakash: 1968 SCC Online Del 52**, the Delhi High Court has held that :

“an able-bodied young man has to be presumed to be capable of earning sufficient money so as to be able to reasonably maintain his wife and child and he cannot be heard to say that he is not in a position to earn enough to be able to maintain them according to the family standard. It is for such able-bodied person to show to the Court cogent grounds for holding that he is unable, for reasons beyond his control, to earn enough to discharge his legal obligation of maintaining his wife and child.”

17. The Hon’ble Apex Court in **Rajesh vs. Neha (supra)** has approved the above law laid down by the Delhi High Court.

18. In the present case, opposite party no. 2 (husband) has not made any averments in his written statement or his deposition, as he, owing to special circumstances, is not able to earn enough to discharge his legal obligation of maintaining his wife as well as his daughters. Therefore, it can be concluded that from the earnings of opposite party no. 2 from doing manual labour, he is earning enough to provide maintenance to his wife and daughters.

19. As from perusal of the evidence of revisionist and opposite party no. 2 regarding the income of the parties, it transpires that whereas the revisionist, P.W.1 Smt. Maya Devi and P.W.2 Kiran have deposed that opposite party no.2, Sunil @ Balendra is engaged in the profession of contractor. He has 15-16 bighas of agricultural land and two houses. They have also deposed that the revisionist has no source of any income and is not earning any money by teaching tuitions or stitching and embroidery. D.W.1 Sunil @

Balendra and D.W.2 have deposed that opposite party no. 2 has no agricultural land in his name but his father has four bighas of agricultural land from which they earn Rs.60,000/- per annum and on which three persons are dependant. They have also deposed that opposite party no. 2 is not a contractor but he works as a labourer. No documentary evidence has been filed by either party on the issue of earning of revisionist or opposite party no. 2.

20. Taking cognizance of prevailing wages in the labour market, even an unskilled labourer earns about Rs.500/- per day, thus it can be concluded that opposite party no.2 may be earning about Rs.12,000/- to 14,000/- per month from his wages. Apart from this, admittedly revisionist along with two other family members, ultimately earns Rs.60,000/- per annum from their agricultural land which is to be divided between three sharers. Thus, the income of the revisionist from agricultural land is about Rs.20,000/- per annum.

21. Therefore, it can be concluded that from manual labour as well as earning from agricultural land, the total income of opposite party no. 2 is Rs.15,000/- per month.

22. The Hon’ble Apex Court in **Kulbhushan Kumar Vs. Raj Kumari, (1970) 3 SCC 129** has held that 25% of the husband’s net salary would be just and proper to be awarded as maintenance allowance to the wife. The amount of permanent alimony awarded to the wife must be befitting the status of the parties and the capacity of the spouse to pay maintenance.

23. In **Kalyan Dey Chaudhary Vs. Rita Dey Chaudhary Nee Nandy, (2017)**

14 SCC 200, the Hon'ble Apex Court has followed the quantum of maintenance fixed by the Hon'ble Apex Court in **Kulbhushan Kumar (supra)** that 25% of net income of the husband should be paid to the wife as maintenance.

24. Following the law laid down by the Hon'ble Apex Court and considering the facts and circumstances of the case, it would be reasonable to fix Rs.3,750/- as monthly maintenance allowance to Smt. Maya Devi, wife of opposite party no. 2.

25. In view of the aforesaid factual and legal aspect, I am of the view that the order impugned dated 06.05.2023 is erroneous and cannot survive in the eyes of law, therefore, I set-aside the impugned order for the aforesaid reasons.

26. Thus, opposite party no.2 shall pay Rs.3,750/- per month as maintenance allowance to his wife, revisionist Smt. Maya Devi from the date of filing of application u/s 125 Cr.P.C. The arrears of maintenance allowance shall be paid by the opposite party no.2 in four equal amounts within a period of six months. The monthly interim maintenance shall be paid regularly till 7th day of each month. The amount of maintenance allowance already paid to the revisionist shall be adjusted in this amount.

27. The present criminal revision is **allowed** in terms of above mentioned conditions.

28. The copy of the order be sent to the trial court concerned forthwith for necessary compliance.

(2024) 4 ILRA 950
REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.03.2024

BEFORE

THE HON'BLE SURENDRA SINGH - I, J.

Criminal Revision No. 3977 of 2022

Smt. Jamuna & Ors. ...Revisionists
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Revisionists:
 Sri Jaysingh Yadav

Counsel for the Opp. Parties:
 G.A., Sri Ved Prakash Ojha

Criminal Law - Code of Criminal Procedure, 1973 - Section 125 - Against maintenance order - From St.ment of P.W.1, it is evident that she was subjected to mental and physical cruelty by her husband and in-laws for not bringing additional dowry and expelled from her matrimonial home, after which she has been residing separately - P.W.2, mother of revisionist No.1, corroborated same, stating that demand was for opening a hotel for husband, and that he has neither maintained his wife nor their daughters - In cross-examination, P.W.2 deposed that revisionist earlier lived in Talabpura on rent and presently resides with her, and that she bears maintenance and educational expenses of her daughter and granddaughters from her income earned by selling vegetables - Trial Court has misinterpreted deposition of P.W.1 regarding her residence with her mother-in-law - From her St.ment, it appears that she earlier resided with her mother-in-law but is now living separately on rent in same village, maintaining herself and her daughters from her own earnings and financial assistance from her mother - Revisionist No.1 is residing separately from her husband for valid reasons - Though P.W.1 and P.W.2 have supported their pleadings regarding profession and income of opposite party No.2, no oral or documentary evidence adduced in this regard - Hence, it cannot be concluded that opposite party No.2 is engaged as

Halwai and earns ₹30,000/- pm - Opposite party No.2 has not St.d in his written St.ment or deposition that, due to any special circumstances, he is unable to maintain his wife and daughters - Hence, it can be concluded that his earnings from manual labour are sufficient to provide maintenance to them - Impugned order is erroneous, set aside - Directions accordingly. (Para 13,15,16,19)

Revision allowed. (E-13)

List of Cases cited:

1. Rajnesh Vs Neha & anr., (2021) 2 SCC 324
2. Pyla Mutyalamma @ Satyavathi Vs Pyla Suri Demudu & anr.: (2011) 12 SCC 189
3. Chander Parkash Vs Shrimati Shila Rani: 1968 SCC Online Del 52

(Delivered by Hon'ble Surendra Singh - I, J.)

By means of the instant criminal revision, revisionists have assailed the judgement and order dated 12.07.2022 passed by Principal Judge, Family Court, Lalitpur in Case No.49 of 2016 (Smt. Jamuna and others vs. Akhlesh), under Section 125 Cr.P.C.

2. By the impugned order, trial Court has rejected the application of the revisionists filed under Section 125 Cr.P.C. on the ground that revisionist no.1 along with her two daughters are residing with her mother-in-law and opposite party No.2 (husband) has given expenses to his wife and two minor children.

3. It has been submitted by the learned counsel for the revisionists that marriage of the revisionist No.1 (Smt. Jamuna) was solemnized with opposite party No.2 (Akhilesh) on 26.06.2007

according to Hindu Rites and Rituals. In the said marriage, parents of the revisionist No.1 had given sufficient dowry according to their capacity. The opposite party No.2 (husband) and in-laws of the revisionist No.1 were not satisfied with the dowry given to them in the marriage and they demanded Rs.1,50,000/-, but on non-fulfilment of the additional dowry, they mentally and physically tortured revisionist no. 1. Out of wedlock of the revisionist No.1 and opposite party No.2, two female children were born, namely, Km. Lali, aged about 12 years and Km. Kiriti, aged about 10 years. After the birth of two female children, husband and in-laws of the revisionist No.1 intensified their harassment for bringing of Rs.1,50,000/- as additional dowry and they also started beating and threatening for divorce. It has also been submitted that opposite party No.2 is a good confectioner and earns Rs.30,000/- per month by taking contract in marriages and other functions. It has also been submitted that revisionist No.1 has claimed Rs.15,000/- per month for herself and Rs.4000/- per month each for her two minor daughters as maintenance allowance.

4. Per contra, learned counsel for the opposite party No.2 has opposed the prayer of the revisionists and submitted that trial court has passed the impugned order on evidence on record and there is no illegality in the impugned order.

5. In the written statement opposite party No.2 (husband) has admitted his marriage with revisionist No.1 and also admitted that two daughters were born out of their wedlock, but he has denied that revisionist No.1 was harassed and pressurised to bring Rs. 1,50,000/- in dowry. Opposite party No.2 also denied that he is confectioner and earns

Rs.30,000/- per month from his professional work. He also admitted that he is a labour and earns Rs.100-150/- per day as remuneration and revisionist No.1 earns about Rs.15,000/- per month from tailoring and embroidery and she is residing along with her two daughters in his house.

6. Heard Sri Jaysingh Yadav, learned counsel for the revisionists, learned A.G.A. for the State and Sri Ved Prakash Ojha, learned counsel for opposite party no.2.

7. Factual matrix of the case, in brief, is that marriage of the revisionist No.1 (Smt. Jamuna) was solemnized with opposite party No.2 (Akhilesh) on 26.06.2007 according to Hindu Rites and Rituals. In the said marriage, parents of the revisionist No.1 had given sufficient dowry according to their capacity. The opposite party No.2 (husband) and in-laws of the revisionist No.1 were not satisfied with the dowry given to them in the marriage and they demanded Rs.1,50,000/-, but on non-fulfilment of the additional dowry, they started torturing revisionist No.1 both mentally and physically. Out of wedlock of the revisionist No.1 and opposite party No.2, two female children were born, namely, Km. Lali and Km. Kiriti. After the birth of two female children, husband and in-law of the revisionist No.1 intensified their harassment for bringing of Rs.1,50,000/- as additional dowry and they also started beating and threatening for divorce. It has also been submitted that opposite party No.2 is a good confectioner and earns Rs.30,000/- per month by taking contract in marriages and other functions.

8. The Hon'ble Apex Court in the case of **Rajnesh vs. Neha and Another, (2021) 2 SCC 324** has held that;

“Maintenance laws have been enacted as a measure of social justice to provide recourse to dependant wives and children for their financial support, so as to prevent them from falling into destitution and vagrancy. Article 15(3) of the Constitution of India provides that:-

“Nothing in this article shall prevent the State from making any special provision for women and children.

Article 15(3) reinforced by Article 39 of the Constitution of India, which envisages a positive role for the State in fostering change towards the empowerment of women, led to the enactment of various legislations from time to time.”

9. The trial Court while recording its finding on the issue no.2 that whether the revisionist No.1 is residing away from her husband due to reasonable cause, trial Court has relied on the averments made in the evidence of P.W.1 (revisionist No.1) that revisionist No.1 residing with her mother-in-law along with her two minor daughters. On this point, trial Court has held :-

“ इस संबंध में प्रार्थिया ने बतौर ए.पी.डब्लू.1 अपने साक्ष्य में कहा है कि वह आज भी अपनी सास के साथ निवास कर रही है तथा उसके बच्चों भी उसकी के साथ रह रहे हैं। मुझे नज़ाई बाजार में रामस्वरूप के यहां से राशन मिलता है। इस प्रकार स्पष्ट है कि ए.पी.डब्लू. 1 ने विपक्षी के द्वारा दाखिल जवाबदावा में इस बात की पुष्टि की है कि “प्रार्थिया आज भी मेरे घर में निवास कर रही है और वहीं उसका खर्चा उठा रहे हैं।” प्रार्थिया अपनी सास के साथ निवास करती है और बच्चे

उसके साथ निवास करते हैं। इस बात को ना केवल ए.पी.डब्लू. 1 ने स्वीकार किया है। बल्कि, ओ.पी.डब्लू. 1 व 2 ने इस बात को अपनी प्रतिपरीक्षा में कहा है। ओ.पी.डब्लू. 1 व 2 से की गयी प्रतिपरीक्षा में कोई भी ऐसा प्रश्न उभर नहीं आया। जिससे इस बात की पुष्टि हो कि प्रार्थिया आज की तिथि में अपने बच्चों सहित ससुराल में सास के साथ निवास ना कर रही हो। उपरोक्त से स्पष्ट है कि प्रार्थिया पृथक निवास नहीं कर रही है। ”

10. The Hon'ble Apex Court in the case of **Pyla Mutyalamma @ Satyavathi vs. Pyla Suri Demudu and Another:** (2011) 12 SCC 189 has held that in the revision against the order passed under Section 125 Cr.P.C., the revisional Court is not required to enter into reappreciation of evidence recorded in the order granting maintenance. But where finding is a negative one, the High Court would entertain the revision reevaluate the evidence and come to a conclusion whether the finding reached by the Magistrate are legally sustainable or not. In case where the trial Court has rejected the claim of the wife, minor child and aged parents and dismissed their application under Section 125 Cr.P.C. for maintenance, the revisional Court has jurisdiction to consider the finding of facts recorded by the trial Court and come to a different conclusion for it.

11. Revisionist No.1 in her application under Section 125 Cr.P.C. has made averments that in her matrimonial home, her husband (opposite party No.2) and in-laws used to physically and mentally harass her for obtaining Rs.1,50,000/- as dowry so that her husband could establish

his own hotel. She also deposed in her evidence that as she could not bring the additional dowry of Rs.1,50,000/- from her parents, the husband as well as in-laws were annoyed with her and started harassing her as well as her children by not providing sufficient food and cloths to them. She also deposed that her husband-opposite party No.2 solemnized marriage with one Shivani, D/o Ram Niswas and he has abandoned his child and he also threatened the revisionist-Smt. Jamuna for divorce. She also deposed that opposite party No.2 filed an application for divorce, which was dismissed.

12. P.W.1-Smt. Jamuna in her cross-examination stated that she was not residing with her in-laws and she is living separately in Talabpura on rent. She also stated that her daughters are studying in school and she bears the expenses of her daughters from the money given by her mother as well as her own earnings while doing domestic work. She has specifically stated that on 31.12.2015, her husband expelled her from his house.

13. From the perusal of the statement of P.W.1-Smt. Jamuna, it appears that her husband and in-laws used to physically or mentally harass her as she failed to bring additional dowry of Rs.1,50,000/- and her husband/opposite party No.2 expelled her from his house on 31.12.2015 and thereafter, she is residing separately. P.W.2-Gaurabai (mother of the revisionist No.1) has corroborated the statement of P.W.1 with the averments that due to failure of her daughter to bring additional dowry of Rs.1,50,000/- from her parents for opening a hotel for her husband, she was expelled from the house of her husband and her husband has not provided maintenance to his wife and daughters. P.W.2 in her

cross-examination has deposed that her daughter earlier used to reside in Talabpura on rent and currently she is residing with her and she bears the expenses of maintenance of her daughters as well her grand daughters for education from her earnings by selling vegetables.

14. For careful perusal of the statement of witnesses and both the parties, it appears that Smt. Jamuna/revisionist No.1 was physically or mentally harassed for additional dowry and she was expelled from her matrimonial house in the year 2015 and she is living separately and bears the expenses of livelihood and her daughters as well as their educational expenses by the money given by her mother as well as her own meagre earnings from domestic work.

15. The trial Court has misinterpreted the deposition of P.W.1 that she is still living with her mother-in-law. From the perusal of the statement of P.W.1, it appears that earlier she used to live with her mother-in-law and later on, she is living separately on the rent in the same village and she bears the expenses of herself as well as her daughters from own earnings as well as money provided by her mother.

16. From the aforesaid discussion, it appears that due to sufficient reason revisionist No.1 is residing away from his husband. Through their deposition, P.W.1-Smt. Jamuna and P.W.2 Gaurabai have corroborated their pleadings regarding the profession and earnings of opposite party No.2 (husband), but they have not produced any oral or documentary evidences in support of their arguments. Under these facts and circumstances of the case, it cannot be concluded that opposite party No.2 is engaged in the profession of

Halwai (sweet maker) and earns Rs.30,000/- per month.

17. In the case of **Chander Parkash vs. Shrimati Shila Rani: 1968 SCC Online Del 52**, the Delhi High Court has held:

“an able-bodied young man has to be presumed to be capable of earning sufficient money so as to be able to reasonably maintain his wife and child and he cannot be heard to say that he is not in a position to earn enough to be able to maintain them according to the family standard. It is for such able-bodied person to show to the Court cogent grounds for holding that he is unable, for reasons beyond his control, to earn enough to discharge his legal obligation of maintaining his wife and child.”

18. The Hon'ble Apex Court in **Rajnish vs. Neha (supra)** has approved the above law laid down by the Delhi High Court.

19. In the present case, opposite party No.2 (husband) has not made any averments in his written statement or his deposition, as he, owing to special circumstances, he is not able to earn enough to discharge his legal obligation of maintaining his wife and two daughters. Therefore, it can be concluded that from the earnings of opposite party No.2 from doing manual labour, is earning enough to provide maintenance to his wife and daughters.

20. Taking cognizance of prevailing wages in the labour market, even an unskilled labourer earns about Rs.500/- per day, thus it can be concluded that opposite party No. 2 may be earning about

Rs.12,000/- to 14,000/- per month from his wages. Apart from his wife, two daughters who are aged about 12 years and 10 years presently are also to be provided maintenance, therefore, opposite party No.2 shall provide 1/3rd of his monthly income as maintenance to his wife and two daughters. Hence, it is justified from the evidence on record that the opposite party No.2 be directed to provide Rs.2000/- per month to his wife (revisionist No.1) and Rs.1,000/- per month each to his daughters (revisionist Nos.2 and 3), total Rs.4000/- per month as maintenance allowance from the date of filing of application under Section 125 Cr.P.C. as has been mandated by the Hon'ble Supreme Court in the case of **Rajnish vs. Neha (supra)**.

21. In view of the aforesaid factual and legal aspect, I am of the view that the order impugned dated 12.07.2022 is erroneous and cannot survive in the eyes of law, therefore, I set-aside the impugned order for the aforesaid reasons.

22. It is provided that revisionist No.1 will be entitled for Rs.2,000/- per month as maintenance allowance till her remarriage along with Rs.1000/- per month to revisionist Nos.2 and 3 (minor daughter of the opposite party No.2) each till they attain the age of majority.

23. Thus, opposite party No.2 shall be bound to provide maintenance allowance @ of Rs.2000/- per month to his wife (revisionist No.1) until her remarriage and Rs.1000/-each for his minor daughters (revisionist Nos.2 and 3) till they attain the age of majority, total Rs.4,000/- per month shall be given to the revisionists from the date of application. The arrears of maintenance allowance shall be paid by the opposite party No.2 in four equal amounts

at the gap of four months. The monthly interim maintenance shall be paid regularly till 7th day of each month. The amount of maintenance allowance already paid shall be adjusted against this amount.

24. The present criminal revision is **allowed** in terms of above mentioned conditions.

25. The copy of the order be sent to the trial Court concerned forthwith for necessary compliance.

(2024) 4 ILRA 955

**REVISIONAL JURISDICTION
CRIMINAL SIDE**

DATED: ALLAHABAD 13.03.2024

BEFORE

THE HON'BLE SURENDRA SINGH - I, J.

Criminal Revision No. 4133 of 2022

Tulsi Ram

...Revisionist

Versus

State of U.P. & Ors.

...Opp. Parties

Counsel for the Revisionist:

Sri Sachida Nand Tripathi

Counsel for the Opp. Parties:

Sri Awadhesh Kumar Yadav, G.A.

Criminal Law - Code of Criminal Procedure, 1973 - Sections 245, 397 & 401 - Indian Penal Code, 1860 - Sections 419, 420, 467, 468 & 471 - U.P. Consolidation of Holdings Act, 1953 - Section 9 - Revisionist challenged order dated 02.08.2022 discharging accused under Section 245 Cr.P.C. in a complaint case alleging forgery of a will dated 15.01.1995. Court held: (1) Trial court's discharge of accused (opposite party nos. 2 and 3, marginal witness and writer of the will) was justified, as complainant's evidence under Section 244 Cr.P.C. failed to establish a prima facie case under Sections 419, 420, 467,

468, 471 I.P.C. (Amit Kapoor Vs Ramesh Chander, (2012) 9 SCC 460). (2) The disputed will, upheld by consolidation authorities and not declared invalid by a civil court, could not form the basis for criminal proceedings for forgery until its validity was adjudicated by a competent civil court. (3) Consolidation court's order, remitted by High Court for fresh consideration, upheld the will's validity, and complainant's oral evidence (himself and one witness) did not raise doubts about the will's authenticity. (4) Revisional court's jurisdiction under Sections 397/401 Cr.P.C. is limited to examining legality, propriety, or correctness of the trial court's order, not re-evaluating evidence; no illegality, irregularity, or jurisdictional error was found in the discharge order. Impugned order upheld; revision dismissed. (Paras 9-15)

Criminal Revision Dismissed.

List of Cases cited:

1. Amit Kapoor Vs Ramesh Chander, (2012) 9 SCC 460 (Para 9)

(Delivered by Hon'ble Surendra Singh - I, J.)

Heard Sri Sachida Nand Tripathi, learned counsel for the revisionist and Sri Awadhesh Kumar Yadav, learned counsel for the opposite party nos. 2 and 3.

2. By means of this instant criminal revision instituted u/s 397/401 Cr.P.C., the revisionist has assailed the impugned judgement and order dated 02.08.2022 passed by Civil Judge (Junior Division)/ Judicial Magistrate, Basi, Siddharth Nagar in Complaint Case No. 258 of 2005 u/s 245 Cr.P.C. (Tulsi Ram Vs. Indramati and others).

3. By the impugned judgement and order, the trial court has allowed the discharge application filed by the accused u/s 245 Cr.P.C.

4. Averment has been made by learned counsel for the revisionist that the

trial court has discharged the accused vide impugned judgement and order without considering the evidence on record. It has been next submitted that complainant had examined the witnesses u/s 244 Cr.P.C. and produced the documentary evidence. There was sufficient reason to frame charge against the accused u/s 419, 420, 467, 468, 471 I.P.C. but the trial court without applying its judicial mind to the evidence on record has illegally discharged the accused u/s 245 Cr.P.C. It has also been submitted that the trial court by the impugned judgement and order, discharged the accused of the offence u/s 419, 420, 467, 468, 471 I.P.C. on the ground that case u/s 9 of U.P. Consolidation of Holding Act was allowed in favour of the accused and the same is sub-judice before the S.O.C. whereas the judgement of the Consolidation Court has no impact on the criminal proceedings. From the evidence produced by the complainant, prima facie offence u/s 419, 420, 467, 468, 471 I.P.C. is made out against the accused, namely, Indramati wife of Phool Ram, Krishna Ram and Krishna Mohan, sons of Ram Ujagir, and Sabhapati Shukla son of Vansh Raj. Therefore, it is requested that the impugned judgement and order be set-aside and the trial court be directed to proceed against the accused after framing of charge against them.

5. Per contra, learned counsel for the opposite party nos. 2 and 3, Krishna Mohan and Sabhapati, has submitted that the trial court vide order dated 13.04.2011 had illegally summoned them u/s 419, 420, 467, 468, 471 I.P.C. for trial whereas there is no evidence against them. It has also been submitted that the opposite party nos. 2 and 3 are merely the marginal witnesses and writer of the will deed respectively. The main accused, Indramati and Krishna Ram

have died. The trial court vide order dated 02.08.2022 has rightly and legally allowed the application u/s 245 (2) Cr.P.C. and discharged opposite party nos. 2 and 3 of the charge. There is no illegality or infirmity in the impugned order and there is no ground to interfere with the same.

6. Learned counsel for the revisionist and learned counsel for the opposite party nos. 2 and 3 have been heard. Perused the entire evidence present on the revision and the impugned order passed by the revisional court.

7. The complainant Tulsi Ram alleging that Ram Ujagir had four sons, namely, Tulsi Ram (complainant), Krishna Ram, Krishna Mohan and Phool Ram. Phool Ram had died earlier and his wife Indramati and son Vashistha were his legal heirs. After death of Ram Ujagir, his four legal heirs, Tulsi Ram, Krishna Ram, Krishna Mohan and Vashistha each inherited 1/4-1/4 part of his property through succession. The father of the complainant, Ram Ujagir had in his lifetime executed sale deed of 1/4th of his agricultural land, namely, plot no. 107 situated in village- Vakainiya in the year 1985 in the favour of Mohd. Hanif and remaining 3/4th in favour of Krishna Mohan, Krishna Ram and Vashistha. In the year 1988, Krishna Ram and Vashistha executed sale deed of their share of land in favour of Sai Mohammed etc. Krishna Mohan and Vashistha executed sale deed of 1/5th of plot no. 109 (Gata No. 179/0.205 aer) in village- Mahua in favour of Om Prakash Pandey on 12.08.1999. On 07.07.1999, Krishna Mohan, Krishna Ram and Vashistha executed their share of land in plot nos. 142 and 113 in favour of Dal Singar, resident of village- Mahua. Vashistha executed sale deed of his share in six plots area 1/4th of 2.347 aer and 1/2 of

plot no. 4 min jumla and plot no. 206 min jumla 2 bighas 17 biswa and 13½ dhoor in favour of complaint Tulsi Ram on 16.10.1999. Mutation has been done in favour of the revisionist. The accused Indramati, wife of Phool Ram, with fraudulent intention prepared a forged unregistered will dated 15.01.1995 of Ram Ujagir. Accused, Indramati wife of Phool Ram in order to deceive the complainant, Tulsi Ram, fraudulently executed a forged unregistered will dated 15.01.1995 with forged signature of Ram Ujagir. In the aforesaid will, Krishna Mohan and Krishna Ram (since deceased) are the marginal witnesses and opposite party no. 3, Sabhapati Shukla, is the writer of the sale deed. The complainant had given information about the alleged offence to concerned police station but no action was taken. Then, he sent his application to Superintendent of Police, Siddharth Nagar by registered post. On the basis of complaint of Tulsi Ram and his statement u/s 200 Cr.P.C. and that of his witnesses u/s 202 Cr.P.C. and other documentary evidence on record, the trial court vide order dated 13.04.2011 summoned accused Indramati, Krishna Mohan and Sabhapati for trial u/s 419, 420, 467, 468, 471 I.P.C. The complainant, Tulsi Ram had filed information received under R.T.I. Act to the effect that the Case No. 36/41/20, Indramati Vs. Ram Ujagir relating to village- Mahua, Tappa Khesraha, Pargana and Tehsil- Bansi, Siddharth Nagar, is pending.

8. The trial court has given following reasons for allowing the discharge application of opposite party nos. 2 and 3 :-

इस परिवाद के सम्बन्ध में थाना खेसरहा की आख्या संलग्न पत्रावली है, जिसमें

तुलसीराम पाण्डेय, इन्द्रमती के नाम से फर्जी वसीयत की जाँच के सम्बन्ध में एक वाद डी०डी० चकबन्दी न्यायालय सिद्धार्थनगर में वसीयतनामा निरस्तीकरण का मुकदमा किया है। जिसमें न्यायालय द्वारा उक्त वसीयतनामा को विधि पूर्ण माना गया है, जिसके विरुद्ध परिवादी माननीय उच्च न्यायालय इलाहाबाद में याचिका दाखिल किया। माननीय उच्च न्यायालय द्वारा चकबन्दी अधिकारी को पुनः गुण दोष के आधार पर मुकदमा को निस्तारित किये जाने का निर्देश दिया गया। जिसके अनुपालन में चकबन्दी अधिकारी बांसी ने दिनांक 13/1/20 को यह निर्णय पारित किया गया कि तुलसीराम द्वारा प्रस्तुत प्रार्थना पत्र/ आपत्ति निस्तारित किया जाता है और ग्राम महुआ, तप्पा- खेसरहा पर परगना बांसी, तहसील बांसी जिला सिद्धार्थनगर को जोत चकबन्दी आकार पत्र- 23 भाग 1 के चक संख्या- 104, 105, 106, 109, 111, 112, 113, 114, 119, व 127 से रामउजागिर पुत्र रामअचल का नाम खारिज होकर वसीयतनामा दिनांकित 15/1/95 के आधार पर इन्द्रमती बेवा फूलराम, कृष्णराम, कृष्णमोहन, तुलसीराम पुत्रगण रामउजागिर का नाम दर्ज हो।

उपरोक्त आदेश गुण दोष पर विश्लेषण करने के उपरान्त पारित किया गया है। अतः इस पर सन्देह नहीं किया जा सकता है। इसके पूर्व तहसीलदार बांसी द्वारा दिनांक 15/2/2000 को उक्त वसीयतनामा के आधार पर वरासत का आदेश किया गया है।

परिवादी धारा 244 दण्ड प्रक्रिया संहिता के अन्तर्गत परीक्षित साक्षीगण अनिल

कुमार का बयान कराया गया है, इसके अतिरिक्त किसी अन्य स्वतन्त्र गवाह एवं अन्य अभिलेखीय साक्ष्य उक्त वसीयतनामा को फर्जी साबित करने के लिये दाखिल नहीं किया गया है।

पत्रावली पर उपलब्ध दस्तावेजों के परिशीलन से यह स्पष्ट होता है कि प्रश्नगत वसीयतनामा एक प्रमाणित दस्तावेज है, जिसके आधार पर अभियुक्त / अंशधारकों का स्वत्व द्वारा हिस्सा प्राप्त हो चुका है। अतः ऐसी स्थिति में अभियुक्तों को उन्मोचित किये जाने का आधार है। चूँकि अभियुक्तगण 1 ता 2 की मृत्यु पहले हो चुकी है। अतः अभियुक्तगण संख्या 3 व 4 को धारा 419, 420, 467, 468, 471 भा०द०सं० के आरोप से अवमुक्त किये जाने योग्य है।

9. In paragraph no. 20 of the judgement in **Amit Kapoor Vs. Ramesh Chander and Another, (2012) 9 SCC 460**, the Hon'ble Apex Court has compared the power and extent of jurisdiction of the High Court u/s 397 Cr.P.C. which is given hereunder :

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 aliquid alicui concedit, concedere videtur id sine quo res ipsa esse non potest 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.

10. After comprehensive survey and discussion of the judgement of the Hon'ble Supreme Court and the factors to be considered by the trial court while disposing of application u/s 227 Cr.P.C. and framing charge u/s 228 Cr.P.C., the Apex Court in **Amit Kapoor (supra)** has given following directions :

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

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

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

27.10. It is neither necessary nor is the court called upon to hold a full-fledged enquiry or to appreciate evidence collected by the investigating agencies to find out whether it is a case of acquittal or conviction.

27.11. Where allegations give rise to a civil claim and also amount to an offence, merely because a civil claim is maintainable, does not mean that a criminal complaint cannot be maintained.

27.12. In exercise of its jurisdiction under Section 228 and/or under Section 482, the Court cannot take into consideration external materials given by an accused for reaching the conclusion that no offence was disclosed or that there was possibility of his acquittal. The Court has to consider the record and documents annexed therewith by the prosecution.

11. From the aforesaid pronouncement of the Hon'ble Apex Court regarding jurisdiction of criminal revision, it is clear that jurisdiction of revisional court is not wide and comprehensive as that of appellate court. In criminal revision, the revisional court cannot re-evaluate the factual aspect of the finding recorded by the trial court. The revisional court has only to see whether by passing the impugned order, the trial court has committed any illegality, irregularity, jurisdictional error or any impropriety.

12. From the perusal of the evidence available on the record of criminal revision, it transpires that the deceased testator, Ram Ujagir had 4 sons, namely, Tulsi Ram (complainant), Krishna Ram, Krishna Mohan and Phool Ram. Phool Ram died earlier leaving behind his wife, Indramati and his son, Vashistha. By the disputed will dated 15.01.1995, Ram Ujagir gave 1/4th share of his property to Indramati who is widow of his deceased son Phool Ram. The revisionist, Tulsi Ram, Krishna Mohan, Krishna Ram and Indramati are the legal heirs of deceased Ram Ujagir. Only 1/4th share of the property of Ram Ujagir has been given to Indramati through the will.

13. It has been contended on behalf of opposite party nos. 2 and 3 that since Vashistha, son of deceased Phool Ram, is mentally retarded, therefore, Ram Ujagir by his will dated 15.01.1995 has given 1/4th share of his property in favour of Indramati, wife of Phool Ram. Mutation has been done by the Consolidation Officer in favour of the legatees in the revenue record on the basis of the will. The appeal filed against the aforesaid order of the court of Consolidation Officer has been dismissed. The complainant Tulsi Ram has filed a writ against the aforesaid order of the S.O.C. in the Allahabad High Court which has remitted the matter to the consolidation authorities for passing a fresh order after giving both parties opportunity of hearing and filing evidence. After remand of the case, the Consolidation Officer, Bansi has again passed order on the basis of the will dated 15.01.1995. The trial court has also mentioned in the impugned order that the revisionist has not filed any other documentary evidence. The complainant has filed u/s 244 Cr.P.C. oral evidence of himself as well as witness, Anil Kumar. From their evidence, no doubt is raised about the validity of the will.

14. From the evidence on record as well as perusal of the impugned order, it transpires that the disputed will dated 15.01.1995 was assailed by the revisionist/complainant before consolidation authorities as well before the High Court but so far no adverse finding has been recorded against the will. Apart from this, the validity of the disputed will can be decided only by the civil court and so far it has not been declared invalid by the civil court. It is well settled law that unless validity of a document is not assailed by a competent court, criminal proceeding on the basis of that document for forgery, cannot proceed.

15. Considering the facts and circumstances of the case and the law laid down by the Hon'ble Apex Court in the aforesaid case regarding continuance of criminal case before finding by competent court regarding validity of the disputed will, I do not find any illegality, irregularity, jurisdictional error or impropriety in the impugned order passed by the trial court. There is no merit in the criminal revision and the same is liable to be dismissed.

16. Accordingly, the criminal revision is **dismissed**.

17. Let a copy of this order be sent to the concerned trial court for necessary action.

(2024) 4 ILRA 960

REVISIONAL JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 04.04.2024

BEFORE

THE HON'BLE SURENDRA SINGH-I, J.

Criminal Revision No. 5133 of 2023

Ashish Jaiswal

...Revisionist

Versus

State of U.P. & Ors.

...Opp. Parties

Counsel for the Revisionist:

Sri Jainendra Kumar Mishra

Counsel for the Opp. Parties:

G.A., Sri Vijai Prakash Yadav

Criminal Law - Code of Criminal Procedure, 1973 - Section 125 - Against maintenance allowance - Revisionist contended that opposite party no.2, voluntarily residing away from him without cause - As per ultrasound report, she was pregnant prior to their marriage and opposite party no.3, was not born from their wedlock, hence both are not entitled to maintenance - Counsel for opposite parties submitted that trial court passed impugned order after due consideration of facts and law as settled by Supreme Court and opposite party no.2, subjected to dowry harassment by revisionist and his family, resides separately with her daughter at her paternal home, receiving no maintenance - Revisionist has not disputed paternity of daughter in his written Statement or evidence, hence, such plea cannot be raised at revision stage - Held, revisionist failed to disclose his actual monthly income, warranting an adverse presumption against him - He pleaded that opposite party no.2 filed criminal and domestic violence cases, and that he suffers from depression, undergoing medical treatment, preventing him from earning - However, no doctor prescription or bill vouchers was produced, hence, his unsubstantiated claim cannot be accepted - Trial court rightly held that opposite party no.2 is legally wedded wife and opposite party no.3 is daughter born from their wedlock - Finding that she has no earning to maintain herself and her minor daughter - Revisionist is capable of earning, but has willfully neglected to maintain them, trial court reasonably awarded monthly maintenance allowance to them - No merit in criminal revision, dismissed. (Para 4, 5, 24, 25, 32)

Revision dismissed. (E-13)

List of Cases cited:

1. Rajnesh Vs Neha & anr.: (2021) 2 SCC 324, (Paras 37 to 40, 77 to 80, 109)

2. Shailja & anr. Vs Khobbanna, (2018) 12 SCC 199

3. Chander Parkash Vs Shrimati Shila Rani: 1968 SCC Online Del 52

4. Kulbhushan Kumar Vs Raj Kumari, (1970) 3 SCC 129

5. Kalyan Dey Chaudhary Vs Rita Dey Chaudhary Nee Nandy, (2017) 14 SCC 200

(Delivered by Hon'ble Surendra Singh-I, J.)

Heard Sri Jainendra Kumar Mishra, learned counsel for the revisionist and Sri Vijai Prakash Yadav, learned counsel for the opposite party nos. 2 and 3.

2. By means of this instant criminal revision, the revisionist has assailed the impugned judgement and order dated 04.08.2023 passed by learned Additional Principal Judge, Family Court-III, Jaunpur, in Petition No. 666 of 2019, Jyoti Kumari and Another Vs. Ashish Jaiswal.

3. By the impugned judgement and order, the trial court has granted Rs.3,000/- per month to opposite party no. 2, Jyoti Kumari and Rs.2,000/- per month to her minor daughter, Niyati from the date of filing of application u/s 125 Cr.P.C. unless they become disqualified for getting maintenance.

4. Averment has been made by learned counsel for the revisionist that the trial court has passed the impugned judgement and order against the provisions of law and without proper appreciation of evidence on record. It has next been submitted that since the opposite party no. 2, Smt. Jyoti Kumari was voluntarily and

without any reason residing away from the revisionist, she is not entitled for maintenance. It has also been submitted that as per ultrasound report of opposite party no. 2, she was pregnant before her marriage with the revisionist and opposite party no. 3, Niyati, daughter of opposite party no. 2, was not born from their wedlock, therefore, she is not entitled for maintenance from him.

5. Per contra, learned counsel for the opposite party nos. 2 and 3 has submitted that the trial court has passed the impugned order after considering the facts and circumstances of the case and the statutory law applicable to the case as interpreted by the Hon'ble Apex Court. There is no illegality and irregularity in the impugned order. It has next been submitted that due to the harassment of opposite party no. 2 by the revisionist and his family members for obtaining additional dowry, opposite party no. 2 is living separately from the revisionist with her daughter at her parental home. No maintenance is being provided by the revisionist to them. The revisionist has neither pleaded in his written statement filed against the petition u/s 125 Cr.P.C. nor in his evidence, oral or documentary adduced in support of his written statement that opposite party no. 3 is not born from his wedlock with opposite party no. 2, Smt. Jyoti Kumari. Therefore, at the stage of revision, such plea cannot be entertained and they shall not be taken into consideration.

6. Learned counsel for the revisionist and learned counsel for the opposite party nos. 2 and 3 have been heard. Perused the evidence available on the record of the revision including the impugned order passed by the trial court.

7. From the pleadings of revisionist and opposite party no. 2 in Petition No. 666

of 2019 u/s 125 Cr.P.C., it transpires that admittedly opposite party no. 2, Smt. Jyoti Kumari was married to revisionist, Ashish Jaiswal on 18.11.2017 according to Hindu rites and customs. The mother of opposite party no. 2 gave sufficient cash and other items as dowry to the revisionist according to her status. The revisionist and his parents were not satisfied with the dowry brought by opposite party no. 2. They started physically and mentally torturing her to compel her to bring Rs.2,00,000/- as additional dowry. On 21.08.2018, from the wedlock of revisionist and opposite party no. 2, a daughter, namely, Niyati was born. On the birth of the daughter, revisionist and his family members became annoyed with her and on 28.08.2019, after beating, abusing and depriving her from her stridhan, sent her to her parental home. Since then opposite party no. 2 is living with her daughter at her parental home. Opposite party no. 2 is a domestic woman and has no skills which may enable her to earn enough for her and for her maintenance as well as of her daughter. The husband of opposite party no. 2 is engaged in the wholesale business of scrap items from which he earns about Rs.50,000/- per month. He is not providing maintenance to opposite party no. 2 and her daughter. Opposite party no. 2 has prayed for maintenance allowance of Rs.10,000/- per month for herself and Rs.5,000/- per month for her daughter.

8. In his written statement, revisionist has admitted that opposite party no. 2 is his legally wedded wife and from their wedlock, opposite party no. 3, Niyati was born. Revisionist has denied that opposite party no. 2 was subjected to physical or mental harassment for compelling her to bring Rs.2,00,000/- or any amount as additional dowry. The

revisionist/applicant has denied the allegations made by opposite party no. 2 against him regarding harassment of opposite party no. 2 and after beating her, left her at her parental home with her daughter. The revisionist/applicant has pleaded that she herself left her matrimonial home and is not willing to stay with him. He has mentioned in his written statement that she has filed false case of cruelty and dowry against him due to which he is suffering from depression.

9. It is desirable to consider statutory law relating to maintenance as provided u/s 125 Cr.P.C. as interpreted by the precedents of Hon'ble Apex Court and High Courts.

10. The provision of Section 125 Cr.P.C. provides for maintenance of wives, children and parents. The Section 125 Cr.P.C. reads as under:-

“125. Order for maintenance of wives, children and parents.—

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

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

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

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

(d) his father or mother, unable to maintain himself or herself,

a Magistrate of the First Class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means:

Provided further that the Magistrate may, during the pendency of the proceeding regarding monthly allowance for the maintenance under this sub-section, order such person to make a monthly allowance for the interim maintenance of his wife or such child, father or mother, and the expenses of such proceeding which the Magistrate considers reasonable, and to pay the same to such person as the Magistrate may from time to time direct:

Provided also that an application for the monthly allowance for the interim maintenance and expenses of proceeding under the second proviso shall, as far as possible, be disposed of within sixty days from the date of the service of notice of the application to such person.

Explanation.—For the purposes of this Chapter—

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

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

(2) Any such allowance for the maintenance or interim maintenance and expenses of proceeding shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance or interim maintenance and expenses of proceeding, as the case may be.

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be, remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due : Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of

refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Explanation.—If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be a just ground for his wife's refusal to live with him.

(4) No wife shall be entitled to receive an allowance for the maintenance or interim maintenance and expenses of proceeding, as the case may be, from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

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

11. In paragraph Nos. 37, 38, 39 and 40 of **Rajnesh vs. Neha and Another:** (2021) 2 SCC 324, the Hon’ble Apex Court has observed as under:-

“37. In *Chaturbhuj v. Sita Bai* [*Chaturbhuj v. Sita Bai*, (2008) 2 SCC 316 : (2008) 1 SCC (Civ) 547 : (2008) 1 SCC (Cri) 356] this Court held that the object of maintenance proceedings is not to punish a person for his past neglect, but to prevent vagrancy and destitution of a deserted wife by providing her food, clothing and shelter by a speedy remedy. Section 125 CrPC is a measure of social justice especially enacted to protect

women and children, and falls within the constitutional sweep of Article 15(3), reinforced by Article 39 of the Constitution.

38. Proceedings under Section 125 CrPC are summary in nature. In *Bhuwan Mohan Singh v. Meena* [Bhuwan Mohan Singh v. Meena, (2015) 6 SCC 353 : (2015) 3 SCC (Civ) 321 : (2015) 4 SCC (Cri) 200] this Court held that Section 125 CrPC was conceived to ameliorate the agony, anguish, financial suffering of a woman who had left her matrimonial home, so that some suitable arrangements could be made to enable her to sustain herself and the children. Since it is the sacrosanct duty of the husband to provide financial support to the wife and minor children, the husband was required to earn money even by physical labour, if he is able-bodied, and could not avoid his obligation, except on any legally permissible ground mentioned in the statute.

39. The issue whether presumption of marriage arises when parties are in a live-in relationship for a long period of time, which would give rise to a claim under Section 125 CrPC came up for consideration in *Chanmuniya v. Virendra Kumar Singh Kushwaha* [Chanmuniya v. Virendra Kumar Singh Kushwaha, (2011) 1 SCC 141 : (2011) 1 SCC (Civ) 53 : (2011) 2 SCC (Cri) 666. This judgment was referred to a larger Bench.] before the Supreme Court. It was held that where a man and a woman have cohabited for a long period of time, in the absence of legal necessities of a valid marriage, such a woman would be entitled to maintenance. A man should not be allowed to benefit from legal loopholes, by enjoying the advantages of a de facto

marriage, without undertaking the duties and obligations of such marriage. A broad and expansive interpretation must be given to the term “wife”, to include even those cases where a man and woman have been living together as husband and wife for a reasonably long period of time. Strict proof of marriage should not be a precondition for grant of maintenance under Section 125 CrPC. The Court relied on the Malimath Committee Report on Reforms of Criminal Justice System published in 2003, which recommended that evidence regarding a man and woman living together for a reasonably long period, should be sufficient to draw the presumption of marriage.

40. The law presumes in favour of marriage, and against concubinage, when a man and woman cohabit continuously for a number of years. Unlike matrimonial proceedings where strict proof of marriage is essential, in proceedings under Section 125 CrPC such strict standard of proof is not necessary. [Kamala v. M.R. Mohan Kumar, (2019) 11 SCC 491 : (2019) 4 SCC (Civ) 732 : (2019) 4 SCC (Cri) 242].”

12. The Hon’ble Apex Court in paragraph Nos.77, 78, 79 and 80 of *Rajnish vs. Neha and Another* (supra) has provided for criteria for determining quantum of maintenance, which reads as under:-

“77. The objective of granting interim/permanent alimony is to ensure that the dependent spouse is not reduced to destitution or vagrancy on account of the failure of the marriage, and not as a punishment to the other spouse. There is no straitjacket formula for fixing the quantum of maintenance to be awarded.

78. *The factors which would weigh with the court inter alia are the status of the parties; reasonable needs of the wife and dependent children; whether the applicant is educated and professionally qualified; whether the applicant has any independent source of income; whether the income is sufficient to enable her to maintain the same standard of living as she was accustomed to in her matrimonial home; whether the applicant was employed prior to her marriage; whether she was working during the subsistence of the marriage; whether the wife was required to sacrifice her employment opportunities for nurturing the family, child rearing, and looking after adult members of the family; reasonable costs of litigation for a non-working wife. [Refer to Jasbir Kaur Sehgal v. District Judge, Dehradun, (1997) 7 SCC 7; Refer to Vinny Parmvir Parmar v. Parmvir Parmar, (2011) 13 SCC 112 : (2012) 3 SCC (Civ) 290]*

79. *In Manish Jain v. Akanksha Jain [Manish Jain v. Akanksha Jain, (2017) 15 SCC 801 : (2018) 2 SCC (Civ) 712] this Court held that the financial position of the parents of the applicant wife, would not be material while determining the quantum of maintenance. An order of interim maintenance is conditional on the circumstance that the wife or husband who makes a claim has no independent income, sufficient for her or his support. It is no answer to a claim of maintenance that the wife is educated and could support herself. The court must take into consideration the status of the parties and the capacity of the spouse to pay for her or his support. Maintenance is dependent upon factual situations; the court should mould the claim for maintenance based on various factors brought before it.*

80. *On the other hand, the financial capacity of the husband, his actual income, reasonable expenses for his own maintenance, and dependent family members whom he is obliged to maintain under the law, liabilities if any, would be required to be taken into consideration, to arrive at the appropriate quantum of maintenance to be paid. The court must have due regard to the standard of living of the husband, as well as the spiralling inflation rates and high costs of living. The plea of the husband that he does not possess any source of income ipso facto does not absolve him of his moral duty to maintain his wife if he is able-bodied and has educational qualifications. [Reema Salkan v. Sumer Singh Salkan, (2019) 12 SCC 303 : (2018) 5 SCC (Civ) 596 : (2019) 4 SCC (Cri) 339]*

13. After thoroughly discussing the numerous judgements of the Hon'ble Apex Court and this Court, the Apex Court in para-109 of **Rajnesh vs. Neha and Another (supra)** held that maintenance should be provided from the date of application not from the date of order. The para-109 of the aforesaid judgement reads as under:-

“ 109. The judgments hereinabove reveal the divergent views of different High Courts on the date from which maintenance must be awarded. Even though a judicial discretion is conferred upon the court to grant maintenance either from the date of application or from the date of the order in Section 125(2) CrPC, it would be appropriate to grant maintenance from the date of application in all cases, including Section 125 CrPC. In the practical working of the provisions relating to maintenance, we find that there is significant delay in

disposal of the applications for interim maintenance for years on end. It would therefore be in the interests of justice and fair play that maintenance is awarded from the date of the application.”

14. The Hon’ble Apex Court in the decision of Rajnesh vs. Neha and Another (supra) has held that the husband is bound to provide maintenance allowance to his wife and children which may be upto 25% of his monthly income.

15. From the pleadings and documents filed by the parties, the trial court has framed following four issues :-

(i) Whether applicant is legally wedded wife of opposite party and due to sufficient reasons, she is residing away from her husband ?

(ii) Whether applicant is capable of maintaining herself as well as her daughter ?

(iii) Whether opposite party having sufficient source of income is still not maintaining his wife and daughter ?

(iv) Whether applicants are entitled to maintenance from opposite party ? If so, what amount ?

16. Disposal of issue no. (i) : The revisionist, Ashish Jaiswal in his pleading in the written statement as well as in his oral evidence has admitted that opposite party no. 2, Smt. Jyoti Kumari is his legally wedded wife and from their wedlock, her daughter, opposite party no. 3, Niyati was born.

17. While deciding the second part of issue no. (i) that whether opposite party no. 2 is residing away from her husband

without sufficient cause, the trial court has taken into consideration the pleadings of opposite party no. 2, Smt. Jyoti Kumari and revisionist, Ashish Jaiswal. The trial court has also analysed the oral and documentary evidence of both parties in this regard including complaint case filed by opposite party no. 2, Smt. Jyoti Kumari against the revisionist Ashish Jaiswal u/s 498-A I.P.C. and $\frac{3}{4}$ of Dowry Prohibition Act and Divorce Petition No. 1025 of 2019 u/s 13 of Hindu Marriage Act filed by the revisionist against opposite party no. 2 in the court of Principal Judge, Family Court, Varanasi and came to the conclusion that due to physical and mental harassment caused by demand of additional dowry by revisionist and his family members, the opposite party no. 2 was living away from her husband. The opposite party no. 2 had apprehension of danger to her life and she was justified in living away from him. The issue no. (i) was thus, rightly decided by the trial court in affirmative.

18. Disposal of issue nos. (ii) and (iii) : Since these two issues are based on same oral and documentary evidence, they are decided together. The trial court has considered the pleading of opposite party no. 2 that she is a housewife and a woman of rural background. She has no professional skills and she is not able to maintain herself and her daughter from her own earnings and she is dependent for maintenance on her widowed mother. Opposite party no. 2 has also pleaded that her husband/revisionist is engaged in the wholesale business of scrap items from which he earns about Rs.50,000/- per month. The opposite party no. 2 has also pleaded that revisionist has a double-storey dwelling house and earns rent from it. On this point, revisionist has pleaded that his wife, opposite party no. 2 is M.A. pass and

she is doing job in Mumbai and earning Rs.50,000/- per month. Opposite party no. 2 has also deposed in her evidence that since she is staying away from her husband, her husband has sent only Rs.5,000/- in her account and Rs.500/- through mobile banking but as her bank documents, aadhar card, etc. have been detained by her husband in her matrimonial home, she is not able to withdraw that amount from her account. The revisionist has not filed any documentary evidence in support of his pleadings that opposite party no. 2 is doing job in Mumbai and earning Rs.50,000/- per month as salary from it. The trial court did not believe the averments made by either party regarding income of both parties as neither party had filed any documentary evidence or other credible evidence in support of their income. From the aforesaid evidence, the trial court has come to the conclusion that opposite party no. 2, Smt. Jyoti Kumari has no earning from which she may be able to maintain herself and her minor daughter.

19. The Hon'ble Apex Court in the case of **Shailja And Another vs. Khobbanna, (2018) 12 SCC 199** has held:

“we find that the High Court has proceeded on the basis that Appellant 1/wife was capable of earning and that is one of the reasons for reducing the maintenance granted to her by the Family Court. Whether Appellant 1 is capable of earning or whether she is actually earning are two different requirements. Merely because Appellant 1 is capable of earning is not, in our opinion, sufficient reason to reduce the maintenance awarded by the Family Court.”

20. Considering the above law laid down by the Hon'ble Apex Court merely

on the ground that opposite party no. 2 is M.A. pass, no presumption can be drawn that she is earning sufficient money to maintain herself and her minor daughter. Thus the plea advanced on behalf of the revisionist (husband) is without any legal basis.

21. It is well settled law that mere averment of wife that she is not able to maintain herself and her child from her earning will shift the burden on her husband to rebut that she has sufficient income for maintenance of herself and her child. The revisionist has not adduced any credible oral or documentary evidence which may rebut the averment of his wife that she cannot maintain herself and her daughter from her income.

22. From the oral and documentary evidence adduced by both parties, the trial court has concluded that the revisionist is a healthy and young man and he is capable to earn enough to maintain himself, his wife and minor daughter.

23. In the case of **Chander Parkash vs. Shrimati Shila Rani: 1968 SCC Online Del 52**, the Delhi High Court has held:

“.....an able-bodied young man has to be presumed to be capable of earning sufficient money so as to be able to reasonably maintain his wife and child and he cannot be heard to say that he is not in a position to earn enough to be able to maintain them according to the family standard. It is for such able-bodied person to show to the Court cogent grounds for holding that he is unable, for reasons beyond his control, to earn enough to discharge his legal obligation of maintaining his wife and child.”

24. In the present case, as the husband has not clearly disclosed to the court, as he ought, his monthly income which he admittedly gets, the presumption would be easily permissible against him. In his written statement, the revisionist has pleaded/deposed that his wife, opposite party no. 2 has registered criminal case as well as case under Domestic Violence Act against him. He is suffering from depression and is undergoing medical treatment for it, therefore, due to depression, he cannot do any work and earn money. But the revisionist has not produced any documentary evidence regarding prescription of doctor, bill vouchers/receipts of medicines purchased by him. Thus, mere bald averments of the revisionist that he is suffering from depression and consequently he is not able to earn anything, cannot be accepted.

25. From the above discussion, the trial court has rightly decided issue no.(ii) in favour of the wife and issue no. (iii) against the revisionist and has determined that the revisionist is capable of earning enough money, still he is not providing maintenance to his wife and minor daughter.

26. Disposal of issue no. (iv) : The trial court has alluded in its judgement that it is the social, moral and legal duty of a husband to maintain his wife and children properly. Section 125 Cr.P.C. is a social welfare legislation which comes in the ambit of Article 15 (3) of Constitution of India. The statutory provision protects the wife and children from destitution and vagrancy. Maintenance includes expenses required for food, clothes, residence, medical expenses and education of children. The maintenance allowance should be sufficient to enable the wife and

children to lead a life with dignity and decorum equal to that they were living with their husband/parents. The wife and children cannot be left in a helpless and hopeless state.

27. Taking cognizance of prevailing wages in the labour market, even an unskilled labourer earns about Rs.500/- per day, thus it can be presumed that revisionist may be earning about Rs.15,000/- per month from his wages.

28. Now, this Court has to consider whether the trial court has rightly provided Rs.3,000/- per month to Smt. Jyoti Kumari and Rs.2,000/- per month to her daughter, Niyati ?

29. The Hon'ble Apex Court in **Kulbhushan Kumar Vs. Raj Kumari, (1970) 3 SCC 129** has held that 25% of the husband's net salary would be just and proper to be awarded as maintenance allowance to the wife. The amount of permanent alimony awarded to the wife must be befitting the status of the parties and the capacity of the spouse to pay maintenance.

30. In **Kalyan Dey Chaudhary Vs. Rita Dey Chaudhary Nee Nandy, (2017) 14 SCC 200**, the Hon'ble Apex Court has followed the quantum of maintenance fixed by the Hon'ble Apex Court in **Kulbhushan Kumar (supra)** that 25% of net income of the husband should be paid to the wife as maintenance.

31. Thus, it will be just and reasonable to provide 1/3rd of the monthly income of the husband for maintenance of revisionist's wife/opposite party no. 2 and his daughter, opposite party no. 3. Thus, the amount of total maintenance to be provided

to opposite party nos. 2 and 3 can be determined as 1/3rd of Rs.15,000/- i.e. Rs.5,000/-. In the impugned judgement and order, considering all the facts and circumstances and evidence on record, the trial court has also granted Rs.3,000/- to opposite party no. 2 and Rs.2,000/- to opposite party no. 3.

32. From the above discussion, I am of the view that the trial court has rightly concluded that opposite party no. 2 is legally wedded wife of revisionist and opposite party no. 3 is the daughter born from their wedlock. The trial court has rightly concluded that opposite party no. 2 has no earning to maintain herself and her minor daughter. The revisionist is capable of earning sufficient income to maintain his wife and minor daughter, still he is neglecting in maintaining them. The trial court has provided just and reasonable monthly maintenance allowance for opposite party nos. 2 and 3 i.e. wife and daughter of the revisionist.

33. There is no merit in the criminal revision and the same is liable to be dismissed.

34. The criminal revision is accordingly, **dismissed**.

35. Let a copy of this order be sent to the concerned trial court for necessary action.

(2024) 4 ILRA 970
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.03.2024

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.
THE HON'BLE DONADI RAMESH, J.

First Appeal No. 245 of 2024

Richa Mumgaie **...Appellant**
Versus
Harendra Prasad **...Respondents**

Counsel for the Appellant:

Sri Ritesh Srivastava, Ms. Shweta Singh, Sri Abhishek Yadav

Counsel for the Respondents:

Civil Law - Hindu Marriage Act, 1955 - Section 23 (1) (b) - Civil Procedure Code, 1908 - Order VII Rule 11(d) - Impugned order dismisses appellant-wife's application under O.VII R.11(d) CPC read with Section 23(1)(b) of Hindu Marriage Act, holding that as divorce petition filed on grounds of cruelty and adultery is at stage of DW-1's cross-examination and matter is expedited, such application can't be entertained - Held, a plain reading of plaint shows a cause of action is made out - Paragraphs 9 -11 and subsequent averments detail the wife's repeated misconduct after initial condonation, including specific instances of adultery - Single condonation of any act does not reject the plaint where such acts are alleged to have been repeated - Condonation u/s 23(1)(b) of Hindu Marriage Act is conditional, presuming forgiven acts will not repeated - Where plaint specifically alleges repetition of such acts after initial condonation, Section 23(1)(b) cannot bar claim, and plaint cannot be rejected under O.VII R.11(d) CPC on ground of prior condonation - Court used words "coupled with" shows application under O.VII R.11 CPC read with Section 23(1)(b) Hindu Marriage Act was not rejected for that sole reason, and contention is misconceived - Appeal is devoid of merits and accordingly dismissed. (Para 3, 9, 13, 16)

Appeal dismissed. (E-13)

List of Cases cited:

1. Saleem Bhai & ors. Vs St. of Mah. & ors., Civil Appeal No. 8518 of 2002

2. Dr. N.G. Dastane Vs. Mrs. S. Dastane, Civil Appeal No. 2224 of 1970

(Delivered by Hon'ble Vivek Kumar Birla, J.
&
Hon'ble Donadi Ramesh, J.)

1. Heard Sri Ritesh Srivastava, learned counsel for the appellant.

2. Present appeal has been filed challenging the order judgment and order dated 16.02.2024 passed by Principal Judge, Family Court, Ghaziabad in Case No. 596 of 2020, under Section 13 (1) (i) of the Hindu Marriage Act.

3. By the impugned order, the application moved by the appellant-wife (hereinafter referred to as 'wife') under Order VII Rule 11(d) CPC read with Section 23 (1) (b) of the Hindu Marriage Act (hereinafter referred to as the Act) on the ground that after discussing the case law on the interpretation of the word 'condonation of the act' as given under Section 23 of the Act. The court below rejected the application and held that the divorce petition has been moved on the ground of cruelty and adultery with the averments made in the petition and the matter is at the stage of cross-examination of DW-1 coupled with the fact that the matter has been expedited by this Court, no such application can be entertained at this stage.

4. By drawing attention to paragraph 9 of the divorce petition, submission of learned counsel for the appellant is that the act of wife was condoned by the husband and therefore, in view of the provisions of Order VII Rule 11(d) CPC read with

Section 23 (1) (b) of the Act, as the act has been condoned in the plaint itself, therefore, the plaint ought to have been rejected. He further submits that the sole reason for rejecting such application is that the matter has been expedited by this Court, therefore, he refused to entertain the application.

5. We have considered the submission and perused the record.

6. For ready reference, the provisions of Order VII Rule 11 and Section 23 of the Hindu Marriage Act are quoted as under:

Order VII Rule 11 CPC

“11. Rejection of plaint.- The plaint shall be rejected in the following cases:—

(a) where it does not disclose a cause of action;

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the court to correct the valuation within a time to be fixed by the court, fails to do so;

(c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the court to supply the requisite stamp paper within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law;

(e) where it is not filed in duplicate;

(f) where the plaintiff fails comply with the provision of Rule 9.

Provided that the time fixed by the court for the correction of the valuation or supplying of the requisite stamp papers shall not be extended unless the court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp papers, as the case may be within the time fixed by the court and that refusal to extend such time would cause grave injustice to the plaintiff.

Section 23 of the Hindu Marriage Act

23. Decree in proceedings.—(1)
In any proceeding under this Act, whether defended or not, if the court is satisfied that—

(a) any of the grounds for granting relief exists and the petitioner [except in cases where the relief is sought by him on the ground specified in sub-clause (a), sub-clause (b) or sub-clause (c) of clause (ii) of section 5] is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, and

(b) where the ground of the petition is the ground specified in clause (i) of sub-section (1) of section 13, the petitioner has not in any manner been accessory to or connived at or condoned the act or acts complained of, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty, and

[(bb) when a divorce is sought on the ground of mutual consent, such consent

has not been obtained by force, fraud or undue influence, and]

(c) [the petition (not being a petition presented under section 11)] is not presented or prosecuted in collusion with the respondent, and

(d) there has not been any unnecessary or improper delay in instituting the proceeding, and

(e) there is no other legal ground why relief should not be granted, then, and in such a case, but not otherwise, the court shall decree such relief accordingly.”

(Emphasis supplied)

7. For the purpose of consideration of the application on merits, paragraph 9 of the divorce petition is also quoted as under:

(ix) *That after the Petitioner came across all vile and filthy chats exchanged between Respondent no. 1 and Respondent no. 2 and call logs of Respondent no.1 for the calls made on mobile number 9873877866 which belongs to Respondent no. 2, Respondent no. 1 confessed the same in front of Petitioner and his family members, that the conversation between the family members of the parties to the petition was recorded by the Petitioner on his mobile phone wherein Respondent no. 1 herself accepted her intimate relationship with Respondent no. 2, family of Respondent no. 1 further requested Petitioner to give a chance to Respondent no. 1 and forced the Petitioner to live with Respondent no.1 in the same house, for the sake of saving the married life and future of his son, Petitioner accepted the terms of family members of Respondent no. 1. (Copy of mobile*

recording is annexed herewith as Annexure-D (colly).

(Emphasis supplied)

8. However, this Court is of the opinion that this paragraph cannot be read in isolation for the purpose of rejection of the plaint and entire contents of the plaint have to be looked into and therefore, paragraphs 10 to 17 are also quoted as under:

(x) *That after the above mentioned family meeting, the Respondent no. 1 remained quiet for a couple of days, but to the surprise of Petitioner and his family the Respondent no.1 again started the same old activities, she again continued her arrogant and egoistic behavior along with continuous telephonic engagement and complete negligence towards her child and responsibilities.*

xi) *That, infact afterwards, it became further worse in addition to remain uncaring towards home and the child, she used to lock herself in a room for most of the time and she used to be continuously on phone. While being in the same room, the Respondent no. 1 used to cover her body and face with blanket, and remain busy on the phone beneath it. Further, Respondent no. 1 many a times threatened the Petitioner and his family members that she is going to file divorce petition along with multiple false complaints at various police stations.*

xii) *That on multiple occasions Respondent no. 1 clearly expressed her love to Co-Respondent i.e. Respondent no. 2 in open words through Facebook messages and WhatsApp messages (Photocopy of screenshot of intimate chats between Respondent no. 1 and Respondent*

no.2 is already annexed for the kind perusal of this Hon'ble Court).

xiii) *That simultaneously the Respondent was in touch and in conversation with many other male friends also. Moreover the Respondent no.1 makes it obvious that the Respondent no.1 was in a habit of approaching her targets in suggestive manner to get into adulterous relation.*

xiv) *That the brazenness in action of the Respondent no. 1 comes to fore on repeated occasions. The Respondent dared to take Co-Respondent to hotel room leaving her son at home and splurged hard earned money of the Petitioner on her male friends. That at the time of this obnoxious act of Respondent no. 1 and Respondent no. 2, family of Petitioner use to take care of child who was born out of the wedlock.*

xv) *That further Petitioner got to know that the Respondent no.1 was in physical relationship with other multiple males and Respondent no.2. i.e. Amit Kumar having mobile number 9873877866.*

xvi) *That after confession of Respondent no.1 neither family members of Respondent no.1 tried to resolve this dispute between Petitioner and Respondent no.1, they never contacted Petitioner or his family member and only Petitioner or his elder brother used to contact the family member of Respondent no. 1. That further on December 14, 2019 as it was hard for the Petitioner to live in a harmonious cohabitation with the Respondent no.1 because of the vile and adulterous act performed by the Respondent no.1 with Respondent no. 2, it is pertinent to mention here that the Petitioner on the request of Respondent no. 1 dropped her at her*

parental home i.e. House No. A-56, A-Block, East Vinod Nagar, Delhi.

xvii) That from December 2019 to February 2020, after every proof Petitioner many times requested Respondent no. 1 and her family to meet at a common place to find a solution peacefully for this situation, and after a delay of more than a month, finally a meeting was set up for the same on 2nd February 2020 at Akshardham Mandir where Petitioner requested family of Respondent no. 1 to bring Viraj (son of Petitioner) along with them at the time of meeting, despite this clear message conveyed via father i.e. the Petitioner, Respondent no. 1 clearly refused the said request to bring the child along with her, which clearly reflects the irked behavior of the Respondent no. 1 towards the Petitioner and his family members, Moreover the Petitioner along with his family members went to the meeting point. Where, to utmost surprise for the Petitioner, family of Respondent no.1 started quarreling and blaming Petitioner for every shameful act of Respondent no.1, and started threatening the Petitioner to lodge a false case and complaints against the Petitioner and his family members. Respondent no. 1 also threatened the Petitioner that if he ever tries to get in between her relationship with Respondent no. 2, she will make sure that Petitioner will face dire consequences and if the Petitioner ever tries to get in touch with Viraj (son of petitioner) she along with Respondent no. 2 will cause serious harm to the Petitioner and his family members."

(Emphasis supplied)

9. A bare reading of the aforesaid paragraphs clearly discloses the fact that a cause of action in the plaint is made out. As per paragraph 9, the family of the wife

forced the husband-respondent to live with her in the same house for the sake of saving the married life and future of his son the respondent-husband accepted the terms of family members of the appellant-wife. In paragraph 10, it has been clearly alleged that after remaining quiet for a couple of days, the appellant-wife again started same activities. Paragraph 11 starts with the words "infact afterwards it became further worse" and other facts are narrated thereafter. Subsequent paragraphs also reflects the conduct of the wife subsequent to the initial condonation of his acts of alleged adultery. We also find that in paragraph 7, the details of check-in and check-out of hotel rooms on the same day, which were booked by the person with whom she was having relationship, have also been mentioned. Therefore, it cannot be said that no cause of action is disclosed in the divorce petition. Even otherwise, single condonation of any act or acts by itself, would not be sufficient to reject the plaint once there is allegation that subsequent to condonation of the such acts, the same were being repeated.

10. Learned counsel for the appellant has placed reliance on the judgments of the Apex Court passed in **Civil Appeal No. 8518 of 2002 (Saleem Bhai & Ors. Vs. State of Maharashtra & Ors.) and Civil Appeal No. 2224 of 1970 (Dr. N.G. Dastane Vs. Mrs. S. Dastane).**

11. We find that such judgments are of no help to the appellant.

12. In para 8 of **Saleem Bhai (supra)**, it has been observed that for Order VII Rule 11 CPC only averment in the plaint are relevant and the plea taken by the defendant in the written statement are wholly irrelevant at this stage. **Dr. N.G.**

Dastane (supra) is essentially on the issue of burden of proof in a case of cruelty. The appeal before Hon'ble Apex Court was challenging the final judgment of High Court passed in a second appeal on the ground that High Court has re-appreciated the evidence and came to erroneous approach and Order VII Rule 11 CPC was not in issue.

13. In our considered opinion even if there is condonation of an act, or even acts but subsequently the same are revived or repeated and there is specific statement regarding such repetition in other paragraphs of the plaint, by reading one paragraph in isolation, ignoring the other paragraphs, would not be covered by Section 23 (1) (b) of the Hindu Marriage Act, 1955 to become a ground for rejection of plaint in Order VII Rule 11 (d) CPC as there can be no such condonation of act/acts, if the acts are being repeated. Even in common understanding, condonation of any act is conditional forgiveness that the act would not be repeated. This is not so in the present case. As the statement has been made in the plaint to the effect that such acts are being repeated.

14. It is also pertinent to note that the divorce petition has been filed not only on the ground of having voluntary sexual relationship with others by the wife but also on the ground of cruelty (Section 13 (1) (i) of the Act) as well. The other paragraphs of the plaint, therefore, cannot be ignored. The prayer clause of the divorce petition is quoted as under:

"1. Pass a decree of divorce by dissolving the marriage between the Petitioner and Respondent no.1, in favour of the Petitioner under Section 13(1)(i) of the Hindu Marriage Act, 1955 as amended up to date;

2. Pass an order thereby directing the district forensic authority for the analysis of phones, Facebook accounts, messenger app, WhatsApp chats, of the Respondent no.1 and Respondent no.2;

3. Pass an order thereby directing OYO to provide check-in and check-out records of bookings made by Respondent no.2 on different occasions as mentioned above'

4. Pass an order thereby directing the Respondent no.1 to handover the custody of the child to father i.e. Petitioner;

5. Pass such an order and further orders as this Hon'ble Court may deem fit and proper in the interest and furtherance of Justice."

15. From perusal of the order-sheet, it appears that the divorce petition is pending at the stage of cross-examination of DW-1 and the court below has also noted that there is also a direction for expeditious disposal issued by this Court is also operating in the aforesaid case.

16. The court below has used the words 'coupled with', it is, therefore, clear that the contention of learned counsel for the appellant that the application under Order VII Rule 11 CPC read with Section 23 (1) (b) of the Act has been rejected for this sole reason, is patently misconceived.

17. The court below is directed to proceed expeditiously as already directed by this Court accordingly. The Registrar (Compliance) is directed to send a copy of this order to the court concerned, as expeditiously as possible.

3. Hunter Douglas Australia Pty. Vs Perma Blinds, (1970) 44 Aust LJ 257

4. R. Vs Norfolk County Court, (1891) 60 LJ QB 379: 65 LT 22

5. Ferguson Vs Mcmillan, 1954 SLT 109

6. *Mullins Vs Treasurer of Surrey*, (1880) LR 5 QBD 170 at p. 173 (DC)

7. Prem Chand Vs Sunil Kumar & ors., 1990
AWC 593 All

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

1. Heard Sri Rajesh Yadav, learned counsel for the appellant.

First Appeal Defective No. 366 of 2023

Smt. Monika Yadav ...Appellant
Versus
Aakash Singh & Ors. ...Respondents

Counsel for the Appellant:

Sri Rajesh Yadav

Counsel for the Respondents:

Civil Law - Indian Succession act, 1925 - Sections 371, 372, 384 & 388(2) - Challenging rejection of application for grant of Succession Certificate - Jurisdiction of Court - Maintainability of appeal - As Civil Judge (Senior Division) which is a inferior court, exercises powers of District Judge under Part X of Succession Act, thus, the proviso to Section 388(2) would be attracted, and appeal from its order lies to District Judge, not to the High Court - Hence, appeal is permitted to be withdrawn with liberty as prayed. (Para 2, 3, 34, 35)

2. The present first appeal filed under Section 384(1) of the Succession act, 1925, is directed against the judgment and order dated 05.01.2023 passed by the Civil Judge (Senior Division), Bhadohi Gyanpur in Succession Case No. 81 of 2020 (Monika Yadav Vs. Akash and Others), whereby the Application (Paper 4Ga) preferred under Section 372 for obtaining the Succession Certificate, has been rejected.

3. A question has arisen with regard to the maintainability of the appeal in view of the provisions contained in Section 388(2) of the Succession Act, 1925.

4. Counsel for the appellant has drawn the attention of the Court to Section 384(1) of the Act to contend that an order passed by the District Judge granting, refusing or revoking the certificate under Part X, which relates to Succession Certificate, would be amenable to an appeal before the High Court. It is contended that the Civil Judge (Senior Division) while passing the order on the application seeking Succession Certificate, was acting as a

Appeal disposed of. (E-13)

List of Cases cited:

1. East End Dwellings Co. Ltd. Vs Finsbury Borough Council, (1951) 2 All ER 587 (HL)
2. St. Aubyn (L.M.) Vs Attorney General (No. 2), (1951) 2 All ER 473; 1952 AC 15 (HL)

District Judge and accordingly the appeal would lie before the High Court.

5. In order to appreciate the controversy at hand, the provisions relating to grant of Succession Certificates under Part X of the Succession Act, would be required to be adverted.

6. The jurisdiction to grant a Succession Certificate and the manner of making an application for the purpose, are provided under Sections 371 and 372 of the Act, respectively, which are as follows:-

"371. Court having jurisdiction to grant certificate.--The District Judge within whose jurisdiction the deceased ordinarily resided at the time of his death, or, if at that time he had no fixed place of residence, the District Judge, within whose jurisdiction any part of the property of the deceased may be found, may grant a certificate under this Part.

372. Application for certificate.--(1) Application for such a certificate shall be made to the District Judge by a petition signed and verified by or on behalf of the applicant in the manner prescribed by the Code of Civil Procedure, 1908, for the signing and verification of a plaint by or on behalf of a plaintiff, and setting forth the following particulars, namely:--

(a) the time of the death of the deceased;

(b) the ordinary residence of the deceased at the time of his death and, if such residence was not within the local limits of the jurisdiction of the Judge to whom the application is made, then the property of the deceased within those limits;

(c) the family or other near relatives of the deceased and their respective residences;

(d) the right in which the petitioner claims;

(e) the absence of any impediment under Section 370 or under any other provision of this Act or any other enactment, to the grant of the certificate or to the validity thereof if it were granted; and

(f) the debts and securities in respect of which the certificate is applied for.

(2) If the petition contains any averment which the person verifying it knows or believes to be false, or does not believe to be true, that person shall be deemed to have committed an offence under Section 198 of the Indian Penal Code.

(3) Application for such a certificate may be made in respect of any debt or debts due to the deceased creditor or in respect of portions thereof."

7. The provision relating to an appeal against an order granting, refusing or revoking a certificate under Part X, is provided under Section 384, which is being reproduced below:-

"384. Appeal.—(1) Subject to the other provisions of this Part, an appeal shall lie to the High Court from an order of a District Judge granting, refusing or revoking a certificate under this Part, and the High Court may, if it thinks fit, by its order on the appeal, declare the person to whom the certificate should be granted and

direct the District judge, on application being made therefor, to grant it accordingly, in supersession of the certificate, if any, already granted.

(2) An appeal under sub-section (1) must be preferred within the time allowed for an appeal under the Code of Civil Procedure, 1908.

(3) Subject to the provisions of sub-section (1) and to the provisions as to reference to and revision by the High Court and as to review of judgment of the Code of Civil Procedure, 1908, as applied by section 141 of that Code, an order of a District Judge under this Part shall be final."

8. It would also be appropriate to take notice of the provisions contained in Section 388, on the basis of which a question has arisen with regard to maintainability of the appeal.

9. Section 388 of the Act reads as follows:-

"388. Investiture of inferior Courts with jurisdiction of District Court for purpose of this Act.—(1) The State Government may, by notification in the Official Gazette, invest any Court inferior in grade to a District Judge with power to exercise the functions of a District Judge under this Part.

(2) Any inferior Court so invested shall, within the local limits of its jurisdiction, have concurrent jurisdiction with the District Judge in the exercise of all the powers conferred by this Part upon the District Judge, and the provisions of this Part relating to the District Judge shall apply to such an inferior Court as if it were a District Judge:

Provided that an appeal from any such order of an inferior Court as is mentioned in sub-section (1) of Section 384 shall lie to the District Judge, and not to the High Court, and that the District Judge may, if he thinks fit, by his order on the appeal, make any such declaration and direction as that sub-section authorises the High Court to make by its order on an appeal from an order of a District Judge.

(3) An order of a District Judge on an appeal from an order of an inferior Court under the last foregoing sub-section shall, subject to the provisions as to reference to and revision by the High Court and as to review of judgment of the Code of Civil Procedure, 1908, as applied by section 141 of that Code, be final.

(4) The District Judge may withdraw any proceedings under this Part from an inferior Court, and may either dispose of them or transfer them to another such Court established within the local limits of the jurisdiction of the District Judge and having authority to dispose of the proceedings.

(5) A notification under sub-section (1) may specify any inferior Court specially or any class of such Courts in any local area.

(6) Any Civil Court which for any of the purposes of any enactment is subordinate to, or subject to the control of, a District Judge shall, for the purposes of this section, be deemed to be a Court inferior in grade to a District Judge."

10. A plain reading of Section 388 would indicate that it provides for investiture of inferior courts with jurisdiction of District Court for purposes

of the Act. Sub-section (1) provides that the State Government may invest any Court inferior in grade to a District Judge with power to exercise the functions of a District Judge under this Part.

11. The State Government, in exercise of powers under sub-section (1) of Section 388 of the Act, issued a notification investing all Civil Judges in the State with power to exercise the functions of the District Judge under Part X of the Act.

12. The aforesaid Notification published in the U.P. Gazette, dated March 19, 1955, reads as follows:-

Judicial Deptt. no. 4516(i)/VII-900(8)-53, dated March 11, 1955] 33 [Published in the U.P. Gazette, dated March 19, 1955, Part I, p. 341:

"In supersession of all previous notifications on the subject, and in exercise of the powers conferred by sub-section (1) of Section 388 of the Indian Succession Act, 1925 (Act XXXIX of 1925), the Governor of Uttar Pradesh is pleased to invest all Civil Judges in the State with power to exercise the functions of a District Judge under Part X of the said Act, within the local limits of their respective jurisdiction as Civil Judges."

13. Section 371 under Part X of the Succession Act, confers jurisdiction upon the District Judge for grant of a Succession Certificate, and against an order of the District Judge granting, refusing or revoking a certificate under Part X, a forum for an appeal before the High Court is provided under Section 384.

14. Section 388 of the Act provides for investiture of inferior courts with jurisdiction of District Court for the

purposes of the Act, and in terms thereof the State Government may, by notification in the official gazette invest any court inferior in grade to a District Judge with power to exercise the functions of a District Judge under Part X.

15. The phrase 'as if it were' used in sub-section (2) of Section 388 is of considerable significance. It is a deeming provision and creates a legal fiction.

16. The legal fiction created by a deeming clause has been subject matter of consideration in a number of judicial precedents. In an oft-quoted passage from **East End Dwellings Co. Ltd. v. Finsbury Borough Council**², Lord Asquith stated:-

"If you are bidden to treat an imaginary state of affairs as real you must surely, unless prohibited from doing so, also imagine as real the consequence and incidents which, if the putative state of affairs had, in fact, existed must inevitably have flowed from or accompanied it. ... The statute states that you must imagine a certain state of affairs, it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

17 . **Lord Radcliffe in St. Aubyn (L.M.) v. Attorney-General (No. 2)**³, observed as follows:-

"The word 'deemed' is used a great deal in modern legislation. Sometimes it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be

uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible."

18. The use of the word "deemed" in statutory definitions was explained by **Windener, J., in Hunter Douglas Australia Pty. v. Perma Blinds**⁴, by stating:-

"Deemed", as used in statutory definitions "to extend the denotation of the defined term to things it would not in ordinary parlance denote, is often a convenient device for reducing the verbiage of an enactment, but that does not mean that wherever it is used it has that effect; to deem means simply to judge or reach a conclusion about something, and the words 'deem' and 'deemed' when used in a statute thus simply state the effect or meaning which some matter or thing has -- the way in which it is to be adjudged; this need not import artificiality or fiction; it may simply be the statement of an undisputable conclusion."

19. **Cave, J. in R. v. Norfolk County Court**⁵, has explained the term "deemed" in the following manner:-

"When a thing is to be 'deemed' something else, it is to be treated as that something else with the attendant consequences, but it is not that something else"

20. The use of the word "deemed" in a definition clause has been explained by **Lord President Cooper in Ferguson v. Mcmillan**⁶, by stating:-

"When a statute gives a definition and then adds that certain things shall be

"deemed' to be covered by the definition, it matters not whether without that addition the definition would have covered them or not."

21. Having regard to the forgoing discussion, the use of the deeming clause under sub-section (2) of Section 388 would mean that any inferior Court invested with power to exercise the functions of a District Judge under Part X shall, within the local limits of its jurisdiction, have concurrent jurisdiction with the District Judge in exercise of all the powers conferred upon the District Judge, and the provisions of Part X relating to the District Judge shall apply to such an inferior Court as if it were a District Judge.

22. The proviso to sub section (2) of Section 388, states in explicit terms that an appeal from such order from inferior court as mentioned in sub section (1) of Section 384, shall lie to the District Judge, and not to the High Court.

23. In **Craies on Statute of Law**⁷, referring to the rules regarding construction of a proviso, it has been observed as follows:-

"9.1. The effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out of the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it; and such a proviso cannot be construed as enlarging the scope of an enactment when it can be fairly and properly construed without attributing to it that effect."

24. Again, as has been pointed out by **Craies** in the treatise on Statute Law:-

"The effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it."

25. **Odgers in Construction of Deeds and Statutes**⁸, while referring to the scope of a proviso, mentioned the following ingredients:-

"p. 317. Provisos--These are clauses of exception or qualification in an Act, excepting something out of, or qualifying something in, the enactment which, but for the proviso, would be within it.

p. 318. Though framed as a proviso, such a clause may exceptionally have the effect of a substantive enactment."

26. It was stated in **Mullins v. Treasurer of Surrey**⁹ that when one finds a proviso to a section the natural presumption is that but for the proviso the enacting part of the section would have included the subject-matter of the proviso.

27. In "**The Construction and Interpretation of Law**" by Henry Campbell Black¹⁰, while considering the manner of construction of provisos it has been stated that the natural and appropriate effect of a proviso to a statute, or to a section thereof, is to restrain or qualify the provisions immediately preceding it.

28. It is therefore seen that the function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined

to that case. It is a qualification of the preceding enactment which is expressed in terms too general to be quite accurate. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment and ordinarily, a proviso is not interpreted as stating a general rule.

29. The use of a proviso after sub-section (2) of Section 388 of the Act has the effect of qualifying or creating an exception by providing that an appeal or any order of an inferior court, as is mentioned in sub-section (1) of Section 384, shall lie to the District Judge.

30. The legislative intent in providing for an appeal before a District Judge in case of an order passed by an inferior court upon investiture of jurisdiction under sub-section (1) of Section 388, is also clear from the emphasis in the language of the proviso where it states '**and not to the High Court**'.

31. A controversy of a similar nature had arisen in the case of **Prem Chand Vs. Sunil Kumar and Others**¹¹, wherein a Division Bench of this Court, upon noticing that Section 384, which deals with the forum where the appeal arising out of an order passed under Part X of the Succession Act, granting, refusing or revoking a certificate would lie, is prefaced with the words '**subject to other provisions of this part**'. This phraseology used in the section, was interpreted to mean that though in ordinary circumstances an appeal against an order passed in proceedings under Chapter X would lie to the High Court, but this would be subject to the condition that there is no other provision contrary to this or which may provide otherwise.

32. It was noticed that Section 388 lays down somewhat a different provision and in its terms where powers of a District Judge are conferred upon an inferior court by a notification of the State Government, such court shall exercise the powers of the District Judge so far as Part X of the Act is concerned, and in such a case an appeal instead of being filed before the High Court would lie before the District Judge.

33. Section 388 thus creates a special jurisdiction on a Court subordinate to the District Judge through investiture of power. Once such power is invested to a Court inferior to the District Judge, under sub-section (1), in that event by virtue of the deeming clause under sub-section (2), such Court would discharge the function of the District Judge by reason of such investiture, and have concurrent jurisdiction in exercise of all the powers conferred by Part X upon the District Judge. The proviso to sub-section (2) creates an exception by providing that an appeal from any order of an inferior court falling within the scope of Section 384 would in such circumstance, lie to the District Judge and 'not to the High Court'.

34. In the case at hand, the order having been passed by the Civil Judge (Senior Division) having been invested with the power to exercise the function of a District Judge under Part X, the proviso to sub-section (2) of Section 388 would be attracted and an appeal from the order passed by the Civil Judge (Senior Division), which is the inferior Court, would lie to the District Judge, and not to the High Court.

35. The appeal, which has been preferred, would therefore not lie before the High Court.

36. Counsel for the appellant, at this stage, submits that he may be permitted to withdraw the appeal with liberty to approach the appropriate forum i.e. the District Judge concerned.

37. The appeal is accordingly permitted to be withdrawn with the liberty as prayed.

38. Office to return the certified copies of the orders to the counsel for the appellant after retaining photo copies of the same.

(2024) 4 ILRA 982
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.04.2024

BEFORE

THE HON'BLE RAJNISH KUMAR, J.

Second Appeal No. 425 of 2014

Sri Thakur Sanatan Ram Yugal Sarkar
Virajman Mandir Faizabad ...Appellant
Versus
Kusam Dasi Chelin Sri Lalita Das
...Respondents

Counsel for the Appellant:
 Sri R.D. Shahi

Counsel for the Respondents:
 Sri Prem Shanker Shukla

Civil Law - Indian Succession Act, 1925 - Section 63 - Indian Evidence Act, 1872 - Sections 69, 70 - Against dismissal of suit for declaration of title and possession - Counsel for plaintiff-appellants submitted that suit for permanent injunction was based on registered Will deed dated 26.09.1969 executed by Ram Rati Dasi in favour of Janki Dasi, which stood duly proved u/s 69 and 70 of Indian Evidence Act, execution being admitted by D.W.1

and D.W.2 - During pendency of suit, the suit was amended to include reliefs for declaration, possession and eviction - Trial Court, considering proved Will, decreed suit, however, Appellate Court, without proper appreciation of evidence, erroneously set aside decree - It was further submitted that respondents claiming rights on basis of unregistered Will dated 28.06.1978, executed after death of Ram Rati Dasi on 28.08.1976 - Held, it is evident that D.W.1 and D.W.2 did not admit execution of Will dated 26.09.1969, rather, D.W.1 St.d that impostor lady had executed Will - Hence, execution of Will cannot be treated as admitted by defendants u/s 70 of Indian Evidence Act - On contrary, St.ment of D.W.1 heightened doubt regarding its execution, which was required to be clarified and removed by plaintiff-appellants in terms of Section 63 of Succession Act, which they failed to do - Considering overall facts and circumstances, Court finds that First Appellate Court rightly set aside Trial Court's decree and dismissed suit - Thus, second appeal, being devoid of merit, accordingly dismissed. (Para 2, 4, 29, 39)

Appeal dismissed. (E-13)

List of Cases cited:

1. Sampath Kumar Vs Ayyakannu & anr.; (2002) 7 SCC 559
2. Babu Singh & ors. Vs Ram Sahai @ Ram Singh; (2008) 14 SCC 754
3. M.B. Ramesh (D) by LRs. Vs K.M. Veeraje Urs (D) by LRs. & ors.; AIR 2013 SC 2088
4. Sebastiao Luis Fernandes (Dead) & ors. Vs K.V.P. Shastri (Dead) & ors.; 2014 (32) LCD 1452
5. Gurunath Manohar Pavaskar & ors. Vs Nagesh Siddappa Navalgund & ors.; 2008 (26) LCD 225

6. Union of India & ors. Vs Vasavi Co-operative Housing Society Ltd. & ors.; 2014 (32) LCD 277, (Paras 12 to 15)

7. Smt. Jaswant Kaur Vs Smt. Amrit Kaur & ors.; AIR 1977 SC 74, (Paras 9, 10)

8. Bharpur Singh & ors. Vs Shamsher Singh; AIR 2009 SC 1766, (Para 11)

9. Meena Pradhan & ors. Vs Kamla Pradhan & anr.; (2023) 9 SCC 734

10. Neeraj Dutta Vs St. (Govt. of N.C.T. of Delhi); (2023) 4 SCC 731

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

1. Heard Shri R.D. Shahi, learned counsel for the appellant and Shri Prem Shankar Shukla, learned counsel for the respondent.

2. This second appeal has been filed assailing the judgment and order dated 09.10.2014 passed in Civil Appeal No.158 of 2014; Kusum Dasi Vs. Awadhesh Das and Another by Additional District Judge, Court No.1, Faizabad, by means of which the appeal has been allowed and the judgment and decree dated 30.05.2014 passed in Regular Suit No.192 of 1978; Sri Thakur Sanatan Ram Yugal Sarkar Virajman Mandir Maibara and Another Vs. Lalita Dasi by Civil Judge (Senior Division), Faizabad has been set aside and the suit of the plaintiff-appellants for declaration and possession has been dismissed.

3. This second appeal was admitted on the following substantial questions of law:-

"1. Whether the learned first appellate court erred in law in observing that the will deed dated 26.09.1969 was not

proved despite the execution of the same being duly admitted by D.W.1 and D.W.2 making the will deed admissible under Section 70 of the Indian Evidence Act?

2. *Whether the learned courts below erred in law in placing burden of proof upon the appellants though as per the law of the land when both the parties have led the evidence, the burden of proof looses its significance?"*

4. Learned counsel for the plaintiff-appellants submitted that the appellant had filed suit for permanent injunction on the basis of registered will deed dated 26.09.1969 executed by Ram Rati Dasi in favour of Janki Dasi. During pendency of the suit, the suit was amended and the prayer for declaration and possession. and eviction of defendant-respondent was made. The will deed dated 26.09.1969 was duly proved and execution of the same was also admitted by the D.W.1 and D.W.2, therefore the same was proved as per Section 69 and 70 of the Indian Evidence Act and considering the same, suit of the appellant-plaintiff was decreed by the Trial Court, but the Appellate Court without considering the same allowed the appeal and set-aside the judgment and decree passed by the Trial Court which could not have been done. He further submitted that the respondents were claiming rights on the basis of an unregistered will dated 28.06.1978 executed by Ram Rati Dasi, whereas she had died on 28.08.1976. Thus, the submission is that the judgment and order passed by the Appellate Court is not sustainable in the eyes of law and liable to be set-aside. He relied on **Sampath Kumar Vs. Ayyakannu and Another; (2002) 7 SCC 559, Babu Singh and Others Vs. Ram Sahai alias Ram Singh; (2008) 14 SCC 754 & M.B. Ramesh (D) by LR. V.**

K.M. Veeraje Urs (D) by LR. and Others; AIR 2013 SC 2088.

5. Per contra, learned counsel for the respondent-defendant submitted that it is not in dispute that the Ram Rati Dasi was the founder of the temple namely Sri. Thakur Sanatan Ram Yugal Sarkar Virajman Mandir Maibara and that she had died on 28.08.1976. However he submits that the suit for permanent injunction was filed on the basis of falls and concocted cause of action by an impostor lady namely Janki Dasi on the behest of Lal Das. He further submitted that the Lal Das, who was a hooligan of Ayodhya and trying to capture the temple in question, had also got executed a document from Janki Dasi appointing him as Sarvarakar. However, when he could not succeed in his illegal design to capture the temple, the suit was amended admitting the possession of the respondent-defendant and the prayer for declaration and possession was added.

6. He further submitted that since the will deed dated 26.09.1969 was the basis of the suit filed by the appellant-plaintiffs, therefore the same was required to be proved as per Section 90A which was added by the U.P. Amendment and the presumption provided under Section 90 of the Indian Evidence Act is not available. He further submitted that the will was required to be proved in accordance with Section 63 of the Indian Succession Act and Sections 68 and 69 of the Indian Evidence Act, as it is not admitted by the respondent-defendant. The burden of proving the will was on the plaintiff-appellants as they were claiming the rights on the basis of the said will. He further submitted that the suit for permanent injunction was filed without disclosing or filing any proof of possession, whereas the

respondent-defendant was and is in possession of the temple in dispute and the proof of title and possession such as mutation, tax receipts, invitations etc. were filed by the respondent-defendant, but without considering the same, the suit was allowed, therefore the appeal has rightly been allowed in accordance with law and the suit of the plaintiff-appellants has been dismissed. Thus this second appeal has been filed on misconceived and baseless grounds and no substantial question of law arises in this appeal, therefore the appeal is liable to be dismissed with cost. He relied on **Sebastiao Luis Fernandes (Dead) and Others Vs. K.V.P. Shastri (Dead) and Others; 2014 (32) LCD 1452, Gurunath Manohar Pavaskar and Others Vs. Nagesh Siddappa Navalgund and Others; 2008 (26) LCD 225, Union of India and Others Vs. Vasavi Co-operative Housing Society Ltd. and Others; 2014 (32) LCD 277, Smt. Jaswant Kaur Vs. Smt. Amrit Kaur and Others; AIR 1977 SC 74 & Bharpur Singh and Others Vs. Shamsher Singh; AIR 2009 SC 1766.**

7. I have considered the submissions of learned counsel for the parties and perused the records.

8. The temple in dispute namely Sri. Thakur Sanatan Ram Yugal Sarkar was constructed and established by late Ram Rati Dasi. During her life time, she used to offer prayers etc. She died on 28.08.1976. A suit for permanent injunction was filed by the appellant-plaintiff no.1 and Mahant Smt. Janki Dasi, claiming the right and possession on the temple as Sarvarakar as plaintiff no.2 on the basis of will deed dated 26.09.1969 executed by Ram Rati Dasi. The suit was filed alleging an incident of 19.08.1978 without lodging any

FIR etc. During pendency of the suit, the plaintiff no.2 Janki Dasi through a registered document executed on 02.03.1979 appointed Mahant Lal Das as Sarvarakar and alleged to have handed him over the possession and charge of the temple. Mahant Lal Das was murdered on 16.11.1993. However before his murder, he had executed a will dated 14.11.1993 in favour of the appellant-plaintiff no.2 Mahant Awadhesh Das. Accordingly he is claiming himself to be the legal heir and Sarvarakar of the temple.

9. The written statement and additional written statement was filed denying the averments made in the plaint and stating in the additional statement that after Mahant Ram Rati Dasi, Lalita Dasi was the Mahant. Smt. Ram Rati Dasi had got a lease of the land, on which the temple is situated, which was constructed and established by her. After death of Ram Rati Dasi, Lalita Dasi had got her cremation etc. done and in presence of reputed saints, Mahants and others of Ayodhya she was made the Mahant of the temple in dispute and a Mehzarnama was also signed by them to this effect. It was also stated that a will dated 28.06.1976 was executed by Ram Rati Dasi, which could not be registered and it was informed by her only and after her death Lalita Dasi is in charge of the temple. It was also alleged that a gang of Ayodhya and Lal Das, who claims himself to be the Naga of Hanumangarhi, Ayodhya used to threaten the defendants to vacate the temple. It was also alleged that Lal Das was basically a family man who has been ousted from Hanumangarhi. It was also alleged that he is disciple of Ramesh Tyagi and residing in Kurmi Mandir, Pramod Van, Ayodhya and with his collusion the suit has been filed by an impostor lady Janki Dasi, who resides at

Bodhayan Asharam, Mohalla- Janki Ghat. She has no concern with temple situated at Maibara. A plea was also taken that no man can reside or come to the temple in question, however it could not be proved. Certain documents relating to the mutation in Nagar Palika, old house number, ration card, correspondence etc. were filed. It was also alleged that the alleged registered will deed had been got executed through some impostor lady. During pendency of suit, it was amended and prayer for declaration, possession and eviction of respondent was made. On the basis of the pleadings of the parties, eighteen issues were framed. Thereafter the evidence was adduced by the parties.

10. The Trial Court allowed the suit. The civil appeal was filed by the respondent-defendant before the District Judge, Faizabad now Ayodhya which has been allowed by the Additional District Judge, Court No.1, Faizabad now Ayodhya. The First Appellate Court framed two points of determination in appeal. The first was as to whether Ram Rati Dasi has executed any will deed dated 26.09.1969 in favour of Janki Dasi, which has been proved by the plaintiffs in accordance with law. The second as to whether any man could have been Sarvarakar of the place/ temple according to the custom, if yes, what would be its effect on merit of appeal. In regard to the first point of determination, the first Appellate Court found that the Court has to examine basically two issues in regard to proof of the will. The first is as to whether the alleged will has been got proved in accordance with law under the provisions of the Indian Evidence Act and Section 63 of the Indian Succession Act. The second is as to whether the alleged will is beyond any doubt and as to whether, the doubt which has been raised has been clearly explained

by the appellant-plaintiff. The Appellate Court has further recorded that the said two issues are required to be proved by the plaintiffs beyond doubt. The appellate court, after considering the pleadings of the parties and evidence adduced before the trial court and affording opportunity of hearing to the parties allowed the appeal and set aside the judgment and decree passed by the trial court and dismissed the suit of the plaintiff-appellants.

11. In view of above and the substantial questions of law framed in this appeal, the issue to be considered in this second appeal is as to whether the alleged will deed has been proved in accordance with law under the relevant provisions of Indian Evidence Act and Section 63 of the Indian Succession Act or not and the doubts raised by the defendant-respondent have been clarified and removed by the plaintiff-appellants or not or as to whether the execution of Will has been admitted by the defendant-respondent, which may be sufficient proof of its execution as against her.

12. Section 63 of the Indian Succession Act, 1925 provides the manner, in which a will shall be executed, which is extracted here-in-below:-

"63. Execution of unprivileged wills.—Every testator, not being a soldier employed in an expedition or engaged in actual warfare, [or an airman so employed or engaged,] or a mariner at sea, shall execute his will according to the following rules:—

(a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

13. Sections 68 to 71 of the Indian Evidence Act provides as to how a will is required to be proved, which are extracted here-in-below:-

"68. Proof of execution of document required by law to be attested.—
If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom

it purports to have been executed is specifically denied.]

69. Proof where no attesting witness found.—If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the hand writing of that person.

70. Admission of execution by party to attested document.—The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.

71. Proof when attesting witness denies the execution.—If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence."

14. The aforesaid section 68 provides that if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if he is alive and capable of giving evidence. Section 69 provides that if no such attesting witness can be found, it must be proved that the attestation of one attesting witness at least is in his handwriting and that the signature of the person executing the document is in the hand writing of that person. In case of admission of a party to an attested document of its execution, it shall be sufficient proof of its execution against him as per section 70. In case the attesting witness denies or does not recollect the

execution of the document, its execution may be proved by other evidence as per section 71.

15. The Hon'ble Supreme Court, in the case of **Bharpur Singh and Others Vs. Shamsheer Singh (Supra)**, has held that a will must be proved having regard to the provisions contained in clause (c) of Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872 and in a case where the Will is surrounded by suspicious circumstances, it would not be treated as the last testamentary disposition of the testator. The relevant paragraph 11 is extracted here-in-below:-

"11. The legal principles in regard to proof of a will are no longer res integra. A will must be proved having regard to the provisions contained in clause (c) of Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872, in terms whereof the propounder of a will must prove its execution by examining one or more attesting witnesses. Where, however, the validity of the Will is challenged on the ground of fraud, coercion or undue influence, the burden of proof would be on the caveator. In a case where the Will is surrounded by suspicious circumstances, it would not be treated as the last testamentary disposition of the testator."

16. A three judge Bench of the Hon'ble Supreme Court, in the case of **Smt. Jaswant Kaur Vs. Smt. Amrit Kaur and Others (Supra)**, while considering the relevant provisions of Section 63 of the Indian Succession Act and 68 of the Evidence Act held as under in paragraphs-9 and 10. award

"9. In cases where the execution of a will is shrouded in suspicion, its proof ceases to be a simple lis between the plaintiff and the defendant. What, generally, is an adversary proceeding becomes in such cases a matter of the court's conscience and then the true question which arises for consideration is whether the evidence led by the propounder of the will is such as to satisfy the conscience of the court that the will was duly executed by the testator. It is impossible to reach such satisfaction unless the party which sets up the will offers a 'cogent and convincing explanation of the suspicious circumstances surrounding the making of the will.

10. There is a long line of decisions bearing on the nature and standard of evidence required to prove a will. Those decisions have been reviewed in an elaborate judgment of this Court in *R. Venkatachala Iyengar v. B.N. Thirumajamma & Others*. (1) The Court, speaking through Gajendragadkar J., laid down in that case the following positions :-

1. Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the case of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.

2. Since section 63 of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by section 63 of the Evidence Act, one attesting witness at least has been called for the purpose of proving

*its execution, if there be an attesting witness alive and subject to the process of the court and capable of giving evidence.*³ Unlike other documents, the will speaks from the death of the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.

4. Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

5. *It is in connection with wills, the execution of which is surrounded by suspicious circumstance that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.*

6. *If a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter."*

17. The Hon'ble Supreme Court, in the case **Babu Singh and Others Vs. Ram Sahai alias Ram Singh (Supra)**, has held that in a case where the attesting witness is either dead or out of the jurisdiction of the court or kept out of the way by the adverse party or cannot be traced despite diligent search, only in that event, the Will may be proved in the manner indicated in Section 69, i.e., by examining witnesses who were able to prove the handwriting of the testator or executant and then the burden of proof may be shifted to others. However, a Will ordinarily must be proved keeping in view the provisions of Section 63 of the Indian Succession Act and Section 68 of the Evidence Act, in the event the ingredients thereof, as noticed here-in-before, are brought on record, strict proof of execution and attestation stands relaxed. However,

signature and handwriting, as contemplated in Section 69, must be proved.

18. In a recent judgment of **Meena Pradhan and Others Vs. Kamla Pradhan and Another; (2023) 9 SCC 734**, the Hon'ble Supreme Court relying on several previous judgments of the Hon'ble Supreme Court deduced the principles required for proving the validity and execution of a Will in terms of Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act. The Hon'ble Supreme Court has also held that one who alleges fraud, fabrication, undue influence etc. has to prove the same. However, even in the absence of such allegations, if there are circumstances giving rise to doubt, then it becomes the duty of the propounder to dispel such suspicious circumstances by giving a cogent and convincing explanation.

19. In view of above, a will is required to be proved by propounder of the Will in accordance with Section 63 of Indian Succession Act 1925 and the aforesaid provisions made in the Indian Evidence Act 1872 and in case of suspicious circumstances giving rise to doubt about the execution of the Will by the executor for one or the other reason, the same is required to be dispel by the propounder by giving cogent and convincing explanation.

20. Adverting to the facts of the present case, the attesting witnesses were not available, therefore the plaintiff-appellants have adduced the oral evidence of Bina Tripathi as PW-2 to prove the will in accordance with section 69 of the Indian Evidence Act. She stated in her examination-in-chief that she knows very well to Ram Rati Dasi and her disciple Smt.

Janki Dasi, who used to live in the temple in question together. Both have died. Ram Rati Dasi had executed a will in favour of Sanatan Ram Bhagwan in the year 1969 and by the same will appointed her disciple Janki Dasi as her legal heir and Sarvarakar. She also stated that the said will deed was written by Ram Rati Dasi with her free will when she was present with Ram Rati Dasi. The will was written by Naval Kishore Lal and the witnesses were Bhagat Das and Parag Das. She had put her signatures on the will after hearing and understanding the same before her and both the witnesses have also signed. PW-2 also stated that she was not the attesting witness of the will but since the will was prepared before her, therefore she recognizes the document.

21. The first Appellate Court found that this witness has not proved the will in her examination-in-chief as per law because she has failed to state that Ram Rati Dasi had put her thumb impression after reading or hearing and understanding. She has also failed to disclose the order of putting thumb impression by Ram Rati Dasi and the witnesses. The appellate court further recorded that PW-2 in her cross-examination stated that she knows the Maibara temple because she is going there for the last 25-26 years. Kurmi temple is half kilometer away from her house and now she does not go to Kurmi temple. Janki Dasi was lower in age to her but she was her friend, however she does not know as to which original place she belongs. Janki Dasi was disciple of Ram Rati, who had taken Mantra before her about 26 years back. Ram Rati Dasi was of 70 years of age at that time. Thereafter she stated that she was not present at the time of Mantra, however she had heard that she had become disciple of Ram Rati Dasi in the year 1967, again said in 1977 and she died in Maibara

temple. She had gone in her 13th day ceremony, for which the cards were distributed. The first Appellate Court found that she does not know sufficiently about Janki Dasi and Ram Rati Dasi. The statement of this witness was recorded on 03.03.2014 and at that time she had stated that her age is 65 years, therefore she was born in 1949 and as per her statement regarding her connection with Maibara temple and Ram Rati Dasi, she had come in contact with Janki Dasi in the year 1976, whereas the will deed was executed on 26.09.1969, therefore she was not in contact with Janki Dasi and Ram Rati Dasi at that time, therefore the question of his presence with Ram Rati Dasi and the attesting witnesses at the time of alleged execution of will deed dated 26.09.1969 does not arrive.

22. The First Appellate Court has further recorded that PW-2 has stated in his evidence that Janki Dasi had taken Mantra from Ram Rati Dasi 24 years back when she became the disciple of Ram Rati Dasi, therefore she would have taken Mantra in the year 1990 as per her statement, whereas she was not alive at that time because she had died in the year 1967 as stated by her even by his subsequent statement of Ram Rati Dasi had died in the year 1977, though it is not correct, thus her evidence is doubtful. The first Appellate Court also found that this witness has stated in her further cross-examination that Ram Rati Dasi had died at the age of 100 years and even if she had died in the year 1977, the evidence of the said witness is not believable because as per her own statement, when she had seen Ram Rati Dasi, she was 70 years of age and she would have been 70 years of age in the year 1947, whereas the witness was born in 1949, therefore it is apparent that this

witness had no information in regard to Ram Rati Dasi and Janki Dasi. He also could not give the length and breadth of the temple and its boundaries. She also does not know the measurement of the statues of Ram, Laxman, Sita and Hanuman and the material of which they are made. She further stated that Maibara is in Ramghat but she does not know any other temple in Ramghat and she does not go there. She further stated in her cross-examination that the will was written in eastern side of court but she does not know the name of the writer. She further stated that she had singed on the said will deed but does not know as to how many places she had signed. She also does not know as to whether thumb impression was taken or not and who was the other witness in the will deed. Her signatures or thumb impression are not on the Will. She also does not know as to who had written the will. She also stated that she does not know Kusum Dasi, who is present in the court. Janki Dasi had died in the year 1969 in Maibara and she had not gone in the 13th day ceremony.

23. In view of above, if Janki Dasi had died in the year 1969 and Ram Rati Dasi in the year 1977 then the question of execution of the will in favour of Janki Dasi does not arise because as per her subsequent statement she died in the year 1977, therefore the first Appellate Court found that the evidence of PW-2 is completely doubtful and his statement is not believable and she has failed to prove the execution of the alleged will in accordance with law.

24. The first Appellate Court also found that the evidence of PW-3 Satya Deo Tiwari is also not believable and sufficient to prove the will of 1969 because he had disclosed his name Satya Deo Tiwari in the

examination-in-chief, whereas in the cross-examination he told his name as Satya Deo Tripathi. His signatures are also different and they also do not seem to be of one and the same person. This witness has recorded his father's name as Girja Shanker Tiwari in the affidavit of examination-in-chief, whereas in the cross-examination he has told his name Girja Shanker Tripathi. He has stated in his evidence that Ram Rati Dasi had executed the will in her lifetime in the year 1969 in favour of Sanatan Ram Bhagwan and by the same will appointed her disciple Janki Dasi as her successor and Sarvarakar and it was told to him by Janki Dasi and the said document was also shown to him. He also tried to prove the document of Sarvarakari written by Janki Dasi in favour of Ram Das.

25. The first Appellate Court found that PW-2 and PW-3 both have not disclosed the date, month and year of execution of the will deed and nothing stated in this regard except that the will deed was written in 1969. PW-3 has given his evidence on the basis of information given by Janki Dasi in regard to the will deed. He has also not proved the signatures of the attesting witnesses and he was not present at the time of execution of the will deed. The first Appellate Court has also recorded that at the time of giving evidence on 07.03.2014, PW-3 has stated his age about 58 years, therefore he must have been borne in the year 1956 and 13 years of age in the year 1969, therefore he is incompetent to prove the will of 1969. The first Appellate Court also found that as per statement of PW-3, he had not seen Ram Rati Dasi and he had gone to Maibara temple for the first time 40 years back, when Janki Dasi had met her, who used to come to his house and at that time he was 18/19 years of age, therefore he is not

competent to prove the thumb impression of Ram Rati Dasi and signatures of the attesting witnesses. Thus the PW-2 and PW-3 have failed to prove the Will.

26. This Court does not find any illegality or error in the aforesaid findings recorded by the first appellate court, which have been recorded on the basis of pleadings, evidence adduced before the trial court and material on record, which are in conformity with them.

27. Now the question arises as to whether even if the plaintiff-appellants have failed to prove the execution of will deed in accordance with law, as to whether the DW-1 and DW-2 have admitted execution of the will and the same can be said to be sufficient proof of execution of will against the defendant-respondent under Section 70 of the Indian Evidence Act

28. Perusal of the oral evidence adduced by DW-1 and DW-2 indicates that DW-1 has stated in his examination-in-chief that Janki Dasi had never lived in the concerned temple and she was not a disciple of Ram Rati Dasi. She has further stated that as per written statement Lal Das, Mahipath Pandey, Lallu Pandey and a forged lady namely Meera had got prepared the will in the name of Ram Rati Dasi and got registered which is apparent from its reading because there was no justification of mentioning Janki Dasi as Sadik Cheli and in the property only Haata has been written and Kaushalya Dasi never lived as such there was no connection of Janki Dasi with the property in dispute. In her cross-examination also she has stated that she does not know as to whether the will dated 26.09.1969 has been written by Ram Rati Dasi to Janki Dasi and she had not heard of

the same prior to it. She has further stated that Lalita Dasi had told her that a will was got executed in favour of Janki Dasi by an impostor lady as Ram Rati Dasi. The DW-2 has stated in her examination-in-chief that Janki Dasi, who used to live in Pramod Van, Janki Ghat, Bodhayan Ashram never lived in Maibara temple. Janki Dasi has never been the disciple of Ram Rati Dasi and she knows it very well because she is residing there since the age of 12 years. She has specifically stated in her cross-examination that Ram Rati Dasi has not written any document in her presence. She also does not know as to any will was executed by Ram Rati Dasi to any Janki Dasi. She also does not know Janki Dasi. Lalita Dasi was the disciple of Ram Rati Dasi.

29. In view of above, it is apparent that DW-1 and DW-2 have not admitted the execution of the will dated 26.09.1969 executed by Ram Rati Dasi in favour of Janki Dasi rather it has specifically been stated by DW-1 that she was told by Lalita Dasi that a will was got executed by an impostor lady as Ram Rati Dasi, therefore, it can not be said that the execution of the will has been admitted by the defendants and the same is admissible against the defendant under Section 70 of the Indian Evidence Act. However by the said statement, the DW-1 has deepened the doubt of execution of Will by an imposter lady which was required to be clarified and removed by the plaintiff-appellants which they have failed to do.

30. In view of above, it is apparent that the plaintiff- appellants have failed to prove the execution of Will in terms of Section 63 of the Indian Succession Act and by giving any cogent evidence in accordance with the provisions made in the

Indian Evidence Act. The respondent defendants and DW-1 and DW-2 appeared on their behalf have not admitted the execution of the will. Their aforesaid statement can only be a hearsay evidence, which can not be relied in absence of its corroboration and substantive evidence and there is no corroborative substantial evidence as discussed above.

31. A Constitution (five judges) Bench of Hon'ble Supreme Court, in the case of **Neeraj Dutta vs State (Govt. of N.C.T. of Delhi); (2023) 4 SCC 731**, has held that hearsay evidence is also called derivative, transmitted, or second-hand evidence in which a witness is merely reporting not what he himself saw or heard, and not what has come under the immediate observation of his own bodily senses, but what he has learnt in respect of the fact through the medium of a third person and normally, a hearsay evidence would be inadmissible, but when it is corroborated by substantive evidence of other witnesses, it would be admissible.

32. The plaintiff-appellants had filed a suit for permanent injunction and during pendency amended the suit and the prayer for declaration, possession and eviction of respondent was made, therefore the burden was heavily on the plaintiff- appellants to establish that they are entitled for such declaration and consequently the possession and eviction of respondent. The weakness, if any, of the case set up by the respondent- defendants could not be a ground to grant relief to the plaintiff-appellants, as they have to stand on their own legs, which they have failed to do, as discussed above.

33. The Hon'ble Supreme Court, in the case of **Union of India and Others Vs.**

Vasavi Co-operative Housing Society Ltd. and Others (Supra), has held that the legal position, therefore, is clear that the plaintiff in a suit for declaration of title and possession could succeed only on the strength of its own title and that could be done only by adducing sufficient evidence to discharge the onus on it, irrespective of the question whether the defendants have proved their case or not. The relevant paragraphs- 12 to 15 are extracted here-in-below:-

"12. It is trite law that, in a suit for declaration of title, burden always lies on the plaintiff to make out and establish a clear case for granting such a declaration and the weakness, if any, of the case set up by the defendants would not be a ground to grant relief to the plaintiff.

13. The High Court, we notice, has taken the view that once the evidence is let in by both the parties, the question of burden of proof pales into insignificance and the evidence let in by both the parties is required to be appreciated by the court in order to record its findings in respect of each of the issues that may ultimately determine the fate of the suit. The High Court has also proceeded on the basis that initial burden would always be upon the plaintiff to establish its case but if the evidence let in by defendants in support of their case probabalises the case set up by the plaintiff, such evidence cannot be ignored and kept out of consideration.

14. At the outset, let us examine the legal position with regard to whom the burden of proof lies in a suit for declaration of title and possession. This Court in Maran Mar Basselios Catholicos v. Thukalan Paulo Avira reported in AIR1959 SC 31 observed that "in a suit for

declaration if the plaintiffs are to succeed, they must do so on the strength of their own title." In Nagar Palika, Jind v. Jagat Singh, Advocate (1995) 3 SCC 426, this Court held as under:

"the onus to prove title to the property in question was on the plaintiff. In a suit for ejectment based on title it was incumbent on the part of the court of appeal first to record a finding on the claim of title to the suit land made on behalf of the plaintiff. The court is bound to enquire or investigate that question first before going into any other question that may arise in a suit."

15. The legal position, therefore, is clear that the plaintiff in a suit for declaration of title and possession could succeed only on the strength of its own title and that could be done only by adducing sufficient evidence to discharge the onus on it, irrespective of the question whether the defendants have proved their case or not. We are of the view that even if the title set up by the defendants is found against, in the absence of establishment of plaintiff's own title, plaintiff must be non-suited."

34. A similar view has been taken by the Hon'ble Supreme Court in the cases of **Gurunath Manohar Pavaskar and Others Vs. Nagesh Siddappa Navalgund and Others (Supra)** and **Sebastiao Luis Fernandes (Dead) and Others Vs. K.V.P. Shastri (Dead) and Others (Supra)**.

35. So far as the judgment, in the case of **Sampath Kumar Vs. Ayyakannu and Another (Supra)** of Hon'ble Supreme Court, relied by the learned counsel for the appellants in regard to amendment of pleadings is concerned, there may not be any quarrel on that, however it is not

applicable on the issue involved in this case, therefore it is not of any benefit to the plaintiff-appellants.

36. The basis of suit, even if registered, is required to be proved in accordance with law and the presumption can not be made in respect of any such document as per Section 90-A inserted by State Amendment of Uttar Pradesh in the Indian Evidence Act 1872.

37. In the present case the Will deed dated 26.09.1969 is the basis of suit filed by the plaintiff-appellants because they are seeking declaration of title and possession on the basis of same, therefore without proof of the said will in accordance with law i.e. its execution in accordance with Section 63 of the Indian Succession Act 1925 and proof thereof in accordance with the aforesaid provisions made in the Indian Evidence Act 1872 and removal of doubts in regard to its execution, no declaration could have been made and direction for possession could have been given but the plaintiff-appellants have failed to prove them in accordance with law and also failed to remove doubts in regard to its execution. As discussed above the will can also not be presumed to be valid and enforceable, therefore also no such declaration could have been made, therefore consequential relief could also not be granted.

38. In view of above, this Court is of the view that learned appellate court has rightly and in accordance with law held that the plaintiff-appellants have completely failed to prove the will deed dated 26.09.1969 and the plaintiff-appellants have failed to dispel the suspicious circumstances arising out of evidence of PW-2, the burden of which was on them and there is no admission of execution of

the said will deed by the DW-1 and DW-2, on account of which it may be said that it is sufficient prove of execution of Will as against the respondent-defendants. Thus the aforesaid substantial questions of law no.1 and 2 framed in this second appeal, are answered accordingly.

39. In view of above and considering over all facts and circumstances of the case, this Court is of the view that the first appellate court has rightly and in accordance with law has allowed the appeal and set aside the judgment and decree passed by the trial court and dismissed the suit and this second appeal is misconceived and lacks merit, which is liable to be dismissed.

40. The second appeal is, accordingly, **dismissed**. No order as to costs.

(2024) 4 ILRA 995
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.03.2024

BEFORE

THE HON'BLE ASHUTOSH SRIVASTAVA, J.

First Appeal From Order No. 272 of 2024

Smt. Preeti Arora **...Appellant**
Versus
Subash Chandra Arora & Anr.
...Respondents

Counsel for the Appellant:
 Sri Arvind Srivastava

Counsel for the Respondents:
 Komal Mehrotra

Civil Law - Hindu Minority and Guardianship Act, 1956 - Section 8 - Instant FAFO u/s 8(c) of Hindu Minority and Guardianship Act, 1956, challenges order of A.D.J, whereby

plaintiff/ appellant's application seeking permission to sell property in interest of minors was rejected - Counsel for appellant contends that application u/s 8 was wrongly rejected - Trial Court erred in relying on mere conjecture that details of property to be purchased in Punj. or its possible rental were not disclosed - Appellant had bonafidely disclosed all circumstances for selling out property in her application, and also opposite parties had consented to transfer - Upon perusal of impugned order and admitted facts, Court is of view that appellant's Application u/s 8 of Act, 1956, was not liable to be rejected - However, as no natural guardian is required for a minor's undivided interest in joint family property as provided u/s 6 and 12 of Act, prior court permission u/s 8 for its disposal is not necessary - Thus, section 8 of Act, in view of express terms of Section 6 and 12 of Act would not be applicable where joint Hindu Family property is sought to be transferred/ disposed off - Impugned order, set aside. (Para 4, 7, 10, 13, 14)

Appeal allowed. (E-13)

(Delivered by Hon'ble Ashutosh Srivastava J.)

1. Heard Shri Arvind Srivastava (Advocate Roll No. A/A 1244/12) learned counsel for the plaintiff/ appellant and Sri Komal Mehrotra, learned counsel representing the defendant/ respondents.

2. The FAFO raises a purely legal issue. The respondent has already put in appearance and the Court is of the opinion that no useful purpose shall be served by keeping the FAFO pending.

3. With the consent of the parties, the FAFO is being decided finally at the admission stage itself.

4. The instant FAFO under Section 8 (C) of the Hindu Minority and Guardianship Act 1956 has been filed

assailing the order dated 04.10.2023 passed by the Additional District Judge, Saharanpur, in Misc. Case No. 276 of 2022 registered under Section 8 of the Hindu Minority and Guardianship Act 1956 whereby and whereunder the Application on behalf of the plaintiff/ appellant (Paper No. 4-B) supported by affidavit seeking permission to sell the property in the interest of minors has been rejected on flimsy grounds.

5. It is the case of the Plaintiff/ Appellant that she is a widow. Her husband expired on 17.03.2021 leaving behind her and 3 daughters besides his mother. The husband of the Plaintiff/ Appellant had 1/2 share in a double storied house bearing No. A-26, Paramount Tulip, having area 143.90 square meters. The other 1/2 share was of her father-in-law. After the death of her husband his heirs i.e. the Appellant, her mother-in-law and three daughters inherited 1/5th share each in the house property. The father-in-law (opposite party no. 1 herein) out of his own free will executed a Gift Deed on 05.08.2021 gifting his entire 1/2 share in the house property to the Appellant. The mother-in-law also executed a registered Gift Deed of her 10% share in favour of the Appellant. The Appellant thus has 70% of the share in the house property. The remaining 30% is that of the 3 minor daughters. The Appellant for the benefit and better prospects of her minor girls wants to sell the house and settle at Zeerakpur, Mohali, Punjab, where she is working. It has become difficult to maintain the property at Saharnpur. The maternal grand parents, uncle are all residing at Zeerakpur, Punjab. The Appellant shall not misappropriate the funds collected from the sale of the house property and shall make adequate investments for the minor girls to secure

their future. The opposite parties i.e. the father and mother in law have also extended their consent for the sale of the House property. All members of the family i.e. the Appellant, father and mother in laws, minor children are residing at Punjab and the minor girls are pursuing their studies at Punjab. The house remains locked. Some land mafias have their eyes over the property. In the aforesaid circumstances seeks permission under Section 8 of the Hindu Minority and Guardians Act 1956.

6. The learned Additional District Judge, Saharanpur, under the order dated 04.10.2023 impugned has rejected the Application of the Appellant seeking permission under Section 8 of the Hindu Minority and Guardianship Act 1956 being of the view that the Appellant wants to sell of the property and reside at Punjab. The children of the Appellant are minor out of them one is 12 year old and the other two are twins of 8 year each. The Appellant has not disclosed from whom she would purchase the property in Punjab and for what amount after selling the House Property here at Saharanpur. The property is residential property and is situated in a posh (VIP) area, it can be let out and the rental income can be utilized for the benefit of the minor children and meet out their educational needs.

7. Learned counsel for the Plaintiff/Appellant submits that the Plaintiff/Appellant ought not to have been non suited on the grounds stated in the impugned order. The Application for permission under Section 8 could not be rejected on the ground that the details of the property the Appellant would purchase in Punjab and for how much after selling the property in question have not been

disclosed, or that the property could be let out on rent. The Appellant had bonafidely disclosed all the circumstances for selling out the property in her application seeking permission, yet the Trial Court proceeded to reject the application on mere conjectures and surmises. It is also contended that the opposite parties had also consented for the transfer. Accordingly it is prayed that the impugned order being illegal, unjustified is liable to be set aside and the Application (Paper No. 4B) is liable to be allowed.

8. Shri Komal Mehrotra, learned counsel appearing for the respondent nos. 1 and 2 submits that the respondents had already accorded their consent in favour of the Appellant and in fact have already gifted their share in the house property in favour of the Appellant. They have no objection if the Appeal is allowed and the impugned order is set aside.

9. I, have heard the learned counsel for the parties and have perused the record.

10. Having gone through the impugned order and taking into consideration the admitted facts as set out in the impugned order, the Court is of the opinion that the Application (4-B) moved by the Appellant under Section 8 of the Hindu Minority and Guardianship Act 1956 was not liable to be rejected.

11. According to the Court, there is one other aspect of the matter and which is whether at all a permission was required for disposing of the undivided share of the minors. Though this point was not argued by the learned counsel for the Appellant but the Court deems it appropriate to state the correct legal position in this regard.

12. Section 6 of the Hindu Minority and Guardianship Act 1956 deals with Natural Guardian of a Hindu minor and inter alia provides that the natural guardian of a Hindu minor in respect of the minors' person as well as in respect of the minors' property (excluding his or her undivided interest in the joint family property), are in the case of a boy or an unmarried girl the father, and after him, the mother provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother. Section 8 thereof inter alia provides that the natural guardian of a Hindu minor has power, subject to the provisions of this section, to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realization, protection or benefit of the minor's estate; but the guardian can in no case bind the minor by a personal covenant. Furthermore the natural guardian shall not, without the previous permission of the court, mortgage or charge, or transfer by sale, gift, exchange or otherwise, any part of the immovable property of the minor or lease any part of such property for a term exceeding five years or for a term extending more than one year beyond the date on which the minor will attain majority. Any disposal of immovable property by a natural guardian, in contravention of sub-section (1) or sub-section (2), is voidable at the instance of the minor or any person claiming on behalf of the minor. Section 12 provides that where a minor has an undivided interest in the joint family property and the property is under the management of an adult member of the family, no guardian shall be appointed for the minor in respect of such undivided interest : Provided that nothing in this section shall be deemed to affect the jurisdiction of a High Court to appoint a guardian in respect of such interest.

13. With regard to the undivided interest of the Hindu minor in joint family property, the provisions afore-culled are beads of the same string and need be viewed in a single glimpse, simultaneously in conjunction with each other. Each provisions, and in particular Section 8, cannot be viewed in isolation. If read together the intent of the legislative in this beneficial legislation becomes manifest. Ordinarily the law does not envisage a natural guardian of the undivided interest of a Hindu minor in joint family property. The natural guardian of the property of a Hindu minor, other than the undivided interest in joint family property, is alone contemplated under Section 8, whereunder his powers and duties are defined. Section 12 carves out an exception to the rule that should there be no adult member of the joint family in management of the joint family property, in which the minor has an undivided interest, a guardian may be appointed; but ordinarily no guardian shall be appointed for such undivided interest of the minor. The adult member of the family in the management of the Joint Hindu Family property may be a male or a female, not necessarily the Karta. The power of the High Court otherwise to appoint a guardian, in situations justifying, has been preserved. This is the legislative scheme on the subject. Under Section 8 a natural guardian of the property of the Hindu minor, before he disposes of any immovable property of the minor, must seek permission of the court. But since there need be no natural guardian for the minor's undivided interest in the joint family property, as provided under sections 6 and 12 of the Act, the previous permission of the Court under Section 8 of disposing of the undivided interest of the minor in the joint family property is not required.

14. Thus in the opinion of the Court, section 8 of the Act in view of the express terms of Section 6 and 12 of the Act would not be applicable where joint Hindu Family property is sought to be transferred/ disposed off.

15. In view of the above discussion, the impugned order dated 04.10.2023 passed by the Additional District Judge, Saharanpur, in Misc. Case No. 276 of 2022 is set aside. The Appeal stands *allowed*.

16. No order as to costs.

(2024) 4 ILRA 999
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.04.2024

BEFORE

**THE HON'BLE Dr. YOGENDRA KUMAR
SRIVASTAVA, J.**

Habeas Corpus Writ Petition No. 949 of 2023

Master Hiras & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Maimoona Fatima, Sri Mohd. Nasir

Counsel for the Respondents:
G.A.

Constitution of India, 1950 – Article 226 – Guardians and Wards Act, 1890 – Sections 12, 17 – Principles of Mahomedan Law – Sections 349, 351 & 352 – Habeas Corpus – Custody of Minor – Illegal Detention – Natural Guardianship – Welfare of Minor - The petitioners, Master Hiras (minor corpus, aged about 2 years, born on 01.01.2022) and his father (petitioner no. 2), filed a habeas corpus petition asserting that the minor was illegally detained by respondent no. 4, the wife

of petitioner no. 2's brother, who had a strained relationship with her husband. The minor was taken by respondent no. 4 on 27.11.2022 when she left the joint family home to reside at her maternal home. The petitioners contended that the father, as the natural guardian, and the biological mother, entitled to custody (hizanat) under personal law, had the right to the minor's custody. The corpus was produced in court on 12.03.2024, and custody was temporarily granted to the parents. Held: (1) The petition was disposed of, with the rule nisi made absolute, allowing the minor to remain with petitioner no. 2 (father) and his mother. (2) The detention of the minor by respondent no. 4 was illegal, as it lacked legal basis under personal law or statutory provisions. (3) Under Section 352 of the Principles of Mahomedan Law, the mother is entitled to custody of a male child until age seven, and the father is the natural guardian; respondent no. 4 had no legal claim to custody. (4) In habeas corpus proceedings for minor custody, the court's primary duty is to ensure the child's welfare under its parens patriae jurisdiction, and illegal detention by a person without legal entitlement justifies issuance of the writ, per Sections 12 and 17 of the Guardians and Wards Act, 1890, read with personal law. (5) The court found no justification for respondent no. 4's custody, and the minor's welfare was best served with his parents. The demand draft deposited in respondent no. 4's name was ordered to be returned to petitioner no. 2.

List of Cases cited:

1. Master Hiras & Anr. Vs St. of U.P. & ors., (2024) 4 ILRA, Habeas Corpus Writ Petition No. 949

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

1. Heard Sri Mohd Nasir, learned counsel for the petitioners and Ms. Divya Ojha, learned AGA-I appearing for the State-respondents.

2. The petition has been filed with the assertion that the petitioner no. 1 (*corpus*),

who is the minor son of the petitioner no. 2, born on 01.01.2022, had been illegally detained by the respondent no. 4 (wife of the brother of the petitioner no. 2), who is stated to be having strained relationship with the husband.

3. Pursuant to the *rule nisi* issued earlier, the petitioner no. 1 (*corpus*) was produced in Court, on 12.03.2024, by respondent no. 4.

4. It was brought to the notice of the Court that the respondent no. 4 (wife of brother of the petitioner no. 2), was at an earlier point of time, living with the joint family, and on 27.11.2022, the respondent no. 4 is stated to have left her home taking the petitioner no. 1 (*corpus*) with her.

5. It was pointed out that the respondent no. 4, since then, was staying at her maternal home, and the petitioner no. 1 (*corpus*) was being illegally detained by her.

6. It was contended that the petitioner no. 1 (*corpus*), being an infant of age about 2 years, the father would be the natural guardian, and the biological mother would be entitled to a right of custody (*hizanat*), as per the personal law.

7. It was also pointed out that the mother of the petitioner no. 1 (*corpus*) and the respondent no. 4, were 'related to each other' and that proceedings of criminal nature as well as a matrimonial case, are pending, between the respondent no. 4 and her husband (i.e. the brother of the petitioner no. 2).

8. Taking into view that the custody of the petitioner no. 1 (*corpus*) with the respondent no. 4, could not prima facie be supported legally, the petitioner no. 1

(*corpus*) was permitted to go along with the petitioner no. 2 (his father) and his mother, who were present in the Court, on the previous date.

9. Today, upon the case being taken up, it was pointed out that the petitioner no. 1 (*corpus*) has been brought to the Court by the petitioner no. 2 (his father) and also his mother.

10. The petitioner No. 2, has been identified by his counsel, Sri Mohd. Nasir.

11. Learned AGA-I, on the basis of an enquiry made from the petitioner no. 2 and his wife (parents of the petitioner-*corpus*), in Court, submits that they have stated that the petitioner no. 1 (*corpus*) is under their guardianship and custody, and is being taken care of.

12. A writ of habeas corpus is prerogative process for securing the liberty of the subject by affording effective means of immediate release from an illegal or improper detention. The writ also extends its influence to restore the custody of a minor to his guardian when wrongfully deprived of it. The detention of a minor by a person who is not entitled to his legal custody would have to be treated as equivalent to illegal detention for the purpose of granting a writ directing custody of the minor child.

13. The law relating to guardians and wards is governed in terms of the Guardians and Wards Act, 18901, and an order with regard to guardianship may be passed under the aforesaid enactment, upon an application filed by a person claiming entitlement.

14. The provision with regard to making of an application regarding claims

based on entitlement of guardianship is under the GWA and under Section 12 thereof the court is empowered to make interlocutory orders for protection of a minor including an order for temporary custody and protection of the person or property of the minor.

15. Section 17 of the GWA relates to matters to be considered by the court in appointing a guardian, and in terms thereof it is provided that the court while deciding the question of guardianship of a minor, shall, as far as possible, do so consistently with the law to which the minor is subject, keeping in view the welfare of a minor. Thus, the provisions of the personal law are to be applied consistently with the provisions of the GWA, and insofar as the question of custody is concerned, the rights of parties in the present case, are to be governed by the personal law.

16. The matters relating to "Guardianship of Person and Property" are provided under Chapter XVIII of Principles of Mahomedan Law² and Part-A thereof pertains to "Appointment of Guardians". In terms of Section 349, all applications for the appointment of a guardian of the person or property or both of a minor, are to be made under the GWA.

17. Further, Section 351 of Principles of Mahomedan Law, which is in terms of Section 17 of the GWA, imposes a duty upon the court in appointing guardian to make the appointment consistently with the law to which the minor is subject, keeping in view the welfare of the minor.

18. The subject matter relating to "Guardianship of a Person of a Minor" is dealt with under Part-B of Chapter XVIII of Principles of Mahomedan Law, and

Sections 352 thereof, which relates to the right of mother to custody of infant children, is set out hereinbelow:-

"352. Right of mother to custody of infant children.—*The mother is entitled to the custody (hizanat) of her male child until he has completed the age of seven years and of her female child until she has attained puberty. The right continues though she is divorced by the father of the child (e), unless she marries a second husband in which case the custody belongs to the father (f).*"

19. It would be seen that in terms of Section 352, abovementioned, the mother is entitled to custody (hizanat) of her male child until he has completed the age of seven years.

20. In a petition seeking issuance of a writ of habeas corpus relating to the custody of a minor child, the principle duty of the Court would be to ascertain whether the custody of the child is unlawful or illegal and whether the welfare of the child requires that the present custody should be changed and the child be handed over to the care and custody of some other person. In doing so, the paramount consideration would undoubtedly be the welfare of the child and the role of the High Court in examining such cases would have to be on the touchstone of principles of *parens patriae* jurisdiction.

21. *Habeas corpus* proceedings would not ordinarily lie to justify or examine the legality of the custody of the minor child, and the question in this regard would have to be addressed by the Court in exercise of its discretionary jurisdiction. The prerogative writ of *habeas corpus*, is in the nature of an extraordinary remedy, and is to

27. The petitioner No. 1 (*corpus*) is permitted to be taken back by the petitioner No. 2 (his father), to the place from where he has been brought.

Civil Law - Prohibition of Benami Property Transactions Act, 1988 - Sections 2(8), 2(9), 2(10), 2(12), 24(1) & 24(3) - Constitution of India, 1950- Article 226-

Petitioner challenged show cause notice and provisional attachment order dated 05.01.2023, alleging constructions on Plot No. 35, Srijan Vihar Colony, Gomti Nagar, Lucknow, as benami transactions for her son-in-law. Court held: (1) No proceedings could be initiated for the plot purchased before the 2016 amendment to the Act, as per U.O.I. Vs Ganpati Dealcom Ltd., (2023) 3 SCC 315, which declared retrospective application unconstitutional. (2) Show cause notice under Section 24(1) lacked sufficient material to establish "reason to believe" petitioner was a benamidar, relying solely on contractor's St.ment without supporting evidence (Indra Prastha Chemicals (P) Ltd. Vs CIT, (2005) UPTC 53). (3) Provisional attachment order under Section 24(3) invalid due to absence of material indicating likelihood

of alienation. (4) "Reason to believe" requires rational, relevant material, not mere suspicion (Calcutta Discount Co. Ltd. Vs ITO, (1961) 41 ITR 0191; Johri Lal (HUF) Vs CIT, (1973) 88 ITR 0439). Show cause notice and attachment order set aside; consequential orders deemed non-est and void. (Paras 4-27)

Show Cause Notice and Provisional Attachment Order Set Aside; **Writ Petition Allowed.**

List of Cases cited:

1. U.O.I. Vs Ganpati Dealcom Ltd., (2023) 3 SCC 315 (Para 4)
2. Indra Prastha Chemicals (P) Ltd. Vs CIT, (2005) UPTC 53 (Para 16)
3. Calcutta Discount Co. Ltd. Vs ITO, (1961) 41 ITR 0191 (Para 20)
4. CST Vs Bhagwan Industries (Pvt.) Ltd., (1973) 31 STC 293 (Para 20)
5. Madhya Pradesh Industries Ltd. Vs ITO, (1965) 57 ITR 0637 (Para 20)
6. Johri Lal (HUF) Vs CIT, (1973) 88 ITR 0439 (Para 22)

(Delivered by Hon'ble Vivek Chaudhary, J.
&
Hon'ble Om Prakash Shukla, J.)

1. Heard Shri J.N. Mathur, learned Senior Counsel assisted by Shri Mudit Agarwal and Ms. Aishwarya Mathur, learned Counsel for the petitioner, Shri Surya Bhan Pandey, learned Senior Advocate/Deputy Solicitor General of India assisted by Dr. Ravi Kumar Mishra representing the respondent no.1/Union of India and Shri Neerav Chitravanshi and Shri Kushagra Dixit, learned Counsel for the respondent nos. 2 and 3.

2. By the present writ petition, primarily the petitioner has challenged the

show cause notice dated 05.01.2023 issued under 24(1) of The Prohibition of Benami Property Transactions Act, 1988 (hereafter referred to as 'Benami Transactions Act 1988') and provisional attachment order dated 05.01.2023 issued under Section 24(3) of the Benami Transactions Act, 1988. Petitioner has sought for further reliefs, but, at the very initial stage, learned counsel for the petitioner states that the main challenge is to the aforesaid show cause notice dated 05.01.2023 and the provisional attachment order dated 05.01.2023. In case the relief is granted to the said extent rest of the consequential orders and further actions would by themselves stand non-est and void.

3. By the impugned notice under challenge, the respondents-authorities have proposed to treat the constructions being raised by the petitioner on her Plot No.35 Srijan Vihar Colony, Gomti Nagar, Lucknow, to be a benami transaction, being carried out by the petitioner on behalf of respondent no.5, her son-in-law. The plot in question was purchased by the petitioner by a sale deed dated 23.04.2016. The Benami Transactions Act, 1988 was amended w.e.f. 25.10.2016. The sale deed of the petitioner is admittedly prior to the said amendment.

4. The Supreme Court has considered the validity of the Benami Transactions Act, 1988 in the case of **Union of India Vs. Ganpati Dealcom Ltd. & others; (2023) 3 SCC 315** and in Paragraph 127, the Supreme Court has given the following findings:

"127. In view of the above discussion, we hold as under:

127.1. Section 3(2)(sic Section 3) of the unamended 1988 Act is declared as

unconstitutional for being manifestly arbitrary. Accordingly, Section 3(2) of the 2016 Act is also unconstitutional as it is violative of Article 20(1) of the Constitution.

127.2. In rem forfeiture provision under Section 5 of the unamended 1988 Act, prior to the 2016 Amendment Act, was unconstitutional for being manifestly arbitrary.

127.3. The 2016 Amendment Act was not merely procedural, rather, prescribed substantive provisions.

127.4. In rem forfeiture provision under Section 5 of the 2016 Act, being punitive in nature, can only be applied prospectively and not retroactively.

127.5. The authorities concerned cannot initiate or continue criminal prosecution or confiscation proceedings for transactions entered into prior to the coming into force of the 2016 Act viz. 25.10.2016. As a consequence of the above declaration, all such prosecutions or confiscation proceedings shall stand quashed.

127.6. As this Court is not concerned with the constitutionality of such independent forfeiture proceedings contemplated under the 2016 Amendment Act on the other grounds, the aforesaid questions are left open to be adjudicated in appropriate proceedings."

5. Thus, the purchase of the said land being prior to coming into force of the amendment to the Benami Transactions Act, 1988, no proceedings with regard to the same can be initiated by the department. The said fact is also admitted

by the respondents in their show cause notice. The respondents have only initiated proceedings with regard to the constructions of residential house being raised by the petitioner on the said plot. The department claims that the petitioner is a *Benamidar* of the said constructions while the son-in-law of the petitioner, namely Sri Indramani Tripathi, is the beneficial owner of the said constructions. However, petitioner disputes the same by claiming that the department did not have any material to reach the said conclusion and the notice is based on the basis of presumptions, surmises and conjectures and thus is without jurisdiction. On the other hand the department submits that the show cause notice is based upon the sound evidence and concrete findings and the same is a show cause notice to which the petitioner can submit her reply to the department which shall be considered by the department.

6. This writ petition was filed in the year 2023 and on 3.5.2023, the following interim order was granted by this Court.

"Order on Memo of Petition

Heard.

Let the Counsel for the petitioner bring on record the reply filed by her to the impugned show cause notice issued during pendency of the present writ petition.

Learned Counsel for the Income Tax Department bring on record statement of then Assessee/witness in response to the summons issued to him on 02.12.2022 under Section 131(1A) of the Income Tax Act, 1961, as referred in the impugned order.

As we are seized with the validity of jurisdictional notice issued under Section 24(1) of The Prohibition of Benami Property Transactions Act, 1988 and the arguments which are on the verge of conclusion, list/put up this matter on 05.05.2023 to be taken up immediately after fresh. Any order referring the matter to the Adjudicating Officer under Section 24(5) of the Act, 1988 shall not be passed till the next date of listing.

C.M. Application No. IA/06 of 2023

This is an application for amendment supported with an affidavit.

The amendment application is allowed.

Let necessary amendment, as prayed, be carried out.

The opposite parties, if so choose, may file response to the amended portion of the writ petition."

7. The parties have exchanged their affidavits and the matter is now being heard finally.

8. The relevant provisions of the Benami Transactions Act, 1988 for the purpose of the present case reads as follows:-

"Section 2(8) benami property" means any property which is the subject matter of a benami transaction and also includes the proceeds from such property;

Section 2(9) "Benami Transactions"

(A) Transaction or an arrangement—

(a) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person; and

(b) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration, except when the property is held by—

(i) a Karta, or a member of a Hindu undivided family, as the case may be, and the property is held for his benefit or benefit of other members in the family and the consideration for such property has been provided or paid out of the known sources of the Hindu undivided family;

(ii) a person standing in a fiduciary capacity for the benefit of another person towards whom he stands in such capacity and includes a trustee, executor, partner, director of a company, a depository or a participant as an agent of a depository under the Depositories Act, 1996 and any other person as may be notified by the Central Government for this purpose;

(iii) any person being an individual in the name of his spouse or in the name of any child of such individual and the consideration for such property has been provided or paid out of the known sources of the individual;

(iv) any person in the name of his brother or sister or lineal ascendant or descendant, where the names of brother or

sister or lineal ascendant or descendant and the individual appear as joint-owners in any document, and the consideration for such property has been provided or paid out of the known sources of the individual; or

(B) a transaction or an arrangement in respect of a property carried out or made in a fictitious name; or

(C) a transaction or an arrangement in respect of a property where the owner of the property is not aware of, or, denies knowledge of, such ownership;

(D) a transaction or an arrangement in respect of a property where the person providing the consideration is not traceable or is fictitious;

Explanation.—For the removal of doubts, it is hereby declared that benami transaction shall not include any transaction involving the allowing of possession of any property to be taken or retained in part performance of a contract referred to in section 53A of the Transfer of Property Act, 1882, if, under any law for the time being in force,—

(i) consideration for such property has been provided by the person to whom possession of property has been allowed but the person who has granted possession thereof continues to hold ownership of such property;

(ii) stamp duty on such transaction or arrangement has been paid; and

(iii) the contract has been registered.

2(10) "benamidar" means a person or a fictitious person, as the case

may be, in whose name the benami property is transferred or held and includes a person who lends his name;

2 (12) beneficial owner" means a person, whether his identity is known or not, for whose benefit the benami property is held by a benamidar;

24. Notice and attachment of property involved in benami transaction.

(1) Where the Initiating Officer, on the basis of material in his possession, has reason to believe that any person is a benamidar in respect of a property, he may, after recording reasons in writing, issue a notice to the person to show cause within such time as may be specified in the notice why the property should not be treated as benami property.

(2) Where a notice under sub-section (1) specifies any property as being held by a benamidar referred to in that sub-section, a copy of the notice shall also be issued to the beneficial owner if his identity is known.

(3) Where the Initiating Officer is of the opinion that the person in possession of the property held benami may alienate the property during the period specified in the notice, he may, with the previous approval of the Approving Authority, by order in writing, attach provisionally the property in the manner as may be prescribed, for a period not exceeding ninety days [from the last day of the month in which the notice under sub-section (1) is issued.]

(4) The Initiating Officer, after making such inquiries and calling for such reports or evidence as he deems fit and

taking into account all relevant materials, shall, within a period of ninety days [from the last day of the month in which the notice under sub-section (1) is issued],-

(a) where the provisional attachment has been made under sub-section (3),--

(i) pass an order continuing the provisional attachment of the property with the prior approval of the Approving Authority, till the passing of the order by the Adjudicating Authority under subsection (3) of section 26; or

(ii) revoke the provisional attachment of the property with the prior approval of the Approving Authority;

(b) where provisional attachment has not been made under sub-section (3),-

(i) pass an order provisionally attaching the property with the prior approval of the Approving Authority, till the passing of the order by the Adjudicating Authority under sub-section (3) of section 26; or

(ii) decide not to attach the property as specified in the notice, with the prior approval of the Approving Authority.

(5). Where the Initiating Officer passes an order continuing the provisional attachment of the property under sub-clause (i) of clause (a) of sub-section (4) or passes an order provisionally attaching the property under sub-clause (i) of clause (b) of that sub-section, he shall, within fifteen days from the date of the attachment, draw up a statement of the case and refer it to the Adjudicating Authority.

[Explanation.- For the purposes of this section, in computing the period of limitation, the period during which the proceeding is stayed by an order or injunction of any court shall be excluded:

Provided that where immediately after the exclusion of the aforesaid period, the period of limitation referred to in sub-section (4) available to the Initiating Officer for passing order of attachment is less than thirty days, such remaining period shall be deemed to be extended to thirty days:

Provided further that where immediately after the exclusion of the aforesaid period, the period of limitation referred to in sub-section (5) available to the Initiating Officer to refer the order of attachment to Adjudicating Authority is less than seven days, such remaining period shall be deemed to be extended to seven days.]"

9. The case of petitioner is that the petitioner has been a regular assessee of the Income Tax department for long and is regularly filing her Income Tax returns. Petitioner belongs to an affluent family. Her husband is a retired IAS Officer and her son is a successful lawyer practicing in the High Court at Allahabad. The son-in-law of the petitioner, respondent no.5, to whom the department claims to be the beneficial owner, is an IAS officer of Uttar Pradesh cadre.

10. Submission of learned counsel for the petitioner is that the department has no evidence to prove any benami transaction or that the petitioner was a *Benamidar* of the constructions in question and respondent no.5 is the beneficial owner, while on the other hand, the claim of the

department that it is respondent no.5, who has paid and invested the entire amount for the said constructions. The department in support of the show cause notice has based its case upon the statement given by the contractor Sri Krishna Kumar Dubey, Partner of M/s. Vishnu Mitra Buildcon.

11. A perusal of the show cause notice shows that the total value of the constructions in dispute is around Rs.1.05 crores and out of the same an amount of Rs.95.00 lakhs has been transferred to M/s. Vishnu Mitra Buildcon from the Bank account of petitioner herself. Admittedly, the construction of the house was still underway, when on 5.1.2023 the show cause notice was issued.

12. Learned counsel for the parties have taken the Court through the detailed evidence on the basis of which the notice dated 5.1.2023 is issued. The only relevant portion, as per both the parties, is the statement of Sri Krishna Kumar Dubey, Partner of M/s. Vishnu Mitra Buildcon given on 4.1.2023. The relevant portion of the statement of Sri Krishna Kumar Dubey reads as follows:-

“प्रश्न 9: आपको दो फोटो (नीचे लगी) दिखाई जा रही हैं। कृपया इसकी पुष्टि करें की ये फोटो आपके द्वारा चसवज छवण 35ए तपरंद टीपीत बसवदलए ळवउजप छहंतए स्नबादवू पर बनाए जा रहे भवन की हैं।

उत्तर: जी हैं श्रीमान, मुझे दिखाई गयी ये दो फोटोज डममतं च्दकमलध्टपदमज च्दकमलध्छममसमदकतं च्दकमलध् प्दकतंउंदप ज्तपचंजीप के चसवज छवण 35ए तपरंद टीपीत बसवदलए ळवउजप छहंतए स्नबादवू पर मेरे द्वारा निर्मित किए जा रहे मउप.नितदपीमक भवन की ही हैं। इस बवदेजतनबजपवद का लगभग 90: से ज्यादा कार्य पूरा हो चुका है।

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प्रश्न 11: श्रीमती मीरा पाण्डेय को आप कैसे जानते हैं तथा उनसे आप कितनी बार मिल चुके हैं?

उत्तर: मैं श्रीमती मीरा पाण्डेय को प्रत्यक्ष रूप से नहीं जानता हूं तथा मैं उनसे एक बार भी नहीं मिला हूं न ही फोन अथवा ईमेल द्वारा कभी भी उनसे कोई संपर्क हुआ है। मैं मीरा पाण्डेय के पति को भी नहीं जानता हूं न ही उनसे कभी मिला हूं।

प्रश्न 12: क्या आप श्री नीलेंद्र पाण्डेय को जानते हैं?

उत्तर: जी हां श्रीमान, मैं श्री नीलेंद्र पाण्डेय जी से 2014 में अपने रिश्तेदार दिनेश कुमार मिश्र जी के माध्यम से मिला था।

प्रश्न 13: कृपया बताएं श्री नीलेंद्र पाण्डेय से आपके क्या व्यावसायिक संबंध हैं।

उत्तर: नीलेंद्र जी ने एक घर चसवज छवण 35ए तपरंद टीपीत बसवदलए ळवउजप छहंतए स्नबादवू जमीन पर बनाने का बवदेजतंबज मुझे दिलवाया था। इसके अलावा मेरा एक दूसरा प्रोजेक्ट भी दिलवाया जो की है—चसवज छवण 98ए तपरंद टीपीत बसवदलए ळवउजप छहंतए स्नबादवू जिसका स्वामित्व क्तण उड़ीअप पदही का है।

प्रश्न 14: क्या आप श्री इन्द्रमणि त्रिपाठी को जानते हैं?

उत्तर: श्रीमान, मेरी जानकारी में श्री इन्द्रमणि त्रिपाठी जी अभी स्व. के टब हैं। चसवज छवण 35ए तपरंद टीपीत बसवदलए ळवउजप छहंतए स्नबादवू पर बन रहे घर के असली मालिक वही हैं। उनके आफिस के स्टाफ और उनकी पत्नी समय समय पर भवन की पजम पर निर्माण देखने आते थे।

प्रश्न 15: कृपया बतायें की चसवज छवण 35ए तपरंद टीपीत बसवदलए ळवउजप छहंतए स्नबादवू पर बनाए जा रहे भवन के निर्माण से सम्बंधित खर्चों के बारे में आपकी बात किससे होती थी?

उत्तर: इस भवन के निर्माण के खर्चों से सम्बंधित बात श्री नीलेंद्र पाण्डेय जी से होती थी। जब निर्माण सम्बन्धी किश्त अकाउंट में आती थी या जब मुझे किश्त की जरूरत होती थी तब श्री नीलेंद्र पाण्डेय जी से ही बातचीत होती थी। यह बातचीत कभी फोन द्वारा या कभी उनके आफिस में खुद जा कर करता था। मेरी उनकी मुलाकात उनके दोनों घरों पर होती थी जिनके

पते हैं—38299ए टपींस झींदकए ळवउजप छंहंतए स्नबादवू तथा भूछवण57ए तैपरंद टपींत बसवदलए ळवउजप छंहंतए स्नबादवू।

प्रश्न16: कृपया बताएं की बसवज छवण35ए तैपरंद टपींत बसवदलए ळवउजप छंहंतए स्नबादवू पर बनाए जा रहे भवन के निर्माण से सम्बंधित खर्चों के लिए श्री नीलेंद्र पाण्डेय क्या कभी नगद में भी पैसे देते थे?

उत्तर: श्रीमान, कभी कभी जरूरत पड़ जाने पर श्री नीलेंद्र पाण्डेय नगद में भी पैसे दे दिया करते थे। कुल मिलाकर शायद 15 लाख रुपया नगद में दिया होगा।

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प्रश्न20: कृपया बताएं कि बसवज छवण35ए तैपरंद टपींत बसवदलए ळवउजप छंहंतए स्नबादवू पर भवन का निर्माण किसके रहने/उपयोग के लिए किया जा रहा था?

उत्तर: बसवज छवण 35ए तैपरंद टपींत बसवदलए ळवउजप छंहंतए स्नबादवू पर बन रहे भवन का असली स्वामित्व श्री इन्द्रमणि त्रिपाठी का है, तथा यह भवन श्री इन्द्रमणि त्रिपाठी के उपयोग के लिए है।

प्रश्न21: बसवज छवण 35ए तैपरंद टपींत बसवदलए ळवउजप छंहंतए स्नबादवू पर बन रहे भवन के निर्माण के दौरान भवन के स्वामी के रूप में निर्माणाधीन भवन को देखने कौन कौन आते थे?

उत्तर: महोदय, भवन के निर्माण के दौरान श्रीमती वत्सला त्रिपाठी निर्माणाधीन भवन को देखने आती थी।”

13. A perusal of the statement clearly shows that Sri Krishna Kumar Dubey, Partner of M/s.Vishnu Mitra Buildcon has not given any basis or reason as to how he believes that the original owner of the constructions is respondent no.5 and even the department has not put a single question to Sri Krishna Kumar Dubey with regard to the basis of his knowledge. In support of his statement Sri Krishna Kumar Dubey has not provided any documentary or other evidence. Similarly, the department has also not referred to any other evidence in the show cause notice to support the said statement.

14. Section 24 (1) of the Benami Transactions Act states that "where the Initiating Officer, on the basis of material in his possession, has reason to believe". Thus, there are two pre-conditions to the issuance of the notice under Section 24(1) of the Benami Transactions Act; (i) The Initiating Officer should have material in his possession and; (ii) the material should be sufficient to cause a reason to believe. It goes without saying that while interpreting a taxing statute, the principle of strict interpretation is to be applied.

15. As per record, in the present case a mere statement of the contractor without any substantial supportive evidence is made the basis of the entire proceedings. Such a mere statement without any supportive evidence cannot under law be held to be a sufficient material in possession of an Initiating Officer to arrive at a reason to believe that constructions are benami. There has to be sufficient material in possession of the Initiating Officer on the basis of which he can come to a logical conclusion that can be called a reason to believe for initiating proceedings.

16. In the case of **Indra Prastha Chemicals (P) Ltd. Vs. CIT (2005) UPTC 53**, a Division Bench of this Court held:-

"..... the 'reason to believe under Section 147, must be held in good faith and should have a rational connection and relevant bearing on the formation of the belief and should not be extraneous or irrelevant. Further, this Court in proceedings under Article 226 of the Constitution of India can scrutinize the reasons recorded by the AO for initiating the proceedings under Sections 147/148 of the Act. The sufficiency of the material cannot be gone into but relevancy certainly be gone into."

17. In the present case except for an oral statement of a contractor, who has not given any reason for making such a statement, and from whom the department has also not even asked as to on what basis he is making the said statement, the entire proceedings are initiated. There is not even an iota of material placed by the department before this Court, referred to in the show cause notice, on the basis of which the Court could believe the said bare statement and conclude that a reason to believe can be arrived at.

18. Admittedly, the petitioner has already submitted her Income Tax Returns for the relevant period and the said proceedings are not yet completed. As such, in the absence of the same the department also cannot claim that her earnings for the relevant year are beyond her known sources of income.

19. The department-respondents while making its submissions tried to rely upon the statement made by an Architect Sri Sanjay Mathur dated 16.01.2023; a jeweler namely Sri Vishal Gupta, proprietor of the firm M/s. Shiv Nath Traders recorded dated 24.01.2023 and the statement of Khazan Chandra dated 25.1.2023. The department has also placed reliance upon certain material collected from the mobile data of Sri Krishan Kumar Dubey. All the said statements and data collected are not referred to in the show cause notice and are of later date to the show cause notice dated 5.1.2023. The said statements and data cannot be referred to or relied upon by the department while defending the impugned notice dated 5.1.2023, as all the said evidences are collected by the department after the notice is issued and cannot be included in the material in possession of the Initiating Officer for forming the reason to

believe for issuance of the impugned notice. It is also not disputed by the department that an amount of Rs.95.00 lakhs is transferred from the Bank account of the petitioner to the account of the construction firm while the construction is underway and thus nearly the entire amount is already spent by the petitioner on constructions from her own account.

20. While interpreting the term "reason to believe" Courts in **Calcutta Discount Co. Ltd. Vs. Income Tax Officer & others; (1961) 41 ITR 0191, CST Vs. Bhagwan Industries (Pvt.) Ltd. 1973 (31) STC 293 (Para9,10, &11), Madhya Pradesh Industries Ltd Vs. ITO (1965) 57 ITR 0637 (Paras 3,6)**, has time and again held that the words "reason to believe" are stronger than the words "is satisfied" or "reason to suspect" and the Constitutional Courts have consistently held that the Officer cannot record his satisfaction for "reason to believe" on an arbitrary or irrational basis. The same has to be recorded based upon reasons supported by relevant material.

21. So far as the issue of maintainability of the petition, raised by the respondents is concerned, the Constitutional Courts have repeatedly held that the basis of a notice cannot be a mere pretence but must be supported by sufficient reasons and material. It is open for the Courts to examine whether the reasons for the belief have a rational connection or relevant bearing to the formation of belief and are not extraneous or irrelevant.

22. Suffice is to refer the judgment of Supreme Court in **Johri Lal (HUF) Vs. Commissioner of Income Tax; (1973) 88 ITR 0439**, the relevant paragraph no.5 reads as follows:-

"Before proceedings under Section 34(1)(a) could be validly initiated the Income-tax Officer must have reasons to believe that, by reason of the omission or failure on the part of the assessee to make a return of his income under Section 22 for any year or to disclose fully and truly all material facts necessary for his assessment for that year; income, profits and gains chargeable to Income-tax, have escaped assessment for that year; or have been unassessed, or assessed at too low a rate, or have been made a subject matter of the excessive relief under the Act, or excessive loss or depreciation allowance have been computed. The formation of the required opinion by the Income-tax Officer is a condition precedent. Without formation of such an opinion he will not have jurisdiction to initiate proceedings under Section 34(1)(a). The fulfilment of this condition is not a mere formality but it is mandatory. The failure to fulfil that condition would vitiate the entire proceedings. As held by this Court in Sheo Nath Singh v. Appellate Assistant Commissioner of Income-tax, (Central), Calcutta, the Income-tax Officer would be acting without jurisdiction if the reason for his belief that the conditions are satisfied, does not exist or is not material or relevant to the belief -required by this Section. It is true that the Courts will not go into the sufficiency of the reasons which persuaded the Income-tax Officer to initiate proceedings under Section 34(1)(a) of the Act. But the Courts will examine the relevancy of the reasons which persuaded the Income-tax Officer to take proceedings under Section 34(1)(a). The formation of the required belief is not the only requirement. The Income-tax Officer is further required by Section 34 to record his reasons for taking action under Section 34(1)(a) and obtain the sanction of the

Central Board of Revenue or the Commissioner, as the case may be."
(emphasis added)

23. Thus, in the aforesaid facts & circumstances, this Court has no hesitation in holding that there was no material in possession of the Initiating Officer which could be held to be sufficient for holding a reason to believe that the petitioner is a Benamidar of respondent no.5, her son-in-law, with regard to the constructions in question for initiating proceedings under Section 24(1) of the Benami Transactions Act.

24. As regards, the order of provisional attachment under Section 24(3) of the Benami Transactions Act is concerned, Section 24(3) requires that Initiating Officer is of the opinion that the person in possession of the property held Benami may alienate the property during the period specified in the notice. Without such a satisfaction the property can not be attached by the Initiating Officer.

25. In the present case, no such material has been referred to by the Initiating Officer in the impugned attachment order or placed before this Court which could demonstrate that the property is likely to be sold and thus require him to resort to Section 24(3) for provisional attachment. Thus, the order of provisional attachment is also without any basis.

26. In view of the aforesaid, it is held that the show cause notice dated 05.01.2023 issued under 24(1) of the Benami Transactions Act, is issued without any relevant material in possession of the Initiating Officer which would cause him to have reason to believe to initiate such

proceedings and similarly the order of provisional attachment dated 05.01.2023 is also held to be without any basis.

27. Thus, the impugned show cause notice dated 05.01.2023 issued under 24(1) of the Benami Transactions Act and also the provisional attachment order dated 05.01.2023 issued under Section 24(3) of the Act, are hereby set aside. All the consequential orders and proceedings on the basis of aforesaid show cause notice dated 5.1.2023 and the provisional attachment order dated 5.1.2023, stand non-est and void.

28. The writ petition is *allowed*.

(2024) 4 ILRA 1012

REVISIONAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 05.03.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Sales/Trade Tax Revision No. 549 of 2013

**The Commissioner, Commercial Tax, U.P.
Lucknow**

...Applicant

Versus

**S/S. Raj Kumar Amit Kumar,
Jahangeerabad**

...Opposite Party

Counsel for the Applicant:

S.C.

Counsel for the Opposite Party:

Sri Suyash Agarwal, Sri R.R. Agarwal (Sr. Adv.)

**Civil Law - Central Sales Tax Act, 1956 -
Section 5(3) - U.P. Value Added Tax Act,
2008 - Sales/Trade Tax Revision** - Revisionist challenged Tribunal's order granting exemption under Section 5(3) for paddy sales, claiming they were "sale for export" rather than "sale in the course of export." Court held: (1) Tribunal's finding

that sales were in the course of export was supported by certificates of foreign buyers, purchase orders, bills of lading, and Form-H, establishing an inseverable link between the sale and export (St. of Karn. Vs Azad Coach Builders Pvt. Ltd., (2010) 9 SCC 524). (2) Section 5(3) exemption applies when sale and export are inextricably linked, requiring intention to export, obligation to export, and actual export, which were satisfied in this case (Babu Kalika Prasad Traders Vs Commissioner Commercial Tax, 2012 N.T.N. Vol-49, p. 218). (3) Revisional jurisdiction under UPVAT Act is limited to correcting jurisdictional errors or egregious legal mistakes, not re-evaluating factual findings unless perverse; Tribunal's findings were based on evidence and not perverse (Hindustan Petroleum Corporation Ltd. Vs Dilbahar Singh, (2014) 9 SCC 78). (4) First Appellate Authority erred in ignoring factual evidence of export linkage, while Tribunal correctly applied legal principles. Revision dismissed; Tribunal's order upheld. (Paras 7-14)

Revision Petition Dismissed.

List of Cases cited:

1. St. of Karn. Vs Azad Coach Builders Pvt. Ltd., (2010) 9 SCC 524 (Para 4, 9)
2. Babu Kalika Prasad Traders Vs Commissioner Commercial Tax, 2012 N.T.N. Vol-49, p. 218 (Para 4)
3. Hindustan Petroleum Corporation Ltd. Vs Dilbahar Singh, (2014) 9 SCC 78 (Para 13)
4. Mohd. Inam Vs Sanjay Kumar Singhal, (2020) 7 SCC 327 (Para 13)
5. The Commissioner, Commercial Tax U.P. Vs M/s Godfrey Phillips India Ltd., 2024:AHC:22365 (Para 13)

(Delivered by Hon'ble Shekhar B. Saraf, J.)

(Judgement dictated in Open Court)

1. Heard Sri Bipin Kumar Pandey, learned counsel appearing on behalf of the revisionist and Sri R.R. Agarwal, learned

Senior Advocate assisted by Sri Suyash Agarwal, Counsel for the respondent.

2. This is a revision petition filed by the State wherein the following question of law has been admitted :-

"Whether under the facts and circumstances of the case, the Commercial Tax Tribunal was legally justified in granting exemption u/s 5(3) of Central Sales Act treating the transaction as sale in the course of export whereas the sale was for export to Ex. U.P. exporter?"

3. The case of the revisionist is that the finding of the first Appellate Authority was that the dealer in the present case was acting as an agent of the farmers and was auctioning the paddy to the highest bidder. The authority came to the conclusion that since the paddy was being auctioned to the highest bidder, even if the paddy was thereafter exported, the same would not come within the definition of "Sale in The Course of Export" and would be only 'Sale For Export'. The relevant part of the order of the first Appellate Authority is provided below :-

“व्यापारी तथ्यात्मक रूप से इसे प्रमाणित नहीं कर सके हैं और अपने स्पष्टीकरण में एक ओर निर्यातक व्यापारी का प्रमाणपत्र दाखिल कर रहे हैं जिसके अनुसार निर्यातक के क्रय आदेश के विरुद्ध उन्होंने माल की बिक्री की है वही दूसरी ओर अपने स्पष्टीकरण में यह कर रहे हैं कि काश्तकार के माल की खुली बोली लगाकर कच्ची आदत में अधिकतम बोली लगाने वाले व्यक्ति को उनके द्वारा माल की बिक्री की गई है। स्पष्ट है कि धारा-5(3) का अनुपालन

सुनिश्चित नहीं हो रहा है इसलिए व्यापारी को इस आधार पर भी उक्त सम्बन्धों पर छूट देय नहीं है। माननीय उच्च न्यायालय तथा सर्वोच्च न्यायालय ने अनेकानेक निर्णयों में “Sale For Export” तथा “Sale in The Course of Export” के अन्तर को स्पष्ट किया है तथा यह व्यवस्था दी है कि केन्द्रीय अधिनियम की धारा 5(3) में केवल “Sale in The Course of Export” पर ही करमुक्ति है तथा “Sale For Export” इस धारा में करमुक्त नहीं होगी।”

4. Against the above order, the dealer/respondent went in appeal before the Tribunal, wherein the Tribunal took into consideration the judgement of the Allahabad High Court in **Babu Kalika Prasad Traders Vs. Commissioner Commercial Tax** reported in 2012 N.T.N. Vol-49 page 218, which had considered the Supreme Court judgement in **State of Karnataka Vs. Azad Coach Builders Pvt. Ltd. and Ors.** reported in (2010) 9 SCC 524. Upon considering the above judgements, the Tribunal came to the following finding:-

“उपरोक्त के सम्बन्ध में व्यापारी द्वारा ज्वाइन्ट कमिश्नर (कार्यपालक) के समक्ष अपने स्पष्टीकरण के साथ सर्वश्री बेस्ट फूड इंटरनेशनल प्रा०लि० द्वारा जारी दो प्रमाण पत्र दाखिल किये हैं, जिनमें यह प्रमाणित किया गया है कि उन्हें विदेशी निर्यातक के आदेशों (4 आदेशों के संख्या एवं दिनांक उल्लिखित हैं) इस व्यापारी से (4 परचेज आर्डर का उल्लेख किया गया है) परचेज आर्डर लेकर धान की खरीद की गयी है। इसी प्रकार दूसरे प्रमाण पत्र में विदेशी

क्रेता के एक आदेश का उल्लेख करते हुए इसके क्रम में निर्यातक द्वारा इस व्यापारी को जारी क्रय आदेश का उल्लेख करते हुए यह प्रमाणित किया गया है कि इन आदेशों के आधार पर की गयी खरीद से निर्मित चावल को देख के बाहर निर्यात किया गया है। अतः ज्वाइन्ट कमिश्नर (कार्यपालक) द्वारा पारित आदेश इस सीमा तक उचित नहीं है। सर्वश्री सतनाम ओवरसीज को की गयी बिक्री रू० 783756.00 के सम्बन्ध में व्यापारी द्वारा कोई प्रमाण पत्र दाखिल नहीं किया है। इस स्तर पर भी सर्वश्री सतनाम ओवरसीज को की गयी बिक्री रू० 783756.00 के सम्बन्ध में विदेशी क्रेता का कोई परचेज ऑर्डर या अन्य साक्ष्य नहीं प्रस्तुत किया गया है। अतः सर्वश्री सतनाम ओवरसीज से सम्बन्धित फार्म-एच को मान्यता प्रदान न करने से सम्बन्धित विद्वान ज्वाइन्ट कमिश्नर (कार्यपालक) द्वारा पारित आदेश दिनांक 18.06.12 को आंशिक रूप से स्वीकार किये जाने योग्य है।

आदेश

अपीलकर्ता व्यापारी द्वारा दायर द्वितीय अपील अंशतः स्वीकार की जाती है। ज्वाइन्ट कमिश्नर (कार्यपालक) द्वारा पारित आदेश को संशोधित करते हुए रू० 2,01,98,089.00 पर 8 प्रतिशत की दर से आरोपित कर रू० 16,15,847.00 समाप्त किया जाता है। अपीलकर्ता व्यापारी ने यदि इस सम्बन्ध में धनराशि जमा की गयी है तो यह धनराशि अपीलकर्ता को वापस की जाये।”

5. Counsel appearing on behalf of revisionist Mr. Bipin Kumar Pandey argued

that in the present case no clear finding could be reached with regard to the goods being sold in the course of export, and accordingly, argued that the benefit of Section 5(3) of Central Sales Act, 1956 (hereinafter referred to as the 'Act') would not be applicable, and therefore, exemption would not be available to the dealer. He relied on the order passed by the first Appellate Authority to buttress his arguments.

6. Per contra, Mr. R.R. Agarwal, Senior Advocate appearing on behalf of the dealer/respondent has placed reliance on the case of **Azad Coach Builders Pvt. Ltd. (Supra)**.

7. Upon considering the arguments placed by counsel appearing on behalf of both the parties and upon perusal of the orders passed by the first Appellate Authority and the Tribunal, I am of the view that the first Appellate Authority did not consider certain factual aspects that have later been considered by the Tribunal.

8. The undisputed facts that emerge from the order passed by the Tribunal are that the dealer/respondent had produced certificate of the foreign buyers, purchase orders of the foreign buyers, bills of lading and the Form-H as required under the Act. These documents strengthened the belief of the Tribunal that the sales were made by the dealer/respondent in the course of export.

9. One may also rely on the relevant paragraphs of the judgement passed in **Azad Coach Builders Pvt. Ltd. (Supra)** that explains the interpretation of Section 5(3) of the Act. Relevant paragraphs are delineated below :-

"23. When we analyse all these decisions in the light of the Statement of Objects and Reasons of the amending Act 103 of 1976 and on the interpretation placed on Section 5(3) of the CST Act, the following principles emerge:

To constitute a sale in the course of export there must be an intention on the part of both the buyer and the seller to export.

There must be obligation to export, and there must be an actual export.

The obligation may arise by reason of statute, contract between the parties, or from mutual understanding or agreement between them, or even from the nature of the transaction which links the sale to export.

To occasion export there must exist such a bond between the contract of sale and the actual exportation, that each link is inextricably connected with the one immediately preceding it, without which a transaction sale cannot be called a sale in the course of export of goods out of the territory of India.

24. The phrase "sale in the course of export" comprises in itself three essentials: (i) that there must be a sale; (ii) that goods must actually be exported; and (iii) that the sale must be a part and parcel of the export. The word "occasion" is used as a verb and means "to cause" or "to be the immediate cause of". Therefore, the words "occasioning the export" mean the factors, which were the immediate cause of export. The words "to comply with the agreement or order" mean all transactions which are inextricably linked with the

agreement or order occasioning that export. The expression "in relation to" are words of comprehensiveness, which might both have a direct significance as well as an indirect significance, depending on the context in which it is used and they are not words of restrictive content and ought not be so construed.

25. Therefore, the test to be applied is, whether there is an inseverable link between the local sale or purchase on export and if it is clear that the local sale or purchase between the parties is inextricably linked with the export of the goods, then a claim under Section 5(3) for exemption from State sales tax is justified, in which case, the same goods theory has no application."

10. It may be noted that circular No.66/31-3-99 issued by the Commissioner, Commercial Tax, Uttar Pradesh, also clarifies the situation wherein the benefit of exemption is to be granted to the dealer. Relevant paragraph is quoted below :-

“3- उत्तर प्रदेश व्यापार कर अधिनियम-1948 के अन्तर्गत धान की प्रथम खरीद पर कर देय है। निर्यातक को धान की बिक्री करने वाले व्यापारी अगर किसान से धान निजी खाते या अन्य प्रिंसिपल के लिए खरीद करके, निर्यातक व्यापारी को ऐसे धान की बिक्री करता है तो उसे धान की खरीद पर क्रय कर देना होगा क्योंकि किसान और उनसे खरीदने वाले व्यापारी के बीच सम्बन्धवहार केन्द्रीय विक्रय कर अधिनियम की धारा-5(3) के अन्तर्गत नहीं आता है लेकिन अगर किसान का धान कोई

व्यापारी अपनी सेलिंग एजेन्सी में निर्यातक व्यापारी को बेचता है और धारा 5(3) की शर्तों को पालन होता है तो ऐसी बिक्री पर कोई कर देय नहीं होगा।”

11. Upon a perusal of aforesaid paragraph, it is clear that the nature of sale, if it is in the course of export, is exempted under Section 5(3) of the Act.

12. From a reading of the order passed by the Tribunal, it is crystal clear that the Tribunal has relied upon the certificate of the foreign buyers, purchase orders of the foreign buyers, bills of lading and the Form-H submitted under the Act to come to a finding that in the present case the goods were sold in the course of export. Based upon this finding, the Tribunal had come to the finding that the sale is exempted under Section 5(3) of the Act.

13. This Court in **The Commissioner, Commercial Tax U.P. v. M/s Godfrey Philips India Limited** [Neutral Citation No. - 2024:AHC:22365 (Sales/Trade Tax Revision No.150 of 2023 decided on February 12, 2024)] after considering the Supreme Court judgements in **Hindustan Petroleum Corporation Limited v. Dilbahar Singh** reported in (2014) 9 SCC 78 and in **Mohd. Inam v. Sanjay Kumar Singhal and others** reported in (2020) 7 SCC 327 had come to the finding that is delineated below :-

"12. The principles governing the exercise of revisional jurisdiction under the UPVAT Act, 2008 are imbued with a presumption of finality attached to judgments and orders pronounced by the appellate authorities. High Courts, in their capacity as revisional bodies, are entrusted

with the solemn duty of upholding the sanctity of such judgments and orders, and such, should not lightly disturb them unless compelling reasons of paramount significance necessitate such intervention. It is imperative to underscore that revisional jurisdiction is not designed as a mechanism for the indiscriminate prelitigation of cases or the unwarranted reopening of matters that have been adjudicated and settled through due process. High Courts, in the exercise of their revisional jurisdiction are circumscribed by certain fundamental principles that underscore the sanctity of factual findings arrived at by lower courts or tribunals. Ordinarily, High Courts are precluded from intervening in factual findings unless such findings exhibit characteristics of perversity, are predicated on no evidence whatsoever, or evince a palpable and egregious error of law. The cardinal principle underlying revisional jurisdiction mandates that High Courts refrain from engaging in the revaluation of factual evidence or arrogating to themselves the authority to substitute their own findings for those meticulously arrived at by the lower courts or tribunals.

13. Revisional jurisdiction, as envisaged under the UPVAT Act, 2008, is meticulously tailored to address jurisdictional errors and excesses of law that may have permeated the adjudicative process at lower echelons of the judicial hierarchy. It is incumbent upon High Courts, when exercising revisional jurisdiction, to vigilantly scrutinize the legal landscape and ascertain whether the impugned judgment or order suffers from any infirmities of jurisdictional import or egregious deviations from the normative contours of legal propriety. The legislative intent underpinning the conferment of

revisional jurisdiction upon High Courts is imbued with a profound commitment to the principles of judicial economy, finality, and legal certainty. Revisional jurisdiction is not conceived as a vehicle for the protracted re-examination of factual matrices, or the interminable redressal of grievances already exhaustively adjudicated upon by the lower courts or tribunals. Rather, it constitutes an instrumental mechanism for rectifying egregious legal errors or jurisdictional excesses that may have vitiated the adjudicative process, thereby ensuring the equitable and efficacious administrative of justice."

14. In view of the above, I find no reason to interfere in the order passed by the Tribunal as the findings of the Tribunal are based on the materials placed before it and not a figment of their imagination. There is no perversity whatsoever in the order passed by the Tribunal, and accordingly, the same is upheld. The question of law is answered against the revisionist and in favour of the dealer/respondent.

15. Ergo, the revision petition is dismissed.

(2024) 4 ILRA 1017
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.03.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Writ Tax No. 619 of 2023

M/s United Spirits Ltd., Shajahnpur
...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sri Harshul Bhatnagar

Counsel for the Respondents:

C.S.C.

Civil Law - U.P. Entry of Goods into Local Area Act, 2007 - Sections 1(3), 17 & 18 - U.P. Entry of Goods into Local Area Tax Act, 2000 - Section 4(A) - U.P. Sales Tax Rules, 2000 - Rule 41(5) - Constitution of India, 1950 - Article 226 - Writ Petition -

Petitioner challenged provisional assessment order dated April 19, 2006, final assessment order dated March 30, 2008, and appellate order dated December 31, 2022, imposing entry tax of Rs. 2,78,02,393/- on Indian Made Foreign Liquor (IMFL). Court held: (1) The U.P. Entry of Goods into Local Area Tax Act, 2000, was declared ultra vires by the Allahabad High Court, and proceedings under the New Act (2007) apply, but IMFL is not listed in the schedule of taxable goods under the New Act, rendering the imposition of entry tax without jurisdiction. (2) The appellate authority failed to address the petitioner's argument regarding the absence of IMFL in the New Act's schedule, making the order unreasoned and non-speaking. (3) Authorities lacked jurisdiction to impose entry tax on goods not included in the New Act's schedule, and the issue of non-inclusion goes to the root of the matter. Impugned appellate order dated December 31, 2022, quashed; matter remanded to the authority for a reasoned order addressing the non-inclusion of IMFL in the schedule, to be completed within three months. (Paras 4-9)

Writ Petition Allowed.

(Delivered by Hon'ble Shekhar B. Saraf, J.)

1. Heard Sri Harshul Bhatnagar, counsel appearing on behalf of the petitioner and Sri Rishi Kumar, learned Additional Chief Standing Counsel appearing for the State respondents.

2. This is a writ petition under Article 226 of the Constitution of India wherein the writ petitioner is aggrieved by the

adjudication order dated March 3, 2008 for recovery of the amount of Rs.2,78,02,393/-
b

3. At the very first instance, counsel appearing on behalf of the petitioner submits that the provisional assessment order dated April 19, 2006 was passed as per Section 4(A) of the Uttar Pradesh Entry of Goods into Local Area Tax Act, 2000 (hereinafter referred to as the 'Act') read with Rule 41(5) of the Uttar Pradesh Sales Tax Rule 2000. Subsequently, final assessment order dated March 30, 2008 was passed. Counsel appearing on behalf of the petitioner submits that the Act was held to be ultra virus by the High Court, Allahabad and the matter is pending before the Supreme Court. In the meantime, the present Act was brought in by way of an ordinance and is named as Uttar Pradesh Entry of goods into Local Area Act, 2007 (hereinafter referred to as the 'New Act'). The Act in Section 1(3) makes it clear that the Act would be deemed to be in force from November 1, 1999.

4. The present proceedings have all taken place under the New Act as earlier Act has been declared ultra virus by the High Court. It is to be noted that in the New Act entry tax is leviable on the goods that are mentioned in the schedule. However, the goods in question in the present case is Indian Made Foreign Liquor (hereinafter referred to as 'IMFL') which is not mentioned in the schedule. Counsel appearing on behalf of the petitioner, accordingly, submits that the entire proceedings that have culminated into the present liability are non est in law and without any basis whatsoever.

5. Counsel appearing on behalf of the State has relied on Sections 17 and 18 of

the New Act to indicate that all actions taken under the earlier Act of 2000 shall be deemed to have been validly taken.

6. I have heard counsel appearing on behalf of the parties and perused the materials on record.

7. The only issue before this Court is whether the authorities below acted in accordance with law at the time of passing the impugned orders. It is clear that the provisional assessment was done as per the earlier Act of 2000 while final assessment has been done under the New Act. The arguments raised by counsel appearing on behalf of the petitioner appears to be a valid one with regard to the fact that the New Act does not contain IMFL in the schedule, and accordingly, under the New Act, no final assessment could have been done with regard to the goods which were not included in the schedule of the New Act. The Appellate Authority while passing the order dated December 31, 2022 has not considered the arguments placed by the petitioner with regard to the absence of goods in question in the schedule. It is to be noted that if the goods in question are not in the schedule of the New Act, the authorities had no jurisdiction whatsoever to impose entry tax on the same. This question is going to the very root of the matter and the authority should have considered and answered the same.

8. In my view, the orders passed are bereft of any reason with regard to imposition of entry tax on IMFL that is not even an item in the schedule to the New Act.

9. In light of the same, impugned orders are unreasoned and have been passed in a non speaking manner.

Accordingly, the impugned order dated December 31, 2022 is quashed and set aside with a direction upon the authority concerned to grant another opportunity of hearing to the petitioner and pass a reasoned order on the same and specifically giving reasons with regard to imposition of tax on the particular goods that are not mentioned in the schedule of New Act. The parties shall be at liberty to place the relevant documents and judgments before the authority concerned. The entire exercise should be completed within a period of three months from date. Upon passing of the reasoned order a copy of the same be handed over to the petitioner within a week, thereafter.

10. The instant writ petition is allowed in aforesaid terms. There shall be no order as to the cost.

(2024) 4 ILRA 1019
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.03.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Writ Tax No. 777 of 2022

With

Writ Tax No. 660 of 2023

M/s Samsung India Electronics Pvt. Ltd.

...Petitioner

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioner:

Sri M.P. Devnath, Sri Nishant Mishra Sri Abhishek Anand

Counsel for the Respondent:

Sri Rishi Kumar, Addl. C.S.C.

Civil Law -Integrated Goods and Services Tax Act, 2017 - Section 16 - Central Goods and Services Tax Act, 2017 - Sections 2(19), 2(59) - Constitution of India,1950 - Article 226 - Petitioner challenged orders dated October 25, 2021, and February 24, 2023, rejecting refund of unutilised Input Tax Credit (ITC) for July-September 2019 (Rs. 7,46,52,231/-) and October-December 2019 (Rs. 8,20,59,875/-) on inputs used for export of IT services. Court held: (1) Department's inconsistent rejection of refund claims, despite sanctioning similar claims for prior and subsequent periods under identical facts, violated the principle of consistency in taxation, undermining fairness and public trust (Birla Corpn. Ltd. Vs CCE, 2005 (186) ELT 266 (SC)). (2) Department travelled beyond show cause notices by rejecting refunds on grounds of Accounting Standard 10, not raised in notices, violating natural justice (Reckitt & Colman of India Ltd. Vs Collector of Central Excise, (1997) 10 SCC 379). (3) Specific goods used for R&D and software development, not capitalised in books, qualified as inputs under Section 2(59) of CGST Act, not capital goods, as they were essential for IT services (Tata Engineering & Locomotive Company Ltd. Vs St. of Bihar, 1994 (74) ELT 193 (SC)). (4) GST authorities lacked jurisdiction to question compliance with Accounting Standards, governed by Companies Act, 2013. Impugned orders dated October 25, 2021, and February 24, 2023, quashed; consequential reliefs to follow. (Paras 7-22)

Writ Petitions Allowed.

List of Cases cited:

1. Birla Corpn. Ltd. Vs CCE, 2005 (186) ELT 266 (SC) (Para 12)
2. Indian Oil Corporation Ltd. Vs Collector of C. Ex., Baroda, 2006 (202) ELT 37 (SC) (Para 13)
3. Bharat Sanchar Nigam Ltd. Vs U.O.I., (2006) 3 SCC 1 (Para 14)
4. Boving Fouress Ltd. Vs Commissioner of Central Excise, Chennai, 2006 (202) ELT 389 (SC) (Para 4)

5. Reckitt & Colman of India Ltd. Vs Collector of Central Excise, (1997) 10 SCC 379 (Para 4)

6. Commissioner of Central Excise, Bangalore Vs M/s Brindavan Beverages (P) Ltd., Appeal (Civil) 3417-3425 of 2002 (Para 4)

7. Tata Engineering & Locomotive Company Ltd. Vs St. of Bihar, 1994 (74) ELT 193 (SC) (Para 16)

8. Ramlala Vs St. of U.P., 2023 SCC OnLine (All) 2479 (Para 18)

9. Associated Switch Gears and Projects Vs St. of U.P., 2024:AHC:12780 (Para 19)

10. The Board of High School and Intermediate Education, U.P. Vs Kumari Chitra Srivastava, (1970) 1 SCC 121 (Para 18)

(Delivered by Hon'ble Shekhar B. Saraf, J.)

1. M/s Samsung India Electronics Private Limited (hereinafter referred to as the “Petitioner”) has preferred the instant writ petitions under Article 226 of the Constitution of India challenging the order of the Additional Commissioner, Grade – 2 (Appeal) – I, Commercial Tax, NOIDA.

2. The facts and submissions made in the instant writ petitions bearing Writ Tax Nos. 777 of 2022 and 660 of 2023 are similar except for the relevant period and refund amount in question and hence, they are being taken up together.

FACTS

3. The factual matrix leading up to the instant writ petitions has been laid down below:

a. The petitioner is a company engaged in the export of Information Technology design and software development services pertaining to mobile

devices (“IT Services”) to its overseas holding company, namely, M/s Samsung Electronics Company Limited, Korea (hereinafter referred to as the “SEC Korea”) in terms of prevalent service agreement dated January 1, 2019. Such export of IT services is made by the Petitioner under Letter of Undertaking (hereinafter referred to as the “LOU”) without payment of IGST which constitutes zero rated supply as per Section 16 of the Integrated Goods and Services Tax Act, 2017 (hereinafter referred to as the “IGST Act, 2017”)

b. For rendering IT Services to SEC Korea, the Petitioner procures various inputs, input services, and capital goods and accordingly avails ITC of the CGST, SGST, and IGST paid thereon, in accordance with the applicable provisions of the GST laws.

c. The Petitioner had filed a refund claim of unutilised ITC of CGST, SGST, and IGST paid on various inputs and input services for the period of April 2019 to June 2019. After due consideration by the Department, said refund claim amounting to Rs.6,36,69,447/- was sanctioned by the Department barring for an amount of Rs.7,500/- on the ground of claiming refund of unutilised ITC on invoices missing in the GSTR-2A returns.

d. The Petitioner then filed for the refund of the unutilised ITC of CGST, SGST, and IGST paid on various inputs and input services, for the period of July – September, 2019 amounting to Rs.7,46,52,231/- and October – December, 2019 amounting to Rs.8,20,59,875/-. Against the aforesaid refund applications, deficiency memos under FORM GST-RFD-03 and later show cause notices were issued

by the Department proposing to reject the refund for the aforesaid periods.

e. Thereafter, the Petitioner filed a reply to the show cause notices and attended personal hearing, after which the Department partially allowed the refund and rejected a portion of the demand on the ground that the specific goods are capital goods, and not inputs vide orders dated April 28, 2021 and November 8, 2021.

f. Thereafter, the Petitioner filed appeals against the aforesaid orders dated April 28, 2021 and November 8, 2021. The said appeals were rejected vide orders dated October 25, 2021 and February 24, 2023.

g. Aggrieved by the order dated October 25, 2021, the Petitioner preferred the Writ Tax No.777/2022 before this Court and aggrieved by the order dated February 24, 2023, the Petitioner preferred the Writ Tax No. 660/2023 before this Court.

CONTENTIONS OF THE PETITIONER

4. Sri M.P. Devnath, learned counsel appearing on behalf of the Petitioner has made the following submissions:

a. The Department has adopted an inconsistent approach in dealing with the refund applications of the Petitioner, despite the fact that each of the refund applications arise out of the same set of facts and circumstances, which is grossly incorrect in law.

b. It is imperative to mention that for the subsequent and prior periods, except the period from July 2019 to March 2020, the refund claims have duly been

sanctioned to the Petitioner on the same facts and circumstances only.

c. It is a settled position of law that the Department cannot take contrary stand and adopt an inconsistent approach while dealing with the same set of facts as well as legal background. Reliance in this regard is placed on the judgments of the Hon'ble Supreme Court in **Birla Corporation Ltd. v. CCE** reported in **2005 (186) ELT 266 (SC)**, **Indian Oil Corporation Ltd. v. Collector of C. Ex., Baroda** reported in **2006 (202) ELT 37 (SC)**, and **Boving Fouress Ltd. v. Commissioner of Central Excise, Chennai** reported in **2006 (202) ELT 389 (SC)**.

d. The Department has travelled beyond the scope of show cause notices. The show cause notices and the refund rejection orders had rejected the refund on the ground that the specific goods are not consumed in the process of provision of output service and hence cannot be treated as inputs. However, the impugned orders dated October 25, 2021 and February 24, 2023, have proceeded on a completely different ground and have held that the expenses incurred on specific goods were required to be capitalised in the books of accounts as per Accounting Standard 10, and hence, the same are covered under the ambit of capital goods in terms of Section 2(19) of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as the "CGST Act, 2017"). The Respondent No. 2 has therefore clearly travelled beyond the scope of the show cause notices, which is clearly impermissible in law. Reliance is placed on the judgments of the Hon'ble Supreme Court in **Reckitt & Colman of India Ltd. v. Collector of Central Excise** reported in **(1997) 10 SCC 379** and

Commissioner of Central Excise, Bangalore v. M/s Brindavan Beverages (P) Ltd. and others (Appeal (Civil) 3417-3425 of 2002).

e. The Department has gone beyond the settled principles of law that if an allegation or ground is not made at the time of issuance of show cause notice, the authority cannot go beyond the scope of show cause notice to create a new ground at the later stage of adjudication. However, it is apparent and abundantly clear in the instant case that the Respondent No. 2 has completely travelled beyond the scope of show cause notices while adjudicating the issues on the principles of Accounting Standards which is not applicable to the facts and circumstances of the instant case. Neither the same was ever highlighted in the show cause notice nor in the order issued by the Respondent No. 3.

f. It is an admitted and undisputed fact that the specific goods have not been capitalised by the Petitioner. Upon a reading of the definition of the 'input' and 'capital goods', it is abundantly clear that the goods, which are not capitalised in the books of account and are intended to be used in course or furtherance of a business, would qualify as 'input'. In effect, as per the CGST Act, 2017, the only distinction between inputs and capital goods is that capital goods are the goods value of which has been capitalised in the books of account of the person claiming credit.

g. The Petitioner has not capitalised the value of specific goods in its books of account because the specific goods procured by it were used for the purpose of R & D, software development, and validation thereof, which includes, inter alia, development of project, testing

and validation of the output results. The Petitioner used these specific goods for undertaking research, design, and development related activities. Since the specific goods were procured by the Petitioner specifically for the purpose of software development and the validation thereof, the Petitioner did not capitalise these goods in its books of accounts. The Petitioner followed the capitalisation method based on use of goods and given that specific items became redundant after completion and validation of software and were discarded thereafter, the said goods were not capitalised in the books and accordingly, the Petitioner availed ITC on such goods by treating them as inputs. Therefore, the Petitioner has clearly treated the specific goods as 'inputs'.

h. It is further submitted that the capitalisation of assets cannot depend upon any straight jacket formula. The question of capitalisation has to be seen and analysed, keeping in mind the use case of the given industry. Goods which can be capital goods for one industry can be input for other industry. The Supreme Court in **Tata Engineering & Locomotive Company Ltd. v. State of Bihar** reported in **1994 (74) ELT 193 (SC)** held that tyres, tubes, and batteries would constitute inputs as they are essential and necessary for producing the goods in which it has been used. The Supreme Court held that no vehicle could operate or work, nor can it be said to have been produced unless tyres, tubes, and batteries are fixed to it, hence, these items would be inputs. Similarly, the specific goods in question are inputs because they are put for use for providing the services of R & D, software development, and validation thereof.

i. Without prejudice, the Petitioner further submits that the impugned orders dated October 25, 2021 and February 24, 2023, have erred in questioning the applicability of Accounting Standards under GST laws. Accounting Standards are applied to present Financial Statements reliably and the applicability of Accounting Standards on companies is governed by the Companies Act, 2013. Further, the financial statements of a company are required to comply with the Accounting Standards and deviation from the same is required to be disclosed along with financial effects thereof. The consequences of failure to comply with the provisions of the Accounting Standards are also contained in the Companies Act, 2013. Hence, GST authorities cannot be permitted to question the applicability and compliance of Accounting Standards as the same is beyond their jurisdiction. As long as financial statements stood prepared and audited in accordance with the provisions of Companies Act, 2013 and there were no questions raised by the relevant officers under Companies Act, 2013, the GST authorities were to regard that all expenses stood correctly recorded in the books of accounts.

j. In view of the aforesaid submissions, it is prayed that the impugned orders dated October 25, 2021 and February 24, 2023 passed by the Respondent No. 2 are patently illegal, devoid of jurisdiction and have been passed in a colourable exercise of power, and hence are liable to be set aside.

CONTENTIONS OF THE RESPONDENTS

5. Learned Additional Chief Standing Counsel appearing on behalf of the

respondents has made the following submissions:

a. The principle of *res judicata* does not apply in matters of taxation and merely because refund claims have been sanctioned previously, does not mean that the refund claims for subsequent period will also be sanctioned.

b. It is clear that the Petitioner while preparing its financial statements has not adhered to the Accounting Standards. Specific goods have not been capitalised by the Petitioner in accordance with Accounting Standard 10.

ANALYSIS AND CONCLUSION

6. I have heard the learned counsels appearing on behalf of the parties and perused the materials on record.

7. Taxation serves as the cornerstone of governmental revenue, facilitating the provision of public services and infrastructure. Essential to this system is consistency, ensuring that similar factual and legal circumstances are met with uniform treatment. Inconsistencies can erode public trust, undermine compliance, and ultimately compromise the integrity of the tax system. Consistency in taxation entails the application of standardized rules and principles to taxpayers confronting analogous factual and legal circumstances. This uniformity is fundamental to fostering fairness, transparency and predictability within the tax regime. The absence of consistency can breed perceptions of inequity and arbitrariness, eroding taxpayer compliance and faith in the tax systems' integrity.

8. The Petitioner in the instant case has put forth a compelling argument, contending

that the approach adopted by the Department in dealing with similar facts and circumstances lacks consistency. Upon a careful consideration, this Court finds itself in agreement with the Petitioner's assertion. It is evident that refund claims arising from precisely similar facts and circumstances for previous and subsequent assessment periods were duly sanctioned. However, a stark deviation from this precedent is observed in the treatment of refund claims for the periods of July-September 2019 and October-December, 2019, which have been inexplicably withheld by the Department. This sudden change in the Department's stand is not only inconsistent but also irrational. The principle of consistency dictates that when faced with identical factual and legal circumstances, the treatment should remain uniform. In this instance, the Department's decision to withhold refund claims for the aforementioned periods, despite having sanctioned similar claims in the past and subsequently in the future, lacks cogent rationale.

9. When taxpayers find themselves in analogous factual and legal circumstances, tax authorities must apply consistent treatment to avoid perceptions of unfairness. Inconsistencies in addressing comparable factual circumstances can lead to distrust in the fairness of the tax system and compromise compliance. Taxation departments must adhere to consistent interpretations and applications of tax laws and regulations. This adherence ensures that taxpayers are treated equitably under the law and prevents arbitrary decision-making by tax authorities. Such consistency also fosters predictability and certainty.

10. The crux of the matter lies in the undeniable fact that the factual and legal circumstances surrounding the refund

claims for July-September 2019 and October-December 2019 are indistinguishable from those of previous assessment periods and also the subsequent assessment periods for which the refunds have been approved. The Department's failure to provide a valid justification for this disparate treatment further underscores the inconsistency and irrationality of its actions. Moreover, such inconsistencies create uncertainty and confusion among taxpayers, leading to potential disputes and litigation. In the absence of clear and consistent guidelines, taxpayers may find it challenging to navigate the tax system, resulting in increased compliance costs and administrative burdens. Taxpayers have a legitimate expectation that similar factual and legal circumstances will be met with uniform treatment, and any deviations from this principle undermine the credibility and legitimacy of the actions taken by tax authorities.

11. The inconsistency and irrationality displayed by the Department in withholding refund claims for July-September 2019 and October-December 2019, despite having sanctioned similar claims in the past and in the future are indefensible.

12. The Supreme Court has upheld the doctrine of consistency on numerous occasions and held that Revenue cannot take a different stand when facts are almost identical. In **Birla Corpn. Ltd. v. CCE (supra)**, the Supreme Court held as follows:

"5. In the instant case the same question arises for consideration and the facts are almost identical. We cannot permit the Revenue to take a different stand in this case. The earlier appeal involving

identical issue was not pressed and was therefore, dismissed. The respondent having taken a conscious decision to accept the principles laid down in Pepsico India Holdings Ltd. [(2001) 130 ELT 193 : (2001) 42 RLT 800 (cegat)] cannot be permitted to take the opposite stand in this case. If we were to permit them to do so, the law will be in a state of confusion and will place the authorities as well as the assesseees in a quandary.”

13. Similarly, reference can also be made to **Indian Oil Corporation Ltd. v. CCE (supra)**, relevant paragraph of which is extracted below:

“9. Since the point involved in the present case is identical to the point involved in Hindustan Petroleum Corpn. Ltd. [(2000) 124 ELT 323 (Tri)] and the Department having accepted the principle laid down in Hindustan Petroleum Corpn. Ltd. [(2000) 124 ELT 323 (Tri)] the Department cannot be permitted to take a different stand in the present appeals.”

14. In **Bharat Sanchar Nigam Ltd. And Anr. v. Union of India and others reported in (2006) 3 SCC 1**, the Supreme Court held that even though res judicata does not apply to tax matters, where facts and law are same, no authority can generally be permitted to take a different view. Relevant paragraph is extracted below:

“20. The decisions cited have uniformly held that res judicata does not apply in matters pertaining to tax for different assessment years because res judicata applies to debar courts from entertaining issues on the same cause of action whereas the cause of action for each assessment year is distinct. The courts will

generally adopt an earlier pronouncement of the law or a conclusion of fact unless there is a new ground urged or a material change in the factual position. The reason why the courts have held parties to the opinion expressed in a decision in one assessment year to the same opinion in a subsequent year is not because of any principle of res judicata but because of the theory of precedent or the precedential value of the earlier pronouncement. Where facts and law in a subsequent assessment year are the same, no authority whether quasi-judicial or judicial can generally be permitted to take a different view. This mandate is subject only to the usual gateways of distinguishing the earlier decision or where the earlier decision is per incuriam. However, these are fetters only on a coordinate Bench which, failing the possibility of availing of either of these gateways, may yet differ with the view expressed and refer the matter to a Bench of superior strength or in some cases to a Bench of superior jurisdiction.”

15. What emerges from the aforementioned judgments of the Supreme Court is that the principles of consistency is sacrosanct in taxation matters. The Supreme Court has consistently emphasized that Revenue cannot take a different stand when facts are almost identical. These judgments underscore the significance of consistency in tax administration and the need for tax authorities to adhere to established principles and precedents. The arbitrary withholding of refund claims for specific periods, despite past precedents and the absence of any material change in circumstances, is contrary to the principles of fairness and equity.

16. Another ground taken in the instant dispute by the Petitioner revolves around the difference between input and

capital goods. Under Section 2 of the CGST Act, 2017 “capital goods” are defined as goods value of which is capitalized in the books of account of the person claiming ITC and are used in the course or furtherance of business. On the other hand, “input” is defined as any goods other than capital goods used or intended to be used by a supplier in the course or furtherance of business. The distinction between inputs and capital goods lies in whether the value of the goods is capitalized in the books of account of the taxpayer claiming ITC. Capital goods, by virtue of their nature, are intended for long-term use in the business and are typically subject to capitalization. Inputs, however, are goods used in the day-to-day operations of the business and are not subject to capitalization. In the instant case, specific goods procured by the Petitioner for R & D, software development, and validation directly contributed to the provisions of IT services exported to SEC Korea. These goods were not capitalized in the books of account, as they were deemed redundant after the completion and validation of software projects. The Petitioner’s assertion aligns with the definition of inputs provided under the CGST Act, 2017 which includes any goods used or intended to be used in the course or furtherance of business. Moreover, the Supreme Court’s decision in *Tata Engineering & Locomotive Company (supra)* underscores the principle that goods essential for producing a final product qualify as inputs. In the instant case, the specific goods used for R & D and software development are essential for providing IT services, and therefore, qualify as inputs under the CGST Act, 2017.

17. It is also apparent that the Department in the instant case has travelled

beyond the show cause notice by taking a completely contrary stand. The issuance of a show cause notice entails the obligation on the authority to meticulously delineate specific allegations or concerns prompting its issuance. The principles of natural justice demands that the recipient be accorded a fair and impartial opportunity to respond to the allegations or concerns raised in the show cause notice. This includes the right to be heard, the right to present evidence or arguments in their defence and the right to present evidence or arguments in their defence and also the right to a reasoned decision based on the merits of the case. Any attempt by the issuing authority to expand the scope of inquiry or introduce new allegations beyond those articulated in the show cause notice would constitute a violation of the principles of natural justice. Such actions would not only undermine the recipient’s right to a fair hearing but also erode trust in the integrity and impartiality of the adjudicatory process. The issuance of a show cause notice marks the initiation of a dialogue between the authority and the recipient, providing an avenue for the latter to present their perspective and defend against any allegation made. This process is rooted in the principle that individuals or entities should be given an opportunity to be heard before any adverse action is taken against them. By formally notifying the recipient of the grounds for initiating action, the authority is compelled to provide a coherent and substantiated basis for its actions, thereby fostering transparency in decision-making processes.

18. In **Ramlala v. State of U.P. and others** reported in **2023 SCC OnLine (All) 2479** this Court propounded that a person must be accorded a fair chance to put up his case and therefore the authorities cannot

traverse beyond the show cause notice. Relevant paragraphs are extracted herein:

“9. The principle that emerges from the above judgments is patently clear that a show cause notice is required to provide details of the nature of the offence and the grounds on which the show cause notice has been issued. Furthermore, the order that is subsequently passed, based on the show cause notice, cannot go beyond the said show cause notice and cannot in any manner penalise the noticee on grounds that were not stated in the show cause notice.

10. The rationale for not allowing the respondents from going beyond the realm of the show cause notice is that the petitioner has to be given a chance to put up his case with regard to the said show cause notice. In the event, a particular case is made out in the show cause notice and the order passed subsequently is beyond the said show cause notice, the same would amount to violation of the principles of natural justice, as the petitioner would not have been aware of the new grounds or new factual elements and could never have placed his case for the above before the authority concerned. It is in this background that the Supreme Court in umpteen judgments has laid down the law that an order passed by an authority cannot go beyond the scope of the show cause notice. In fact, the Supreme Court in the case of The Board of High School and Intermediate Education, U.P. v. Kumari Chitra Srivastava, (1970) 1 SCC 121 has categorically stated that the principles of audi alteram partem are required to be followed even if the same is burdensome in nature. Justice S.M. Sikri in his inimitable style stated as follows: “Principles of natural justice are to some minds

burdensome but this price - a small price indeed - has to be paid if we desire a society governed by the rule of law.”

19. In Associated Switch Gears and Projects v. State of U.P. and others reported in **2024:AHC:12780**, this Court espoused on the importance of show cause notice. Relevant paragraphs are extracted below:

“8. The significance of adhering to the confines of a show cause notice lies in upholding the rule of law and preventing arbitrary exercises of power. Any action taken by an authority beyond the scope defined in the notice risks transgressing the boundaries of legality and procedural fairness. Such overreach not only undermines the legitimacy of the authority but also compromises the rights of the individuals or entities involved, potentially leading to legal challenges and erosion of public trust. Moreover, the issuance of a show cause notice imposes a duty on the part of the authority to meticulously outline the specific allegations or concerns prompting its issuance. This requirement fosters transparency and accountability, as the recipient is entitled to a clear understanding of the charges against it, enabling it to formulate an informed response. Any attempt by the authority to expand the scope of inquiry or introduce new allegations beyond those articulated in the notice would violate this principle of specificity, depriving the recipient of a fair opportunity to address the accusations leveled against it.

9. The issuance of a show cause notice represents a pivotal juncture in administrative proceedings, demarcating the boundaries within which any authority can exercise its powers. By adhering to the

confines of the notice, authorities uphold principles of fairness, accountability, procedural regularity, and legal certainty essential for the legitimacy and effectiveness of governance systems. Any attempt to transcend these limits not only violates the rights of the individuals or entities involved but also undermines the rule of law and public trust in the institutions tasked with upholding it. Thus, this Court holds that, adhering to the show cause notice is not merely a procedural formality, but a mandatory requirement, beyond the scope of which, no action can be taken. Adherence to the show cause notice is a fundamental safeguard against arbitrary exercises of power, ensuring that authority remains tethered to the principles of justice and the rule of law."

20. It is evident in the instant case that the Department has deviated from the show cause notice, and as such any order passed by it running contrary to the grounds taken in the show cause notice, cannot be sustained. Issuance of the show cause notice represents a pivotal juncture in legal or administrative proceedings, demarcating the boundaries within which any authority can exercise its powers. Adhering to the confines of the show cause notice upholds principles of fairness, accountability, procedural regularity, and legal certainty essential for the legitimacy and effectiveness of the governance systems. Any attempt to transcend these limits not only violates the rights of the individuals or entities involved but also undermines the rule of law and public trust in the institutions tasked with upholding it. Therefore, adherence to the show cause notice is not merely a procedural formality but a mandatory requirement, beyond the scope of which, no action can be taken.

21. Principles emerging from the aforesaid discussion have been summarised below:

a. While the principle of *res judicata* does not apply to taxation matters, it is incumbent upon authorities to take a consistent approach when dealing with similar factual and legal circumstances. The principle of consistency states that when faced with analogous factual and legal circumstances, the treatment should remain uniform. Taxpayers have a legitimate expectation that similar factual and legal circumstances will be met with uniform treatment, and any deviations from this principle undermine the credibility and legitimacy of the actions taken by tax authorities.

b. When facts and circumstances in a subsequent assessment year are the same, no authority, whether quasi-judicial or judicial can generally be allowed to take a contrary view. The arbitrary withholding of refund claims for specific periods, despite past precedents and the absence of any material change in circumstances, is contrary to the principles of fairness and equity.

c. Capital goods, are intended for long-term use and are typically subject to capitalization. However, inputs, are goods used in the day-to-day operations of the business and are not subject to capitalization.

d. While issuing a Show Cause Notice, it is incumbent upon the Department to clearly outline the specific allegations or concerns against the recipient. In no case, the Department can be allowed to traverse beyond the confines of the Show Cause Notice, since the same will

trample upon the recipient's right to defend itself. Any attempt by the issuing authority to expand the scope of inquiry or introduce new allegations beyond those articulated in the show cause notice would constitute a violation of the principles of natural justice. Such actions would not only undermine the recipient's right to a fair hearing but also erode trust in the integrity and impartiality of the adjudicatory process. Any action taken beyond the confines of the Show Cause Notice, is void ab initio and cannot be sustained.

22. In light of the aforesaid, it is evident that the impugned orders dated October 25, 2021 and February 24, 2023 are palpably erroneous, and cannot be sustained. Accordingly, let there be a writ of certiorari issued against the orders dated October 25, 2021 and February 24, 2023 passed by the Respondent No. 2. The said orders are hereby quashed and set aside.

23. The writ petitions bearing Writ Tax No.777 of 2022 and Writ Tax No.660 of 2023 are, accordingly, allowed. Consequential reliefs to follow. There shall be no order as to the costs.

24. An urgent photostat-certified copy of the order, if applied for, should be readily made available to parties upon compliance with requisite formalities.

(2024) 4 ILRA 1029
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.04.2022

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Writ Tax No. 916 of 2022
 WITH

Writ Tax No. 1600 of 2022

M/s Eco Plus Steels Pvt. Ltd. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
 Sri Aloke Kumar

Counsel for the Respondent:
 C.S.C.

Civil Law - U.P. Goods and Services Tax Act, 2017 - Sections 74, 107, 122, 130 - Constitution of India, 1950 - Article 226 -
 - Petitioner challenged orders dated September 25, 2019, and April 5, 2022 (confiscation and penalty under Sections 130 and 122), and orders dated December 3, 2022, and August 3, 2022 (tax liability under Section 74), alleging improper assessment of excess stock. Court held: (1) Mere presence of excess stock does not justify confiscation under Section 130(1) unless tax liability arises at the point of supply or intent to evade tax is established; no such intent was alleged (M/s Maa Mahamaya Alloys Pvt. Ltd. Vs St. of U.P., 2023 82 NTN DX 393). (2) Stock valuation based on eye estimation, without physical weighing or counting despite available facilities, violated Section 15 and Rules, rendering confiscation and penalty orders unsustainable (M/s Metenere Ltd. Vs U.O.I., Writ Tax No. 360 of 2020). (3) Inordinate delay of 10 months in issuing show cause notice and 11 months in passing confiscation order indicated callous conduct, vitiating proceedings. (4) Burden of proof for confiscation and penalty lies on the Department, which failed to conduct proper physical verification. Impugned orders dated September 25, 2019, April 5, 2022, December 3, 2022, and August 3, 2022, quashed; deposited amounts to be refunded within eight weeks. (Paras 7-15)

Writ Petitions Allowed.

List of Cases cited:

1. M/s Maa Mahamaya Alloys Pvt. Ltd. Vs St. of U.P., 2023 82 NTN DX 393 (Paras 7-8)

2. M/s Metenere Ltd. Vs U.O.I., Writ Tax No. 360 of 2020 (Para 6)

(Delivered by Hon'ble Shekhar B. Saraf, J.)

1. Heard Mr. Alope Kumar, counsel appearing on behalf of the petitioner and Mr. Rishi Kumar, Additional Chief Standing Counsel appearing for the respondents.

2. The above two writ petitions have been filed challenging the orders passed in appeal under Section 107 of the Uttar Pradesh Goods and Services Tax Act, 2017 (hereinafter referred to as 'the Act').

3. In the first writ petition bearing Writ Tax No.916 of 2022, the orders under challenge are the order passed by the respondent No.3 (being the Assessing Officer) dated September 25, 2019 and the order dated April 5, 2022 passed by the Appellate Authority under Section 107 of the Act. The above two orders have been passed in relation to confiscation under Section 130 of the Act and levy of penalty under Section 122 of the Act.

4. In the second writ petition bearing Writ Tax No.1600 of 2022, the order dated December 3, 2022 passed by the respondent No.3 (being the Assessing Officer) and the order dated August 3, 2022 passed by the First Appellate Authority under Section 107 of the Act are under challenge. These orders have been passed under Section 74 of the Act for liability arising out of additional stock that was present with the petitioner.

5. In relation to Writ Tax No.916 of 2022, the issue to be answered is whether mere presence of additional stock would

result in confiscation and subsequent penalty.

6. Counsel on behalf of the petitioner has relied on two judgments of the coordinate Bench of this Court in the case of **M/s Maa Mahamaya Alloys Pvt. Ltd. vs. State of U.P. and others** reported in **2023 82 NTN DX 393** and in the case of **M/s Metenere Ltd. vs. Union of India** (Writ Tax No.360 of 2020, decided on December 17, 2020) in support of his arguments.

7. From a perusal of the judgment in the case of **M/s Maa Mahamaya Alloy Pvt. Ltd. (supra)**, it is clear that the issue was decided against the respondents. One may rely upon the paragraphs provided below for the same:-

"14. Coming to the Issue no.2, Section 130 of the GST Act contemplates and provides for levy of the penalty, in the event, any of the conditions so mentioned in Section 130(1) are made out. Section 130(1) reads as under:

"Section 130. Confiscation of goods or conveyances and levy of penalty-

(1) Notwithstanding anything contained in this Act, if any person -

(i) supplies or receives any goods in contravention of any of the provisions of this Act or the rules made thereunder with intent to evade payment of tax; or

(ii) does not account for any goods on which he is liable to pay tax under this Act; or

(iii) supplies any goods liable to tax under this Act without having applied for registration; or

(iv) contravenes any of the provisions of this Act or the rules made thereunder with intent to evade payment of tax; or

(v) uses any conveyance as a means of transport for carriage of goods in contravention of the provisions of this Act or the rules made thereunder unless the owner of the conveyance proves that it was so used without the knowledge or connivance of the owner himself, his agent, if any, and the person in charge of the conveyance,

then, all such goods or conveyances shall be liable to confiscation and the person shall be liable to penalty under section 122."

15. On a plain reading of the allegations levelled against the petitioner with regard to the improper accounting of goods, the only stipulation contained in Clauses (ii) and (iv) of sub-section (1) of Section 130 can at best be invoked by the department, however, in the present case, even assuming for the sake of argument, that the goods were lying in excess of the goods in record, the case against the petitioner would not fall under Clause (ii) of sub-section (1) of Section 130 for the simple reason that the liability to pay the tax arises at the time of point of supply, and not at any point earlier than that. On a plain reading, the scope of Clause (ii) of sub-section (1) of Section 130 is that any assessee who is liable to pay tax and does not account for such goods, after the time of supply is occasioned, would be liable to penalty under Clause (ii). Analyzing Clause (iv) of sub-section (1) of Section 130, the contravention of any provision of the Act or the Rules should be in conjunction with an intent to evade payment tax and penalty

can be levied by invoking Clause (iv) only when the department establishes that there were a contravention of the Act and Rules coupled with the 'intent to make payment of tax'. There is no such allegation in the show cause notice or any of the orders, I have no hesitation in holding that even the Clause (iv) of sub-section (1) of Section 130 would not be attracted in the present case."

8. Furthermore, the coordinate Bench in **M/s Maa Mahamaya Alloy Pvt. Ltd. (supra)** held that confiscation of the stock cannot be done only on the basis of eye estimation. The relevant paragraph is delineated below:-

"19. Coming to the Issue no.IV with regard to the determination of value of the goods. Section 15 of the GST Act provides for valuation of the taxable supply. In furtherance of the provisions contained in the Act, Rules have been framed and Rule 27 of the said Rules provides for the manner of valuation of supply of goods or services, however, in the present case, the valuation of the goods is required to be done in terms of the mandate of Section 15(1) read with Section 15(2) and read with Section 15(3). In the said Section 15 or the Rules framed thereunder, there is no prescriptions for valuation of the goods on the basis of eye estimation as has been done by the department and has been repelled by the appellate authority. The appellate authority has erred in repelling the valuation done on the basis of eye estimation, however, has proceeded to value the goods (although differently) at the appellate stage without resorting to the mandate and manner prescribed in Section 15 read with the Rules, thus, on that count also, the impugned order is not sustainable."

9. In the present case, the Appellate Authority, after examining all materials, came to the following conclusion:-

“... यह स्थिति यह स्पष्ट करती है कि अधिकारियों द्वारा वास्तव में माल का वजन कराकर स्टॉक अंकित नहीं किया गया है तथा इस संबंध में अपीलकर्ता का कथन उचित होना स्पष्ट होता है कि अधिकारियों द्वारा उचित प्रकार से वजन कराकर स्टॉक अंकित किए बना अंदाजा से गिनती एवं वजन का आगणन किया गया है जो केवल eye estimation के आधार पर ही है जिसमें जूनियरतम अधिकारी को अकेले लगभग 90 प्रति० स्टॉक को अंकित करने का कार्य दिया गया है। सर्वेक्षण के समय बनाए गये स्टॉक शीट में से किसी भी स्टॉक शीट के साथ माल को छोटे छोटे टुकड़ों में वजन कराने की तकपट्टी जिसमें एक बार में किए गये वजन को लिखा जाता है, नहीं बनायी गयी जबकि व्यापार स्थल पर वजन कराने का कांटा उपलब्ध रहा था? स्टॉक गणना की यह प्रक्रिया निश्चय ही त्रुटिपूर्ण है जिसमें सभी साइज के सरिया का एक बण्डल का वजन बिना वास्तविक वजन कराए गोलांकित में 50 केजी अंकित किया गया है एवं बिना तकपट्टी बनाए 520, 1676, 478, 757, 150, 400, 350, 500, 292 टन आदि का स्टॉक एक एक ढेर में अंकित किया गया है। इस प्रकार का स्टॉक अंकित किये जाने से यह स्पष्ट है कि स्टॉक की गणना उचित प्रकार से नहीं की गयी है तथा अधिकारियों द्वारा केवल Eye Estimation के आधार पर स्टॉक का अंकन किया गया है। यहाँ यह भी उल्लेखनीय है कि स्टॉक शीट के प्रत्येक पन्ने पर व्यापारी की ओर से उपस्थित व्यक्ति के हस्ताक्षर न होने एवं पंचों के हस्ताक्षर न होने से यह स्पष्ट हो रहा है कि अधिकारियों द्वारा स्टॉक गणना करने के विभागीय परिपाट का अनुपालन भी नहीं किया गया है। मेरे द्वारा भौतिक सत्यापन शीट पर हस्ताक्षर करने वाले अधिकारियों द्वारा प्रयोग किए गये बाड़ी वार्न कैमरे की रिकार्डिंग

मंगाकर देखी गयी। रिकार्डिंग की विडियो उपलब्ध नहीं करायी गयी। जो स्पष्ट करता है कि इन अधिकारियों द्वारा माल की कोई तौल करायी गयी है से संबंधित साक्ष्य विभाग के पास नहीं है। व्यापार स्थल पर टुकड़ों का वजन करने हेतु कांटा उपलब्ध रहने की दशा में व्यापारी के मजदूरों का प्रयोग करके वजन कराया जा सकता था। यह भी उल्लेखनीय रूप से पाया गया कि मात्र 10 घंटे के कार्यकाल में इतने अधिक सरिया के बंडल की गिनती भी नहीं करायी जा सकती है जबकि वजन कराया जाना भी नामुमकिन कार्य है।”

10. One is unable to understand that after the Appellate Authority had come to the above finding that the stock was not weighed or counted, specifically when the same could have very well been done in the premises of the petitioner, why did the Appellate Authority subsequently reduce the penalty by making a fresh assessment. The calculation of the stock by the Appellate Authority on the basis of an estimate is without any basis in law. When the Appellate Authority had come to the finding that the officers in the survey did not carry out the quantification of the stock in the correct manner, there was no reason for the Appellate Authority to uphold the confiscation and penalty. It is to be further noted that the survey was carried out on October 26, 2018, immediately thereafter objection was raised by the petitioner on October 28, 2018 and the order of confiscation was passed by the Assessing Authority on September 25, 2019, almost after 11 months of the date of survey. From the record, I do not find any reason with regard to the delay in the confiscation and levy of penalty. In fact, the notice for confiscation was issued in August 2019, almost 10 months after the date of survey. This inordinate delay in issuing show cause

notice goes to the root of the matter and is a factor to be considered. In my view, the delay leads to an inference that the authorities have acted in a callous manner.

11. This Court is of the view that the entire procedure followed by the authorities indicates not only a lackadaisical approach but also showcases the incompetence and inefficiency of the authorities that had carried out the survey in a shoddy manner and thereafter issued the show cause notice and passed order of confiscation and penalty belatedly.

12. It is trite law that the burden of proof for imposition of penalty and confiscation of goods is on the Department and the same cannot be done on estimates when it is clear that the Department could have carried out a physical verification based on counting and weighing of the goods. In light of the same, the entire finding with regard to excess stock, that is based on estimate, is liable to be rejected outrightly.

13. In light of the above, the impugned orders in Writ Tax No.916 of 2022 with regard to penalty and confiscation are quashed and set aside.

14. Similarly, the entire proceedings that have been initiated under Section 74 of the Act that have culminated in the writ petition bearing Writ Tax No.1600 of 2022, wherein challenge has been raised against the order passed by the Assessing Officer and the order passed in appeal with regard to liability of tax under Section 74 of the Act are to be quashed and set-aside as the same are based on finding that there was excess stock. As the said finding of excess stock is clearly without any basis in law and illegal, the initiation of proceedings

under Section 74 of the Act cannot stand on any footing.

15. Accordingly, the impugned orders in Writ Tax No.1600 of 2022 are quashed and set-aside. Consequently reliefs to follow. The amount, if any, deposited by the petitioner with the authorities, the same should be returned to the petitioner within a period of eight weeks from date.

16. Accordingly, both the writ petitions are allowed.

(2024) 4 ILRA 1033
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.03.2024

BEFORE

THE HON'BLE SAUMITRA DAYAL SINGH, J.
THE HON'BLE SURENDRA SINGH-I, J.

Writ Tax No. 1597 of 2022

Dipak Kumar Agarwal **...Petitioner**
Versus
Assessing Officer, Ward III, Mirzapur &
Ors. **...Respondents**

Counsel for the Petitioner:

Sri Ram Narain Yadav, Sri Suyash Agarwal, Sri Rakesh Ranjan Agarwal (Sr. Adv.)

Counsel for the Respondent:

A.S.G.I., Sri Gaurav Mahajan, Sri Gopal Verma

Civil Law - Income Tax Act, 1961 - Sections 132(1-A), 132B(1)(i) & 132B(4) - Income Tax Rules, 1962 - Rule 119A - Constitution of India, 1950 - Article 226 - Petitioner challenged seizure of Rs. 36,12,000/- on 01.09.2022 under Section 132B(1)(i) and sought its release with interest under Section 132B(4), alleging non-compliance with the 120-day timeline for deciding release application. Court held: (1) Section 132B(1)(i) allows release of seized assets if their nature and source are explained and no pre-existing or likely tax

demand exists; the second proviso's use of "shall release" within 120 days is directory, not mandatory, as the only consequence of non-compliance is interest at 18% per annum under Section 132B(4) (St. of U.P. Vs Manbodhan Lal Srivastava, AIR 1957 SC 912). (2) Petitioner's application dated 15.09.2022, claiming ownership of seized cash with supporting books of accounts, was maintainable despite seizure from another person, as ownership was not disputed by the revenue. (3) Assessing Authority's failure to decide the application within 120 days did not result in automatic release, as the directory nature of the provision preserves jurisdiction to decide post-timeline (C. Bright Vs District Collector, (2021) 2 SCC 392). (4) Decisions of Guj. and Gauhati High Courts treating the timeline as mandatory were not followed, as they relied on inapplicable precedent under Section 132(8) (Mitaben R. Shah Vs Deputy Commissioner of Income-Tax, (2011) 311 ITR 424 (Guj)). Writ petition disposed of with direction to Assessing Authority to decide application within two weeks by a reasoned order. (Paras 13-36)

Writ Petition Disposed.

List of Cases cited:

1. St. of U.P. Vs Manbodhan Lal Srivastava, AIR 1957 SC 912 (Para 23)
2. Banwarilal Agarwalla Vs The St. of Bihar, AIR 1961 SC 849 (Para 24)
3. C. Bright Vs District Collector, (2021) 2 SCC 392 (Para 25)
4. New India Assurance Company Vs Hilli Multipurpose Cold Storage (P) Ltd, (2020) 5 SCC 757 (Para 26)
5. Mitaben R. Shah Vs Deputy Commissioner of Income-Tax, (2011) 311 ITR 424 (Guj) (Para 8)
6. Mul Chand Malu (HUF) Vs Assistant/Deputy Commissioner of Income Tax, (2016) 69 Taxmann.com 437 (Gauhati) (Para 8)
7. Nadim Dilip Bhai Panjvani Vs Income-tax Officer, (2016) 66 Taxmann.com 124 (Guj.) (Para 8)

8. Ashish Jayantilal Sanghavi Vs Income-tax Officer, (2022) 139 Taxmann.com 126 (Guj.) (Para 8)

(Delivered by Hon'ble Saumitra Dayal
Singh, J.

&
Hon'ble Surendra Singh-I, J.)

1. Heard Sri Rakesh Ranjan Agarwal, learned Senior Advocate assisted by Sri Ram Narain Yadav, learned counsel for the petitioner and Sri Gaurav Mahajan, learned counsel for the revenue.

2. Present writ petition has been filed to quash the seizure of Rs. 36,12,000/- dated 13.09.2022, effected under Section 132B(1)(i) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'). Further relief has been sought to release the said amount detained since 01.09.2022, together with due interest payable under Section 132(B)(4) read with Rule 119 (A) of the Income Tax Rule, 1961 (hereinafter referred to as 'the Rules').

3. Learned Senior Counsel for the petitioner submits, petitioner is a jeweller. He regularly filed his income tax returns since 2012-2013. In the year 2022, he set out to acquire stock of gold jewellery for the oncoming Dushehra and Diwali festivities. He thus handed over Rs.36,12,000/- to his worker Om Prakash Bind on 31.08.2022 alongwith railway ticket requiring him to undertake the rail journey to Kolkata to buy jewellery. On 31.08.2022, said Om Prakash Bind was apprehended by the Government Reserved Police (GRP) at Railway Station, Mirzapur. In the course of that search by the police authorities, Rs.36,12,000/- was recovered from his bag. Later, that information was passed on to the Income Tax Authority who arrived on the scene on 01.09.2022 and

subjected the cash recovered from Om Prakash Bind to proceeding under Section 132 (1-A) of the Act.

4. In the course of proceedings statements of the petitioner as also Om Prakash Bind were recorded. In that, according to the petitioner, a consistent story emerged that the cash Rs.36,12,000/- recovered from Om Prakash Bind, belonged to the present petitioner.

5. The petitioner further claims, during the course of that investigation, petitioner had produced regular books of accounts and details of his income tax returns filed for the past Assessment Years to establish that the seized cash was duly accounted for/tax paid money. On 15.09.2022, the petitioner made an application to the assessing authority/respondent No.3 in terms of Section 132 B (1) (i) read with the proviso to Section 132 B (1) (i) of the Act to release the amount Rs.36,12,000/-. As a fact, it is undisputed, rather it is admitted to the revenue-that application has remained pending till now.

6. In such facts, learned Senior Counsel for the petitioner has vehemently urged, in view of the clear language of Section 132 B (1) (i) of the Act read with the second proviso thereto, once the application had been made by the petitioner to release the seized amount, the assessing authority was obligated to examine, if the nature and source of acquisition of any part of the seized money was explained. Further, it was obligated to examine, if there was any existing liability of tax or penalty etc. against the petitioner that may be satisfied from the seized amount. In absence of such pre-existing demand etc., the amount or the balance amount, as the

case may be, ought to have been released in favour of the petitioner.

7. Relying heavily of the second proviso, it has been urged, in absence of any decision made under the first proviso, the entire seized amount had to be released at the end of 120 days time period specified therein. Since, the petitioner had made the application within the stipulated time of 30 days (from the end of month in which assets/money was seized), that period of 120 days would expire not beyond mid January, 2023. Since no decision was made within that time, the petitioner has become absolutely entitled to release of that money.

8. Reliance has been placed on the decisions of the Gujarat High Court in **Mitaben R. Shah vs. Deputy Commissioner of Income-Tax And Another; (2011) 311 ITR 424 (GUJ)** as followed in **Mul Chand Malu (HUF) vs. Assistant/Deputy Commissioner of Income Tax; (2016) 69 Taxmann.com 437 (Gauhati)** and as also followed by the Gujarat High Court in **Nadim Dilip Bhai Panjvani vs. Income-tax Officer, Ward No.3; (2016) 66 Taxmann.com 124 (Gujarat)** and **Ashish Jayantilal Sanghavi vs. Income-tax Officer; (2022) 139 Taxmann.com 126 (Gujarat).**

9. Second, referring to the provisions of Section 132 B (4) read with Rule 119 A of the Rules, it has been submitted, the petitioner is entitled to monthly interest at the rate one-half percent, to be computed strictly in accordance with Rule 119 A of the Rules.

10. Thus, it has been submitted, the word 'shall' used in the second proviso to Section 132 B (1) (i) of the Act is a legislative mandate. It comes into force on

its own, upon expiry of time. Thus, at most, the revenue may hold the seized money for 120 days. During that period upon application filed, the assessing authority would become obligated to apply his mind- if money is duly accounted for and also if such money may be applied to satisfy any existing demand or demand likely to arise from the seizure itself. In the present facts, there was no pre-existing demand against the petitioner. Therefore, the revenue authority could only have examined if the seized amount Rs.36,12,000/- was accounted for and it was required to satisfy the likely demand of tax. The petitioner produced his books of accounts and clearly established that the entire money was duly accounted for. In absence of any adverse inference drawn within the permissible time limitation of 120 days, the petitioner is entitled to refund of that money, by operation of law.

11. On the other hand, Sri Gaurav Mahajan, learned counsel for the revenue would submit, there is no absolute right to refund earned by the petitioner during pendency of the assessment proceedings arising from the requisition made under Section 132 A (c) of the Act. He would also submit that the word 'shall' used in the second proviso of Section 132 B (1) (i) of the Act provides for directory scheme and not a mandatory legislative dictate.

12. Further objection that was also raised by Sri Mahajan, learned counsel for the revenue that the cash seized was not from the present petitioner but from Om Prakash Bind and therefore, application, if any, may have been made by said Om Prakash Bind, does not impresses the Court.

13. Having heard the learned counsel for the parties and perused the record, in

the first place, it would be useful to take note of the provisions of Section 132 B (1) (i) of the Act. It reads:

"132 B. Application of seized or requisitioned assets.- (1) The assets seized under section 132 or requisitioned under section 132 A may be dealt with in the following manner, namely:-

(i) the amount of any existing liability under this Act, the Wealth-tax Act, 1957 (27 of 1957), the Expenditure-tax Act, 1987 (35 of 1987), the Gift-tax Act, 1958 (18 of 1958) and the Interest-tax Act, 1974 (45 of 1974), and the amount of the liability determined on [completion of the assessment or reassessment or recomputation] and the assessment of the year relevant to the previous year in which search is initiated or requisition is made, or the amount of liability determined on completion of the assessment under Chapter XIV-B for the block period, as the case may be (including any penalty levied or interest payable in connection with such assessment) and in respect of which such person is in default or is [deemed to be in default, or the amount of liability arising on an application made before the Settlement Commission under sub-section (1) of section 245C, may be recovered out of such assets]"

14. Undoubtedly, the first proviso to the said sub-section allows the person searched, an opportunity to make an application for release of a seized assets, if nature and source of its acquisition, is explained. The money Rs. 36,12,000/- seized from Om Prakash Bind is clearly an asset that has been seized. Therefore, subject matter of seizure fell within the scope of provisions of Section 132 B (1) (i) of the Act.

15. Second it is also not in doubt that the petitioner applied for release of that asset/cash Rs.36,12,000/- within a time stipulated for that purpose i.e. 30 days from the last authorization. That, the revenue does not dispute.

16. Then, a presumption exists that under the Act, an asset seized from a person belongs to that person at the same time that presumption remains rebuttable in law. Therefore, it was open to the petitioner to make such an application even though the cash had not been seized from his person or from him. At the same time, it may have remained open to the respondent/authority to issue notice to Om Prakash Bind on that application made by the petitioner and pass appropriate order, thereafter.

17. Here, it is not disputed to the revenue that in the course of investigation arising from seizure made, the said Om Prakash Bind did participate in the investigation and at present, the record appears to suggest that he made a statement indicating petitioner's ownership in the money Rs.30,12,000/-. In any case, we are not required to draw any final conclusion in that regard, at present, since that exercise had to be made by the assessing authority. Yet, there was no inherent defect in the application made by the petitioner.

18. In the present facts, no finding has been recorded by the Assessing Authority. In fact he has neither disputed the ownership of money claimed by the petitioner nor he has considered the issue to any extent. Therefore, the only conclusion to be drawn at this stage is-the application made by the petitioner for release of the seized money of Rs.36,12,000/- dated 15.09.2022 was wholly maintainable.

19. Under the scheme of the Act, in the first place, upon an application for release of seized assets filed, the Assessing Authority is first required to examine if the nature and source of acquisition of the seized asset is explained. In fact, law obligates the Assessing Authority to consider release such part of the seized asset of which nature and source of acquisition is explained by the person searched. The first caveat to that statutory principle is that there may not pre-exist any demand of tax to which such explained asset may not be applied, in the interest of revenue. The second caveat is, such asset may not be released if it would be required to recover the tax demand likely to arise upon assessment being made consequent to the search. Thus, though tax paid/duly explained assets of an assessee may come to be seized in the course of search proceedings on the strength 'reason to believe' recorded at that stage of proceedings, the Act does not permit retention of such assets. On the contrary, the Act stipulates, such assets may be released in favour of the person searched at the initial stage itself subject however to the exception that there may not be any outstanding recovery of tax against such a person and such asset may not be required to recover the demand of tax likely to arise upon assessment to be made as consequent to the search.

20. Seen in that light, we come to the core issue involved in the present case. It is whether in such facts where the petitioner had made an application to release seized asset/cash of Rs.36,12,000/- in terms of the first proviso to Section 132 B (1) (i) of the Act and the Assessing Authority failed to record any satisfaction within '120 days' stipulated under the second proviso to the above noted provision, the petitioner

became absolutely entitled in law to obtain release of those assets.

21. To decide that issue, we have to interpret the word 'shall release' appearing in the second proviso to Section 132 B (1) (i) of the Act. If those words express mandatory intent, it cannot be denied that the petitioner would remain entitled to refund of Rs.36,12,000/-, upon the Assessing Authority's failure to decide the petitioner's application dated 15.09.2022 within the stipulated time of 120 days. On the other hand, if those words express directory intent, the application would survive for consideration by the Assessing Authority, in terms of first proviso to Section 132 B (1) (i) of the Act.

22. In grammar, the words 'shall' and 'may' indicate different intent. The word 'shall' is normally used to indicate to cause a mandatory effect whereas 'may' indicates action to be taken as per the doers volition. In usage, the difference may also indicate the degree of politeness invoked by the user. However in law though application of the rules of grammar is not excluded, at the same time interpretation in law as to mandatory or directory nature of the word 'shall' is not to be decided solely on the strength of rules of grammar. Well recognized principle in that regard involve looking at the object and purpose and whether consequences of non-compliance have been prescribed in law.

23. In **State of U.P. vs. Manbodhan Lal Srivastava: AIR 1957 SC 912**, a five-Judge bench of the Supreme Court observed as below:

11. An examination of the terms of Article 320 shows that the word "shall" appears in almost every paragraph and

every clause or sub-clause of that article. If it were held that the provisions of Article 320(3)(c) are mandatory in terms, the other clauses or sub-clauses of that article, will have to be equally held to be mandatory. If they are so held, any appointments made to the public services of the Union or a State, without observing strictly, the terms of these sub-clauses in clause (3) of Article 320, would adversely affect the person so appointed to a public service, without any fault on his part and without his having any say in the matter. This result could not have been contemplated by the makers of the Constitution. Hence, the use of the word "shall" in a statute, though generally taken in a mandatory sense, does not necessarily mean that in every case it shall have that effect, that is to say, that unless the words of the statute are punctiliously followed, the proceeding or the outcome of the proceeding, would be invalid. On the other hand, it is not always correct to say that where the word "may" has been used, the statute is only permissive or directory in the sense that non-compliance with those provisions will not render the proceeding invalid. In that connection, the following quotation from Crawford on Statutory Construction— Article 261 at p. 516, is pertinent:

"The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other..."

(emphasis supplied)

24. Then, in the case **Banwarilal Agarwalla vs. The State of Bihar And Others; AIR 1961 SC 849**, another five Judge bench of the Supreme Court as under:

6. It was not disputed before us that when the Regulations were framed, no Board as required under Section 12 had been constituted, and so, necessarily there had been no reference to any Board as required under Section 59. The question raised is whether the omission to make such a reference makes the rules invalid. As has been recognised again and again by the courts, no general rule can be laid down for deciding whether any particular provision in a statute is mandatory, meaning thereby that non-observance thereof involves the consequence of invalidity or only directory, i.e., a direction the non-observance of which does not entail the consequence of invalidity, whatever other consequences may occur. But in each case the court has to decide the legislative intent. Did the legislature intend in making the statutory provisions that non-observance of this would entail invalidity or did it not? To decide this we have to consider not only the actual words used but the scheme of the statute, the intended benefit to public of what is enjoined by the provisions and the material danger to the public by the contravention of the same. In the present case we have to determine therefore on a consideration of all these matters whether the legislature intended that the provisions as regards the reference to the Mines Board could be contravened only on pain of invalidity of the regulation.

(emphasis supplied)

25. Then, in **C. Bright vs. District Collector And Others; (2021) 2 SCC 392**

a three Judge bench of the Supreme Court had the occasion to consider whether the word 'shall' used (in Section 14 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002) to prescribe 30-60 days time limit to deliver possession, was mandatory or directory. The Supreme Court considered the pre-existing law on the subject and observed as below:-

8. A well-settled rule of interpretation of the statutes is that the use of the word "shall" in a statute, does not necessarily mean that in every case it is mandatory that unless the words of the statute are literally followed, the proceeding or the outcome of the proceeding, would be invalid. It is not always correct to say that if the word "may" has been used, the statute is only permissive or directory in the sense that non-compliance with those provisions will not render the proceeding invalid and that when a statute uses the word "shall", prima facie, it is mandatory, but the Court may ascertain the real intention of the legislature by carefully attending to the whole scope of the statute. The principle of literal construction of the statute alone in all circumstances without examining the context and scheme of the statute may not serve the purpose of the statute.

9. The question as to whether, a time-limit fixed for a public officer to perform a public duty is directory or mandatory has been examined earlier by the courts as well. A question arose before the Privy Council in respect of irregularities in the preliminary proceedings for constituting a jury panel. The Municipality was expected to revise the list of qualified persons but the jury was drawn from the old list as the Sheriff

neglected to revise the same. It was in these circumstances, the decision of the jury drawn from the old list became the subject-matter of consideration by the Privy Council. It was thus held that it would cause greater public inconvenience if it were held that neglecting to observe the provisions of the statute made the verdicts of all juries taken from the list ipso facto null and void so that no jury trials could be held until a duly revised list had been prepared.

10. The Constitution Bench of this Court held that when the provisions of a statute relate to the performance of a public duty and the case is such that to hold acts done in neglect of this duty as null and void, would cause serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, the practice of the courts should be to hold such provisions as directory. In a seven-Bench judgment, this Court was considering as to whether the power of the Returning Officer to reject ballot papers is mandatory or directory. The Court examined well-recognised rules of construction to observe that a statute should be construed as directory if it relates to the performance of public duties, or if the conditions prescribed therein have to be performed by persons other than those on whom the right is conferred.

11. In a judgment reported as *Remington Rand of India Ltd. v. Workmen*, Section 17 of the Industrial Disputes Act, 1947 came up for consideration. The argument raised was that the time-limit of 30 days of publication of award by the Labour Court is mandatory. This Court held that though Section 17 is mandatory, the time-limit to publish the award within 30 days is

directory inter alia for the reason that the non-publication of the award within the period of thirty days does not entail any penalty.

12. In *T.V. Usman v. Food Inspector, Tellicherry Municipality*, the time period during which report of the analysis of a sample under Rule 7(3) of the Prevention of Food Adulteration Rules, 1955 was to be given, was held to be directory as there was no time-limit prescribed within which the prosecution had to be instituted. When there was no such limit prescribed then there was no valid reason for holding the period of 45 days as mandatory. Of course, that does not mean that the Public Analyst can ignore the time-limit prescribed under the Rules. He must in all cases try to comply with the time-limit. But if there is some delay, in a given case, there is no reason to hold that the very report is void and, on that basis, to hold that even prosecution cannot be launched.

13. This Court distinguished between failure of an individual to act in a given time-frame and the time-frame provided to a public authority, for the purposes of determining whether a provision was mandatory or directory, when this Court held that it is a well-settled principle that if an act is required to be performed by a private person within a specified time, the same would ordinarily be mandatory but when a public functionary is required to perform a public function within a time-frame, the same will be held to be directory unless the consequences therefor are specified.

14. In *P.T. Rajan v. T.P.M. Sahir*, this Court examined the effect of non-publication of final electoral rolls before the time of acceptance of nomination

papers. The Court held as under : (SCC p. 516, para 48)

"48. Furthermore, even if the statute specifies a time for publication of the electoral roll, the same by itself could not have been held to be mandatory. Such a provision would be directory in nature. It is a well-settled principle of law that where a statutory functionary is asked to perform a statutory duty within the time prescribed therefor, the same would be directory and not mandatory."

(emphasis supplied)

26. Then, the Supreme Court further considered the law laid down by a five Judge Constitution Bench of the Supreme Court in **New India Assurance Company vs. Hilli Multipurpose Cold Storage (P) Ltd; (2020) 5 SCC 757**. It observed:

"15. A recent Constitution Bench held that the provisions of the Consumer Protection Act granting 30 days' time to file response by the opposite party or such extended period not exceeding 15 days is mandatory as the object of the statute is for the benefit and protection of the consumer. It observed that such Act had been enacted to provide expeditious disposal of consumer disputes. In this case, an individual was called upon to file his written statement in contradiction for a public authority to decide the issue before it"

(emphasis supplied)

27. Upon, that discussion of the law, the Supreme Court then concluded (in **C Bright vs. District Collector And Others: (2021) 2 SCC 392**) as below:

"21. The Act was enacted to provide a machinery for empowering banks and financial institutions, so that they may

have the power to take possession of secured assets and to sell them. The DRT Act was first enacted to streamline the recovery of public dues but the proceedings under the said Act have not given desirous results. Therefore, the Act in question was enacted. This Court in Mardia Chemicals, Transcore and Hindon Forge (P) Ltd. has held that the purpose of the Act pertains to the speedy recovery of dues, by banks and financial institutions. The true intention of the legislature is a determining factor herein. Keeping the objective of the Act in mind, the time-limit to take action by the District Magistrate has been fixed to impress upon the authority to take possession of the secured assets. However, inability to take possession within time-limit does not render the District Magistrate functus officio. The secured creditor has no control over the District Magistrate who is exercising jurisdiction under Section 14 of the Act for public good to facilitate recovery of public dues. Therefore, Section 14 of the Act is not to be interpreted literally without considering the object and purpose of the Act. If any other interpretation is placed upon the language of Section 14, it would be contrary to the purpose of the Act. The time-limit is to instil a confidence in creditors that the District Magistrate will make an attempt to deliver possession as well as to impose a duty on the District Magistrate to make an earnest effort to comply with the mandate of the statute to deliver the possession within 30 days and for reasons to be recorded within 60 days. In this light, the remedy under Section 14 of the Act is not rendered redundant if the District Magistrate is unable to handover the possession. The District Magistrate will still be enjoined upon, the duty to facilitate delivery of possession at the earliest."

(emphasis supplied)

28. Here, the only consequence of non-compliance of Section 132 B (1) (i) of the Act, as has been rightly pointed out by the learned Senior Counsel for the petitioner is contained in Section 132 B (4) of the Act. That provision of law reads as below:

" 4 (a) The Central Government shall pay simple interest at the rate of [one-half per cent. for every month or part of a month] on the amount by which the aggregate amount of money seized under section 132 or requisitioned under section 132A, as reduced by the amount of money, if any, released under the first proviso to clause (I) of sub-section (1), and of the proceeds, if any, of the assets sold towards the discharge of the existing liability referred to in clause (I) of sub-section (1), exceeds the aggregate of the amount required to meet the liabilities referred to in clause (I) of sub-section (1) of this section.

(b) Such interest shall run from the date immediately following the expiry of the period of one hundred and twenty days from the date on which the last of the authorisations for search under section 132 or requisition under section 132A was executed to the date of completion of the assessment [or reassessment or recomputation]"

29. Thus, the only consequence of non-compliance of Section 132 B (1) (i) of the Act is by way of payment of interest at the highest rate provided by the legislature i.e. @ of 18 % per annum. The period for which such interest may become payable has also been specified under that provision. By imposing the levy of interest on the revenue, a plain reading of sub section (4) of Section 132 B (1) (i) of the Act, the legislature itself contemplated

cases where orders may remain to be passed by the Assessing Authority within the timeline provided under Section 132 B (1) (i) of the Act. Payability of interest may arise only in a case where the order may have remained to be passed within a time stipulation provided under the second proviso to Section 132 B (1) (i) of the Act.

30. That being the only consequence provided, we find it difficult to persuade ourselves to the reasoning of the Gujarat High Court in **Mitaben R. Shah vs. Deputy Commissioner of Income-Tax And Another** (supra)-the sheet anchor of the submissions advanced by Senior Advocate for the petitioner, perusal of that decision reveals, mandatory intent was read into the language of Section 132 B (1) (i) of the Act by relying on the reasoning/ratio in **Cowasjee Nusserwanji Dinshaw vs. Income Tax Officer : (1987) 165 ITR 702**. That was a case of proceeding under Section 132 (8) of the Act and not Section 132 B of the Act, as it then existed. For ready reference, that provision of law is quoted below:

"132. (8) The books of account or other documents seized under sub-section (1) or sub-section (1-A) shall not be retained by the authorised officer for a period exceeding one hundred and eighty days from the date of seizure unless the reasons for retaining the same are recorded by him in writing and the approval of the Commissioner for such retention is obtained."

31. On the test of consequences provided, **Cowasjee Nusserwanji Dinshaw (supra)** case was a different case altogether. It provided a statutory injunction against retention of books of accounts and other documents beyond a

period of 180 days, unless reasons for their continued retention were recorded in writing with the approval of the Commissioner. In absence of reasons recorded and approval granted prior to the expiry of 180 days time limit, the seized books of accounts and documents had to be released.

32. Plainly that mandate of law does not exist under the provision of Section 132 B (1) (i) of the Act. This provision only contemplates-a person subjected to search may not be made to wait endlessly for release of valuable assets that may have been seized during the course of search. If, the nature and source of acquisition of a seized asset is wholly explained and it may not be required for recovery of any outstanding demand or demand of tax that may arise under the assessment proposed to be made consequent to the search giving rise to the seizure itself, the same may be released. The provisions does not stipulate any consequence of automatic release. It would first have to be invoked by the assessee by filing a proper application. Then if conditions are fulfilled, an order recording that satisfaction may be passed. It is for that purpose a timeline of 120 days is contemplated on a non-imperative basis. In the event of delay in making the decision the revenue has been saddled with interest liability @ 18 % per annum. On the contrary under Section 132 (8) of the Act [as considered in *Cowasjee Nusserwanji Dinshaw* (supra)], a statutory duty was cast on the seizing authority to itself record reasons to detain seized documents beyond 180 days and the consequence of its non-adherence was also provided by way of release of the same. Therefore, in absence of statutory intent shown to exist, it may not be inferred through the process of legal reasoning-that if no order is passed within a

time of 120 days, seized assets must be released notwithstanding its impact on the recovery of existing and likely demands.

33. As noted above, similar stipulations of time provided under different enactments have been interpreted to be directory and not mandatory. Therefore, we are unable to pursue ourselves to subscribe to the reasoning that has found its acceptance by the Gujarat High Court in the case of **Mitaben R. Shah vs. Deputy Commissioner of Income-Tax And Another** (supra), **Ashish Jayantilal Sanghavi vs. Income-tax Officer** (supra), **Nadim Dilip Bhai Panjvani vs. Income-tax Officer, Ward No.3** (supra) and Gauhati High Court in the case of **Mul Chand Malu (HUF) vs. Assistant/Deputy Commissioner of Income Tax** (supra).

34. Insofar as, learned Senior Counsel for the petitioner has invoked the principle- if an Act is required to be done in a particular way, it may be done in that way or not at all, we find the same to be inapplicable to the present law. In our opinion, the provision in question [Section 132 B (1) (i)] being directory, the jurisdiction of the Assessing Authority to deal with the petitioner's application dated 15.09.2022 did not lapse or abate upon expiry of the period of 120 days. Since that stipulation of law is only directory, it survives to the Assessing Authority to deal with the application, even today.

35. We may also observe at this stage, if on due application of mind, the Assessing Authority reaches a conclusion that the nature and source of Rs.36,12,000/- seized from Om Prakash Bind was duly explained and if assessing officer is adequately satisfied that that amount was neither required for satisfaction of any outstanding

demand or satisfaction of demand that may arise pursuant to the assessment proposed to be made, such refundable amount would attract liability of interest under Section 132 B (4) of the Act read with Rule 119 A of the Rules.

36. In view of the above, we decline to issue the writ of Mandamus as prayed. Instead, we **dispose of** the writ petition with a direction on the Assessing Authority/respondent No.2 to proceed to deal with and decide the application of the petitioner dated 15.09.2022 within two weeks from today, by a reasoned and speaking order, after hearing the petitioner. No order as to costs.

(2024) 4 ILRA 1044
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 23.04.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Criminal Misc Anticipatory Bail Application U/S
 438 Cr.P.C. No. 846 of 2024

Sushil Kumar Shukla ...Applicant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Applicant:
 Piyush Tripathi, Manoj Kumar Mishra

Counsel for the Respondents:
 G.A.

आपराधिक विधि – भारतीय दंड संहिता, 1860 –
 धारा 420, 467, 468, 471, 34, 120-ख - अग्रिम
 जमानत - कथित प्राथमिकी लेखपाल द्वारा दिनांक
 26.05.2023 को प्रार्थी एवं उसके पुत्र के विरुद्ध
 जिलाधिकारी के आदेशानुसार तहसीलदार के निर्देश पर

दर्ज कराई गई है - तथापि, प्राथमिकी में उल्लिखित
 कथनों से किसी भी अभियुक्त द्वारा कोई संज्ञेय अपराध
 कारित होना प्रतीत नहीं होता, अतः ऐसी परिस्थिति में
 प्राथमिकी का अंकन उचित नहीं कहा जा सकता -
 जिलाधिकारी द्वारा दिनांक 25.05.2023 को जारी
 नोटिस में प्रार्थी पर आरोप है कि लेखपाल के पद पर
 रहते हुए उसने सरकारी भूमि का एक भाग सह-
 अभियुक्त के नाम अनुचित रूप से अंकित किया -
 जबकि प्रार्थी का कथन है कि उक्त सह-अभियुक्त का
 नामांतरण सहायक चकबंदी अधिकारी द्वारा मुकदमा के
 आधार पर किया गया था और प्रार्थी को लेखपाल के
 पद पर 26.07.2012 को तैनात किया गया था, जो
 उक्त नामांतरण से काफी पूर्व की घटना है - प्रार्थना-पत्र
 के साथ संलग्न शपथ-पत्र में उल्लेख है कि प्रार्थी के
 विरुद्ध एक अन्य प्राथमिकी दर्ज है, जिसमें उसे धारा
 41क भा.दं.सं. का लाभ प्रदान किया जा चुका है -
 अभिनिर्धारित, विशेष न्यायाधीश (भ्रष्टाचार निवारण
 अधिनियम), सी.बी.आई. द्वारा पारित आदेश दिनांक
 06.04.2024 से स्पष्ट है कि विद्वान न्यायाधीश ने
 गुरुबक्श सिंह सिब्बिया बनाम पंजाब राज्य (नीचे) में
 उच्चतम न्यायालय के निर्णय का सम्यक अध्ययन
 किए बिना, अग्रिम जमानत प्रार्थना-पत्र निरस्त किया
 है - उपरोक्त तथ्यों के आलोक में, चूँकि प्राथमिकी में
 प्रार्थी द्वारा किसी संज्ञेय अपराध के कारित होने का
 कोई उल्लेख नहीं है, तथा राजस्व अभिलेखों में
 नामांतरण प्रार्थी के पद ग्रहण करने से पूर्व सक्षम
 अधिकारी के आदेश से संपादित हो चुका था, प्रार्थी
 द्वारा कोई नामांतरण नहीं किया गया है - प्रार्थी
 सरकारी कर्मचारी है, उसके न्यायिक प्रक्रिया से फरार
 होने की कोई संभावना नहीं है एवं विवेचना पूर्ण हो
 चुकी है - अतः प्रार्थी अग्रिम जमानत का अधिकारी है।
 (पैरा 3, 4, 5, 13, 17)

आवेदन स्वीकारा (E-13)

प्रोद्गत मामलों की सूची:

1. जयप्रकाश सिंह बनाम बिहार राज्य और एक अन्य
 (2012) 4 एससीसी 379

2. गुरुवक्श सिंह साबिया बनाम पंजाब राज्य एआईआर 1980 सुप्रीम कोर्ट 1632

3. पोकर राम बनाम राज्य एआईआर 1985 सुप्रीम कोर्ट 1969

4. गुरुवक्श सिंह सिब्बिया बनाम पंजाब राज्य 1977 एससीसी ऑनलाइन पंजाब और हरियाणा 157

5. गुरुवक्श सिंह सिब्बिया बनाम स्टेट ऑफ पंजाब (1980) 2 एससीसी 565

6. पोकर राम बनाम पंजाब राज्य (1985) 2 एससीसी 597

7. भाव नगर यूनिवर्सिटी बनाम पलीताना शुगर मिल (प्राइवेट लिमिटेड) (2003) 2 एससीसी 111

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

1. प्रार्थी के विद्वान अधिवक्ता श्री मनोज कुमार मिश्रा तथा राज्य सरकार के विद्वान अधिवक्ता श्री पुनीत कुमार यादव को सुना तथा पत्रावली का अवलोकन किया।

2. धारा 438 दं०प्र०सं० द्वारा प्रस्तुत प्रार्थना-पत्र द्वारा प्रार्थी ने मुकदमा अपराध संख्या 0211 सन 2023 अन्तर्गत धारा 420, 467, 468, 471, 34, 120-B भा०दं०वि० थाना सरोजिनी नगर जिला लखनऊ में अग्रिम जमानत की प्रार्थना की है।

3. उपरोक्त प्रथम सूचना रिपोर्ट एक लेखपाल ने दिनांक 26.05.2023 को प्रार्थी तथा उसके पुत्र परितोष शुक्ला के विरुद्ध लिखाते हुए कहा कि जिलाधिकारी के आदेश के क्रम में तहसीलदार, सरोजिनीनगर द्वारा एक आदेश पारित कर उसे प्रथम सूचना रिपोर्ट दर्ज कराने का निर्देश दिया गया है। प्रथम सूचना रिपोर्ट में कहे गये कथनों से किसी भी अभियुक्त द्वारा कोई भी संज्ञेय अपराध कारित

करना प्रतीत नहीं होता है तथा ऐसी परिस्थिति में प्रथम सूचना रिपोर्ट अंकित नहीं की जा सकती है।

4. जिलाधिकारी, लखनऊ द्वारा प्रार्थी को दिये गये एक नोटिस दिनांक 25.05.2023 में यह आरोप लगाया गया है कि प्रार्थी ने लेखपाल के पद पर रहते हुए सरकारी भूमि के एक अंश को एक सह-अभियुक्त विशाल तिवारी के नाम गलत तरीके से अंकित कर दिया था। इस संबंध में प्रार्थी का यह कथन है कि विशाल तिवारी का नाम सहायक चकबंदी अधिकारी, मलिहाबाद, लखनऊ द्वारा मुकदमा नंबर 463/8.8.99 के आधार पर अंकित हुआ था। प्रार्थी लेखपाल, अमौसी के पद पर दिनांक 26.07.2012 को तैनात किया गया था तथा प्रश्नगत नामांतरण उसके काफी पूर्व हो चुका था।

5. प्रार्थना-पत्र के साथ प्रस्तुत शपथ पत्र में कहा गया है कि प्रार्थी एक अन्य प्रथम सूचना रिपोर्ट संख्या 0374 सन 2023 अंतर्गत धारा 406, 420, 504, 506, 120-B भा०दं०सं० थाना सरोजिनी नगर जनपद लखनऊ में भी आरोपी है, जिसमें उसको भा०दं०सं० की धारा 41A का लाभ दिया जा चुका है।

6. प्रस्तुत प्रकरण में सह-अभियुक्त विशाल तिवारी को जमानत प्रार्थना-पत्र संख्या 10344 सन 2023 में पारित आदेश दिनांक 18.08.2023 द्वारा जमानत दी जा चुकी है।

7. प्रार्थी ने इसके पूर्व इस न्यायालय के समक्ष आपराधिक प्रकीर्ण याचिका संख्या 4697 सन 2023 प्रस्तुत की थी, जिसमें

पारित आदेश दिनांक 16.06.2023 द्वारा प्रार्थी की गिरफ्तारी पर रोक लगा दी गयी थी।

8. राज्य सरकार के विद्वान अधिवक्ता ने याचिका के विरोध किया। प्रकरण में आरोप - पत्र दिनांक 16.04.2023 को प्रस्तुत किया जा चुका है जिसमें धारा 34/ 120-B भा०दं०सं० का आरोप भी जोड़ा गया है।

9. इसके पूर्व प्रार्थी विशेष न्यायाधीश (भ्रष्टाचार निवारण अधिनियम), सी०बी०आई०, कोर्ट नं०- 03, लखनऊ के समक्ष अग्रिम जमानत प्रार्थना-पत्र संख्या 2331 सन 2024 प्रस्तुत किया था, जिसमें अभियोजन पक्ष की तरफ से **जयप्रकाश सिंह बनाम बिहार राज्य और एक अन्य** (2012) 4 SCC 379 की विधि व्यवस्था प्रस्तुत की गयी, जिसमें यह प्रतिपादित किया गया था कि:- "Parameters for grant of anticipatory bail in a serious offence are required to be satisfied and further while granting such relief, the court must record the reasons therefor. Anticipatory bail can be granted only in exceptional circumstances where the court is prima facie of the view that the applicant has falsely been enroped in the crime and would not misuse his liberty."

10. विद्वान विशेष न्यायाधीश ने यह कहा कि:- "अग्रिम जमानत प्रार्थना-पत्र के संबंध में माननीय उच्चतम न्यायालय द्वारा **गुरुवक्श सिंह साबिया बनाम पंजाब राज्य** एआईआर 1980 सुप्रीम कोर्ट 1632 एवं **पोकर राम बनाम राज्य** एआईआर 1985 सुप्रीम कोर्ट 1969 में माननीय उच्चतम न्यायालय द्वारा यह विधिक सिद्धान्त प्रतिपादित कि गया है कि अग्रिम जमानत केवल तभी प्रदान की जा

सकती है, जब प्रार्थी / अभियुक्त की ओर से अपवादीय एवं असाधारण परिस्थितियां इस प्रकार की प्रदर्शित की जायें, जिन कारणों से न्यायालय द्वारा अग्रिम जमानत प्रदान किया जाना उचित प्रतीत होता हो, किन्तु इस मामले में इस प्रकार की कोई अपवादीय एवं असाधारण परिस्थिति सामने नहीं आयी है।

अतः माननीय न्यायालयों की उपरोक्त विधि व्यवस्थाओं में पारित किये गये विधिक सिद्धान्तों व उपरोक्त वाद के समस्त तथ्यों एवं परिस्थितियों को दृष्टिगत रखते हुये इस न्यायालय की राय में प्रार्थी / अभियुक्त को अग्रिम जमानत पर रिहा किये जाने हेतु इस स्तर पर पर्याप्त विधिक आधार नहीं है। तदनुसार प्रार्थी अभियुक्त की ओर से प्रस्तुत अग्रिम जमानत प्रार्थनापत्र निरस्त किये जाने योग्य है।"

11. गुरुवक्श सिंह सिब्बिया के प्रकरण में पंजाब और हरियाणा उच्च न्यायालय ने अपने निर्णय (**गुरुवक्श सिंह सिब्बिया बनाम पंजाब राज्य** 1977 SCC ऑनलाइन पंजाब और हरियाणा 157) में पंजाब एवं हरियाणा उच्च न्यायालय ने यह प्रतिपादित किया था कि धारा 438 दं०प्र०सं० के अंतर्गत प्रदान की गयी शक्ति असाधारण प्रकृति की है तथा इसका प्रयोग अत्यन्त संयम के साथ, मात्र असाधारण परिस्थितियों में किया जाना चाहिए।

12. पंजाब तथा हरियाणा उच्च न्यायालय के उक्त निर्णय के विरुद्ध अपील स्वीकार करते हुए माननीय उच्चतम न्यायालय ने अपने निर्णय (**गुरुवक्श सिंह सिब्बिया बनाम स्टेट ऑफ पंजाब** (1980) 2 SCC 565) में यह

कहा कि पंजाब एवं हरियाणा उच्च न्यायालय की पूर्ण पीठ द्वारा धारा 438 दं०प्र०सं० के ऊपर लगाये गये अवरोध स्वीकार किये जाने योग्य नहीं हैं। विधि की व्याख्या के सिद्धान्त के अनुसार व्यापक प्रभाव वाले शब्दों को इस प्रकार नहीं पढ़ा जाना चाहिए, जिससे कि वैधानिक प्रावधानों पर ऐसा अंकुश लग जाय, जो कि विधायिका ने स्वयं नहीं लगाये हैं। यह विशेषतया तब और भी सत्य हो जाता है जबकि वैधानिक प्राविधान निजी स्वतंत्रता के अधिकार को सुनिश्चित करने से संबंधित हो तथा इसके साथ ही इस सिद्धान्त का उपयोग भी सम्मिलित हो कि कोई व्यक्ति जब वह दोषी सिद्ध न हो जाय, तो निर्दोष माना जायेगा।

गुरुवक्श सिंह सिब्बिया के निर्णय में माननीय उच्चतम न्यायालय ने यह स्पष्ट रूप से कहा कि पंजाब एवं हरियाणा उच्च न्यायालय द्वारा दिया गया निर्णय, कि धारा 438 दं०प्र०सं० के अंतर्गत अग्रिम जमानत दिये जाने की शक्ति अपवाद स्वरूप मामलों में इस्तेमाल की जानी चाहिए क्योंकि यह एक असाधारण प्रवृत्ति की शक्ति है, किसी भी प्रकार से न्यायोचित नहीं है। माननीय उच्चतम न्यायालय ने मात्र इतना कहा कि इस शक्ति का प्रयोग सावधानीपूर्वक, प्रकरण की परिस्थितियों को देखते हुए तब किया जाना चाहिए जब इसका प्रयोग न्यायोचित हो। माननीय उच्चतम न्यायालय ने यह कहा कि अग्रिम जमानत प्रार्थना-पत्र इस आधार पर निरस्त नहीं किया सकता कि प्रार्थी कोई असाधारण परिस्थितियाँ दिखाने में समर्थ नहीं रहा है तथा अग्रिम जमानत प्रार्थना-पत्र उसके गुण-दोष पर ही तय किया जाना चाहिए।

13. विशेष न्यायाधीश (भ्रष्टाचार निवारण अधिनियम), सी०बी०आई०, कोर्ट नं०-03, लखनऊ द्वारा पारित आदेश दिनांक 06.04.2024 के अवलोकन से यह प्रतीत होता है कि विद्वान विशेष न्यायाधीश ने गुरुवक्श सिंह सिब्बिया बनाम पंजाब राज्य के माननीय उच्चतम न्यायालय के निर्णय को ठीक प्रकार से पढ़े बिना, उसके आधार पर अग्रिम जमानत प्रार्थना-पत्र निरस्त कर दिया है।

14. **पोकर राम बनाम पंजाब राज्य** (1985) 2 SCC 597 के प्रकरण में गोली मारकर हत्या का प्रयास कर देने के आरोपी व्यक्ति को सत्र न्यायाधीश द्वारा अग्रिम जमानत दे दी गयी थी तथा उच्च न्यायालय ने उक्त आदेश को निरस्त करने से मना कर दिया था। ऐसी परिस्थिति में माननीय उच्चतम न्यायालय ने कहा कि जब अभियुक्त आग्नेयास्त्र से हत्या कारित करने का आरोपी है, न्यायालय को अग्रिम जमानत प्रार्थना-पत्र तय करते हुए अत्यन्त सावधानी बरतनी चाहिए।

15. कोई भी न्यायिक निर्णय अपने विशेष तथ्यों एवं परिस्थितियों के आधार पर दिया जाता है तथा उसकी न्यायिक बाध्यता मात्र उन तथ्यों एवं परिस्थितियों के आलोक में ही होती है। **भाव नगर यूनिवर्सिटी बनाम पलीताना शुगर मिल (प्राइवेट लिमिटेड)** (2003) 2 SCC 111 में माननीय उच्चतम न्यायालय ने अवधारित किया कि कोई भी निर्णय मात्र उस बिन्दु पर बाध्यकारी है, जो उसके द्वारा तय किया है, न कि उस बिन्दु पर जिनके संबंध में तर्कपूर्ण परिणाम निकाले जा सके। माननीय उच्चतम न्यायालय ने यह भी

कहा कि यह विधि का सुस्थापित सिद्धान्त है कि तथ्यों में छोटे से अंतर से अथवा कुछ अतिरिक्त तथ्यों से किसी निर्णय के बाध्यकारी प्रभाव पर बड़ा अंतर आ सकता है।

16. चूंकि **पोकर बनाम राजस्थान राज्य** का निर्णय उस वाद के तथ्यों के आलोक में दिया गया था, जहाँ अभियुक्त ने आग्नेयास्त्र से गोली मारकर हत्या कारित की थी, जबकि प्रश्नगत मामले में ऐसा कोई आरोप नहीं है तथा उ०प्र० राज्य में हत्या के आरोप में धारा 438(6) (जैसा कि उ०प्र० राज्य में लागू है), के अनुसार अंतरिम जमानत प्रार्थना- पत्र पोषणीय ही नहीं है, पोकर का उपरोक्त निर्णय प्रस्तुत मामले के निर्णय के लिए किसी भी प्रार्थी के अग्रिम जमानत प्रार्थना-पत्र के निर्णय के लिए किसी भी प्रकार संगत नहीं था और विद्वान विशेष न्यायाधीश ने उक्त निर्णय पर गलत आश्रय लेते हुए अंतरिम जमानत आदेश प्रार्थना-पत्र तय किया।

17. उपरोक्त तथ्यों को दृष्टिगत रखते हुए, जबकि प्रथम सूचना रिपोर्ट में प्रार्थी द्वारा किये गये किसी भी ऐसे कृत्य का कथन नहीं है जिससे एक संज्ञेय अपराध कारित होता हो; राजस्व अभिलेखों में किया गया नामांतरण प्रार्थी के पद पर आने के कई वर्षों पूर्व सक्षम अधिकारी के आदेश से किया जा चुका था और प्रार्थी ने कोई नामांतरण नहीं किया है; प्रार्थी एक सरकारी कर्मचारी है और अग्रिम जमानत दिये जाने की स्थिति में उसके न्यायिक प्रक्रिया से भागने की कोई संभावना प्रतीत नहीं होती है और प्रकरण में विवेचना पूर्ण हो चुकी है,

न्यायालय का मत है कि प्रार्थी अग्रिम जमानत पाने का अधिकारी है।

18. उपरोक्त मुकदमा अपराध संख्या में आवेदक की गिरफ्तारी / न्यायालय के समक्ष उपस्थिति की दशा में, उसे संबंधित थाने के भारसाधक अधिकारी/न्यायालय की संतुष्टि के अनुसार व्यक्तिगत बंध पत्र एवं दो प्रतिभू प्रस्तुत करने पर परीक्षण के अंतिम रूप से निस्तारण तक, निम्न शर्तों के अधीन अग्रिम जमानत पर रिहा किया जाएगा:-

क- आवेदक, यदि आवश्यक होगा तो पुलिस अधिकारी द्वारा जाँच हेतु अपेक्षित समय पर उपस्थित होगा;

ख- आवेदक मामले के तथ्यों से परिचित किसी व्यक्ति या पुलिस अधिकारियों को प्रत्यक्ष या परोक्ष रूप से कोई धमकी, वादा या प्रलोभन नहीं देगा जिससे कि वह ऐसे तथ्य को न्यायालय के समक्ष या किसी पुलिस अधिकारी के समक्ष प्रकट न करने पर मान जाए;

ग- आवेदक अदालत की पूर्व अनुमति के बिना भारत नहीं छोड़ेगा;

घ- आवेदक को प्रत्येक निर्धारित तिथि पर ट्रायल कोर्ट के समक्ष उपस्थित होना होगा, जब तक कि व्यक्तिगत उपस्थिति से छूट न दी गयी हो;

ङ- आवेदक अभियोजन पक्ष के गवाह पर दबाव नहीं डालेगा। धमकी नहीं देगा;

च- आवेदक विवेचना एवं विचारण के दौरान सहयोग करेंगे और जमानत की स्वतंत्रता का दुरुपयोग नहीं करेगा।

19. इस आदेश की एक प्रति विशेष न्यायाधीश (भ्रष्टाचार निवारण अधिनियम), सी०बी०आई०, कोर्ट नं०.- 03, लखनऊ को भेजी जाय।

(2024) 4 ILRA 1049
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.03.2024

BEFORE

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

Criminal Misc Bail Application No. 6712 of 2024

Amit Maurya @ Amit Kumar Singh
...Applicant
Versus
State of U.P. ...Respondent

Counsel for the Applicant:

Ms. Mahima Maurya Kushwaha, Sri Mukesh Kumar Kushwaha

Counsel for the Respondents:

Sri Desh Ratan Chaudhary, G.A., Sri Harish Kumar Srivastava, Sri Ishwar Chandra Pandey, Sri Kumar Ankit Srivastava, Sri Manoj Kumar Singh, Sri Siddharth Chaudhary, Sri Sujan Singh

Criminal Law - Indian Penal Code, 1860 - Sections 386, 389, 504 & 506 - As per FIR, informant, Vice President of Purvanchal Truck Owners Association, pursued action against A.R.T.O., leading to his incarceration - Applicant allegedly offered bribe of ₹1 crore and demanded ₹1 lakh monthly to restrain informant from pursuing case against A.R.T.O, threatening to defame him through media - He is further accused of issuing threats, using abusive language, and posting hate and derogatory content against public and religious figures on social media - In defence, counsel for applicant contends that allegations are false and motivated by malice - It is submitted that applicant has no connection with cases against

A.R.T.O or any criminal activity - FIR is alleged to be consequence of applicant's publication exposing corruption in transport department - Further asserted that applicant neither sent any threatening messages nor visited informant's residence - Counsel for informant contends that applicant falsely poses as press reporter/editor to conceal illegal activities, lacks requisite publishing licenses, and questions authenticity of his publications - Considering gravity of allegations, including misuse of publication for extortion, abusive remarks against public figures, and disregard for religious sentiments, no merit is found in granting bail - Application rejected. (Para 3, 4, 5, 32)

Application rejected. (E-13)

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

1. Heard Ms. Mahima Maurya Kushwaha, learned counsel for the applicant, Mr. Desh Ratan Chaudhary, learned counsel for the informant, Mr. Amit Singh Chauhan, learned AGA for the State and perused the record.

2. The instant bail application has been filed on behalf of the applicant, **Amit Maurya @ Amit Kumar Singh** with a prayer to release him on bail in Case Crime No.0259 of 2023, under sections 386, 389, 504, 506 IPC, Police Station ? Lalpur, District?Varuna (Commissionerate Varanasi), during pendency of trial.

3. As per the allegations in the FIR, the informant, serving as the Vice President of the Purvanchal Truck Owners Association, stands as the prime witness and key individual in the FIR lodged against R.S. Yadav, the A.R.T.O. of Chandauli. It is alleged that the informant was instrumental in pursuing the case

against R.S. Yadav on behalf of the government, leading to Yadav's detention in jail for the past three years. Additionally, the informant was actively involved in pursuing cases seen by the Anti-Corruption Court. However, the applicant allegedly coerced the informant into refraining from pursuing the case against R.S. Yadav, offering a bribe of one crore rupees. Furthermore, the applicant demanded monthly payments of one lakh rupees from the informant, threatening to tarnish his reputation by publishing damaging articles in newspapers if his demands were not fulfilled. It is also alleged that the applicant resorted to sending threatening messages and engaging in verbal abuse towards the informant. Moreover, the applicant is accused of utilizing social media platforms to propagate hate speech against public figures, including Prime Minister Narendra Modi and Chief Minister Yogi Adityanath, while also making derogatory remarks against religious figures.

4. In defense, learned counsel for the applicant contends that the allegations against the applicant are baseless and motivated by ulterior motives. They further contend that the applicant has no involvement in the cases against R.S. Yadav and is not associated with any criminal activities. Moreover, they highlight a publication made by the applicant regarding corrupt practices within the transport department, suggesting that this may have provoked the present FIR. The defense asserts that the applicant has never sent threatening messages to the informant nor visited his residence. They also emphasize the applicant's good family background and lack of criminal antecedents. Additionally,

they assure the court that if granted bail, the applicant will cooperate fully with the trial proceedings and will not abscond or tamper with witnesses.

5. On the other hand, learned counsel for the informant asserts that the applicant falsely presents himself as a press reporter/editor to conceal his illegal activities. They argue that the applicant has not obtained the necessary licenses or permissions for publishing news articles, and they question the authenticity of the publications made by the applicant. Furthermore, they claim that the applicant has a history of criminal behaviour, as detailed in the counter affidavit. The counsel alleges that the applicant has used social media platforms to propagate hate speech and has made derogatory remarks against public figures and religious figures. They also raise concerns regarding the applicant's use of multiple Aadhar cards for identity purposes.

6. I have heard learned counsel for the parties and perused the record.

7. Firstly, it is imperative to address the principle that if someone is engaged in corrupt practices, the appropriate course of action is to bring forth information to the public domain, allowing for transparency and accountability to prevail. It is the duty of journalists and publishers to disseminate factual information to the public, empowering them to make informed decisions. However, it is entirely unacceptable for publishers to exploit their platform for personal gain, resorting to coercive tactics under the guise of publication. The act of leveraging publication as a tool for coercion not only undermines the integrity of journalism but

also erodes public trust in the media, which plays a pivotal role in upholding democratic values.

8. It is crucial to underscore the fundamental principle that in the event of someone being involved in corrupt activities, the proper course of action entails bringing this information to light in the public domain. This serves to uphold transparency and accountability within society, essential pillars of a functioning democracy. It is the solemn duty of journalists and publishers to disseminate factual and accurate information to the public, thereby empowering individuals to make informed decisions regarding their governance and societal matters.

9. However, it is utterly reprehensible for publishers to misuse their platform for personal gain, resorting to coercive tactics disguised as legitimate publication endeavours. Exploiting one's position in the media landscape to extract benefits or coerce individuals through threats tarnishes the integrity of journalism. Such actions not only betray the trust bestowed upon the media by the public but also undermine the very essence of democratic principles.

10. When publishers resort to leveraging their platforms as tools for extortion, they not only betray the trust of their audience but also jeopardize the foundational values of journalism, which include impartiality, integrity, and commitment to the truth. By engaging in such unethical practices, they erode public confidence in the media, which serves as a crucial watchdog in safeguarding democratic norms and institutions.

11. In essence, the misuse of publication for personal gain not only corrodes the credibility of journalism but also undermines the democratic fabric of society. The media's role as a guardian of truth and accountability is essential in ensuring the health and vitality of democracy. Therefore, it is imperative that publishers adhere to ethical standards and refrain from exploiting their platform for illicit purposes, thereby upholding the integrity of journalism and preserving public trust in the media as a cornerstone of democratic governance.

12. Secondly, the use of personal remarks and abusive language against any individual, particularly public figures such as the Prime Minister or Chief Minister, is reprehensible and antithetical to the principles of civil discourse. In a democratic society, dissent and criticism are essential components of robust governance, but they must be expressed in a manner that upholds dignity and respect for all individuals. Resorting to derogatory language and personal attacks serves no constructive purpose and only serves to inflame tensions and undermine the fabric of civil society.

13. Within the context of democratic governance, dissent and criticism play pivotal roles as mechanisms for accountability and progress. Citizens have the right to express their grievances and concerns regarding governmental actions or policies, fostering a culture of transparency and public engagement. However, it is essential to underscore that the exercise of this right must be conducted with a sense of responsibility and decorum. Respect for the dignity of individuals, regardless of their position or status, is paramount in upholding the integrity of

civil discourse. Personal attacks and the use of derogatory language serve no constructive purpose in advancing meaningful dialogue or effecting positive change. Instead, they diminish the quality of public discourse, sow discord, and erode public trust in democratic institutions.

14. In a democracy, the robust exchange of ideas and perspectives is fundamental to the process of governance. Dissent serves as a catalyst for critical reflection and course correction, prompting policymakers to reconsider decisions in light of public feedback. However, when dissent devolves into *ad hominem* attacks and character assassination, it detracts from the substantive issues at hand and impedes the pursuit of common goals for the betterment of society.

15. Moreover, resorting to abusive language and personal remarks not only undermines the dignity of the individuals targeted but also sets a harmful precedent for future discourse. It fosters a culture of divisiveness and hostility, where civil dialogue becomes increasingly elusive, and the exchange of ideas gives way to vitriol and animosity. Such behaviour not only undermines the fabric of civil society but also hampers the functioning of democratic institutions by diverting attention from substantive issues to petty squabbles and personal vendettas.

16. Thirdly, it is crucial to draw a clear distinction between legitimate dissent with the government and constructive criticism, and the propagation of abusive language and hatred. In a democracy, citizens have the right to express dissent and engage in constructive criticism of government policies and actions. However, this must be done within the bounds of

civility and respect for democratic institutions. Resorting to inflammatory language and spreading hatred only serves to sow discord and undermine the foundations of democracy.

17. In discussing the imperative of distinguishing between legitimate dissent and abusive language or hatred, we must underscore the fundamental principles that underpin democratic discourse. In any democratic society, the ability to voice dissent and engage in constructive criticism of governmental decisions is not only a right but a cornerstone of civic engagement. It is through such dissent that citizens express their concerns, advocate for change, and hold those in power accountable. This process fosters an environment of transparency and accountability, essential for the functioning of a healthy democracy.

18. However, this right to dissent comes with a responsibility to exercise it in a manner consistent with the norms of civil discourse. Constructive criticism entails thoughtful analysis, reasoned arguments, and a commitment to engaging with differing viewpoints respectfully. It serves as a catalyst for meaningful dialogue and positive change, encouraging policymakers to consider alternative perspectives and refine their decisions in the best interests of society as a whole.

19. On the other hand, the propagation of abusive language and hatred represents a stark departure from the principles of democratic discourse. When dissent descends into vitriol and personal attacks, it ceases to contribute constructively to public discourse and instead fosters division and animosity. Inflammatory rhetoric not only undermines

the credibility of the individual expressing it but also erodes trust in the democratic process itself. It perpetuates polarization, stifles meaningful dialogue, and impedes progress towards common goals.

20. Moreover, the spread of hatred and incendiary language poses a grave threat to social cohesion and undermines the foundational values of tolerance and respect for diversity. In a pluralistic society, where individuals hold diverse beliefs and identities, fostering an environment of mutual understanding and acceptance is paramount.

21. Therefore, it is incumbent upon all members of society, including journalists, activists, and public officials, to uphold the principles of civil discourse and reject the proliferation of abusive language and hatred. While robust debate and disagreement are inherent to democracy, they must be conducted in a manner that respects the dignity and rights of all individuals. By promoting a culture of civility and respect, we can safeguard the integrity of democratic institutions and advance the collective well-being of society.

22. Fourthly, it is essential to acknowledge and uphold the secular principles upon which our nation is founded. Religious sentiments hold immense significance for millions of citizens, and any act that seeks to denigrate or insult these sentiments is not only morally reprehensible but also a violation of the fundamental rights enshrined in our Constitution. Publishers and journalists must exercise their power responsibly, refraining from making baseless statements or passing derogatory remarks on religious figures or practices. Such actions not only

constitute a misuse of power but also pose a threat to the very fabric of our secular democracy.

23. Secularism stands as a cornerstone of our democratic ethos, emphasizing the equal treatment of all religions and the separation of religion from the affairs of the state. This principle not only ensures religious freedom and pluralism but also fosters a society where individuals from diverse religious backgrounds can coexist harmoniously.

24. Religious sentiments hold profound significance for millions of citizens, shaping their beliefs, practices, and cultural identities. In acknowledging the importance of these sentiments, it becomes evident that any act aimed at denigrating or insulting them constitutes a grave affront to the principles of tolerance and respect. Such actions not only undermine the sanctity of religious beliefs but also violate the fundamental rights enshrined in our Constitution, which guarantee the freedom of religion and expression for all individuals.

25. Publishers and journalists, as purveyors of information and opinion, wield significant influence in shaping public discourse and perceptions. It is therefore incumbent upon them to exercise their power responsibly and ethically. Making baseless statements or passing derogatory remarks on religious figures or practices not only constitutes a misuse of their power but also poses a direct threat to the fabric of our secular democracy.

26. In a pluralistic society like ours, characterized by its rich tapestry of religious diversity, fostering an environment of mutual respect and

understanding is paramount. Publishers and journalists must be vigilant in their adherence to ethical standards, ensuring that their reporting and commentary do not inflame religious tensions or incite hatred.

27. Upholding secular principles is not merely a legal or constitutional obligation but a moral imperative essential for the preservation of our democratic values. Publishers and journalists play a crucial role in this endeavour, and it is incumbent upon them to exercise their power responsibly, refrain from denigrating religious sentiments, and uphold the principles of tolerance, respect, and equality for all. By doing so, they contribute to the strength and resilience of our secular democracy, ensuring that it remains a beacon of hope and freedom for generations to come.

28. Fifthly, it is apparent from the allegations presented in this case that the individual in question has egregiously misused publication as a tool for coercion, all while hiding behind the facade of being a journalist. Instead of fulfilling the noble duty of providing accurate and unbiased information to the public, this individual has opted to exploit their position for personal gain. By leveraging their platform to coerce individuals through threats and intimidation, they have not only betrayed the trust of their audience but also violated the ethical standards expected of journalists.

29. The misuse of publication for coercive purposes represents a severe abuse of power and a blatant disregard for the principles of journalistic integrity. Rather than serving as a beacon of truth and

accountability, the individual in question has distorted the very essence of journalism, using it as a means to further their own selfish interests. Such reprehensible conduct not only undermines the credibility of the media but also erodes public trust in the institution as a whole.

30. Moreover, the act of using publication as a tool for coercion poses a significant threat to the integrity of democratic values. In a democracy, the media plays a pivotal role in fostering informed public discourse and holding power to account. When journalists abuse their authority for coercive purposes, they not only undermine the principles of transparency and accountability but also corrode the foundation of trust upon which democratic governance relies.

31. In light of these egregious allegations, it is clear that the individual in question has failed to uphold the ethical standards expected of journalists. Instead of serving the public interest, they have chosen to prioritize their own personal gain at the expense of journalistic integrity and democratic values. Therefore, considering the gravity of these allegations, there is no justification for granting bail to an individual who has so blatantly abused their position of trust and influence.

32. In conclusion, considering the gravity of the allegations against the applicant, including the misuse of publication for extortion, propagation of abusive language against public figures, and disregard for religious sentiments, I find no merit in granting bail. The principles of justice and integrity demand that individuals who abuse their position and influence for personal gain be held accountable for their actions.

33. Accordingly, the bail application stands **rejected**.

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

(2024) 4 ILRA 1055
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.03.2024

BEFORE

THE HON'BLE SAMEER JAIN, J.

Criminal Misc Anticipatory Bail Application No.
 12465 of 2023
 (Under Section 438 Cr.P.C.)

Satish Chandra Gupta ...Applicant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Applicant:
 Sri Gopal Misra, Sri Anoop Trivedi (Sr. Adv.)

Counsel for the Respondents:
 G.A., Sri R.P.S. Chauhan

Criminal Law - Companies Act, 2013 - Sections 439 (2), 436 (1)(a) & (d) Proviso to Section 212(6) & 212 (14) - Companies Act, 1956 - Section 621(1) - Anticipatory bail - Maintainability - Record reveals that criminal complaint under Companies Act was filed against applicant & ors., wherein applicant, arrayed as accused no. 54, being ex-director of foreign entity, is alleged to have connived with other entities in conducting fraudulent merchanting trade, causing loss of crores of rupees to bank, thereby attracting liability u/s 447 of Act, 2013 - Learned counsel for Union of India raised preliminary objection that applicant, having directly approached High Court u/s 438 Cr.P.C. without first

moving court concerned, renders present anticipatory bail application not maintainable - As per Five-Judge Full Bench decision in *Ankit Bharti (infra)*, application for pre-arrest bail can be entertained by High Court directly only in exceptional circumstances, and not as matter of routine, unless special circumstances are shown to exist - Applicant has not disclosed any special circumstance for directly approaching High Court u/s 438 Cr.P.C. without first moving court concerned - In supplementary affidavit, applicant merely asserted that Section 438 Cr.P.C. does not bar filing anticipatory bail directly before the High Court - However, such assertion does not constitute special circumstance warranting direct entertainment of instant application - Admittedly, applicant is resident of London (U.K.) and not residing in India - Investigation stands concluded, and applicant has been summoned along with others - No warrants issued against him till date - Hence, question arises whether any reasonable apprehension of arrest still exists - Therefore, it appears that no apprehension of arrest exists in respect of applicant - Application rejected. (Para 22, 23, 26, 27, 33, 35)

Application rejected. (E-13)

List of Cases cited:

1. Ankit Bharti & ors. Vs St. of U.P & anr. 2020 (3) ADJ 575
2. Vinod Kumar Vs St. of U.P. & anr. 2019 (12) ADJ 495
3. Vijay Babu Vs St. of Kerala & ors. 2022 SCC OnLine Ker 3158
4. Mahdoo Bava Vs Central Bureau of Investigation 2023 SCC OnLine SC 299
5. Gurbaksh Singh Sibbia & ors. Vs St. of Punj. (1980) 2 SCC 565, (Para 35)
6. Sushila Agarwal & ors. Vs St. of NCT Delhi & anr. (2020) 5 SCC 1

(Delivered by Hon'ble Sameer Jain, J.)

1. Dr. S.B. Maurya, learned AGA-I for the State apprised the Court that he has received the instructions, therefore, instant anticipatory bail application may be finally disposed off.

2. Heard Sri Anoop Trivedi, learned Senior Advocate assisted by Sri Gopal Misra, learned counsel for the applicant, Sri R.P.S. Chauhan, learned counsel appearing on behalf of Union of India and Dr. S.B. Maurya, learned AGA-I for the State.

3. The present anticipatory bail application has been filed on behalf of the applicant to enlarge him on anticipatory bail in Sessions Trial No. 577 of 2020 under Section 447 of the Companies Act arising out of Complaint U/s 439 (2) R/W, Section 436 (1)(a) & (d) R/W Proviso to Section 212(6) R/W 212 (14) of the Companies Act, 2013 R/W 621 (1) of the Companies Act, 1956 pending in the Court of Special Judge (Companies Act)/ Additional Sessions Judge, Kanpur Nagar.

Preliminary objections raised by Union of India

4. At the very outset, Sri R.P.S. Chauhan, learned counsel appearing on behalf of Union of India raised following preliminary objections:-

(a) applicant directly approached this Court for his pre arrest bail under Section 438 Cr.P.C. without approaching the court concerned under Section 438 Cr.P.C.

(b) applicant is the resident of United Kingdom (U.K.) and is residing in

U.K. and not in India, therefore, there is no apprehension of his arrest.

Submissions advanced on behalf of Union of India with regard to preliminary objections:-

5. Learned counsel appearing on behalf of Union of India submitted that applicant straight-way filed instant anticipatory bail application before this Court without approaching the court concerned and no special circumstances has been disclosed by him in this regard, therefore, considering the law laid down by the Full Bench of Five Judges of this Court in the case of **Ankit Bharti and others Vs. State of U.P and another 2020 (3) ADJ 575**, the instant anticipatory bail application is not maintainable.

6. He further submits that admittedly applicant is the resident of London (U.K.) and investigation of the case has already been concluded and on the basis of the complaint, he has been summoned and till date no warrant has been issued against him, therefore, applicant is not having any belief of his arrest, therefore, on this ground also the instant anticipatory bail application is not maintainable.

7. He further submits that if applicant is released on anticipatory bail then under the pretext of order of pre-arrest bail, he will never return to India for trial. He further submits that no blanket protection can be given to the applicant under Section 438 Cr.P.C. He further submits that there are several examples in the past, if an accused once fled from India he never turned up to face the legal proceedings.

8. He further submits that it is a fraud under the Companies Act in the tune

of crores of rupees and applicant being Ex Director of one of the U.K. firm also involved in the commission of the fraud.

9. He further submits that on the summon issued, applicant can come to India and participate in the court proceedings and on arrival in India if he apprehends that when he will appear before the court concerned, he will be sent to the custody then he can file an application for pre-arrest bail under Section 438 Cr.P.C. and therefore present application is premature.

10. He further submits that instant pre-arrest bail application filed by applicant clearly suggests that applicant is not intended to participate in the court proceedings and under the pretext of order of pre-arrest bail he will never turn up before the trial court.

Submissions advanced on behalf of applicant against the preliminary objections

11. Against the preliminary objections raised by learned counsel appearing on behalf of Union of India, learned Senior Advocate appearing on behalf of the applicant submitted that from perusal of the provisions of Section 438 Cr.P.C. it is apparent that anticipatory bail application can be filed either before the court of sessions or before this Court, therefore, if applicant opted to file the anticipatory bail application directly before this Court then he did not commit any illegality and it cannot be said that his anticipatory bail application is not maintainable.

12. He further submits that admittedly applicant is residing in London

(U.K.) and he is not residing within the jurisdiction of concerned sessions judge, therefore, even from this angle, he can directly file anticipatory bail application before this Court in view of the judgment passed by learned Single Judge of this Court in case of **Vinod Kumar Vs. State of U.P. and another 2019 (12) ADJ 495.**

13. He further argued, as per observation made by learned Single Judge of this Court in the case of Vinod Kumar (supra), the anticipatory bail can be filed straight-way to this Court where an accused is not residing within the jurisdiction of the concerned sessions judge faces a threat of arrest.

14. He further submits that the Full Bench of this Court in the case of Ankit Bharti (supra) approved the law laid down by the learned Single Judge of this Court in the case of **Vinod Kumar (supra).**

15. He further submits that as far as the second objection raised by learned counsel appearing on behalf of Union of India is concerned, merely due to the fact that applicant is residing abroad, it cannot be said that he is not having any apprehension of arrest. He further submits that advancement in investigative technology and communication, the various agencies of investigation could even be deployed to arrest a person outside the country. He placed reliance on the judgment of High Court of Kerala in the case of **Vijay Babu Vs. State of Kerala and others 2022 SCC OnLine Ker 3158.**

16. He further submits that applicant is 73 years old person and he is willing to participate in the legal proceedings pending in India, therefore, on the basis of summons issued to him, he

wants to appear before the court concerned but is having apprehension, if he will appear before the court concerned then he will be taken into custody.

17. He further submits that considering the practice now a days being adopted by the trial courts apprehension of custody raised by the applicant cannot be completely brushed aside. He further submits that even the Apex Court in the case of **Mahdoo Bava Vs. Central Bureau of Investigation 2023 SCC OnLine SC 299** has shown its concern in this regard.

18. He further submits that as till date only summons have been issued against the applicant on the complaint, therefore, filing of instant anticipatory bail before this Court itself shows his bona fide and his eagerness to participate in the legal proceedings.

19. He further submits that applicant is law abiding citizen and he does not want to evade any legal process. He further submits that during investigation applicant was not arrested, however, on call he twice visited India from United Kingdom and appeared before the Investigating Officer and after the permission of the Investigating Officer he went back U.K., therefore, no presumption can be drawn that if applicant would be released on anticipatory bail then he will not return to India and will not participate in the court proceedings.

20. Learned Senior Advocate appearing on behalf of the applicant further submitted that considering the facts and circumstances of the case, both the preliminary objections raised by learned counsel appearing on behalf of Union of

India are devoid of merits and are liable to be dismissed and instant anticipatory bail application of the applicant should be heard on merit.

Conclusion

21. I have heard learned counsel for the parties and perused the record of the case.

22. From the record, it reflects that a criminal complaint was filed against the applicant and several others under the provisions of Companies Act. Applicant, is the accused no.54 in the complaint and as per allegation he was Ex Director in a Foreign Entity and he also connived with other entities in running of fraudulent/abusive merchanting trade business and thus caused huge losses of crores of rupees to the bank and is liable to be punished for offence under Section 447 of Companies Act, 2013.

23. Learned counsel appearing on behalf of Union of India raised two preliminary objections. His first objection is that applicant directly approached this Court under Section 438 Cr.P.C. for his pre-arrest bail without approaching the court concerned, therefore, instant anticipatory bail application is not maintainable.

24. Five Judges Full Bench of this Court in the case of Ankti Bharti (supra) held, the anticipatory bail application can be filed before this Court directly but only in special circumstances and special circumstances must necessarily exist and be established as such before jurisdiction of this Court is invoked directly.

25. The Full Bench further observed that it is up to the Hon'ble Judge

before whom the anticipatory bail application is placed whether according to him any special circumstances exist to entertain the application of anticipatory bail filed directly before this Court.

26. Therefore, as per five judges Full Bench of this Court an application for pre-arrest bail can only be entertained by this Court directly in only exceptional circumstances and not in routine manner and for entertaining such application directly special circumstances must exist.

27. In case at hand, in the entire anticipatory bail application, applicant did not disclose any special circumstances why he directly approached this Court without approaching the court concerned under Section 438 Cr.P.C., however, in the supplementary affidavit dated 26.11.2023 applicant averred that in view of the provisions of Section 438 Cr.P.C. there is no bar if applicant directly files anticipatory bail application before this Court. In view of this Court, it is not a special circumstance on the basis of which, the instant anticipatory bail application can be entertained directly by this Court.

28. Further, applicant is the resident of London (U.K.) and as per the view expressed by learned Single Judge of this Court in the case of Vinod Kumar (supra), which was approved by the Full Bench of this Court in the case of Ankit Bharti (supra) if an accused resides outside the concerned jurisdiction of sessions judge, then he can file anticipatory bail application directly before this Court if faces threat of arrest. Even five judges full Bench of this Court in case of Ankit Bharti (supra) held that such application must rest on strong foundation with regard to apprehension of arrest. Therefore, threat of

arrest of the applicant is necessary for maintainability of his instant anticipatory bail application directly before this Court.

29. The second objection of Union of India is also with regard to belief of arrest of the applicant. Therefore, the core issue is whether applicant is having belief of his arrest.

Belief of arrest

30. The belief of arrest of accused is also the condition precedent for pre-arrest bail. The Constitution Bench of the Apex Court in the case of **Gurbaksh Singh Sibbia and others Vs. State of Punjab (1980) 2 SCC 565** also emphasised a lot on it and held that mere fear is not belief of arrest and belief of arrest must be based on concrete facts and it must be clearly reflected from the face on record and without apprehension of arrest, the anticipatory bail application under Section 438 Cr.P.C. should not be considered.

31. The Constitution Bench of the Apex Court in the case of Gurbaksh Singh Sibbia (supra) in paragraph 35 observed:-

“35. Section 438 (1) of the Code lays down a condition which has to be satisfied before anticipatory bail can be granted. The applicant must show that he has reason to believe that he may be arrested for a non-bailable offence. The use of the expression reason to believe shows that the belief that the applicant may be so arrested must be founded on reasonable grounds. Mere fear is not belief, for which reason it is not enough for the applicant to show that he has some sort of a vague apprehension that some one is going to make an accusation against him, in pursuance of which he may be arrested.

The grounds on which the belief of the applicant is based that he may be arrested for a non-bailable offence, must be capable of being examined by the court objectively, because it is then alone that the court can determine whether the applicant has reason to believe that he may be so arrested. Section 438 (1), therefore, cannot be invoked on the basis of vague and general allegations, as if to arm oneself in perpetuity against a possible arrest. Otherwise, the number of applications for anticipatory bail will be as large as, at any rate, the adult populace. Anticipatory bail is a device to secure the individual's liberty; it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations, likely or unlikely."

32. The another Constitution Bench of the Apex Court in the case of **Sushila Agarwal and others Vs. State of NCT Delhi and another (2020) 5 SCC 1** reiterated the observation made by the Constitution Bench in the case of Gurbaksh Singh Sibbia (*supra*) and observed that apprehension of arrest should not be imaginary, therefore, the law is settled, for pre-arrest bail, it is necessary for the accused to show his apprehension of arrest against accusation for non-bailable offences.

33. In case at hand, admittedly applicant is not residing in India and he is resident of London (U.K.). The investigation of the case has already been concluded and on complaint applicant was summoned along with others and till date no warrants has been issued against him. Therefore, question is whether still applicant is having belief of his arrest.

34. The learned Single Judge of Kerala High Court in case of Vijay Babu

(*supra*) on which reliance was placed by applicant, however, observed that investigating agencies can arrest the accused even outside the country but the facts of the present case are distinguishable from the facts of the case of Vijay Babu (*supra*).

35. In the case of Vijay Babu (*supra*) it appears that the investigation of the case was pending, therefore, learned Single Judge of the Kerala High Court observed in that context that due to the advancement in investigative technology and communication, the various agencies of investigation could even arrest a person outside the India but in case at hand, investigation has already been concluded and after filing of complaint till date only summons have been issued against the applicant. Therefore, *prima facie* in the present matter it appears, there is no apprehension of the arrest of applicant who resides in London (U.K.)

36. Further, if applicant truly wants to participate in the legal proceeding in India then on the basis of summon he can arrive India and after arrival if he apprehends his arrest/custody then he can approach under Section 438 Cr.P.C. for his pre-arrest bail. The instant anticipatory bail application, at this stage, appears to be premature.

37. Further, this Court finds force in the argument advanced by learned counsel appearing on behalf of Union of India that if blanket protection is given to the applicant under Section 438 Cr.P.C. then possibility cannot be ruled out that he will never return to India.

38. Therefore, considering the facts and circumstances of the case

List of Cases cited:

1. Ramesh Hirchand Kundanmal Vs Municipal Corporation of Greater Bombay, (1992) 2 SCC 524
 2. Kasturi Vs Iyyamperum, (2005) 6 SCC 733
 3. Gurmit Singh Bhatia Vs Kiran Kant Robinson, (2020) 3 SCC 773
 4. Maulvi Muhammad Vs Syed Husain, 1880 ILR 3 All. 203
 5. Laxmi Kishore Vs Har Prasad Shukla, 1981 Allahabad Rent Cases 545
 6. Shankar Ramchandra Abhyankar Vs Krishnaji Dattatreya Bapal, (1969) 2 SCC 74
 7. Pandurang Dhondi Chougule Vs Maruti Hari Jadhav, 1966 AIR SC 153
 8. Anil Kumar Singh Vs Pappu, 2022(2) ADJ 267
 9. Kesardeo Chamria Vs Radha Kissen Chamria, AIR 1953 SC 53
 10. Mohunt Bhagwan Ramanuj Das Vs Khetter Moni Dass, (Calcutta HC)
 11. Enat Mondul Vs Baloram Dey, (Calcutta HC)
- (Delivered by Hon'ble Saral Srivastava, J.)

1. Heard Ms Shreya Gupta, learned counsel for the plaintiff/revisionist and Sri Navin Sinha, learned Senior Advocate assisted by Sri Arvind Srivastava, learned counsel for the respondents.

2. By means of the present civil revision, the plaintiff/revisionist has assailed the order dated 11.05.2022 passed by the Civil Judge (Senior Division), Bareilly by which he has allowed the application 151Ka and application 227Ga of Dharmendra Kumar Rathore-respondent no.1 for impleading him as 'defendant' in Original Suit No.530 of 2017.

3. The facts in brief are that the plaintiff/revisionist is a private limited company duly registered with the Registrar of Companies Uttar Pradesh and Uttarakhand, Kanpur on 07.07.2011. The plaintiff-revisionist has instituted the Original Suit No.530 of 2017 praying for a decree of specific performance of agreement to sale dated 12.07.2011 executed by respondent no.2 (defendant no.1 in original suit) in favour of plaintiff/revisionist registered in the office of Sub-Registrar-II, Bareilly on 12.07.2011, and a direction to the respondent no.2 to execute the sale deed of the land described in the plaint and in the agreement to sale dated 12.07.2011 (hereinafter referred to as 'suit property') in favour of plaintiff/revisionist after taking the balance sale consideration of Rs.2 crore & 28 lacs from the plaintiff/revisionist. It is further prayed that respondent no.3 (defendant no.2 in the original suit) and respondent no.5 (defendant no.4 in the original suit) be also directed to join with defendant no.1 as sellers in the said sale deed. The plaintiff/revisionist further prayed for a decree declaring the two sale deeds dated 11.11.2011 registered on 15.11.2011 and the sale deed dated 29.11.2012 registered on 01.12.2012 as null and void.

4. The case of the plaintiff/revisionist is that respondent no.2 agreed to sell the plaintiff/revisionist his Bhumidhari land detailed in paragraph 4 of the plaint situated at village Bilwa, Tehsil and District Bareilly. Respondent no.2 for the said purpose executed a registered agreement to sale dated 12.07.2011 registered in the office of Sub-Registrar II, Bareilly on 12.07.2011 (hereinafter referred to as 'agreement') in favour of the plaintiff/revisionist through its two Directors namely, Dharmendra Kumar

Rathore and Smt. Neetu Sahu. The total amount of sale consideration for the suit property under the agreement was Rs.3,28,00,000/- (Rs.3 crores & 28 lac) out of which, an amount of Rs.1 crore was paid to respondent no.2 by plaintiff/revisionist as part of sale consideration and balance amount of sale consideration was agreed to be paid at the time of execution of sale deed.

5. Under the agreement, six months was stipulated for the execution of the sale deed, and it was also agreed between the plaintiff/revisionist and respondent no.2 that the plaintiff/revisionist as prospective purchaser shall be at liberty to get the sale deed executed in its name or the name of other person or persons, firm or company of its choice and may also get the sale deed executed in one go or in parts as may be permissible under the relevant revenue law. It is also agreed that all the costs and expenses of registration, stamp duty etc. shall be borne by the plaintiff/revisionist.

6. Initially, on 07.07.2011 at the time of incorporation of the plaintiff/revisionist's company, Dharmendra Kumar Rathore and Smt. Neetu Sahu were promoters and first Directors of the company. Thereafter, Bharat Kumar Agarwal and Smt. Smita Agarwal became shareholders of the plaintiff/revisionist's company by purchasing 25% shares of the company by each of them w.e.f. 11.07.2011. Thus, Dharmendra Kumar Rathore, Smt. Neetu Sahu, Bharat Kumar Agarwal and Smt. Smita Agarwal became the shareholder of the plaintiff/revisionist's company each having 25% shares in the company. Bharat Kumar Agarwal and Smt. Smita Agarwal were also appointed Directors of the plaintiff/revisionist's

company on 18.07.2011. Thus, the plaintiff/revisionist's company had four Directors namely, Dharmendra Kumar Rathore, Smt. Neetu Sahu, Bharat Kumar Agarwal and Smt. Smita Agarwal w.e.f. 18.07.2011.

7. The further case in the plaint is that the two Directors namely Dharmendra Kumar Rathore and Smt. Neetu Sahu resigned from the Directorship of the plaintiff/revisionist's company w.e.f. 18.10.2011. It is further stated that before the expiry of the period stipulated in the agreement for execution of the sale deed, two Directors of the plaintiff/revisionist's company namely, Bharat Kumar Agarwal and Smt. Smita Agarwal came to know that respondent no.2 had sold away the suit property by executing two sale deeds; one sale deed dated 11.11.2011 (registered on 15.11.2011 in the office of Sub-Registrar, Bareilly) in favour of respondent no.4 (defendant no.3 in the suit) and respondent no.5 (defendant no.4 in the suit) is in respect to one half of the land of the suit property of southern portion; and second sale deed dated 11.11.2011 (registered on 15.11.2011 in the office of Sub-Registrar, Bareilly) in favour of respondent no.3 in respect of one half of the northern portion of suit property. At the time of execution of the second sale deed, the name of respondent no.3 was M/s Saraswati Paddy Private Limited and its Director was Sri Anupam Agarwal, but thereafter, its name was changed to M/s Marigold Infra Developers Private Limited.

8. It is further stated that in both the aforesaid sale deeds, it is mentioned that respondent no.2 had earlier entered into the aforesaid agreement to sale dated 12.07.2011 in favour of the plaintiff/revisionist, and plaintiff/revisionist

under clause 11 of the agreement through its resolution dated 15.07.2011 nominated and requested to the vendor i.e. respondent no.2 to sell the said land to the purchaser concerned. It was also mentioned in the aforesaid two sale deeds that the amount of advance of Rs.1 crore was paid by the plaintiff/revisionist to respondent no.2 under the agreement be adjusted in each of the said sale deeds equally. The expenses incurred in the execution and registration of sale deeds viz stamp duty, registration charges etc. were borne and paid by the vendor i.e. respondent no.2.

9. The plaintiff/revisionist further alleges that when two Directors namely, Bharat Kumar Agarwal and Smt. Smita Agarwal came to know about aforesaid two sale deeds dated 11.11.2011 (registered on 15.11.2011 in the office of Sub-Registrar, Bareilly), they objected to it alleging that no resolution dated 15.07.2011 was ever passed by the plaintiff/revisionist's company authorising the sale of suit property to said purchasers. Plaintiff/revisionist also alleged that two Directors namely, Dharmendra Kumar Rathore and Smt. Neetu Sahu had resigned from the plaintiff/revisionist's company on 18.10.2011 and they in collusion with purchasers and respondent no.2 and other persons got the sale deeds executed without there being any such resolution as referred in the said sale deeds to cause grave loss to the plaintiff/revisionist's company.

10. The aforesaid two Directors namely, Bharat Kumar Agarwal and Smt. Smita Agarwal made complaints about the aforesaid illegal sale to various authorities and requested that the sale deeds be cancelled.

11. It is further stated that the respondent nos.4 and 5 despite knowing the

fact that sale deeds have not been legally executed, sold away and transferred the suit property purchased by them through the aforesaid sale deeds dated 11.11.2011 to respondent no.6 (defendant no.5 in the suit).

12. As there arose serious dispute among the Directors, two Directors namely, Bharat Kumar Agarwal and Smt. Smita Agarwal filed Company Petition No.99 (N.D.) of 2012 (Bharat Kumar and Another Vs. Shri Bankhandi Nath Developers Private Limited), under Sections 397 and 398 of the Companies Act, 1956 before the National Company Law Tribunal, Allahabad Bench praying that the aforesaid sale deeds dated 11.11.2011 and the two sale deeds dated 15.11.2011 be declared null and void and suit property sold under the aforesaid sale deeds be restored. They further prayed that a proceeding for fraudulent conduct of business be launched against the respondents in the said company petition.

13. Later on, Dharmendra Kumar Rathore and Smt. Neetu Sahu also filed Company Petition No.86 (N.D.) of 2013 (Dharmendra Kumar Rathore and Another Vs. Shri Bankhandi Nath Developers Private Limited) praying for a declaration that transfer/allotment of shares to Bharat Kumar Agarwal and Smt. Smita Agarwal be declared as invalid and null and void. Further declaration sought was that the alleged transfer forms be declared invalid, null and void and the resolution passed on 18.07.2011 for appointing Bharat Kumar Agarwal and Smt. Smita Agarwal as Director on the filing of Form-32 is cancelled besides other reliefs.

14. The National Company Law Tribunal (hereinafter referred to as

'N.C.L.T.') decided both the company petitions i.e. Company Petition No.99 (N.D.) of 2012 and Company Petition No.86 (N.D.) of 2013 by common judgement dated 24.01.2017 wherein it held that Bharat Kumar Agarwal and Smt. Smita Agarwal are the shareholders and Directors of the plaintiff/revisionist's company having together 50% authorized capital and shall continue as such. The N.C.L.T. also held that Dharmendra Kumar Rathore and Smt. Neetu Sahu have not resigned from the Directorship and they are continuing as Directors of the plaintiff/revisionist's company. It also held that there was no resolution dated 15.07.2011 authorising execution of the sale deeds dated 11.11.2011 in favour of respondent nos.3, 4 and 5. The N.C.L.T. also held that no resolution for parting with the rights of the plaintiff/revisionist under the agreement to purchase the suit property in suit was ever passed by the Board or by Extraordinary General Meeting (hereinafter referred to as 'EOGM') or by Annual General Meeting (hereinafter referred to as 'AGM') and held that parting of the suit property by the company at the behest of Dharmendra Kumar Rathore and Smt. Neetu Sahu without approval of the Board and members ignoring legal requirements cannot be held to be legal. However, N.C.L.T. refused to cancel the sale deeds and held that the plaintiff/revisionist may get the agreement enforced through a competent Civil Court since it has no jurisdiction to grant the said relief.

15. Bharat Kumar Agarwal and Smt. Smita Agarwal filed a Company Appeal No.72 of 2017 whereas Dharmendra Kumar Rathore and Smt. Neetu Sahu filed Company Appeal Nos.108 & 109 of 2017 before the National Company Law Appellate Tribunal, Delhi

against the judgement and order dated 24.01.2017 passed by the N.C.L.T. The National Company Law Appellate Tribunal decided all three appeals by a common judgement dated 23.08.2017 affirming the judgement dated 24.01.2017 passed by the N.C.L.T and further directed Dharmendra Kumar Rathore to compensate the plaintiff/revisionist in the manner provided in the order.

16. It is also stated by the plaintiff/revisionist in the plaint that the plaintiff/revisionist has always been ready and willing to perform its part of the agreement and pay the balance sale consideration to respondent no.2 and to get the sale deed executed from him in terms of the agreement. In the aforesaid factual backdrop, the plaintiff/revisionist has prayed for the relief, referred to above.

17. In the aforesaid suit, an application 151Ka under Order 1 Rule 10 of C.P.C. has been filed by Dharmendra Kumar Rathore, who is one of the Directors of the plaintiff/revisionist's company for being impleaded as 'defendant' in the suit. The said application has been filed by Dharmendra Kumar Rathore mainly on the ground that N.C.L.T. in its order dated 24.01.2017 held that there are four Directors in the company, but because of the dispute between them, they are divided, and no decision of the company can be taken without the majority of the Directors. Consequently, the N.C.L.T. appointed Sri Anil Kumar, a practising Company Secretary so that the decision could be taken by the company by majority. It is further stated that no meeting of the five Directors had taken place to decide about the filing of suit on behalf of the company. Therefore, one Director Sri Bharat Kumar Agarwal alone is not competent to institute

the suit as no decision to institute the suit has been taken by the other four Directors. It is further stated that since respondent no.1 Dharmendra Kumar Rathore is the Director of the company and has a direct interest in the suit property, therefore, any decision in the suit will affect the interest of respondent no.1, hence, he is a necessary and proper party in the suit.

18. It is further stated that Bharat Kumar Agarwal has stated wrong facts in the plaint which are adverse to the interest of respondent no.1, and therefore, respondent no.1 is a necessary and proper party in the suit.

19. The application 151Ka of respondent no.1 was objected to by the plaintiff/revisionist by filing objection 163Ga contending inter alia that respondent no.1 is neither necessary nor proper party in the suit and application 151Ka has been filed on misconceived grounds. It is further stated that so far as the legality of the resolution passed by the company is concerned, a third party has no right to challenge the legality and correctness of the resolution, and this Court has no jurisdiction to decide the legality and correctness of the said resolution. It is further stated that the averments made in application 151Ka are vague since respondent no.1 has not stated in his application what facts have been concealed by the plaintiff/revisionist. It is also stated that the suit has been instituted in the interest of the company and for the benefit of the company, and in case relief prayed for in the suit is granted, respondent no.1 shall not suffer any prejudice rather he would be benefited by the decree in favour of the plaintiff/revisionist.

20. It transpires from the record that the plaintiff/revisionist also filed an

application under Order 39 Rules 1 & 2 of C.P.C. praying for an interim injunction. The said application was rejected by the trial court by order dated 21.10.2021. Against the said order, the plaintiff/revisionist preferred F.A.F.O. No.1771 of 2021 which was dismissed by the Division Bench of this Court by judgement dated 26.11.2021. Against the judgement of this Court dated 26.11.2021 passed in F.A.F.O. No.1771 of 2021, the plaintiff/revisionist preferred Special Leave to Appeal (C) No.1204 of 2022 in which, Apex Court has passed the following order on 07.02.2022:-

“Upon hearing the counsel the Court made the following

ORDER

Applications for exemption from filing O.T., permission to file additional documents/facts/annexures are allowed.

Learned counsel for the petitioner points out that the original vendor (respondent No.1) executed a registered agreement to sell on 12.07.2011 in respect of 55,000 sq. mtrs. of land with 50% stamp duty paid in favour of the petitioner company. There are two subsequent agreements dated 11.11.2011 registered on 15.11.2011 executed in favour of respondent No.2 and respondent Nos.3 & 4. It is the say of learned counsel for the petitioner that in view of there being an issue on the Board resolution authorizing the subsequent sales, the matter went to NCLT and thereafter NCLAT and this Court which upheld the findings that the Board Resolution authorizing the same was fraudulent in character. It is thereafter in the year 2017, the suits for specific performance were filed in which interim orders have been declined by the trial Court after 4 years and the appeal against the same dismissed by the impugned order.

He further submits that pending suit, sale transactions have taken place to third parties, including respondent No.5, represented before us, by respondent Nos.3 & 4. These parties, it is submitted were before the NCLT but only respondent No.5 is arrayed as a defendant in the suit as a subsequent purchaser other than the first four respondents.

The case of the petitioner is thus predicated on the findings of a fraudulent Board Resolution and also its submissions that the original vendor/respondent No.1 was asked to execute sale deed in favour of respondent No. 2 and respondent Nos. 3 & 4 and the proceeds therefrom is not known where they went. In this behalf he submits that as per the registered agreement for sale dated 12.07.2011, one crore had been paid out of a total consideration of Rs. 3 crores 28 lakh. The petitioner is thus stated to have been left high and dry and that the property is dealt with in the meantime, it may be difficult to realize the money from those properties, the dispute being one inter se the company.

On the other hand learned counsel for respondent No. 5 submits that he is a subsequent second purchaser and thus, his interest cannot be compromised.

The impugned orders being interim in character, we would normally loathe to interfere with the same. However, the High Court order also does not deal with this crucial aspects to give prima facie finding way one necessitating our scrutiny. or the other

Issue notice on the special leave petition as well on interim relief returnable on 07.03.2022. Learned counsel for respondent No.5 accepts notice. Respondents Nos. 1 and 4 be served dasti as well.

We may note the disputed Board Resolution is dated 15.07.2011 which has

been found to be fraudulent by the different forums stated to be authorizing Mr. Dharmendra Rathore, one of the Directors who is stated to be still a Director of the petitioner company. In order to enable this Court to take a view and to find out where the monies realized have gone, we consider appropriate to implead Mr. Dharmendra Rathore as respondent No. 6 in the present proceedings.

Amended Memo of parties be filed within a week.

Notice in terms aforesaid will also issue to the newly impleaded as respondent No. 6.

A copy of the order to accompany the notice."

21. The aforesaid S.L.P. was disposed off by the Apex Court by judgement dated 07.03.2022. Respondent no.1 on the strength of the judgement dated 07.02.2022 passed by the Apex Court in Special Leave to Appeal (C) No.1204 of 2022 filed an application 227Ga for impleading him as 'defendant' in the suit.

22. The aforesaid application was contested by the plaintiff/revisionist by filing objection 231Ga stating therein that the impleadment of respondent no.1 by the Apex Court in Special Leave to Appeal (C) No.1204 of 2022 was for a limited purpose and Apex Court has never directed or allowed the impleadment of respondent no.1 in the above suit.

23. The trial court by order dated 11.05.2022 allowed the application 151Ka and 227Ga of respondent no.1 by placing reliance upon the order passed by the Apex Court on 07.02.2022 in Special Leave to Appeal (C) No.1204 of 2022. The order dated 11.05.2022 is assailed in the present revision.

24. Challenging the aforesaid order, learned counsel for the plaintiff/revisionist has contended that the order of the trial court allowing application 151Ka and application 227Ga is erroneous and has been passed without application of mind inasmuch as the trial court while allowing the aforesaid applications has failed to consider the necessary ingredients of Order 1 Rule 10 of C.P.C. in allowing the impleadment application of respondent in the suit. It is contended that the plaintiff/revisionist is a dominus litis and he cannot be compelled to proceed against a person against whom he does not claim any relief. It is further contended that the plaintiff/revisionist being dominus litis is not bound to sue every possible adverse claim in the suit. It is further contended that respondent no.1 is neither a necessary nor a proper party in the suit, therefore, the trial court has committed material irregularity in not considering the fact whether respondent no.1 has made out a case for impleadment under Order 1 Rule 10 of C.P.C. or not.

25. It is further contended that the trial court has failed to appreciate correctly the order passed by the Apex Court in S.L.P. No.1204 of 2022 for impleading respondent no.1 as 'defendant' in the suit. It is submitted that the impleadment of respondent no.1 in the suit was for a limited purpose to get the direction of the National Company Law Appellate Tribunal directing respondent no.1 to compensate the company by depositing Rs.1 crore along with 12% interest complied with. Thus, it is contended that the revisional court has committed manifest irregularity in allowing the application of respondent no.1.

26. Per contra, Sri Navin Sinha, learned Senior Counsel for the respondents submits that respondent no.1 is a necessary

and proper party in the suit. It is contended that it is not disputed that respondent no.1 is one of the Directors of the plaintiff/revisionist's company as has been held by the N.C.L.T. and affirmed by the National Company Law Appellate Tribunal, therefore, he has direct interest in the suit property. In such view of the fact, even if no relief has been claimed against respondent no.1, he is a proper party in the suit.

27. It is submitted that reading of the plaint does not disclose that there is any pleading to the effect that the plaintiff/revisionist's company passed any resolution authorising Bharat Kumar Agarwal to institute suit for enforcement of the agreement to sale. He further contends that after the order was passed by the National Company Law Appellate Tribunal, no meeting of five Directors of the plaintiff/revisionist's company had taken place resolving to institute a suit for enforcement of the agreement to sale, and this fact has been specifically stated by the respondent no.1 in paragraph 5 of his application which has not been denied by the plaintiff/revisionist's company in its objection 163Ga to the application 151Ka of respondent no.1. Accordingly, his further submission is that there is no provision to challenge the resolution of the Company under the Companies Act. He further submits that since the relevant issue which arises in the instant case to be considered by the trial court is whether the company has taken any decision to take legal recourse for enforcement of the agreement to sell, and the said issue strikes at the maintainability of the suit and cannot be decided effectively in the absence of respondent no.1 and the decision on said issue does not change the nature of suit, therefore, the respondent

no.1 is necessary and proper party in the suit.

28. It is further stated that there are serious allegations made by the plaintiff/revisionist in the plaint against respondent no.1 that respondent no.1 has colluded with other persons in executing the sale deed, and in such view of the fact, the respondent no.1 has a right to defend himself and thus, respondent no.1 is a necessary and proper party in the suit and application of respondent no.1 falls within the parameters of Order 1 Rule 10 of C.P.C., therefore, the trial court has not committed any illegality in allowing the application of respondent no.1. Lastly, he contends that by impleading respondent no.1, plaintiff/revisionist would not suffer any prejudice.

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

30. Plaintiff-revisionist instituted Original Suit No.530 of 2017 praying for a decree of specific performance of agreement to sale dated 12.07.2011 executed by respondent no.2 in favour of plaintiff-revisionist. It emanates from the record that initially there were two shareholders of the plaintiff's company, namely, Dharmendra Kumar Rathore and Smt. Neetu Sahu and they were the Directors of the plaintiff's company. Subsequently, Bharat Kumar Agarwal and Smt. Smita Agarwal purchased 50% share from Dharmendra Kumar Rathore and Smt. Neetu Sahu, and thus, there were four shareholders each having 25% shareholding in the company.

31. The plaintiff/revisionist entered into an agreement to sale executed by

respondent no.2 in favour of the plaintiff's company through its Director Dharmendra Kumar Rathore for sale consideration of Rs.3,28,00,000/- (Rs. Three Crores & Twenty Eight Lacs), out of which Rs.1 crore was paid as advance. It was stipulated in the agreement to sale that the sale deed was to be executed within six months either in favour of the plaintiff-revisionist or in the name of another person or persons, firm or company of its choice and may also get the sale deed executed in one go or in portion as permissible under the relevant Revenue Law. Later on, Bharat Kumar Agarwal and Smt. Smita Agarwal also became the Directors of the plaintiff's company on 18.07.2011, and thereafter, there were four Directors of the plaintiff's company namely, Dharmendra Kumar Rathore, Smt. Neetu Sahu, Bharat Kumar Agarwal and Smt. Smita Agarwal.

32. It transpires from the record that respondent no.2 sold away the suit property by executing two sale deeds; one dated 11.11.2011 in favour of respondent no.4 & 5 selling southern one half of the suit property; and the second sale deed on the same date i.e., 11.11.2011 in favour of respondent no.3 in respect of one half of the northern portion of the suit property. It further transpires from the record that a dispute arose among the Directors of the company which led Bharat Kumar Agarwal and Smt. Smita Agarwal to file a Company Petition No. 99 (N.D.) of 2012, under Sections 397 & 398 of the Companies Act, 1956 before the N.C.L.T. praying for a relief of declaration declaring the sale deed dated 11.11.2011 and two sale deeds dated 15.11.2011 as null and void and suit property sold under the aforesaid sale deeds be restored to the plaintiff's company. The other Company Petition No.86 (N.D.) of 2013 was filed by Dharmendra Kumar

Rathore and Smt. Neetu Sahu praying that allotment of share to Bharat Kumar Agarwal and Smt. Smita Agarwal be declared invalid and null and void. The N.C.L.T. decided both the company petitions, i.e. Company Petition No. 99 (N.D.) of 2012 and Company Petition No.86 (N.D.) of 2013 by a common judgement dated 24.01.2017. Paragraphs 5.2 to 5.5, 6.1 & 7 of the judgement of N.C.L.T. dated 24.01.2017 which have been relied upon by learned counsel for both the parties in respect of their submissions are reproduced herein below:-

“5.2. Thus, there cannot be any doubt that the Company has agreed to purchase the property and the Company is at liberty to obtain sale deed either in its own name or in the name of any other else within a period of six months, subject to other conditions of contract. But very strangely, on 15.11.2011 the company has taken the decision to part with that land. The reason for that as stated by the Respondents in their petition in CP 86/2013 is that they being directors of the Company got an offer for sale of the land at a point, therefore in order to benefit the Respondent No.1 Company, the land was sold to (1) Saraswati Paddy Products Pvt. Ltd. and (now Mari Gold Infra) (2) Shri Styendra Rathore and Shri Prem Shankar Rathore by way of registered sale deed on 15.11.2011 and thus 'earned profit within a short span of time'.

5.3 One of the important clauses of the sale deeds is that the Vendor has borne the Registration and Stamp duty charges. Under the deeds the sale consideration is Rs.3,28,00,000. It is the same value for which the land was purchased from Respondent No.4 under the agreement of sale by the Company. Therefore, there is no profit earned by the company as pleaded by

the Respondents. Further very weirdly, the vendor had to bear the Stamp duty and Registration charges which comes to Rs.23 lakhs as shown in both the sale deeds together. Why the 4th Respondent had to bear loss in meeting this stipulation is un-understandable and this also goes contrary to the ordinary course of transactions. It is unknown whether the advance consideration paid by the Company under the agreement of sale was returned to it by the vendees under the sale deeds. The Respondents did not produce any evidence to that effect. Therefore, deliberately this transaction, instead of fetching profit to the company resulted in incurring huge loss. If such is not called an act of mismanagement, certainly it is imprudent act prejudicially affecting the interest of the company.

5.4. Interestingly, the Board did not record any minutes of its meeting and produce that the decision to get the sale deed executed in favour of 3rd parties in pursuance of the Agreement of sale, by the Respondent No.4 approved by the EOGM which is necessary to part with the property of the Company. Even if any such meeting was held, that minutes are not valid because, the Petitioners who are Directors are not parties to that resolution.

The Respondents did not even plead that there is any such resolution passed by the Board and the EOGM or AGM. The property of the company acquired under the agreement of sale cannot be parted with in favour of a 3rd party without the approval of the Board and Members. To that extent, the parting of property by the company at the behest of the Respondent No.2 and 3 claiming to be sole directors of the company ignoring the legal requirements and also the fact that there are other Directors, the Petitioner in CP-99/2012 as per our findings above, is not legal.

5.5. *The next important question that remains with us is whether the sale deeds dated 15.11.2011 can be declared as 'null and void' as sought for in CP 99/2012. The jurisdiction of this tribunal is summary in nature and the powers thereof while dealing with causes of oppression and mismanagement are spelt out in Sec. 402 of 1956 Act and Sec. 242 of Companies Act, 2013. Two important clauses of Sec. 242 are relied upon by the learned counsel for the Petitioners in CP 99/2012 to contend that the Tribunal is competent to set aside any transfer of property under Sec. 242. Those two clauses are:*

(e). the termination, setting aside or modification, of any agreement, howsoever arrived at, between the company and the managing director, any other director or manager, upon such terms and conditions as may, in the opinion of the Tribunal, be just and equitable in the circumstances of the case;

(f). the termination, setting aside or modification of any agreement between the company and any person other than those referred to in clause (e):

Provided that no such agreement shall be terminated, set aside or modified except after due notice and after obtaining the consent of the party concerned;

(g). the setting aside of any transfer, delivery of goods, payment, execution or other act relating to property made or done by or against the company within three months before the date of the application under this section, which would, if made or done by or against an individual, be deemed in his insolvency to be a fraudulent preference;

Clause (e) is with respect to termination of any agreement between directors of the company; and clause (f) is between company and 3rd parties. To fall back on the spirit of clause (f), the 3rd

party shall give consent. Here the 3rd party, other than the directors is Respondent No.11, 5 to 6 who are vendees under two registered sale deeds executed by Respondent No.4. They are resisting the CP 99/2012 substantially and so, there is no consent as such they are giving to terminate any agreement i.e., the sale deeds, if they are taken as 'agreements' for the purpose of cl.(f) of sec. 242 above.

Clauses (g) cannot be attracted because the tribunal can set aside any transfer etc made or done within three months before the date of the application. Obviously this is also not applicable. Further, it is pertinent to note that there is no transfer of property as such effected by the Company but it is by the 4th Respondent. Had the sale deeds in question dated 15.11.2011 been executed by or on behalf of the Company, this provision could have been very well attracted.

5.6...

6.1. As observed in point No.3, parting with the property of the company in favour of 3rd parties is virtually parting with equitable rights of the company to seek sale deed from the vendor in pursuance of the agreement of sale. When once the act of the Respondents in allowing the sale deed executed by the vendor in favour of 3rd party, is held oppressive and not binding on the company, that decision does not disturb the rights accrued to the Respondents 4 to 6 and 11, the vendees under sale deeds because there is transfer of property to them by operation of Sec. 54 of the Transfer of Property Act. Therefore, the Company has to take legal action for getting those sale deeds cancelled and obtain a sale deed in its favour and for that the Board of the Company has to take decision with the ratification by the members. Whether or not the Board will

take a decision is left to the wisdom of the Directors and Members of the company.

7. Result: In view of the above discussion and observations, the following Order is passed:

1. It is declared that both the groups, namely the Petitioners in CP 99/2012 and Petitioners in CP86/2013 are guilty of committing acts of oppression and mismanagement;

2. It is declared that both petitioners in CP 99/2012 and Petitioners in CP86/2013 are Directors of the Board of the Company;

3 (a) Shri Anil Kumar, Practicing Company Secretary is appointed as 5th Director of the Company to enable the Board to take majority decision on the following issues:

(i) whether any legal action shall be taken by the Company for getting the sale deeds dated 15.11.2011 executed by Mr. Alok Goel in favour of 3rd parties cancelled and to specifically enforce the agreement of sale dated 12.07.2011 in favour of the Company executed by Mr. Alok Kumar Goel according to law;

(ii) Whether the Registered office of the Company be shifted or not;

iii) Any other issue relating to the affairs of the Company in order to put the company on track to continue its business as per the objectives of its incorporation;

3 (b) Shri Anil Kumar is further empowered to supervise that the Board meeting and the meeting of members is convened smoothly by following the procedure according to the Companies Act, 2013 and relevant rules and report to the Tribunal. He shall continue as Director of the Board till the Board elects another independent director within a period of 6 months from the date of this order or such other period as the Tribunal may direct on the application of any of the Directors or the members of the Company.

3 (c) Each of parties shall pay Rs. 25, 000/ (twenty five thousand only) (total Rs.50,000) to Shri Anil Kumar as his honorarium in advance, besides reimbursing his travelling and other incidental expenses, whenever he claims therefor;

4. Both parties in both the petitions shall file certified copy of this order before Registrar of Companies, Kanpur within 30 days from the date of this order;

5. All the other reliefs claimed in both the petitions are refused and merged in this order;

6. All applications if any pending as on today are hereby disposed of and merged in this order;

7. The Company Petitions CP 99/2012 and 86/2013 are disposed off accordingly;

8. Both parties shall bear their respective costs."

33. Against the judgement of N.C.L.T. dated 24.01.2017, Bharat Kumar Agarwal and Smt, Smita Agarwal preferred Company Appeal (AT) No.72 of 2017 and two Company Appeals i.e., Company Appeal (AT) Nos.108 & 109 of 2017 preferred by Dharmendra Kumar Rathore and Smt. Neetu Sahu before the National Company Law Appellate Tribunal which were decided by it by a common judgement dated 23.08.2017.

34. It is further relevant to point out that the Special Leave Petition preferred by Dharmendra Kumar Rathore i.e. Civil Appeal Diary No.38283 of 2017 against the judgement dated 23.08.2017 of National Company Law Appellate Tribunal was dismissed by the Apex Court by judgement and order dated 10.08.2018.

35. Before advertng to the submission of respective counsels, it would

be useful to have a glance at Order 1 Rule 10 of C.P.C. which is reproduced herein below.

“10. Suit in name of wrong plaintiff.—(1) *Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just.*

(2) **Court may strike out or add parties.**—*The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.*

(3) *No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent.*

(4) **Where defendant added, plaint to be amended.**—*Where a defendant is added, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the Court thinks fit, on the original defendant*

(5) Subject to the provisions of the Indian Limitation Act, 1877 (XV of 1877), Section 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons.”

36. The Apex Court while interpreting Order 1 Rule 10 of C.P.C. ruled that the party filing application under Order 1 Rule 10 (2) of C.P.C. has to establish that he is a necessary and proper party in the proceeding and without his presence the court cannot effectively and completely adjudicate upon and settle all the questions involved in the suit. Once the person who files an application under Order 1 Rule 10 of C.P.C. establishes the existence of the aforesaid prerequisite conditions, the Court is under obligation to exercise its jurisdiction under Order 1 Rule 10 of C.P.C. and direct for impleadment of such person.

37. In this respect it would be apt to refer few judgments of the Apex Court:

38. In **Ramesh Hirchand Kundanmal Vs. Municipal Corporation of Greater Bombay and Others (1992) 2 SCC 524**, the question which came for consideration before the Apex Court was whether the second respondent is a necessary and proper party to be joined as 'defendant' under Order 1 Rule 10 of C.P.C. in the suit instituted by the appellant against respondent no.1.

39. In the said case under the Dealership Agreement of 1974, appellant Ramesh Hirchand Kundanmal was in possession of the service station erected on the land held by respondent no.2-Hindustan Petroleum Corporation Ltd. as lessee. The service station consisted of a petrol pump

on the ground floor and a structure with an open terrace for parking vehicles. Respondent no.1, the Municipal Corporation of Greater Bombay issued notice dated August 5, 1988, under Section 351 of the Municipal Corporation Act to the appellant for demolition of two chattels on the terrace on the ground that these were unauthorised constructions. The appellant instituted suit No.6181 of 1988 before the City Civil Court, Bombay challenging the validity of the notice and for injunction restraining the municipal corporation from demolishing the structures.

40. In the said suit, an application under Order 1 Rule 10 of C.P.C. was filed by respondent no.2 -Hindustan Petroleum Corporation Ltd. on the ground that they have materials to show that the constructions are unauthorised, and they are necessary parties to the litigation. The trial court allowed the said application and directed the appellant to add respondent no.2 as the defendant and amend the plaint suitably. The appellant preferred Writ Petition No.4229 of 1989 under Article 227 of the Constitution of India in the High Court of Bombay challenging the order passed by the trial court allowing the impleadment application which was dismissed by the High Court. The order of the trial court allowing the impleadment application and the order of the High Court dismissing the writ petition of the appellant came to be challenged by the appellant before the Apex Court in the present case.

41. In the said appeal, three submissions were advanced by the appellant; The plaintiff is dominus litis, and therefore, cannot be forced to join the second respondent as the defendant; secondly, the second respondent is neither a necessary nor a proper party to the suit;

thirdly, addition of second respondent would enlarge the issue in the suit. In this regard, it would be relevant to reproduce paragraphs 13, 14 and 15 of the said judgement:-

“13. A clear distinction has been drawn between suits relating to property and those in which the subject-matter of litigation is a declaration as regards status or legal character. In the former category, the rule of present interest as distinguished from the commercial interest is required to be shown before a person may be added as a party.

14. It cannot be said that the main object of the rule is to prevent multiplicity of actions though it may incidentally have that effect. But that appears to be a desirable consequence of the rule rather than its main objectives. The person to be joined must be one whose presence is necessary as a party. What makes a person a necessary party is not merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some questions involved and has thought or relevant arguments to advance. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party. The line has been drawn on wider construction of the rule between the direct interest or the legal interest and commercial interest. It is, therefore, necessary that the person must be directly or legally interested in the action in the answer; i.e., he can say that the litigation may lead to a result which will affect him legally that is by curtailing

his legal rights. It is difficult to say that the rule contemplates joining as a defendant a person whose only object is to prosecute his own cause of action. Similar provision was considered in Amon v. Raphael Tuck & Sons Ltd., (1956) 1 All E.R. 273, wherein after quoting the observations of Wynn-Parry, J. in Dollfus Mieg et Compagnie S.A v. Bank of England, (1950) 2 All E.R. 611, that there true test lies not so much in an analysis of what are the constituents of the applicants' rights, but rather in what would be the result on the subject-matter of the action if those rights could be established, Devlin, J. has stated:-

The test is 'May the order for which the plaintiff is asking directly affect the intervenor in the enjoyment of his legal rights'."

15. It has been strenuously contended before us that the respondent 2 has no interest in the subject-matter of the litigation and the presence of the respondent is not required to adjudicate upon the issue involved in the suit or for the purpose of deciding the real matter involved. It is pointed out that the subject-matter in the suit is the notice issued by the Municipal Corporation to the appellant and the issue is whether it is justified or not. The Hindustan Petroleum Corporation Limited is interested in supporting the Municipal Corporation and sustaining the action taken against the appellant. But that does not amount to any legal interest in the subject-matter in the sense that the order, if any, either in favour of the appellant or against the appellant would be binding on this respondent. It is true that being lessee of the premises, the Hindustan Petroleum Corporation Limited has an answer for the action proposed by the Municipal Corporation against the appellant, but for the purpose of granting the relief sought for by the appellant by examining the

justification of the notice issued by the Municipal Corporation, it is not necessary for the Court to consider that answer. If that be so, the presence of the respondent cannot be considered as necessary for the purpose of enabling the Court to effectually and completely adjudicate upon and settle all the questions involved in the suit. The appellant is proceeded against by the Municipal Corporation for the alleged action in violation of the municipal laws. The grievance of the respondent against the appellant, if any, could only be for violation of the agreement and that is based on a different cause of action. The consolidation of these two in the same suit is neither contemplated nor permissible."

42. In the case of **Kasturi Vs Iyyamperum and Others (2005) 6 SCC 733** the question which cropped up for consideration before the Apex Court was whether in a suit for specific performance of contract for sale of a property instituted by a purchaser against the vendor, a stranger or a third party to the contract claiming to have an independent title and possession over the contracted property is entitled to be added as a party-defendant in the suit. In the said case, a suit for specific performance of the contract was instituted by the appellant against respondents no.2 and 3. An application was filed in the suit by respondents no.1 and 4 to 11, who were admittedly not parties to the contract setting up a claim of independent title and possession over the contracted property to get themselves added in the suit as 'defendants'.

43. The trial court allowed the application for impleadment of respondent no.1 and 4 to 11, and the writ petition preferred against the order of the trial court was also dismissed by the High Court.

These two orders came to be challenged before the Apex Court. The Apex Court after considering the scope of Order 1 Rule 10 of C.P.C. held that a third party, who is alien to the agreement, is neither necessary nor proper party and cannot be impleaded as defendant. Paragraphs 13, 16, 17 and 18 of the said judgement are reproduced herein below:-

"13. From the aforesaid discussion, it is pellucid that necessary parties are those persons in whose absence no decree can be passed by the Court or that there must be a right to some relief against some party in respect of the controversy involved in the proceedings and proper parties are those whose presence before the Court would be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit although no relief in the suit was claimed against such person.

14...

15..

16. That apart, from a plain reading of the expression used in sub-rule (2) Order 1 Rule 10 CPC "all the questions involved in the suit" it is abundantly clear that the legislature clearly meant that the controversies raised as between the parties to the litigation must be gone into only, that is to say, controversies with regard to the right which is set up and the relief claimed on one side and denied on the other and not the controversies which may arise between the plaintiff/appellant and the defendants inter se or questions between the parties to the suit and a third party. In our view, therefore, the court cannot allow adjudication of collateral matters so as to convert a suit for specific performance of contract for sale into a complicated suit for title between the plaintiff/appellant on one hand and Respondent Nos. 2 & 3 and

Respondent Nos. 1 and 4 to 11 on the other. This addition, if allowed, would lead to a complicated litigation by which the trial and decision of serious questions which are totally outside the scope of the suit would have to be gone into. As the decree of a suit for specific performance of the contract for sale, if passed, cannot, at all, affect the right, title and interest of the respondent Nos.1 and 4 to 11 in respect of the contracted property and in view of the detailed discussion made hereinafter, the respondent Nos.1 and 4 to 11 would not, at all, be necessary to be added in the instant suit for specific performance of the contract for sale.

17. It is difficult to conceive that while deciding the question as to who is in possession of the contracted property, it would be open to the Court to decide the question of possession of a third party or a stranger as first the lis to be decided is the enforceability of the contract entered into between the appellant and the Respondent 3 and whether contract was executed by the appellant and the Respondent Nos.2 and 3 for sale of the contracted property, whether the plaintiffs were ready and willing to perform their part of the contract and whether the appellant is entitled to a decree for specific performance of a contract for sale against the Respondent Nos.2 and 3. Secondly in that case, whoever asserts his independent possession of the contracted property has to be added in the suit, then this process may continue without a final decision of the suit. Apart from that, the intervener must be directly and legally interested in the answers to the controversies involved in the suit for specific performance of the contract for sale. In Amol Vs. Raphael Tuck and Sons Ltd. [1956(1) All ER 273] it has been held that a person is legally interested in the answers to the controversies only if he can

satisfy the Court that it may lead to a result that will effect him legally.

18. That apart, there is another principle which cannot also be forgotten. The appellant, who has filed the instant suit for specific performance of the contract for sale is dominus litis and cannot be forced to add parties against whom he does not want to fight unless it is a compulsion of the rule of law, as already discussed above. For the reasons aforesaid, we are, therefore, of the view that Respondent Nos.1 and 4 to 11 are neither necessary parties nor proper parties and therefore they are not entitled to be added as party-defendants in the pending suit for specific performance of the contract for sale."

44. In a recent judgement of the Apex Court in the case of **Gurmit Singh Bhatia Vs. Kiran Kant Robinson and Others (2020) 3 SCC 773**, the Apex Court considered the issue whether the plaintiff could be compelled to implead a person in a suit for a specific performance against his wishes and more particularly in respect of a person against whom no relief has been claimed by him. In the said case, the suit was instituted by respondent no.2 and 3 against respondent no.1 for specific performance of agreement to sale. During the pendency of the suit, and despite there being an injunction order, a sale deed was executed by respondent no. 1 in favour of the appellant. The appellant, thereafter, filed an application for impleadment under Order 1 Rule 10 of C.P.C. The trial court allowed the impleadment application which order was set aside by the High Court in a writ petition. The appellant preferred the appeal against the judgement of the High Court dismissing the writ petition of the appellant before the Apex Court. The Apex Court placed reliance upon the judgement in the case of **Kasturi**

(supra) and dismissed the special leave petition.

45. It can thus be seen that the Apex Court has held that for being a necessary and proper party, the twin conditions have to be satisfied. The first one is that there must be a right to some relief against such a party in respect of the controversies involved in the proceeding. The second is that no effective decree can be passed in the absence of such a party. Thus, in other words, it is necessary that a person must be directly or legally interested in the action in the answer i.e. the litigation would affect him legally by curtailing his legal rights. Further, the presence of such a person is necessary to decide and adjudicate all the issues involved in the suit and the absence of such party would handicap the Court from adjudicating the issues involved in the suit.

46. While elaborating on the scope of Order 1 Rule 10 of C.P.C., the Apex Court has further emphasised that the main object of the rule is not to prevent the multiplicity of actions though it may incidentally have that effect. A person would not be a necessary and proper party merely because he has relevant evidence to give on some of the questions involved; that would only make such a person a necessary witness. Such a person would also not become a necessary party because he has an interest in the correct solution of some questions and has thought or relevant arguments to advance.

47. Further, a plain reading of the expression 'all the questions involved in the suit' used in sub-Rule 2 of Order 1 Rule 10 of C.P.C. signifies that the legislature conceived that the controversies raised between the parties to the litigation must be

gone into only. The Court cannot by invoking power under Order 1 Rule 10 (2) of C.P.C. allow adjudication of collateral matters as this would lead to a complicated litigation by which the trial and decision of serious questions which are outside the realm of issues involved in the suit would have to be gone into.

48. Now, this Court proceeds to consider the legality of the order of the trial court allowing the impleadment application. The order of the trial court reflects that it has placed reliance upon the order passed by the Apex Court in Special Leave to Appeal (C) No.1204 of 2022 which has been extracted above. The trial court did not advert to the scope of Order 1 Rule 10 (2) of C.P.C. in passing the impugned order. When this lacuna in the order was pointed out to the learned counsel for the respondents, he could not demonstrate from the impugned order that the trial court has recorded finding that ingredients of Order 1 Rule 10 (2) of C.P.C. are present, so respondent no.1 is a proper party in the suit and his presence is necessary to effectively adjudicate all the issues involved in the suit. Thus, it can easily be held that the trial court has committed material irregularity in allowing the application of respondent no.1 under Order 1 Rule 10 of C.P.C.

49. Now, the question which further comes for consideration before this Court is whether this Court in the exercise of power under Section 115 of C.P.C. can proceed to decide the impleadment application of respondent no.1 on merit or should remand the matter to the trial court to decide the application 227Ga of respondent no.1 afresh.

50. Learned counsel for the plaintiff/revisionist submits that this Court

in the exercise of power under Section 115 of C.P.C. can decide the application if there is no disputed question of fact or purely a legal issue is involved. She submits that in the present case, only the question of law is involved i.e. whether the impleadment application of respondent no.1 satisfies the essential conditions to invoke the power under Order 1 Rule 10 (2) of C.P.C. to conclude that respondent no.1 is a necessary and proper party and has a right to be impleaded.

51. She has placed reliance upon the two judgements of this Court. In the case of *Maulvi Muhammad Vs. Syed Husain 1880 ILR 3 All. 3 203*, the question referred to the larger Bench was whether Section 622 of Act 10 of 1877 gives larger power of revision in civil cases than the power of Courts in exercising jurisdiction of Second Appeal. In other words, the question was whether under Section 622 of Act 10 of 1877, the Court in the exercise of power of revision has the power to pass all orders it can pass in Second Appeals. In this regard, it would be apt to reproduce the judgement of Stuart, C.J as well as the judgement of Straight, J and Oldfield, J:-

"Stuart, C.J: ...Under this s.622, I consider, we can make any order, whether in regard to fact or law, we may think proper for the purposes of the justice of the case. In fact, it appears to me that the power given to the High Court under s. 622 in civil cases very much resembles, if it is not the same as, the jurisdiction given to the High Court in criminal cases under s. 297 of the Criminal Procedure Code, by which the High Court is empowered to "pass such judgment, sentence, or order as it thinks fit." In my opinion, we have under s. 622 the same power as this in civil cases."

*“Straight, J, Oldfield, J:-
concurring. I would answer this reference
by saying that, in my opinion, the terms of
s. 622, Act X of 1877, as amended by Act
XII. of 1879, are so wide and
comprehensive as to invest the High Court
with the power to call for the records of
cases not open to second appeal, and to
pass any order on them which might
properly be made in second appeal. The
words added by Act XII. of 1879 were
apparently introduced for the purpose of
relaxing the somewhat contracted limits
within which it had been competent for the
High Court to exercise revision over the
proceedings of Sub-ordinate tribunals in
which no second appeal lay, and to give
them a narrow interpretation would, I
think, be to defeat the object the Legislature
had in view. Placing the most reasonable
construction I can upon the terms “acting
in the exercise of its jurisdiction illegally or
with material irregularity,” I should read
them to mean, deciding erroneously in
point of law, or irregularly in a material
particular in respect of procedure, and if
this view be correct, the High Courts must
necessarily possess in revision all the
powers they have in second appeal. It is
argued that this practically provides a
second appeal in all cases that are in the
strict sense of the term unappealable, and it
is further urged that, if so serious an
alteration of the law had been
contemplated, words might readily have
been found to express such an intention. I
confess I feel the force of this contention,
but I cannot give effect to it in face of the,
what appear to me to be, plain directions of
s. 622 in its present shape. I would
accordingly answer the question put by this
reference in the affirmative.”*

52. In the case of **Laxmi Kishore
and Another Vs. Har Prasad Shukla 1981**

Allahabad Rent Cases 545, the question
referred to the Bench was in respect to the
powers of the revisional court under
Section 25 of Provincial Small Causes
Courts Act. The question which was
referred to the Bench was as follows:-

*“Whether under section 25 of the
Provincial Small Cause Courts Act a
revisional court can pass a suitable decree
in a case on a consideration of the evidence
on record, if it finds that the findings
recorded by the trial court were vitiated by
an error of law, or can it only remand the
case for a fresh trial?”*

53. The Bench while answering
the aforesaid question held as under:-

*“14. It was in this state of affairs
that section 103 was enacted in the present
Code of 1908. It expressly enables the High
Court to determine an issue of fact itself
rather than remand matters in such cases.*

*15. The question is what is the
effect of exclusion of section 103 from the
purview of the prescribed powers and
procedure for revision under Sec. 25 of the
Small Cause Courts Act. The answer is
evident. The court exercising revisional
power under Section 25 does not possess
jurisdiction to determine issues of fact
itself, by entering into the evidence and
assessing it.*

*16. This aspect makes the Full
Bench decision of this court in Maulvi
Muhammad v. Syed Husain,
distinguishable. In that case, the Full
Bench was considering the scope of the
phrase “may call for the record of the case
and pass such orders with respect thereto
as it thinks fit” occurring in Section 622 of
this Act corresponding to the present
section 115 CPC. It was held that under it,
the court had to pass all orders which it*

can pass in second appeals. In second appeals, the court can, in given circumstances, determine the question of fact. As already seen, a court acting under Section 25 of the Provincial Small Causes Courts Act has no such power. The power to determine question of fact has been expressly taken away.

17...

18. The court deciding a revision under section 25 of the Provincial Small Cause Courts Act has to satisfy itself that the trial courts' decree or order is according to law. Of course, the Revisional Court should keep in mind the Supreme Court's dictum in *Naicker*' case (*supra*) that a wrong decision on fact is also a decision according to law.

19. If it finds that there is no evidence to sustain a finding on a particular issue of fact, it can ignore that finding. Same will be the case where the finding is based only on inadmissible evidence. In such cases, the court will be justified in deciding the question of fact itself, because the evidence is all one way. No assessment is needed. The court can also decide the revision if only a question of law or some preliminary point of law, viz., validity of notice, is sufficient for its decision.

20. But, if it finds that a particular finding of fact is vitiated by an error of law, it has a power to pass such order as the justice of the case requires; but it has no jurisdiction to reassess or reappraise the evidence in order to determine an issue of fact for itself. If it cannot dispose of the case adequately without a finding on a particular issue of fact, it should send the case back after laying down proper guidelines. It cannot enter into the evidence, assess it and determine an issue of fact.

21. Our answer to the question referred to us is that, in the stated

circumstances, the revisional Court has no power to consider the evidence for itself in order to determine an issue of fact. The proper course is to remand the case to the trial court."

54. In the case of ***Shankar Ramchandra Abhyankar Vs. Krishnaji Dattatreya Bapal*** (1969) 2 SCC 74, the issue before the Apex Court was whether the High Court could interfere under Article 226 and 227 of the Constitution of India with the order of the appellate court in proceedings under an act where a petition for revision under Section 115 of C.P.C. against the same order had been previously dismissed by the learned Judge of High Court. The following paragraphs from the judgement apposite to the issue are reproduced herein below:-

"5. It would appear that their Lordships of the Privy Council regarded the revisional jurisdiction to be a part and parcel of the appellate jurisdiction of the High Court. This is what was said in *Nagendra Nath Dey v. Suresh Chandra Dey* 59 IA 283.

"There is no definition of appeal in the Code of Civil Procedure, but their Lordship have no doubt that any application by a party to an appellate court, asking it to set aside or revise a decision of a subordinate Court, is an appeal within the ordinary acceptation of the term...."

Similarly in *Raja of Ramnad v. Kamid Rowthen* 53 IA 74, a civil revision petition was considered to be an appropriate form of appeal from the judgment in a suit of small causes nature. A full Bench of the Madras High Court in *P.P.P. Chidambara Nadar v. C.P.A. Rama Nadar* A.I.R. 1937 Mad. 385 had to decide whether with reference to Article 182(2) of

the Limitation Act, 1908, the term "appeal" was used in a restrictive sense so as to exclude revision petitions and the expression "appellate court" was to be confined to a court exercising appellate, as opposed to, revisional powers. After an exhaustive examination of the case law including the decisions of the Privy Council mentioned above the Full Bench expressed the view that Article 182(2) applied to civil revisions as well and not only to appeals in the narrow sense of that terms as used in the Civil Procedure Code. In Secretary of State for India in Council v. British India Steam Navigation Company 13 C.L.J. 90 and order passed by the High Court in exercise of its revisional jurisdiction under Section 115, Code of Civil Procedure, was held to be an order made or passed in appeal within the meaning of Section 39 of the Letters Patent. Mookerji, J., who delivered the judgment of the Division Bench referred to the observations of Lord Westbury in Attorney General v. Sillem (1864) 10 R.L.C. 704 and of Subramania Ayyar, J. in Chappan v. Moidin I.L.R. (1958) Mad. 68, 80 on the true nature of the right of appeal. Such a right was one of entering a superior Court and invoking its aid and interposition redress the error of the court below. Two things which were required to constitute appellate jurisdiction were the existence of the relation of superior and inferior Court and the power on the part of the former to review decisions of the latter. In the well known work of Story on Constitution (of United States) vol. 2, Article 1761, it is stated that the essential criterion of appellate jurisdiction is that it revises and corrects the proceedings in a cause already instituted and does not create that cause. The appellate jurisdiction may be exercised in a variety of forms and, indeed, in any form in which the Legislature may choose

to prescribe. According to Article 1762 the most usual modes of exercising appellate jurisdiction, at least those which are most known in the United States, are by a writ of error; or by an appeal, or by some process of removal of a suit from an inferior tribunal. An appeal is a process of civil law origin and removes a cause, entirely subjecting the fact as well as the law, to a review and a retrial. A writ of error is a process of common law origin, and it removes nothing for re-examination but the law. The former mode is usually adopted in cases of equity and admiralty jurisdiction; the latter, in suits at common law tried by a jury.

6. Now when the aid of the High Court is invoked on the revisional side it is done because it is a superior court and it can interfere for the purpose of rectifying the error of the court below. Section 115 of the Code of Civil Procedure circumscribes the limits of that jurisdiction but the jurisdiction which is being exercised is a part of the general appellate jurisdiction of the High Court as a superior court. It is only one of the modes of exercising power conferred by the statute; basically and fundamentally it is the appellate jurisdiction of the High Court which is being invoked and exercised in a wider and larger sense. We do not, therefore, consider that the principle of merger of orders of inferior courts in those of superior Courts would be affected or would become inapplicable by making a distinction between a petition for revision and an appeal.

55. The judgement referred to above, postulates that the revision power of the High Court is akin to the powers of High Court's appellate power. Thus, the power of the revision of Superior Court or High Court is that of an Appellate Court

with the only restraint that the prerequisite conditions to invoke power under Section 115 of C.P.C. must be present. Once, the High Court is of the view that the essential conditions to invoke jurisdiction under Section 115 of C.P.C. are present, then the High Court can revise the order passed by the subordinate courts in the exercise of power under Section 115 of C.P.C.

56. However, Sri Navin Sinha, learned Senior Counsel for the respondents submits that if this Court finds that conditions enumerated in Section 115 of C.P.C. are present to exercise the power of revision, the Court may not substitute the finding of the trial court by recording a fresh finding rather the court should remand the matter. In this respect, he has placed reliance upon paragraph 10 of the judgement of Apex Court in the case of **Pandurang Dhondi Chougule Vs. Maruti Hari Jadhav 1966 AIR SC 153** which is reproduced herein below:-

“10. The provisions of Section 115 of the Code have been examined by judicial decisions on several occasions. While exercising its jurisdiction under Section 115, it is not competent to the High Court to correct errors of fact however gross they may, or even errors of law, unless the said errors have relation to the jurisdiction of the court to try the dispute itself. As clauses (a), (b) and (c) of Section 115 indicate, it is only in cases where the subordinate court has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity that the revisional jurisdiction of the High Court can be properly invoked. It is conceivable that points of law may arise in proceedings instituted before subordinate courts which

are related to questions of jurisdiction. It is well settled that a plea of limitation or a plea of res judicata is a plea of law which concerns the jurisdiction of the court which tries the proceedings. A finding on these pleas in favour of the party raising them would oust the jurisdiction of the court, and so, an erroneous decision on these pleas can be said to be concerned with questions of jurisdiction which fall within the purview of Section 115 of the Code. But an erroneous decision on a question of law reached by the subordinate court which has no relation to questions of jurisdiction of that court, cannot be corrected by the High Court under Section 115.”

57. He has also placed reliance upon paragraphs 9, 10 and 42 of the judgement of this Court in the case of **Anil Kumar Singh Vs. Pappu and Others 2022(2) ADJ 267** which are reproduced herein below:-

“9. Before proceeding to consider the merits of the issue it would be worthwhile to refer to a few decisions as to the scope of revisional jurisdiction under section 115, C.P.C. by the High Court. A Four Judges' Bench of the Supreme Court of India had an occasion to consider this aspect of the matter in the case of Kesardeo Chamria v. Radha Kissen Chamria & Ors. AIR 1953 SC 53. Relevant extract of the said judgment is quoted hereinbelow:

"17. We now proceed to consider whether a revision was competent against the order of 25th April, 1945, when no appeal lay. It seems to us that in this matter really the High Court entertained an appeal in the guise of a revision. The revisional jurisdiction of the High Court is set out in the 115th section of the Code of Civil Procedure in these terms:

"The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which appeal lies thereto, and it such subordinate Court appears:

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit."

A large number of cases have been collected in the fourth edition of Chitaley & Rao's Code of Civil Procedure (Vol. 1), which only serve to show that the High Courts have not always appreciated the limits of the jurisdiction conferred by this section. In Mohunt Bhagwan Ramanuj Das v. Khetter Moni Dassn the High Court of Calcutta expressed the opinion that sub-clause (c) of Section 115 of the Civil Procedure Code, was intended to authorise the High Courts to interfere and correct gross and palpable errors of subordinate Courts, so as to prevent grave injustice in non-appealable cases. This decision was, however, dissented from by the same High Court in Enat Mondul v. Baloram Dey but was cited with approval by Lort-Williams, 3., in Gulabchand Bangur v. Kabiruddin Ahmed. In these circumstances it is worthwhile recalling again to mind the decisions of the Privy Council on this subject and the limits stated therein for the exercise of jurisdiction conferred by this section on the High Courts.

18. As long ago as 1894, in Rajah Amir Hassen Khan v. Sheo Baksh Singhi the Privy Council made the following observations on Section 622 of the former Code of Civil Procedure, which was replaced by Section 115 of the Code of 1908:

"The question then is, did the Judges of the lower Courts in this case, in the exercise of their jurisdiction, act illegally or with material irregularity. It appears that they had perfect jurisdiction to decide the case, and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity."

In 1917 again in Balakrishna Udayar v. Vasudeva Aiyar the Board observed:

"It will be observed that the section applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved."

In 1949 in Venkatagiri Ayyangar v. Hindu Religious Endowments Board, Madras the Privy Council again examined the scope of Section 115 and observed that they could see no justification for the view that the section was intended to authorise the High Court to interfere and correct gross and palpable errors of subordinate Courts so as to prevent grave injustice in non-appealable cases and that it would be difficult to formulate any standard by which the degree of error of subordinate Courts could be measured. It was said - "Section 115 applies only to cases in which no appeal lies, and, where the legislature has provided no right of appeal, the manifest intention is that the order of the trial Court, right or wrong, shall be final. The section empowers the High Court to satisfy itself on three matters, (a) that the order of the subordinate Court is within its jurisdiction; (b) that the case is one in which the Court ought to exercise jurisdiction; and (c) that in exercising jurisdiction the Court has not acted illegally. that is, in breach of some provision of law, or with material

irregularity, that is, by committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision. If the High Court is satisfied on those three matters, it has no power to interfere because it differs, however from the conclusions of the subordinate Court on questions of fact or law."

19. Later in the same year in *Joy Chand Lal Babu v. Kamalaksha Choudhuryis Their Lordships* had again adverted to this matter and reiterated what they had said in their earlier decision. They pointed out:

"There have been a very large number of decisions of Indian High Courts on Section 115 to many of which Their Lordships have been referred. Some of such decisions prompt the observation that High Courts have not always appreciated that although error in a decision of a subordinate Court does not by itself involve that the subordinate Court has acted illegally or with material irregularity so as to justify Interference in revision under sub-section (c), nevertheless, if the erroneous decision results in the subordinate Court exercising jurisdiction not vested in it by law, or failing to exercise a jurisdiction so vested, a case for revision arises under sub-section (a) or sub-section (b) and sub-section (c) can be ignored."

20. Reference may also be made to the observations of Bose, 3. in his order of reference in *Narayan Sonaji v. Sheshrao Vithobail* wherein it was said that the words "illegally" and "material irregularity" do not cover either errors of fact or law. They do not refer to the decision arrived at but to the manner in which it is reached. The errors contemplated relate to material defects of procedure and not to errors of either law or fact after the formalities

which the law prescribes have been complied with."

10. Though section 115 C.P.C. has undergone some changes over the years, especially so far as its application in the State of U.P. is concerned and in addition to the requirements contained in Clause (a) to (c) of section 115, C.P.C. which are required to be satisfied for exercise of such revisional jurisdiction, now, by virtue of the U.P. Act 14 of 2003, two other requirements are required to be satisfied, (i) the order if it had been made in favour of the party applying for revision, would have finally disposed off the suit or other proceeding; or (ii) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it is made. However, as far as clauses (a), (b) and (c) laying down the jurisdictional parameters for exercise of revisional jurisdiction under Section 115(1), C.P.C. they stand as it is, therefore, to this extent the law as laid down in *Kesardeo Chhamaria* (supra) applies even today as to the meaning and purport of the said clauses.

42. In view of the law which has been discussed hereinabove and considering the scope of a revision under section 115, C.P.C. in the light of the decision in the case of *Kesardeo Chhamaria* (supra) it cannot be said that the Court below has committed any jurisdictional error attracting clause (a) to (c) of Section 115, C.P.C. nor that the order if it was made in favour of the revisionist would not have disposed off the proceedings for impleadment nor that the order, impugned herein, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it is made. As already noticed, in the facts of the case, the presence of the transferee pendent lite is necessary for

complete and effective adjudication of the suit and issues involved therein and the Court below has exercised its discretion in the matter, which does not require any interference under Article 115, C.P.C."

58. The reading of the judgement of the Apex Court in the case of ***Pandurang Dhondi Chougule (supra)*** reveals that the Apex Court has held that the Superior Court while exercising the power under Section 115 of C.P.C. is not competent to correct the errors of fact or law unless the said error has relation to the jurisdiction of the Court to try the dispute itself. In other words, it is held that the Superior Court or High Court can exercise its revisional power under Section 115 of C.P.C. when the subordinate court has exercised a jurisdiction not vested in it by law or it has failed to exercise a jurisdiction so vested or has acted in exercise of its jurisdiction illegally or with material irregularity. The High Court cannot invoke its jurisdiction under Section 115 of C.P.C. where the subordinate court has taken erroneous view on a question of law which has no relation to the question of jurisdiction of that court.

59. At this stage, it would be apt to notice that Section 115 of C.P.C. as applicable to State of Uttar Pradesh, states "superior Court may 'revise' an order passed in a suit or other proceedings by the subordinate court where no appeal lies against the order.....". The legislature has used the word 'revise' which in the dictionary is described as meaning to 're-examine, to review, to correct, or to amend the fault'. So the legislature in the State of U.P. has given ample power under Section 115 of C.P.C. by using the word 'revise' to the revisional court to review, correct or

amend the fault in the orders of the subordinate courts.

60. The Court has already held that the impugned order cannot be sustained for want of consideration of the prerequisite condition of Order 1 Rule 10 (2) of C.P.C to allow impleadment application.

61. In the light of the aforesaid principle, the only question which needs adjudication by this Court in the instant case is whether the application under Order 1 Rule 10 (2) of C.P.C. meets the requirement of said provision to confer right upon the respondent no.1 to be impleaded in the suit.

62. Since, the trial court has committed material irregularity and failed to exercise jurisdiction vested in it correctly, and the revision power of the High Court is akin to the power of the appellate court, therefore, the issue of impleadment of respondent no.1 can be adjudicated by this Court, and this Court does not deem it fit to remand the matter to the trial court to decide the application of respondent no.1 afresh.

63. The impleadment application has been filed by respondent no.1 alleging that there is no resolution of the plaintiff's company to institute the aforesaid suit inasmuch as after the order was passed by the National Company Law Appellate Tribunal, no meeting of five Directors of plaintiff's company had taken place resolving to institute a suit for enforcement of agreement to sale. Further averments in the application are that the allegation of collusion by respondent no.1 with other persons in executing the sale deed has been levelled by the plaintiff/revisionist. Therefore, respondent No. 1 is the proper

party in the suit to rebut and meet the said allegation. The further ground in the application is that since the Apex Court in its order dated 07.02.2022 has directed for impleadment of respondent no.1 in the special leave petition, therefore, respondent no.1 is a necessary party in the suit.

64. In the opinion of the Court, the averments contained in the application of respondent no.1 under Order 1 Rule 10 (2) of C.P.C. does not make out a case in favour of respondent no.1 to conclude that he is necessary and proper party in the suit, and he is entitled to be impleaded under Order 1 Rule 10 (2) of C.P.C. for the reasons enumerated below.

65. The question whether there is any resolution of the plaintiff's company resolving to institute a suit for the enforcement of the agreement to sell can very well be adjudicated even in the absence of respondent no.1. In this respect, it is pertinent to note that it is open to the defendants in the suit to take such plea and get an issue framed and prove by leading cogent evidence that suit has been instituted by incompetent person inasmuch as there was no meeting of the Board of the Directors of the company resolving to institute a suit for the execution of agreement to sell. Respondent no.1 can at best be a witness in the said case because he could lead evidence on record to prove that no meeting of the Board of the plaintiff's company had taken place. Only to prove that there was no resolution of the plaintiff's company to institute a suit for enforcement of agreement to sale does not make him a necessary and proper party in the suit. The suit is for enforcement of the agreement to sale which admittedly has been entered into between the plaintiff's company and respondent no.2. It is

pertinent to note that the domain of Order 1 Rule 10(2) of C.P.C is to implead a person whose presence is necessary to decide the issues in the suit which have arisen between the parties, but not the issues which are between the plaintiff and third party. Order 1 Rule 10(2) of C.P.C. is not meant to implead such a person and to expand the scope of dispute.

66. Now, coming to the second ground of respondent no.1 that there are allegations of collusion against respondent no.1 in the suit, and therefore, to defend and to rebut the allegation against him, his presence is necessary, this Court may note that the allegation made in paragraph 12 of the plaint are allegation of collusion against respondent no.1 in reference to the execution of sale deed, and the reason for such allegation is that in the sale deeds executed by respondent no.2 in favour of respondent nos.3 to 6, it is mentioned that there was resolution of the plaintiff's company authorising the said sale to said purchaser. In this respect, it would be apt to reproduce the conclusion by the N.C.L.T in paragraph 6:-

“6. Conclusion: The findings recorded above would demonstrate certain situations to accept the contention of both the parties that there is oppression and mismanagement. They are:

(i). The Respondents have deliberately denied the fact that the Petitioners are members and Directors in the Company, having gained the monetary benefit from them. This defence is taken by the Respondents only to preclude the Petitioners from participating in all affairs of the Company and that is an act of oppression committed by the Respondents.

(ii). So far as the Petitioners are concerned, they have propounded the

theory of resignation by the Respondents 2 and 3 to preclude them from the administration of the Company which amounts of oppression.

(iii). Further, the Respondents, having unilaterally parted with the valuable land belonging to the Company, without approval of Board and members, incurred loss to the Company which amounts to an act of mismanagement.

These acts of oppression and mismanagement are attributable to both the parties equally which is sufficient to order liquidation of the company. But ordering liquidation will not be the appropriate solution to place the company on right track."

67. It is also relevant to reproduce the finding returned by the National Company Law Appellate Tribunal holding that there was no resolution of the plaintiff's company to part with the suit property, and after recording the relevant finding, the National Company Law Appellate Tribunal directed the respondent no.1 to deposit Rs.1 crore alongwith 12% interest to compensate the plaintiff's company. Paragraphs 14, 15 and 16 of the said judgment are reproduced herein below:-

"14. We have perused the chequered career of the matter and also the exchange of additional affidavits by the Appellant and Respondents before this Tribunal. It is observable that the Appellant/ Petitioner believing on the rosy picture painted by the respondents found the deal of property lucrative and invested money. The Respondents parted with its right to sale in favour of 3rd party. Appellant/ Petitioners knot the story of resignation of respondents. Though we are not into the details of the finding of the

tribunal below concluding the failure on the part of both of the groups in maintaining standard of probity, fair play and business ethics thus committed oppression against each other and as has been dealt in the previous paras, but it is pertinent to take a note of the Additional Affidavits filed by the Respondents:

a. M/s Oak Infradevelopers Pvt Ltd Respondent No. 13 has claimed that they purchased on the southern side of the said property from Mr. Satyendar Rathore & Prem Shankar Rathore vide sale deed 01.12.2012, for sale consideration of Rs. 1,75,00,000.

b. Respondent 9 & 10 i.e. Satyendar Rathore & Prem Shankar Rathore has contended that they purchased the southern side of the property vide sale deed dated 15.11.2011 registered with the Registrar of Regional Office Bareilly for consideration of Rs. 1, 14,00,000 and got adjusted the half of the advance amount of Rs. 50,00,000. Further contended that they tendered a cheque of Rs 55,00,000 dated 15.11.2011 in terms of demands of M/s Bankhandi Nath Developers Pvt Ltd was returned by Mr Dharmindar Kumar director of M/s Bankhandi Nath Developers Pvt Ltd, stating that "we are returning herewith the cheque as we are finding it difficult to en-cash the same due to dispute in the company."

c. Respondent No. 5 has stated in its additional affidavit that Respondent 4 was agreed to sale for a total sale consideration of Rs.328,00,000 and advance was already paid by Respondent No.1 to the vendor. So the Respondent No.1 agreed to take 55,00,000 as against the 50% share of the advance paid by them to the vendor. And balance sale consideration of Rs. 1,14,00,000 by adjusting the half of the advance amount of Rs. 50,00,000.

Further stated that the cheque dated 15.11.2011 was returned to them by Mr Dharmendra Kumar vide letter dated 21.11.2011 stating that "we are returning herewith the cheque as we are finding it difficult to en-cash the same due to dispute in the company."

15. The statements by the Respondents above leaves it no more a grey area that the money which ought to have been received from the 3rd parties have been denied to be accepted and returned by the Respondent No. 2 on ground of dispute in the company finding it difficult to en-cash the same. Till date the Respondent has not produced any evidence on record whether the company has received the money proposed by the vendee Respondents. What seem opaque to the Tribunal is, if Company was experiencing internal dispute in the management, Respondent 2 should not have taken decision of parting with its right to sale under the agreement to sale on behalf of company. It is an intriguing situation that the Respondent 2 & 3 did not find it difficult to sell the property but found it difficult to accept the money on behalf of company which should have come to the coffers of the company. We hold the conduct of respondent as prejudicial to the interest of the company. The only property the company had was sold, claiming to be a beneficial deal, ended with neither receipt of money nor profitable continuous operation of the company in furtherance of its objectives, in fact halted its operation.

16. In view of the additional facts brought into notice through additional affidavits, while keeping all the directions in the order of NCLT intact, we uphold the decision of the Tribunal with the following modification:

"i) As the decision of returning money was a major decision, which was to

be 'taken by the company but unilaterally taken by Respondent No.2 have caused prejudice to the company. The Respondent No. 2 is directed to ensure that the money which was returned comes to the account of company. The Respondent directors are also directed to compensate the company equal to 12% of interest p.a. on the amounts outstanding from 15.11.2011 to till date within one month from the date of order.

ii) The new 5th director appointed in the company will continue to enable the board to take majority decision w. r. t.

a. Whether the registered office of the company be shifted or not.

b. Any other issue relating to the affairs of the company in order to put the company on tract to continue its business as per objectives of its incorporation."

Appeals are disposed off accordingly. Parties to bear their own cost."

68. The judgement of N.C.L.T. affirmed by the National Company Law Appellate Tribunal has attained finality as the special leave petition preferred against the order of National Company Law Appellate Tribunal has been dismissed.

69. It has come on record that the National Company Law Appellate Tribunal has held that there was no resolution of the plaintiff's company to part with the suit property in favour of a third party. The National Company Law Appellate Tribunal directed respondent no.1 to return the money to the plaintiff's company which he had got in execution of the sale deeds.

70. In the light of the finding returned by the N.C.L.T. as well as the National Company Law Appellate Tribunal about the conduct of respondent no.1, the

allegation of collusion does not prejudice or curtail any right of respondent no.1 to make him a necessary and proper party to be impleaded in the suit. Respondent no.1 is continuing as Director of the plaintiff's company. The object of filing the impleadment application appears to defeat the interest of the plaintiff's company by getting the suit dismissed. Such conduct of respondent no.1 cannot be appreciated.

71. The Court may note that the purpose of enactment of Order 1 Rule 10(2) of C.P.C. is to implead a person who comes up with a bona fide prayer for impleadment on the ground that if any decree is passed, that would infringe or curtail his legal rights, but said provision is not incorporated to come to aid of a person whose bona fide is skeptical and has approached the Court with disdainful object to get the suit dismissed which is detrimental to the interest of the plaintiff. In the present case, the application of respondent no.1 is misconceived and has been filed with malicious intention to cause harm to the company of he is a Director.

72. Whether any right has accrued to respondent no.1 to be impleaded as a party in the suit because of the impleadment of respondent no.1 in the special leave petition.

73. The Court at the first instance would consider the background in which Apex Court passed the order dated 07.02.2022 for impleadment of respondent no.1 in the Special Leave to Appeal (C) No.1204 of 2022. The temporary injunction application filed by the plaintiff/revisionist was rejected by the trial court by order dated 21.10.2021, and F.A.F.O. No.1771 of 2021 preferred against the refusal of the temporary injunction order was also

dismissed. Both the orders came to be challenged by the plaintiff/revisionist in the special leave petition and the Apex Court found that the order passed by the National Company Law Appellate Tribunal directing respondent no.1 to deposit the money alongwith 12% interest has not been complied with. Considering the fact that National Company Law Appellate Tribunal has held that conduct of respondent no.1 was prejudicial to the interest of the plaintiff's company and the order of the National Company Law Appellate Tribunal was not complied with, therefore, to protect the interest of the plaintiff's company and to ensure the compliance of the order of National Company Law Appellate Tribunal, the Apex Court directed for impleadment of respondent no.1 in the special leave petition.

74. Perusal of the order of the Apex Court nowhere indicates that the Apex Court ever intended to implead respondent no.1 as the party in the suit. The impleadment of respondent no.1 was only for a limited purpose that is to ensure compliance of the order of the National Company Law Appellate Tribunal. This Court may note that in the supplementary counter affidavit, the respondents have enclosed cheques in favour of the plaintiff's company, but there is no material on record to indicate that those cheques have been encashed and money has been deposited in the accounts of the plaintiff's company.

75. In the instant case, the suit has been instituted for the specific performance of the contract and respondent no.1 is a third party. The law is settled that the plaintiff/revisionist being dominus litis cannot be forced to implead a person who is neither a necessary nor proper party. Further, no relief has been claimed against

respondent no.1 in the suit nor the averments contained in Order 1 Rule 10(2) of C.P.C. makes out a case that the presence of respondent no.1 is necessary to enable the Court to settle all questions and issues involved in the suit, and to pass effective decree.

76. In view of the aforesaid discussion, this Court is also of the opinion that the conduct of respondent no.1 is not appropriate as till date he has not complied with the order passed by the National Company Law Appellate Tribunal as well as the order of Apex Court in letter and spirit.

77. In such view of the fact, this Court is of the opinion that respondent no.1 is neither a necessary nor a proper party to the suit, and the application of respondent no.1 under Order 1 Rule 10(2) of C.P.C. is misconceived and deserves to be rejected.

78. Thus, for the reasons given above, the revision is *allowed* and the order dated 11.05.2022 passed by the Civil Judge (Senior Division), Bareilly is quashed and applications 151Ka and application 227Ga are hereby rejected. There shall be no order as to costs.

(2024) 4 ILRA 1090
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 10.04.2024

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.
THE HON'BLE AJAI KUMAR SRIVASTAVA-I, J.

Criminal Appeal No. 18 of 1992

Maiku & Anr.		...Appellants
	Versus	
State of U.P.		...Respondent

Counsel for the Appellants:

Amar Nath Dubey (Amicus), Brij Mohan Sahai,
 Prince Singh, Raghunath Prasad

Counsel for the Respondent:

Govt. Advocate

Criminal Law - Indian Penal Code, 1860 – Sections 302/34, 377, 201 & 403 – Code of Criminal Procedure, 1973 – Sections 161, 313, 386 & 437-A – Criminal Appeal Against Conviction – Circumstantial Evidence – Last Seen Theory – Extra-Judicial Confession – Reliability of Witnesses – Complete Chain of Circumstances - The appellants, Maiku and Manzoor alias Mansoor, challenged the judgment dated 27.11.1991 by the VIth Additional Sessions Judge, Unnao, in Sessions Trial No. 171 of 1990, convicting them under Sections 302/34 and 377 IPC (Maiku also under Section 377, Manzoor under Section 403 IPC) for the murder and unnatural sexual acts on the deceased, Satya Narayan, whose body was found in a well on 15.03.1990. The appeal abated against Manzoor due to his death. The prosecution relied on circumstantial evidence, alleging the appellants took the deceased, committed unnatural acts, and killed him, with his body discovered five days after he went missing. The surviving appellant, Maiku, argued: (1) no complete chain of circumstances established his guilt, (2) the prosecution failed to prove motive, (3) the "last seen" evidence and extra-judicial confession by Manzoor were unreliable, and (4) prosecution witnesses P.W.-2 (Hari Narayan, deceased's brother) and P.W.-4 (Jugnu) were contradictory and unreliable. The St. countered that minor contradictions in witness testimonies were immaterial and the prosecution established a complete chain of events. Held: The court allowed the appeal, acquitting Maiku, finding: (1) the prosecution's case, based entirely on circumstantial evidence, failed to establish a complete chain excluding all hypotheses except Maiku's guilt, per Sharad Birdhichand Sarda Vs St. of Maharashtra, (1984) 4 SCC 116, and Raja Naykar Vs St. of Chhattisgarh, 2024 SCC OnLine SC 67; (2) P.W.-2 and P.W.-4's testimonies were unreliable due to contradictions, as P.W.-2 did not confirm P.W.-4's claim of informing him about seeing the deceased with the appellants, and P.W.-2's failure to report the deceased's absence cast doubt on his veracity; (3) the "last

seen" evidence alone was insufficient without corroboration, per Navaneethakrishnan Vs St., (2018) 16 SCC 161; (4) the extra-judicial confession by Manzoor was inadmissible as weak evidence without corroboration, per Moorthy Vs St. of T.N., 2023 SCC OnLine SC 1027; (5) the trial court's conviction relied on conjectures, ignoring the requirement that circumstances must conclusively point to guilt. The judgment was set aside, and Maiku was ordered released.

List of Cases cited:

1. Sharad Birdhichand Sarda Vs St. of Maharashtra, (1984) 4 SCC 116
2. Raja Naykar Vs St. of Chhattisgarh, 2024 SCC OnLine SC 67
3. Navaneethakrishnan Vs St. by Inspector of Police, (2018) 16 SCC 161
4. Moorthy Vs St. of T.N., 2023 SCC OnLine SC 1027
5. Pawan Kumar Chourasia Vs St. of Bihar, 2023 SCC OnLine SC 259
6. Hanumant Vs St. of Madhya Pradesh, (1952) 2 SCC 71
7. Tufail (Alias) Simmi Vs St. of U.P., (1969) 3 SCC 198
8. Ramgopal Vs St. of Maharashtra, (1972) 4 SCC 625
9. Shivaji Sahabrao Bobade Vs St. of Maharashtra, (1973) 2 SCC 793

(Delivered by Ajai Kumar Srivastava-I, J.)

1. This appeal challenges the judgment and order dated 27.11.1991 passed by the learned VIth Additional Sessions Judge, Unnao in Sessions Trial No.171 of 1990 arising out of Case Crime No.151 of 1990, under Sections 377, 302, 201 and 404 of the Indian Penal Code, Police Station Safipur, District Unnao,

whereby the appellants, Maiku and Manzoor alias Mansoor have been convicted and sentenced to undergo life imprisonment for the offence under Section 302 read with Section 34 I.P.C. The appellant no.1, Maiku has also been convicted and sentenced to undergo five years' rigorous imprisonment for the offence under Section 377 I.P.C. The appellant no.2, Manzoor alias Mansoor has also been convicted and sentenced to undergo five years' rigorous imprisonment for the offence under Section 377 read with Section 34 I.P.C. The appellant no.2, Manzoor alias Mansoor has also been convicted and sentenced to undergo one year's rigorous imprisonment for the offence under Section 403 I.P.C.

2. At the outset it is relevant to mention that this appeal was filed by the appellants, Maiku and Manzoor alias Mansoor. However, due to death of co-convict, Manzoor alias Mansoor, during pendency of this appeal, the appeal in respect of him has been abated vide order dated 20.01.2020 passed by a Co-ordinate Bench of this Court. Therefore, the present appeal survives with regard to accused/ appellant, Maiku only.

3. The prosecution case, in nutshell, is that on 15.03.1990 the first informant, Afsar Ali gave an oral information at Police Station Safipur that dead body of the deceased, Satya Narayan was spotted afloat in a well situated in the agricultural field of Mahadev Singh, which was noticed by the shepherds.

4. The inquest proceeding started on 15.03.1990 at 09:30 A.M. and got concluded on 15.03.1990 at 10:30 A.M. The inquest report has been duly proved by P.W.-7, Shiv Harsh Tiwari, Investigating Officer as Ext. Ka.6.

5. On the basis of an oral information given by the first informant, Afsar Ali, the first information report, Ext. Ka-18 came to be lodged against the appellants on 16.03.1990 under Sections 377, 302, 201 and 404 I.P.C.

6. The Investigating Officer recorded the statements of the witnesses under Section 161 Cr.P.C. He visited the place of occurrence and prepared site plans thereof Ext. Ka-11 to 14.

7. Upon conclusion of investigation, a charge-sheet, Ext. Ka-15 came to be submitted in the Court concerned, which has been proved by P.W.-7, Shiv Harsh Tiwari, Investigating Officer.

8. The accused/ appellants were charged under Sections 302/34, 377/34, and 403 I.P.C., who pleaded not guilty and claimed to be tried.

9. In order to bring home guilt of the appellants, the prosecution has examined Afsar Ali as P.W.-1, Hari Narayan as PW-2, Jurakhan as P.W.-3, Jugnu as P.W.-4, Balram as P.W.-5, Dr. P. N. Verma as P.W.-6, Investigating Officer, Shiv Harsh Tiwari as P.W.-7 and Sri Krishna Shukla as P.W.-8.

10. The accused/ appellants, in their statements, recorded under Section 313 Cr.P.C., have stated the prosecution story to be false. They also stated to have been falsely implicated in this case and claimed to be innocent.

11. No evidence in defence was adduced by the accused/ appellant before the learned trial court.

12. The postmortem on the cadaver has been conducted by Dr. P. N.

Verma, P.W.-6, which has been proved by him as Ext. Ka-5. As per postmortem report of the deceased, following ante-mortem injuries were found on the person of the deceased :-

"1. Superficial burn I degree, 2.5 cm x 1 cm on uppermost part of forehead in the middle. Hair adjacent are burnt.

2. Abrasion 14 cm x 11 cm on lower part of chest and upper part of abdomen (epigastrium) in the middle.

3. Abrasion 6 cm x 3 cm on back of Lt. elbow.

4. Abrasion 4 cm x 3 cm on back of Lt. hand in middle.

5. Abrasion 4 cm x 4 cm on back of right elbow.

6. Abrasion 6 cm x 4 cm on back of right forearm in middle.

7. Superficial burn II degree 4 cm x 1.5 cm on back of right middle finger, proximal phalynx.

8. Abrasion around anus in 2.5 cm diameter. Seminal stains not present. (Swab smears from inside taken and sent for examination to pathologist)."

13. According to the postmortem report, Ex. Ka- 5, the cause of death of the deceased, Satya Narayan is reported to be asphyxia as a result of drowning.

14. At the conclusion of trial, learned Trial Judge found that the prosecution had succeeded in proving its case on the basis of evidence adduced by the prosecution, therefore, learned trial Court convicted the surviving appellant for the offence under Sections 302/34 and 377 of I.P.C. as stated above.

15. Being aggrieved, the surviving appellant and other co-convict, Manzoor alias Mansoor preferred this appeal.

16. It is contended by learned counsel for the surviving appellant that the surviving appellant, Maiku is innocent, who has been falsely implicated in this case. He submits that the entire prosecution case is based on circumstantial evidence. A complete chain of circumstances pointing out guilt of the surviving appellant only has not been proved by the prosecution. Therefore, he submits that the surviving appellant has been wrongly convicted by the learned trial Court without there being any evidence against him.

17. His further submission is that the name of the surviving appellant was not mentioned in the oral information which was given by P.W.-1, Afsar Ali, Village Chowkidar at Police Station Safipur. According to prosecution story, co-convict, Manzoor alias Mansoor only is stated to have taken away the deceased on the fateful day. The surviving appellant was falsely implicated in this case only on the basis of confessional statement of co-convict, which is not admissible in law. He has drawn attention of this Court to the fact that the deceased had gone missing four days' prior to the alleged recovery of his dead body from a well. However, no missing report in respect of the deceased having gone missing was lodged by the elder brother of the deceased, P.W.-2, Hari Narayan, which lends support to the submission of the appellant that the deceased was done to death by some unknown culprits. Therefore, after recovery of the dead body of the deceased, the surviving appellant was falsely implicated in this case.

18. Shri Brij Mohan Sahay, learned counsel for the surviving appellant has vehemently argued that motive assumes significance in cases based on circumstantial evidence. However, in the

present case, the prosecution has miserably failed to attribute any motive to the surviving appellant. Therefore, the surviving appellant could not have been convicted by the learned trial Court.

19. While concluding his submissions, learned counsel for the surviving appellant has submitted that if the testimonies of P.W.-1, Afsar Ali and P.W.-2, Hari Narayan are examined together, it would show that they are not reliable witnesses as there appear major contradictions in their testimonies which have wrongly been ignored by the learned trial Court while appreciating their evidence.

20. In order to buttress his aforesaid submissions, he has placed reliance upon a judgment rendered by Hon'ble Supreme Court in **Sharad Birdhichand Sarda v. State of Maharashtra** reported in (1984) 4 SCC 116 and on the basis thereof, he has submitted that the impugned judgment being unsustainable deserves to be set aside and the surviving appellant deserves to be acquitted of all charges levelled against him.

21. Shri Umesh Chandra Verma, learned A.G.A., on the other hand, has submitted that though the prosecution case is based on circumstantial evidence, however, the prosecution has been able to prove a complete chain of events, which indicates the guilt of surviving appellant. He has submitted that it is settled law that minor contradictions in the statements of prosecution witnesses do not go to the root of the matter; rather existence of minor contradictions lend support to the contention of State that the prosecution witnesses were not tutored.

22. He has submitted that the impugned judgment and order dated 27.11.1991 is based on proper analysis of the prosecution evidence adduced before the learned trial Court and finding arrived at by the learned trial Court cannot be said to be perverse, therefore, no interference by this Court in exercise of power under Section 386 Cr.P.C. is warranted. The present appeal lacks merit which deserves to be dismissed for the aforesaid reasons.

23. Having heard learned counsel for the surviving appellant, learned A.G.A. for the State and upon perusal of the record, it transpires that on 15.03.1990 at 8:10 A.M., the first informant, Afsar Ali orally informed at Police Station Safipur, District Unnao that dead body of the deceased, Satya Narayan was spotted afloat in a well situated in the agricultural field of Mahadev Singh, resident of Mirzapur which was noticed by the shepherds, who informed this fact to the first informant, Afsar Ali. On the basis of aforesaid oral information, General Diary entry bearing No.19 was recorded on 15.3.1990 at 8:10 A.M. The first informant, Afsar Ali, who is a Village Chowkidar, was examined as P.W.-1.

24. The prosecution case is based on circumstantial evidence as there is no eye-witness, who claims to have seen the incident of murder of the deceased. A perusal of testimony of P.W.-1, Afsar Ali, who informed the police station about the dead body of deceased having been seen in a well situated in the agricultural field of Mahadev Singh, reveals that at the time of recovery of dead body of deceased, Satya Narayan, the family members of the deceased had also reached there.

25. P.W.-2, Hari Narayan, who is the elder brother of the deceased, Satya

Narayan, has also admitted in his testimony that not only he had reached the well from where dead body of deceased was recovered, but he had also retrieved the dead body of the deceased from the well on the instructions of police personnel. This witness has also stated that five days before the day of recovery of dead body of the deceased from the well i.e. , co-convict, Manzoor alias Mansoor had come to his house to take away the deceased with him. Even at the cost of repetition we may again mention that the oral information regarding recovery of dead body of deceased from the well was given by P.W.-1, Afsar Ali, who is a Village Chowkidar. However, despite being present at the time of recovery of dead body of deceased, P.W.-2, Hari Narayan did not get the first information report lodged by himself stating therein that his brother was taken away by co-convict, Manzoor alias Mansoor. This fact casts serious doubt on the veracity of testimony of P.W.-2, Hari Narayan.

26. P.W.-3, Jurakhan has deposed that the co-convict, Manzoor alias Mansoor had told him that he had committed unnatural sexual acts with the deceased many times. This fact was communicated to this witness by co-convict, Manzoor alias Mansoor about 20 days prior to the date of incident. This witness is admittedly cousin brother of the deceased. However, even after recovery of dead body of deceased, he did not tell this fact that co-convict, Manzoor alias Mansoor had told him of having committed unnatural sexual acts with the deceased, to the real elder brother of the deceased, P.W.-2, Hari Narayan. He has stated this fact for the first time in the Court which appears to us to be an afterthought effort to improve upon the prosecution case.

27. P.W.-4, Jugnu has stated that he had seen the deceased, Satya Narayan with the surviving appellant, Maiku and co-convict, Manzoor alias Mansoor. The co-convict, Manzoor alias Mansoor told this witness that they are going to have a walk. According to this witness, he had seen the deceased, Satya Narayan in the company of surviving appellant, Maiku and co-convict, Manzoor alias Mansoor prior to death of the deceased. P.W.-4, Jugnu says that he had informed the family members of the deceased that he had seen the deceased in the company of surviving appellant, Maiku and co-convict, Manzoor alias Mansoor before the death of deceased. However, when we examine the statement of P.W.-2, Hari Narayan, who is the real elder brother of the deceased carefully in its entirety, we find that P.W.-2, Hari Narayan does not admit that he was intimated by P.W.-4, Jugnu about any such fact that P.W.-4, Jugnu had seen the deceased in the company of surviving appellant, Maiku and co-convict, Manzoor alias Mansoor. This renders testimonies of P.W.-2, Hari Narayan and P.W.-4, Jugnu to be unreliable.

28. The recovery of wristwatch of the deceased which has been proved by P.W.-7, Shiv Harsh Tiwari as Ext Ka-2 relates to the co-convict, Manzoor alias Mansoor, who has already died and the appeal in respect of him has already been abated. Therefore, the same is not of any assistance to the prosecution insofar as the surviving appellant, Maiku is concerned.

29. Thus, if we remind ourselves of the chronology of this incident, we find that dead body of the deceased was recovered on 15.03.1990. The deceased, Satya Narayan had gone missing five days prior to the date of recovery of his dead body. His dead body was spotted by the

shepherds afloat in the well situated in the agricultural field of Mahadev Singh on 15.03.1990. The oral information in this regard was given by the first informant, Afsar Ali, Village Chowkidar, who has been examined as P.W.-1. From a bare perusal of the statements of P.W.-2, Hari Narayan and P.W.-4, Jugnu, we find that the dead body of the deceased was spotted in the well and was retrieved therefrom. This place of recovery of dead body of deceased is shown in site plan, Ext. Ka 11. At the time of recovery of dead body of deceased, the family members of the deceased, Satya Narayan were present there, but P.W.-2, Hari Narayan, the elder brother of the deceased did not lodge any first information report himself. He even did not lodge any missing report in respect of deceased having gone missing and who remained untraceable for about five days despite having seen the deceased being taken away by the co-convict, Manzoor alias Mansoor. Also at the time of inquest report being prepared Maiku and Manzoor alias Mansoor were present along with other villagers and Hari Narayan and Satya Narayan did not say at the time that Maiku or Manzoor alias Mansoor were responsible for taking away the deceased and later killing him.

30. Keeping in view the aforesaid admitted facts, we find it very strange, unnatural and unbelievable that the real elder brother of the deceased would not lodge any missing report about his younger brother having gone missing and not traceable for many days, especially when P.W.-2, Hari Narayan says that the deceased had gone with the co-convict, Manzoor alias Mansoor.

31. Upon a careful scrutiny of statements of P.W.-2, Hari Narayan and

P.W.-4, Jugnu, we find their statements to be unreliable for the reason that P.W.-4, Jugnu says that he had informed the fact that he had seen the deceased in the company of surviving appellant, Maiku and co-convict, Manzoor alias Mansoor, to the family members of the deceased. However, P.W.-2, Hari Narayan does not admit of any such information having been given by P.W.-4, Jugnu to him. Therefore, we are constrained to observe that P.W.-2, Hari Narayan and P.W.-4, Jugnu have named the co-convict, Manzoor alias Mansoor and the surviving appellant, Maiku only with a view to introduce a case of “last seen” in order to rope in the surviving appellant.

32. The celebrated judgment of **Sharad Birdhichand Sarda (Supra)** has been recently quoted with approval by Hon’ble Supreme Court in para 14 of the judgment in **Raja Naykar vs. State of Chhattisgarh** reported in **2024 SCC OnLine SC 67** which, for ready reference, is quoted hereinbelow :-

“14. Undoubtedly, the prosecution case rests on circumstantial evidence. The law with regard to conviction on the basis of circumstantial evidence has very well been crystalized in the judgment of this Court in the case of Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116, wherein this Court held thus:

“152. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hanumant v. State of Madhya Pradesh [(1952) 2 SCC 71 : AIR 1952 SC 343 “ 1952 SCR 1091 : 1953 Cri LJ 129]. This case has been uniformly followed and applied by this

Court in a large number of later decisions up-to-date, for instance, the cases of Tufail (Alias) Simmi v. State of Uttar Pradesh [(1969) 3 SCC 198 : 1970 SCC (Cri) 55] and Ramgopal v. State of Maharashtra[(1972) 4 SCC 625 : AIR 1972 SC 656}. It may be useful to extract what Mahajan, J. has laid down in Hanumant case [(1952) 2 SCC 71 : AIR 1952 SC 343 : 1952 SCR 1091 :1953 Cri LJ 129]:

“It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.”

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 : 1973 SCC (Cri) 1033 : 1973 Cri LJ 1783] where the observations were made : [SCC para 19, p. 807 : SCC (Cri) p. 1047]

“Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between ‘may be’ and ‘must be’ is long and divides vague conjectures from sure conclusions.”

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.

15. It can thus clearly be seen that it is necessary for the prosecution that the circumstances from which the conclusion of the guilt is to be drawn should be fully established. The Court holds that it is a primary principle that the accused ‘must be’ and not merely ‘may be’ proved guilty before a court can convict the accused. It has been held that there is not only a grammatical but a legal distinction between ‘may be proved’ and ‘must be or should be proved’. It has been held that the facts so established should be consistent only with the guilt of the accused, that is to

say, they should not be explainable on any other hypothesis except that the accused is guilty. It has further been held that the circumstances should be such that they exclude every possible hypothesis except the one to be proved. It has been held that there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probabilities the act must have been done by the accused.

16. It is settled law that the suspicion, however strong it may be, cannot take the place of proof beyond reasonable doubt. An accused cannot be convicted on the ground of suspicion, no matter how strong it is. An accused is presumed to be innocent unless proved guilty beyond a reasonable doubt.”

33. After a careful analysis of testimonies of prosecution witnesses of fact, we have no hesitation in holding that the case of prosecution rests entirely on circumstantial evidence, as there was no ocular witness to this incident. For the reasons stated above, we find that the statement of alleged witness of fact, P.W.-2, Hari Narayan and P.W.-4, Jugnu, to be unreliable. Even otherwise mere evidence of "last seen", in want of any other corroborative evidence cannot, per se, be sufficient to hold any accused guilty in a case based on circumstantial evidence. In this regard, we are supported by a judgment rendered by Hon'ble Supreme Court in **Navaneethakrishnan vs. State By Inspector of Police** reported in **(2018) 16 SCC 161**. Para 22 of the same, being relevant, is quoted hereinbelow:

“22. PW 11 was able to identify all the three accused in the court itself by recapitulating his memory as those persons who came at the time when he was washing

his car along with John Bosco and further that he had last seen all of them sitting in Omni van on that day and his testimony to that effect remains intact even during the cross-examination in the light of the fact that the said witness has no enmity whatsoever against the appellants herein and he is an independent witness. Once the testimony of PW 11 is established and inspires full confidence, it is well established that it is the accused who were last seen with the deceased specially in the circumstances when there is nothing on record to show that they parted from the accused and since then no activity of the deceased can be traced and their dead bodies were recovered later on. It is a settled legal position that the law presumes that it is the person, who was last seen with the deceased, would have killed the deceased and the burden to rebut the same lies on the accused to prove that they had departed. Undoubtedly, the last seen theory is an important event in the chain of circumstances that would completely establish and/or could point to the guilt of the accused with some certainty. However, this evidence alone cannot discharge the burden of establishing the guilt of the accused beyond reasonable doubt and requires corroboration.

(emphasis supplied)

34. So far as the alleged extra judicial confession made regarding surviving appellant by the co-convict, Manzoor alias Mansoor is concerned, it is no more res integra that an extra judicial confession must be accepted with great care and caution. It is considered as a weak type of evidence and is generally used as a corroborative link to lend credibility to the other evidence on record. In **Moorthy vs. State of Tamil Nadu** reported in (2023) SCC On Line SC 1027, Hon'ble Supreme

Court while reiterating the evidentiary value of an extra judicial confession in para 6 has held as under :

“6. Firstly, we will deal with the prosecution case about the extra-judicial confession. As regards extra-judicial confession, the law has been laid down by this Court in the case of Pawan Kumar Chourasia v. State of Bihar 2023 SCC OnLine SC 259. In paragraph 5 it is held thus:

*“5.As far as extra-judicial confession is concerned, the law is well settled. **Generally, it is a weak piece of evidence. However, a conviction can be sustained on the basis of extra-judicial confession provided that the confession is proved to be voluntary and truthful. It should be free of any inducement. The evidentiary value of such confession also depends on the person to whom it is made. Going by the natural course of human conduct, normally, a person would confide about a crime committed by him only with such a person in whom he has implicit faith.** Normally, a person would not make a confession to someone who is totally a stranger to him. Moreover, the Court has to be satisfied with the reliability of the confession keeping in view the circumstances in which it is made. As a matter of rule, corroboration is not required. However, if an extra-judicial confession is corroborated by other evidence on record, it acquires more credibility.”*

35. As the prosecution has failed to bring on record any other incriminating evidence against the surviving appellant, therefore, the alleged extra judicial confession made by the surviving appellant to the co-convict, cannot be of any assistance to the prosecution in proving its

case beyond a reasonable doubt in so far as the surviving appellant is concerned.

36. Having carefully examined the entire evidence adduced by the prosecution in the trial Court, we are of the considered view that learned trial Court, while holding the surviving appellant guilty, proceeded on the basis of conjectures and surmises and failed to bear in mind the true import of law laid down by Hon'ble Supreme Court in **Sharad Birdhichand Sarda (Supra)** which has recently been quoted with approval by Hon'ble Supreme Court in **Raja Naykar (Supra)** for ascertaining whether there was indeed a complete chain of events that excludes any other possibility except the involvement of the surviving appellant in commission of crime in question.

37. The upshot of aforesaid discussion is that the impugned judgment and order dated 27.11.1991 rendered by learned VIth Additional Sessions Judge, Unnao, whereby it held the surviving appellant guilty for the offence under Sections 302/34 and 377 I.P.C., is unsustainable which deserves to be set aside and the present appeal deserves to be allowed.

38. Accordingly, the present appeal is **allowed**. Consequently, the impugned judgment and order dated 27.11.1991 is set aside. The appellant is acquitted of all charges levelled against him.

39. The surviving appellant, Maiku is in jail. Let him be released from jail forthwith, if he is not wanted in any other case.

40. The appellant is directed to file a personal bond and two sureties in the like

amount to the satisfaction of the Court concerned in compliance of Section 437-A Cr.P.C. within a period of four weeks from the date of his release.

41. Let the record of trial Court along with a copy of this judgment be transmitted forthwith to the concerned trial Court for information and necessary compliance.

(2024) 4 ILRA 1099
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.04.2024

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE MOHD. AZHAR HUSAIN
IDRISI, J.

Criminal Appeal No. 153 of 2023
 (Under Section 372 Cr.P.C.)

X **...Appellant**
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Appellant:
 Sri Agnivesh, Sri Jadu Nanda Yadav

Counsel for the Respondents:
 G.A.

Criminal Law - Code of Criminal Procedure, 1973 – Sections 372 & 384 – Criminal Appeal Against Acquittal – Indian Penal Code, 1860 – Sections 376-D & 506 – POCSO Act, 2012 – Section 6 – Benefit of Doubt – Proof of Minority – Material Contradictions – Lack of Corroboration – Medical Evidence - The appellant/victim (X) challenged the acquittal order dated 24.02.2023 by the Special Judge (POCSO Act), Bareilly, in Sessions Trial No. 46 of 2020, arising from Case Crime No. 432 of 2017, under Sections 376-D, 506 IPC and Section 6 POCSO Act. The prosecution alleged that on 10.09.2017, the victim, aged 17, was abducted from Nekpur Sugar Mill, rendered

unconscious by a substance, and gang-raped by multiple accused, including Sanjay Sonkar, Bobby, Nandram, and others, before being left at her home with threats. The FIR was lodged on 18.09.2017, and a chargesheet was filed after investigation. The trial court acquitted the accused, granting them the benefit of doubt, finding the prosecution failed to prove the incident. Held: The appeal was summarily rejected under Section 384 Cr.P.C., affirming the acquittal, as: (1) the prosecution failed to prove the victim's minority, with the trial court noting deficiencies in evidence (unverified transfer certificate, absence of birth register or parental testimony) and the ossification test indicating the victim was 19 years old, per Section 94 of the Juvenile Justice Act; (2) the medical examination, conducted on 19.09.2017, showed no external or internal injuries, with an old, healed hymen tear, undermining the gang-rape allegation; (3) material contradictions in the victim's St.ments (varying number of assailants from 9 to 6, 10, and 8 across St.ments and trial) and lack of independent corroboration dented her credibility; (4) the bloodstained Capri, allegedly worn by the victim, was unreliable evidence, as it was washed, and bloodstains persisting after 10 days were implausible; (5) the absence of independent witnesses to the abduction from a public place and admitted enmity between families suggested possible false implication; (6) no perversity or misconstruction of evidence was found in the trial court's permissible view that the prosecution failed to prove the case beyond reasonable doubt. The court declined to interfere with the acquittal, as a different view alone does not warrant reversal.

(Delivered by Hon'ble Ashwani Kumar
Mishra, J.
&
Hon'ble Mohd. Azhar Husain Idrisi, J.)

1. This appeal has been filed by the victim (X) challenging the judgment and order dated 24.2.2023, passed by Special Judge (POCSO Act), Court No.3/Additional Sessions Judge Bareilly, in Sessions Trial No.46 of 2020 (State Vs. Sanjay and others), arising out of Case

Crime No. 432 of 2017, under Sections 376-D, 506 IPC & Section 6 POCSO Act, Police Station Subhash Nagar, District Bareilly, whereby accused persons have been acquitted of the offence by granting them benefit of doubt. A finding has been returned that prosecution has not been able to successfully prove the incident, which led to the implication of accused persons.

2. This appeal was initially entertained and lower court records were summoned, so that the appeal may be considered for admission. The records have been received and have been perused by us.

3. The prosecutrix has alleged in her written report that on 10.9.2017 at about 7.00 pm she had gone to Nekpur Sugar Mill to get Chowmein. A scooty arrived with the minor accused alongwith accused Jittu @ Jitendra, who are resident of the same locality and administered some substance, on account of which she became unconscious and victim was taken to a village where she was kept in a room. When the victim became conscious, she found herself in a room, where she was subjected to sexual assault by Sanjay Sonkar son of Netrapal, Bobby, Nandram and Sanjay son of Makhan Lal etc. The victim thereafter was left at her house at about 11.00 in the night and she was also extended threats. The victim has claimed herself to be 17 years of age. It is thereafter that on 18.9.2017 a report was lodged with local police pursuant to which Case Crime No.432 of 2017 came to be registered with above-noted allegations.

4. The investigation ultimately concluded with submission of a chargesheet. Thereafter the case was committed to the court of sessions. Charges were framed against the accused persons

who denied the accusations made against them and demanded trial. It is thereafter that the trial proceeded and has ultimately resulted in acquittal of the accused persons.

5. First and foremost, the court of sessions has taken up the issue as to whether the victim at the time of incident was minor or major. Evidence in that regard has been noticed in para 31 to 34 of the judgment. The prosecution has placed reliance upon the transfer certificate issued to the victim of Class-VI, on the basis of which the victim got admitted to Class-VII in a different educational institution on 24.8.2012. The scholar register has been produced of the later institution and the Officiating Principal of the institution has been examined. The Officiating Principal has admitted that at the time of admission of the victim and till she left the institution, the witness was not posted in the institution. The transfer certificate was not verified. Trial court has taken note of the provision of Section 94 of the Juvenile Justice Act and it has been observed that there is neither any material to show the age of the victim at the time of her admission to Class-I, nor the extract of the birth register as per the municipal record etc. has been produced. Parents of the victim have also not been examined in respect of the age of the victim.

6. Upon evaluation of the evidence placed on record, the trial court has held that prosecution has not been able to prove the date of birth of the victim on the basis of materials placed on record. The victim was medically examined and in her ossification test report her age has been found to be 19 years. The trial court has thus concluded that the prosecution has not been able to prove the victim to be a minor, and that the evidence on record proves that

she was major on the date of incident. Although learned counsel for the appellant has placed various submissions but no illegality or perversity has been pointed out in the application of appropriate law on the subject by the trial court. We, therefore, find no illegality in the finding returned by the trial court that the victim was major on the date of incident.

7. On the aspect of commissioning of gang rape the trial court has taken note of the statement of doctor, who had examined the victim and found no traces of any external or internal injury on the victim. The hymen of the victim was found old torn and healed. The trial court has doubted the prosecution case of gang rape upon the victim by accused persons on the ground that absolutely no injury of any kind has been found on the person of the victim.

8. The trial court has also disbelieved the prosecution case on account of material contradictions in the statement of victim herself. The victim in her statement under Section 161 Cr.P.C. specifically implicated 9 persons, who allegedly had subjected her to sexual assault. The figure of assailants at the stage of her statement under Section 164 Cr.P.C. was reduced to 6 persons. At the time of medical examination of the victim, she disclosed the doctor that number of assailants was 10. During the course of trial, the figure of assailants has been reduced to 8. This material contradiction in the number of assailants has been relied upon by the trial court to doubt the prosecution case, particularly when the medical examination of the victim showed absolutely no external or internal injury. Apart from the testimony of the victim, no independent corroboration has come on

record. Although it is settled that if the victim appears to be credible then her statement alone can form the basis of conviction in a case of sexual offence, but for it to be accepted the victim must be shown to be trustworthy. The apparent consideration in her testimony coupled with the fact that medical report does not support the allegation of gang rape and no independent witness has come forward to support the victim shall surely dent the prosecution case.

9. Learned counsel for the appellant has submitted that medical examination was conducted nearly 10 days after the incident, and therefore, injuries may not have been noticed. This plea of the appellant cannot be accepted, when the version of the victim is otherwise doubted by the trial court for valid consideration. The reason for delayed holding of medical examination also needs to be noticed. The incident allegedly occurred on 10.9.2017, whereas the medical examination was conducted on 19.9.2017, only because the written report itself was given to the police on 18.9.2017. The delay in holding of medical examination, therefore, was not on account of any mistake on part of the accused or the Investigating Agency.

10. The only material, which has been relied upon by the appellant is the bloodstained Capri worn by the victim. It is asserted that same Capri was worn by the victim at the time when it was recovered by the police and sent for scientific examination before the FSL. Though we find that FSL report shows existence of human blood but the circumstance of the victim wearing the same cloth even 10 days after the incident raises some doubt. The assertion that bloodstains survived even after the Capri was washed cannot be held

convincing. In fact, the victim has admitted that her Capri was washed. This evidence in itself would not explain the contradictions noticed by the court of sessions in the case of the victim. After the cloth itself was washed, we do not understand as to how the bloodstains would still remain on the Capri even after 10 days of the incident. Enmity between the families is otherwise admitted on record, which can be the cause for committing the offence but can also be the reason for false implication.

11. Learned court below has also noticed that though the victim was taken from a public place in the presence of several persons at 7.00 in the evening, allegedly by the accused persons on a two-wheeler but no independent person saw the incident nor anyone came forward to save the prosecutrix also seems doubtful. The trial court on the basis of material placed on record has, therefore, found that the prosecution case is not convincing and a finding has been returned that prosecution has failed to prove its case beyond reasonable doubt.

12. Though the original records have been produced before the Court and the appeal has been heard at some length, but we find that there is neither any apparent perversity nor any misconstruction of oral or documentary evidence on record, which may vitiate the findings returned in the judgment of the court below. Law is otherwise settled that just because a different view could be taken in the matter would hardly be a ground to interfere with the judgment of acquittal. On the analysis of evidence on record, we find that the view taken by the court below is clearly a permissible view, and there is no sufficient ground to

interfere in the present appeal against the judgment of acquittal.

13. Consequently, this appeal is summarily rejected under Section 384 of the Code of Criminal Procedure.

(2024) 4 ILRA 1103
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.04.2024

BEFORE

THE HON'BLE MRS. JYOTSNA SHARMA, J.

Criminal Appeal No. 218 of 2024

Shamsher Ali ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:

Sri Suresh Chandra Mishra, Sri Mohd. Akhtar, Sri Ramesh Kumar Pandey, Ms. Sufia Bano, Sri Rajiv Upadhyaya

Counsel for the Respondent:

G.A.

Criminal Law - Code of Criminal Procedure, 1973 – Section 31 – Indian Penal Code, 1860 – Sections 363, 366 & 376 – Criminal Appeal Against Sentencing – Concurrent vs. Consecutive Sentences – Single Transaction Rule – Proviso to Section 31(2) Cr.P.C. – Judicial Discretion in Sentencing.

The appellant, Shamsheer Ali, challenged the sentencing part of the judgment dated 10.01.2014 by the Additional District and Sessions Judge, Bhadohi, in S.T. No. 20 of 2011, arising from Case Crime No. 325 of 2010 under Sections 363, 366, 376 IPC, P.S. Gopiganj, Sant Ravi Das Nagar, Bhadohi. The appellant was convicted and sentenced to 7 years' rigorous imprisonment each for kidnapping (Section 363 IPC) and abduction with intent (Section 366 IPC), and 10 years' rigorous imprisonment for rape (Section 376 IPC), with the trial court silent on whether the sentences would run concurrently or consecutively, resulting in a

potential aggregate sentence of 24 years' imprisonment. Held: The appeal was disposed of, modifying the sentencing order, as: (1) the trial court's failure to specify whether sentences should run concurrently or consecutively violated the legal obligation under Section 31(1) Cr.P.C., per *Nagaraja Rao Vs Central Bureau of Investigation*, (2015) 4 SCC 302; (2) the aggregate sentence of 24 years contravened the proviso to Section 31(2) Cr.P.C., which limits consecutive sentences to 14 years, per *Chatar Singh Vs St. of M.P.*, AIR 2007 SC 319; (3) the offences under Sections 363 and 366 IPC formed part of a single transaction, with Section 366 being a graver version of Section 363, warranting concurrent sentences under the single transaction rule, per *Mohd. Akhtar Hussain Vs Assistant Collector of Customs*, 1998 AIR 2143, and *O.M. Cherian Vs St. of Kerala*, AIR 2015 SC 303; (4) no facts justified maximum punishment under Sections 363 and 366 IPC or consecutive sentences, indicating a lack of judicious exercise of discretion; (5) the appellant, having served 10 years, was entitled to relief, as consecutive sentences were disproportionate and lacked justification in the trial court's judgment. The sentences for Sections 363, 366, and 376 IPC were upheld but ordered to run concurrently, ensuring compliance with Section 31 Cr.P.C. and balancing reformatory, retributive, and deterrent sentencing principles.

List of Cases cited:

1. Mohd. Akhtar Hussain Vs Assistant Collector of Customs, 1998 AIR 2143
2. Chatar Singh Vs St. of M.P., AIR 2007 SC 319
3. O.M. Cherian Vs St. of Kerala, AIR 2015 SC 303
4. Muthuramalingam Vs St., (2016) 8 SCC 313
5. Nagaraja Rao Vs Central Bureau of Investigation, (2015) 4 SCC 302
6. Sunil Kumar Vs St. of U.P., Criminal Appeal No. 526 of 2021, decided on 25.05.2021
7. Yogesh Kumar Vs St. of Punjab, CRR No. 3415 of 2019, decided on 01.06.2022

8. Suganthi Suresh Kumar Vs Jagdeeshan,
(2002) 2 SCC 420

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

1. Heard Sri Rajiv Upadhyaya, Advocate holding brief of Ms. Sufiya Bano, learned counsel for the appellant and Sri L.D.Rajbhar, learned A.G.A. for the State.

2. This criminal appeal has been preferred by the appellant challenging the judgment and order dated 10.01.2014, passed by Addl. District and Sessions Judge, Bhadohi in S.T. No. 20 of 2011 (State Vs. Shamsheer Ali) arising out of Case Crime No. 325 of 2010 under section 363, 366, 376 I.P.C. P.S. Gopiganj, District- Sant Ravi Das Nagar, Bhadohi, where appellant got convicted under sections 363, 366 and 376 I.P.C. and sentenced for seven years rigorous imprisonment each under sections 363 and 366 I.P.C. and for 10 years rigorous imprisonment under section 376 I.P.C.

3. The submission in brief of the appellant is that he has been awarded a substantive sentence of 7 years for an offence under section 363 I.P.C. and another substantive sentence of 7 years for an offence under section 366 I.P.C. and further substantive sentence of 10 years for the offence under section 376 I.P.C. The trial court did not specify whether such sentences shall run concurrently or consecutively. Resultantly, he is facing prospect of imprisonment of 24 years, which is too rigorous and severe. The sentencing part of the order of the trial court is therefore flawed.

4. Learned A.G.A. submits that section 31 Cr.P.C. provides that where

accused is convicted at one trial of two or more offences and the trial court has not provided for concurrent running of sentences, it shall run consecutively i.e. one after the other.

5. During the course of arguments it is, however fairly admitted by the State that section 31 Cr.P.C. is subject to provisions of section 71 of I.P.C. and further that the proviso to section 31 (2) provides that in no case, shall such person be sentenced to imprisonment for a longer period than 14 years and that in this case, the aggregate punishment is 24 years.

6. Several important issues arise in this matter, first, whether the trial court can afford to not to mention how the sentences are to run, whether concurrently or consecutively. Secondly, whether the failure to mention the same is ignorable in view of the facts and circumstances of the matter. Related with this issue is the point that whether the court intended that the sentences should run consecutively and if so, whether or not such a presumption will lead to disproportionate period of imprisonment and against the provision of law as contained in section 31 (2) proviso (a).

7. The Hon'ble Apex Court in ***Mohd. Akhtar Hussain Alias Ibrahim vs Assistant Collector Of Customs 1998 AIR 2143***, while allowing the appeal, observed that the basic rule of thumb over the years has been the so called principles of "single transaction rule" for concurrent sentence. The Court held as below:

"2(i) The enormity of the crime committed by the accused is relevant for measuring the sentence. But the maximum sentence awarded in one case against the

*same accused is not irrelevant for consideration while giving the consecutive sentence in the second case although it is grave. The court has to consider the totality of the sentences which the accused has to under go if the sentences are to be consecutive. **The totality principle has been accepted as correct principle for guidance.** [753E.F]*

*2(ii) The broad expanse of discretion left by legislation to sentencing courts should not be narrowed only to the seriousness of the offence. **No single consideration can definitively determine the proper sentence.** In arriving at an appropriate sentence, the court must consider, and some times reject, many factors. The court must 'recognise, learn to control and exclude' many diverse data."*

*8. The Hon'ble Apex Court in **Chatar Singh Vs. State of M.P. (AIR 2007 SC 319), in Criminal Appeal No. 623 of 2005 decided on 24.11.2006**, had a case before it in which the accused was convicted for several offences and was convicted for different period of imprisonment which added up to 28 years, if allowed to run consecutively. The Court observed in the light of provisions of section 31(2) proviso (a) as below:*

" After making such a provision, proviso (a) is added to this sub-section to limit the aggregate of sentences which such a court pass while making the sentences consecutive. That is this proviso has provided that in no case the aggregate of consecutive sentences passed against an accused shall exceed 14 years. In the instant case the aggregate of the two sentences passed against the appellant being 28 years clearly infringes the above

proviso. It is accordingly not liable to be sustained."

In view of the proviso appended to Section 31 of the Criminal Procedure Code, we are of the opinion that the High Court committed a manifest error in sentencing the appellant for 20 years' Rigorous Imprisonment. The maximum sentence imposable being 14 years and having regard to the fact that the appellant is in custody for more than 12 years. Now, we are of the opinion that interest of justice would be sub- served if the appellant is directed to be sentenced to the period already undergone."

*9. In **O.M. Cherian @ Thankachan Vs. State of Kerela and Ors, AIR 2015 Supreme Court 303, decided on 11.11.2014**, the Apex Court had a criminal appeal before it against a judgment where the trial court had ordered two years rigorous imprisonment under section 498 I.P.C. and further 7 years rigorous imprisonment under sections 306 I.P.C. and the substantive sentences were ordered to run consecutively. The Supreme Court observed in para 19, 20 and 21 as below:*

"19. As pointed out earlier, Section 31 Cr.P.C. deals with quantum of punishment which may be legally passed when there is - (a) one trial and

(b) the accused is convicted of two or more offences. Ambit of Section 31 is wide, covering not only single transaction constituting two or more offences but also offences arising out of two or more transactions. In the two judgments in Mohd. Akhtar Hussain and Manoj (supra), the issue that fell for consideration was the imposition of sentence for two or more offences arising out of the single transaction. It is in that context, in those

cases, this Court held that the sentences shall run concurrently.

*20. Under Section 31 Cr.P.C. it is left to the full discretion of the Court to order the sentences to run concurrently in case of conviction for two or more offences. It is difficult to lay down any straitjacket approach in the matter of exercise of such discretion by the courts. By and large, trial courts and appellate courts have invoked and exercised their discretion to issue directions for concurrent running of sentences, favouring the benefit to be given to the accused. Whether a direction for concurrent running of sentences ought to be issued in a given case would depend upon the nature of the offence or offences committed and the facts and circumstances of the case. **The discretion has to be exercised along the judicial lines and not mechanically.***

21. Accordingly, we answer the Reference by holding that Section 31 Cr.P.C. leaves full discretion with the Court to order sentences for two or more offences at one trial to run concurrently, having regard to the nature of offences and attendant aggravating or mitigating circumstances. We do not find any reason to hold that normal rule is to order the sentence to be consecutive and exception is to make the sentences concurrent. Of course, if the Court does not order the sentence to be concurrent, one sentence may run after the other, in such order as the Court may direct. We also do not find any conflict in earlier judgment in Mohd. Akhtar Hussain and Section 31 Cr.P.C.”

10. The Supreme Court further observed that normally the appellate court do not interfere unless the discretion exercised is arbitrary or unreasonable.

11. The Supreme Court in **Sunil Kumar @ Sudhir Kumar and Anr Vs.**

State of U.P. in Criminal Appeal No. 526 of 2021 decided on 25.05.2021 had a question on the point of sentence before it wherein the convict having convicted under sections 363, 366 376(1) I.P.C. had already undergone 13 years and two months of imprisonment and found that the decisions were silent on the point of concurrent or consecutive running of sentences and therefore, the convict faced a prospect of sentence of 22 years. In the above noted case, the Apex Court referred to the judgment given in **Muthuramalingam & Ors. v. State: (2016) 8 SCC 313 (paragraph 28)** and observed in para 11 as below:

“11. For what has been provided in Section 31(1) CrPC read with the expositions of this Court, it follows that the Court of first instance is under legal obligation, while awarding multiple sentences, to specify in clear terms as to whether they would run concurrently or consecutively. In the case of Nagaraja Rao (supra), this Court expounded on this legal obligation upon the Court of first instance in the following terms:-

“11. The expressions “concurrently” and “consecutively” mentioned in the Code are of immense significance while awarding punishment to the accused once he is found guilty of any offence punishable under IPC or/and of an offence punishable under any other Special Act arising out of one trial or more. It is for the reason that award of former enure to the benefit of the accused whereas award of latter is detrimental to the accused’s interest. It is therefore, legally obligatory upon the court of first instance while awarding sentence to specify in clear terms in the order of conviction as to whether sentences awarded to the accused would run

“concurrently” or they would run “consecutively”.”

12. The Apex Court further in para 12 and 13 observed that the court of first instance ought not to leave the matter of consecutive or concurrent running of sentences for deduction at latter stage and that there is yet another obligation on the trial court that is to state the order i.e. the sequence in which the consecutive sentence ought to be executed.

In the end the Apex Court discussing about **Nagaraja Rao v. Central Bureau of Investigation (2015) 4 SCC 302**, held in para 21 as below:

“21. While closing on the matter, we deem it appropriate to reiterate what was expounded in the case of Nagaraja Rao (supra), that it is legally obligatory upon the Court of first instance, while awarding multiple punishments of imprisonment, to specify in clear terms as to whether the sentences would run concurrently or consecutively. It needs hardly an emphasis that any omission to carry out this obligation by the Court of first instance causes unnecessary and avoidable prejudice to the parties, be it the accused or be it the prosecution.”

13. While referring to a number of judicial pronouncements in the matter of sentence, the High Court in **Yogesh Kumar Vs. State of Punjab and Another, in CRR No. 3415 of 2019** with connected matters decided on 01.06.2022, has observed in para-35 as below:

“ 35. Thus, while applying the aforesaid principles of law, it would also be essential to balance the principle of

sentencing in a manner that would restore faith of people in the system of administration of criminal justice and that the judicial process is not seen siding with an accused. The sentence imposed must not seem to be a flea-bite sentence, a phrase aptly used by the Hon'ble Supreme Court in the matter of "Suganthi Suresh Kumar versus Jagdeeshan" reported as (2002) 2 Supreme Court Cases

420. The sentencing must not only show reformatory and reprimanding aspect, but must also take the retributive aspect into consideration. Where the violator of law has displayed lack of bona fide and his culpability stands duly established, the Court has to keep in mind that the sentence so imposed should not appeared to be lenient or fail to display any deterrent effect. It cannot be the object of law or the philosophy behind imposing of sentence that the same promotes violation or makes a violator-convict believe that he 40 of 53 CRR No. 3415 OF 2019 (O&M) & connected cases -41- may commit multiple offences and thereafter seek concurrent running of the sentences. A transaction in the nature of issuance of multiple cheques towards discharge of one single liability has a potential of great misuse on either sides and just as it may incite an accused to swell his liability and to not pay the same despite issuance of multiple cheques, at the same time, there is immense possibility that the creditor secures multiple cheques for each installment and lodges different complaints against default of each cheque and claim consecutive running of sentences in each of the said cases to seek confinement of a defaulter in custody for an indefinite period. The crucial test thus is the similarity of the transaction and not the quantum of the money involved. A Court is thus required to maintain a fine balance by imposing a sentence so that the

reformatory, retributive and deterrent effects are balanced well. “

14. Now, coming to the instant case, the appellant has confined his arguments on the sentencing part only, submitting that the accused has been convicted for an offence under sections 363 and 366 I.P.C. both and that that he has been sentenced for 7 years in each one of them. It may be noted that section 366 I.P.C. includes the ingredients of section 363 I.P.C. Section 363 I.P.C. punishes a person who kidnaps the victim from lawful guardianship and the maximum punishment provided in this section is seven years while section 366 I.P.C. punishes a person who has kidnapped or abducted a woman with certain intent and in such case, the punishment provided is 10 years. Section 366 I.P.C. is a graver version of section 363 I.P.C.

15. There are no such facts or circumstances mentioned in the judgment to justify the award of maximum term of punishment under sections 363 I.P.C. or 366 I.P.C. Definitely the court is vested with power to award maximum term of punishment but that power is to be exercised in a judicious manner.

16. Moreover, the section 363 and 366 I.P.C. pertains to one transaction only and it does not appeal to reason that two separate sentences be provided which should run consecutively by default. The approach of the court has not been judicious to that extent. The accused has further been convicted for offence under section 376 I.P.C. and sentenced to 10 years of rigorous imprisonment. Incidentally, it may be noted that 10 years have already elapsed, a fact which has been admitted by the State. Further it may be noted that if all the sentences are allowed to run consecutively, the proviso to section 31 Cr.P.C. shall stand flouted.

17. I went through the judgment to fathom the facts and circumstances and the gravity of the matter which may justify the running of consecutive sentences but found none. In my opinion, the sentencing part of the order is flawed on two counts, first that it is against the provisions of section 31 Cr.P.C. and that the learned trial court has overlooked the legal obligation to expressly provide for whether the sentences shall run concurrently or consecutively.

18. In my opinion, the sentencing part of the order needs to be suitably modified in the manner as below:

19. The terms of imprisonment awarded by the trial court for each one of the offences i.e. section 363, 366 and 376 I.P.C. are upheld and that all the sentences shall run concurrently.

20. Accordingly this appeal is *disposed of*.

21. A copy of the order shall be immediately transmitted to the trial court concerned for necessary action.

(2024) 4 ILRA 1108

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 05.04.2024

BEFORE

THE HON'BLE SIDDHARTH, J.

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

Criminal Appeal No. 573 of 1983

&

Criminal Appeal No. 705 of 1983

Ajai Kumar Gupta

...Appellant

Versus

State of U.P.

...Respondent

Counsel for the Appellant:

Sri Kamal Krishna (Sr. Adv.), Sri Ashok Gupta, Sri D.N. Wali, Sri Rakesh Kumar Singh, Sri Viresh Gupta, Sri Viresh Misra

Counsel for the Respondent:

A.G.A., Sri V.S. Chauhan

Criminal Law - Indian Penal Code, 1860 – Sections 302, 34 – Code of Criminal Procedure, 1973 – Section 313 – Juvenile Justice (Care and Protection of Children) Act, 2000 – Sections 2(k), 2(l), 15, 16 & 18

– Criminal Appeals Against Conviction and Sentence – Murder – Common Intention – Juvenility Plea – Prompt FIR – Eye-Witness Testimony – Motive in Direct Evidence Cases

The appellants, Ajai Kumar Gupta and Satish Kumar Gupta, challenged the judgment dated 04.03.1983 by the Sessions Judge, Banda, in S.T. No. 285 of 1982, convicting them under Section 302 read with Section 34 IPC for the murder of Avadhesh Singh on 16.05.1982 at Atarra Railway Station, sentencing them to life imprisonment. The incident arose from an altercation at a tea shop, where Satish Kumar Gupta exhorted Ajai Kumar Gupta to shoot Avadhesh Singh with a countrymade pistol, causing his death. The FIR was lodged promptly at 4:30 AM, supported by eye-witnesses PW-1 (Rakesh Kumar Singh), PW-2 (Ramhit Singh), and PW-3 (Kishan Pal), though PW-1 and PW-3 partly turned hostile. The prosecution relied on medical evidence, FSL reports confirming human blood on the deceased's clothes and the bench, and recovery of a .315 bore pistol from Ajai Kumar Gupta. The appellants claimed false implication due to enmity between the Investigating Officer (PW-5, Ramji Mishra) and Ajai Kumar Gupta's uncle, Shiv Prasad Gupta, over defamatory articles, and raised a juvenility plea. Held: (1) Criminal Appeal No. 705 of 1983 (Satish Kumar Gupta) was dismissed, affirming his conviction and life sentence under Section 302/34 IPC, as the prosecution proved the case beyond reasonable doubt through PW-2's reliable eye-witness account, prompt FIR, medical evidence, and FSL reports; discrepancies in witness statements (e.g., number of train tickets, mode of transport) were minor and did not undermine the prosecution case, per St. of U.P. Vs Jaggo, AIR

1971 SC 1586; motive was irrelevant in a direct evidence case; (2) Criminal Appeal No. 573 of 1983 (Ajai Kumar Gupta) was partly allowed, affirming the conviction but setting aside the life sentence, as he was declared a juvenile (aged 15 years 6 months on 16.05.1982) per the Juvenile Justice Act, 2000, vide the Sessions Judge's Inquiry Report dated 21.09.2023; under Sections 15 and 16, he was ordered to be released on probation for three years with a personal bond and two sureties, prohibiting imprisonment for juveniles; (3) the claim of false implication due to enmity lacked evidence, and the defence failed to discredit PW-2's testimony or the prompt FIR; (4) Satish Kumar Gupta was directed to surrender to serve his sentence, with coercive measures if he failed to comply. The court emphasized that juvenility can be raised at any stage, per Section 15, Juvenile Justice Act, 2000, and separate trials for juveniles and non-juveniles are mandatory under Section 18.

List of Cases cited:

1. St. of U.P. Vs Jaggo @ Jagdish, AIR 1971 SC 1586
2. Habeeb Mohammad Vs St. of Hyderabad, 1954 SCR 475
3. Shahid Khan Vs St. of Rajasthan, 2016 0 Supreme (SC) 210
4. Ram Ranjan Roy Vs Emperor, ILR 42 Cal 422 : AIR 1915 Cal 545
5. Stephen Seneviratne Vs The King, AIR 1936 PC 289

(Delivered by Ram Manohar Narayan Mishra,J.)

1. Heard Sri Kamal Krishna learned Senior Advocate, assisted by Sri Rakesh Kumar Singh, learned counsel for the appellant, Ajai Kumar Gupta; and also assisted by Sri Chandra Shekhar Garg, learned counsel for the appellant, Satish Kumar Gupta; as well as Sri Virendra Singh Chauhan, learned counsel for the

mother of the deceased; Sri Gyan Narayan Kanojia, learned AGA Ist for the State and perused the material placed on record.

2. As both the criminal appeals have arisen out of same judgement of conviction and sentence, hence, these are being decided by this common judgement:-

3. Above noted Criminal appeals have been preferred by the accused appellants namely, Ajai Kumar Gupta and Satish Kumar Gupta, with a prayer to set aside the judgment and order dated 4.3.1983, passed by Sessions Judge, Banda, in S.T. No.285 of 1982, under Sections-302 IPC, arising out of Case Crime No.78 of 1982, Police Station- Atarra, District-Banda, whereby, they have been convicted for charge under Section 302 read with Section 34 IPC and have been sentenced to imprisonment for life. The appellant Ajai Kumar Gupta was released on bail on 8.3.1983 and appellant Satish Kumar Gupta was released on bail vide order dated 22.3.1983, in their respective appeals.

4. The factual matrix of the case in brief are that the informant lodged present FIR on the basis of written report (Ext.Ka-1) at police station concerned on 16.5.1982, at 4:30 AM, with allegation that a groom's party (barat) had come from district Jalaun at the place of his maternal uncle, Raj Singh, in village Musasi, Police Station Badausa. This marriage party was to leave in the intervening night of 15/16.5.1982 from Atarra railway station. The passenger train by which this marriage party was to leave was late. The train arrived at the station at around 2:00 AM, in which informant got the marriage party boarded and he also travelled in the same train alongwith his three companions up to Khurhand railway station together with said

groom's party (barat). They disembarked from the train at Khurhand railway station and came back to railway station Atarra by Bundelkhand Express. It was 3:30 AM. As soon as they reached at the platform, accused Ajay Kumar Gupta and Satish Kumar Gupta, who hail from Kasba Atarra and were known as local goons, appeared there. Satish Kumar wielded an iron rod in his hand. They stopped Shyam Sundar Gupta, one of the companions of the informant and accosted him while abusing that he appeared to be a rogue (badmash), from where he was coming. The informant and his companions objected to this and intervened. They asked them not to speak in bad manner, which resulted in altercation between informant and his companions and the accused persons. They came out of the station and sat in the tea shop of one Badku on a bench lying outside his shop. These two miscreants started abusing and threatening them while standing in front of the shop. Avadhesh Singh, one of the companions of the informant, took a strong exception to their conduct and asked them to refrain from abusing them. As soon as he stood from the bench, Satish Kumar Gupta caught hold of his hand and twisted it and got him forcefully seated on the bench. Accused Satish Kumar also exhorted accused Ajay Kumar to kill him as he was showing arrogance, thereupon, accused Ajai Kumar whipped out a countrymade pistol from pocket of his pant and fired close to the chest of Avadhesh Singh. Avadhesh Singh got injured in his left chest and fell down on the bench. Thereafter, both the accused fled away towards town. The occurrence was also seen by one Kishan Pal Singh. A written report Ext.Ka-1 of the occurrence was lodged by Rakesh Kumar Singh (PW-1) at 4:30 AM at Police Station Atarra, situated about one kilometer away from the scene of the incident.

Station Officer of Police Station Atarra, Ramji Mishra (PW-5) was present at the police station. Soon after the case was registered, he took up the investigation and examined Rakesh Kumar Singh and Shyam Sundar. He reached at the scene of incident at about 7:30 AM and found dead body of Avadhesh Singh lying on the bench in front of the shop of Badku outside the railway station. He started inquest proceeding and prepared Panchayat nama (Ext.Ka-7), Challan (Ext.Ka-8), Sketch (Ext.Ka-9) and letters (Ext.Ka-10 and 11) for postmortem. The dead body was sealed and handed over at 9:00 AM to constable Jagdeo Lal and Jeev Mandal alongwith inquest papers and copies of chik FIR (Ext.Ka-20) and general diary (Ext.Ka-21). The Investigating Officer also recovered from the dead body a pair of sleeper (Ext.Ka-5), blood stained shirt (Ext.Ka-6) and prepared recovery memo Ext.Ka-12 and 13 in respect thereof. He also recovered sample blood stained and unstained chips (Ext.Ka-6 and 7) of the bench and prepared memo (Ext.Ka-14) in respect thereof. The Investigating Officer rushed from the scene of occurrence and arrested the accused at about 11:00 or 11:15 AM near the hostel of Degree College and on search found a .315 bore countrymade pistol, two live cartridges and discharged cartridge from the possession of accused Ajai Kumar. The accused were lodged at the police station at 13:15 hours on the same day. The Investigating Officer inspected the scene of occurrence on 18.5.1982, examined witnesses Ramhit Singh, Kishanpal, conducted spot inspection and prepared site plan (Ext.Ka-15) and after concluding the investigation submitted chargesheet (Ext.Ka-16) on 1.6.1982. The autopsy was conducted by Dr. G.J. Gupta, Medical Officer, District Hospital, Banda (PW-6) at 12:10 Noon on 17.5.1982. The deceased was aged about 18

years and had died about one and half days before.

External examination:- Young man of average built, rigor mortis passing off from the upper extremities and partially present in the lower extremities, decomposition set in, foul smell, abdomen penis scrotum swollen up, blisters are occasionally present. Skin peeled off at places.

Antemortem Injuries:-

(1) gun shot wound of entry 1.5 cm X 1.5 cm X chest cavity deep on the front of left side chest 12 cm above and lateral to left nipple blackening, charring and tattooing present. Direction inward, backward and downward towards right side. One section heart perforated and lacerated. Left lung lacerated and perforated at one place. 4th rib front left fractured.

(2) Gun shot wound of exit 1 cm X 1 cm X communicating to injury No.1, on the back of chest right side 5 cm lateral to verbatim spin and 7 cm below and medial to inferior angle of scapula margin lacerated and everted.

Internal Examination:- Pleura perforated on left side and lacerated on right side. Right chamber of heart full and left empty weight 240 grams. Free and clotted blood about 1.5 litres present in chest cavity. Stomach contained about 200 grams of semi digested food material. Small and large intestine contain faecal matter and gases.

In the opinion of Dr. G.J. Gupta cause of death was due to shock and haemorrhage resulting from ante mortem gun shot injuries. Doctor also recovered a

blood stained under shirt (Ext.Ka-4) and underwear (Ext.Ka-3) and pant (Ext.1) from the dead body and forwarded the same to the police station. The accused have thus been committed for their trial upon being charged, stated as above.

5. The prosecution, in support of its case examined Rakesh Kumar Singh, complainant, as PW-1; Ramhit Singh as PW-2 and Kishanpal as PW-3 on facts. PW-4, Bahadur Singh was Head Moharrir of the police station Atarra and he proved chik FIR, general diary entries and other police papers. PW-5, Station Officer, Ramji Mishra, proved the investigation of the case as indicated above. Dr. G.J. Gupta, PW-6, proved postmortem examination of the deceased and memo Ext.Ka20, which he had prepared at the time of examination.

6. The prosecution tendered in evidence report of Chemical Examiner (Ext.Ka 22) and of serologist (Ext. Ka 23), according to whom blood stained shirt (Ext.2), chips of the Bench (Ext-6), Banyan (Ext.4), underwear (Ext.3) and pant (Ext. 1), were found to contain human blood and the pant (Ext.-1), chips (Ext-6) and Banyan (Ext.-4) were found to contain blood of group "O'.

7. The accused denied the allegations of the prosecution and their complicity in the occurrence of this case in their statement recorded under Section 313 Cr.P.C. Accused Ajai Kumar stated that S.O. of P.S. Atarra namely, Shri Ramji Mishra, was highly inimical with his uncle Shiva Prasad Gupta, who edited weekly newspaper 'GANTAVYA LAHAR', that his uncle had published articles against misdeeds of Shri Ramji Mishra and that the news item in respect thereof were supplied by him and that there fore Shri Ramji

Mishra implicated him falsely in the case. He also alleged that

deceased Avdhesh Singh was not resident of village Musasi and was also not related as nephew of P.W.-2 Ramhit. The accused also alleged that he was taken away by the police from his house at about 8:00 A. M. on 16.5.82 and was implicated in the case. Accused Satish Kumar stated that he was taken away by the police from his house at about 9:00 A. M. on 16.5.82 and was required by S.O. Ramji Mishra to become a witness against accused Ajai Kumar, that when he declined to become a false witness, he too was implicated in the case. The accused also alleged that there had been ill will between him and accused Ajai Kumar and that he had instituted a criminal case under section 324 IPC against Ajai Kumar.

8. After hearing counsel for parties, the accused were called upon to enter in defence. Accused examined Kali Charan, Assistant Judicial Assistant of Collectorate as D.W.1 to state that special report of this case, which is received at the residence of District Magistrate was received in his office on 22.5.82 and that endorsement was made : Send to A.J.A.: by Shri R.C.Dixit for Collector on 22.5.82. The witness brought file of the special report and made statement with reference to the same. The said special report has been brought on record as Ext. Kha 3. The accused further examined S.U.Khan, Station Master, Atarra Railway Station as D.W.-2, to state that on the night between 15 and 16.5.1982, three tickets were sold at Atarra Railway Station for Jhansi, that on that night Bundelkhand Express arrived Atarra Railway Station at 1:12 AM and left for Jhansi at 1:17 AM and that Bundelkhand Express arrived Atarra Railway Station at 3:23 AM from Jhansi.

The accused have also filed some documents, which will be dealt with at appropriate stage in this judgement.

9. There can be no doubt that Avdhesh Singh, a young man aged about 18 years, was murdered in the wee hours of 16.5.82. There can also be raised no doubts that dead body of Avdhesh Singh was found on a wooden bench lying in front of the shop of Badku close towards south of Atarra Railway Station. It is also borne out from the evidence that the assailant fired a gun shot which caused gun shot wound of entry on the front of left side chest 12 cm above and lateral to left nipple and corresponding gun shot wound of exit on the back of chest right side from close range, say few inches, as blackening, charring and tattooing was present. It is also not denied that the Investigating Officer found dead body of Avdhech Singh on the bench in front of the shop of Badku. The accused persons had come up of age at the time of incident and were of young age at the time of incident. In essence, the defence denied participation of present appellants in homicidal death of the deceased Avadesh Singh.

10. The prosecution in order to bring home its case relied upon evidence of P.W.1 Rakesh Kumar Singh, complainant; P.W.2 Ramhit Singh and Kishan Pal P.W.3. P.W.-1, Rakesh Kumar Singh, had set up the story of the prosecution in all its essential details in the first information report Ext. Ka-1, but was not inclined to support the case in full in his evidence. According to the evidence of P.W.-2, Ramhit Singh, the case of the prosecution had been that Rakesh Kumar Singh, Ramhit Singh, Avdhesh Singh and Shyem Sundar had escorted the Barat party from the house of Raja Singh from village Musasi to

Atarra, that they took the Barat party by Bundelkhand Express from Atarra Railway station towards Jhansi, that they got down at the corssing at Khurhand Railway Station and came back by Bundelkhand Express, that they got down at about 4:00 AM at Atarra Railway Station, that the accused accosted Shyam Sundar at the platform and came along with them at the shop of Badku and hurled abuses and that when Avdhesh Singh got up to protest, accused Satish Kumar twisted his hand and got him seated on the bench and that at his exhortation accused Ajai Kumar whipped out a country made pistol and fired at Avdhesh Singh and killed him.

11. P.W.1, Rakesh Kumar Singh, in his evidence stated that he along with Avdhesh Singh, Shyam Sundar and Ramhit had come to Atarra to see off the Barat party which was returning after the marriage of sister of Raja Singh of village Musasi, that they went upto Khurhand with the Barat party and returned by another train, that the accused met them at Atarra Railway Station and accosted Shyam Sundar, that they all came along with the accused upto the shop of Badku and sat on the bench lying there, that the accused continued hurling abuses and that Avdhesh Singh got up to protest as to why the accused were hurling abuses. The witness thereafter appeared not inclined to support factum of the actual incident in which Avdhesh Singh was murdered. He stated that thereafter he went away on another shop for getting tea prepared, that in the meantime he heard a gun shot fire, that he rushed and came there and that he saw Avdhesh Singh lying dead and the two accused running away. P.W.-1, Rakesh Kumar Singh, further stated that he at once rushed to the police station and lodged written report Ext.Ka-1 and that he had

correctly stated in the report as to what he had seen. This witness in the report Ext.Ka 1 had stated that accused Satish Kumar twisted the hand of Avdhesh Singh and that on the exhortation of Satish Kumar, accused Ajai Kumar whipped out a country made pistol and fired at Avdhesh Singh by his chest.

12. PW-2, Ramhit Singh has testified before the Court that he was identifying both the accused Ajai Kumar and Satish Kumar prior to incident and he identified them before the Court. He further stated that informant Rakesh Kumar Singh, who is before the Court is his nephew and deceased Avadhesh Singh was also his nephew. On fateful day marriage of the sister of Raj Singh was scheduled in village Musasi. The groom's party had come from District Jalaun. It was intervening night of 15/16.5.1982. The groom's party went back from Atarra by train. The witness accompanied by Rakesh, Avadhesh (deceased) and Shyam Sundar had come to station to see off the party, which was boarded in the train at around 3:00 AM in the Bundelkhand Express, which was running between Manikpur to Jhansi at Atarra Railway Station. He also boarded the train alongwith Avadhesh, Rakesh and Shyam Sundar and travelled up to Khurhand alongwith groom's party. They disembarked from the train at Khurhand and reached at Atarra Railway Station at 4:00 AM by Jhansi Manikpur Train from Khurhand. Accused Ajai Kumar and Satish Kumar met them at railway station Atarra, who grabbed Shyam Sundar and stated that he is gunda. The witness and his companions objected to this and they walked up to tea shop of Badku while talking together. The shop was closed and light was illuminating on electric poll. They sat on the bench lying in front of the shop.

The accused Ajai Kumar and Satish Kumar engaged in abusing throughout whereupon Avadhesh stood up and asked them to refrain from abusing them. Thereupon, Satish Kumar grabbed hand of Avadhesh and twisted it and forcefully made him to sit on the bench and exhorted Ajai Kumar to kill him. Ajai Kumar whipped out a countrymade pistol from his west and pointed out towards left side of his chest and shot a fire. Avadhesh rolled down on the bench and died. The incident was witnessed by the witnesses Rakesh Kumar, Shyam Sundar and one another person named as Krishna Pal. They cried on the incident whereupon the accused persons fled away in southwards of the town. He stayed near the dead body and Rakesh Kumar went to police station Atarra to lodge a report. A Sub-Inspector and constable reached the spot at around 6:00 AM. The witness opened a sealed bundle comprising a pant, bushirt, underwear, banyan and a pair of chappal on which material Ext.1 to 5 were marked. He identified these articles as those worn by the deceased at the time of incident. The witness also stated that the deceased Avadhesh was his real nephew and Rakesh (PW-1) is not closely related to him. In cross-examination this witness denied his statement recorded by the Investigating Officer under Section 161 Cr.P.C. that on that date marriage of his daughter was scheduled in his house and clarified that he stated to Investigating Officer that on that date marriage of his niece was scheduled and he is not aware as to how the Investigating Officer had written in his statement that marriage of his daughter was scheduled. He also denied statement under Section 161 Cr.P.C. that Rakesh Kumar Singh was his 'Bhanja' (sister's son). He also stated that he had told the Darogaji that Satish Kumar exhorted Ajai Kumar to

kill Avadhesh by calling his mother's name and if Darogaji has referring the abuse hurled on Avadhesh by some other way, he is not apprised of that. He had stated that he has told the Darogaji that he stayed near the dead body, when Rakesh went to lodge the report at police station, if this fact is not appearing in his statement, he is not able to disclose its reason. Barat had visited the venue of marriage on 13th date by train at Badausa and he had visited the station to receive the barat, which comprise 15 persons. 4 to 5 other persons also accompanied him while receiving the barat. The marriage was solemnized in the intervening night of 13/14.5.1982. The barat was scheduled to depart in the morning of 15.5.1982. One Raghuraj Singh of Musasi had stopped the barat by way of courtesy, when it departed in the morning of 15.5.1982. He had purchased tickets of groom's party up to Jhansi for which money was paid to him by father of Raj Singh, which cost total Rs.156/-. The witness and his 4 companions had not purchased any ticket while returning from Khurhand. There was a crossing at Khurhand railway station and for that reason, the descended from train at Khurhand and went back. There was much rush in the train on that night. He has been posted as police constable and retired 16 years earlier to his statement before the Court. There were a number of passengers in musafirkhana of railway station Atarra on that date. They did not find any police constable at the railway station at the time of incident. They sat on the bench with a view to let the accused move from there. The deceased was sitting on the bench while keeping his face northwards. Shyam Sundar and Rakesh were sitting on the bench by the side of Avadhesh. There was time gap of five minutes between their descending at the platform and commission

of the offence. Shyam Sundar also accompanied Rakesh after the incident to lodge the report. The witness denied the defence suggestion that he had not seen any occurrence and the Sub Inspector of Police got written report prepared in consultation with the witness and his companions. He further stated that the accused persons were running shops at Atarra and had seen them at Atarra.

12. PW-3, Kishan Pal, is also projected as one of the persons who was coming down from platform alongwith informant and deceased and had seen the occurrence. He is resident of Atarra town and stated that he had to go to Chitrakoot by train, which he missed, therefore, he was coming back from railway station towards town at about 4:00 AM. He heard and saw the commotion in the nearby tea and sweet shop, where murder had taken place. In the cross examination, the witness was declared hostile and in the cross-examination by the prosecution, he reiterated that he had not seen how the murder had taken place and who committed the murder. He also reiterated that he did not see the accused there. The witness denied the prosecution suggestion that he was not ascertaining true facts in view of being scared by accused persons. He also denied the prosecution suggestion that he witnessed the entire incident of commission of murder of Avadhesh Singh by present accused persons. He also stated that he had requested folded hands to Investigating Officer to spare him from to be a witness of the incident.

13. PW-4, Head Constable, Bahadur Singh, stated that he was posted in the month of April and May, 1982 at police station Atarra as Head Moharrir. On 16.5.1982, the informant Rakesh Kumar

produced written report Ext.Ka-1 before him and lodged chik report on the basis of Ext.Ka-1 at 4:30 AM, on which Ext.Ka-2 was marked. He prepared this chik report in his signature and hand writing. He further stated that a special report was sent on 16.5.1982, vide GD Report No.9, at 9:30 AM by SHO Lalji Shukla to senior officials. The written entry of special report is made vide GD Report No.21, time 21:30 hours on same date. SHO Ramji Mishra was present in the police station when this case was registered and he undertook the investigation of the case. The case was registered after lodging of FIR vide GD Report No.4, on which Ext.Ka-3 is marked. The special report and its receiving report were proved by this witness as Ext.Ka-4 and 5. he filed certified copies of extracts of GD at the time of his evidence. He further stated that constable Jagdeo and Jeev Mandal made entry of their return at police station after postmortem on dead body of the deceased vide GD report No.22, time 19:30 hours, dated 17.5.1982. The Investigating Officer Shri Ramji Mishra returned to police station on 16.5.1982 alongwith both the two arrested accused persons namely, Ajai Kumar and Satish Kumar and five bundles of sealed case property and lodged them at police station and a GD entry in this regard was made by the report No.12 by him. He filed certified copy of GD Entry on record as Ext.Ka-6.

14. PW-5, Ramji Mishra, is Investigating Officer of the case. He proved steps taken during investigation. He also proved inquest report being its author as Ext.Ka-7 and stated that he conducted inquest on the body of the deceased at around 7:30 AM on the date of incident. The dead body of the deceased was lying on a bench in front of tea shop of Badku at

Railway Station Atarra. After conducting inquest proceeding sent the dead body of Avadhesh Singh after preparing police papers relating to postmortem of the deceased i.e. challan lash Ext.Ka-9 and letters Ext.Ka-10 and 11 through two constables. He also got the dead body sealed after inquest proceeding. The sleepers worn by deceased and his shirt were sealed and their inventory was prepared which proved as Ext.Ka-12 and Ka-13 during his evidence. He also stated that he scratched the blood stains from the bench on which dead body was lying and collected the blood stained and plain pieces of wood and got them sealed separately and prepared its inventory as Ext.Ka-14. He produced these articles before the Court and on which Ext.Ka-5, 6 and 7 were marked. He also stated that he arrested accused persons on secret information at around 11:00 AM near hostel of Degree College. A .315 bore countrymade pistol and two live cartridges, and one empty cartridge shell were recovered from accused Ajay Kumar Gupta. He produced the accused persons at police station at 13:15 hours. He also stated that so long as the case property remained with him, it was in sealed condition. He also proved site plan as Ext.Ka-15 being in his hand writing and signature. He stated that after carrying out the investigation, he submitted chargesheet (Ext.Ka-16) on 1.6.1982. he also filed statement of witnesses namely, Rakesh Kumar and Krishna Pal as Ext.Ka-17 and Ka-18 during his evidence.

15. PW-5, Investigating Officer, Ramji Mishra, deposed that soon after the case was registered at the police station, he took up the investigation, that he recorded the statements of complainant Rakesh Kumar Singh and his companion Shyam Sundar and that thereafter he reached the

scene of incident at about 7.30 A.M. The police station was about one kilometre away from the scene of incident and I consider that the Investigating Officer lost no unreasonable time in reaching the scene of incident in course of investigation. The Investigating Officer, as it appears from the evidence, after the inquest proceedings which were concluded at 9 A.M. ,and after making recoveries and examining other witnesses, rushed to apprehend the accused persons whose presence in the town was made known to him through his informant. He deposed that he found the two accused at about 11 A or 11.15 A.M near the hostel of Degree College in the town of Atarra and he arrested both of them. He also deposed that accused Ajai Kumar was found in possession of .315 bore country made pistol with two live cartridges and one discharged cartridge and that the accused were deposited in the police station at 1.15 P.M. on the same day. He further deposed that he again came on the spot on 18.5.82 and examined. P.W. Ramhit Singh who was summoned by him and that thereafter he prepared site-plan Ext.Ka-15.

16. PW-6, Dr. G.J. Gupta, is author of postmortem report of the deceased, who proved the postmortem report as Ext.Ka-19 and stated that he prepared this in his hand writing and signature. He in his evidence stated that deceased was around 18 years of age and there was gap of one and half day between death and postmortem. Rigor mortis had passed off from the upper extremities but it was present in small portion of lower extremities. There was onset of marks of decomposition on dead body. He elaborated antemortem injuries and internal examination of dead body. He stated that antemortem injuries found on the dead body were sufficient to cause death. These were caused by some firearm

like countrymade pistol or gun. He retrieved the clothes worn on dead body and prepared a bundle and sent the same through police constables, after getting it sealed. In cross-examination, he stated that firearm injuries were caused to deceased from a distance of 5 to 6 inches. Wound of entry was found to be bigger than wound of exit, which was due to reason of decomposition. He also stated that even after death, chemical process continues in digestive system and for that reason, food does not proceed further and gets blocked on same place in the stomach. The deceased might have taken meal one or two hours before the incident.

16. Accused persons in their statement under Section 313 Cr.P.C. stated that the witnesses of fact have stated falsely against them. They are not aware about the time, place, mode and manner of the incident. There was enmity between Shiv Prasad Gupta, a family member of the accused persons and S.I. Ramji Mishra, the Investigating Officer of the case due to reason that said Shiv Prasad Gupta had published an article in his weekly publication "Gantavya Lahar" against said Investigating Officer. The said police officer falsely implicated the accused persons in this case. They were not arrested from the place where shown in the police papers but they were arrested from their home on 16.5.1982 at 8/9:00 AM. Accused Satish Kumar also stated that he was forced to testify against accused Ajai Kumar by police officials and when he declined to oblige them he was falsely implicated in the case.

17. D.W.1, Kali Charan and D.W.-2 S.U. Khan were examined as defence witnesses. D.W.-1, Kali Charan, stated that he was posted as Judicial Assistant in the

collectorate. The special report is received from police station at the bungalow of District Magistrate and from there it goes in his office. He received a special report of this case on 22.5.1982, which bears signature of Sri R.C. Dixit. An order to the effect "sent to A.J.A." is appended thereon. He produced file before the court regarding special report and in its column 11, the name of arrested accused namely Ajai Kumar Gupta and Satish Kumar is mentioned. He filed a copy of special report which is marked as Ext.Ka-3. In cross-examination, this witness could not tell as to when this special report was received in the bungalow of District Magistrate.

18. D.W.-2, S.U. Khan stated that on 15/16.6.1982, he was posted as A.S.M. Head Quarter, Banda and stated that he had brought daily train cash book of Railway Station Atarra dated 15/16.5.1982, three tickets for Jhansi were sold from Railway Station Atarra on that date. These tickets were sold after 12:00 hours in the night, which is entered in register dated 16.5.1982. One ticket was valued Rs.12.50/-. He also produced train timing register, which shows that on that date i.e. 16.5.1982, Bundelkhand Express (towards Jhansi) reached at Atarra Station at 1:12 AM and departed at 1:17 AM. Bundelkhand Express reached from Jhansi at 3:23 AM at said station. He was on station duty in the night. He also stated that booking gates closed after arrival of train and no ticket can be sold to passengers after closing of booking window. The passengers get their ticket issued by T.T.E. thereafter. Sometimes passengers take journey certificate from guard after informing him.

19. Learned counsel for the appellants submitted that PW-1, Rakesh Kumar Singh, has stated at page No.28 of his evidence that he scribed the written

report at police station and he has admitted that prior to writing the report (Ext.Ka-1), he was guided by the Head Muharrir as to how the report should be written. He has also stated that the barat reached at Atarra railway station from Musasi to Atarra by bus and the witness and his companions reached at Atarra station around 10:00 PM. In fact, appellants have been falsely implicated at the instance of PW-5, Ramji Mishra, the Investigating Officer.

20. He further submitted that from statement of PW-1, at page No.28, it appears that the FIR has been lodged at the instruction of police and not in natural manner. The witnesses are not reliable. PW-1 has stated that marriage party left the railway station Atarra by Bundelkhand Express whereas PW-2, Ramhit, has stated that marriage party left from Atarra railway station to Banda by passenger train, which is material contradiction in their mutual statements at certain points. PW-2, has stated at page No.35 in his evidence that he had purchased 15 tickets from Atarra to Jhansi for Bundelkhand Express for Rs.156/-, paid by Raja Singh whereas D.W.-2, the Assistant Station Manager, who is an independent and official witness has stated that in the intervening night of 15/16.5.1982, only three tickets were sold for Railway Station Atarra to Jhansi. D.W.-2 also stated that the value of one ticket is Rs.12.50/-. Thus, total value of 15 tickets accordingly comes to Rs.187.50/- and not Rs.156/-, as told by PW-2. The prosecution evidence is also very much discrepant inasmuch as the key witness Raj Singh, who was host of marriage ceremony of his sister has not been produced in evidence. Even, none of the members of the marriage party (barat) was examined in support of prosecution case. He further submitted that PW-1, has stated that he purchased tickets

for themselves from railway station Atarra to railway station Khurhand but this fact has been denied by PW-2 and he has stated that he had not purchased any ticket for himself and his companions. PW-1 has stated in his cross-examination that marriage party came from the village to railway station by bus whereas PW-2 has stated that it came by a tractor from village to railway station. Thus, the prosecution version that witnesses escorted the barat from Atarra railway station to Khurhand is completely absurd and does not appeal to common sense. PW-1 has denied that he had seen the actual incident of firing allegedly made by accused Ajai Kumar Gupta upon deceased and has stated that he had only seen back posture of accused persons while they were fleeing away.

21. Learned counsel for the appellant further submitted that above discrepancies in the testimony of the witnesses strongly suggests that they had not seen the incident of killing of deceased Avadhesh Singh and they have falsely testified before the Court inasmuch as the appellants had no motive to commit the murder of deceased and they have been falsely implicated at the behest of PW-5, Ramji Mishra, the Investigating Officer of the case. Real facts of the case are that one Shiv Prasad Gupta, Editor of weekly newspaper 'Gantavya Lahar', who was uncle of accused Ajai Kumar Gupta, on 22.9.1981 and 29.9.1981 had published certain news items in said newspaper against PW-5, Ramji Mishra, the Investigating Officer of the case, which was taken by him as defamatory and therefore, he filed a complaint against said Shiv Prasad Gupta on 29.9.1981 and because of this, he was harbouring ill will against Shiv Prasad Gupta and his family members. Appellant Satish had filed an FIR

against co-accused Ajai Kumar Gupta under section 324 IPC prior to this incident. Accused Satish Kumar Gupta had stated that Ramji Mishra came to his house and asked Satish to become a witness against Ajai Kumar Gupta and appellant Satish declined the request made by Ramji Mishra to become a witness against Ajai Kumar Gupta and for that reason, he has been falsely implicated in the case.

22. Learned counsels for the appellants lastly submitted that both the appellants had raised plea of juvenility during pendency of present appeal. The plea of Juvenility raised by appellant Satish Kumar Gupta was declined by learned Session Judge, Banda on a reference made by this Court vide his Inquiry Report dated 20.4.2022 but the plea of juvenility raised by appellant Ajai Kumar Gupta was accepted in Juvenile Inquiry Report submitted by learned Session Judge, Banda to the Court on a reference made by this Court in this regard. Therefore, the order in respect of appellant Ajai Kumar Gupta may passed under provisions of Juvenile Justice (Care and Protection of Children) Act, 2000 and not under provisions of Indian Penal Code.

23. Learned counsel for the appellants placed reliance on a judgement of Hon'ble Apex Court in **State of U.P. and Another vs. Jaggo @ Jagdish and others, AIR 1971 SUPREME COURT 1586**, wherein it is held that It is true that all the witnesses of the prosecution need not be called but it is important to notice that the witness whose evidence is essential to the "unfolding of the narrative" should be called. This salutary principle in criminal trials has been stressed by this Court in the case of **Habeeb Mohammad vs. The State of Hyderabad, 1954 SCR 475** for eliciting

the truth. Hon'ble Apex Court further observed in paragraph No.16 of the judgement as under:-

“16. This Court in Habeeb Mohammad's case, (supra) referred to the observations of Jenkins, C.J. in Ram Ranjan Roy v. Emperor ILR 42 Cal 422 : AIR 1915 Cal 545 that the purpose of a criminal trial is not to support at all costs a theory but to investigate the offence and to determine the guilt or innocence of the accused and the duty of a public prosecutor is to represent the administration of justice so that the testimony of all the available eye-witnesses should be before the Court Lord Roche in Stephen Seneviratne v. The King AIR 1936 PC 289, referred to the observations of Jenkins, C.J. and said that the witnesses essential to the unfolding of the narrative on which the prosecution is based must be called by the prosecution whether the effect of their testimony is for or against the case for the prosecution. That is why this Court in Habeeb Mohammad's case, (supra) said that the absence of an eye witness in the circumstances of the case might affect a fair trial On be half of the appellant it was said that Ramesh Chand was won over and therefore the prosecution could not call Ramesh. The High Court rightly said that the mere presentation of an application to the effect that a witness had been won over was not conclusive of the question that the witness has been won over. In such a case Ramesh could have been produced for cross-examination by the accused. That would have elicited the correct facts. If Ramesh were an eye-witness the accused were entitled to test his evidence particularly when Lalu was alleged to be talking with Ramesh at the time of the occurrence.”

24. Learned counsel for the appellant cited another judgement of

Hon'ble Apex Court in **Shahid Khan vs. State of Rajasthan, 2016 0 Supreme (SC) 210**, wherein it is held that the delay in recording the statements casts a serious doubt about their being eye-witnesses to the occurrence. It may suggest that the investigating officer was deliberately marking time with a view to decide about the shape to be given to the case and the eye-witnesses to be introduced.

25. Per contra, learned AGA submitted that there are no material discrepancies or infirmity in the evidence of witnesses of fact. Learned trial court has made a thread bear analysis of the evidence on record while passing the impugned judgment, which formed basis of conclusion of guilt of accused appellants. The contradictions pointed out by learned counsel for the appellants are not of material nature, which may have a potential of making the prosecution version suspicious or doubtful. Learned trial court has rightly observed that ticket less travels are not uncommon in this country.

26. In present case, accused Ajai Kumar Gupta had pleaded animosity between PW-5, Ramji Mishra, the Investigating Officer and his uncle Shiv Prasad Gupta, who is a journalist, as a reason to falsely implicate him in the case but he could not bring any fact or circumstance to suggest that PW-5 was having any grudge or indignation against the accused Ajai Kumar Gupta himself. The deceased died on the spot due to gun shot injuries by firearm in the incident, which is proved to have taken place at 4:00 Am on 16.5.1982. The FIR was lodged on the same date at 4:30 AM. The distance of police station from place of occurrence is shown as one kilometer in chik FIR (Ext.Ka-1), thus, the FIR in the case has

been lodged at utmost promptitude without any delay, which keeps credence to its version and also gives up any likelihood of embroidery, afterthought or embellishment. Learned counsel for the appellant contended that this version of PW-2 that he had purchased tickets of 15 members of marriage party from Atarra to Jhansi for Rs.156/- which was advanced by Raj Singh to him whereas DW-2, the Releaving Assistant Station Master posted at Atarra Railway Station in the fateful night i.e. 15/16.5.1982 stated that the Bundelkhand Express train reached at Atarra railway station at 1:12 AM and left the station at 1:17 AM by producing the relevant register. He has also stated that in that night only three tickets were sold from Atarra to Jhansi, thus, this version of PW-2 gets falsify that he had purchased 15 tickets and that too it costs for Rs.156/- whereas DW-2 had stated that one ticket costs Rs.12.50/- only. Thus, the value of 15 tickets comes Rs.187.50/-. Here this fact is also noticeable that DW-2 has admitted that sometime the ticket window is closed after arrival of train and passengers purchased the ticket from T.T.E. in the train and after informing the train guard while travelling in train. Here, learned trial court has rightly observed that the question whether the barat party and the persons who were escorted them were bonafide person or not is of little significance in this case and I considered that in prosecution case that the barat party leave the Atarra railway station for that night is not shaken in the lease. Learned trial court has also observed correctly that it is “also borne out from the evidence that DW-2, S.U. Khan that the Bundelkhan via Jhansi left Atarra at 1:17 Am and the other Bundelkhand from Jhansi reach Atarra railway station at 3:23 AM, thus, the case of the prosecution that deceased, PW-1, PW-2, deceased Avadhesh

and Shyam Sundar escorted the barat and came back from said Bundelkhand Express and unboarded the train at about 4:00 Am (approximately), finds support from the aforesaid evidence.

27. Learned trial court has rightly observed that the contradiction pointed out in statement of PW-2 that in his earlier statement and under Section 161 Cr.P.C., he had attributed role of referring the deceased by calling his mother's name and before the Court by calling him by his sister's name in role attributed to accused Satish Kumar is not of much significance and the defence has laid undue importance on these factors.

28. So far as the motive is concerned, as the case is based on direct evidence of witnesses of fact and PW-2 has given eye-witness account of sequence of events which led to homicidal death of Avadhesh Singh. Only reason that the prosecution failed to suggest any motive against the accused persons will not defeat the prosecution case. On facts of the case, this is trite law that in case of direct evidence, motive loses its significance to great extent. In fact motive is a mental factor which lies in the mind of assailant/culprit and there is an old adage that even devil cannot read out the mind of a person. In Bible, it is stated that only God knows thou thoughts. It is quite natural that the accused persons could have been harbouring some grudge or indignation against the deceased and driven by that, they engaged in commission of murder of deceased Avadhesh Singh, due to indiscretion in any manner, the reason of false implication at the behest of PW-5, narrated by the accused persons in their statement under Section 313 Cr.P.C., does not hold good on facts of the case. The only reason assigned by accused Satish Kumar

for his false implication is that the police wanted to project him as a witness against accused Ajai Kumar and when he refused to oblige them, he was also falsely implicated in this murder case and was arrested from his home in the early hours of 9:00 AM on 16.5.1982.

29. PW-1 has slightly deviated from his earlier statement under Section 161 Cr.P.C. while testifying before the Court. In his statement under Section 161 Cr.P.C. recorded by Investigating Officer, he stated that he witnessed the incident in presence of witnesses Ramhit Singh (PW-2) and Shyam Sundar. He has also stated in his evidence before the court that the contents of Ext.Ka-1 were truly recorded by him but he has stated in his evidence that he had not seen the accused persons firing shot at deceased, but he had seen Ajay and Satish fleeing away from the place of incident and notices their back posture and he had not seen nothing in their hand. This witness was cross-examined by public prosecutor after declaring hostile, in which he stated certain more things which is supportive of prosecution case. He acknowledged entire contents of Ext.Ka-1, the written report which formed basis of lodging of FIR, as its author. He also stated that when Ajay Kumar and Satish Kumar met him, Satish Kumar was having iron rod in his hand. However, he further stated that eye-witness account given by witnesses Shyam Sundar and Ramhit were narrated by him in Ext.Ka-1. He did not see the incident at his own. He also stated that he had stated the true version of the incident to the Investigating Officer. If we go through the entire testimony of PW-1, we find that he is trying to conceal the fact that he had witnessed the incident himself for reasons best known to him or under influence of accused side. This witness has named the

accused persons in his written report Ext.Ka1, just after the commission of the offence but in cross-examination by defence, he has wrongly stated that prior to the incident, he had never seen the accused persons and was not acquainted with them. He has also stated that he had seen the accused persons in police lockup on 16.5.1982, at about 11:30 AM and he came to know the name of the accused persons for the first time at police station. He admitted that police proceeded to the place of occurrence just after lodging of the FIR at around 10:00 to 10:30 AM. The witness has stated that he reached at the place of incident after hearing sound of fire from a tea shop and found Avadhesh Singh in dead condition on the bench. Ramhit and Shyam Sundar were standing there. He saw Ajay Kumar and Satish Kumar taking to their heels from 15 to 20 paces. He has also stated that the master of barat had purchased full tickets. This is prosecution case that this witness as well as other witnesses, deceased and accused were present on the tea shop and this witness has also stated that he ran from tea shop to the place of incident after hearing the noise of firearm shot, thus, this version has corroborated the prosecution case that this witness was present on the spot and not only this, he has categorically stated that just after the incident, he found witnesses Ramhit and Shyam Sundar on the spot where Avadhesh was found dead on bench.

30. In FSL Report, human blood was found on shirt, banyan, underwear and pant recovered from the dead body as well as pieces of wood which were taken from the bench, on which dead body was lying after the incident. This scientific evidence corroborates the testimony of witnesses of fact with regard to place of occurrence, which is also proved by statement of PW-5,

who prepared and proved the site plan of the place of incident, which is marked as Ext.Ka-15. PW-5 also filed statements of witness Rakesh Kumar and Krishan Pal on record during his testimony before the Court, which are marked as Ext.Ka-17 and 18. Although, these cannot be treated as piece of evidence in view of bar of proviso to Section 162 Cr.P.C. but these statements are permitted to be used by defence to point out contradictions in the statement of the witnesses before the Court.

31. Proviso to Section 162 Cr.P.C. also permits the prosecution to contradict such witness in the manner provided under Section 145 of Indian Evidence Act, 1972. Thus, so far as pointing out contradiction in sworn testimony of a witness from his earlier statement recorded during investigation is concerned the prosecution and defence both are afforded an equal opportunity under proviso to Section 162 Cr.P.C. The only difference is that for pointing out such contradiction in sworn testimony of the witness before the court from his earlier statement, the prosecution will have to seek permission of the court and in present case, the prosecution has pointed out contradiction in the statement of PW-1 before the court from his earlier statement recorded by the Investigating Officer.

32. In view of foregoing discussion and re-appreciation of evidence in the light of contention raised on behalf of the appellants, we are of the considered inference that the prosecution has been able to prove its case beyond reasonable doubt that on 16th of May, 1982, at about 4:00 AM in front of tea shop of Badku, situated nearby gate of Atarra Railway Station, the accused persons knowingly and intentionally committed murder of

Avadhesh Singh in furtherance of common intention shared by both of them. The fatal shot was fired by accused Ajai Kumar Gupta on exhortation of accused Satish Kumar Gupta. The single shot fired by accused Ajai Kumar resulted in instantaneous death of deceased Avadhesh Singh. From medical evidence, it is crystal clear that the injuries suffered by the deceased were sufficient to cause death. Thus, on reappraisal of evidence, we find no factual or legal error in appreciation of evidence undertaken by learned trial court by passing the verdict of guilt and awarding sentence permissible under law against the appellants. The appeal so far as conviction of the appellant for charge under Section 34 read with Section 34 IPC is concerned is devoid of merits and deserves to be dismissed. However, at this stage this fact is pertinent to be mentioned that during pendency of appeal before this Court, plea of juvenility was raised by both the appellants and the plea of juvenility raised by appellant Satish Kumar Gupta was rejected by Session Judge, Banda vide order dated 20.4.2022, to which a reference was made by this Court to enquire into plea of juvenility raised by him, but learned Session Judge, Banda, allowed the plea of juvenility raised by Ajai Kumar Gupta before this Court on a reference made by this Court. Both the appellants were released on bail on filing of present appeal. Appellant Ajai Kumar Gupta was held twice as juvenile in conflict of law by Session Judge, Banda on a reference made by this Court, vide Inquiry Report dated 6.9.2012, which was subsequently set aside by order dated 13.7.2023 passed by this Court as a Criminal Revision (Defective) No.68 of 2022 was filed by the complainant against inquiry report dated 6.9.2022, submitted by Session Judge, Banda and on no objection raised by

learned counsel for the appellant, on premises that if an opportunity is afforded by the Session Judge, Banda to the complainant and the State to objection with regard to inquiry and determination of juvenility of the accused appellant pursuant to the order dated 6.4.2012 of this Court. Vide order dated 13.7.2023, this Court directed the Session Judge, Banda to proceed to determine the juvenility of the accused appellant Ajai Kumar Gupta and submit his report, with the consent of learned counsel for the parties and on statement of learned counsel for the complainant that he shall withdraw the aforesaid defective revision filed against inquiry report in question dated 6.9.2012. An office report dated 10.10.2023 is appended in ordersheet to the effect that in compliance of Court's order dated 13.7.2023, thus, Additional Session Judge, Banda has submitted a report dated 22.9.2023 (Flag 'Q'), wherein it is said that the appellant Ajai Kumar Gupta was juvenile at the time of incident.

From perusal of second Inquiry Report dated 21.9.2023, Special Judge, POCSO Act/Additional Session Judge, Banda, it appears that the learned Session Judge held the age of the appellant Ajai Kumar Gupta as 15 years and 6 months on the date of incident dated 6.5.1982 and, therefore, the appellant was declared juvenile in conflict of law on the date of incident. In terms of Section 2(l) of The Juvenile Justice (Care and Protection of Children) Act, 2000, which was found to be applicable in present case, as date of occurrence in present case is shown as 16.5.1982 and for that reason, learned Session Judge has rightly observed that The Juvenile Justice (Care and Protection of Children) Act, 2015 as effective from 15.1.2016 will not be applicable in present

case because the incident took place prior to the enforcement of new Act.

30. Section 2(k) of The Juvenile Justice (Care and Protection of Children) Act, 2000 defines "Juvenile" as follows:-

'juvenile' or 'child' means a person who has not completed eighteenth year of age.

31. The definition of "juvenile in conflict of law" under Section 2(l), which stood amended in 2006 is as follows:-

"(l) 'juvenile in conflict with law' means a juvenile who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of commission of such offence."

32. Undoubtedly, the appellant has been assigned main role in the offence as author of the wound of gunshot, which turned fatal to the deceased, yet this is trite law that plea of juvenility can be raised by an accused or convict at any stage of investigation, inquiry, trial or appeal and once he has been held to be juvenile by competent court or Juvenile Justice Board, as the case may be, even after finding of a verdict of guilt against him, the final order will be governed by Section 15 of The Juvenile Justice (Care and Protection of Children) Act, 2000, which is a statute in parimateria of Section 18 to present enactment on the subject i.e. The Juvenile Justice (Care and Protection of Children) Act, 2015.

33. Section 15, 16 and 18 of Juvenile Justice (Care and Protection) Act, 2000, provides as under:-

"15. Order that may be passed regarding juvenile

(1) Where a Board is satisfied on inquiry that a juvenile has committed an offence, then, notwithstanding anything to the contrary contained in any other law for the time being in force, the Board may, if it so thinks fit-

(a) allow the juvenile to go home after advice or admonition following appropriate inquiry against and counselling to the parent or the guardian and the juvenile;

(b) direct the juvenile to participate in group counselling and similar activities;

(c) order the juvenile to perform community service;

(d) order the parent of the juvenile or the juvenile himself to pay a fine, if he is over fourteen years of age and earns money;

(e) direct the juvenile to be released on probation of good conduct and placed under the care of any parent, guardian or other fit person, on such parent, guardian or other fit person executing a bond, with or without surety, as the Board may require, for the good behaviour and well-being of the juvenile for any period not exceeding three years;

(f) direct the juvenile to be released on probation of good conduct and placed under the care of any fit institution for the good behaviour and well-being of the juvenile for any period not exceeding three years;

(g) [make an order directing the juvenile to be sent to a special home for a period of three years:

Provided that the Board may, if it is satisfied that having regard to the nature of the offence and the circumstances of the case, it is expedient so to do, for reasons to be recorded, reduce the period of stay to such period as it thinks fit.

(2) The Board shall obtain the social investigation report on juvenile

either through a probation officer or a recognised voluntary organisation or otherwise, and shall take into consideration the findings of such report before passing an order.

(3) Where an order under clause (d), clause (e) or clause (f) of sub-section (1) is made, the Board may, if it is of opinion that in the interests of the juvenile and of the public, it is expedient so to do, in addition make an order that the juvenile in conflict with law shall remain under the supervision of a probation officer named in the order during such period, not exceeding three years as may be specified therein, and may in such supervision order impose such conditions as it deems necessary for the due supervision of the juvenile in conflict with law: Provided that if at any time afterwards it appears to the Board on receiving a report from the probation officer or otherwise, that the juvenile in conflict with law has not been of good behaviour during the period of supervision or that the fit institution under whose care the juvenile was placed is no longer able or willing to ensure the good behaviour and well-being of the juvenile it may, after making such inquiry as it deems fit, order the juvenile in conflict with law to be sent to a special home.

(4) The Board shall while making a supervision order under sub-section (3), explain to the juvenile and the parent, guardian or other fit person or fit institution, as the case may be under whose care the juvenile has been placed, the terms and conditions of the order and shall forthwith furnish one copy of the supervision order to the juvenile, the parent, guardian or other fit person or fit institution, as the case may be, the sureties, if any, and the probation officer.

16. Order that may not be passed against juvenile

(1)Notwithstanding anything to the contrary contained in any other law for the time being in force, no juvenile in conflict with law shall be sentenced to death [or imprisonment for any term which may extend to imprisonment for life] or committed to prison in default of payment of fine or in default of furnishing security:Provided that where a juvenile who has attained the age of sixteen years has committed an offence and the Board is satisfied that the offence committed is so serious in nature or that his conduct and behaviour have been such that it would not be in his interest or in the interest of other juvenile in a special home to send him to such special home and that none of the other measures provided under this Act is suitable or sufficient, the Board may order the juvenile in conflict with law to be kept in such place of safety and in such manner as it thinks fit and shall report the case for the order of the State Government.

(2)On receipt of a report from a Board under sub-section (1), the State Government may make such arrangement in respect of the juvenile as it deems proper and may order such juvenile to be kept under protective custody at such place and on such conditions as it thinks fit:

[Provided that the period of detention so ordered shall not exceed in any case the maximum period provided under section 15 of this Act.]

18. No joint proceeding of juvenile and person not a juvenile-

(1)Notwithstanding anything contained in section 223of the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, no juvenile shall be charged with or tried for any offence together with a person who is not a juvenile.

(2)If a juvenile is accused of an offence for which under section 223 of the

Code of Criminal Procedure, 1973 (2of 1974) or any other law for the time being in force, such juvenile and any person who is not a juvenile would, but for the prohibition contained in sub-section (1), have been charged and tried together; the Board taking cognizance of that offence shall direct separate trials of the juvenile and the other person.

34. Section 16 of the Act strictly prohibits the sentencing a juvenile in conflict in law to death or imprisonment for any term, if may extend in term for life or committed to prison in default of fine or in default of furnishing of security. Section 18 provides that no joint proceeding of juvenile and a non juvenile shall be undertaken. Thus, in present case, although we affirm the verdict of guilt for charge under Section 302 IPC recorded against the appellant Ajai Kumar Gupta by learned trial court yet the sentence passed against him is set aside for reasons stated, as above, as he has been declared juvenile in conflict of law by learned Session Judge on reference made by this Court during penency of this appeal and we direct the appellant Ajai Kumar Gupta, the juvenile in conflict of law, to be enlarged on probation of good conduct under Section 15(1) of the Act, 2000 on furnishing a personal bond and two sureties in the like amount in prescribed form to the satisfaction of concerned Session Court within a period of 10 days from today with undertaking to maintain peace and good behaviour and to abstain from indulging any criminal activity during period of three years' probation bond. It is also directed that Session Court shall forward a copy of this operative order in respect of said juvenile/appellant to District Probation Officer, Banda, under whose supervision and observation the appellant will remain

for a period of 3 years, as directed and will apprise the Court concerned regarding conduct and behaviour of the juvenile, if found contrary to the conditions of the probation bond.

35. Accordingly, Criminal Appeal No.705 of 1983, stands dismissed and the conviction and sentence passed against the appellant Satish Kumar Gupta in impugned judgement is hereby affirmed and the Criminal Appeal No.573 of 1983 stands partly allowed in respect of sentence awarded to appellant Ajai Kumar Gupta as directed above. He need not surrender.

36. Appellant Satish Kumar Gupta has been enlarged on bail by orders of this Court passed in present criminal appeal. Therefore, he is directed to immediately surrender before the Court of Sessions Judge, Banda to undergo the sentence awarded in impugned judgement dated 4.3.1984. In case of failure of the appellant to surrender before the trial court concerned, the trial court shall compel the appearance of the appellant by issuing appropriate coercive process against him and on being apprehended/appearance before the court as the case may be, he will be sent to jail for undergoing the sentence of life imprisonment as awarded in impugned judgement.

37. Let lower court record be sent back to court concerned within a period of two weeks from today alongwith certified copy of this order for information/necessary compliance.

(2024) 4 ILRA 1127
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.03.2024

BEFORE

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

Criminal Appeal No. 680 of 2001

Dhaunkal & Ors. ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
 Sri Arvind Agarwal, Sri Rajrshi Gupta

Counsel for the Respondent:
 Govt. Advocate

Criminal Law - Indian Penal Code, 1860 – Sections 302, 304(1), 147, 148 & 149 – Code of Criminal Procedure, 1973 – Sections 161, 313 & 374 – Criminal Appeal Against Conviction and Sentence – Murder – Unlawful Assembly – Dying Declarations – Eye-Witness Testimony – Motive – Medical Evidence – Alteration of Conviction

The appellants, Dhaunkal, Bhaiya Lal, Rajendra, Ram Swaroop, and Buddhu, challenged the judgment dated 22.02.2001 by the VIth Additional Session Judge, Fatehpur, in S.T. No. 405 of 1996, convicting them for the murder of Raju alias Kamta Prasad on 10.09.1995 at Rampatiya Ka Purwa, Fatehpur. Buddhu was convicted under Section 302 IPC simplicitor and Section 148 IPC, sentenced to life imprisonment and one year rigorous imprisonment, respectively. The other appellants were convicted under Sections 302/149 and 148 IPC, sentenced to life imprisonment and one year rigorous imprisonment, respectively, with sentences to run concurrently. The incident stemmed from enmity over a prior criminal case, where the deceased, while weeding in his chili field, was shot by Buddhu (and allegedly Ram Swaroop) following Bhaiya Lal's exhortation, causing fatal injuries. The FIR was lodged by the deceased in an injured condition at 6:30 PM on 10.09.1995, supported by his dying declarations (under Section 161 Cr.P.C. and by Naib Tehsildar), eye-witness PW-1 (Smt. Mantoriya, deceased's mother), and medical evidence (Ext. Ka-2, Ka-3). The appellants

claimed false implication due to village rivalry and the deceased's alleged criminal ties. Held: (1) The appeal was partly allowed; Buddhu's conviction under Section 302 IPC was altered to Section 304(1) IPC, sentencing him to 10 years rigorous imprisonment and Rs. 10,000 fine (8 months additional imprisonment in default); convictions of Dhaunkal, Bhaiya Lal, Rajendra, and Ram Swaroop under Section 302/149 IPC were altered to Section 304(1)/149 IPC, sentencing them to 7 years rigorous imprisonment and Rs. 7,000 fine each (6 months additional imprisonment in default); Section 148 IPC convictions were affirmed; all sentences to run concurrently with set-off for custody undergone. (2) The court found the prosecution case proved beyond reasonable doubt through the deceased's three dying declarations (FIR, Section 161 Cr.P.C. St.ment, and magisterial declaration), PW-1's eye-witness testimony, and medical evidence, despite minor discrepancies (e.g., role of Ram Swaroop, timing of incident); the cause of death was toxemia and septicemia due to firearm injuries to non-vital parts (waist, knee), indicating no intention to cause death but intent to cause bodily injury likely to cause death, warranting alteration to Section 304(1) IPC, per Sucha Singh Vs St. of Punj., AIR 2003 SC 3617. (3) The presence of all appellants at the scene was established, and their vicarious liability under Section 149 IPC was upheld, as no specific overt act is required, per Masalti Vs St. of U.P., (1964) 8 SCR 133, and Parshuram Vs St. of M.P., (2023) SCC OnLine SC 1416. (4) Defence claims of false implication due to village rivalry or the deceased's criminal ties were unsupported; minor inconsistencies did not discredit the prosecution case, and the maxim falsus in uno falsus in omnibus does not apply in India. (5) The dying declarations were reliable, with the deceased in a fit mental St., supported by medical certification and PW-1's testimony, per Laxman Vs St. of Maharashtra, (2002) 6 SCC 710. Appellants on bail were directed to surrender to serve the modified sentence, with coercive measures for non-compliance.

List of Cases cited:

1. Sucha Singh Vs St. of Punj., AIR 2003 SC 3617

2. Masalti Vs St. of U.P., (1964) 8 SCR 133

3. Parshuram Vs St. of M.P., Criminal Appeal No. 524 of 2021, (2023) SCC OnLine SC 1416

4. Laxman Vs St. of Maharashtra, (2002) 6 SCC 710

5. Gulab Singh Vs St. of U.P., 2003 (47) ACC 161

6. Mohd. Muslim Vs St. of U.P., 2023 LiveLaw (SC) 489

7. Irfan @ Naka Vs St. of U.P., 2023 LiveLaw (SC) 698

8. Shahid Khan Vs St. of Rajasthan, (2016) 4 SCC 96

9. Jafarudheen Vs St. of Kerala, (2022) 8 SCC 440

10. Harbeer Singh Vs Sheeshpal, (2016) 16 SCC 418

11. Himachal Pradesh Administration Vs Shri Om Prakash, (1972) 1 SCC 249

12. Kali Ram Vs St. of Himachal Pradesh, (1973) 2 SCC 808

13. St. of Rajasthan Vs Raja Ram, (2003) 8 SCC 180

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

15. Upendra Pradhan Vs St. of Orissa, (2015) 11 SCC 124

16. Golbar Hussain Vs St. of Assam, (2015) 11 SCC 242

17. Darya Singh Vs St. of Punj., AIR 1965 SC 328

18. Puran Vs St. of Punj., AIR 1953 SC 459

19. Shivalal Vs St. of Chhattisgarh, (2011) 9 SCC 561

20. Rajeevan Vs St. of Kerala, (2003) 3 SCC 355

21. St. of Rajasthan Vs Om Prakash, (2002) 5 SCC 745

22. Ganesh Bhavan Patel Vs St. of Maharashtra, (1978) 4 SCC 371

23. Nallapati Sivaiah Vs Sub-Divisional Officer, Guntur, (2007) 15 SCC 465

24. Bhajju alias Karan Singh Vs St. of Madhya Pradesh, (2012) 4 SCC 327

25. Neville Nembhard Vs The Queen, (1982) 1 All ER 183

26. The King Vs William Woodcock, (1789) 1 Leach 500

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

1. The instant Criminal Appeal has been preferred by the convict /appellants against the judgment and order dated 22.02.2021 passed by learned VIth Additional Session Judge, Fatehpur in Case No.405 of 1996, whereby the appellants are convicted for charge under Section 302 IPC read with section 149 IPC and sentenced to imprisonment for life for the said charge. The appellants Dhaukal, Bhaiya Lal, Rajendra and Ram Swaroop are convicted for charge under Section 302 IPC read with Section 149 IPC and sentenced to life imprisonment, and they are also convicted for charge under Section 148 IPC, sentenced to one year rigorous imprisonment for said charge. The appellant Buddhhu is convicted for charge under Section 302 IPC and sentenced to imprisonment for life. He has also been convicted for charge under Section 148 IPC and sentenced to one year rigorous imprisonment for said charge. All the sentences are directed to run concurrently.

2. The factual matrix of the case in brief as discerned from the material on

record is that FIR in the case was lodged on the basis of written report Ext. Ka-1 of deceased Raju alias Kamta in injured condition which was scribed by one Dharamveer Singh, at Police Station Kishanpur, District Fatehpur on 10.09.1995 at 6:30 PM, wherein he stated that he is a resident of village Rampatiya Ka Purwa, H/o Dariyapur, Police Station Kishanpur, District Fatehpur. His co-villager Dhaukal son of Jodhi had got a criminal case registered against him and his father in which he was bailed out. In view of this enmity the accused, co-villagers Buddhhu and Dhaukal sons of Jodhi, Bhaiya Lal son of Ramdev, Rajendra son of Rambhawan and one Ram Swaroop son of Badal, R/o Gokulpur H/o Dariyapur, P.S. Kishanpur, came to him at his agricultural field lying in his village Rampatiya Ka Purwa, where he was weeding, his mother Mantoriya and one Hiruwa son of Kichdu were ploughing the field, as soon as he said to take meal, these persons came near him, and on being given a call by Bhaiya Lal to kill, him come whatever may, he would spend whatever money required, accused Buddhhu, fired two shots from his fire arm at him which hit him on his right waist and knee of left leg, he fell down on the spot, the miscreants fled away after the incident. The incident was seen by mother of the injured and witness Hiruwa. As condition of the injured deteriorated, his dying declaration was recorded by Naib Tehsildar (Executive Magistrate) on 11.09.1995 at around 7:45 AM at District Hospital, Fatehpur, wherein he substantially reiterated his version in FIR with variation that in dying declaration he stated that first fire was shot at him by Buddhhu, which hit him and thereafter Ramswaroop fired a shot at him by his gun and he fell down. He also stated the accused persons were on inimical terms with him and a scuffle (marpeet) occurred

prior to ten days, in which he was sent to jail. The investigation of the case was entrusted to Sub Inspector Kamla Singh, who collected relevant papers including copy of FIR, got the inquest and postmortem examination on dead body of the deceased Rajesh who died during treatment on 17.09.1995 at 04:00 PM at District Hospital, Fatehpur. In postmortem examination report Ext. Ka-3, the cause of death has been shown as Toxemia and Septicemia as a result of ante-mortem injuries. The postmortem was conducted on 19.09.1995 at 04:30 PM and inquest was conducted on 19.09.1995 at 10:00 AM. The Investigating Officer carried out local inspection of the place of incident and prepared a site plan, which is marked as Ext. Ka-4. The medico legal examination of the deceased was conducted in injured condition at C.S.C. Khaga, which is marked as Ext.Ka-2. He was admitted in District Hospital, Fatehpur for his medico legal examination, where he died during treatment. The FIR was initially registered vide Crime No.136 of 1995, under Sections 147, 148,149, 307 IPC at Police Station Kishanpur, District Fatehpur and same was altered into Section 302, 147, 148,149 IPC vide GD Report No.11, time 08:00 hours dated 21.09.1995 on receiving death memo of injured Raju alias Kamta from hospital.

3. The Investigating Officer, received report of Serologist regarding blood stained clothes of the deceased, which is marked as Ext. Ka-17. The Investigating Officer submitted charge-sheet against accused persons on finding their complicity in the offence marked, which is marked as Ext. Ka-5. The learned Civil Judge (Judicial Magistrate, Kharga) District Fatehpur took cognizance of the offence and committed the case to the court of session vide order dated 21.10.1996,

where it was registered as ST No.405 of 1996, and was transferred to the Court of VIth the Additional Session Judge, Fatehpur. The learned trial judge, framed charge under Section 147, 148,302/149 IPC against all the accused persons and charge under Section 302 IPC against accused Buddhu simplicitor on 20.02.1997 on commencement of trial.

4. The prosecution examined PW1, Matoriya wife of Shivmohan, father of the deceased, PW3 Dharamveer Singh scribe of written report Ka-1, PW4 Dr. K.N. Pandey, the author of injury report of deceased Raju @ Kamta Prasad during his life time, PW5 Dr. Anil Kumar Shukla, author of postmortem examination report of the deceased, PW6 Sub Inspector Kamla Singh the initial investigating officer of the case, PW7 Sub Inspector Rambahadur Verma, who carried out final investigation in the case, PW8 Gyan Prakash Srivastava, the then Naib Tehsildar/ Executive Magistrate who recorded dying declaration of the deceased. The trial court recorded statements of accused persons under Section 301 Cr.P.C., in which they admitted that they belong to same progeny (khandan) and are resident of same village, except accused Ramswaroop. Accused persons barring Ramswaroop are of same Khandan of which deceased belonged. They also admitted that some scuffle (marpeeth) took place on some date prior to the incident between informant (deceased) and his father and accused persons had lodged a report against deceased and his father regarding said prior incident of marpeeth. However, they denied the incident alleged in the present case and stated that informant/deceased had lodged wrong report against them, they are not aware of the contents of documents proved during trial. Naib Tehsildar, Gyan Prakash

Srivastava, had given wrong statement with regard to dying declaration of the deceased. The Investigating Officer had carried out wrong investigation and submitted wrong chargesheet against them. They are falsely implicated in the case due to village Partibandi. Accused persons examined DW1 Sukul Prasad, DW2 Shiv Poojan, DW3 Om Bihari Shukla, DW4 Hiralal alias Hiru as witnesses of defence. They also filed a copy of chargesheet filed against deceased Raju alias Kamra under Section 25 of Arms act, in Case Crime No.168 of 1990, P.S. Kishanpur, District Fatehpur dated 16.09.1990.

5. Learned trial judge after considering the submissions made by prosecution and defence and appreciating the evidence on record concluded trial regarding conviction and sentences against accused persons as aforesaid. The convict accused persons preferred present Criminal Appeal under Section 374 Cr.P.C. feeling aggrieved by impugned judgment and order.

6. We have heard submissions of Sri Arvind Agarwak and Sri Rajrshi Gupta, learned counsel for the appellants and learned A.G.A. appearing on behalf of the State-respondent and perused the material on record including impugned judgment.

7. Learned counsel for the appellants submitted that the conviction and sentence recorded against the appellants is against weight of evidence appearing on record. No offence is proved against the appellants on the basis of evidence adduced by prosecution, sentence is also severe. The appellants were enlarged on bail in present appeal vide order dated 16.12.2002 passed by this Court, the appeal is pending since year 2001. He further submitted that :

(i) FIR in the case was lodged anti-time, the distance of alleged place of incident to the police station is mentioned as 18 km in the FIR; the first Informant who was injured and admittedly received two gun shot wounds on body parts claims to have walked around to the Police Station which is highly unbelievable. The scribe of FIR as stated in his testimony that he found the injured alongwith his mother wondering about and he had written down the written report at Police Station, Vijaypur Chauki. This facts creates a serious shadow of doubt in the prosecution story, inasmuch as it is difficult to believe that the injured/ first informant having sustained gunshot wounds due village out post and police personnel present there could not make any effort to render medical assistance to him first of all. The said police out post was not situated on way to police station from the place of incident, and there was no occasion on the part of the informant/injured to visit the said police out post for lodging the FIR. The time of incident is shown as 1:30 PM, FIR was lodged at 10:30 hours and medical examination of the injured was conducted on same day at 08:30 PM at CSC, Kharga, which is around 60 kms away from police station Kushangarh. This is inconceivable that in the state of suffering two fire arm injury, the deceased traveled the distance of 18 kms for getting him medically examined.

(ii) There are three dying declarations in the present case, first being the FIR itself which is lodged by the deceased while in injured condition; second being the statement of deceased recorded under Section 161 Cr.P.C. after lodging of FIR, and third the dying declaration dated 11.09.1995 recorded by Naib Tehsildar, Sadar Tehsil, Fatehpur which is marked as Ext. Ka-14, and the alleged dying

declaration are in variants with each other with regard to manner and the mode of incident as well as timing and other dates. In FIR the injured has stated that incident took place at 10:30 pm, whereas in his dying declaration he has stated that incident occurred around 10-11 am, moreover, there is variation with regard to manner of assault, author of the injuries as stated in FIR and dying declaration, whereas both are recorded at the instance of the deceased while in injured condition. In FIR both fire arms injuries are attributed to accused Buddhu on extortion of Bhaiyalal, whereas in dying declaration Ext. Ka 14 one shot is attributed Buddhu and the other to accused Ramswaroop.

(iii) The Doctor who has allegedly given certificate of fitness, but margin of dying declaration Ext. Ka-14 was not examined as witness during trial and the certificate of fitness has been appended after recording of dying declaration, there is no certificate of doctor prior to recording of dying declaration regarding fitness of the deponent. The dying declaration is shrouded in suspicion and is not reliable.

(iv) PW1 is highly interested and partisan witness who has given contradictory statements about the time of the incident as well as the manner of assault, her statement is full of inconsistency and does not inspire confidence. The independent witness Heera Lal @ Hiru whose name has been surfaced in FIR has not been examined as prosecution witness and even he was discharged, as prosecution witness at the instance of PW1 to avoid his testimony before the court, and he was subsequently produced as a defence witness (DW4) who has not supported the prosecution version.

(v) There is considerable delay of 14 days in recording statement of PW1

Smt. Mantoriya, the mother of the deceased, which is fitted to prosecution story.

(vi) Motive, introduced by PW2- Shiv Mohan the father of the deceased has not been proved.

(vii) Unlawful Assemble has not been proved by the prosecution has no overt act has been attributed to most of the accused persons. Genesis of the incident is suspected in FIR and prosecution evidence. No weapon of any incriminating article has been affected to any of the accused persons. Even, if this Court comes to the conclusion that death of the deceased Raju was caused by accused appellants, the case does not travel beyond Section 304 (2) IPC due to lack of intention to cause death of the deceased on the part of accused-appellants.

With the above submissions learned counsel for the appellants prayed for acquittal of accused appellants.

8. Per contra, learned A.G.A. appearing for the State-respondent submitted that there is no discrepancy or infirmity in the impugned judgment of learned trial court, whereby the appellants are convicted for charge under Section 302/149 IPC and Section 148 IPC in accordance with law.

9. He further submitted that the strength of the prosecution case lies in the fact that FIR in the case was lodged at the instance of deceased himself, while in injured condition and from police papers also it is established that he appeared on the police station to lodge the FIR by producing police report Ext. Ka.1 scribed by one Dharamveer Singh, his dying declaration is also recorded in formal manner by Executive Magistrate and same has been proved by Executive Magistrate during trial. PW1, is mother of the

deceased, who has given an eyewitness account of the incident and there is no reason to disbelieve her testimony. PW2, who is father of the deceased who is not an eye witness, but has proved motive attributed to accused persons for commission of crime. The accused appellants are convicted and sentence by trial court in proper and legal manner. The appeal is devoid of force and deserved to be dismissed.

10. The postmortem examination report, Raju alias Kamta Prasad was prepared on 10.09.1995 at 08:30 PM by PW4 Dr. K.N Pandey at CSC Khaga, who has proved this document as Ext. Ka-2 during his evidence before the Court at PW4. According to injury report of Raju alias Kamta Prasad following ante-mortem injuries were found on the persons of the deceased:-

i. Fire arm wound of entry 1cm x 1 cm right side of back, 7 cm above from hip bone, pellets felt on the left side of lower abdomen under skin 9 cm away from umbilicus. No blackening, no tattooing, fresh bleeding is present.

ii. Multiple fire arm wound in the are of 22 cm x 12 cm on the back side of lower part of left thigh, left knee, joint and upper part o left leg. No exit wound, blackening or tattooing is present.

11. In the opinion of doctors and the injuries kept under observation advice xray referred to District Hospital, Fatehpur. Both the injuries were caused by fire arm, injury No.1 would have been caused from far distance from right side of entry No.2 which was caused from close distance from back side. This injury report was prepared at the instance of police station through Chitthi Majrubi of P.S. concerned.

12. PW4, Dr. K.N. Pandey has sated in his evidence that injury No.1 could be fatal. In cross examination, he stated that xray report of this injury was not brought before him, he has not sent any supplementary report. Injury No.1 was fresh, injury No.2 was also fresh; by the word 'fresh' means within six hours with three hours margin on both sides. He has not written the duration of injuries in his injury report Ext. Ka-2. Injury No.2 was found in leg in the area 12 cm width, this injury was caused by firing from back side on leg, but he could not tell whether the fire was shot from front or back.

13. The postmortem examination report of deceased Raju alias Kamta was prepared by PW5. Dr. Anil Kumar Shukla, who has proved this document as Ext. Ka-3 by his evidence before the Court. The postmortem report of deceased Raju alias Kamta Prasad, reveals that his postmortem examination was conducted on 19.09.1995 at 4:30 PM at District Hospital, Fatehpur. At the time of postmortem following ante-mortem injuries were found on his person:-

i. Stitched wound right side 18 cm long on abdomen, just right to umbilicus, 15 stitches given on vertically place wound.

ii. Stitched would 3 cm horizontally on right side back of abdomen 4 cm above left crest 3 stitches given.

iii. Stitched would with drain of rubber on left side of abdomen 3 cm long 3 stitches given.

14. Initial examination- No abnormality detected in neck, scalp, membranes, brain, skull, vertebra, spinal cord was not opened, no abnormality detected in walls of ribs and cartilage, pleura, trachea, longs, pericardia, both chambers of heart were empty in

abdominal cavity 200 ml puss was present, stomach was empty, his small intestine was empty and only gases were present. Multiple repairs were done at different places by calgut, faeces and gas were present in long intestine. In the the opinion of doctor, the cause of death was due to Toxemia and Septicemia, as a result of ante-mortem injuries. The one unwrapped bandage with lucoplast and rubberbands were recovered from dead body and entrusted to police constables who had brought dead body for postmortem. These exhibits were sent to FSL, Mahanagar, Lucknow for scientific examination, in FSL report dated 05.12.1995, human blood was found in large parts of these articles.

15. First Information Report was lodged by the deceased himself in injured condition. The FIR is proved by evidence of its scribe. PW3 Dharamveer Singh, due to death of the author of Ext. Ka-1 deceased Raju alias Kamta Prasad. PW3 has stated in his evidence that about two years ago Raju alias Kamta Prasad met him in injured condition. He got the written report scribed by him, he wrote down the written report as dictated by injured Raju alias Kamta and readover the same to him, after writing this paper, he signed the written report as scribed and got thumb impression of informant Raju alias Kamta Prasad, on this report which is paper No.3A/2 on record, the documents is marked as Ext. Ka1. The witnesses stated that after signing this paper he handed over the same to the informant Raju alias Kamta Prasad. Investigating Officer had interrogated him about this paper. In cross examination this witness has stated that he had visited village Rampatiya Ka Purwa, and village Dariyapur prior to the incident, these villages are situated within ½ km of distance. He drives the tempo from his

village Shivpuri to Khaga on the fateful day he was going to his village from Khaga; injured Raju and his mother met him on his way at around 3:00 pm. He scribed the report at police out post Vijaipur in the name of Raju alias Kamta Prasad.

16. PW1 Smt. Mantoriya, has been examined as eye witness of the incident, she is mother of the deceased. She identified the accused persons Buddhu, Dhaukal, Bhaiya Lal, Rajendra and Ram Swaroop before this court and stated that Ramswaroop is resident of village Gokulpur, and a relative of accused Bhaiyalal. Dhaukal and Buddhu are real brothers, Rajendra is nephew of Dhaukal and the accused persons are related to each other.

(i) She further stated in her evidence that the incident occurred two years ago, on the date of incident her son was weeding in his chili field, she had brought his meal in the field at 01:30 pm, suddenly her co-villagers Dhaukal, Bhaiya Lal, Bhuddhu, Rajendra and Ramswaroop appeared, who were armed with lathi, gun and Tamancha (country made pistol). Her son Raju alias Kamta was sitting to take meal, Bhaiya Lal exhorted and called other accused persons to kill him, he will spend whatever money would be required, whereupon Buddhu opened two fired by his gun, the shot fired by Buddhu hit Raju alias Kamata on his right waist and left knee. The incident was seen by Hiruwa who was ploughing his field in the vicinity, she raised an alarm and challenged the accused persons who fled away. Her son went to police station for lodging FIR in injured condition; he was sent to hospital and thereafter to Fatehpur for treatment. Her son Raju alias Kamta Prasad died in District Hospital, Fatehpur due to injuries

suffered in the incident, her son had produced written report at police station, he had studied up to class 8th, he got the report prepared at police station. Accused Dhaukal and others had got a case registered against her son and husband in collusion with police, in which her husband and son (decease) were challaned. They were implicated in a case of marpeeth (thrashing) and her sons and husband were released on bail in that case. The accused persons assaulted her son due to this enmity and he died due to injuries suffered in the incident. The Darogaji (Investigating Officer) met and interrogated her.

17. PW2 Shiv Mohan, who is father of the deceased is not an eye witness of the incident; he stated in his evidence that the incident occurred one month prior to two years of his statement before the Court, his son Raju alias Kamta Prasad was shot in the incident. He had gone to visit some relative on that day, where he got the information that accused persons present in the court named as Bhaiya Lal, Dhaukal, Buddhu, Rajendra and Ramswaroop had got his son injured by firing shots due to enmity. He came to hospital at Fatehpur on getting information, his son died in the hospital after 8-9 days of the incident due to injuries suffered in the incident. The scuffle (marpeet) had taken place some days ago between his son Raju alias Kamta Prasad and accused persons, and a case is still proceeding in regard to that incident. The accused Dhaukal and others had got him and his son Raju alias Kamta challaned on the basis of false report, the deceased and the witness were sent to jail in that case and were later released on bail. The accused persons had shot his son Raju alias Kamta Prasad due to enmity. Darogaji visited the village and took him and his wife at the spot of incident and

interrogated. He received information of this incident at village Tulsiput and reached at the hospital on the next day.

18. PW3 Dharamveer Singh, has stated that he found Raju alias Kamta Prasad, resident of Rampatiya Ka Purwa in injured condition. He got the written report prepared by him by dictating its contents, he wrote down whatever he dictated, he read-over the written report after scribing this to the informant and got his signature appended on that, on which Ext. Ka-1 is marked. He handed over the report to Raju after scribing this. Darogaji had interrogated him. In cross examination this witness has stated he was returning to his village from Khaga, the injured Raju alias Kamta Prasad and his mother met him at around 03:00 PM, he wrote down written statement at O.P. Vijaipur. In cross examination the witness denied suggestion that he scribed the false report at the behest of Athar.

19. PW4 Doctor K.N. Pandey is author of the postmortem report of the deceased Raju alias Kamta Prasad and has proved the postmortem.

20. PW6, SI Kamla Singh, who is first investigating officer of the case has testified that on 10.09.1995 he was posted as Sub Inspector at Police Station Kishanpur (District Fatehpur). The investigation of the case was entrusted to him on that day, the witness prescribed the steps taken by him in investigation of the case, he stated that he recorded statement of the victim/injured after much efforts. The case was registered in its presence and he had also signed the chick FIR. He conducted raids to apprehend the accused persons, but during the period in which investigation was interested to him they

could not be arrested. The investigation was later on resumed by Station House Officer himself. In cross examination the witness stated that injured visited the police station for lodging the FIR, he asked him about eye witnesses of the incident, whereupon he told name of his mother and one Hirwa of his village. He stated to him that these persons had not come to police station, the condition of the injured was very serious, when he visited the police station and for that reason he immediately sent him to hospital for treatment. He did not tried to record his dying declaration at that time, but he recorded his statement under Section 161 Cr.P.C. Chitthi Majrubi was not bearing his signature, as it was left due to inadvertence, Ext. Ka-2 is signed by constable Manoj, when the patient was sent to hospital he did not tried to put his clothes off and take the same in his custody. He visited the place of incident on the date of incident, but had not carried out local inspection, as it was night and none was present in the house of the informant. He did not record statement of eye witness Hirwa, he had not met him on that time. The witness verified the statement of deceased Raju alias Kamta Prasad recorded by him under Section 161 Cr.P.C. in his cross-examination, wherein he stated that on 10.09.1995 he was weeding in his field, his mother Smt. Mantoriya had got meal for her. Witness Hirwa was ploughing the field in the vicinity. The accused persons Dhaukal, Buddhu, Bhaiya Lal, Rajendra and Ramswaroop appeared there in a planned manner and while coming near him Bhaiya Lal and Ramswaroop exhorted to kill, whereupon Buddhu opened fire on him in indiscriminate manner which hit him on right side of waist, lower back and back side of left knee. He visited the spot on the date of incident, as he was lone officer at police station at that time.

21. PW7 SI Ram Bahddur Verma has testified the course of investigation conducted by him as second investigation, who was posted as Station House Officer at P.S concerned. He stated that after preliminary, he recorded statement of witnesses Hira @ Hiruwa and conducted spot inspection and prepared the site plan, which is exhibited as Ext. Ka-4. He also recorded statement of witnesses Chedi and Jagdish proceeded to trace the accused persons. On 13.09.1995 he came to know that accused Ramswaroop, Bhaiya Lal and Rajendra had surrender in the Court on 17.09.1995. He copied dying declaration of Raju alias Kamta Prasad in case diary and later on he went in search of Dhaukal and Buddhu, but could not find them. On 17.09.1995 he received information of surrender of accused Dhaukal in the Court. On 20.09.1995 he again tried to trace out the accused Buddhu and gave report for issuing process under Section 82 and 83 Cr.P.C. against him in the Court. On 21.09.1995 vide GD Report No.11 time 08:00 hours the case was converted from section 307 IPC to Section 302 IPC on account of death of the injured Raju. On 24.09.1995 he recorded statement of Smt. Mantoriya, mother of the deceased and Shiv Mohan, father of the deceased. On 27.09.1995 he recorded statements of the accused persons barring respondent No.2 Buddhu in jail after taking permission of the Court. On 11.10.1995 he received information regarding surrender of accused Buddhu in the court and thereafter he recorded his statement after taking permission of the court. On 18.09.1995 he recorded statements of the witnesses of inquest, on 20.10.1995 he sent the exhibits for scientific examination at FSL. He also recorded the statement of scribe of the written report namely Dharamveer Singh; after concluding the investigation and

finding sufficient evidence against accused persons Dhaukal and others and submitted chargesheet before the court against them under Sections 147, 148, 149, 302 IPC. The witness proved the chargesheet as Ext. Ka-5 by the evidence. He also proved Chik FIR as Ext. Ka-6, entries of registration of case vide GD Report No.22, time 18:20 hours dated 10.09.1995 in absence of its author head Moharir Yashwant Singh, as Ext. Ka-7. He also proved modified GD Report dated 21.09.1995 Report No.11 time 08:00 hours by which case was converted into Section 302 IPC, in absence of its author Constable Manoj Kumar who was posted with him and the witness was acquainted with his writing and signature. The modified GD report is exhibited as Ext. Ka-8. The witness also proved the inquest report and papers relating to postmortem of the deceased like Photo Nash, Chalan Nash, letter CMO, letter RI and these papers were exhibited as Ka-9 to 13. The witness also stated that the report of FSL is placed on record.

22. In cross examination, the witness stated that at the time of registration of the case, he was on duty outside the police station, but was not on leave. He came back to police station on 10.01.1995 at 19:45 hours, he received investigation of the case from previous Investigating Officer on 12.01.1995. He tried to record statement of one of the accused Mantoriya in the village, but did not visit the hospital for recording her statement. He could not obtain the clothes worn by the deceased due to his death during treatment. He recorded statement of Mantoriya on 24.09.1995, the incident occurred within jurisdiction of O.P. Vijaipur which was lying within police station headed by him. The place of incident is dacoity infested area. At the

time of incident the Gang was operated by one Athar Nian who was resident of village Rahmatpur, situated in the vicinity of police station. During investigation he did not get any information that deceased belonged to a gang of Atharmia, this fact is not stated in site plan that place of incident was 400-500 paces away from the village. The place of incident was an empty agricultural field, in which standing tree of Neem situated. This field belonged to Raju alias Kamta, the injured who later died, he has not shown in the site plan that Chili was planted in the field where incident occurred. He has also not shown the place of weeding (Nirai). He conducted spot inspection on the pointing out of eye witness Hiru alias Hirawa. The witness denied defence suggestion that investigation was carried out in the case was shoddy and was conducted under influence of the injured. The witness proved site plan of the place of occurrence, as Ext. Ka-4 being preferred by him.

23. PW8 Sri Gyan Prakash Srivastava, the then Naib Tehsildar Sadar, District Fatehpur has testified that on 11.09.1995 he visited District Hospital Fatehpur on orders of Sub Divisional Magistrate, Fatehpur where injured Raju alias Kamta prasad son of Shiv Mohan, resident of Rampatiya Ka Purwa, H/o Barar, Police Station Kishunpur, District Fatehpur admitted in emergency ward No.24, after general examination by doctor recorded his dying declaration, which is placed on record. He questioned him, as to what happened to him and why, they he replied on 10.09.1995 at around 10 to 11 hours in a day he was weeding in his chilli field; in the meanwhile his mother brought meal from home and he started eating this, suddenly Buddha, Dhaukal, Ramswaroop, Bhaiya Lal and Rajendra reached there and Buddha fired a shot at him which hit him,

Ramswaroop also fired a shot which hit him and he fell down, thereafter they fled away. He asked from the injured about enmity with the accused persons to which he replied that all of them were inimical terms with him, the marpeet occurred 10-12 days ago in which was sent to jail. He recorded the statement of the injured and read-over to him on which he affixed his thumb impression, which is attested by him. The doctor has endorsed the fact of fitness of patient after deposition. PW8 also stated that he prepared dying declaration of the deceased in his handwriting, on which Ext. Ka-14 is being marked. In cross-examination the witness stated that no written order of SDM Sadar addressed to him for recording dying declaration, which is placed on record. The order of SDM would be of information sent by hospital to P.S. Kotwali, he did not perused the bed head ticket of the patient, as he did not find its necessity.

24. The accused persons stated in their statement under Section 313 Cr.P.C. that witness has denied and testified against them falsely, they had lodged a two reports against deceased and his father, in which they were challaned, but for that count they had not borne any grudge against the deceased, and the allegations made against them with regard to cause of death of deceased Raju alias Kamta Prasad is false. They were not aware of the evidence of the prosecution papers. The Naib Tehsildar has given false information with regard to the dying declaration of the deceased, the case was falsely registered against them, as deceased was connected with a local gangster Athar, he would have been killed by some other persons. The deceased was the man of criminal antecedents and was held in jail custody also, he falsely implicated the accused Buddhu due to

enmity. The accused Ramswaroop stated that there were party bandi in village due to Gram Pradhan election, he was falsely implicated in the case due to village party bandi. Same statement was made by accused Bhaiya Lal.

25. DW1 Shukru Prasad, stated in his evidence that Gram Sabha Barar consists of 8 Purwa including Rampatiya Ka Purwa, he is resident of Roshanpur Purwa. Village Rampatiya Ka Purwa is situated towards north of his purwa. He is acquainted of deceased, his father Shiv Mohan and his family members. The deceased and his brothers, were four siblings. He was residing in Rampatiya Ka Purwa and his brothers are residing in village Simri Khei, he used to wander here and there and had thrown out his wife, he was also an accused in murder case which occurred in another village, he was also arrested alongwith fire arm. He was the member of the gang of Athar Mian, he came to know the fact Raju alias Kamta was shot by fire arm 4-5 days after this incident. The chilli field of Raju alias Kamta was lying north towards of the field of Shivdarshan.

26. DW2 Shiv Poojan testified that he resides in village Gokulpur, which is also included in Gram Sabaha, which is also included in Gram Sabha Barar and consists of 8 villages. The accused Ramswaroop is his brother and his wife Mithilesh is Gram Pradhan. The deceased Raju alias Kamta Prasad was challaned on the charge of possessing Fire Arms 8 years ago, in which he was also a witness. Deceased Raju alias Kamta Prasad had threatened him and warned him to stay away to depose against him. Accused Bhaiya Lal is a relative of Raju alias Kamta Prasad was also exerting pressure

on him also to refrain from deposing against him.

27. DW3 Awadh Bihari Shukla, was Lekhpal consolidation who stated in his evidence that he was posted as consolidation Lekhpal of village Barar since 12.01.1996 and used to visit different purwas of Gram Sabha Barar in connection with his official duties. He produced village original map of Mauza Barar, which is proved by his evidence and marked as Ext. Kha-2. He also produced Gunia, on which ME-1 was marked. He inspected site plan Ext. Ka-1 during his evidence and stated that in this site plan plot number or chak number is not mentioned.

28. DW4 Hira Lal alias Hiru is shown as witness in FIR, his statement under Section 161 Cr.P.C. was also recorded by Investigating Officer, in which he supported the prosecution version. However, he was discharged from evidence at the instance of informant on application of the informant, in which he stated that he had been warned her by the accused persons. He deposed as DW4, that his village is situated in Gram Panchayat Barar. He had gone at the field of Raju alias Kamta Prasad at around 12 to 01 hours of the day at the place of incident to quench his thirst, he saw Raju alias Kamta in the shadow of Neem tree in the field, his parents and younger brother were also present there, his mother was weeping and crying that someone assault him. The witness clarified that he neither saw the assailants nor the mother of injured told him the name of assailants. He had taken some agricultural field on batai there. The Investigating Officer had called him after one day of the incident, but he did not point out the place where Raju alias Kamta Prasad was lying. Accused are resident of

village Rampatiya Ka Purwa, it is wrong to say that he had stated the true facts to Investigating Officer.

29. Learned counsel for the appellants placed reliance on following judgments of Apex Court in support of defence case:-

(1) Mohd. Muslim Vs. State of Uttar Pradesh 2023 Live Law (SC) 489.

(2) Irfan @ Naka Vs. The State of Uttar Pradesh 2023 Live Law (SC) 698

(3) Shanid Khan Vs. State of Rajasthan 2016 (4) SC 96.

(4) Jafarudheen and others Vs. State of Kerala 2022 (8) SCC 440

(5) Harbeer Singh Vs. Sheshpal and Ors. 2016 (16) SCC 418

The relevant paragraphs of these judgments which are pertinent to this Criminal Appeal are being cited as follows:-

(i) In **Mohd. Muslim Vs. State of U.P. (now) Uttarakhand (supra)** where there was interpolation in the FIR which suggested that it was anti dated time, the chick FIR was sent to court with a delay of four days, the blanket and cycle alleged to be that of the accused appellant left behind and the site of the incident does not produced before the court; considerable delay in conducting the postmortem of the dead body and difference in name of the weapons of weapon of crime in statement of witnesses and the unnatural behaviour and the conduct of the son and nephew of the deceased reflected that prosecution has merely failed to prove that accused/appellant has committed the offence beyond reasonable doubt.

(ii) In **Irfan @ Naka Vs. The State of Uttar Pradesh** the Hon'ble Supreme Court while deciding the appeal under Sections 302, 436 and 326-A IPC

delve into the scope and evidential value of dying declaration, in that case there were two dying declaration observed as under :

.....43. *The juristic theory regarding the acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on the deathbed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason, the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the courts insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however, should always be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. [See: **Laxman v. State of Maharashtra, (2002) 6 SCC 710**]*

44. *The mode and manner, in which the dying declarations came to be recorded, is also something which creates a doubt, as regards its truthfulness and trustworthiness. Although, the Investigating Officer says that the recording of the dying declarations was video-graphed and the CD has been exhibited in evidence yet it is very important to determine the evidentiary value of the same.*

45. *We should also look into the genesis of the occurrence from a different*

angle. It is not in dispute that the three deceased died on account of severe burn injuries. It is also not in dispute that the room in which they were sleeping caught fire on account of which they suffered severe burn injuries. It is also not in dispute that inflammable substance like kerosene was found from the room which ignited the fire. However, the moot question is who set the room on fire? Could it be said that the prosecution has been able to prove beyond reasonable doubt that it was only and only the appellant-convict who set the room on fire by pouring the inflammable substance?

48. *The justification for the sanctity/presumption attached to a dying declaration, is two fold; (i) ethically and religiously it is presumed that a person while at the brink of death will not lie, whereas (ii) from a public policy perspective it is to tackle a situation where the only witness to the crime is not available.*

49. *One of the earliest judicial pronouncements where the rule as above can be traced is the King's Bench decision of the **King v. William Woodcock** reported in (1789) 1 Leach 500 : 168 ER 352, where a dying woman blamed her husband for her mortal injuries, wherein Judge Eyre held this declaration to be admissible by observing: -*

"...the general principle on which this species of evidence is admitted is, that they are declarations made in extremity, when the party is at the point of death and when every hope of this world is gone: when every motive to falsehood is silent, and the mind is induced by the most powerful consideration to speak the truth; a situation so solemn, and so awful, is considered by the law as creating obligation equal to that which is imposed by a positive oath administered in a Court

of Justice. (b) But a difficulty also arises with respect to these declarations; for it has not appeared and it seems impossible to find out, whether the deceased herself apprehended that she was in such a state of morality as would inevitably oblige her soon to answer before her Maker for the truth or falsehood of her assertions. Declarations so made are certainly entitled to credit; they ought therefore to be received in evidence: but the degree of credit to which they are entitled must always be a matter for the sober consideration of the Jury, under all the circumstances of the case."

(Emphasis supplied)

51. It is significant to note the observations made by Taylor that "Though these declarations, when deliberately made under a solemn sense of impending death, and concerning circumstances wherein the deceased is not likely to be mistaken, are entitled to great weight, if precisely identified, it should always be recollected that the accused has not the power of cross examination, a power quite as essential to the eliciting of the truth as the obligation of an oath can be, and that, where a witness has not a deep sense of accountability to his Maker, feelings of anger or revenge, or, in the case of mutual conflict, the natural desire of screening his own misconduct, may effect the accuracy of his statements and give a false colouring to the whole transaction. ...". [See: Taylor on "Treatise on the Law of Evidence", 1931, 12th Edition Pg. 462]

52. It is observed in **Corpus Juris Secundum Vol XL, Page 1283** that:

In weighing dying declarations, the jury may consider the circumstances under which they were made, as, whether they were due to outside influence or were made in a spirit of revenge, or when declarant was unable or unwilling to state the facts,

the inconsistent or contradictory character of the declarations, and the fact that deceased has not appeared and accused has been deprived of the opportunity to cross-examine him, and may give to them the credit and weight to which they believe, under all the circumstances, they are fairly and reasonably entitled."

53. In India in the relevant provision of Section 32 of the Act 1872, the first exception to the rule against admissibility of hearsay evidence, is as under:

"32(1). When it relates to cause of death. — When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

54. Jon R. Waltz, American Jurist observed that, "It has been thought, rightly or wrongly, that Dying Declarations have intrinsic assurances of trustworthiness, making cross examination unnecessary. The notion is that a person who is in the process of dying, and knows it, will be truthful immediately before departing to meet his Maker. (Of course, the validity of this hearsay exceptions is open to some debate. What about the person who is not deeply religious? What of the person who, as his last act, seeks revenge by falsely naming a life-long enemy as his killer? How reliable is he perception and memory of a person who is dying?)" [See: Waltz, J.R. (1975) Criminal Evidence, Chicago: Nelson-Hall. pp.75-76]

55. The Privy Council in **Neville Nembhard v. The Queen** reported in

(1982) 1 AII ER 183, on Section 32(1) of the Act 1872 opined that the evidence of dying declaration under the Indian law lacks the special quality as in Common Law and hence, the weight to be attached to a dying declaration admitted under Section 32 of the Act 1872 would necessarily be less than that attached to a dying declaration admitted under the common law rules.

58. This Court in **Nallapati Sivaiah v. Sub-Divisional Officer, Guntur, Andhra Pradesh** reported in (2007) 15 SCC 465 and **Bhajju alias Karan Singh v. State of Madhya Pradesh** reported in (2012) 4 SCC 327 had explained the meaning and principles of dying declarations upon which its admissibility is founded, with the following observations:-

“20. There is a historical and a literary basis for recognition

of dying declaration as an exception to the hearsay rule. Some authorities suggest the rule is of Shakespearian origin. In *The Life and Death of King John*, Shakespeare had made Lord Melun utter “Have I met hideous death within my view, retaining but a quantity of life, which bleeds away, ... lose the use of all deceit” and asked, “Why should I then be false, since it is true that I must die here and live hence by truth?” William Shakespeare, *The Life and Death of King John*, Act 5, Scene 4, lines 22-29.

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22. It is equally well settled and needs no restatement at our hands that dying declaration can form the sole basis for conviction. But at the same time due care and caution must be exercised in considering weight to be given to dying declaration inasmuch as there could be any number of circumstances which may affect

the truth. This Court in more than one decision has cautioned that the courts have always to be on guard to see that the dying declaration was not the result of either tutoring or prompting or a product of imagination. It is the duty of the courts to find that the deceased was in a fit state of mind to make the dying declaration. In order to satisfy itself that the deceased was in a fit mental condition to make the dying declaration, the courts have to look for the medical opinion.

23. It is not difficult to appreciate why dying declarations are admitted in evidence at a trial for murder, as a striking exception to the general rule against hearsay. For example, any sanction of the oath in the case of a living witness is thought to be balanced at least by the final conscience of the dying man. Nobody, it has been said, would wish to die with a lie on his lips. A dying declaration has got sanctity and a person giving the dying declaration will be the last to give untruth as he stands before his creator.

24. There is a legal maxim “*nemo moriturus praesumitur mentire*” meaning, that a man will not meet his Maker with a lie in his mouth. Woodroffe and Amir Ali, in their *Treatise on Evidence Act* state:

“when a man is dying, the grave position in which he is placed is held by law to be a sufficient ground for his veracity and therefore the tests of oath and cross-examination are dispensed with”.

25. The court has to consider each case in the circumstances of the case. What value should be given to a dying declaration is left to court, which on assessment of the circumstances and the evidence and materials on record, will come to a conclusion about the truth or otherwise of the version, be it written, oral, verbal or by sign or by gestures.”

(Emphasis supplied)

59. This Court in **Bhajju alias Karan Singh Vs. State of MP (2012) 4 SCC 327** has observed as under:

“23. The “dying declaration” essentially means the statement made by a person as to the cause of his death or as to the circumstances of the transaction resulting into his death. The admissibility of the dying declaration is based on the principle that the sense of impending death produces in a man's mind, the same feeling as that of a conscientious and virtuous man under oath. The dying declaration is admissible upon the consideration that the declaration was made in extremity, when the maker is at the point of death and when every hope of this world is gone, when every motive to file a false suit is silenced in the mind and the person deposing is induced by the most powerful considerations to speak the truth.

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26. The law is well settled that a dying declaration is admissible in evidence and the admissibility is founded on the principle of necessity. ...”

62. There is no hard and fast rule for determining when a dying declaration should be accepted; the duty of the Court is to decide this question in the facts and surrounding circumstances of the case and be fully convinced of the truthfulness of the same. Certain factors below reproduced can be considered to determine the same, however, they will only affect the weight of the dying declaration and not its admissibility: -

(i) Whether the person making the statement was in expectation of death?

(ii) Whether the dying declaration was made at the earliest

opportunity? “Rule of First Opportunity”

(iii) Whether there is any reasonable suspicion to believe the dying

declaration was put in the mouth of the dying person?

(iv) Whether the dying declaration was a product of prompting, tutoring or leading at the instance of police or any interested party?

(v) Whether the statement was not recorded properly?

(vi) Whether, the dying declarant had opportunity to clearly observe the incident?

(vii) Whether, the dying declaration has been consistent throughout?

(viii) Whether, the dying declaration in itself is a manifestation / fiction of the dying person's imagination of what he thinks transpired?

(ix) Whether, the dying declaration was itself voluntary?

(x) In case of multiple dying declarations, whether, the first one inspires truth and consistent with the other dying declaration?

(xi) Whether, as per the injuries, it would have been impossible for the deceased to make a dying declaration?

63. It is the duty of the prosecution to establish the charge against the accused beyond the reasonable doubt. The benefit of doubt must always go in favour of the accused. It is true that dying declaration is a substantive piece of evidence to be relied on provided it is proved that the same was voluntary and truthful and the victim was in a fit state of mind. It is just not enough for the court to say that the dying declaration is reliable as the accused is named in the dying declaration as the assailant.

(iii) In **Shahid Khan Vs. State of Rajasthan** (supra) the accused appellant was convicted of charge under Sections 147, 148, 302/149 and 397 IPC by High Court. There was a concurrent finding of guilt of appellant and co-accused with regard to charge under Section 302/149 and

148 IPC and he was sentenced for these charges. The deceased suffered four stab wounds, two incised wounds and one abrasion in the incident. He was declared brought dead “on reaching the hospital”. He died on injuries sustained in homicide violence allegedly authored by the appellants and co-accused. The statement of main witnesses of facts was recorded after three days of the offence in the opinion of Apex Court no explanation is forthcoming as to why they are not examined after three days. It is also not known as to how the police came to know that these witnesses saw the occurrence. The court further observed that the delay in recording the statements of witnesses during investigation caused serious doubt about there being eye witnesses to the occurrence, it may suggest that the investigating officer was deliberately marking time with a view to decide about the shape to be given to the case to the eye witnesses to be produced. The circumstances in this case lend such significance to this delay in view of unexplained silence and delayed statements of main witnesses PW25 and PW24 to the police, in view of their unexplained silence and delayed statement to the police does not appear to us to be wholly reliable witnesses. There is no corroboration of their evidence from any other independent source either. Therefore, it was found unsafe to rely on their evidence only to approach conviction and sentence of the appellant. The High Court has failed to overt the contentions raised by the appellants and reappreciate the evidence thereby resulting in miscarriage of justice. The case against the appellants has not been proved beyond reasonable doubt, consequently the appeals are allowed and conviction of sentence to the appellants set aside.

(iv) In **Jafarudheen and others Vs. State of Kerala** (supra) the deceased of the accused belonged to two different political parties, there was an altercation between the affiliated political members on 17.07.2002 prior to main occurrence of the murder of deceased. In the altercation on 17.07.2002 the deceased had reportedly assaulted the accused No.2. The accused were 16 in numbers and assembled at the family house of accused No.5 on the same day at about 7:00 pm and hatched a conspiracy to take out the life of the deceased i.e. three hours of the incident of altercation and resultantly the deceased was done to death by accused persons. The four accused persons were acquitted for charge of conspiring to commit murder of the deceased. However, High court recorded conviction of the appellants setting-aside order of the acquittal passed by trial court.

The Apex Court in appeal against conviction reiterated the law laid down in regard to appeal against acquittal, as laid down in **Shivlal Vs. State of Chhattisgarh, 2011 (9) SCC 561 and Rajeevan Vs. State of Kerala (2003) 3 SCC 355, State of Rajasthan Vs. Om Prakash (2002) 5 SCC 745, Shahid Khan Vs. State of Rajasthan (2016) 4 SCC 96, Ganesh Bhavan Patel Vs. State of Maharashtra (1978) 4 SCC 371** and some other important judgments on the subject.

Hon’ble Apex Court observed in paragraph No.36 of the judgment that trial court had the advantage of seeing the witnesses as they deposed. The appellate forum cannot change the conclusion arrived at thereafter by substituting its views. It seems to us that the High Court has adopted the principle of preponderance of probability as could be applicable to the civil cases to the case on hand when more scrutiny is warranted for reversing an order

of acquittal. The prosecution has to prove its fundamental facts.

(v) In **Harbeer Singh Vs. Sheeshpal and others** (supra) the two appeals were filed, one of State and other by son of the deceased against judgment of High Court dated 25.11.2011, where by the conviction and sentence recorded by trial court against the respondents was set-aside.

Hon'ble Supreme Court while deciding both the appeals observed as under:-

.....7. However, the High Court gave the benefit of doubt to the Respondents and acquitted them on the ground that the prosecution was not able to prove its case beyond all reasonable doubt since the eye-witnesses were interested in the complainant and hence unreliable, while most other prosecution witnesses were chance witnesses. The evidence of the eye-witnesses both as to the fact of the alleged conspiracy and the murder of the deceased, did not inspire confidence; there were inconsistencies and improvements in the deposition of the prosecution witnesses made over their statements recorded under Section 161 Cr.P.C. Further, there was unexplained delay in recording the evidence of certain prosecution witnesses as well as many important and basic lapses in investigation that made the prosecution case suspicious.

9. In Himachal Pradesh Administration Vs. Shri Om Prakash, (1972) 1 SCC 249, it was held by this Court:-

“In appeals against acquittal by special leave under Article 136, this Court has undoubted power to interfere with the findings of fact, no distinction being made between judgments of acquittal and conviction, though in the case of acquittals it will not ordinarily interfere with the appreciation of evidence or on findings of

fact unless the High Court ‘acts perversely or otherwise improperly’.”

11. It is a cardinal principle of criminal jurisprudence that the guilt of the accused must be proved beyond all reasonable doubt. The burden of proving its case beyond all reasonable doubt lies on the prosecution and it never shifts. Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. [Vide Kali Ram Vs. State of Himachal Pradesh, (1973) 2 SCC 808; State of Rajasthan Vs. Raja Ram, (2003) 8 SCC 180; Chandrappa & Ors. vs. State of Karnataka, (2007) 4 SCC 415; Upendra Pradhan Vs. State of Orissa, (2015) 11 SCC 124 and Golbar Hussain & Ors. Vs. State of Assam and Anr., (2015) 11 SCC 242].

18. Further, the High Court has also concluded that these witnesses were interested witnesses and their testimony were not corroborated by independent witnesses. We are fully in agreement with the reasons recorded by the High Court in coming to this conclusion.

19. In Darya Singh Vs. State of Punjab, AIR 1965 SC 328 = 1964 (7) SCR 397, this Court was of the opinion that a related or interested witness may not be hostile to the assailant, but if he is, then his evidence must be examined very carefully and all the infirmities must be taken into account. This is what this Court said:

“There can be no doubt that in a murder case when evidence is given by near relatives of the victim and the murder is alleged to have been committed by the enemy of the family, criminal courts must examine the evidence of the interested

witnesses, like the relatives of the victim, very carefully.....But where the witness is a close relation of the victim and is shown to share the victim's hostility to his assailant, that naturally makes it necessary for the criminal courts examine the evidence given by such witness very carefully and scrutinise all the infirmities in that evidence before deciding to act upon it. In dealing with such evidence, Courts naturally begin with the enquiry as to whether the said witnesses were chance witnesses or whether they were really present on the scene of the offence.....If the criminal Court is satisfied that the witness who is related to the victim was not a chance-witness, then his evidence has to be examined from the point of view of probabilities and the account given by him as to the assault has to be carefully scrutinised."

20. However, we do not wish to emphasise that the corroboration by independent witnesses is an indispensable rule in cases where the prosecution is primarily based on the evidence of seemingly interested witnesses. It is well settled that it is the quality of the evidence and not the quantity of the evidence which is required to be judged by the Court to place credence on the statement.

23. The defining attributes of a 'chance witness' were explained by Mahajan, J., in the case of *Puran Vs. The State of Punjab*, AIR 1953 SC 459. It was held that such witnesses have the habit of appearing suddenly on the scene when something is happening and then disappearing after noticing the occurrence about which they are called later on to give evidence.

25. In the light of the above and other reasons recorded by the High Court, we hold that the evidence of the eye witnesses is not truthful, reliable and

trustworthy and hence cannot form the basis of conviction. Their presence at the scene of occurrence at the time of the incident is highly unnatural as also their ability to individually and correctly identify each of the accused from a considerable distance, especially when it was dark at the alleged place of occurrence, is itself suspect.

30. On perusal of evidence on record including the impugned judgment passed by learned trial court it appears that incident occurred on 10.09.1995 at 01:30 PM, and FIR thereafter was lodged by the deceased in injured condition himself on same day at 18:30 hours under Sections 147, 148, 149, 307 IPC at Police Station Kishanpur, District Fatehpur against the named accuse persons Dhaukal, Buddhu, Bhaiya Lal, Rajendra and Ramswaroop. Accused Ramswaroop in his statement under Section 313 Cr.P.C. admitted that accused Dhaukal and Buddhu are real brothers, Rajendra is nephew of Dhaukal, Bhaiya Lal is cousin of accused Dhaukal, accused Ramswaroop is relative of Bhaiyalal. All the accused persons for the charge under Section 148, 149 IPC, accused Buddhu was charged under Section 302 IPC (simplisitor) and remaining accused persons namely Dhaukal, Bhaiyal Lal, Rajendra and Ramswaroop were charged under Section 302/149 IPC. Prosecution examined PW1 Smt. Mantoriya, the mother of the deceased as eye witness, PW2 Shiv Mohaan, the father of the deceased who is not an eye witness was not present in the village on the day of incident. He stated that accused persons belonged to his own Khnandan, Bhaiya Lal is his relative. Bhaiya Lal is cousin of Dhaukal and Buddhu, Ramswaroop is resident of village Gokulpur. He had gone to the place of some relative and where he

was apprised of this incident that his son was shot at by accused persons due to enmity and he was hospitalized in Civil Hospital at Fatehpur, his son died due to injuries suffered in the incident after 8 to 9 days. After getting information of the incident he went to the hospital straightway, he also admitted that he resides in village Chandanapur at the time of this incident. This witness was given a suggestion during cross-examination by accused side. Accused Dhaunkal had lodged a report of marpeet against prosecution side of the case in regard to the incident of same day in which his daughter suffered serious injuries and she died next day, due to injuries received in the incident. He has also denied that his son belonged to gang of one Athar of locality and was involved in case of dacoity and murder, the witness denied this suggestion. From evidence of witnesses it appears that barring accused Ramswaroop, other accused persons belonged to same family, and Ramswaroop is related to them.

31. In this case DW3 Hirwa is projected as independent eye witness in FIR itself authored by the deceased Raju alias Kamta Prasad. The Investigating Officer recorded his statement under Section 161 Cr.P.C on 12.09.1995 i.e. after two days of the incident in which he has supported the FIR version. However, he did not appear as prosecution witness and was later examined as DW3.

32. PW7 S.O. Ram Bahadur Varma has stated in his evidence before the court that he conducted spot inspection of the case on the date of incident on 12.09.1995 and prepared site plan of the place of incident at pointing out of witness Hirwa. There is some inconsistency in the stand of prosecution with regard to role

assigned to accused Ramswaroop in the offence. In FIR authored by the deceased and scribed by PW3 Dharamveer it is stated that at the time of incident deceased/informant Raju alias Kamta Prasad was sitting to take meal brought by his mother from home in his agricultural field, he was weeding grass and straws from his chili field, when his mother brought meal for him. The accused attacked him while he was sitting to take his meal, Bhaiya Lal exhorted the other accused persons to kill him, whereupon Buddhu opened two fires which hit his right waist and left knee, he fell on the ground being injured and accused took to their heel thereafter. The incident was witnessed by his mother Smt. Mantoriya and one Hirwa son of Kichadoo, who was ploughing the field alongwith the mother of victim Mantoriya. In FIR the injured Raju alias Kamta Prasad has assigned role of exhortation to accused Bhaiya Lal and role of firing two shots to accused Buddhu, he has not assigned any specific role to other appellants in FIR.

33. PW6 Kamla Singh, the first investigating officer stated in his cross examination that he met the deceased (then injured) at Police Station when he came to lodge his report, he told him that his co-villager Hirwa is eye witness. However, no person accompanied him as the condition of injured (Raju) was very serious, he immediately sent him to hospital, he has recorded his statement under Section 161 Cr.P.C. on that day, but he did not make effort to record his dying declaration. On the date of incident Station House Officer was not present in the police station, FIR was lodged in his presence and he has signed the Chik FIR. The witness has proved the statement under Section 161 Cr.P.C of the deceased Raju alias Kamta

Prasad, will be treated as a first dying declaration.

34. In *Laxman Singh Vs. State of Maharashtra*, 2002 (6) SCC 710 the Hon'ble Apex Court held that the situation in which a man is on death bed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the court insists that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however has to always be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and in any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a magistrate or a doctor or a police officer. When it is recorded, no oath is necessary nor is the presence of a magistrate is absolutely

necessary, although to assure authenticity it is usual to call a magistrate, if available for recording the statement of a man about to die. There is no requirement of law that a dying declaration must necessarily be made to a magistrate and when such statement is recorded by a magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind.

35. **The Divisoin Bench of this Court in *Gulab Singh Vs. State of U.P.* 2003 (47) ACC 161** has held that the statement of the victim recorded under Section 161 Cr.P.C. by the Investigating Officer amounts to dying declaration, where statement was recorded after lodging the FIR at the instance of victim himself.

36. In the present case also the statement of victim Raju alias Kamta was recorded under Section 161 Cr.P.C. by the Investigating Officer on the date of incident i.e. 10.09.1995 which also may be treated as his dying declaration which preceded the dying declaration recorded by the Executive Magistrate on 11.09.1995 at 07:45 am (Ext. Ka-14) . PW6 SI Kamla Singh (first Investigating Officer) has proved the statement under Section 161 Cr.P.C. of deceased which amounts to dying declaration during his evidence before the court, in which he reproduced the version of deceased Raju alias Kamta who was injured at that time. In paragraph No.6 of his testimony the Investigating Officer stated that the injured Raju alias Kamta stated to him that he was weeding

straw and grass from his field on 10.09.1995, his mother Mantoriya brought meal for her in the field, witness Hirwa son of Kichadoo was ploughing his field nearby his co-villagers Dhaukal, Buddhu, Bhaiya Lal, Rajendra and Ramswaroop resident of Gokulpur came to him in the merely in a planned manner and on reaching near him Bhaiya Lal and Ramsraroop exhorted the the accused persons to kill him, whatever money would be required they would spend, whereupon Buddhu fired two shots at him indiscriminately which hit him on right side of his waist and left knee.

37. The written report Ext. Ka1 which forms basis of lodging of FIR Ext. Ka-6 scribed by Dharamveer Singh and deceased Raju alias Kamta Prasad was its author. The written report bears its thumb impression. In FIR there is slight variation of sequence of events as stated in section 161 Cr.P.C. of the informant. In FIR the informant has stated that on exhortation of Bhaiya Lal, Buddhu opened two fires by his fire arm, whereas in statement under Section 161 Cr.P.C. he has stated that Bhaiya Lal and Ramswaroop exhorted other accused persons to kill him. Ext. Ka-14 dying declaration recorded by Nayab Tehsildar.

38. PW8 Gyan Prakash Srivastava, stated that the statement of victim Raju alias Kamta in reiterated in question answer form. In Ext. Ka-14 it is stated that dying declaration of injured Raju alias Kamta was recorded on 11.09.1995 at 07:45 am who was admitted in emergency ward bed No.24 of District Hospital. The victim stated that on 10.09.1995 between 10 to 11 hours he was weeding out grass and straws from his chili field, his mother brought meal for him at at that time and he started to have a meal, the accused Buddhu,

Bhaiya Lal, Rajenddra his co-villagers and Ramswaroop resident of Gokulpur appeared suddenly and Buddhu fired a shot at him by his gun from distance, which hit him and the second fire was shot at him by Ramswaroop, he fell. There was enmity between him and accused persons and marpeet took place between 10 to 12 days before in which he was sent to jail. This dying declaration bears certificate of doctor to the effect that patient Raju alias Kamta was mentally fit to make statement during the whole period of giving his statement.

39. In the facts of the case, certificate of doctor approved on Ext. Ka14 which is proved by the author of dying declaration PW8 in his testimony before the court is sufficient to prove the fact that deceased was in fit state of mind to depose as to the cause of his death or as to circumstances of the transaction which resulted in his death or in other words to make his dying declaration, even in absence of the doctor who has certified his fitness of mind and his ability to speak on margin of dying declaration. This fact has not been disputed that deceased visited the police station to lodge his FIR by way of written statement Ext. Ka-1 and his dying declaration was recorded next day by the Magistrate. He died on 17.09.1995 i.e. after 7 days of the incident during treatment in the hospital. Therefore, the dying declaration recorded and proved by the Executive Magistrate, (PW8) is an admissible and reliable in evidence regarding regarding relevant facts attending to present case.

40. In Magisterial dying declaration Ext. Ka-14, there is slight variation in stand of the deceased in a manner of causing fire arm injuries to him by accused persons from his FIR and

statement recorded under Section 161 Cr.P.C. by the Investigating Officer which also amounts to dying declaration. In FIR and statement under Section 161 Cr.P.C. the victim has attributed role of causing fire arm injury to accused Buddhu, whereas in Magisterial dying declaration he has attributed role of causing fire arm injury to accused Buddhu and Ramswaroop and role of exhortation is attributed to accused Bhaiya Lal.

41. In the present case apart from two dying declarations of the deceased Raju alias Kamta Prasad one recorded by Investigating Officer on the date of incident and after lodging of FIR, and the other was recorded by Naib Tehsildar in District Hospital. As FIR in the case was itself lodged by the deceased on reaching at Police Station, it may also be treated as dying declaration. In all these three dying declarations the variation is mainly on point of role attributed to accused Ramswaroop. In FIR it is stated that on being exhorted by Bhaiya Lal, Buddhu fired two shots at informant which hit in right side of his waist and left knee. Statement under Section 161 Cr.P.C. is proved by PW6, the first Investigating Officer, the deceased is stated to have said that on being exhorted by Bhaiya Lal and Ramswaroop, Buddhu fired two shots indiscriminately which hit him on right side of waist and left knee joint. In dying declaration recorded by Naib Tehsildar in the hospital on 11.09.1995 which is duly proved as Ext. Ka-14 by its author, PW8 Sri Gyan Prakash Srivastava, in which deceased has stated that occurrence took place at between 10 to 12 in day hours on 10.09.1995 while he was weeding out straw and grass from his chili field and on being supply meal by his mother he started eating it first fire was shot by Buddhu and second

fire was shot at him by Ramswaroop. The first fire was shot by Buddhu from distance by his gun and second fire was shot by Ramswaroop. Both fires hit him, he fell down and thereafter the miscreants took to their heal. In all the three dying declarations including FIR, name of all the appellants Bhaiya Lal, Buddhu, Ramswaroop and Rajendra has been mentioned.

42. PW1 Smt. Mantoriya, mother of the deceased is projected as eye witness of the incident who is also stated in her evidence that accused persons Buddhu, Bhaiya Lal, Rajendra and Ramswaroop are know to her, except Ramswaroop other co-accused persons are resident of village, Ramswaroop is resident of Gokulpur who is relative of Bhaiya Lal. In examination in Chief PW1 has stated that on being exhorted by Bhaiya Lal, Buddhu opened two fire at his son Raju alias Kamta which hit him on right side of waist and left knee. Her son Raju alias Kamta the injured went to lodged FIR at Police Station, from where he was sent to district hospital, Fatehpur, where he died due to injuries suffered in this incident. PW1 Mantoriya and PW2 Shiv Mohan are parents of the deceased and both have stated in their evidence that there was enmity between deceased and accused persons. In cross examination this witness has stated that she had heard sound of two fire arms, both fires were shot by accused Buddhu, her son had taken meal in the morning before moving to his field, he was conducting weeding by Khurpi from his chili field, she reached at the field at around one and half hours. She is not proficient to read the watch, as his son stated to her that she had brought meal at 1 ½ hours, she came to know that it was one and half hour in the day, the blood was spread at the place where her son received

fire arm shots. He was wearing pant and shirt at that time, his clothes got blood stained due to fire arm injuries. He went to police station in same clothes worn at the time of incident. The blood strains might have been washed due to traversing of field by cattle. When her son was challenged by accused he ran towards Ganga, but he was shot at by accused Buddhu while chasing him. First fire was shot by Buddhu and the other fire was shot by Ramswaroop. Thus, inspite of variation with regard to role of firing attributed to accused Ramswaroop in dying declaration the deceased and cross examination of PW1, this is significant that in all these three dying declarations including the evidence of PW1, the role of firing is consistently attributed to accused Buddhu and for that reason he has been convicted for charge under Section 302 IPC simplicitor and other accused persons are convicted for charge under Section 302 IPC read with section 149 IPC by learned trial judge.

43. PW1 has also stated in cross-examination that Buddhu shot two fires at deceased. Her son was speaking even after getting hurt by firearm injury and was conscious. He has stated in cross-examination that she lifted her son from the place of incident and visited the police station alongwith injured. The witnesses Rujanwa, Devtaha and Rajaram also accompanied her, whereas in statement of PW6, the Investigation Officer this fact surfaced that deceased visited the police station alone and was not accompanied by any other person. However, PW6 has stated that condition of the informant was very serious and for that reason he was sent to District Hospital from Police Station, she was sent to hospital just after lodging of FIR.

44. PW1 has stated that at the time of lodging the FIR she was removed from

police station, she had spoken to his son in the night. She denied the defence suggestion that Athar Nian (local muscle man) visited her son in the hospital in the night. She was given suggestion by defence that as there was Arhar field near place of occurrence, where Buddhu opened fired. She could not see the firing this suggestion infact fortifies prosecution case atleast with regard to involvement of accused Buddhu in the offence. This witness has also given defence suggestion that at the time of incident wife of Ramswaroop was village Pradhan and she has implicated Ramswaroop only due to influence of Athar Mian. This prosecution evidence with regard to role of firing attributed to Ramswaroop is highly doubtful and version of the deceased and PW1 on that point is not reliable.

45. Investigating Officer, PW7 who conducted spot inspection of the place of incident has stated in his evidence as PW7 that he had carried out spot inspection at pointing out of Hira alias Hiruwa DW4 and prepared site plan in his writing and signature which is marked as Ext. Ka-4. Both witnesses Hira alias Hiruwa deviated from his statement under Section 161 Cr.P.C. recorded by PW6 the first investigating officer, wherein he supported the prosecution case in his testimony as DW4 and has stated as defence witness that he could not see the incident of firing at injured Raju alias Kamta Prasad. Yet he stated that that he visited the place of occurrence to quench his thirst around 12 to 01 hours in the day and found Raju alias Kamta Prasad and his parents present in the shadow of neen tree standing in the field, his mother was weeping saying that some body assaulted Raju, but she did not disclose the name of assailants. Chari was sown in the field, where Raju alias Kamta

was lying, but it was harvested at that time, Jawar and Bazra was sown near by his field. PW7 stated that he had not tried to record the statement of Mantoriya by visiting the hospital. He recorded statement of witness Hira alias Hiruwa on 12.09.1995, PW6 has stated that a river flows by the side of the village in northern side. Deceased stated name of his co-villagers Hira alias Hiruwa as an eye witness. The circumstances strongly suggest that Hira alias Hiruwa were present on the spot at the time or just after the incident and for reasons best known to him he did not appear as witness of prosecution during trial, otherwise there was no reason that Investigating Officer would have conducted spot inspection on 12.09.1995 at his pointing out.

47. PW7 has stated in cross-examination that the place where deceased was shot was vacant and a neem tree was lying there in this field was belonged to Raju alias Kamta. He has not mentioned this fact that the field where incident occurred was chili field, he has not stated this fact also in site plan that straws were weeded out from this field at the time of incident, as he inspected the place of incident after two days. He did not find any sign of taking meal there, he did not find any wad, empties and blood stained on the place of incident. He has marked the place from where witness Hira alias Hiruwa had seen the occurrence, only due to fact that Investigating Officer had not shown plantation of chili in the field where deceased was shot dead or he was taking meal is expected from the fact that in evidence of PW1 this fact is emerged that on being exhorted by Bhaiya Lal, the injured ran to some extent and he was sought at from behind. Neither in FIR nor the dying declaration the deceased has

stated that he was taking meal in the same field where he was weeding. Thus, this statement of investigating officer is not contrary to prosecution case.

48. Despite aforesaid discrepancies pointed out by defence in prosecution evidence, this fact is proved beyond reasonable doubt that accused Buddhu on alleged place date and time of incident fired two shots at the deceased which hit him on his knee, vital parts of waist and knee due to which he received serious injuries which culminated in his death after seven days of the incident at 07:45 PM during his treatment at district hospital and assailant Buddhu was accompanied by accused Dhaukal and Ramswaroop. Bhaiya Lal exhorted the assailant Buddhu at the time of incident and thereafter Buddhu caused two fire arm injuries to deceased Raju alias Kamta Prasad. Although no specific role has been assigned in dying declaration of the deceased or in testimony of eye witness PW1 Smt. Mantoriya to remaining accused Dhaukal and Rajendra, but presence of all the accused persons at the place and time of incident is proved by dying declaration of the deceased and evidence of PW1 Smt. Mantoriya. There is nothing on record which negates their presence on the spot.

49. In **Sucha Singh And Anr vs State Of Punjab AIR 2003 (SC) 3617** the Hon'ble Supreme Court held that even if major portion of evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, his conviction can be maintained. It is the duty of Court to separate grain from chaff. Where chaff can be separated from grain, it would be open to the Court to convict an accused notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons. 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" has no application in India and the witnesses cannot be branded as liar. The maxim "falsus in uno falsus in omnibus" has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to, is that in such cases testimony may be disregarded, and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a Court may apply in a given set of circumstances, but it is not what may be called 'a mandatory rule of evidence'.

50. Evidence has been adduced by any of the evidence regarding their presence else where at the time of incident. In a recent judgment of Hon'ble Supreme Court in **Parshuram Vs. State of M.P. Criminal Appeal No.524 of 2021 delivered on 03.11.2023** placed reliance on its proved judgment in **Masalti Vs. State of U.P. (1964) 8 SCR 133** held as under:-

".....14. It could thus clearly be seen that the Constitution Bench has held that it is not necessary that every person constituting an unlawful assembly must play an active role for convicting him with the aid of Section 149 of IPC. What has to be established by the prosecution is that a person has to be a member of an unlawful assembly, i.e. he has to be one of the persons constituting the assembly and that he had entertained the common object along with the other members of the assembly, as defined under Section 141 of IPC. As provided under Section 142 of IPC, 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."

51. In **Masalti Vs. State of U.P. Hon'ble Apex Court** (supra) observed as under:-

*"17. What has to be proved against a person who is alleged to be a member of an unlawful assembly is that he was one of the persons constituting the assembly and he entertained along with the other members of the assembly the common object as defined by Section 141 IPC. Section 142 provides that 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. In other words, an assembly of five or more persons actuated by, and entertaining one or more of the common objects specified by the five clauses of Section 141, is an unlawful assembly. The crucial question to determine in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified by Section 141. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly. It is in that context that the observations made by this Court in the case of **Baladin [AIR 1956 SC 181]** assume significance; otherwise, in law, it would not be correct to say that before a person is held to be a member of an unlawful assembly, it must be shown that he had committed some illegal overt act or had been guilty of some illegal omission in pursuance of the common object of the*

assembly. In fact, Section 149 makes it clear that 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 of 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; and that emphatically brings out the principle that the punishment prescribed by 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 the unlawful assembly.....”

52. Thus in view of the law laid down by Hon'ble Apex Court in **Masalti Vs. State of U.P.** (supra) as well as **Parshuram Vs. State of M.P.** all the five accused persons are vicariously liable for act done by one of them, which is under Section 149 IPC for causing death of deceased on given date time and place and they cannot be exculpated from liability that no specific role has been attributed to two of them in FIR as well as in prosecution evidence. In so far as the charge under Section 302 IPC is concerned, taking into account dying declaration of the deceased, eye witness account of PW1 and medical evidence adduced by PW4 doctor K.N. Pandey, author of the injury report of the deceased in injured condition, PW5 doctor Anil Kumar Shukla, the author of postmortem examination of the deceased, we find that a deadly weapon like gun was used in the offence while causing such bodily injuries to victim Raju alias Kamta Prasad which ultimately resulted in his death. However, this fact cannot be lost sight that in postmortem report, cause of death has been shown as Toxemia and Septicemia as a result of ante-mortem

injuries. Onset of Toxemia and Septicemia is not normal phenomenon of gun shot injuries and this symptom of often occurs due to non administration of proper medical treatment. The seats of injury are non vital part of the body i.e waist and knee and there is at least 6 hours duration between the incident and first visit of the injured in hospital as per record. Thus, keeping in view the totality of the facts and circumstances of the case, we do not find it a case where fire arms injuries was caused to deceased by assailant Buddhu with intention to cause death, which is a prerequisite of offence of murder, but from the facts and circumstances of the case it is inferred that the act by which death is caused was done with intention to cause such bodily injuries as is likely to cause death. Thus, the appellant Buddhu who is attributed role of causing fire arm injuries to deceased which proved fatal later on, is liable to be altered from Section 302 IPC to section 304(1) IPC and conviction of appellants Dhaukal, Bhaiya Lal, Rajendra and Ramswaroop from Section 302 IPC read with Section 149 IPC to Section 304(1) IPC read with section 149 IPC.

53. Conviction of appellant Buddhu for charge under Section 302 IPC, and conviction and sentence of other accused appellants for charge under Section 302 read with section 149 IPC is hereby modified/altered to Section 304(1) IPC and Section 304(1) read with Section 149 IPC, respectively.

54. The appellant Buddhu is sentenced to 10 years rigorous imprisonment for charge under Section 304(1) IPC, and Rs.10,000/- fine and in case of default of payment of fine he will further have to suffer eight months additional imprisonment in default. The

conviction and sentence awarded to the appellants for charge under Section 148 IPC is hereby affirmed.

55. Other appellants namely Dhaukal, Bhaiya Lal, Rajendra and Ramswaroop are sentenced to seven years rigorous imprisonment and Rs.7,000/- fine for charge under Section 304 (I) read with section 149 IPC. In case of default of payment of fine they are awarded six months default sentence. The period of custody undergone by the appellants will be set-off to sentence awarded in this modified order. All the sentences will concurrently. The appeal stands partly allowed accordingly and conviction and sentence awarded to the appellants in impugned judgment will be deserved to be modified in above manner.

56. Let the copy of the judgment be sent to Sessions Judge, Fatehpur to ensure compliance of this appellate judgment. The appellants who were enlarged on bail in this appeal are directed to surrender before the court concerned to undergo this modified conviction and sentence.

57. Let lower court record be sent back immediately to session judge, Fatehpur for necessary action. In case of non-appearances of appellants before the Court below, they will be taken into custody without any delay by court concerned and sent to jail for undergoing this modified order and sentence.

(2024) 4 ILRA 1155
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.04.2024

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE MOHD. AZHAR HUSAIN
IDRISI, J.

Criminal Appeal No. 843 of 2018

Shripal Yadav **...Appellant**
Versus
State of U.P. **...Respondent**

Counsel for the Appellant:

Sri Ram Kesh, Sri Saroj Kumar Dubey, Sri Virendra Pratap Pal

Counsel for the Respondent:

Govt. Advocate

Criminal Law - Indian Penal Code, 1860 – Sections 452 & 376-D – Protection of Children from Sexual Offences Act, 2012 – Sections 5-G & 6 – Code of Criminal Procedure, 1973 – Sections 161, 313, 437-A – Criminal Appeal Against Conviction and Sentence – House Trespass – Gang Rape – POCSO Offences – Delayed FIR – Reliability of Witnesses – Medical Evidence – False Implication - The appellant, Shripal Yadav, challenged the judgment dated 14.12.2017 by the Special Judge (POCSO)/Additional Sessions Judge, Court No. 6, Shahjahanpur, in Special Case No. 60 of 2014, convicting him under Section 452 IPC (7 years rigorous imprisonment, Rs. 10,000 fine, 1 month additional imprisonment in default) and Section 376-D IPC (life imprisonment, Rs. 50,000 fine, 2 months additional imprisonment in default), with sentences to run concurrently. The prosecution alleged that on the intervening night of 17/18.04.2014, Shripal Yadav and Rahul Yadav, armed with a countrymade pistol, abducted the informant's minor daughter (aged 12-13 years) from her home, sexually assaulted her at Rahul's verandah, and left her at 4:00 AM with threats. The FIR was lodged on 19.06.2014, over 60 days after the incident, due to alleged obstruction by villagers. The victim's medical examination on 20.06.2014 showed no injuries, an old torn and healed hymen, and an estimated age of 18 years, leading to acquittal under POCSO Act charges. The prosecution relied on PW-1 (informant-mother), PW-2

(victim), and documentary evidence (FIR, medical reports, chargesheet). The appellant claimed false implication due to village enmity (Yadav vs. Thakur communities) and a land sale dispute. Held: (1) The appeal was allowed, reversing the conviction and sentence, as the prosecution failed to prove guilt beyond reasonable doubt; the appellant was ordered to be set free, subject to Section 437-A Cr.P.C. compliance. (2) The 60-day delay in FIR lodging was inadequately explained, with vague claims of obstruction by villagers; PW-1's failure to contact the local MLA, with whom she had ties, or raise an alarm despite other family members' presence, rendered her testimony unreliable. (3) PW-2's testimony lacked credibility due to no injuries despite alleged forcible abduction, and her conduct (not informing family or police) was unnatural. (4) Medical evidence did not support rape or minor age claims, and no independent witnesses corroborated the prosecution case. (5) Enmity due to caste differences and a land dispute suggested possible false implication. (6) The trial court failed to critically evaluate witness testimonies, and the victim's testimony was not of sterling quality to warrant conviction without corroboration.

(Delivered by Hon'ble Ashwani Kumar
Mishra, J.

&

Hon'ble Mohd. Azhar Husain Idrisi, J.)

1. This appeal is directed against judgment and order of conviction and sentence dated 14.12.2017, passed by the Special Judge (POCSO)/Additional Sessions Judge, Court No.6, Shahjahanpur in Special Case No.60 of 2014 (State Vs. Shripal Yadav), arising out of Case Crime No.264 of 2014, Police Station Garhiya Rangeen, District Shahjahanpur, whereby the accused appellant Shripal Yadav has been convicted and sentenced to 7 years rigorous imprisonment alongwith fine of Rs.10,000/- under Section 452 IPC and on failure to deposit fine to undergo additional simple imprisonment for a month; and life imprisonment alongwith fine of

Rs.50,000/- under Section 376-D IPC and on failure to deposit the fine to undergo additional simple imprisonment for two months. Sentences are to run concurrently.

2. As per the prosecution case, informant (PW-1) was sleeping alongwith her daughter, aged 12-13 years, in the intervening night of 17/18.4.2014 at about 1.00 in the night, when the accused Rahul Yadav and Shripal Yadav came armed with countrymade pistol and forcibly abducted her minor daughter, who was later subjected to sexual assault by them. The victim was left in the village with threats that mother would not be allowed to live in the village. The informant tried to lodge a report but the villagers surrounded her and did not allow her to go to police station. No medical examination was held either. Repeated attempts to reach out to police personnel also failed. Ultimately the FIR was registered at 9.30 am on 19.6.2014. Written report on the basis of which FIR got registered is Ex.Ka-1 and has been proved by PW-1. The victim has been medically examined on 20.6.2014, in which no external or internal injuries have been found. Age of the victim has been determined medically as 18 years. Her hymen was found old torn and healed. The statement of victim was also got recorded on 25.6.2014, as per which the incident occurred on the date of elections. The accused came, gagged her mouth and forcibly abducted her on gun point. Thereafter, victim was allegedly subjected to sexual assault in the Verandah of accused Rahul and the victim was later left at her house at about 4.00 in the morning. Threats were extended to the victim. Though the victim claims to have informed of the incident to her mother but they were not allowed to go to police station. It is alleged that only when a complaint was made to

higher authorities that the FIR was registered. Statement of victim was also recorded under Section 161 Cr.P.C. On the basis of evidence collected during investigation the chargesheet was submitted against the accused appellant on 11.7.2014.

3. The Magistrate took cognizance of the aforesaid chargesheet and committed the case to the court of sessions, where charges were framed on 13.5.2015 against the accused appellant under Sections 452, 376-D IPC and 5-G/6 of POCSO Act. The accused denied the charges and demanded trial.

4. During the course of trial, documentary evidence have been adduced by the prosecution in the form of FIR as Ex.Ka-8; written report as Ex.Ka-1; medical report as Ex.Ka-3; supplementary medico legal report as Ex.Ka-4; X-Ray report as Ex.Ka-5; chargesheet as Ex.Ka-7; and site plan with Index as Ex.Ka-6.

5. The prosecution has produced two witnesses namely PW-1 and PW-2. PW-1 is the mother, who has supported the prosecution case, as per which 12-13 year old victim was abducted on gun point and was subjected to sexual assault between 1.00 am to 4.00 am on the date of incident. In the cross-examination PW-1 has stated that she has two sons and three daughters. The victim is her second daughter. There were other family members also in the house alongwith the victim. PW-1 has also admitted that she is on visiting terms with one Munna Vidhayak, who has been an MLA for 5-6 terms. She used to serve in his house. She has denied the suggestion that there was earlier an agreement to sell the land of her brother-in-law to the accused, whereafter the land was sold to someone else on a higher consideration. It is,

however, admitted that the person to whom land has been sold lives adjacent to the house of the informant. She has admitted that accused Shripal Yadav has been working outside the village for the last 5-6 years. On the date of incident, there was election and she had voted. She has admitted that report has been lodged two months after the incident. In her statement under Section 161 Cr.P.C., PW-1 has admitted that the victim was sleeping next to her and when she woke up at about 2.00 a.m., in the night, she did not find her daughter nor saw anyone else abducting her. She has denied the suggestion that her daughter was in relation with accused Rahul, and on account of village enmity she has falsely implicated the accused persons.

6. The victim has been examined as PW-2, who has supported the prosecution case. She has also verified her statement under Section 161 Cr.P.C. In her cross-examination, she has denied her friendly relations with accused Rahul or that she was caught with Rahul in the Sugarcane Field. She has alleged that force was used while abducting her but no injury was caused. As per the victim, her mother was sleeping next to her but she could not know of the incident. She has admitted that she knew Munna Vidhayak and her mother was cooking food in the school run by him. Victim has also denied the suggestion that on account of village enmity she has falsely implicated the accused.

7. The doctor, who had medically examined the victim has been produced as PW-3. In her opinion, age of the victim was around 18 years and no definite opinion with regard to rape could be given. She found no existence of any external or internal injury on the victim and her hymen

was found old torn and healed. PW-4 is Sub-Inspector, who has proved the police papers.

8. The accused was confronted with the evidence led by the prosecution in order to record his statement under Section 313 Cr.P.C. He has alleged to have been falsely implicated on account of village enmity. It is alleged that there was enmity between the Yadavs and Thakurs and as accused was from Yadav Community, while informant was working with local MLA, who was from the Thakur Community, therefore, false complaint has been lodged against him.

9. Defence has also produced its evidence in order to show that on account of sale of landed property, there was an enmity between the parties. The defence witness DW-1 is a 60 year old resident of the same village.

10. Trial court on the basis of evidence on record has convicted the accused appellant and sentenced him as per law.

11. Learned counsel for the appellant states that accused appellant has been falsely implicated, inasmuch as the prosecution story is wholly unbelievable and is not supported by any evidence on record.

12. Learned AGA, on the other hand, has supported the judgment of conviction and sentence, on the basis of reasons assigned therein.

13. We have heard Sri Virendra Pratap Pal, holding brief of Sri Ram Kesh, learned counsel for the appellant and learned AGA for the State and have perused the material on record.

14. The incident in the present case is alleged to have occurred in the

intervening night between 17/18.4.2014, on which date there was an election in the locality for the office of local member of Legislative Assembly. According to the prosecution the two accused came with arms and on gun point physically abducted the minor victim and subjected her to sexual assault.

15. First and foremost, it is to be noticed that though the incident occurred on 17/18.4.2014, but no report in the matter was lodged immediately after the incident. The report has been lodged only on 19.6.2014, which is after more than 60 days. Although delay in itself would not be fatal in a case of sexual offence, but the court will have to examine the circumstances, which may have led to the delayed reporting of the offence. PW-1 has stated that she tried to go to police station but the villages surrounded her and did not let her go. In the testimony of PW-1, it is, however, not disclosed as to when she attempted to go to the police station or who stopped her from reporting the incident to the police. Discussion in this regard is absolutely vague. We suspect the testimony of PW-1 and do found her to be credible in this regard for the simple reason that PW-1, admittedly was known to local MLA and was working as a Cook in the school run by the concerned MLA. In the event the incident of the kind, as is alleged, had taken place, it would be expected that PW-1 would try to reach out to influential persons of the village, who are known to her, including the MLA. There is no explanation in the testimony of PW-1 as to why she made no attempt to reach out the local MLA, who admittedly was known to her. Even otherwise, we find that election was held on the date of incident, and generally, it is expected that there would be greater vigil maintained in the area to

secure law and order. Easy access to police personnel during the election would be expected.

16. We have examined the testimony of PW-1 and PW-2 carefully, who have not furnished any detail as to when they tried to go to the police station and what attempt was made to inform the authorities or the villagers in that regard. 60 days is not a small time and the fact that during this period no attempt was made to reach out to anyone for lodging the report has to be viewed with suspicion.

17. We have also perused the statement of PW-1 and PW-2, as per whom the victim was abducted on the day of the election. As per PW-1, she was sleeping next to the victim. PW-2 has admitted that when she woke up at 2.00 in the night, she found her daughter missing. There is no explanation forthcoming from the PW-1 as to what she did, when her daughter was found missing. PW-1 has stated that she had never gone out from the house. The fact that PW-1 did not raise any alarm regarding disappearance of her daughter or make any attempt either to inform the family members or to inform police raises doubt on the prosecution version. We are reluctant to rely upon testimony of PW-1 that having found her daughter missing at 2.00 in the night, she did nothing. PW-2, moreover, has stated that on gun point she was abducted despite resistance by her. However, there was no mark of injury or even old injury on the victim. We further find from the testimony of PW-1 that the family composition of the informant included other members also. Informant has two sons and another daughter apart from the victim and the eldest daughter, who was already married. In normal circumstances, an incident of the kind

where a young girl goes missing at 2.00 in the night, the mother is expected to make immediate endeavours to trace out her daughter or to at least inform other family members, who could either inform police or attempt to trace out the victim. The prosecution evidence is absolutely silent and shoddy on this aspect.

18. Medical evidence on record also belies the prosecution claim that victim is a minor. No documentary evidence in the form of school record or birth certificate etc. has been produced to prove the age of the victim. The only material in that regard is the medical opinion, as per which the victim was 18 years of age. It is for this reason that accused persons have been exonerated of charges under the POSCO Act. The medical examination otherwise does not depict any external or internal injury on the victim. The doctor has also not expressed any opinion with regard to occurrence of rape upon the victim.

19. In the facts of the present case, no independent witness has come forward to support the prosecution case. The medical opinion on record also does not support the claim of prosecutrix. The testimony of PW-1 and PW-2 are also not found convincing, inasmuch as their conduct in not reporting the incident or raising an alarm etc. is questionable. It is otherwise specifically asserted that there existed enmity on account of alleged sale of immovable property as well as village enmity, as the accused and the informant belong to two separate castes and there was cordiality missing between these two communities.

20. Upon overall evaluation of evidence on record, we find that the

testimony of PW-1 and PW-2 cannot be termed to be wholly reliable. The testimony of victim cannot be treated as that of a sterling witness, which alone can be relied upon to convict the accused persons. The fact that no protest was made for almost two months nor anyone in the family raised any alarm are factors, which persuade us to doubt the testimony of injured witness. There are no other incriminating material adduced by the prosecution against the accused persons. Possibility of false implication on account of enmity between the two sides cannot be ruled out. One of the accused namely Rahul has been declared juvenile and his trial has been segregated. Accused appellant Shripal Yadav is in jail since the date of judgment i.e. 14.12.2017. He was also remained incarcerated for about 11 months during the trial.

21. Considering the totality of circumstances placed on record and for the reasons recorded above, we are of the considered opinion that prosecution has failed to establish the guilt of the accused appellant beyond reasonable doubt. The trial court has also not examined the testimony of witnesses in correct perspective.

22. In that view of the matter, this appeal succeeds and is allowed. The judgment and order of conviction and sentence dated 14.12.2017, passed by the Special Judge (POCSO)/ Additional Sessions Judge, Court No.6, Shahjahanpur in Special Case No.60 of 2014 is reversed. The appellant Shripal Yadav shall be set free, unless he is wanted in any other cases, subject to compliance of Section 437-A Cr.P.C.

(2024) 4 ILRA 1160
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.04.2024

BEFORE

THE HON'BLE RAJIV GUPTA, J.
THE HON'BLE SHIV SHANKER PRASAD, J.

Criminal Appeal No. 1731 of 2004

Shankar Yadav		...Appellant	
	Versus		
State of U.P.		...Respondent	

Counsel for the Appellant:

Sri Jagdish Singh Sengar, Sri Babu Lal Ram, Sri Prem Chandra Patel, Sri Ram Babu Sharma, Sri Vindhyachal Singh, Sri Muktesh Kumar Singh, Sri Ashok Kumar Singh Yadav, Sri Sanjay Kumar Yadav, Sri Rajesh Yadav, Sri V.P. Srivastava (Sr. Adv.)

Counsel for the Respondent:

Govt. Advocate, Sri Dharendra Kumar Srivastava, Sri Ram Ji Yadav, Sri Saroj Kumar Dubey, Sri Vineet Kumar Yadav, Sri Virendra Pratap Pal, Sri Siddhartha Shukla, Sri Rajiv Lochan Shukla

Criminal Law - Indian Penal Code, 1860 – Sections 148, 149 & 302 – Code of Criminal Procedure, 1973 – Sections 161, 313 & 437-A – Criminal Appeal Against Conviction and Sentence – Rioting – Murder – Unlawful Assembly – Dying Declaration – Reliability of Witnesses – Delay in FIR – Contradictions in Testimonies – False Implication - The appellant, Shanker Yadav, challenged the judgment dated 25.03.2004 by the Additional Sessions Judge/F.T.C.-IV, Jaunpur, in Sessions Trial No. 41 of 1990, convicting him and four co-accused (Jwala Prasad, Bankey Lal, Shyam Bahadur, Mithai Lal) under Section 148 IPC (1 year simple imprisonment) and Section 302/149 IPC (life imprisonment, Rs. 20,000 fine each, 1 year additional imprisonment in default) for the murder of Rambali Yadav on 26.08.1989 at 6:00 PM near an unpaved road in Jaunpur. The prosecution case, based on a written report by PW-1 (Lalji Yadav, deceased's brother), alleged that the accused, armed with gandasas and a

lathi, assaulted Rambali due to prior enmity over land disputes and a pending Section 107 Cr.P.C. case. The FIR was lodged at 4:30 AM on 27.08.1989, supported by PW-1 and PW-3 (Hari Shanker Yadav) as eye-witnesses, a purported dying declaration to the deceased's father (Jai Shri), and medical evidence showing 18 incised wounds. The appellant claimed false implication due to ongoing litigations. Held: (1) The appeal was allowed, reversing the conviction and sentence, and the appellant was ordered to be released, subject to Section 437-A Cr.P.C. compliance. (2) The prosecution failed to prove guilt beyond reasonable doubt due to unreliable testimonies of PW-1 and PW-3, who were interested witnesses (brother and friend of the deceased) and likely not present at the incident, as they reached the spot after the accused fled. (3) The alleged dying declaration to Jai Shri was unreliable, lacking proof of the deceased's fit mental St., certification, or corroboration, as Jai Shri and other witnesses (Sukhdeo, Santram, Amarnath) were not examined, per *Irfan Vs St. of U.P.*, 2023 SCC OnLine SC 1060, *Surinder Kumar Vs St. of Har.*, (2011) 10 SCC 173, and *Naresh Kumar Vs Kalawati*, 2021 SCC OnLine SC 260. (4) A 10-hour delay in lodging the FIR was unexplained, casting doubt on the prosecution case. (5) Major contradictions in PW-1 and PW-3's testimonies (e.g., timing of arrival, lighting conditions, presence of others) and their enmity with the accused suggested possible false implication. (6) The trial court failed to critically evaluate evidence, and the prosecution evidence was insufficient to sustain the conviction.

List of Cases cited:

1. *Irfan alias Naka Vs St. of U.P.*, 2023 SCC OnLine SC 1060
2. *Surinder Kumar Vs St. of Har.*, (2011) 10 SCC 173
3. *Naresh Kumar Vs Kalawati & ors.*, 2021 SCC OnLine SC 260
4. *Paparambaka Rosamma* (referred to in *Naresh Kumar Vs Kalawati*)

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

1. This criminal appeal has been preferred by the accused-appellant Shanker Yadav against the judgment and order dated 25th March, 2004 passed by the Additional Sessions Judge/F.T.C.-IV, Jaunpur in Sessions Trial No. 41 of 1990 (*State of U.P. Vs. Jwala Prasad & Others*), arising out of Case Crime No. 110 of 1989, under Sections 148, 149 and 302 of I.P.C., Police Station-Baxa, District-Jaunpur, whereby the accused-appellant along with four other co-accused, namely, Jwala Prasad, Bankey Lal, Shyam Bahadur and Mithai Lal, has been convicted and sentenced to undergo one year simple imprisonment for the offence punishable under Section 148 of I.P.C. and life imprisonment for the offence punishable under Section 302/149 I.P.C. with a fine of Rs. 20,000/- each, in default thereof he has to further undergo one year additional imprisonment.

2. We have heard Mr. V.P. Srivastava, learned Senior Advocate, assisted by Mr. Ashok Singh Yadav, Mr. Sanjay Kumar Yadav, Mr. Rajesh Yadav, learned counsel for the accused-appellant, Mr. Rajeev Lochan Shukla, Mr. Direndra Kumar Srivastava, learned counsel for the respondent, Mr. Siddhartha Shukla, learned counsel for the first informant and Mr. Arun Kumar Pandey, learned A.G.A. for the State and also perused the entire materials available on record.

3. The prosecution case is based upon a written report dated 26th August, 1989 (Exhibit-Ka/1) of first informant, namely, Lal Ji Yadav (P.W.-1) wherein he has stated that there was a rivalry between his family and the family of the accused Jwala Prasad due to certain litigations. Earlier, the accused persons had beaten the father of the informant, which case under Section 107 was pending in the court.

Because of the said case, the accused Jwala Prasad along with other accused persons had grudge. On 26th August, 1989 at around 6:00 p.m., when the brother of the informant, namely, Rambali was returning to his house after taking medicine for the use of his child from Lakhaunwa market, the informant himself and Harishankar were also following him. As soon as the brother of the informant crossed the railway line and reached the unpaved road, the accused Jwala Prasad, Banke Lal, Shyam Bahadur, Shankar (accused-appellant) and Mithai, who resided in the same village, arrived. The accused Jwala, Bankey Lal, Shyam Bahadur and Shankar (accused-appellant) had Gandasas in their hands and the accused Mithai had stick in his hand. The above accused persons, after surrounding the brother of the informant, started beating him brutally. On hearing the scream of the informant and when the informant and Harishankar shouted, Sukhdev and Santram, who were coming from the market, arrived. On this the accused ran away threatening them. The brother of the informant had fallen down due to injuries sustained by him. His condition was severe. He was taken to Sadar Hospital by auto rickshaw and was admitted where he died at 11:30 in the night. On the basis of such written report dated 27th August, 1989 (Exhibit-Ka/1), first information report (Exhibit-Ka/4) came to be lodged at 04.30 a.m. on 27th August, 1989 in respect of the incident which occurred on 26th August, 1989 at about 06:00 p.m. (evening).

4. Thereafter, the inquest followed and the inquest report dated 27th August, 1989 came on record (Exhibit-ka/6). It is mentioned in the inquest report that the death of the deceased relates to an offence,

which requires doctor's opinion and the body of the deceased be sent for post-mortem.

5. The post-mortem has been conducted on 27th August, 1989 at 04:30 p.m. and in the post-mortem report (Exhibit-ka/16), the cause of death of the deceased has been reported to be shock and haemorrhage as a result of following ante-mortem injuries:

"1. Incised wound 4 cm x 4 cm above right eye brow on the seal.

2. Incised wound 1.5 cm x 4 cm above incised wound no.1.

3. Incised wound 5 cm. bone deep on right ... 5 cm. above injury no.1

4. Incised wound stitched 7 cm above injury no.1 or temporal bone.

5. Incised wound 5 cm. stitched on 10 cm. above root of the nonjunctions wound.

6. 0.2 cm x 0.2 cm on the frontal aspect of left elbow joint.

7. Incised 4 cm. stitched, 4 cm below left knee joint on anteromedial aspect,

8. Incised wound 1 cm x 0.5 cm on the anteromedial aspect of left leg 4 cm. below knee.

9. 2 parallel incised wounds 6 cm each stitched 1 cm. apart 10 cm injury no.7 on anteromedial aspect of left leg.

10. Incised wound 2 cm x 0.5 cm anteromedial aspect of left leg 14 cm. below injury no.7.

11. Incised wound 5.5 cm. stitched 10 cm. below right knee joint on anterolateral part.

12. Incised wound 7 cm. x 4 cm. below injury no.11.

13. Incised wound 2.5 cm. x 0.5 cm. 3 cm. below injury no. 11 antero lateral aspect.

14. Incised wound 2.5 cm. x 1 cm. on right antero lateral of the right leg 2 cm. above lateral malleolus .

15. Incised wound 7 cm. x 01 cm. on heel 7.5 cm. below ankle joint on the dorsal aspect on lateral side. ”

6. The investigation was conducted by the Inspector Jagannath Tiwari (P.W.-4). He has recorded the statements of witnesses and prepared the site plan. He has also collected the blood stained earth and plain earth and prepared the recovery memo. After conclusions of the statutory investigation under Chapter XII Cr.P.C.. P.W.-4 has submitted the charge-sheet against the accused persons including the present appellant, namely, Jwala Prasad @ Achhey Lal, Bankey Lal, Shaym Bahadur, Shanker and Mithai.

7. On submission of charge-sheet, the concerned Magistrate took cognizance in the matter and committed the case to the Court of Sessions by whom the case was to be tried. On 5th November, 1992, the concerned Court framed following charges against the accused-persons:

“Firstly; that you, on 26.8.1989 at about 6 P.M. in the evening near kuchcha road of village Lakhawan besides Railway Line, within the circle of P.S.Buxa, district Jaunpur, were member of an unlawful assembly armed with deadly weapon, like Gandasa and lathi, and in prosecution of the common object of that assembly, used force, committed the offence of rioting with the said weapon, punishable under section 148 of I.P.C., and within the cognizance of this Court; and

Secondly; that you, on the aforesaid date, time and place, being member of above unlawful assembly and in prosecution of common object of murder of

Rambali Yadav son of Jaishri Yadava you assaulted Rambali Yadava with Gandasa and lathi resulting his death, and thereby you committed an offence punishable under section 302 read with section 149 of I.P.C., and within the cognizance of this court.

And, I hereby direct that you be tried by this court on the said charges.”

8. The charges were read out and explained to the accused persons including the appellant in simple Hindi, who denied the accusation and demanded trial.

9. The trial started and the prosecution has examined six witnesses, who are as follows:-

1	Lalji Yadav (complainant)	P.W.-1
2	Dr. D. Mandal	P.W.-2
3	Hari Shanker Yadav	P.W.-3
4	Jagannath Tiwari	P.W.-4
5	Mahmood Alam	P.W.-5
6	Dr. S.S. Banarjee	P.W.-6

10. The prosecution in order to establish the charges levelled against the accused-appellant has relied upon following documentary evidence, which were duly proved and consequently marked as Exhibits:

1	Written report dated 26th August, 1989	Ex.Ka.-1
2	First Information Report dated 27th August, 1989	Ex.Ka.-4
3	Recovery memo of blood stained and plain earth dated 27th August, 1989	Ex. Ka.-13
4	Injury report	Ex.Ka.-2

	dated 26th August, 1989	
5	Letter qua information for death of deceased in the hospital	Ex.Ka.-3
6	Copy of the G.D. entry about the first information report	Ex.Ka.-5
7	Copy of the letter for sending the post-mortem of the deceased	Ex.Ka.-8
8	Photo lash	Ex.Ka.-8
9	Police Paper no.33	Ex.Ka.-9
10	Sample of seal	Ex.Ka.-10
11	Informations to the Kotwali	Exts.Ka.-11 & 12
12	Post Mortem Report dated 27th August, 1989	Ex.Ka.-16
13	Inquest Report (Panchayatnama) dated 27th August, 1989	Ex. Ka.-6
14	Charge-sheet original dated 27th September, 1989	Ex.Ka.-15
15	Site plan with index dated 27th August, 1989	Ex.Ka.-14

11. After completion of the prosecution evidence, statement of the accused was recorded under Section 313 Cr.P.C. The accused-appellant denied the prosecution version and stated that due to litigation between the accused side and prosecution side, a false case has been concocted and also stated that the deceased was killed somewhere in the dark and they

have been falsely implicated. In their defence, a copy of the charge sheet related to the case has been filed by the accused persons.

12. On the basis of above evidence adduced during the course of trial, the court below has come to the conclusion that the accused persons, namely, Bankey Lal, Jwala Prasad, Shanker (appellant), Shyam Bahadur and Mithai Lal, who armed with Gandasa and Lathi, organized a riot. The accused Mithai Lal had a lathi in his hand, while remaining accused persons had Gandasa in their hands. Because of the said riot created by the accused, all the accused gathered near Sarpat's tuft with the intention to kill the deceased. The deceased Rambali was returning to his house after shopping in the market and after crossing the railway line, when he came on the unpaved road, all the accused, who indulged in old rivalry, assaulted the deceased by Gandasa and Lathi due to which he sustained injuries. All the accused armed with weapons and having common object to kill the deceased Ram Bali. As many as 18 injuries were found on the body of the deceased Rambali. Most of the injuries were caused by Gandasa, as is evident from the medical examination report and the post-mortem report of the deceased. All the accused unanimously agreed to inflict injuries on the deceased Ram Bali, due to which he later died in the hospital. Thus, all the accused persons were made responsible for causing the death of deceased Ram Bali by creating a riot with a common intention. Thus, the trial court found the accused Jwala Prasad, Bankey Lal, Shankar, Mithai Lal and Shyam Bahadur guilty under Section 148, 302, read with Section 149 of I.P.C.

13. On the basis of the above exhaustive analysis of the evidence, the trial court has held that since the accused

persons armed with Gandasa and lathi, came to a consensus and attacked the deceased Rambali in such a way that he died at around 6:00 p.m. in the evening (this time has wrongly been mentioned by the trial court in his impugned judgment, as at around 06:00 the alleged incident took place, whereas the deceased died in hospital at 11:30 p.m. (night) with Gandasa and lathi, the accused persons are liable to be punished to undergo one year simple imprisonment for the offence 148 I.P.C. and life imprisonment for the offence under Section 302 read with section 149 I.P.C. along with a fine of Rs 20,000/- each, which would be fair in the eyes of justice. The trial court has further held that in case of non-payment of fine, additional imprisonment of one year would be appropriate.

14. Being aggrieved with the impugned judgment and order of conviction passed by the trial court, the accused-appellant has preferred the present jail appeal.

15. In support of his case, the learned counsel for the accused-appellant has advanced following submissions:

(i) As per the prosecution, alleged incident occurred at 06:00 p.m. (evening) on 26th August, 1989, whereas the first information report was registered on 27th August, 1989 at 04:00 a.m. (morning), meaning thereby that there is delay of 10 hours in lodging of the first information report for which no plausible explanation has been given by the prosecution.

(ii) The dying declaration of the deceased which has heavily been relied upon by the learned counsel for the informant/prosecution in the form of an information given by the deceased to his

father, when he reached at the place of occurrence and such information has also been received by P.W.-1 and P.W.-2, is not reliable in the eyes of law, as the ingredients of acceptance of such dying declaration are missing in the present case.

(iii) The father of the deceased, namely, Jai Shree, to whom the deceased told as to who has assaulted him, as per the testimonies of P.W.-1 and P.W.-3, was not even produced in the court to support the prosecution version, as such, the alleged dying declaration of the deceased as well as the testimonies of P.W.1 and P.W.-3 are not trustworthy. Apart from the above, Sukhdeo and Santraj who are stated to be eye witnesses and also charge-sheeted witnesses, as per the prosecution, were not produced during the course of trial.

(iv) P.W.1, who is real brother of the deceased and P.W.-3, who is close friend of the deceased are interested witnesses and from their testimonies, it is apparent that they were not present at the time and place of occurrence and they reached there after the accused ran away, as such their presence at the time and date of occurrence is doubtful.

(v) The deceased did not die on the spot as per the oral as well as documentary evidence relied upon by the prosecution. He was killed somewhere in the dark.

(vi) There are major contradictions in the testimonies of the prosecution witnesses.

(vii) The prosecution evidence is very weak in which the accused-appellant has been implicated only on the basis of suspicion and no evidence exist to hold the accused-appellant guilty.

16. On the cumulative strength of the aforesaid, learned counsel appearing for the appellants submits that in view of the inconsistency in the statements of the

prosecution witnesses; the prosecution has failed to establish the guilt of accused-appellant beyond reasonable doubt, as such the impugned judgment is liable to be set aside.

17. Per contra, the learned counsel for the informant and the learned A.G.A. for the State, supporting the judgment and order of conviction, submits that the first information report has been lodged promptly naming the accused persons; there is clinching evidence to support the prosecution's case in the form of witnesses of fact (P.W.-1 and P.W.-3); there is strong motive for the accused-persons, as there was dispute qua certain litigations between the families of both the parties; the prosecution case has also been supported by the medical evidence.

18. Mr. Rajiv Lochan Shukla, appearing for the informant has heavily relied upon the testimony of P.W.-3 in which it has been stated that when the accused persons escaped from the spot, the father of the deceased, namely, Jai Shree reached there and asked the deceased as to who has assaulted him, in reply, the deceased disclosed that accused Jwala Prasad, Bankey Lal, Shyam Bahadur and Shanker (appellant) assaulted him by Gandasa and accused Mithai assaulted him by Lathi with intention to kill him. Drawing the attention of the Court to the aforesaid testimony of P.W.-3, Mr. Shukla further relied upon the testimony of P.W.-1 in which it has been stated that after the escape of the accused, his father and other people also came to the spot from their house and his brother i.e. the deceased disclosed the names to his father as to who assaulted him.

19. Mr. Shukla on the basis of such testimony submits that the disclosure given by the deceased to his father Jai Shree, in

an injured state as to who had beaten him, be treated to be his dying declaration as the same have been duly supported by P.W.-1 and P.W.-3, who are eye-witnesses.

20. Learned counsel for the informant and the learned A.G.A. for the State, therefore, submits that the prosecution has proved the charges levelled against the accused-appellants beyond reasonable doubt.

21. On the cumulative strength of the aforesaid, learned A.G.A. urges that in such circumstances the conviction and sentence awarded to the accused-appellant, by the court below merits no interference.

22. We have examined the respective contentions urged by the learned counsel for the parties and have perused the records of the present appeal including the trial court records.

23. The only question requires to be addressed and determined in this appeal is whether the conclusion of guilt arrived at by the learned trial court and the sentence awarded is legal and sustainable in law or it suffers from infirmity and perversity.

24. Before entering into the merits of the case set up by the learned counsel for the accused-appellant and the learned A.G.A. qua impugned judgment and order of conviction passed by the trial court, it is desirable for us to briefly refer to the statements of the prosecution witnesses.

25. P.W.-1/informant, Lalji Yadav who happens to be the brother of the deceased Ram Bali, in his examination-in-chief has stated that before the present incident, a civil case and a case under Section 107 were going on between

informant's side and accused's side. Earlier there was quarrel between both parties qua a land. The accused had beaten the father of the informant, whose case is pending in civil court. The court had stayed the civil case. Even at the time of the incident, the stay continued. On the same land, his Arvi/Arooi (taro roots) was buried and the accused Jwala Prasad and others were uprooting it. When the informant's side objected not to do the same, they were beaten. There is a rivalry between both the parties regarding land and criminal cases.

26. P.W.-1 has further stated that it has been almost 8 years since the incident happened. The incident is of 26 August 1989. The time was 6 o'clock in the evening. His brother i.e. deceased Ram Bali had gone to the Lakhwan market to buy medicine for his children. When the brother of the informant was coming home through the unpaved road after crossing the railway line, the informant and P.W.-3 Harishankar were also following him from the market towards home. When his brother reached near Sarpat on the unpaved road, the accused Jwala Prasad alias Achhe Lal, Bankey Lal, Mithai Lal, Shyam Bahadur and Shankar came out of the tuft of Sarpat and started beating his brother Ram Bali. The accused Jwala Prasad, Shyam Bahadur, Shankar (appellant) and Bankey Lal were holding Gandasa in their hands and the accused Mithai Lal was holding a lathi in his hand. On howling of his brother, the P.W.-1/informant and P.W.-3 Hari Shankar also moved towards the spot. P.W.-1 and P.W.-3 also started shouting loudly, hearing their noise, Sukhdev and Santram reached the spot from the village. When those people arrived, the accused ran towards the south. The informant/P.W.1 went to his brother. His brother had fallen when the accused were beating him. Even after he

fell down, the accused were beating his brother. His brother was conscious at that time. After the escape of the accused, his father and other people also came from the house. His brother had disclosed the names of those who had beaten him.

27. P.W.-1 has further stated that after arranging an auto rickshaw, the deceased was taken to Sadar Hospital, Jaunpur and admitted there and he was treated. Even at that time his brother was conscious but his condition was getting serious. The deceased brother died in the hospital at around 11:15 p.m. P.W. 1 left the body at Sadar Jaunpur Hospital and wrote the report there and along with the medical examination, went to Baksa police station where his report was registered. Amarnath Yadav also went to the hospital with him. His brother i.e. deceased had disclosed the names of those who had beaten him in front of Amarnath also. The statement of P.W.1 has been recorded by the Investigating Officer. The accused had attacked his brother with the intention to kill him due to some existing rivalry and due to the injuries sustained by his brother, he died.

28. P.W.-1 has then stated that from home his brother i.e. deceased went to the market first and he went later (about an hour later, he went to the market). P.W.-1 did not scribe any report until he went to the hospital from the place of incident and his brother died in the hospital. Whatever the deceased was saying in the hospital and at home, he did not write in the report.

29. In the cross-examination, P.W.-1 has stated that when he went to the police station, his signature was made on the report. His clothes were not taken, where the Investigating Officer had only seen. His statement was recorded by the Investigating

Officer at the police station. Statement of Amarnath was also recorded there. In his statement recorded by the Investigating Officer, he had stated that his brother was conscious at that time.

30. In the cross-examination, when the defence counsel put a question to P.W.-1, the accused did not kill you?, P.W.-1 replied that the accused did not kill him.

31. P.W.-1 in his cross-examination has further stated that when his brother Ram Bali went to the market to buy medicine, he was not there. Ram Bali had gone to get medicine for his two children, as they were suffering from boils and fever. P.W.-1 has further stated that on that day, he was free but he did not go to take the medicine. P.W.-1 had taken ointment for boils and tablets. P.W.-1 did not know as to which medicines Ram Bali had received on the day of the incident. The deceased Ram Bali met him in the market and when he went to the spot where Ram Bali fell down in injured condition, he did not see any medicine there as also he did not find any prescription. P.W.-1 also did not find the money which the deceased had with him at that time. He did not see whether the deceased had anything in his pocket or not. P.W.-1 came at the spot when the Panchayatnama (inquest) was taking place. He did not see whether the deceased had any luggage or not.

32. P.W.-1 has further stated that he had gone to the market for a walk, not for any specific work. P.W.-3 Harishankar had also gone for a walk, there was no special work. P.W.-3 Harishankar is from his village and he is his old friend.

33. P.W.-1 has again stated that he did not remember that after the accused ran

away, his brother was conscious and his father and other people also came and his brother disclosed the name of those who had beaten him, to his father.

34. P.W.-1 has stated that when P.W.-1 reached to rescue his brother, the accused had run away towards south. No man or witness from the south side came to the spot. P.W.-1 has denied that he did not see anyone beating or killing Ram Bali. He was beaten/killed in the darkness of the night.

35. P.W.-2 Dr. D. Mondal, Retired Senior Medical Officer, District Hospital, Jaunpur has medically examined the deceased Ram Bali when he was admitted. P.W.-2 has found as many as 18 injuries on the body of the then injured Ram Bali. P.W.-2 has stated that at the time when he was examining the deceased, he found that the condition of the patient was critical and he was in a semi-conscious state. P.W.-2 has opined that injuries of the deceased were fresh and life-threatening and all injuries were kept under observation. He also stated that the deceased did not die in his presence.

36. P.W.-3 Hari Shanker Yadav, who happens to be the old friend of P.W.-1 in his examination-in-chief has stated that the incident is of 26th August, 1989. On the evening of the incident, he was returning to his home along with P.W.-1 Lal ji Yadav from Lakhouwan market. A little ahead of them, the deceased Rambali Yadav was also returning to his home from Lakhouwan market. He and P.W.1 could see Rambali Yadav, who was walking ahead. At around 6 o'clock in the evening, when Ram Bali had reached the unpaved road south of the railway line that goes from Lakhouwan Bazaar to Pakadi Bazaar,

the accused Jwala Prasad alias Achhe Lal, Bankey Lal, Shankar (appellant), Shyam Bahadur armed with Gandasa and Mithai Lal armed with Lathi, who were already behind tuft of Sarpat, came out and surrounded Rambali and started assaulting him with Gandasa and lathi with intention to kill him. Rambali suffered fatal injuries due to the assault of those five accused. Rambali i.e. deceased, he and P.W.-1 had raised alarm. At the time of the incident, Sukhdev and Sant Ram, who were coming from the village towards the market, had reached the spot shouting. P.W.-1 Lal ji, Sukhdev and Santram/Saptram saw the entire incident very well and made the same statement. At the time of the incident it was sunset but there was ample light at that time and Rambali had fallen due to injury. There was rivalry and litigation between Rambali and the accused before the present incident.

37. P.W.-3 has further stated that after the accused ran away from the spot, the deceased Rambali's father, namely, Jai Shri also came to the place of incident and when Jai Sri inquired from the deceased Rambali as to who has assaulted him, in his presence, then Ram Bali, disclosed to his father Jai Shri that the accused Jwala Prasad, Baken Lal, Shyam Bahadur and Shankar (appellant) had hit him by Gandasa and the accused Mithai had hit him by lathi with intention to kill him, as such he would not survive.

38. In the cross-examination, P.W.-3 has stated that before the present case, on the report of accused Shyam Bahadur, a case under Sections 325, 323, 308 etc. of I.P.C. was going on and the same is pending before the Court of Additional District Judge-IX. A cross case was also pending in the same court against the

accused Shyam Bahadur, Achhelal, Devraj, Shanker (appellant) etc. who were accused in the said case on the report of Harilal son Jagan in which he, P.W.-1 Lal Ji and his father Jai Sri were the witnesses against the accused. P.W.-3 was also an injured person and a witness in both the cases. P.W.-3 was also a witness in the case of State vs Shyam Bahadur etc. and apart from him, P.W.-1 Lal ji and his father Jai Sri were also witnesses in the said case. P.W.-3 has also stated that he did not know whether the deceased Rambali was a witness or an accused in the above two cases or not. The above two cases were going on before the instant case. A case under Sections 107/116 was also going on between the parties. In reply to a question put by the defence counsel that when his family members and villagers came to the spot, whether the accused ran away from the spot or not, in answer to this, P.W.3 has stated that before his family members and villagers came to the spot, the accused ran away.

39. P.W.-3 has further stated that he did not always come along with the deceased Rambali. On that day, he and P.W.1 were behind the deceased. He had gone to the market wearing shirt and slippers. Lal ji was wearing pyjama, kurta and slippers. Rambali was carrying a wooden sieve and medicines in his hand. When they were carrying him to the hospital, blood was falling from Rambali's body. His sieve, slippers and medicine were left behind. The investigating officer had not prepared any paper regarding the present incident.

40. This witness has further stated that he and P.W.-1 were a little away from the place of incident, therefore they did not look at the people stooping down. He did not remember whether it was dark or bright

from the time of the incident till returning home. P.W.-3 has denied that any incident about which he has given his statement was not seen by him. He has also denied that he was not coming behind the deceased. He has further denied that he did not see as to who has assaulted the deceased. He has then denied that on the date and time of incident, the deceased Rambali did not go to the market nor was he returning after taking goods. He has lastly denied that the accused persons have been falsely implicated due to earlier litigations between the parties.

41. P.W.-4 Inspector Jagannath Tiwari has investigated the case and after conducting the same in terms of statutory provision under Chapter XII of the Code of Criminal Procedure, he has submitted the charge-sheet against the accused persons including the appellant.

42. P.W.-4 in his cross-examination has stated that he never went to the hospital during the investigation nor did he see any register of the hospital on which the inspection took place or the form on which the patient was admitted. He has also stated that during investigation he did not find out from where the informant/P.W.1 was coming and also no doctor's prescription and medicine were found. He knew that the patient's name is recorded in the register of the doctor's office but he did not find out. The informant/P.W.-1 did not say about the same in his statement recorded under Section 161 Cr.P.C. He has further stated that in his statement recorded under Section 161 Cr.P.C., the informant/P.W.1 did not say that his brother was conscious at that time. He also did not say that after the accused ran away, the people of his village had also come and his brother i.e. the

deceased had disclosed the names of those who hit him to his father. P.W.-1 did not say that Amarnath Yadav had also gone to the hospital along with him. His brother had also revealed the names of those who hit him in front of Amarnath.

43. P.W.-5 Inspector Mahmood Alam, who after appointing five witnesses had conducted the inquest of the deceased has stated that after getting the dead body of the deceased sealed and after preparing the form 13 and photo lash, form no. 3, letter to the Chief Medical Officer, had sent the dead body of the deceased to the Hospital along with two constables, namely, Harshnath Yadav and Surendra Nath Tiwari. This witness has also proved the same before the Court.

44. Dr. Shitanshu Shekhar Banerjee has been examined as P.W.-6. This witness has conducted the post-mortem of the body of the deceased.

45. For coming to the conclusion that the prosecution has been able to prove its case against the accused including the appellant beyond reasonable doubt, it is important for this Court to scrutinize the testimonies of the prosecution witnesses deeply, which have been relied upon by the trial court while passing the impugned judgment.

46. As per the prosecution case, P.W.-1 Lalji Yadav, P.W.-3 Hari Shanker Yadav and Amarnath were the eye-witnesses but Amarnath was not examined as prosecution witness as he died during the course of trial.

47. Therefore, first this Court may peruse the testimony of P.W.-1. In the examination-in-chief, P.W.-1 has stated that

on screaming of the deceased, he and P.W.-3 moved towards the spot and on shouting of P.W.-1 and P.W.-3, charge-sheeted witnesses Sukhdeo and Santram reached at the place of occurrence and when they reached there, all the accused ran away towards south, then P.W.-1 reached to his injured brother i.e. deceased, meaning thereby that when P.W.-1 reached at the alleged place of occurrence, the incident had already taken place and P.W.-1 has not seen as to who has assaulted the deceased and by which weapon, which makes the presence of this witness as an eye witness is doubtful. For ready reference, the above statement is extracted here-under:

"भाई के चिल्लाने पर मैं व हरि शंकर भी कुछ दूर पर पहुंच गये थे। हम लोग भी जोर से चिल्लाने लगे। हम लोगों का शोर सुनकर गांव की तरफ से सुखदेव व संतराम पहुंच गये। इन लोगों के आने पर मुल्जिमान भाग कर दक्षिण तरफ भागे। मैं अपने भाई के पास गया।"

48. Similarly, in his cross-examination, this witness has stated as under:

"जब हम लोग अपनी भाई को उठाने के लिए पहुंचे तो मुल्जिमान भाग गए थे। दक्षिण की तरफ भाग गए। दक्षिण की तरफ से कोई आदमी या गवाह मौके पर नहीं आया था।"

49. In the cross-examination, this witness has stated that from home his brother i.e. deceased went to the market first and he went later. About an hour he went to the market.

50. Further in the cross-examination this witness has stated that

when the deceased was injured, he went, where he did not see any medicine or any prescription nor any money was found by him. This statement will also go to show that when the deceased had already sustained injuries, then this witness reached to the deceased, which also cast a dent in the presence of P.W.-1.

51. This witness has not stated anywhere in his statement as to why he went to the market. In the cross-examination he has only stated as under:

"मैं वैसे टहलने के लिए बाजार चला गया था, कोई खास काम से नहीं गया था। हरिशंकर भी वैसे घूमने टहलने चले गए थे कोई खास काम नहीं था।"

52. In the examination-in-chief, P.W.-1 has stated that after the accused ran away, his father Jai Sri and other people came from the house and the deceased disclosed the names of persons, who assaulted him to his father, whereas in his cross-examination, he has stated that his statement was recorded by the Investigating Officer in which he has stated that his brother i.e. deceased was conscious and after the accused ran away, his father and other people came and his brother i.e. deceased disclosed the names of accused to his father. This witness has also stated in his cross-examination that when the deceased disclosed the names of accused to his father, Amarnath was also present there. When as a matter of fact father of the deceased, namely, Jai Sri and Amarnath to certify such disclosure were not produced during the course of trial. However, such statements of P.W.-1 have not been supported by the Investigating Officer i.e. P.W.-4. The relevant statements of P.W.-4 are extracted here-under:

"वादी ने अपने ब्यान मे यह नहीं बतलाया था कि, " मेरे भाई उस समय होश में थे। मुल्जिमान के भागने के बाद मेरे पिता जी वा अन्य लोग भी आ गये थे। और भाई ने मारने वालो का नाम पिता जी को बतलाया था।" यह बात भी गवाह ने नहीं बताया था कि मेरे साथ अमरनाथ यादव भी अस्पताल गये थे, मेरे भाई ने अमरनाथ के सामने भी मारने वालो का नाम बतलाया था।"

53. Such statements of P.W.-1 also create a doubt on the ground that when P.W.-1 qua his presence at the time of occurrence, who happens to be brother of the deceased, was already present at the place of occurrence along with P.W.-3 and Amarnath, why the deceased, who was in serious condition, has not disclosed the names of accused to his brother i.e. P.W.-1 and why he waited his father to disclose the same to him.

54. There is major contradictions in the testimony of P.W.-2. In the cross-examination, at one place this witness has stated that at the time of incident the deceased was conscious but at another place he has stated that he did not remember after the accused ran away, whether his brother i.e. deceased was conscious or not? Similarly, in the cross-examination, at one place, this witness has stated that when the deceased went to the market for taking medicine, he was not there, but at another place this witness has stated that in the market, he met the deceased Rambali.

55. Apart from the above, from the statements of P.W.-1, it is apparently clear that there was inimical terms between his

side and the accused side as there were litigations pending before the concerned court against each other as per the own statement of P.W.-1. Even otherwise, P.W.-1 being the brother of the deceased, is an interested and partisan witness.

56. There is major contradiction in the statement of P.W.-3. In-examination-in-chief, this witness has stated that at the time of incident, the sun had set but at that time there was adequate light. However, in the cross-examination this witness has stated that he did not remember whether that there was dark night or bright after the incident till his returning to home? Before this statement this witness has stated that he and P.W.-1 were a little away from the place of occurrence.

57. There is also contradiction in the testimonies of P.W.-1 and P.W.-3. In his examination-in-chief, P.W.-1 has stated that on screaming of the deceased, P.W.-1 and P.W.-3 reached at some distance and they also started shouting and on hearing the same, Sukhdeo and Santram reached and when they came, all the accused ran away towards south. The relevant statement is extracted hereunder:

"भाई के चिल्लाने पर मैं व हरि शंकर भी कुछ दूर पर पहुंच गये थे। हम लोग भी जोर से चिल्लाने लगे। हम लोगों का शोर सुनकर गांव की तरफ से सुखदेव व संतराम पहुंच गये। इन लोगों के आने पर मुल्जिमान भाग कर दक्षिण तरफ भागे। मैं अपने भाई के पास गया।"

58. When as matter of fact in the examination-in-chief P.W.-3 has stated that when the accused assaulted the deceased,

the deceased himself, P.W.-1 and P.W.-3 shouted, then at that time, Sukhdeo and Santram, who were coming to the village from the market, while exhorting reached there. P.W.-1, P.W.-3, Sukhdeo and Santram saw the incident very well. The relevant statement is extracted here-under:

"रामबली मैं तथा लाल जी ने शोर किया था। मौके पर घटना के समय सुखदेव तथा स्तराम जो गांव की तरफ से बाजार की तरफ आ रहे थे ललकारते हुए मौके पर पहुंच गये थे मैंने लाल जी, सुखदेव तथा सन्तराम ने पूरी घटना भली भांती देखा तथा वही बयान किया।"

59. P.W.-3 had also inimical terms with the accused persons including the appellant, which has been admitted by P.W.-3 in his cross-examination itself. For ready reference, the same is quoted here-under:

"मेरे नाम बल्लियत का दुसरा व्यक्ति मेरे गांव मे कोई नहीं है। इस मुकदमा के पहले श्याम बहादुर अभियुक्त की रिपोर्ट पर थाना बक्सा से धारा 325, 323, 308 आदि का मुकदमा चल रहा है। यह मुकदमा ADJ 9 के यहा लम्बित है। इसका Cross Case हरिलाल पुत्र जगन की रिपोर्ट पर श्याम बहादुर अच्छेलाल देवरान, शंकर आदि जो इस मुकदमे में अभियुक्त है उनके खिलाफ उसी न्यायालय में पहले से चल रहा है। यह मुकदमा हरिलाल के रिपोर्ट पर चल रहा है जिसमें मैं गवाह लाल जी और जय श्री पुत्र जगरूम मुल्जिमान के खिलाफ गवाह है। इन दोनो मुकदमो में मैं भी चोटईल व

गवाह हूँ। मैं स्टेट बनाम श्याम बहादुर आदि मे गवाह हूँ मेरे अलावा लाल जी और जयश्री जो लाल जी के पिता है उसमे गवाह व चोटईल है। कहा मुझे पता नहीं कि उपरोक्त दोनों मुकदमे में मृतक रामबली गवाह या मुल्जिम है या नहीं। यह मुकदमे घटना के पहले से चल रहे हैं। इन पार्टीयो के बीच में 107/116 का मुकदमा भी पुलिस ने चलाया था।"

60. P.W.-3 is also an interested witness, as he is old friend of P.W.-1, as is admitted by P.W.-1 in his testimony. He is also a chance witness. Like P.W.-1, P.W.-3 also reached at the place of occurrence along with P.W.-1, when the incident had already taken place.

61. From bare scrutiny of the aforesaid testimonies of P.W.-1 and P.W.-3, who are stated to be eye-witnesses of the incident as per the prosecution, it is crystal clear that such testimonies of P.W.-1 and P.W.-3 are not reliable and trustworthy, on the basis of which it can be said that the accused has committed the alleged crime and they could be held guilty for the same.

62. Now this Court comes to examine the submission made by Mr. Rajiv Lochan Shukla, learned counsel appearing for the informant that the disclosure made by the deceased to his father Jai Sri who reached at the place of occurrence after the accused ran away as to who has assaulted him, be treated to be dying declaration of the deceased.

63. It is the duty of the prosecution to establish the charge against the accused beyond the reasonable doubt. The benefit of doubt must always go in favour of the accused.

64. It is true that dying declaration is a substantive piece of evidence to be relied on provided it is proved that the same was voluntary and truthful and the victim was in a fit state of mind. It is just not enough for the court to say that such dying declaration like the disclosure made by the deceased to his father in an injured condition, is reliable as the accused is named in such disclosure/ dying declaration as the assailant.

65. It is unsafe to record the conviction on the basis of a dying declaration alone in the cases where suspicion, like the case in hand is raised, as regards the correctness of the dying declaration. In such cases, the Court may have to look for some corroborative evidence by treating the dying declaration only as a piece of evidence. The evidence and material available on record must be properly weighed in each case to arrive at an appropriate conclusion.

66. In the case of **Irfan alias Naka Vs. State of Uttar Pradesh** reported in 2023 SCC OnLine SC 1060, the Hon'ble Supreme Court in paragraph-60 has opined as follows:

"62. There is no hard and fast rule for determining when a dying declaration should be accepted; the duty of the Court is to decide this question in the facts and surrounding circumstances of the case and be fully convinced of the truthfulness of the same. Certain factors below reproduced can be considered to determine the same, however, they will only affect the weight of the dying declaration and not its admissibility: -

(i) Whether the person making the statement was in expectation of death?

(ii) Whether the dying declaration was made at the earliest opportunity? "Rule of First Opportunity"

(iii) Whether there is any reasonable suspicion to believe the dying declaration was put in the mouth of the dying person?

(iv) Whether the dying declaration was a product of prompting, tutoring or leading at the instance of police or any interested party?

(v) Whether the statement was not recorded properly?

(vi) Whether, the dying declarant had opportunity to clearly observe the incident?

(vii) Whether, the dying declaration has been consistent throughout?

(viii) Whether, the dying declaration in itself is a manifestation / fiction of the dying person's imagination of what he thinks transpired?

(ix) Whether, the dying declaration was itself voluntary?

(x) In case of multiple dying declarations, whether, the first one inspires truth and consistent with the other dying declaration?

(xi) Whether, as per the injuries, it would have been impossible for the deceased to make a dying declaration?"

67. In a case where a person was in serious state, it was necessary to ascertain the fit mental state of the injured before accepting the dying declaration. Paragraph-9 of the judgment is reproduced hereunder:-

"9. It is true that the medical officer Dr. K.Vishnupriya Devi (PW 10) at the end of the dying declaration had certified patient is conscious while recording the statement. It has come on record that the injured Smt. Venkata Ramana had sustained extensive burn injuries on her person. Dr. P.Koteswara Rao (PW 9) who performed the post

mortem stated that injured had sustained 90% burn injuries. In this case as stated earlier, the prosecution case solely rested on the dying declaration. It was, therefore, necessary for the prosecution to prove the dying declaration being genuine, true and free from all doubts and it was recorded when the injured was in a fit state of mind. In our opinion, the certificate appended to the dying declaration at the end by Dr. Smt. K.Vishnupriya Devi (PW 10) did not comply with the requirement inasmuch as she has failed to certify that the injured was in a fit state of mind at the time of recording the dying declaration. The certificate of the said expert at the end only says that patient is conscious while recording the statement. In view of these material omissions, it would not be safe to accept the dying declaration (Ex.P-14) as true and genuine and was made when the injured was in a fit state of mind. From the judgments of the courts below, it appears that this aspect was not kept in mind and resultantly erred in accepting the said dying declaration (Ex.P-14) as a true, genuine and was made when the injured was in a fit state of mind. In medical science two stages namely conscious and a fit state of mind are distinct and are not synonymous. One may be conscious but not necessarily in a fit state of mind. This distinction was overlooked by the courts below.

(Emphasis supplied by us)

68. The observation made in the case of Paparambaka Rosamma (supra) has been reiterated in a subsequent decision of the Supreme Court in the case of Naresh Kumar Vs. Kalawati & Others reported in 2021 SCC OnLine SC 260, wherein the Supreme Court after referring to the above quoted paragraph no. 9 observed as under in para-13:-

“13. In the facts and circumstances of the present case, considering that the statements of the deceased have vacillated, there is no evidence about the fitness of mind of the deceased to make the dying declaration including the presence of the Doctor, the veracity and truthfulness of the dying declaration remains suspect. It would not be safe to simply reject the probable defence of suicide, to reverse the acquittal and convict the respondents.”

(Emphasis supplied by us)

69. In the facts of the present case, neither the contents of the dying declaration were read out to the injured/deceased nor to the father of the deceased, namely, Jai Sri, who could certify such disclosure, as in his presence such disclosure has been made by the deceased in respect of the person, who has assaulted him. As also the father of the deceased certifying such disclosure of the deceased, was not produced during the course of trial so that the defence could have an opportunity to cross-examine such disclosure. In **Suriender Kumar Vs. State of Haryana** reported in (2011) 10 SCC 173, the Supreme Court questioned the dying declaration also on the ground that such a satisfaction about the contents of the dying declaration having read out to the victim was missing. In paragraph no. 25 of the judgment, the Supreme Court observed as under:-

“25.As per the prosecution, the incident took place at 2 a.m. on 26.06.1991 and as per her statement, the occurrence of burning was in the evening of 25.06.1991, that is, the previous day. The dying declaration did not carry a certificate by the Executive Magistrate to the effect that it was a voluntary statement made by the deceased and that he had read over the

statement to her. The dying declaration was not even attested by the doctor. As stated earlier, though the Magistrate had stated that the statement had been made in mixed dialect of Hindi and Punjabi and the statement was recorded only in Hindi. Another important aspect is that there was evidence that Kamlesh Rani was under the influence of Fortwin and Pethidine injections and was not supposed to be having normal alertness. In our view, the trial Court rightly rejected the dying declaration altogether shrouded by suspicious circumstances and contrary to the story of prosecution and acquitted the appellant."

(Emphasis supplied by us)

70. We also find substance in the submission made by the learned counsel for the accused-appellant that there is a delay in lodging of the first information report. It is clear from the first information report that the alleged incident took place at 06:00 p.m. (evening) on 26th August, 1989, whereas the first information report was registered on 27th August, 1989 at 04:00 a.m. (morning), for which there is no explanation, which also cast a dent in the prosecution version.

71. It is also not clear from the prosecution version as to where the deceased has been done to death because of inconsistency in the testimony of P.W.-1 Lalji Yadav and P.W.-3 Hari Shanker Yadav.

72. In such circumstances, we are of the view that the court below has not examined the evidence led by the prosecution in correct perspective and the finding returned by it that the prosecution has succeeded in proving its case beyond reasonable doubt cannot be sustained. The prosecution has failed to establish the guilt

of the accused-appellant on the basis of evidence led at the stage of trial by the prosecution. The conviction and sentence of accused-appellant is consequently reversed.

73. In view of the discussions and deliberations held above, the present appeals succeed and are allowed. The judgment and order of conviction and sentence dated 25th March, 2004 passed by the Additional Sessions Judge/F.T.C.-IV, Jaunpur in Sessions Trial No. 41 of 1990 (State of U.P. Vs. Jwala Prasad & Others), arising out of Case Crime No. 110 of 1989, under Sections 148, 149 and 302 of I.P.C., Police Station-Baxa, District-Jaunpur against the accused appellant, is set aside.

74. The accused appellant Shanker Yadav, who is reported to be in jail, shall be released forthwith, unless he is wanted in any other case on compliance of Section 437-A Cr.P.C.

75. Let a copy of this judgment be sent to the Chief Judicial Magistrate, Jaunpur, henceforth, for necessary compliance.

(2024) 4 ILRA 1176
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.04.2024

BEFORE

THE HON'BLE ARVIND SINGH SANGWAN, J.
THE HON'BLE RAM MANOHAR NARAYAN
MISHRA, J.

Criminal Appeal No. 1995 of 2012

Vinay Kumar Jaiswal	...Appellant
Versus	
State of U.P.	...Respondent

Counsel for the Appellant:

Sri B.K. Tripathi, Sri Anil Kumar, Sri Arun Srivastava, Sri Manish Jaiswal, Sri Naveen Kumar Yadav, Sri Sheshadri Trivedi, Sri Sriprakash Dwivedi, Sri Vijay Kumar Mishra

Counsel for the Respondent:

Govt. Advocate

Criminal Law - Indian Penal Code, 1860 – Sections 302, 307, 506 & 504 – Arms Act, 1959 – Sections 3, 25 & 27 – Code of Criminal Procedure, 1973 – Sections 161 & 313 – Criminal Appeal Against Conviction and Sentence – Murder – Attempt to Murder – Criminal Intimidation – Illegal Arms Possession – Eye-Witness Testimony – Recovery of Weapon – Forensic Evidence – Motive – Reliability of Witnesses

The appellant, Vinay Kumar Jaiswal, challenged the judgment dated 16.05.2012 by the Additional Sessions Judge, Court No. 2, Maharajganj, in Sessions Trial No. 9 of 2010, convicting him under Section 302 IPC (life imprisonment, Rs. 10,000 fine, 6 months additional imprisonment in default), Section 307 IPC (7 years rigorous imprisonment, Rs. 5,000 fine, 6 months additional imprisonment in default), Section 506 IPC (2 years imprisonment), and Section 3/25 Arms Act (1 year imprisonment, Rs. 1,000 fine, 6 months additional imprisonment in default), with sentences to run concurrently. The prosecution alleged that on 07.05.2009 at 5:30 AM, the appellant shot his brother, Dileep Kumar Jaiswal (deceased), in the head and his mother, Durgawati Devi, in the chest, due to disputes over a saw mill and a Rs. 5,00,000 loan, killing Dileep and injuring Durgawati, who later died. The FIR was lodged by PW-1 (Sarita Jaiswal, deceased's wife), supported by PW-2 (Ashok Kumar Jaiswal, her brother), medical evidence, forensic reports, and recovery of a country-made pistol and cartridges. The appellant claimed false implication, alleging PW-1 and PW-2 were absent and the recovery was fabricated. Held: (1) The appeal was dismissed, upholding the convictions and sentences. (2) PW-1 and PW-2 were reliable eye-witnesses, providing consistent details despite rigorous cross-examination; defence claims of their absence were unsupported, as DW-1 and DW-2

(Pradeep Kumar Jaiswal, appellant's brother, who married PW-1) lacked credibility due to inconsistencies and bias. (3) The recovery of the pistol and cartridges, corroborated by forensic reports (Ex. Ka-19, Ka-20), confirmed the weapon's use in the crime. (4) Motive was established through PW-1's testimony of disputes over the saw mill and the appellant's financial demands. (5) Medical evidence, including the postmortem (Ex. Ka-2) and medico-legal report (Ex. Ka-5), supported firearm injuries with blackening and charring, consistent with prosecution claims. (6) Durgawati's Section 161 Cr.P.C. Statement (Ex. Ka-15), though not admissible as evidence, was unchallenged by the appellant under Section 313 Cr.P.C. (7) Defence witnesses (DW-1, DW-2) were unreliable, and the trial court correctly evaluated the evidence, proving guilt beyond reasonable doubt.

(Delivered by Hon'ble Arvind Singh Sangwan, J.)

1. The present appeal arises out of judgment of conviction dated 16.5.2012 passed by Additional Sessions Judge, Court No. 2, Maharajganj in Sessions Trial No.9 of 2010 holding appellant-Vinay Kumar Jaiswal guilty of offence under Section 302, 307 & 506 of IPC read with Section 3/25 of Arms Act. Vide order of sentence dated 17.5.2012, the accused-appellant was awarded imprisonment for life under Section 302 IPC with fine of Rs.10,000/-. Under Section 307 IPC, he was sentenced to seven years of rigorous imprisonment with fine of Rs. 5000/-, under Section 506 of IPC, imprisonment for two years and under Section 3/25 of the Arms Act, the appellant was sentenced to one year imprisonment with fine of Rs.1000/-. It was directed that in case of default in payment of fine, the appellant would further undergo imprisonment for six months. All the sentences were directed to run concurrently.

2. It is worth noticing that the Supreme Court of India vide order dated 16.12.2022 had directed the High Court to decide the appeal expeditiously. Paper book is complete and trial court's record has been received.

3. Learned counsel for the appellant and learned AGA for the State have addressed their respective arguments and with their assistance, the entire evidence is re-scrutinized and re-appreciated.

4. As per the prosecution, informant-Sarita Jaiswal, PW-1 (wife of deceased-Dileep Kumar Jaiswal), gave a complaint (Ex.Ka-1) that her husband runs a saw mill which is in the name of her mother-in-law, Smt. Durgawati Devi. Her mother-in-law is residing with her husband. The elder brother of her husband, appellant-Vinay Kumar Jaiswal, had separated after the death of their father and used to demand money from her husband. On 7.5.2009, at about 5.30 in the morning, the appellant fired on the head of his brother (deceased-Dileep Kumar Jaiswal) and when his mother-Durgawati Devi tried to intervene, the appellant also fired upon her which hit her on chest and by abusing and threatening, he ran away from the spot. The informant and other brother of her husband namely Ashok alias Raju Jaiswal and other family members took the injured to Medical College, Gorakhpur, where Dileep Kumar Jaiswal died and Durgawati was admitted. On receiving the information, the formal F.I.R. was registered.

5. During the course of investigation, the police recovered the weapon of offence from the appellant along with live cartridges. From the spot,

bloodstained earth was also recovered and a bullet was recovered from the head of the deceased during the postmortem which was also taken into possession by the police. The cartridges both empty and live were sent to F.S.L. for examination. Thereafter, charge-sheet was presented before the Trial Court and charges under Section 307, 302, 504 & 506 of IPC read with Section 3/25/27 of the Arms Act were framed.

6. The appellant did not plead guilty and claimed trial.

7. In prosecution evidence, the informant (PW-1) reiterated her version. It was stated by her that her husband, Late Dileep Kumar Jaiswal, were four brothers. The eldest is Ashok alias Raju Jaiswal, younger to him is Vinay Jaiswal (accused-appellant), at number three was her husband (deceased Dileep) and the youngest is Pradeep Kumar alias Chhotu. She further stated that after the death of her father-in-law namely Shiv Kumar Jaiswal, her husband separated from his two brothers, Ashok alias Raju and Vinay Kumar Jaiswal who had got their share separated and started their separate business. It was further stated that her mother-in-law and youngest brother of her husband, Pradeep alias Chhotu were staying with her husband and they were working on saw mill which was in the name of her mother-in-law and this property was not divided. She further stated that accused-Vinay Kumar had taken Rs.5,00,000/- from her husband and spent this amount on bad habits.

8. On 7.5.2009, when she was getting ready to go to her parental home and her husband was sleeping, suddenly she heard a noise of firing. She along with her brother-Ashok (PW-2), brother-in-law,

Raju and mother-in-law, Durgawati Devi, went towards the room where her husband was sleeping. Accused-appellant was carrying a revolver and before they could understand anything, he fired upon her mother-in-law, Durgawati, on her chest. By extending threat, accused-Vinay Kumar Jaiswal, ran away. In the meantime, many people gathered. Injured persons were taken to Medical College, Gorakhpur where Dileep died and her mother-in-law was admitted.

9. In cross examination, the defence tried to prove that PW-1 was not present at the spot. However, in her cross examination, PW-1 has given complete details of the manner in which the incident took place, the manner in which the injured persons were taken to the hospital, the manner in which the information was given to the police and the investigation carried out by the police at the spot. This witness categorically stated that her brother (PW-2) was there at her matrimonial home as on previous day i.e. 6.5.2009, he had come to take her back for attending some function at her parental home. One suggestion was given to this witness that at the time of incident she was at her parental home and was not present in matrimonial home, however, she denied the suggestion that she along with her brother was not present at the spot.

10. Ashok Kumar Jaiswal (PW-2) narrated the incident as stated by PW-1. He has also given the complete details of giving complaint to the police and taking the injured persons to the hospital. In cross examination, the defence tried to prove that he was not present on the spot. However, this witness was consistent in giving details of the incident. He has also denied the suggestion by defence that on the date of

incident, he along with his sister (PW-1) had gone to their parental home and on receiving information from the brother of the deceased, they reached the medical college.

11. Sanjay Jaiswal (PW-3), is the neighbour of the deceased as well as the accused. This witness also gave the description of the incident by saying that when he reached the house of Dileep (deceased), he found both Dileep and his mother-Durgawati lying injured due to bullet injuries. This witness also stated that there used to be panchayat between Vinay Kumar (appellant) and Dileep Kumar (deceased) regarding partition of saw mill. However, this witness stated that on 24.5.2009, the Investigating Officer, in his presence, did not record any confession of accused (Vinay Kumar) or effected any recovery from the accused. Qua this part of statement, this witness was declared hostile. He was cross examined by government pleader. In cross examination, he stated that after 5-6 months, Durgawati died and Vinay Kumar had surrendered before the Court. This witness further denied the suggestion as incorrect about the deposition made by him that after 4-5 days of the incident, the SHO came and took him and Raju (brother of accused) to the house of accused-Vinay Kumar, from where, his wife-Rekha produced a revolver wrapped in a newspaper and memo was prepared by SHO which was exhibited as Ex.15-Kha/2. In further cross examination by the defence, this witness again stated that the revolver was recovered from Rekha vide recovery memo 15Kha/2 and he had signed on the same which he identified. However, he stated that, on 24.5.2009, the Investigating Officer, after taking order from the Court had taken Vinay Kumar Jaiswal to the police station where

signature of PW-3 was taken on a blank paper. This witness further deposed that PW-1 & PW-2 were not present at the spot and also stated that nobody knew as to who had fired upon Dileep Kumar (deceased) and his mother and he had given information to PW-1 & PW-2 on mobile phone.

12. Ganesh Jaiswal (PW-4) is a witness of Panchayatnama (Ex.Ka-21). In cross examination, this witness stated that both, PW-1 and PW-3, were not present on the spot.

13. Shiv Raj (PW-5) submitted that he was witness of recovery of the bloodstained earth collected by S.H.O. However, he denied having made any recovery in his presence. This witness was declared hostile.

14. Dr. Mukesh Kumar Srivastava (PW-6) conducted the postmortem of Dileep Kumar Jaiswal (deceased) and found that there was an entry wound on right parietal region with blackening and charring of size 1 x 1 cm bone deep. The bone was fractured and bullet was found inside the brain. He also stated that another injury wound with blackening and charring was present below the injury No.1 on the right parietal region of 1 x 1 cm with inverted margin. The bone was fractured and a bullet was recovered from the left side of parietal bone. He opined that death was due to shock and haemorrhage on account of receiving gunshot injuries. He prepared the postmortem report (Ex.Ka-2). This witness stated that two bullets which were retrieved from the wound of the deceased were sealed along with clothes and were handed over to the constable who had brought the dead body for postmortem and copies were sent to Chief Medical

Officer, Gorakhpur and Senior Superintendent of Police, Gorakhpur. In cross examination, this witness stated that the weapon of offence was not produced before him at the time when his statement was recorded.

15. Head Constable Dileep Kumar Singh (PW-7) stated that on 7.5.2009, informant-Sarita Jaiswal gave a written complaint in the Police Station, upon which, he registered the F.I.R. (Ex.Ka-3) and copy of the same in the original G.D. was entered at 9.15 a.m. In cross examination, this witness stated that he has not brought the original G.D.

16. Dr. A.K. Srivastava (PW-8) prepared the medico-legal report of Durgawati Devi and found that injury No.1 is on the left side of the chest with inverted margin of 1 x 0.8 cm which is six centimetre towards the centre from nipple with blackening. Injury No.2 was on the left lower side of the chest .8 cm x .8 cm having inverted margins. He opined that the injuries were caused with firearm. This witness produced the original record and the medico-legal report was exhibited as Ex.Ka-5.

17. Rafiq Ahmad (PW-9), the Investigating Officer, deposed about investigation carried out by him. He proved the site plan and recovered the bloodstained earth which was sealed vide recovery memo (Ex.Ka-7) . Bloodstained bed sheet along with bloodstained mattress cover were recovered vide recovery memo (Ex.Ka-8 and Ex. Ka-9) . Thereafter, this witness went to B.R.D. Medical College on 8.5.2009 where Durgawati was admitted in emergency ward. There, he met Constable Moharir who gave him carbon copy of postmortem report, one sealed packet in

which the bullets recovered from the body of the deceased were kept and copy of Panchayatnama. This witness stated that he tried to arrest the accused, however, on 15.5.2009, the accused surrendered before the Court of Chief Judicial Magistrate and thereafter, he was taken in custody. On 19.5.2009, his custody was taken from District Jail, Gorakhpur, where he recorded his confession statement about purchase of country made pistol along with cartridges and committing murder of his brother and causing injuries to his mother. This witness stated that the accused had concealed the country made pistol near Lehra Station. Thereafter, by taking permission from the Court on 24.5.2009, weapon of offence was recovered at the instance of accused. This witness further stated that in his confession, the accused admitted that he has committed murder of his brother and caused injuries to his mother. The confession statement of accused was exhibited as Ex.Ka-11. The country made pistol was taken in possession vide recovery memo Ex.Ka.12 and the site plan as Ex.Ka.13. After coming back to the Police Station, this witness added Section 3/25/27 of the Arms Act in Original G.D. and this was exhibited as Ex.Ka-14. This witness stated that on 6.7.2009, he reached the house of Durgawati where he recorded a statement which was also recorded in Case Diary. Statement of Durgawati under Section 161 Cr.P.C. in toto was recorded in the Case Diary and was attested which is Ex.Ka-15. On the same date, the memo was attested by Deepak Agarwal and Shivraj and statements of other witnesses were also recorded. This witness stated that after 4-5 months, Durgawati Devi died. This witness further proved sending of weapon of offence along with live cartridges, bloodstained clothes and earth, to Forensic Science Laboratory. This witness produced

the case property as noticed above which were exhibited before the Trial Court.

18. This witness has also proved the country made pistol, live cartridges and empty cartridges which were inspected by Forensic Science Laboratory and were marked as 'Report of F.S.L.' This witness also stated that country made pistol along with empty cartridges and two live cartridges were the same which were recovered from accused-appellant.

19. This witness was subjected to lengthy cross examination. With regard to Ex.Ka-15, this witness stated that statement of Durgawati was recorded at her residence and the same was recorded in the Case Diary, however, there were no witness to her statement.

20. Further, with regard to recovery of country made pistol on 24.5.2009, a suggestion was given that the same was not recovered on the spot, however, this witness denied the same and stated that the country made pistol and cartridges were recovered under the Mango Tree, concealed with the dry grass and no one had access to that place.

21. S.H.O. Harish Chandra (PW-10) stated that he had verified the investigation conducted in the case and the case property along with other records were sent to Forensic Science Laboratory by preparing a docket through Constable Naval Kishore Sharma.

22. S.I. Ajit Kumar Mishra (PW-11), who had also conducted part of investigation, stated that during his investigation, he received ballistic report and forensic report from the Forensic Science Laboratory which were the part of

Charge-sheet and were exhibited as Ex.Ka-19 & Ex.Ka-20 respectively. In cross examination, he stated that while seeking permission from the District Magistrate to conduct the case under the Arms Act, he had mentioned the details of recovery in the Case Diary.

23. S.I. Ambika Prasad Tiwari (PW-12) is a witness who had prepared the Panchayatnama (Ex.Ka-21) along with statements Ex.Ka-22 to Ex.Ka-25. In cross examination, this witness stated that he could not tell whether wife of the deceased and her brother were present there or not.

24. Thereafter, statement of accused under Section 313 Cr.P.C. was recorded and all the incriminating evidence was put to him.

25. In majority of the questions relating to Ex.Ka-1 to Ex.Ka-4, it was stated that fake reports were prepared. With regard to postmortem report, the accused replied that no postmortem was conducted. Regarding recording of statement of Durgawati (Ex.Ka-15) which was proved by PW-9, again a reply was given that the entire proceeding is fake and not done as per law. Regarding F.S.L. Report of country made pistol and cartridges, again he replied that the same is incorrect. Regarding another forensic report i.e. Ex.Ka-20 of bloodstained clothes and earth, the accused replied that he has nothing to say.

26. While putting all the statements of PW-1 to PW-12, the accused stated that they (prosecution witnesses) have made incorrect statements. The accused further stated that he want to lead defence witness.

27. In defence, Ashish Kumar Jaiswal (DW-1) appeared and stated that his house abutting the house of Dileep Kumar Jaiswal (deceased). On 7.5.2009, at

about 5.30 a.m., he heard the voice of weeping and he went to the house of Dileep along with his brother- Sanjay and found that Dileep Kumar Jaiswal and his mother- Durgawati were injured and blood was oozing from their body. He along with his brother-Sanjay and Pradeep Jaiswal (another brother of deceased-Dileep) took Dileep and his mother to Medical College, Gorakhpur where Dileep died and his mother was admitted. This witness stated that Sarita (PW-1/wife of deceased) and Ashok Kumar Jaiswal (PW-2/brother of Sarita) were in village Naua Bari, Police Station - Jhangaha, District - Gorakhpur and they were not present at the house of the deceased. This witness stated that he and his brother-Sanjay intimated the same to them on mobile phone and thereafter, they came to the hospital and started crying.

28. He further stated that thereafter, Panchayatnama was conducted and postmortem of dead body was done. He stated that when he and other people enquired about the incident, the people who were present at the place of incident and at Medical College said that they had no knowledge of the person who had committed the offence.

29. This witness further stated that Sarita (PW-1) has performed marriage with brother of deceased namely Pradeep Kumar Jaiswal according to Hindu rites and ceremonies.

30. In cross examination by Public Prosecutor, this witness stated that he had no knowledge, when Sarita (PW-1) had gone to her parental home and he informed them (PW-1 & PW-2) through the mobile phone of his brother-Sanjay. However, this witness stated that after giving information,

he did not remember if before or thereafter, he received any telephone call. On asking whether he can tell the mobile number of Sarita (PW-1) or her brother Ashok (PW-2), this witness stated that he cannot tell the same and denied that accused-appellant had committed the offence.

31. Pradeep Kumar Jaiswal (DW-2) stated that some unknown person had committed the murder of his brother and had also caused injuries to his mother by using firearm. He along with his brother accused-Vinay Kumar Jaiswal were sleeping about half kilometre away from the place of incident and Ganesh Jaiswal who lives in front of his house told him and Vinay that somebody had fired upon Dileep and, thereafter, he and Vinay Kumar went there and found that their brother-Dileep and mother-Durgawati were lying in injured condition. This witness further stated that he along with Ashish Kumar Jaiswal and Sanjay Jaiswal took his brother and mother to Medical College, Gorakhpur in a Maruti Car. This witness further stated that he told Sanjay Jaiswal to inform Sarita (PW-1) regarding the incident and to come to Medical College as a day prior to the incident, his sister-in-law, Sarita Devi (PW-1), had gone to her parental home to attend some function. When police conducted the Panchayatnama, both PW-1 and PW-2 reached there.

32. This witness further stated that four months before making his statement before the Court i.e. 27.4.2011, he had performed marriage with Sarita Devi (PW-1). This witness stated that he did not know as to who had committed murder of his brother-Dileep and further stated that he did not know as to why his statement was not recorded by the Investigating Officer and why he was named as a witness.

33. Lastly, he denied the suggestion that being brother of accused-Vinay Jaiswal, he was making false statement.

34. Jairam Shah (DW-3), an employee of the Medical College, admitted and proved the record relating to admission of Dileep Kumar Jaiswal and Durgawati which is at page Nos. 42 & 43 of the original register. As per the record, they were admitted by Ashish Jaiswal.

35. Hasim Ali (DW-4), an employee of the Office of C.O. Farenda, who brought the Z register in the Court and proved on record the chik report relating to F.I.R. (Ex.Ka-3).

36. Thereafter, the Trial Court vide impugned judgment of conviction and order of sentence held the appellant guilty and sentenced him for life imprisonment.

37. Counsel for the appellant has firstly argued that presence of PW-1 and PW-2, the eye-witnesses, are highly doubtful. Counsel has placed reliance upon the statement of Sanjay Jaiswal (PW-3) to submit that he has stated that Sarita (PW-1) had gone to her parental home and even PW-2 was not present at the spot. Counsel further submits that in cross examination, S.I. Ambika Prasad (PW-12) has also stated that at the time of conducting the Panchayatnama, wife of the deceased (PW-1) and his brother-in-law (PW-2) were present or not, he could not state. Counsel further relied upon the statement of Ashish Kumar Jaiswal (DW-1) that at the time of incident, PW-1 and PW-2 were not present at the place of occurrence and he and his brother gave information to them on mobile phone which was informed by Pradeep Kumar Jaiswal. Counsel has also stated that

Pradeep Kumar Jaiswal (DW-2/brother of deceased and accused-Vinay Kumar) had also stated that PW-1 and PW-2 were not present at the spot and he along with Ashish Jaiswal and Sanjay Jaiswal took the injured persons to the hospital. Counsel submits that it has also come in the statement of DW-3 that the injured persons were admitted in the hospital and if PW-1 and PW-2 were present, they would have admitted them in the hospital.

38. It is next argued that recovery of the country made pistol was not proved. Counsel relies upon the statement of PW-3 who has stated that after 4-5 days, the S.H.O. came at the house of Vinay Kumar and took him and Ashok Kumar alias Raju (brother of accused-Vinay Kumar) to the room of Vinay Kumar where his wife-Rakhi produced a country made pistol wrapped in a newspaper and Investigating Officer prepared some document regarding recovery, on which, they have signed which was tagged with the records.

39. Counsel submits that later on as per the prosecution, some recovery was effected at the pointing of accused on 24.5.2009 from an open place concealed under dry grass near Lehra Station and, therefore, recovery from the appellant is not proved.

40. It is next argued that no motive has been proved as to why the appellant has committed murder of his brother and caused injuries to his mother. Counsel has next argued that as per prosecution version, the firearm injuries were caused from close range but as per the Postmortem report, there was blackening and charring on the wound

which occurs if the firearm is used from some distance.

41. Counsel further submitted that mother of the appellant was not examined as witness though she was a natural witness and the Trial Court has not given due weightage to defence evidence.

42. In reply, learned A.G.A. for the State has however submitted that both PW-1 and PW-2 are the natural witnesses and PW-1 being wife of the deceased was present in the house when the accident took place and despite lengthy cross examination, the defence could not put a dent to prove that she was not present at the spot as she has replied to every minute question put to her from the time of incident till recovery. It is further stated that she denied that she or her brother was not present on the spot. Similar is the evidence of PW-2 who was remained consistent with regard to his presence on the spot and the manner in which murder of Dileep was committed by the appellant.

43. Learned A.G.A. has also referred to the recovery effected from the appellant i.e. country made pistol, bullets retrieved from the body of the deceased, empty cartridges and live cartridges. Counsel has referred to the report of Forensic Science Laboratory (Ex.Ka-19 & Ex. Ka.20) wherein a categorical report was given that the cartridges sent for examination were matching with the weapon of offence and were fired upon by the same weapon.

44. Counsel has referred to the conclusion part of this report wherein it was stated that the disputed cartridges marked as EC-1, EC-2 & EC-3 were fired

upon by pistol of .32 (point thirty two) bore marked as 1/10.

45. It is next argued that the recovery was effected from the accused on 24.5.2009 on his pointing out and no recovery was effected from the wife of accused.

46. Learned A.G.A. submits that had there been any such recovery at the instance of Rekha, the defence would have produced her as witness and, therefore, the statement of PW-3 to this effect is not relied upon as this witness was declared hostile as he was witness before whom the recovery was effected and this witness has admitted that his signatures are there on the recovery memo.

47. Learned A.G.A. has further argued that postmortem report of deceased-Dileep and medico-legal report of injured-Durgawati clearly suggest that both of them received firearm injuries because as per the injuries, the wounds were having blackening and charring.

48. Counsel further submitted that there was motive attributed to the accused as it has come in the statement of PW-3 that even on previous occasions, deceased-Dileep and accused-Vinay, both brothers, had convened Panchayat for partition of saw mill which was in the name of their mother-Durgawati.

49. Learned A.G.A. for the State further stated that it has come in the statement of PW-1 that accused-Vinay was spending money on his vices and had taken Rupees Five Lakhs from deceased-Dileep and, therefore, motive is proved.

50. Learned A.G.A. has referred to Ex.Ka-15 which is proved by PW-9, the

Investigating Officer. This document is the copy of G.D. report wherein statement of Durgawati recorded under Section 161 Cr.P.C. was entered. It is submitted that in this statement Durgawati stated that her son – Vinay Kumar committed murder of her another son-Dileep Kumar Jaiswal and also tried to commit her murder.

51. Learned A.G.A. submits that though statement under Section 161 Cr.P.C. is not admissible, however, in cross examination was offered to PW-9, the Investigating Officer regarding Ex.Ka-15 by suggesting that same was recorded in presence of two eye-witnesses and, therefore, in the absence of any statement of Durgawati recorded by Court, as she died within six months of incident, no adverse inference can be drawn.

52. Learned A.G.A. has lastly argued that all the incriminating evidence including Ex.Ka-15 was put to the appellant in his statement under Section 313 Cr.P.C. but he could not give any explanation. Learned A.G.A. argued that Pradeep Kumar Jaiswal (DW-2) had stated that he accompanied Ashish Jaiswal and Sanjay Jaiswal to the Medical College but, this statement is an after thought as neither this witness lodged the First Information Report regarding murder of his own brother and injury to his mother nor he was a witness to Panchayatnama and even he did not get the injured admitted in the hospital which suggests that he was not present at the spot.

53. Learned A.G.A. submits that since this witness had performed marriage with Sarita (PW-1), he has made

false statement in order to save his brother-Vinay Kumar Jaiswal.

54. After hearing the counsel for the parties, we find no merit in this appeal for the following reasons :

A. Counsel for the accused-appellant could not substantiate his arguments that Sarita Jaiswal (PW-)/Informant/wife of deceased-Dileep, was not present at the place and time of incident and is not an eye-witness.

A perusal of the examination-in-chief of PW-1 reveals that she has given a complete detail of incident as stated in the F.I.R. and investigated by the police. This witness stated that her husband (deceased-Dileep Jaiswal) had four brothers and, after the death of her father-in-law, the elder brothers namely Ashok alias Raju Jaiswal and accused-Vinay Kumar Jaiswal separated and started their independent business. However, mother and younger brother-Pradeep alias Chhotu were residing with deceased-Dileep. This witness has also stated that the accused was addicted to vices and even previously had taken Rupees Five Lakhs from his deceased brother-Dileep. She has further stated that her brother-Ashok (PW-2), a day prior to the incident, had come to her matrimonial house as she was to accompany him to attend some function at her parental home. However, on 7.5.2009 in the morning at about 6.00 a.m., the accused came with a revolver and murdered her husband and caused grievous injuries to her mother-in-law, Durgawati. Even during cross examination of both PW-1 and PW-2, nothing has come on record that they were not present at the spot as both the witnesses have replied to every minute cross examination regarding the manner of incident, the investigation, the

Panchayatnama, postmortem report as well as further investigation.

Similarly, defence could not prove that Ashok Kumar Jaiswal (PW-2) who is real brother of PW-1 was also not present at the spot when the incident took place.

In order to prove that PW-1 and PW-2 were not present at the spot, the defence examined Ashish Kumar Jaiswal (DW-1), a neighbour, who stated that he had taken the deceased and his mother to hospital along with his own brother-Sanjay Jaiswal and brother of deceased namely Pradeep Jaiswal. However, this witness could not give satisfactory explanation about phone number used by him and Pradeep Jaiswal (DW-2) by which the alleged information was given to PW-1 and PW-2 to prove that they were not present at the spot and were at Village Naua Bari where DW-1 informed them.

Even Pradeep Kumar Jaiswal (DW-2) stated that he along with Ashish Jaiswal and Sanjay Jaiswal took his brother-Dileep and mother-Durgawati to Medical College. This witness also stated that PW-1 reached Medical College after the incident. However, this witness stated that four months prior to his statement before the Trial Court i.e. 27.4.2011, he performed marriage with Sarita (PW-1) who is widow of deceased-Dileep. Therefore, it is apparent that in order to save his brother (accused-Vinay Kumar Jaiswal), he appeared as defence witness. If this witness had gone to Medical College, his presence should have been marked in the record as well as the Panchayatnama which is missing.

Jairam Shah (DW-3), an employee of the Medical College, has proved that deceased-Dileep and injured-Durgawati were admitted by Ashish Jaiswal (DW-1). This statement also falsified the deposition of Pradeep Kumar Jaiswal (DW-2).

Therefore, we uphold the finding of the Trial Court that PW-1 and PW-2 are the eye-witnesses of the incident.

B. Next argument raised by the counsel for the appellant is that the recovery of weapon from the appellant is not proved is also without any substance. Counsel for the appellant has heavily relied upon the statement of PW-3 who was partly declared hostile with regard to recovery of weapon as he stated that 4-5 days after the incident, the Investigating Officer came to the house of accused-Vinay Kumar and in presence of Sanjay Jaiswal (PW-3) and Ashok Kumar Jaiswal alias Raju (brother of accused-Vinay Kumar), Rakhi (wife of accused) had produced the revolver wrapped in the newspaper. The Investigating Officer prepared recovery memo at spot which was signed by PW-3 and other witnesses. However, this witness stated that later on when accused-Vinay surrendered before the Court, the Investigating Officer had shown recovery on a subsequent date by changing date on the memo of recovery of weapon which was signed by PW-3 and other witnesses 4 – 5 days after the incident when Rakhi handed over the weapon. This aspect of PW-3 is without any substance as Rakhi, wife of Vinay Kumar, was never cited as defence to prove that she had handed over the weapon of offence to the Investigating Officer 4-5 days after the incident as it is the case of prosecution that Vinay Kumar surrendered before the Court of Chief Judicial Magistrate on 15.5.2009 and thereafter, as per the statement of Investigating Officer (PW-9), by taking permission from the Court, the accused was taken to the place of recovery and on his pointing out, the recovery of firearm was effected and recovery memo was prepared. Even there is no cutting on this record. This version of PW-3 has been rightly

disbelieved by the Trial Court that the recovery was not effected from the house of the accused 4-5 days after the incident as accused was arrested after about 20 days of incident.

C. The argument raised by the counsel for the appellant that no motive is proved is also without any force as it has come in the statement of PW-1 that after the death of her father-in-law, two elder brothers of her husband had separated including appellant-Vinay Kumar. It has also come in the statement that Vinay Kumar was putting pressure on her husband for the partition of saw mill which was in the name of her mother-in-law namely Durgawati and he had even taken Rs.5,00,000/- from deceased-Dileep which he had spent on his bad habits. Therefore, he came with a premeditated motive to put pressure on deceased-Dileep and her mother-in-law in whose name the saw mill was there. However, having been unsuccessful, he committed murder of Dileep and made murderous assault on his mother-Durgawati who later on died after 4-5 months.

D. The next argument of counsel for the appellant is that as per prosecution, the firearm injuries were caused from close range but as per the postmortem report there was blackening and charring of the wound which occur if the firearm is used from some distance. This argument is also without any basis as both PW-1 and PW-2 have stated that when they heard noise of the gunshot, they found that accused was carrying a revolver and her husband was lying in a pool of blood and while leaving, the accused extended threat even to her mother who tried to stop him and caused firearm injuries to his mother as well which is proved from the medico-legal report. The medical evidence i.e. postmortem report and medico-legal report corroborates the version of prosecutor.

E. Next argument of the counsel for the appellant that statement of the mother of the appellant who was a natural witness was not recorded is also without any substance as she died 4-5 months after the incident that is much prior to recording of her evidence. It has come in the statement of PW-9 that during investigation, he has recorded statement of Durgawati, who stated that her son had committed murder of her other son-Dileep and had even caused injuries to her. This statement was recorded by PW-9 under Section 161 Cr.P.C. even in the Case Diary which was exhibited as Ex.Ka-15.

Though it is settled principle of law that statement under Section 161 Cr.P.C. can only be used for the purpose of confrontation of the witness. However, perusal of statement of PW-9 shows that the defence has even cross examined this witness qua Ex.Ka-15 and PW-9 has stated that he recorded the statement of Durgawati at her residence which he also recorded in the Case Diary in verbatim.

Even while recording the statement under Section 313 Cr.P.C., the statement of Durgawati Ex.Ka-15 was put to appellant but no explanation was given by defence.

F. Argument of counsel for the appellant that prosecution has failed to prove that weapon of offence recovered from the appellant, in fact was used for commission of offence is also without any substance. It has come in the reports of Forensic Science Laboratory (Ex.Ka-19 & 20) that the cartridges sent for examination matched with the weapon of offence and were fired upon by the same weapon. Therefore, the categorical finding recorded by the Forensic Science Laboratory that disputed cartridges marked as EC-1, EC-2 and EC-3 were fired upon by the pistol of .32 (point three two) bore marked as 1/10 proves that the weapon recovered from the appellant was used in commission of offence whereby the

accused-appellant committed murder of his brother and caused gunshot injuries to his mother.

G. Learned A.G.A. for the State has rightly pointed out that Pradeep Kumar Jaiswal (DW-2) being brother of deceased as well as accused, after performing marriage with PW-1, in order to save accused, has made false statement that PW-1 and PW-2 were not present at the spot.

55. In view of the above, we find no merit in the present appeal.

56. Accordingly, this appeal is dismissed.

57. The accused-appellant is already in custody. He will undergo the remaining sentence in accordance with law.

58. Record and proceedings be sent back to the Trial Court forthwith.

(2024) 4 ILRA 1188

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 27.04.2024

BEFORE

THE HON'BLE SANJAY KUMAR SINGH, J.

Criminal Appeal No. 2596 of 2024

Dhananjay Singh & Anr.	...Appellants
Versus	
State of U.P.	...Respondent

Counsel for the Appellants:

Sri Sudhir Walia (Sr. Adv.), Shri Saghir Ahmad (Sr. Adv.), Shri Kartikeya Saran, Sri S.P. Singh, Shri Prakash Mani Tripathi, Shri Mohd. Raghib Ali

Counsel for the Respondent:

Shri P.C. Srivastava (Addl. A.G.), Shri J.K. Upadhyay (A.G.A.), Shri Deepak Mishra (A.G.A.),

Shri Vikas Sahai(A.G.A.), Shri Rabindra Kumar Singh (A.G.A.)

Criminal Law - Indian Penal Code, 1860 – Sections 364, 386, 504, 506 & 120-B – Code of Criminal Procedure, 1973 – Sections 374(2), 389(1), 161 & 313 – Representation of People Act, 1951 – Section 8(3) – Indian Evidence Act, 1872 – Sections 3, 65-B & 101 – Criminal Appeal – Suspension of Sentence – Stay of Conviction – Kidnapping for Murder – Extortion – Intentional Insult – Criminal Intimidation – Criminal Conspiracy – Hostile Witnesses – Electronic Evidence – Criminal History – Political Disqualification

The appellants, Dhananjay Singh and Santosh Vikram Singh, challenged the judgment dated 05.03.2024 and sentence order dated 06.03.2024 by the Additional Sessions Judge-IV/Special Judge, MP/MLA, Jaunpur, in Sessions Trial No. 109 of 2020, convicting them under Section 364 IPC (7 years rigorous imprisonment, Rs. 50,000 fine, 4 months additional imprisonment in default), Section 386 IPC (5 years rigorous imprisonment, Rs. 25,000 fine, 3 months additional imprisonment in default), Section 504 IPC (1 year rigorous imprisonment, Rs. 10,000 fine, 1 month additional imprisonment in default), Section 506 IPC (2 years rigorous imprisonment, Rs. 15,000 fine, 45 days additional imprisonment in default), and Section 120-B IPC (7 years rigorous imprisonment, Rs. 50,000 fine, 4 months additional imprisonment in default), with sentences to run concurrently. The prosecution alleged that on 10.05.2020 at 5:30 PM, the appellants abducted Abhinav Singhal (PW-1/CW-1) to Dhananjay Singh's residence, where Singh, armed with a pistol, abused and threatened him to supply substandard materials for the Namami Gange Project, supported by a WhatsApp message, CCTV footage, and mobile location data. The appellants sought suspension of sentence and stay of conviction, citing false implication due to political motives and lack of evidence, as PW-1, PW-2, PW-3, and CW-2 turned hostile, and PW-1's Section 164 Cr.P.C. Statement denied the incident. Held: (1) The application under Section 389(1) Cr.P.C. for suspension of sentence was allowed, and both appellants were granted bail pending appeal, considering the lack of substantive evidence,

hostile witnesses, and no misuse of prior bail. (2) The prayer for stay of conviction was rejected for appellant No. 1 (Dhananjay Singh) due to his extensive criminal history (46 cases, 28 acquittals due to hostile witnesses, 10 pending), absence of exceptional circumstances, and the need to prevent criminalization of politics under Section 8(3) of the Representation of People Act, 1951. (3) The prosecution failed to prove the charges beyond reasonable doubt, as all fact witnesses (PW-1, PW-2, PW-3) and CW-2 did not support the case, CCTV footage lacked Section 65-B certification and was unusable, and key witnesses (Mohan Lal Singhal, Pulkit) were not examined. (4) The trial court's findings, including an erroneous mention of ransom, were based on presumption rather than evidence, violating Section 101 of the Evidence Act. (5) The appeal was listed for final hearing after paper book preparation.

List of Cases cited:

1. Anvar P.VS Vs P.K. Basheer & ors., (2014) 10 SCC 473
2. Lallu Manjhi & Anr. Vs St. of Jharkhand, (2003) 2 SCC 401
3. St. of Rajasthan Vs Babu Meena, (2013) 4 SCC 206
4. Afjal Ansari Vs St. of U.P., (2024) 2 SCC 187
5. Navjot Singh Sidhu Vs St. of Punj. & Anr., (2007) 2 SCC 574
6. Sucha Singh Langah Vs St. of Punj., Criminal Appeal No. 40 of 2017 (decided on 05.01.2017)
7. K.C. Sareen Vs CBI, (2001) 6 SCC 584
8. Union of India Vs Atar Singh, (2003) 12 SCC 434
9. St. of Maharashtra Vs Gajanan, (2003) 12 SCC 432
10. St. of Har. Vs Hasmat, (2004) 6 SCC 175

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

ORDER**In re: Criminal Misc. Application
(For Suspension of Sentence) Under
Section 389 (1) Cr.P.C. No. 02 of 2024**

1. The above mentioned appeal under Section 374(2) Cr.P.C. has been preferred by the appellants-Dhananjay Singh and Santosh Vikram Singh against the judgment of conviction dated 05.03.2024 and order of sentence dated 06.03.2024 passed by learned Additional Sessions Judge-IV/Special Judge, MP/MLA, Jaunpur in Sessions Trial No. 109 of 2020 (State Vs. Dhananjay Singh and another) arising out of Case Crime No. 142 of 2020, Police Station Line Bazar, District Jaunpur, convicting and sentencing the appellants as under :-

(a) Seven years' rigorous imprisonment and fine of Rs. 50,000/- for the offence under Section 364 I.P.C. and in default of payment of fine, four months' additional imprisonment.

(b) Five years' rigorous imprisonment and fine of Rs. 25,000/- for the offence under Section 386 I.P.C. and in default of payment of fine, three months' additional imprisonment.

(c) One year's rigorous imprisonment and fine of Rs. 10,000/- for the offence under Section 504 I.P.C. and in default of payment of fine, one month's additional imprisonment.

(d) Two years' rigorous imprisonment and fine of Rs. 15,000/- for the offence under Section 506 I.P.C. and in default of payment of fine, forty five days' additional imprisonment.

(e) Seven years' rigorous imprisonment and fine of Rs. 50,000/- for the offence under Section 120-B I.P.C. and in default of payment of fine, four months' additional imprisonment.

However, the sentences were ordered to run concurrently.

Relief

2. By means of this application No. 02 of 2024, a prayer has been made to stay the operation and effect of the judgment of conviction dated 05.03.2024 and order of sentence dated 06.03.2024 of the appellants and enlarge them on bail during pendency of this Criminal Appeal before this Court.

3. Heard Shri Sudhir Walia, learned Senior counsel, Shri Saghir Ahmad learned Senior counsel assisted by Shri Kartikay Saran, Shri S.P. Singh, Shri Prakash Mani Tripathi and Shri Mohammad Raghbir Ali, learned counsel appearing on behalf of the appellants and Shri P.C. Srivastava, learned Additional Advocate General assisted by Shri J.K. Upadhyay, Shri Deepak Mishra, Shri Vikas Sahai and Shri Rabindra Kumar Singh, learned Additional Government Advocate representing the State.

Brief facts

4. The emanation of facts giving rise to the present Criminal Appeal as per prosecution case are that on 10.05.2022 at about 10:40 PM, an FIR was lodged by Shri Abhinav Singhal, complainant/informant (PW-1/CW-1), verbatim whereof is quoted here-under :-

“Sir, with due respect, I would like to inform you that last couple of weeks back I have got random call from (8948320530) & Vikram Singh (9415905703) regarding to meet Mr. Dhananjay Singh. Once I have meet with him before Holi with Dhananjay Singh ji at his home but his phone started again on

04.05.2020. Surprise to note that today Mr. Vikram Singh has visit our site and forcibly with his two person captured and taken to me at Dhananjay Singh ji house when I reached. Dhananjay Singh ji came with his black colour pistol and using abusing words his intention is for supply the material (aggregate & Sand) to STP site. By forcibly he has taken my M.D. mobile no and talked to them in front of me. They have called to UPJN department J.E. also and asking for quality of materials. Mr. Satya Prakash Yadav (8115879097) told him that the quality which they have supplied is not up to the mark (back pto) that is why we are not in position to place the order, more to him. Where as, what ever they forcibly send it may be consumed in some other disposing work but not for construction. Today at 17.30 pm Vikram Singh along with two men with black colour fortuner (0111) come at panchatiya site. Finally they leave and I also leave from there office but Vikram Singh told me that provide your supply rate list so that he can proceed further. The whole incident took place in residence of Mr. Dhananjay Singh. They forcefully want to supply quality less material to our firm and for that they said that they will do this under any situation. Mr. Dhananjay Singh and his men are very hard criminals and through his gangs and gang members he forcefully wants to do this things which we already denied. He has threaten me that I and my MD and firm owner will not accept his demand or cooperate, then he will not leave any one I am very much afraid and I want your help. So I kindly request you to lodge my FIR and take stern action against gangster Dhanjay Singh, Vikram Singh and his men.”

5. After registration of F.I.R., appellants were promptly arrested in the night intervening 10/11.05.2020 at about 02:50 AM.

6. During investigation Statement under Section 164 of Cr.P.C. of Abhinav Singhal (complainant / informant) was also recorded on 02.07.2020, in which he has denied the alleged incident and did not support the prosecution case. The said statement of the complainant is quoted as under:-

"मैं नमामि गंगे प्रोजेक्ट उसमें उपस्थित प्रोजेक्ट में प्रोजेक्ट मैनेजर हूं। दिनांक 10 मई 2020 को विक्रम जी के साथ पूर्व सांसद धनंजय सिंह के घर गया था वहां पर एक जन शिकायत के सिलसिले में गया था। लाकडाउन की वजह से मेरे पास कार न होने की वजह से सांसद जी ने विक्रम को कार लेकर मेरे पास भेजा था। वहां पर जाने के बाद हमारी क्वालिटी को लेकर वार्तालाप हुई और मैंने उनको असोरेंस दिया कि हम अच्छी क्वालिटी का काम करेंगे। उसके बाद उन्होंने मुझे जहां से पिकअप किया था वहीं पर छुड़वा दिया ड्यूरिंग दिस टेक्निकल डिसकसन मेरे पर कोई दबाव नहीं डाला गया, न ही गाली गलौज की गयी और न ही मेरा अपहरण किया गया मैंने एम.डी. और कम्पनी के सीनियर के कहने पर मैं S.P. साहेब के पास बताने गया था सारा प्रकरण क्या था, पता नहीं मेरे सीनियर के दिमाग में क्या था मुझे नहीं मालूम। S.P. साहेब ने मुझे दिनेश कुमार पाण्डे के पास भेजा, जो S.H.O. हैं वहां पे। S.H.O. ने मुझे 03 घंटे-04 घंटे तक मुझे बैठा कर रखा। मेरे ऊपर S.H.O. ने दबाव बनाया कि आप कम्पलेंट लिखो। फिर मुझे डिक्टेट करके कम्पलेंट लिखवाया जिसको बाद में उन्होंने FIR में दर्ज कर दिया। अगले दिन 11.05.2020 को मुझे

सोशल मीडिया से पता चला कि सांसद जी की गिरफ्तारी ढाई बजे हुई। मेरे साथ कुछ भी ऐसा नहीं हुआ जो मैं सांसद जी के खिलाफ FIR या कम्प्लेंट करूं। मेरे ऊपर कोई दबाव नहीं है और मैंने 11.05.2020 को ही पत्र S.P. साहेब को दिया था कि मैंने कोई कम्प्लेंट नहीं दिया था उसके बारे में मैंने अफीडेविट भी दिया है। मुझे और कुछ नहीं कहना है।"

7. After culmination of the investigation, Shri Kaushlendra Pratap Singh, first Investigating Officer/PW-4 filed final/closer report No. 83 of 2020 dated 03.07.2020 after recording his conclusion in the case diary that no crime was found to have been committed, on which Circle Officer, City Jaunpur made objection and directed for further investigation.

8. On 26.07.2020, further investigation was handed over to Mr. Jai Prakash Singh-second Investigating Officer/PW-6, who after further investigation, submitted Charge sheet No. 228 of 2020 dated 05.08.2020 under Sections 364, 386, 504, 506 and 120-B I.P.C. against appellants Dhananjay Singh and Santosh Vikram Singh, on which learned C.J.M., Jaunpur took cognizance on 06.08.2020 and on 14.08.2020, the case was committed to the Court of Sessions for trial.

9. On 02.04.2022, charges under Sections 364, 386, 504, 506 and 120-B I.P.C. were framed against the appellants, which reads as under:-

“1. यह कि दिनांक-10.05.2020 को समय करीब 17.30 बजे घटनास्थल पचहटिया

थाना लाइन भाजार जनपद जौनपुर में आप लोगों ने अपने सबके सामान्य आशय के अग्रसारण में वादी मुकदमा अभिनव सिंहल की हत्या करने के आशय से अपहरण कर ऐसे व्यनित किया कि वह अपनी हत्या होने के खतरे में पड़ जाये। इस प्रकार आप लोगों ने ऐसा अपराध कारित किया, जो धारा-364 भा०दं०सं० के अधीन दण्डनीय है और इस न्यायालय के प्रसंज्ञान में है।

2. यह कि उपरोक्त समय दिनांक स्थान पर आप लोगों ने अपने सबके सामान्य आशय के अग्रसारण में वादी मुकदमा अभिनव सिंहल को मृत्यु या घोर उपहति के भय में डालकर उद्घापन कर ऐसा अपराध कारित किया है। जो धारा-386 भा०दं०सं० के अंतर्गत दण्डनीय है और इस न्यायालय के प्रसंज्ञान में है।

3. यह कि उपरोक्त दिनांक, समय व स्थान पर आप लोगों ने अपने सबके सामान्य आशय के अग्रसारणमें वादी मुकदमा अभिनव सिंहल को भद्दी-भद्दी गालियां देकर शासय अपमानित किया। इस प्रकार आप लोगों ने एक ऐसा अपराध कारित किया है। जो धारा-504 भा०दं०सं० के अंतर्गत दण्डनीय है और इस न्यायालय के प्रसंज्ञान में है।

4. यह कि उपरोक्त दिनांक, समय व स्थान पर आप लोगों ने अपने सबके सामान्य आशय के अग्रसारण में वादी मुकदमा अभिनव सिंहल को जान से मारने की धमकी देकर ऐसा अपराध कारित किया है, जो धारा-506 भा०दं०सं० के अंतर्गत दण्डनीय है और इस न्यायालय के प्रसंज्ञान में है।

5. यह कि उपरोक्त दिनांक समय व स्थान पर आप लोगों ने अपने अज्ञात सहयोगियों के साथ मिलकर पूर्व नियोजित योजनानुसार वादी मुकदमा अभिनव सिंहल का अपहरण कर मृत्यु या घोर उपहति में डालकर उद्घापन करने का आपराधिक षडयन्त्र रचकर ऐसा अपराध किये है, जो धारा-120 बी भा०दं०सं० के अंतर्गत दण्डनीय है और जो इस न्यायालय के प्रसन्नान में है।"

The appellants denied the charges and claimed to be tried.

10. Before the Trial Court, following three prosecution witnesses of the fact and three formal prosecution witnesses were produced to prove the charges against the appellants :

The prosecution witnesses of fact

(i) PW-1 Abhinav Singhal
(Complainant)

(ii) PW-2 Satya Prakash Yadav

(iii) PW-3 Harendra Pal

The formal prosecution witnesses

(i) PW-4 Kaishlendra Pratap Singh
(First Investigating Officer)

(ii) PW-5 Anil Kumar Yadav

(iii) PW-6 Jai Prakash Yadav
(Second Investigating Officer)

Following three witnesses were also summoned and examined before the trial court including the complainant (PW-1)

The Court Witnesses

(i) CW-1 Abhinav Singhal (PW-1)

(ii) CW-2 Vinod Kumar Singh
(owner of Fortuner Car)

(iii) CW-3 Dinesh Prakash Pandey
(S.H.O., P.S. Line Bazar)

11. On behalf of prosecution, following thirteen documents were

produced and exhibited before the trial Court.

i-Written Complaint (Ext. Ka-1).

ii-CCTV footage Certificate
(Ext.Ka-2).

iii-Site Plan (Ext. Ka-3).

iv-Site Plan (Ext. Ka-4).

v- First Information Report (Ext. Ka-5).

vi-General Diary No. 40 regarding registration of case (Ext.Ka-6).

vii-Charge Sheet (Ext. Ka-7).

viii-Statement U/s 164 Cr.P.C. of the complainant (Ext. Ka-8).

ix-Letter dated 14.05.2020 of complainant sent to S.H.O, Line Bazar (Ext. Ka-9).

x-Letter dated 26.05.2020 of complainant sent to District Magistrate, Jaunpur (Ext. Ka-10).

xi-Affidavit dated 26.05.2020 of complainant sent to District Magistrate, Jaunpur (Ext. Ka.11).

xii-Letter dated 27.05.2020 of complainant sent to District Magistrate, Jaunpur (Ext.Ka.12).

xiii-G.D. Entry No. 003 dated 11.05.2020 made at 05:02 O'clock regarding arrest of appellants at 02:50 am (Ext. Ka.13)

12. Five C.D.s of CCTV footage have been exhibited as (Material Ext-1) to (Material Ext-5).

13. The statements of accused-appellants under Section 313 Cr.P.C. were recorded on 05.11.2022 and their additional statements under Section 313 Cr.P.C. were recorded on 13.02.2024, in which they have denied the allegations levelled against them.

Submissions on behalf of the appellants

14. Main substratum of argument of learned counsel for the appellants is that the appellants have been falsely implicated due to political reasons by fabricating and getting false case registered against the by the police. It is a case of no evidence against the appellants. The impugned judgment and order of the trial court are illegal and based on perverse findings, which are apparent on the face of record itself. The presumption drawn and findings recorded by the trial Court while convicting and sentencing the appellants by the impugned judgment and order dated 05.03.2020/06.03.2024 are in complete disregard to the provisions of Cr.P.C. and Evidence Act, hence the same are not sustainable in the eye of law. Appellants have been convicted on the basis of presumption / imagination without any legal evidence admissible under the law. The Trial Court has failed to appreciate that ingredients to constitute the offence punishable under Sections 364, 386, 504, 506 and 120-B IPC are lacking in this case. Learned counsel for the appellants, in order to strengthen the aforesaid submissions, further argued that:-

14.1. As per prosecution case, alleged incident as mentioned in the F.I.R. took place on 10.05.2020 at 5:30 PM and F.I.R. was lodged on 10.05.2020 at 10.40 PM without any preliminary enquiry against appellant No.1 Dhananjay Singh, who has been MLA twice and MP once and appellant No.2 Santosh Vikram Singh. Thereafter police in a pre-planned manner promptly arrested them at 02:50 AM in the night intervening 10/11.05.2020.

14.2. Referring the applications dated 12.05.2020, 13.05.2020 and 26.05.2020 (Ext. Ka-10) as well as affidavit dated 26.05.2020 (Ext. Ka-11) of the complainant, it is submitted that

complainant has stated inter alia that on the direction of M.L.Singhal, Managing Director of the company 'Pulkit Project Pvt. Ltd', he met Superintendent of Police, Jaunpur on 10.05.2020, who sent him to S.H.O. Police Station Line Bazar. When he went there, Dinesh Prakash Pandey, Station House Officer made him to sit for about three hours and dictated a complaint against the appellants and obtained his signature putting pressure on him. On the next day when he came to know that Dhananjay Singh, Ex MP was arrested on his F.I.R., he was shocked. Thereafter, he personally met Superintendent of Police, Jaunpur and also wrote an application to him on 12.05.2020. When nothing happened, then he also sent an application to the Chief Minister stating true facts. Thereafter complainant sent a letter dated 26.05.2020 and his affidavit dated 26.05.2020 to District Magistrate, Jaunpur disclosing all the true facts making allegation against S.H.O. Dinesh Prakesh Pandey (CW-3) that he did not allow him to leave his house and to meet his advocate and to give any application before Sessions Judge. The complainant also disclosed that S.H.O. Dinesh Prakash Pandey pressurized him to leave district Jaunpur and to go to his native home at Muzaffarnagar for some time.

14.3. The case of the prosecution is that on 14.05.2020 security was provided to the complainant is wrong on the face of record. In fact after getting false F.I.R. registered by the S.H.O. Police Station Line Bazar, local security was given to the complainant on 10.05.2020 itself.

14.4. The complainant before the Trial Court clearly stated that after registration of F.I.R., his statement was not recorded by the inspector. When statement under Section 161 Cr.P.C. was read out to the complainant, after listening to it he said

that I had not given any such statement to the Inspector.

14.5. The complainant-Abhinav Singhal in his statement under Section 164 Cr.P.C. dated 02.07.2020, did not utter anything against the appellants so far as commission of alleged offence is concerned. He has not supported the prosecution case rather he disclosed the true facts. He also proved his statement under Section 164 Cr.P.C. in accordance with law. There is full consistency and corroboration in the complainant's statement under Section 164 Cr.P.C. and his statement recorded before the trial Court as PW-1 and CW-1.

14.6. All the three prosecution witnesses of the fact namely Abhinav Singhal, complainant (PW-1), Satya Prakash Yadav (PW-2), Harendra Pal (PW-3) have not supported the prosecution case and completely denied the alleged incident stating true facts. The informant / complainant Abhinav Singhal (PW-1) has also been examined as CW-1 but again he has not supported the prosecution case. Vinod Kumar Singh who is owner of Fortuner Car, has been examined as CW-2, but he also did not support the prosecution case.

14.7. There is no substantive evidence against the appellants to prove their guilt beyond reasonable doubt, even then the Trial Court has convicted and sentenced the appellants on the basis of wrong presumption and placing reliance upon police papers created by the police in order to falsely implicate the appellants, broken CD of CCTV footages and the statements under Sections 161 Cr.P.C. which are not a substantive piece of evidence and can be used only for corroboration.

14.8. The fact and issue so far commission of alleged offence are

concerned, are relevant, but those facts have not been duly proved by the prosecution witnesses beyond reasonable doubt.

14.9. Referring the investigation part, it is pointed out that initially, a final / closure report dated 03.07.2020 was submitted by the first investigating officer-Kaushlendra Pratap Singh (PW-4) but on the direction of the then Circle Officer, further investigation was handed over to second investigating officer on 26.07.2020 on the ground that statements of Mohan Lal Singhal (MD) and Pulkit (employee of STP, Namami Gangey Project) have not been recorded, the CCTV footage dated 10.05.2020 has not been enclosed along with case diary, audio clip of conversation between complainant Abhinav Singhal and Mohan Lal Singhal has not been recovered and sent to forensic laboratory, Lucknow and did not trace the owner of vehicle No. UP50 AJ 0111, but the second investigating officer, except to trace the owner of vehicle in question, also did nothing.

14.10. The ingredients of mens rea and actus-reus, which are pre-requisite conditions for commission of an offence are lacking in the present case.

14.11. So far as electronic evidence is concerned, there is neither any Forensic Science Laboratory Report nor required certificates under Section 65-B of Indian Evidence Act are on record, hence, the same cannot be taken into consideration in view of the judgment of the Apex Court in the case of **Anvar P.V. vs. P.K. Basheer and Ors., (2014) 10 SCC 473**

14.12. The trial court, without any evidence on record, gave finding of demand of ransom on his own, whereas prosecution case is otherwise. It is further submitted that imagination is not an evidence in accordance with Section 3 of Evidence Act, hence, in view of Section

101 of the Evidence Act, the trial court cannot set up another story other than prosecution case.

14.13. There is no direct evidence of facts in issue nor any circumstances in order to prove alleged guilt of the appellants.

14.14. There is no evidence of extending any influence by the appellants over the prosecution witnesses.

14.15. With regard to whatsapp message alleged to have been sent by PW-1 to PW-3, it is argued that the said whatsapp message was not collected during investigation. Even during trial, no question was put to the Investigating Officers regarding non collection of said whatsapp message.

14.16. The prosecution could not prove the allegation of abduction of complainant against the appellants. Stretching his submissions, it is further submitted that when the offence of abduction is not made out, then all other offences automatically abolish.

14.17. Referring the internal page no. 42 of the judgment, it is submitted that the trial court has recorded a wrong finding that “the statement made by the complainant that the accused have not committed any crime was made long after the incident. This appears to have been done under duress while the evidence on file is contrary.” In this regard it is further pointed out that on 11.05.2020 when the complainant came to know about the registration of false F.I.R., he on the very next day sent an application on 12.05.2020 to Superintendent of Police, Jaunpur and application dated 13.05.2020 to Chief Minister of State of U.P. denying the incident by stating true facts.

14.18. Much emphasis has been given by contending that the accused appellants cannot be convicted either on the

basis of evidence of formal witnesses or material exhibits. The accused-appellants also cannot be held guilty on the basis of corroborative evidence.

14.19. The materials produced by the prosecution to prove the prosecution case do not inspire confidence.

14.20. It is well settled that according to Section 231 of Cr.P.C. and Section 101 of Indian Evidence Act, the burden of proof of the charges against the accused is on the prosecution, which could not be proved by the prosecution witnesses of fact in the present case.

14.21. The appellant No.1 is a political person. Referring the statement of the P.W.2, it is pointed out that P.W.-2 (Satya Prakash) in his statement before the Trial Court has stated inter alia that Dhananjay Singh is a popular leader of the District. Some people go to his place to make complaint. He used to visit various public representative in respect of public complaints. In this matter, I had already given an affidavit on 29.05.2020 before the Court out of his own freewill. The complainant told him that no such untoward incident had happened with him. The conversation took place in a very dignified manner.

14.22. Referring the judgment of the Apex Court in the case of **Lallu Manjhi and Another vs. State of Jharkhand, (2003) 2 SCC 401**, and in the case of **State of Rajasthan vs. Babu Meena, (2013) 4 SCC 206**, it is also argued that the statement under Section 313 Cr.P.C. of the accused-appellants has not been recorded in the light of guideline laid down by the Apex Court. The relevant paragraph no.14 of the judgment of Lallu Manjhi (Supra) is quoted here as under:-

“14. Incidentally, it may also be stated that the manner in which the Trial Court has recorded the statements of the

accused persons u/s 313 Cr.P.C. is far from satisfactory. The entire prosecution case running into very many details has been summed up into just 5 questions asked to each of the accused persons. It is obligatory on the part of the Trial Court to examine the accused for the purpose of enabling the accused personally to explain any circumstances appearing in evidence against him. If such opportunity is not afforded, the incriminating pieces of evidence available in the prosecution evidence cannot be relied on for the purpose of recording conviction of the accused persons."

14.23. Lastly it is submitted that the appellant No.1 has been convicted only in the present case. Referring and relying on the judgments of the Hon'ble Supreme Court in the cases of **Afjal Ansari vs. State of Uttar Pradesh**, (2024) 2 SCC 187, **Navjot Singh Sidhu vs. State of Punjab and Anr.** (2007) 2 SCC 574 and **Sucha Singh Lanagh vs. State of Punjab**, Criminal Appeal No. 40 of 2017 arising out of SLP (Crl.) No. 5 of 2017, it is submitted that appellant No.1 has been a Member of the Uttar Pradesh Legislative Assembly twice and a Member of Parliament once. He wants to contest the elections of Member of Parliament, 2024. The notification has already been issued notifying the schedule for 'Lok-Sabha elections 2024' and last date of filing of nomination papers for Member of Parliament, Jaunpur is to begin from 29.04.2024 to 05.05.2024. In case, the impugned conviction of the appellant No.1 is not stayed, he will be deprived of his right to contest Lok-Sabha election 2024 in view of the Section 8(3) of Representation of People Act, 1951. Much emphasis has been given by contending that in case of irreversible situation of acquittal in future, the loss of the appellant No.1 cannot be

compensated. If he misses the bus, the time will not come back and the clock will not turn back.

Submissions on behalf of the State

15. On the other hand, it is argued on behalf of the State that :-

15.1. The F.I.R. of the incident was promptly lodged by the complainant Abhinav Shinghal on 10.05.2020 at 10:40 PM with regard to incident of same day, which took place at 5:30 PM. Appellants are named accused in the F.I.R. The complainant during trial, has proved his signature on the F.I.R. (Ext.Ka.1).

15.2. On 10.05.2020, when complainant was abducted, he sent a whatsapp message to Harendra Pal (PW-3) that "*Dhananjay Singh ke aadmi muzhai un ka ghar per le ker aya hai. Inform to pulkit sir immediately*".

15.3. After two days of the incident, the complainant started giving application from 12.05.2020 changing his version under the pressure, fear and influence of the appellants.

15.4. On 10.05.2020, complainant was also provided security and thereafter, on his demand/letter dated 14.05.2020 (Ext.Ka-9), he was also provided security to go to his native place Muzaffar Nagar.

15.5. Referring the G.D. No. 003 dated 11.05.2020 at 05:02 O'clock (Ext.Ka-13), it is submitted that a black coloured fortuner Car no. UP-50-AJ-0111 was also recovered from the resident of Dhananjai Singh at the time of his arrest.

15.6. The complainant in his letter dated 12.05.2020 addressed to the Superintendent of Police, Jaunpur stated inter alia that "*the complaint was given by me on exaggerated facts as my mental*

condition was not good and I was in some pressure”, therefore it cannot be said that the complainant had not lodged F.I.R.

15.7. There are material contradictions regarding the complainant’s stand that Dhananjay Singh was talking to Mohan Lal Singhal, MD over telephone. In this regard, it is further pointed out that complainant in his letter dated 13.05.2020 addressed to the Chief Minister and affidavit dated 26.05.2020 (Ext. Ka-11) has stated inter-alia that Dhananjay Singh had talked with owner (MD) of my company over telephone but when the complainant was examined as PW-1 on 15.04.2022, he in his cross-examination has stated that it is wrong to say that Dhananjay Singh, after taking the mobile number of MD of his company, talked him in his presence.

15.8. The investigating officer had collected CCTV footage of the spot and Harendra Pal (PW-3) had also given certificate dated 11.05.2020 (Ext. Ka-2) mentioning that he is posted on the post of Supervisor in M/s SPML Pulkit Project Pvt. Ltd. and no interpolation has been done in the CCTV footage installed at the working site.

15.9. During investigation, the location of mobile number 9968872016 at 17:17:06 hours and 17:32:59 hours, used by the complainant, was found near Gurudwara Ras Mandal, Jaunpur, then Jessis Chauraha, Bus Stand, then Chandra Hotel, Oland Ganj and thereafter near the site in question again via the same route, as such, it was proved from the location of the complainant that he was near the house of Dhananjay Singh at the time of incident.

15.10. It is fairly admitted that investigation of this case has not been done properly by the investigating officers. In this regard it is submitted that the accused appellants cannot take benefit of the faulty investigation.

15.11. Much emphasis has been given by contending that considering the facts and circumstances of the case in totality, only conclusion can be drawn that the complainant and other prosecution witnesses have been won over.

15.12. Referring the list of criminal history of the appellant No.1 enclosed as Annexure No. CA-1 to the counter affidavit dated 22.04.2024 filed on behalf of the State and S.A-1 to the Supplementary Affidavit dated 20.04.2024 filed on behalf of appellants, it is submitted that the appellant No.1 has long criminal history of 46 cases including heinous offences, out of which in 28 cases, appellant No.1 has been acquitted as the witnesses turned hostile due to fear of accused Dhananjay Singh. It is also submitted that due to terror of appellant No.1, no one dares to depose against him.

15.13. Lastly it is submitted that the trial court considering all aspects of the matter, rightly convicted the appellants, therefore, the relief as sought by the appellants by means of this Criminal Appeal is liable to be rejected.

Issue

16. Having heard the submissions of learned counsel for the parties at length and examined the matter in its entirety, I find that in view of the interim relief as sought by means of above mentioned Criminal Misc. Application Under Section 389 (1) Cr.P.C., at this stage, this Court is only required to consider the following two prayer of the appellants for interim relief during pendency of this Criminal Appeal :-

- (a) Suspension of Sentence
- (b) Stay of operation and effect of judgment of conviction

Discussion & Conclusion about suspension of sentence

17. Following facts which emerge from the record and are not in dispute are as follows :-

17.1. All the three prosecution witnesses (PW-1, PW-2 and PW-3) of fact as well as two court witnesses (CW-1 and CW-2) did not support the prosecution case and they denied the incident in the manner as alleged in the F.I.R., hence, they have been declared hostile by the trial court.

17.2. Neither the statement under Section 161 Cr.P.C. of Mohan Lal Singhal, M.D. of the company nor Pulkit (employee of STP, Namami Gangey Project) was recorded nor they were produced by the prosecution before the trial court whereas they were material witnesses who could throw some light on the prosecution case.

17.3. Anil Kumar (PW-5), who registered the F.I.R., in his statement has stated inter-alia that he had registered F.I.R. on the direction of Dinesh Prakash Pandey, S.H.O., Line Bazar, Jaunpur.

17.4. Despite serious allegation of the complainant against Dinesh Prakash Pandey, S.H.O., Line Bazar, Jaunpur that he dictated the complaint and obtained complainant's signature under pressure, he was not produced by the prosecution as prosecution witness. Later he was summoned and examined as CW-3 by the trial Court, who supported the prosecution case.

17.5. No incriminating material like mobile phones, conversation between complainant and M.L. Singhal (M.D. of the company) etc. have been collected.

17.6. Though the prosecution has collected five CCTV footages, but there is no certificate under Section 65-B of the evidence Act with regard to all CCTV

footages, which are essential for considering the electronic evidence. Even all the CCTV footages (Material Ext-1 to Material Ext-5) produced by the prosecution before the trial court were useless as the same were produced by the prosecution in a broken condition which were not able to play.

17.7. As per the prosecution case, main allegation against the appellants is that they, through gang members, by hook or by crook adopting different modus operandi forcibly wanted to supply quality less materials (Aggregate, Sand, Ballast, Morang etc.) to the firm in question in the project which was being run in village Pachatiya, district Jaunpur at that time under "Namami Gangey Project Scheme". There is no allegation of demand of any ransom by the accused-appellants from the complainant but the trial court, at internal page no. 37 of the judgment, has recorded an erroneous finding mentioning that from the evidence on record, it is clear that the complainant and Satya Prakash Yadav were called by the accused and after giving threat to Mohan Lal Singhal on phone, a ransom was demanded.

17.8. The statements U/s 313 Cr.P.C. of the accused appellants have been recorded on 05.11.2022 and 13.02.2024. The relevant part of the statement of the appellants relating to their defence is as under:-

A. The appellant No.1 in his statement dated 05.11.2022 under Section 313 Cr.P.C. has taken stand inter alia that there was gross irregularity in the S.T.P. work, which was opposed by him on receiving complaint. The complainant - Abhinav Singhal came to his place voluntarily. Earlier also he used to come. He has nothing to do with the case. He has been implicated because of his fight against corruption. Public money is being misused.

The appellant No.2 in his statement dated 05.11.2022 under Section 313 Cr.P.C. has stated inter alia that he is innocent and false case has been registered against him.

B. The appellant No.1 in his statement dated 13.02.2024 under Section 313 Cr.P.C. has stated inter alia that F.I.R. is false, complainant did not give such statement as mentioned in the F.I.R. Wrong action has been taken by the Investigating Officer. Case has been registered due to political malice. He is innocent and was not involved in the alleged crime. He has been implicated due to political malice on raising his voice against corruption. The appellant No.2 in his statement dated 13.02.2024 under Section 313 Cr.P.C. has stated inter alia that case has been registered against him due to enmity. He is innocent.

17.9. The chain of prosecution case is missing, therefore, the accused appellants are entitled to benefit of doubt.

17.10. The appellants were on bail during trial and there is no evidence to indicate that they misused the liberty of bail.

17.11. The maximum sentence awarded to the appellants is up to seven years. There is no possibility of absconding of the appellants.

17.12. In view of the above, considering the facts and circumstances of the case in totality, nature of allegations, role attributed to the appellants, material evidence on the record, submissions advanced on behalf of the parties concerned and reasons as noted above, this Court is of the view that the application under Section 389(1) Cr.P.C. of the appellants for suspension of their sentence dated 06.03.2020 during pendency of this Criminal Appeal is liable to be allowed.

18. Accordingly appellants, namely, Dhananjay Singh and Santosh Vikram Singh, who are convicted by the impugned judgment dated 05.03.2024 and sentenced by impugned judgment and order dated 06.03.2024, as noted above, be released on bail on their furnishing a personal bond and two reliable sureties each in the like amount to the satisfaction of Court concerned during pendency of this criminal appeal subject to furnishing undertaking that they will cooperate with the hearing of this criminal appeal.

19. Realisation of fine is not stayed.

20. On acceptance of their bail bonds, the trial court shall transmit the photostat copies thereof to this Court for being kept on record of this criminal appeal.

Discussion & Conclusion about stay of conviction

21. So far as the second prayer with regard to stay of conviction of judgment dated 05.03.2024 of the appellants is concerned, it would be apposite to mention following facts :-

21.1. As per disclosure made by the appellant No.1-Dhananjay Singh, he has a criminal history of following 46 criminal cases (36 disposed of cases [as per Chart A] & 10 pending cases [as per Chart B]).

CHART-A (Decided Cases)

Sl. No.	Case Crime No.	Sections	Police Station	District	Result
1.	628/1991	147, 504,	Line Baza	Jaunpur	Acquitted on

		506, 427 IPC	r		10.06.19 99
2.	601/ 1992	307/34 IPC	Kot wali	Jaunpur	Acquitted on 01.06.19 95
3.	788/ 1992	25 Arms Act	Line Baza r	Jaunpur	Acquitted on 17.06.19 99
4.	204/ 1993	323, 504, 506 IPC	Line Baza r	Jaunpur	Acquitted on 20.02.20 05
5.	55- A/19 95	147, 148, 149, 307 IPC	Hasa ngan j	Luckno w	Acquitted on 02.08.20 01
6.	79/1 995	307/34 IPC	Hasa ngan j	Luckno w	Acquitted on 28.01.20 04
7.	314/ 1995	147, 148, 149, 307 IPC	Hasa ngan j	Luckno w	Acquitted on 04.05.20 00
8.	466/ 1995	323, 504, 506, 427 IPC	Hasa ngan j	Luckno w	Acquitted
9.	514- A/19 95	147, 148, 149, 307 IPC	Hasa ngan j	Luckno w	Acquitted on 02.06.20 00
10.	9/19 96	147, 148, 149, 307 IPC	Hasa ngan j	Luckno w	Acquitted on 26.07.20 00
11.	20/1 996	3(1) U.P. Gangste r Act	Hasa ngan j	Luckno w	Acquitted on 19.11.20 08
12.	168/ 1997	147, 148, 149, 307, 120B IPC	Haza ratga nj	Luckno w	Acquitted on 31.07.20 01
13.	206/ 1997	302, 34 IPC	Hasa ngan j	Luckno w	Acquitted on 03.08.20 01
14.	302/ 1997	352, 427, 307 IPC and Section 5 Exp. Act	Alig anj	Luckno w	Acquitted on 16.05.20 00
15.	491/ 1997	302, 304A	Ghaz ipur	Luckno w	Acquitted on

		IPC			27.03.20 00
16.	230/ 1998	364, 302, 201, 34 IPC	Huss ainga nj	Luckno w	Acquitted on 18.02.20 00
17.	393/ 1998	2/3(1) U.P. Gangste r Act	Hasa ngan j	Luckno w	Acquitted on 09.03.20 09
18.	612/ 2000	302, 120-B, 34 IPC and 3(2)5 SC/ST Act	Haza ratga nj	Luckno w	Acquitted on 10.05.20 10
19.	26- A/20 02	147, 148, 435, 452, 323, 504, 506 IPC	Sikra ra	Jaunpur	Acquitted on 18.07.20 02
20.	224/ 2002	147, 148, 149, 323, 353, 427, 504, 506 IPC and Section 7 Crimina l Law Amend ment Act	Baks a	Jaunpur	Acquitted on 07.02.20 07
21.	232/ 2002	3(1) U.P. Gangste r Act	Baks a	Jaunpur	Withdraw n on 20.01.20 09
22.	293/ 2002	147, 148, 149, 452, 352 IPC, Section 7 Crimina l Law Amend ment Act and Section 2/3 Gangste r Act	Huss ainga nj	Luckno w	Withdraw n on 01.10.20 03
23.	6/20	387,	Line	Jaunpur	Acquitted

	03	120B IPC and 7 CLA Act	Baza r		on 31.01.20 07
24.	63/2 003	387, 506 IPC	Sikra ra	Jaunpur	Acquitted on 25.02.20 07
25.	110/ 2003	3(1) Gangste r Act	Line Baza r	Jaunpur	Withdraw on 20.01.20 09
26.	394/ 2008	147, 148, 149, 307, 352, 506 IPC and 7 CLA Act	Suja anga nj	Jaunpur	Final report submitted .
27.	44/2 013	302 IPC	Baks ha	Jaunpur	Final report submitted .
28.	708/ 2013	504, 506 IPC	Kot wali	Jaunpur	Final report submitted .
29.	520/ 2013	376, 377, 506, 323 IPC	Pand av Naga r	Delhi	Acquitted on 19.12.20 14
30.	0690 /201 7	147, 307, 392, 336, 435, 426, 352, 506 IPC	Khut han	Jaunpur	Acquitted on 09.01.20 24
31.	495/ 2018	384, 467, 468, 471, 506, 507 IPC	Janki pura m	Luckno w	Final report submitted .
32.	0387 /201 9	307, 506 IPC	Haza ratga nj	Luckno w	Final report submitted on 08.09.20 23.
33.	254/ 2020	171G IPC	Sarai khwa jha	Jaunpur	Acquitted on 06.12.20 22
34.	142/ 2020	364, 386, 504, 506,	Line Baza r	Jaunpur	Convict ed

		120B IPC			
35.	0181 /202 0	147, 148, 149, 506, 307, 120B IPC	Ala mba gh	Luckno w	Name dropped on 05.11.20 20
36.	44/2 022	127A Represe ntation of People Act	Sikra ra	Jaunpur	Acquitted on 02.01.20 24

Summary of Chart-A are as under:-

In 26 cases, appellant No.1 has been acquitted.

01 case against the appellant No.1 has been dropped.

In 05 cases, final/closure report have been submitted.

03 cases have been withdrawn by the State Government.

In 01 case (present matter), appellant No.1 has been convicted.

CHART-B
(Pending Cases of appellant No.1-
Dhananjay Singh)

Sl. No.	Case Crim e No.	Section s	Police Station	District	Present status
1.	242/ 2010	302, 109 IPC	Keraka t	Jaunpur	He has been granted bail on 13.03.20 12 and trial is pending.
2.	486/ 2011	3(1) U.P. Gangs ter Act	Keraka t	Jaunpu r	He has been granted bail on 20.03.20 12 and trial is pending.
3.	198/ 2013	109 r/w 302, 326,	Chanak yapuri	New Delhi	He has been discharge d in

		324, 120B r/w 307, 370, 374, 201, 202 IPC			Sections 202, 109 r/w 302, 326, 324, 120B r/w 307, 370, 374 IPC and has been charged under Section 201 IPC. He has been granted bail on 30.10.2014 and the trial is pending.
4.	0687/2017	147, 148, 149, 307, 323, 332, 353, 504, 506, 34, 427, 435 IPC	Khuthan	Jaunpur	He has been granted bail on 15.04.2019 and the trial is pending.
5.	526/2017	17H/188 IPC and Prevention to Damages to Public Property Act	Kotwali	Jaunpur	He has been granted bail on 15.04.2019 and the trial is pending.
6.	201/2017	188, 353 IPC and 126 Representation of Peoples Act	Baksha	Jaunpur	The case is pending.
7.	445/2020	Section 5(2) of the Offici	Vibhuti Khand	Lucknow	The case is pending and is at

		al Secret Act and 465 IPC			the summoning stage whereas proceedings have been stayed.
8.	15/2021	302, 307, 34, 120B IPC	Vibhuti Khand	Lucknow	The appellant has been charged under Sections 176, 212 IPC and he has been granted bail on 21.01.2023 and the trial is pending.
9.	110/2021	188, 269, 270 IPC and Section 3 of Epidemic Diseases Act, 1897	Khuthan	Jaunpur	In this case, investigation is pending.
10.	0334 of 2023	Section 188 IPC and Section 5 of Sound Pollution (Regulation and Control) Rules 2000	Kotwali	Jaunpur	In this case, investigation is pending.

Summary of Chart-B are as under:-

The aforesaid 10 criminal cases of appellant No.1 are still pending, out of which in 07 cases (mentioned at serial nos.

1,2,3,4,5,6 & 8), appellant No.1 is facing trial. In 01 case mentioned at serial No. 7, he has been summoned, but proceedings have been stayed by the High Court. 02 cases (mentioned at serial Nos. 9 & 10) are pending at the investigation stage.

22. During course of the argument, submission on behalf of the State that acquittal of appellant No.1 in all the 28 cases have been done on account of the fact that the prosecution witnesses turned hostile in those cases. The said fact has not been denied on behalf of the appellant No.1 but submitted that once the appellant No.1 has been acquitted, he shall be treated as innocent.

23. Section 389 of the Code of Criminal Procedure empowers the Court to suspend the sentence pending the appeal and for release of the appellants on bail. Section 389 Cr.P.C so far relevant reads as follows:

"389. Suspension of sentence pending the appeal; release of appellant on bail - (1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond.

Provided that the Appellate Court shall, before releasing on bail or on his own bond a convicted person who is convicted of an offence punishable with death or imprisonment for life or imprisonment for a term of not less than ten years, shall give opportunity to the Public Prosecutor for showing cause in writing against such release:

Provided further that in cases where a convicted person is released on

bail it shall be open to the Public Prosecutor to file an application for the cancellation of the bail."

24. The cases relied upon by Shri Surendra Walia and Shri Saghir Ahmad, learned Senior Advocates appearing on behalf of the appellants, i.e. Afjal Ansari Vs. State of U.P., (2024)2 SCC 187, Navjot Singh Sidhu Vs. State of Punjab and another, (2007)2 SCC 574 and Sucha Singh Lanagh Vs. State of Punjab, Criminal Appeal No. 40 of 2017 arising out of SLP (Crl.) No. 5 of 2017, decided on 05.1.2017, are distinguishable on the facts of the present case.

25. In the case of **Afjal Ansari (Supra)**, the appellant was having the following criminal history:

(i) Case Crime No. 28 of 1998, which was registered on 16.2.1998 under Section 171-F IPC and Section 135(2) of the Representation of People Act, 1951, police station Nonhara, district Chandauli.

(ii) Case Crime No. 260 of 2001 was registered on 09.8.2001 at police station Mohammadabad, Uttar Pradesh, under Sections 147, 148 and 353 IPC and 3 of Prevention of Damage to Public Property Act, 1984 along with Section 7 Criminal Law Amendment Act.

(iii) Case Crime No. 493 of 2005 was registered under Sections 302, 506, 120-B IPC on 27.6.2005 at police station Mohammadabad, U.P. in which the appellant was named as a conspirator.

(iv) Case Crime No. 589 of 2005 was registered under Sections 147, 148, 149, 307, 302, 404 and 120-B IPC at police station Bhanvar Kol, district Ghazipur on 29.11.2005 for hatching conspiracy.

(v) Case Crime No. 1051 of 2007 was registered under Sections 302, 120-B,

436, 427 IPC and Section 3,4 and 5 of the Explosives Act, 1884 and Section 7 of Criminal Law Amendment Act, 1932.

(vi) Case Crime No. 607 of 2009, under Sections 171 and 188 IPC was registered on 11.4.2009 at police station Mohammadabad, Uttar Pradesh.

(vii) Case Crime No. 18 of 2014 was registered under Sections 171-J, 188 IPC and 121(2) of Representation of People Act, police station Chakarghatta, district Chandauli, U.P. the appellant has been granted bail.

26. In **Afjal Ansari case (Supra)**, the appellant was involved in seven cases, out of which in one case (mentioned at serial No. IV) in which the appellant was accused for hatching conspiracy in the said murder case. The investigation of this case was entrusted to the Central Bureau of Investigation and the trial was subsequently transferred to CBI Court at Rouse Avenue, New Delhi. In this case the appellant was acquitted. In two cases (mentioned at serial Nos. I & VI) which relate to violation of Model Code of Conduct during election period, he has not been summoned, and in two cases (mentioned at serial Nos. III & V) after investigation, his name has been dropped and he has not been charge sheeted. In two cases (mentioned at serial Nos. II & VII) which are of trivial nature involving violation of Model Code of conduct during election period, he has been granted bail.

27. The effect and operation of conviction of Afjal Ansari was suspended by the Hon'ble Supreme Court with certain conditions, one of which was that the appellant Afjal Ansari shall not be entitled to participate in the proceedings of the House. He shall also not have the right to

cast his vote in the House or to draw any perks or monetary benefits.

28. **Navjot Singh Sidhu Vs. State of Punjab and another (2007)2 SCC 574** was a case in which the appellant was charged of causing death of a person by inflicting fist blows on head. The trial court acquitted him. Thereafter, he contested election and was declared elected as Member of Parliament. However, on the appeal being filed by the State, the High Court convicted him under Section 304 Part II IPC and sentenced him to three years RI. In view of the order of conviction and sentence passed by the High Court, appellant Navjot Singh Sidhu incurred disqualification under Section 8(3) of the Representation of the People Act, 1951. Instead of filing an appeal against the order of High Court, before the Supreme Court, the appellant-Navjot Singh Sidhu resigned from the membership of Lok Sabha on moral ground and then chose to contest election again. Thereafter, he filed an appeal against the order of High Court before the Supreme Court, which by an interim order suspended the execution of the sentence. In addition to this case, he did not have any case against him.

29. **Sucha Singh Langah (Supra)**, no detailed facts of the case has been given by Hon'ble Supreme Court as the case was pending consideration before the High Court.

30. So far as appellant No. 1, Dhananjay Singh is concerned, it is relevant to note that at present ten cases is still pending against him as mentioned in Chart-B.

31. In **K.C. Sareen Vs. CBI, (2001) 6 SCC 584**, it was held by Hon'ble

Supreme Court that “though the power to suspend an order of conviction, apart from the order of sentence, is not alien to Section 389 (1) of the code, its exercise should be limited to very exception Cases. It was further held that merely because the convicted person files an appeal to challenge his conviction, the court should not suspend the operation of the conviction and the court has a duty to look at all aspect including the ramifications of keeping such conviction in abeyance.”

32. In **Union of India Vs. Atar Singh, (2003) 12 SCC 434**, accused was convicted under Section 409 IPC and Section 13 of Prevention of corruption Act. He filed an appeal before the High Court, which has suspended the conviction solely on the ground that non-suspension of conviction may entail removal of the delinquent government servant from service. On appeal, the Hon'ble supreme Court set aside the order of the High Court by holding that the High Court had mechanically passed the order by suspending the conviction and the discretion ought not to have been exercise by the High Court by passing such an order suspending the conviction.

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33. In **State of Maharashtra Vs. Gajanan, (2003)12 SCC 432**, relying on K.C. Sareen (Supra) it was reiterated that only in exceptional cases, the Court should exercise the power of stay of conviction.

34. In **State of Haryana Vs. Hasmat (2004) 6 SCC 175**, it was observed as under:

“Section 389 of the Code deals with suspension of execution of sentence pending the appeal and release of the appellant on bail. There is a distinction

between bail and suspension of sentence. One of the essential ingredients of Section 389 is that requirement for the appellate court to record reasons in writing for ordering suspension of execution of the sentence or order appealed. If he is in confinement, the said court can direct that he be released on bail or on his own bond. The requirement of recording reasons in writing clearly indicates that there has to be careful consideration of the relevant aspect and the order directing suspension of sentence and grant of bail should not be passed as a matter of routine. “

35. In **Ravi Kant S. Patil Vs. Sarvabhuma S. Bagali, (2007) 1 SCC 673**, Hon'ble Supreme Court held in paragraph 15 that “it deserves to be clarified that an order granting stay of conviction is not the rule but is an exception to be resorted to in rare cases depending upon the facts of a case.”

36. In **Sanjay Dutt Vs. State of Maharashtra (2009) 5 SCC 787**, petitioner Sanjay Dutt was charged under various sections of Terrorist and Disruptive Activities (Prevention) Act. He was found guilty of offences punishable under Section 3 and 7 read with Sections 25(IA) and 25(IB) of the Arms Act and was sentenced to six years rigorous imprisonment. The petitioner has filed appeal against his conviction and sentence before the Supreme Court. Pending appeal, he was granted bail on 28.2.2007. Thereafter, he has filed application under Section 389 of the code of Criminal Procedure, 1973 praying that execution of the order of conviction and sentence be suspended pending final hearing of the appeal. In the petition, it was mentioned that he belongs to a family which has been in long public service in the country and that the

petitioner is now desirous of contesting election of the House of People from Lucknow Parliament Constituency and in view of Section 8(3) of the Representation of People Act, 1951, he has incurred disqualification from contesting the election for becoming a member of either House of Parliament. Therefore, it is prayed that the conviction and sentence of the petitioner be suspended to enable him to contest the election.

Hon'ble Supreme Court while declining his prayer held as under:

“Despite all these favourable circumstances, we do not think that this is a fit case where conviction and sentence could be suspended so that the bar under Section 8(3) of the Representation of People Act, 1951 will not operate against the petitioner. Law prohibits any person who has been convicted of any offence and sentenced to imprisonment for not less than two years from contesting the election and such person shall be disqualified for a further period of six years since his release. In the face of such a provision, the power of the Court under Section 389 Cr.P.C. shall be exercised only under exceptional circumstances.

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“ In the present case, no such circumstances are in favour of the petitioner, In view of the serious offence for which he has been convicted by the Special Judge, we are not inclined to suspend the conviction and sentence awarded by the Special Judge in the present case. “

37. In **Shyam Narain Pandey V. State of U.P. (2012) SCC 384**, the appellant Shyam Narain Pandey, who was a Principal of an institution, who was inter

alia, convicted for murder. Hon'ble Supreme Court while stressing on the exceptionality of the power to suspend the conviction observed thus:

“ In the light of the principles stated above, the contention that the appellant will be deprived of his source of livelihood if the conviction is not stayed cannot be appreciated. For the appellant, it is a matter of deprivation of livelihood but he is convicted for deprivation of life of another person. Until he is otherwise declared innocent in appeal, the stain stands. The High Court has discussed in detail the background of the appellant, the nature of the crime, manner in which it was committed etc and his rightly held that it is not a very rare and exceptional case for staying the conviction.”

38. In **State of Maharashtra Vs. Balakrishna Dattatrya Kumbhar, (2012) 12 SCC 384**, Hon'ble Apex Court after considering a catena of judgement, held as under:

“Thus, in view of the aforesaid discussion, a clear picture emerges to the effect that, the Appellate Court in an exceptional case, may put the conviction in abeyance along with the sentence, but such power must be exercised with great circumspection and caution, for the purpose of which, the applicant must satisfy the Court as regards the evil that is likely to befall him, if the said conviction is not suspended. The Court has to consider all the facts as are pleaded by the applicant, in a judicious manner and examined whether the facts and circumstances involved in the case are such, that they warrant such a course of action by it. The court additionally, must record in writing, its reasons for granting such relief. Relief of

staying the order of conviction cannot be granted only on the ground that an employee may lose his job, if the same is not done."

39. It is well settled that every case turns on its own facts and circumstances. Even one additional or different fact may make a big difference between the conclusion in two cases, because even a single significant detail may alter the entire aspect.

40. It is often seen that after conviction of a person who was or is Member of Legislative Assembly or Member of Parliament, used to take a general plea for stay of operation and effect of his conviction that he wants to contest election and in case the judgment of his conviction is not stayed, he will be deprived of his right to contest the election which will result in irreparable loss and injury to him, but this Court feels that each and every case has to be decided on its own merit as well as considering all the surrounding circumstances and other attending factors including gravity of offences, nature of previous criminal history etc. No uniform and straight-jacket formula can be laid down for stay of conviction in all the cases. The parameter and legal position for stay of execution of sentence/bail and stay of conviction are different. Now it is the need of hour to have purity in politics, therefore for staying the judgment of conviction, the Courts should exercise its discretionary power sparingly with caution in a rare and appropriate cases. The purpose sought to be achieved by enacting disqualification on conviction for certain offences is to prevent person with criminal background from entering into politics and governance. Persons with criminal background pollute the process of

election as they have no reservation from indulging in criminality to win an election. When persons having long criminal history turn into elected representatives and become law maker, they pose a serious threat to the functioning of a democratic system. The very future of our democracy gets imperilled when such offenders masquerade as leaders making a travesty of the entire system. The increasing trend of criminalisation of politics is dangerous and has steadily been eating into the vitals of our democratic polity along with growing corruption of a humongous nature. Considering the facts of this case that the appellant No.1 has secured acquittal in 28 criminal cases due to reasons that witnesses turned hostile as pointed out on behalf of the State, which has not been controverted on behalf of the accused-appellant No.1 and that there is no dispute that at present, 10 criminal cases (**as noted in Chart-B**) are still pending against him, I do not find any good ground, special reason or exceptional case to stay the operation and effect of impugned judgment of conviction dated 05.03.2024 of the appellant No.1-Dhananjay Singh.

41. As a fallout and consequence of above discussion, the prayer for stay of operation and effect of judgment of conviction dated 05.03.2024 of appellant No.1 is refused and is hereby **rejected**.

42. Since prayer for stay of impugned judgment of conviction with regard to appellant No.2 (who is not a political person or government servant) has not been pressed during argument, therefore, his case has not been dealt with in this regard.

43. The further details relating to merits of this case need not be referred to

herein since the allegations of the prosecution and the defence thereto is still open to be urged by the parties at the time of final hearing of this case.

44. The application of the appellants under Section 389(1) Cr.P.C. stands disposed of.

In re : Criminal Appeal

1. Trial Court record has been received.

2. Office is directed to prepare paper book.

3. Let this matter be listed before the appropriate Bench for final hearing after preparation of paper book.

(2024) 4 ILRA 1209

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 16.04.2024

BEFORE

**THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE MOHD. AZHAR HUSAIN
IDRISI, J.**

Criminal Appeal No. 3674 of 2016

Nanhaku Singh	...Appellant
Versus	
State of U.P.	...Respondent

Counsel for the Appellant:

Sri Anupam Tripathi, Sri Ashok Kumar Tripathi

Counsel for the Respondent:

G.A.

**Criminal Law - Indian Penal Code, 1860 –
The Scheduled Castes and the Scheduled
Tribes (Prevention of Atrocities) Act, 1989
- Sections 302, 376, 201 & 3(2)(V)– Code
of Criminal Procedure, 1973 – Sections
374(2), 161, 313 & 437A – Criminal Appeal
Against Conviction and Sentence – Murder –
Rape – Causing Disappearance of Evidence –**

**Offence Against Scheduled Caste – Lack of
Evidence – Hearsay – Suspicion – False
Implication – Hostile Witnesses**

The appellant, Nanhaku Singh, challenged the judgment dated 23.06.2016 by the Additional Sessions Judge, Court No. 2, Shahjahanpur, in Sessions Trial No. 77 of 2013, convicting him under Section 302 IPC (life imprisonment, Rs. 5,000 fine, 3 years additional imprisonment in default), Section 376 IPC (life imprisonment, Rs. 5,000 fine, 3 years additional imprisonment in default), Section 3(2)(V) SC/ST Act (life imprisonment, Rs. 5,000 fine, 3 years additional imprisonment in default), and Section 201 IPC (4 years rigorous imprisonment), with sentences to run concurrently. The prosecution alleged that on 18.03.2012, the appellant raped and murdered an 11-year-old girl from a Scheduled Caste, whose body was found on 19.03.2012 near a wheat field with multiple incised wounds, burn injuries, and signs of sexual assault, based on a written report by PW-1 (Premwati, the deceased's mother). The appellant was implicated due to alleged enmity over land reclaimed by the informant's family. Held: (1) The appeal was allowed, and the conviction and sentence were set aside. (2) The prosecution failed to prove the appellant's guilt beyond reasonable doubt, as there was no direct or circumstantial evidence; PW-1 and PW-2 (parents) relied on hearsay without identifying sources, and no incriminating material or weapon was recovered. (3) Key witnesses (PW-3, PW-8, PW-9, PW-10) turned hostile, and PW-4 (Neelam Kumari) denied implicating the appellant. (4) The trial court's conviction was based on suspicion of enmity, which cannot substitute for evidence, and it failed to evaluate the lack of proof. (5) The appellant, incarcerated for over 12 years since 2012, was ordered released forthwith, subject to Section 437A Cr.P.C., unless wanted in another case. (6) The court expressed concern over the appellant's prolonged detention without evidence but refrained from strictures against the Investigating Officer and trial court.

(Delivered by Hon'ble Ashwani Kumar
Mishra, J.

&

Hon'ble Mohd. Azhar Husain Idrisi, J)

1. The present appeal has been preferred by the accused appellant Nanhaku Singh challenging the judgment and order of conviction and sentence dated 23.06.2016, passed by the Additional Session Judge, Court No.2, Shahjahanpur in Session Trial No.77 of 2013 (State vs. Nanhaku Singh) arising out of Case Crime No.56 of 2012, Police Station Jaitipur, District Shahjahanpur, whereby the accused appellant has been convicted and sentenced to life imprisonment under sections 302, 376 IPC and 3(2)(V) SC/ST Act with fine of Rs.5,000/-, in default whereof he is to further undergo three years rigorous imprisonment; under section 201 IPC for four year rigorous imprisonment. All the sentences are to run concurrently.

2. Written report (Ex.Ka.1) given by the informant is the basis of present case, which alleges that on 18.03.2012 the daughter of informant (PW-1), aged 11 years, had gone alone to fetch fodder from the field. She did not return till 4-5 pm and the family members got concerned. The informant kept searching for his daughter and ultimately the dead body of the deceased daughter was found near the wheat field of Bhubnesh Singh. There were signs of injuries on neck and apprehension was expressed that she was done to death. The dead body was recovered at 08.00 am on the next day i.e. 19.03.2012.

3. On the basis of written report (Ex.Ka.1) First Information Report (Ex.Ka.2) was lodged at 10.30 am on 19.03.2012 as Case Crime No.56 of 2012 under Section 302 IPC, Police Station Jaitipur, District Shahjahanpur. Investigation proceeded in the matter. Inquest (Ex.Ka.4) was conducted at 10.30 am on 19.03.2012. In order to ascertain the cause of death the inquest witnesses opined

that the postmortem of deceased be conducted. Consequently, the dead body was sealed and sent to mortuary for postmortem. The postmortem (Ex.Ka.8) was conducted at 04.45 pm on the same day. The Autopsy Surgeon determined the cause of death as shock and haemorrhage as a result of ante-mortem injuries. Following ante-mortem injuries were found on the deceased:-

“(i) Incised wound 2cm x 1 cm x muscle deep over the right side chin 3cm below from right angle of mouth margins are clear cut and regular. Clotted blood present in the wound.

(ii) Incised wound 1cm x .5cm x muscle deep over the right side of chin 1cm lateral to the injury no.1 margins regular and clear cut. Clotted blood present in the wound.

(iii) Incised wound 3cm x 1.5cm x muscle deep over the left side face 2cm medial to the ear tragus, margins regular and clear cut. Clotted blood present in the wound.

(iv) Incised wound 1cm x 1cm x muscle deep on the left side of face 1cm medial to the left ear tragus, margins regular and clear cut. Clotted blood present in the wound.

(v) Incised wound 11cm x 5cm x oesophagus deep over the front and lateral aspect of neck some part of muscle, skin, and underneath trachea and oesophagus missing. Margins regular and clear cut. Clotted blood present in the wound.

(vi) Incised wound 9cm x 3cm x oesophagus deep over the front of neck just above injury no.5 over part of skin and muscle missing and underneath part of trachea and oesophagus also missing and both neck vessels found cut and separated. Margins regular and clear cut. Clotted blood present in the wound.

(vii) Incised wound 8cm x 2cm x trachea deep over the front of upper neck just above injury no.6, some part of muscle and underneath larynx and trachea also missing and neck vessels cut and separated. Margins regular and clear cut. Clotted blood present in the wound.

(viii) 1st to 2nd degree burn injury present over the front of chest 7cm x above the right nipple margins blurred size 16x11cm.

(ix) 1st to 2nd degree burn injury over the left clavicle 4cm lateral to medial end of left clavicle. Margins blurred.

(x) Lacerated wound present around the labia minora and laceration present in the both lateral aspect of anterior 1/3rd vaginal wall, hymen was also found lacerated and some part of hymen missing, margins irregular and clotted, blood present in the wound. ”

4. Investigating Officer has recovered the clothes, slippers etc. of the deceased vide Ex.Ka.13 and has also recovered a plastic sack and sickle (daranti) etc. vide Ex.Ka.11. The Investigating Officer has collected bloodstained earth and plain earth vide Ex.Ka.10 as also recovered bloodstained plants of wheat crops vide Ex.Ka.13. Such recovered materials were sent for scientific investigation by the Forensic Laboratory.

5. Role of accused appellant surfaced on the basis of information given to the parents of the deceased by the family members. The Investigating Officer, after recording the statement of witnesses under Section 161 Cr.P.C., concluded the investigation and submitted chargesheet against the accused appellant under Sections 302, 376, 201 IPC and 3(2)(V) SC/ST Act. The Magistrate took cognizance on the chargesheet and

committed the case to the Court of Sessions where it got registered as Session Trial No77 of 2013. Charges were framed against the accused appellant under aforesaid sections. On being read out the charges to the accused appellant, he denied the accusations made against him and demanded trial.

6. The prosecution in order to prove its case has exhibited various documentary evidence, noticed above. In addition to the exhibited documentary evidence, the prosecution has also produced the oral testimony of following prosecution witnesses:

7. PW-1 (Premwati) is the first informant/mother of deceased. In her examination-in-chief, she has stated that she has five daughters and on the date of incident her husband as well as her eldest son were working in Delhi. She has supported the prosecution case that having gone to fetch fodder from the field her daughter disappeared and ultimately her dead body was found near the field of Bhubnesh and that her throat was slit and she had no clothes on her. It is also stated that clothes, slippers, sickle (daranti) etc. were recovered from near vicinity of dead body. The report was got scribed by someone on the asking of the informant and she placed her thumb impression on it. PW-1 has also stated that she later came to know that her daughter has been done to death by accused appellant, who came in possession over her agricultural land after it was got released from accused appellant about three years back, due to which he maintained enmity.

In her cross-examination, PW-1 has admitted that she has not seen the incident and the contents of written report are based

on hearsay information received from others. The person from whom such information has been received has not been identified. She has also stated that accused appellant has five children and eldest daughter is about 18-19 years of old. PW-1 has been elaborately examined in which she has disclosed her family composition and except to state that she has apprehension that accused appellant had committed the murder, there was no other basis for her to implicate the accused appellant. PW-1 has also admitted that initially one Atul Kumar was apprehended by the police whereafter Gopal Jatav was arrested but both of them were released. PW-1 has admitted that she has won the election of member of Gram Panchayat after defeating the wife of one Ram Bharose. She has denied the suggestion that on account of political dispute she has falsely implicated the accused appellant.

8. PW-2 (Ram Charan) is the father of deceased. In his examination-in-chief he has stated that on account of enmity accused appellant has committed the offence as he got his land released from him. In the cross-examination, PW-2 has stated that he was not in the village and only after death of the deceased he returned. The source of information to implicate the accused appellant by PW-2 is also hearsay statement without specifying the person from whom such information was received.

9. Omveer has been produced as PW-3, who has turned hostile during trial.

10. PW-4 (Neelam Kumari) is the minor girl whose statement was recorded by the police during investigation under section 161 Cr.P.C. in which she alleged that the deceased was done to death by the

accused appellant. In her statement before the trial court PW-4 has denied having given any information to the Investigating Officer about complicity of the accused appellant.

11. PW-5 (Rohil Husain) is the Head Constable, who has proved the police papers. PW-6 (K. P. Singh) is the Sub Inspector, who has proved the inquest papers.

12. PW-7 (A. K. Rai) is the Autopsy Surgeon, who conducted the postmortem of deceased. He has proved the postmortem report and as per him ten injuries were found on the deceased.

13. PW-7 (Balwant) is stated to be an independent witness, who has turned hostile during trial. PW-9 and PW-10 are also the independent witnesses, who have turned hostile and have not supported the prosecution case.

14. PW-10 (Mukesh), PW-11 (Harirai Tripathi) and PW-12 (Vinay Kumar Saroj) are the police personnel, who have conducted the investigation in the matter from time to time.

15. The accused appellant has been confronted with the above incriminating materials produced by the prosecution during trial for recording his statement under section 313 Cr.P.C. in which he has denied the charges by stating that he has been falsely implicated in the present case while he is innocent.

16. It is on the basis of such evidence led during trial by the prosecution and upon consideration of the explanation furnished by the accused appellant under section 313 Cr.P.C. that the court below has

come to the conclusion that the prosecution has established its case beyond reasonable doubt against the accused appellant and found him guilty of committing the offence. The court below has convicted and sentenced the accused appellant vide impugned judgment and order. Thus aggrieved, the accused appellant is before this Court in the present appeal.

17. Shri Ashok Kumar Tripathi, learned counsel for the appellant submits that this is a case in which accused appellant has been falsely implicated only on account of suspicion of the parents of deceased. He submits that absolutely no evidence of any kind has been produced by the prosecution to prove the guilt of accused appellant. Submission is that it is neither a case of direct evidence nor any circumstance adverse to accused appellant has been produced so as to implicate him. Argument is that without any cogent evidence produced during trial against the accused appellant he has remained in jail for over twelve years and that as the trial court has not correctly appreciated the evidence on record, as such the judgment of conviction and sentence is liable to be set aside.

18. Learned A.G.A. for the State, on the other hand, has supported the judgment of conviction and sentence for the reasons recorded therein.

19. We have heard learned counsel for the parties and have perused the materials brought on record, including the original records of the court below.

20. Perusal of record would go to show that the deceased was a girl aged about 11 years, who died on account of ten injuries caused to her. Her dead body was

recovered at about 08.00 am on 19.03.2012. It is on the basis of information received by family members that the accused appellant has been implicated in the present case.

21. We have carefully gone through the evidence on record, which consists of documentary evidence as well as oral testimony. This is not a case of direct evidence against the accused appellant. This is also not a case falling in the category of circumstantial evidence, inasmuch as none of the circumstances have been produced by the prosecution to implicate the accused appellant.

22. PW-1 and PW-2 are the star prosecution witnesses, who are parents of the deceased. PW-2 admittedly was not present in the village when the incident occurred. PW-1 is the mother, who also admits that she has not seen the accused appellant committing the offence. She claims to have learnt of the complicity of accused appellant but no person has been identified from whom information has been received. None has otherwise been produced who has either seen the incident or any incriminating material against the accused appellant has been produced.

23. Admittedly, there is no recovery from the accused appellant. It is also not the case that dead body has been recovered on the pointing out of the accused appellant. No weapon of assault has been recovered from the appellant. In the absence of any evidence produced by the prosecution to implicate the accused appellant, we are amazed as to how the prosecution on the basis of such non-existent material could either implicate the accused appellant or the court of sessions could have convicted the accused appellant.

24. The only basis to implicate the accused appellant is the suspicion on account of alleged reclaiming of land by the informant from the accused appellant about three years back. Mere apprehension howsoever strong cannot be the substitute for evidence which alone can justify implication of an accused.

25. In the absence of evidence worth the name we find it difficult to approve the judgment of conviction and sentence of the trial court in the facts of the present case. It appears that the trial court has not carefully examined the records and in its anxiety to convict the accused has proceeded to deliver the judgment even without any evidence appearing on record against the accused appellant.

26. We are also informed that the accused appellant is in jail since 2012. It is unfortunate that despite there being no evidence against the accused appellant he has been forced to remain in jail for over twelve years. We are tempted to make harsh observations not only against the Investigating Officer but also the Presiding Officer but we refrain from doing so as they have not been heard in the matter. Nevertheless, we are disappointed by the manner in which a person is incarcerated in jail for over twelve years without any evidence against him.

27. From the discussions and deliberations held above, we have no hesitation in coming to the conclusion that the prosecution has failed to establish its case against the accused appellant beyond reasonable doubt. We also hold that the court below has not evaluated the evidence led during trial in correct perspective and, therefore, the impugned judgement and

order of conviction and sentence is liable to be reversed.

28. Consequently, the appeal succeeds and is allowed. The judgment and order of conviction and sentence dated 23.06.2016 is hereby set aside. The appellant is acquitted of the charges levelled against him. Since the appellant is in jail, he shall be released forthwith, unless he is wanted in any other case, subject to compliance of section 437A Cr.P.C.

29. Copy of this judgment shall be communicated to the Chief Judicial Magistrate concerned as also the concerned Superintendent of Jail for necessary compliance.

(2024) 4 ILRA 1214

**APPELLATE JURISDICTION
CRIMINAL SIDE**

DATED: ALLAHABAD 24.04.2024

BEFORE

**THE HON'BLE RAJIV GUPTA, J.
THE HON'BLE SHIV SHANKER PRASAD, J.**

Criminal Appeal No. 4371 of 2005

Hari Bahadur		...Appellant
	Versus	
State of U.P.		...Respondent

Counsel for the Appellant:

Sri Vinod Kumar Tripathi, Sri Dilip Kumar Kesharwani, Sri Noor Mohd., Sri Ram Sagar Yadav, Sri S.K. Dubey

Counsel for the Respondent:

Govt. Advocate

**Criminal Law - Indian Penal Code, 1860 –
Section 302 – Code of Criminal Procedure,
1973 – Sections 313, 374(2) & 433A –
Criminal Appeal Against Conviction and
Sentence – Murder – Eye-Witness Testimony –
Medical Evidence – Recovery of Weapon –**

Motive – Sterling Witness – Fixed-Term Sentence – Remission – Constitutional Court's Power

The appellant, Hari Bahadur, challenged the judgment dated 14.09.2005 by the Additional Sessions Judge, Court No. 10, Ghaziabad, in Sessions Trial No. 1147 of 2003, convicting him under Section 302 IPC for the murder of Sita Ram, sentencing him to life imprisonment with a Rs. 10,000 fine, and 6 months additional imprisonment in default. The prosecution alleged that on 13/14.05.2003 at 11:45 PM, the appellant stabbed Sita Ram in a hutment area, suspecting him of withholding information about his brother Radhey Shyam, who allegedly enticed the appellant's wife. PW-1 (Shobha Kant Poddar), an eye-witness, saw the assault in electric bulb light and lodged the FIR, supported by PW-2's testimony confirming PW-1's presence, the postmortem report showing six stab wounds causing death by lung laceration, and the appellant's arrest with the crime weapon (knife). The appellant claimed false implication due to enmity but led no evidence. Held: (1) The appeal was partly allowed, upholding the conviction but modifying the sentence. (2) PW-1's testimony was of sterling quality, unimpeachable, and corroborated by PW-2's confirmation of his presence and the postmortem report, despite PW-2 not witnessing the assault. (3) Adequate lighting from electric bulbs enabled clear identification of the appellant, who was known to PW-1. (4) Failure to prove recoveries (knife, blood-stained clothes, hair strands) did not undermine the prosecution case, as PW-1's reliable testimony sufficed for conviction. (5) Considering the appellant's age (28 at the time of the offence), lack of criminal antecedents, and 20 years served, the life sentence was modified to a fixed term of 22 years actual imprisonment, excluding remission, due to the brutal nature of the crime and public confidence in the legal system. (6) The court exercised its power under Section 53 IPC to impose a fixed-term sentence, as clarified by constitutional courts' authority.

List of Cases cited:

1. Vadivelu Thevar Vs St. of Madras, AIR 1957 SC 614

2. Shahaja @ Shahajan Ismail Mohd. Shaikh Vs St. of Maharashtra, Criminal Appeal No. 739 of 2017

3. Rai Sandeep @ Deepu Vs St. (NCT of Delhi), (2012) 8 SCC 21

4. Shiva Kumar @ Shiva @ Shivamurthy Vs St. of Karn., Criminal Appeal No. 942 of 2023

5. Union of India Vs VS Sriharan, (2014) 11 SCC 1

6. Swamy Shraddananda Vs St. of Karn., (2008) 13 SCC 767

(Delivered by Hon'ble Rajiv Gupta, J.)

1. Heard Shri Ram Sagar Yadav, learned counsel for the appellant, Shri Arun Kumar Pandey, learned AGA for the State and perused the record.

2. The instant criminal appeal has been preferred against the judgment and order dated 14.09.2005 passed by Additional Sessions Judge, Court No.10, Ghaziabad in Sessions Trial No. 1147 of 2003 (State of U.P. Vs. Hari Bahadur), arising out of Case Crime No. 686 of 2003, under Section 302 IPC, Police Station Indirapuram, District Ghaziabad, convicting and sentencing the accused-appellant to undergo imprisonment for life with fine of Rs.10,000/- under Section 302 IPC and in default of payment of fine, to undergo six months' further additional imprisonment.

3. The prosecution case as has been set out by the first informant Shobha Kant Poddar (PW-1) in the first information report is that in the night between 13/14.05.2003 at about 12:00 O'clock in the night, while he was taking his meals, he heard an alarm being raised from near the hutment of Sita Ram. After hearing the

alarm, he reached there, where he had seen in the light of the electric bulbs lit there on the electric pole, that appellant, who also used to reside near his hutment, assaulting Sita Ram by a knife on his chest and back, uttering that he suspects that his brother Radhey Shyam had enticed away his wife and whereabouts of Radhey Shyam is not being disclosed by him, as such, he would be done to death and continued to assault Sita Ram by a knife.

4. It is further stated that when PW-1 Shobha Kant tried to rescue Sita Ram, he was also threatened for dire consequences, as such, he retreated back and started raising alarm. On hearing the alarm, number of persons reached the place of incident and saw Hari Bahadur, with the knife in his hand, making his escape good towards Shukra Bazaar. The dead body of the deceased Sita Ram, soaked with blood, was lying at the place of incident.

5. On the basis of the said written report handed over by the first informant Shobha Kant, a first information report was registered against the appellant Hari Bahadur Nepali, which was registered vide Case Crime No. 686 of 2003, under Section 302 IPC at Police Station Indirapuram, District Ghaziabad at 12:45 AM or 00:45 Hours, which has been proved and exhibited as Exhibit Ka-1. Entry regarding first information report was made in G.D. Report No.2, dated 14.05.2003 at 00:45 hours.

6. Perusal of the record shows that prior to the lodging of the said first information report, after committing the incident of murder by the appellant Hari Bahadur Nepali, and making his escape

good, he was being chased by number of villagers and on the alarm raised by them, S.I. R.V. Kaul of Police Station Indirapuram, who was on the patrolling duty, reached near the place of incident and apprehended the accused-appellant Hari Bahadur Nepali alongwith crime weapon knife, which he was holding in his hand at about 12:20 AM in the night. The said knife held by the accused-appellant, was taken in possession by the S.I. R.V. Kaul and its fard recovery memo was prepared, which has been proved and exhibited as Exhibit Ka-9. Thereafter, the blood-stained pant, worn by the appellant at the time of his arrest, was also taken in possession and its fard recovery memo was drawn. Thereafter, accused was taken to the Police Station and lodged in the jail.

7. Thereafter, the investigation of the said case was entrusted to S.I. Mahesh Singh Tomar (PW-4), who recorded the statement of first informant Shobha Kant (PW-1) and that of the accused, who was arrested by the police. Thereafter, the statement of other relevant witnesses, namely, Sanjeev and Rajesh Kumar were recorded and the Investigating Officer reached the place of incident and prepared the site plan, which has been proved and exhibited as Exhibit Ka-4.

8. Thereafter, on 14.05.2003, S.I. R.V. Kaul conducted the inquest on the person of the deceased and prepared the inquest memo and other relevant documents and thereafter, despatched the dead body of the deceased for post-mortem and an autopsy was conducted on the person of the deceased on 14.05.2003 at about 4:00 PM. In the said post-mortem report, the Doctor has noted as many as six injuries on the person of the deceased, which are noted herein-below:-

(i) कटा हुआ घाव 3.5 x 1.5 से०मी० जो छाती के बीचो बीच फेफड़े की गहराई तक पाई गयी बायाँ फेफड़ा कटा हुआ था, जिसके चारो ओर लगभग 800 मि०ली० रक्त पाया गया।

(ii) कटा हुआ घाव 3 x 1 से०मी० पेट के ऊपरी हिस्से पर बांयी तरफ पसली के मध्य के नीचे मांस पेशियों की गहराई तक पाया गया।

(iii) कटा हुआ घाव 3.5 x 1.5 से०मी० पीठ पर बांयी तरफ स्कैपुला हड्डी के नीचे फेफड़े की गहराई तक पाया गया, बायाँ फेफड़ा कटा हुआ पाया गया, जिसके चारो तरफ लगभग 1 लीटर रक्त जमा पाया गया।

(iv) कटा हुआ घाव पीठ पर बांयी तरफ चोट नं०-3 से 12 से०मी० नीचे फेफड़े की गहराई तक जिससे बायाँ फेफड़ा कटा हुआ पाया गया।

(v) कटा हुआ घाव 3.5 x 1.5 से०मी० पीठ पर दाहिने हाथ की तरफ चोट नं०4 से आर पार होता हुआ तथा लगभग इससे 10 से०मी० दूर पेट की गहराई तक पाया गया। पेट के अन्दर कोई चोट नहीं पायी गयी।

(vi) कटा हुआ घाव 3 x 1.5 से०मी० चोट नं०5 से 12 से०मी० नीचे माँस पेशी की गहराई तक पाया गया।

9. In internal examination, both lungs were found lacerated and the cause of death has been noted to be shock and haemorrhage due to laceration of both lungs.

10. At the time of conducting the panchayat nama, the Investigating Officer had also collected plain earth and blood-stained earth from the place of incident and

kept it in a container. Apart from it, hair strands of the accused-appellant Hari Bahadur, held by the deceased Sita Ram in his fist, was also recovered and taken in possession by the Investigating Officer and its fard recovery memo was prepared. The Investigating Officer thereafter recorded the statement of other relevant witnesses and after concluding the investigation, submitted the charge-sheet against the appellant.

11. On the basis of the said charge-sheet, learned Magistrate had taken cognizance of the offence and since the case was exclusively triable by the court of Sessions, made over the case to the court of Sessions for trial, which was registered as Sessions Trial No. 1147 of 2003 (State of U.P. Vs. Hari Bahadur). The trial court on 29.07.2023 framed the charges against the appellant under Section 302 IPC, which was read out to the appellant, who abjured the charges, did not plead guilty and claimed to be tried.

12. During the course of trial, the prosecution, in order to bring home the guilt against the appellant, examined as many as two witnesses of fact and two other formal witnesses. Their testimony, in brief, is enumerated herein-below:-

13. PW-1 Shobha Kant, first informant of the case, has stated that in the night of 13/14.05.2003, Sita Ram was murdered at about 11:45 PM, while he was taking his meals in his hutment. The hutment of Sita Ram is situated behind his hut, from where, alarm was being raised by Sita Ram. Hearing the alarm, he reached there and saw Hari Bahadur, present in the court, assaulting Sita Ram on his chest and back by a knife. The source of light was the electric bulbs lit there on the electric poles.

While assaulting him, Hari Bahadur was uttering that he had not disclosed the whereabouts of his brother Radhey Shyam, who had enticed away his wife. On making an attempt to rescue him, he was also threatened. On raising alarm, number of persons of the vicinity reached there, consequent to which, Hari Bahadur made his escape good. The report in respect of the incident was lodged by him, which has been proved and exhibited as Exhibit Ka-1.

14. During cross-examination, he has stated that incident had occurred at about 11:45 PM on 13.05.2003 and before he reached near the place of incident, no other person was present there. His hutment is situated at a distance of 30 feet from the hutment of deceased Sita Ram. The incident had taken place outside the hutment of Sita Ram and he had reached the place of incident at about 11:45 PM and the police had also reached in the night itself. He had gone alone to lodge the report at 12:00 in the night and he himself had scribed the report in the Police Station itself and not on the dictation of any police personnel. He returned back after the police had recorded his statement.

15. During cross-examination, he further denied the recovery of knife in his presence. He further stated that Radhey Shyam is not related to him and Sita Ram used to live with his brother Radhey Shyam. He further denied the suggestion that Hari Bahadur used to make their complaints to the police, who used to look out for the miscreants in respect of sale of Ganja and in retaliation to which, he is falsely deposing against the appellant. He further denied the suggestion that he had not witnessed the incident.

16. PW-2 Raja Ram is the panch witness and after conducting the panchayat nama, the dead body of the deceased was despatched for post-mortem.

17. During cross-examination, he has stated that at about 12:00-12:30 AM, Sita Ram was murdered and his hut is situated just adjacent to his hut, which is at a distance of 20 feet. On the alarm being raised, he got up and reached the place of incident within five minutes, however, before he reached there, Shobha Kant (PW-1) had already reached there alongwith 20-25 other persons. He further stated that police reached the place of incident at about 12:00-12:30 AM. He further categorically stated that the accused made his escape good, before he could reach the place of incident. He further stated that he was a panch witness and his signature was obtained on the inquest.

18. PW-3 Dr. A. Mishra had conducted the autopsy on the person of the deceased and proved the autopsy report and contents thereof. The autopsy report has been proved and exhibited as Exhibit Ka-3.

19. During cross-examination, he stated that an autopsy was conducted on the person of the deceased at 4:00 PM on 14.05.2003. He further stated that injury nos. 1, 3 & 4 were sufficient to cause the death and the cause of death is laceration of the lungs. He further stated that on account of long illness or on account of taking excessive liquor, such injuries could not be caused. All the injuries could be caused by sharp edged weapon and the said injuries could not be caused by fall over a sharp edged weapon.

20. PW-4 S.I. Mahesh Singh Tomar is the Investigating Officer of the case, who was entrusted the investigation on 14.05.2003. He stated that he had recorded the statement of the first informant and that of the accused, who had been arrested by the police and brought at the police station. He prepared the site plan, which has been proved and exhibited as Exhibit Ka-4.

21. He further stated that he had recorded the statement of S.I. R.V. Kaul, who had arrested the accused Hari Bahadur, while he was trying to make his escape good towards Shukra Bazaar after killing Sita Ram and the crime weapon (knife) was taken in his possession from the hands of the accused-appellant Hari Bahadur, who prepared the respective recovery memos. After recording the statement of several witnesses and collecting the material evidence, he concluded the investigation and submitted the charge-sheet against the appellant.

22. During cross-examination, he stated that the place of incident is near the police outpost Kaushambi and at the relevant time of incident, Shri R.V. Kaul was on patrolling duty, who reached the place of incident and arrested the accused alongwith crime weapon (knife). The inquest proceedings was also conducted by the said S.I. R.V. Kaul and the knife, bloodstained pant, hair strands from the fist of the deceased, plain earth and bloodstained earth were taken in possession by him, who prepared their respective recovery memos.

23. He further stated that fard recovery memo in respect of recovery of knife and hair strands is not before the court, as such, he can not state anything

about the said recoveries. He further denied the suggestion that on the instigation of the first informant, he investigated the said case and falsely implicated the accused-appellant.

24. Thereafter, statement of the accused under Section 313 CrPC has been recorded and all the incriminating circumstances were put to him, which were denied by him and he pleaded that on account of enmity, he has falsely implicated, however, in his defence, no evidence has been led nor any evidence relating to enmity with the witnesses has been proved by the appellant.

25. The trial court, after appreciating the entire material and evidence available on record, has held that the prosecution has proved its case beyond all reasonable doubts against the appellant by relying upon the testimony of PW-1 as also corroborated by PW-2 regarding presence of PW-1 at the place of incident and the medical reports of the deceased, however, the factum of recovery of various articles has not been found proved by the trial court. The trial court, on the basis of unimpeachable testimony of PW-1 and post-mortem report of the deceased, has held that the appellant is guilty of the offence committed and convicted and sentenced him. The medical evidence also lends credence to the prosecution case against the appellant. The datas mentioned in the post-mortem report points out conclusively to the culpability of the appellant for the commission of offence.

26. Being aggrieved and dissatisfied by the said judgment and order, the present criminal appeal has been filed.

27. Learned counsel for the appellant has vehemently submitted that trial court has committed a serious error in recording the finding that the appellant is guilty of murder. He has further submitted that trial court committed a serious error in believing the two so called eye-witnesses as reliable witnesses. He has further submitted that both the eye-witnesses PW-1 and PW-2 are unreliable witnesses, however, trial court by placing implicit reliance upon their testimony, has illegally recorded the finding of conviction and sentence against the appellant.

28. Learned counsel for the appellant has further submitted that PW-2 in his testimony has clearly stated that when he reached the place of incident, accused person had already made his escape good and as such, he had not witnessed any part of the actual incident of assaulting the victim by the appellant and therefore, his testimony do not lend any credence to the prosecution story and as such, the finding of conviction recorded against the appellant is bad in law and is liable to be set aside.

29. Learned counsel for the appellant has next submitted that veracity of entire prosecution story, rests only on the sole testimony of PW-1, which has not been corroborated by any other link evidence and as such, the finding of the guilt recorded against the appellant based on the sole testimony of PW-1 is bad in law and is liable to be set aside.

30. Learned counsel for the appellant has further submitted that only on the basis of sole testimony of a witness, the finding of guilt can not be recorded against an accused person.

31. Learned counsel for the appellant has next submitted that admittedly, the incident has taken place in the dark hours of the night at 12:00 O'Clock as evident from the testimonies of witnesses and no source of light was available in the hutment, in absence of which, identification of the appellant to be the assailant, is nothing but based on imagination of the prosecution witnesses and as such, their testimony is liable to be discarded.

32. Learned counsel for the appellant has next submitted that recovery of blood-stained clothes, knife and hair strands recovered from the fist of the deceased has not been sent for forensic examination, in absence of which, no reliance can be placed on the said link evidence and the appellant is liable to be acquitted by setting aside the impugned judgment and order of conviction and sentence.

33. Per contra, learned AGA has submitted that PW-1 Shobha Kant Poddar is an eye-witness of the incident, who is living in the vicinity, where the incident is said to have taken place and he has been attracted on the alarm raised by the victim and when he reached the place of incident, he had seen the appellant Hari Bahadur assaulting the victim Sita Ram by a knife on his chest and the back. He has further categorically stated in his statement that adequate light of electric bulb fixed on the electric poles was available there, in which, he had witnessed the incident and identified the accused Hari Bahadur assaulting the victim, thereby causing his death.

34. Learned AGA has further submitted that during the course of trial, PW-1 in his testimony has clearly narrated

the entire incident of assaulting the victim by the appellant causing his death and his testimony is of unimpeachable character and the defence has not been able to point out any inconsistency, improvement or embellishment in his testimony. Even during the cross-examination, nothing has been elicited to doubt the credibility of the said witness. PW-1 has corroborated the prosecution story in all material particulars and therefore, his testimony falls in the category of "wholly reliable witnesses," as such the trial court by placing implicit reliance upon his testimony, has rightly recorded the finding of conviction and guilt against the appellant, which is just, proper and legal and do not call for any interference.

35. Learned AGA has further submitted that even PW-2 in his cross-examination has clearly proved the factum of presence of PW-1 at the time and place of incident, which further lends credibility to the prosecution story.

36. Learned AGA has further submitted that post-mortem report completely corroborates the prosecution story and the defence has not been able to point out any contradiction or improvement in the said post-mortem report, viz-a-viz to the prosecution story, which further lends credibility to the prosecution story.

37. Learned AGA has further submitted that from the site plan as well as statement of PW-1, it is evident that adequate source of light was available at the place of incident in the form of electric bulbs fixed on the electric poles, outside the hutment in the slum area, which has been clearly marked by the Investigating Officer while preparing the

site plan. Even PW-1 has clearly stated that he had identified the appellant in the bulb light, which was lit there. The Investigating Officer in the site plan has pointed out that at point B-1, B-2 and B-3, electric poles were fixed having electric bulbs, which were lighted and there was adequate source of light, in which, PW-1 had witnessed the incident and identified the appellant to have assaulted the deceased causing his death. Even PW-1 has clearly pointed out that source of light at the place of incident in the form of electric bulb lit on the electric poles. To quote: "बिजली की रोशनी खम्भे से आ रही थी।" Thus, there was adequate source of light at the place of incident, in which, the assailant has been distinctly identified by the first informant.

38. Learned AGA has further submitted that appellant is living in the same vicinity, where the first informant-PW-1 used to reside and therefore, he was well acquainted with the appellant and there can not be any doubt about his identity.

39. Learned AGA has further submitted that it is well settled principle of law that on the sole testimony of a witness if unimpeachable, the accused can well be convicted. He has further submitted that even the medical report completely corroborates the prosecution story and therefore, the trial court by placing the implicit reliance of testimony of PW-1, corroborated by the statement of PW-2 and the medical report, has rightly convicted the appellant for the offence charged with and there is absolutely no illegality in recording the finding of conviction and sentence against the appellant and as such, the instant criminal appeal has no merit and is liable to be dismissed.

40. Having considered the rival submissions made by learned counsel for the parties and the evidence adduced during the course of trial, we would now scrutinize the material available on record, on the basis of which, finding of conviction has been recorded against the appellant. It appears from the evidence available on record, more particularly, the evidence of PW-1 Shobha Kant Poddar that both the deceased and the appellant herein were known to him. PW-1 Shobha Kant Poddar knew both as they used to reside in the same locality and very well acquainted with each other. PW-1 in his statement has clearly stated that while he was taking his meals, he heard the alarm raised by the deceased Sita Ram, on which, he was attracted and reached the place of incident and saw the appellant assaulting the deceased with knife, which resulted in his death. In his testimony, he has categorically stated that the incident was well witnessed by him in the electric bulb light, lit at the place of incident, particularly places B-1, B-2 and B-3 as pointed out by the Investigating Officer in the site plan. PW-1 in his testimony has categorically corroborated the entire prosecution story as witnessed by him, on the basis of which, he had gone to the Police Station and lodged the first information report.

41. Moreover, we do not find anything improbable in examination-in-chief of PW-1 Sobha Kant Poddar, even during cross-examination, the defence has not been able to point out any inconsistency, improvement or embellishment in his statement. Thus, nothing could be elicited by the defence to doubt the credibility of the said witness.

42. In the backdrop of scrutinizing the testimony of said witness, we find that

the testimony of PW-1 falls in the category of “wholly reliable witness” as held by the Hon’ble Apex Court in the case reported in ***AIR 1957 (SC) 614 Vadivelu Thevar Vs State of Madras.***

43. It is further germane to point out here that though PW-2 in his testimony has stated that he has not been an eye-witness of the incident of actual assault by the appellant but in his statement, he has categorically stated about the presence of the first informant Shobha Kant Poddar (PW-1) at the time and place of incident, which further lends credibility to the prosecution story.

44. The Hon’ble Apex Court in a recent decision passed in ***Criminal Appeal No. 739 of 2017 (Shahaja @ Shahajan Ismail Mohd. Shaikh Vs. State of Maharashtra)*** has laid down broad principles for appreciation of an ocular evidence, wherein it has been stated that:-

“27. The appreciation of ocular evidence is a hard task. There is no fixed or straight-jacket formula for appreciation of the ocular evidence. The judicially evolved principles for appreciation of ocular evidence in a criminal case can be enumerated as under:

(I). While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the

evidence is shaken as to render it unworthy of belief.

(II). *If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details.*

(III). *When eye-witness is examined at length it is quite possible for him to make some discrepancies. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence.*

(IV). *Minor discrepancies on trivial matters not touching the core of the case, hyper technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.*

(V). *Too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny.*

(VI). *By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.*

(VII). *Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.*

(VIII). *The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.*

(IX). *By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.*

(X). *In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.*

(XI). *Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.*

(XII). *A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The subconscious mind of the witness sometimes so operates on account*

of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him.

(XIII). A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Unless the former statement has the potency to discredit the later statement, even if the later statement is at variance with the former to some extent it would not be helpful to contradict that witness. [See Bharwada Bhoginbhai Hirjibhai v. State of Gujarat, 1983 Cri LJ 1096 : AIR 1983 SC 753, Leela Ram v. State of Haryana, AIR 1999 SC 3717, and Tahsildar Singh v. State of UP, AIR 1959 SC 1012].

28. To put it simply, in assessing the value of the evidence of the eyewitnesses, two principal considerations are whether, in the circumstances of the case, it is possible to believe their presence at the scene of occurrence or in such situations as would make it possible for them to witness the facts deposed to by them and secondly, whether there is anything inherently improbable or unreliable in their evidence. In respect of both these considerations, the circumstances either elicited from those witnesses themselves or established by other evidence tending to improbabilise their presence or to discredit the veracity of their statements, will have a bearing upon the value which a Court would attach to their evidence. Although in cases where the plea of the accused is a mere denial, yet the evidence of the prosecution witnesses has to be examined on its own merits, where the accused raise a definite plea or puts forward a positive case which is inconsistent with that of the prosecution, the nature of such plea or case and the probabilities in respect of it will also have

to be taken into account while assessing the value of the prosecution evidence."

45. Thus, testing the credibility of the statement of two prosecution witnesses PW-1 and PW-2 on the aforesaid principle, we find that there is nothing palpable or glaring in the evidence of two eye-witnesses, on the basis of which, we can take the view that they are not true or reliable eye-witnesses.

46. Analysing the testimony of PW-1 on its face value, we are of the view that the defence has not been able to point out any inconsistency, improvement or embellishment in his testimony and he falls in the category of "wholly reliable witnesses" as held by the Hon'ble Apex Court in several of its decision.

47. Now, coming to the plea raised by learned counsel for the appellant that PW-2 is not an eye-witness of the incident of actual assault by the appellant as he in his statement has categorically stated that he reached the place of incident, when the accused had already made his escape good, therefore, he is not an eye-witness of the incident of assaulting the victim, causing his death and therefore, PW-1 is the sole eye-witness of the incident and only on the basis of his sole testimony, conviction can not be based as held by the trial court.

48. In our considered opinion, the said submission made by learned counsel for the appellant can not be accepted in view of settled law laid down by the Hon'ble Apex Court in several of its decisions, wherein it has been held that on the sole testimony of the witness, the accused can be held guilty but the only caveat is that the testimony of the said witness must be of sterling quality. The

Hon'ble Apex Court in the case of **(2012) 8 SCC 21 Rai Sandeep @ Deepu Vs. State (NCT of Delhi)** has very vividly described the characteristics of the sterling witness.

“22. In our considered opinion, the “sterling witness” should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of

such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a “sterling witness” whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.”

49. On the anvil of the above principles, when we test the version of PW-1, we find that his testimony is of sterling quality and the defence has not been able to point out any inconsistency, improvement or embellishment, which makes the said witness to be wholly reliable witness and we find that there is a ring of truth in his testimony, therefore, the said argument of learned counsel for the appellant that on the basis of the sole testimony of the witness, the accused-appellant can not be convicted, is beyond comprehension and is liable to be rejected.

50. It is further germane to point out here that at the time of incident, adequate source of light has been pointed out by the Investigating Officer at the place of incident, in which, witnesses are said to have seen the incident and adduced their testimony, which further lends credibility to the prosecution story.

51. It is further germane to point out here that even PW-2, who is not an eye-

witness of the incident, has also reached the place of incident on being attracted by the alarm raised by the deceased and he has categorically stated that when he reached the place of incident, he saw PW-1, to be present there, which further lends credibility to the testimony of PW-1. Furthermore, the datas mentioned in the post-mortem clearly supports the prosecution story and further lends credence to it.

52. Learned counsel for the appellant has also submitted that prosecution has failed to cogently and convincingly establish the recoveries of knife, blood-stained clothes and the factum of hair strands, said to be recovered from the fist of the deceased at the time of incident and as such, the prosecution has miserably failed to prove the case against the appellant beyond all reasonable doubt and he is entitled for benefit of doubt by setting aside the impugned judgment and order convicting and sentencing the appellant.

53. Now, considering the said submission of learned counsel for the appellant on its face value, it is well settled principle of law that even where the prosecution fails to prove the factum of recoveries made against the appellant as a link evidence, the conviction can be recorded against the appellant and failure to prove the factum of recoveries against the appellant can not be the sole ground to acquit the accused, where testimony of the witnesses is otherwise found to be reliable and trustworthy as in the instant case.

54. Thus, from the entire analysis and discussions made above, it is evident that prosecution by relying upon the testimony of PW-1 and PW-2 and the

medical evidence, has proved its case beyond all reasonable doubt against the appellant and has rightly held the appellant guilty for the offence, for which, he has been charged with and we are of the opinion that there appears to be no infirmity or illegality in its judgment, hence, the conviction of the appellant by the trial court under Section 302 IPC is just, proper and legal and is hereby upheld.

55. Now, coming to the sentence of life imprisonment been awarded to the appellant is concerned, learned counsel for the appellant has submitted that at the time of commission of the offence, the appellant was only 28 years of age, moreover, he has no criminal antecedents and poses no threat to the society.

56. Lastly, learned counsel for the appellant has pointed out that the appellant as on date has undergone approximately 20 years of sentence, however, since he is a resident of Nepal, therefore, his case is not being considered for “remission” and therefore, he be awarded “fixed term sentence” as held by the Hon’ble Apex Court in a recent decision passed in ***Criminal Appeal No. 942 of 2023 (Shiva Kumar @ Shiva @ Shivamurthy Vs. State of Karnataka)***, wherein it has been held that:-

“7. Under Chapter III of the IPC, different punishments have been provided. Section 53 provides for five categories of punishments: the death penalty, imprisonment for life, imprisonment (either rigorous or simple), forfeiture of property and fine. It is also a settled position that when an offender is sentenced to undergo imprisonment for life, the incarceration can continue till the end of the life of the accused. However, it is subject to a grant of

remission under the provisions of the Code of Criminal Procedure, 1973 (for short, 'Cr.P.C.') and the Constitutional powers vested in the Hon'ble Governor and the Hon'ble President of India, as the case may be. While imposing a life sentence, if it is directed that the accused shall not be released for a specific period, it becomes a modified punishment."

57. Further, in the said case (**Union of India Vs. V. Sriharan, (2014) 11 SCC 1**), it has been held that a modified sentence only be imposed by the Constitution Bench and not by the sessions court.

9. In the case of **Union of India Vs. V. Sriharan, (2014) 11 SCC 1**, the Constitution Bench was dealing with the question, which is quoted in paragraph 50, which reads thus:

"50. Having thus noted the relevant provisions in the Constitution, the Penal Code, the Criminal Procedure Code and the DSPE Act, we wish to deal with the questions referred for our consideration in seriatim. The first question framed for the consideration of the Constitution Bench reads as under: Union of India Vs. V. Sriharan, (2014) 11 SCC 1 : (2014) 3 SCC (Cri) 1] , SCC p. 19, para 52)

"52.1. Whether imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code meant imprisonment for rest of the life of the prisoner or a convict undergoing life imprisonment has a right to claim remission and whether as per the principles enunciated in paras 91 to 93 of Swamy Shraddananda Vs. State of Karnataka, (2008) 13 SCC 767: (2009) 3 SCC (Cri) 113, a special category of sentence may be made for the very few cases where the death penalty might be substituted by the punishment of

imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond application of remission?"

10. While answering the question, the Constitution Bench (majority view) held that imprisonment for life in terms of Section 53 read with Section 45 of the IPC means imprisonment for the rest of the life of the convict. In such a case, right to claim remission, commutation etc. in accordance with law will always be available. Thereafter, in paragraph 105, the Constitution Bench held thus:

"105. We, therefore, reiterate that the power derived from the Penal Code for any modified punishment within the punishment provided for in the Penal Code for such specified offences can only be exercised by the High Court and in the event of further appeal only by the Supreme Court and not by any other court in this country. To put it differently, the power to impose a modified punishment providing for any specific term of incarceration or till the end of the convict's life as an alternate to death penalty, can be exercised only by the High Court and the Supreme Court and not by any other inferior court." (emphasis added)

11. What is held by the Constitution Bench, cannot be construed in a narrow perspective. The Constitution Bench has held that there is a power which can be derived from the IPC to impose a fixed term sentence or modified punishment which can only be exercised by the High Court or in the event of any further appeal, by the Supreme Court and not by any other Court in this country. In addition, the Constitution Bench held that power to impose a modified punishment of providing any specific term of incarceration or till the end of convict's life as an alternative to death penalty, can be exercised only by the High

Court and the Supreme Court and not by any other inferior Court.

12. In a given case, while passing an order of conviction for an offence which is punishable with death penalty, the Trial Court may come to a conclusion that the case is not a 'rarest of the rare' case. In such a situation, depending upon the punishment prescribed for the offence committed, the Trial Court can impose other punishment specifically provided in Section 53 of the IPC. However, when a Constitutional Court finds that though a case is not falling in the category of 'rarest of the rare' case, considering the gravity and nature of the offence and all other relevant factors, it can always impose a fixed-term sentence so that the benefit of statutory remission, etc. is not available to the accused. The majority view in the case of **V. Sriharan** cannot be construed to mean that such a power cannot be exercised by the Constitutional Courts unless the question is of commuting the death sentence. This conclusion is well supported by what the Constitution Bench held in paragraph 104 of its decision, which reads thus:

"104. That apart, in most of such cases where death penalty or life imprisonment is the punishment imposed by the trial court and confirmed by the Division Bench of the High Court, the convict concerned will get an opportunity to get such verdict tested by filing further appeal by way of special leave to this Court. By way of abundant caution and as per the prescribed law of the Code and the criminal jurisprudence, we can assert that after the initial finding of guilt of such specified grave offences and the imposition of penalty either death or life imprisonment, when comes under the scrutiny of the Division Bench of the High Court, it is only the High Court which derives the power under the Penal Code,

which prescribes the capital and alternate punishment, to alter the said punishment with one either for the entirety of the convict's life or for any specific period of more than 14 years, say 20, 30 or so on depending upon the gravity of the crime committed and the exercise of judicial conscience befitting such offence found proved to have been committed." (emphasis added)

13. Hence, we have no manner of doubt that even in a case where capital punishment is not imposed or is not proposed, the Constitutional Courts can always exercise the power of imposing a modified or fixed-term sentence by directing that a life sentence, as contemplated by "secondly" in Section 53 of the IPC, shall be of a fixed period of more than fourteen years, for example, of twenty years, thirty years and so on. The fixed punishment cannot be for a period less than 14 years in view of the mandate of Section 433A of Cr.P.C."

16. This is one case where a Constitutional Court must exercise the power of imposing a special category of modified punishment. The High Court expressed the view that the punishment imposed by the Trial Court was justified after considering the balance sheet of aggravating and mitigating circumstances. It is the duty of the Court to consider all attending circumstances. The Court, while considering the possibility of reformation of the accused, must note that showing undue leniency in such a brutal case will adversely affect the public confidence in the efficacy of the legal system. The Court must consider the rights of the victim as well. After having considered these circumstances, we are of the opinion that this is a case where a fixed-term sentence for a period of thirty years must be imposed.

58. Accordingly, in the instant case, we modify the order of sentence passed by the trial court for the offence punishable under Section 302 IPC. The appellant is already in jail having undergone about 20 years of actual imprisonment, as such, we direct that the appellant shall be released only after he completes 22 years of actual sentence. The instant criminal appeal is **partly allowed** to the above extent.

59. Let a copy of this judgment and order be forwarded to the court concerned along with trial court record for information and necessary compliance.

(2024) 4 ILRA 1229

APPELLATE JURISDICTION

CRIMINAL SIDE

DATED: ALLAHABAD 08.04.2024

BEFORE

THE HON'BLE MS. NAND PRABHA SHUKLA, J.

Criminal Appeal No. 4785 of 2010

Dharampal		...Appellant
	Versus	
State of U.P.		...Respondent

Counsel for the Appellant:

Sri Rajeev Sisodia, Ms. Mayuri Mehrotra (A/C),
Sri Shashank Kumar

Counsel for the Respondent:

G.A.

Criminal Law - Indian Penal Code, 1860 – Sections 452, 304/34, 504 & 506 – Code of Criminal Procedure, 1973 – Sections 313 & 374(2) – Indian Evidence Act, 1872 – Section 27 – Criminal Appeal Against Conviction and Sentence – House Trespass – Culpable Homicide Not Amounting to Murder – Common Intention – Insult and Criminal Intimidation – Eye-Witness Testimony – Child

Witness – Medical Evidence – Recovery of Weapon – Delay in FIR – Minor Contradictions

The appellant, Dharampal, challenged the judgment dated 03.07.2010 by the Additional Sessions Judge/Fast Track Court No. 2, Bijnor, in Sessions Trial No. 140 of 2009, convicting him under Section 304/34 IPC (10 years rigorous imprisonment, Rs. 10,000 fine, 3 months simple imprisonment in default) and Section 452 IPC (3 years rigorous imprisonment, Rs. 3,000 fine, 3 months simple imprisonment in default), with sentences to run concurrently. The prosecution alleged that on 21.02.2008 at 6:00 PM, Dharampal, armed with a tabbal, along with his wife Somo and son Kapil, armed with lathi and danda, trespassed into the house of PW-1 (Ram Singh) and assaulted his son Harvansha due to a dispute over a water tap, causing fatal head injuries. Harvansha died on 26.02.2008, leading to the addition of Section 304 IPC. The FIR was lodged on 26.02.2008, delayed due to medical treatment. Held: (1) The appeal was partly allowed, affirming the conviction but modifying the sentence to the period already undergone. (2) The prosecution proved the case beyond reasonable doubt through consistent eye-witness testimonies of PW-1 (father), PW-2 (grandson, child witness), and PW-4 (sister), corroborated by medical evidence showing head injuries caused by blunt and sharp weapons, and recovery of the tabbal under Section 27 of the Evidence Act. (3) Minor contradictions in witness testimonies (e.g., sequence of arrival, weapon descriptions) were insignificant and did not undermine the prosecution case. (4) The delay in lodging the FIR was satisfactorily explained by PW-1's focus on Harvansha's critical medical treatment. (5) PW-2's testimony as a child witness was reliable, supported by case law affirming the credibility of child witnesses unless tutored. (6) The absence of blood-stained earth at the scene was attributed to investigative lapses and delay, not disproving the incident. (7) The sentence was modified to the period undergone, considering the appellant's custody and a separate life imprisonment conviction in another case.

List of Cases cited:

1. Gul Singh @ Guliya Vs St. of M.P., 2014 SCC Online SC 719

2. St. of U.P. Vs Krishna Master, (2010) 12 SCC 324

3. Gulab Vs St. of U.P., (2024) 1 SCC (Criminal) 609

4. Birbal Nath Vs St. of Rajasthan, 2023 SCC Online SC 1396

5. St. of U.P. Vs Naresh, (2011) 4 SCC 324

6. Appabhai Vs St. of Gujarat, 1988 (Supp) SCC 241

7. Tehsilar Singh Vs St. of U.P., AIR 1959 SC 1012

8. Yogesh Singh Vs Mahabeer Singh, (2017) 11 SCC 195

9. Perumal Raja @ Perumal Vs St., 2024 SCC Online SC 12

10. Dharampal Vs St. of U.P., (2024) 4 ILRA, Criminal Appeal No. 47

(Delivered by Hon'ble Ms. Nand Prabha Shukla, J.)

1. Heard Ms. Mayuri Mehrotra, learned Amicus Curiae for the appellant and Sri Ratnesh Nandan Singh, learned Additional Government Advocate for the State.

2. Perused the record.

3. This Criminal Appeal has been filed against the Judgment and Order dated 03.07.2010 passed by the Additional Sessions Judge/Fast Track Court No.2, Bijnor in Sessions Trial No.140 of 2009 (State vs. Dharampal) arising out of Case Crime No.179 of 2008, under Sections 452, 304/34, 504, 506 IPC, Police Station Kotwali Dehat, District Bijnor, whereby the appellant Dharampal has been convicted under Sections 304/34 and 452 IPC and sentenced as follows:

(i) Under Section 304/34: 10 years rigorous imprisonment with fine of Rs.10,000/-.

(ii) Under Section 452 IPC: 3 years rigorous imprisonment with fine of Rs.3000/-.

In case of default of fine, further imprisonment of 3 months simple imprisonment shall be awarded. All sentences to run concurrently.

INTRODUCTORY FACTS

4. The prosecution version in brief, is that, on 26.02.2008, the first informant Ram Singh lodged the First Information Report (for short 'FIR') at Police Station Kotwali Dehat, District Bijnor, based on a written Tehrir (Exhibit-Ka1) dated 25.02.2008 scribed by Dumpi stating that on 21.02.2008 at around 6:00 pm when his son Harvansha was at home, the accused Dharampal armed with tabbal, his wife Somo and son Kapil armed with lathi and danda respectively entered into his house and hurled abuses and challenged them for dire consequences for not allowing them to wash the clothes at the tap. His son objected but all the three accused armed with tabbal, lathi and danda gave severe beatings to his son in order to kill him. Hearing the noise, the first informant and the villagers Raju and Abid rushed to the spot and tried to save Harvansha from the accused. The accused extended life threats and fled away. In the said incident of marpeet, his son Harvansha received severe injuries on his head and the body. He was given medical treatment at Government Hospital, Bijnor. As the condition of his son was critical, so he remained busy with the medical treatment and approached late to lodge an FIR.

5. Initially, the aforementioned FIR was registered under Sections 452, 323, 504, 506 and 308 IPC, subsequently, vide G.D. Rapat No. 29 dated 27.2.2008, the case was amended and section 304 IPC was added as Harvansha died on 26.2.2008. The inquest proceedings and the post mortem of the deceased were conducted on the same day. The investigation was entrusted to S.I. Ghanshyam Tyagi who reached the spot and recorded the statement of the witnesses and prepared the site plan. A recovery memo of Tabbal at the pointing of Dharampal was also prepared. After the completion of investigation, the charge-sheet dated 09.03.2008 was submitted against Dharampal and his wife Smt. Somo alias Somvati under Sections 452, 504, 506, 304 IPC. The co-accused Kapil being a juvenile, was also charge sheeted and was referred to the Juvenile Justice Board for further course of action.

6. After the committal proceedings, the Sessions Court framed the charges against the accused Dharampal and Smt. Somo alias Somvati under Sections 452, 304/34, 504, 506 IPC. The accused pleaded not guilty and claimed to be tried. During trial, the co-accused Smt. Somo alias Somvati died and the trial against her was abated on 24.02.2010.

PROSECUTION EVIDENCE

7. During the trial proceedings, the prosecution examined as many as ten witnesses. Their testimony, in brief, are as follows:

P.W.-1 Ram Singh: the first informant/father of the deceased/eyewitness stated on oath that he knew the accused Dharampal, Smt. Somo alias Somvati and Kapil, who were the

resident of his village. There was previous enmity with Dharampal regarding water tap. Due to this reason, on 21.02.2008 at about 6:00 pm, when his son Harvansha was at home, in the meantime, Dharampal, his wife Smt. Somo alias Somvati and his son Kapil entered into their house. Dharampal was armed with tabbal, Smt. Somo was armed with lathi and Kapil was armed with danda. All the three accused challenged his son Harvansha for dire consequences for not allowing to fetch water from the water tap. Often, the accused washed dishes and cleansed the dirt etc. at the water tap which was objected by him and his son. This water tap was installed within his premises. The accused hurled abuses. His son objected. But the accused attacked and gave severe beatings to Harvansha with their weapon. At the time of incident, first informant was sleeping in his room hearing the noise, he reached the spot where other villagers also joined, amongst whom were Abid, Raju, his grandson Dumpi and his daughter Rajo, who intervened and saved Harvansha from the accused. While fleeing, the accused extended life threats. His son Harvansha received serious injuries on his body. With the help of the villagers, Harvansha was brought to Bijnor. Looking to his critical condition, he was given medical treatment. As he was busy in his treatment, therefore, delay was caused in lodging the FIR (Exhibit Ka-15).

After four days of the incident, he gave a Written Tehrir (Exhibit Ka-1), scribed by his grandson Dumpi bearing his thumb impression. He further stated that the Tehrir was written on 22.02.2008 but as he remained busy in the treatment of his only son, therefore, he modified the date of Written Tehrir from 22.02.2008 to 25.02.2008. His son died on 26.02.2008 due to the said injuries, while returning

from Delhi. His son was given medical treatment at Meerut and Delhi. In the said marpeet, his son received injuries on his head caused with tabbal and danda. The danda injuries were caused on his hands, shoulders and waist, resultantly, his son fainted at the spot and could not regain his consciousness and finally succumbed to death.

P.W.-2 Himanshu alias Dumpi: an eyewitness/the grandson of the first informant who scribed the Written Tehrir stated on oath that on the date of incident he was at his maternal grandfather's (Nana) home where his maternal uncle Harvansha died due to the incident which took place on 21.02.2008 at 6:00 pm. The accused Dharampal, Somvati and Kapil came to his maternal grandfather's home, armed with lathi and danda. Dharampal was armed with tabbal and the rest two were armed with lathi and danda. The accused assaulted his maternal uncle with the said weapons who lost his consciousness and the blood was oozing out from his body. His maternal grandfather who was sleeping, reached thereafter at the spot. His maternal aunt was also present at the spot. He did not remember as to who else were present there. His maternal uncle was taken to the Hospital where he died during treatment due to the said injuries. He stated that Written Tehrir (Exhibit Ka-1) was scribed by him and his maternal grandfather had put the thumb impression. The said report bears his signature as well.

P.W.-3 Sanjay Kumar Shankar: the consultant pathologist stated on oath that on 26.02.2008 at 4:30 pm, he conducted the post mortem of the deceased Harvansha whose body was brought in a sealed cover by Constable Jabbar Singh and Home Guard Rajpal. The seal was checked and

was found in order. The details of the post mortem report is as follows:

External Examination

The deceased was about 32 years old and was of normal height and physique. There was rigour mortis present over upper extremity. This was happening in the lower part from the beginning. There was a rice tube in the nose. The urine tube was also lying there. Three jelly pads were fitted and there was a vein flow on the left wrist.

Anti Mortem Injuries

(i) Stitched wound (one stitch) of 1 cm back of left skull and 5 cm from left Ear.

(ii). Stitched wound (two stitches) of 3.5 cm on the right skull and 6 cm from Ear.

(iii). Contusion 2 x 1 cm on Right arm and 2.5 cm below shoulder.

On dissection of the head, the parietal bone on right side was broken and there was only 120 gms of Haematoma in the cavity. The heart was empty on the left side. The straight side was full. The teeth were 16/16. The stomach mucosa was normal. The stomach was empty. The gall bladder was full. The weight of the pancreas liver was 1200 gms. The weight of both the kidneys was 200 gms. Death was possible about half a day back. The cause of death was coma as a result of ante mortem injuries and the patient was given first aid before post mortem. He prepared the post mortem report (Exhibit Ka-2) at the time of inspection, which was present in his hand writing and was kept on the file.

P.W.-4 Smt Rajo: the sister of the deceased Harvansha and an eyewitness of

the incident stated on oath that she knew the accused Dharampal, his son Kapil and his wife Somo alias Somvati. About 2 years back at around 6:00 pm, her brother Harvansha was beaten by the accused Somo alias Somvati, Dharampal and Kapil. The marpeet took place in her house and she was an eyewitness account. Several villagers gathered at the time of incident who saved Harvansha. Her brother died due to the injury caused by the accused.

P.W-5 Mohan Lal Yadav: prepared the inquest report of the deceased Harvansha on 26.02.2008. He stated on oath that the information regarding the death of Harvansha was given by Subhash Chand. After receiving the information, he along with Constable Jabar Singh and Home Guard Rajpal Singh proceeded to District Hospital Bijnor along with the necessary documents. He appointed the five Panchas before preparing the inquest report and relevant records. The relevant records i.e. Inquest Report, Challan Lash, Chitthi RI, Chitthi CMO, Photo Lash were in his hand writing and were prepared at the time of inquest which were proved by him as Exhibit Ka-3. He sealed the dead body and handed over to Constable Jabar Singh and Home Guard Rajpal Singh.

P.W.-6 Constable Jabar Singh: took the dead body for post mortem in a sealed condition. After the post mortem, the dead body was handed over to the family members.

P.W.-7 Dr. R.S. Ravidas: examined the injuries of Harvansha on the date of incident. He stated on oath that on 21.02.2008, he was posted at Sadar Hospital, Bijnor and he medically examined the injuries of Harvansha (Exhibit Ka-9). The said witness proved the

medical report (Exhibit Ka-9) and stated that injured Harvansha was brought by his father Ram Singh. At the time of medical examination, he found following injuries on the body of deceased Harvansha:

(i) Injury No.1 : Lacerated wound, 1x 0.5 cm x scalp deep on left side back of skull 5 cm behind from left ear. Surrounded with swelling in an area of 3 cm x 2 cm.

(ii) Injury No.2 : The incised wound was 3.5 cm x 0.5 cm x bone deep, on the right side of the skull, 6 cm away from right ear.

(iii) Injury No.3 : A red contusion 2 cm x 1 cm on the right upper arm 12½ cm below top of shoulder.

In his opinion, the Injury Nos. 1 and 3 were caused by blunt and hard object while Injury No. 2 was caused by some sharp edged object. Injuries Nos. 1 and 2 were kept under observation. An X-ray of skull was advised. Injury no. 3 was simple. All the injuries were fresh. The patient was admitted and referred to the Surgeon. He further deposed that the patient's injury nos. 1 and 3 were caused by danda and sticks and Injury No. 2 was caused by tabbal at 6:00 pm on 21.02.2008. Injuries No. 1 and 2 were on the head which was a vital part of the body. This witness further stated that the medical report was in his hand writing and was prepared at the time of examination and the original medical register was in front of him which he had brought. The photocopy of it was on the file which he matched with the Register and was correct as per the original records. So, he authenticated it. Thus, the medical report dated 21.02.2008 (photocopy) was proved by this witness as Exhibit Ka-9.

P.W.-8 S.I. Ghanshyam Singh Tyagi: the Investigating Officer stated on

oath that on 26.02.2008, after the registration of the FIR, he was entrusted with the investigation. On the same date, he inspected the spot. On the pointing of the first informant, he prepared the site plan which was in his handwriting and was exhibited as Exhibit Ka-8. On 27.02.2008, he recorded the statement of witnesses Ram Prasad, Rajesh and Subhash. He perused the medical examination report and entered them in the Case Diary and added Section 304 IPC on the basis of the post mortem report (Exhibit Ka-2). On 28.02.2008, he arrested Dharampal at 12:30 pm at Bhankhala Road Tiraha who in his confessional statement, disclosed that on 21.02.2009, at around 6:00 pm, he quarrelled with Harvansha for the tap water. Harvansha lifted and threw him on the ground, so he rushed to his sister's house and brought a tabbal with which he assaulted Harvansha. He even assured to get the tabbal recovered. Relying on his statement on 28.02.2008, the Constable Udai Veer Singh and Suresh Singh went on the Government Vehicle driven by Raghuvveer Singh and reached at his sister's residence. The accused Dharampal went straight to the roof top of the house and took out a tabbal hidden under the heap of eucalyptus logs. He disclosed that he assaulted Harvansha with this tabbal. The tabbal was sealed on the spot, the recovery memo was prepared and a site plan of the recovery was also prepared. The said recovery memo was signed by the police officers and the copy was handed over to the accused and the thumb impression was also taken. The recovery memo was prepared in his hand writing which he proved it as Exhibit Ka-11. The said recovery was entered in the G.D. as G.D. Rapat No.22 at 14:50 dated 28.02.2008, which was marked as Exhibit Ka-12. The said GD was in his hand writing and was

prepared at the spot. The site plan of the place of recovery was prepared as Exhibit Ka-13, which was in his hand writing. Thereafter, the rest two accused were arrested and the statements were recorded. After completing the investigation, the accused Dharampal, wife Sonu @ Somvati were charge sheeted vide charge sheet No. 22 dated 09.03.2008 which was marked as Exhibit Ka-14. On the same date, charge sheet No.22-A was submitted against the co-accused Kapil. The said witness stated that the sealed cover opened before him was the recovered tabbal. It was the same tabbal which was recovered on 28.02.2008 at the pointing of the accused Dharampal from his sister's house at the rooftop hidden under the heap of eucalyptus logs. The recovered tabbal was marked as Exhibit -2 and the sealed cloth was marked as Exhibit-1.

P.W.-9 Constable Onkar Singh: prepared the Chik FIR and stated on oath that he registered the FIR on the basis of the Written Tehrir (Exhibit Ka-1) given by P.W.-1 Ram Singh and made necessary entries in the General Diary. The said witness proved the First Information Report under Sections 452, 323, 504, 506, 308 IPC which was registered by him and whose carbon copy was kept under the record. This witness proved the FIR (Exhibit Ka-15) and Kaymi Muqadma GD (Exhibit Ka-26) were proved by him. He also proved the GD (Exhibit Ka-27) on 27.02.2008, vide Rapat No. 29, Section 304 IPC was added which were in his handwriting and was proved by him.

P.W-10 Subhash Chandra: the brother-in-law of the deceased gave an application at the Police Station for conducting the post mortem of Harvansha. He stated on oath that the application dated

26.02.2008 placed on record having his signature was in his own handwriting and was marked as Exhibit Ka-8. He also stated that his brother-in-law was beaten on 21.02.2008 at 6:00 pm and due to the said injuries, he died.

**STATEMENT UNDER
SECTION 313 Cr.P.C.**

8. After the prosecution evidence was recorded, the incriminating circumstances that appeared against the appellant in the prosecution evidence were put to him for recording his statement under Section 313 Cr.P.C. The appellant in his statement recorded under Section 313 Cr.P.C. denied the prosecution case and stated that he was falsely implicated on the basis of false evidence. In fact, a person named Akbar committed the offence. No defence witness was produced.

TRIAL COURT FINDINGS

9. The Trial Court recorded the following findings:

There was no material contradiction in the statement of the eyewitnesses. Even in the cross-examination, no contradiction or inconsistencies were found in regard to the place and manner of incident. All the three witnesses of fact were extensively cross-examined, their presence at the place of incident was not found doubtful.

The Trial Court also found that the medical report corroborated with the ocular evidence. The medical examination report dated 21.02.2008 was proved by P.W.-7 Dr. R.S. Ravidas. The said witness found that Injury Nos. 1 and 3 were caused with a blunt weapon and Injury No. 2 was caused

by some sharp edged weapon. The seat of Injury Nos. 1 and 3 was the head and the Injury No. 2 was on the shoulder. P.W.-1, in his statement, disclosed that deceased Harvansha received injuries on the head and shoulder. The rest two eyewitnesses disclosed that the deceased Harvansha was assaulted on his head with tabbal and Danda which corroborated with the medical report.

The learned Trial Court also found that the weapon (tabbal) used in the incident was recovered at the pointing of the appellant Dharampal.

All the relevant records, post mortem and inquest reports were duly proved by the prosecution witnesses, therefore, the offence was proved to be committed by the appellant beyond reasonable doubt.

As far as delay in the lodging of the FIR is concerned, the learned Trial Court found that there was no discrepancy in the narration of facts and it was explained by the first informant Ram Singh that as he was busy in the treatment of his only son, therefore, delay was caused in lodging the FIR which was reasonably and satisfactorily explained. The prosecution case cannot be refuted on the ground that no suggestion was given to the said witnesses.

The accused, in his statement, under Section 313 Cr.P.C. did not state that there was any enmity between them. Therefore, it cannot be concluded that there was any previous enmity existing between them.

**SUBMISSION ON BEHALF OF
THE APPELLANT**

10. The learned Amicus Curiae Ms. Mayuri Mehrotra, appearing for the appellant vehemently argued as follows:

(i) Firstly, it was argued that there was delay in lodging of the FIR and was lodged after deliberation and consultation. Broadly, it was submitted that the three witnesses of fact (PW-1, PW-2 and PW-4) stated that though the police reached at the spot on the same day yet no FIR was lodged. PW-2 Dumpi went to the extent of stating that he went along with his grandfather PW-1 and his injured uncle Harvansha (deceased) to the Police Station, yet no attempt was made to lodge an FIR by either of them. It was asserted that there were two instances of lodging the FIR, in case they were the eyewitnesses to the incident and knew the names of the accused-appellant, they would have lodged it at once. Till that time, they did not know as to how this offence was committed and who committed it, therefore, none of the prosecution witnesses made an effort to lodge an FIR and had not even witnessed the incident. The FIR was lodged after consultation and deliberation.

(ii) Secondly, it was argued that the place of occurrence was doubtful. The prosecution witnesses deposed that the place of occurrence was the room of the deceased, but during investigation no blood was found. The Investigating Officer, S.I. Ghanshyam Tyagi, PW-8 did not find any drop of blood on the floor, neither on the cot nor on the bed roll or quilt though it was deposed by PW-1 Ram Singh that he found his son in a pool of blood lying on the cot, when he reached at the spot.

(iii) It was next argued that PW-1 Ram Singh, PW-2 Himanshu alias Dumpi and PW-4 Rajo were examined as eyewitnesses. But in the charge sheet only PW-1 Ram Singh was the sole eyewitness.

Had PW-2 and PW-4 been present at the place of the incident they would have been incorporated as eyewitnesses in the charge sheet? Moreover, PW-8, the Investigating Officer categorically stated that neither PW-2 nor PW-4 gave any statement nor did he record their statements during investigation which casts serious doubt on the presence of P.W.- 2 and P.W.-4 at the spot.

(iv) It was further argued that there were major contradictions in the statements of the three eyewitnesses, which are as follows:

(a) PW-1 Ram Singh was the father of the deceased and in his testimony, he made major improvements as compared to what he asserted in the FIR. He stated that he was sleeping when he heard the noise then he came out of his room and thereafter he along with the villagers saved his son from the accused appellants. He further improved his statement to show the presence of PW-2 and PW-4 that they also saved the deceased from the accused-appellant as opposed to the version of the FIR. The FIR nowhere mentions the name of the two witnesses that they were also present at the place of the incident. Further, PW-1 stated that he had a poor vision. The incident occurred in the month of February at 06:00 P.M. It becomes dusky and, therefore, it also casts doubt if he was able to recognise the assailants due to his poor eyesight. PW-1 thereafter stated that his son Harvansha fell unconscious due to the injuries inflicted upon him and later succumbed to death. The question arises here if PW-1 was sleeping at the time of incident and reached only after hearing the commotion and then his son became unconscious, who later died, how did he come to know about the incident as to how it occurred and who were the assailants? It is the version of PW-1 that when he woke

up and saw many persons near his son who also saved him. It casts serious doubt on the testimony of PW-1 and his intention to falsely implicate the accused-appellant.

(b) The presence of PW-2 Himanshu alias Dumpi was not proved on the date and time of the incident but as per his statement recorded before the Court below the injured was taken to the hospital immediately after the incident by PW-1 and PW-2. P.W.-2 further admitted that taking notice of the said incident the police personnel reached at the spot between 07:30 and 08:00 PM. The witness further stated that the injured along with this witness was taken to the Police Station by the Police where FIR was lodged. The said version of the PW-2 contradicts the statement of PW-1 and the FIR because it was lodged on 25th/26th February, 2008 and the incident was of 21st February 2008.

(c) Another contradiction discussed was that P.W.2 Himanshu @ Dumpi was sleeping at the time of incident next to his maternal grandfather (nana) and on hearing the noise, he reached at the spot.

(d) Further, P.W.2 Himanshu @ Dumpi in his deposition stated that the accused Dharampal was armed with tabbal and the rest accused were armed with lathi and danda, who assaulted his maternal uncle Harvansha causing injuries on his head and body. P.W.3 Smt. Rajo, in her chief, stated that the accused Dharampal, his wife Somo and his son Kapil assaulted her brother Harvansha with lathi, danda and weapons.

(v) As far as testimony of PW-2 Himanshu alias Dumpi is concerned, it was argued by learned Amicus Curiae that he was a child witness, therefore, his credibility was doubtful as an eyewitness. The name Dumpi nowhere finds mention in the FIR as a witness nor in the charge-sheet. In his examination-in-chief, PW-2

stated that he was sleeping with his grandfather (PW-1) and after hearing the noise, he woke up. He admitted that his grandfather (PW1) reached the place of occurrence after him. However, in his cross-examination, he took a different stand and stated that he was playing near the disputed tap. He heard the noise, then he entered into his house, woke up everyone and called everyone in the house and then he witnessed the incident. There were three injuries found on the person of the deceased and as per the prosecution version there were three assailants, so far how long were they hitting and beating the deceased that PW-2 got so much time to enter, call everyone and even witness the incident. It was submitted that he was not an eyewitness to the occurrence.

(vi) PW-4 Smt. Rajo, the mother of PW-2, daughter of PW-1 and sister of the deceased stated that she saw her brother (the deceased) in a pool of blood who fell unconscious for three to four hours. She even gave exaggerated statement and said that the Police came to the place of occurrence and took her thumb impression. However, no such paper was produced as to what was the purpose of thumb impression if at all they were taken. She was neither named in the FIR as a witness nor in the charge-sheet.

(vii) In regard to recovery of tabbal, it was argued by learned Amicus Curiae for the appellant that Dharampal did not give any statement in police custody that weapon (tabbal) used in the incident was kept hidden in the house of his sister Vinod Kumari nor any such recovery was effected. It was also submitted that no independent witness was present at the time of recovery nor any blood stain was found on the tabbal, which was recovered at the pointing out of the accused-appellant Dharampal. The said recovery was not

done in compliance with Section 27 of the Indian Evidence Act. The recovered weapon was not sent for examination to the Forensic Science Laboratory. Thus, it was not proved that the said weapon was used by Dharampal.

Thus, it was argued by the learned *Amicus Curiae* that the contradictions in the statement of the witnesses proved that none of the eyewitnesses were present at the spot nor had seen the incident. It is also a case of the prosecution that the incident took place at the sunset and PW-1 Ram Singh had poor eye vision hence there is every likelihood that the informant had falsely implicated the accused persons due to previous enmity. On the basis of the aforesaid submissions, the appellant is liable to be acquitted.

SUBMISSION ON BEHALF OF THE RESPONDENT-STATE

11. *Per contra*, Mr. Ratnesh Nandan Singh, learned Additional Government Advocate, vehemently opposed the aforesaid contentions and argued that the findings recorded by the Trial Court is quite convincing and satisfactory.

(i) As far as delay in lodging of the FIR is concerned, the first informant disclosed in the FIR itself that he was too busy in the treatment of his only son whose condition was critical, therefore, he could not lodge the FIR in time. In his examination-in-chief he also deposed that a written Tehrir was scribed on 22.02.2008 by his grandson Dumpi P.W.2, but as he was busy in the treatment of his only son, therefore, he modified the date of the Tehrir as 25.02.2008 and then gave it at the police station, on the basis of which the FIR was registered on 26.02.2008. The incident took

place on 21.02.2008 at about 06:00 P.M. and the written report (Exhibit Ka-1) was given on 25.02.2008. The FIR (Ex. Ka. 15) was lodged on 26.02.2008 at 12:10 AM. As per the version of PW-1, he took the injured from Bijnor to Meerut and then to Delhi for his treatment. His son remained unconscious throughout and later died while returning from Delhi on 26.02.2008. It is only after his death that he lodged an FIR. In the cross-examination, the said witness deposed that, after the incident, he went to the Police Station alongwith his injured son Harvansha. The concerned Police Officer advised him that he should first rush for the treatment of his son, therefore, the FIR was not lodged at that very moment. Even from the medical examination report (Exhibit Ka-9), it clearly shows that Harvansha was medically examined within two hours from the time of the incident on 21.02.2008 at District Hospital, Bijnor at 9:00 pm. Thereafter his son was referred to Meerut Hospital and then to Delhi. Finally while returning from Delhi, his son died on 26.02.2008.

(ii) Another contention of the defence that no blood stained earth was found at the spot is also false and baseless. P.W.1 Ram Singh deposed that when he came out of his room and reached the spot he saw his son lying on a cot in a pool of blood. P.W.2 Himanshu @ Dumpi also deposed that at the time of marpeet, the blood was oozing out from the head of Harvansha which fell on the ground. The Investigating Officer should have recovered the blood stained earth from the spot but as in the instant matter, the FIR was lodged after 3-4 days of the incident i.e. 26.02.2008 and thereafter, the Investigating Officer went to the spot for inspection where no blood stained earth was found. Though P.W.-8 S.I. Ghanshyam Tyagi,

Investigating Officer deposed that he inspected the spot at the instance of the first informant but still he could not collect any blood stained earth indicates the lapses on the part of the Investigating Agency. The eyewitness account P.W.1 Ram Singh, P.W.2 Himanshu @ Dumpi and P.W.4 Smt. Rajo clearly deposed that the accused Dharampal and other co-accused entered into their premises and assaulted Harvansha with tabbal, lathi and danda due to said marpeet, Harvansha fainted and finally succumbed to death due to the said injuries.

(iii) The next contention of the defence that P.W.2 and P.W.4 were not mentioned as a witnesses in the charge sheet but were subsequently produced and examined as prosecution witnesses is also a baseless submission and does not belie the prosecution story as P.W.1 in his examination-in-chief deposed that P.W.2 and P.W.4 were present at the spot. Even if they were not mentioned in the FIR or in the charge sheet as eyewitnesses but were examined subsequently as prosecution witnesses, will not support the defence version or disproof the prosecution case. An FIR is not an encyclopedia which may include each and every detail of the incident. It is also not sine qua non that each and every witness has to be mentioned in the charge sheet. There is no hard-and-fast rule that all the witnesses particularly eyewitnesses should be indicated in the FIR. It cannot be denied that the incident took place inside the premises of P.W.1 Ram Singh, therefore, the presence of the said witnesses (P.W.2 and P.W.4) at the spot, is not doubtful and they are the natural witnesses. The accused Dharampal could not produce any credible evidence which may deny the presence of P.W.1 Ram Singh at the spot.

(iv) So far as contradictions and discrepancies in the statement of the

witnesses are concerned, the defence version that P.W.1 Ram Singh reached the spot after some time and was not an eyewitness account and P.W.2 Himanshu @ Dumpi and P.W.4 Smt. Rajo were also not present at the spot as they were the resident of another village is not correct. In fact, P.W.1 Ram Singh in his chief stated that on hearing the noise he reached the spot and saw the accused assaulting his son. Several villagers Raju, Abid and others also gathered along with his daughter Smt. Rajo and grandson Himanshu @ Dumpi. From the said statement, it can be concluded that P.W.2 Himanshu @ Dumpi, P.W.4 Smt. Rajo were present at the spot and witnessed the incident. In his cross-examination, the said witness deposed that on the previous night, he was tired so he went to sleep in the early hours of evening wrapped in his quilt and on hearing the noise of his son Harvansha, he rushed towards the spot. P.W.2 Himanshu @ Dumpi in his examination-in-chief also deposed that at the time of incident, he stood near the Government tap to fetch water, in the meantime, accused Dharampal alongwith other co-accused assaulted Harvansha. On hearing the noise, he rushed to the spot and saw the incident and shouted thereafter his maternal grandfather (nana) P.W.1 Ram Singh also reached at the spot simultaneously, P.W.4 Smt. Rajo also reached the spot and saw the incident. Learned State-counsel in his submission also stated that the ocular evidence corroborates with the medical evidence. P.W.7 Dr. R.S. Ravidas deposed that there were three injuries on the body of Harvansha out of which two were on his head and one on his right shoulder. The said witness also deposed that injury nos. 1 and 3 were caused with some blunt weapon and injury no. 2 was caused with some sharp edged weapon. The eyewitnesses

deposed that accused Dharampal was armed with tabbal which is a sharp edged weapon and rest of the accused Smt. Somo and Kapil were armed with lathi and danda and assaulted Harvansha. Thus, there were no major contradiction in the prosecution case.

(v) The arguments of learned Amicus Curiae that P.W.2 Dumpi was a child witness, therefore, his testimony was not trustworthy, was refuted. To controvert their submission, the learned State-counsel cited the following case laws:

In ***Gul Singh @ Guliya and others vs. State of M.P. and another, 2014 SCC Online SC 719***, the Apex Court held that:

“ The evidence of child witness cannot be rejected unless the same is tutored or unless the same is unreliable.”

In ***State of Uttar Pradesh vs. Krishna Master and others, (2010) 12 SCC 324***, wherein it was held that:

“ It would be doing injustice to a child witness possessing a sharp memory to say that it is inconceivable for him to recapitulate facts in his memory witnessed by him long ago. A child of tender age is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life. The child would be able to recapitulate correctly and exactly when asked about the same in future. When a child of tender age witnesses gruesome murder of his father, mother, brothers, etc. he is not likely to forget the incident for his whole life and would certainly recapitulate facts in his memory when asked about the same at any point of time, notwithstanding the gap of about ten years between the incident and recording of his evidence.”

(vi) It was further submitted by the appellant-counsel that P.W. 4 Smt. Rajo gave an exaggerated version of the prosecution case and is not trustworthy. It cannot be denied that P.W.4 Smt. Rajo was an eyewitness account and gave her testimony as a natural witness. She was a rustic lady who used to put thumb impression therefore, such improvements and exaggerations might find possibility.

(vii) Learned State Counsel referred to the statement of the P.W.8 S.I. Ghanshyam Singh Tyagi, Investigating Officer, who deposed that on 28.02.2008 accused Dharampal was arrested and was taken into police custody. During police custody, he confessed that the weapon used in the incident was kept hidden as his sister's house Vinod Kumari. On the basis of this confessional statement, Dharampal was taken to that place and on the pointing of accused Dharampal, he took out tabbal, hidden under the heap of eucalyptus logs on the roof-top of the house of his sister Vinod Kumari on the basis of which recovery memo was prepared which was proved as Exhibit Ka-1. It was also deposed that an effort was made to have independent witnesses but no one agreed. Thus, the recovery of tabbal on the pointing of accused appellant Dharampal was proved.

ANALYSIS

12. Having heard the learned counsel appearing for the parties and after carefully going through the material on record and the case laws cited, this Court is of the view that it can be safely concluded that the delay in lodging the FIR was properly explained by the prosecution. The reasons given by the first informant were genuine and satisfactory. The first informant Ram Singh was consistent in stating that as the condition of his only son

Harvansha was critical, therefore, he was busy in his medical treatment, which caused delay in lodging the FIR.

In a recent judgment in ***Gulab vs. State of Uttar Pradesh (2024) 1 SCC (Criminal) 609 para-29***, the Hon'ble Apex Court has held that:

“The delay in lodging FIR is not material, when prosecution case is supported by reliable eyewitnesses.”

The incident took place within the premises of the first informant Ram Singh. It transpires from the site plan that the living room of the first informant was situate at the east of Haveli. In front of the said living room, the incident of marpeet took place which was at a distance of only 30 feet. The distance from the Government tap to the place of incident was about 25 feet. As the incident of marpeet took place within the premises of the first informant, therefore, the incident was clearly and easily witnessed by the three eyewitnesses. As soon as P.W.-1 Ram Singh heard the noise of his son, he at once arose and rushed to the spot. The truthfulness of this witness could be judged from the fact that he deposed that as he was too tired on the previous night, therefore, he slept during evening hours wrapped in his quilt, therefore, it can be safely concluded that he was a reliable eyewitness. P.W.2 Himanshu @ Dumpi in his evidence stated that he was present at the Government Tap to fetch water when Harvansha was being assaulted by accused Dharampal and others. After hearing the noise he reached the spot and saw the incident and screamed. Thereafter his maternal grandfather (Ram Singh P.W.1) also reached the spot and saw the incident and thereafter P.W.4 Smt. Rajo also

reached the spot and witnessed the incident. Though certain minor contradictions and discrepancies have been noticed in the deposition of eyewitnesses but they can be ignored as they are merely marginal variations and will not belie the prosecution case entirely. Due to these minor contradictions and discrepancies as to who reached first at the spot etc. cannot doubt their presence at the spot. P.W.1 Ram Singh in his deposition clearly stated that accused appellant Dharampal was armed with tabbal, Smt. Somo was armed with lathi and Kapil was armed with danda. The same version was given by P.W.2 Dumpi. Though, P.W.4 Smt. Rajo in her deposition stated that Dharampal, Somo and Kapil were armed with lathi, danda and weapons but as she did not use the term “tabbal” in her statement, this does not doubts her presence at the spot. She was a rustic villager, therefore, such minor contradictions and discrepancies are not of such a nature that it would hit the root of prosecution case.

Recently, the Hon'ble Apex Court in ***Birbal Nath vs. State of Rajasthan and others, 2023 SCC Online SC 1396***, has held that:

“No doubt statement given before Police during investigation under Section 161 Cr.P.C. are previous statements under Section 145 of the Evidence Act and therefore, can be used to cross-examine a witness. But this is only for a limited purpose, to contradict such a witness. Even if the defence is successful in contradicting a witness it would not always mean that the contradictions in her two statements would result in totally discrediting the witness.”

(Emphasis supplied)

The Apex Court after considering a large number of its earlier judgments has held in ***State of U.P. vs. Naresh, (2011) 4 SCC 324***, that:

“In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence. Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility. Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution’s case, render the testimony of the witness liable to be discredited.”

The Apex Court took a similar view in ***Appabhai and another vs. State of Gurajat, 1988 (Supp) SCC 241***, that:

“A witness though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him -perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment. The Court while appreciating the evidence must not attach undue importance to minor discrepancies. The discrepancies which do not shake the basic version of the prosecution case may be discarded. The discrepancies which are due to normal errors of perception or observation should not be given importance. The errors due to lapse of memory may be given due allowance. The Court must evaluate the entire material on record by excluding the exaggerated version given by any witness when a doubt arises in respect of certain facts alleged by such witness, the proper course is to ignore that fact only unless it goes into the root of the matter so as to demolish the entire prosecution story. The witnesses may go on adding embellishments to their version perhaps for the fear of their testimony being rejected by the Court. The Courts, however, should not believe the evidence of such witnesses or together if they are otherwise trustworthy.”

A similar view has been reiterated by this Court in ***Tehsilar Singh and***

Another vs. State of U.P. AIR 1959 SC 1012.

It could also be safely concluded that the ocular evidence corroborated with the medical evidence. The statement of the doctor P.W.7 Dr. R.S. Ravidas who medically examined Harvansha as well as by the evidence of P.W.3 Dr. Sanjay Kumar Shankar, who conducted the post mortem and opined that injury nos.1 and 3 could have been caused with a blunt weapon and injury no. 2 with some sharp edged weapon. As far as non mentioning of the name of the witnesses in the FIR and charge sheet is concerned, it is a settled law that an FIR is not an encyclopedia, which may contain each and every fact in detail nor it is mandatory to mention the name of every witness in the charge sheet. As there was no previous enmity between P.W.2 and P.W.4 with the accused appellant, therefore, there was no occasion to falsely implicate him. The submission that the presence of P.W.2 and P.W.4 was doubtful at the place of incident on the ground as they have been planted as a witness being the close relatives is unbelievable. P.W.1 in his statement deposed that P.W.2 and P.W.4 were present on the spot and therefore, they were natural witnesses and their presence cannot be doubted. P.W.2 Dumpi who is stated to be a child witness, was an eyewitness account. His version is truthful and believable and inspires confidence.

The Apex Court has considered the evidence of child/young witness in ***Yogesh Singh vs. Mahabeer Singh and others, (2017) 11 SCC 195***, which is reproduced as under:

“ It is well settled that evidence of a child witness must find adequate corroboration, before it is relied upon, as

the rule of corroboration is of practical wisdom rather than of law. However, it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others telling and thus a child witness is an easy prey to tutoring.”

So far as non recovery of blood stained earth on the spot is concerned, P.W.1 Ram Singh clearly deposed that when he came out of his room, his son was lying on a cot, soaked in blood. P.W.2 deposed that he saw the blood oozing from the head of his maternal uncle which even fell on the ground. As the delay was caused in lodging the FIR, therefore, by the time the Investigating Officer reached the spot, the blood stained earth was not available. This seems the lapse on the part of the Investigating Agency which cannot be a ground to discard the prosecution version which is authentic and credible and this benefit cannot be extended to the accused persons. The recovery of tabbal at the pointing of accused appellant which was used in the commission of offence was proved. The Investigating Officer S.I. Ghanshyam Singh Tyagi deposed that he arrested the accused Dharampal on 28.02.2008 and while being in police custody he confessed that the tabbal used in the incident was kept hidden on the roof top of the house of the sister Vinod Kumari under the heap of eucalyptus logs. An effort was made to collect evidence of an independent witness but no one came forward, so the Police Official were made witness to the recovery memo.

Looking to the confessional statement of the accused appellant

Dharampal, it is clear that he disclosed that he committed the offence by using tabbal which was recovered at his pointing from the roof top of the house of his sister Vinod Kumari, kept hidden under the heap of eucalyptus logs. The said recovery of tabbal corroborates with his confessional statement and satisfies the test of section 27 of the Indian Evidence Act.

The Hon'ble Apex Court in ***Perumal Raja @ Perumal vs. State, represented by Inspector of Police, 2024 SCC Online SC 12***, held that :

“ The discovery of a fact resulting in recovery of a physical object exhibits knowledge or mental awareness of the person accused of the offence as to the existence to the physical object at the particular place. Accordingly, discovery of a fact includes the object found, the place from which it was produced and the knowledge of accused as to its existence. To this extent, therefore, the factum of discovery combines both the physical object as well as the mental consciousness of the accused in relation thereto.”

P.W.9 Constable Onkar Singh has proved the FIR and G.D. Entry. P.W.10 Subhash Chandra proved that application which he gave on 26.02.2008 for conducting post mortem of the deceased Harvansha. P.W.5 S.I. Mohan Lal Yadav proved the relevant records relating to inquest report and post mortem report. P.W.6 Constable Zabbar Singh proved that he took the dead body for post mortem and thereafter, handed it to the family members of the deceased. P.W.8 S.I. Ghanshyam Singh Tyagi has proved the site plan and charge sheet.

In view of the above, the Court is convinced with the findings on the guilt of the accused by the Trial Court. The Court is also of the considered view that the prosecution has proved its case beyond all reasonable doubt. It can be rightly concluded that that accused appellant alongwith other co-accused entered into the premises of the first informant and caused injuries on the vital part of the body of Harvansha by using the weapons tabbal, lathi and danda which in all probability, would have caused death and resultantly, Harvansha died due to said injuries which comes under the category of culpable homicide not amounting to murder. Thus, looking at the nature of injuries and the manner of assault established by the prosecution evidence and discussion above, Section 304 IPC has clear application. The Court has no difficulty in affirming the conviction of the appellant.

CONCLUSION

13. The learned Trial Court has rightly convicted the accused appellant Dharampal under Sections 452, 304/34 IPC. The judgement and order of conviction and sentence dated 03.07.2010 awarding ten years rigorous imprisonment under section 304/34 IPC and fine of Rs.10,000/- and under section 452 IPC three years rigorous imprisonment and fine of Rs.3,000/- and in case of default of payment of fine, an additional simple imprisonment for three months is upheld.

14. Accordingly, the conviction and sentence of the appellant is hereby affirmed.

15. The ends of justice would be served, if the accused- appellant is

sentenced with the period of imprisonment already undergone in prison.

16. The Custody Certificate dated 02.08.2023 issued by Central Prison, Bareilly reflects that the appellant Dharampal has been convicted in another case, i.e., Case Crime Nos. 31 and 34 of 2010, Sessions Trial No. 533, 534/2010 under Section 302 IPC and Section 25 Arms Act, Police Station Kotwali Dehat, District Bijnor whereby life imprisonment was awarded on 22.12.2010 by Additional Session Judge, Court No. 5, Bijnor and the conviction has been upheld by this High Court on 05.04.2018.

17. The appeal stands **partly allowed**.

18. The accused-appellant Dharampal shall be released forthwith from jail, if he is not wanted in any other case.

19. Office is directed to transmit a copy of this judgement to the learned Sessions Judge, Bijnor for compliance.

20. Office is also directed to send back the record of the Trial Court immediately.

21. We record our appreciation for the able assistance rendered by the Amicus Curiae, who would be entitled to her fee as per the rules of the High Court Legal Services Committee.

(2024) 4 ILRA 1245
APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.04.2024

BEFORE

THE HON'BLE ASHWANI KUMAR MISHRA, J.

THE HON'BLE MOHD. AZHAR HUSAIN
IDRISI, J.

Criminal Appeal No. 5137 of 2021
 Connected with'
 CrI. Appeal Nos. 1178 of 2022, 5268 of 2021,
 5408 of 2021 & 5608 of 2021

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

Counsel for the Appellant:

Sri Rahul Saxena, Sri Satyendra Kumar Mishra,
 Sri Surendra Pal, Sri Ajay Pandey

Counsel for the Respondent:

G.A.

Criminal Law - Indian Penal Code, 1860 – Sections 147, 148, 149, 302, 304 Part II, 452 & 504 – Arms Act, 1959 – Sections 25/27 & 30 – Code of Criminal Procedure, 1973 – Sections 313, 319, 374(2), 437A – Criminal Appeal Against Conviction and Sentence – Murder – Culpable Homicide Not Amounting to Murder – Rioting – Unlawful Assembly – Common Object – House Trespass – Insult – Firearm Injury – Eye-Witness Testimony – Medical Evidence – Forensic Evidence – Motive – Delay in Medical Treatment

The appellants, Nikka, Bhola, Jameel @ Lalla, Gama, and Shama, challenged the judgment dated 06.10.2021 by the Sessions Judge, Pilibhit, in Sessions Trial No. 98 of 2017 (arising out of Case Crime No. 2246 of 2016), convicting them under Section 302 read with Section 149 IPC for life imprisonment with a Rs. 30,000 fine each, along with convictions under Sections 25/27 and 30 Arms Act for some appellants. The prosecution alleged that on 18.11.2016 at 6:00 AM, the appellants, motivated by prior enmity, trespassed into the house of PW-1 (Faizulla Khan), dragged his son Yunus to the road, where Bhola fired a single shot from a licensed double-barrel gun, causing a fatal thigh injury. Yunus died due to delayed medical treatment. Held: (1) The appeals were partly allowed, modifying Bhola's conviction to Section 304 Part II IPC and setting aside convictions of Nikka, Jameel, Gama, and Shama. (2) The prosecution case rested on PW-1's testimony, supported by

PW-2 (deceased's brother) and medical evidence, but PW-6 was not an eye-witness. (3) The single gunshot injury on the thigh, non-vital part, and absence of repeat shots indicated no intent to kill, supported by PW-4's testimony that death resulted from excessive bleeding due to delayed treatment. (4) The lack of overt acts by other appellants and acquittal of co-accused Khaleel rendered their implication ornamental. (5) The plea of prior enmity was unsubstantiated, as PW-1's claim of a prior shop-ransacking incident was not mentioned in the FIR or Section 161 Cr.P.C. St.ments. (6) Forensic evidence confirmed the recovered gun fired the cartridge, but the absence of tattooing/blackening did not negate the prosecution case. (7) Bhola's sentence was modified to the period undergone (over 8 years with remission), with the fine sustained, while other appellants were acquitted and ordered released unless wanted in other cases.

(Delivered by Hon'ble Ashwani Kumar
Mishra, J.

&

Hon'ble Mohd. Azhar Husain Idrisi, J.)

1. Heard Sri Ajay Pandey and Sri Rahul Saxena, learned counsel for the appellants as well as learned A.G.A for the State and perused the record.

2. This bunch of appeals are directed against the composite judgement and order passed by the trial court in Sessions Trial No. 98 of 2017, arising out of Case Crime No. 2246 of 2016 (State Vs. Shama and others), whereby the accused appellants have been convicted under Section 302 read with 149 Cr.P.C. and sentenced to undergo life imprisonment with a fine of Rs. 30,000/- together with default sentence.

3. The prosecution case proceeds upon a report (Ext. Ka- 1) as per which the informant Faizulla Khan S/o Tullan Khan is resident of Village Kitnapur, District Pilibhit.

On 18.11.2016 at about 6.00 a.m. in the morning all the accused persons entered the house of the complainant and on account of previous enmity dragged his son out of the house to the road with the intention to kill him. All the accused persons were having firearms. Accused Bhola then fired from the licensed gun of Khaleel causing gun shot injury to the deceased. On the intervention of the villagers, all the accused persons ultimately fled from the spot. The informant's son Yunus later died. The informant initially brought the injured to the police station where he was sent to Primary Health Centre, Bisalpur and then to District Hospital, Pilibhit. He was later referred to District Hospital, Bareilly but he died while on the way to Bareilly. On the basis of such written report, first information report came to be lodged as Case Crime No. 2246 of 2016 on 18.11.2016 at 8.30 in the morning. The place of incident is 4 kilometer from the police station. 4. The dead body of the deceased was taken to the mortuary on the date of incident itself at 4.30 p.m. where inquest followed. Information with regard to the death has been furnished by the Rehmat Khan S/o Faizulla (P.W.-2). The inquest was completed at about 5.30 p.m. The post mortem was also conducted on the same day at about 11.45 p.m. by Dr. Manjeet Singh (PW- 4). As per the post mortem report, following injuries were found on the deceased during post mortem examination:-

Wound of entry 8 cm above from upper border of left patella on front of the lower portion of thigh with size of wound 10 x 6.5 x inverted & margin lacerated on cutting haematoma present and vessels and mussels damaged.

Wound was through and through and communicating with the external (exit) wound and underneath bone is fractured.

Wound of exit 6 cm. from upper border of popliteal upper fossa on back of left thigh and size of wound is 11 x 6.5, everted margin and casseration. Both the wounds are communicated with each other. Tattooing & blackening & singeing of hair is not present on both the wounds.

5. According to the autopsy surgeon, the cause of death of the deceased was shock and hemorrhage due to ante mortem fire-arm injury.

6. The accused persons were later arrested on 20.11.2016 and the weapon of offence, namely double barrel licensed gun, along with cartridge and two country made pistols etc. were recovered from the accused Khaleel S/o Zafar Khan and Bhola S/o Jamil Khan and others and Case Crime No. 2249 of 2016 and 2250 of 2016, under Section 25/27 Arms Act were registered at 5.10. p.m. on the same day i.e. 20.11.2016.

7. The record further reveals when the injured was taken to the District Hospital, Pilibhit on 18.11.2016, his X-ray was got conducted. The X-ray report is on record (page 17 of the paper 4 book). Deceased Yunus Khan alias Bhoora had suffered fracture in his left thigh in the femur bone region. This document reveals that at District Hospital, Pilibhit itself the deceased had died. The investigation further proceeded and bloodstained earth and plain earth were collected from the spot by the Investigating Officer (Ext. Ka-15). The weapon of assault i.e. 12 bore double barrel gun and 12 bore used bullet were also produced (Ext. Ka-16). The recovered firearm alongwith used bullet was sent for scientific examination to the Forensic Science Laboratory and its report is on record which shall be dealt with later. The investigation was ultimately concluded and

charge sheets were submitted on 13.01.2017 (Ext. Ka-18), 20.12.2016 (Ext. Ka-21), 20.12.2016 (Ext. Ka-22 and 02.01.2017 (Ext. Ka-23). Cognizance was taken by the concerned court and since the offence was triable by the court of Sessions, the matter was referred to the court of Sessions where four Session Trials were registered. Charges were framed against the accused appellants who denied the accusation and claimed to be tried. The Session Trial No. 98 of 2017 was in respect of Case Crime No. 2246 of 2016, under Sections 147, 148, 149, 302, 452, 504 I.P.C., Police Station Bisalpur, District Pilibhit. Session Trial No. 99 of 2017 was in respect of Case Crime No. 2249 of 2016, under Section 25/27 Arms Act, Police Station Bisalpur, District Pilibhit. Session Trial No. 100 arose out of Case Crime No. 2250 of 2016, under Section 25/27 Arms Act, Police Station Bisalpur, District Pilibhit. Session Trial No. 101 of 2017 arose out of Case Crime No. 2250 of 2016, under Section 30 Arms Act, Police Station Bisalpur, District Pilibhit. All the session trials have been clubbed and disposed of vide judgment and order dated 06.10.2021 by the Session Judge, Pilibhit and accused appellants have been convicted and sentenced as per above. Against the said judgment and order, five appeals have been preferred before this Court.

8. The prosecution has produced testimonies of following prosecution witnesses:-

(i) PW-1 Faizulla Khan, (ii) PW-2 Rehmat Khan, (iii) PW-3 Hitesh Kumar, (iv) PW-4 Dr. Manjeet Singh, (v) PW-5 Puskar Singh, (vi) PW-6 Munees, (vii) PW-7 Ramveer Singh, (viii) PW-8 Shakeel Ahmad, (ix) PW-9 Suresh Kumar Singh and (x) PW-10 Pushkar Singh.

9. In addition to oral testimony of the prosecution witnesses, the prosecution has also produced following documentary evidences:-

(i) F.I.R. Ext. Ka-2, Ext. Ka-4 and Ext. Ka-6, (ii) Written Report Ext. Ka-1, (iii) Recovery memo of murder weapon licensed gun double barrel 12 bore with used bullet Ext. Ka-16, (iv) Recovery memo of bloodstained and plain soil Ext. Ka-15, (v) X-ray report, (vi) Post mortem report Ext. Ka-7, (vii) Three reports of Forensic Science Laboratory, (viii) Panchayatnama Ext. Ka-8, (ix) Four Charge sheets Ext. Ka-18, Ext. Ka-21, Ext. Ka-22 and Ext. Ka-23.

10. All the accused appellants were then confronted with the evidence adduced against them during trial in order to record their statements under Section 313 Cr.P.C. All the accused appellants denied the allegations made against them and stated that they have been falsely implicated. It has also been asserted by the accused appellants that they have been implicated on account of enmity.

11. Trial court has examined oral and documentary evidence produced during trial in order to return the finding of guilt against the accused appellants on the basis of which they have been convicted and sentenced as per above.

12. Sri Ajay Pandey, learned counsel appearing in all the appeals submits that the prosecution has failed to establish the guilt of the accused appellants beyond reasonable doubt; the testimony of PW- 1, who is the sole eye witness, is not credible and reliable and the conviction and sentence of the accused appellants, relying upon his testimony, is not sustainable; it is

submitted that F.S.L. report does not support the prosecution case inasmuch as the gun shot wound on the deceased neither tallies with the bullet recovered nor any pallet has been found and no blackening or tattooing is noticed either which nullifies the prosecution case of firing from a close distance by a bullet; learned counsel for the accused appellants further submitted that six persons were initially implicated in the aforesaid offence but implication of one of them, namely Khaleel, has not been accepted, which renders the testimony of PW-1 unreliable; learned counsel for the accused appellants also argued that the prosecution case against all six accused persons intending to murder the deceased is not credible as there is a solitary gun shot injury on the thigh of the deceased, caused by accused Bhola, whereas other five accused persons have not caused any injury to the deceased; with reference to testimony of autopsy surgeon i.e. PW-4 Dr. Manjeet Singh, it is urged that cause of death was excessive bleeding on account of the fact that proper medical aid was not rendered to the injured, at that time, as he was initially taken to the police station, and later referred to Primary Health Center, Bisalpur and then to District Hospital, Pilibhit. In this process a lot of time was wasted. In case the deceased had been given proper medical treatment and his bleeding was stopped, he might have survived. In the alternative, learned counsel for the accused appellants submits that even if the prosecution case is taken on its face value, it would not indicate an offence under Section 302 I.P.C. and as such, maximum punishment, which could be awarded to the accused Bhola, would fall under Section 304-II I.P.C. Learned counsel asserted that accused appellant Bhola has already undergone incarceration for more than 8 years, as such, he is entitled to be

released on the punishment already undergone; so far as other accused appellants are concerned, there is no overt act attributed to them and since their implication is otherwise ornamental, all other accused appellants are liable to be acquitted and the appeals deserve to be allowed.

13. Learned A.G.A., on the other hand, urged that testimony of PW-1 is wholly reliable, which is otherwise supported by the documentary evidence on record. Learned A.G.A. further argued that since the weapon used in the incident has been recovered from the accused appellants and there was specific motive available to the accused appellants to commit the murder, as such, the judgment and order of the Court of Session merits no interference.

14. Before advertng to the respective submissions advanced on behalf of the learned counsels for the parties, it would be relevant to mention some features of the case. The deceased, who was aged about 26 years, was of average built and he admittedly died on 18.11.2016. The inquest report as well as post mortem report clearly shows existence of single gun shot injury caused to the deceased, which resulted into two wounds, one of entry wound 8 cm above upper border of left patella on front of the lower portion of thigh with size of wound being 10 cm. x 6.5 cm. This wound was inverted and margins were lacerated. On cutting, haematoma was found present and vessels and muscles were found damaged. The wound was through and through and communicated with the external (exit) wound and underneath bone was fractured. The other wound is exit wound from upper border of popliteal upper fossa on back of left thigh and size of wound is 11 cm. X 6.5 cm., everted margin

and casseration. Tattooing, blackening and singeing of hair was found absent on both the wounds.

15. The evidence on record therefore clearly shows that the deceased died on account of single gun shot injury which has caused both the injuries i.e. entry wound and exit wound. Cause of death was shock and haemorrhage due to ante mortem fire-arm injury. The F.S.L. report shows that clothes worn by the deceased had bloodstained on major parts. The blood found was human blood but was integrated. So far as firearm recovery from the accused persons is concerned, it transpires that 12 bore DBBL Gun No. 87000 was examined. The F.S.L. report shows that 12 bore cartridge recovered from the accused persons was fired from the DBBL Gun No. 87000.

16. The prosecution case essentially relies upon the testimony of PW-1 Faizulla Khan who happens to be first informant and is also father of the deceased Yunus. In the examination-in-chief, PW-1 has stated that the incident occurred at about 6.00 a.m. in the morning. He had enmity with the accused persons. The accused entered his house and hurled filthy abuses on his son and dragged out him from the house to the public road. The accused Bhola fired from the licensed double barrel gun of accused Khaleel with an intention to kill Yunus. All other accused persons were armed with unauthorized country made pistols. On receiving the gun shot injury, Yunus fell down. On exhortation of PW-1, his other son Rahmat Khan (PW-2) and neighbour Shahjad and Munees (not produced) arrived and the accused persons left the injured thinking him to have died. All the accused persons had entered his house armed with firearms

having common intention. The gun shot injury on Yunus has caused excessive bleeding. PW-1 took his son Yunus to the police station and after getting an application typed, lodged the report at Police Station Bisalpur. After the report was registered, the police took the injured to Primary Health Center, Bisalpur. As the condition of the injured was deteriorating, the doctors advised him to be taken to the District Hospital, Pilibhit. At District Hospital, Pilibhit, the doctors advised the injured to be taken to Bareilly and as the injured was on the way to Bareilly, he died. PW-1 has also stated that three months prior to the incident, the accused had ransacked the shop of maternal uncle of the deceased Yunus, namely Safiq Khan, and that was the reason of enmity between them. Safiq Khan was also not living with him. The accused persons are stated to be of criminal nature and various cases were pending against them.

17. In the cross examination, PW-1 has admitted that a case under Sections 323/324 I.P.C. is proceeding against him wherein Islam is accused. Mulla is informant of that case. Father of Mulla is Jaleel. Accused Shama, Gama and Bhola are real brothers. Accused Jameel alias Lalla and Khaleel are also real brothers. Nikka is family member.

18. Soon after the incident, PW-1 claims to have gone to the Police Station, Bisalpur. He reached at Police Station, Bisalpur within 15-20 minutes. PW-2 came later and was standing behind him. Soon after the incident, Daroga and local police arrived on the spot. Following passage from the cross examination of PW-1 is relevant and reproduced hereinafter:-

"हम लोग उजाला मे रवाना हो गये। 15-20 मिमनट मे थाने पहुच गये। पहले मैं थाना पहुचा। मेरा बेटा रहमत खां मेरे पीछे खड़ा हुआ है। यह उस मुकदमे का गवाह है। मैं आधा घण्टे के अन्दर थाने पहुच गया। सुबह 6 बजे गोली चली, लड़ाई हुयी, दरोगा जी तुरन्त पहुच गये थे। दरोगा जी ने मुझसे पूछा कि क्या मामला है। मैंने कहा कि रंजिश थी। दरोगा जी मेरे गांव पहुचे और मुझसे कहा कि तुम थाने मे रिपोर्ट लिखाओ मैंने रिपोर्ट लिखाने थाने गया और फिर मैं थाने से तहसील गया, और वहां तहरीर टाइप करायी और फिर लड़के को गांव से अस्पताल इलाज हेतु भेज दिया। लड़के के साथ गांव के ही दरोगा जी ने एक सिपाही अस्पताल भेजा और कहा कि उसको अस्पताल बीसलपुर मे भर्ती कराओ लड़का पुलिस की मदद से गांव से अस्पताल पहुच गया और उसका इलाज शुरू हो गया। फिर मैं रपट लिखाकर थाने से अस्पताल पहुचा।"

19. PW-1 has categorically stated that solitary gun shot injury on the deceased was caused by accused Bhola and that none of other five accused persons either fired or did anything. The passage in that regard is reproduced hereinafter:-

"भोला के पास तमंचा था। भोला ने तमंचे से कोई फायर नहीं किया। उसने बन्दूक से फायर मारा। जब पहला फायर हुआ तब मैं लिलयाकत के दरवाजे से 10 कदम की दूरी पर था, लिलयाकत के दरवाजे के पश्चिम की तरफ था। मैं व यूनूस संग संग आगे पीछे जा रहे थे।

तभी फायर हुआ, फायर करने वाला मुझसे 10 कदम की दूरी पर था, यूनुस मेरे साथ था, उसके फायर आया। यूनुस गिर गया। लियाकत के मकान के सामने लियाकत के दरवाजे से 2 कदम की दूरी पर। घटना के समय मेरे पास 1 जानवर थे, मेरे पास दूध देने वाले जानवर भी थे, मैं जानवर पालने का काम भी करता हूँ। उसके लिए मैंने अलग गोडा बना रखा है। उसी में जानवर रहते हैं। कुल मिलाकर मुल्जिमान थे। 6 में से 5 मुल्जिमान ने कोई फायर नहीं नहीं किया और कुछ नहीं किया। 5 मुल्जिम 5 कदम की दूरी पर खड़े रहे मेरे पूरब में खड़े रहे। "

20. In the cross examination, PW-1 has stated that they never had any fight with the accused persons nor had ever been disclosed to them before three months of the incident. The passage in that regard reads as under:-

"मेरी मुल्जिमान से कभी कोई लड़ाई नहीं हुई। अब लड़ाई बन गयी, जब से भूरा मरा पहले कोई चक्कर नहीं था। न मुझसे न लड़ाई हो। पहले मुल्जिमान ने कहा था कि यदि 3 माह पहले --- साथ दिया था। यह बात मैंने एफ.आई.आर में नहीं लिखायी थी, दरोगा जी ने मेरा 2 बार 161 सीआरपीसी का ब्यान लिया उसमें भी नहीं बतायी थी, मुझे नहीं बताई इसकी वजह नहीं बता सकता।"

21. The cross examination of PW-1 also indicates that he had not named any of the witness in the report and witnesses were later introduced on the further questioning of the Investigating Officer.

The passage in that regard is reproduced hereinafter:-

"यह कहना गलत है कि मैंने सिखाने से ब्यान दिया हो, मैंने रिरपोट7 में मिकसी गवाह का नाम नहीं लिखाया है। मैंने जब दरोगा जी को अपना ब्यान दिया था, उसमें किसी गवाह का नाम नहीं बताया था, घटना के 7-8 मिदन बाद दरोगा जी आये, उन्होंने मुझसे पूछा था कि किसको -2 गवाह रखोगे तो मैंने तीन लोगों के नाम बताये थे, जिसमें अपन दामाद मुनीम खां को, अपने लडके रहमत खां को और अपने लडके शहजाद को गवाह बनाने की बात कही थी। मैंने तीनों आदमियों से पूछा था कि क्या गवाही दोगे। इन्होंने कहा कि हम पक्की तौर पर गवाही देंगे, नाम लिखा दो। दरोगा जी ने कहा कि ठीक है मैं गवाह बना देता हूँ। मेरे जिन कपडों पर यमिनस खां का खून लगा था दरोगा जी ने कब्जे में ले लिये थे। खलील खां पर तमंचा नहीं था बन्दूक थी। मैंने एफ.आई.आर में यह बात लिखवाई थी कि सभी लोगों पर तमंचे थे। यह मैंने एफ.आई.आर. में मैंने लिखा दिया यह नहीं जानता। मेरे इस मुकदमे में रफीक, जाहिद, शफीक, लियाकत किसी को भी गवाह नहीं बनाया, जबकि इन लोगों के घर घटना स्थल के पास है लियाकत के घर में लियाकत के बच्चे रहते हैं जबकि शफीक खां घर पर थे, लेमिकन मैंने इनमें से मिकसी को गवाह नहीं बनाया, उन लोगों ने कहा कि हम गवाही नहीं देंगे। इन लोगों ने कहा कि हम झूठी गवाही नहीं देंगे, सच्ची गवाही देंगे। "

22. PW-2 Rahmat Khan is brother of the deceased and he has also supported the prosecution case. He has also implicated the accused Bhola of causing gun shot injury. In the cross examination, he has admitted that PW-1 had taken the deceased to the police station and he had also joined him. This witness has been confronted with his previous statement in which he has not disclosed that he had gone with PW-1 to the police station.

23. PW-3 is Constable Hitesh Kumar. He has proved the G.D. entry relating to three reports lodged in the matter. 24. PW-4 is Dr. Manjeet Singh who has conducted the postmortem on the body of the deceased. He has clearly stated that there is only one firearm injury. Following passage from cross examination of PW-4 is relevant and is reproduced hereinafter:-

" युनुस की मृत्यु उसके जॉघ में जो घाव था उससे अत्यधिक खून बहने के कारण हुई थी। अगर रक्त श्राव बन्द हो जाता तो उसकी मृत्यु नहीं भी हो सकती थी। मैं यह नहीं बता सकता हूँ कि बच सकता था। या नहीं। रक्त श्राव रोकने के लिए बाँध दिया जाता व और उसको प्राथमिक उपचार दिया जाता प्राथमिक उपचार में आई०वी० फिल्टर रक्त चढ़ाया जाता है।

मृतक की मृत्यु का कारण उसकी मृत्यु पूर्व चोट से अत्यधिक रक्तश्राव तथा सदमा था। यह चोट बुलेट से आयी थी। बुलेट पोस्टमार्टम में मृतक के शरीर में नहीं मिली थी।"

25. PW-5 is Senior Sub Inspector Puskar Singh who has proved the inquest report. PW-6 is Munees who has admitted that he arrived at the place of occurrence after five minutes of the incident on hearing

the commotion. He has admitted that he works as daily labour for about 5-6 months at Delhi.

26. Additional S.H.O. PW-7 is Ramveer Singh who has prepared the site plan and proved the recovery of clothes, plain and bloodstained earth etc. PW-8 is Sub Inspector Shakeel Ahmad who is Investigating Officer and has arrested the accused persons, from whose possession firearms were recovered. PW-9 is Incharge Inspector Suresh Kumar Singh and is formal witness. He has stated that implication of Khaleel was found false. PW-10 is Sub Inspector Puskar Singh who has conducted the investigation in Case Crime No. 2249 of 2016 and 2250 of 2016 under Section 25/27 Arms Act, Police Station Bisalpur, District Pilibhit.

27. The evidence, noticed above, has been confronted to all the accused who have stated that they have been falsely implicated on account of enmity and they have not committed the offence. No defence, however, has been produced in the matter.

28. The trial court in the facts of the case has returned the finding that the prosecution has been able to prove its case against the accused appellants beyond reasonable doubt. The accused Khaleel was summoned under Section 319 Cr.P.C. but his implication has not been established and consequently Khaleel has been acquitted. All the five accused appellants Shama, Gama, Bhola, Nikka, and Jameel Khan alias Lalla have been convicted and sentenced under Sections 147, 148, 302 read with Section 149 I.P.C. The accused Gama, Shama, and Bhola have also been convicted under Section 25/27 Arms Act. The accused Jameel Khan has also been convicted under Section 30 Arms Act.

29. It is in the context of above material placed on record that this Court is required to consider as to whether the prosecution has been able to establish the guilt of the accused appellants beyond reasonable doubt in the matter or not ?

30. Prosecution case essentially relies upon the testimony of PW- 1 who is the first informant and is father of deceased. As per the prosecution, there was an old enmity on account of which the accused persons entered his house; hurled filthy abuses on the deceased; dragged him out of the house to the road whereafter accused Bhola shot at the deceased with the licensed gun of Khaleel Khan. Although, Khaleel Khan was also initially implicated in the matter, but ultimately he has been acquitted after being summoned under Section 319 Cr.P.C. It was noticed that Khaleel Khan was above 80 years of age and there is no challenge to the acquittal of Khaleel Khan. The incident allegedly occurred on account of a previous enmity between the parties. The evidence on the aspect of enmity, which also is the genesis of the offence, needs to be carefully examined.

31. In the first information report, PW-1 has stated that there was an old enmity, due to which the accused persons entered his house. What was the enmity has not been explained in the FIR. The enmity has been disclosed by PW-1 in his testimony. In his examination-in-chief PW-1 has stated that due to old enmity, the accused persons entered his house. As per PW-1 about three months prior to the incident, the accused persons had ransacked the shop belonging to maternal uncle of deceased, namely, Shafiq Khan ever since then the accused persons maintained enmity with the informant and

the deceased. It is further asserted by PW-1 that he had supported his relative Shafiq who has not been residing in the village since then. It is also alleged that the accused persons are dangerous persons against whom various criminal cases are pending.

32. However, in the cross-examination PW-1 has stated that he had no fight with the accused persons and it was only after the incident that differences have arisen between them. He has categorically admitted that the incident of ransacking of the shop of Shafiq Khan was not mentioned in the FIR nor was it ever disclosed to the Investigating Officer during recording of statement under Section 161 Cr.P.C. It is otherwise apparent on record that no FIR or even a complaint relating to incident of ransacking of shop of Shafiq Khan was ever made or disclosed to the police. No other cause of enmity has otherwise been disclosed. The other two witnesses of fact, namely, PW-2 and PW-6 have also not substantiated the plea of prior enmity. In such circumstances, analysis of evidence on record does not substantiate the plea of prior enmity between the parties. Such a plea otherwise appears to have been set up for the first time during trial and no reasons are disclosed as to why such important information was withheld by the witness earlier during investigation. The prosecution has also not been able to demonstrate as to what exactly was the genesis of the dispute between the parties. No evidence has been collected in that regard during trial. In the absence of there being any credible evidence on the point of enmity or the genesis of offence, we are not inclined to endorse the submission of learned A.G.A. that there existed prior enmity between the parties on account of which the incident occurred.

33. The prosecution case essentially rests upon the testimony of PW-1, who is the first informant and the father of deceased. PW-1 has specifically asserted that all six persons had entered into his house and had dragged the deceased outside the house and took him to the road where he was shot at by the accused Bhola. According to PW-1 all accused had firearms with them. As per PW-1 it was Bhola who shot at the deceased.

34. We have perused the inquest and the postmortem report, which shows existence of a solitary gunshot injury on the thigh region of the deceased. The wound of entry and exit have already been reproduced above which would clearly go to show that only one fire was shot at the deceased. The place of injury apparently is not on the vital part of the body. We also find that no repeat gunshot was fired. In the event, intent of the accused was to kill the deceased either the gunshot injury would have been caused on some vital part of the body or repeat fire could have been resorted to. We also find that five other accused allegedly were armed with firearms and in the event all of them intended to eliminate the deceased, there was no reason why none of them did any overt act nor any fire was shot by any of them. One of the accused specifically implicated by PW-1 is Mohd. Khaleel, who was above 80 years of age and has been acquitted after he was summoned under Section 319 Cr.P.C. The testimony of PW-1 is also questioned on the ground that implication of Khaleel once is found false, his testimony cannot be treated to be entirely reliable.

35. So far as testimony of PW-2 is concerned, though this witness claims to be present at the place of incident but his

reference is not made in the first information report nor he is a witness to the inquest. The presence of PW-2 is also questioned by the appellants on the strength of statement made by PW-1, as per which, the Investigating Officer inquired from him as to who would be nominated as witness. According to PW-1, he has disclosed the Investigating Officer that PW-2 would be a witness and after being satisfied that this witness would also testify in favour of prosecution that PW-2 was subsequently introduced. It is also pointed out that statement of PW-2 has been recorded by the Investigating Officer on 22.11.2016 i.e. two days after the incident. His statement is recorded on the same day when statement of Shahzade was also recorded under Section 161 Cr.P.C, but he was not produced.

36. So far as PW-6 is concerned, he has admitted that he came at the place of occurrence after hearing the commotion. PW-6 by his very statement therefore has admitted that he was not an eyewitness and arrived subsequently at the place of occurrence. PW-6 has only stated that he saw the accused persons leaving the spot.

37. It is in the context of testimony of above three witnesses of fact that we are required to determine as to whether there was any intention on part of accused persons to kill the deceased or not.

38. So far as implication of persons other than accused Bhola is concerned, no overt act has been attributed to them. Out of those who were allegedly present with firearms, none of them are even claimed to have fired at the deceased. Implication of one of the five other accused persons namely Mohd. Khaleel has been found wrong. In the event, the intent on

part of other accused persons was to eliminate the deceased, there was no reason why none of them did any overt act on the spot. In the facts of the case, we are persuaded to accept the contention of the appellants that the presence of other five accused was ornamental and merely to add colour to the prosecution case. Though, recovery of firearm is shown from some of those other five accused persons but the recovered firearm from them have not been connected in any manner with the firing on the accused, inasmuch as the case of the prosecution is that the firing by Bhola on the deceased was from the licensed double barrel gun of Mohd. Khaleel.

39. One of the other important aspects that needs examination in the facts of the present case, is the cause of death of the deceased. The post-mortem report indicates that the cause of death of the deceased was shock and haemorrhage due to ante-mortem firearm injuries. The Autopsy Surgeon however has clearly stated that the cause of death of deceased was excessive bleeding. It is also apparent from the evidence on record that though the incident occurred at about 6.00 in the morning and the deceased was profusely bleeding but he was not rushed to any hospital for 17 treatment. PW-1 admits that he took the injured first to the police station from where he was sent to the Primary Health Centre, Bisalpur and then to the District Hospital, Pilibhit. There was a gap of several hours between the incident and the time of death of deceased. As per the evidence on record, it was the failure to provide immediate medical assistance to stop bleeding which ultimately led to the cause of death. It is otherwise admitted by the doctor that in ordinary course of things gunfire on the thigh area would not lead to the death of the person and it was only on

account of excessive bleeding that the death occurred.

40. Considering the fact that there was only one fire shot at deceased on his thigh region and there was no repeat shot fired on the deceased clearly demonstrates that the accused appellant Bhola had no intention to cause the death of the deceased. It is also submitted that this was not a case where the nature of injury caused to the deceased was such that in ordinary course such injury was likely to cause death of the deceased.

41. From the evidence noticed above, we find substance in the contention of the accused appellants that the offence attributed to the accused appellant Bhola at the best would fall within the ambit of Section 304, Part-II of the Indian Penal Code. Accused Bhola has already undergone incarceration of more than seven years six months without remission and with remission the period of incarceration would be above eight years. In our view, the sentence already undergone by the accused appellant Bhola, would sufficiently meet the ends of justice. In our conclusion, the offence committed by him at the best would fall within the ambit of Section 304 IPC Part II. Fine of Rs. 53,000/- imposed upon the appellant Bhola is however, sustained. Failure to deposit the amount of fine would result further incarceration of a period of six months.

42. The appeal is consequently allowed in part in respect of accused appellant Bhola.

43. The appeal instituted by the other accused appellants Nikka, Jameel @ Lalla, Gama and Shama are allowed for the reasons recorded above and their

44. Copy of this judgment shall be communicated to the Chief Judicial Magistrate concerned as also the concerned Superintendent of Jail for necessary compliance. Date: 01.04.2024

THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE MOHD. AZHAR HUSAIN
IDRISI, J.

Mohd. Rehan **...Appellant**
Versus
State of U.P. & Ors. **...Respondents**

Criminal Law - Indian Penal Code, 1860 – Sections 452, 377 & 506 – Protection of Children from Sexual Offences Act, 2012 – Section 3/4 – Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 – Section 3(2)(v) – Code of Criminal Procedure, 1973 – Sections 313, 374(2) & 437A – Criminal Appeal Against Conviction and Sentence – House Trespass – Unnatural Offence – Criminal Intimidation – Sexual Assault on Minor – SC/ST Atrocities – Eye-Witness Testimony – Medical

The appellant, Mohd. Rehan, challenged the judgment dated 26.07.2019 by the First Additional Session Judge/Special Judge (POCSO Act), Kaushambi, in Sessions Trial No. 125 of 2016, convicting him under Section 452 IPC (5 years imprisonment, Rs. 5,000 fine), Section 377 IPC (10 years imprisonment, Rs. 10,000 fine), Section 506 IPC (2 years imprisonment, Rs. 2,000 fine), Section 3/4 POCSO Act (12 years imprisonment, Rs. 12,000 fine), and Section 3(2)(v) SC/ST Act (life imprisonment, Rs. 15,000 fine), with 2 months additional imprisonment for default of fine, all sentences to run concurrently. The prosecution alleged that on 20.08.2016, the appellant lured the 11-year-old male victim into a house under the pretext of offering toffee, committed an unnatural offence, and threatened the informant (PW-1, victim's mother) with a knife. The FIR was lodged on 21.08.2016, supported by PW-1, PW-3 (victim), and medical evidence showing anal injuries. Held: (1) The appeal was partly allowed, setting aside the conviction under Section 3(2)(v) SC/ST Act and modifying the sentence under Section 377 IPC to the period undergone. (2) No evidence established that the offence was committed due to the victim's Scheduled Caste identity or that the appellant knew of it, rendering the SC/ST Act conviction unsustainable. (3) PW-1 and PW-3's consistent testimonies, corroborated by medical evidence of anal redness and a tear, confirmed the unnatural offence under Section 377 IPC and POCSO Act. (4) Minor discrepancies in the place of occurrence (informant's house vs. accused's house) were overlooked due to the victim's young age (10-11 years). (5) The inconclusive FSL report on DNA evidence did not negate the prosecution case, as oral and medical evidence sufficed. (6) Considering the appellant's lack of prior criminal history, over 8 years of incarceration with remission, and the reformative theory of punishment, the sentence under Section 377 IPC was modified to the period undergone, with fines sustained.

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. Jameel Vs St. of U.P., (2010) 12 SCC 532

4. Guru Basavraj Vs St. of Karn., (2012) 8 SCC 734

5. Sumer Singh Vs Surajbhan Singh, (2014) 7 SCC 323

6. St. of Punj. Vs Bawa Singh, (2015) 3 SCC 441

7. Raj Bala Vs St. of Har., (2016) 1 SCC 463

8. Ravada Sasikala Vs St. of A.P., AIR 2017 SC 1166

(Delivered by Hon'ble Ashwani Kumar
Mishra, J.
&

Hon'ble Mohd. Azhar Husain Idrisi, J.)

1. This criminal appeal is directed against the judgment and order dated 26.7.2019, passed by the First Additional Session Judge/Special Judge (POCSO Act), Kaushambi in Sessions Trial No.125 of 2016, arising out of Case Crime No.319 of 2016, under Sections 452, 377, 506 IPC, Section ¾ POCSO Act and Section 3(2)(v) SC/ST Act, Police Station Pipari, District Kaushambi; whereby the appellant Mohammad Rehan has been convicted under section 452 IPC and sentenced to five years imprisonment alongwith fine of Rs.5,000/-; sentenced to ten years imprisonment alongwith fine of Rs.10,000/- under Section 377 IPC; sentenced to two years imprisonment alongwith fine of Rs.2,000/- under Section 506 IPC; sentenced to twelve years imprisonment alongwith fine of Rs.12,000/- under Section ¾ POCSO Act; sentenced to life imprisonment alongwith fine of Rs.15,000/- under Section 3(2)(v) SC/ST Act and in default of payment of fine to undergo two months additional

imprisonment, each. All the sentences to run concurrently.

2. Informant in the present case is the mother of the eleven year old male child, who has been subjected to unnatural offence. The informant (PW-1) is Pasi by caste and is a vegetable seller. She is a original resident of village Saiyed Sarawan, Police Station Charwa, District Kaushambi and had taken a house on rent in village Akbarpur where she lived alongwith her family. On 20.8.2016 the informant had gone to Mundera Mandi for selling vegetable whereafter she returned at about 3.00 PM. When she arrived at her house she was informed by her ten year old son that he was playing in front of the house when the accused on the pretext of offering toffee took him inside the house and subjected him to unnatural offence. The minor son of the informant was weeping outside the house when the informant returned. Informant then attempted to raise a protest with the accused, who threatened her with knife, whereafter the informant came to the Police Station. On the basis of such written report (Ex.Ka.1) First Information Report came to be lodged at Police Station Pipari, District Kaushambi as Case Crime No.319 of 2016 under Sections 377, 506 IPC, ¾ POCSO Act and 3(2)(v) SC/ST Act. The FIR has been lodged on 21.8.2016 at 7.30 in the morning in respect of incident occurred on the previous day i.e. 20.8.2016 during afternoon hours. The investigation proceeded in the matter and the blood sample and underwear of the victim and the accused was taken and sent for scientific examination to the FSL. The victim was also examined by Dr. Himanshu (PW-5) at the Primary Health Centre, Chail at Kaushambi. Following injuries have been found on the victim:-

”Injury- Redness around anal orifice
tear anal orifice inner side 0.5 x 0.1 cm.“

3. In the opinion of the doctor the injury was simple in nature and caused by hard and blunt object. The victim was referred to district hospital for expert opinion and further evaluation. Investigation proceeded further and ultimately a charge-sheet came to be submitted by the Circle Officer, Chail on 27.8.2016. The concerned Magistrate took cognizance of the charge-sheet and committed the case to the court of Sessions where it got registered as Sessions Trial No.125 of 2016. The concerned court of Sessions framed charges against the accused appellant on 24.6.2017 under Sections 452, 377, 506, $\frac{3}{4}$ POCSO Act and 3(2)(v) of SC/ST Act. The accused denied the accusations and demanded trial.

4. During the course of trial the informant appeared as PW-1 and has supported the prosecution case. The informant alleged that she has four children. She has verified the written report given to the Police. She has fully supported the prosecution case including the recovery of the underwear of the victim. PW-1 has denied the suggestion that there was some dispute between her and the accused on account of non-payment of outstanding amount due for purchase of fish from the accused.

5. PW-2 is the Head Constable, who has proved the police papers.

6. PW-3 is the victim, who has supported the prosecution case and has alleged that on the pretext of offering him toffee the accused took him inside the

house and subjected him to unnatural offence. During cross-examination PW-3 has stated that he resides at Saiyed Sarawan. As per him the place of incident is Akbarpur and the house where the offence was committed situates within the market. Victim’s brothers and sisters were playing outside and various persons were moving on the road.

7. Doctor, who has examined the victim has been produced in evidence as PW-5. This witness has found existence of internal injury in the anal region of the victim of the size 0.5cmx0.1cm tear. Redness was also observed on the anal region. According to the doctor the injury could have been caused due to unnatural offence. Other witnesses produced by the prosecution are the I.O. and other formal witnesses.

8. The accused has been confronted with the evidence adduced by the prosecution during trial, wherein the appellant denied the allegation made against him and has stated that he is innocent and has been falsely implicated due to enmity.

9. It is on the basis of above evidence that the trial court has convicted the accused appellant of offence under Sections 452, 377, 506 IPC read with $\frac{3}{4}$ POCSO Act and 3(2)(v) of SC/ST Act. Aggrieved by the conviction and sentence of accused appellant this instant appeal has been filed before this Court.

10. Sri Shams Tabrez Ali, learned counsel appearing for the appellant submits that the accused appellant has been falsely implicated on account of prior enmity as the informant had not returned the amount payable to him for the meat and fish

supplied to her by the appellant. It is further submitted that the injury report on record does not conclusively establish the commissioning of unnatural offence. It is then submitted that the injury could have been caused for other reasons also. Learned counsel further submits that the DNA sample was taken but the DNA report has not been produced.

11. The prosecution has however produced on record the FSL report. As per it the DNA profile was generated of the blood sample and underwear of the victim as well as blood sample and underwear of the accused. The result of the examination shows that only partial DNA profile could be generated and, therefore, no definite opinion could be expressed to connect the DNA profile generated of the accused and the victim. The FSL report, therefore, does not help the cause of the prosecution.

12. Further argument advanced on behalf of the appellant is that the place of incident indicated by PW-1 is her house, whereas PW-3 has disclosed the house of accused to be the place of incident and this material contradiction has been overlooked. Learned counsel also submits that the trial court has misconstrued the evidence on this aspect of the matter and has erroneously overlooked this crucial aspect by observing that this is merely an error of investigation. Sri Ali further argued that there are no allegations in the FIR or the evidence adduced during trial that the offence was committed by the accused on account of caste identity of the victim nor is it proved that the accused was aware that the victim belonged to Scheduled Caste and, therefore, no offence can be said to have been made out under the provisions of

Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 (hereinafter referred to as the 'SC/ST Act').

13. It is also argued that no offence is otherwise made out under the provisions of Prevention of Children from Sexual Offences Act, 2012 (hereinafter referred to as the 'POCSO Act').

14. Lastly it is urged by the counsel for the appellant that the appellant has already undergone incarceration of more than eight years and since no evidence has been adduced to implicate the appellant under the SC/ST Act as such it is alternatively urged that the sentence of the accused appellant be reduced and he be let off on the period of incarceration already undergone.

15. Learned AGA, on the other hand, supports the finding returned in the judgment of the court of Sessions on the basis of evidence led during trial.

16. We have heard learned counsel for the parties and have perused the material on record.

17. So far as the conviction and sentence of the accused appellant under the provisions of SC/ST Act is concerned, we find that there is absolutely no evidence led by any of the witness during trial that the offence upon the victim was committed on account of his caste identity. It is also submitted that the prosecution has not adduced any evidence to show that the accused appellant was even aware of the caste identity of the victim. It is, therefore, submitted that the conviction and sentence of the accused appellant under the SC/ST Act is without any basis and, therefore, unsustainable.

18. The offence, in the present case, is alleged to have been committed on 20.8.2016. Section 3(2)(v) of the SC/ST Act as it stood on the date of offence reads as under:-

“3(2)(v)- commits any offence under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property [knowing that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member], shall be punishable with imprisonment for life and with fine.”

19. After the amendment has been incorporated in SC/ST Act, an offence punishable with imprisonment for a term of ten years or more against a person or property knowing that such person is a member of Scheduled Castes and Scheduled Tribes or such property belongs to such member is to be punished with imprisonment for life and with fine. The necessary ingredients for attracting the offence under Section 3(2)(v) of SC/ST Act would thus be that the base offence draws imprisonment for a term of ten years or more against the person or property belonging to Scheduled Castes/Scheduled Tribes. The other condition for attracting the offence is that the perpetrator of crime is aware that the person against whom such offence is committed is a member of Scheduled Castes/Scheduled Tribes. In order to bring home the charge under Section 3(2)(v) of SC/ST Act the prosecution will have to demonstrate on the basis of evidence led during trial that the perpetrator of crime knew that the victim belongs to Scheduled Castes/Scheduled Tribes. In the facts of the present case, the entire evidence has been perused by us and we do not find any evidence on record to

indicate that the accused was even aware of the caste identity of the victim. Unless such evidence is led it cannot be said that an offence under Section 3(2)(v) of SC/ST Act is made out against the accused appellant. In such view of the matter, we are inclined to accept the argument of counsel for the appellant that on the basis of evidence led during trial, by the prosecution, no offence can be said to be made out against the accused appellant under Section 3(2)(v) of SC/ST. The conviction and sentence of the accused appellant under the SC/ST Act is, therefore, reversed.

20. On merits the main submission advanced on behalf of the appellant is that the place of occurrence has not been fixed/determined by the prosecution. It is alleged that the version of PW-1 and PW-3 contradicts each other. On this aspect we have examined the evidence on record. PW-1 in her testimony has alleged that she was informed by the victim that accused on the pretext of offering toffee took him inside the house where the unnatural offence was committed. The statement of PW-3 has also been examined by us. PW-3 has stated that he was playing in front of his house when the accused on the pretext of offering toffee called him inside his house. The exact expression used by PW-3 is reproduced hereinafter:-

“मैं पढा नहीं हूँ। निशानी अंगूठा लगाता (कांफा) साल महीना जानता हूँ। बरसात का महीना था मैं अपने दरवाजे पर खेल रहा था। मेरी मां मुण्डेरा मण्डी गयी थी। मेरे पापा मजदूरी पर गये थे। जब मैं खेल रहा था तो रेहान मुझे टाफी देने के बहाने अपने मेरे घर बुला लिया घर के अन्दर ले गया। और मेरे साथ गलत काम किया। फिर मेरी मां आयी तो मैंने

सारी बात अपने मां को बतायी। मेरी डाक्टरी हुयी थी। पुलिस वालो ने मेरा वयान लिया था। रिपोर्ट मेरी मम्मी ने लिखाया था। मेरी मां उलाहना देने गयी थी तो रेहान उसे चाकू लेकर दौड़ा लिया था।”

21. There appears to be some discrepancy in the statement of PW-3, inasmuch as his statement can be construed differently and an inference could be drawn that the offence was committed inside the house of the accused appellant. However, we are not inclined to attach much importance to this aspect of the matter considering the fact that the victim is only 10-11 years old. The statement of PW-3 in its entirety suggests that the house where offence is committed is within the main market and her sisters and brothers were playing outside. The statement of PW-3 will have to be read as a whole and an isolated statement cannot be read out of context to support the defence case. The statement that brothers and sisters of the victim were playing outside the house lends credence to the stand of learned State counsel that in fact it was the house of PW-1 where the offence was committed. PW-3 during trial has specifically identified the accused as being the perpetrator of crime. There is thus not much of a substance regarding identity of the accused or the place of occurrence.

22. So far as the commissioning of offence is concerned, the statement of doctor as well as the medico-legal report clearly shows existence of redness around anal orifice and there is a tear in the inner anal orifice of the size 0.5cmx0.1cm. The medical examination of the victim has been conducted on 21.8.2016 at 1.40 PM which is within 24 hours of the incident. The

victim as well as her mother both are specific in implicating the accused appellant of committing the offence. Upon evaluation of the oral evidence led by the prosecution in the form of statement of PW-1 and PW-3 coupled with the medico-legal report on record we are inclined to concur with the opinion expressed by the court below that in fact the ten year old minor victim was subjected to unnatural offence. The finding returned by the court of Sessions in that regard is sustained.

23. Learned counsel for the appellant has lastly urged that the punishment imposed upon the accused appellant in the facts and circumstances of the case is highly excessive. It is submitted that the punishment specified under Section 377 IPC is life or up to ten years and fine. At the time when the offence was committed the minimum punishment under POCSO Act was seven years. It is submitted that accused appellant has no criminal history and has actually remained in jail for over 7½ years and with remission the period of incarceration would be above eight years. Learned counsel, therefore, submits that this is the first offence of the accused appellant and it would not be necessary to award maximum punishment for the offence established against the accused appellant. It is submitted that the incarceration of more than eight years with remission would adequately sub-serve the interest of justice.

24. On the aspect of sentencing we may refer to a recent judgment of this Court in Criminal Appeal No.2878 of 2013:-

“14. While coming to the conclusion that the accused is the perpetrator of the offence, whether sentence

of life imprisonment and fine is adequate or the sentence requires to be modified in the facts and circumstances of this case and in the light of certain judicial pronouncements and precedents applicable in such matters. This Court would refer to the following precedents, namely, 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."

15. '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.

16. 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], 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.

17. 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.

18. 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 cases 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."

25. We have carefully examined the submission in that regard and we find that the accused appellant is the first offender. There is no criminal history of any prior sexual perversity attributed to the accused appellant. The accused appellant has also undergone incarceration of more than eight years with remission. Minimum punishment for the offence under the POCSO Act is seven years.

Keeping in view the criminal jurisprudence which encompasses reformatory and corrective theory, as also the doctrine of proportionality, it would not be necessary to award maximum sentence to the appellant, who is the first offender. In such circumstances, we are of the view that the sentence awarded to the accused appellant under Section 377 IPC deserves to be modified and substituted with the sentence already undergone by him. The appeal, accordingly, is partly allowed. The fine imposed by the accused appellant, however, is maintained. The judgment and order passed by the court below in Sessions Trial No.125 of 2016, arising out of Case Crime No.319 of 2016, under Sections 452, 377, 506 IPC, Section 3/4 POCSO Act and Section 3(2)(v) SC/ST Act, Police Station Pipari, District Kaushambi is modified, accordingly. The appellant shall be released, forthwith, on the period undergone by him and upon deposit of fine or completion of default sentence in lieu of fine unless he is required in any other case, subject to compliance of Section 437A Cr.P.C.

(2024) 4 ILRA 1263
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.04.2024

BEFORE

THE HON'BLE ALOK MATHUR, J.

Election Petition No. 6 of 2022

Abhay Kumar @ Dheeraj Ojha ...Petitioner
Versus
Rakesh Kumar Verma & Ors.
...Respondents

Counsel for the Petitioner:

In Person, Amol Kumar Srivastava, Chetan Kumar Tiwari, Kuldeep Pati Tripathi, Pramod Kumar Pandey, Sakshi Singh, Shivanshu Mishra

Counsel for the Respondents:

Santosh Kumar Yadav, Ashutosh Chaurasia, Dr. Pooja Singh, Kuldeep Pati Tripathi, Santosh Kr. Yadav Warsi, Vijay Vikram Singh

Civil Law - Representation of the People Act, 1951 - Sections 80, 81, 82, 83, 86, 100 - Election Petition - Constitution of India, 1950- Article 227-

Petitioner challenged the election of Respondent No. 1 from 250, Raniganj Assembly Constituency, Pratapgarh, alleging improper acceptance of nomination materially affected the election result. Respondent raised preliminary objections under Sections 80, 81, 86, and Order VII Rule 11, Order VI Rule 16 CPC, contesting petitioner's locus, pleading defects, and improper inclusion of Returning Officer as a party. Court held: (1) Petitioner's locus as a duly nominated candidate or elector was not conclusively disproved at the preliminary stage, requiring evidence (Tej Bahadur Vs Narendra Modi, 2021 (14) SCC 211). (2) Pleadings sufficiently alleged material effect on election results per Section 100(1)(d)(i), and improper acceptance of the returned candidate's nomination does not require further proof of material effect (Mairembam Prithviraj Vs Pukhrem Sharatchandra Singh, (2017) 2 SCC 487). (3) Estoppel does not apply to statutory grounds under Section 100. (4) Missing or blurred pages did not violate Section 81(3) as all pages were filed with the court (Mithilesh Kumar Pandey Vs Baidyanath Yadav, (1984) 2 SCC 1). (5) Returning Officer was not a necessary party per Section 82 (Jyoti Basu Vs Debi Ghosal, (1982) 1 SCC 691); deletion ordered, not dismissal. (6) Defective affidavit was curable, not warranting dismissal under Section 86 (Saritha S. Nair Vs Hibi Eden, (2021) 14 SCC 148). Applications under Order VII Rule 11, Order VI Rule 16, and Section 86 rejected; petitioner granted two weeks to file a fresh affidavit. (Paras 18-85)

List of Cases cited:

1. Tej Bahadur Vs Narendra Modi, 2020 (2) All WC 1871, affirmed in 2021 (14) SCC 211 (Para 11)
2. Charan Lal Sahu Vs Fakruddin Ali Ahmed (Para 11)

3. Charan Lal Sahu Vs Giani Zail Singh (Para 11)
4. Om Prakash Srivastava Vs U.O.I., (2006) 6 SCC 207 (Para 24)
5. Mairembam Prithviraj Vs Pukhrem Sharatchandra Singh, (2017) 2 SCC 487 (Paras 30, 31)
6. Durai Muthuswami Vs N. Nachiappan, (1973) 2 SCC 45 (Para 30)
7. Jagjit Singh Vs Dharam Pal Singh, 1995 Supp (1) SCC 422 (Para 30)
8. Vashist Narain Sharma Vs Dev Chandra, (1955) 1 SCR 509 (Para 30)
9. Kisan Shankar Kathore Vs Arun Dattatray Sawant, (2014) 14 SCC 162 (Para 30)

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

1. Heard Sri Kuldeep Pati Tripathi, Sri Chetan Kumar Tiwari, Ms. Sakshi Singh, Sri Pramod Kumar Pandey and Dr. Pooja Singh, learned counsel for the petitioner as well as Sri Prem Prakash, learned Senior Advocate assisted by Sri Santosh Kumar Yadav Warsi, learned counsel appearing for the respondents.

2. The instant election petition has been filed Abhay Kumar @ Dheeraj Ojha challenging the election of the returned candidate namely Rakesh Kumar Verma (Respondent no.1) for the Vidhan Sabha 2022 Elections, from 250, Raniganj Assembly Constituency, Pratapgarh, Uttar Pradesh. The petitioner has sought the relief of declaration of the election of the returned candidate as null and void and further prayed that he be declared as elected member of the legislative assembly.

3. The main ground for challenging the election of respondent no.1 by the petitioner is that the returning officer

had improperly accepted his nomination which has materially affected the result of the election.

4. Certain relevant facts regarding the election in question are that the Notification for holding general elections of members of U.P Legislative Assembly was issued on 01/02/2022. The last date of filing of the nomination papers was 08/02/2022 and the polling took place on 27/02/2022 and the counting of votes was done on 10/03/2022. Respondent No. 1, the returned candidate had polled 75583 votes while the election petitioner had secured 72934 votes, and the result was declared on 10/03/2022 itself.

5. This Court, by means of order dated 25/04/2022 had issued notices to the respondents. Notices were duly served upon the respondents and appearance was put in on behalf of respondent no.1 and 14.

6. Preliminary objections for dismissal of the election petition in limine has been filed by respondent no.1 under Section 80/81 read with Section 86 as well as under Order VI Rule 16 of the Representation of People's Act, 1951 (hereinafter, referred to as "the Act of 1951"), and also an application under order VII Rule 11 CPC for dismissal of the petition, as it does not disclose the cause of action.

7. The preliminary objection raised by the respondent can broadly be classified in 2 sets. The first set of objections is regarding locus of the election petitioner to maintain the Election Petition while the second set of objections pertain to the defect and infirmity in the Election Petition.

A. MAINTAINABILITY OF ELECTION PETITION

8. With regard to the issue regarding maintainability of election petition, it has been contended on behalf of the respondent no.1 that oath was subscribed by the election petitioner on 07.02.2022 i.e. the date prior to filing of nomination papers on 08.02.2022. It is stated that the said facts are discernible from the copy of nomination papers filed along with the Election Petition and also certificate in this regard issued by the Returning Officer. He submits that oath has to be administered on the same day after presentation of nomination papers. The election petitioner having failed to subscribe oath on 08.02.2022 after presentation of nomination paper, is fatal to his candidature, and he has incurred disqualification and accordingly his nomination was liable to be rejected by the Returning Officer as he is not a "duly nominated candidate" and consequently cannot maintain Election Petition

9. It has been submitted that aspect of locus of an individual to maintain Election Petition has to be determined statutorily as per provisions contained in the Representation of the People Act, 1951 (*hereinafter referred to as "the Act, 1951"*). Section 81(1) of the Act, 1951 provides that Election Petition may be presented by any candidate to such election or any elector. The Elector has been defined in Explanation to Section 81 of the Act, 1951 which states that "elector" means a person who was entitled to vote at the election to which the election petition relates, whether he has voted at such election or not. The definition of "candidate" as provided in Section 79(b) of the Act, 1951 states that "candidate" means a person who has been

or claims to have been duly nominated as a candidate at any election.

10. It has further been stated that oath has to be subscribed before the Returning Officer and Article 173(a) of the Constitution of India, requires that oath be subscribed before the “authorised officer” as per form contained in IIIrd Schedule of the Constitution of India.

11. It has been submitted that this Court in the case of **Tej Bahadur Vs. Narendra Modi, 2020 (2) All WC 1871** had dismissed the election petition on the ground that election petitioner had failed to comply with the mandatory requirement contained in Section 33(3) of the Act, 1951 and it was held therein that the election petitioner was not “duly nominated candidate” and the Election Petition filed by him was dismissed at the threshold and the judgment was also affirmed by the Apex Court in its judgment reported in the case of **Tej Bahadur Vs. Narendra Modi, 2021 (14) SCC 211**. Reliance has also been placed by the respondents on the case of **Charan Lal Sahu vs Fakruddin Ali Ahmed (supra)** and **Charan Lal Sahu vs Giani Zail Singh (Supra)**

12. The election petitioner on the other hand has denied the allegations and has submitted that the application for dismissal of election petition has been filed under Section 86 of the Act, 1951 and therefore the objections which can be raised should pertain only to the provisions contained in Section 81, 82 or 117 of the Act, 1951. It was stated that the nomination paper of the election petitioner having been duly accepted by the Returning Officer and hence he has automatically become a duly nominated candidate and consequently there is no defect in the locus of the

election petitioner in maintaining the present election petition. He further submits that such an objection cannot be raised under Section 81 of the Act, 1951. It was further alternatively submitted that election petition can be maintained by a duly nominated candidate or any elector, and the petitioner is also the Elector for the said constituency and hence on that account also he has locus to file the election petition.

13. Considering the rival submissions with regard to the locus of the election petitioner to maintain the petition, though, the said objection does not fall under Section 86 of the Act, 1951, but this Court has proceeded to consider the said objection as it pertains to the maintainability of this election petition and can be considered at this stage even if strictly it does not fall for consideration under Section 86 of the Act, 1951.

14. In support of the application under Section 86 of the Act, 1951, it was contended by the learned counsel for the respondent no.1 that four sets of nomination papers can be filed by any candidate. The election petitioner had filed four sets of nomination papers, while in the Election Petition only one set of nomination papers filed on 08.02.2022 has been annexed. A certificate has been issued by the Returning Officer certifying that oath was administered to the election petitioner on 07.02.2022, is also on record. Accordingly, there is no dispute that firstly, 4 sets of nomination papers are filed by the election petitioner, and secondly that he had in fact subscribed to the oath as provided under Article 173(a) of the Constitution of India. The question to be considered is whether the oath was administered to him by the Returning Officer before filing of

the nomination papers or subsequent to filing of the nomination papers. According to the respondent no.1, this plea has been set up relying solely upon the material available on record, which is the nomination papers filed by the election petitioner on 08/02/2022, without asserting as to whether any nomination paper was filed by him on 07/02/2022.

15. Even if the facts as submitted by the respondent are accepted by this Court, then whether on the basis of the material available on record a finding can be returned at this stage, that the election petitioner did not subscribe to the oath of affirmation as per the Constitution, which according to the respondent no.1 should have been administered prior to submission of the nomination form?

16. The main plank of the arguments regarding locus is built upon the copy of one set of the nomination papers filed on 08/02/2022 which has been annexed with the election petition along with the certificate issued by the Returning Officer on 07/02/2022 with regard to the administration of oath, both of which are of different dates. It is on the strength of these 2 documents alone that this Court has been called upon by respondent no.1 to hold that the petitioner does not have locus to file the present election petition.

17. On considering the aforesaid contention it is noticed that the remaining 3 nomination papers submitted by the election petitioner are not on record, nor is there any averment by the respondent no.1 that no nomination paper was filed on 07.02.2022 on the date on which the election petitioner had taken oath. In case any nomination paper has been filed on 07.02.2022, and the same has been

accepted by the Returning Officer, then even according to respondent no.1 there would be no infirmity in this regard, to hold that he is not a duly nominated candidate.

18. The said plea has been taken only on the basis of one set of nomination papers which has been annexed by the election petitioner which was filed on 08/02/2022, and oath having been administered one day prior i.e 07.02.2022. It is admitted that 4 sets of nomination papers filed by him before the returning officer while only 1 of those sets, has been annexed with the election petition. In case the respondent is able to demonstrate that the election petitioner did not file any nomination paper on 07.02.2022, then it may be open for the respondent to set up a plea that the election petitioner is not a duly nominated candidate as he has failed to subscribe to the oath as provided for in the Constitution of India, prior to submission of his nomination papers. In the aforesaid facts, this Court is of the considered view that this issue cannot be decided in the absence of relevant pleadings, and proper opportunity to place all the relevant material necessary for deciding the said issue. The deficiencies pointed out by the respondent no.1 are nothing but contentions which can form part of their defence and in any case such contentions being contestable questions, are to be made subject matter of issues and only after permitting the petitioner to lead evidence, can the matter be decided. The said issue can be decided only after giving opportunity to both the parties to lead evidence during the trial, and not at the very threshold, as it may cause injustice by nonsuited the election petitioner only on the basis of the material on record, when there is no dispute with regard to the fact that more than one nomination papers were filed but only one

nomination paper has been annexed along with the election petition.

19. Even if the said issue has to be decided, it has to be done after receiving evidence and cannot be decided as a preliminary issue in the facts of the present case, to non-suit the election petitioner at the very threshold. Accordingly, the said contention of respondent no.1 is rejected at this stage.

B. Civil Misc. Application No. 3 of 2022

(Under Order VII Rule 11 CPC)

20. The 2nd application pressed by the respondent no.1 is Application No. 03 of 2022 filed under Order 7 Rule 11 CPC for rejection of the election petition on account of non-disclosure of cause of action. It has been submitted that from the perusal the election petition it would be evident that there is no averment to the effect that the election result was affected due to improper acceptance of the nomination papers of the respondent no.1. In support of the said contention, it has been submitted that the respondent no.1 had secured 75,583 votes whereas the election petitioner had secured 72,934 votes and that was a margin of 2449 votes. It has further been stated that only 166 votes were rejected and 1139 votes were polled in the option of NOTA, and therefore contends that even if the rejected votes had been cast in favour of the election petitioner he could not have been declared elected, and there is no mention in the entire election petition as to how the improper acceptance of the nomination of respondent no.1 had materially affected his election.

21. Counsel for the respondent no.1 submitted that perusal of the pleadings

made in the election petition specially in paragraph No. 57 would indicate that there is absence of any averment as to how the election result has materially affected due to improper acceptance of the nomination paper. It was further contended that at the time of scrutiny of the nomination papers no objection was raised by the election petitioner before the Returning Officer, and therefore applying the principle of estoppel and acquiescence the election petitioner is precluded from raising objections in this regard, and accordingly, it is on the basis of the aforesaid facts it is contended that no cause of action is disclosed in the election petition and therefore it deserves to be dismissed.

22. On behalf of the election petitioner it has been submitted that as per provisions of Section 100(d)(i) of the Act, 1951, the election of respondent no.1 has been challenged on the ground of improper acceptance of nomination, and the conditions laid down in section 100(d) of the Act of 1951 is to the effect that the result of the election, insofar as it concerns the returned candidate, has been materially affected, has been clearly stated in paragraph No. 57, and further substantiated in paragraph Nos. 72, 73, 74 and 76 of the election petition. It is submitted that the ground raised by the respondent in the present application is accordingly misconceived and deserves to be rejected.

23. It has further been submitted on behalf of the election petitioner that where the allegation of improper acceptance of nomination has been made with regard to the returned candidate, then, even if it is not been mentioned in the election petition that the acceptance of his nomination papers has materially affect the election, still the election petition can have

been dismissed on this ground in as much as respondent no.1 is the returned candidate, and once it is held that acceptance of his nomination was improper or illegal, his election would have to be set aside. A perusal of the aforesaid pleadings would indicate that it cannot be said that no cause of action is made out on a bare reading of the election petition.

24. Considering the above contentions it would be gainful to refer to the Hon'ble Supreme Court in **Om Prakash Srivastava v. Union of India & Anr., (2006) 6 SCC 207** where they have explained the expression "cause of action" in the following words:

"The expression 'cause of action' has acquired a judicially settled meaning. In the restricted sense 'cause of action' means the circumstances forming the infraction of the right or the immediate occasion for the reaction. In the wider sense, it means the necessary conditions for the maintenance of the suit, including not only the infraction of the right, but also the infraction coupled with the right itself. Compendiously, as noted above the expression means every fact, which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. Every fact, which is necessary to be proved, as distinguished from every piece of evidence, which is necessary, to prove each fact. comprises in 'cause of action'."

25. Considering the application under Order VII Rule 11 CPC on the ground that the election petition does not disclose any cause of action, the learned Counsel for respondent no.1 has urged that the election petitioner has not been able to substantiate that improper rejection of the

nomination of the respondent no.1 would materially affect the election. A bare perusal of the scheme of act of 1951 would indicate that Section 100(1)(a) to (c) of the Act, 1951 deals with disqualification, corrupt practices and improper rejection of nominations, respectively, which are grounds for setting aside the election. The sine qua non for setting aside an election under Section 100(1)(d) of the Act, 1951 is that the result of the election, in so far as it concerns a returned candidate, has been materially affected. Under Section 81 of the Act, 1951 an election petition calling in question any election may be presented on one or more grounds specified in sub-Section (1) of Section 100 and Section 25 of the Act, 1951. The contention of Mr. Prem Prakash Yadav learned Senior Counsel for the Respondent no.1 is that even if it is held that the nomination of the petitioner was improperly accepted, his election cannot be set aside in the absence of any pleading or proof that the result was materially affected by the improper acceptance of the nomination. It was further submitted that an election cannot be set aside on the ground of improper acceptance of any nomination without a pleading and proof that the result of the returned candidate was materially affected.

26. The question to be considered is whether as per Act of 1951 and also the judgments of the Hon'ble Supreme Court relating to the pleading and proof of the fact of the result of the election being materially affected applies to a case where the nomination of the returned candidate is declared to have been improperly accepted?

27. At the very outset, a bare perusal of the election petition would disclose that in paragraph No. 69 there is a long list of allegations with regard to false

information being given on affidavit by respondent No. 1 along with his nomination form, and in paragraph 75 and 76 it has been categorically stated that improper acceptance of nomination of returned candidate has materially affected the result of the election, which is liable to be set aside. Accordingly, this is not the case where there is absence of pleadings to the effect the improper acceptance of the nomination of the return candidate has not materially affected the election, while in paragraph 68 of the election petition it has been alleged, that the affidavit in support of the nomination form of the respondent no.1 was not verified by the Notary, nor has it been signed by him and merely stamp is affixed, and consequently in absence of a proper affidavit the nomination paper ought to have been rejected.

28. The bare perusal of the election petition therefore clearly indicates that the election petitioner has duly taken the plea that the improper acceptance of the nomination of the returned candidate has materially affected the result of the election. Once pleadings have been made in the election petition that the election has been materially affected, the sufficiency of the same, as well as the material in support of the pleadings, and its effect on the election of the returned candidate, are issues to be considered at the time of hearing of the election petition. The petition cannot be thrown out at the very outset on the ground that no “cause of action” is made out, when such a ground has been taken by the election petitioner as mandated in provisions contained in Section 100(d)(i) of the Act of 1951. At this stage considering the application of the respondent no.1 under Order VII Rule 11 CPC, the enquiry would be limited only to the aspect as to whether such a ground has

been raised by the election petitioner in assailing the election and not to the extent whether the ground is made out or not, which determination can be made only after final hearing.

29. The Hon’ble Supreme Court in the case of **Eldeco Housing and Industries Ltd. Vs. Ashok Vidyarthi and others**, Civil Appeal No. 7891 of 2023 (arising out of SLP (C) No. 19465 of 2021), decided on 30.11.2023, in para 17 the Court has held as under :-

“17. In Kamala and Ors. v. K.T. Eshwara Sa and Ors., (2008) 12 SCC 661 this Court opined that for invoking Clause (d) of Order VII Rule 11 Code of Civil Procedure, only the averments in the plaint would be relevant. For this purpose, there cannot be any addition or subtraction. No amount of evidence can be looked into. The issue on merits of the matter would not be within the realm of the Court at that stage. The Court at that stage would not consider any evidence or enter a disputed question of fact or law. Relevant paragraphs thereof are extracted below :

21. Order 7 Rule 11(d) of the Code had limited application. It must be shown that the suit is barred under any law. Such a conclusion must be drawn from the averments made in the plaint. Different clauses in Order 7 Rule 11, in our opinion, should not be mixed up. Whereas in a given case, an application for rejection of the plaint may be filed on more than one ground specified in various sub-clauses thereof, a clear finding to that effect must be arrived at. What would be relevant for invoking Clause (d) of Order 7 Rule 11 of the Code are the averments made in the plaint. For that purpose, there cannot be any addition or subtraction. Absence of jurisdiction on the part of a court can be

invoked at different stages and under different provisions of the Code. Order 7 Rule 11 of the Code is one, Order 14 Rule 2 is another.

22. For the purpose of invoking Order 7 Rule 11(d) of the Code, no amount of evidence can be looked into. The issues on merit of the matter which may arise between the parties would not be within the realm of the court at that stage. All issues shall not be the subject matter of an order under the said provision.

23. The principles of res judicata, when attracted, would bar another suit in view of Section 12 of the Code. The question involving a mixed question of law and fact which may require not only examination of the plaint but also other evidence and the order passed in the earlier suit may be taken up either as a preliminary issue or at the final hearing, but, the said question cannot be determined at that stage.

24. It is one thing to say that the averments made in the plaint on their face discloses no cause of action, but it is another thing to say that although the same discloses a cause of action, the same is barred by a law.

25. The decisions rendered by this Court as also by various High Courts are not uniform in this behalf. But, then the broad principle which can be culled out therefrom is that the court at that stage would not consider any evidence or enter into a disputed question of fact or law. In the event, the jurisdiction of the court is found to be barred by any law, meaning thereby, the subject matter thereof, the application for rejection of plaint should be entertained.” (emphasis supplied)

30. Hon’ble Supreme Court also considered the question whether the election of the returned candidate is

materially affected where, the improper acceptance of the nomination is of the returned candidate himself in the case of **Mairembam Prithviraj v. Pukhrem Sharatchandra Singh, (2017) 2 SCC 487**

24. The judgment of this Court in *Durai Muthuswami [Durai Muthuswami v. N. Nachiappan, (1973) 2 SCC 45]* was referred to in *Jagjit Singh v. Dharam Pal Singh [Jagjit Singh v. Dharam Pal Singh, 1995 Supp (1) SCC 422]*, in which it was held as follows: (*Jagjit Singh case [Jagjit Singh v. Dharam Pal Singh, 1995 Supp (1) SCC 422]* SCC p. 429, para 21)

“21. The trial Judge has held that since there is no averment in the petition that the result of the election was materially affected by improper rejection or acceptance of votes, it is devoid of cause of action. We are unable to agree that the absence of such an averment in the facts of this case is fatal. As pointed out by this Court, there may be cases where the obvious conclusion to be drawn from the circumstances is that the result of the election has been materially affected and that Section 100(1)(d) of the Act is not intended to provide a convenient technical plea in a case where there can be no dispute at all about the result of the election being materially affected by the alleged infirmity. (See: *Durai Muthuswami v. N. Nachiappan [Durai Muthuswami v. N. Nachiappan, (1973) 2 SCC 45]*). In the present case, the appellant in the election petition has stated that he has lost by a margin of 80 votes only. From the various averments in the election petition it was evident that the number of valid votes of the appellant which are alleged to have been improperly rejected is much more than 80. From the averments contained in the election petition it is thus

obvious if the appellant succeeds in establishing his case as set out in the election petition the result of this election, insofar as it concerns the returned candidate, would be materially affected."

25. It was held by this Court in *Vashist Narain Sharma v. Dev Chandra* [*Vashist Narain Sharma v. Dev Chandra*, (1955) 1 SCR 509 : AIR 1954 SC 513] as under: (AIR pp. 515-16, para 9)

"9. The learned counsel for the respondents concedes that the burden of proving that the improper acceptance of a nomination has materially affected the result of the election lies upon the petitioner but he argues that the question can arise in one of three ways:

(1) where the candidate whose nomination was improperly accepted had secured less votes than the difference between the returned candidate and the candidate securing the next highest number of votes,

(2) where the person referred to above secured more votes, and

(3) where the person whose nomination has been improperly accepted is the returned candidate himself.

It is agreed that in the first case the result of the election is not materially affected because if all the wasted votes are added to the votes of the candidate securing the highest votes, it will make no difference to the result and the returned candidate will retain the seat. In the other two cases it is contended that the result is materially affected. So far as the third case is concerned it may be readily conceded that such would be the conclusion. But we are not prepared to hold that the mere fact that the wasted votes are greater than the margin of votes between the returned candidate and the candidate securing the next highest number of votes must lead to the necessary inference that the result of

the election has been materially affected. That is a matter which has to be proved and the onus of proving it lies upon the petitioner. It will not do merely to say that all or a majority of the wasted votes might have gone to the next highest candidate. The casting of votes at an election depends upon a variety of factors and it is not possible for any one to predicate how many or which proportion of the votes will go to one or the other of the candidates. While it must be recognised that the petitioner in such a case is confronted with a difficult situation, it is not possible to relieve him of the duty imposed upon him by Section 100(1)(c) and hold without evidence that the duty has been discharged. Should the petitioner fail to adduce satisfactory evidence to enable the Court to find in his favour on this point, the inevitable result would be that the Tribunal would not interfere in his favour and would allow the election to stand."

(emphasis supplied)

This Court in *Kisan Shankar Kathore v. Arun Dattatray Sawant* [*Kisan Shankar Kathore v. Arun Dattatray Sawant*, (2014) 14 SCC 162] dealt with a situation similar to that of this case. In that case, the election of the returned candidate was successfully challenged on the ground of non-disclosure of material information. The appeal filed by the returned candidate was dismissed by this Court by observing as follows:

"43. ... Once it is found that it was a case of improper acceptance, as there was misinformation or suppression of material information, one can state that question of rejection in such a case was only deferred to a later date. When the Court gives such a finding, which would have resulted in rejection, the effect would be same, namely, such a candidate was not entitled to contest and the election is void."

26. *Mere finding that there has been an improper acceptance of the nomination is not sufficient for a declaration that the election is void under Section 100(1)(d). There has to be further pleading and proof that the result of the election of the returned candidate was materially affected. But, there would be no necessity of any proof in the event of the nomination of a returned candidate being declared as having been improperly accepted, especially in a case where there are only two candidates in the fray. If the returned candidate's nomination is declared to have been improperly accepted it would mean that he could not have contested the election and that the result of the election of the returned candidate was materially affected need not be proved further. We do not find substance in the submission of Mr Giri that the judgment in Durai Muthuswami [Durai Muthuswami v. N. Nachiappan, (1973) 2 SCC 45] is not applicable to the facts of this case. The submission that Durai Muthuswami [Durai Muthuswami v. N. Nachiappan, (1973) 2 SCC 45] is a case of disqualification under Section 9-A of the Act and, so, it is not applicable to the facts of this case is also not correct. As stated supra, the election petition in that case was rejected on the ground of non-compliance with Section 100(1)(d). The said judgment squarely applies to this case on all fours. We also do not find force in the submission that the Act has to be strictly construed and that the election cannot be declared to be void under Section 100(1)(d) without pleading and proof that the result of the election was materially affected. There is no requirement to prove that the result of the election of the returned candidate is materially affected once his nomination is declared to have been improperly accepted.*

31. In light of the above, this Court is of the considered view that where the election is challenged on the ground of improper acceptance of nomination of the returned candidate then there is no requirement to further prove that the election of the returned candidate is materially affected. Even otherwise, in the present case the election petition contains sufficient pleadings stating that the improper acceptance of the nomination of the returned candidate has materially affected the election. The grounds urged by the respondent no.1 stating that there are no pleadings in this regard, is not made out. Relying on the judgement of the Hon'ble Supreme Court in the case of **Mairembam Prithviraj v. Pukhrem Sharatchandra Singh (supra)**, this Court is of the considered opinion that the application filed by the respondent no.1 under Order VII Rule 11 of CPC is bereft of merits and therefore rejected.

C. APPLICABILITY OF RULE OF ESTOPPEL

32. It has been submitted on behalf of respondent no.1 that the election petitioner had not raised any objections at the time of filing of nominations and is therefore now estopped from raising the plea in this regard in the present election petition, and hence prayed that on this ground alone the election petition deserves to be dismissed. In this regard it is noticed that Section 100 of the Act, 1951 clearly provides the grounds on which the election of a returned candidate can be challenged. As per Section 100 (d)(i) of the Act, 1951 one of the grounds stated therein is improper acceptance of any nomination. The ground taken by the petitioner has been prescribed statutorily and even if no objections were raised by the election

petitioner at this stage of filing/accepting of nominations, he is at liberty to raise any grounds for challenging of the election of the returned candidate as provided for in Section 100 of the Act of 1951. No conditions have been imposed for invoking the grounds of improper acceptance of nomination as mentioned in Section 100 of the Act, 1951 and therefore if no objection was raised before the returning officer it would still be open for the election petitioner to challenge the election of the returned candidate. Therefore, rule of estoppel and acquiescence does not apply to a challenge made to the election of the returned candidate, as urged on behalf of the respondent no.1, and therefore the argument in this regard is misconceived and accordingly rejected.

D. Civil Misc, Application No. 4 of 2022

(Under Section 81 read with Section 86 of the Act, 1952)

33. Respondent no.1 has also pressed Application No. 4 of 2022 filed under Section 81 read with Section 86 of the Act of 1951, for dismissal of the election petition in limine. In the said application a number of objections have been raised on behalf of the respondent no.1, but only a few of them were pressed and accordingly this Court is proceeding to consider and decide the objections pressed by the learned Counsel for the respondent no.1.

D1. CERTAIN PAGINATED PAGES NOT ANNEXED WITH THE ELECTION PETITION.

34. The First objection was with regard to the fact that pages Nos. 226, 227,

235, 239, 325, 326 and 328 of the election petition were not furnished to respondent no.1, and failure to file these pages along with the election petition at the time of making presentation and therefore neither the election petition was correctly filed nor true copy of the petition was furnished to the respondent no.1, and consequently the petition deserves to be dismissed as per provisions of Section 86 of the Act of 1951.

35. The election petitioner has objected to the contention raised by the respondent no.1 stating that true copy of the election petition containing all pages was filed before the Registrar of this Court who is authorised under the rules for scrutiny of institutional defects and duly examined the petition where it was found to contain all the pages and no defect in this regard was recorded, and therefore the allegations levelled are false and deserve to be rejected.

36. At the very outset the Court proceeded to verify the allegations levelled by the respondent no.1, and found that pages No. 226, 227, 235, 239, 325, 326 and 328 of the election petition were existing as part of the election petition filed with the Registry of this Court and form part of the record of this Court. While scrutinizing the election petition certain defects were recorded by the Registry on 20/04/2022 including that the typed copy of page Nos. 192, 116, 119, 234 and 278 were required, which defects were removed by the election petitioner on the same day itself. It was further certified that there are 14 Annexures were filed along with election petition and provisions of Sections 81 and 117 of the Act 1951 have been complied. There was no defect recorded to the effect that certain pages of the election petition were missing. A perusal of the report of the

Registry of this Court clearly indicates that the same was made after due examination of the election petition and the same would have been done after examining all the pages. Where certain pages were found to be illegible and defective, objections were duly recorded, and it was further certified that provision of Section 81 of the Act of 1951 have been complied.

37. There is no other material adduced by the respondent no.1 in support of his contention in this regard. This Court has duly considered the submission of the respondent no.1 with regard to the fact that the copy of the election petition supplied to them had 7 pages missing. There is no material to indicate that the copies served on the other respondents also had missing pages, so as to bring home the point that a true copy of the election petition was not served to the parties. On the other hand the copy of the election petition filed in the Registry of this Court had all the pages intact, which is clear from report of the Registry which had scrutinised the election petition at the stage of filing where no such defect was noticed despite the fact that the entire election petition was examined by them, and whatever pages were not found to be legible, the defect was duly noted. In case the pages were missing they would have been noticed by the Registry of this Court, and objections in this regard would have been made. This Court has also examined the election petition, and found that page's No. 226, 227, 225, 235, 239, 325, 326 and 328 of the election petition are very much available on record. Considering the fact that all the pages of the election petition are available on the record of the court, there is no objection by the Registry of this court to the effect that pages of the election petition were missing at the time of filing, and also that no other

respondent has made such an allegation, this Court is of the considered view that the said allegations are not proved to the satisfaction of the court, so as to return a finding that there is violation of section 81 necessitating dismissal of election petition. Accordingly, there is no basis for accepting the contention raised by the respondent no.1 in this regard, and accordingly the said objection is devoid of merits and is accordingly rejected.

D2. BLURRED PAGES ANNEXED

38. The next objection raised by the respondent no.1 is with regard to the illegible copies annexed with election petition at page number 116 and 119 which are completely blurred and appear as blackened pieces of paper. It has been submitted that failure to file the correct, illegible and true copy of the aforesaid documents attracts provisions of Section 81 of the Act, 1951, as a consequence of which the election petition is liable to be rejected under Section 86 of the Act of 1951.

39. The election petitioner opposing the aforesaid application preferred by respondent no.1 has submitted that the certificate so filed at page nos. 116 & 119 of the election petition are not integral part of the election petition rather, they are documents which the petitioner is intending to use as evidence. He further submitted that as per the provisions of Section 81(3) of the Act of 1951 the only requirement is that the election petition which is filed in the Court is accompanied by as many copies thereof as the number of respondents mentioned in the petition and every such copy shall be attested by the petitioner under his own signatures to be a

true copy of the petition. It is stated that there is no allegation that the copy of the documents which were annexed with election petition, are the very documents which have been supplied to the respondent no.1 nor has there been a failure to certified the said documents to be true copies. It is stated, if the document is a relevant document which is relied upon by the election petitioner, then it is open for him to file a copy of the same as evidence during course of the trial. It was stated that the said objection is misconceived and does not fall within the scope of Section 81 of the Act of 1951, for which the election petition can be dismissed.

40. To consider the submission of respondent no.1 it will be fruitful to glance into the requirement of statutory provisions on the basis of which the rejection of petition has been sought. Section 81 of the Act, 1951 provides:-

81. Presentation of petitions.—(1) An election petition calling in question any election may be presented on one or more of the grounds specified in 8 [sub-section (1)] of section 100 and section 101 to the 6 [High Court] by any candidate at such election or any elector 9 [within forty-five days from, but not earlier than the date of election of the returned candidate, or if there are more than one returned candidate at the election and the dates of their election are different, the later of those two dates].

Explanation.—In this sub-section, “elector” means a person who was entitled to vote at the election to which the election petition relates, whether he has voted at such election or not.

*1 * * * **

(3) Every election petition shall be accompanied by as many copies thereof as

there are respondents mentioned in the petition and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition.

41. The consequences of infraction of provisions of Section 81 have been provided in Section 86 of the Act of 1951, which is as follows:-

86. Trial of election petitions.—(1) The High Court shall dismiss an election petition which does not comply with the provisions of section 81 or section 82 or section 117. Explanation.—An order of the High Court dismissing an election petition under this sub-section shall be deemed to be an order made under clause (a) of section 98.

(2) As soon as may be after an election petition has been presented to the High Court, it shall be referred to the Judge or one of the Judges who has or have been assigned by the Chief Justice for the trial of election petitions under sub-section (2) of section 80A. (3) Where more election petitions than one are presented to the High Court in respect of the same election, all of them shall be referred for trial to the same Judge who may, in his discretion, try them separately or in one or more groups.

(4) Any candidate not already a respondent shall, upon application made by him to the High Court within fourteen days from the date of commencement of the trial and subject to any order as to security for costs which may be made by the High Court, be entitled to be joined as a respondent. Explanation.—For the purposes of this sub-section and of section 97, the trial of a petition shall be deemed to commence on the date fixed for the respondents to appear before the High Court and answer the claim or claims made in the petition.

(5) The High Court may, upon such terms as to costs and otherwise as it may deem fit, allow the particulars of any corrupt practice alleged in the petition to be amended or amplified in such manner as may in its opinion be necessary for ensuring a fair and effective trial of the petition, but shall not allow any amendment of the petition which will have the effect of introducing particulars of a corrupt practice not previously alleged in the petition.

(6) The trial of an election petition shall, so far as is practicable consistently with the interests of justice in respect of the trial, be continued from day to day until its conclusion, unless the High Court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded.

(7) Every election petition shall be tried as expeditiously as possible and endeavour shall be made to conclude the trial within six months from the date on which the election petition is presented to the High Court for trial.

42. The question posed by respondent no.1 is as to whether filing 2 blurred pages along with the election petition would incur rejection of the election petition as per provisions of Section 86 of the Act of 1951. From a plain reading of sub clause 3 of Section 81 it is borne out that the election petitioner must file as many copies of the petition as there are respondents mentioned in the petition with the caveat that every copy of the document shall be attested by the petitioner under his own signature to be a true copy. It is not the case of the objector that page nos.116 or 119 were not attested to be true copies of the documents filed along with the election petition or were different documents than those enclosed with the

election petition. This issue has been considered by the Supreme Court in the case of **Mithilesh Kumar Pandey v. Baidyanath Yadav, (1984) 2 SCC 1** and the relevant portion is reproduced here under:-

“15. On a careful consideration and scrutiny of the law on the subject, the following principles are well established:

“(1) that where the copy of the election petition served on the returned candidate contains only clerical or typographical mistakes which are of no consequence, the petition cannot be dismissed straightaway under Section 86 of the Act,

(2) a true copy means a copy which is wholly and substantially the same as the original and where there are insignificant or minimal mistakes, the court may not take notice thereof,

(3) where the copy contains important omissions or discrepancies of a vital nature, which are likely to cause prejudice to the defence of the returned candidate, it cannot be said that there has been a substantial compliance with the provisions of Section 81(3) of the Act,

(4) prima facie, the statute uses the words ‘true copy’ and the concept of substantial compliance cannot be extended too far to include serious or vital mistakes which shed the character of a true copy so that the copy furnished to the returned candidate cannot be said to be a true copy within the meaning of Section 81(3) of the Act, and

(5) as Section 81(3) is meant to protect and safeguard the sacrosanct electoral process so as not to disturb the verdict of the voters, there is no room for giving a liberal or broad interpretation of the provisions of the said section.”

25. It may be mentioned that in all the above decisions cited at the Bar, the

document in question had been filed in the court along with the election petition, but a copy of that document was not supplied to the respondent with the copy of the election petition. In those cases wherein the annexed document was treated to be incorporated by reference in the election petition forming an integral part of the election petition, non-supply of a copy of the document was held to be fatal warranting dismissal of the election petition under Section 86(1) for non-compliance of Section 81(3). In the other cases, the document was filed with the election petition, but the contents thereof were also incorporated in the body of the election petition, a copy of which had been supplied to the respondent even though copy of that document was not furnished in addition. In those cases, non-supply of a copy of the document was held not to be non-compliance of Section 81(3) because the document annexed to the election petition was treated as evidence of the averments contained in the body of the election petition, a copy of which had been furnished to the respondent. This is the gist of these decisions which also indicates that the question has to be answered with reference to the kind of use made of the document annexed to the petition, whether as an integral part of the election petition or merely as evidence of the pleadings contained in the body of the election petition.

26. In the present case, the video cassettes, non-supply of a copy of transcript of which is urged by Shri Jethmalani to be a ground for non-compliance of Section 81(3), were not even filed in the High Court with the election petition in the High Court. This is, therefore, not a case of non-supply of a copy of a document which was filed along with the election petition. What was

supplied to the returned candidate in the present case, was a true copy of the election petition as it was presented in the court without the video cassettes of which mere mention was made without incorporating its contents by reference or enumerating it in the election petition. It is not the case of the election petitioner that the full contents of the video cassettes or their transcripts are incorporated by reference in the election petition in order to make the video cassettes an integral part of the election petition, inasmuch as no video cassette was filed along with the election petition as it was presented in the High Court. Reliance is placed by the election petitioner on the video cassettes produced later during the trial as only evidence of the pleading in paras 32 and 33 of the election petition. It is, therefore, clear that the contents of the video cassettes, except to the extent pleaded in paras 32 and 33 of the election petition, cannot be treated to be incorporated by reference in the election petition as a part of the pleadings and its use is sought to be made by the election petitioner only as evidence of the averments contained in paras 32 and 33 of the election petition. Admittedly, a true copy of the election petition as presented in the High Court was furnished to the returned candidate along with the notice of the election petition. There was thus no non-compliance of sub-section (3) of Section 81 of the R.P. Act. The election petition was, therefore, not liable to be dismissed under Section 86(1) even on the ground of non-compliance of Section 81(3) of the R.P. Act.

43. In the instant case there is no doubt that page nos. 116 and 119 were duly attested as true copies and supplied to the respondent no1 as part of the election petition. Merely because the pages were

illegible, will not be a ground for dismissal of the election petition in as much as to justify a dismissal of the election petition on account of violation of condition prescribed under Section 81(3) of the Act, 1951 where it has to be shown that the documents which were part of the election petition were not supplied at all or the documents supplied are not the true copies. In case certain documents are not legible, the defect of such a nature which is a curable and cannot lead to dismissal of the election petition. Such a consequence is not even envisaged on the reading of Section 81(3) of the Act of 1951. Second part of Section 81(3) of the Act, 1951, in our view, is satisfied if the copy is attested by the election petitioner to be true copies of the election petitions under his own signature. In our view, the defects as noted above cannot lead us to hold that election petitions should be rejected for non-compliance of Section 81(3) of the Act, 1951 as copies served on the respondent No.1 cannot be treated to be "true copies" within the meaning of the second part of Section 81(3) of the Act, 1951, and accordingly the argument in this regard made by the respondent no.1 is rejected.

D3. INFIRMITY IN FORM 26
FILED BY THE ELECTION
PETITIONER

44. The respondent no. 1 in his objections has also submitted that the affidavit filed by the election petitioner alongwith his nomination form in Form 26, had infirmities inasmuch, he has not filed the same in accordance with the directions issued by the Election Commission and has not even complied with the judgment of Hon'ble Apex Court where he is duty bound to disclose all the criminal cases

pending against him, and accordingly prays for rejection of election petitioner at the very outset.

45. It is noticed that objections raised by respondent no. 1 relate to the affidavit filed by the election petitioner before the Returning Officer, and the allegations are recriminatory in nature and these issues cannot be decided as preliminary issue as they are not covered under Section 86 of the Act, 1951 as such objections do not fall within the purview of Section 81, 82 and 117 of the Act, 1951 and hence this Court declines to examine the said issue as a preliminary issue and accordingly said arguments are rejected at this stage.

E. Civil Misc, Application No. 11
of 2022
(Under Order VI Rule 16 CPC)

46. Counsel the respondent has also pressed his Application No. 11 of 2022 under Order VI Rule 16 CPC for striking of the objectionable pleadings made in the election petition. It has been submitted That the District Election Officer, Pratapgarh had issued a press note on 29/01/2022 that elections with regard to the 7 constituencies of district Pratapgarh including 250 Raniganj would be held in the 5th phase of elections on 27/02/2022. Subsequently notification was issued where the number and name of the constituency was specified where again it was described as 250 Raniganj. After the elections the respondent No.1 was declared elected by the returning officer of 250 Raniganj Assembly Constituency, Pratapgarh, and accordingly it was emphatically submitted that the correct name of the constituency is 250 Raniganj, and despite the aforesaid, the election petitioner in paragraphs Nos. 7 and

37 of the election petition has stated that he is a registered voter of constituency which is comprised of 13 Pratapgarh constituency. It has been submitted that 13 Pratapgarh is not even in existence in the State of U.P and the election petitioner claiming to be a voter of such a constituency would not be entitled to challenge the election of respondent no.1 from 250 Raniganj.

47. The counsel for the election petitioner has vehemently denied the allegations levelled by the respondent no.1 and submitted that merely due to typographical error in paragraph No. 7 and 37 the constituency from where the petitioner and other private parties in the present election petition had contested the election has been described as “250 Raniganj assembly constituency comprised within 13-Pratapgarh constituency”. It has been submitted that in the entire election petition there is no doubt that election of the returned candidate from 250 Raniganj has been questioned, and the correct name of the constituency namely 250 Raniganj has occurred at about 16 places in the election petition, while at 2 places in addition to 250 Raniganj it has been mentioned “assembly constituency comprised within 13 Pratapgarh constituency”. It is stated that there can be no confusion about the identity of the constituency from which the election petitioner had contested election, or from where the returned candidate was declared elected, and the typographical error which has occurred in paragraph No. 7 and 37 of the election petition also does not indicate that the averments were with respect to some other constituency rather than 250 Raniganj, and therefore submitted that the objections are frivolous and misconceived and liable to be rejected.

48. I have heard the counsel the parties, and the issue for determination is as to whether the pleadings of paragraph No. 7 and 37 of the election petition should be deleted/stuck out as they are unnecessary, scandalous, frivolous or vexatious as per Order VI Rule 16(a) of CPC.

49. Order VI Rule 16 of the Civil Procedure Code permits striking out pleadings which are unnecessary, scandalous, frivolous, or vexatious or which may tend to prejudice, embarrass or delay a fair trial at any stage of the proceedings. It does not admit to any exception that the respondent must file written statement before the preliminary objections can be entertained. If, therefore, a preliminary objection is raised before commencement of the trial, the court is duty bound to consider the same. It need not wait for the filing of the written statement by the defendant and point out defects. Instead, it can proceed to hear the preliminary objection and strike out the pleadings.

50. Section 80 of the Act, 1951 provides that no election is to be called in question except by an election petition presented in accordance with the provisions of Part VI of the Act, 1951 before the High Court. Section 81 provides that an election petition may be presented on one or more of the grounds specified in Section 100 of the Act, 1951 by an elector or by a candidate questioning the election of a returned candidate. Section 83 of the Act, 1951 provides that an election petition shall contain a concise statement of material facts on which the petitioner relies, and he shall set forth full particulars of infirmities in the nomination form of the returned candidate due to which it is contended that it should have been rejected. Section 86 of

the Act, 1951 confers power on the High Court to dismiss an election petition which does not comply with the provisions of Sections 81 and 82 or Section 117 of the Act, 1951. Section 87 of the Act, 1951 deals with the procedure to be followed in the trial of the election petition and it lays down that subject to the provisions of the Act and of any rules made thereunder, every election petition shall be tried by the High Court as nearly as may be in accordance with the procedure applicable to the trial of suits under the Code of Civil Procedure, 1908.

51. The perusal of the election petition would indicate that there is no doubt that the election petitioner has assailed the election of the returned candidate, i.e respondent No. 1 from the constituency described as to 250 Raniganj which is in District Pratapgarh. The correct description of the constituency has been stated in paragraph number 2, 3, 5, 6 in ground A, 32, 33, 35, 36, 37, 68 and 74 as well as in prayer I & II. In paragraph No. 37 the description of the constituency 250 Raniganj has been stated at 2 places, and at the latter part of the paragraph it has been described as “assembly constituency comprised within 13 Pratapgarh constituency” and the same error is existing in paragraph no. 37.

52. It is the aforesaid circumstances that this Court has been called upon to examine the contention of the respondent No. 1 that the pleadings in paragraph No. 7 and 37 deserve to be stuck out.

53. It has been fairly submitted by the counsel for the petitioner that the addition of the words “assembly constituency comprised within 13

Pratapgarh constituency” to 250 Raniganj is a typographical error, but it does not change the nature of the case, or the name of the constituency and perusal of the entire petition would show that there was no doubt that the election of the returned candidate from 250 Raniganj has been challenged by him. He further submitted that even with the error, it cannot be said that the contents of the election petition in the aforesaid paragraphs are either unnecessary, scandalous, frivolous or vexatious or the election petition does not disclose the cause of action.

54. On careful examination of the rival submission, it is evident that in the entire election petition the reference to the constituency in question is referred to as 250 Raniganj. At 2 places, in paragraph 7 and 37 in addition to 250 Raniganj it has been further described as “assembly constituency comprised within 13 Pratapgarh constituency”. The respondent no.1 had to demonstrate that in case the description of the constituency as stated by the election petitioner in paragraph 7 and 37 would lead a reasonable person to believe that the election petition pertains to constituency other than 250 Raniganj. These additional words (assembly constituency comprised within 13 Pratapgarh constituency) to the correct description of the constituency (250 Raniganj) do not materially alter the description of the constituency, nor can a reasonable person believe that the election petitioner is referring to some other constituency other than 250 Raniganj. It is further noticed that in the prayer clause the correct description has been stated, also in the remaining paragraphs of the election petition the correct name has been mentioned. The inadvertent typographical error in the present case does not amount

to unnecessary, scandalous, frivolous or vexatious pleading and consequently the same cannot be struck out. Such an error can always be cured by an appropriate application at the behest of the election petitioner, and there cannot be any objection to the same. In exercise of power under order VI rule 16 until and unless the court comes to conclusion that the pleadings are unnecessary, scandalous, frivolous or vexatious they cannot be struck out, and it is a duty of the applicant to demonstrate that the said pleadings fall into the specified category as provided. The respondent no.1 has only emphasized on the typographical error, rather than bringing home the point that the said typographical error amounts to being unnecessary, scandalous, frivolous or vexatious. In the present case the submission was only to the extent that the error in description of the constituency goes to the root of the matter and consequently prayed for dismissal of the petition. The said contention on behalf of respondent No. 1 is not made out in light of the discussion aforesaid, and there is no doubt that the correct name of the constituency has been stated in the entire election petition except at 2 places where in addition to the name of the constituency “assembly constituency comprised within 13 Pratapgarh constituency” have been added. No reasonable person can be misguided with regard to the name of the constituency from which the election is being challenged in the present petition. The aforesaid typographical error is not substantial in nature, and accordingly the prayer of the petitioner for striking out of the pleading is not made out as the said error does not amount to “unnecessary, scandalous, frivolous or vexatious”. The prayer for striking out of the pleadings of paragraph No. 7 and 37 is rejected.

F. Civil Misc. Application No. 2 of 2023

Civil Misc. Application No. 17 of 2023

(For deletion of respondent no. 14 from the array of parties)

And

G. Civil Misc. Application No. 19 of 2023

(For release of EVMs)

55. Another ground raised by the respondent no.1 is that the Returning Officer has been made a respondent in the election petition, which is contrary to the provisions contained in Section 82 of the Act of 1951 according to which only the candidates can be made parties, and further submitted that any violation of Section 82 entails dismissal of the election petition as per Section 86 of the Act of 1951.

56. The aforesaid ground has been taken by respondent no.1 by filing an Application No. 17 of 2023 on 22/03/2023. This Court is further considering the Application No. 2 of 2023 filed on behalf of respondent no. 14, i.e the Returning Officer praying for deletion of respondent no.14 from the array of parties, and also application No. 19 of 2023 filed on behalf of respondent 14 to release the EVM's as there is no controversy in the present case regarding the EVMs.

57. Learned counsel for the petitioner on the other hand submitted that there are allegations against the Returning Officer who illegally accepted the nomination form of respondent no.1 and therefore he is a proper party, but further submitted that in case the Court comes to the opinion that he should not have been made a party, he undertakes to delete the returning officer as a party in the present

case. It was further submitted that merely because the Returning Officer has been made a party the election petition cannot be dismissed, even if it is found that he is not a necessary or proper party or that section 82 prohibits making him a party, as such a defect even if determined to be existing in the election petition, is a curable defect and the Court has abundant powers to direct deletion of a party, if the same has been improperly made.

58. This issue was extensively dealt by the Hon'ble Supreme Court in the case of **Jyoti Basu vs Debi Ghosal, (1982) 1 SCC 691** where it was held that the election petition is guided by the provisions contained in the Representation of People's Act, 1951. Section 82 provides for parties to the petition, where the returned candidate may be arrayed as respondent in case only the election is challenged, while in case there is a prayer to declare the election petitioner as elected, then all the candidates have to be arrayed as parties. The relevant extract taken from **Jyoti Basu v. Debi Ghosal, (supra)** is as under:-

9. Section 81 prescribes who may present an election petition. It may be any candidate at such election; it may be any elector of the constituency; it may be none else. Section 82 is headed "Parties to the petition" and clause (a) provides that the petitioner shall join as respondents to the petition the returned candidates if the relief claimed is confined to a declaration that the election of all or any of the returned candidates is void and all the contesting candidates if a further declaration is sought that he himself or any other candidate has been duly elected. Clause (b) of Section 82 requires the petitioner to join as respondent any other candidate against whom allegations of any corrupt practice

are made in the petition. Section 86(4) enables any candidate not already a respondent to be joined as a respondent. There is no other provision dealing with the question as to who may be joined as respondents. It is significant that while clause (b) of Section 82 obliges the petitioner to join as a respondent any candidate against whom allegations of any corrupt practice are made in the petition, it does not oblige the petitioner to join as a respondent any other person against whom allegations of any corrupt practice are made. It is equally significant that while any candidate not already a respondent may seek and, if he so seeks, is entitled to be joined as a respondent under Section 86(4), any other person cannot, under that provision seek to be joined as a respondent, even if allegations of any corrupt practice are made against him. It is clear that the contest of the election petition is designed to be confined to the candidates at the election. All others are excluded. The ring is closed to all except the petitioner and the candidates at the election. If such is the design of the statute, how can the notion of "proper parties" enter the picture at all? We think that the concept of "proper parties" is and must remain alien to an election dispute under the Representation of the People Act, 1951. Only those may be joined as respondents to an election petition who are mentioned in Section 82 and Section 86(4) and no others. However desirable and expedient it may appear to be, none else shall be joined as respondents.

10. It is said, the Civil Procedure Code applies to the trial of election petitions and so proper parties whose presence may be necessary in order to enable the court "effectually and completely to adjudicate upon and settle all questions involved" may be joined as respondents to the petitions.

The question is not whether the Civil Procedure Code applies because it undoubtedly does, but only "as far as may be" and subject to the provisions of the Representation of the People Act, 1951 and the Rules made thereunder. Section 87(1) expressly says so. The question is whether the provisions of the Civil Procedure Code can be invoked to permit that which the Representation of the People Act does not. Quite obviously the provisions of the Code cannot be so invoked. In Mohan Raj v. Suendra Kumar Taparia [AIR 1969 SC 677 : (1969) 1 SCR 630 : (1969) 2 SCJ 198] this Court held that the undoubted power of the Court (i.e. the Election Court) to permit an amendment of the petition cannot be used to strike out allegations against a candidate not joined as a respondent so as to save the election petition from dismissal for non-joinder of necessary parties. It was said:

"The court can order an amendment and even strike out a party who is not necessary. But where the Act makes a person a necessary party and provides that the petition shall be dismissed if such a party is not joined, the power of amendment or to strike out parties cannot be used at all. The Civil Procedure Code applies subject to the provisions of the Representation of the People Act and any rules made thereunder (see Section 87). When the Act enjoins the penalty of dismissal of the petition for non-joinder of a party the provisions of the Civil Procedure Code cannot be used as a curative means to save the petition."

59. Again, in **K. Venkateswara Rao v. Bakkam Narasimha Reddi** [AIR 1969 SC 872] the Apex Court observed as under :-

"With regard to the addition of parties which is possible in the case of a

suit under the provisions of Order 1 Rule 10 subject to the added party's right to contend that the suit as against him was barred by limitation when he was impleaded, no addition of parties is possible in the case of an election petition except under the provisions of sub-section (4) of Section 86."

11. The matter may be looked at from another angle. Parliament has expressly provided that an opportunity should be given to a person who is not a candidate to show cause against being "named" as one guilty of a corrupt practice. Parliament however, has not thought fit to expressly provide for his being joined as a party to the election petition either by the election petitioner or at the instance of the very person against whom the allegations of a corrupt practice are made. The right given to the latter is limited to show cause against being "named" and that right opens up for exercise when, at the end of the trial of the election petition notice is given to him to show cause why he should not be "named". The right does not extend to participation at all stages and in all matters, a right which he would have if he is joined as a party at the commencement. Conversely the election petitioner cannot by joining as a respondent a person who is not a candidate at the election subject him to a prolonged trial of an election petition with all its intricacies and ramifications. One may well imagine how mischievous minded persons may harass public personages like the Prime Minister of the country, the Chief Minister of a State or a political leader of a national dimension by impleading him as a party to election petitions, all the country over. All that would be necessary is a seemingly plausible allegation, casually or spitefully made, with but a facade of truth. Everyone is familiar with such allegations.

To permit such a public personage to be impleaded as a party to an election petition on the basis of a mere allegation, without even prima facie proof, an allegation which may ultimately be found to be unfounded, can cause needless vexation to such personage and prevent him from the effective discharge of his public duties. It would be against the public interest to do so. The ultimate award of costs would be no panacea in such cases, since the public mischief cannot be repaired. That is why Public Policy and legislative wisdom both seem to point to an interpretation of the provisions of the Representation of the People Act which does not permit the joining, as parties, of persons other than those mentioned in Sections 82 and 86(4). It is not as if a person guilty of a corrupt practice can get away with it. Where at the concluding stage of the trial of an election petition, after evidence has been given, the court finds that there is sufficient material to hold a person guilty of a corrupt practice, the court may then issue a notice to him to show cause under Section 99 and proceed with further action. In our view the legislative provision contained in Section 99 which enables the court, towards the end of the trial of an election petition, to issue a notice to a person not a party to the proceeding to show cause why he should not be "named" is sufficient clarification of the legislative intent that such person may not be permitted to be joined as a party to the election petition.

12. There is yet another viewpoint. When in an election petition in addition to the declaration that the election of the returned candidate is void a further declaration is sought that any candidate other than the returned candidate has been duly elected. Section 97 enables the returned candidate or any other party to "recriminate" i.e. to give evidence to prove

that the election of such candidate would have been void if he had been a returned candidate and a petition had been presented to question his election. If a person who is not a candidate but against whom allegations of any corrupt practice are made is joined as a party to the petition then, by virtue of his position as a party, he would also be entitled to "recriminate" under Section 97. Surely such a construction of the statute would throw the doors of an election petition wide open and convert the petition into a "free for all" fight. A necessary consequence would be an unending, disorderly election dispute with no hope of achieving the goal contemplated by Section 86(6) of the Act that the trial of the election petition should be concluded in six months. It is just as well to remember that "corrupt practice" as at present defined by Section 123 of the Act is not confined to the giving of a bribe but extends to the taking of a bribe too and, therefore, the number of persons who may be alleged to be guilty of a corrupt practice may indeed be very large, with the consequence that all of them may possibly be joined as respondents.

13. In view of the foregoing discussion we are of the opinion that no one may be joined as a party to an election petition otherwise than as provided by Sections 82 and 86(4) of the Act. It follows that a person who is not a candidate may not be joined as a respondent to the election petition. The appeal is therefore, allowed with costs and the names of the appellants and the 7th respondent in the appeal are directed to be struck out from the array of parties in the election petition. We may mention that in arriving at our conclusion we have also considered the following decisions cited before us: S.B. Adityan v. S. Kandaswami [AIR 1958 Mad 171 : ILR 1958 Mad 279 : (1958) 1 Mad LJ

61] ; *Dwijendra Lal Sen Gupta v. Harekrishna Konar* [AIR 1963 Cal 218 : 66 Cal WN 917] , *H.R. Gokhale v. Bharucha Noshir C.* [AIR 1969 Bom 177 : 70 Bom LR 466] ; and *S. Iqbal Singh v. S. Gurdas Singh Badal* [AIR 1973 P & H 163 : ILR (1972) 1 Punj 554] .

60. The question whether the Election Commission of India is a necessary party in the election petition, was considered by the Supreme Court in the case of **B. Sundara Reddy vs Election Commission of India, 1991 (Supp2) SCC 624** and Supreme Court duly considered and relied upon the judgement in the case of **Jyoti Basu (supra)** and held that:-

3. After hearing learned counsel for the petitioner we do not find any merit in the petition. Section 82 of the Representation of the People Act, 1951 specifies the persons who are required to be joined as respondents to an election petition. Under this provision the returned candidate is a necessary party as a respondent and where relief for a declaration is claimed that the election petitioner, or any other candidate be duly elected, all the contesting candidates are necessary to be impleaded as respondents to the petition. No other person or authority except as aforesaid is required to be impleaded as a respondent to an election petition under the Act. The Election Commission of India is therefore not a necessary party to an election petition.

4. Learned counsel for the petitioner urged that even if the Election Commission may not be a necessary party, it was a proper party since its orders have been challenged in the election petition. He further urged that since Civil Procedure Code, 1908 is applicable to trial of an election petition the concept of proper

*party is applicable to the trial of election petition. We find no merit in the contention. Section 87 of the Act lays down that subject to the provisions of the Act and any rules made thereunder, every election petition shall be tried by the High Court, as nearly as may be in accordance with the procedure applicable under the Code of Civil Procedure, 1908 to the trial of suits. Provisions of the Civil Procedure Code have thus been made applicable to the trial of an election petition to a limited extent as would appear from the expression "subject to the provisions of this Act". Since Section 82 designates the persons who are to be joined as respondents to the petition, provisions of the Civil Procedure Code, 1908 relating to the joinder of parties stands excluded. Under the Code even if a party is not necessary party, he is required to be joined as a party to a suit or proceedings if such person is a proper party, but the Representation of the People Act, 1951 does not provide for joinder of a proper party to an election petition. The concept of joining a proper party to an election petition is ruled out by the provisions of the Act. The concept of joinder of a proper party to a suit or proceeding underlying Order I of the Civil Procedure Code cannot be imported to the trial of election petition, in view of the express provisions of Sections 82 and 87 of the Act. The Act is a self-contained Code which does not contemplate joinder of a person or authority to an election petition on the ground of proper party. In *K. Venkateswara Rao v. Bekkam Narasimha Reddi* [AIR 1969 SC 872 : (1969) 1 SCR 679] , this Court while discussing the application of Order I Rule 10 of the Civil Procedure Code to an election petition held that there could not be any addition of parties in the case of an election petition except under the provisions of sub-section*

(4) of Section 86 of the Act. Again in Jyoti Basu v. Debi Ghosal [(1982) 1 SCC 691 : (1982) 3 SCR 318] , this Court held that the concept of 'proper party' is and must remain alien to an election dispute under the Representation of the People Act, 1951. Only those may be joined as respondents to an election petition who are mentioned in Section 82 and Section 86(4) and no others. However desirable and expedient it may appear to be, none else shall be joined as respondents.

61. The law in this regard has been settled by the Supreme Court where it has clearly been held that only the persons prescribed under Section 82 of the Act of 1951 can be arrayed as parties to the election petition, and the concept of proper party would be alien to the proceedings of the election petition, which would be guided only by the statutory prescription contained in the Representation of People Act 1951. Thus, the issue in this regard is out of the ambit of any debate, and the returning officer is not a necessary party to the election petition which is designed to be confined to the candidates at the election. All others are excluded. The ring is closed to all except the petitioner and the candidates at the election.

62. Once it is concluded that the returning officer has incorrectly been made a respondent in the instant election petition, then, the question arises as to whether the election petition deserves to be dismissed on this account, or this court can direct the election petitioner to delete respondent no.14 from the array of parties? Counsel for respondent no.1 has relied upon the judgement of the Kerala High Court in the case of **Saritha S. Nair Vs Rahul Gandhi, 2020 AIR (Kerala) 26** where it is submitted that the High Court has

dismissed the election petition and one of the objections raised therein was that the Election Commission of India and the returning officer had been made parties in the election petition. It was further vehemently submitted that the Special Leave Petition against the aforesaid judgement of Kerala High Court was dismissed by the Hon'ble Supreme Court on 16/12/2022 in SLP (C) No. 4200/2020, and therefore it is a binding precedent which deserves to be followed in the present case also.

63. Considering the submissions of counsel for respondent No. 1 in this regard, I have carefully perused the judgement of the Kerala High Court in the case of **Saritha S. Nair Vs Rahul Gandhi (supra)**. The Kerala High Court had observed that there were several defects in the election petition including the fact that the election petition was not verified and signed by the petitioner, there was no prayer to declare the election of the return candidate as void and the sentence of the election petitioner had been suspended while the conviction had not been suspended and she was held to be disqualified as per provisions of Article 102 of the Constitution of India, and accordingly held that the rejection of the nomination paper of the petitioner was in accordance with law.

64. With regard to the issue pertaining to joining of returning officer as a party in the election petition, an objection was raised by the counsel for the Election Commission for being removed from the array of parties, and after due consideration, the Kerala High Court had held that the said "officials were unnecessary parties to the election petition" and removed them from the array of

parties. Therefore, even the Kerala High Court did not dismiss the election petition on the ground that the returning officer was made a respondent in the election petition. The election petition was dismissed for other incurable defects in the election petition which were with regard to the criminal antecedents of the election petitioner, and his conviction had not been stayed by the trial Court. Accordingly, this Court is of the considered view that in case persons other than the candidate are arrayed as a party, then the Court has sufficient powers to direct deletion of such parties, and on this account election petition cannot be dismissed as it is a curable defect and is not a defect of substantial nature for which the election petition should be dismissed. Even the Supreme Court in the case of **Jyoti Basu vs Debi Ghosal (supra)** had proceeded to direct deletion of the returning Officer and the Election Commission from the array of parties rather than dismissing the election petition.

65. Accordingly, the objection raised by respondent No. 1 is allowed and respondent No. 14 (Returning Officer) is directed to be deleted from the array of parties. Application No. 2 of 2023 preferred on behalf of respondent no. 14 is **allowed**. With regard to the Application No. 17 of 2023, all the parties expressed that they do not wish to oppose the said application with regard to return of EVM's for use of the Election Commission, and there is no reason why they should be held up till the final determination of the instant case, in as much as, there is no dispute with regard to the number of votes polled or with any issue regarding the EVM's and accordingly the Application No. 17 of 2023 is also **allowed**.

H. OBJECTIONS AS TO THE DEFECT IN THE AFFIDAVIT

66. Next objection raised by the Counsel for respondent no.1 is with regard to the defect in the affidavit filed in support of the election petition. The objections are:-

a. There is no column for swearing of paragraphs of pleadings made in the affidavit on base of personal knowledge.

b. The election petitioner has failed to make compliance with regard to the mandatory requirements of subrule (1) & (2) of rule 15 of order VI CPC.

c. There is no affidavit to prove the facts stated in the election petition.

67. This Court had proceeded to examine the election petition, as well as the affidavit in support of the election petition, to test the allegations levelled by the respondent No. 1. On page 46 of the election petition the reliefs prayed for have been stated, ending with the signature of the election petitioner, and page 47 commences with the verification where most of the paragraphs stated therein have been sworn on personal knowledge, thereafter certain paragraphs have been sworn on basis of records and 2 paragraphs have been stated to be true on the basis of legal advice, and thereafter it has been signed by the election petitioner, and below the signatures of the election petitioner is the signature of Advocate, oath Commissioner.

68. Section 83 of the Act of 1951 provides for the content of the petition which is as follows: -

83. Contents of petition. (1) An election petition—

(a) shall contain a concise statement of the material facts on which the petitioner relies;

(b) shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and

(c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings:

Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.]

(2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition.

69. Rule 94A of the Conduct of Election Rules, 1961 also refers to the requirement of filing of an affidavit along with election petition in the following terms:-

94A. Form of affidavit to be filed with election petition.—The affidavit referred to in the proviso to subsection (1) of section 83 shall be sworn before a magistrate of the first class or a notary or a commissioner of oaths and shall be in Form 25.

70. According to Section 83 sub-clause (c) of the Act, 1951 the election petition is to be signed and verified in the manner laid down in the Code of Civil Procedure. Order VI Rule 15 CPC provides for verification of pleadings which is as under:-

15. Verification of pleadings. —

(1) Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case. (2) The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believed to be true.

(3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed.

(4) The person verifying the pleading shall also furnish an affidavit in support of his pleadings

71. A perusal of the election petition, and more specifically the verification at the end of it, indicates that the election petitioner has duly verified the pleadings by referring it to the paragraph numbers of the election petition and stating that which of the paragraphs have been found on the basis of personal knowledge, record and legal advice and to that extent there is no infirmity in the same and it is in consonance with Order VI Rule 15(1) & (2) CPC.

72. The verification has also been signed by the election petitioner and it also been stated that the same has been done on 18th day of April 2022 at Lucknow and hence provisions of Order VI Rule 15 (3) CPC have also been duly complied and we do not find any infirmity with the same.

73. At this stage is also pertinent to notice that the allegations in the present case against the returned candidate is with regard to the improper acceptance of his

nomination by the returning officer, and not with regard to the corrupt practices, and consequently proviso to Section 83 of Act of 1951 will not apply in the present case which provides for an additional affidavit to be filed in support of the allegations with regard to the corrupt practices.

74. As per Section 139 of the Code of Civil Procedure, the oath on affidavit can be administered by any Court or Magistrate, or any Notary appointed under the Notaries Act, 1952. Further, provisions of Order XIX CPC provide for the matters to which the affidavit shall be filed, and it has been provided that the affidavit shall be confined to such facts as the deponent is able on his own knowledge to prove. Similarly, Section 295 and 296 of the Criminal Procedure Code provide for giving evidence on affidavit.

75. From the aforesaid statutory provisions, it can safely be concluded that an affidavit is a statement of a person either on oath or on affirmation. If the Court permits such a statement to be given by a witness in relation to matters of fact under enquiry, such a statement is called oral evidence. The Court has also got powers under Order XIX C.P.C. in civil matters to direct a witness to file an affidavit in relation to matters of fact under inquiry. In criminal proceedings also, the Code of Criminal Procedure empowers the Court to require a witness to file an affidavit in relation to matters of fact under inquiry. Sections 295 and 296 of the Cr.P.C. empower the Court in the course of inquiry, trial or other proceeding under the Code requiring evidence of the facts to be given by an affidavit. Section 296 gives the general power to the Court with the rider that if an application is given by the prosecution or the accused, the Court shall

summon and examine any such person as to the facts contained in his affidavit. Being thus empowered by law, the Court has got the discretion either to permit or require a witness to file an affidavit in relation to matters of facts under inquiry, trial or other proceedings.

76. In the present case, it is noticed that the election petition is supported only by verification of the pleadings. There is no solemn affirmation or oath either before any magistrate or before the Notary Public, and the oath commissioner has merely signed below the name of the election petitioner after the verification. In absence of the solemn affirmation or oath, the document cannot be called an affidavit and accordingly, there is no doubt that the essential ingredients of affidavit are lacking, and hence it can safely be concluded that there is no affidavit in support of the election petition as required under Order VI Rule 15(4) CPC.

77. Once this Court has come to a conclusion that the election petition is not supported by an affidavit, then the consequences for the said infirmity are required to be considered next. The submission of respondent no. 1 is that the infirmity is relatable to Section 83(c) of the Act of 1951 and liable to be dismissed as per Section 86 of the said Act.

78. The provision of Chapter II of the 1951 Act relate to the presentation of election petition to the High Court, and Section 83 of the Act, 1951 which forms part of Chapter II deals with the condition of election petition to be filed. The proviso to sub-section (c) of Section 83 of the Act, 1951 also provides for filing of an affidavit in the prescribed form in support of allegations of corrupt practice. In other

words, when corrupt practices are alleged in an election petition, the source of such allegation has to be disclosed and the same has to be supported by an affidavit filed in support thereof.

79. Counsel for the respondent no.1 has relied upon the judgement of the Supreme Court in the case of **P.A. Mohammed Riyas v. M.K. Raghavan, (2012) 5 SCC 511** it was held:-

47. In our view, the objections taken by Mr P.P. Rao must succeed, since in the absence of proper verification as contemplated in Section 83, it cannot be said that the cause of action was complete. The consequences of Section 86 of the 1951 Act come into play immediately in view of sub-section (1) which relates to trial of election petitions and provides that the High Court shall dismiss the election petition which does not comply with the provisions of Section 81 or Section 82 or Section 117 of the 1951 Act. Although Section 83 has not been mentioned in sub-section (1) of Section 86, in the absence of proper verification, it must be held that the provisions of Section 81 had also not been fulfilled and the cause of action for the election petition remained incomplete. The petitioner had the opportunity of curing the defect, but it chose not to do so.

80. This aspect of the matter was also considered by the Supreme Court in the case of **Ponnala Lakshmaiah v. Kommuri Pratap Reddy, (2012) 7 SCC 788** where it was held that in case of any infirmity in the affidavit, the same was a curable defect and does not lead to dismissal of the election petition. Relevant paragraphs of the rendition of the Supreme Court are reproduced as under:-

“9. We may also gainfully refer to the decision of this Court in H.D. Revanna v. G. Puttaswamy Gowda [(1999) 2 SCC 217] where this Court held that an election petition can be dismissed for non-compliance with Sections 81, 82 and 117 of the Representation of the People Act, 1951 but it may also be dismissed if the matter falls within the scope of Order 6 Rule 16 or Order 7 Rule 11 CPC. A defect in the verification of the election petition or the affidavit accompanying the election petition was held to be curable, hence, not sufficient to justify dismissal of the election petition under Order 7 Rule 11 or Order 6 Rule 16 CPC. The following passage in this regard is instructive:

“14. ... the relevant provisions in the Act are very specific. Section 86 provides for dismissal of an election petition in limine for non-compliance with Sections 81, 82 and 117. Section 81 relates to the presentation of an election petition. It is not the case of the appellant before us that the requirements of Section 81 were not complied with.... Sections 82 and 117 are not relevant in this case. Significantly, Section 86 does not refer to Section 83 and non-compliance with Section 83 does not lead to dismissal under Section 86. This Court has laid down that non-compliance with Section 83 may lead to dismissal of the petition if the matter falls within the scope of Order 6 Rule 16 or Order 7 Rule 11 CPC. Defect in verification of the election petition or the affidavit accompanying the election petition has been held to be curable and not fatal.”

22. Even otherwise the question whether non-compliance with the proviso to Section 83(1) of the Act is fatal to the election petition is no longer res integra in the light of a three-Judge Bench decision of this Court in Sardar Harcharan Singh Brar v. Sukh Darshan Singh [(2004) 11

SCC 196] . In that case a plea based on a defective affidavit was raised before the High Court resulting in the dismissal of the election petition. In appeal against the said order, this Court held that non-compliance with the proviso to Section 83 of the Act did not attract an order of dismissal of an election petition in terms of Section 86 thereof. Section 86 of the Act does not provide for dismissal of an election petition on the ground that the same does not comply with the provisions of Section 83 of the Act. It sanctions dismissal of an election petition for non-compliance with Sections 81, 82 and 117 of the Act only. Such being the position, the defect if any in the verification of the affidavit filed in support of the petition was not fatal, no matter the proviso to Section 83(1) was couched in a mandatory form.

23. This Court observed: (Sukh Darshan case [(2004) 11 SCC 196] :-

“14. So is the case with the defect pointed out by the High Court in the affidavit filed in support of the election petition alleging corrupt practice by the winning candidate. The proviso enacted to sub-section (1) of Section 83 of the Act is couched in a mandatory form inasmuch as it provides that a petition alleging corrupt practice shall be accompanied by an affidavit in the prescribed form in support of the allegations of such corrupt practice and the particulars thereof. The form is prescribed by Rule 94-A. But at the same time, it cannot be lost sight of that failure to comply with the requirement as to filing of an affidavit cannot be a ground for dismissal of an election petition in limine under sub-section (1) of Section 86 of the Act. The point is no more *res integra* and is covered by several decisions of this Court. Suffice it to refer to two recent decisions, namely, *G. Mallikarjunappa v. Shamanur Shivashankarappa* [(2001) 4 SCC 428]

and *Vijay Laxmi Sadho v. Jagdish* [(2001) 2 SCC 247] , both three-Judge Bench decisions, wherein the learned Chief Justice has spoken for the Benches. It has been held that an election petition is liable to be dismissed in limine under Section 86(1) of the Act if the election petition does not comply with either the provisions of ‘Section 81 or Section 82 or Section 117 of the RP Act’. The requirement of filing an affidavit along with an election petition, in the prescribed form, in support of the allegations of corrupt practice is contained in Section 83(1) of the Act. Non-compliance with the provisions of Section 83 of the Act, however, does not attract the consequences envisaged by Section 86(1) of the Act. Therefore, an election petition is not liable to be dismissed in limine under Section 86 of the Act, for alleged non-compliance with the provisions of Section 83(1) or 83(2) of the Act or of its proviso. The defect in the verification and the affidavit is a curable defect. What other consequences, if any, may follow from an allegedly ‘defective’ affidavit, is required to be judged at the trial of an election petition but Section 86(1) of the Act in terms cannot be attracted to such a case.”

25. To the same effect is the decision of a three-Judge Bench of this Court in *G. Mallikarjunappa v. Shamanur Shivashankarappa* [(2001) 4 SCC 428] . The High Court had in that case also dismissed the election petitions taking the view that there had been non-compliance with Rule 94-A of the Conduct of Elections Rules, 1961 inasmuch as the affidavit filed in support of the allegations of corrupt practices with the election petitions did not comply with the requirements of the format as prescribed in Form 25. Allowing the appeal this Court observed:

“7. An election petition is liable to be dismissed in limine under Section 86(1)

of the Act if the election petition does not comply with either the provisions of 'Section 81 or Section 82 or Section 117 of the RP Act'. The requirement of filing an affidavit along with an election petition, in the prescribed form, in support of the allegations of corrupt practice is contained in Section 83(1) of the Act. Non-compliance with the provisions of Section 83 of the Act, however, does not attract the consequences envisaged by Section 86(1) of the Act. Therefore, an election petition is not liable to be dismissed in limine under Section 86 of the Act, for alleged non-compliance with the provisions of Section 83(1) or 83(2) of the Act or of its proviso. The defect in the verification and the affidavit is a curable defect. What other consequences, if any, may follow from an allegedly 'defective' affidavit, is required to be judged at the trial of an election petition but Section 86(1) of the Act in terms cannot be attracted to such a case."

81. A similar view was taken by a three-Judge Bench of this Court in *F.A. Sapa v. Singora* [(1991) 3 SCC 375] and in *Vijay Laxmi Sadho v. Jagdish* [(2001) 2 SCC 247]

"31. Suffice it to say, that in the absence of any provision making breach of the proviso to Section 83(1) a valid ground of dismissal of an election petition at the threshold, we see no reason why the requirement of filing an affidavit in a given format should be exalted by a judicial interpretation to the status of a statutory mandate. A petition that raises triable issues need not, therefore, be dismissed simply because the affidavit filed by the petitioner is not in a given format no matter the deficiency in the format has not caused any prejudice to the successful candidate and can be cured by the election petitioner by filing a proper affidavit."

82. A similar view was taken by the Supreme Court in the case of **Sardar Harcharan Singh Brar v. Sukh Darshan Singh, (2004) 11 SCC 196**, where it was held:-

*"14. So is the case with the defect pointed out by the High Court in the affidavit filed in support of the election petition alleging corrupt practice by the winning candidate. The proviso enacted to sub-section (1) of Section 83 of the Act is couched in a mandatory form inasmuch as it provides that a petition alleging corrupt practice shall be accompanied by an affidavit in the prescribed form in support of the allegations of such corrupt practice and the particulars thereof. The form is prescribed by Rule 94-A. But at the same time, it cannot be lost sight of that failure to comply with the requirement as to filing of an affidavit cannot be a ground for dismissal of an election petition in limine under sub-section (1) of Section 86 of the Act. The point is no more res integra and is covered by several decisions of this Court. Suffice it to refer to two recent decisions namely *G. Mallikarjunappa v. Shamanur Shivashankarappa* [(2001) 4 SCC 428] and *Vijay Laxmi Sadho (Dr.) v. Jagdish* [(2001) 2 SCC 247], both three-Judge Bench decisions, wherein the learned Chief Justice has spoken for the Benches. It has been held that an election petition is liable to be dismissed in limine under Section 86(1) of the Act if the election petition does not comply with either the provisions of "Section 81 or Section 82 or Section 117 of the RP Act". The requirement of filing an affidavit along with an election petition, in the prescribed form, in support of allegations of corrupt practice is contained in Section 83(1) of the Act. Non-compliance with the provisions of*

Section 83 of the Act, however, does not attract the consequences envisaged by Section 86(1) of the Act. Therefore, an election petition is not liable to be dismissed in limine under Section 86 of the Act, for alleged non-compliance with provisions of Section 83(1) or (2) of the Act or of its proviso. The defect in the verification and the affidavit is a curable defect. What other consequences, if any, may follow from an allegedly “defective” affidavit, is required to be judged at the trial of an election petition but Section 86(1) of the Act in terms cannot be attracted to such a case.

15. Having formed an opinion that there was any defect in the affidavit, the election petitioner should have been allowed an opportunity of removing the defect by filing a proper affidavit. Else the effect of such failure should have been left to be determined and adjudicated upon at the trial, as held in G. Mallikarjunappa case [(2001) 4 SCC 428].

83. In the backdrop of two seemingly conflicting views of the Supreme Court where in the case of **P.A. Mohammed Riyas (supra)** it was held that in case the affidavit was not in the prescribed format with regard to the allegations of corrupt practice then the defect in the form of petition would be relatable to Section 81 of the Act of 1951 for which the election petition should be rejected as per provisions of Section 86 of the Act of 1951. It is also noted that the defect was not removed despite the grant of opportunity. The other 2 cases considered above namely **Ponnala Lakshmaiah v. Kommuri Pratap Reddy (supra)** and **Sardar Harcharan Singh Brar v. Sukh Darshan Singh (Supra)** the Supreme Court has held that defect in affidavit is a curable defect, and the election petition

cannot be out rightly dismissed on this account.

84. The issue as to whether the defect in the affidavit in an election petition is a curable defect or otherwise has been dealt with extensively in the case of **Saritha S. Nair v. Hibi Eden, (2021) 14 SCC 148** where all the previous judgements have been considered and relevant observations are quoted hereunder: -

“33. Section 83(1)(c) mandates that an election petition shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure for verification of pleadings. Signing a petition and verifying the petition are two different aspects. While Order 6 Rule 14 deals with the signing of the petition, Order 6 Rule 15 deals with the verification of pleading. Rule 14 mandates that every pleading shall be signed by the party as well as the pleader, if any. But the proviso carves out an exception by stating that where a party is unable to sign the pleading, by reason of absence or for other good cause, it may be signed by any person duly authorised by him to sign the same or to sue or defend on his behalf. Order 6 Rule 14 reads as follows:

“14. Pleading to be signed.—Every pleading shall be signed by the party and his pleader (if any):

Provided that where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorised by him to sign the same or to sue or defend on his behalf.”

34. Order 6 Rule 15 which speaks about verification of pleadings reads as follows:

“15. Verification of pleadings.—(1) Save as otherwise provided by any law

for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case.

(2) The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believed to be true.

(3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed.

(4) The person verifying the pleading shall also furnish an affidavit in support of his pleadings.”

35. It is to be noted that sub-rule (1) of Rule 15 of Order 6 also permits the verification of pleading to be done by a person other than the party pleading, provided it is proved to the satisfaction of the Court that such other person was acquainted with the facts of the case.

36. Section 86(1) empowers the High Court to dismiss an election petition which does not comply with the provisions of Section 81, Section 82 or Section 117 and it does not include Section 83 within its ambit. Therefore, the question whether or not an election petition which does not satisfy the requirements of Section 83, can be dismissed at the pre-trial stage under Section 86(1), has come up repeatedly for consideration before this Court. We are concerned in this case particularly with the requirement of clause (c) of sub-section (1) of Section 83 and the consequence of failure to comply with the same.

37. In Murarka Radhey Shyam Ram Kumar v. Roop Singh Rathore [Murarka Radhey Shyam Ram Kumar v. Roop Singh

Rathore, AIR 1964 SC 1545] , a preliminary objection to the maintainability of the election petition was raised on the ground that the verification was defective. The verification stated that the averments made in some paragraphs of the petition were true to the personal knowledge of the petitioner and the averments in some other paragraphs were verified to be true on advice and information received from legal and other sources. There was no statement that the advice and information received by the election petitioner were believed by him to be true. Since this case arose before the amendment of the Act under Act 47 of 1966, the election petition was dealt with by the Tribunal. The Tribunal held the defect in the verification to be a curable defect. The view of the Tribunal was upheld by this Court in Murarka Radhey Shyam Ram Kumar [Murarka Radhey Shyam Ram Kumar v. Roop Singh Rathore, AIR 1964 SC 1545] . This Court held that :

“8. ... it is impossible to accept the contention that a defect in verification which is to be made in the manner laid down in the Code of Civil Procedure, 1908 for the verification of pleadings as required by clause (c) of sub-section (1) of Section 83 is fatal to the maintainability of the petition.”

(emphasis supplied)

38. The ratio laid down in Murarka [Murarka Radhey Shyam Ram Kumar v. Roop Singh Rathore, AIR 1964 SC 1545] was reiterated by a three-member Bench of this Court in F.A. Sapa v. Singora [F.A. Sapa v. Singora, (1991) 3 SCC 375] holding that : (F.A. Sapa case [F.A. Sapa v. Singora, (1991) 3 SCC 375] ,

“21. ... [the] mere defect in the verification of the election petition is not fatal to the maintainability of the petition and the petition cannot be thrown out solely on that ground.”

(emphasis supplied)

It was also held in F.A. Sapa [F.A. Sapa v. Singora, (1991) 3 SCC 375] that :

“21. ... since Section 83 is not one of three provisions mentioned in Section 86(1), ordinarily it cannot be construed as mandatory unless it is shown to be an integral part of the petition under Section 81.”

(emphasis supplied)

39. In F.A. Sapa [F.A. Sapa v. Singora, (1991) 3 SCC 375] this Court framed two questions in para 20 of the Report, as arising for consideration. The first question was as to what is the consequence of a defective or incomplete verification. While answering the said question, this Court formulated the following principles :

(i) A defect in the verification, if any, can be cured:

(ii) It is not essential that the verification clause at the foot of the petition or the affidavit accompanying the same should disclose the grounds or sources of information in regard to the averments or allegations which are based on information believed to be true:

(iii) If the respondent desires better particulars in regard to such averments or allegations, he may call for the same, in which case the petitioner may be required to supply the same; and

(iv) The defect in the affidavit in the prescribed Form 25 can be cured unless the affidavit forms an integral part of the petition, in which case the defect concerning material facts will have to be dealt with, subject to limitation, under Section 81(3) as indicated earlier.

40. It was also held in F.A. Sapa [F.A. Sapa v. Singora, (1991) 3 SCC 375] that though an allegation involving corrupt practice must be viewed very seriously and the High Court should ensure compliance with the requirements of

Section 83 before the parties go to trial, the defective verification of a defective affidavit may not be fatal. This Court held that the High Court should ensure its compliance before the parties go to trial. This decision was followed by another three-member Bench in R.P. Moidutty v. P.T. Kunju Mohammad [R.P. Moidutty v. P.T. Kunju Mohammad, (2000) 1 SCC 481] .

41. In Harcharan Singh Brar v. Sukh Darshan Singh [Harcharan Singh Brar v. Sukh Darshan Singh, (2004) 11 SCC 196] , this Court held that though the proviso to Section 83(1) is couched in a mandatory form, requiring a petition alleging corrupt practice to be accompanied by an affidavit, the failure to comply with the requirement cannot be a ground for dismissal of an election petition in limine under Section 86(1). The Court reiterated that non-compliance with the provisions of Section 83 does not attract the consequences envisaged by Section 86(1) and that the defect in the verification and the affidavit is a curable defect. The following portion of the decision is of significance :

“14. ... Therefore, an election petition is not liable to be dismissed in limine under Section 86 of the Act, for alleged non-compliance with provisions of Section 83(1) or (2) of the Act or of its proviso. The defect in the verification and the affidavit is a curable defect. What other consequences, if any, may follow from an allegedly “defective” affidavit, is required to be judged at the trial of an election petition but Section 86(1) of the Act in terms cannot be attracted to such a case.”

(emphasis supplied)

42. In K.K. Ramachandran Master v. M.V. Sreyamakumar [K.K. Ramachandran Master v. M.V. Sreyamakumar, (2010) 7 SCC 428] , this Court followed F.A. Sapa [F.A. Sapa v.

Singora, (1991) 3 SCC 375] and Harcharan Singh Brar [Harcharan Singh Brar v. Sukh Darshan Singh, (2004) 11 SCC 196] to hold that defective verification is curable. The Court again reiterated that the consequences that may flow from a defective affidavit is required to be judged at the trial of an election petition and that such election petition cannot be dismissed under Section 86(1).

43. Though all the aforesaid decisions were taken note of by a two-member Bench in *P.A. Mohammed Riyas v. M.K. Raghavan [P.A. Mohammed Riyas v. M.K. Raghavan, (2012) 5 SCC 511]*, the Court held in that case that the absence of proper verification may lead to the conclusion that the provisions of Section 81 had not been fulfilled and that the cause of action for the election petition would remain incomplete. Such a view does not appear to be in conformity with the series of decisions referred to in the previous paragraphs and hence *P.A. Mohammed Riyas [P.A. Mohammed Riyas v. M.K. Raghavan, (2012) 5 SCC 511]* cannot be taken to lay down the law correctly. It appears from the penultimate paragraph of the decision in *P.A. Mohammed Riyas [P.A. Mohammed Riyas v. M.K. Raghavan, (2012) 5 SCC 511]* that the Court was pushed to take such an extreme view in that case on account of the fact that the petitioner therein had an opportunity to cure the defect, but he failed to do so. Therefore, *P.A. Mohammed Riyas [P.A. Mohammed Riyas v. M.K. Raghavan, (2012) 5 SCC 511]* appears to have turned on its peculiar facts. In any case *P.A. Mohammed Riyas [P.A. Mohammed Riyas v. M.K. Raghavan, (2012) 5 SCC 511]* was overruled in *G.M. Siddeshwar v. Prasanna Kumar [G.M. Siddeshwar v. Prasanna Kumar, (2013) 4 SCC 776 : (2013) 2 SCC (Civ) 715]* on the

question whether it is imperative for an election petitioner to file an affidavit in terms of Order 6 Rule 15(4) of the Code of Civil Procedure, 1908 in support of the averments made in the election petition in addition to an affidavit (in a case where resort to corrupt practices have been alleged against the returned candidate) as required by the proviso to Section 83(1). As a matter of fact, even the filing of a defective affidavit, which is not in Form 25 as prescribed by the Rules, was held in G.M.

Siddeshwar [G.M. Siddeshwar v. Prasanna Kumar, (2013) 4 SCC 776 : (2013) 2 SCC (Civ) 715] to be a curable defect and the petitioner was held entitled to an opportunity to cure the defect.

44. The upshot of the above discussion is that a defective verification is a curable defect. An election petition cannot be thrown out in limine, on the ground that the verification is defective.”

85. In the present case the election is accompanied by verification and all the paragraphs of the election petition have been verified either in personal knowledge, record or legal advice. The said verification has also been made before oath Commissioner, but there is no solemn affirmation required under Rule 94A of the Act, 1951. With no solemn affirmation of oath it cannot be said that the election petition is duly supported by an affidavit. The said infirmity can be duly cured by filing another affidavit, and the election petition cannot be dismissed barely because there is a defect in the affidavit. We have also considered the fact that the present election petition is not based on allegations of corrupt practices, and therefore there is no requirement of additional affidavit as per proviso to Section 83 of the Act, 1951. The divergent view of the Supreme Court has been set at rest in the case of **Saritha S.**

Nair v. Hibi Eden (Supra). Even in the case of **P.A. Mohammed Riyas (supra)** where the election petition was dismissed for the defect in the affidavit, has been overruled by the Supreme Court in the case **G.M. Siddeshwar v. Prasanna Kumar, (2013) 4 SCC 776** and accordingly is no longer good law. The defect in the affidavit is a curable defect, and therefore on the basis of such a defect the election petition cannot be dismissed. Accordingly, the objections of the respondent no.1 in this regard are rejected. The election petitioner is granted two weeks' time to file a fresh affidavit in accordance with law.

86. List this case on 02.05.2024.

(2024) 4 ILRA 1298

APPELLATE JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 22.03.2024

BEFORE

**THE HON'BLE ASHWANI KUMAR MISHRA, J.
THE HON'BLE SYED QAMAR HASAN RIZVI, J.**

Special Appeal No. 291 of 2024

State of U.P. & Ors.	...Appellants
Versus	
Shyam Kewal Ram	...Respondent

Counsel for the Appellants:

C.S.C., Sri Tej Bhanu Pandey

Counsel for the Respondents:

Sri Ganesh Shankar Dubey, Sri Upendra Upadhyay

A. Service Law – Disciplinary inquiry – Punishment – Reversion – Enquiry Officer exonerated the petitioner from charge no. 1, 2 & 3 due to its being not proved, but the disciplinary authority disagreed and imposed major punishment of reversion – No reasons was disclosed by the disciplinary authority for disagreeing with

the conclusions arrived at by the inquiry officer – Permissibility – Held, recording of reasons in the show cause notice for disagreeing with the opinion of inquiry officer has a definite purpose to subserve. It gives an opportunity to the delinquent employee to offer his explanation on the issues that have weighed with the disciplinary authority – The delinquent employee was denied opportunity to effectively put U.P. his defense in respect of charge nos. 1, 2 and 3. (Para 5, 6 and 7)

Appeal dismissed. (E-1)

List of Cases cited:

1. P.N.B.Vs Kunj Behari Misra; 1998 (7) SCC 84

2. St. Bank of India & ors. Vs Mohammad Badruddin; 2019 (16) SCC 69

(Delivered by Hon'ble Ashwani Kumar Mishra, J. & Hon'ble Syed Qamar Hasan Rizvi, J.)

1. This appeal arises out of the judgment and order dated 13.3.2023 passed by learned Single Judge allowing the writ petition filed by the respondent-petitioner against imposition of punishment vide order dated 24.3.2008.

2. It transpires that disciplinary inquiry was initiated against the writ petitioner by the disciplinary authority with service of charge-sheet dated 19.1.2006. The inquiry officer ultimately submitted a report in which he found charge nos.1,2 and 3 not to be proved. Charge no.4 was in respect of the temporary embezzlement in which the inquiry officer found the petitioner to be guilty. It transpires that a notice dated 12.11.2007 was issued by the disciplinary authority who had disagreed with the conclusion of the inquiry officer with regard to exoneration of the writ petitioner in respect of charge nos.1,2 and

3. Writ petitioner submitted a reply to this notice whereafter the major punishment of reversion to basic pay was imposed by the disciplinary authority upon the petitioner.

3. Learned Single Judge has found the procedure for imposition of such punishment to be unsustainable, inasmuch as proper opportunity was denied to the writ petitioner to defend himself. Thus aggrieved, the State is before us challenging the judgment of learned Single Judge.

4. We have heard learned State counsel as well as Sri Upendra Upadhyay, learned counsel for the respondent-petitioner and have perused the materials on record.

5. The facts, as have been noticed above, are not in issue. We have perused the show cause notice dated 12.11.2007, issued by the disciplinary authority, whereby he had disagreed with the conclusions drawn by the inquiry officer while exonerating the delinquent employee of charge nos.1,2 and 3. This notice only records the reasons for which the inquiry officer had exonerated the delinquent employee. Absolutely no reasons have been disclosed by the disciplinary authority for disagreeing with the conclusions arrived at by the inquiry officer. It is, therefore, urged on behalf of the writ petitioner that in the absence of reasons disclosed to the delinquent employee, by the disciplinary authority, for disagreeing with the opinion of the inquiry officer, the delinquent employee was denude of opportunity to explain the circumstances or his defense in that regard.

6. Recording of reasons in the show cause notice for disagreeing with the opinion of inquiry officer has a definite purpose to subserve. It gives an opportunity

to the delinquent employee to offer his explanation on the issues that have weighed with the disciplinary authority. In a case where the disciplinary authority does not record reasons for his disagreement with the opinion of the inquiry officer the delinquent employee will be denuded of his right to effectively explain his defense regarding reasons of disagreement. The law in that regard has been settled by the Supreme Court in Punjab National Bank vs. Kunj Behari Misra 1998 (7) SCC 84, wherein the Court has clearly observed that reasons of disagreement must be disclosed to the delinquent employee in order to enable him to effectively meet the material which is proposed to be relied upon against him. Para 17 and 19 of the judgment are relevant for the present purposes and are reproduced hereinafter:-

"17.....The principles of natural justice would demand that the authority which proposes to decide against the delinquent officer must give him a hearing. When the enquiring officer holds the charges to be proved, then that report has to be given to the delinquent officer who can make a representation before the disciplinary authority takes further action which may be prejudicial to the delinquent officer. When, like in the present case, the enquiry report is in favour of the delinquent officer but the disciplinary authority proposes to differ with such conclusions, then that authority which is deciding against the delinquent officer must give him an opportunity of being heard for otherwise he would be condemned unheard. In departmental proceedings, what is of ultimate importance is the finding of the disciplinary authority.

19.....As a result thereof, whenever the disciplinary authority disagrees with the enquiry authority on any

article of charge, then before it records its own findings on such charge, it must record its tentative reasons for such disagreement and give to the delinquent officer an opportunity to represent before it records its findings. The report of the enquiry officer containing its findings will have to be conveyed and the delinquent officer will have an opportunity to persuade the disciplinary authority to accept the favourable conclusion of the enquiry officer. The principles of natural justice, as we have already observed, require the authority which has to take a final decision and can impose a penalty, to give an opportunity to the officer charged of misconduct to file a representation before the disciplinary authority records its findings on the charges framed against the officer."

The aforesaid point of law has been reaffirmed by the Apex Court in *State Bank of India & Ors. vs. Mohammad Badruddin* (2019) 16 SCC 69.

7. In the facts of the present case, we are inclined to concur with the view taken by the learned Single Judge that in fact reasons of disagreement were not disclosed to the delinquent employee by the disciplinary authority. In such view of the matter, the delinquent employee was denied opportunity to effectively put up his defense in respect of charge nos.1,2 and 3. So far as charge no.4 is concerned, the only allegation found proved against the writ petitioner was that he had belatedly deposited the government money. The disciplinary authority had already imposed a minor punishment by the order under challenge, inasmuch as adverse entry was awarded to the employee concerned. It transpires that major punishment has been imposed upon the writ petitioner primarily on account of his implication in other

charges which were impermissible, in view of the discussions held above.

8. In such circumstances, the view taken by the learned Single Judge to quash the major punishment of reversion of basic pay scale requires no interference. We are also cognizant of the fact that the writ petitioner had otherwise superannuated. In that view of the matter, we are of the view that no interference in the present appeal is required which, consequently, fails and is, accordingly, dismissed.

(2024) 4 ILRA 1300
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.03.2024

BEFORE

THE HON'BLE MANJIVE SHUKLA, J.

Writ -A No. 2941 of 2020
 With
 Writ -A No. 8011 of 2020

Smt. Anusuiya Sharma **...Petitioner**
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:
 Sri Bheem Singh

Counsel for the Respondents:
 C.S.C., Sri Sanjay Kumar Srivastava, Sri Suresh Kumar Maurya

A. Service Law – Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 – Cancellation of Special BTC Training Certificate – Charge of using fake disability certificate was leveled – The petitioner met with a serious accident – After examination by the Medical Board in 2006, CMO issued the Disability Certificate declaring the petitioner 50% disable – Petitioner was re-examined in 2018 after litigation U.P.to the S.U.P.reme Court, in

which she was found 20% physical disability – Petitioner’s disability certificate dated 20.07.2006 was never declared to be a forged and fabricated document – Effect – Held, medical board which examined the petitioner on 14.11.2018 did not consider the earlier disability certificate dated 20.07.2006 and no finding has been recorded that the disability certificate dated 20.07.2006 is not a genuine certificate or at the time of issuance of disability certificate dated 20.07.2006, petitioner was not properly examined by the medical board – There cannot be any occasion to punish the petitioner even if there has been any error on the part of medical board while issuing disability certificate dated 20.07.2006. (Para 31, 34, 35, 36 and 37)

Writ petition allowed. (E-1)

(Delivered by Hon'ble Manjive Shukla, J.)

1. Heard learned counsel appearing for the petitioner, learned Standing Counsel appearing for the State respondents including the Examination Regulatory Authority, U.P., Prayagraj and Sri Suresh Kumar Maurya, learned counsel appearing for the District Basic Education Officer, Firozabad.

2. Since both the writ petitions are inter-connected and decision of Writ-A No. 8011 of 2020 is dependent on the decision of Writ-A No. 2941 of 2020, therefore they have been connected together and are being decided by the common judgement.

3. Petitioner through Writ-A No. 2941 of 2020 has challenged the orders dated 31.10.2019 and 22.01.2020 whereby petitioner’s Special B.T.C. Training Certificate has been cancelled. Petitioner through Writ-A No. 8011 of 2020 has challenged the order dated 13.03.2020 passed by the District Basic Education

Officer, Firozabad whereby petitioner’s appointment has been declared to be void-ab-initio.

FACTS OF THE CASE:

4. Facts of the case, in brief, are that petitioner having requisite educational qualifications, applied for admission in Special B.T.C. Training, 2007 under physically disabled (general women) category. Petitioner along with her application, annexed the disability certificate dated 20.07.2006 issued by the Chief Medical Officer, Firozabad whereby it was certified that petitioner suffers with 50% partial permanent disability.

5. Petitioner completed her Special B.T.C. Training from District Institute for Education and Training (hereinafter to be referred as “DIET”), Harchandpur Kalan, District Etah and was issued Special B.T.C. Training Certificate by the Respondent No. 3 i.e. Examination Regulatory Authority, U.P., Prayagraj. On the strength of the said Special B.T.C. Training Certificate, petitioner was duly appointed on the post of Assistant Teacher in Primary School Chirawali, District Etah/Kashiram Nagar vide appointment order dated 3.7.2009. Petitioner submitted her joining on the aforesaid post on 6.07.2009 and started getting salary from the State Exchequer. Subsequently petitioner was transferred from District Etah to District Firozabad and was posted as Assistant Teacher in Primary School Nagla Sonth, Block Narkhi, District Firozabad.

6. It appears that certain complaints were made to the State Government wherein allegation was levelled that certain candidates have obtained appointment by using fake

disability certificates therefore, State Government issued a Government Order on 10.11.2009 whereby direction was given for constituting fresh medical board and to verify disability of the candidates. The Director, State Council for Educational Research and Training (hereinafter referred to as "SCERT"), U.P., Lucknow also issued a letter addressed to all the Principals of DIET whereby direction was given for verification of the disability of the candidates who passed out the Special B.T.C. course, through fresh medical board.

7. The Government Order dated 10.11.2009 and the order dated 15.07.2010 were challenged by filing *Civil Misc. Writ Petition No. 53152 of 2010 (Ravindra Kumar Sharma and Others Vs. State of U.P. and Others)* but learned Single Judge of this Court dismissed the writ petition vide order dated 31.08.2010. The judgement and order dated 31.08.2010 was challenged in Special Appeal No. 811 of 2010 and the Division Bench of this Court disposed of the Special Appeal with a direction that firstly respondents will verify the genuineness of the disability certificate of the candidates and once it is found that the certificate is fake, only then they will be subjected to disability test by the fresh medical board. The judgement and order dated 9.09.2010 passed in *Special Appeal No. 811 of 2010* was challenged by the State of U.P. through *S.L.P. (C) No. 8880 of 2011 (State of U.P. and Others Vs. Ravindra Kumar Sharma and Others)*. The Hon'ble Supreme Court vide judgement and order dated 03.02.2016 set-aside the aforesaid judgement and order dated 9.09.2010 passed by the Division Bench of this Court in Special Appeal No. 811 of 2010 and further provided that before taking any action against the individuals, they shall be issued show cause

in the matter and thereafter decision will be taken in accordance with law.

8. In compliance of the aforesaid judgement rendered by the Hon'ble Supreme Court, Principal, DIET, Harchandpur Kalan, Etah issued a show cause notice on 24.05.2018 wherein it was stated that petitioner has used a forged and fabricated disability certificate to secure her admission in the Special B.T.C. Training Course, 2007 and therefore, cause may be shown as to why Special B.T.C. Training Certificate issued to the petitioner may not be cancelled. Petitioner in response to the show cause notice dated 24.05.2018 submitted her reply wherein she categorically stated that Disability Certificate No. 1549 issued to the petitioner by the Chief Medical Officer, Firozabad on 20.07.2006 is a genuine document and at no point of time, it has been found that the said certificate has not been issued by the competent authority.

9. Principal, DIET, Harchandpur Kalan, District Etah vide his notice dated 15.10.2018 required the petitioner to appear before the medical board headed by the Deputy Chief Medical Officer, Lucknow on 14.11.2018 and to get her disability certified. Petitioner in compliance of the notice dated 15.10.2018 appeared before the medical board and the said medical board issued certificate wherein petitioner's disability has been found to be 20%.

10. Principal, DIET, Harchandpur Kalan, Etah again issued a show cause notice to the petitioner on 27.02.2019 wherein he cited the disability certificate dated 14.11.2018 issued by the fresh medical board and thereby stated that under the Persons with Disabilities (Equal Opportunities, Protection of Rights and

Full Participation) Act, 1995 (hereinafter to be referred as “the Act of 1995”), 40% disability is must for claiming the benefit of reservation under the Physically Disabled Category whereas her disability has been found only 20% as such, it is apparent that she has used forged and fabricated disability certificate for securing her admission in Special B.T.C. Training Course, 2007 therefore, she may show cause as to why her candidature for Special B.T.C. Training Course, 2007 may not be cancelled. Petitioner submitted her reply to the aforesaid show cause notice on 12.03.2019 wherein she categorically stated that the Disability Certificate No. 1549 issued to her by Chief Medical Officer, Firozabad on 20.07.2006 is a genuine document and at no point of time, it has been found that the same is either forged or fabricated. Petitioner in her reply further submitted that she met with a serious accident and thereby she became disabled. She applied for disability certificate and she was subjected to medical examination by medical board and thereafter disability certificate was issued by the Chief Medical Officer, Firozabad whereby it was certified that petitioner suffers from 50% partial permanent disability. Petitioner in her reply also categorically stated that she is in continuous medical treatment with effect from the date of her accident therefore, merely because the fresh medical board which was constituted after about 12 years has reported that petitioner is having only 20% disability, it cannot be presumed that the medical certificate dated 26.07.2006 is a forged and fabricated document.

11. Though, show cause notice for cancelling candidature of the petitioner of the Special B.T.C. Training Course, 2007 was issued by the Principal, DIET, Harchandpur Kalan, Etah, but all of a

sudden, Secretary Examination Regulatory Authority, U.P., Allahabad has passed the order dated 31.10.2019 wherein it is mentioned that on the basis of information related with non-certification of the disability of certain candidates, on the directions of Director, S.C.E.R.T., U.P., Lucknow, Result Committee in its meetings held on 19.03.2019 and 21.10.2019 has taken decision to cancel the certificates of Special B.T.C. Training, 2007 issued to the petitioner and other candidates.

12. Petitioner has challenged the order dated 31.10.2019 passed by the Secretary, Examination Regulatory Authority, U.P., Prayagraj which recites that Result Committee of the Examination Regulatory Authority, U.P., Prayagraj in its meetings held on 19.03.2019 and 21.10.2019 has taken decision to cancel the Special B.T.C. Training Certificate issued to the petitioner, by filing Writ-A No. 2941 of 2020.

13. On the strength of the order dated 31.10.2019 passed by the Secretary, Examination Regulatory Authority, U.P., Prayagraj, the District Basic Education Officer, Firozabad issued notices to the petitioner on 3.02.2020, 13.02.2020 and 22.02.2020 whereby he directed petitioner to appear before him on the date fixed and to submit her reply along with evidence as her Special B.T.C. Training Certificate has been cancelled by the Secretary, Examination Regulatory Authority, U.P., Prayagraj vide order dated 31.10.2019. Petitioner in response to the aforesaid notices, submitted application on 15.02.2020 whereby she requested for providing copies of the letters dated 31.10.2015 and 13.05.2016 and further she filed an application on 28.02.2020 whereby she submitted that the disability certificate

was duly issued by the Chief Medical Officer, Firozabad.

14. The District Basic Education Officer, Firozabad has passed order on 13.03.2020 whereby petitioner's appointment on the post of Assistant Teacher has been declared to be void-ab-initio only for the reason that her Special B.T.C. Training Certificate has been cancelled by the Secretary, Examination Regulatory Authority, U.P., Prayagraj vide order dated 31.10.2019.

15. Petitioner has challenged the order dated 13.03.2020 passed by the District Basic Education Officer, Firozabad by filing Writ-A No. 8011 of 2020.

SUBMISSIONS ON BEHALF OF PETITIONER:

16. Learned counsel appearing for the petitioner has submitted that petitioner suffered disability out of an accident. She applied for disability certificate and was subjected to thorough medical examination by the medical board at district Firozabad and accordingly she was issued Disability Certificate No. 1549 on 20.07.2006 under the signatures of the Chief Medical Officer, Firozabad.

17. It is not the case of respondents that the aforesaid disability certificate dated 20.07.2006 has not been issued by a competent medical board and therefore, any action against the petitioner treating the said disability certificate to be a forged and fabricated document, is unsustainable in the eyes of law. It has further been submitted on behalf of the petitioner that both the medical boards i.e. medical board which examined the petitioner at the time of issuance of disability certificate dated

20.07.2006 which found her to be having 50% partial permanent disability and the medical board which examined the petitioner at the time of issuance of disability certificate dated 14.11.2018 and found her to be having 20% disability, have examined the petitioner as per their methods and standards of examination but the fact remains that petitioner is a disabled person and her Disability Certificate No. 1549 dated 20.07.2006 is a genuine document. It has also been submitted that there may be possibility of error in the decisions taken by both the aforesaid medical boards and for that, petitioner cannot be held responsible that too after about 14 years from the date of issuance of disability certificate. There may also be possibility that due to proper medical treatment, the disability of the petitioner may have been reduced from 50% to 20% but by no stretch of imagination, it can be said that the petitioner does not suffer from physical disability and her Disability Certificate dated 20.07.2006 is a forged and fabricated document.

18. Learned counsel appearing for the petitioner has contended that the provisions of the Act of 1995 provides that any person who suffers with 40% disability will be termed as 'disabled person' and shall be entitled for benefits of reservation under the disabled category meaning thereby that both the categories of persons i.e. persons suffering with more than 40% permanent disability and the persons suffering with more than 40% disability are entitled for benefit of reservation for different purposes provided under the Act of 1995, therefore the disability certificate dated 20.07.2006 thereby describing petitioner to be 50% partially permanent disabled, the percentage of disability may have reduced due to medical treatment but

by no stretch of imagination, it can be inferred that petitioner has committed any fraud or forgery therefore, petitioner cannot be penalized for the errors in the decision making process or any other error committed by the two medical boards before whom petitioner has been subjected to medical examination.

19. It has been argued by the learned counsel appearing for the petitioner that the Result Committee of the Examination Regulatory Authority, U.P., Prayagraj has not considered the aforesaid issues at all and straightway has cancelled the Special B.T.C. Training Certificate issued to the petitioner only on the ground that since in the medical examination conducted by the medical board on 14.11.2018, she has been found to be having only 20% disability therefore, the decision taken by the Result Committee, communicated to the petitioner vide letter dated 31.10.2019 by the Secretary, Examination Regulatory Authority, U.P., Prayagraj, on its face, is erroneous.

20. Learned counsel appearing for the petitioner has vehemently argued that the authority which has cancelled the Special B.T.C. Training Certificate issued to the petitioner i.e. Result Committee of the Examination Regulatory Authority, U.P., Prayagraj, has not provided any opportunity of hearing to the petitioner and even has not issued any show-cause notice to the petitioner before taking decision to cancel the certificate, as such, decision of the Result Committee communicated to the petitioner vide letter dated 31.10.2019 by the Secretary, Examination Regulatory Authority, U.P., Prayagraj, on its face, is hit by the violation of the principles of natural justice. It has further been argued that had the Result Committee before taking

decision to cancel petitioner's B.T.C. Training certificate would have issued notice to the petitioner or would have afforded opportunity of hearing to the petitioner then it may have been explained to the Result Committee that it is not a case of forgery or fabricating any document but it is a case of different standards and methods adopted by the two different medical boards and it may be a case of error in decision making process adopted by the two different medical boards and therefore, petitioner cannot be held responsible and cannot be penalized.

21. Learned counsel appearing for the petitioner has also invited attention of this Court that in this case, a very unique method has been adopted as the show-cause notice was issued to the petitioner by the Principal, DIET who has no authority to cancel the Special B.T.C. Training Certificate issued to the petitioner whereas the competent authority i.e. Result Committee of the Examination Regulatory Authority, U.P., Prayagraj has not issued any show cause notice and without taking into consideration the reply of the petitioner, straightway has cancelled her Special B.T.C. Training Certificate therefore, the decision taken in the matter, stands vitiated due to non-observance of the principles of natural justice.

22. Learned counsel appearing for the petitioner has vehemently argued that it is not the case of the respondents that petitioner does not suffer from physical disability but it is a case of variance in the percentage of physical disability ascertained by two medical boards at a gap of about 12 years therefore, the essence of time is of paramount importance and it cannot be ignored that there may be an error in the decision making process

adopted by the medical boards and there may also be possibility of improvement in the percentage of physical disability of the petitioner, as such, it is absolutely arbitrary to cancel the Special B.T.C. Certificate after about 13 years and thereby to declare petitioner's appointment on the post of Assistant Teacher void-ab-initio after about 11 years.

23. Learned counsel appearing for the petitioner has also argued that petitioner was a regularly appointed and a confirmed Assistant Teacher working in a primary school therefore, her appointment could not have been cancelled without adopting due procedure prescribed under law i.e. without holding proper disciplinary inquiry as contemplated under the rules but the District Basic Education Officer has straightway passed the order on 13.03.2020 whereby petitioner's appointment has been declared to be void-ab-initio on the basis of the order dated 31.10.2019 issued by the Secretary, Examination Regulatory Authority, U.P., Prayagraj reciting therein that the Special B.T.C. Training Certificate issued to the petitioner, has been cancelled by the Result Committee.

24. Learned counsel appearing for the petitioner has thus concluded his arguments by submitting that at no point of time i.e. either at the time of cancellation of petitioner's Special B.T.C. Training Certificate by the Result Committee of the Examination Regulatory Authority, U.P., Prayagraj or at the time of passing of the order by the District Basic Education Officer, Firozabad declaring the petitioner's appointment as void-ab-initio, petitioner's case that she has not committed any forgery, has been considered in its true perspective, accordingly, writ petitions filed

by the petitioner are liable to be allowed by this Court.

SUBMISSIONS ON BEHALF OF RESPONDENTS:

25. Per-contra, learned Standing Counsel appearing for the Secretary, Examination Regulatory Authority, U.P., Prayagraj has submitted that petitioner on the basis of Disability Certificate No. 1549 issued by the Chief Medical Officer, Firozabad on 20.07.2006 has obtained admission in Special B.T.C. Training Course, 2007 and was issued certificate on completion of the said course but later on when on 14.11.2018, she was subjected to medical examination by the fresh medical board, it was found that she is suffering with only 20% physical disability whereas in the certificate dated 20.07.2006, she has been shown to be having 50% partial permanent disability, accordingly, it is manifest that the certificate dated 20.07.2006 is a forged and fabricated document and as such petitioner's Special B.T.C. Training Certificate has been cancelled which is perfectly in accordance with law. Learned Standing Counsel appearing for the Examination Regulatory Authority, U.P., Prayagraj has further submitted that petitioner was issued show cause notice by the Principal, DIET and thereafter decision has been taken by the Result Committee of the Examination Regulatory Authority, U.P., Prayagraj and the said decision was duly communicated to the petitioner vide letter dated 31.10.2019 by the Secretary, Examination Regulatory Authority therefore, it is absolutely incorrect to say that decision has been taken by the Result Committee without following the principles of natural justice.

26. Learned Standing Counsel has thus concluded his arguments and has submitted that once it has been found that petitioner is not suffering with minimum 40% physical disability required for availing the benefit of reservation under the disabled category, she is not entitled to continue with the Special B.T.C. Training Certificate and accordingly, same has been cancelled, therefore, writ petitions filed by the petitioner, being absolutely misconceived, are liable to be dismissed by this Court.

27. Mr. S.K. Maurya, learned counsel appearing for the District Basic Education Officer, Firozabad has submitted that since the Secretary, Examination Regulatory Authority, U.P., Prayagraj vide order dated 31.10.2019 has cancelled the Special B.T.C. Training Certificate issued in favour of the petitioner therefore, the District Basic Education Officer, Firozabad issued notices to the petitioner and thereafter has passed order on 13.03.2020 whereby petitioner's appointment has been declared to be void-ab-initio on the ground that since the basis of the appointment does not exist anymore, the appointment of the petitioner cannot sustain in the eyes of law.

28. Sri S.K. Maurya has further submitted that petitioner has been found to have used forged and fabricated disability certificate and, therefore the District Basic Education Officer, while declaring the petitioner's appointment void-ab-initio has not committed any error under law. It has thus been contended that the writ petitions filed by the petitioner, are liable to be dismissed by this Court.

FINDINGS:

29. I have considered the rival arguments advanced by the learned counsels appearing for the parties. For adjudicating the issues involved in these writ petitions, it is necessary to consider the provisions of the Act of 1995 and the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Rules, 1996 (hereinafter referred to as "the Rules of 1996"). Relevant provisions of the Act of 1995 and Rules of 1996 are extracted as under :-

Section 2(t) of the Act of 1995:

(t) "Person with disability" means a person suffering from not less than forty per cent. of any disability as certified by a medical authority;

Section 33 of the Act of 1995:

"33. Every appropriate Government shall appoint in every establishment such percentage of vacancies not less than three per cent. for persons or class of persons with disability of which one per cent. each shall be reserved for persons suffering from-

(i) Blindness or low vision;

(ii) Bearing impairment;

(iii) Loco motor disability or cerebral palsy, in the posts identified for each disability:

Provided that the appropriate Government may, having regard to the type of work carried on in any department or establishment, by notification subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section."

Section 39 of the Act of 1995:

"39. All Government educational institutions and other educational institutions receiving aid from the Government, shall reserve not less than three per cent seat for persons with disabilities."

Rule 4 of the Rules of 1996:

“4. Authorities to give Disability Certificate:- (1) A Disability Certificate shall be issued by a Medical Board duly constituted by the Central and the State Government.

(2) The State Government may constitute a Medical Board consisting of at least three members out of which at least one shall be a specialist in the particular field for assessing locomotor/Visual including low vision/hearing and speech disability, mental retardation and leprosy cured, as the case may be.”

Rule 5 of the Rules of 1996:

5. (1) The Medical Board shall, after due examination, give a permanent Disability Certificate in cases of such permanent disabilities where there are no chances of variation in the degree of disability.

(2) The Medical Board shall indicate the period of validity in the certificate, in cases where there is any chance of variation in the degree of disability.

(3) No refusal of Disability Certificate shall be made unless an opportunity is given to the applicant of being heard.

(4) On representation by the applicant, the Medical Board may review its decision having regard to all the facts and circumstances of the case and pass such order in the matter as it thinks fit.

30. The aforesaid provisions of the Act of 1995 clearly demonstrate that any person who is suffering with 40% of any disability certified by the medical authority shall be the “person with disability”. Section 39 of the Act of 1995 provides that all Government Educational Institutions

and other Educational Institutions receiving aid from Government shall reserve not less than 3% seats for persons with disability. Section 33 of the Act of 1995 provides that every appropriate Government shall appoint in every establishment such percentage of vacancies not less than 3 % for persons or class of persons with disability. Rule 4 of the Rules of 1996 provides that disability certificates shall be issued by a Medical Board duly constituted by the Central and the State Government. Rule 5(1) of the Rules of 1996 provides that the Medical Board in the cases of permanent disability where there are no chance of variation in the degree of disability shall issue certificate of permanent disability. Rules 5(2) further provides that Medical Board shall indicate the period of validity in the certificate in cases where there is any chance of variation in the degree of disability. The aforesaid provisions of the Act of 1995 read with Rule 4, 5(1) and 5(2) of the Rules of 1996 make it crystal clear that if a person is suffering with more than 40% disability then he is entitled for the reservation provided under the Act of 1995 irrespective of the fact whether the disability is permanent or the disability may be cured over a period of time. Thus it is patently manifest that there may be cases where the person on the date of examination by the Medical Board may be having more than 40% disability but over a period of time due to proper medical treatment his percentage of disability may improve.

31. The petitioner met with a serious accident and on 20.07.2006, she was examined by the duly constituted medical board and thereafter Chief Medical Officer, Firozabad issued Disability Certificate No. 1549 dated 20.07.2006. The aforesaid medical certificate provided that

petitioner is suffering with partial permanent disability and percentage of disability is 50 %. Petitioner, on the basis of the disability certificate dated 20.07.2006, was given admission in the Special B.T.C. Training Course, 2007 against the seat reserved for physically disabled candidates. Petitioner completed her training and she was issued Special B.T.C. Training Certificate on 22.06.2009. On the strength of the Special B.T.C. Training Certificate dated 22.06.2009, petitioner was appointed on the post of Assistant Teacher in a Primary School on 03.07.2009 and further, petitioner submitted her joining on the post of Assistant Teacher on 06.07.2009.

32. This Court finds that petitioner continued to discharge duties attached to her post since 06.07.2009 till 13.03.2020 and continued to receive salary from the State Exchequer.

33. It appears that the State Government issued Government Order dated 10.11.2009 whereby decision was taken to ask the candidates appointed on the posts of Assistant Teacher on the basis of disability certificate to appear before the medical board for fresh medical examination as there were certain complaints that various candidates have secured appointment on the posts of Assistant Teacher on the basis of forged and fabricated disability certificates. The Government Order dated 10.11.2009 was challenged in Civil Misc. Writ Petition No. 5315 of 2010 but the said writ petition was dismissed vide order dated 31.08.2010. Thereafter the order dated 31.08.2010 was challenged in Special Appeal No. 811 of 2010 which was disposed of vide order dated 09.09.2010 with the observation that the candidates shall be subjected to fresh

medical examination where the disability certificates issued in their favour are found to be forged and fabricated. The State Government challenged order dated 09.09.2010 passed in Special Appeal No. 811 of 2010 by filing ***Special Leave Petition (C) 8880 of 2011*** and Hon'ble Supreme Court vide judgment and order dated 03.02.2016 set aside the order passed in Special Appeal but provided that before taking action against any candidate, he/she shall be issued show cause in the matter and thereafter decision will be taken in accordance with law.

34. After the aforesaid judgment passed by the Hon'ble Supreme Court, Principal, DIET, Harchandpur Kalan, District Etah vide notice dated 15.10.2018 directed the petitioner to appear before the fresh medical board at Lucknow on 14.11.2018. The petitioner was examined by the medical board on 14.11.2018 and thereafter a report has been given that petitioner is suffering with 20% physical disability.

35. This Court finds that in the report/medical certificate dated 14.11.2018, there is no whisper about the disability certificate issued to the petitioner on 20.07.2006 meaning thereby that medical board which examined the petitioner on 14.11.2018 did not consider the earlier disability certificate dated 20.07.2006 and no finding has been recorded that the disability certificate dated 20.07.2006 is not a genuine certificate or at the time of issuance of disability certificate dated 20.07.2006, petitioner was not properly examined by the medical board. This Court further finds that the proper course would have been that the medical board while examining the matter of the petitioner on 14.11.2018 must have expressed its opinion

on the earlier disability certificate dated 20.07.2006 as this possibility cannot be overruled that after the issuance of disability certificate on 20.07.2006 due to proper medical treatment the percentage of disability of the petitioner may have been improved. It is also worth consideration that the medical board which examined the petitioner on 20.07.2006 was a duly constituted medical board and it is not denied that Disability Certificate No. 1549 dated 20.07.2006 has been issued to the petitioner by the competent authority then unless the subsequent medical board records a finding that the disability certificate dated 20.07.2006 either was not a genuine document or was not issued after thorough examination by the experts, there was no occasion for the respondents to hold the petitioner guilty of using forged and fabricated disability certificate for securing her appointment on the post of Assistant Teacher. The disability certificate dated 20.07.2006 clearly provides that petitioner was suffering from partial permanent disability and the percentage of disability was found to be 50% therefore, there is every possibility that under a proper medical treatment her percentage of disability may have been improved to 20% as such, merely because the percentage of disability has changed in the period of 12 years, that itself does not hold that earlier disability certificate dated 20.07.2006 is a fake and forged document.

36. On the basis of subsequent medical report/certificate dated 14.11.2018, Principal, DIET Harchandpur Kalan, District Etah issued a show cause notice to the petitioner on 27.02.2019 wherein it was stated that in the medical examination held on 14.11.2018, petitioner's physical disability has been found less than 40% therefore, why the Special B.T.C. training

certificate issued to the petitioner may not be cancelled for the reason that petitioner secured admission in the B.T.C. training course on the basis of a forged and fabricated disability certificate. The aforesaid show cause notice on its face was absolutely erroneous as petitioner's disability certificate dated 20.07.2006 has never been declared to be a forged and fabricated document. Petitioner submitted detailed reply on 12.03.2019 wherein it was categorically stated that the disability certificate dated 20.07.2006 has never been declared to be forged and fabricated document and therefore, notice is liable to be cancelled. It appears from the record that Principal, DIET, Harchandpur Kalan, District Etah did not take any decision pursuant to show cause notice dated 27.02.2019.

37. The Secretary, Examination Regulatory Authority, U.P. Prayagraj vide his letter dated 31.10.2019 directed the Principal, DIET, District Etah to register the cancellation of the Special B.T.C. certificate of the petitioner in the register maintained in the DIET on the ground that Result Committee of the Examination Regulatory Authority, U.P. Prayagraj has taken decision to cancel the petitioner's Special B.T.C. Training Certificate. This Court finds that neither the Result Committee of the Examination Regulatory Authority, U.P. Prayagraj nor the Secretary Examination Regulatory Authority, U.P. Prayagraj issued any show cause notice to the petitioner nor petitioner's version has been considered while cancelling petitioner's Special B.T.C. Training Certificate therefore, the decision of the Result Committee taken in respect of the petitioner and the order dated 31.10.2019 passed by the Secretary Examination Regulatory Authority, U.P. Prayagraj

cannot sustain in the eyes of law for simple reason of violation of principles of natural justice. Even otherwise, this Court finds that the petitioner's disability certificate dated 20.07.2006 at no point of time has ever been declared to be a forged and fabricated document and further vide disability certificate dated 20.07.2006, petitioner was declared to be partially permanent disabled and percentage of disability was 50% and therefore this possibility cannot be ruled out that over a period of 12 years due to proper medical treatment, petitioner's disability may have been improved and as such, in the medical examination report dated 14.11.2018, her disability has been found to be 20%. Once there is no finding that the disability certificate dated 20.07.2006 was not a genuine document or was not issued after proper medical examination, there cannot be any occasion to punish the petitioner even if there has been any error on the part of medical board while issuing disability certificate dated 20.07.2006.

38. In view of the aforesaid reasons, Writ-A No. 2941 of 2020 is **allowed**. The decision of the Result Committee regarding cancellation of the Special B.T.C. Training Certificate of the petitioner and the consequential order dated 31.10.2019 passed by the Secretary, Examination Regulatory Authority, U.P. Prayagraj and order dated 22.01.2020 passed by the Principal, DIET Harchandpur Kalan, District Etah are quashed.

39. The District Basic Education Officer, Firozabad has passed order dated 13.03.2020 whereby petitioner's appointment on the post of Assistant Teacher has been declared to be void-ab-initio only on the ground that her Special B.T.C. Training Certificate has been

cancelled vide order dated 31.10.2019 passed by the Secretary Examination Regulatory Authority, U.P. Prayagraj and order dated 22.01.2020 passed by the Principal DIET district Etah.

40. The aforesaid order dated 13.03.2020 passed by the District Basic Education Officer, Firozabad has been challenged by the petitioner in Writ-A No. 8011 of 2020 on various grounds including that such order could not have been passed without instituting proper disciplinary proceedings under the relevant rules but since this Court has already quashed the orders dated 31.10.2019 and 22.1.2020, which are the basis of the order dated 13.03.2020 therefore, the order dated 13.03.2020 passed by the District Basic Education Officer, Firozabad declaring the petitioner's appointment on the post of Assistant Teacher to be void-ab-initio cannot sustain in the eyes of law.

41. Accordingly, Writ-A No. 8011 of 2020 is **allowed**. The order dated 13.03.2020 passed by the District Basic Education Officer, Firozabad is quashed. Direction is issued to District Basic Education Officer, Firozabad to allow the petitioner to join on the post of Assistant Teacher in a Primary School at District Firozabad within three weeks from the date of service of certified copy of this order and to pay her salary regularly. It is further provided that since petitioner has not worked as Assistant Teacher in the Primary School at District Firozabad therefore, she is not entitled for the salary for the period from 13.03.2020 till the date of her reinstatement in service but the aforesaid period shall be counted towards service rendered by the petitioner for all other service benefits.

(2024) 4 ILRA 1312
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 03.04.2024

BEFORE

THE HON'BLE MANISH KUMAR, J.

Writ-B No. 178 of 1983

Pancham & Ors. ...Petitioners
Versus
D.D.C. Sultanpur & Ors. ...Respondents

Counsel for the Petitioners:

H.S. Sahai, Ajay Kumar Verma, Mahesh Chandra Shukla, Mohan Singh, Rankaj Kumar Vishwakarma, Sudhir Kumar Misra, U.S. Sahai, Vinod Kumar

Counsel for the Respondents:

U.P. Singh, Ajay Kumar Verma, Ajay Verma, C.S.C., Kaushal Kishore, Sudhir Kumar Misra

Civil Law - Constitution of India,1950-Article 226-U.P. Consolidation of Holdings Act,1953-dispute regarding property rights-Petitioners argued that the property was part of Joint Hindu Family and should be treated as joint property – petitioners and their predecessors were not recorded as tenure holders in the revenue records for the property in question-Possession and rent payment were deemed insufficient to establish ownership-The petitioners relied on a compromise agreement between the co-tenureholders, but one key party, Pandoi, did not sign it-This rendered the agreement invalid in determining ownership-based on the lack of evidence to prove joint family ownership or valid title, and the invalid compromise, the court upheld the revisional order and dismissed the petition.(Para 1 to 21)

The writ petition is dismissed. (E-6)

List of Cases cited:

1. Jai Narain Vs D.D.C & ors. (1979) RD 198

2. Bodh Raj Vs Joint Director of Consolidation Faizabad & ors., in Writ Petition No. 676 of 1980 connected with Writ Petition No. 23 of 1980

3. Lakshmaiah & anr. Vs L. Balasubramanyam (2003) 10 SCC 310

4. Kunj Bihari Vs Ganga Sahai Pande (2013) SCC Online Alld. 13489: 2013 (99) ALR 826

5. Rukhmabai Vs Lala Laxminarayan(1960)AIR SC 335

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

1. Heard Sri Mohan Singh, learned counsel for the petitioners, Sri Sudhir Kumar Misra, learned counsel for Respondent Nos.3/1, 3/2, 3/2/1, 3/2/2, 3/2/3 and 3/3 and Sri Kaushal Kishor, learned counsel for Respondent Nos.4 and Sri Hemant Kumar Pandey, learned Standing Counsel for the State.

2. The present writ petition has been preferred for quashing of the impugned order dated 12.02.1981 passed under Section 9(2) of the Uttar Pradesh Consolidation of Holdings Act, 1953 (hereinafter referred as 'the Act, 1953') by Consolidation Officer and the revisional order dated 30.12.1982 passed under Section 48 of the Act, 1982.

3. Learned counsel for the petitioners has submitted that the predecessors of the present petitioners i.e. Petitioner No.1 and Late Bairagi father of Petitioner Nos.2, 3 and 4 had filed objection under Section 9 of the Act, 1952 claiming co-tenancy right over Khata No.112 on the ground that the family of the petitioners and the opposite parties were Joint Hindu Family and Late Ramhit was the Karta of the family. Being the Karta of the Joint Hindu Family his name alone was recorded under the

representative capacity in the revenue records.

4. It is further submitted that the consolidation officer had rejected the objection filed under Section 9A of the Act, 1953 by impugned order dated 12.02.1981 against which Late Pancham and his cousin brother late Bairagi the father of the Petitioner Nos. 2,3 and 4 had preferred an appeal and the said appeal was decided on the basis of the compromise / agreement entered between the petitioners and the respondents.

5. It is further submitted that against the appellate order Pandohi had preferred a revision under Section 48 of the Act, 1953, who is the brother of Ram Lakhan and son of Late Nidhi.

6. It is further submitted that the Revisional Court committed manifest error of law in allowing the revision without giving due weightage to the admission made by respondent No.4 Ronghai and the compromise filed which was duly verified before the Assistant Settlement Officer, Consolidation and also failed to consider the admission made by the opposite parties in the reconciliation proceedings by filing a compromise.

7. It is further submitted that the Respondent No.1 had misread the evidence with respect to the rent receipts and Khasra entries. It is also submitted that in CH Form 2A issued under Rule 21 the name of the petitioner No.1 and Bairagi are recorded.

8. It is further submitted that the predecessors of the petitioners Late Pancham i.e. Petitioner No.1 and Late Bairagi father of Petitioner Nos.2,3 and 4,

were in possession of the gatas and have been depositing the rent.

9. On the other hand, learned counsel for the respondents have submitted that there is no illegality in the impugned revisional order and the same has been passed after appreciating and considering the evidence.

10. Sri Sudhir Kumar Mishra, learned counsel for Respondent Nos.3/1, 3/2, 3/2/1, 3/2/2, 3/2/3 and 3/3 has submitted that Pandohi the brother of Ram Lakhan and son of Nidhi had never signed any agreement nor participated in alleged conciliation proceedings between Late Pancham and Ram Lakhan. It is further submitted that the petitioners have failed to show any entry in the name of petitioners in the revenue records.

11. After hearing the learned counsel for the parties and going through the record of the case the position which emerges out in the present case is that as far as the submission of learned counsel for the petitioners that the property belongs to a Joint Hindu Family is concerned, it is not tenable in the eyes of law as per law regarding the Joint Hindu Family Property it is now fairly well settled that in order to successfully claim the share regarding the Joint Hindu Family property, the burden is on the party to prove that there existed a joint family which had the requisite funds and nucleus out of which the property in question has been purchased. The onus is upon the petitioner to adduce evidence to indicate that the property was the Joint Hindu Family Property which they have failed to prove and in absence of any evidence to that effect the petitioner could not have been granted the benefit of getting the property treating as Joint Hindu Family

Property. The petitioner except simply making an averment in Para 3 of the writ petition, nothing has been placed on record to establish that the gatas of Khata No.112 were purchased from the nucleus of Joint Hindu Family and the property as such is a Joint Hindu Family Property.

12. In the case of *Jai Narain v. D.D.C. & others reported in (1979) RD 198*, it was held that the presumption is only in respect of jointness and not that any property acquired by members of the family is a joint family property and this is a matter of evidence and not of presumption. In the present case, the petitioners have failed to adduce any evidence that the property is a joint family property.

13. In the case of *Bodh Raj v. Joint Director of Consolidation Faizabad and Others, in Writ Petition No.676 of 1980* connected with *Writ Petition No.23 of 1980*, decided on 22.09.1995, wherein it has been held that there is a presumption with respect to the jointness of family and if it is shown or proved to the satisfaction of the Court then property inherited from a common ancestor will be deemed to be a joint property of all. It is also clarified in the said judgement that joint family funds must be used for purchase of the property in order to make it joint and property is entered in the name of one person then it has to be proved by other party, who claims to be a joint property that it was acquired by the joint family funds, which the petitioners have failed to establish.

14. The Hon'ble Supreme Court in the case of *D.S. Lakshmaiah and Another Vs. L. Balasubramanyam* reported in *2003 (10) SCC 310*, the relevant portion reads as under:-

"18. The legal principle, therefore, is that there is no presumption of a property being joint family property only on account of existence of a joint Hindu family. The one who asserts has to prove that the property is a joint family property. If, however, the person so asserting proves that there was nucleus with which the joint family property could be acquired, there would be presumption of the property being joint and the onus would shift on the person who claims it to be self-acquired property to prove that he purchased the property with his own funds and not out of joint family nucleus that was available."

15. Similarly, the Coordinate Bench of this Court in the case of *Kunj Bihari Vs. Ganga Sahai Pande* reported in *2013 SCC Online Alld. 13489: 2013 (99) ALR 826* wherein tracing the history and considering the earlier decision on the point of Joint Hindu Family and property, the burden of proof etc. This Court has held as under:-

"24. The "patriarchal family" may be defined as a group of natural or adoptive descendants, held together by subjection to the eldest living ascendant, father, grand-father, great-grandfather. Whatever be a formal prescription of law, the head of such a group is always in practice, despotic; and he is the object of respect, if not always of affection, which is probably seated deeper than any positive institution. Manu says, "three persons, a wife, a son and a slave, are declared by law to have in general no wealth exclusively their own; the wealth which they may earn is regularly acquired for the man to whom they belong." Narada says, "he is of age and independent, in case his parents be dead; during their lifetime he is dependent, even though he be grown old."

25. The "joint family" is normally a transition form from "patriarchal family". At the death of common ancestors or head of house, if the family chooses to continue united, the eldest son would be the natural head. The former one was head of family by natural authority, the later other can only be so by a delegated authority. He is *primus but inter pares*. An undivided Hindu family thus is ordinarily joint, not only in estate but in food and worship. The presumption, therefore, is that members of a Hindu family are living in a state of union unless contrary is established. This presumption however varies inasmuch as it is stronger in case of real brother than in case of cousin and farther one go, from the founder of family, the presumption becomes weaker and weaker. However, there is no presumption that a family, because it is joint, possesses joint property. Under Mitakshara Law, possession of property is not necessary requisite for constitution of a joint family, though where persons live together, joint in food and worship, it is difficult to conceive of their possessing no property whatever, such as, at least, ordinary household articles which they would enjoy in common.

32. The joint undivided family is the normal condition of Hindu society as observed in *Raghunadha Vs. Brozo Kishroe* (1876) 3 IA 154 and *Neelkisto Deb Vs. Beerchunder* (1989) 12 MIA 523. An HUF is ordinarily joint not only in estate but in food and worship. Unless contrary is established, the presumption is that the members of a Hindu family are living in a state of union (see: *Govind Dass Vs. Kuldip Singh* AIR 1971 Delhi 151 and *Bhagwan Dayal Vs. Mst. Reoti Devi* AIR 1962 SC 287). If, however, one of the coparceners is

admittedly living separately from other members of the family, neither it can be said that other members do not constitute a Hindu joint family nor the member living separately, who has stripped his relation with the joint family, can be said to be still a coparcener or member of joint family. Simultaneously, merely if some members are working and living at different places, though own a joint family in common, it cannot be said that they do not form a joint Hindu family. Since it is only a presumption, the strength thereof necessarily varies in every case. The presumption of union is stronger in the case of brothers than in the case of cousins and farther one goes from the founder of the family, the presumption becomes weaker and weaker.

33. Brothers may be presumed to be joint but conclusion of jointness with collaterals must be affirmatively proved. The presumption lies strongly in favour of father and son that they are living jointly unless proved otherwise.

34. This presumption, however, does not apply in respect of property. There is no presumption that a family, because it is joint, possess joint property. As per Mitakshara law, the possession of property is not a necessary requisite for the constitution of a joint family, though where persons live together, joint in food and worship, it is difficult to conceive that they are possessing no property whatever, such as ordinary household articles which they would enjoy in common.

35. In *Sher Singh Vs. Gamdoor Singh* 1997 (2) HLR 81 (SC), the Court said that once existence of a joint family is not in dispute, necessarily the property held by family assumed the character of a coparcenary property and every member of family would be entitled, by birth, to a share in coparcenary property, unless any

one of the coparcener pleads, by separate pleadings and proves, that some of the properties or all the properties are his self-acquired properties and cannot be blended in coparcenary property. Merely because the family is joint, there is no presumption of joint property. A Hindu, even if he be joint may possess separate property. Such property belongs exclusively to him. Neither member of the coparcenary, nor his male issue, acquires any interest in it by birth. On his death (intestate), it passes by succession to his heirs and not by survivorship to the surviving coparcener. The existence of joint family does not raise presumption that it owns properties jointly. But once joint family nucleus is either proved or admitted so as to draw inference that such property could have been acquired out of joint family funds, the burden shifts to the party alleging self acquisition, to establish affirmatively, that such property was acquired without aid of joint family. Initial burden always lies upon the party asserting that any item of property is joint family property.

38. In *Appalaswami Vs. Suryanarayanamurti and Ors.*, AIR 1947 PC 189, it was held that Hindu law is very clear. Proof of existence of a joint family does not lead to the presumption that property held by any member of family is joint. The burden rests upon one who asserts that an item of property is joint, to establish that fact. But where it is established that the family possessed some joint property which, from its nature and relative value, may have formed the nucleus, from which property in question may have been acquired, the burden shifts to the party alleging self-acquisition, to establish affirmatively that the property was acquired without the aid of joint family property/fund.

39. Again in *Srinivas Krishnarao Kango Vs. Narayan Devji Kango* AIR 1954 SC 379, it was held that proof of existence of a joint family does not lead to the presumption that property held by any member of family is joint. The burden rests upon anyone asserting that any item of property is joint to establish the fact. But where it is established that the family possessed some joint property which form its nature and relative value, may have formed the nucleus, from which property in question may have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of joint family property.

40. The legal proposition which emerges therefrom is that initial burden is on the person who claims that it is joint family property but after initial burden is discharged, the burden shifts to the party claiming that the property was self acquired and without the aid of joint family property/fund.

41. In *Rukhmabai Vs. Lala Laxminarayan* AIR 1960 SC 335, the Court said:

"There is a presumption in Hindu Law that a family is joint. There can be a division in status among the members of a joint Hindu family by refinement of shares which is technically called "division in status", or an actual division among them by allotment of specific property to each one of them which is described as "division by metes and bounds". A member need not receive any share in the joint estate but may renounce his interest therein, his renunciation merely extinguishes his interest in the estate but does not affect the status of the remaining members vis- a-vis the family property. A division in status can be effected by an unambiguous declaration to become divided from the others and that

intention can be expressed by any process. Though prima facie a document clearly expressing the intention to divide brings about a division in status, it is open to a party to prove that the said document was a sham or a nominal one not intended to be acted upon but was conceived and executed for an ulterior purpose. But there is no presumption that any property, whether movable or immovable, held by a member of, a joint Hindu family, is joint family property. The burden lies upon the person who asserts that a particular property is joint family property. to establish that fact. But if he proves that there was sufficient joint family nucleus from and out of which the said property could have been acquired, the burden shifts to the member of the family setting up the claim that it is his personal property..." (emphasis added"

16. The CH Form 2A issued under Rule 21 which has heavily been relied by the learned counsel for the petitioners to establish the title over Khata No.112 as a co-tenure holder but after the perusal of the same which has been enclosed as Annexure No.S.A.-4 to the supplementary affidavit filed on 20.09.2023 on behalf of the petitioners in which only the name of Late Pancham was entered only in Gata No.95 as tenure holder and in rest of the gatas the name of Late Pancham and Late Bairagi are not shown as tenure holder except in Column No.9 in some gatas the name of Late Bairagi and in some gatas name of Late Pancham had been shown as 'कब्जा बहुत दिन से बतौर सहखारेदार बताया',.

17. On being asked a specific query from the learned counsel for the petitioners to show any provision or case law that the title can be established on the basis of the possession and by depositing the rent, except where the rights have been

claimed to have been perfected by adverse possession. The learned counsel for the petitioners has very fairly submitted that there is neither any provision in the statute or any law which provides possession and depositing the rent for the purpose of determination of title.

18. The title is to be seen from the basic fasli year from the date of consolidation proceedings and as per admitted case of both the sides, the consolidation year was 1970 and basic fasli year would be 1363 and in both the Khatauni of basic fasli year enclosed by the petitioners in their supplementary affidavit, even in that Khatauni the name of Late Pancham and Late Bairagi are also not recorded, so from the revenue records the petitioners have failed to show entry in their names in the revenue records. The entries in the Khatauni, which is a document of title and the entries in the Khasra which a document of possession only, the petitioners had failed to show any entries in the Khatauni. Even CH Form 2A which has heavily been relied as admitted except Gata No.95 in other Gatas of Khata No.112 the petitioners were not recorded as tenure holders. The petitioners had not enclosed any copy of Khasra which determines the possession.

19. Learned counsel for the petitioners is also unable to dispute that the names of the petitioners or their predecessors were never ever entered in the revenue records in the gatas of Khata No.112 and the entry shown in CH Form 2A issued under Rule 21 the name of Petitioner No.1 is on separate Gata, which is not in Khata No.112.

20. The compromise on the basis of which the petitioners are claiming their

right is nonest in the eyes of law for the reason it is an admitted case of the parties that Pandoi and Ram Lakhan are the co-tenure holders of the gatas of Khata No. 112 the compromise / agreement was signed only by Ram Lakhan and it was not signed by the Pandoi who had preferred the revision, the petitioners have failed to establish their title / ownership on the gatas of Khata No.112 from the revenue records as discussed above and this Court finds no illegality in the revisional order.

21. In view of the facts and circumstances of the case and the discussion made hereinabove, the writ petition is devoid of merits and is accordingly **dismissed**.

(2024) 4 ILRA 1318

**ORIGINAL JURISDICTION
CIVIL SIDE**

DATED: LUCKNOW 10.04.2024

BEFORE

THE HON'BLE MANISH KUMAR, J.

Writ-B No. 382 of 2024

Surendra Bahadur Singh & Ors.

...Petitioners

Versus

**Chakbandi Aayukt U.P. Saptam Tal Indra
Bhawan Lko. & Ors.**

...Respondents

Counsel for the Petitioners:

Sandeep Tiwari

Counsel for the Respondents:

C.S.C.

**A. Civil Law - Constitution of India,1950-
Article 226-Consolidations of Holdings
Act,1953-Sections 10,20,23,52,9A(2)-The
petitioners claimed that proceeding with
the notifications/publications u/s
10,20,23,52 of the act without resolving
their objections u/s 9A(2) would violate**

**their legal rights-Held, the court ruled
against the petitioners emphasizing
section 52(2) and Rule 109(A)(1) provide
mechanisms to address unresolved
objections even after publication or
notification-hence, petitioners rights
would not be prejudiced by the issuance
of the notifications.(Para 1 to 11)**

The writ petition is dismissed. (E-6)

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

1. Heard Shri Sandeep Tiwari, learned counsel for petitioner as well as Shri Hemant Kumar Pandey, learned Standing Counsel.

2. The present writ petition has been preferred for issuing direction to the Consolidation Officer, District Amethi, not to make any notification/publication of Section 10, Section 22 and Section 27 of the U.P. Consolidation of Holdings Act, 1953 (hereinafter referred as Act, 1953) and to restrain the Consolidation Officer (C.O) to prepare the final documents with a further prayer that till the decision in the revision/Review, no publication shall be made under Section 10 , 19, 29 and 23 of the Act, 1953.

3. Learned counsel for petitioners has submitted that the petitioners inherited the property of his maternal grandparents (after the demise of their maternal grandfather in the year 1976 and maternal grandmother in the year 1986). A notification has been issued under Section 4A(2), against which the petitioners have filed an objection under Section 9A(2) of the Act, 1953. The objection of the petitioners was not decided by the Consolidation Officer, and the petitioners had no other option except to approach this Court by filing writ petition No. 1204 of 2022, (Surendra Bahadur Singh versus

District Magistrate District Amethi and others). The said writ petition was finally disposed of vide order dated 26.04.2022, with a direction to respondent no. 2 to consider and decide the pending objections of the petitioners as early as possible. Despite the direction of this Court, the objections of the petitioners are still pending before the Consolidation Officer.

4. It is further submitted that without deciding the objections of the petitioners filed under Section 9A(2) of the Act, 1953, the notification has been issued under Sections 10, 20 and 23 of the Act, 1953 and submitted the final documents for the purposes of publication under Section 52. The said action on the part of Consolidation Officer i.e. respondent no. 2 is against the statutory provisions wherein it has been provided that after deciding all the objections, the publication be made under Sections 10, 20 and 23 and forward the final documents for the purpose of publication under Section 52 of the Act, 1953.

5. It is further submitted that after the publication under Section 52, the consolidation operations will be closed without deciding the objections of the petitioners which will affect the legal right of the petitioners as provided under the provisions of the Act and the Rules.

6. On the other hand, learned State Counsel has submitted that by mere pendency of the objection of the petitioner, the notification/publication under Section 52 cannot be stopped for the reason that the rights of the petitioners are protected under Sub-Section 2 of Section 52 of the Act, 1953 read with Rule 109 (A)(1) of the U.P. Consolidation of Holdings Rules, 1954 (hereinafter referred as Rules, 1954).

7. After hearing learned counsel for parties, going through the records of the case, the objections regarding title of the land have been filed by petitioners under Section 9A(2) of the Act, 1953. The submission of learned counsel for petitioner that as per the provisions of the act, particularly Section 10, wherein it has been provided that the Annual Register shall be revised on the basis of the orders passed under Sub-Section 2 of Section 9A which has not been decided yet, so any consequential proceedings by making publication under Section 10, 20 and 23 will deprive the petitioner of his lawful claim is not tenable and acceptable as per Sub-Section 2 of Section 52 of the Act, 1953, read with Rule 109 (A)(1) Rules, 1954.

8. For convenience, Section 52(2) of the Act, 1953 and Rules 109 (A)(1) of Rules, 1954 are quoted herein below:-

'Section 52(2) of Consolidation of Holdings Act, 1953:- *Notwithstanding anything contained in Sub-Section (1), any order passed by a Court of competent jurisdiction in cases of writs filed under the provision of the Constitution of India, or in cases or 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.*

Rule 109 (A)(1) of the Consolidation of Holdings Rules, 1954:- *Orders passed in cases covered by sub-section (2) of Section 52 shall be given effect to by the consolidation authorities, authorised in this behalf under sub-section (2) of Section 42. In case there be no such authority the Assistant Collector, incharge*

of the sub-division, the Tahsildar, the Naib-Tahsildar, the Supervisor kanungo, and the Lekhpal of the area to which the case relates shall, respectively, perform the functions and discharge the duties of the Settlement Officer; Consolidation, Consolidation Officer; the Assistant Consolidation Officer; the Consolidator and the Consolidation Lekhpal respectively for the purpose of giving effect to the orders aforesaid.'

9. From the conjoint reading of the section and the rule as quoted above, the position as far as the rights of the petitioners, which is very clear that even after the publication under Section 52 for closing the consolidation operations in the village will not be affected as Sub-Section 2 of Section 52 of the Act, 1953 provides that in cases or proceedings pending under this Act on the date of issuance 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 the purposes be deemed to have not been closed and Rule 109A(1) provides the authorities who shall give effect to the orders passed by the Consolidation authorities.

10. The rights of the petitioners are protected under the statute itself and mere pendency of the objections of the petitioners under Section 9A(2) of the Act, 1953 will not come in the way of issuing a notification under Section 52(1) of the Act, 1953 regarding closing of the consolidation operations in the village or the villages and by notification under Section 52 of the Act, 1953 or publication under Sections 10, 20, 23 will not prejudice any of the rights of the petitioner as already mentioned above. The apprehension of the petitioners that publication under Section 10, Section 20,

Section 23 and Section 52 of the U.P. Consolidation of Holdings Act, 1953 would adversely affect the rights, has no basis as sufficient protection in regard to the pending cases under Section 52(2) of the Act, 1953 read with Rule 109A(1) of the Rules, 1954.

11. In view of the facts, circumstances and discussion made hereinabove, the present writ petition being devoid of merit is *dismissed*.

(2024) 4 ILRA 1320

**ORIGINAL JURISDICTION
CIVIL SIDE**

DATED: LUCKNOW 08.04.2024

BEFORE

THE HON'BLE MANISH KUMAR, J.

Writ-B No. 694 of 2012

Jageshwar & Anr.	...Petitioners
Versus	
D.D.C. Lko. & Ors.	...Respondents

Counsel for the Petitioners:

Piyush Chandra Agarwal, Abdul Shadab Khan, Abhinav Trivedi, Durgesh Kumar Rajput, Jay Prakash Singh, Paresb Mishra, Parijat Mishra Belavra, Pradeep Kumar Singh, Rajendra Pratap Singh, Ravi Prakash Mishra, Sameer Kumar, Satyendra Kumar Tiwari

Counsel for the Respondents:

C.S.C., Amit Tripathi, Anand Mani Tripathi, Mohd. H.U. Ansari, Shashendra Pratap Singh, Sher Bahadur Yadav

**A. Civil Law - Constitution of India,1950-
Article 226-U.P. Consolidation of Holdings
Act,1953-Section 48-The petitioners
claimed property rights over Plot No.194
recorded in the name of their
grandmother under succession-
Respondent no. 4 claimed rights as
Maika's brother in law, asserting she was
issueless-Respondent 5 to 10 claimed**

right through an unproven will-Held, - Procedural lapses occurred as no issue were framed regarding the petitioner's claims-The appellate and revisional authorities failed to ensure adherence to statutory requirements, depriving the petitioners of a fair hearing-The court set aside the orders and remanded the matter to the Consolidation Officer-the officer was directed to frame issues, allow evidence and decide afresh within one year.(Para 1 to 37)

The writ petition is allowed. (E-6)

List of Cases cited:

1. Ram Dular Vs DDC, Jaunpur & ors. Suppl. (2) SCC 198
2. Smt. Baijnath & anr.. Vs DDC Varanasi & ors. (1997) RD 433
3. Ram Prasad & ors. Vs DDC Pratapgarh & ors. (Consolidation No. 2205 of 1980)

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

1. Heard Shri Abhinav Trivedi, learned counsel for the petitioners, Shri Hemant Kumar Pandey, learned Standing Counsel and Shri Anand Mani Tripathi, learned counsel for the respondent no. 4 assisted by Shri P. Venkatesh, Advocate. However, as far as respondent nos. 5 to 10 are concerned, it is mentioned in the service report dated 23.10.2013 that notices were issued to them by speed post but neither any undelivered cover received back as yet and none appear for their behalf. It has also been apprised to this Court that Shri Sher Bahadur Yadav had filed vakalatnama on 17.05.2023 on behalf of respondent no. 4 but due to some inadvertence, respondent no. 6 was mentioned in place of respondent no. 4.

2. Present petition has been preferred for quashing of the judgment and

order of the revisional Court dated 20.09.2012 passed by the Deputy Director Consolidation i.e. respondent no. 1 under Section 48 of the Consolidation and Holdings Act, 1953 (hereinafter referred to as, the Act, 1953) and the impugned judgment and orders dated 02.07.2010 and dated 31.10.2005 passed by the Settlement Officer (Consolidation). Quashing of the impugned judgment and order dated 28.07.2005 passed by the respondent no. 3-Consolidation Officer as well as the impugned order dated 04.07.2005 i.e. the order of remand passed by the Consolidation Officer have also been challenged.

3. At this stage, learned counsel for the petitioners has submitted that the petitioners may be permitted not to press the prayer made in the present petition as far as it is related to the quashing of the impugned orders dated 28.07.2005 and 04.07.2005.

4. As prayed, the petition is dismissed as not pressed as far as it is related to prayers whereby quashing of the impugned orders dated 02.07.2005 and 04.07.2005 has been challenged.

5. Learned counsel for the petitioners has submitted that Village Sarawan, Pargana, Tehsil and District Lucknow had undergone in consolidation proceedings vide notification issued under Section 4(2) of the Act, 1953 on 31.01.1970 and the notification under Section 52 of the Act, 1953 was issued on 11.02.2006.

6. The dispute in the present petition is with regard to the plot No. 194, which was recorded in the name of late Maika-wife of i.e. the grand mother of the petitioners.

7. It is further submitted that the petitioners being the grand son of late Maika moved an application under Section 12 of the Act, 1953 before the Consolidation Officer for taking decision on matters relating to changes and transactions affecting the rights or interest recorded in the revised records. The said application preferred by the petitioners were allowed by order dated 17.07.2004.

8. Against the order dated 17.07.2004, an appeal was preferred by late Ram Khelawan before the Settlement Officer (Consolidation) under Section 11 of the Act, 1953 stating therein that his objection under Section 12 was pending and without deciding the same, the application of the petitioners were allowed by order dated 17.07.2004. The appeal preferred by late Ram Khelawan was allowed and remanded the matter to the Consolidation Officer.

9. It is further submitted that the Consolidation Officer had allowed the application of respondent no. 4-Bhuinyadeen and rejected the application filed on behalf of late Ram Khelawan-the predecessor of respondent nos. 5 to 10, without deciding the application of the petitioners under Section 12 of the Act, 1953. Even the issues were not framed for determining the rights of the petitioners. It was treated that the order passed in favour of the petitioners dated 17.07.2004 had already been set aside by the Settlement Officer (Consolidation) while deciding the appeal by its judgment and order dated 04.07.2005.

10. It is further submitted that aggrieved by the order of the Consolidation Officer, the petitioners had preferred an appeal which was dismissed by the

Settlement Officer (Consolidation) by its judgment and order dated 31.10.2005 without discussing the issues raised by the petitioners in appeal and determined the rights of the respondent no. 4 and predecessor of respondent nos. 5 to 10.

11. It is further submitted that feeling aggrieved by the appellate order, the petitioners had preferred a revision under Section 48 of the Act, 1953 which was also dismissed by the impugned order dated 20.09.2012 by giving contradictory finding that at one place in the earlier part of the judgment admitting the petitioners as grandsons of late Nanhe-husband of late Maika by giving a finding that there is no dispute about the same and on the other hand a contradictory finding has also been given that the revisionist has failed to establish that the father of petitioners late Dhani was son of late Nanhe, who was the husband of late Maika whereas in the earlier part of the judgment discussed all the evidences led by the petitioners.

12. The Revisional Court has rejected the claim of predecessors of respondent nos. 5 to 10-late Ram Khelawan as the will in his favour was not proved and found to be suspicious and for the respondent no. 4, the revisional Court had not considered the fact that late Maika had been wrongly shown as issue-less in the pedigree of the family given by the respondent no. 4 in his application under Section 12 and thus, being a brother-in-law, he is entitled for the property in the name of late Maika.

13. On the other hand, Shri Amar Mani Tripathi, learned counsel for the respondent no. 4 has submitted that the claim of the petitioners had already been rejected by the appellate Court hence, there

is no occasion to consider their case when the matter was remanded to the Consolidation Officer by the Settlement Officer (Consolidation) by its order dated 04.07.2005.

14. It is further submitted that there was no need to frame any issue for determining the rights of the petitioners after the remand.

15. It is further submitted that the respondent no. 4 being a brother-in-law of late Maika is entitled for the property in the name of late Maika.

16. It is further submitted that the petitioners were failed to establish the pedigree as they have claimed in their application under Section 12 hence, there is no illegality in the findings given by the revisional authority in its judgment and order dated 20.09.2012.

17. On the other hand, learned Standing Counsel has very fairly submitted that after the remand, the Consolidation Officer had to frame the issues for determining the rights of the petitioners and by not doing the same, they deprived the petitioners from their alleged lawful claim over the property of their grand mother late Maika.

18. After hearing learned counsel for the parties and going through the record of the case, the position which emerges out in the present case is that it is an admitted fact between the petitioners and the respondents that plot no. 194 was in the name of late Maika. The petitioners are claiming their rights on the above mentioned property on the basis of succession. Late Maika was the grand mother of petitioners. The respondent no. 4

was claiming his right on the property entered in the name of late Maika being a brother-in-law and shown late Maika as issue-less in his application preferred under Section 12 of the Act, 1953 before the Consolidation Officer while respondent nos. 5 to 10 had claimed their rights on the basis of Will which they had failed to prove and there is a finding in the orders that the Will appears to be suspicious.

19. The respondent nos. 5 to 10 had contested the case up to the stage of revision and after the passing of the impugned revisional order dated 20.09.2012, they had not challenged the same by filing the writ petition before this Court.

20. The appellate order dated 04.07.2005 passed under Section 11 of the Act, 1953 clearly shows that the order passed on 17.07.2004 in Case No. 275 i.e. objections preferred by the petitioners under Section 12 was set aside and the matter was remanded to the Consolidation Officer to decide the same on merits after hearing the parties. The relevant extract of the said judgment is quoted hereinbelow:-

“अपील स्वीकार की जाती है। आदेश वाद संख्या 275/17-7-04 निरस्त किया जाता है। पत्रावली च0अ0 सदर को इस आशय के प्रत्यावर्तित की जाती है की वे साक्ष्य व सुनवाई का अवसर देकर पक्षों को गुणदोष के आधार पर वाद का निस्तारण करें। पक्ष च0 अ0 सदर के न्यायालय में 21-7-05 को उपस्थित हो पत्रावली वाद अनुपालन दफ्तर हो।”

21. The Consolidation Officer while deciding the matter after the remand by its judgment and order dated 28.07.2005

had framed three issues and the family tree/pedigree given by the respondent no. 4 in his objections under Section 12 had been relied and neither even a single issue as far as it is related to the present petitioners had been framed nor the pedigree mentioned by the petitioners in their application under Section 12 had been considered and decided the matter between the respondent no. 4 and late Ram Khelawan-the predecessor of the respondent nos. 5 to 10.. Meaning thereby, the Consolidation Officer while deciding the matter after the remand had not considered the case of the petitioners under the presumption that the remand is only for determining the rights between the respondent nos. 4 and 5 treating that the rights of the petitioners had already decided in the appeal by order dated 04.07.2005 by which the order was remanded.

22. Against the order dated 31.10.2005, the petitioners had preferred a revision which was also dismissed by the revisional authority by its judgment and order dated 20.09.2012. While deciding the revision, the revisional Court had mentioned the case of the petitioners alongwith their family pedigree but thereafter started determining and discussing the rights between the predecessor of the respondent nos. 5 to 10 and respondent no. 4. In the end relied upon the documents filed by the petitioners i.e. Voter I.D. Card, Medical Praman Patra and Kishan Bahi to establish their rights in the property of late Maika, where the petitioners were entered as son of Dhani. Dhani was the son of late Nanhe and late Nanhe was the husband of late Maika. It is accepted by the revisional Court by giving a finding that there is no dispute but at the same time a contrary finding was given by the revisional Court that the property is of

late Maika and the petitioners have failed to establish that they are the son of late Dhani, who was the son of late Nanhe, who was the husband of late Maika by not filing the parivar register. The revisional Court also erred in drawing inference that perhaps late Maika had no issue, merely because a will was there relied upon by Ramkhelavan, which has also been held to suspicious and not proved as held by the Courts below. The relevant portion of the impugned revisional order dated 20.09.2012 is quoted hereinbelow:-

“निगरानीकर्तागण अपने को विवादित आराजी जो स्व० मैका के नाम अंकित थी पर अपना नाम बतौर वारिस अंकित किये जाने हेतु आकार पत्र 11 खाता 241 व आकार पत्र 23 भाग-1 चक संख्या 80 की छाया प्रति निगरानी के साथ दाखिल किया है जिसमें उक्त खाता धानी पुत्र नन्हे के नाम अंकित है। इस क्रम में अपने को धाना का पुत्र साबित करने के लिए मतदाता पहचान पत्र दिनांक 22-3-09 व मेडिकल प्रमाण पत्र मेडिकल आफिसर दिनांक 2-7-08 बाबत राजाराम पुत्र धानी व किसान वही दिनांक 3-9-02 बाबत जागेश्वर पुत्र धानी दाखिल किया है और यह दर्शाने का प्रयास किया है कि वह नन्हे मृतक की बेवा स्व० मैका के पुत्र धानी के पुत्र होने के कारण विवादित आराजी के हकदार है। जहाँ यह उल्लेख आवश्यक है जो भी धानी पुत्र नन्हे के नाम अंकित है उस पर जागेश्वर आदि का जो नाम आया है, उस पर विवाद नहीं है। विवाद स्व० मैका के नाम अंकित समपत्ति का है। निगरानीकर्तागण यह साबित करने में असफल रहे हैं कि वह स्व० मैका के पति नन्हे के पुत्र धानी के पुत्र है क्योंकि इस क्रम में कोई

परिवार रजिस्टर की नकल आदि दाखिल नहीं है। कथित वसीयत का प्रकाश में आना भी इस बात का संकेत है कि स्व० मैका के शायद औलाद नहीं थी। इस प्रकार स्व० मैका के नाम अंकित भूमि पर अपने को हकदार सिद्ध करने में निगरानीकर्तागण सफल नहीं रहे हैं। मेरे विचार से चकबंदी अधिकारी व बन्दोबस्त अधिकारी चकबंदी ने जो आदेश दिनांक 28-7-05 व 31-10-05 पारित किया है वह उचित है। इस आलोक में आदेश दिनांक 2-7-10 में भी हस्तक्षेप की आवश्यकता नहीं है।

जहाँ तक राम खेलावन की निगरानी का प्रश्न है, अवर न्यायालयों ने विस्तार से विवेचना करते हुये उनके पक्ष में स्व० मैका द्वारा की गयी पंजीकृत वसीयत को प्रमाणित होना नहीं पाया है। इसका मुख्य कारण गवाहों के बयानों में विरोधाभास बताया है। पत्रावली के अवलोकन से अवर न्यायालयों द्वारा दिये गये अभिमत से मैं सहमत हूँ।

उपर्युक्त तथ्यों के प्रकाश में तीनों निगरानियां निरस्त होने योग्य हैं।

आदेश

उपर्युक्त विवेचना के आधार पर तीनों निगरानियां निरस्त की जाती है।

पत्रावलियां वाद अमलदरामद दाखिल दफ्तर हो।“

23. As per the law settled that the revisional Court is not supposed to decide the matter by appreciating the evidence and by substituting the finding by its own findings as the Hon'ble Supreme Court in the case of *Ram Dular Vs. Deputy Director of Consolidation, Jaunpur and Ors.* reported in *Suppl. (2) SCC 198* has held that Deputy Director Consolidation cannot assume to itself the jurisdiction of

the original authority. It had to consider whether the legally admissible evidence had not been considered by the authorities in recording a finding of fact or law or the conclusion reached by it is based on no evidence, any patent illegality or impropriety had been committed or these was any procedural irregularity, which goes to the root of the matter, had been committed in recording the finding.

24. The proposition of law laid down by Hon'ble Supreme Court in the case of *Ram Dular (supra)* has been followed by this Court in the cases of *Smt. Baijnath and Anr. Vs. Deputy Director of Consolidation, Varanasi and Ors. reported in 1997 RD 433 and Ram Prasad and others Vs. Deputy Director of Consolidation, Pratapgarh and others (Consolidation No. 2205 of 1980)* judgment and order dated 15.03.2019 wherein it has been held that the Deputy Director Consolidation in exercise of powers under Section 48 of the U.P. Consolidation of Holdings Act, 1953 can interfere with the findings of fact recorded by the authorities below and can set-aside the said findings if they are found to be erroneous, perverse not based on any evidence or illegal, but he can not substitute his own findings after reappraisal of the evidence on the records. The Deputy Director of Consolidation could at the best remand the case to the Settlement Officer, Consolidation or the Consolidation Officer, as the case may be, for decision afresh.

25. The relevant extracts of the judgment authored by Hon'ble Apex Court in the case of *Ram Dular (supra)* is reproduced hereinbelow:-

" It is clear that the Director had power to satisfy himself as to the

legality of the proceedings or as to the correctness of the proceedings or correctness, legality or propriety of any order other than interlocutory order passed by the authorities under the Act. But in considering the correctness, legality or propriety of the order or correctness of the proceedings or regularity thereof it cannot assume to itself the jurisdiction of the original authority as a fact-finding authority by appreciating for itself of those facts de novo. It has to consider whether the legally admissible evidence had not been considered by the authorities in recording a finding of fact or law or the conclusion reached by it is based on no evidence, any patent illegality or impropriety had been committed or there was any procedural irregularity, which goes to the rest (sic root) of the matter, had been committed in recording the order or finding."

26. The revisional authority was supposed to examine whether Rule 26(2) of the U.P. Consolidation of Holdings Rules, 1954 (hereinafter referred to as, the Rules, 1954) has been complied with by the subordinate Courts or not.

27. For convenience, Rules 26 (2) of the Rules, 1954 is quoted hereinbelow"

" 2) On the date fixed under sub-rule (2) of Rule 25-A, or any subsequent date fixed for the purpose, the Consolidation Officer shall hear the parties, frame issues on the points in dispute, take evidence, both oral and documentary, and decide the objections"

28. The sub-Rule 1 and 2 of Rule 25 A of the Rules, 1954 is quoted hereinbelow:-

"25-A(1) The Assistant Consolidation Officer shall, as far as possible, deal with all the objections filed by a tenure-holder with regard to matters referred to in clause (i) of sub-section (1) of Section 9-A and sub-Section (1) of Section 9-B in village itself. In deciding disputes on the basis of conciliation in terms of sub-Section (1) of Section 9-A, he shall record the terms of conciliation in the presence of at least two members of the Consolidation Committee of the village. These terms shall then be read over to the parties concerned and their signatures or thumb impressions obtained. The members of the Consolidation Committee present shall also sign the terms of conciliation. The assistant Consolidation Officer shall then pass orders deciding the dispute in terms of conciliation specifying the precise entries to be made in the records. Details of the operative part of the orders passed by the Assistant Consolidation Officer shall be noted in the Misilband Register. No ex parte order or orders in default shall be passed by the Assistant Consolidation Officer."

(2) In all cases in which the Assistant Consolidation Officer sends a report, under the provisions of Sub section-2 of Section 9-A, or sub-section (1) of Section 9-B to the Consolidation Officer for disposal, he may fix a date and place for the disposal of the cases by the Consolidation Officer and communicate the same to the parties present before him and issue notices in C.H. Form 6-A to the parties not so present. The report of the Assistant Consolidation Officer in such cases clearly brings out the points in dispute between the parties and the efforts made by him to reconcile them."

29. Rule 30 (b) of the Rules, 1954 provides for applicability of the same

procedure for deciding the matter raised before the Assistant Consolidation Officer under Section 12. For convenience, the Rule 30 (b) of the Rules, 1954 is quoted hereinbelow:-

" (b) The procedure laid down in Rules 25-A to 27 and 29 shall, mutatis mutandis be followed in deciding matters raised before the Assistant Consolidation Officer under Section 12.

30. From conjoint reading of Rule 26(2) to Rule 25 A(2) and Rule 30 (b), it is clear that for determination of rights/disputes between the parties, the Consolidation Officer is supposed to fix a date and place for disposal of cases, frame the issues on the points in dispute, take evidence both oral and documentary and decide the objection.

31. Since the very beginning all the authorities whether it is Consolidation Officer, Settlement Officer or the Deputy Director of Consolidation / Revisional Authority had failed to comply with the statutory provisions as at no stage any issue was framed regarding the claim of the petitioners for the property in dispute, opportunity was given to adduce any evidence either oral or documentary regarding the claim of the petitioners and decided the matter against the procedure prescribed under the law and deprived the petitioners from their lawful claim to get the property of their grandmother-late Maika. The revisional authority had failed to consider that the respondent no. 4 as alleged by the petitioners had given a wrong family tree/pedigree by showing late Maika as issue-less just to grab the property of late Maika being her brother-in-law.

32. All these questions are disputed questions of fact and as per the

statutory provisions mentioned above, the issues are to be framed, evidences are to be led both oral and documentary and only thereafter, the objection could be decided which had not been followed in the present case. The rights of the petitioners had not been decided by any authority as mentioned above by treating that the initial order under Section 12 dated 17.07.2004 passed in favour of the petitioners had already been set aside by the Settlement Officer in its appellate order dated 04.07.2005 and that is why no issues were framed for determining the claim of the petitioners.

33. In view of the facts, circumstances and discussion made hereinabove, it is held that Rule 30 of the Rules, 1954 provides for procedure laid down in Rules 25-A to 27 and 29 shall mutatis mutandis be followed in deciding matters raised before the Assistant Consolidation Officer/Consolidation Officer under Section 12, which is the procedure provided for deciding the application under Section 9 A but the same has not been followed in the present case while deciding the case of the petitioners as discussed hereinabove, thus, impugned orders dated 20.09.2012 passed by Deputy Director Consolidation and the judgment and orders dated 02.07.2010 as well as 31.10.2005 passed by respondent no. 2-Settlement Officer Consolidation, Lucknow are hereby set aside.

34. It is true that Settlement Officer, Consolidation has set-aside the order passed by the Consolidation Officer in favour of the petitioners under Section 12 but the authorities failed to consider and appreciate that by the same order, the matter was remanded again for consideration to the Consolidation Officer,

therefore, the Consolidation Officer should have given the proper opportunity of hearing, according to provisions of law to the petitioners also. The authorities erred in considering the case of the petitioners shut and close by order dated 31.10.2005 passed by the Settlement Officer, Consolidation by which the matter was remanded, as discussed above.

35. The matter is remanded to the Consolidation Officer to take a decision on the applications preferred by the petitioners and respondent 4, as the respondent nos. 5 to 10 have not challenged the revisional order as it became final against them.

36. The Consolidation Officer-respondent no. 3 is directed to decide the matter expeditiously by following the procedure as provided under the statute and by framing issues regarding the claim of petitioners as well and provide opportunity to adduce oral and written evidence to the petitioners and respondent no. 4/1- Becha Lal (legal heirs of late Bhuinyadeen-respondent no. 4), who was substituted after the demise of respondent no. 4, being an old case of the year 1985, as far as possible within a period of one year from the date of production of certified copy of this order without giving any unnecessary adjournment to any of the parties.

37. Writ petition is *allowed*.

(2024) 4 ILRA 1328
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.04.2024

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ-B No. 8021 of 1990

Nanki Bai

...Petitioner

Versus

D.D.C. & Ors.

...Respondents

Counsel for the Petitioner:

Sri Sunil Ambwani, Sri Awadhesh Prasad Pandey,
Sri Himanshu Pandey, Sri J.P. Rai

Counsel for the Respondents:

S.C., Sri Chandra Shekhar Agnihotri, Sri Harish
Chandra Mishra, Sri Narendra Mohan

A. Civil Law - Constitution of India,1950-Article 226-U.P. Consolidation of Holdings Act,1953-Section 9-A(2)-U.P. Zamindari Abolition and Land Reforms Act,1950-Sections 20, 240-A-Petitioner no.1 filed an objection, seeking to be declared the bhumidhar of the plots-She claimed the plots were leased to her father by the local zamindar-She asserted her long possession of over 50 years entitled to bhumidhar rights u/s 20,240-A of the Act,1950-Held, the deputy director of consolidation acted correctly in dismissing the appellate decision as the petitioner failed to prove adverse possession or valid lease agreements-the petitioner acted improperly by transferring the property during the pendency of the case-Filing appeals and revisions after the village's denotification constituted a misuse of legal process.(Para 1 to 14)

The writ petition is dismissed. (E-6)

List of Cases cited:

1. Nanhoo Mal Vs, Mulloo(1963) LawSuit (All) 92=1964 AIR (ALL) 213
2. Ram Dular Singh & ors. Vs Babu Sukhu & ors. (1963) Lawsuit (All) 101=1963 RD 221
3. Sharda Prasad Tiwari Vs St.of U.P. & ors. (2015)127 RD 702
4. Siddh Narayan Vs DDC & ors.(2007)103 RD 627

(Delivered by Hon'ble Chandra Kumar Rai, J.)

**In Re: Civil Misc. Impleadment
Application No.3 of 2019**

1. Heard Mr. Himanshu Pandey, learned counsel for the applicant and Mr. C.S. Agnihotri, learned counsel for respondent no.4/1.

2. The instant application has been filed on behalf of the applicant- Rajendra Kumar Rai to implead him as petitioner no.2 in the instant petition on the ground that the applicant- Rajendra Kumar Rai has purchased the plot in question by way of registered sale deed executed on 22.1.2001.

3. On the other hand, Mr. C.S. Agnihotri, learned counsel for respondent no.4/1 submitted that the applicant- Rajendra Kumar Rai has committed forgery and he is not bona fide purchaser, as such, he cannot be permitted to be impleaded in the instant petition. He further submitted that the petitioner no.1 has already sold the land in favour of several persons, as such, the applicant is not entitled to be impleaded in the instant petition.

4. I have considered the argument advanced by learned counsel for the parties.

5. Considering the entire facts and circumstances of the case coupled with the fact that the writ petition against the order of the consolidation officer dated 26.3.1981 and Deputy Director of Consolidation dated 26.4.1989 is pending before this Court since 1990, as such, in order to decide the dispute finally between the parties, the applicant- Rajendra Kumar Rai is permitted to be impleaded in the instant petition as petitioner no.2.

6. The impleadment application is accordingly, allowed.

7. Office is directed to implead the applicant- Rajendra Kumar Rai as petitioner no.2 in the array of the parties to the writ petition.

Order on Writ Petition

1. Heard Mr. Himanshu Pandey, Mr. Awadhesh Prasad Pandey & Mr. J.P. Rai, learned counsel for petitioner no.2, Mr. C.S. Agnihotri, learned counsel for respondent no.4/1 and Mr. Rajesh Kumar Tiwari, learned Additional Chief Standing Counsel for the State-respondents.

2. Brief facts of the case are that dispute relates to Khata no.569, plot no.2083 area 0.30 acres and plot no.2086/1 area 0.70 acres situated at Mauza Mau, Pargana and Tahsil- Muranipur, District- Jhansi. In the basic year of the consolidation operation plot in question was recorded in the name of respondent no.4- Bhagwan Das. Against the basic year entry of the aforementioned plot in question petitioner no.1/ Nanki Bai filed an objection under Section 9-A (2) of U.P. Consolidation of Holdings Act, 1953 (hereinafter referred to as "U.P.C.H. Act") claiming to be bhumidar of the plot in question on the ground that the plot in question was given to petitioner's father by the Zamindar of the area on lease. Consolidation Officer framed issues in the aforementioned title objection filed by the petitioner and afforded opportunity to the parties to lead evidence in support of their cases. Consolidation Officer vide order dated 26.3.1981 decided the aforementioned title objection maintaining the basic year entry as well as expunged the entry of possession made in favour of the petitioner. In place of filing appeal against the order of Consolidation Officer dated 26.3.1981, petitioner filed a Civil Suit No-

799 of 1982 for permanent injunction in respect to plot in question along with certain other plots impleading the respondent No-4 as defendant. The aforementioned civil suit was dismissed vide judgment dated 5.11.1984. The village in question was de-notified, under Section 52 of U.P.C.H. Act on 16.12.1985. Against the order of Consolidation Officer dated 26.3.1981, appeal under Section 11 (1) of U.P.C.H. Act along with the prayer for condonation of delay of about 6 years was filed by the petitioner before Settlement Officer of Consolidation on 20.1.1987. The aforementioned appeal was registered as Appeal No.22 and Assistant Settlement Officer of Consolidation, Jhansi vide order dated 26.4.1989 granted benefit of Section 5 of Limitation Act as well as allowed the appeal setting aside the order of Consolidation Officer dated 26.3.1981 and directed to record the name of the petitioner as bhumidhar with transferable right after expunging the name of respondent no.4 from the plot in question. Against the appellate order dated 26.4.1989, a revision under Section 48 of U.P.C.H. Act was filed by respondent no.4 before Deputy Director of Consolidation. The aforementioned revision was registered as Revision No.195 / 203. The Deputy Director of Consolidation vide order dated 23.3.1990 allowed the revision and set aside the appellate order dated 26.4.1989, hence this writ petition on behalf of the petitioner challenging the impugned revisional order dated 23.3.1990 passed by respondent no.1 and to restore the appellate order dated 26.4.1989.

3. This Court vide order dated 6.4.1990 entertained the matter, issued notice to respondent no.4 and granted interim protection staying the operation

of the order dated 23.3.1990 passed by the Deputy Director of Consolidation.

4. Since, the date of grant of interim order dated 6.4.1990, petitioner has not taken steps to serve the respondent no.4. Respondent no.4 has expired in the year 1993 but petitioner has not taken steps to substitute the legal heir of respondent no.4, accordingly, abatement application no.2 of 2019 was filed on behalf of respondent no.4/1 in the instant petition but no step was taken on behalf petitioner no.1, accordingly, this Court vide order dated 8.8.2022 dismissed the writ petition as abated due to non-substitution of legal heirs of deceased respondent no.4 and vacated the interim order. On the recall / restoration application filed on behalf of petitioner no.2, the order dated 8.8.2022 was recalled and writ petition was restored to its original number vide order dated 5.3.2024. The application for substitution of legal heir of respondent no.4 along with the prayer for condonation of delay was allowed by this Court vide order dated 5.3.2024. Respondent no.4/1 has filed her counter affidavit to the main writ petition and petitioner has filed his rejoinder affidavit also.

5. Learned counsel for the petitioner submitted that the title objection was filed by the petitioner under Section 9 A (2) of U.P.C.H. Act for recording her name as bhumidhar with transferable right as petitioner is in possession for last 50 years over the plot in question. He further submitted that the Consolidation Officer has rejected the objection filed by the petitioner on misconceived ground that petitioner has failed to prove his adverse possession over the plot in question. He next submitted that basis of the petitioner's objection is long possession of the

petitioner since before the date of vesting, as such, in view of the provisions contained under Section 20 & 240 A of U.P. Zamindari Abolition & Land Reforms Act, 1950 (hereinafter referred to as "U.P.Z.A. & L.R. Act"), petitioner is entitled to be recorded as bhumidhar of the plot in question. He further submitted that the appellate Court has rightly considered the controversy and allowed the appeal filed by the petitioner directing the authorities to record the name of the petitioner as bhumidhar with transferable rights after expunging the name of respondent no.4. He further submitted that the revisional Court has illegally allowed the revision setting aside the appellate order on the ground that the petitioner has failed to prove his adverse possession in respect to the plot in question. He further submitted that the case of the petitioner has not been examined by the Consolidation Officer as well as Deputy Director of Consolidation taking into consideration the provisions of Section 20 & 240A of U.P.Z.A. & L.R. Act. He next submitted that the revisional Court has not afforded proper opportunity of hearing to petitioner no.1 while deciding the revision under the impugned order. He further placed reliance upon the judgment of this Court reported in **1963 LawSuit (All) 92=1964 AIR (ALL) 213, Nanhoo Mal vs. Mulloo** as well as **1963 LawSuit (All) 101=1963 RD 221, Ram Dular Singh & Others vs. Babu Sukhu Ram & Others** in support of his argument with respect to the provisions contained under Sections 20 & 240A of U.P.Z.A. & L.R. Act.

6. On the other hand, learned counsel appearing on behalf of respondent no.4/1 submitted that nobody is representing the petitioner no.1, as such, the writ petition cannot be entertained and liable to be dismissed. He further submitted

that the petitioner no.1 has misused the process of law by executing the sale deed in favour of petitioner no.2 without getting permission from this Court, as such, the writ petition filed by the petitioner no.1 is liable to be dismissed with cost. He further submitted that the petitioner no.1 has not taken steps to serve the respondent no.4 after getting the interim order from this Court in the year 1990, as such, petitioners are not entitled to any relief in the matter. He next submitted that the title objection filed by the petitioner has been rightly rejected by the Consolidation Officer holding that the entry of possession in favour of petitioner is illegal. He next submitted that no document regarding lease by the Zamindar was filed before the Consolidation Officer nor the Zamindar was examined before the Consolidation Officer, as such, the claim of the petitioner was rightly rejected by the Consolidation Officer. He next submitted that the petitioner has failed to prove the issuance of P.A.-10, as such, the entry of possession will not give any right to petitioner. He further submitted that after decision of Consolidation Officer dated 26.3.1981 petitioner no.1 filed a civil suit for injunction in respect to the plot in question, which was dismissed with finding that petitioner no.1 is neither owner nor in possession of the plot in question. He further submitted that C.H. Form-45 was prepared in the name of respondent no.4 as well as respondent no.4/1 as respondent no. 4 had executed sale-deed in favour of his daughter/respondent no.4/1 on 20.10.1985. He further submitted that village in question was de-notified, under Section 52 of U.P.C.H. Act on 16.12.1985 and appeal under Section 11 (1) of U.P.C.H. Act was filed on 20.1.1987, which has been illegally entertained & allowed by appellate Court vide order dated 26.4.1989, hence

revisional Court has rightly exercised his jurisdiction under Section 48 of U.P.C.H. Act in setting aside the appellate order dated 26.4.1989. He further placed reliance upon the judgments of this Court as well as Hon'ble Supreme Court on the point of opportunity of hearing as well as the provisions contained under Section 20 & 240-A of U.P.Z.A. & L.R. Act in order to demonstrate that no right will accrue to the petitioners. The particulars of the judgments cited by learned counsel for respondent no.4/1 are as under:

"i. 2022 LawSuit (MP) 1678, Shanti w/o Late Ramdas Laxmi w/o Ramswaroop vs. State of Madhya Pradesh Executive Engineer PWD Division 1 Gwalior: Sub Divisional Officer PWD.

ii. AIR 1978 Allahabad 139, Raghubir Sahai Bhatnagar vs. Bhakt Sajja.

iii. Civil Revision No.19 of 2012, Kamleshwar Shahi vs. Rajeev Khurana, judgement dated 20.5.2014.

iv. Civil Misc. Appeal No.5971 of 1985 in Writ Petition No.6178 of 1984.

v. Civil Appeal No.7550-7553 of 2021 (arising out of S.L.P. (C) Nos.26374-26377 of 2013), Shri K. Jaya Ram & Others Vs. Bangalore Development Authority & Others, judgment dated 8.12.2021.

vi. 2020 0 Supreme (SC) 504, Narasamma and Others vs. A.Krishnappa (dead) through LRs.

vii. 2018 0 Supreme (All) 850, Chauthi vs. D.D.C. And Others.

viii. 2013 LawSuit (All) 1533, Sri Pal vs. D.D.C. & Others.

ix. 2022 LawSuit (All) 708, Bhagwati Deen vs. Sheetladin and Others."

7. I have considered the argument advanced by learned counsel for the parties and perused the records.

8. There is no dispute about the fact that the title objection filed by the petitioner has been dismissed by the Consolidation Officer vide order dated 26.3.1981. There is also no dispute about the fact that village in question was de-notified, under Section 52 of U.P.C.H on 16.12.1985, but in appeal filed by the petitioner on 20.1.1987, the order of Consolidation Officer dated 26.3.1981 was set aside and petitioner was ordered to be recorded as bhumidhar with transferable rights. There is also no dispute about the fact that in revision filed by respondent no.4, the appellate order dated 26.4.1989 has been set aside affirming the order of Consolidation Officer dated 26.3.1981. There is also no dispute about the fact that Civil Suit No-799 of 1982 filed by petitioner was dismissed by civil Court on 15.11.1984 holding that petitioner is not in possession of the plot in question.

9. In order to appreciate the controversy involved in the matter, perusal of the order dated 26.3.1981 passed by the Consolidation Officer will be relevant, which is as under:

" न्यायालय श्रीमान चकबंदी अधिकारी
झांसी

वाद सं०-5059 धारा 9ए(2)जोत चकबंदी
अधिनियम 30प्र०

ग्राम मऊ परगना मऊ जिला झांसी

पक्ष नन्ही बाई बनाम भिगवानदास ता०
फैसला 26.3.81

निम्न वाद बिन्दू बनाये गये:-

1- क्या विवादित भूमि का मु० नन्ही बाई से भूमिधरी अधिकार प्राप्त है।

2- क्या प्रतिवादी असल काश्तकार भूमिधर है और काविज है।

3- क्या मु० नन्ही बाई का कब्जे का इन्द्राज फर्जी है।

निर्णय

वाद विन्दु संख्या 1,2 व 3- तीनों वाद विन्दु एक दूसरे से संबंधित हैं। अतः एक साथ तय किये जाते हैं। श्रीमती नन्नी बाई पत्नी मुकुन्द वादी ने शपथपूर्वक कथन किया कि इस भूमि को उसने चन्द्रभान व अजमेर सिंह जमींदार से पट्टे पर लिया था पहले उसके पिता बहोरन जोतते थे और उनकी मरने के बाद वह स्वयं काविज है। उसमें कूप उसके पिता ने खुदवाया और सरकारी कर्जा लिया और बाग लगाया कछियाना पैदा किया जाता है। श्री बदलू पुत्र नन्थू वादी साक्षी ने भी उक्त कथन की पुष्टि की है कि नन्नी बाई इस भूमि को खेती कर रही है। उसने स्वीकार किया कि भगवानदास अपनी भूमि पर व मु० नन्नी बाई अपनी भूमिधर काबिज है। वादी ने कब्जे के समर्थन में कुछ रसीदे जमींदारी व बाद की प्रस्तुत की है। जो दिनांक 14.4.64 लगान 4/- बहोरन सिंह की भूमि लगान मारफ्त राजावेटी 56/57,27/3/61, 27.4.60 चन्द्रभान सिंह द्वारा दी गयी प्रस्तुत की, एक रसीद मु० नन्नी बाई के नाम 1357 फ० 1362 फ० प्रस्तुत की है जिसके द्वारा कब्जा सिद्ध किया गया है किन्तु इन हस्तलिखित कागज को परीचों में न तो कोई भूमि का ब्योरा व विवरण ही है और न यह सिद्ध होता है कि नन्नी बाई द्वारा लगान का भुगतान किया गया है कोई खसरे के इन्द्राज कब्जा सिद्ध करने के लिये व वर्ग 9 क इन्द्राज का लिखित साक्ष्य भी प्रस्तुत नहीं किया गया। जमींदार द्वारा दिया गया पट्टा भी पेश नहीं किया गया और न जमींदार को ही पेश किया गया है। जबकि वह जीवित है। जीवित जमींदार को पेश न करना वादी के दावे के क्षीण कर देता है। कितना लगान दिया मालूम नहीं है। वादी अपना कब्जा सिद्ध करने में असफल रही है।

प्रतिवादी भगवानदास ने मु० नन्नी बाई के कब्जे को अस्वीकार करते हुए अपना कब्जा स्थल पर कथन किया। लगान भी स्वयं देना बताया श्री रमेश चन्द्र पुत्र राजाराम प्रतिवादी साक्षी ने भी मु० नन्नी बाई के कब्जे को इनकार किया है। आर०डी० 1900

पृष्ठ 190 पर व्यक्त किये गये मत के अनुसार से संक्रमणीय भूमिधरी अधिकार गासिवाना कब्जे के आधार पर उसी को दिये जा सकते हैं जो वास्तविक कब्जे में हो और असल कृषक को बिना सहमति के होगा महिला मु० नन्नी बाई का स्वयं का कृषिक actual cultivatory possession नहीं रहा और इस आधार पर महिला को धारा 210 ज०वि० अधिनियम के अन्तर्गत से संक्रमणीय भूमिधरी अधिकार प्राप्त नहीं होते। वाद विन्दु संख्या नकारात्मक वाद विन्दु 2 व 3 सकारात्मक तय किये जाते हैं।

आदेश

गाटा संख्या 2092/1/0-60, 8283/1/0-05, 2083/0-30, 2086/1/0-70 पर से मु० नन्नी बाई पुत्री मुकुन्दी नि० प वारीपुल का कब्जा खारिज करके दर्ज खातेदार भगवानदास पुत्र लक्ष्मी नारायन का नाम यथावत दर्ज रहे।

पत्रावली वाद अमलदरामद दाखिल दफ्तर हो।

ह०/अस्पष्ट च०अ०

26.3.81

10. The perusal of the order passed by the Consolidation Officer dated 26.3.1981 demonstrate that the Consolidation Officer has exercised the jurisdiction in proper manner by framing issues and considering the evidence adduced by the parties in support of their cases. The perusal of the order further demonstrates that the Consolidation Officer while rejecting the title objection filed by the petitioner against the basic year entry as recorded finding that petitioner is not in actual cultivatory possession of the plot in question, as such, petitioner is not entitled to be recorded as bhumidhar with transferable rights.

11. It is material to state that the appeal under Section 11 of U.P.C.H. Act

was filed on behalf of the petitioner on 20.1.1987 although village was de-notified under Section 52 of U.P.C.H. Act on 16.12.1985. It is also material that title objection filed by the petitioner herself was rejected by the Consolidation Officer on 26.3.1981 and civil suit for permanent injunction filed by the petitioner herself was dismissed on 5.11.1984, as such, the filing of appeal at the instance of the petitioner on 20.1.1987 after de-notification of the village was misuse of the process of law. The Settlement Officer of Consolidation has illegally entertained and allowed the appeal under Section 11 of U.P.C.H. Act filed by the petitioner. The filing of appeal and revision after de-notification of the village of under Section 52 of U.P.C.H. Act has been considered by this Court in the case reported in **2015 (127) RD 702, Sharda Prasad Tiwari vs. State of U.P. and Others as well as 2007 (103) RD 627, Siddh Narayan Vs. Deputy Director of Consolidation and Others**. In the aforementioned cases, this Court has held that the appeal and revision can be filed even after de-notification of the village under Section 52 of U.P.C.H. Act in the facts and circumstances of the cases. In the instant matter, petitioner was fully aware about the order of Consolidation Officer dated 26.3.1981 even petitioner no.1 had filed a civil suit after decision of title objection by the Consolidation Officer, which was dismissed on 5.11.1984. The C.H. Form-45 was prepared by the Consolidation Authorities and village has been de-notified on 6.12.1985, as such, the filing of appeal under Section 11 of U.P.C.H. Act on 20.1.1987 was misuse of the process of law. The appeal and revision cannot be filed after de-notification of the village in each and every cases particularly where the parties were fully aware about the order of Consolidation Officer passed

during consolidation operation. The Deputy Director of Consolidation has rightly set aside the order passed by the Settlement Officer of Consolidation although on different ground holding that petitioner has not been found in cultivatory possession of the plot in question and maintained the basic year entry of the plot in question.

12. The Settlement Officer of Consolidation while allowing the appeal filed by the petitioner has held that the petitioner has filed the lagan receipt of 1357 fasli and 1362 fasli, which proves the possession of the petitioner, accordingly, petitioner is entitled to be recorded on the basis of adverse possession as bhumidhar with transferable rights but the finding recorded by the Consolidation Officer while deciding the title objection has not been reversed in proper manner. The Deputy Director of Consolidation while deciding the revision has recorded the finding of fact that in order to prove the adverse possession the issuance of P.A.-10 is mandatory but the same has not been proved that P.A.-10 was issued in the matter, accordingly, Deputy Director of Consolidation allowed the appeal filed by respondent no.4 setting aside the appellate order dated 26.4.1989, which is just and proper exercise of jurisdiction by the Deputy Director of Consolidation.

13. It is material in the instant matter that petitioner no.1 has filed the instant petition in the year 1990 and obtained interim order on 6.4.1990 but she herself transferred the property in question by way of sale deed in favour of petitioner no.2 on 22.1.2001 without getting permission of this Court, which is misuse of the interim order passed by this Court on 6.4.1990 in the writ petition filed by the petitioner no.1 herself. Petitioner has not

taken steps to serve respondent no.4 in proper manner rather transferred the property in question from time to time in favour of strangers, as such, petitioners are not entitled to any relief in the matter.

14. Considering the conduct of petitioner no.1 as well as the order dated 26.3.1981 passed by the Consolidation Officer rejecting the title objection filed by the petitioner, no interference is required in the matter, the writ petition is accordingly, *dismissed*.

15. No order as to cost.

(2024) 4 ILRA 1335
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.03.2024

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ-B No. 24167 of 2017

Karamjeet Singh & Ors. ...Petitioners
Versus
Board of Revenue & Ors. ...Respondents

Counsel for the Petitioners:
 Sri Arvind Srivastava

Counsel for the Respondents:
 C.S.C., Sri Pradeep Singh

A. Civil Law - Constitution of India,1950- Article 226-U.P. Revenue Code,2006- Sections 76(dd) & 77-The petitioner's father was allotted land in 1973 and recorded as a Sirdar later becoming a Bhumidhar with non-trnasferable rights under operation of law-In 1989, his name was expunged from revenue records, downgrading his status to Asami-Subsequent revisions challenging this decision were dismissed-Held, the court ruled that the land was not covered u/s 77 of the Code,2006-U/s 76(dd), even an

Asami in possession could acquire Bhumidhar rights if conditions were met-The impugned orders were found illegal and were set aside-The respondents were directed to record the petitioners' name as bhumidhar with transferable rights within six weeks.(Para 1 to 16)

The writ petition is allowed. (E-6)

List of Cases cited:

1. Gangadeen Vs St.of U.P. & ors.(2018) 138 RD 68

(Delivered by Hon'ble Chandra Kumar Rai, J.)

1. Heard Mr. Arvind Srivastava, learned counsel for the petitioners, Mr. Rajesh Kumar Tiwari, learned Additional Chief Standing Counsel for the State-respondent and Mr. Pradeep Singh, learned counsel for respondent No. 4/Gaon Sabha.

2. Brief facts of the case are that the petitioners' father was employed in the Indian Army and after retirement from the Armed Forces, he was inclined to settle at Mauza Roshannagar, Pargana Arhaura, Tehsil Chunar, District Mirzapur. Petitioners' father filed an application dated 24.03.1973 before the District Magistrate, Mirzapur, for allotting a piece of land to him so that he may cultivate, reside and earn his livelihood. On the application of petitioners' father proceeding was started and a land was allotted in favour of petitioners' father on 22.10.1973. The Sub-Divisional Magistrate granted his approval in respect to the aforementioned allotment made in favour of the petitioners' father giving him Sirdari right in respect to plot Nos. 84, 102, 104, 1, 64/1, 103, 104/183. Naiyab Tehsildar, vide order dated 20.08.1975, ordered to record the name of petitioners' father as Sirdar in respect to plot Nos. 84, 102, 104, 1, 64/1, 103,

104/183. In pursuance of the aforementioned allotment made in favour of the petitioners' father construction was made by him. After expiry of ten years, a proceeding was initiated in respect to the the aforementioned Sirdari right of petitioners and Tehsildar, vide order dated 07.12.1989, recommended to record the aforementioned plot as Asami class-3 after expiring the entry of bhumidhar with non-transferable right. The aforementioned report dated 07.12.1989 was accepted by Sub-Divisional Magistrate, vide order dated 26.12.1989. Against the order dated 26.12.1989, a revision was filed by petitioners' father before the Commissioner, which was dismissed by Additional Commissioner, vide order dated 08.05.1997. Petitioners' father challenged the order dated 08.05.1997, through revision before the Board of Revenue, but Board of Revenue has also dismissed the revision vide order dated 01.03.2017. Hence, this writ petitioner challenging the order dated 26.12.1989 passed by Sub-Divisional Magistrate, order dated 08.05.1997 passed by Additional Commissioner and order dated 01.03.2017 passed by Board of Revenue.

3. This Court, vide order dated 26.05.2017, entertained the matter and granted interim protection in favour of petitioners. In pursuance of the order dated 26.05.2017, counter affidavit has been filed by State and petitioners has filed his rejoinder affidavit also.

4. Learned counsel for the petitioners submitted that petitioners' father was granted lease in the year 1973 being ex-army man as such, the entry of the petitioner cannot be expunged in arbitrary manner without cancelling the lease executed in favour of the petitioners' father in accordance

with law. He further submitted that on the basis of lease executed in favour of petitioners' father, the entry was made in the revenue record as Sirdar and later on, due to operation of law petitioners' father became bhumidhar, with non-transferable right. He further placed a copy of Khatauni, which is annexed as Annexure No. 6 to the instant petition, in which petitioners' father was recorded as bhumidhar with non-transferable right in respect to plot in question. He further submitted that due to further operation of law, the petitioners' father is to be recorded as bhumidhar with transferable right, but under the impugned order, the petitioners entry has been expunged on misconceived ground that petitioners were asami of the plot in question as such, no right will accrue to petitioners after expiry of five years. He further submitted that in view of provisions contained under Section 76 (dd) of U.P. Revenue Code 2006, every person, who was even an asami in possession of land not covered by Section 77 of U.P. Revenue Code 2006 shall be given bhumidhari right. He further submitted that the land in dispute is not covered under Section 77 of the U.P. Revenue Code 2006 as such, even assuming, though without admitting, that the petitioners' father was asami, petitioners will be entitled to the benefit of Section 76 (dd) of the U.P. Revenue Code 2006 and petitioners are entitled to be recorded as bhumidhar with transferable right as petitioners' father has expired. He further submitted that impugned orders passed by Sub-Divisional Officer, Additional Commissioner and Board of Revenue are wholly illegal as such, the same are liable to be set aside and petitioners should be recorded as bhumidhar with transferable right.

5. On the other hand, Mr. Rajesh Kumar Tiwari, learned Additional Chief Standing Counsel for the State and Mr.

Pradeep Singh, learned counsel for respondent No. 4/Gaon Sabha, submitted that petitioners' father was asami of plot in question as such, no right will accrue to petitioners' father or the petitioners after expiry of five years. They further submitted that impugned orders have been rightly passed by the respondents as such, no interference is required against the impugned orders. They further submitted that entry of bhumidhar with non-transferable right was made in illegal manner as such, the entry has been expunged under the impugned orders, which requires no interference by this Court. They further submitted that instant writ petition filed by the petitioners is liable to be dismissed.

6. have considered the arguments advanced by learned counsel for the parties and perused the record.

7. There is no dispute about the fact that allotment was made in favour of petitioners' father in the year 1973 in respect to land which is not covered by Section 77 of U.P. Revenue Code 2006. There is also no dispute about the fact that plot in dispute was recorded as banjar before making allotment in favour of petitioners' father. There is also no dispute about the fact that Nayb Tehsildar, while passing the order for recording the name of petitioners' father in respect to the plot in question vide order dated 20.08.1975 ordered to record the name of petitioners' father as sirdar, but under the impugned order, the petitioners' father was ordered to be recorded as asami of the plot in question. There is also no dispute about the fact that revisions filed by petitioners' father have been also dismissed by Additional Commissioner/Board of Revenue.

8. In order to appreciate the controversy involved in the matter the perusal of Section 76 of U.P. Revenue Code 2006 will be relevant for perusal which is as under:-

"76. Bhumidhar with non-transferable rights.- (1) Every person belonging to any of the following classes shall be called a bhumidhar with non-transferable rights and shall have all the rights and be subject to all the liabilities conferred or imposed upon such bhumidhar by or under this Code, namely:-

(a) every person who was a bhumidhar with non-transferable rights immediately before the date of commencement of this Code;

(b) every person who is admitted as a bhumidhar with non-transferable rights on or after the said date by the Bhumi Prabandhak Samiti to any land under or in accordance with the provisions of this Code;

(c) every person who is allotted any land on or after the said date under the provisions of the Uttar Pradesh Bhoodan Yajna Act, 1952;

(d) every person who is allotted any land on or after the said date under the provisions of the Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960;

(dd) every person who was an asami in possession of land not covered by section 77 of this Code, immediately before the date of the commencement of this Code and had been recorded as such in class-3 of the annual register (khatauni) of 1407 Fasli;

Provided that where the land in possession of a person, together with any other land, held by him in Uttar Pradesh exceeds the ceiling area determined under the Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960, the rights of a

Bhumidhar with non-transferable rights shall accrue in favour of such person in respect of so much area of the first mentioned land, as together with such other land held by him, does not exceed the ceiling area applicable to him, and the said area shall be demarcated in the prescribed manner in accordance with the principles laid down in the aforesaid Act;

(e) every person who in any other manner acquires on or after the said date, the rights of such a bhumidhar under or in accordance with the provisions of this Code, or any other law for the time being in force.

(2) Every person who was a bhumidhar with non-transferable rights immediately before the commencement of this Code and had been such bhumidhar for a period of five years or more, shall become bhumidhar with transferable rights on such commencement.

(3) Every person who was a bhumidhar with non-transferable rights on the commencement referred to in sub-sections (1) and (2) or becomes bhumidhar with non-transferable rights after such commencement shall become bhumidhar with transferable rights after expiry of five years from his becoming bhumidhar with non-transferable rights.

(4) Notwithstanding anything contained in any other provisions of this Code, if any person transfers land by sale after becoming bhumidhar with transferable rights under sub-section (2) or sub-section (3), he shall not be eligible for lease of any land vested in the Gram Panchayat or the State Government or the surplus land defined in the Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960."

9. The perusal of Section 77 of the U.P. Revenue Code 2006 will be also relevant which is as under:-

[(1)] Notwithstanding anything contained in this Code or any other law for the time being in force; no person shall acquire the rights of a bhumidhar in the following land :-

(a) Khaliyan, manure pits, pasture land or land normally used as burial or cremation ground;

(b) land covered by water and used for the purpose of growing singhara or other produce;

(c) land situate in the bed of a river and used for casual or occasional cultivation;

(d) such tracts of shifting or unstable cultivation which the State Government may by notification specify;

(e) land declared by the State Government to be intended or set apart for taungya plantation and notified as such;

(f) grove land entrusted or deemed to be entrusted to a [Gram Panchayat] or any other local authority under Section 59;

(g) land included in sullage farm or trenching ground entrusted or deemed to be entrusted to a [Gram Panchayat] or any other local authority under Section 59;

(h) had acquired or held for a public purpose or a work of public utility;

(i) land covered by a pond, tank or lake, or forming part of an embankment, bandh or bhita; and

(j) any other land which the State Government may, by notification, specify in this behalf;

Explanation. - The expression 'public purpose', in clause (h) shall include :-

(i) land set apart for military camping ground;

(ii) land included within railway or canal boundaries;

(iii) land acquired and held by a local authority for its own purposes;

(iv) land referred to in Section 29-C of the Uttar Pradesh Consolidation of Holdings Act, 1953; or

(v) land reserved by a [Gram Panchayat] for the purposes of public utility :

[***]

[(2) Notwithstanding anything to the contrary contained in other provisions of this Code, where any land or part thereof specified in sub-section (1) of this section is, surrounded by or, in between, or on the edges and necessary for public purpose, the plot or plots of land purchased, acquired or resumed for public purpose, the State Government may change the class of such public utility land, and if class of such public utility land is changed, any other land equivalent to or more than that of the aforesaid public utility land, shall be reserved for the same purpose in the same or any nearby Gram Panchayat or local authority, as the case may be or the State Government may permit the exchange thereof under Section 101 of this Code in the manner prescribed:

Provided that the class of any public utility land may be changed only in exceptional cases on such terms and conditions, as may be prescribed. The reason for changing the class of public utility land shall be recorded in writing.]

(3) The State Government, while changing the class of the land or permitting the exchange of the same under Section 101 of the Code, shall consider the location, public utility and suitability of the land proposed to be reserved or exchanged.

(4) If class of land is changed under sub-section (2) of this section, the Collector shall order the record of rights (Khatauni) and the map to be corrected accordingly.

Explanation. - The expression 'public purpose', in sub-section (2) of this

section means, *mutatis mutandis*, 'the public purpose' as defined in clause (za) of Section 3 of Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (Act No. 30 of 2013).]

10. The perusal of Section 76 (dd) fully demonstrate that even an asami in possession of the land entitled to be recorded as bhumidhar, if, the land is not covered under Section 77 of U.P. Revenue Code 2006.

11. This Court in case reported in **(2018) 138 RD 68, Gangadeen vs. State of U.P. and others** has considered the scope of Section 76 (1) (dd) of the U.P. Revenue Code 2006. Paragraph No. 7 of the judgment rendered in Gangadeen (supra) will be relevant for perusal which is as under:-

"7. As per clause (dd) of Sub-section (1) of the Section 76, every person who was an asami in possession of land not covered by section 77 of the Code, immediately before the date of the commencement of the Code and had been recorded as such in class-3 of the annual register (khatauni) of 1407 Fasli shall be called a bhumidhar with non-transferable rights and shall have all the rights and be subject to all the liabilities conferred or imposed upon such bhumidhar by or under the Code. The land in question is not covered by Section 77 of the Code. Undisputedly, the name of the petitioner was continued to be recorded in the annual register (khatauni) till 1411 to 1416 Fasli. Thus, it is undisputed that the name of the petitioner was recorded in class-3 in the annual register (khatauni) of 1407 Fasli and, therefore, the petitioner is entitled to the benefit conferred under clause (dd) of

Sub-section (1) of the Section 76 of the Code. Therefore, both the impugned orders deserve to be quashed and the case of the petitioner deserves to be considered in the light of the provisions as afore-quoted."

12. In the instant matter, the plot in question was recorded as banjar before making allotment in favour of petitioners' father, which is not covered under Section 77 of the U.P. Revenue Code 2006 as such, right of the petitioners to be recorded as bhumidhar with transferable right in respect to plot in question cannot be rejected in any manner.

13. The perusal of the revenue entry as well as the order passed by Nayb Tehsildar/Sub-Divisional Officer fully demonstrate that after grant of lease in favour of petitioners' father in the year 1973, petitioners' father was initially recorded as sirdar and later on, he was recorded as bhumidhar with non-transferable right. The period of ten years from the date of giving right to the petitioners' father as bhumidhar with non-transferable right had already completed as such, petitioners' father was entitled to be recorded as bhumidhar with transferable right, but authority has illegally ordered to record the name of petitioners father as asami (class-3 category) in respect to the plot in question.

14. Considering the entire facts and circumstances of the case, the impugned order dated 26.12.1989 passed by Sub-Divisional Magistrate, order dated 08.05.1997 passed by Additional Commissioner and the order dated 01.03.2017 passed by Board of Revenue cannot be sustained in the eye of law as such, the same are hereby set aside.

15. The writ petition stands allowed.

16. Respondent No. 2/Sub-Divisional Magistrate, Chunar, District Mirzapur, is directed to take immediate steps for recording the name of the petitioners as bhumidhar with transferable right in respect to plot in question within period of six weeks from the date of production of certified copy of this order before him as more than 48 years period have passed from the date of making allotment of the plot in question in favour of petitioners' father.

(2024) 4 ILRA 1340

**ORIGINAL JURISDICTION
CIVIL SIDE**

DATED: ALLAHABAD 11.03.2024

BEFORE

THE HON'BLE CHANDRA KUMAR RAI, J.

Writ-B No. 47402 of 2012

**Kapil Ram Pandey & Anr. ...Petitioners
Versus
Board of Revenue & Anr. ...Respondents**

Counsel for the Petitioners:

Sri Anil Kumar Mishra

Counsel for the Respondents:

Sri Tarun Gaur(S.C.), Sri Dinesh Kumar Singh,
Sri S.S. Singh, Sri Shri Ram Pandey

**A. Civil Law - Constitution of India,1950-
Article 226-dispute over property
ownership based on two conflicting wills-
A registered will dated 19.02.2002 in
favor of the petitioners-An unregistered
will dated 02.03.2002 in favour of the
both the petitioners and respondent no.2-
The tehsildar ruled in favor of the
registered will rejecting the unregistered
will-The SDM dismissed the respondent
no.'s2 appeal-the board of revenue
reversed the decision allowing the
unregistered will-The court upheld the
Tehsildar's original order favoring the
registered will and set aside the Board of**

Revenue's decision-under section 92 of the Indian Evidence Act, a registered document cannot be overridden by an unregistered one.(Para 1 to 15)

The writ petition is allowed. (E-6)

List of Cases cited:

1. Kalawati Vs Board of Revenue & ors. (2022) 155 RD 169

2. Rampal Vs Board of Revenue U.P. & ors. (2010) ILR 3 All. 1298

3. Sahed Jan @ Bonde & ors. Vs Board of Revenue U.P. at Lko & ors. (2004)96 RD 656

4. Sardul Rajan & ors. Vs DDC Mau & ors. RD (2015) (129) 495.

5. S. Saktivel (Dead) by LRs. Vs M. Venugopal Pillai & ors.(2000)91 RD 615

(Delivered by Hon'ble Chandra Kumar Rai, J.)

1. Heard Sri Anil Kumar, learned counsel for the petitioners, Sri Dinesh Kumar Singh, learned counsel for the respondent no.2 and Sri Tarun Gaur, learned standing counsel for the state-respondents.

2. Brief facts of the case are that one Bakunth Ram Pandey, had two sons, namely, Raghunath Pandey and Ishwar Prasad Pandey. Raghunath Pandey died issueless and Ishwar Prasad Pandey had three sons, namely, Raj Kishor Pandey, Kapil Ram Pandey and Brijesh Ram Pandey. Kapil Ram Pandey and Brijesh Ram Pandey are petitioner nos. 1 & 2 in the instant petition and Meera Pandey, widow of Raj Kishor Pandey is respondent no.2 in the instant petition. A registered will deed is alleged to be executed in favour of the petitioners by Raghunath Pandey on 19.2.2002. Another unregistered will deed

was alleged to be executed on 2.3.2002 in favour of respondent no.2 as well as petitioners by Raghunath Pandey. The property of Raghunath Pandey was situated in two villages, namely, Balwaniya and Lohari. A mutation application was filed on behalf of the petitioners under Section 34 of the U.P. Land Revenue Act, 1901 on the basis of the registered will deed dated 19.2.2002 in respect to the property situated in the aforementioned two villages, accordingly, two cases were registered which were numbered as Case Nos. 469 & 896 before the Tehsildar. Mutation application under Section 34 of the U.P. Land Revenue Act, 1901 were also filed by respondent No. 2 on the basis of her unregistered will deed dated 2.3.2002 which were also registered as Case Nos. 581 & 582 before the Tehsildar. All the aforementioned four cases were consolidated and heard together. The Tehsildar vide order dated 25.3.2004 recorded a finding that will deed executed on 19.2.2002 is fully proved, as such, the petitioners are entitled to be recorded in place of deceased Raghunath Pandey and claim set up by respondent no.2 on the basis of unregistered will deed is liable to be rejected. The order dated 17.6.2002 passed on the basis of Pa Ka-11, recording the name of Ishwar Prasad Pandey (father of petitioners) has been set aside. Against the order of Tehsildar dated 25.3.2004, Appeal No.13 of 2003-04 was filed before the Sub Divisional Magistrate by respondent no.2 under Section 210 of the U.P. Land Revenue Act, 1901 which was heard and dismissed vide order dated 29.4.2004. Against the order dated 29.4.2004, respondent no.2 filed revision under Section 219 of the U.P. Land Revenue Act, 1901 before the Board of Revenue, U.P. at Lucknow which was registered as Case No.112/L.R./2003-04.

The Board of Revenue vide judgment dated 28.7.2005 allowed the revision setting aside the order dated 29.4.2004 passed by Tahasildar as well as order dated 25.3.2004, passed by the Sub Divisional Magistrate, ordered and to record the name of respondent no.2 as well as petitioners on the basis of unregistered will deed dated 2.3.2002. The petitioners challenged the order dated 28.7.2005 passed by respondent no.1/Board of Revenue through Writ Petition No.59259 of 2005 which was allowed vide order dated 29.8.2011 setting aside the order of respondent no.1/Board of Revenue dated 28.7.2005 and the matter was remanded back before the Board of Revenue to decide the revision afresh. In pursuance of the remand order passed by this Court on 29.8.2011, revision was heard afresh by respondent no.1/Board of Revenue and respondent no.1 has again allowed the revision vide order dated 10.7.2012, setting aside the order dated 29.4.2004 and 25.3.2004 as well as directed the authorities to record the name of respondent no.2 along with petitioners on the basis of will deed dated 2.3.2002. Hence, this writ petition, challenging the order dated 10.7.2012 passed by respondent No.1/Board of Revenue.

3. This Court vide order dated 17.9.2012 entertained the matter and issued notice to respondent no.2. This Court vide subsequent order dated 4.4.2016 further granted time to the counsel for the private respondent no.2 to file counter affidavit and as an interim measure, directed the authorities not to create 3rd party right in respect to the property in question.

4. In pursuance of the aforementioned orders, stay vacation application along with counter affidavit has been filed on behalf of respondent no.2 on

24.11.2021 and the petitioners have filed their rejoinder affidavit also on 13.1.2022.

5. Counsel for the petitioner submitted that the Tehsildar has rightly allowed the mutation application filed on behalf of the petitioners on the basis of registered will deed executed on 19.2.2002 and rejected the claim of respondent no.2 set up on the basis of subsequent unregistered will deed dated 2.3.2002. He submitted that the Tehsildar has rightly exercised the jurisdiction under Section 34 of the U.P. Land Revenue Act, 1901 against which the aggrieved party can avail the remedy of regular court rather to contest the mutation proceeding before the court exercising the summary jurisdiction. He further submitted that the Tehsildar has properly considered the evidence of marginal witness of the registered will deed and found that the registered will deed was executed in accordance with the provisions of the Indian Evidence Act and the Indian Succession Act. He also submitted that against the earlier order of the Board of Revenue passed in favour of respondent no.2, the writ petition filed by the petitioners was allowed and the matter was remanded back to decide the revision afresh but the revisional court has again exercised the revisional jurisdiction in arbitrary manner by which the right set up on the basis of the subsequent unregistered will deed has been accepted and the claim set up on the basis of earlier registered will deed has been rejected. He also submitted that the registered document cannot be substituted by unregistered document. He further submitted that Raghunath Pandey expired on 14.3.2002 and unregistered will deed was alleged to be executed on 2.3.2002 as such the unregistered will deed deemed to be suspicious in view of the health condition of Raghunath Pandey at

the relevant point of time. He also submitted that the impugned revisional order be set aside and the order passed by the Tehsildar dated 25.3.2004 be affirmed.

6. On the other hand, Sri Dinesh Kumar Singh, learned counsel appearing for respondent no. 2 submitted that the Board of Revenue has exercised the revisional jurisdiction in accordance with law for directing to record the names of the petitioners as well as respondent no.2 on the basis of unregistered will deed dated 2.3.2002, setting aside the order of Tehsildar and the Sub Divisional Magistrate. He further submitted that in the subsequent unregistered will deed dated 2.3.2002, Raghunath Pandey has cancelled the earlier will deed dated 19.2.2002, supported by reason as such, the subsequent unregistered will deed executed on 2.3.2002 cannot be doubted in any manner. He also submitted that due to health condition of Raghunath Pandey, the unregistered will deed was thumb marked and the reason has been assigned in the will deed that he is not in a position to make his signature over the will deed in question. He also submitted that the will deed dated 2.3.2002 was the second and the last will deed executed in favour of respondent no.2 along with the petitioners, as such, the exercise of jurisdiction by the Board of Revenue is in the interest of justice which requires no interference by this Court. He also submitted that the will deed dated 2.3.2002 was proved according to the provisions contained under Section 68 of the Indian Evidence Act, as such, the order passed by respondent no.1/Board of Revenue for recording the name on the basis of subsequent unregistered will deed dated 2.3.2002 was in accordance with law. He also submitted that as per the cross-examination of the marginal witness of the

will deed dated 19.2.2002, it is established that Raghunath Pandey had no knowledge that in the will deed dated 19.2.2002, there is no mention of the name of respondent no.2/Meera Pandey along with petitioners. He submitted that the instant writ petition arises out of mutation proceeding, as such, the same is not maintainable and petitioners should avail remedy before the regular court for declaration of their right. He further placed reliance upon the judgment of this Court reported in **Kalawati Vs. Board of Revenue and others 2022 (155) RD 169, Rampal Vs. Board of Revenue U.P & Ors. (2010) ILR 3 All. 1298, Sahed Jan @ Bonde and others Vs. Board of Revenue U.P at Lucknow and others 2004 (96) RD 656 and Sardul Rajan and others Vs. Deputy Director of Consolidation Mau and others RD 2015 (129) 495.**

7. I have considered the arguments advanced by learned counsel for the parties and perused the records.

8. There is no dispute about the fact that in respect to the property of Raghunath Pandey, two claims were set up by the petitioners as well as by respondent no.2, one claim was set up by the petitioners on the basis of registered will deed executed on 19.2.2002 by Raghunath Pandey and another claim was set up by respondent no.2 on the basis of unregistered will deed dated 2.3.2002 executed by Raghunath Pandey. There is also no dispute about the fact that the Tehsildar after considering the claim of both the parties, directed to record the name of the petitioners on the basis of registered will deed executed on 19.2.2002 and rejected the claim of respondent no.2 set up on the basis of subsequent unregistered will deed executed on

2.3.2002. There is also no dispute about the fact that the appeal filed by respondent no.2 was dismissed but in revision the Board of Revenue has set aside the order of the Tehsildar as well as that of the S.D.M. in appeal and directed to record the name of respondent no.2 as well as petitioners on the basis of subsequent unregistered will deed dated 2.3.2002.

9. In order to appreciate the controversy, perusal of the relevant portion of the order of the Tehsildar dated 25.3.2004 will be relevant which is quoted hereunder:-

न्यायालय तहसीलदार-घोरावल,

जनपद सोनभद्र

1- वाद संख्या-469, अन्तर्गत धारा 34/भू०रा०अधि०

कपिल राम, बृजेश राम प्रति रघुनाथ प्रसाद बावत मौजा लोहामण्डी।

2- वाद संख्या 896, अन्तर्गत धारा 34/भू०रा०अधि०

कपिलराम, बृजेश राम प्रति रघुनाथ प्रसाद बावत मौजा बेलवनियां।

3- वाद संख्या 581, अन्तर्गत धारा 34/भू०रा०अधि०

मीरा पाण्डेय, कपिल राम, बृजेश राम प्रति रघुनाथ प्रसाद बावत मौजा लोहा मण्डी।

4- वाद संख्या 582, अन्तर्गत धारा 34/भू०रा०अधि०

मीरा पाण्डेय, कपिल राम, बृजेश राम प्रति रघुनाथ प्रसाद बावत मौजा बेलवनिया।

सर्वप्रथम पंजीकृत वसीयत 19.2.2002 का परीक्षण किया जा रहा है। इस वसीयत पर

चस्पा की गई फोटो को स्व० रघुनाथ प्रसाद पाण्डेय के फोटो के रूप में दोनों हासिया के गवाहों ने स्वीकार किया है। मीरा पाण्डेय की ओर से यह प्रतिवाद नहीं किया गया है कि यह फोटो रघुनाथ प्रसाद पाण्डेय की नहीं है। यही व्यक्ति दिनांक: 19.02.2002 को उपनिबन्धक घोरावल के यहां उपस्थित होकर वसीयत का निस्पादन सुन समझ कर स्वीकार किया है, जैसा कि उपनिबन्धक के पृष्ठांकर दिनांक: 19.2.2002 से स्पष्ट है। इस पंजीकृत वसीयत के हासिया के दो गवाह हैं एक ईश्वर प्रसाद तथा दूसरे जय प्रसाद पाठक। दोनों ने न्यायालय में उपस्थित होकर वसीयत के निस्पादन को स्वीकार किया है। ईश्वर प्रसाद जो कि मृतक के नौसर्गिक निकटतम वारिस तथा कपिल राम व बृजेश राम के पिता हैं, के ब्यान को एक क्षण के लिए अलग भी कर दें तो जय प्रसाद पाठक ने अपने बयान में कहा है कि " वकील साहब सुदा वसीयत को पढ़कर सुनाए। सुनने व समझने के बाद रघुनाथ अपना नि०अं० लगाए। अं० नि० मेरी व ईश्वर प्रसाद की उपस्थिति में रघुनाथ ने अपना नि०अं० लगाए। रघुनाथ की उपस्थिति में मैं और ईश्वर प्रसाद पाण्डेय ने बतौर गवाह अपना-अपना हस्ताक्षर बनाया। वसीयतनामा में चिपकाए गए फोटो को देखकर गवाह ने बताया कि यह फोटो रघुनाथ प्रसाद पाण्डेय पुत्र बैकुण्ठ प्रसाद पाण्डेय का है।" इस प्रकार गवाह ने एक ही सीटिंग में एक दूसरे की उपस्थिति में एक दूसरे को वसीयत पर हस्ताक्षर/अं०नि० लगाने की बात स्वीकार की है। इससे सम्पत्ति अन्तण अधिनियम की धारा 3 के अनुसार वसीयत के अटेस्टेशन प्रमाणित होते हैं।

अब इसी जय प्रसाद पाठक के बयान के प्रति परीक्षण के अंश को देखते हैं, इसमें गवाह ने कहा कि " रघुनाथ पाण्डेय को मैंने देखा है। वे चलने फिरने में वसीयत लिखने के दिन पूर्णतया असमर्थ थे। ठेला से लादकर आए थे। जितना देर तक वसीयत की लिखी पढ़ी हुयी रघुनाथ उसी ठेले पर सोये रहे। लिखा पढ़ी के बाद हमने या मसविदाकर्ता द्वारा उनसे न तो कुछ पूछा गया और न ही उन्हें पढ़कर सुनाया गया। वसीयत लिखने के बाद उसी ठेले पर ले जाया गया उसी जगह उनका नि०अं० लगवाया गया।" उस बयान में भी गवाह ने रघुनाथ को नि०अं० लगाने की बात स्वीकार की है, परन्तु अपने मुख्य परीक्षा के ब्यान से हटकर एक तथ्य यह भी कहा है कि रघुनाथ चलने फिरने में असमर्थ थे तथा उनसे कुछ पूछा नहीं गया और न वसीयत पढ़कर सुनायी गयी। इस सम्बन्ध में उपनिबन्धक का पृष्ठांकन दिनांक 19.2.2002 जो कि उनके द्वारा अपने पदीय राजकीय दायित्व के तहत किया गया है महत्वपूर्ण है, इसमें उपनिबन्धक घोरावल ने स्पष्ट रूप से यह लिखा है कि " इस पत्र के विषय व सम्पादन को सुनसमझ कर श्री रघुनाथ प्रसाद उक्त ने स्वीकार किया" इससे स्पष्ट है कि वसीयत के निस्पादन को श्री रघुनाथ प्रसाद को सुनाया व समझाया गया था और निस्पादन को श्री रघुनाथ प्रसाद को सुनाया व समझाया गया था और उन्होंने उसे स्वीकार करते हुए निस्पादिन किया है। मैं कपिल राम के विद्वान के अधिवक्ता के इस कथन से सहमत हूँ कि गवाह जय प्रसाद पाठक ने प्रतिपरीक्षण में दबाव में कुछ हटकर

टिप्पणी की है, परन्तु रघुनाथ प्रसाद के नि०अं० लगाने की बात को स्वीकार किया है। इस प्रकार गवाह मूल रूप से निस्पादन को स्वीकार करते दिखता है। वसीयत भारतीय साक्ष्य अधिनियम की धारा 68 के अनुसार साबित है।

सुबसे मुख्य बात यह है कि मीरा पाण्डेय के पास में अपंजीकृत वसीयत 2.3.2002 में कपिल व बृजेश के पक्ष में लिखे गए वसीयत दिनांक 19.2.2002 को स्वीकार किया गया है तथा उसे निरस्त करने की बात इस वसीयतनामा 2.3.2002 में है। इस प्रकार इस दृष्टि से भी दिनांक 19.2.2002 को कपिल राम व बृजेश राम के पक्ष में निस्पादित पंजीकृत वसीयत सिद्ध है।

अब मीरा पाण्डेय, कपिल राम व बृजेश राम के पक्ष में लिखे गए अपंजीकृत वसीयत 2.3.2002 पर विचार किया जा रहा है। वाद में निस्पादित वसीयत ही प्रभावी भी होगी। लेकिन वसीयत को भारतीय साक्ष्य अधिनियम की धारा 68 तथा सम्पत्ति अन्तरण अधिनियम की धारा 3 के अन्तर्गत प्रमाणित होना अनिवार्य है। मीरा पाण्डेय द्वारा 2.3.2002 को अपने पक्ष में रघुनाथ द्वारा वसीयत लिखने की बात कही जा रही है, परन्तु उनके द्वारा रघुनाथ मृतक के मृत्यु की वास्तविक तिथि का कोई अभिलेखीय साक्ष्य नहीं दिया गया है, जिससे यह सिद्ध हो सके कि निस्पादन की तथाकथित तिथि पर निस्पादनकर्ता जीवित भी था या नहीं। यह मान भी लें कि 2.3.2002 को रघुनाथ प्रसाद जीवित थे, ऐसी स्थिति में वसीयत दिनांक 2.3.2002 के परीक्षण पर क्या तथ्य आते हैं?

जैसा कि ऊपर के प्रस्तरों में विवेचनोपरान्त यह निष्कर्ष प्रमाणित है कि कपिल राम व बृजेश के पक्ष में निष्पादित वसीयत 19.2.2002 प्रमाणित तथा उभय पक्षों को स्वीकार है, इसलिए इस वसीयत पर बने रघुनाथ के अं०नि० तथा दिनांक 2.3.2002 को मीरा पाण्डेय आदि के वसीयत पर बने रघुनाथ के अं०नि० के सामान्य मिलान से दिनांक 2.3.2002 के वसीयत की प्रमाणिकता सिद्ध हो सकती है। दिनांक 19.2.2002 के वसीयत पर रघुनाथ प्रसाद पाण्डेय के अंगूठा निशान जो बने हैं, सामान्यता नंगी आंखों से देखने पर भी उसमें जो रेखायें दिखती हैं उनसे अंगूठा के बीच में घुमावदार चक्र "चक्र" जैसी आकृति बन रही है। दिनांक 2.3.2002 के वसीयत पर रघुनाथ प्रसाद पाण्डेय के अंगूठा के जो निशान बने हैं, सामान्य तथा नंगी आंख देखने पर ही उसमें जो रेखायें दिखती हैं उनसे अंगूठा बीच में कोई "चक्र" जैसी आकृति नहीं बनती है, बल्कि घुमावदार रेखायें अंगूठा के प्रथम पोर के ऊपरी हिस्से पर "शंख" जैसी आकृति बनती है। अंगूठा के निशान में उभरी रेखाओं के घुमाव व टर्निंग में भिन्नता नंगी आंखों से ही देखी जा सकती, इसके लिए किसी विशेषज्ञ की राय लेने की भी आवश्यकता नहीं है। भारतीय साक्ष्य अधिनियम में स्पष्ट प्राविधान है कि न्यायालय स्वयं भी विशेषज्ञ के रूप में व्यवहार कर सकता है। ऐसी स्थिति में दिनांक 19.2.2002 की प्रमाणित वसीयत पर बने रघुनाथ के अंगूठा निशान की तुलना में दिनांक 2.3.2002 की वसीयत पर बने अंगूठा के

निशान भिन्न हैं तथा रघुनाथ के अंगूठा के निशान नहीं हो सकते हैं।

अतः दिनांक 2.3.2002 की वसीयत की परिस्थितिजन्य साक्ष्यों पर विचार करते हैं। दिनांक 2.3.2002 की वसीयत टंकित है तथा हसियें के गवाह चंद्रमणि द्वारा यह भी कहा गया है कि वसीयत की लिखा पढ़ी तहसील मुख्यालय पर की गई है। तहसील मुख्यालय पर मात्र चंद कदमों पर स्थित उपनिबंधक कार्यालय में पंजीयन न होने के विषय में गवाह ने मात्र यह कहा है कि पंजीयन के लिए समय नहीं था। गवाह ने वसीयत पूर्ण होने का समय चार-पांच बजे बताया है। उपनिबंधक कार्यालय पाँच बजे तक खुला रहता है और यह कहना कि समयाभाव के कारण पंजीयन नहीं हो सका, बिल्कुल तथ्य से हट कर है। इस प्रकार परिस्थितियों यह प्रदर्शित करती है कि 2.3.2002 वसीयत प्रूवड नहीं है।

उपर्युक्त विवेचन के आधार पर मैं इस निष्कर्ष पर पहुँचा हूँ कि दिनांक 19.2.2002 की पंजीकृत वसीयत प्रूवड है तथा दिनांक 2.3.2002 की अपंजीकृत वसीयत प्रूवड नहीं है, ईश्वर प्रसाद के पक्ष में प०क० 11 क का पारित आदेश भी जो कि धारा 171 में पारित किया गया है, अब धारा 169 में वसीयत प्रूवड होने के कारण निरस्त होने योग्य है।

आदेश

ग्राम बेलवनिया की वर्तमान खतौनी 1408-1412 एफ खाता 81 तथा 101 से मृतक रघुनाथ पुत्र बैकुण्ठ राम नि० ग्राम बेलवनिया का नाम पृथक करके पंजीकृत वसीयत के

आधारपर कपिल राम व बृजेश राम पुत्रगण ईश्वर प्रसाद पाण्डेय नि० बेलवनीर्यी का नाम बतौर वारित दर्ज हो। प०क० 11 क का आदेश 16.6.2002 निरस्त हो।

ग्राम लोहामण्डी की खतौनी वर्ष 1405-1410 फ० के खाता 9 तथा 118 से बने वर्तमान खतौन 1411-1416 एफ के खाता 9 से मृतक रघुनाथ पुत्र बैकुण्ठ राम नि० ग्राम बेलवनियां का नाम (गैर गुन्दर्ज खतौनी), ईश्वर प्रसाद पुत्र बैकुण्ठ प्रसाद मुन्दर्ज खतौनी (केवल पूरा खतौन 1405 1410 एफ के खाता 9, 118 के बावत) का नाम पृथक करके पंजीकृत वसीयतनामा के आधार पर कपिल राम व बृजेश राम पुत्रगण ईश्वर प्रसाद पाण्डेय नि० बेलवनिया का नाम दर्ज हो। प०क० 11का आदेश 17.6.2002 निरस्त हो। वाद अमलदरामद दाखिल दफतर हो।

ह०अप०

तहसीलदार 25.3.2004

(सत्य प्रतिलिपि)

10. The perusal of the finding of fact recorded by the Tehsildar fully demonstrates that the Tehsildar has rightly exercised the jurisdiction considering the claim set up on the basis of the registered will deed dated 19.2.2002 as well as the claim set up on the basis of unregistered will deed dated 2.3.2002. The Tehsildar has recorded the finding of fact that the registered will deed dated 19.2.2002 is proved and the subsequent unregistered will deed dated 2.3.2002 is not proved, as such, there is no infirmity in exercise of jurisdiction under Section 34 of the U.P. Land Revenue Act, 1901 by the Tehsildar.

The exercise of jurisdiction by the Board of Revenue under Section 219 of the U.P. Land Revenue Act, 1901 for recording the name on the basis of subsequent unregistered will deed is in excess of revisional jurisdiction of the Board of Revenue. The law relating to mutation under Section 34 of the U.P. Land Revenue Act, 1901 is very clear that there should be proper exercise of jurisdiction by the authority under Section 34 of the U.P. Land Revenue Act, 1901 and the exercise of jurisdiction by the authority under Section 34 of the U.P. Land Revenue Act, 1901 is always subject to the adjudication of the dispute by the regular court, as such, respondent no.2 can initiate proper proceeding before the regular court for redressal of her grievance in accordance with law rather contest the summary proceeding for unlimited period.

11. There is another aspect of the case also that registered will deed executed in favour of petitioners' has been alleged to be cancelled by unregistered will deed which is in violation of the provisions contained under Section 92, proviso (4) of the Indian Evidence Act, 1872 which runs as follows:-

Proviso (4).--The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents:

12. Hon'ble Apex Court in the case reported in **2000(91) RD 615, S. Saktivel (Dead) by L.Rs. vs. M. Venugopal Pillai**

and Others has discussed the scope of Section 92 proviso 4 of the Indian Evidence Act, 1872. The paragraph no. 7 of the judgment rendered in **S. Saktivel (Dead) by L.Rs. (Supra)** is relevant which is as follows:-

"In sum and substance what proviso (4) to Section 92 provides is that where a contract or disposition, not required by law to be in writing, has been arrived at orally then subsequent oral agreement modifying or rescinding the said contract or disposition can be substantiated by parol evidence and such evidence is admissible. Thus if a party has entered into a contract which is not required to be reduced in writing but such a contract has been reduced in writing, or it is oral in such situations it is always open to the parties to the contract to modify its terms and even substitute a new by oral contract and it can be substantiated by parol evidence. In such kind of cases the oral evidence can be let in to prove that the earlier contract or agreement has been modified or substituted by new oral agreement. Where under law a contract or disposition are required to be in writing and the same has been reduced in writing, its terms cannot be modified or altered or substituted by oral contract or disposition. No parol evidence will be admissible to substantiate such an oral contract or disposition. A document for its validity or effectiveness is required by law to be in writing and, therefore, no modification or alteration or substitution of such written document is permissible by parol evidence and it is only by another written document the terms of earlier written document can be altered, rescinded or

substituted. There is another reason why the defendant/appellant cannot be permitted to let in parol evidence to substantiate the subsequent oral arrangement. The reason being that the settlement deed is a registered document. The second part of proviso (4) to Section 92 does not permit leading of parol evidence for proving a subsequent oral agreement modifying or rescinding the registered instrument. The terms of registered document can be altered, rescinded or varied only by subsequent registered document and not otherwise. If the oral arrangement as pleaded by the appellant if allowed to be substantiated by parol evidence it would mean re-writing of Ex.A/1 and, therefore, no parol evidence is permissible."

13. So far as the case laws cited by learned counsel for the respondent No. 2 are concerned, this Court has held in **Kalawati (Supra) & Sahed Jan @ Bonde (Supra)** that there should be proper exercise of jurisdiction in the mutation proceeding under Section 34 of U.P. Land Revenue Act, 1901 now Section – 34/35 of U.P. Revenue Code, 2006 which shall be subject to the adjudication of the dispute by regular court. In the instant matter, Tahasildar has rightly exercised the jurisdiction in the mutation proceeding which shall be subject to the adjudication of dispute, if any, by regular court. In the case of **Sardul Ranjan (Supra)** this Court in paragraph No-13 of the judgment has considered the case of Hon'ble Apex Court reported in **2005 (98) RD 613, Sridevi Versus Jayaraja Shetty** in which death of testator occurred within 15 days of the execution of will, as such, the will deed was found suspicious as such case laws cited by learned Counsel for the

respondent No – 2 will not support his argument.

14. Considering the entire facts and circumstances as well as the ratio of law laid down by the Hon'ble Apex Court in the case of **S. Saktivel (Dead) by L.Rs.** (supra), the impugned revisional order dated 10.7.2012, passed by respondent no.1/Board of Revenue is liable to be set aside and the same is hereby set aside. The order passed by the Tehsildar dated 25.3.2004 for recording the name of the petitioners on the basis of the registered will deed dated 19.2.2002 is hereby affirmed.

15. The writ petition stand allowed.

16. Needless to say that the order passed in mutation / summary proceeding is always subject to adjudication of dispute if any by the regular court.

(2024) 4 ILRA 1349
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.04.2024

BEFORE

THE HON'BLE ROHIT RANJAN AGARWAL, J.

Writ-C No. 292 of 2024
 With other connected cases

The Indian Express Pvt. Ltd. ...Petitioner
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioner:
 Sri Sunil Kumar Tripathi

Counsel for the Respondents:
 A.S.G.I., Sri Anand Kumar Chaubey, Sri Man Mohan Singh, C.S.C.

**A. Civil Law - Constituion of India,1950-
 Article 226-Working Journalists and Other
 Newspaper Employees(Conditions of**

Service) and Miscellaneous Provisions Act,1955-Section 17-The petitioners contested the validity of the state government's notification authorizing specific officers to handle dispute 17 of the act,1955-the Assistant Labour Commissioner referred disputes to the Labour Court regarding short payments to employees-Held, the notification delegating power u/s 17 was upheld as it was consistent with the seamless mechanism envisaged by the act,1955-Section 17 was found to provide an integrated framework for resolving disputes and recovering dues-The Assistant labor commissioner's role in referring disputes was valid-The Labour Court's findings on short payment of wages were not challenged on merits but only on technical grounds, which were dismissed-The court clarified that the Labour Court's decision under section 17(3) was not an "award" requiring publication under the Industrial Disputes Act-Hence, the notification, reference to Labour Court and recovery orders were upheld-The court emphasized the intent of the act 1955 to safeguard the rights of journalists and newspaper employees, especially concerning wage disputes through an effective recovery mechanism.(Para 1to 60)

The writ petition is dismissed. (E-6)

List of Cases cited:

1. ABP Pvt. Ltd. Vs U.O.I.(2014) 3 SCC 327
2. Avishek Raja & ors. Vs Sanjay Gupta(2017) 8 SCC 422
3. Pradhan Prabandbank/Unit Head M/s Amar Ujala Vs St. of U.P. & ors. (2018)7 ADJ 715
4. Hindustan Media Ventures Ltd. Jagatganj Vns. Vs St. of U.P. & ors.(2020)7 ADJ 555
5. Ficus Pax (P) Ltd. Vs U.O.I.(2020) 4 SCC 810
6. Coleman Co.Ltd. Vs St.of Bih.(2015) 11 SCC 204
7. Awaz Prakashan (P) Ltd. Vs Pramod Kumar Pujari (2003) 6 SCC 104

8. M/s Jagran Prakashan Ltd. & anr. V Labour Court & ors. Writ-C 37024 of 2012

9. Bharat Heavy Electricals Ltd Vs Anil(2007) 1 SCC 601

10. P. Virudhachalam VS Lotus Mills(1998) 1 SCC 650

11. Nelson Motis Vs U.O.I.(1992) 4 SCC 711

12. Singareni Collieries Co. Ltd. Vs Vemuganti Ramakrishnan Rao(2013) 8 SCC 789

13. CBI Vs Ramesh Gelli(2016) 3 SCC 788

14. Indore Development Authority Vs Shailendra (2018) 3 SCC 412

15. Smyuktha Karnataka Vs M.L. Satyanarayana Rao & anr.(1986) LIC 626

16. Samarjit Ghosh Vs Bennet Coleman & Co. & ors. (1987) 3 SCC 507

17. The Mgmt of Samyutha Karanataka Vs M.L., Satyanarayana Rao & anr.(1986)

18. Rajan Sandhi P. Vs U.O.I. & anr.(2010) 10 SCC 338

19. Novttis India Ltd Vs St.of W.B. & ors.(2004) 101 FLR 278

20. Smt Shushila Sharma Vs Sh. Pawan Sharma WP No. 18946 of 2006

21. Sadhu Ram Vs DTC(1983) 4 SCC 165

22. St. of U.P. & ors. Vs C/M D.A.V . Inter College & anr. (2009)6 ADJ (DB)

(Delivered by Hon'ble Rohit Ranjan Agarwal, J.)

1. Through all these writ petitions, a challenge has been made to the notification dated 12.11.2014 issued by State Government specifying the officers mentioned in Column II to be “authorities competent” to dispose the application under

Section 17 of “Working Journalists and other Newspaper Employees (Conditions of Service) and Misc. Provisions Act, 1955” (for short ‘Act 1955’), the reference order dated 10.03.2023 passed by Assistant Labour Commissioner, Gautam Budh Nagar and order dated 22.05.2023 passed by Labour Court, NOIDA rejecting the application regarding jurisdiction of Court.

2. Writ Petition No. 292 of 2024 assails the order dated 10.11.2023 passed by Labour Court, NOIDA, Gautam Budh Nagar in WJA Case No. 01/2023, 02/2023, 03/2023, 04/2023, 05/2023, 06/2023, 07/2023, 08/2023, 09/2023, 10/2023 and 11/2023. As all the cases are interconnected and petitioner is same in all the writ petitions, with the consent of the parties, they are heard and decided together. Writ Petition No. 292 of 2024 is taken as the leading case.

3. Petitioner before this Court, The Indian Express Pvt. Ltd. is a company incorporated under the provisions of Companies Act having its registered office at Mumbai and branch office at NOIDA at Express Building B1/B Sector 10 NOIDA and also a factory at NOIDA. It is a media group known as “Indian Express Group” or “Express Group”. Respondent nos. 7 to 15 are newspaper employees of petitioner company as defined under Section 2(c) of Act 1955. Except respondent no. 13 who is a working journalist as defined under Section 2(f). The other contesting respondents are non-journalist newspaper employees covered under Section 2(dd) of the Act 1955.

4. The Act 1955 was enacted for improvement and regulation of service condition of working journalists and other employees. The Act covers entitlement of

gratuity, provident fund settlement of industrial disputes, leave with pay, hours of working and minimum wages.

5. Section 2(b) defines “newspaper” which means any printed periodical work containing public news or comments on public news and includes such other class of printed periodical work as may, from time to time, be notified in this behalf by Central Government in the Official Gazette. Section 2(c) defines “newspaper employee” which not only means working journalists but also includes any other person employed to do any work in, or in relation to, any newspaper establishment.

6. Section 2(dd) was inserted by Act No. 60 of 1974 which defines “non-journalist newspaper employees” which covers person employed to do any work in, or in relation to, any newspaper establishment, but does not include a working journalist or other employees employed mainly in a managerial or administrative capacity or in a supervisory capacity.

7. “Working journalists” have been defined in Section 2(f) which means persons whose principal avocation is that of journalist and also includes an editor, a letter-writer, news-editor, sub-editor, feature-writer, copy-tester, reporter, correspondent, cartoonists, news-photographer and proof-reader. Section 3 of Chapter II provides that provisions of Industrial Disputes Act, 1947 (for short ‘Act of 1947’) shall be subject to modification specified in sub-section (2), apply to, or in relation to, working journalists as they apply to, or in relation to workmen within the meaning of that Act.

8. Section 9 provides for the procedure for fixing and revising rates of wages in respect of working journalists by Wage Board constituted by Central Government. The recommendation made by Wage Board accepted by Central Government are notified under Section 12 of the Act. Section 13 thereafter provides that working journalists will be entitled to wages at the rate not less than those specified in the order on coming into operation of an order of Central Government under Section 12.

9. Chapter II-A deals with non-journalist newspaper employees. Section 13-B provides for fixation or revision of rates of wages of non-journalists newspaper employees. Section 13-C provides for constitution of Wage Board by Central Government for fixing and revising the wages of non-journalist newspaper employees.

10. The Central Government in exercise of power under Section 9 and 13-C of the Act 1955 had constituted two Wage Boards under Chairmanship of one Dr. Justice Narayan Kurup. When Justice Narayan Kurup resigned, Justice G.P. Majithia was appointed as Chairman of two Wage Boards. He made recommendation to Central Government on 31.12.2010, which was accepted on 25.10.2011 and notification under Section 12 was published on 11.11.2011.

11. Various newspaper establishments challenged the Majithia Wage Board Award under Article 32 of Constitution of India before Hon’ble Apex Court, leading case being **ABP (Private Ltd.) vs. Union of India, (2014) 3 SCC 327**. The Apex Court dismissed all the petitions and held that wages as

revised/determined shall be payable from 11.11.2011 when the Government of India notified the recommendation of Majithia Wage Boards. All the arrears upto March, 2014 shall be paid to all eligible persons in four equal installments within a period of one year and continue to pay the revised wages from April, 2014 onwards.

12. As the wages and allowances as per Majithia Wage Board were not paid various contempt petitions were filed before Hon'ble Apex Court. The contempt petitions were decided by judgment and order dated 19.06.2017, **Avishek Raja and others vs. Sanjay Gupta, (2017) 8 SCC 422**. In para no. 29 of the said judgment, the Apex Court directed that henceforth all the complaints with respect to non implementation of Majithia Wage Board Award or otherwise be dealt with in terms of mechanism provided under Section 17 of the Act.

13. The State Government in exercise of its power under sub-section (1) of Section 17 of Act 1955 issued notification dated 12.11.2014 which was published in Official Gazette specifying the "officers competent" to dispose of application made under Section 17 of Act 1955.

14. In **Pradhan Prabandhank/Unit Head M/s. Amar Ujala vs. State of U.P. and others, 2018 (7) ADJ 715**, the dispute arose as to competence of Deputy Labour Commissioner referring a dispute under Section 17(2) of Act 1955 to Labour Court. This Court found that State was competent to delegate power for reference as it was an administrative Act. Relevant paras 28, 29, 30, 31, 31 and 32 are extracted hereunder:-

"28. The apex court in the case of Samarjit Ghosh's case (supra) had therefore observed that when all the provisions of section 17 are considered together it is apparent that they constitute a single scheme. The apex court in Samarjit Ghosh's case (supra) was dealing with a situation where a newspaper employee had moved an application under section (1) of section 17 of the Act for recovery of dues. A dispute in respect of those dues had been raised and, in the meantime, the newspaper employee had been transferred to a State other than the State where he had moved an application under sub-section (1) of section 17 of the Act. A question arose as to which State Government would have a right to make a reference under sub-section (2) of section 17 of the Act for adjudication of the dispute to effect recovery under sub-section (1). In that context, the apex court had observed that it was the State Government before whom the application of recovery is made which will refer the question as to the amount due to the labour court and the labour court, upon receiving its decision, will forward its decision to the State Government, which will then direct recovery of the amount. While holding so, the apex court had examined the provisions of the Act and had come to a conclusion that when all the provisions of section 17 are considered together, it is apparent that they constituted a single scheme.

29. Further, under the Act, 1955, in exercise of powers under section 20 of the Act, 1955, Working Journalists (Conditions of Service) and Miscellaneous Provisions Rules, 1957 (in short Rules, 1957) have been framed. Rule 36 of Rules, 1957 provides for an application under Section 17 of the Act. It reads as follows:-

"36. Application under section 17 of the Act. -- An application under section 17 of the Act shall be made in Form "C" to

the Government of the State, where the Central Office or the Branch Office of the newspaper establishment in which the newspaper employee is employed, is situated."

Form 'C' has been provided in the Rules, 1957. Title of the application as denoted by Form C is as follows:

"FORM 'C'

APPLICATION UNDER SUB-SECTION (1) OF SECTION 17 OF THE ACT 45 OF 1955

(Rule 36)

The aforesaid application is addressed to the Secretary to the Government....."

30. The Rules, 1957 do not provide for any separate application other than application under sub-section (1) of section 17 of the Act.

Having gone through the provisions of the Act, 1955, the Rules framed thereunder; the decisions cited by the learned counsel for the parties and, in particular, the decision of the Apex Court in Samarjit Ghosh's case (supra), this Court is of the firm view that section 17 of the Act, 1955 contemplates a seamless single scheme for recovery of amount due to a newspaper employee from any employer under the Act, 1955. The application by a newspaper employee is to be filed under sub-section (1) of section 17 of the Act, as per Rule 36 of Rules, 1957. That application can be filed before the State Government or such authority, as the State Government may specify in that behalf. Where there exists no dispute, the State Government or the authority, so specified, upon being satisfied that any amount is so due, shall issue a certificate for that amount to the Collector and the Collector would, thereafter, recover that amount as an arrear of land revenue. Where a question or dispute arises then a reference

is to be made to the labour court for adjudication of the dispute. After adjudicating the dispute, the labour court has to forward its decision to the State Government or authority which made the reference, upon which the amount is to be recovered in the manner provided by sub-section (1) of the Act. Since Section 17, as a whole, creates a single seamless scheme, the State Government, in exercise of its power under sub-section (1) can specify an authority to do all acts which it has power to do under Section 17 of the Act.

31. In the State of Uttar Pradesh, the State Government, by notification dated 12th November, 2016, has delegated its powers to the Additional/Deputy/Assistant Labour Commissioners of the regions specified to dispose application made under section 17 of the Act, 1955. The notification does not limit the delegation to exercise of power contemplated by sub-section (1) of section 17. It is a broad delegation to exercise power to dispose application under Section 17. Once such power has been conferred upon the Additional/Deputy/Asst.

Labour Commissioner, in case of a dispute, the Deputy Labour Commissioner is also empowered to make a reference and such reference would be on behalf of the State Government as one contemplated by sub-section (2) of section 17 of the Act.

The contention of the learned counsel for the petitioner that there is a conscious omission of the words "such authority, as the State Government may specify in this behalf" in sub-section (2) of section 17 of the Act, 1955 and therefore it would be deemed that reference can be made only by the State Government and not by the specified authority cannot be accepted because when various parts of section 17 are read as a whole a single seamless scheme emerges. Even otherwise,

the notification of the State Government delegates power to the authority specified to deal with applications under Section 17 which necessarily includes power to make reference under Section 17(2).

32. *It may be observed that a reference under sub-section (2) of section 17 of the Act does not contemplate exercise of judicial/quasi-judicial power and therefore the power which vests in the State Government to make a reference can be delegated and, in fact, by the notification dated 12th November, 2014, the State Government has clearly delegated its power by specifying the authorities who are competent to dispose the applications contemplated by section 17 of the Act. In fact, reference on an application under sub-section (1) upon a question having arisen is a step-in-aid of final disposal of an application under section 17 (1) of the Act, 1955 and, therefore, by conferring power on the specified authority to dispose the application under Section 17, the State Government, by necessary implication, has conferred power to make a reference as well."*

15. Thereafter, various media houses challenged the notification dated 12.11.2014 through various writ petitions which was decided by co-ordinate Bench of this Court on 08.07.2019, leading case being **Hindustan Media Ventures Ltd. Jagatganj Varanasi vs. State of U.P. and others, 2020 (7) ADJ 555** wherein the Court held as under:-

"15. This Court is constrained to say most respectfully that the reasoning of his Lordship in paragraph 9 of the judgment in Jagran Prakashan Limited vs. State of Punjab and others (supra) is based on some mistaken reading of the U.P. Government Notification, inasmuch as, His

Lordship there has held that the U.P. Notification has made a blanket law delegating powers of the Government under Section 17 of the Act to subordinate officers, without specifying whether the delegation is under sub-Section (1) or sub-Section (2) of Section 17. This reading of the U.P. Notification is contrary to the terms of the notification dated 12.11.2014, which clearly spells out that the delegation is under Section 17(1) of the Act. It is not a blanket delegation under Section 17 as held in Jagran Prakashan Limited vs. State of Punjab and others (supra).

16. *This Court is afraid that if for a fact the basis of distinguishing the decision in Pradhan Prabandhak/ Unit Head M/s. Amar Ujala (supra), were factually correct, which it is not, the assistance sought to be derived by Sri Tripathi from the decision of the Punjab and Haryana High Court would have had more diminished prospects. But, it is not so. This Court has considered the reasoning adopted in Jagran Prakashan Limited vs. State of Punjab and others (supra) by the Punjab and Haryana High Court, and with greatest respect, for all that is said here and in the decision of this Court in Pradhan Prabandhak/ Unit Head M/s. Amar Ujala (supra), this Court is unable to agree."*

16. Facts of leading Writ Petition No. 292 of 2024 are that each of respondents were entitled to get 35% variable pay along with basic wages. The contesting respondents had been being paid their basic wages along with variable pay till March, 2020. From 1st April 2020 to 28 February 2021, the petitioner had deducted substantial amount from 35% variable pay and in case of respondent no. 7, he was paid Rs.1187 instead of Rs.6965, short by Rs.5778. Thus, total shortfall was

Rs.63,558. Similarly, respondent no. 8 was paid Rs.74,327/- short for the same period. Respondent no. 9 was paid Rs.63,558/- less, while respondent no. 10 was also paid Rs.63,558/- less. Respondent nos. 11, 12, 13, 14 and 15 were paid short by Rs.74,327/-, Rs.74,327/-, Rs.1,47,106/-, Rs.74,327/- and Rs.57,805/-.

17. This led to filing of application under Section 17(1) of the Act 1955 before Assistant Labour Commissioner, Gautam Budh Nagar (Prescribed Authority under notification dated 12.11.2014). By order dated 07.12.2022, the Management was directed to pay the deducted amount of wages to respondents. The petitioner challenged the order by filing Writ-C No. 659 of 2023 (The Indian Express Pvt. Ltd. vs. Union of India and others) on the ground that Prescribed Authority under Section 17(1) could not decide the dispute and correct procedure was to make reference to Labour Court for adjudication of dispute. This Court on 21.02.2023 set aside the order dated 07.12.2022 and directed the Prescribed Authority to refer the dispute to Labour Court within two weeks. After remand the Prescribed Authority has referred the dispute to Labour Court on 10.03.2023 which is WJA Case No. 01/2023, 02/2023, 03/2023, 04/2023, 05/2023, 06/2023, 07/2023, 08/2023, 09/2023, 10/2023 and 11/2023 of the present writ petition and also by the reference order dated 10.03.2023 to Labour Court in all the other connected writ petitions wherein the reference order is under challenge.

18. In Writ Petition No. 292 of 2024, the Labour Court had passed the order on 10.11.2023 adjudicating the dispute and directing the petitioner to pay the wages due which was deducted along

with 6% interest from the date due till the date of payment while in the other connected writ petitions only reference order dated 10.03.2023 passed by Assistant Labour Commissioner along with notification dated 12.11.2014 issued by State Government and order dated 22.05.2023 passed by Labour Court rejecting the application regarding jurisdiction of Labour Court is under challenge.

19. Sri Sunil Tripathi, learned counsel for petitioner submits that challenge through these bunch of writ petitions have been made on five grounds.

20. Firstly, the Assistant Labour Commissioner has no jurisdiction to refer a dispute raised by an individual workman for adjudication of dispute other than discharge, dismissal or termination. According to him, before 1965 all disputes were raised by Trade Union or with support of considerable number of workers. Section 2-A was for the first time inserted in Act of 1947 in the year 1965, and later on Section 2-A was also inserted in U.P. Industrial Disputes Act, 1947 (for short 'U.P. Act') in the year 1978, whereby legal fiction was created for giving status of workman to working journalists who are not covered by definition of workman. As per Section 2-A dispute raised by individual workman shall be deemed as industrial dispute only when it is in regard to discharge, dismissal and termination. Under the Act 1955, there are two categories of employees (i) working journalists (ii) non-journalist newspaper employees. Working journalist in view of their duties are not covered under definition of "workman". By virtue of legal fiction under Section 3 of Act 1955, working journalists have been given limited right to raise disputes in individual capacity

regarding discharge, dismissal and termination of service. Despite Section 2-A, working journalists have no right to raise any dispute in individual capacity for any matter not connected with discharge, dismissal and termination. As far as non-journalist newspaper employees are concerned, they are covered under definition of “workman”, limitation imposed by Section 2-A would apply in their case as it applies to working journalists. Non-journalist newspaper employees were not entitled to raise any industrial dispute before insertion of Section 2-A in the year 1978 in U.P. Act. Since 1978 they have been given right to raise industrial dispute in individual capacity only for discharge, dismissal and termination but have no right to raise dispute in individual capacity for any other matter.

21. Secondly, he urged that impugned award has been delivered without permission of appropriate Government for publishing the award. It was statutory obligation of Labour Court to first submit the award to State Government under Section 6(1). Under Section 6(4), Labour Court shall form an opinion whether the award can be published within 30 days as prescribed under Section 6(3). As per Section 6A(1), an award shall become enforceable on expiry of 30 days. As disputed question was referred under Section 17(2) for adjudication to Labour Court, any order passed under Section 17(2) is award and Labour Court is under statutory obligation to submit the award under Section 6(1) to State Government. Impugned award was declared without submitting the award to State Government for forming opinion under Section 6(4).

22. Thirdly, it was urged that Assistant Labour Commissioner has no jurisdiction to refer a disputed issue under Section 17(2) of the Act 1955. According to him, the section confers power of reference only upon the State Government. He then submitted that against the judgment rendered by co-ordinate Bench of this Court in case of **Pradhan Prabandhank (supra)**, three Special Appeal Nos. 777 of 2019, 778 of 2019 and 779 of 2019 have been filed which are pending consideration.

23. Fourthly, it was contended that under Section 17(2) only State Government on its own motion or on the application made to it refer the question to Labour Court. According to him, use of impression “such authority, as the State Government may specify in this behalf” under Section 17(1) and absence of this expression in Section 17(2) is conscious omission and not casus omissus. According to him, respondents employees had filed application under Section 17(1) of the Act 1955 but they have not filed any application through Union or with support of considerable number of workers under Section 17(2) of the Act.

24. It was lastly contended that respondents employees filed application under Section 17(1) for claiming partial wages for 11 months from April, 2020 to February, 2021. According to him, the issue regarding payment of wages for COVID-19 period was challenged by several establishments before Hon’ble Apex Court. First petition was filed by **Ficus Pax (P) Ltd. v. Union of India, (2020) 4 SCC 810**, in which vires of notification dated 29.03.2020 was challenged. The Apex Court had passed an interim order.

25. Reliance has been placed upon decisions in cases of **Bennett Coleman & Co. Ltd. v. State of Bihar**, (2015) 11 SCC 204; **Awaz Prakashan (P) Ltd. v. Pramod Kumar Pujari**, (2003) 6 SCC 104; **M/s. Jagran Prakashan Ltd. and another v. Labour Court and others**, Writ-C No. 37024 of 2012, decided on 04.08.2020; **Bharat Heavy Electricals Ltd. v. Anil**, (2007) 1 SCC 610; **P. Virudhachalam v. Lotus Mills**, (1998) 1 SCC 650; **Nelson Motis v. Union of India**, (1992) 4 SCC 711; **Singareni Collieries Co. Ltd. v. Vemuganti Ramakrishan Rao**, (2013) 8 SCC 789; **CBI v. Ramesh Gelli**, (2016) 3 SCC 788 and **Indore Development Authority v. Shailendra**, (2018) 3 SCC 412.

26. Sri Man Mohan Singh, learned counsel appearing for workmen submitted that in petitioner establishment there are two categories of employees – (a) working journalist (b) non-journalist newspaper employees (administrative staff and factory staff). Respondent no. 13 belongs to category of working journalist while others are covered under non-journalist newspaper employees. According to him, petitioner has raised legal issues which have already been dealt with by this Court earlier through various pronouncements. The dispute raised as to reference by Assistant Labour Commissioner to Labour Court, it is submitted that Government had delegated the power by notification dated 12.11.2014. The notification was challenged in **Hindustan Media Ventures (supra)** and writ petition was dismissed on 08.07.2019, relying upon the decision rendered in case of **Pradhan Prabandhank (supra)**.

27. Replying to the question that reference of individual workman is not

covered under Section 2-A of the Act of 1947, he submitted that Act 1955 is a special Act, enacted specifically for regulating the services of a particular class of employees employed in newspaper establishment. The Act takes note of special feature of these categories of newspaper employees and takes care of their service condition, thus, special Act, in respect of journalist and non-journalist newspaper employees, and excludes general provisions of Industrial Disputes Act. Section 17 has been incorporated as a special remedy for recovery of wages or any other amount due to a working journalist and non-journalist newspaper employee from his employer individually. Reliance has been placed upon decision of Karnataka High Court in case of **Samyuktha Karnataka vs. M.L. Satyanarayana Rao and another**, 1986 LIC 626. Further, Section 16 provides that if provision of any other law is inconsistent with provisions of Act 1955, the Act 1955 shall have overriding effect. Section 3 is an enabling clause. It does not mean that in case if for specific purpose a provision already exist, it shall not be followed or the Act of 1947 shall prevail over the Act 1955.

28. Emphasis has been laid upon the words “employee himself, or any person” used in Section 17(1) which provides right to an individual employee to make an application before the State Government or such authority, in regard to wage or any amount due. Rule 36 and Form-C also provide for making only one application under Section 17(1) and no further application is provided under Section 17(2), thus, application made under Section 17(1) by an employee before Prescribed Authority shall make reference under Section 17(2) to the Labour Court.

29. Replying the question as to award having not sent for publication, learned counsel submitted that words used in Sub-section (3) of Section 17 are “decision of Labour Court” and not “award” which is used under the Act of 1947 and cognate statutes, hence, the same is not required for publication under the Act of 1947.

30. Reliance has been placed upon decisions in cases of **Samarjit Ghosh v. Bennet Coleman and Co. and others, (1987) 3 SCC 507; The Management of Samyutha Karnataka v. M.L. Satyanarayana Rao and another, 1986 LIC 626, Rajan Sandhi P. v. Union of India & another, (2010) 10 SCC 338; Novttis India Ltd. v. State of West Bengal and others, 2004 (101) FLR 278; Smt. Shushila Sharma v. SH. Pawan Sharma, Writ Petition No. 18946 of 2006, decided on 17.01.2007; Sadhu Ram v. Delhi Transport Corporation, (1983) 4 SCC 165 and State of U.P. and others v. Committee of Management D.A.V. Inter College and another, 2009 (6) ADJ 243 (DB).**

31. I have heard respective counsel for the parties and perused the material on record.

32. Some of the issues raised through these connected petitions have already been answered by this Court in case of **Pradhan Prabandhank (supra)** and **Hindustan Media Ventures (supra)**. However, an attempt has been made from petitioner’s side to raise some additional issues along with decided issues for consideration of this Court.

33. Primarily, petitioner has tried to raise jurisdictional issue of reference by

Prescribed Authority under notification dated 12.11.2014 to the Labour Court on the premise that it was incompetent to refer as the dispute does not deal with discharge, dismissal and termination of an employee.

34. In **Pradhan Prabandhank (supra)**, this Court had already found that reference under sub-section (2) of Section 17 does not contemplate exercise of judicial/quasi-judicial power and, therefore, the power which vests in the State Government to make a reference can be delegated and, in fact, by notification dated 12.11.2014, the State Government had clearly delegated its power by specifying the authorities who are competent to dispose the applications contemplated by Section 17 of the Act.

35. The Court further found that reference on an application under sub-section (1) upon a question having arisen is a step-in-add of final disposal of an application under Section 17(1) of the Act 1955 and, therefore, by conferring power on the specified authority to dispose the application under Section 17, the State Government, by necessary implication, has conferred power to make a reference as well.

36. In **Hindustan Media Ventures (supra)**, the challenge was laid to notification dated 12.11.2014, and the Court refused to quash the notification and relying upon the decision rendered in **Pradhan Prabandhank (supra)** upheld the notification.

37. Moreover, the Apex Court in **Samarjit Ghosh (supra)** found that all the provisions of Section 17, considered together constitute a single scheme. Relevant para 6 of the judgment is extracted hereasunder:-

“6. When all the provisions of Section 17 are considered together it is apparent that they constitute a single scheme. In simple terms the scheme is this. A newspaper employee, who claims that an amount due to him has not been paid by his employer, can apply to the State Government for recovery of the amount. If no dispute arises as to the amount due the Collector will recover the amount from the employer and pay it over to the newspaper employee. If a question arises as to the amount due, it is a question which arises on the application made by the newspaper employee, and the application having been made before the appropriate State Government it is that State Government which will call for an adjudication of the dispute by referring the question to a Labour Court. When the Labour Court has decided the question, it will forward its decision to the State Government which made the reference, and thereafter the State Government will direct that recovery proceedings shall be taken. In other words the State Government before whom the application for recovery is made is the State Government which will refer the question as to the amount due to a Labour Court, and the Labour Court upon reaching its decision will forward the decision to the State Government, which will then direct recovery of the amount.”

38. Rule 36 which finds place in Chapter VI of Working Journalists (Condition of Service) and Misc. Provisions Rules, 1957 provides for application under Section 17 of the Act which shall be made in Form ‘C’ to the Government of the State, where the Central Office or Branch Office of newspaper

establishment in which the newspaper employee is employed, is situated.

39. Further, Form ‘C’ was inserted by G.S.R. 1320, dated 01.08.1963, which specifically mentions application under sub-section (1) of Section 17 of the Act 1955. Relevant Form ‘C’ is extracted hereasunder:-

“Form ‘C’

[See Rule 36]

Application under sub-section (1) of Section 17 of the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955

To,

The Secretary to the Government of(here insert the name of the State Government).

Department of.....(here insert the name of the Department which deals with the labour matters).....(here insert the name of the place where the headquarters of the State Government are situated).

Sir,

I have to state that I Shri/Shrimati/Kumari..... son/ widow/ daughter of....., a working journalist, was entitled to receive from(here insert the name and address of the newspaper establishment) a sum of Rs..... on account of.....(here insert gratuity, wages, etc. as the case may be), payable under the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955 (45 of 1955).

I further state that I was appointed by Shri by an instrument, dated, to

receive the amount of the gratuity on behalf of Shri/Km

I further state that I served the said newspaper establishment with a demand notice by registered post on..... for the said amount which the said newspaper establishment has neither paid nor offered to pay to me even though 15 days have since lapsed. The details of the amount due are mentioned in the statement hereto annexed.

I request that the said sum may kindly be recovered from the said newspaper establishment under Section 17 of the said Act, and paid to me as early as possible.

*[I have been duly authorized in writing by(*here insert the name of the newspaper employee*) to make his application and to receive the payment of the aforesaid amount due to him.]

*[I am a member of the family of late.....(*insert the name of the deceased newspaper employee*), being his.....(*here insert the relationship*) and am entitled to receive the payment of the aforesaid amount due to late(*here insert the name of the deceased newspaper employee*).]

*To be struck out when the payment is claimed by the newspaper employee himself.

Station.....

... Signature of the applicant

Date.....

.... Address.....

ANNEXURE

[Here insert the details of the amount claimed]"

40. Under the Rules, there is no other form except Form 'C' which provides for making application under Section 17(1). Moreover, the entire scheme of Section 17 emphasises recovery of money due from an

employer. Sub-section (1), (2) and (3) only categorise the stages. Sub-section (1) enumerates the condition when there is no dispute as to the amount, then on an application made by an employee himself or by any person authorised by him, or in case of his death, by any member of his family, the State on its satisfaction that amount is due recover the same through Collector. Sub-section (2) envisages a situation where question arises as to the amount, then on an application which has already been preferred under sub-section (1) of Section 17, the State Government refers the question to Labour Court for adjudication.

41. Once the Labour Court makes a decision, it forwards the same to State Government which made the reference and any amount found due by Labour Court is to be recovered in the manner provided in sub-section (1). All the three sub-sections of Section 17 are intertwined, and sub-section (1) and (2) only differentiate the method for arriving at the amount due from an employer to an employee. In case of sub-section (1) where there is no dispute to the amount, the same is recovered from employer by State machinery for the employee.

42. However, in case of any question arisen as to any amount due reference is to be made to Labour Court on the application which has already been preferred in Form 'C' before State Government under sub-section (1) of Section 17. Thus, from the reading of Section 17, it is abundantly clear that it constitutes a single scheme of recovery of money from employer.

43. The State Government while exercising its administrative power had

delegated the same by notification dated 12.11.2014 specifying the authorities who are competent to dispose the applications contemplated by Section 17 of the Act 1955.

44. Section 3 of the Act 1955, under Chapter II is only an enabling provision which provides that Act of 1947, subject to modifications specified in sub-section (2), applied to, or in relation to, working journalists. The argument that after insertion of Section 2-A in the Act of 1947 in the year 1965 restricts a working journalist who is covered as a workman from raising an industrial dispute in an individual capacity except in case of discharge, dismissal and retrenchment is totally misplaced.

45. The Act of 1955 was enacted after a Press Commission, which was constituted by Government to inquire, among other things, into the conditions of employment of working journalists, had made certain recommendations for improvement and regulation of such service conditions by means of legislation.

46. By the amendment made in 1974 for other newspaper employees employed in newspaper establishment the Act was made applicable. In **ABP (Private Ltd.) (supra)**, a challenge was laid to the Amendment Act, 1974. The Apex Court disallowed the same and held as under:-

“23. The petitioners herein have also challenged the vires of the Amendment Act, 1974 on the ground that extending the benefit of the Act to employees other than working journalists is against the object that was sought to be achieved by the original Act since the benefits to other newspaper employees has no rational

nexus between the differentia and the object sought to be achieved. In this regard, as already discussed, the challenge as to the singling out of the newspaper industry per se was rejected by the Constitution Bench in Express Newspaper (P) Ltd. [Express Newspaper (P) Ltd. v. Union of India, AIR 1958 SC 578 : 1959 SCR 12] and the newspaper industry was held to be a class by itself. All that the 1974 Amendment did was to only bring the other employees of the newspaper industry (i.e. non-working journalists) into the ambit of the Act and extend the benefits of the Act to them. Thus, the same is also covered as per the reasoning of the Constitution Bench decision of this Court. Therefore, the challenge as to the Amendment Act, 1974 stands disallowed.”

47. Thus, the Act of 1955 is only an enabling provision for improving and regulating the service conditions of newspaper employees which includes both working journalists and non-journalist newspaper employees.

48. The argument raised by Sri Tripathi that Assistant Labour Commissioner had no jurisdiction to refer dispute raised by an individual workman except in case of discharge, dismissal or termination is thoroughly misplaced. The Act of 1947 only supplements the cause of working journalists, but in no way it restricts in reaping the benefits provided under the Act 1955, especially under Section 17, which is a scheme of recovering of dues of an employee from its employer.

49. Now coming to another issue that decision rendered by Labour Court post reference is whether an award or simplicitor a decision. The word employed

in sub-section (3) of Section 17 is 'decision' and not 'award'. The word 'award' has been defined both under the Central Act of 1947 and the State Act of 1947 in Section 2(b) and 2(c), but does not find place under the Act of 1955.

50. Under the Central Industrial Disputes Act when reference is made under Section 10 to a Labour Court or Tribunal, it makes an award. Similarly, under the State Industrial Disputes Act, when a reference is made under Section 4-k, the Labour Court or the Tribunal, as the case may be, makes an award. However, the scheme of Section 17 of the Act 1955 in sub-section (3) provides for decision of a Labour Court and not an award.

51. Thus, no question arises for treating the decision as an award and making publication. The decision rendered by Labour Court is forwarded to State Government which had made the reference for recovery in the manner provided under sub-section (1) of Section 17. Thus, the entire scheme of Section 17 is only for the recovery of money due from an employer and not beyond that. The issue regarding absence of impression "such authority, as State Government may specify in this behalf" in sub-section (2) of Section 17 is a conscious omission has already been dealt with in case of **Pradhan Prabandhank (supra)** and needs no more further adjudication.

52. Much emphasis has been placed by Sri Tripathi upon the decision of Apex Court rendered in case of **Ficus Pax (P) Ltd. (supra)**, wherein a challenge was laid to order dated 29.03.2020 issued by Government of India in exercise of power of Section 10(2)(l) of Disaster Management Act, 2005. The Apex Court as an interim

measure provided that any settlement entered into between the employers and employees in the establishments which are before them the same was to be acted upon by employers and workers irrespective of order dated 29.03.2020. However, petitioner was not before the Apex Court nor had challenged the order of Central Government. Relevant part of the order of Apex Court is extracted hereunder:-

"41. We thus direct the following interim measures which can be availed by all the private establishments, industries, factories and workers trade unions/employees associations, etc. which may be facilitated by the State authorities:

41.1. The private establishments, industries, employers who are willing to enter into negotiation and settlement with the workers/employees regarding payment of wages for 50 days or for any other period as applicable in any particular State during which their industrial establishment was closed down due to lockdown, may initiate a process of negotiation with their employees' organisation and enter into a settlement with them and if they are unable to settle by themselves submit a request to the Labour Authorities concerned who are entrusted with the obligation under the different statute to conciliate the dispute between the parties who on receiving such request, may call the employees trade union/workers association/workers concerned to appear on a date for negotiation, conciliation and settlement. In the event a settlement is arrived at, that may be acted upon by the employers and workers irrespective of the Order dated 29-3-2020 issued by the Government of India, Ministry of Home Affairs.

41.2. Those employers' establishments, industries, factories which were working during the lockdown period

although not to their capacity can also take steps as indicated in Direction 41.1.

41.3. The private establishments, industries, factories shall permit the workers/employees to work in their establishment who are willing to work which may be without prejudice to rights of the workers/employees regarding unpaid wages of above 50 days. The private establishments, factories who proceed to take steps as per Directions 41.1 and 41.2 shall publicise and communicate about their such steps to workers and employees for their response/participation. The settlement, if any, as indicated above shall be without prejudice to the rights of employers and employees which is pending adjudication in these writ petitions.

41.4. The Central Government, all the States/UTs through their Ministry of Labour shall circulate and publicise this order for the benefit of all private establishments, employers, factories and workers/employees.

42. In event, any settlement is entered into between the employers and employees in the establishments which are before us, an affidavit giving details shall be filed by next date of hearing."

53. Moreover, reliance placed upon various decisions by petitioner is distinguishable in the present set of case and are not applicable.

54. Thus, considering the facts and circumstances of this Case, I find that notification dated 12.11.2014 issued by State Government specifying the officers mentioned in Column II to be authorities competent to dispose applications under Section 17 of the Act 1955 has already been upheld by this Court in **Hindustan Media Ventures (supra)**, and the power of

reference to Labour Court having also been upheld in case of **Pradhan Prabandhank (supra)**, no interference is required in the writ petition as far as the challenge having been laid to the notification as well as the reference order.

55. Moreover, it was on the writ petition filed by petitioner being Writ Petition No. 659 of 2023, decided on 21.02.2023 by co-ordinate Bench of this Court that the matter was referred by Prescribed Authority to Labour Court. The order was never challenged by petitioner and it became final. No challenge can be made to the reference order after the decision as rendered above.

56. The Labour Court had rightly rejected the application questioning the jurisdiction on the ground that the matter had already been settled by decision of the Court dated 21.02.2023 rendered in Writ Petition No. 659 of 2023.

57. Further, I find that petitioner has only challenged the decision of Labour Court on technical grounds, such as, competence of reference, power to issue notification and non-publication of the award.

58. All the points raised above have already been dealt with by this Court. No challenge has been laid, as to the finding recorded by Labour Court on the decision taken for paying the short variable pay to the various employees of the establishment. Once it is an accepted fact that the employer had paid less wages to the employees, the application made under Section 17 was rightly allowed by Labour Court and sent to authorities mentioned in sub-section (1) of Section 17 for recovery of the amount so quantified.

59. In view of said fact, as there is no challenge on merit to the findings recorded by Labour Court for short payment of wages made to the employees, the order passed on 10.11.2023 which has been assailed in Writ Petition No. 292 of 2024 warrants no interference by this Court.

60. All the writ petitions fail and are hereby dismissed.

61. However, no order as to costs.

(2024) 4 ILRA 1364

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 05.03.2024

BEFORE

THE HON'BLE MRS. RENU AGARWAL, J.

Writ -C No. 1067 of 2024

Mariya Zameel & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
 Sri Vijay Kumar Tiwari

Counsel for the Respondents:
 C.S.C.

Civil Law - Constitution of India, 1950- Article 26-The petitioners an interfaith couple, claimed to have solemnized their marriage according to Arya Samaj rituals and alleged interference and threats from a family member(Respondent no.4)-The State argued that their marriage is not valid under the Hindu Marriage Act, as the Muslim petitioner did not convert, violating the Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act,2021-Held, petitioners failed to follow the mandatory provisions of the Act,2021-the court emphasized the right to

personal liberty and choice but noted these rights are subject to statutory restrictions.(Para 1 to 21)

The writ petition is dismissed. (E-6)

List of Cases cited:

1. Lata Singh Vs St. of U.P. & anr.. (2006) 5 SCC 475
2. Shafin Jahan Vs Asokan K.M. & ors. (2018) 16 SCC 368
3. Nandkumar & anr. Vs St. of Ker.(2018) 16 SCC 620
4. Kamini Devi Vs St. of U.P. Writ. C No. 11108 of 2020
5. Razia & anr. Vs St. of U.P. Writ C No. 27338 of 2023
6. Kiran Rawat & anr.. Vs St. of U.P.
7. D.Velusamy Vs D.Patchajammal (2010) 10 SCC 469
8. Indra Sarma Vs V.K.V. Sharma (2013) 15 SCC 755
9. Asha Devi & anr. Vs State of U.P. & ors. Writ C No. 18743 of 2020
10. A Subhash Babu Vs St. of A.P.
11. Shayara Bano Vs U.O.I.
12. Lily Thomas & anr. Vs U.O.I. & ors.
13. Dir. of Settlement, A.P. Vs M.R. Apparao
14. Kalyan Singh Vs St.of U.P. (1962)AIR SC 1183

(Delivered by Hon'ble Mrs. Renu Agarwal, J.)

1. Heard Sri Vijay Kumar Tiwari, learned counsel for the petitioners and Sri Yogesh Kumar, learned Standing Counsel for the State.

2. The present petition under Article 226 of the Constitution has been preferred by the petitioners with the following prayers:

" (i) Issue a writ order or direction in the nature of mandamus commending the respondents not to harass/torture/illegally arrest the petitioners or to interfere or create hindrance in the peaceful living of the petitioners as living husband and wife and to protect the life and liberty of the petitioners.

(ii) Issue a writ order or direction in the nature of mandamus as this Hon'ble Court may deem fit and proper under the facts and circumstances of the case.

(iii) Award the cost of the writ petition to the petitioners."

3. It is submitted by the learned counsel for the petitioners that both the petitioners have attained the age of majority. As per high school certificate-cum-marks sheet the date of birth of petitioner No.1-Mariya Zameel Urf Riya is 25.12.1999 and she is aged about more than 24 years and as per pan card the date of birth of the petitioner No.2-Mihir Pandey is 04.03.2000 and he is aged about more than 23 years. It is submitted that both the petitioners are major and they developed love affair and solemnized their marriage on 01.01.2024, as per Rituals of Arya Samaj. Copy of marriage certificate issued by Arya Samaj is annexed as annexure no.5 to the petition. They have applied on-line for registration of their marriage before the competent authority, which is pending. Copy of on-line application for registration of marriage is annexed as annexure no.6 to the petition. Learned counsel for the petitioners has averred in the writ petition that they are living as wife and husband and their relationship is not

relished and agreed by private respondent no.4 and he is interfering in their marital life. The petitioners apprehend danger to the life and liberty from respondent No.4, therefore, the indulgence of this Court is sought. Petitioner No.1 has also moved an application before the Senior Superintendent of Police, Varanasi on 17.01.2024 by registered post, seeking protection for herself and petitioner No.2 from respondent No.4, but no action has been taken by police authorities in the matter. Copy of application dated 17.01.2024 is annexed as annexure no.1 to the supplementary affidavit dated 29.01.2024. Therefore, present petition moved by the petitioners for issuance of mandamus against respondent no.4.

4. On the other hand, learned Standing Counsel submitted that both the petitioners are different religion and either of the parties have not applied for conversion of their religion, as per sections 8 & 9 of Conversion Act. The Muslim women cannot solemnized her marriage with Hindu man as per the rituals of Arya Samaj, in Hindu Marriage Act. Hence opposed the prayer of petition.

5. I have heard the rival submissions of learned counsel for the parties and perused the record.

6. From the perusal of record it transpires that both the petitioners have attained the age of majority. As per high school certificate-cum-marks sheet the date of birth of petitioner No.1-Mariya Zameel Urf Riya is 25.12.1999 and she is aged about more than 24 years and as per pan card the date of birth of the petitioner No.2-Mihir Pandey is 04.03.2000 and he is aged about more than 23 years. Both the petitioners are major and they developed

love affair and solemnized their marriage on 01.01.2024, as per Rituals of Arya Samaj. They have applied on-line for registration of their marriage before the competent authority, which is pending.

8. Reliance has been placed on the judgment passed by Co-ordinate Bench of this Court in case of **Razia and Anr. Vs. State of U.P. and Ors.** passed in **Writ-C No. 27338 of 2023**, in which Co-ordinate Bench of this Court relying upon various judgment granted protection to the couple living in live-in-relationship. Learned counsel for the petitioners submitted that in this case also one of the party is muslim by faith and in the identical situation, the court has granted protection. Opposing the arguments advanced by learned counsel for the petitioners, learned Chief Standing Counsel appearing on behalf of the State relied upon the case law passed by Division Bench in case of **Kiran Rawat and Anr. Vs. State of U.P.** passed in **Criminal Misc. Writ Petition No. 3310 of 2023**. From the perusal of both the cases, it is apparent that the judgment of **Kiran Rawat (supra)** is mentioned by the Single Bench decision of this Court in case of **Razia (supra)** but the ruling is not discussed on merits in that case nor the ruling is distinguished on facts, hence, the ruling has no application on the present case. Reliance has also been placed by petitioners upon the judgement of the Apex Court in **Lata Singh Vs. State of Uttar Pradesh and Anr.** reported in **(2006) 5 SCC 475**, whereby Hon'ble 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 are not harassed by any one nor subjected to threats or acts of violence, and any one 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. 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."

9. In ***Shafin Jahan Vs. Asokan K.M. and Ors.*** reported in **(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. Hon'ble the Apex Court held as under :-

"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/he 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"

10. Both these cases guarantee the fundamental right of choice of an adult person while marrying with inter-faith

persons. The said freedom is both a constitutional and human right and no-one is allowed to deprive all such freedom from any human being.

11. In the case of ***D.Velusamy Vs. D. Patchajammal*** reported in **(2010) 10 SCC 469**, Hon'ble Apex Court while considering the definitions given under Section 2 of the Domestic Violence Act dealt with the definition of "domestic relationship", as a relationship in the nature of marriage. It laid down the following requisite criteria in the 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."

12. In the case of ***Asha Devi and Another vs. State of U.P. and Others*** passed in **Writ (C) No.18743 of 2020**, the Hon'ble Division Bench of this Court formulated two questions as under:-

"(i) Whether the petitioners, who claim themselves to be living together as husband and wife; can be granted protection when the petitioner No.1 is legally wedded wife of someone else and has not taken divorce so far ?

(ii) Whether protection to petitioners as husband and wife or as live-in-relationship can be granted in exercise of powers conferred under Article 226 of

the Constitution of India, when their living together may constitute offences under Sections 494/495 I.P.C. ?"

13. In the judgment of **Asha Devi (Supra)**, Hon'ble Division Bench of this Court has discussed the judgment of Hon'ble Apex Court in the case of "**D. Velusamy Vs. D. Patchaiammal**", in which the Hon'ble Apex court held that:-

"32. In our opinion not all live in relationships will amount to a relationship in the nature of marriage to get the benefit of the Act of 2005. To get such benefit the conditions mentioned by us above must be satisfied, and this has to be proved by evidence.

If a man has a 'keep' whom he maintains financially and uses mainly for sexual purpose and/or as a servant it would not, in our opinion, be a relationship in the nature of marriage'."

(Emphasis supplied)

14. In the judgment of **Asha Devi (Supra)**, the Division Bench of this Court on the basis of various judgments of High Court held that following relationship are not recognized or approved as live-in-relationship:-

*"(a) **Concubine** can not maintain relationship in the nature of marriage vide paras 57 & 59 of the judgment of Hon'ble Supreme Court in **Indra Sarma Vs. V. K. V. Sarma**.*

*(b) **Polygamy**, that is a relationship or practice of having more than one wife or husband at the same time, or a relationship by way of a bigamous marriage that is marrying someone while already married to another and/or maintaining an adulterous relationship that is having voluntary sexual intercourse between a*

*married person who is not one's husband or wife, cannot be said to be a relationship in the nature of marriage vide para 58 of judgment in **Indra Sarma's Case (supra) & A Subhash Babu Vs. state of A.P.**4 (paras 17 to 21, 27, 28 & 29). Polygamy is also a criminal offence under Section 494 & 495 I.P.C., vide **Shayara Bano Vs. Union of India** 5 (paras 299.3).*

*(c) Till a decree of divorce is passed the marriage subsist. Any other marriage during the subsistence of the first marriage would constitute an offence under Section 494 I.P.C. read with Section 17 of the Hindu Marriage Act, 1955 and the person, inspite of his conversion to some other religion would be liable to be prosecuted for the offence of bigamy, vide **Lily Thomas and another Vs. Union of India and others**6 (Para 35). In para 38 of the aforesaid judgment, Hon'ble Supreme Court observed as under:-*

"38. Religion is a matter of faith stemming from the depth of the heart and mind. Religion is a belief which binds the spiritual nature of man to a super-natural being; it is an object of conscientious devotion, faith and pietism. Devotion in its fullest sense is a consecration and denotes an act of worship. Faith in the strict sense constitutes firm reliance on the truth of religious doctrines in every system of religion. Religion, faith or devotion are not easily interchangeable. If the person feigns to have adopted another religion just for some worldly gain or benefit, it would be religious bigotry. Looked at from this angle, a person who mockingly adopts another religion where plurality of marriage is permitted so as to renounce the previous marriage and desert the wife, he cannot be permitted to take advantage of his exploitation as religion is not a commodity to be exploited. The institution of marriage under every personal law is a sacred

institution. Under Hindu Law, Marriage is a sacrament. Both have to be preserved."

(Emphasis supplied)

(d) If both the persons are otherwise not qualified to enter into a legal marriage including being unmarried, vide **D Velusamy Vs. D Patchaiammal** (*supra*) (para 31)."

15. In the judgment of **Asha Devi (Supra)**, Hon'ble Division Bench of this Court has also discussed the judgment of Hon'ble Apex Court in the case of **"Director of Settlement, A.P. Vs. M.R. Apparao**, in which the Hon'ble Apex court has considered the High Court's power for issuance of mandamus and held as under:-

"17. One of the conditions for exercising power under Article 226 for issuance of a mandamus is that the Court must come to the conclusion that the aggrieved person has a legal right, which entitles him to any of the rights and that such right has been infringed. In other words, existence of a legal right of a citizen and performance of any corresponding legal duty by the State or any public authority, could be enforced by issuance of a writ of mandamus. "Mandamus" means a command. It differs from the writs of prohibition or certiorari in its demand for some activity on the part of the body or person to whom it is addressed. Mandamus is a command issued to direct any person, corporation, inferior Courts or Government, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. A mandamus is available against any public authority including administrative and local bodies, and it would lie to any person who is under a duty imposed by statute or by the common law to do a particular act.

In order to obtain a writ or order in the nature of mandamus, the applicant has to satisfy that he has a legal right to the performance of a legal duty by the party against whom the mandamus is sought and such right must be subsisting on the date of the petition."

16. In the relationship of marriage or in the nature of live-in-relationship there must be two consenting adults human beings. The concept of Gotra, Caste and Religion is left a way back. No one has right to interfere in the personal liberty of two adults, not even the parents to two adults can interfere in their relationship, but, the Right to Freedom or Right to Personal Liberty is not an absolute or unfettered right, it is qualified by some restrictions also. The freedom of one person extincts where the statutory right of another person starts, hence, the freedom of one person cannot encroach or overweigh the legal right of another person. If the petitioners are already married and had their spouse alive, he/she cannot be permitted to enter into live-in-relationship with third person without seeking divorce from the earlier spouse. He/she first has to obtain the decree of divorce from the court of competent jurisdiction before solemnizing marriage of entering into live-in-relationship out of their legal marriage.

17. It is pertinent to mention here that The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act, 2021 (in brevity 'the Act') has come into force on 05.03.2021, thereafter it is made mandatory for interfaith couples to seek conversion according to the provisions of the Act. In the case at hand, admittedly, none of the petitioners has moved application for conversion of religion in accordance with

Section 8 and 9 of the Act. Explanation to Section 3(1) of the Act reads as follows:-

"3(1) No person shall convert or 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. No person shall abet, convince or conspire such conversion.

Explanation:- For the purposes of this sub-section conversion by solemnization of marriage or relationship in the nature of marriage on account of factors enumerated in this sub-section shall be deemed included."

18. Explanation goes to show that conversion is not only required for the purpose of marriage, but it is also required in all relationship in the nature of marriage, therefore, Conversion Act applies to relationship in the nature of marriage or live-in-relationship. Petitioners have not yet applied for conversion as per provisions of Section 8 and 9 of the Act, hence, the relationship of petitioners cannot be protected in contraventions of the provisions of law.

19. Certainly, the Courts have power to interpret the provisions of law if there is ambiguity in the provisions of law, but, the above mentioned law is explicit which mandates that conversion is required not only in cases of inter-caste marriages but relationship in the nature of marriage, hence, Courts should refrain from embarking upon the interpretation of law in any sense when the law is very explicit.

20. While applying the principles laid down in various pronouncements by

Hon'ble the Apex Court, it gives guidelines to the fact that couple must be of legal age to marry and qualified to enter into legal marriage including being unmarried and they must be akin to spouse for significant period of time. No proof of joint account, financial security, joint property or joint expenditure is produced before this Court. Petitioners have not applied for conversion so far. Till date, no F.I.R. has been lodged by the parents of any of the petitioner, therefore, there is no challenge to the relationship of petitioners.

21. In view of the discussions as above, it is not considered desirable that relationship of the petitioners be protected in contravention of the statutory provisions of law passed by legislature, hence, petition has no force and is liable to be dismissed and is **dismissed** accordingly.

(2024) 4 ILRA 1370
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.04.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Writ -C No. 1782 of 2024

Shahnawaz Ali **...Petitioner**
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:
Vipul Shukla

Counsel for the Respondents:
C.S.C., Gaurav Mehrotra, Nirankar Singh

The Uttar Pradesh High Courts Amalgamation Order, 1948-Clause 14-
Petitioner has filed as many as four Writ Petitions at Allahabad- two of which are still pending- root cause for filing all the writ

petitions is a challenge to the Caste Certificate issued to the petitioner-all the writ petitions have been filed challenging various orders- all of which essentially emanate from the same root cause-present writ petition filed challenging the validity of three orders- two of which were passed at places falling within the exclusive territorial jurisdiction sitting at Allahabad-third order has been passed by the State Level Caste Certificate Scrutiny Committee at Lucknow- which falls within the territorial jurisdiction of this Court sitting at Allahabad-it would not be proper for this Court sitting at Lucknow to entertain the 5th Writ Petition filed by the petitioner at Lucknow during pendency of two earlier writ petitions filed by him at Allahabad- Clause 14 of Order, 1948 -provides that the Chief Justice may in his discretion order that any case or class of cases arising in the said areas shall be heard at Allahabad. matter be placed before the Hon'ble Chief Justice. (E-9)

List of Cases cited:

1. Prem Prakash Yadav versus Union of India, (162) ALR 628, (2024) 1 UPLBEC 119

2. Kusum Ingots & Alloys Ltd. v. Union of India, (2004) 6 SCC 254

(Delivered by Hon'ble Subhash Vidyarthi J.)

1. Heard Shri Sanjay Bhasin Senior Advocate assisted by Shri Vipul Shukla, learned counsel for the petitioner, Shri Kuldeep Pati Tripathi, learned counsel for the Additional Advocate General assisted by Shri Vivek Kumar Shukla, Additional Chief Standing Counsel for respondent Nos.1 to 5, Shri Gaurav Mehrotra and Shri Nirankar Singh, learned counsel appearing for the respondent No.6.

2. By means of the instant petition filed under Article 226 of Constitution of India, the petitioner has made following main prayer:-

“To issue a writ order or direction in the nature of Certiorari quashing the order dated 14.02.2024 passed by State Level Caste Certificate Verification Committee, Department of Social Welfare, Government of Uttar Pradesh, Lucknow - Respondent No.2, order dated 15.07.2023 passed by Divisional Appellate Forum for Caste Certificate Verification Committee, Saharanpur Division, Saharanpur Respondent No.3 and the order dated 09.06.2023 passed by District Level Caste Certificate Verification Committee, District Muzaffarnagar Respondent No.4, which said orders are morefully annexed as Annexure No.1, Annexure No.2 and Annexure No.3 respectively to the Writ Petition.”

3. On the last date of hearing, a preliminary objection was raised that earlier the petitioner has filed as many as four petitions before this Court sitting at Allahabad and prayer made in this Writ Petition is for quashing of three orders- (i) order dated 09.06.2023 passed by the District Level Caste Certificate Scrutiny Committee, Muzaffarnagar, (ii) order dated 15.07.2023 passed by Divisional Level Caste Certificate Scrutiny Committee, Saharanpur and (iii) order dated 14.02.2023 passed by the State Level Caste Certificate Scrutiny Committee. The first two orders have been passed at Muzaffarnagar, and Saharanpur, both of which fall outside the territorial jurisdiction of this Court sitting at Lucknow. Although the third order dated 14.02.2022 has been passed by the State Level Caste Certificate Scrutiny Committee, which falls within the territorial jurisdiction of this Court sitting at Lucknow, as two of the orders have been passed within the limits of territorial jurisdiction of this Court sitting at Allahabad and earlier the petitioner has

filed as many as four writ petitions at Allahabad, two of which are still pending, it would not be proper for this Court sitting at Lucknow to entertain this writ petition and the petitioner should file this writ petition also at Allahabad.

4. Replying to the aforesaid preliminary objection, Shri Sanjay Bhasin Senior Advocate appearing for the petitioner has submitted that the first writ petition bearing Writ-C No.20676 of 2023 was filed by the petitioner with the following main prayers:-

“(i) issue a writ, order or direction in the nature of mandamus commanding the stay the effect and operation of order dated 9.6.2023 passed by the District Level Caste Scrutiny Committee till the disposal of the stay application filed by the petitioner in appeal dated 14.6.2023.

(ii) issue a writ, order or direction in the nature of mandamus commanding the Regional Level Caste Scrutiny Committee/appellate authority to decide the petitioner’s stay application dated 14.6.2023 (Annexure 16 to the writ petition).

(iii) issue a writ, order or direction in the nature of mandamus commanding the Regional Level Caste Scrutiny Committee to sent the matter to the vigilance sell for verification of petitioners caste certificate as per the provision contained in government order dated 05.01.1996.”

5. Writ-C No.20676 of 2023 was disposed of by means of an order dated 22.06.2023 passed by a Division Bench of this Court sitting at Allahabad directing the Appellate Authority to decide the stay application of the petitioner within a week’s time.

6. Thereafter, the petitioner filed Writ C No.23754 of 2023 challenging the validity of a show cause notice dated 05.07.2023 issued by the Additional District Magistrate (Administration), Muzaffarnagar requiring the petitioner to show cause as to why he should not be removed from the office of Chairman of Nagar Palika Parishad, Khatauli, District Muzaffarnagar on the ground that the aforesaid office was reserved for persons belonging to Other Backward Classes and the petitioner had wrongly obtained a certificate that he belong to Kalal caste whereas the District Level Caste Certificate Scrutiny Committee has found in its order dated 09.06.2023 that the petitioner does not belong to the aforesaid backward caste and he belongs to a general caste. Consequent to the order dated 09.06.2023 passed by the District Level Caste Certificate Scrutiny Committee, the Tehsildar, Khatauli had passed an order dated 12.06.2023 cancelling the Caste Certificate of the petitioner.

7. Taking into consideration the fact that the Caste Certificate of the petitioner certifying that he belong to a backward caste Kalal had already been cancelled by the District Level Caste Certificate Scrutiny Committee and an appeal filed against the order of the District Level Caste Certificate Scrutiny Committee was pending before the Divisional Level Caste Certificate Scrutiny Committee, the writ petition was disposed of expressing the expectation that the Appellate Authority will comply with the order dated 22.06.2023 passed in Writ-C No.20676 of 2023.

8. Thereafter the respondent No.6 Krishna Pal filed Election Petition No.5 of 2023 before the Election Tribunal/District

Judge, Muzaffarnagar challenging election of the petitioner to the post of Chairman, Nagar Palika Parishad, Khatauli and a notice of the election petition was issued to the petitioner. The petitioner then filed Writ-C No.27653 of 2023 before this Court sitting at Allahabad, in which an interim order dated 19.10.2023 was passed staying further proceedings of Election Petition. The aforesaid writ petition is still pending.

9. Meanwhile, the State Government initiated proceedings under Section 48 of Nagar Palika Adhiniyam, 1916 for removal of the petitioner from the office of Chairman, Nagar Palika Parishad, Khatauli on the ground that he was not qualified to be elected as an Other Backward Class candidate and the administrative and financial powers of the petitioner as Chairman of Nagar Palika Parishad were seized. The petitioner challenged this order by filing Writ-C No.44898 of 2023 mainly on the ground that the issue of the petitioner's Caste Certificate was sub judice before the District Level Caste Certificate Scrutiny Committee and it was otherwise not a consideration germane for the proceedings to be initiated under Section 48 of the Act.

10. It was further contended on behalf of the petitioner that the Election Petition was the only course by which his election could be challenged and an Election Petition had already been filed and it had been stayed by the High Court. An interim order was passed in the aforesaid writ petition on 16.01.2024 staying the effect and operation of the impugned order dated 08/11.03.2023. That writ petition is also pending consideration before this High Court sitting at Allahabad.

11. Submission of the learned Senior Advocate appearing for the petitioner is that the subject of all the four writ petitions was separate and distinct from the subject matter of this writ petition, which is the order dated 14.02.2024 passed by the State Level Caste Certificate Scrutiny Committee. He has further submitted that in furtherance of an order passed by the State Level Caste Certificate Scrutiny Committee, a vigilance inquiry was conducted by the Vigilance Cell at Lucknow and the report was submitted in favour of the petitioner on 11.12.2023. The State Level Caste Certificate Scrutiny Committee has passed the impugned order against the findings of the Vigilance report. He has further submitted that the entire proceedings of State Level Caste Certificate Scrutiny Committee was conducted at Lucknow and an order was also passed at Lucknow and, therefore, the subject matter of this Writ petition falls within the exclusive jurisdiction of this Court sitting at Lucknow.

12. I have considered the submissions advanced by the learned counsel for the parties. What appears from the material available on record at this stage is that the petitioner was elected as Chairman, Nagar Palika Parishad, Kjhatauli, District Muzaffarnagar, which was a seat reserved for a candidate belonging to OBC (Other Backward Class). The petitioner, on the strength of a Caste Certificate issued by Tehsildar, Khatauli, claimed himself to be belonging to Kalal Caste, which falls within the category 'Other Backward Class'. The respondent Nos. 6 and 7 raised a challenge against the petitioner's claim of belonging to Kalal caste and they contended that he belongs to 'Sheikh' Caste. The matter was examined by the District Level Caste

Certificate Scrutiny Committee at Muzaffarnagar, which passed an order dated 09.06.2023 holding that the petitioner belongs to Sheikh caste and he does not belonged to Kalal Backward Caste. This order was passed at Muzaffarnagar, which falls within the exclusive territorial jurisdiction of this Court sitting at Allahabad. The petitioner filed an appeal against the aforesaid order dated 09.06.2023 passed by the District Level Caste Certificate Scrutiny Committee before the Divisional Level Caste Certificate Scrutiny Committee at Saharanpur. During pendency of his appeal, he filed Writ Petition No.20676 of 2023 referred to above, inter alia seeking a direction to the Divisional Level Caste Certificate Scrutiny Committee for deciding his stay application. This writ petition was disposed off by means of an order dated 22.06.2023 passed by a Division Bench of this Court sitting at Allahabad.

13. Consequent to the order dated 09.06.2023 passed by the District Level Caste Certificate Scrutiny Committee Muzaffarnagar, Tehsildar Khatauli passed an order dated 12.06.2023 cancelling the Caste Certificate of the petitioner and thereafter a notice was issued to the petitioner to show cause as to why he should not be removed from the office of Chairman, Nagar Palika Parishad Khatauli, Muzaffarnagar on the ground that the District Level Caste Certificate Scrutiny Committee has found that he does not belong to Kalal Backward Caste and Tehsildar Khatauli had cancelled his Cast Certificate by means of an order dated 12.06.2023. The petitioner then filed Writ-C No.23754 of 2023 before this Court at Allahabad, which was disposed off by a Division bench by expressing an

expectation that the Appellate Authority will comply with the order dated 22.06.2023 passed in Writ C No.20676 of 2023.

14. The respondent No.6 filed an Election Petition before the Election Tribunal/District Judge, Muzaffarnagar challenging election of the petitioner to the post of Chairman, Nagar Palika Parishad, Khatauli on the ground that the aforesaid post was reserved for candidates belonging to OBC category and the District Level Caste Certificate Scrutiny Committee having recorded a finding in its order dated 09.06.2023 that the petitioner does not belong to Kalal caste and his caste certificate having been cancelled by the Tehsildar in furtherance of the aforesaid order, the petitioner's election to the office of Chairman, Nagar Palika Parishad, Khatauli, which was reserved for candidates belonging to OBC category, is liable to be set aside. The petitioner then filed Writ-C No.27653 of 2023 challenging proceeding of the Election Petition and this Court sitting at Allahabad has passed an interim order dated 19.10.2023 staying the proceedings of the election petition. That writ petition is pending before this Court sitting at Allahabad.

15. Meanwhile, proceedings for removal of the petitioner from the Office of Chairman, Nagar Palika Parishad, Khatauli have been initiated under section 48 of U.P. Municipalities Act, 1916 and the petitioner has filed yet another Writ-C No.44898 of 2023. The effect and operation of the order dated 08/11.12.2023 whereby the administrative and financial powers of the petitioner as Chairman of Nagar Palika Parishad, Khatauli have been seized, has been stayed by a Division Bench of this Court sitting at Allahabad, the aforesaid

writ petition is also pending consideration before this Court sitting at Allahabad.

16. The relevant portion of the Article 226 of the Constitution of India provides as follows:—

“226. Power of High Courts to issue certain writs:—

(i) Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercise jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose

(ii) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories

(iii).....”

(Emphasis added)

17. A bare perusal of Article 226 of the Constitution of India makes it manifest that it confers power upon every High Court to issue directions, orders or writs throughout the territories in relation to which it exercises jurisdiction. Clause (2) of the Article 226 of the Constitution of India further provides that the power to issue directions, orders or writs may be

exercised by any High Court exercising jurisdiction in relation to the territory within which the cause of action wholly or in part arises for exercise of such power. As the Writ Petition inter alia seeks quashing of the order dated 14.02.2024 passed by State Level Caste Certificate Verification Committee, Department of Social Welfare, Government of Uttar Pradesh, Lucknow, undisputedly a part of cause of action for filing this Writ Petition has accrued within the territorial jurisdiction of this Court sitting at Lucknow and, therefore, this Court sitting at Lucknow has jurisdiction to entertain the Writ Petition and the Writ Petition is maintainable here.

18. However, here the question involved is not of maintainability of the Writ Petition at Lucknow as a part of cause of action has undoubtedly accrued within the territorial jurisdiction of this Court at sitting Lucknow, the question is of propriety of this Court exercising its discretion to entertain the Writ Petition here, when the root cause for filing the Writ Petition accrued within the territorial jurisdiction of this Court sitting at Allahabad and the petitioner has already filed as many as four Writ Petitions mentioned above at Allahabad, two of which are still pending.

19. In **Kusum Ingots & Alloys Ltd. v. Union of India**, (2004) 6 SCC 254, the Hon’ble Supreme Court laid down that:

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“Forum conveniens

30. *We must, however, remind ourselves that even if a small part of cause of action arises within the territorial jurisdiction of the High Court, the same by itself may not be considered to be a determinative factor compelling the High*

Court to decide the matter on merit. In appropriate cases, the Court may refuse to exercise its discretionary jurisdiction by invoking the doctrine of forum conveniens. [See Bhagat Singh Bugga v. Dewan Jagbir Sawhney [AIR 1941 Cal 670 : ILR (1941) 1 Cal 490] , Madanlal Jalan v. Madanlal [(1945) 49 CWN 357 : AIR 1949 Cal 495] , Bharat Coking Coal Ltd. v. Jharia Talkies & Cold Storage (P) Ltd. [1997 CWN 122] ,S.S. Jain & Co. v. Union of India [(1994) 1 CHN 445] and New Horizons Ltd. v. Union of India [AIR 1994 Del 126] .]

20. Shri Gaurav Mehrotra, learned counsel appearing for the respondent No.6 has placed before this Court a judgment passed by a Division Bench of this Court in **Prem Prakash Yadav versus Union of India**, (162) ALR 628 = (2024) 1 UPLBEC 119. That Writ Petition was filed before this Court sitting at Lucknow challenging validity of a Government Order dated 26.02.2014, whereby approval was given to revise rates for conversion of Nazul property into freehold. The petitioner had also challenged a notification dated 04.03.2014 issued by the State Government. A further prayer made was for protecting the petitioner's possession over House No.23, Stanley Road, Allahabad. A preliminary objection was raised against maintainability of the writ petition at Lucknow on the ground that the petitioner had earlier filed a writ petition at Allahabad praying for a writ of mandamus commanding the respondents to execute a sale deed in favour of the petitioner in respect of the aforesaid property, which writ petition was disposed off by means of an order dated 19.02.2009. The petitioner then filed another Writ-C No.15798 of 2010 at Allahabad praying essentially for the same relief regarding the same property. The third writ petition was filed at

Lucknow with respect to the same property. In the aforesaid factual background a Division Bench of this court held in **Prem Prakash Yadav**(Supra) that:-

“9. No doubt petitioner is master of his petitions. In case jurisdiction partially falls at Lucknow in appropriate case a petition can be filed at Lucknow also. But in the present matter earlier repeatedly petitioner chose to file petitions at Allahabad and some of them are pending at Allahabad. The said fact ought to have been disclosed by the petitioner in the very first paragraph of his writ petition. The same was not done. Even otherwise, the unique position with regard to Allahabad High Court is that under Clause 14 of United Provinces High Court (Amalgamation) Order, 1948 the petitions can be transferred by the Chief Justice while sitting at Lucknow to Allahabad but same can neither be transferred by him from Allahabad to Lucknow nor any Court can summon them. The matters at Allahabad can only be heard at Allahabad. Therefore, in the given circumstances, this Court can not summon the records from Allahabad. It creates a unique difficulty. Thus, in this peculiar situation it is necessary that once petitioner chooses between Lucknow or Allahabad for filing his petitions the same is a judicial discipline and ought to be followed in later petitions, if any filed. In absence of the same it becomes difficult for Courts at Allahabad and Lucknow, to have all the matters together and decide the same. Petitioner in garb of his power to chose forum can not cause inconvenience to Court and keep list pending unnecessary in bifurcated manner.

10. This type of disputes are frequently occurring before this Court. The difficulty faced by the Court, in the

aforesaid circumstances, where a case cannot be transferred from Allahabad to Lucknow while they can be transferred from Lucknow to Allahabad only when Chief Justice of High Court sitting at Lucknow passes an order under Clause 14 of the United Provinces High Court (Amalgamation) Order, 1948, creates unnecessary hurdle in disposal of cases, if jurisdiction is changed from one place to another by the parties to the dispute. It needs to be solved.

11. Merely because petitioner has a right to file writ petition before any Court of their choice either at Allahabad or Lucknow, it does not give them a kangaroo right to hop around jurisdiction on whims. It is not only his convenience, which is to be looked into, but convenience of all related is also relevant, including that of Court. Facts of this case are a glaring example of the same. The difficulty being faced by this Court is created by petitioner only.

12. A party has a choice to invoke jurisdiction of this Court either at Allahabad or at Lucknow and once they have exercised the said choice, parties should restrict themselves to their initial choice of forum while filing later petitions. Hopping around forums would be highly inconvenient to the working of the Court as in the present case. Once petitioner chooses a jurisdiction, out of many available, in normal course, he should stick with the same, unless he can provide cogent reasons for his hopping around. In the present case the petitioner has not provided any such reasons.”

21. When we examine the facts of the present case in light of law laid down in the aforesaid cases, it appears that the root cause for filing all the writ petitions is a challenge to the Caste Certificate issued to

the petitioner. All the writ petitions have been filed challenging various orders, all of which essentially emanate from the same root cause. Two writ petitions filed by the petitioner at Allahabad stand disposed of and two other writ petitions filed by him are still pending before this Court at Allahabad. The present writ petition has been filed challenging the validity of three orders, two of which were passed at places falling within the exclusive territorial jurisdiction sitting at Allahabad. Although, the third order has been passed by the State Level Caste Certificate Scrutiny Committee at Lucknow, which falls within the territorial jurisdiction of this Court sitting at Allahabad, when the root cause for filing all the writ petitions is the same and the petitioner has already filed four writ petitions before this Court sitting at Allahabad, two of which are still pending, it would not be proper for this Court setting at Lucknow to entertain the 5th Writ Petition filed by the petitioner at Lucknow during pendency of two earlier writ petitions filed by him at Allahabad.

22. At this stage, Shri Sanjay Bhasin, learned Senior Advocate for the petitioner has submitted that as counter affidavit and rejoinder affidavit in the present case have already been filed and the matter is ripe for final hearing and this plea was not raised in the counter affidavit, it would not be proper for this Court to refuse to hear the writ petition finally on the ground of the writ petition not being entertainable before this Court sitting at Lucknow.

23. The mere filing of a counter affidavit would not affect the demand of judicial propriety on the part of this Court sitting at Lucknow to refrain from hearing a writ petition while two earlier writ petitions

filed by the petitioner essentially arising out of the same root cause are pending before this Court sitting at Allahabad.

24. The learned Senior Advocate appearing for the petitioner lastly submitted that instead of dismissing the writ petition and giving a liberty to the petitioner to file a fresh petition at Allahabad, this Court should transmit the record of the present case to Allahabad for being decided there since the pleadings have been exchanged by the parties. None of the learned Counsel raised any objection against this submission of the learned Counsel for the petitioner.

25. Clause 14 of the Uttar Pradesh High Courts Amalgamation Order, 1948 inter alia provides that the Chief Justice may in his discretion order that any case or class of cases arising in the said areas shall be heard at Allahabad.

26. Accordingly, this request of the learned Counsel for the petitioner is accepted. Let the matter be placed before the Hon'ble Chief Justice for passing appropriate order for transfer of this Writ Petition to this Court sitting at Allahabad in terms of Clause 14 of the Amalgamation Order.

(2024) 4 ILRA 1378
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.03.2024

BEFORE

THE HON'BLE MRS. RENU AGARWAL, J.

Writ -C No. 1969 of 2024

Faujiya Bano & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
 Sri Dharmendra Kumar

Counsel for the Respondents:
 C.S.C.

A. Civil Law - Constitution of India,1950-Article 226-Indian Penal Code,1860-Sections 498 & 504-Petitioners sought protection from Respondent No.4, claiming threats and interference in their marriage-Petitioner no.1 was previously married to Respondent no.4 under muslim rites, with two children born out of that union-Respondent no. 4 allegedly issued a triple talaq and ousted her in 2019-In 2023, Petitioner no.1 remarried petitioner no.2, also under muslim rites, without obtaining a legal divorce from Respondent no. 4 and this marriage was registered-Respondent no. 4 contested the validity of Petitioner no.1's second marriage, arguing that no formal decree of divorce was obtained-A police report was lodged against Petitioner no. 2 for enticing petitioner no.1 and her child-Held, second marriage entered into without obtaining a formal decree of divorce from the first spouse is invalid, even under muslim personal law-The petitioner(a muslim woman) failed to produce evidence of a valid divorce(triple talaq or khula) from her first husband-Hence, the petitioners first marriage had not been legally dissolved,the second marriage could not be granted protection, as it violated sections 494 and 495 IPC-The court declined to issue a writ of mandamus to protect the petitioner's relationship.(Para 1 to 16)

The writ petition is dismissed. (E-6)

List of Cases cited:

1. D.Velusamy Vs D.Patchajammal (2010) 10 SCC 469

2. Asha Devi & anr. Vs St. of U.P. & ors. Writ C No. 18743 of 2020

(Delivered by Hon'ble Mrs. Renu Agarwal, J.)

1. Instant writ petition under Article 226 of the Constitution has been filed by the petitioners with prayer for issuing writ, order or direction in the nature of mandamus commanding/directing the respondent nos. 2 and 3 to secure the security of life and property of the petitioners from the respondent No.4.

2. Heard learned counsel for the petitioners, Mr. Ashwani Kumar Tripathi, learned Additional Chief Standing Counsel for State respondents and perused the record.

3. It is submitted by the learned counsel for the petitioners that both the petitioners are major and are of marriageable age and profess the same religion. It is further submitted that petitioner No.1 is legally wedded wife of respondent No.4 and she belong to Muslim community. The date of birth of petitioner No. 1 is 01.02.1997 and the date of birth of petitioner no. 2 is 01.01.1995, in support thereof the petitioner No.1 has brought on record copy Birth Certificate and petitioner No.2 has brought on record copy of Adhar Card respectively which are annexed as Annexure No. 2 to the affidavit filed in support of the writ petition. It is submitted that petitioner No. 1 solemnized marriage with respondent No.4 according to Muslim Rites and Rituals. Thereafter, one daughter and one son was born out of wedlock of petitioner No.1 and 4. It is further submitted that respondent No.4 started illegal demand of money which was not fulfilled by parents of petitioner No.1, thereafter, in April 2019, respondent No. 4 gave Triple Talaq to petitioner No.1 and ousted the petitioner No.1 from his house. After four years of the Khula Talaq to the petitioner No.1, she solemnized her marriage with petitioner No.2 according to

Muslim Rites and Rituals. It is contended that after solemnization of their marriage, petitioners applied for registration of their marriage before the Marriage Registration Officer, under the provision of the Marriage Registration Rules, 2017 and their marriage was registered on 10.01.2023 and copy of the marriage registration certificate is annexed as Annexure No.3 to the petition. It is further contended that after solemnization of the marriage of the petitioners, respondent No.4 started threatening and interfering in the matrimonial life of petitioner No.1. Being aggrieved with the alleged threatening, petitioner No. 1 moved an application through registered post to the Inspector Incharge of Police Station-Ghoorpur, District-Prayagraj, however, no protection was provided to the petitioners, hence, it is prayed to issue an order or direction in the nature of mandamus directing respondents not to interfere in the peaceful marriage life of the petitioners and to secure the personal life and liberty of the petitioners from respondent No. 4. and his associates.

4. Learned Additional Chief Standing Counsel appearing on behalf of the State submitted that petitioner No.1 has not obtained decree of divorce from her previous husband and NCR No. 123/2023 under Section 498, 504 I.P.C., police station-Ghoorpur, Prayagraj has also been lodged by respondent No.4 against petitioner No.2 which is still pending, hence, protection cannot be granted to the petitioner and opposed the prayer of the petitioners.

5. In view of the order proposed to be passed, there is no need to issue notice to private respondent. With the consent of learned counsel appearing for the parties, this writ petition is being disposed of

finally at this stage in terms of the Rules of the Court.

6. I have heard the rival submissions advanced on behalf of the parties and perused the entire materials brought on record.

7. Perusal of the record reveals that date of birth of petitioner No.1 is 01.02.1997 as per her Birth Certificate, and date of birth of petitioner No.2 as per his Adhar Card is 01.01.1995 and both the petitioners are major. Petitioners have solemnized their marriage on 12.10.2023 according to Muslim Rites and Rituals and their marriage has been registered by the marriage registration office concerned, however, no decree of divorce of petitioner No.1 and respondent No.4 is brought on record, apparently, petitioner No.1 solemnized marriage with petitioner No.2 without obtaining any decree of divorce from the concerned Court.

8. In the case of **D.Velusamy Vs. D. Patchajammal** reported in **(2010) 10 SCC 469**, Hon'ble Apex Court while considering the definitions given under Section 2 of the Domestic Violence Act dealt with the definition of "domestic relationship", as a relationship in the nature of marriage. **It laid down the following requisite criteria in the 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."

9. In the case of **Asha Devi and Another vs. State of U.P. and Others** passed in **Writ (C) No.18743 of 2020**, the Hon'ble Division Bench of this Court formulated two questions as under:-

"(i) Whether the petitioners, who claim themselves to be living together as husband and wife; can be granted protection when the petitioner No.1 is legally wedded wife of someone else and has not taken divorce sofar ?

(ii) Whether protection to petitioners as husband and wife or as live-in-relationship can be granted in exercise of powers conferred under Article 226 of the Constitution of India, when their living together may constitute offences under Sections 494/495 I.P.C. ?"

10. In the judgment of **Asha Devi** (Supra), Hon'ble Division Bench of this Court has discussed the judgment of Hon'ble Apex Court in the case of "**D. Velusamy Vs. D. Patchaiammal**", in which the Hon'ble Apex court held that:-

"32. In our opinion not all live in relationships will amount to a relationship in the nature of marriage to get the benefit of the Act of 2005. To get such benefit the conditions mentioned by us above must be satisfied, and this has to be proved by evidence.

If a man has a 'keep' whom he maintains financially and uses mainly for sexual purpose and/or as a servant it would not, in our opinion, be a relationship in the nature of marriage'."

(Emphasis supplied)

10. In the judgment of **Asha Devi** (Supra), the Division Bench of this Court

on the basis of various judgments of High Court held that following relationship are not recognized or approved as live-in-relationship:-

"(a) Concubine can not maintain relationship in the nature of marriage vide paras 57 & 59 of the judgment of Hon'ble Supreme Court in Indra Sarma Vs. V. K. V. Sarma.

(b) Polygamy, that is a relationship or practice of having more than one wife or husband at the same time, or a relationship by way of a bigamous marriage that is marrying someone while already married to another and/or maintaining an adulterous relationship that is having voluntary sexual intercourse between a married person who is not one's husband or wife, cannot be said to be a relationship in the nature of marriage vide para 58 of judgment in Indra Sarma's Case (supra) & A Subhash Babu Vs. state of A.P.4 (paras 17 to 21, 27, 28 & 29). Polygamy is also a criminal offence under Section 494 & 495 I.P.C., vide Shayara Bano Vs. Union of India 5 (paras 299.3).

(c) Till a decree of divorce is passed the marriage subsist. Any other marriage during the subsistence of the first marriage would constitute an offence under Section 494 I.P.C. read with Section 17 of the Hindu Marriage Act, 1955.....

(d) If both the persons are otherwise not qualified to enter into a legal marriage including being unmarried, vide D Velusamy Vs. D Patchaiammal (supra) (para 31)."

11. In the judgment of **Asha Devi** (Supra), Hon'ble Division Bench of this Court has also discussed the judgment of Hon'ble Apex Court in the case of "Director of Settlement, A.P. Vs. M.R.

Apparao, in which the Hon'ble Apex court has considered the High Court's power for issuance of mandamus and held as under:-

"17. One of the conditions for exercising power under Article 226 for issuance of a mandamus is that the Court must come to the conclusion that the aggrieved person has a legal right, which entitles him to any of the rights and that such right has been infringed. In other words, existence of a legal right of a citizen and performance of any corresponding legal duty by the State or any public authority, could be enforced by issuance of a writ of mandamus. "Mandamus" means a command. It differs from the writs of prohibition or certiorari in its demand for some activity on the part of the body or person to whom it is addressed. Mandamus is a command issued to direct any person, corporation, inferior Courts or Government, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. A mandamus is available against any public authority including administrative and local bodies, and it would lie to any person who is under a duty imposed by statute or by the common law to do a particular act. In order to obtain a writ or order in the nature of mandamus, the applicant has to satisfy that he has a legal right to the performance of a legal duty by the party against whom the mandamus is sought and such right must be subsisting on the date of the petition."

12. In the relationship of marriage or in the nature of live-in-relationship there must be two consenting adults human beings. The concept of Gotra, Caste and Religion is left a way back. No one has right to interfere in the personal liberty of

two adults, not even the parents to two adults can interfere in their relationship, but, the Right to Freedom or Right to Personal Liberty is not an absolute or unfettered right, it is qualified by some reasonable restrictions also. The freedom of one person extincts where the statutory right of another person starts. Spouse have statutory right to enjoy the company of his or her counterpart and he/she cannot be deprived of that right for the sake of personal liberty and no such protection can be granted to infringe statutory right of another spouse, hence, the freedom of one person cannot encroach or overweigh the legal right of another person. If the petitioners are already married and had their spouse alive, he/she cannot be permitted to enter into live-in-relationship with third person without seeking divorce from the earlier spouse. He/she first has to obtain the decree of divorce from the court of competent jurisdiction before solemnizing marriage of entering into live-in-relationship out of their legal marriage.

13. In the instant case, both the parties are Muslims by faith and marriage of petitioner No.1 was first solemnized with respondent No.4 according to Muslim Rites and Rituals and one son and one daughter was also born out of the wedlock of petitioner No.1 and respondent No.4. It is alleged that respondent No. 4 used to beat petitioner No.1 and after giving Triple Talaq to petitioner No.1, ousted her from his house along with their minor son. Thereafter, she came to her paternal house along with minor son. Petitioner No.1 gave Khula Talaq to respondent No. 4 in the year 2019 and since then she was resident at her paternal house. After four years of the alleged divorce petitioner No.1 solemnized marriage with petitioner No.2, despite being legally wedded to respondent No.4.

Furthermore, an N.C.R. has also been lodged by respondent No. 4 against petitioner No.2 under Section 498, 504 I.P.C., police station-Ghoorpur, Prayagraj alleging therein that on 09.10.2023 at about 10:30 AM, petitioner No.2 enticed away petitioner No.1 along with his minor son of three years on the pretext of marriage.

14. The pleadings of the petition does not disclose the date of divorce either by Triple Talaq or by way of Khula Talaq. Petitioner No.1 did not disclose the date on which she returned to her paternal house with her minor son. It is relevant to quote hereinbelow the Section 2 of The Dissolution Of Muslim Marriages Act, 1939, which deals with the grounds for decree for dissolution of marriage:-

" 2. Grounds for decree for dissolution of marriage. *A woman married under Muslim law shall be entitle to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely: ??*

(i) that the whereabouts of the husband have not been known for a period of four years;

(ii) that the husband has neglected or has failed to provide for her maintenance for a period of two years;

(iii) that the husband has been sentenced to imprisonment for a period of seven years or upwards;

(iv) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;

(v) that the husband was impotent at the time of the marriage and continues to be so;

(vi) that the husband has been insane for a period of two years or is suffering from a virulent venereal disease;

(vii) that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years

: Provided that the marriage has not been consummated;

(viii) that the husband treats her with cruelty, that is to say, ?

(a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treat

(b) associates with women of evil repute or leads an infamous life, or

(c) attempts to force her to lead an immoral life, or

(d) disposes of her property or prevents her exercising her legal rights over it, or

(e) obstructs her in the observance of her religious profession or practice, or

(f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Qoran;

(ix) on any other ground which is recognized as valid for the dissolution of marriages under muslim law :

Provided that ?

(a) no decree shall be passed on ground (iii) until the sentence has become final;

(b) a decree passed on ground (i) shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorized agent within that period and satisfies the Court that he is prepared to perform his conjugal duties, the Court shall set aside the said decree;

and

(c) before passing a decree on ground (v) the Court shall, on application by the husband, make an order requiring

the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the Court within such period, no decree shall be passed on the said ground"

15. While applying the principles laid down in various pronouncements by Hon'ble the Apex Court, it gives guidelines to the fact that couple must be of legal age to marry and qualified to enter into legal marriage including being unmarried and they must be akin to spouse for significant period of time. Petitioner No.1 could have applied for dissolution of her previous marriage on the ground mentioned in the Dissolution Of Muslim Marriages Act, 1939, however, she chose to solemnize another marriage from another person. Petitioner No.1 is still legally wedded wife of respondent No.4 and she has not obtained any decree of divorce.

16. In view of the discussions as above, it is not considered desirable that relationship of the petitioners be protected in contravention of the statutory provisions of law passed by legislature, hence, petition has no force and is liable to be dismissed and is **dismissed** accordingly.

(2024) 4 ILRA 1383
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 12.03.2024

BEFORE

THE HON'BLE ALOK MATHUR, J.

Writ -C No. 2214 of 2024

Hem Kant

State of U.P. & Ors.

Versus

...Petitioner

...Respondents

Counsel for the Petitioner:

Vipul Shukla

Counsel for the Respondents:

C.S.C.

Caste certificate-Where a public functionary - is required to perform a public function within a time frame-same will be held to be directory unless the consequences are specified-time provided is merely directory - appeal is not decided within the prescribed time- remedy of approaching High Court for obtaining suitable direction -but merely because the appeal is not decided within the time prescribed- no further appeal can be preferred to the higher authority as has been done in the present case- District Level Committee shall consider and decide the same expeditiously.

Petition disposed. (E-9)**List of Cases cited:**

1. Kumari Madhuri Patil and another Vs. Additional Commissioner, Tribal Development and others (1994) 6 SCC 241

2. C. Bright v. Distt. Collector, (2021) 2 SCC 392

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

1. Heard Sri Vipul Shukla, learned counsel for the petitioner as well as learned Standing counsel on behalf of the respondents.

2. It has been submitted by learned counsel for the petitioner that the petitioner is a B.Sc. graduate and after his graduation applied for his caste certificate through online portal vide application No.211470030073241 before the Tehsildar, Tehsil Sadar, Firozabad on 21.5.2021. It has been submitted that the said application was rejected by means of order dated 25.5.2021.

3. Being aggrieved by the order of the Tehsildar the petitioner filed an

application before District Level Caste Scrutiny Verification Committee on 16.6.2021. It is stated that the said application was filed in terms of the Government Order dated 28.2.2011 where it is provided that the said verification of the caste be done within fifteen days. The petitioner waited for fifteen days and on expiry of the said period as the application was not decided he approached the Divisional Level Caste Verification Committee vide application dated 21.7.2021. It is submitted that as per the Government Order dated 27.1.2011 clause 5 provides for thirty days? time to decide the application preferred against the order of District Level Caste Verification Committee but it is stated that despite expiry of a period of one month the application was not decided by Divisional Level committee. After waiting for two months the petitioner approached the State Level Caste Verification Committee by filing application on 30.9.2021. It is submitted that as per the Government Order dated 5.1.1996 under sub clause 5 of of clause 6 two months? time has been provided to the State Level to decide application. It is further submitted that even after expiry of two months? time no order was passed by the State Level Caste Verification and in these circumstances the petitioner has approached this Court by filing writ petition bearing Writ A No.875 of 2024 which was disposed of vide order dated 6.2.2024 directing the State Level Caste Verification Committee to decide the application of the petitioner within a period of ten days from the date a certified copy of the is submitted to them. It is in compliance of the order of this Court passed in Writ A No.875 of 2024 that the State Level Committee has rejected the appeal of the petitioner on the ground that the said appeal is not in accordance with the rules in as

much as there is no decision taken by the District Level Committee against which the application has been filed and, therefore, held that such an application was not maintainable.

4. Learned counsel for the petitioner while assailing the impugned order dated 14.2.2024 has submitted that the time period prescribed in various government orders which have been passed in pursuance of the judgment and order of Supreme Court in the case of ***Kumari Madhuri Patil and another Vs. Additional Commissioner, Tribal Development and others (1994) 6 SCC 241*** is mandatory and once the time period has expired and no decision is passed on the application preferred by the aggrieved person then he will have the right of approaching higher forum and accordingly submits that the State Level Committee should have dealt with the case of the petitioner on merits. It has been submitted by learned counsel for the petitioner that during pendency of the appeal before the State Level Committee a vigilance report was also obtained as per the direction of the judgment of Supreme Court in the case of Madhuri Patil (supra) and the said report was submitted on 28.4.2022. It is further submitted that once Vigilance Cell report was brought on record the matter ought to have been decided on merits and accordingly remanding the matter back to the District Level Committee by means of the impugned order is illegal and arbitrary and requires interference.

5. Learned Standing counsel, on the other hand, has opposed the writ petition. It has been submitted that the appeal preferred by the petitioner has neither been decided by the District Level Committee nor by the Divisional Level

Committee and without waiting for the decision of the authorities the petitioner has rushed and filed his appeal before the State Level Committee. He submits that appeals can be considered only once there is an order in existence which can be affirmed or set aside by the appellate authority and in absence of any order by the District Level Committee or by the Divisional Level Committee the appeal preferred by the petitioner before State Level Committee was a mere empty formality. It is further stated that though time period has been prescribed by various Government Orders for completion of the proceedings of the application/appeal before the District Level Committee or Divisional Level Committee as well as State Level Committee is directory. He submits that there is no explanation provided in the said Government Order as to whether on expiry of the said time period prescribed for deciding the said appeal an aggrieved person should wait or directly approach higher forum without waiting for the decision of the appeal.

6. It is further submitted that by the State Level Committee a Vigilance Cell report was obtained but when the matter of the petitioner was examined on merits it was found that orders have yet not been passed by the District Level or Divisional Level Committees and in the facts and circumstances of the case the appeal preferred before the State Level Committee was not maintainable and it has rightly been rejected. Before the District Level and Divisional Committees the appeal of the petitioner is still pending.

7. Learned counsel for the petitioner does not dispute the objection raised by counsel for the respondents on facts but on the other hand submits that the

petitioner has applied for the post of Revenue Lekhpal conducted by U.P. Subordinate Services Selection Commission, Lucknow and as the petitioner claims to be belonging to reserved category he has to upload caste certificate it is necessary for him to obtain caste certificate and upload the same within the time prescribed so that his case can be considered against reserved quota of post. He submits that the petitioner has already cleared both the stages of examination and has got provisional selection in the final merit list /result which was declared on 30.12.2023 by U.P. S.S.S. Commission and now the petitioner has been directed to appear before the Selection Commission on 7.2.2024 for verification of academic and other related documents.

8. Learned counsel for the petitioner submits that it was, therefore, necessary for the petitioner to produce his certificate with regard to his caste before the Selection Commission and before the said date and if he is unable to produce the said certificate he will have no option except to give up the post. He further submits that there is no fault of the petitioner but merely on account of delay in deciding the appeal of the petitioner he will be made to suffer.

9. In these circumstances, this Court has also considered the observations of Supreme Court in the case of Kumari Madhuri Patil (Supra) on the aspect of delay in deciding the applications/appeals by the various Caste Scrutiny Committees wherein in para 13 (10) it has been held as under:-

"In case of any delay in finalising the proceedings, and in the meanwhile the last date for admission into an educational

institution or appointment to an officer post, is getting expired, the candidate be admitted by the Principal or such other authority competent in that behalf or appointed on the basis of the social status certificate already issued or an affidavit duly sworn by the parent/guardian/candidate before the competent officer or non- official and such admission or appointment should be only provisional, subject to the result of the inquiry by the Scrutiny Committee."

10. Merely on account of the delay by the State in taking decision the opportunity which has come to the petitioner in the form of selection for the post of Revenue Lekhpal should not be lost and accordingly the petitioner is at liberty to move application before Uttar Pradesh State Services Selection Commission in light of the observations made by the Supreme Court provided for in para 10 of the said judgment.

11. The next issue which arises for consideration is the maintainability of applications/appeals before the next higher forums in case the application/appeal is not decided within the time prescribed in various Government Orders. Here, it would be pertinent to refer to the case of **C. Bright v. Distt. Collector, (2021) 2 SCC 392**, where Hon'ble Supreme Court has observed as under:

"9. The question as to whether, a time-limit fixed for a public officer to perform a public duty is directory or mandatory has been examined earlier by the courts as well. A question arose before the Privy Council in respect of irregularities in the preliminary proceedings for constituting a jury panel. The Municipality was expected to revise the

list of qualified persons but the jury was drawn from the old list as the Sheriff neglected to revise the same. It was in these circumstances, the decision of the jury drawn from the old list became the subject-matter of consideration by the Privy Council. It was thus held that it would cause greater public inconvenience if it were held that neglecting to observe the provisions of the statute made the verdicts of all juries taken from the list ipso facto null and void so that no jury trials could be held until a duly revised list had been prepared [Montreal Street Railway Co. v. Normandin, 1917 SCC OnLine PC 3 : AIR 1917 PC 142] .

10. The Constitution Bench of this Court held that when the provisions of a statute relate to the performance of a public duty and the case is such that to hold acts done in neglect of this duty as null and void, would cause serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, the practice of the courts should be to hold such provisions as directory [Dattatraya Moreshwar Pangarkar v. State of Bombay, (1952) 1 SCC 372 : AIR 1952 SC 181 : 1952 Cri LJ 955] . In a seven-Bench judgment, this Court was considering as to whether the power of the Returning Officer to reject ballot papers is mandatory or directory. The Court examined well-recognised rules of construction to observe that a statute should be construed as directory if it relates to the performance of public duties, or if the conditions prescribed therein have to be performed by persons other than those on whom the right is conferred [Hari Vishnu Kamath v. Syed Ahmad Ishaque, AIR 1955 SC 233] .

11. In a judgment reported as *Remington Rand of India Ltd. v. Workmen* [Remington Rand of India Ltd. v. Workmen,

AIR 1968 SC 224] , Section 17 of the Industrial Disputes Act, 1947 came up for consideration. The argument raised was that the time-limit of 30 days of publication of award by the Labour Court is mandatory. This Court held that though Section 17 is mandatory, the time-limit to publish the award within 30 days is directory inter alia for the reason that the non-publication of the award within the period of thirty days does not entail any penalty.

12. In *T.V. Usman v. Food Inspector, Tellicherry Municipality* [T.V. Usman v. Food Inspector, Tellicherry Municipality, (1994) 1 SCC 754 : 1994 SCC (Cri) 187] , the time period during which report of the analysis of a sample under Rule 7(3) of the Prevention of Food Adulteration Rules, 1955 was to be given, was held to be directory as there was no time-limit prescribed within which the prosecution had to be instituted. When there was no such limit prescribed then there was no valid reason for holding the period of 45 days as mandatory. Of course, that does not mean that the Public Analyst can ignore the time-limit prescribed under the Rules. He must in all cases try to comply with the time-limit. But if there is some delay, in a given case, there is no reason to hold that the very report is void and, on that basis, to hold that even prosecution cannot be launched.

13. This Court distinguished between failure of an individual to act in a given time-frame and the time-frame provided to a public authority, for the purposes of determining whether a provision was mandatory or directory, when this Court held that it is a well-settled principle that if an act is required to be performed by a private person within a specified time, the same would ordinarily be mandatory but when a public

functionary is required to perform a public function within a time-frame, the same will be held to be directory unless the consequences therefor are specified [Nasiruddin v. Sita Ram Agarwal, (2003) 2 SCC 577] .

14. *In P.T. Rajan v. T.P.M. Sahir [P.T. Rajan v. T.P.M. Sahir, (2003) 8 SCC 498] , this Court examined the effect of non-publication of final electoral rolls before the time of acceptance of nomination papers. The Court held as under : (SCC p. 516, para 48)*

“48. Furthermore, even if the statute specifies a time for publication of the electoral roll, the same by itself could not have been held to be mandatory. Such a provision would be directory in nature. It is a well-settled principle of law that where a statutory functionary is asked to perform a statutory duty within the time prescribed therefor, the same would be directory and not mandatory. (See Shiveshwar Prasad Sinha v. District Magistrate [Shiveshwar Prasad Sinha v. District Magistrate, 1965 SCC OnLine Pat 43 : AIR 1966 Pat 144 : ILR 45 Pat 436] , Nomita Chowdhury v. State of W.B. [Nomita Chowdhury v. State of W.B., 1999 SCC OnLine Cal 235 : (1999) 2 Cal LJ 21] and Garbari Union Coop. Agricultural Credit Society Ltd. v. Swapan Kumar Jana [Garbari Union Coop. Agricultural Credit Society Ltd. v. Swapan Kumar Jana, 1996 SCC OnLine Cal 209 : (1997) 1 CHN 189] .)”

12. A perusal of the above renditions of the Hon'ble Supreme Court would put the issue out of the ambit of any confusion, that where a public functionary is required to perform a public function within a time frame, the same will be held to be directory unless the consequences are specified. The relevant Government Orders do not provide for any consequences in case the

applications/appeals are not decided within the time frame. In these circumstances, this Court is of the considered opinion that the time provided in various government orders constituting District Level, Divisional Level and State Level Committees is merely directory and in case appeal is not decided within the prescribed time the petitioner has remedy of approaching High Court by filing a writ petition for obtaining suitable direction to the concerned committee to decide the matter expeditiously but merely because the appeal is not decided within the time prescribed no further appeal can be preferred to the higher authority as has been done in the present case. An appeal would only be maintainable against a decision of a committee and in absence of any decision no further application/appeal can be preferred. An appeal is a challenge to an order and in absence of any order the appeal would be an empty formality and even otherwise the appellate authority does not decide any issue on merits at the first instance but merely looks into validity of the order passed by the subordinate authority.

13. In light of the above, this Court does not find any infirmity in the impugned order.

14. Considering the fact that the matter has been referred to the District Level Committee, it is expected that the District Level Committee shall consider and decide the same expeditiously and while deciding the application of the petitioner it shall take due note of the Vigilance Cell report which has been obtained by State Level Committee and will consider the case of the petitioner.

15. It is also noticed that the observations of Supreme Court has already been incorporated in Government Order

dated 5.1.1996 where opportunity has been given to the applicants to move appropriate application before the Selection Commission in case there is any delay in taking decision taken by the Committees.

16. Considering that the appeal preferred by the petitioner is pending for substantially long length of time, the District Level Committee shall make all endeavour to conclude the proceedings within a period of three weeks from the date a certified copy of this order is produced before him in accordance with law and communicate the decision to the petitioner.

17. With aforesaid observations and directions the petition stands **disposed of**.

(2024) 4 ILRA 1389
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.04.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Writ -C No. 2288 of 2024

Indradev **...Petitioner**
Versus
Shri Umesh Singh & Ors. **...Respondents**

Counsel for the Petitioner:
 Sharad Pathak, Lalita Prasad Misra

Counsel for the Respondents:
 Ashok Kumar Srivastava, Arun Kumar Singh Parihar, Avinash Srivastava, B/R0135, Raj Kumar Upadhyaya(R.K. Upadhyaya), Sudeep Srivastava

Election Petition-Opposite party no.1 had filed the election petition -was a candidate in the election held for the post of member of Zila Panchayat- alleged in the election petition that serious irregularities were committed in

preparation of the voters list- District Judge has committed a patent error of law in holding that the election petition was not a regular Civil Suit- and it has to be decided keeping in view the principles of natural justice only- Election of a returned candidate can only be set aside on the proof of illegalities affecting the purity of election-it cannot be interfered lightly remanded to for passing appropriate orders for preparation of a correct calculation sheet-impugned judgment quashed.

Writ Petition allowed. (E-9)

(Delivered by Hon'ble Subhash Vidyarthi J.)

1. Heard Sri Sharad Pathak, the learned counsel for the petitioner, Sri R.K.Upadhyaya, learned counsel for the opposite party no.1, Sri Ashok Kumar Srivastava, learned counsel for the opposite party no.10 and Sri Sudeep Srivastava, learned counsel for the opposite parties no. 2, 3, 4, 5, 7, 8, 11 to 16.

2. By means of the writ petition filed under Section 226 of the Constitution of India, the petitioner has challenged the validity of the judgment and order date 27.02.2024 passed by the District Judge, Pratapgarh in Election Petition No. 01 of 2021 filed under Section 27(2) Uttar Pradesh Kshettra Panchayat and Zila Panchayat Adhiniyam, 1961.

3. The opposite party no.1 had filed the aforesaid election petition inter alia stating that he was a candidate in the election held for the post of member of Zila Panchayat, Kshetra Mangraura III, Ward No. 11, Development Block Mangraura, Pargaana and Tehsil Patti, District Pratapgarh and he was allotted Polling symbol Axe. The opposite parties No. 1 to 17 in the election petition i.e. the petitioner and opposite parties no. 2 to 17 in this writ petition, were also candidates in the

election. It was alleged in the election petition that serious irregularities were committed in preparation of the voters list.

4. In para 5 of the election petition it was pleaded that a total of 27,928 ballots had been casted and 1933 ballots had been cancelled whereas a total of 27,160 ballots had been counted, out of which 1328 had been cancelled, whereas in para 7 of the election petition it was pleaded that a total of 27,160 ballots had been casted whereas 27,928 ballots had been counted and thus 768 ballots were counted in excess. The opposite party no.1 had contended that 3896 votes were casted in his favour and 833 votes casted in his favour were cancelled and the returned candidate (the writ petitioner) got 3818 votes. The opposite party no.1 claimed that he had won by 78 votes and the opposite parties no. 18 to 20 to the election petition – the Assistant Returning Officer, Returning Officer and District Election Officer, had made an announcement to this effect at the polling center, but a certificate to this affect was not given to him and it was told that the same will be provided at the district headquarter on the following day. When the election petitioner reached the district headquarter on the following day, the writ petitioner was declared successful by committing serious irregularities in counting of ballot papers, whereby 833 votes casted in favour of the election petitioner were cancelled and 768 excess votes were counted, which affected the result of the election.

5. In para 10 of the election petition seven grounds were taken by the election petitioner for assailing validity of the election which are as follows:-

(i) The counting was not done in accordance with the provisions of the U. P. Kshetra Panchayat and Zila Panchayat Act,

1961 and the relevant rules and the counting sheet was prepared illegally and it is erroneous, ambiguous and misleading.

(ii) The counting was not done in an independent, unbiased and legal manner.

(iii) A total of 27,160 votes had been casted and 768 votes have been counted in excess of the votes casted. The election petitioner was told that his 3896 votes were valid and 833 votes were cancelled. He had been told that the returned candidate had got 3818 votes and thus he had won by 78 votes and the opposite parties 18 to 20 had made a declaration to this effect. However, it was told that the winning certificate will be given at the District Headquarter on the following day. Subsequently in absence of the election petitioner, his 833 valid votes were cancelled, his 78 votes were added to the votes of the returned candidate and the writ petitioner was declared to have won the election.

(iv) The election petitioner's 78 votes were added to the votes of the returned candidate and in place of 27,169 votes that were casted, 27,928 votes were counted. Thus 768 excess votes were counted.

(v) The election petitioner's valid votes were illegally cancelled and 768 excess votes were counted and by doing this, the writ petitioner was declared elected with a margin of 501 votes.

(vi) The counting sheet is ambiguous and misleading, it is based on counting of false votes and it is irregular and void.

(vii) The election petitioner had been declared elected with a margin of 78 votes but by committing illegality in counting of votes, the writ petitioner was declared to have won the election by 501 votes. There is a narrow margin of victory and it would be in the interest of justice that a recounting of votes be carried out.

6. The writ petitioner - opposite party no.1 to the election petition, and some other defendants filed their written statement/objections.

7. The trial court had framed the following nine issues on 01.04.2023: -

(i) Whether in counting of votes for election of member of Zila Panchayat Mangaraura III, Ward No. 11, Patti, Pratapgarh votes were counted in excess of votes that were actually polled and thus the election result was declared in an illegal manner?

(ii) Whether 833 votes casted in favour of the election petition Umesh Singh were not included in counting and those were cancelled illegally, which affected the election result?

(iii) Whether 78 votes casted in favour of the election petitioner Umesh Singh were counted in favour of the Writ Petitioner Indradev? If yes, then its effect.

(iv) Whether 768 votes casted in favour of some other candidates were irregularly included in the votes of the Writ Petitioner and thus he was illegally declared successful?

(v) Whether the calculation sheet was prepared against the actual votes casted in favour of the candidates?

(vi) Whether the calculation sheet for election of member of Zila Panchayat Mangaraura III, Ward No. 11, Patti, Pratapgarh has not been prepared in an impartial manner?

(vii) Whether the petitioner was entitled to a recounting of votes on the basis of averments made in para 10 of the petition?

(viii) Whether the election of member of Zila Panchayat Mangaraura III, Ward No. 11 is liable to be declared illegal as it violates the rules and the law?

(ix) Whether the petitioner was entitled to any relief?

8. The election petitioner adduced his evidence in support of the election petition on 12.04.2023. When the matter was fixed for cross-examination of the election petitioner on 25.04.2023, he filed a supplementary affidavit along with an application under Section 151 C.P.C. stating that he has already filed his examination-in-chief (Paper no. 39 A) but some facts were left to be incorporated due to inadvertence of the author of the affidavit, which were being brought to light by way of the supplementary affidavit.

9. The writ petitioner filed objections against the application stating that there were no pleadings regarding the facts sought to be brought on record by way of the supplementary affidavit.

10. On 25.04.2023, the writ petitioner filed an application before the District Judge stating that the issues no. 1 to 4 framed on 01.04.2023 deal with one issue and these should be reformulated as a single issue. The petitioner further stated that the issue no. 5 did not arise from the pleadings and it should be deleted. The District Judge disposed of this application by means of an order dated 24.05.2023 stating that issue no. 1 to 4 will be decided together at the time of final disposal of the petition. Regarding issue no. 5, the District Judge stated that the same will be disposed off in case its importance comes to light after considering the entire facts and material at the time of final decision of the petition.

11. The election petition was decided by means of the impugned judgment dated 27.02.2024, in which the

District Judge has decided issue Nos.1 to 6 together. The objection of the writ petitioner that issue No.5 did not arise from the pleadings of the parties, which was ordered to be decided while decision of the election petition finally, has not been decided while allowing the election petition.

12. The opposite party No.1 to the election petition had raised a specific objection that the facts which had not been pleaded in the election petition, cannot be proved by leading evidence and the facts stated in the supplementary affidavit filed after the examination-in-chief of the election petitioner, cannot be taken into consideration by the Court. While dealing with this objection, the District Judge has held that the election petition was not a regular Civil Suit and it has to be decided keeping in view the principles of natural justice. He further held that the election petition should not be allowed or rejected merely on any technical ground.

13. At this stage, it would be appropriate to have a look at Rule 11 of the U.P. Zila Panchayat (Settlement and Dispute Relating to Membership) Rules, 1994, which reads thus: -

“11. Procedure before the Judge. -
(1) Except so far as provided by the Act or in these Rules, the procedure provided in Civil Procedure Code, 1908 in regard to suits shall so far as it is not inconsistent with the Act or any provisions of these rules and it can be made applicable be followed in the hearing of the petitions :

Provided that-

(a) any two or more petitions to the membership of the same person may be heard together ;

(b) the Judge shall not be required to record the evidence in full but shall make a memorandum of the evidence sufficient in his opinion for the purpose of deciding the case ;

(c) the Judge may, at any stage of the proceedings, require the petitioner to give further cash security for the payment of the costs incurred or likely to be incurred by any respondent;

(d) for the purpose of deciding any issue, the Judge shall only be bound to order production of or to receive only so much evidence, oral or documentary as he considers necessary ;

(e) any person aggrieved from the decision of the Judge may apply for review to the Judge within 15 days from the date of the decision and the Judge may thereupon review the decision.

(2) The provisions of the Indian Evidence Act, 1872 (Act No. 1 of 1872) shall, subject to the provision of the Act and these rules, be deemed to apply in all respects in the proceedings for the disposal of the petition.”

14. Thus the District Judge has committed a patent error of law in holding that the election petition was not a regular Civil Suit and it has to be decided keeping in view the principles of natural justice only, as Rule 11 aforesaid provides that the election petitions are to be decided as per the procedure provided in Civil Procedure Code in regard to suits.

15. Order XIV C.P.C. deals with settlement of Issues and determination of suit on issues of law or on issues agreed upon. Rules 1 and 2 of Order XIV C.P.C. are being reproduced below: -

“1. Framing of issues.—

(1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.

(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.

(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.

(4) Issues are of two kinds:

(a) issues of fact,

(b) issues of law.

(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after examination under Rule 2 of Order X and after hearing the parties or their pleaders, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

(6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence.

2. Court to pronounce judgment on all issues.—

(1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.

(2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to—

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time being in force,

and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue.

16. It is clear from a bare reading of Rule 1 of Order XIV that issues have to be framed on the first date of hearing, after reading the plaint and the written statements, if any, and after examination under Rule 2 of Order X and after hearing the parties or their pleaders. No issue can be framed which does not arise from the aforesaid material. Therefore, when issue no. 5 did not arise from the pleadings of the parties or from the examination of the parties under Order X Rule 2 – which was not done, issue no. 5 could not have been framed and no judgment could be given on this issue.

17. There are only two principles of natural justice - (i) no person can be a judge in his own cause and (ii) no person can be condemned un-heard. There is no principle of natural justice which may justify the trial Court's approach of ignoring the basic principle of dispensation of justice that all the cases are to be decided on the basis of pleadings of the parties and in absence of pleadings, no amount of evidence can be looked into. The District Judge has committed a patent error of law in ignoring this basic principle of dispensation of justice and rejecting the objection of the petitioner regarding lack of pleadings to support issue No.5.

18. Issue No.1 to 6 have been decided together and even while concluding the discussion on six issues, no separate specific findings has been recorded regarding the issue No.6. Order XIV Rule 2 C.P.C. provides that the Court

shall pronounce judgment on all issues. Order XX Rule 5 C.P.C. mandates that the Court shall state its finding or decision, with the reasons thereof, on each separate issue, unless the finding upon any one or more of the issues is sufficient for the decision of the suit. Therefore, even while proceeding to decide several issues together, it was incumbent on the trial Court to give its finding on each of the issues and impugned order passed by the District Judge without giving the findings on each of the issues no. 1 to 6, does not fulfill the legislative mandate contained in Order XIV Rule 2 and Order XX Rule 5 C.P.C.

19. While deciding all the issues together, the District Judge has found that there was no evidence to establish as to how many votes of the return candidate were cancelled and how many votes of the election petitioner were cancelled. District Judge having himself recorded that there was no evidence to establish the aforesaid facts, the election of the return candidate could not have been set-aside on this count.

20. The District Judge found that there appears to be force in the contention of the election petitioner that it had been announced on the loud-speakers installed at the counting center that he had won the election. However, this finding is not supported by the statement of the election petitioner made in his cross-examination, wherein he had categorically stated that at the close of the counting, the returning officer had told him that he had won by 78 votes, but no announcement to this effect was made. The R.O. had told him in a conversation that he had won by 78 votes and he should collect the winning certificate from Sadar Tahsil on the following day. The R.O. did not give him

any round-wise counting details and no round-wise announcement was made by the R.O.

21. The District Judge has recorded a finding that in the counting sheet of Mangraura III, Ward No. 11, the votes casted in polling booth nos. 64 and 181 – Panchayatghar Nevra A, had also been included whereas those booths fall outside the constituency of Mangraura-III. Moreover, the votes casted at Polling booth Salhipur Kanas – Booth D, had not been included while preparing the calculation-sheet, which shows that the calculation-sheet had not been prepared properly. The learned Counsel for the Writ Petitioner has fairly conceded that this finding recorded by the District Judge is correct and this error committed while preparing the calculation-sheet needs to be corrected by the authorities, although as per him, it will not make any difference in the outcome of the election.

22. The District Judge has found that the counting sheet was erroneous, but it was not a fit case for ordering recount of votes and he has allowed the election petition and set-aside the election.

23. The learned counsel for the petitioner has submitted that the error committed in preparation of the counting sheet was a curable defect and this defect ought to have been cured by preparing a correct counting sheet. Further submission of learned counsel for the petitioner is that even if this defect is cured, it will not affect the result of the election in any manner and in fact it would result in an increase in the votes of the returned candidate.

24. The learned counsel for opposite party No.1 has vehemently

opposed the writ petition and he has submitted that numerous illegalities were committed in conduct of the election, the most serious of those being non-declaration of result of the counting immediately after closure thereof in favour of the opposite party No.1 and subsequent illegal alteration of the result by issuing the winning certificate in favour of the writ petitioner. He has further submitted that issue no. 7 was framed by the District Judge regarding recounting of the votes and this Court should at least order a recount of the votes.

25. When the District Judge has found that there was no evidence to establish as to how many votes of the returned candidate were cancelled and how many votes of the election petitioner were cancelled, the election of the returned candidate could not have been set-aside on this count.

26. The finding of the District Judge that there appears to be force in the contention of the election petitioner that it had been announced on the loud-speakers installed at the counting center that he had won the election, is against the evidence on record in the shape of the statement of the election petitioner made in his cross-examination, wherein he had stated that at the close of the counting, the returning officer had told him that he had won by 78 votes, but no announcement to this effect was made. The R.O. had told him in a conversation that he had won by 78 votes and he should collect the winning certificate from Sadar Tahsil on the following day. Therefore, this finding is perverse.

27. The alleged personal communication made by the returning officer with the opposite party no.1 cannot

be the basis of setting aside election of the returned candidate when there is nothing on record to establish that the opposite party No.1 had in fact been declared successful prior to issuance of winning certificate in favour of the petitioner.

28. So far as the submission of the learned Counsel for the respondent no. 1, that this Court should order a recount of votes, the law in this regard was explained in **Chandrika Prasad Yadav v. State of Bihar**, (2004) 6 SCC 331, wherein the Hon'ble Supreme Court held that: -

“20. It is well settled that an order of re-counting of votes can be passed when the 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 re-counting of votes; and

(iv) an objection to the said effect has been taken recourse to.

21. The requirement of maintaining the secrecy of ballot papers must also be kept in view before a re-counting can be directed. Narrow margin of votes between the returned candidate and the election petitioner by itself would not be sufficient for issuing a direction for re-counting.”

29. The election petitioner had pleaded in para 10 of the petition that he had been declared elected with a margin of 78 votes but by committing illegality in counting of votes, the writ petitioner was declared to have won the election by 501 votes, there is a narrow margin of victory and it would be in the interest of justice that a recounting of votes be carried out. The allegation that the election petitioner had been declared elected with a margin of 78

votes, was not supported by the statement of the election petitioner himself, as has already been discussed above. The victory margin in the present case cannot be said to be a narrow margin and even if it is taken to be a narrow margin, it does not provide a good ground to order a recounting of votes in view of the law laid down by the Hon'ble Supreme Court in **Chandrika Prasad Yadav** (Supra).

30. Election of a returned candidate can only be set aside on the proof of illegalities affecting the purity of election and it cannot be interfered lightly, on the basis of unsubstantiated allegations.

31. In view of the aforesaid discussion, the writ petition is *allowed*. The impugned judgment and order dated 27.02.2024 passed by the District Judge, Pratapgarh in the Election Petition No. 01 of 2021 filed under Section 27 (2) Uttar Pradesh Kshettra Panchayat and Zila Panchayat Adhiniyam, 1961, setting aside election of the petitioner, is hereby *quashed*.

32. The matter is remanded to the District Judge for passing appropriate orders for preparation of a correct calculation sheet in light of the observations made in this order and the finding recorded in the judgment and order dated 27.02.2024, that in the counting sheet of Mangraura III, Ward No. 11, the votes casted in polling booth nos. 64 and 181 – Panchayatghar Nevra A, had also been included whereas those booths fall outside the constituency of Mangraura-III and that the votes casted at Polling booth Salhipur Kanas – Booth D, had not been included while preparing the calculation-sheet.

(2024) 4 ILRA 1396
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.03.2024

BEFORE

THE HON'BLE SAURABH LAVANIA, J.

Writ -C No. 2686 of 2024

Ram Tirath **...Petitioner**
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:
 Rakshit Raj Singh

Counsel for the Respondents:
 C.S.C., Mohan Singh

U.P. Zamindari Abolition and Land Reforms Act, 1950-Section 122-B(4-F)-
 Impugned order - the respondent no.3 directed the revenue official concerned to evict the petitioner- petitioner and his wife are Bhumidhar with transferable rights- On being found in possession of a part land recorded as Grade-5 'Banjar' land in the revenue records- the Lekhpal of the vicinity submitted a report and the respondent no.3 initiated the proceedings under Section 67 of Code of 2006- Section 122-B(4-F) of Act, 1950- he had acquired the rights over part of Gata-impugned orders set aside.

Writ Petition allowed. (E-9)

List of Cases cited:

1. Satya Veer and another vs State of U.P. and others; 2015 SCC Online All 7504
2. Special Appeal no.479 of 2015 (Sushila and another vs State of U.P. and others)
3. Writ-C no.129 of 2013 (Brahmanand and others vs State of U.P. and others)

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

1. Heard Sri Rakshit Raj Singh, learned counsel for the petitioner, Sri Ajay Kumar Singh Tomar, learned Additional Chief Standing Counsel appearing for the State-respondent Nos. 1 to 3 and Sri Mohan Singh, learned counsel appearing for the respondent No. 4/Gram Sabha concerned.

2. Under challenge is the order dated 15.07.2023 passed by the respondent no.3-/Tehsildar (Nyayik), Mandal-Ayodhya, District- Barabanki, Tehsil-Nawabganj, in the proceedings carried out against the petitioner under Section 67 of the U.P. Revenue Code, 2006 (in short "Code of 2006") registered as Case No. 9045/2016, Computerized Case No. T20160412019045 (Gaon Sabha vs. Ram Tirath).

3. The petitioner has also challenged the order dated 05.02.2024 passed by the respondent no.2-Collector, Ayodhya Mandal, District-Barabanki, in the Appeal No. 3037/2023, Computerized Case No. D202304120003037 (Ram Tirath vs. Gaon Sabha and others) filed under Section 67(5) of the Code of 2006.

4. By the order dated 15.07.2023, the respondent no.3 directed the revenue official concerned to evict the petitioner from Gata No.458/.02960 Hect. (recorded as 'Banjar').

5. Brief facts, which appears from the material available on record and are relevant for the purposes of disposal of the present petition, are as under:-

(i) That the petitioner namely Ram Tirath claims that he belongs to Scheduled Caste community and is an agricultural labour.

(ii) As per Khatauni of fasli year 1424-1429, the petitioner and his wife are Bhumidhar with transferable rights of Gata no.464/0.055 Hect. and Gata no. 551/0.279 Hect. of Khata no.234.

(iii) On being found in possession of a part land situated in Village-Pyarepur Saraiya, Pargan-Pratapganj, Tehsil-Nawabganj, District-Barabanki bearing Gata no.458 measuring 0.2960 Hect. recorded as Grade-5 'Banjar' land in the revenue records, the Lekhpal of the vicinity submitted a report dated 03.07.2016 and based upon the same, the respondent no.3 initiated the proceedings under Section 67 of Code of 2006.

(iv) In the proceedings aforesaid registered as Case No. 9045 of 2016, the petitioner took the defence based upon Section 122-B(4-F) of U.P. Zamindari Abolition and Land Reforms Act, 1950 (in short "the Act of 1950").

(v) The case set up by the petitioner on the basis of Section 122-B(4-F) of the Act of 1950 in the proceedings under Section 67 of Code of 2006 was rejected by the respondent no.3 vide impugned order dated 15.07.2023, the relevant portion of which is extracted hereinunder:-

"मेरे द्वारा पत्रावली पर उपलब्ध साक्ष्यों एवं विद्वान अधिवक्ता के तर्कों को सुना गया एवं अभिलेखीय परीक्षण किया गया जिसमें पाया गया कि प्रश्नगत वाद क्षेत्रीय लेखपाल द्वारा भूमि स्थित ग्राम प्यारेपुर सरैया परगना प्रतापगंज जिला बाराबंकी की गाटा संख्या 458/0.296 हे० जो कि राजस्व अभिलेखों में श्रेणी 5 बजरं खाते की भूमि है, पर अवैध अध्यासन करने के फलस्वरूप उ०प्र०राजस्व संहिता 2006की धारा 67 के तहत रिपोर्ट विपक्षी रामतीरथ के विरुद्ध

प्रस्तुत की गयी। क्षेत्रीय लेखपाल की रिपोर्ट के जवाब में विपक्षी द्वारा मुख्य रूप से इस बात पर बल दिया गया कि विपक्षी अनुजाति जाति का सदस्य है एवं उक्त भूमि उ०प्र०भू० अधिनियम की धारा 132 व राजस्व संहिता की धारा 77 से अच्छादित नहीं है। प्रश्नगत भूमि पर उसका कब्जा लगभग कई वर्षों से चला आ रहा है इसलिए जमींदारी विनाश अधिनियम की धारा-122 ख(4-च) के अन्तर्गत पात्रता की श्रेणी में है। इस बिन्दु के सम्बन्ध में पत्रावली पर उपलब्ध साक्ष्यों एवं क्षेत्रीय लेखपाल के बयान एवं नामिका अधिवक्ता द्वारा प्रस्तुत तर्कों के आधार पर न्यायालय इस निष्कर्ष पर पहुंचता है कि प्रश्नगत वाद की कार्यवाही उ०प्र०रा० संहिता 2006 की धारा 67 के अन्तर्गत प्रचलित है। इस कारण विपक्षी द्वारा प्रस्तुत प्रार्थना पत्र प्रश्नगत वाद की कार्यवाही से अच्छादित न होने के कारण प्रार्थना पत्र पोषणनीय न होने के कारण निरस्त होने योग्य है। फिर भी प्राकृतिक न्याय के दृष्टिगत यदि न्यायालय प्रार्थना पत्र विचार करता भी है तो उ०प्र०ज०वि० अधिनियम 1950 की धारा 122ख(4-च) अथवा राजस्व संहिता 2006 की धारा 67-क के व्यवस्था के तहत राजस्व प्राधिकारी व ग्राम सभा के लिए यह बिन्दु आवश्यक है कि अवैध अधिवासी प्रश्नगत भूमि पर निवासित एवं वास्तव में गरीब व्यक्ति होना चाहिए इसके सम्बन्ध में पत्रावली में संलग्न खतौनी की फसली वर्ष 1424-1429 की खाता संख्या 234 की गाटा संख्या 464/0.055 हे० व गाटा संख्या 551/0.279 हे० से स्पष्ट है कि अतिक्रमणकर्ता स्वयं व उसकी पत्नी संक्रमणीय

भूमिधर के रूप में दर्ज अभिलेख है यह विधि मानवीय दृष्टि के तहत केवल असहाय एवं मजबूर निराश्रित व्यक्तियों के उत्थान के नियति से प्रालब्ध किया गया है यदि न्यायालय ऐसे परिस्थितियों में भी लाभ प्रदान करता है तो वह समाज के लिए आदतन सरकारी भूमियों पर अतिक्रमण करने के लिए प्रेरित करने का स्रोत होगा। जहां तक प्रश्नगत वाद में विपक्षी का सरकारी भूमि पर कब्जा होने का प्रश्न है तो विपक्षी द्वारा स्वयं अन्तर्गत धारा 122ख (4-च) के तहत प्रस्तुत प्रार्थना पत्र प्रस्तुत करके यह स्वीकार कर लिया गया कि ग्राम समाज की भूमि है पर उसका कब्जा व दखल है। इस प्रकार उपरोक्त बिन्दुओं के आलोक में विपक्षी रामतीरथ पुत्र रामनाथ द्वारा ग्राम समाज की भूमि पर अवैध कब्जा करने के फलस्वरूप क्षेत्रीय लेखपाल द्वारा प्रस्तुत रिपोर्ट दिनांक 03.07.2016 की पुष्टि करते हुए विपक्षी के विरुद्ध प्रश्नगत से बेदखली एवं क्षतिपूर्ति का आदेश पारित किया जाना न्यायोचित प्रतीत होता है।

आदेश

अतः ग्राम प्यारेपुर सरैया परगना प्रतापगंज तहसील नवाबगंज जिला बाराबंकी की गाटा संख्या 458/0.296 हे० राजस्व अभिलेखों में श्रेणी 5-3-ड (बंजर) से विपक्षी रामतीरथ पुत्र रामनाथ को बेदखल किया जाता है तथा अनाधिकार अतिक्रमण के लिए विपक्षी रामतीरथ पुत्र रामनाथ निवासी:- ग्राम प्यारेपुर सरैया परगना प्रतापगंज तहसील नवाबगंज जिला बाराबंकी पर 7, 10, 400-00 (सात लाख दस हजार चार सौ रुपये मात्र) क्षतिपूर्ति

आरोपित किया जाता है। आदेश की प्रति लेखपाल को निःशुल्क उपलब्ध करायी जाये। लेखपाल को निर्देशित किया जाता है कि प्रतिवादी को वादीय भूमि से बेदखल करते हुए 15 दिन के अन्दर आर०सी० प्रपत्र 67क व 67ख न्यायालय में प्रस्तुत करें। आर०सी० प्रपत्र 67 क व 67ख प्राप्त होने पर आर०सी० प्रपत्र 67ग जारी हो। वसूली व बेदखली के उपरान्त पत्रावली दाखिल दफ्तर हो।"

(vi) The appellate authority i.e respondent no.2 vide impugned order dated 05.02.2024 passed in Appeal No. 3037 of 2023 filed by the petitioner challenging the order dated 15.07.2023 dismissed the appeal and affirmed the order dated 15.07.2023 passed by respondent no.3. The relevant portion of the order dated 05.02.2024 reads as under:-

"मैंने उभय पक्ष द्वारा प्रस्तुत तर्कों सहित अपील पत्रावली एवं अवर न्यायालय की पत्रावली एवं प्रस्तरवार आख्या का सम्यक अवलोकन एवं परिशीलन किया। अवर न्यायालय की पत्रावली पर उपलब्ध लेखपाल प्रसूचना दिनांक 03.07.2016 के अवलोकन से पाया जाता है कि ग्राम प्यारेपुर सरैया परगना प्रतापगंज तहसील नवाबगंज की गाटा संख्या 458/0.296 हे० जो ग्राम सभा श्रेणी-5 बंजर खाते की भूमि है जिसपर लगभग 10 वर्षों से अपीलार्थी / विपक्षी द्वारा अवैध रूप से खेती की जा रही है, जिसके सर्किल रेट के अनुसार गाँव सभा सम्पत्ति को रू०- 14, 20, 800-00की क्षति पहुंची। लेखपाल प्रसूचना से सहमत होकर तहसीलदार नवाबगंज द्वारा वाद पंजीकृत कर नोटिस निर्गत की गयी। अपीलार्थी/ विपक्षी की

ओर से अवर न्यायालय के समक्ष आपत्ति प्रस्तुत की गयी। अपीलार्थी/ विपक्षी द्वारा अवर न्यायालय के समक्ष नोटिस के विरुद्ध आपत्ति में मुख्य रूप से यह कथन किया गया कि काफी मेहनत करके लगभग 20 वर्ष से उक्त भूमि पर कृषि कार्य करता चला आ रहा है। आपत्तिकर्ता अनुसूचित जाति पासी का सदस्य है और प्रश्नगत नोटिस में इंगित गाटा संख्या 458का असंक्रमणीय भूमिधर अन्तर्गत धारा 122ख(4च) जमींदारी विनाश अधिनियम के अन्तर्गत हो चुका है। जमींदारी विनाश अधिनियम की धारा 122ख(4च) का प्रतिस्थापन दिनांक 16.07.1975 से प्रभावी करते हुये गाँव सभा की 117जमींदारी विनाश अधिनियम के अन्तर्गत आने वाली भूमियों के बाबत प्रख्यापित किया गया है कि 30जून 1975के पूर्व अगर जमींदारी विनाश अधिनियम की धारा 177 के अन्तर्गत आने वाली किसी भूमि पर कोई अनुसूचित जाति/ अनुसूचित जनजाति का कोई व्यक्ति काबिज अर्थात् अध्यासित है तो उस भूमि का असंक्रमणीय भूमिधर मान लिया जायेगा, उसे गाँव सभा या कलेक्टर बेदखल नहीं कर सकेगा। कालान्तर में जमींदारी विनाश अधिनियम की धारा 122 ख(4च) में संशोधन करते हुये उत्तर प्रदेश अधिनियम संख्या 31वर्ष 2007 द्वारा यह प्रतिस्थापित किया गया कि संगत तिथि 01.05.2002 को बढ़ाकर 13.05.2007 कर दिया गया है। इस प्रकार अनुसूचित जाति एवं अनुसूचित जनजाति के व्यक्ति जो 13 मई 2007 के पूर्व काबिज है उन्हें अब बेदखल नहीं किया

जायेगा। अवर न्यायालय द्वारा अपने पारित आदेश दिनांक 15.07.2023 में पत्रावली पर उपलब्ध साक्ष्यों एवं विद्वान अधिवक्ता के तर्कों को सुनने के उपरान्त अभिलेखीय परीक्षणोंपरान्त पाया गया कि विपक्षी द्वारा गाटा संख्या 458/0.296 हे० जो राजस्व अभिलेखों में बंजर खाते की भूमि है, जिसपर विपक्षी द्वारा अवैध अध्यासन किया गया, जिसके सम्बन्ध में क्षेत्रीय लेखपाल द्वारा रिपोर्ट प्रस्तुत की गयी। अवर न्यायालय द्वारा विपक्षी की आपत्ति में किये गये कथनों के क्रम में यह भी विवेचना की गयी कि उ०प्र० ज०वि० अधिनियम 1950 की धारा 122ख(4च) अथवा राजस्व संहिता 2006 की धारा 67-क की व्यवस्था के तहत राजस्व प्राधिकारी द्वारा ग्राम सभा के लिये यह बिन्दु आवश्यक है कि अवैध अधिवासी प्रश्नगत भूमि पर निवासित एवं वास्तव में गरीब व्यक्ति होना चाहिये। इस सम्बन्ध में पत्रावली पर उपलब्ध अभिलेखीय साक्ष्य के रूप में उद्धरण खतौनी फसली वर्ष 1424-1429 की खाता 234 की गाटा संख्या 464/0.55 हे० व गाटा संख्या 551/0.297 हे० अतिक्रमणी (अपीलार्थी) स्वयं व उसकी पत्नी संक्रमणीय भूमिधर के रूप में दर्ज अभिलेख है। इस प्रकार स्पष्ट है कि अवर न्यायालय द्वारा उभय पक्षों को सुनने एवं अभिलेखीय साक्ष्यों के आधार पर विधि सम्मत रूप से आदेश दिनांक 15.07.2023 पारित किया गया है, जिसमें किसी प्रकार के हस्तक्षेप की आवश्यकता नहीं है। अतएवं अपीलार्थी द्वारा प्रस्तुत अपील बलहीन एवं निराधार तथ्यों पर

आधारित होने के कारण निरस्त किये जाने योग्य है।

अतएवं उपरोक्त की गयी विवेचना के आलोक में अवर न्यायालय द्वारा पारित आदेश दिनांक 15.07.2023 में किसी प्रकार के हस्ताक्षेप की आवश्यकता न पाये जाने के कारण अपीलार्थी राम तीरथ पुत्र राम नाथ निवासी ग्राम प्यारेपुर सरैया परगना प्रतापगंज तहसील नवाबगंज जिला बाराबंकी की अपील दिनांकित 05.08.2023 निरस्त की जाती है। आदेश की प्रमाणित प्रति के साथ अवर न्यायालय की पत्रावली इस निर्देश के साथ प्रेषित कि वह अपने पारित आदेश दिनांक 15.07.2023 का विधि अनुसार क्रियान्वन सुनिश्चित करायें। बाद आवश्यक कार्यवाही अपील पत्रावली संचित राजस्व अभिलेखागार की जाय।"

6. Impeaching the impugned orders dated 05.02.2024 and 15.07.2023, it is stated that in rejecting the plea based upon Section 122-B(4-F) of the Act of 1950 taken by the petitioner, the respondent nos.2 and 3 erred in law and facts both and as such interference and protection of this Court is required.

7. Per contra, learned State counsel stated that the impugned orders are not liable to be interfered by the Court being reasoned and speaking orders as also that under Section 67A of the Code, 2006, the 'house sites' can be settled/protected and the petitioner is in possession of land recorded as 'Banjar' and he and his wife are recorded tenure holder of Gata no.464/0.055 Hect. and Gata no.551/0.297 Hect.

8. Considered the aforesaid and perused the record.

9. Issue before the Court is as to whether the plea of the petitioner, based upon Section 122-B(4-F) of the Act of 1950, has rightly been considered by respondent nos.2 and 3.

10. In order to decide the aforesaid, this Court finds it appropriate to take note of some authorities wherein Section 122-B(4-F) of the Act of 1950 has been considered and interpreted.

11. Relevant paras of the judgment passed in the case of **Satya Veer and another vs State of U.P. and others; 2015 SCC Online All 7504** read as under:-

"12. To examine this question, it would be apt to go through the relevant provisions under the Act:—

Section 122-B reads as under:—

"122-B. Powers of the Land Management Committee and the Collector:—

(1) Where any property vested under the provisions of this Act in a Gaon Sabha or a local authority is damaged or misappropriated or where any Gaon Sabha or local authority is entitled to take or retain possession of any land under the provisions of this Act and such land is occupied otherwise than in accordance with the provisions of this Act, the Land Management Committee or Local Authority, as the case may be, shall inform the Assistant Collector concerned in the manner prescribed.

(2) Where from the information received under sub-section (1) or otherwise, the Assistant Collector is satisfied that any property referred to in sub-section (1) has been damaged or misappropriated or any

person is in occupation of any land, referred to in that sub-section, in contravention of the provisions of this Act, he shall issue notice to the person concerned to show cause why compensation for damage, misappropriation or wrongful occupation as mentioned in such notice be not recovered from him or, as the case may be, why he should not be evicted from such land.

(3) If the person to whom a notice has been issued under subsection (2) fails to show cause within the time specified in the notice or within such extended time not exceeding three months from the date of service of such notice on such person, as the Assistant Collector may allow in this behalf, or if the cause shown is found to be insufficient, the Assistant Collector may direct that such person may be evicted from the land and may for that purpose, use, or cause to be used such force as may be necessary and may direct that the amount of compensation for damage, misappropriation or wrongful occupation be recovered from such person as arrears of land revenue.

(4) If the Assistant Collector is of opinion that the person showing cause is not guilty of causing the damage or misappropriation or wrongful occupation referred to in the notice under sub-section (2) he shall discharge the notice.

(4-A) Any person aggrieved by the order of the Assistant Collector under sub-section (3) or sub-section (4) may, within thirty days from the date of such order prefer, a revision before the Collector on the grounds mentioned in clauses (a) to (e) of section 333.

(4-B) The procedure to be followed in any action taken under this section shall be such as may be prescribed.

(4-C) Notwithstanding anything contained in section 333 or section 333-A, but subject to the provisions of this section—

(i) every order of the Assistant Collector under this section shall, subject to the provisions of subsections (4-A) and (4-D), be final.

(ii) every order of the Collector under this section shall, subject to the provisions of sub-section (4-D), be final.

(4-D) Any person aggrieved by the order of the Assistant Collector or Collector in respect of any property under this section may file a suit in a Court of competent jurisdiction to establish the right claimed by him in such property.

(4-E) No such suit as is referred to in sub-section (4-D) shall lie against an order of the Assistant Collector if a revision is preferred to the Collector under sub-section (4-A).

Explanation.—For the purposes of this section, the expression 'Collector' means the officer appointed as Collector under the provisions of the U.P. Land Revenue Act, 1901 and includes an Additional Collector].

Section 122-B(4-F)-
Notwithstanding anything in the foregoing subsection, where any agricultural labourer belonging to a Scheduled Caste or Scheduled Tribe is in occupation of any land vested in a Gaon Sabha under section 117 (not being land mentioned in section 132) having occupied it from before [May 13, 2007] and the land so occupied together with land, if any, held by him from before the said date as *bhumidhar*, *sirdar* or *asami*, does not exceed 1.26 hectares (3.125 acres), then no action under this section shall be taken by the Land Management Committee or the Collector against such labourer and it shall be deemed that he has been admitted as *bhumidhar* with non-transferable rights of that land under section 195 and it shall not be necessary for him to institute a suit for

declaration of his rights as *bhumidhar* with nontransferable rights in that land.

Explanation.—The expression 'agricultural labourer' shall have the meaning assigned to it in section 198."

13. Section 123 further reads as under:—

"Section 123. Certain house sites to be settled with existing owner thereof.—(1) Without prejudice to the provisions of section 9, where any person referred to in sub-section (3) of section 122-C has built a house on any land referred to in sub-section (2) of that section, not being land reserved for any public purpose and such house exists on the (30th day of June, 1985) the site of such house shall be held by the owner of the house on terms and conditions as may be prescribed.

(2) Where any person referred to in sub-section (3) of section 122-C has built a house on any land held by a tenure-holder (not being a Government lessee) and such house exists on the (30th day of June, 1985) the site of such house shall, notwithstanding anything contained in this Act, be deemed to be settled with the owner of such house by the tenure holder on such terms and conditions as may be prescribed.

Explanation.—For the purposes of sub-section (2), a house existing on the (30th day of June, 1985) on any land held by a tenure-holder shall, unless the contrary is proved, be presumed to have been built by the occupant thereof and where the occupants are members of one family by the head of that family.)"

14. These are the two provisions which provides for settlement of land in favour of the scheduled castes or scheduled tribes agricultural labourers who have built their house or have occupied the land prior to the cut-off date i.e. 1.5.2002 (in the instant case).

15. Only rider is that the land in question should not be a land reserved for public purpose or the land mentioned in section 132 of the Act. In so far as according benefit of section 122-B (4-F) is concerned, the petitioners who allege their possession have to fulfil certain conditions.

16. Section 122-B under the scheme of the Act provides for a complete mechanism to save Gaon/Sabha land from encroachment and unauthorised possession.

17. Sub-section (1) provides that information has to be sent by the Land Management Committee to Gaon Sabha or local authority in case of any encroachment over the land of Gaon Sabha or the local authority and the Assistant Collector concerned shall proceed in the manner prescribed therein.

18. Sub-sections (2), (3) and (4) provide for the manner in which a report of encroachment is to be dealt with by the Assistant Collector.

19. Sub-section (4-A) further provides that if any person is aggrieved by the order of Assistant Collector under subsection (3) or sub-section (4) of section 122-B, he may prefer revision before the Collector.

20. Sub-section (4-C) further provides that the order of Assistant Collector or the Collector as the case may be, is final.

21. Sub-section (4-D) further provides that any person, aggrieved by the orders of the Assistant Collector or Collector, may file a suit before the competent Court to establish his rights.

22. These provisions imposed a responsibility upon the Land Management Committee to keep a vigil on the encroachment or unauthorised occupation of the Gaon-Sabha land. In case of any such situation, immediate action is to be

taken by making a report to the Assistant Collector concerned who shall issue a notice and take appropriate action and shall pass necessary orders accordingly.

23. However, sub-section (4-F) of section 122-B of the Act carves out an exception which permits the occupation over the Gaon-Sabha land by a certain class of persons namely Scheduled Castes/Scheduled Tribes who is an agricultural landless labourer and has been in possession over the said land before 1st May, 2002. Sub section (4-F) which was substituted by U.P. Act No. 24 of 1986 is an enabling provision to protect the agricultural labourers belonging to Scheduled Castes and Scheduled Tribes from being evicted from the Gaon-Sabha land if he/she fulfils the conditions enumerated therein.

24. Section 195 confers power upon the Land Management Committee to admit any persons as "Bhumidhar with non-transferable rights" to any land which does not fall in any of the clauses mentioned in section 132 with the previous approval of the Assistant Collector incharge of the Sub-Divisions with respect to the lands as follows:—

"(a) the land is vacant land,

(b) the land is vested in the (Gaon Sabha) under section 117, or

(c) the land has come into the possession of [Land Management Committee] under section 194 or under any other provisions of this Act."

25. Section 197 of the Act, however, gives power to the Land Management Committee to admit any person as 'Aasami' to any land falling in any of the clauses mentioned in section 132. Thus, under the Scheme of "U.P. Zamindari, Abolition & Land Reforms Act" but for the aforesaid provisions of sub-section (4-F), the rights of any person as Bhumidhar with

transferable or non-transferable rights, as the case may, unless his name is duly recorded in the revenue records has not been recognised except where such person seeks declaration by filing a suit under section 229-B of the Act. It is only by virtue of subsection (4-F) of section 122-B that the agricultural labourer who fulfils the conditions given therein is not required to seek a declaration by filing a suit and can be admitted as "Bhumidhar with non-transferable rights" under section 195.

26. Thus, from a reading of the provisions of section 122-B in its entirety, it is clear that sub-section (4-F) is not a provision for seeking declaration of the rights of a person who is in occupation of the Gaon-Sabha land for declaring him as "Bhumidhar with nontransferable rights". In fact, it is a right to defend, if such a person is to be evicted or dispossessed from the land of Gaon-Sabha in an appropriate provision under the Act. Thus, the occupant as described in sub-section (4-F), who is sought to be evicted from the Gaon-Sabha land, would have a right to plead and establish that since his possession has continued since before the cut-off date, rights had precipitated in his favour and he is a Bhumidhar of the land with non-transferable rights, if such plea is raised the same would be considered by the authority concerned before evicting that person.

27. The right of defence given under the said provision to an Agricultural labourer belonging to Scheduled Caste/Scheduled Tribe cannot be taken as a right of seeking declaration under the aforesaid provisions. Meaning thereby, section 122-B (4-F) cannot be taken recourse for recording entry in the 'Khatauni'."

12. Relevant para of the judgment passed in Special Appeal no.479 of 2015

(Sushila and another vs State of U.P. and others) reads as under:-

"Sub-section (4F) of Section 122B has been construed and interpreted in a judgment of the Hon'ble Supreme Court in *Manorey alias Manohar vs. Board of Revenue (U.P.) and Ors.* 3. The Supreme Court held that sub-section (4F) carves out an exception from the provisions of sub-sections (1), (2) & (3) under which a procedure for eviction of unauthorized occupants of land vested in the Gram Sabha is provided. The exception which is carved out by sub-section (4F) is in favour of agricultural labourers belonging to Scheduled Castes and Schedule Tribes having land below the stipulated ceiling of 3.125 acres. Where the conditions of sub-section (4F) are fulfilled, the legislature has provided that no action to evict such person shall be taken and he shall be deemed to have been admitted as Bhumidhar with non transferable rights over the land.

The Supreme Court has held thus:

"8. First, the endeavour should be to analyze and identify the nature of the right or protection conferred by sub-section (4F) of Section 122-B. Sub-sections (1) to (3) and the ancillary provisions upto sub-section (4E) deal inter alia, with the procedure for eviction of unauthorized occupants of land vested in Gaon Sabha. Sub-section (4F) carves out an exception in favour of an agricultural labourer belonging to a Scheduled Caste or Scheduled Tribe having land below the ceiling of 3.125 acres. Irrespective of the circumstances in which such eligible person occupied the land vested in Gaon Sabha (other than the land mentioned in Section 132), no action to evict him shall be taken and moreover, he shall be deemed to have been admitted as a Bhumidhar with

non transferable rights over the land, provided he satisfies the conditions specified in the sub-section. According to the findings of the Sub-Divisional Officer as well as the appellate authority, the appellant does satisfy the conditions. If so, two legal consequences follow. Such occupant of the land shall not be evicted by taking recourse to sub-section (1) to (3) of Section 122B. It means that the occupant of the land who satisfies the conditions under sub-section (4F) is entitled to safeguard his possession as against the Gaon Sabha. The second and more important right which sub-section (4F) confers on him is that he is endowed with the rights of a Bhumidhar with no-transferable rights. The deeming provision has been specifically enacted as a measure of agrarian reform, with a thrust on socio-economic justice. The statutorily conferred right of Bhumidhar with non-transferable rights finds its echo in clause (b) of Section 131. Any person who acquires the rights of Bhumidhar under or in accordance with the provisions of the Act, is recognized under Section 131 as falling within the class of Bhumidhar. The right acquired or accrued under sub-section (4F) is one such right that falls within the purview of Section 131(b)."

The Supreme Court also held that sub-section (4F) is not merely a shield to protect the possession of a person who fulfills the conditions in sub-section (4F) but it also confers a positive right of being recognized as Bhumidhar on the occupant satisfying the conditions and criteria laid down in the sub-section.

The Supreme Court has held thus:

"Thus, sub-section (4F) of Section 122-B not merely provides a shield to protect the possession as opined by the High Court, but it also confers a positive right of Bhumidhar on the occupant of the land satisfying the criteria laid down in

that sub-Section. ...When once the deeming provision unequivocally provides for the admission of the person satisfying the requisite criteria laid down in the provision as Bhumidhar with non-transferable rights under Section 195, full effect must be given to it. Section 195 lays down that the Land Management Committee, with the previous approval of the Assistant Collector in-charge of the Sub Division, shall have the right to admit any person as Bhumidhar with non-transferable rights to any vacant land (other than the land falling under Section 132) vested in the Gaon Sabha. Section 198 prescribes "the order of preference in admitting persons to land under Sections 195 and 197". The last part of sub-section (4F) of Section 122-B confers by a statutory fiction the status of Bhumidhar with non-transferable rights on the eligible occupant of the land as if he has been admitted as such under Section 195. In substance and in effect, the deeming provision declares that the statutorily recognized Bhumidhar should be as good as a person admitted to Bhumidhari rights under Section 195 read with other provisions. In a way, sub-section (4F) supplements Section 195 by specifically granting the same benefit to a person coming within the protective umbrella of that sub-section. The need to approach the Gaon Sabha under Section 195 read with Section 198 is obviated by the deeming provision contained in sub-section (4F). We find no warrant to constrict the scope of deeming provision."

13. Relevant para of the judgment passed in Writ-C no.129 of 2013 (**Brahmanand and others vs State of U.P. and others**) reads as under:-

"9. From the bare reading of the aforesaid provisions it is quite explicit that

the intendment of the legislature in incorporating said provision was to automatically conferred the rights in respect of the category of lessees who had the possession as on 30th June, 1985 and, therefore, if the tenure holder was living on said date, he would have automatically become entitled to the said benefit. Merely because necessary application has come to be made at a later point of time and tenure holder died leaving behind heirs, the said claim cannot be denied on the ground that on the date application had been moved the original tenure holder had died and that land later on came within territorial of the municipality or Nagar Nigam. The provision clearly indicates that one who was in possession of the land on the relevant date, the land stood settled with the said person conferring upon him with the status of bhumidhar with non-transferable and mere application would have only resulted in necessary correction in the revenue records. So, even if the application is subsequently moved, it cannot be said that the rights would accrue only on the date of the application and in case if the tenure holder died subsequently his heirs shall be denied benefits. The right to the tenure holder accrued in the year 1985 itself as per the provision and subsequent death of the tenure holder would automatically result in the succession of his heirs and right would automatically get transferred to the successors and it cannot be said that the bhumidhari rights even in the category of non transferable rights are not subject to succession and, therefore, in my considered opinion the Sub-Divisional Magistrate manifestly erred in rejecting the application on the ground that the heirs would not have been permitted to step into the shoes to claim rights under the relevant provision of law.

10. Besides above, once the Additional Commissioner had remitted the matter with clear observation in the order of remand that the claim would not be denied on the ground that subsequently the land had got notified under the Nagar Nigam under the U.P. Nagar Nigam Adhiniyam Act, 1959, it was not open for the Sub-Divisional Magistrate to sit in appeal over the order of the Additional Commissioner and thus, the Court is of definite opinion that the authority has clearly exceeded its jurisdiction and authority in making such observation and, therefore, the order passed by the Sub-Divisional Magistrate on that count also cannot be sustained.

11. So far the findings recorded by the Additional Commissioner in the subsequent revision is concerned, as I have already held hereinabove that rights would not get changed merely because the land has subsequently been notified as within the territorial limits of Nagar Nigam Meerut, if the tenure holder was in possession on the cut of date i.e. 30th June, 1985. In my above observation and the view taken by me, I am supported by the judgment of the Apex Court in the case of Manorey v. Board of Revenue 2003 (5) SCC 521, wherein the Supreme Court while dealing with the said provision and its application, vide paragraph 9 of the judgment has held thus:-

"9. Thus, sub-Section (4F) of Section 122B not merely provides a shield to protect the possession as opined by the High Court, but it also confers a positive right of Bhumidhar on the occupant of the land satisfying the criteria laid down in that sub-Section. Notwithstanding the clear language in which the deeming provision is couched and the ameliorative purpose of the legislation, the learned single Judge of the High Court had taken the view in Ramdin Vs. Board of Revenue (supra)

(followed by the same learned Judge in the instant case) that the Bhumidhari rights of the occupant contemplated by sub-Section (4F) can only blossom out when there is a specific allotment order by the Land Management Committee under Section 198. According to the High Court, the deeming provision contained in sub-Section (4F) cannot be overstretched to supersede the other provisions in the Act dealing specifically with the creation of the right of Bhumidhar. In other words, the view of the High Court was that a person covered by the beneficial provision contained in sub-Section (4F) will have to still go through the process of allotment under Section 198 even though he is not liable for eviction. As a corollary to this view, it was held that the occupant was not entitled to seek correction of revenue records, even if his case falls under sub-Section (4F) of Section 122B. We hold that the view of the High Court is clearly unsustainable. It amounts to ignoring the effect of a deeming provision enacted with a definite social purpose. When once the deeming provision unequivocally provides for the admission of the person satisfying the requisite criteria laid down in the provision as Bhumidhar with non-transferable rights under Section 195, full effect must be given to it. Section 195 lays down that the Land Management Committee, with the previous approval of the Assistant Collector in-charge of the Sub Division, shall have the right to admit any person as Bhumidhar with non-transferable rights to any vacant land (other than the land falling under Section 132) vested in the Gaon Sabha. Section 198 prescribes "the order of preference in admitting persons to land under Sections 195 and 197". The last part of sub-Section (4F) of Section 122B confers by a statutory fiction the status of Bhumidhar with non transferable rights on the eligible occupant

of the land as if he has been admitted as such under Section 195. In substance and in effect, the deeming provision declares that the statutorily recognized Bhumidhar should be as good as a person admitted to Bhumidhari rights under Section 195 read with other provisions. In a way, sub-Section (4F) supplements Section 195 by specifically granting the same benefit to a person coming within the protective umbrella of that sub-Section. The need to approach the Gaon Sabha under Section 195 read with Section 198 is obviated by the deeming provision contained in sub-Section (4F). We find no warrant to constrict the scope of deeming provision. That being the legal position, there is no bar against an application being made by the eligible person coming within the four corners of sub-Section (4F) to effect necessary changes in the revenue record. When once the claim of the applicant is accepted, it is the bounden duty of the concerned revenue authorities to make necessary entries in revenue records to give effect to the statutory mandate. The obligation to do so arises by necessary implication by reason of the statutory right vested in the person coming within the ambit of sub-Section (4F). The lack of specific provision for making an application under the Act is no ground to dismiss the application as not maintainable. The revenue records should naturally fall in line with the rights statutorily recognized. The Sub-Divisional Officer was therefore within his rights to allow the application and direct the correction of the records. The Board of Revenue and the High Court should not have set aside that order. The fact that the Land Management Committee of Gaon Sabha had created lease hold rights in favour of the respondents herein is of no consequence. Such lease, in the face of the

statutory right of the appellant, is nonest in the eye of law and is liable to be ignored."

14. From the aforesaid, it is apparent that Section 122-B(4-F) of the Act of 1950 is a beneficial and deeming provision enacted with a definite social purpose and this deeming provision unequivocally provides for the admission of the person satisfying the requisite criteria laid down in the provision as Bhumidhar with non-transferable rights under the Act of 1995 and full effect must be given to it and this provision as per the Hon'ble Apex Court is not a mere shield to protect the possession of a person who fulfills the conditions indicated in sub-section (4-F) but also confers positive right of being recognized as Bhumidhar or occupant satisfying the condition /criteria provided under the Act of 1950 and further, this provision provides rights to defend, if such person is to be evicted or dispossessed from the land of Gaon Sabha.

15. In view of the aforesaid, it is now to be considered the effect of rights provided to an occupant of Gaon Sabha land under Section 122-B(4-F) of the Act of 1950, after enforcement of Code of 2006, w.e.f. 11.02.2006 and on this aspect, it would be relevant to consider Section 230 of the Code of 2006, which reads as under:-

"230.Repeal. (1) *The enactments specified in the First Schedule are hereby repealed.*

(2) *Notwithstanding anything contained in sub-section (1), the repeal of such enactments shall not affect-*

(a) *the continuance in force of any such enactment in the State of Uttarakhand;*

(b) *the previous operation of any such enactment or anything duly done or suffered there under; or*

(c) *any other enactment in which such enactment has been applied, incorporated or referred to; or*

(d) *the validity, invalidity, effect or consequences of anything already done or suffered, or any right, title or obligation or liability already acquired, accrued or incurred (including, in particular, the vesting in the State of all estates and the cessation of all rights, title and interest of all the intermediaries therein), or any remedy or proceeding in respect thereof, or any release or discharge of or from any debt, penalty, obligation, liability, claim or demand, or any indemnity already granted or the proof of any past act or thing; or (e) any principle or rule of law or established jurisdiction, form or course of pleading, practice or procedure or existing usage, custom, privilege, restriction, exemption, office or appointment:*

Provided that anything done or any action taken (including any rules, manuals, assessments, appointments and transfers made, notifications, summonses, notices, warrants, proclamation issued, powers conferred, leases granted, boundary marks fixed, records of rights and other records prepared or maintained, rights acquired or liabilities incurred) under any such enactment shall, insofar as they are not inconsistent with the provisions of this Code, be deemed to have been done or taken under the corresponding provisions of this Code, and shall continue to be in force accordingly, unless and until they are superseded by anything done or action taken under this Code.

16. From a bare reading of above quoted provision, it is crystal clear that the

repeal of the Act of 1950 shall not affect any right acquired or accrued.

17. The case set up by the petitioner, in the instant case, is that in terms of Section 122-B(4-F) of the Act of 1950, he had acquired the rights over part of Gata No. 458/0.2960 Hect.

18. Upon conjoint reading of aforesaid, this Court is of the view that plea based upon Section 122-B(4-F) of the Act of 1950 was available to the petitioner in the proceedings instituted under Section 67 of the Code of 2006 and he has rightly took the same.

19. Now the question is that as to whether the plea of the petitioner based upon Section 122-B(4-F) of the Act of 1950 has rightly been considered by the respondent nos.2 & 3 and for coming to the conclusion on this aspect, this Court considered observations made in the impugned orders dated 05.02.2024 and 15.07.2023, quoted above, in the light of settled law on the benefit provided under Section 122-B(4-F) of the Act of 1950 to an occupant of Gaon Sabha land and upon due consideration, this Court is of the opinion that in considering and rejecting the plea of the petitioner based upon Section 122-B(4-F) of the Act of 1950, the respondent nos.2 and 3 erred in law and facts both. It is for the following reasons:

(i) the respondent nos.2 and 3 have not considered the effect of Section 122-B(4-F) of the Act of 1950 and Section 230 of the Code of 2006.

(ii) the respondent nos.2 and 3 have not recorded any finding after considering the period of possession pleaded by the petitioner and cut off date provided under the relevant provisions i.e. Section 122-B(4-F) of the Act of 1950.

(iii) the respondent nos.2 and 3 have not recorded the finding after considering the area i.e. 1.26 Hectares (3.125 acres) indicated under Section 122-B(4-F) of the Act of 1950 and the area of the land of which the petitioner and his wife are Bhumidhar with transferrable rights.

(iv) the respondent nos.2 and 3 have not recorded the findings, as required, on the issue as to whether the petitioner fulfills the criteria to seek benefit of Section 122-B(4-F) of the Act of 1950.

20. For the reasons aforesaid, this Court is of the view that the impugned orders dated 05.02.2024 and 15.07.2023 passed by respondent nos.2 and 3, respectively, are liable to be set-aside.

21. Accordingly, the petition is **allowed**. The impugned orders dated 05.02.2024 and 15.07.2023 passed by respondent nos.2 and 3, respectively, are hereby set-aside. The matter is remanded back to respondent no.3-Tehsildar (Nyayik), Mandal-Ayodhya, District- Barabanki, Tehsil-Nawabganj to decide the matter afresh, most expeditiously, strictly in accordance with law.

(2024) 4 ILRA 1409
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.04.2024

BEFORE

THE HON'BLE SHREE PRAKASH SINGH, J.

Writ -C No. 3070 of 2024

B.S.S. Public School, Raebareli & Ors.

...Petitioners

Versus

U.O.I. & Ors.

...Respondents

Counsel for the Petitioners:

Rakesh Kumar Chaudhary, Ayush Chaudhary

Counsel for the Respondents:

A.S.G.I., C.S.C., Krishna Lal Yadav, Pankaj Patel,
Shashank Bhasin

Opportunity of Hearing-School was granted affiliation with CBSE to run secondary level classes and senior secondary level classes -last extension of provisional affiliation was granted from 01.04.2020 till 31.03.2028 -the complaints made to the District Magistrate- wherein the enquiry committee was constituted-and after receiving the enquiry report, the same was referred to the CBSE-The CBSE conducted an internal enquiry while calling the report from the petitioners' Institution - enquiry was concluded and a show cause notice was issued - admittedly could not be responded by the petitioners' Institution due to some inadvertence on the part of the personnel of the Institution - impugned order passed-deaffiliation- it was incumbent upon the authority which has issued the notice to accord 30 days time, and that too is violated -.settled proposition of law is that affected person by administrative/judicial/quasi-judicial action, must be heard, before the decision is taken-impugned order quashed.

Writ Petition allowed. (E-9)

List of Cases cited:

1. Managing Director, ECIL Hyderabad and others Vs. B. Karunakar and others, 1993 (4) SCC 727
2. Union of India and others Vs. R.P. Singh, (2014) 7 SCC 340
3. Himachal Pradesh State Electricity Board Limited Vs. Mahesh Dahiya, 2017 (1) SCC 768
4. State Bank of India and others Vs. Rajesh Agarwal and others, (2023)6SCC 1
5. Union of India and others Vs. Mohd. Ramzan Khan, 1991 (1) SCC 588

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

1. Heard Sri S.C. Mishra, learned Senior Counsel assisted by Sri Ayush

Chaudhary, learned counsel for the petitioners, Sri Shailendra Kumar Singh, learned Chief Standing Counsel and Sri Vivek Shukla, learned Additional Chief Standing Counsel for the opposite party no.5, Sri Krishna Lal Yadav, learned counsel for the opposite party no.1 and Sri Shashank Bhasin, learned counsel for the opposite party nos. 2 to 4.

2. By means of the present writ petition, the petitioners have assailed the order dated 26.02.2024 bearing no. CBSE/Aff. No. 2130934/E-35280/2024 whereby, the affiliation of the petitioners' school has been withdrawn, while holding it that the petitioners' school is found responsible for violation of the provisions envisaged under clause 12.2.1, 12.2.11 and 12.2.12 of the affiliation bye-laws.

3. The factual matrix of the case is that the petitioner no. 1, i.e., B.S.S. Public School, Raebareli (hereinafter referred to as an 'Institution'), is an academic institution, established in the year 1987 and is being run by the petitioner no. 2 society, which is a registered society under Societies Registration Act, 1860. The school was granted affiliation with Central Board of Secodary Education (hereinafter, referred to as 'CBSE') to run secondary level classes i.e. IXth and Xth on 27.03.2008, for three years, which was extended from time to time and was further granted affiliation to run senior secondary level classes i.e. class 11th and 12th, which too was extended subsequently and the last extension of provisional affiliation was granted from 01.04.2020 till 31.03.2028, vide the affiliation letter dated 04.05.2022. Later on, vide the impugned order dated 26.02.2024, the petitioners' Institution is de-affiliated, which is under challenge.

4. The contention of learned counsel for the petitioners is that all of sudden vide order dated 26.02.2024, the affiliation granted to the institution of the petitioners, is withdrawn by CBSE while mentioning some inquiry report, but the inquiry report was never served upon the petitioners by the CBSE while issuing show cause notice or prior to passing the impugned order.

5. Further contention of learned counsel for the petitioners is that, at the time of nation-wide lockdown, due to Covid-19 Pandemic, the educational activities in schools were heavily affected and the CBSE canceled the class 12th examination vide notifications dated 01.06.2021 and 17.06.2021 and for the purpose of assessment of class 12th, the result of Unit Test/Mid Term exam/pre-board examination, conducted by the respective schools in class 12th and 11th alongwith the result of performance in the best three subjects out of main five subjects in class 10th board examination, was proposed to be calculated.

6. He pointed out that the petitioners' institution also evaluated the marks of all the students of class 12th for academic year 2021 and performance of total 140 students were scrutinized out of which 11 students failed, whereas, 23 students got compartments. Thereafter, one Santosh Kumar Sonkar who was aggrieved that his son namely, Ritesh Sonkar became failed in class 12th, came into the school and started chaos, by hurling abuses upon the teachers and staff, whereafter, an information was given to the educational authorities, but he further kept on doing so in the subsequent days, while protesting in the school premises to disrupt the functioning of the school administration

and therefore, considering the future of the students, the manager of the petitioners' school by means of an e-mail requested the CBSE to re-assess and increase of the marks of the students, who were failed or is to appear in the compartment exams.

7. He further submits that Sri Sonkar also made a false complaint to the District Magistrate, whereafter, the District Magistrate i.e. opposite party no. 5 constituted a committee to conduct an inquiry in the alleged irregularities and after a sham inquiry, a report is submitted on 04.08.2021, itself, wherein, the petitioners' institution was not associated and the inquiry report was directly sent to the CBSE.

8. He argued that the impugned de-affiliation order dated 26.2.2024 has been passed in most mechanical and clandestine manner while blindly relying on the enquiry report submitted by the opposite party no. 5 based upon false and misleading facts and the petitioners were not associated in the alleged enquiry. He added that though a show cause notice is said to have been issued while sending it on the email of school website but the enquiry report on the basis of which the proceedings of de-affiliation is started, was not enclosed therewith. He has drawn attention of this Court towards Annexure No.24 of the writ petition, which is a show cause notice dated 12.10.2023 and submitted that on the second page of the notice, the report of the Enquiry Committee is allegedly observed but, in fact, the same is not the enquiry report which was submitted by the enquiry committee constituted by the CBSE and, in this regard, he pointed out the enquiry report appended as Annexure No.10 along with the writ petition, and added that from

perusal of the observation of alleged enquiry report in the show cause notice, the same is verbatim the English Translation of the conclusion of the enquiry report dated 4.8.2021 and, thus, this cannot be said that the enquiry report submitted by the enquiry committee by CBSE is quoted in the show cause notice.

9. Further contented that Chapter-V of the affiliation bye laws speaks about withdrawal of the regular affiliation. Clause 18 of Chapter-V is quoted hereinunder:-

"(1) Within the general frame work of Section 17 of this chapter, the Board reserves the right to withdraw regular affiliation in the even of a school failing to observe affiliation norms and rules and/or the pass percentage in most of the subjects goes lower than the pass percentage of each subject at the examinations of the Board, continuously for three years. The Board will ask such a school to rectify the deficiencies and given adequate time (6 months to one year). If the school fails to show improvement, it will lose the status of a regular affiliation school and will revert to a provisionally affiliated school status."

10. From bare perusal of the provisions of Clause 18 of Chapter-V, it is evident that in the event, where the pass percentage in most of the subjects goes lower than the pass percentage of each subject at the examinations of the Board, continuously for three years, the Board will ask such a school to rectify the deficiencies while affording adequate time of six months to one year and if even then such institution fails to show improvement, it will lose status of a regular affiliation school. So far as the present matter is concerned, in Covid Pandemic, in one academic session, there were only 9

students, who were failed, though repeatedly, it has wrongly been stated that out of 140, 50 students were failed. Adding his arguments, he submits that so far as the Committee constituted by the District Magistrate is concerned, without considering the actual fact and evidence, the Committee submitted its report and, thereafter also, the opposite party no.4 after receiving the letter of the District Magistrate, has constituted enquiry committee which also submitted its report but the said enquiry report was never served upon the petitioners' Institution while sending the show cause notice.

11. Along with the above, he has also shown certain other anomalies in the impugned order and submitted that the sole basis of taking decision of de-affiliation is the enquiry report though while the enquiry by the enquiry committee constituted by the opposite party no.4, the petitioners were not associated. He also added that in compliance of the order passed by the writ court, the documents were sent, vide letter dated 8.11.2021 to the opposite party no.4 but without considering the same, the above order impugned is passed. He next added that the show cause notice dated 12.10.2023 was sent to the school on its registered email but the same could not come in the notice of the Principal or Manager of the petitioners' Institution, perhaps, due to some inadvertence of the personnel of the school but fact remains that no physical copy of the show cause notice or any reminder was served upon the petitioners while attaching the enquiry report. It has been practice of the CBSE, in past, to send notices and multiple reminders along with the telephonic information but in the instant matter, the same practice has not been followed deliberately and in fact the CBSE has blindly relied upon the report

of the Committee constituted by the District Magistrate which was issued only on the complaint made by one of the guardian of the student of the Institution.

12. Lastly, it is submitted that future of the students are on stake as most of the students have been studying in the petitioners' Institution since beginning and they have been thrown to suffer and, in this event also, welfare of the students have been ignored by the CBSE in a hasty manner.

13. In support of his contention, learned counsel for the petitioners has placed reliance on the Judgment reported in **1993 (4) SCC 727, Managing Director, ECIL Hyderabad and others Vs. B. Karunakar and others** and referred paras 29 and 30 of the abovesaid Judgments which are quoted hereinunder:-

"29. Hence it has to be held that when the enquiry officer is not the disciplinary authority, the delinquent employee has a right to receive a copy of the enquiry officer's report before the disciplinary authority arrives at its conclusions with regard to the guilt or innocence of the employee with regard to the charges levelled against him. That right is a part of the employee's right to defend himself against the charges levelled against him. A denial of the enquiry officer's report before the disciplinary authority takes its decision on the charges, is a denial of reasonable opportunity to the employee to prove his innocence and is a breach of the principles of natural justice.

30. Hence the incidental questions raised above may be answered as follows:

[i] Since the denial of the report of the enquiry officer is a denial of reasonable opportunity and a breach of the principles of

natural justice, it follows that the statutory rules, if any, which deny the report to the employee are against the principles of natural justice and, therefore, invalid. The delinquent employee will, therefore, be entitled to a copy of the report even if the statutory rules do not permit the furnishing of the report or are silent on the subject.

[ii] The relevant portion of Article 311(2) of the Constitution is as follows:

"(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."

Thus the article makes it obligatory to hold an inquiry before the employee is dismissed or removed or reduced in rank. The article, however, cannot be construed to mean that it prevents or prohibits the inquiry when punishment other than that of dismissal, removal or reduction in rank is awarded. The procedure to be followed in awarding other punishments is laid down in the service rules governing the employee. What is further, Article 311(2) applies only to members of the civil services of the Union or an all-India service or a civil service of a State or to the holders of the civil posts under the Union or a State. In the matter of all punishments both Government servants and others are governed by their service rules. Whenever, therefore, the service rules contemplate an inquiry before a punishment is awarded and when the enquiry officer is not the disciplinary authority the delinquent employee will have the right to receive the enquiry officer's report notwithstanding the nature of the punishment.

[iii] Since it is the right of the employee to have the report to defend himself effectively and he would not know in advance whether the report is in his favour or against him, it will not be proper to

construe his failure to ask for the report, as the waiver of his right. Whether, therefore, the employee asks for the report or not, the report has to be furnished to him.

[iv] In the view that we have taken, viz., that the right to make representation to the disciplinary authority against the findings recorded in the enquiry report is an integral part of the opportunity of defence against the charges and is a breach of principles of natural justice to deny the said right, it is only appropriate that the law laid down in Mohd. Ramzan case should apply to employees in all establishments whether Government or non-Government, public or private. This will be the case whether there are rules governing the disciplinary proceeding or not and whether they expressly prohibit the furnishing of the copy of the report or are silent on the subject. Whatever the nature of punishment, further, whenever the rules require an inquiry to be held, for inflicting the punishment in question, the delinquent employee should have the benefit of the report of the enquiry officer before the disciplinary authority records its findings on the charges levelled against him. Hence question (iv) is answered accordingly.

[v] The next question to be answered is what is the effect on the order of punishment when the report of the enquiry officer is not furnished to the employee and what relief should be granted to him in such cases. The answer to this question has to be relative to the punishment awarded. When the employee is dismissed or removed from service and the inquiry is set aside because the report is not furnished to him, in some cases the non-furnishing of the report may have prejudiced him gravely while in other cases it may have made no difference to the ultimate punishment awarded to him. Hence to direct reinstatement of the employee with back-wages in all cases is to reduce the

rules of justice to a mechanical ritual. The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a perversion of justice to permit the employee to resume duty and to get all the consequential benefits. It amounts to rewarding the dishonest and the guilty and thus to stretching the concept of justice to illogical and exasperating limits. It amounts to an "unnatural expansion of natural justice" which in itself is antithetical to justice."

14. Referring the aforesaid, he submits that the Constitutional Bench of the Apex Court, while framing several questions has answered that denial of supply of the enquiry report to the delinquent, is denial of reasonable opportunity and breach of principles of natural justice.

15. Further reliance is placed on a Judgment reported in **(2014) 7 SCC 340, Union of India and others Vs. R.P. Singh** and paras 12, 20, 21, 23 and 24 are referred, which are quoted hereinunder:-

"12. We will be failing in our duty if we do not take note of the submission of Mr W.A. Qadri that the decision in S.N. Narula case is not an authority because the Tribunal had set aside the order of the disciplinary authority on the ground that it

was a non-speaking order. Be that as it may, when the issue was raised before this Court and there has been an advertence to the same, we are unable to accept the submission of Mr Qadri. The said decision in S.N. Narula case is an authority for the proposition that the advice of UPSC, if sought and accepted, the same, regard being had to the principles of natural justice, is to be communicated before imposition of punishment."

"20. Testing on the aforesaid principles it can safely be concluded that the judgment in T.V. Patel case is per incuriam.

21. At this juncture, we would like to give our reasons for our respectful concurrence with S.K. Kapoor. There is no cavil over the proposition that the language engrafted in Article 320(3)(c) does not make the said article mandatory. As we find, in T.V. Patel case³, the Court has based its finding on the language employed in Rule 32 of the Rules. It is not in dispute that the said Rule from the very inception is a part of the 1965 Rules. With the efflux of time, there has been a change of perception as regards the applicabilityany the principles of natural justice. An inquiry report in a disciplinary proceeding is required to be furnished to the delinquent employee so that he can make an adequate representation explaining his own stand/stance. That is precisely what has been laid down in B. Karunakar cases. We may reproduce the relevant passage with profit: (B. Karunakar case, SCC p. 756, para 29)

"29. Hence it has to be held that when the enquiry officer is not the disciplinary authority, the delinquent employee has a right to receive a copy of the enquiry officer's report before the disciplinary authority arrives at its conclusions with regard to the guilt or

innocence of the employee with regard to the charges levelled against him. That right is a part of the employee's right to defend himself against the charges levelled against him. A denial of the enquiry officer's report before the disciplinary authority takes its decision on the charges, is a denial of reasonable opportunity to the employee to prove his innocence and is a breach of the principles of natural justice."

"23. We have referred to the aforesaid decision in B. Karunakar case in e extenso as we find that in the said case it has been opined by the Constitution Bench that non-supply of the enquiry report is a breach of the principle of natural justice. Advice from UPSC, needless to say, when utilised as a material against the delinquent officer, it should be supplied in advance. As it seems to us, Rule 32 provides for supply of copy of advice to the government servant at the time of making an order. The said stage was in prevalence before the decision of the Constitution Bench. After the said decision, in our considered opinion, the authority should have clarified the Rule regarding development in the service jurisprudence.

24. We have been apprised by Mr Raghavan, learned counsel for the respondent, that after the decision in S.K. Kapoor case, the Government of India, Ministry of Personnel, PG & Pensions, Department of Personnel and Training vide Office Memorandum dated 6-1-2014 has issued the following directions:

"4. Accordingly. it has been decided that in all disciplinary cases where the Commission is to be consulted, the following procedure may be adopted:

(i) On receipt of the inquiry report, the DA may examine the same and forward it to the Commission with his observations:

(ii) On receipt of the Commission's report, the DA will examine the same and

forward the same to the charged officer along with the inquiry report and his tentative reasons for disagreement with the inquiry report and/or the advice of UPSC;

(iii) The charged officer shall be required to submit, if he so desires, his written representation or submission to the disciplinary authority within fifteen days, irrespective of whether the inquiry report/advice of UPSC is in his favour or not. (iv) The disciplinary authority shall consider the representation of the charged officer and take further further action as prescribed ribed in sub-rules (2-A) to (4) of Rule 15 of the CCS (CCA) Rules, 1965."

16. Placing reliance on the abovesaid, he submits that referring the decision in B. Karunakar's case (supra), it has been held that enquiry report should be supplied in advance as non-supply of the enquiry report is a breach of principles of natural justice.

17. Further placing reliance on the Judgment and order reported in **2017 (1) SCC 768, Himachal Pradesh State Electricity Board Limited Vs. Mahesh Dahiya**, referred paras 23, 24 and 25, which are quoted hereinunder:-

"23. The basis of coming to the conclusion by both the learned Single Judge and the Division Bench that disciplinary authority has violated the principle of natural justice is based on the fact that although the enquiry report was sent to the writ petitioner by the letter dated 2-4-2008, the disciplinary authority-cum-whole-time members have already come to the opinion on 25-2-2008 that the writ petitioner be punished with major penalty. The Division Bench of the High Court has placed reliance on Union of India v. R.P. Singh.

24. In the above case the issue was as to whether non-supply of the copy of advice of UPSC to the delinquent officer at pre-decision stage violates the principle of natural justice. This Court placed reliance on the Constitution Bench judgment in ECIL v. B. Karunakar and laid down the following in para 21: (R.P. Singh case, SCC p. 349)

"21. At this juncture, we would like to give our reasons for our respectful concurrence with S.K. Kapoor. There is no cavil over the proposition that the language engrafted in Article 320(3)(c) does not make the said article mandatory. As we find, in T.V. Patel case, the Court has based its finding on the language employed in Rule 32 of the Rules. It is not in dispute that the said Rule from the very inception is a part of the 1965 Rules. With the efflux of time, there has been a change of perception as regards the applicability of the principles of natural justice. An enquiry report in a disciplinary proceeding is required to be furnished to the delinquent employee so that he can make an adequate representation explaining his own stand/stance. That is precisely what has been laid down in B. Karunakar cases. We may reproduce the relevant passage with profit: (B. Karunakar cases, SCC p. 756, para 29)

29. Hence it has to be held that when the enquiry officer is not the disciplinary authority, the delinquent employee has a right to receive a copy of the enquiry officer's report before the disciplinary authority arrives at its conclusions with regard to the guilt or innocence of the employee with regard to the charges levelled against him. That right is a part of the employee's right to defend himself against the charges levelled against him. A denial of the enquiry officer's report before the disciplinary authority takes its

decision on the charges, is a denial of reasonable opportunity to the employee a breach of the principles to prove his innocence and is of natural justice."

There can be no dispute to the above proposition.

25. The Constitution Bench in *ECIL v. B. Karunakar* after elaborately considering the principle of natural justice in the context of the disciplinary inquiry laid down the following in paras 29, 30(iv) and (v): (SCC pp. 756-58)

"29. Hence it has to be held that when the enquiry officer is not the disciplinary authority, the delinquent employee has a right to receive a copy of the enquiry officer's report before the disciplinary authority arrives at its conclusions with regard to the guilt or innocence of the employee with regard to the charges levelled against him. That right is a part of the employee's right to defend himself against the charges levelled against him. A denial of the enquiry officer's report before the disciplinary authority takes its decision on the charges, is a denial of reasonable opportunity to the employee to prove his innocence and is a breach of the principles of natural justice.

30.... (iv) In the view that we have taken viz. that the right to make representation to the disciplinary authority against the findings recorded in the enquiry report is an integral part of the opportunity of defence against the charges and is a breach of principles of natural justice to deny the said right, it is only appropriate that the law laid down in *Mohd. Ramzan* cases should apply to employees in all establishments whether Government or non-government, public or private. This will be the case whether there are rules governing the disciplinary proceeding or not and whether they expressly prohibit the furnishing of the copy of the report or are

silent on the subject. Whatever the nature of punishment, further, whenever the rules require an inquiry to be held, for inflicting the punishment in question, the delinquent employee should have the benefit of the report of the enquiry officer before the disciplinary authority records its findings on the charges levelled against him. Hence question (iv) is answered accordingly.

(v) The next question to be answered is what is the effect on the order of punishment when the report of the enquiry officer is not furnished to the employee and what relief should be granted to him in such cases. The answer to this question has to be relative to the punishment awarded. When the employee is dismissed or removed from service and the inquiry is set aside because the report is not furnished to him, in some cases the non-furnishing of the report may have prejudiced him gravely while in other cases it may have made no difference to the ultimate punishment awarded to him. Hence to direct reinstatement of the employee with back wages in all cases is to reduce the rules of justice to a mechanical ritual. The theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all and sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a perversion of justice to permit the employee to resume duty and to get all the consequential benefits. It amounts to rewarding the dishonest and the guilty and thus to

stretching the concept of justice to illogical and exasperating limits. It amounts to an "unnatural expansion of natural justice" which in itself is antithetical to justice."

18. While referring the aforesaid, he submits that it is settled that if a person is charged then he shall be given the opportunity to submit reply, while furnishing the evidence relied upon.

19. Lastly, the emphasis has been placed on a case reported in **(2023) 6 SCC 1, State Bank of India and others Vs. Rajesh Agarwal and others**, and paragraphs 36, 40, 41, 42, 80, 81 and 84 are referred, which are extracted hereinunder:-

"36. We need to bear in mind that the principles of natural justice are not mere legal formalities. They constitute substantive obligations that need to be followed by decision-making and adjudicating authorities. The principles of natural justice act as a guarantee against arbitrary action, both in terms of procedure and substance, by judicial, quasi-judicial, and administrative authorities. Two fundamental principles of natural justice are entrenched in Indian jurisprudence: (i) nemo iudex in causa sua, which means that no person should be a Judge in their own cause; and (ii) audi alteram partem, which means that a person affected by administrative, judicial or quasi-judicial action must be heard before a decision is taken. The courts generally favour interpretation of a statutory provision consistent with the principles of natural justice because it is presumed that the statutory authorities do not intend to contravene fundamental rights. Application of the said principles depends on the facts and circumstances of the case, express

language and basic scheme of the statute under which the administrative power is exercised, the nature and purpose for which the power is conferred, and the final effect of the exercise of that power.

40. The process of forming an informed opinion under the Master Directions on Frauds is administrative in nature. This has also been acceded to by RBI and lender banks in their written submissions. It is now a settled principle of law that the rule of audi alteram partem applies to administrative actions, apart from judicial and quasi-judicial functions. 15 It is also a settled position in administrative law that it is mandatory to provide for an opportunity of being heard when an administrative action results in civil consequences to a person or entity.

41. In State of Orissa v. Binapani Dei16, a two-Judge Bench of this Court held that every authority which has the power to take punitive or damaging action has a duty to give a reasonable opportunity to be heard. This Court further wear held that an administrative action which involves civil consequences must be made consistent with the rules of natural justice: (AIR p. 1271, para 9)

"9.... The rule that a party to whose prejudice an order is intended to be passed is entitled to a hearing applies alike to judicial tribunals and bodies of persons invested with authority to adjudicate upon matters involving civil consequences. It is one of the fundamental rules of our constitutional set-up that every citizen is protected against exercise of arbitrary authority by the State or its officers. Duty to act judicially would therefore arise from the very nature of the function intended to be performed: it need not be shown to be super-added. If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the

exercise of such power. If the essentials of justice be ignored and an order to the prejudice of a person is made, the order is a nullity. That is a basic concept of the rule of law and importance thereof transcends the significance of a decision in any particular case."

42. In *Maneka Gandhi v. Union of India*¹¹, a seven-Judge Bench of this Court held that any person prejudicially affected by a decision of the authority entailing civil consequences must be given an opportunity of being heard. This has been reiterated in a catena of decisions of this Court.

80. *Audi alteram partem* has several facets, including the service of a notice to any person against whom a prejudicial order may be passed and providing an opportunity to explain the evidence collected. In *Tulsiram Patel*³⁴, this Court explained the wide amplitude of *audi alteram partem*: (SCC p. 476, para 96)

"96. The rule of natural justice with which we are concerned in these appeals and writ petitions, namely, the *audi alteram partem* rule, in its fullest amplitude means that a person against whom an order to his prejudice may be passed should be informed of the allegations and charges against him, be given an opportunity of submitting his explanation thereto, have the right to know the evidence, both oral or documentary, by which the matter is proposed to be decided against him, and to inspect the documents which are relied upon for the purpose of being used against him, to have the witnesses who are to give evidence against him examined in his presence and have the right to cross-examine them, and to lead his own evidence, both oral and documentary, in his defence. The process of a fair hearing need not, however, conform to the judicial process in a court of law, because judicial

adjudication of causes involves a number of technical rules of procedure and evidence which are unnecessary and not required for the purpose of a fair hearing within the meaning of audi alteram partem rule in a quasi-judicial or administrative inquiry." (emphasis supplied)

81. *Audi alteram partem*, therefore, entails that an entity against whom evidence is collected must: (i) be provided an opportunity to explain the evidence against it; (ii) be informed of the proposed action, and (iii) be allowed to represent why the proposed action should not be taken. Hence, the mere participation of the borrower during the course of the preparation of a forensic audit report would not fulfil the requirements of natural justice. The decision to classify an account as fraud involves due application of mind to the facts and law by the lender banks. The lender banks, either individually or through a JLF, have to decide whether a borrower has breached the terms and conditions of a loan agreement, and based upon such determination the lender banks can seek appropriate remedies. Therefore, principles of natural justice demand that the borrowers must be served a notice, given an opportunity to explain the findings in the forensic audit report, and to represent before the account is classified as fraud under the Master Directions on Frauds.

84. In *E.P. Royappa v. State of T.N.*³⁸, this Court held that an arbitrary State action is violative of Article 14 of the Constitution. Again, in *Maneka Gandhi*¹⁷ this Court reiterated that the principle of non-arbitrariness pervades Article 14. An administrative action can be tested for constitutional infirmities under Article 14 on four grounds: (i) unreasonableness or irrationality; (ii) illegality; (iii) procedural impropriety;³⁹ and (iv) proportionality.

However, the scope of such judicial review is limited to ascertaining the deficiency in the decision-making process, and not the correctness of the choice made by the administrator."

20. Particularly, emphasizing on paragraph 36, he argued that Rule of **Audi Alteram Partem** is explained by the Apex Court and it is held that a person affected by **administrative**, judicial or quasi judicial action, must be heard, before taking decision.

21. Concluding his arguments, he submits that the impugned de-affiliation order dated 26.2.2024 is bad in the eyes of law as the same has been passed without providing copy of the enquiry report along with the show cause notice.

22. Refuting the aforesaid contentions of the learned counsel for the petitioners, it has been submitted by learned counsel for the opposite parties that there were 50 students reported to be failed in different subjects in the petitioners' Institution and, therefore, when it was found that the same was in utter violation of the moderation policy of the Board framed under the directions of the Apex Court, the CBSE has taken the note of the fact including the report of the District Magistrate, who constituted a committee on large number of complaints before him and a report was forwarded to the CBSE, whereafter an internal committee was also constituted for conducting enquiry/inspection against the Institution upon the same. The internal committee submitted its report, though the Institution during the course of enquiry did not co-operate in the enquiry proceedings.

23. He further argued that in conclusion of the internal enquiry report, it

has been found that there are violation of the rules and norms of the tabulation policy of the Board by the petitioners in awarding marks to its students while tempering the records of the year 2020–21. He further contended that after the internal inspection/enquiry report was received, the show cause notice was served to the school by the Board through email and this fact has not been disputed by the petitioners but the school has failed to submit its reply within the stipulated period of time as granted by the Board. He further added that the school has violated provisions of clause 13.5, 12.2.11, 12.2.12 and 17 (2) (b) of the Affiliation Bye Laws, 2018 and since the clause 17 (2) (a) (xi) provides with respect to the misconduct in connection with the admission/examination/any other area, which is in the opinion of the Board warrants deaffiliation of the schools. Since the school has violated the rules and guidelines of CBSE and, therefore, invoking the procedure for imposition of penalties prescribed under the Affiliation Bye Laws, 2018, the Institution of the petitioners have been deaffiliated by the order dated 26.2.2024.

24. Controverting the plea of the learned counsel for the petitioners, he submits that the relevant extract of the enquiry report is observed in the show cause notice dated 12.10.2023, which is evident on the second page of the show cause notice, but, since the petitioners have chosen, not to reply the aforesaid show cause notice, therefore, there is no violation of principle of natural justice on the part of the CBSE so far the allegation is with respect to non-supply of the enquiry report concerned. He also added that the petitioners' institution has manipulated the marks which is against the guidelines of the exemption given for the students of class

XII, looking to the Covid Pandemic, 2019. Adding his arguments, he submits that the ratio of the judgements which are placed by the learned counsel for the petitioners, are not applicable in the facts and circumstances of the present case and, therefore, submission of the learned counsel for the CBSE is that the petitioners are not entitled for any relief as there is no erroneousness in the order dated 26.2.2024.

25. Learned counsel appearing for the opposite party no.5 submits that when several complaints were received by the District Magistrate regarding the irregularities committed by the petitioners' Institution, the District Magistrate proceeded while constituting six members enquiry committee, which submitted a report while holding the petitioners' Institution guilty and, therefore, the District Magistrate referred the matter to the CBSE annexing the enquiry report and, thereafter, the CBSE proceeded in the matter. He added that there is no fault on the part of the District Magistrate as what the minimum requirement was after receiving the complaints, have been done by the opposite party no.5 and, ultimately, the decision was to be taken by the CBSE.

26. Having heard learned counsel for the parties and after perusal of the material placed on record, it transpires that a dispute arose when the complaints were made to the District Magistrate, wherein the enquiry committee was constituted, and after receiving the enquiry report, the same was referred to the CBSE. The CBSE after receiving the enquiry report has conducted an internal enquiry while calling the report from the petitioners' Institution and, thereafter, the enquiry was concluded and a show cause notice was issued on 12.10.2023, which admittedly could not be

responded by the petitioners' Institution due to some inadvertence on the part of the personnel of the Institution and, thereafter, the CBSE passed the order while de-affiliating the Institution, which is under challenge.

27. Sheet anchor of the argument of learned counsel for the petitioners is that the impugned order is passed by the CBSE without furnishing/ supplying copy of the enquiry report, which is evident from the show cause notice that the same was taken into consideration but was not appended while sending it to the petitioners.

28. When this Court examines the instant matter on facts and law, it emerges that a punitive action has been taken by the CBSE, vide order dated 26.2.2024 where by the school of the petitioners has been de-affiliated. From perusal of the show cause notice dated 12.10.2023, it transpires that the enquiry report is allegedly quoted in the show cause notice which is as follows:-

"1. The school management could not make available the answer sheets of the children on the demand of the examination committee, due to which it was not possible to assess whether the answer sheets have been evaluated correctly or not. Prima facie it appears to be suspicious due to non-availability of answer books, as well as against the standard number of 24 subject-wise failed students against the prescribed provisions in the Moderation Policy, 50 students have been failed, which is 26 students more than the norm. No archival evidence was produced by the school management in this regard. Rationalization documents, minutes of the examination committee were not presented by the school management before the inquiry

committee, for which the school management is completely guilty.

2. The facts of the statement mentioned in paragraph 5 above regarding difference in the two-mark sheets of class 11 issued by the school are not acceptable. The school management is at fault for issuing different mark sheets of the same class. 3 As far as there is a question of students being given less marks and being failed due to not taking tuition from the teachers of the school. In this regard, according to the facts given in paragraph-2, statements of some students AND WHEREAS, the District Magistrate Rae Bareilly Uttar Pradesh had requested to this office that send a team for collecting all the records from the Treasury from District Administration and directed that the unbiased investigation must be ensured immediately, if the school manage is found guilty in the investigation long with ensuring strict legal action as per rules."

29. When the observations of the enquiry report are tallied with the conclusion of the enquiry report dated 4.8.2021, which was submitted by six members enquiry committee before the District Magistrate, it is the verbatim translation in English in the show cause notice dated 12.10.2023. The conclusion/observation of the enquiry committee is quoted hereinunder:-.

“निष्कर्ष

उपर्युक्त तथ्यों से स्पष्ट है कि बी0एस0एस0 पब्लिक स्कूल अमोल बिहार रायबरेली की जांच में समिति के द्वारा निम्न तथ्य पाए गए हैं:-

1 जांच कमेटी द्वारा बच्चों के उत्तर पुस्तिका मांगने पर विद्यालय प्रबंधन द्वारा उत्तर पुस्तिका उपलब्ध नहीं करायी जा सकी, जिससे यह आंकलन कर पाना संभव नहीं हो पाया कि उत्तर पुस्तिका का सही मूल्यांकन किया गया है अथवा नहीं। उत्तर पुस्तिका उपलब्ध न कराने से प्रथम दृष्ट्या संदिग्धता प्रतीत होती है, साथ ही माडरेशन पालिसी में विहित प्रावधानों के

सापेक्ष विषयवार अनुत्तीर्ण होने वाले छात्रों की मानक संख्या 24 के सापेक्ष 50 छात्रों को अनुत्तीर्ण किया गया है जो मानक से 26 छात्र अधिक है इस संबंध में विद्यालय प्रबंधन द्वारा कोई अभिलेखीय साक्ष्य प्रस्तुत नहीं किया गया है। जांच कमेटी के समक्ष विद्यालय प्रबंधक द्वारा युक्तिकरण दस्तावेज परीक्षा कमेटी का कार्यवृत्त प्रस्तुत नहीं किया गया, जिसके लिए विद्यालय प्रबंधन पूर्णतया दोषी है।

2 विद्यालय द्वारा कक्षा 11 की जारी दो अंकतालिकाओं में भिन्नता के सम्बन्ध में उपरोक्त प्रस्तर 5 में उल्लिखित बयान के तथ्य स्वीकार किये जाने योग्य नहीं है। एक ही कक्षा की भिन्न-भिन्न अंकतालिका जारी करने के लिए विद्यालय प्रबंधन सर्वथा दोषी है।

3 जहां तक विद्यालय के अध्यापकों से द्यूशन न पढ़ने के कारण छात्रों को कम नम्बर दिए जाने व फेल कर दिए जाने का प्रश्न है। इस सम्बन्ध में प्रस्तर-2 में दिए गए तथ्यों के अनुसार कतिपय छात्रों का बयान लिया गया है जिसके अनुसार उक्त तथ्यों की पुष्टि नहीं होती है।"

30. While going into the aforesaid observations, this Court is of the considered opinion that the observation of the enquiry report, which is said to be quoted in the show cause notice dated 12.10.2023, is not the observations of the enquiry report submitted by the internal committee constituted by the CBSE, but in fact, it is the observations of the enquiry committee, which was constituted by the District Magistrate and, therefore, the plea which has been taken by the CBSE that though the copy of the enquiry report was not appended along with the show cause notice but the observation of the same was transcribed, is false and baseless.

31. The settled proposition of law is that if a person is affected by administrative/judicial/quasi-judicial action, must be heard, before the decision is taken. It is also trite law that even if the statutory rules laying down the procedure for holding the enquiry are silent on the subject, it is incumbent upon the authority to bring the enquiry report in

the notice of the person against whom the enquiry is instituted. Hon'ble Apex Court while rendering the judgement in the case of **Union of India and others Vs. Mohd. Ramzan Khan, 1991 (1) SCC 588** has held that wherever, there has been an enquiry officer and he has furnished a report to the disciplinary authority at the conclusion of the enquiry holding the delinquent guilty of all or any of the charges with proposal for any particular punishment or not, the delinquent is entitled to a copy of such report and has a right to represent against it. Thereafter, in catena of judgements of the Apex Court, this view is adopted including the judgement and order reported in **(1993) 4 SCC 727, Managing Director, ECIL, Hyderabad and others Vs. B. Karunakar and others**, and subsequently, the same view is also taken in the case reported in **2023 (6) SCC 1, State Bank of India and others Vs. Rajesh Agarwal and others**.

32. This Court is also of considered opinion that the right of hearing while extending the rule of audi alteram partem, not only in case of judicial or quasi-judicial action, but if a person is affected with the administrative action, is required a copy of enquiry report so as to represent against the same. Ancillary issues are with respect to the application of the rules of the Affiliation of Bye Laws of 2018.

33. Learned counsels from both sides have tried to substantiate that the provisions have been misread. Much emphasis is laid by learned counsel for the CBSE that the CBSE has proceeded as per the procedure for imposition of penalties, while referring the clauses 13.1 and 13.2. On the contrary, learned

counsel for the petitioners has placed reliance on the provisions of the clause 18 (1) of Chapter V of the Affiliation Bye Laws and has indicated that the petitioners' school was accorded regular affiliation and, therefore, prior to passing any order for de-affiliation, the procedure prescribed should have been adhered to. He has also drawn attention towards the provisions that even if in most of the subjects, the percentage goes lower than the pass percentage of each subject at the examination of the Board, continuously for three years, the Board could have asked the school to rectify deficiencies while giving adequate time, i.e., six months to 1 year and in the event that the school fails to show any improvement, then the status of regular affiliation would be reverted to the provisionally affiliated school status.

34. In the aforesaid background, this Court, after going through the procedure, which was adopted by the CBSE thereby de-affiliating the school seems to be lacking of adhering the provisions provided in clause 18 (1) of Chapter V of the Affiliation Bye Laws, 2018. Further, in the show cause notice, 15 days time was given to the petitioners' school to reply the show cause notice whereas clause 13.4 of the affiliation bye laws, itself speaks that reply will be asked to be given in not more than 30 days and, at least, it was incumbent upon the authority which has issued the notice to accord 30 days time, and that too is violated by the CBSE.

35. In view of the abovesaid submissions and discussions, this Court is of the considered opinion that the order dated 26.2.2024 is erroneous and against the settled proposition of law. Hence, the order dated 26.2.2024 is hereby quashed.

responsible/burdened by the act of another-for the fault of institution or any authority- the petitioners/students cannot be thrown to suffer-directions issued.

Writ Petition allowed. (E-9)

39. Consigned to the records.

1. At the very outset, counsel for the petitioners submits that he may be allowed to implead the Senior Director (I.T.), National Informatics Centre, U.P. State Centre, 3rd floor Yojna Bhawan, 9- Sarojini Naidu Marg, Lucknow.

BEFORE

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3. In view of the above counsel for the petitioners is permitted to implead the Senior Director (I.T.), National Informatics Centre, U.P. State Centre, 3rd floor Yojna Bhawan, 9- Sarojini Naidu Marg, Lucknow as opposite party no. 9 in the array of opposite parties, during course of the day.

Sudeep Kumar, Avdhesh Kumar Pandey

4. Heard Ms Radhika Verma, advocate, holding brief of Sri Sudeep Kumar, Sri A.K. Pandey, Sri Shivendra Singh and Sri Sreesh Srivastava, counsels for the petitioners, Sri Shailendra Kumar Singh, learned Chief Standing Counsel for the State and Sri Vivek Shukla, additional chief standing counsel for the State, Sri Umesh Singh, counsel for opposite party no. 1 and 9, Sri Devak Vardhan, counsel for opposite party no. 4, Sri D.P. Singh for opposite party no. 7 and Sri Jai Prakash Mishra, advocate, holding brief of Sri Sudhanshu Chauhan, counsel for opposite party no. 8

5. The present petition is preferred seeking a writ in the nature of certiorari

Examination-‘Nemo Alterius Facto Pragravari Debet’ Petitioners are selected candidates- through the valid counselling process -allocated the respondent institution-also are studying over there-dispute arose when it came into the knowledge of the petitioners that their names are not uploaded on the portal of NIC/NCISM -and they are being deprived of to appear in the examination-aggrieved - instant petition- no fault on the part of the petitioners- as they are duly selected and have persuaded their courses -due to some technical fault- their names could not be uploaded on the portal-maxim ‘Nemo Alterius Facto Pragravari Debet’ says that no one should be

quashing the decision if any, taken by National Commission for Indian System of Medicine for not updating the detail/data of the petitioners on the official website of National Commission for Indian System of Medicine or Uttar Pradesh Ayush Under-Graduate Counseling Board, while summoning the records and further writ of mandamus is also sought commanding the respondent nos. 4 and 6 to update the details and data of the petitioners on the official website of respondent nos. 4 and 6.

6. The factual matrix of the case is that in year 2020, the Central Government promulgated the National Commission for Indian System Medical Act, 2020 (hereinafter referred to as 'Act 2020') for improving the access to the students and thereafter, on 06.02.2023, the National Commission for Indian System of Medicine (hereinafter referred to as 'NCISM') vide certificate dated 06.02.2023, granted the permission to the respondent no. 8 institution for establishing new Ayurveda Medical College, named as RGS Medical College and Research Centre at village Karaundi Post- Itaunja District Lucknow and for the academic session 2022-2023, the institution was permitted to run 100 seats in undergraduate (BAMS) course and thereafter, the institution approached for inclusion of its name in the under graduate counseling, under section 14 of the Act, 2020.

7. All the petitioners said to be appeared in the National Eligibility cum Entrance Test conducted by NCISM through the allotment letters issued by the Member Secretary, Uttar Pradesh Ayush Undergraduate Counseling Board (hereinafter referred to as 'Board') and the petitioners have been allotted the institution in question under the mop-up round.

Thereafter, the petitioners pursued their course for the academic session 2022-2023, but allegedly due to some technical fault, the names of the petitioners could not be uploaded on the official website of NCISM thereafter, the respondent institution wrote letter on 19.10.2023, while approaching the Director/Member Secretary of the Board for uploading the details of 7 students, including the petitioners, but nothing was done. Subsequently, on 19.01.2024, the Director/Member Secretary Homeopathy, U.P. wrote a letter to respondent no. 2, while transcribing therein, the names of 15 candidates/students, including the present petitioners, but no decision is taken by the State, rather on 14.03.2024, the State Government intimated to the Director Homeopathy, U.P. that since as per the Government Order 10.12.2022, no proceeding is required to be done by the State and therefore, the matter was again remitted back to the Director Homeopathy to take decision on its own.

8. In the meantime, the petitioners were kept on writing to the different authorities for uploading their names, but that was of no avail, even the letter has also been written to NIC on 04.10.2023, but the request was declined on the ground that since, counseling of 2023-2024 is started and therefore, it is not possible to upload the names of the students/petitioners. Under the aforesaid exigencies, the petitioners have approached this Court while preferring the instant petition.

9. The contention of counsel for the petitioners is that the petitioners are validly selected candidates through the National Eligibility Cum Entrance Test conducted by NCISM and thereafter, they are entitled to pursue course without any interruption. He next added that it is

undisputed that the petitioners are inducted properly through the Board, adopting due course, and they have also started their study with respondent institution i.e. opposite party no. 8, but it seems that due to some negligence on the part of the institution, the names of petitioners could not be uploaded on the portal and therefore, it was left to be uploaded by the NIC as well and therefore, the data could not reach to the office of NCISM.

10. He argued that there is no fault on the part of the petitioners as they are duly selected through 'Board 2022' and it is nobody's case that the petitioners are not duly inducted/selected. He also added that the petitioners being the students are suffering hard and their academic carrier is on stake therefore, submission is that the appropriate authority may be directed to upload the names of the petitioners on the portal/website of NCISM and the NCISM may further be directed to proceed accordingly.

11. On the other hand, Sri Devak Vardhan, counsel appearing for the NCISM has submitted that only the name of three candidates are found which are different than the actual students/candidates who are claiming themselves to be the student of the institution. He added that NCISM has no objection, if any technical fault is corrected by appropriate authority.

12. Sri Vivek Shukla, additional chief standing counsel for the State on the basis of instructions submits that it is undisputed that after counseling, the petitioners are allocated the institution i.e. opposite party no. 8, in mop-up round of the counseling 2022-2023 and since, the institution did not upload the names of the petitioners on portal, well within time

provided by the Counseling Authority and therefore, after completion of the time period, the same was closed and this fact with respect to non-uploading the names of the petitioners came at very belated stage and therefore, it was not possible for NIC to upload those data as per the procedure prescribed. He also added that the petitioners themselves have admitted the fact that opposite party no. 8 i.e. institution itself has failed to upload their names on portal.

13. Considering the submission of counsel for the parties and after perusal of material placed on record, it transpires that the thing which is undisputed in between the parties is that the petitioners are selected candidates through the valid counselling process by the counseling board and they have been allocated the respondent institution and they also are studying over there.

14. The dispute arose when it came into the knowledge of the petitioners that since, their names are not uploaded on the portal of NIC/NCISM and they are being deprived of to appear in the examination, therefore, being aggrieved they approached this Court by way of filing the instant petition.

15. Since, this borne out that there is no fault on the part of the petitioners as they are duly selected and have persuaded their courses and due to some technical fault, their names could not be uploaded on the portal, and the maxim 'Nemo Alterius Facto Pragravari Debet' says that no one should be responsible/burdened by the act of another and thus, for the fault of institution or any authority, the petitioners/students cannot be thrown to suffer.

16. This Court has also taken the note of fact that the Director Homeopathy has also written a letter to the State Government mentioning the names of the 15 candidates including the present petitioners and brought the facts into the knowledge of the State Government that due to some technical flaw the names of these petitioners could not be uploaded on portal, but in response thereto, the State Government vide letter dated 14.03.2024 has observed that as per the Government Order dated 10.12.2021, nothing remains to be done by the State Government and thus, there became a deadlock.

17. In view of the above-said submissions and discussions and to resolve the controversy at this Stage, the opposite party no. 9 as well as the NCISM, are hereby directed to upload the names of the petitioners on the portal/website meant therefor, and further, do as needful.

18. It is further provided that the aforesaid proceedings shall be carried out by the NIC and NCISM, within a period of two weeks from the date of certified copy of this order produced before it.

19. With the aforesaid observations, the instant petition is hereby **allowed**.

20. Appearance of Dr. Raj Kumar Kasyap is hereby exempted.

21. Counsel appearing for the opposite parties shall communicate this order to the respective authorities forthwith.

(2024) 4 ILRA 1427
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.04.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Writ-C No. 3277 of 2024

M/S Shrasty Computer Solution & Tech.
Lko. ...Petitioner
Versus
Employee Provident Org. & Ors.
...Respondents

Counsel for the Petitioner:
 Jai Narayan Mishra

Counsel for the Respondents:
 Akhilesh Pratap Singh, C.S.C.

A. Civil Law - Constitution of India,1950- Article 226-Employees Provident funds and Miscellaneous Provisions Act,1952- Section 7A-The petitioner challenged the dismissal of appeal by the Central Government Industrial Tribunal(CGIT)- The petitioner failed to file the appeal within the prescribed period of 60 days which could only be extended by another 60 days under Rule 7(2) of the EPF Appellate Tribunal(Procedure)Rules, 1997-Despite a previous writ petition allowing a 15-day extension to file the appeal, the petitioner missed this extended deadline as well-The appeal was dismissed for being time-barred, as the tribunal lacks jurisdiction to condone delays beyond the statutory maximum of 120 days-The court observed that the petitioner's explanation (illness) for the delay was deemed inadequate since the appeal was filed even after recovery-the petitioner failed to deposit 75% of the amount due, as mandated by Rule 7(2), a prerequisites for filing such appeals-The writ petition is dismissed as there were no valid grounds to extend the limitation further or to waive procedural requirements.(Para 1 to 20)

The writ petition is dismissed. (E-6)

List of Cases cited:

1. C/M Angoori Devi Inter College & ors. Vs St. of U.P. & ors. (2019)12 ADJ 62

2. Collector (LA) Vs Katiji(1987) 2 SCC 107

3. Sheo Raj Singh Vs U.O.I.(2023) 10 SCC 531

4. Basawaraj Vs Land Acquisition Officer(2013) 14 SCC 81

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

1. Heard Sri Jai Narayan Mishra, learned counsel for the petitioner, Sri S. K. Khare, learned Additional Chief Standing Counsel and Sri Akhilesh Pratap Singh, the learned counsel for the Respondents No. 1 to 4.

2. By means of the instant writ petition filed under Article 226 of the Constitution of India, the petitioner has challenged the validity of an order dated 04.03.2024 passed by the Central Government Industrial Tribunal/EPFAT, Lucknow in Appeal No. 67 of 2023, whereby the appeal has been dismissed as being barred by the period of limitation as provided under Section 7(2) of the Employees' Provident Fund Appellate Tribunal (Procedure) Rules, 1997, which was filed by the petitioner against an order dated 31.03.2023 passed by the Assistant Provident Fund Commissioner, Regional Office, Lucknow, under Section 7A of the Employees' Provident Funds and Miscellaneous Provisions Act.

3. The provisions of limitation for filing an Appeal under Section 7A of the Employees' Provident Funds and Miscellaneous Provisions Act is provided in Rule 7(2) of the Employees Provident Fund Appellate Tribunal (Procedure) Rules, 1997, which reads as under:-

“7. Fee, time for filing appeal, deposit of amount due on filing appeal-

(2) Any person aggrieved by a notification issued by the Central Government or an order passed by the Central Government or any other authority under the Act, may within 60 days from the date of issue of the notification/order, prefer an appeal to the Tribunal.

Provided that the Tribunal may if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the prescribed period, extend the said period by a further period of 60 days:

Provided further that no appeal by the employer shall be entertained by a Tribunal unless he has deposited with the Tribunal (a Demand Draft payable in the Fund and bearing) 75 per cent of the amount due from him as determined under Section 7-A:

Provided also that the Tribunal may for reasons to be recorded in writing, waive or reduce the amount to be deposited under Section 7-O.”

4. The petitioner did not file the appeal within the time prescribed by the aforesaid Rule. He had filed Writ-C No. 8978 of 2023 challenging the aforesaid order dated 31.03.2023 and the writ petition was dismissed on the ground of availability of alternative remedy of filing the appeal and it was provided in the order that in case the petitioner files an appeal within a period of 15 days, the same shall be decided on its merits and shall not be rejected on the ground of delay.

5. The time of 15 days granted by this court expired on 31.10.2023. The petitioner did not file the appeal within the extended time granted by this Court and he filed the appeal on 07.11.2023.

6. The Central Government Industrial Tribunal dismissed the appeal

holding that the appeal was not filed even within the extended time granted by this Court and it had been filed belatedly and the Tribunal has no power to condone any delay beyond 60 days.

7. The Tribunal has relied upon numerous judgments on the point.

8. In **Kushang Security and House Keeping Private Limited v. Central Government Industrial**, 2019 SCC OnLine All 3080, a coordinate Bench of this Court has dealt with this issue and after discussing numerous precedents on the issue, as held that: -

“32. In view of the foregoing discussion, the legal position which emerges that in terms of Section 7-I (2) every appeal is to be filed in such form and manner, within such time and be accompanied by such fees, as may be prescribed. Rule 7 (2) of the Rules, 1997 provides for filing of the appeal within 60 days from the date of issuance of the order. The first proviso thereunder further stipulates that the Tribunal may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the prescribed period, extend the said period by a further period of 60 days.

33. It is thus seen that the EPF Act is a special law providing for institution of provident funds, pension fund and deposit-linked insurance fund for employees in factories and other establishments and in terms of the rules framed thereunder a certain period of limitation for filing an appeal having been provided for in clear terms and a further provision having been made for extension of such period only upto a specified time period and no further, the Appellate Tribunal would have no

jurisdiction to treat within limitation, an appeal filed before it beyond such maximum time limit specified in terms of the statutory rules.

34. Moreover, in terms of the scheme and the intent of the provisions contained in the EPF Act it is seen that the legislature intended it to be a complete code by itself. As a consequence, even if the provisions of the Limitation Act may be held to have not been expressly excluded the principle of implied exclusion would apply in terms of the nature of the subject matter, the purpose and the scheme of the Act. The provisions contained under the Limitation Act, 1963 would therefore not be applicable for seeking extension of time beyond the statutory time period of 60 days from the date of issue of the notification/order, extendable by a further period of 60 days, upon the Tribunal being satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the prescribed period. The maximum period for filing the appeal would be thus 120 (60+60) days from the date of the issuance of the notification/order which is sought to be challenged.

35. It is a well settled principle of statutory interpretation that where the statute confers power on the authority to condone the delay only to a limited extent the same cannot be stretched or extended beyond what has been provided under the statute.”

9. The decision in **Kushang Security and House Keeping Private Limited (Supra)** has been followed and reiterated in **Committee of Management, Angoori Devi Inter College and Others Versus State of U.P. and Others** 2019 (12) ADJ 62, wherein it was held that: -

“35. ...the EPF Act, 1952 being a special statute and having prescribed a certain period of limitation for filing a

particular application thereunder and also having provided in clear terms that such period on sufficient cause being shown, may be extended, in the maximum, only upto a specified time-limit, the Tribunal concerned would have no jurisdiction to treat within limitation, an application filed before it beyond such maximum time-limit specified in the statute, by excluding the time spent in prosecuting in good faith and due diligence any prior proceeding on the analogy of Section 14(2) of the Act, 1963.

36. It may be noticed that in the instant case against the order dated 28.12.2018 passed under Section 7-A of the EPF Act, 1952 a writ petition, Writ-C No. 5308 of 2019, was filed and the same was dismissed at the threshold vide order dated 18.2.2019 with liberty to the petitioners to avail the statutory remedy of appeal under Section 7-I of the EPF Act, 1952. A copy of the aforesaid order which has been filed as Annexure-9 to the writ petition indicates that a certified copy of the order dated 18.2.2019 was applied for on 10.6.2016 and the same was issued on 12.6.2019. It appears that only thereafter the appeal bearing Appeal A.T.A. No. 06 of 2019 was filed which came to be rejected as time barred vide order dated 15.7.2019 passed by the Appellate Authority/Presiding Officer, Central Government Industrial Tribunal-cum-Labour Court, Kanpur. These facts also go to show that the necessary requirement under Section 14 that the prior proceeding should have been prosecuted in good faith and with due diligence also does not stand fulfilled.

37. The time limit is prescribed by the rule making authority for filing an appeal and also the extended period having been provided, and no further extension thereof having been envisaged or contemplated, the Appellate Authority could not have granted any further

extension. In view of the aforesaid, the order passed by the Appellate Authority recording its conclusion that the appeal was filed beyond the statutory period of limitation, cannot be faulted with."

10. By means of its order dated 16.10.2023 passed in Writ-C No. 8978 of 2023 passed in exercise of its extraordinary Writ jurisdiction, this Court had extended the period of limitation prescribed by law and had granted 15 days' time to the petitioner to file the appeal, but the petitioner did not file the appeal within the aforesaid period. The Tribunal had no power to condone any delay for expiry of the extended period granted by this court. In these circumstances, the Central Government Industrial Tribunal/EPFAT, Lucknow has not committed any illegality in passing of the impugned order dated 04.03.2024.

11. The learned Counsel for the petitioner has placed reliance upon the judgment in the case of **Collector (LA) v. Katiji**, (1987) 2 SCC 107 and **Sheo Raj Singh v. Union of India**, (2023) 10 SCC 531.

12. In **Collector (LA) v. Katiji**, (1987) 2 SCC 107 the Hon'ble Supreme Court had held that: -

"3. The legislature has conferred the power to condone delay by enacting Section 5 of the Indian Limitation Act of 1963 in order to enable the courts to do substantial justice to parties by disposing of matters on "merits". The expression "sufficient cause" employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves the ends of justice — that being the life-purpose for the

existence of the institution of courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that:

“1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. “Every day's delay must be explained” does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

Making a justice-oriented approach from this perspective, there was sufficient cause for condoning the delay in the

institution of the appeal. The fact that it was the “State” which was seeking condonation and not a private party was altogether irrelevant. The doctrine of equality before law demands that all litigants, including the State as a litigant, are accorded the same treatment and the law is administered in an even-handed manner. There is no warrant for according a step-motherly treatment when the “State” is the applicant praying for condonation of delay. In fact experience shows that on account of an impersonal machinery (no one in charge of the matter is directly hit or hurt by the judgment sought to be subjected to appeal) and the inherited bureaucratic methodology imbued with the note-making, file-pushing and passing-on-the-buck ethos, delay on its part is less difficult to understand though more difficult to approve. In any event, the State which represents the collective cause of the community, does not deserve a litigant-non-grata status. The courts therefore have to be informed with the spirit and philosophy of the provision in the course of the interpretation of the expression “sufficient cause”. So also the same approach has to be evidenced in its application to matters at hand with the end in view to do even-handed justice on merits in preference to the approach which scuttles a decision on merits.”

13. In Sheo Raj Singh v. Union of India, (2023) 10 SCC 531 also the Hon'ble Supreme Court explained the scope of Section 5 of the Limitation Act and held that: -

“31. Sometimes, due to want of sufficient cause being shown or an acceptable explanation being proffered, delay of the shortest range may not be condoned whereas, in certain other cases,

delay of long periods can be condoned if the explanation is satisfactory and acceptable. Of course, the courts must distinguish between an “explanation” and an “excuse”. An “explanation” is designed to give someone all of the facts and lay out the cause for something. It helps clarify the circumstances of a particular event and allows the person to point out that something that has happened is not his fault, if it is really not his fault. Care must, however, be taken to distinguish an “explanation” from an “excuse”. Although people tend to see “explanation” and “excuse” as the same thing and struggle to find out the difference between the two, there is a distinction which, though fine, is real.

32. An “excuse” is often offered by a person to deny responsibility and consequences when under attack. It is sort of a defensive action. Calling something as just an “excuse” would imply that the explanation proffered is believed not to be true. Thus said, there is no formula that caters to all situations and, therefore, each case for condonation of delay based on existence or absence of sufficient cause has to be decided on its own facts. At this stage, we cannot but lament that it is only excuses, and not explanations, that are more often accepted for condonation of long delays to safeguard public interest from those hidden forces whose sole agenda is to ensure that a meritorious claim does not reach the higher courts for adjudication.”

14. Both the aforesaid cases explain the scope of Section 5 of the Limitation Act and the approach to be adopted by the Courts while deciding an application under Section 5. As Section 5 of the Limitation Act does not apply to the appeals filed under the Section 7A of the

Employees’ Provident Funds and Miscellaneous Provisions Act, the law laid down in **Collector (LA) v. Katiji and Sheo Raj Singh v. Union of India (Supra)** would have no application to the present case.

15. So far as the question of this Court exercising its extraordinary powers under Article 226 of the Constitution of India for again extending the prescribed period of limitation is concerned, this Court has already exercised this power in favour of the petitioner while passing the order dated 31.03.2023 in Writ-C No. 8978 of 2023 filed by the petitioner by providing that in case the petitioner filed an appeal within a period of 15 days, the same should be decided on its merits and should not be rejected on the ground of delay.

16. Although, the petitioner claimed that he could not file the appeal within time granted by this Court as he had fallen ill, the medical certificate annexed with the writ petition mentions that he was under treatment of a doctor since 17.10.2023 to 31.10.2023 and he became medically fit on 31.10.2023. The appeal has been filed seven days after expiry of the time granted by this Court as well as after his regaining fitness.

17. It is also relevant to note that the Second Proviso appended to Rule 7(2) of the Employees Provident Fund Appellate Tribunal (Procedure) Rules, 1997 provides that no appeal by the employer shall be entertained by a Tribunal unless he has deposited with the Tribunal a Demand Draft payable in the Fund and bearing 75 per cent of the amount due from him as determined under Section 7-A. The learned Counsel for the Employees Provident Fund Organization has pointed out even while

filing the time barred appeal, the petitioner did not comply with this provision.

18. In **Basawaraj v. Land Acquisition Officer**, (2013) 14 SCC 81, the Hon'ble Supreme Court held that: -

*“12. It is a settled legal proposition that law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribes. The court has no power to extend the period of limitation on equitable grounds. “A result flowing from a statutory provision is never an evil. A court has no power to ignore that provision to relieve what it considers a distress resulting from its operation.” The statutory provision may cause hardship or inconvenience to a particular party but the court has no choice but to enforce it giving full effect to the same. The legal maxim *dura lex sed lex* which means “the law is hard but it is the law”, stands attracted in such a situation. It has consistently been held that, “inconvenience is not” a decisive factor to be considered while interpreting a statute”*

19. Keeping in view the entire facts and circumstances of the case, it appears that the petitioner has not complied with the mandate of Rule 7 C of the Employees Provident Fund Appellate Tribunal (Procedure) Rules, 1997 on two counts – (1) he did not file the appeal in the prescribed period of limitation or even in the extended period granted by this Court and (2) he did not deposit 75% of the amount due from him as determined under Section 7-A. Therefore, there appears to be no good ground for again extending the period of limitation for filing the appeal by the petitioner.

20. The writ petition lacks merit and the same is hereby **dismissed**.

(2024) 4 ILRA 1433
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 16.04.2024

BEFORE

THE HON'BLE MRS. SANGEETA CHANDRA, J.
THE HON'BLE SUBHASH VIDYARTHI, J.

Writ -C No. 3400 of 2024

Dilip Charan Wahal & Anr. ...Petitioners
Versus
U.O.I. & Ors. ...Respondents

Counsel for the Petitioners:
 Samarth Saxena

Counsel for the Respondents:
 A.S.G.I., Sanjeev Singh

Cantonment Act, 2006-A lease deed was executed on behalf of the Central Government - for a period of 30 years-renewable up to 90 years-petitioners are in actual physical possession-CLA Rules of 2021 have replaced the CLA Rules of 1937-all subsisting leases given under Cantonment Codes of 1989 and 1912 and Cantonment Land Administration Rules 1925 and 1937, shall continue to be governed under the said Rules - CLA Rules of 2021 not applicable - as their lease was admittedly subsisting till 24.10.1923-petitioners were given a calculation sheet-which clearly specifies that Standard Table Rent -fixation of such rent per sq. mts. per annum is not arbitrary. No ground for interference.

Writ Petition dismissed. (E-9)

List of Cases cited:

1. Vishnu Traders Versus State of Haryana: (1995) Supp SCC 461
2. Tata Cellular v. Union of India, (1994) 6 SCC 651 (77)

3. Fruit Commission Agents Assn. v. Govt. of A.P., (2007) 8 SCC

(Delivered by Hon'ble Mrs. Sangeeta Chandra J.

&

Hon'ble Subhash Vidyarthi J.)

1. Heard learned counsel for the petitioners, Shri S.B. Pandey, learned D.S.G.I. assisted by Shri Raj Kumar Singh, learned counsel for the respondent Nos.1 & 3 and Shri Sanjeev Singh, learned counsel for respondent No.2.

2. This petition has been filed with the following prayers:-

“(i) Issue a writ, order or direction in the nature of certiorari quashing the impugned demand notices dated 08.12.2023 (ANNEXURE NO 2) and 19.02.2024 (Annexure No.3) issued by the Defence Estates Officer, Lucknow Circle, Lucknow to the extent, it seeks to recover an amount of Rs. 91,63,857/- from the petitioners in respect of an area of 3.36 acres, situated over Survey No. 93/2 Cator House 236 M.G. Road Lucknow Cant.

(ii) Issue a writ, order or direction in the nature of certiorari ‘summoning and quashing the minutes of the meeting of the Cantonment Board, Lucknow dated 25.09.2023 in so far as it increases the Standard Table of Rent (STR) of Zone-I, to Rs. 566.70/- per sq. meter w.e.f. 01.07.2023 to 01.07.2024.

(iii) Issue a writ, order or direction in the nature of mandamus declaring Clause-B(a)(iii) of the Policy dated 10.03.2017 as extended till 31.12.2024, in so far as it directs recovery of lease rent on the basis of Standard Table of Rent (STR) prevailing on the date of expiry of lease as ultra vires to the provisions of Rule-16 r/w

rule 28 and also Schedule VIII of the Cantonment Land Administration Rules, 1937 and Article 14 of the Constitution of India.

(iv) Issue a writ, order or direction in the nature mandamus directing the respondents not to take any coercive measures against the petitioners in pursuance to the impugned demand notices dated 08.12.2023 and 19.02.2024 issued by the Defence Estates Officer, Lucknow Circle, Lucknow and further direct the respondents to accept the lease rent in respect of Survey No. 93/2 Cator House 236 M.G. Road Lucknow Cant. from the petitioner at the rate of Rs. 50/- per annum.”

3. The learned Counsel for the petitioners has submitted that a lease deed was executed on behalf of the Central Government on 15.05.1934 in respect of a premises described as ‘Cator House, 236, M.G. Road, Lucknow Cantonment’ in favour of Shri Shiv Charan, for a period of 30 years with effect from 25.10.1933, which was renewable up to 90 years. The said property has been mentioned at Survey No.93/2 and comprises of buildings known as Cater house and Shiv Kutir. The petitioners are in actual physical possession of Shiv Kutir and are residing therein and they are in de-jure possession of the rest of the property (Cater House) which is in occupation of the respondents, as it was let out to the Governor General in Council by Smt. Lalto Devi, wife of Shri Shiv Charan at a monthly rent of Rs.220/- by a lease deed dated 21.11.1941. The entire demised premises measures 13,597.44 Sq. Mts. On 10.03.2017, the Central Government framed a policy providing for an extension of expired/expiring leases and in pursuance of such policy, the lease of the demised premises was extended initially up to

31.12.2019 and thereafter it was again extended on 15.02.2021 up to 31.12.2021 or till finalization of a new policy, whichever is earlier. The policy dated 10.03.2017 was further extended beyond 31.12.2022 for one year i.e. till 31.12.2023 or till finalization of a new policy, whichever is earlier. The lease dated 15.05.1934 in favour of the predecessors of the petitioners, had expired on 24.10.2023 and in pursuance of the policy dated 10.03.2017 issued by the Central Government as extended from time to time, the petitioners have been allowed to occupy the demised premises till date.

4. The Cantonment Act 1924, under which the initial lease deed was executed, has been repealed by the Cantonment Act 2006. Section 125 of the Act of 2006 empowers the Central Government to make rules to provide for conditions on which properties vested in a Cantonment Board may be transferred by sale, mortgage, lease or exchange. Under Section 63 of the Act of 2006, the Board has to manage any property entrusted to its management by the Central Government, subject to the rules made by the Central Government under Section 346 of the Act of 2006. In exercise of powers conferred by the Section 280 of the now repealed Act of 1924, the Central Government had framed Rules known as Cantonment Land Administration Rules, 1937 (hereinafter referred to as CLA Rules 1937). After the said Act was repealed, the Central Government in exercise of its powers under Section 346 of the Act of 2006 framed the Cantonment Land Administration Rules 2021 (hereinafter referred to as CLA Rules of 2021). Under Rules 17 of the CLA Rules of 2021, it has been provided that subsisting Cantonment leases given under earlier Act shall continue to be governed

under the said Rules and conditions of the lease deed. The subsisting lease with renewal terms can be considered for renewal or otherwise, in accordance with the instructions issued by the Central government from time to time, including such instructions as pertain to submissions of on-line application for renewal of lease as well as processing thereof, and the renewal of lease deed shall be executed on the proforma given in Schedule IV.

5. The learned Counsel for the petitioner has also submitted that the CLA Rules of 2021 have been issued in supersession of the CLA Rules of 1937, but these Rules of 2021 do not govern those subsisting leases which had been in operation under the CLA Rules of 1937 and because the lease deed of the disputed property was subsisting and in operation at the time when CLA Rules of 2021 came into force, the CLA Rules of 1937 are applicable with respect to the disputed property. Rule 6 of CLA Rules of 1937 defines Class B-3 land as that land which has been held by any private person under the provisions of CLA Rules of 1937 or may be presumed to be held under the provisions of Cantonment Board Act 1899 or 1912 or under any executive order previously in force, subject to conditions under which the Central Government has reserved to themselves the propriety rights in the soil. Rule 9 of CLA Rules of 1937 vests the management of all category 'B' lands with the Military Estates Officer, now called the Defence Estates Officer. Under Rule 8 of CLA Rules of 1937, the Standard Table of Rent has to be prepared by the respondent No.3 - the Defence Estates Officer in consultation with the Collector which is suitable for application on lands held for agricultural and non-agricultural purpose having regard to situation of site in

the Cantonment, nature of soil and rates charged for adjacent agricultural lands or building sites in the neighborhood.

6. It has further been submitted that since a number of leases were granted under the CLA Rules of 1937 which had either expired or were expiring, therefore, the Government of India issued a policy vide its order dated 10.03.2017 which has been referred to herein above, by which all the leases under the CLA Rules of 1937, whose full term had expired or was expiring before 21.12.2018, were extended. The last such extension of lease was made by a letter dated 30.01.2024. It is the case of the petitioners that their lease had expired on 24.10.2023 lastly, but they continued to be in possession of the property in question and are using it for residential purposes. The respondent No.3 by a letter dated 08.12.2023, had issued a demand notice to the petitioners demanding rent at the rate of Rs.77,05,669/- per annum. Another demand notice had been issued on 19.02.2024 in pursuance of interim policy dated 30.01.2024 demanding a total of Rs.91,63,857/- to be paid within a period of 90 days for the purpose of processing the issue of execution of the lease deed up to 31.12.2024, failing which the petitioners would be deemed to be unauthorized occupants of the land in question and would be liable for eviction under the provisions of Public Premises (Eviction of Un-authorized Occupant) Act 1971. Upon payment of the amount demanded by the impugned demand notice dated 19.02.2024, the petitioners would only be entitled to an extension of the lease up to 31.12.2024.

7. It has been argued that since extension of the lease has been granted under the policy notified on 10.03.2017, it

is not a renewal of lease as contemplated under the CLA Rules of 1937 and that as per the provisions of Rule 16 of the CLA Rules of 1937, the annual lease rent fixed under Rule 19 can be revised only at the time of renewal of the lease and not while extending the lease, as the terms of the lease can be modified only on renewal of lease.

8. The learned counsel for the petitioners has submitted that the Standard Table of Rents which has been prepared by the respondent No.3 has been purportedly prepared on the basis of the circle rate fixed by the District Magistrate which was applicable on the date of expiry of the lease. Since the respondents are only extending the terms of the expired lease up to 31.12.2024, there cannot be any change in the terms and conditions of the original lease and that any extension of the lease has to be on the same terms and conditions as the original lease and the lease rent cannot be increased exorbitantly by the respondents at the time of extension of the lease.

9. It has also been argued that as per the minutes of the meeting dated 25.09.2023 of the Board regarding fixation of Standard Table of Rents, the Standard Table Rent (S.T.R.) was fixed at Rs.566.70/- per square meters in an arbitrary manner on the basis of prevailing rates of the adjoining municipal lands. Such prevailing rates relate to sale deeds executed of properties adjoining the Cantonment Board under the control of Municipal Corporation of Lucknow. In case of the petitioners, only lease-hold rights are being given by the respondent No.3 Circle Rates have been taken into consideration to determine the market value of those lands which are subject matter of sale deeds by

private citizens. The circle rates cannot be made applicable for determining the annual lease rent in respect of leases granted by the Cantonment Board/ Defence Estates Officer where no ownership rights are being granted to the lessee. Therefore, the Moolya Nirdharan Suchi prepared by the Collector, Lucknow in respect of adjoining areas cannot be relied upon.

10. The learned counsel for the petitioners has also submitted that the impugned notices dated 08.12.2023 and 19.02.2024 are arbitrary and liable to be quashed for the reason that the rent of the premises has been increased exorbitantly from Rs.50/- per annum to Rs.77,05,669/- per annum even for limited lease holds rights as are being extended up to 31.12.2024 and the Cantonment Board/Defence Estates Officer being instrumentality of State, which is the Welfare State, cannot act arbitrarily and contrary to the principles enshrined under Article 14 of the Constitution of India.

11. It has also been argued that similar petitions have been filed before the Delhi High Court which have been entertained and the Court had issued interim directions that during pendency of the petitions, no coercive action can be taken against the lessees therein. Similarly, this Court has passed an interim order dated 27.10.2021 in Writ-C No.27621 of 2021 (Onkar Prasad Bhardwaj Vs. Union of India and 3 Others) directing that no coercive action be taken against the lessees therein as long as they continue to pay old rent. Similar order has also been passed by this Court at Allahabad on 13.10.2023 in Writ-C No.34544 of 2023 (Smt. Vinita Bahuguna Vs. Union of India and 2 Others). It has been argued by the learned counsel for the petitioners that since this

Court has granted interim orders in similar petitions pending at Allahabad, parity of such interim order be also be granted to the writ petitioners.

12. Shri S.B. Pandey, learned Deputy Solicitor General appearing for the respondent Nos.1 & 3 has stated that this Court may finally consider and dispose of this writ petition on the basis of arguments raised by the parties and he does not propose to file a counter affidavit.

13. In **Vishnu Traders Versus State of Haryana**: (1995) Supp SCC 461, the Hon'ble Supreme Court held that "*In the matters of interlocutory orders, principle of binding precedents cannot be said to apply. However, the need for consistency of approach and uniformity in the exercise of judicial discretion respecting similar causes and the desirability to eliminate occasions for grievances of discriminatory treatment requires that all similar matters should receive similar treatment except where factual differences require a different treatment so that there is assurance of consistency, uniformity, predictability and certainty of judicial approach.*" However, the aforesaid principles would not apply where the earlier writ petitions are pending and the present Writ Petition is being decided finally.

14. Shri S.B. Pandey has submitted that admittedly, the lease of the petitioners had expired way back on 23.10.2023 as the initial lease was granted on 25.10.1933 for a maximum period of 90 years. The extension of the period of lease has been done on the basis of policy dated 10.03.2017. The petitioners having derived advantage on the basis of the policy dated 10.03.2017 cannot turn around and

challenge such conditions of the policy which according to them cause undue hardship. They have to accept the policy in its entirety or forgo the benefits of the policy as a whole.

15. The scope of interference by this Court in exercise of its powers under Article 226 of the Constitution of India in the matters involving challenge to any State policy, is limited to examining whether the policy suffers from Wednesbury unreasonableness.

16. In **Tata Cellular v. Union of India**, (1994) 6 SCC 651 (77), the Hon'ble Supreme Court held: -

"77. ...Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) Illegality : This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury unreasonableness.

(iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time."

17. In **Fruit Commission Agents Assn. v. Govt. of A.P.**, (2007) 8 SCC 511, it was held that: -

"14. Fixation of rent is an administrative function and the court cannot sit as a court of appeal over administrative decisions vide Tata Cellular v. Union of India [(1994) 6 SCC 651]. Hence the view taken by the High Court is correct.

15. As we have held in S. C. Chandra v. State of Jharkhand [(2007) 8

SCC 279] the judiciary should exercise restraint and should not ordinarily encroach into the legislative or executive domain. In our opinion fixing of the rent is an executive function and hence the judiciary cannot interfere with the same except on Wednesbury principles. There is broad separation of powers under the Constitution and ordinarily one organ of the State should not encroach into the domain of another. Montesquieu's theory of separation of powers (XIth Chapter of his book The Spirit of Laws) broadly applies in India too."

(Emphasis added)

18. Having considered the arguments raised by the learned counsel for the parties, this Court has gone through the relevant CLA Rules of 1937 and of 2021. In the CLA Rules of 2021, which have replaced the CLA Rules of 1937, it has been mentioned that all subsisting leases given under Cantonment Codes of 1989 and 1912 and Cantonment Land Administration Rules 1925 and 1937, shall continue to be governed under the said Rules and the conditions of the lease deed. Therefore, in so far as the applicability of CLA Rules of 2021 are concerned, they may not be applicable to the case of the petitioners as their lease was admittedly subsisting till 24.10.1923. However, the Rules of 1937 which have been relied upon by the learned counsel for the petitioners themselves say that all leases shall be governed by the Standard Table of Rents to be prepared by the Military Estates Officer/ Defence Estates Officer. The Standard Table of Rents has to be prepared in consultation with the Collector and shall be compiled taking into account the situation of the site, the nature of the soil and the rates charged for adjacent agricultural land or for building sites in the neighborhood.

19. We have gone through the Resolution of the Board as recorded in the Minutes of the meeting of the Board, a copy of which has been filed as Annexure No.14 to the writ petition. The said meeting was attended by a representative of Collector Lucknow, representative of Nagar Nigam Lucknow, representative of Defence Estates Officer, Lucknow Circle, Lucknow Cantt representative of Head Quarters Madhya U.P. Sub-area Lucknow Cantt and representative of Chief Executive Officer Lucknow Cantt and it was pointed out that Lucknow being the biggest city of U.P. with an increasing population and advantageous and healthy environment and being the hub of commercial activities, the land values have increased exponentially. The Cantonment land is perhaps the best located in Lucknow city with well connected roads and amenities. It can be assessed on the valuation based on sales data/ Moolyankan Soochi, site survey and other relevant information gathered in this regard. Since Cantonment land belongs to the Government of India, Ministry of Defence and no part of it can be sold to anyone, hence no sales data was available to decide the fair market value of land but rates/value of land situated in the vicinity of Cantt area as assessed by the Collector are mentioned in the Moolyankan Soochi issued by the Collector, Lucknow and it can be taken into account. The Standard Table of Rents was last revised in July, 2022 and was valid till 30.06.2023 and it had now to be re-fixed/revised for the years 2023-2024.

20. To arrive at a realistic value of land in the Cantonment, it has been divided into four zones and one subsidiary zone. The disputed property in this writ petition falls in Zone-I. This Zone comprises of Restaurants, Banks, Post Office, Hospitals

and Commercial areas with wide roads. It is adjacent to the Railway Station and such localities of Lucknow Municipal Corporation as Mall Avenue, Abadi Kabristan and Vikramaditya Marg, which are some of the most posh areas of the Lucknow city. The Collector in the Circle Rate notified on 15.12.2015 had notified Mall Avenue at Rs.21,500/- per sq. mts., Abadi Kabristan at Rs.16,500/- per sq. mts. and Vikramaditya Marg at Rs.30,000/- per square meter. The average rate of all such localities was calculated at Rs.22,666.66/- per sq. mt. The average cost of land being so determined for this Zone-I, the Standard Table Rent for Zone-I for residential areas was taken on that basis as 2.5% of the market value of such land. It was fixed at Rs.566.70/- per sq. mts. The petitioners' property is undoubtedly residential and, therefore, 2.5% of Rs.22,667/- came out to be Rs.566.70/- per sq. mts.

21. The CLA Rules of 1937 and that of 2021 all refer to grant and renewal of leases on the basis of instructions issued by the Central Government from time to time. The Central Government had issued a policy on 10.03.2017 laying down the conditions for extension of leases till a new policy is finalized. The petitioners have taken benefit of this policy and their lease which admittedly expired on 24.10.2023, had been extended up to 31.12.2023 i.e for a period of 69 days on the basis of Standard Table of Rents. Rs.14,56,688/- has been demanded as outstanding dues in the Notice issued in December, 2023. The petitioners were given a calculation sheet which is enclosed with the Notice dated 08.12.2023 which clearly specifies that Standard Table Rent rate at the rate of Rs.566.70/- per sq. mts. having been determined, the rent of Rs.13,597,4400/- sq. mts. would be Rs.17,05,669/- per

annum and consequently for 69 days, Rs.14,56,688/- only has been demanded.

22. It is clear from the demand notice dated 08.12.2023 that Rs.566.70/- per sq. mts. per annum has been determined as rent for the lease hold property which falls in Zone-I. This Court does not find fixation of such rent per sq. mts. per annum as arbitrary, looking into the area where the property is situated which is M. G. Road, the main lifeline of the city of Lucknow. The petitioners do not dispute that the property falls in Zone-I. The petitioners also do not dispute that the Circle Rate has only been taken as a determinative factor for market value of land of the area adjacent to land under the administration of Lucknow Municipal Corporation and it is not the market value which is being demanded but only 2.5% of such market value has been demanded for lease hold rights to be granted/extended for a period of one year.

23. The lease rent fixed by a Resolution passed in a Minutes of the meeting of the Board which was attended by a representative of Collector Lucknow, representative of Nagar Nigam Lucknow, representative of Defence Estates Officer, Lucknow Circle, Lucknow Cantt representative of Head Quarters Madhya U.P. Sub-area Lucknow Cantt and representative of Chief Executive Officer Lucknow Cantt, after taking into consideration the location of the land, the connectivity and the amenities available nearby, thereafter fixing 2.5% of the average circle rate of lands situated nearby which was assessed in the year 2015, does not at all appear to be arbitrary or unreasonable.

24. The CLA Rules of 1937 and that of 2021 all refer to grant and renewal

of leases on the basis of instructions issued by the Central Government from time to time. The Central Government had issued a policy on 10.03.2017 laying down the conditions for extension of leases till a new policy is finalized. The petitioners have taken benefit of this policy and their lease which admittedly expired on 24.10.2023, had been extended up to 31.12.2023 i.e for a period of 69 days on the basis of Standard Table of Rents. Rs.14,56,688/- has been demanded as outstanding dues in the Notice issued in December, 2023. The petitioners were given a calculation sheet which is enclosed with the Notice dated 08.12.2023 which clearly specifies that Standard Table Rent rate at the rate of Rs.566.70/- per sq. mts. having been determined, the rent of Rs.13,597.4400/- sq. mts. would be Rs.17,05,669/- per annum and consequently for 69 days, Rs.14,56,688/- only has been demanded.

25. This Court is also of the considered opinion that Article 14 of the Constitution of India which has been invoked by the learned counsel for the petitioners without explaining as to how the same would apply in their case, would not be applicable as the decision for determining the annual rent cannot be said to be arbitrary for such a huge piece of land situated in Zone-I as is being enjoyed by the petitioners.

26. Moreover, admittedly the lease of the petitioners expired on 24.10.2023, they have continued to enjoy the property only because of policy of extension as notified on 10.03.2017 by the Central Government. It was for the Central Government to decide the conditions for extension of an already expired leases. If the petitioners are not willing to deposit the lease rent as determined by the impugned

demand notices, they are free to vacate the property as they have not been forced to get their lease extended. They have voluntarily remained in the property on the basis of extension of lease as aforesaid on the basis of conditions mentioned therein. The Central Government being the lessor has determined the value for the land it owns in the Lucknow Cantonment in Zone-I and it has offered that land on lease on conditions determined by it on the basis of market value of adjoining land in the city. The petitioners being lessees are free to accept or reject the offer but they cannot place conditions on such offer to their liking only on the basis of alleged undue hardship being faced by them.

27. This Court finds no good ground to invoke the concept of Welfare State and Article 14 of the Constitution of India in such a matter where the dispute between the petitioners and the Government is regarding fixation of lease rent of 1,46,362 sq. feet land regarding which the 90 years lease of the petitioners has come to an end and the Government has fixed the new rate of lease rent on relevant considerations, which do not suffer from wednesbury unreasonableness. On the contrary, continuance or extension of lease of Government lands at the old rates of lease rent fixed more than 90 years ago would be against the interest of the public at large and that would be arbitrary and unreasonable.

28. In view of the observations made herein above, we find no good ground to entertain this petition. Hence, the instant writ petition is hereby **dismissed**.

(2024) 4 ILRA 1441
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.04.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Writ-C No. 5832 of 2024

Vinod Kumari **...Petitioner**
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:
 Sri Jeet Bahadur Singh

Counsel for the Respondents:
 C.S.C.

Authority rejected the application of the petitioner- seeking interest on the delayed payment of the refund of stamp duty - order for refund was passed on September 19, 2013- authority concerned refunded this amount only on December 5, 2023- State has no power to hold on the money -it has taken without any authority of law -amount that has been collected is dehors the law.

Writ Petition disposed. (E-9)

(Delivered by Hon'ble Shekhar B. Saraf, J.)

1. Heard learned counsel for the petitioner and the learned Standing Counsel for the State

2. This is a writ petitioner under Article 226 of the Constitution of India wherein the order dated January 24, 2024 passed by the Additional District Magistrate (Finance/Revenue), Aligarh is under challenge.

3. By the order impugned, the authority concerned rejected the application of the petitioner seeking interest on the delayed payment of the refund of stamp duty that has been deposited by the petitioner.

4. On perusal of the facts, it is clear that the order for refund of the

amount of Rs.5,35,454/- was passed on September 19, 2013. However, the authority concerned refunded this amount only on December 5, 2023. The stand taken by the respondent authorities is that there is no provision in the Indian Stamp Act, 1899 for payment of interest on refund of excess stamp duty that has been collected by the revenue. In light of the same, counsel for the respondent submitted that no interest is payable even if there is lackadaisical approach by the authorities in returning of the refund.

5. The stand of the revenue is rejected outrightly as the State has no power to hold on the money that it has taken without any authority of law. Article 265 of the Constitution of India clearly provides that no tax can be collected without authority of law and any amount that has been collected is dehors the law and is required to be returned to the person concerned. As a natural corollary, the time for which the amount was illegally detained by the Government, is required to be compensated for by the Government by way of payment of interest thereon. There is no requirement of any specific provision for the payment of interest in such circumstances. In light of the same, I am of the view that the authority concerned is required to pay interest for the delay in refund.

6. Accordingly, the authority concerned is directed to pay interest at the rate of 5 per cent from October 19, 2013 (one month after passing of the order directing the refund) till December 5, 2023 (when the refund was made). The said amount should be paid by the authority concerned within six weeks from date.

7. With the above observations, the writ petition is disposed of.

(2024) 4 ILRA 1442
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.03.2024

BEFORE

THE HON'BLE MRS. RENU AGARWAL, J.

Writ -C No. 6350 of 2024

Gajala & Anr.	...Petitioners
	Versus
State of U.P. & Ors.	...Respondents

Counsel for the Petitioners:
 Sri Umesh Chandra Prajapati

Counsel for the Respondents:
 C.S.C.

A. Civil Law - Constitution of India,1950-Article 226-Indian Penal Code,1860-Sections 498,504-Petitioners sought protection from family members, claiming threats and interference in their marriage-Petitioner no.1 was previously married and had not obtained a divorce-Petitioner no. 2 began a live-in relationship with petitioner no. 1 after they met in Noida 2022 –The court that petitioner 1 had no legal right to protection while living in an adulterous relationship without obtaining a divorce-the court emphasized that such relationships in contravention of Islamic law and the Indian Penal Code(sections 494,495) cannot be considered a live-in relationship akin to marriage-The writ petition was dismissed as the court found no enforceable legal right in favor of the petitioners for protection.(Para 1to 15)

The writ petition is dismissed. (E-6)

List of Cases cited:

1. Lata Singh Vs St. of U.P. & anr.. (2006) 5 SCC 475

2. Shafin Jahan Vs Asokan K.M. & ors. (2018) 16 SCC 368

3. Nandkumar & anr. Vs St. of Ker.(2018) 16 SCC 620

4. Kamini Devi Vs St. of U.P. Writ. C No. 11108 of 2020

5. Razia & anr. Vs St. of U.P. Writ C No. 27338 of 2023

6. Kiran Rawat & anr.. Vs St. of U.P.

7. D.Velusamy Vs D.Patchajammal (2010) 10 SCC 469

8. Indra Sarma Vs V.K.V. Sharma (2013) 15 SCC 755

9. Asha Devi & anr. Vs State of U.P. & ors Writ © No. 18743 of 2020

10. A Subhash Babu Vs St. of A.P.

11. Shayara Bano Vs U.O.I.

12. Lily Thomas & anr. Vs U.O.I. & ors.

13. Dir. of Settlement, A.P. Vs M.R. Apparao

14. Kalyan Singh Vs St.of U.P. (1962) AIR SC 1183

(Delivered by Hon'ble Mrs. Renu Agarwal, J.)

1. Heard learned counsel for the petitioners, learned Standing Counsel for the State and perused the record.

2. Instant writ petition under Article 226 of the Constitution has been filed by the petitioners with prayer for issuing writ, order or direction in the nature of mandamus the respondents not to interfere in the peaceful married life of the petitioners as husband and wife.

3. It is submitted by the learned counsel for the petitioners that as per

aadhar card the date of birth of petitioner No.1 is 03.01.1993 and she is aged about 31 years and the date of birth of the petitioner No.2 as per his aadhar card is 07.09.2002 and he is aged about more than 21 years. It is submitted that petitioner no.1 was earlier married with one Shahrukh on 04.03.2014 and since the petitioner No. 1 was not able to conceive, she was thrown out from her matrimonial house. Thereafter, in the year 2022 when the petitioners No.1 was working in NOIDA, she met petitioner No. 2 and since then they are living in relationship. It is further submitted that the parents of petitioner no.1 and her other family members are interfering in their peaceful live-in-relationship. The petitioners apprehend danger to the life and liberty from respondent No.4 and other family members, therefore, petitioner no.1 moved an application, therefore present petition moved by the petitioners for issuance of mandamus.

4. On the other hand, learned Standing Counsel submitted that petitioner no.1 is already married to one Shahrukh, she has not obtained any decree of divorce, as prescribed under the personal law, from her earlier husband and started living with petitioner no.2 in adultery, therefore, their relationship can not be protected by law. Learned Standing Counsel has relied upon the judgment of Apex Court in the case of **Kiran Rawat and Another Vs. State of U.P.** and judgment of the Division Bench of this Court passed in the case of **Asha Devi and Another Vs. State of U.P. and 3 Others**, and opposed the petition. It is also submitted by the learned Standing Counsel that no cause of action arose as no application for protection has been moved to the authorities in the instant matter. Lastly it is submitted that mandamus cannot be issued against private person,

hence the prayer made in the writ petition is opposed.

5. I have heard the rival submissions of learned counsel for the parties and perused the record.

6. From the perusal of record it transpires that both the petitioners are major and as per aadhar card the date of birth of petitioner No.1 is 03.01.1993 and she is aged about 31 years and the date of birth of the petitioner No.2 as per his aadhar card is 07.09.2002 and he is aged about more than 21 years. It is also apparent from the record that petitioner no.1 was earlier married to one Shahrukh and leaving her earlier husband without obtaining divorce, as prescribed under law, she started living with petitioner no.2. In the case of **Kiran Rawat(Supra)**, the Hon'ble Apex Court observed that:-

"21. However, in Muslim law no recognition can be given to sex outside marriage. "Zina" which has been defined as any sexual intercourse except that between husband and wife includes both extramarital sex and premarital sex and is often translated as fornication in English. Such premarital sex is not permissible in Islam. In fact any sexual, lustful, affectionate acts such as kissing, touching, staring etc. are "Haram" in Islam before marriage because these are considered parts of "Zina" which may lead to actual "Zina" itself. The punishment for such offence according to Quran (chapter 24) is hundred lashes for the unmarried male and female who commit fornication together with the punishment prescribed by the "Sunnah" for the married male and female that is stoning to death." It is observed that in Muslim Law living-in-relationship is not permitted."

7. In the case of **Asha Devi(Supra)**, the Hon'ble Division Bench of this Court formulated two questions as under:-

"(i) Whether the petitioners, who claim themselves to be living together as husband and wife; can be granted protection when the petitioner No.1 is legally wedded wife of someone else and has not taken divorce sofar ?

(ii) Whether protection to petitioners as husband and wife or as live-in-relationship can be granted in exercise of powers conferred under Article 226 of the Constitution of India, when their living together may constitute offences under Sections 494/495 I.P.C. ?"

8. In the judgment of **Asha Devi (Supra)**, Hon'ble Division Bench of this Court has discussed the judgment of Hon'ble Apex Court in the case of **"D. Velusamy Vs. D. Patchaiammal"**, in which the Hon'ble Apex court held that:-

"32. In our opinion not all live in relationships will amount to a relationship in the nature of marriage to get the benefit of the Act of 2005. To get such benefit the conditions mentioned by us above must be satisfied, and this has to be proved by evidence.

If a man has a 'keep' whom he maintains financially and uses mainly for sexual purpose and/or as a servant it would not, in our opinion, be a relationship in the nature of marriage'."

(Emphasis supplied)

9. In the judgment of **Asha Devi (Supra)**, the Division Bench of this Court on the basis of various judgments of High Court held that following relationship are not recognized or approved as live-in-relationship:-

"(a) **Concubine** can not maintain relationship in the nature of marriage vide paras 57 & 59 of the judgment of Hon'ble Supreme Court in **Indra Sarma Vs. V. K. V. Sarma**.

(b) Polygamy, that is a relationship or practice of having more than one wife or husband at the same time, or a relationship by way of a bigamous marriage that is marrying someone while already married to another and/or maintaining an adulterous relationship that is having voluntary sexual intercourse between a married person who is not one's husband or wife, cannot be said to be a relationship in the nature of marriage vide para 58 of judgment in **Indra Sarma's Case (supra) & A Subhash Babu Vs. state of A.P.** (paras 17 to 21, 27, 28 & 29). Polygamy is also a criminal offence under Section 494 & 495 I.P.C., vide **Shayara Bano Vs. Union of India** 5 (paras 299.3).

(c) Till a decree of divorce is passed the marriage subsist. Any other marriage during the subsistence of the first marriage would constitute an offence under Section 494 I.P.C. read with Section 17 of the Hindu Marriage Act, 1955 and the person, inspite of his conversion to some other religion would be liable to be prosecuted for the offence of bigamy, vide **Lily Thomas and another Vs. Union of India and others** 6 (Para 35). In para 38 of the aforesaid judgment, Hon'ble Supreme Court observed as under:-

"38. Religion is a matter of faith stemming from the depth of the heart and mind. Religion is a belief which binds the spiritual nature of man to a super-natural being; it is an object of conscientious devotion, faith and pietism. Devotion in its fullest sense is a consecration and denotes an act of worship. Faith in the strict sense constitutes firm reliance on the truth of religious doctrines in every system of

religion. Religion, faith or devotion are not easily interchangeable. If the person feigns to have adopted another religion just for some worldly gain or benefit, it would be religious bigotry. Looked at from this angle, a person who mockingly adopts another religion where plurality of marriage is permitted so as to renounce the previous marriage and desert the wife, he cannot be permitted to take advantage of his exploitation as religion is not a commodity to be exploited. The institution of marriage under every personal law is a sacred institution. Under Hindu Law, Marriage is a sacrament. Both have to be preserved."

(Emphasis supplied)

(d) If both the persons are otherwise not qualified to enter into a legal marriage including being unmarried, vide **D Velusamy Vs. D Patchaiaammal (supra)** (para 31)."

10. In the judgment of **Asha Devi (Supra)**, Hon'ble Division Bench of this Court has also discussed the judgment of Hon'ble Apex Court in the case of **"Director of Settlement, A.P. Vs. M.R. Apparao**, in which the Hon'ble Apex court has considered the High Court's power for issuance of mandamus and held as under:-

"17. One of the conditions for exercising power under Article 226 for issuance of a mandamus is that the Court must come to the conclusion that the aggrieved person has a legal right, which entitles him to any of the rights and that such right has been infringed. In other words, existence of a legal right of a citizen and performance of any corresponding legal duty by the State or any public authority, could be enforced by issuance of a writ of mandamus. "Mandamus" means a command. It differs from the writs of prohibition or certiorari in its demand for

some activity on the part of the body or person to whom it is addressed. Mandamus is a command issued to direct any person, corporation, inferior Courts or Government, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. A mandamus is available against any public authority including administrative and local bodies, and it would lie to any person who is under a duty imposed by statute or by the common law to do a particular act. In order to obtain a writ or order in the nature of mandamus, the applicant has to satisfy that he has a legal right to the performance of a legal duty by the party against whom the mandamus is sought and such right must be subsisting on the date of the petition."

11. From the factual matrix of the case it is apparent that petitioner no.1 is legally wedded wife of Shahrukh. She has not obtained any decree of divorce as prescribed in law. She is living with petitioner no.2 in contravention of the provisions of Islamic Law(Shariat), wherein legally wedded wife can not go out side marriage and this act of Muslim women is defined as Zina which is Haram (prohibited) . If we go to the criminality of the act of petitioner no.1 she may be prosecuted for the offence under section 494 and 495 IPC, as such relationship is not covered within the phrase of live-in-relationship or relationship in the nature of marriage.

12. Present writ petition has been filed by the petitioners for protection from interference by respondent no.4, who is father of petitioner no.1 and others in their peaceful living as husband and wife. If such a protection is granted, it may amount

to grant the protection against the commission of offence under section 494 and 495 IPC.

13. It is settled law that writ of mandamus can be issued only if the petitioners has legal right to the performance of legal duty by the party against whom the mandamus is sought. The Hon'ble Apex Court in the case of "**Kalyan Singh Vs. State of U.P., AIR 1962 SC 1183** held as under:-

"Applying the principles of issuance of writ of mandamus on the facts of the present case, we find that the petitioners have no legal right for protection on the facts of the present case inasmuch as such the protection as being asked, may amount to protection against commission of offence under Section 494/495 I.P.C. It is well settled law that writ of mandamus can not be issued contrary to law or to defeat a statutory provision including penal provision. The petitioners do not have legally protected and judicially enforceable subsisting right to ask for mandamus."

14. In the present case petitioner no.1 is Muslim by religion and she has not moved any application to the authority concerned for conversion of her religion under sections 8 and 9 of the Conversion Act. Hence petitioner no.1 is living in relationship with petitioner no.2 without obtaining divorce from her husband, that constitute an offence under sections 494 and 495 IPC and also without complying the provisions of sections 8 & 9 of the Conversion Act. Hence such type of criminal act cannot be supported and protected by the Court. Therefore, the petition has no substance and is liable to be dismissed

15. Accordingly, the petition is dismissed.

(2024) 4 ILRA 1447
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.03.2024

BEFORE

THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE KSHITIJ SHAILENDRA, J.

Writ-C No. 7022 of 2023

Executive Committee Maulana Mohd. Ali Jauhar Trust
Versus
State of U.P. & Ors.

...Petitioner

...Respondents

Counsel for the Petitioner:

Sri Imran Ullah, Sri Mohd. Khalid, Sri Vineet Vikram, Sri Kunal Shah, Sri Amit Saxena (Sr. Adv.)

Counsel for the Respondents:

C.S.C.

A. Civil Law - Constitution of India,1950-Article 226-The land and building for the institute were leased to the Trust in 2015 for 33 years at nominal rates, with the purpose of promoting educational development for minority communities-The Trust later established the Rampur Public school on the premises-The lease arrangement resulted from misuse of power by Mohamammad Azam Khan, the then Cabinet Minister and the trust's chairman, causing significant financial loss to the state-The institute was allegedly used for private benefits rather than the intended public purpose-The High Court analyzed the legality of the lease, procedural lapses, and whether the revocation of the lease followed due process-The court ruled that alleged violations of natural justice must be weighed against the facts of the case, such violations may not render government actions invalid-Such transactions are void ab initio as they violate public trust- allocation of public property through non-transparent

processes, without competitive bidding, adherence to financial norms, is void.(Para 1 to 112)

The writ petition is dismissed. (E-6)

List of Cases cited:

1. A.K. Kraipak Vs U.O.I.(1969) 2 SCC 262
2. Board of Control for Cricket in India Vs Cricket Assn of Bih.(2015) 2 SCC 251
3. R.Sai Bharathi Vs. J. Jayalalitha & ors.(2004) 2 SCC 9
4. Ori. Olympic Assn thru Gen.Secy. Vs St. of Ori. & anr.(2017) 14 SCC 22
5. A.C. Muthiah Vs Board of Control for Cricket in India & ors.(2011) 6 SCC 617
6. Ridge Vs Baldwin (1964) AC 40
7. S.L.Kapoor Vs Jagmohan(1980) 4 SCC 379
8. Malloch Vs Aberdeen Corp. (1971) 2 WLR 1578
9. Glynn Vs Keele Univ. (1971) 1 WLR 487
10. Cinnamond Vs British Airports Authority(1980) 1 WLR 582
11. Straughton, L.J., in R. Vs Ealing Magistrates court ex P Fannaran (1996) 8 Admn LR 351(358)
12. Dharampal Satyapal Ltd. Vs Deputy Commr of Central Excise Gauhati & ors.(2015) 8 SCC 519
13. Bishambhar Prasad vs Arfat Petrochemicals Pvt. Ltd & ors.
14. Mohinder Singh Gill Vs The Chief Election Officer
15. S.L. Kapoor Vs Jgmohan
16. K. Balasubramanian (Ex. Capt.) Vs St. of TN(1991) 2 SCC 708

(Delivered by Hon'ble Manoj Kumar
Gupta, J.
&
Hon'ble Kshitij Shailendra, J.)

1. The Executive Committee of Maulana Mohammad Ali Jauhar Trust through its authorized signatory has invoked the writ jurisdiction of this Court under Article 226 of the Constitution of India challenging an Office Memorandum dated 31.01.2023 (for short the 'Office Memorandum') issued by the Additional Chief Secretary, Department of Minority Welfare and Waqf, U.P. Civil Secretariat, Lucknow, withdrawing permission to attach Maulana Mohammad Ali Jauhar Trust (for short 'the Trust') with the Maulana Mohammad Ali Jauhar Technical and Research Institute, Rampur (hereinafter referred to as 'the Research Institute') and grant it on lease to the Trust and further terminating the lease deed dated 04.02.2015 and also the Rectification Deed dated 22.05.2015. A notice dated 15.02.2023 issued by the District Minority Welfare Officer, District Rampur, whereby the Manager of the Trust has been directed to vacate the premises of the Research Institute, has also been challenged. The writ petition was amended pursuant to an order dated 21.03.2023 and a further challenge was made to a notice dated 06.03.2023 issued by the District Minority Welfare Officer directing the Manager of the Trust to vacate the premises within a period of fifteen days, failing which possession would be taken by the Administration. A writ of mandamus has also been prayed for directing the respondents to remove the seal placed on the gate of the institution with a further prayer that the respondents be directed not to take any coercive measure against the petitioner trust on the strength of impugned order/ Office

Memorandum/ notice. An order dated 31.01.2023 issued by the Additional Chief Secretary, Department of Minority Welfare and Waqf, Lucknow, has also been challenged whereby the Divisional Minority Welfare Officer, Moradabad Region, District Moradabad, and the District Minority Welfare Officer, Rampur have been directed to resume possession of the land of the Research Institute and inform the Government about the same.

FRAME OF THE WRIT PETITION

2. The facts of the case, as culled out from the writ petition, are that the petitioner trust is a society registered under the provisions of the Societies Registration Act, 1860, its registration having been granted on 24.04.1995 and renewed from time to time. The primary aims and objectives of the trust, as per the petitioner, is to undertake philanthropic activities for the purposes of fostering scientific temperament among the persons belonging to the minority community and to take steps for their social and educational upliftment as set out in the Memorandum of Association, appended as Annexure No.6 to the writ petition.

3. It is pleaded that, in the year 2005, the then Chief Minister made public announcement for launching different projects for the welfare of the persons belonging to the minority community and, amongst the same, the Government, in remembrance of the contributions made by Maulana Mohammad Ali Jauhar in the freedom struggle as also in the Khilafat Movement, decided to set up a training and research institute in Rampur. It is pleaded that the primary objective of the research institute was to outline and prepare plans for economic and educational

developments of the persons belonging to the minority community and the institution was at liberty to run programmes for effective development of such persons. Accordingly, the Department of Minority Welfare and Waqf, Government of U.P. established a research institute at Village Thothar, District Rampur in the name and style of 'Maulana Mohammad Ali Jauhar Training and Research Institute' (for short 'the Research Institute'), which is spread over a total area of 13140 square meters, out of which constructions in the shape of building existed over 4252.07 square meters and the remaining area, i.e. 8887.93 square meters was in the shape of an open land.

4. It is further pleaded that the State Government, vide Office Memorandum dated 20.11.2014, took a decision to lease out the Research Institute in favour of the petitioner trust under the provisions of the Government Grants Act, 1895, as applicable in the State of U.P. and, in furtherance of the said decision, a lease deed dated 04.02.2015 was executed between the Governor of the State and the petitioner trust and the same was registered on the same day in Book No.1, Volume No.6403, Page No.317 to 328 in the office of Sub-Registrar, Tehsil Sadar, District Rampur. Further pleadings are that the lease was granted for a period of 33 years on receipt of a premium of Rs.1,000/- and at an annual rent of Rs.100/- with an option for renewal of the lease for two further terms of 33 years each, the maximum period of the lease being 99 years, Though, Clause 2 of the lease deed casts an obligation upon the petitioner trust to ensure that activities are carried out in furtherance of the aims and objectives set out in Schedule-II, inadvertently, the said Schedule and a map exhibiting the

boundaries could not be appended to the original lease deed. The State Government, considering the fact that there was a pressing need for qualitative improvement of primary and secondary level education among the minority community, vide Office Memorandum dated 03.03.2015, authorized the petitioner trust to make arrangements in the institution in question for imparting studies in all subjects of primary and secondary level of education, including Urdu, Arabi and Farsi. It is further pleaded that though Clause 9 of the lease deed prohibits raising of any pucca constructions on the open land let out to the petitioner trust, certain confusion arose, for removal of which, the State Government, vide an Office Memorandum dated 17.03.2015, approved the amendment in Clause 9 of the lease deed and the words "pucca construction" were replaced by words "permanent construction". The case of the petitioner is that in order to cure the aforesaid inadvertent omission of not appending the 'Schedule' and the subsequent decision of the State Government contained in the Office Memorandum dated 03.03.2015 and 17.03.2015, a Rectification Deed was executed between the State Government and the petitioner trust on 22.05.2015 which was also registered in the office of Sub-Registrar concerned and, consistent with the objectives set out in Clause 16 of the Second Schedule of the amended lease deed dated 22.05.2015, the petitioner trust, after obtaining requisite permission, in June, 2015, established a co-education school under the name and style of "Rampur Public School" affiliated to Central Board of Secondary Education (for short C.B.S.E.); the affiliation was extended from time to time and is still valid till 31.03.2026. Certain details regarding strength of students in the said school have

been disclosed in the writ petition and the petitioner's case is that functioning of the institution is without any complaint or any other infirmity.

5. According to the petitioner, on coming of new Government in power in the year 2017, one Shri Baldev Singh Aulakh, a Member of U.P. Legislative Assembly and Minister of State, made certain complaints before the State Government regarding the functioning of the petitioner trust and the Government constituted a Special Investigation Team (for short S.I.T.) by an order dated 23.05.2018, whereafter the Additional Superintendent of Police, S.I.T., vide letter dated 07.01.2019, made certain queries regarding the functioning of Rampur Public School by the petitioner trust. The S.I.T. marked the letter to the petitioner trust and also to the Principal of Rampur Public School raising certain queries and the Principal, vide his letter dated 24.01.2019, provided necessary information as well as the copies of relevant documents, as desired by the Additional Superintendent of Police, S.I.T. It is further pleaded that the S.I.T. submitted some report before the State Government, whereupon, the State Government, on 28.01.2023, took a decision to terminate the lease deed dated 04.02.2015, the rectification deed dated 22.05.2015 and also to revoke the Office Memorandum dated 20.11.2014 whereby previous Government had let out the Research Institute in favour of the petitioner trust. The orders/ notices and Office Memorandum impugned in the writ petition are said to have been issued in furtherance of the decision of the State Government.

6. The impugned action has been challenged mainly on the ground that the

entire exercise leading to passing of the impugned orders/ notices/ Office Memorandum has been carried out in complete derogation of the principles of natural justice; that the Government never issued any show cause notice to the petitioner regarding alleged breaches and defaults on the part of the petitioner; and that the Office Memorandum dated 31.01.2023 does not disclose any reason and, hence, the entire action is liable to be declared illegal and void.

COUNTER AFFIDAVIT

7. A counter affidavit has been filed on behalf of the State-respondents stating that Mohd. Azam Khan, being a Cabinet Minister in the regime of the previous Government (herein after, for short 'the Cabinet Minister/ Hon'ble Minister') holding the portfolio of Minister of Urban Development and Parliamentary Affairs with effect from 28.08.2003 to 13.05.2007 and Minister for Minority Welfare and Waqf, Government of U.P., with effect from 15.03.2012 till 19.03.2017, misused and abused his position to usurp highly valuable State land and the building of the Research Institute built from the State exchequer. The trust was headed by him only, being the founder and lifetime Chairman thereof since before execution of the lease. It is further pleaded that the petitioner trust, instead of advancing the objects of the Research Institute, established a CBSE recognised school in the building of the research institute. The Managing Committee of the said school comprises mainly of the family members of Cabinet Minister. It is further pleaded that Rampur Public School was established over the land and building without approval from the Cabinet or competent authority. Further stand is that Cabinet Minister

himself determined and fixed premium of the entire land and building at Rs.1000/- and annual lease rent of Rs.100/- by misusing and abusing his position, causing financial loss to the State exchequer to the extent of around Rs.20.44 crores. In the aforesaid background, the present Cabinet constituted a Special Investigation Team to enquire and investigate into the entire transaction. The Cabinet found the attachment of the Research Institute with the Trust and also grant of lease of land and building of the Research Institute in favour of the petitioner- Trust to be a result of gross corruption and fraud and the same were set at naught.

8. The facts preceding the execution of lease deed in favour of the petitioner-trust have been disclosed in the counter affidavit as follows:-

(i) The erstwhile Government, ruled by Samajwadi Party, had transferred 1.314 hectares of land of District Jail, Rampur to the Department of Minority Welfare and Waqf, State of U.P., vide Government Order of August, 2004, for establishment of the Training and Research Institute. The objectives of the Research Institute contained in the project report have been reproduced in the counter affidavit. For achieving the objectives of the trust, a building was constructed over the aforesaid land out of Government funds. It is further stated that the then Chief Minister, on his visit to district Rampur, announced that the Research Institute would be attached with Maulana Ali Mohammad Jauhar University, vide Mukhyamantri Ghoshana (declaration) on 19.12.2012, however, subsequently, the said *Ghoshana* (declaration) was modified on 07.06.2013 to the effect that the said institute would be attached to the petitioner

trust, a private society. It is further stated that the Secretary, Minority Welfare and Waqf Department, on 25.10.2014, reported that the Government building constructed on the land had not been utilized for any purpose, therefore, a proposal had been sent to the office of the then Chief Minister who directed to take appropriate decision at competent level, i.e. the Cabinet on 11.11.2014. The decision of the Cabinet, contained in the resolution dated 20.11.2014, has been reproduced in paragraph no.19 of the counter affidavit substantially observing that a document of lease would be executed in between the State Government and the Trust, however, in case the Trust fails to achieve the objects of the Research Institute, the right to cancel the lease before its expiry would remain reserved with the State Government. It is further pleaded that though asked, the Department of Finance and Department of Law did not provide any proper or clear opinion regarding the lease rent and its duration, therefore, file was sent for finalization of the said aspects to the office of the then Chief Minister on 19.01.2015 and a direction was issued for taking action at the level of concerned departments as per the Cabinet decision. Various amendments in the documents have been spelt out in the counter affidavit and the stand is that Rampur Public School started running in the Government building constructed for Training and Research Institute on the said land since 02.04.2015, even before amendment in the aims and objectives of the Institute permitting the running of the school and also before execution of the amended lease deed dated 22.05.2015. This became possible in view of enormous power wielded by the Cabinet Minister of the concerned Ministry itself. There was direct conflict of interest between the Minister and the grant of lease and,

therefore, all actions are rendered void ab initio.

(ii) It is further pleaded that the State Government, by letter dated 23.05.2018, constituted a Special Investigation Team to enquire into the complaints and the Department of Minority Welfare and Waqf also sent a proposal for High Level Inquiry regarding misappropriation of State land and building in the garb of advancing the objectives of the Training and Research Institute, causing huge financial loss to the State Exchequer. Regarding the participation of the trust in the investigation process, the stand is that during the course of investigation, the S.I.T. recorded statements of Mr. Naseer Ahmad Khan, Member of Legislative Assembly/ Secretary of the Trust, who happens to be a relative of the Cabinet Minister and of Mr. Sultan Khan, Principal, Rampur Public School. The report dated 04.07.2019 submitted by the Executive Engineer of Public Works Department, Rampur regarding construction of a permanent structure over the land in violation of the terms and conditions of the lease deed has also been referred to and the conclusion drawn by the S.I.T. in the report has been reproduced in the counter affidavit apart from recommendations made by the S.I.T. regarding cancellation of the lease deed dated 04.02.2015. It is further stated that the Department of Home took cognizance of the report of S.I.T. on 31.01.2020 and a meeting of High Powered Committee was convened on 16.03.2020, headed by Additional Chief Secretary, Home and attended by Principal Secretary, Minority Secretary Waqf Department, Additional Chief Secretary (Revenue) and Director General of Police. The report was further examined by the said Committee and, after due diligence, the recommendations were validated and accepted in toto. Further

pleadings are that pursuant to the impugned action, correction of entries has already been incorporated in the relevant records and regarding opportunity of hearing or participation during the course of investigation, it has been repeatedly stated that during such investigation, oral/ written statements were made by the Principal of Rampur Public School and the Secretary of the Trust and, hence, office bearers of the trust and the institution were fully aware of the ongoing investigation and, therefore, it cannot be said that they were not provided any opportunity in the matter.

REJOINDER AFFIDAVIT

9. Rejoinder affidavit filed on behalf of the petitioners reiterates the stand taken in the writ petition and by referring to various authorities, emphasis is on adherence to the principles of natural justice. The participation of the officials of the trust and Rampur Public School in the investigation has not been denied, however, it has been stated that the same can, in no way, be deemed to be compliance of the principles of natural justice, particularly, when the Principal of Rampur Public School cannot be said to be aware of the managerial affairs of the trust. Every action on the part of the State Government leading to passing of the orders/ notices/ Office Memorandum has been assailed by taking various factual and legal pleas.

INTERVENTION BY THIRD PARTIES

10. In the present case, by an order dated 13.12.2023, an application filed by Rampur Public School and its Principal seeking intervention in the writ proceedings was allowed taking care of the interest of the students who got affected on account of impugned action of the State-respondents.

The reasons are recorded in the said order itself. By a subsequent order dated 18.12.2023, while reserving judgment in this case, stand of the State Government contained in affidavit filed on that day was recorded to the effect that out of 1479 students in Rampur Public School in academic session 2022-23, 733 students had been shifted to other branches of Rampur Public School, Rampur; that 161 students of Class XII had passed out and remaining 585 students had taken admission in other schools. Further stand of the Government is that a meeting was held on 15.12.2023 with students and their guardians wherein they did not point out to any specific problem being faced by the students. It is also stated that a helpline desk has been made operational and the students and parents have been informed about the same.

COUNSEL HEARD

11. We have heard Sri Amit Saxena, learned Senior Counsel, assisted by Mohammad Khalid and Sri Kunal Shah, for the petitioner and Shri Ajay Kumar Mishra, learned Advocate General, assisted by Sri Ajit Singh, learned Additional Advocate General, along with Sri Sudhanshu Srivastava and Sri Ishan Mehta, learned Additional Chief Standing Counsel for the respondents.

SUBMISSIONS ON BEHALF OF THE PETITIONER

12. Learned Senior Counsel for the petitioner-trust has made the following arguments:-

(i) Neither any show cause notice was issued to the petitioner nor any opportunity of hearing was ever afforded

by the respondents to the petitioner before passing the impugned order dated 31.01.2023, whereby the decision dated 20.11.2014 to grant lease, office memorandum, lease deed and correction lease deed, were revoked or set aside.

(ii) The impugned order dated 31.01.2023 does not contain any reason, therefore, the said order as well as all consequential orders/notices are wholly invalid.

(iii) The impugned order suffers from breach of principles of natural justice and, therefore, all the impugned orders and the notices deserve to be quashed.

(iv) No material or document on the basis of which the decision dated 20.11.2014 has been withdrawn or the lease deed has been cancelled, had been supplied to the petitioner.

(v) The impugned order has not been passed on merit and no ground of cancellation emerges therefrom.

(vi) Impugned order cannot be supplemented by fresh reasons assigned in counter affidavit, particularly when neither any show cause notice was issued nor was the petitioner confronted with any material nor any opportunity of hearing was afforded before passing the impugned order.

(vii) The allegations of fraud, conflict of interest or violation of Rules have been pleaded for the first time in the counter affidavit and the petitioner was never put to notice on the said grounds which might have been reasons behind taking the action impugned.

(viii) S.I.T. sent letter dated 07.01.2019 to the District Magistrate, Rampur, a copy whereof was marked to the Principal of the School as well as Manager of the Trust and seven queries raised through said letter were confined to running of the school by the Research

Institute; recognition granted to the school inside the premises of the Research Institute; since when the school was being run; which subjects and languages were being taught; what was the number of officers and employees in the management of the school; which classes were being run therefrom and as to whether, apart from running the school, any research activity was also being carried out; if yes, what is the number of the research scholars. Certain documents were also called from the petitioner and the petitioner responded to the communication so made and answered all the seven points in the following manner:-

“1- यह मोलाना मोहम्मद अली जौहर ट्रस्ट को उत्तर प्रदेश सरकार द्वारा लीज पर दिया गया है।

2- सी.बी.एस.ई. बोर्ड नई दिल्ली द्वारा पंजीकृत प्रमाण पत्र प्रतिलिपि।

3- (क) अनापत्ति प्रमाण पत्र आयुक्त द्वारा प्रदान किया गया।

(ख) अनापत्ति प्रमाण पत्र नगर पालिका द्वारा प्रदान किया गया।

(ग) अग्नि एवं सुरक्षा प्रमाण पत्र मुख्य अग्नि शमन अधिकारी द्वारा प्रदान किया गया।

प्रमाणित प्रतिलिपियाँ संलग्न

4- 2015 से हिन्दी अंग्रेजी उर्दू संस्कृत भाषायें एवं सी.बी.एस.ई पाठ्यक्रम के अनुसार सारे विषय।

5- प्रधानाचार्य, अध्यापक, लेखाकार, चपरासी, एवम सफाई कर्मी ग्रेड मिलाकर कुल 40.

6- कक्षा 1 से 11 तक 857 विद्यार्थी।

7- मौलाना मोहम्मद अली जौहर पर शोधकर्ता एवम उनकी जीवनी और शैली के बारे में जानने वाले बहुत से आचार्य व शोधकर्ता समय समय आते रहते हैं। और संस्थान की लाइब्रेरी में मौजूद मोलाना मोहम्मद अली जौहर पर साहित्य का उपयोग करते हैं। एवम समय समय पर मौलाना मोहम्मद अली जौहर पर सेमिनार भी प्रस्तुत किये जाते हैं।”

(ix) The purpose behind the establishment of Research Institute was never frustrated as the Minority Welfare and Waqf Department of the State Government, vide Office Memorandum dated 03.03.2015, itself permitted substitution of the objects mentioned in the detailed project report/ Chief Minister Declaration, at point no.16 thereof, in the following manner:-

3. तदनुसार श्री राज्यपाल महोदय मौलाना मोहम्मद अली जौहर प्रशिक्षण एवं शोध संस्थान, रामपुर के लिए निर्धारित किये गये उद्देश्यों के बिन्दु सं०-16 पर अंकित उद्देश्य जो ऊपर प्रस्तर-1 पर अंकित है के स्थान पर निम्नलिखित उद्देश्य प्रतिस्थापित करने की सहर्ष अनुमति प्रदान करते हैं:-

“वर्तमान में उर्दू, अरबी तथा फारसी भाषा में गुणात्मक सुधार, शोध कार्य, नियोजन तथा ज्ञानवर्धन अत्यन्त सीमित हो गया है साथ ही अल्पसंख्यकों में प्राथमिक व माध्यमिक शिक्षा में भी गुणात्मक सुधार की आवश्यकता है। अतः इस बिन्दु को दृष्टिगत रखते हुए संस्थान में प्राथमिक व माध्यमिक शिक्षा के समस्त विषयों के साथ-साथ उर्दू

अथवा अरबी व फारसी विषयों में शिक्षा की व्यवस्था करना एवं शोध कार्य कराना।

4. मौलाना मोहम्मद अली जौहर प्रशिक्षण एवं शोध संस्थान, रामपुर के लिए निर्धारित किये गये शेष उद्देश्य यथावत् रहेगें।”

(x) Such decision of the State Government was implemented and Schedule II was attached by executing a supplementary lease deed on 22.05.2015. The S.I.T. report itself indicates that the State Government had transferred the land to the Research Institute in August, 2004 and since the Government was not able to accomplish the objects set out behind establishment of Research Institute, the petitioner-trust, which is a society registered under the Societies Registration Act, 1860, since 1995, took over the building pursuant to resolutions passed and decision taken by the Government, as noted in the counter affidavit itself.

CASE LAW CITED ON BEHALF OF THE PETITIONER

13. Learned senior counsel for the petitioner, in support of his submissions, has placed reliance upon the following authorities:-

(i) Deepak Ananda Patil Vs. State of Maharashtra and others¹;

(ii) Dipak Babaria Vs. State of Gujarat & others²;

(iii) UMC Technologies Private Limited Vs. Food Corporation of India and another³;

(iv) Harbanslal Sahnia and another Vs. Indian Oil Corporation Ltd. and others⁴;

(v) 63 Moons Technologies Limited (Formerly Known as Financial

Technologies India Limited) and others Vs. Union of India and others⁵;

(vi) Kaushal Kishore Vs. State of U.P.⁶;

(vii) Mohinder Singh Gill Vs. Chief Election Commissioner⁷;

(viii) Sachidanand Pandey Vs. State of West Bengal⁸;

(ix) Re Natural Resources Allocation⁹;

(x) Electrosteel Castings Ltd. Vs. U.V. Asset Reconstruction Company Ltd¹⁰.

SUBMISSIONS ON BEHALF OF THE STATE-RESPONDENTS

14. On the other hand, learned Advocate General, assisted by State Counsel, has structured his arguments mainly under the following heads:-

(i) Mohammad Azam Khan was the Cabinet Minister during the period entire exercise for grant of lease took place. He used his power and influence in securing long term lease of 99 years of valuable State land & building, built from State fund, for his own Trust. He played the role of granter and was also the beneficiary. This was a direct conflict of interest and it renders the entire exercise void ab initio.

(ii) The petitioner has approached the Hon'ble Court with unclean hands by concealing material facts, deserving dismissal of the petition on this count alone, as justice and fraud cannot dwell together and fraud vitiates even a solemn act.

(iii) Alleged breach of principles of natural justice would be of no significance, as setting aside of the impugned action on this ground would revive and restore the illegal grant and orders, disentitling the petitioner to any discretionary relief.

(iv) There is flagrant violation of provisions of U.P. Revenue Manual

regarding grant of lease and fixation of rent etc.

(v) Creation of temporary posts for running Research Institute and then abolishing them for the purpose of establishing a school instead of Research Institute, was a ploy.

15. Elaborating the arguments on the above noted points, it has been contended that the Cabinet Minister was holding the portfolio of Ministry of Urban Development, and Parliamentary Affairs (w.e.f. 28.08.2003 till 13.05.2007) and Minister for Minority Welfare and Waqf (w.e.f. 15.03.2012 to 19.03.2017). Under a pre-meditated design, he, by abusing his position and power as a Cabinet Minister, succeeded in usurping highly valuable State land & building, for his own private Trust in the garb of reviving and advancing the objectives of the Research Institute. However, that was never the intention and, therefore, no effort was ever made in that direction. Rather, the Government building and land was utilized for establishing "Rampur Public School" by private Committee of Management, controlled by his family members. The abuse of public office held by him was to such extent that he himself determined & fixed premium of the demised land and building worth 20.44 crores as Rs.1000/- only & annual lease rent as Rs.100/-. This was in complete defiance of the Cabinet decision dated 20.11.2014 that duration of lease and lease rent would be determined/fixed separately as per relevant rules. The relevant extract of Office Memorandum dated 20.11.2014 as well as Cabinet resolution dated 20.11.2014 is as below:-

(5) मौलाना मोहम्मद अली जौहर प्रशिक्षण एवं शोध संस्थान, रामपुर की भूमि एवं भवन का मूल्य जो प्रचलित नियमों के अन्तर्गत निर्धारित होगा, के सापेक्ष निर्धारित

धनराशि का नियमानुसार सांकेतिक मूल्य/राशि राज्य सरकार को दिये जाने के संबंध में उभय पक्षों के मध्य अनुबन्ध कर निष्पादित किया जायेगा।

(6) मोहम्मद अली जौहर ट्रस्ट से सम्बद्ध की जा रही/लीज पर दी जा रही मौलाना मोहम्मद अली जौहर प्रशिक्षण एवं शोध संस्थान, रामपुर की भूमि एवं भवन की लीज की अवधि एवं लीज रेन्ट का निर्धारण पृथक से नियमानुसार किया जायेगा।

(emphasis supplied)

16. It has further been argued that no advertisement inviting applications from public at large for settlement of lease and management of the Research Institute was ever published. The Cabinet Minister of the concerned department, in a completely surreptitious manner, succeeded in getting the lease and management rights of the Research Institute settled in favour of his family Trust. The long period of lease of 99 years and the one-sided terms of lease were tailor made to ensure conferment of rights of permanent nature in favour of his family trust.

17. It is contended that in the entire writ petition, it has not been disclosed anywhere that Mohd. Azam Khan was the Cabinet Minister at the time when the entire exercise of execution of lease and conferment of management rights in the Training Institute, in favour of the petitioner-Trust took place. It is also not disclosed that he himself was the beneficiary of the allotment made and that the petitioner has also suppressed information regarding the proceedings undertaken by S.I.T. though the petitioner was well aware of the same. The argument

is that the deliberate act of concealment of material facts has rendered the petition liable to dismissal solely on the ground of suppression of material facts as it is an act of abuse of the process of the Court. Reference to Chapter XIX of U.P. Revenue Manual, particularly Clauses 361, 366 and 368, has been made regarding procedure to be followed while fixing lease rent and duration thereof. It is contended that in cases involving concession in favour of the lessee regarding lease rent or premium, the matter has to be submitted before the State Government, which procedure has not at all been followed in the present case. Moreover, fixation of period of lease as 99 years was also without any approval of the Cabinet. It is further argued that posts created to be filled up by Government Officers for achieving the objectives of the Research & Training Institute, vide Government Order dated 1st August 2006, were directed to be abolished under pressure of the Cabinet Minister. Breach of terms and conditions contained in the lease deed dated 04.02.2015 has been elaborately argued stating that Research Institute never came into existence according to the terms of the lease, no permission to open & run "Rampur Public School" was obtained and the aim was profiteering & amassing wealth by misusing Government Land & Building meant for Government Research Institute. It has further been argued that no fair and transparent procedure was ever followed for allotment/leasing of the land/building in question and the petitioner has not brought on record any pleading or document to demonstrate that any legally recognized procedure was ever followed prior to the allotment of the land in question. The property in question belongs to State Government and is a public

property. Hence, it was the Cabinet Minister's public duty to ensure that the property was allotted in favour of eligible person by following the procedure laid down by the State Government. However, he misused his power to procure lease for his family trust, at a throw-away price.

CASE LAW CITED ON BEHALF OF THE RESPONDENTS

18. Learned counsel for the respondents has placed reliance upon the following authorities:-

- (i) Secretary, Jaipur Development Authority Vs. Daulat Mal Jain¹¹;
- (ii) State (NCT of Delhi) Vs. Union of India¹²;
- (iii) Common Cause Vs. Union of India¹³;
- (iv) Institute of Law, Chandigarh Vs. Neeraj Sharma¹⁴;
- (v) Ram & Shyam Co. Vs. State of Haryana¹⁵;
- (vi) Satluj Jal Vidyut Nigam Vs. Raj Kumar Rajinder Singh¹⁶;
- (vii) K.D. Sharma Vs. Sail¹⁷;
- (viii) Satyan Vs. Deputy Commissioner and others¹⁸;
- (ix) State of U.P. Vs. Sudhir Kumar Singh¹⁹;
- (x) Bishambhar Prasad Arfat Petrochemicals²⁰;
- (xi) Gadde Venkateswara Rao Vs. Govt. of A.P.²¹;
- (xii) M.C. Mehta Vs. Union of India²²; and
- (xiii) 63 Moons Technologies Ltd. (Formerly Known as Financial Technologies India Limited) and others Vs. Union of India²³.

THE ISSUES

19. From perusal of pleadings of the parties, documents annexed to various affidavits as well as the record produced before this Court and after hearing learned counsel for parties at length, following broad issues emerge for consideration of this Court and discussion on the same would cover all the contentions raised by the respective parties:-

(i) Whether the initial grant made by the previous Government in favour of the Petitioner-Trust was void ab initio?

(ii) Whether there was violation of principles of natural justice as would render the impugned decision(s) of the present State Government a nullity ?

(iii) Whether discretionary and equitable jurisdiction of High Court under Article 226 of the Constitution of India should be exercised in the facts and circumstances of the instant case ?

PRODUCTION AND PERUSAL OF THE ORIGINAL RECORD

20. During the course of arguments, the original record was produced before the Court on 08.12.2023. By the order dated 08.12.2023, we permitted Sri Amit Saxena, learned Senior Counsel for the petitioner, along with his assisting counsel, to peruse the record and take notes, if needed. Learned counsel for both sides were given full opportunity to refer to the original record during the course of hearing. With the assistance of learned counsel for both the sides, the Court noted certain aspects from the original record, which will be referred to while analysing the arguments.

ANALYSIS

Issue No.1

21. The fundamental question is whether the initial grant made by the previous Government in favour of the Petitioner-Trust was void ab initio. It would be advantageous to first advert to certain proceedings from the original record and the counter affidavit.

22. The State Government decided to establish a Training and Research Institute at Rampur to provide fillip to Urdu, Arabi and Farsi languages. For achieving the said objective, it transferred 1.314 hectare of land of District Jail, Rampur to Department of Minority Welfare and Waqf, State of U.P. vide G.O. No. U.O.-53/22-4-2-2004 August 2004 for establishment of Training and Research Institute in the name of Maulana Mohd. Ali Jauhar Training and Research Institute, Rampur. A detailed project report was got prepared setting out the objectives of the Research Institute. The building of the Research Institute was got constructed on the said land in pursuance of G.O. No. 1690/52-2-2005-2(47)/2005, dated 24.10.2005. The Construction and Design Services, U.P. Jal Nigam was given the task of constructing the building of the Research Institute at an estimated cost of Rs. 9.44 crores. Eighty percent of the work was duly completed by the Construction Agency. On 1.8.2006, a G.O. was issued creating 21 temporary posts for the Research Institute. The post of Director of the Research Institute was conceived to be equivalent to the post of Professor and was to be filled up by transfer/deputation by the Department of Minority Welfare and Waqf, Government of U.P. Rest of the 20 temporary posts were to be filled up from Provincial Civil Services, Economic Statics Wing of the Department of Planning by deputation/transfer, till Service Conditions were laid down and regular appointments were made. Abruptly,

on 10.12.2012, the then Chief Minister announced in a public meeting that the Research Institute would be attached to Maulana Mohd. Ali Jauhar University. The decision was communicated vide Mukhya Mantri Ghoshna dated 9.12.2012. The original record reveals that on 30.1.2013, the Section Officer of Minority Welfare and Waqf Department sent a request to the Deputy Secretary of the State for creation/sanction of 21 posts in the Research Institute. Just below the aforesaid noting is a noting dated 13.02.2013 made by Cabinet Minister (Minister of Urban Development, Parliamentary Affairs, Minority Welfare and Waqf), to the following effect:-

“मा० मंत्री जी

(क.) इस सम्बन्ध में विदित रहे कि उक्त

मौलाना मोहम्मद अली जौहर शोध संस्थान के बारे में मा० मुख्य मन्त्री जी द्वारा मौहम्मद अली जौहर ट्रस्ट को मोहम्मद अली जौहर विश्वविद्यालय से सम्बद्ध करने की घोषणा रामपुर से की गयी है। तथा आवश्यक है कि दोनों बिन्दुओं पर एक साथ निर्णय लेना चाहें।

ह० मो० आजम”

(मो० आजम खाँ)

मंत्री

संसदीय कार्य, मुस्लिम वक्फ, नगर

विकास,

जल सम्पूर्ति, नगरीय रोजगार एवं

गरीबी उन्मूलन,

अल्पसंख्यक कल्याण एवं हज,

उत्तर प्रदेश शासन।

23. It is apparent from the aforesaid noting, written and signed by the

Cabinet Minister himself that he wanted the attachment of Research Institute with Mohammad Ali Jauhar University and, hence, requested for decision being taken in this regard along with decision for creation of posts.

24. At this stage, it would be interesting to note how the said University, i.e. Mohammad Ali Jauhar University was established and who controls it. It is a creature of Mohammad Ali Jauhar University Act, 2005 (U.P. Act No.19 of 2006) passed by the U.P. Legislature during the period Mohd. Azam Khan was a Cabinet Minister holding the portfolio of Minister of Urban Development and Parliamentary Affairs. The Statement of Objects and Reasons behind such enactment reads as follows:-

“Prefatory Note- Statement of Objects and Reasons.- Urdu language is spoken as mother tongue by a particular section of the society of Uttar Pradesh. The Urdu language is required to be developed in such a way that any person of the society may continue their study to the higher stage of learning in Urdu literature including Arabi and Farasi languages. There is no University under the control of State wherein higher study or Urdu, Arabi and Farasi language and research therein could be facilitated to the persons who are interested in Urdu, Arabi or Farasi language. The Maulana Mohammad Ali Jauhar Trust, Lucknow has sponsored for the establishment of such University. It has, therefore, been decided to establish a University sponsored by the said Trust to be known as Mohd. Ali Jauhar University at Rampur in the State of Uttar Pradesh to provide advance knowledge and wisdom and understanding by teaching and research in Urdu, Arab and Farasi languages to the scholar.

The Mohd. Ali Jauhar University Bill, 2005 is introduced accordingly.”
(emphasis supplied)

25. It is apparent from the Statement of Objects and Reasons that the petitioner-Trust was a sponsor for establishment of the University at Rampur. The Act defines “Trust” under Section 2(r), as follows:-

“2(r) “Trust” means Maulana Mohammad Ali Jauhar Trust, Lucknow, Uttar Pradesh registered under the Societies Registration Act, 1860.”
(emphasis supplied)

26. Section 10 of the Act describes Officers of the University, namely, the Chancellor; the Vice-Chancellor; the Pro-Vice-Chancellor; Directors/ Head of the Institutions; the Registrar; the Treasurer; the Deans of Faculties; the Dean of Students’ Welfare; the Proctor; the Finance Officer; and such other Officers as may be declared by the Statutes to be officers of the University. Interestingly, the Chancellor and Vice-Chancellor of the University have been defined under Sections 11 and 12 of the Act, as follows:-

“11. The Chancellor.- (1) The Chairman of the Maulana Mohammad Ali Jauhar Trust (Registered) shall be the Chancellor of the University till such time as determined from time to time by the Trust.

(2) The Chancellor shall, by virtue of his office, be the Head of the University.

(3) The Chancellor shall, if present, preside at the Convocation of the University held for conferring degrees.

(4) Other powers and functions of the Chancellor shall be such as may be prescribed.

12. **Vice-Chancellor.-** (1) The Vice-Chancellor shall be appointed by the Chancellor with the prior approval of the Trust for such period as may be prescribed.
.....”
(emphasis supplied)

27. It is very much clear that the Chairman of the petitioner-Trust shall be the Chancellor of the University and, by virtue of his office, he shall be the Head of the University and he himself is the Appointing Authority of the Vice-Chancellor. There is no dispute about the fact that the Cabinet Minister is the Lifetime Chairman of the petitioner-Trust and, therefore, the University, though established under a State Legislation was/is under his full control and command.

28. Further proceedings on record demonstrate that, time and again, different departments of the Government forwarded the file from one office to other seeking opinion with respect to affiliation/ attachment of the Research Institute with Jauhar University. Sri Surya Prakash Singh Sengar, Deputy Secretary of Higher Education, Government of U.P., on 31.05.2013, clearly opined that there was no provision for attachment of an institution established by Government with a private University established under Maulana Mohammad Ali Jauhar University Act, 2005 and, accordingly, the file was directed to be returned to the Minority Welfare and Muslim Wakf Department for requisite approval to the said decision. The matter did not rest there and the file was again moved from one office to other emphasizing the need on the attachment/ affiliation of the Research Institute with the University. Ultimately, the matter was referred for opinion of the Advocate General on 22.01.2014, however, noticing

that there was no law under which the Research Institute could be attached with/affiliated to a private University, merely to fulfill the declaration (*ghoshana*) made by the Chief Minister.

29. A very interesting feature of the decision to obtain opinion from the Advocate General stands reflected from record, that is to the effect that the declaration made by the Chief Minister with respect to attaching/affiliating the Research Institute with Jauhar University was substituted by an “amended declaration” to attach the Research Institute with Mohammad Ali Jauhar Trust (petitioner-Trust) and the officials of the State Government clearly recorded in the reference proceedings dated 22.01.2014 that there was no law or even instance under which any Government institution had ever been attached to a private institution/ trust. Then, the Advocate General submitted his opinion dated 24.05.2014 stating that there appears to be no legal impediment in attachment/ leasing out of Research Institute with/to the petitioner trust with a further opinion that the said attachment/ leasing out would be in public interest as it would help in achieving the common objectives of these organisations and to create supplementary resources for assisting the State Government in providing quality higher education, mainly in the field of Urdu language. As such, in fact, the Advocate General approved the decision to lease out the property of the Research Institute in alleged public interest. Even after such opinion, there was difference of opinion amongst Government Officials and the file was again placed before the Advocate General who furnished second legal opinion on 21.06.2014 stating that previously furnished opinion was clear and

unambiguous and he expected the administrative department to act in accordance with the opinion already given.

30. The next proceeding on record, drawn on 24.06.2014, is of great relevance. It takes note of ‘conflict of interest’ in case the lease is granted to the petitioner-Trust. Sri Dharm Raj Singh, Deputy Secretary of the Minority Welfare Department of U.P. Government, observed that various policy, procedural and financial complications would arise in the event of attachment of the Research Institute with the petitioner-trust and, therefore, suggested for obtaining opinion of the Revenue and Law Department. Reference to certain decisions of Hon’ble Supreme Court was also made in the noting dated 24.06.2014 stating that the land and the building concerned, being the property of Minority and Welfare Department and, at the relevant time, Mohd. Azam Khan, being the Cabinet Minister of the same Department as well as the person taking all important decisions in the matter relating to transfer of land/ building to the trust, there would be ‘conflict of interest’. It would give rise to various complaints and legal complications. It was also observed that in past also, not only such allotments had been cancelled but departmental proceedings were also launched against the officials during whose regime such decisions were taken. Ultimately, the matter was referred to the Revenue and Legal Department formulating following four points for further consideration:-

- (i) Policy aspect;
- (ii) Procedural aspect;
- (iii) Financial aspect; and
- (iv) Conflict of interest aspect

31. Each of the aforesaid aspects carries considerable importance in the present case. We first refer to the financial

aspect about which the concerned ministry was of the clear opinion that the market value of the land over which the Research Institute exists, was Rs.5.51 crores and the structure worth Rs.9.44 crores exists over it. Therefore, the value of the property being approximately Rs.15 crores, it would require payment of Rs.20.44 crores in the event of grant of lease and as to whether the trust is agreeable to the same, is not clear.

32. As far as conflict of interest is concerned, following noting needs reference:-

(4) Conflict of interest सम्बन्धित पहलू - उल्लेखनीय है कि प्रश्नगत शोध संस्थान की भूमि एवं भवन अल्पसंख्यक कल्याण विभाग की सम्पत्ति है। वर्तमान में मा० आजम खां जी अल्पसंख्यक कल्याण विभाग के मा० मंत्री हैं। प्रश्नगत जौहर ट्रस्ट जिसे संस्थान को लीज/सम्बद्धता पर देने का प्रकरण विचाराधीन है, में भी मा० मंत्री जी स्वयं तथा उनके परिवार के सदस्य मुख्य पदाधिकारी हैं। इस प्रकार प्रकरण में मा० मंत्री जी लाभ के पक्षकार भी हैं तथा निर्णय लेने हेतु महत्वपूर्ण प्राधिकारी भी हैं। इस प्रकार अल्पसंख्यक कल्याण विभाग द्वारा ही ट्रस्ट को भूमि/भवन का स्वामित्व स्थानान्तरित करने की प्रक्रिया सम्भवतः कनफ्लिक्ट आफ इन्टरेस्ट Conflict of interest से बाधित हो सकती है, जो कि बाद में विभिन्न शिकायतों व कानूनी पेचीदगियों में फँस सकती है।

6- उल्लेखनीय है कि इस प्रकार के प्रकरण पूर्व में शासन के राजस्व विभाग में

व्यवहृत हुए हैं जिसमें शासन द्वारा इस प्रकार भूमि आवंटन को विपरीत प्रकार से लेते हुए आवंटन निरस्त ही नहीं किया बल्कि सम्बन्धित अधिकारियों के विरुद्ध भी कार्यवाही हुई थी। अतः यह परीक्षण आवश्यक है कि पूर्व में इस प्रकार के प्रकरण में आवंटन निरस्त करने हेतु जो भी विधिक परामर्श दिया गया होगा उसका प्रभाव इस प्रकरण पर तो नहीं पड़ेगा।?

उपरोक्त बिन्दुओं पर विचार करते हुए ही इस पर निर्णय लेना उचित होगा। महोदय यदि सहमत हों तो इस पर राजस्व विभाग तथा न्याय विभाग का परामर्श प्राप्त कर अग्रिम कार्यवाही की जाय।

(emphasis supplied)

33. It is interesting to note that Sri Shri Prakash Singh, Secretary of the Department, retired on 31.07.2014. However, he was granted extension of service. Soon thereafter, he puts up a note dated 13.10.2014 recording that there was no justification for seeking opinion from the Revenue and Legal Departments as Advocate General had twice given his opinion in favour of the attachment/ lease. The explanation given by him for making such recommendation was that by creation of lease, title in land and building would not get transferred in favour of the petitioner-Trust but would remain with the State Government. Therefore, there was no question of 'conflict of interest' as in case the trust fails to achieve the objects set out, the State Government would have full right to cancel the lease before expiry of term and take possession of the property.

34. Therefore, the matter that began with the concept and vision of establishment of Research Institute, moved

to the attempt of the State Government to attach the same with Jauhar University and, when it failed, shifted to settlement of lease hold rights in the land and building of the Research Institute in favour of the petitioner-trust. What happened later on, would stand reflected from further proceedings, described herein below.

35. It is apt to refer to the proceedings dated 17.10.2014 drawn by the Joint Secretary of the Minority Welfare and Waqf Department. In para 10 thereof, need to lease out property of the Research Institute to the petitioner-trust and to obtain an opinion from the Legal Department was felt. On 25.10.2014, the Secretary, Minority Welfare and Muslim Waqf, U.P. Government granted approval for placing the matter relating to leasing out of the Research Institute in favour of the petitioner-trust before the Chief Minister for approval and, thereafter, by the Cabinet. The said proposal of the Secretary, Minority Welfare and Muslim Waqf, U.P. Government was approved by the Chief Secretary on 14.11.2014. Thereafter, the record reveals that a note was prepared containing opinion of different departments for being placed before the Cabinet in relation to proposal for leasing out the Research Institute in favour of the petitioner-trust. The note which was to be put up before the Cabinet was approved by the Cabinet Minister himself, in his capacity as Minister, Parliamentary Affairs, Muslim Waqf, Urban Development, Water Supply, Urban Employment and Haj. The Finance Department, then, on 19.11.2014, proposed that in case of attachment of the Research Institute with the Trust, the posts initially created for the Research Institute, would be of no use (anupyogi) and be abolished and period of lease as

well as lease rent be determined in accordance with law.

36. At page 106 of the original record, it is noted that the proposal for leasing out the Research Institute in favour of the petitioner-trust was placed before the Cabinet on 20.11.2014, vide item No.2 and it was approved by the Cabinet. The note also mentions that in accordance with the comments of the administrative wing contained at paragraph no.13, an office memorandum has been prepared and that the note be put up for approval by the concerned Secretary. On the same date, on 20.11.2014, it was approved by the Joint Secretary, Minority Welfare and Waqf Department, U.P. Government. Also, on the same date, an office memorandum dated 20.11.2014 (Annexure-3 to the counter affidavit) was issued relating to grant of lease of the Research Institute in favour of the petitioner-trust, subject to the condition, inter alia, that the lease would become effective from the date of execution of the lease deed; the petitioner-trust would use the land and building of the Research Institute for advancing the objectives of the Research Institute, failing which the Government shall have right to determine the lease; the decision relating to fixation of lease rent would be taken subsequently having regard to the prevalent rules; 21 posts created at the time of establishment of the Research Institute being of no use, would stand abolished; and that period of lease and lease rent would be determined as per Rules 1/4yht+ dh vof/k ,oa jsUV fu/kkZj.k fu;ekuqlkj dj;k tk;sxk½.

37. It is evident from the above, that within a short span of just one week, all objections were overruled and the matter was put up before the Cabinet and its consent obtained. Sri Shri Prakash

Singh, the Secretary of the Department, who was granted extension, played the prime role to see that the entire transaction materialises as per the desire of the Cabinet Minister.

38. Then, on 08.12.2014, a decision was proposed in respect of following four points:-

(i) What should be the period of lease granted to the Trust;

(ii) Considering the value of the property being Rs.20.44 crores, what would be token money required to be deposited;

(iii) The amount of annual lease rent; and

(iv) Period of renewal of lease with percentage of increment in the lease rent.

39. On the same date, on 08.12.2014, an office note was got put up by Shri Rakesh Kumar Mishra, Special Secretary to the effect that the opinion of Revenue and Finance Departments would not be required as the same had already been obtained while putting the matter before the Cabinet. It also mentions that Rs.100/- be proposed as annual lease rent and a notional premium be also proposed. The said note was put on the very next date, i.e. on 09.12.2014, before the same Special Secretary, namely, Shri Rakesh Kumar Mishra mentioning the necessity of obtaining opinion from the Revenue and Finance Departments in respect of four points enlisted above and he approved the same, overlooking his own note dated 08.12.2014. In pursuance thereof, an office note was prepared proposing a notional premium of Rs.1,000/- only for creation of lease in favour of the petitioner-trust for property worth Rs.20.44 crores and lease rent of Rs.100/- per annum apart from other conditions of lease finalized earlier. The

proposal for fixation of premium of Rs.1,000/- for property value of Rs.20.44 crores, as per the said note, came into existence for the first time vide the aforesaid note. It was approved by the Deputy Secretary and the same Special Secretary Sri Rakesh Kumar Mishra on the same day and, thereafter, the matter was sent to Finance and Law Departments.

40. At page 114-115 of the record, there is a note/report prepared by Special Officer-II, Law Department, U.P. Government to the effect that pursuant to previous proceedings, an office memorandum dated 20.11.2014 was issued and that copy of registration certificate of the petitioner-trust, memorandum of association, bye-laws and project report concerning the Research Institute have been made available. The note/ report further mentions that upto then, approval from the Finance Department qua lease deed had not been obtained and name of the petitioner-trust in the office memorandum dated 20.11.2014 was not as per the registration certificate. The Special Secretary opined that before executing the lease deed, the name of the petitioner-trust be amended, Schedules II and III be attached along with lease deed, approval be obtained from the Finance Department, blanks in the deed be filled up and, lastly, the vetting fees be deposited.

41. Then comes in light very important proceedings in the matter. Sri Jai Prakash Pandey, Joint Secretary of Minority Welfare Department drew those proceedings on 26.12.2014 to the following effect:-

“कृपया गतपृष्ठ पर राजस्व विभाग की टिप्पणी का अवलोकन करें। इस पत्रावली में

मौलाना मोहम्मद अली जौहर शोध संस्थान को मौलाना मोहम्मद अली जौहर विश्वविद्यालय से सम्बद्ध/लीज पर दिये जाने का प्रकरण विचाराधीन है। प्रश्नगत प्रकरण मा० मंत्रि-परिषद के समक्ष दिनांक 20.11.2014 को प्रस्तुत किया गया था और अनुमोदन प्राप्त होने पर कार्यालय ज्ञाप दिनांक 20.11.2014 निर्गत किया गया।

2- मा० मंत्रि-परिषद द्वारा लिये गये निर्णय के अनुपालन में मौलाना मोहम्मद अली जौहर प्रशिक्षण एवं शोध संस्थान को मौलाना मोहम्मद अली जौहर ट्रस्ट के साथ सम्बद्ध/लीज पर दिये जाने हेतु पट्टा विलेख का आलेख तैयार किया गया और उस पर न्याय विभाग एवं वित्त विभाग की सहमति प्राप्त करने हेतु पत्रावली संदर्भित की गयी। न्याय विभाग द्वारा पृष्ठ-114-118 पर अपनी सहमति व्यक्त करते हुये पट्टा विधीक्षण से पूर्व आलेख्य पर कतिपय संशोधन/कार्यवाही कराने की अपेक्षा की गयी। वित्त विभाग का परामर्श पृष्ठ-119 से 123 पर प्राप्त हुआ। वित्त विभाग द्वारा अपनी सहमति व्यक्त करते हुये यह भी परामर्श दिया गया कि प्रशासनिक विभाग लीज रेण्ट/ लीज की अवधि के निर्धारण पर राजस्व विभाग का सहमति/अनापत्ति प्राप्त कर लेंगे।

3- राजस्व विभाग का परामर्श पृष्ठ-126 पर प्राप्त हुआ, जिस पर उन्होंने पृष्ठ-92 के प्रस्तर-4 में अंकित परामर्श के अनुसार अनापत्ति देते हुये पत्रावली वापस की गयी। उल्लेखनीय है कि प्रश्नगत प्रकरण में 02 मुख्य बिन्दु विचाराधीन है। प्रथम यह कि मौलाना

मोहम्मद अली जौहर प्रशिक्षण एवं शोध संस्थान, रामपुर की भूमि एवं भवन का प्रचलित नियमों के अनुसार मूल्य लगभग 20.44 करोड़ निर्धारित होता है, जिसके सापेक्ष सांकेतिक धनराशि के रूप में कितना रूपया ट्रस्ट से जमा कराया जाय और लीज रेण्ट क्या रखा जाय। इस लीज की अवधि कितने वर्ष की रखी जाय।

4- इस संबंध में पृष्ठ-110 पर सचिव महोदय के आदेश के उपरान्त विभाग द्वारा पृष्ठ-111 से 113 पर टिप्पणी अंकित की गयी है, जिसमें पट्टा विलेख में निर्धारित अन्य शर्तों के साथ सांकेतिक मूल्य रु० 1000/- (रूपये एक हजार मात्र) एवं लीज रेण्ट रु० 100/- (रूपये एक सौ मात्र) वार्षिक एवं प्रत्येक नवीनीकरण के समय 10 प्रतिशत लीज रेण्ट में वृद्धि करने का प्रस्ताव किया गया। लीज की अवधि 99 वर्ष अर्थात् 33 वर्ष एवं 33-33 वर्ष के 02 नवीनीकरण सहित रखने का प्रस्ताव भी किया गया। उक्त प्रस्ताव के उपरान्त न्याय विभाग, वित्त विभाग एवं राजस्व विभाग की सहमति/परामर्श प्राप्त किया गया, जो प्रस्तर-2 एवं प्रस्तर-3 में उल्लिखित है।

5- चूँकि सांकेतिक मूल्य की धनराशि, वार्षिक लीज रेण्ट की धनराशि एवं लीज की अवधि के संबंध में तीनों विभागों द्वारा कोई स्पष्ट अभिमत नहीं दिया गया है वरन् अनापत्ति व्यक्त कर दी गयी। अतः उपरोक्त विभाग द्वारा किये गये प्रस्ताव पर मा० मंत्री जी एवं मा० मुख्य मंत्री जी का अनुमोदन प्राप्त करके निर्णय लिया जाना है ताकि तदुसार पट्टा विलेख के रिक्त स्थानों की पूर्ति करते हुये पट्टा विलेख न्याय

विभाग से विधीक्षित कराया जा सके और अग्रेतर कार्यवाही की जा सके।

कृपया उपरोक्त स्थिति से अवगत होते हुये गत पृष्ठ के प्रस्तर-4 पर मा० मंत्री जी के माध्यम से मा० मुख्य मंत्री जी का अनुमोदन/आदेश प्राप्त करना चाहें ताकि तदुसार अग्रेतर कार्यवाही की जा सके। ”

(emphasis supplied)

42. Just below the aforesaid, following noting was made by Sri Shri Prakash Singh, Secretary of the Minority Department on 27.12.2014, seeking approval from the Urban Development Minister and Hon'ble Chief Minister in respect of paragraph no.4:-

“क”{ “वि०सचिव

सचिव उक्त टिप्पणी का अवलोकन करना चाहे तथा उक्त टिप्पणी के प्रस्तर-4 (गतपृष्ठ-127) पर मान० नगरविकास मंत्रीजी तथा मान० मुख्यमंत्री जी का अनुमोदन प्राप्त करना चाहे।”

(emphasis supplied)

43. Just below the said noting, the Cabinet Minister in his own handwriting, requested the Urban Development Minister to make arrangement for girls education. The said noting dated 01.01.2015 written and signed by the Minister reads as follows:-

“मा० नगर विकास मंत्री जी

कृ. उच्च वर्ग की शिक्षा के लिये जिसके लिये रामपुर मे बहुत कुछ किया गया है। बच्चियों की व्यवस्था के बाद नौनिहालों के

लिये किये जाने वाले उदगार का धन्यवाद करते हुए निर्णय लेना चाहें।”

(emphasis supplied)

44. Then, on 27.01.2015, the Cabinet Minister, in his own handwriting made an endorsement approving the proposal at “क”, i.e. the note of the Secretary of his own Ministry for seeking approval of the Urban Development Minister and Chief Minister in respect of proposal No.4 at page 127 (4प्रस्तर-4 पृष्ठ-127)24. The proposal no.4 at page 127 was regarding fixation of notional premium of Rs.1,000/- and annual rent of Rs.100/- and its enhancement by 10% at the time of renewal after 33 years. The reason given by the Minister for the aforesaid approval was that the decision in relation thereto was already approved by the Cabinet. The note is as under:-

“मा० मंत्री,

अल्पसंख्यक कल्याण

अवगत तथा (क) अनुमोदित जैसा कि मा०- मंत्री परिषद द्वारा स्वीकृत किया गया है।

ह० मो० आजम खां

27.01.2015”

45. It may be noted here that the only approval given by the Cabinet was to item No.2 regarding creation of lease in favour of the petitioner-trust and to work out the modalities in respect of fixation of premium of the lease and lease rent as per extant Rules. It is noteworthy that the Cabinet Minister, deliberately or by oversight, assuming the said approval to be the approval granted by the Cabinet to the premium amount and lease rent, himself proceeded to accord approval to the

proposal made in this behalf. While doing so, he conveniently overlooked the consistent notings on the file for getting the premium value and lease rent fixed after seeking opinion of the Revenue and Finance Departments keeping in mind the relevant rules.

46. From the aforesaid proceedings, it is clear that there was no clear approval, either from the Law Department or from the Finance Department or Revenue Department with respect to fixation of lease rent or other financial aspects except the alleged approval granted by the Cabinet Minister himself on 27.01.2015. It is, therefore, established that the Minister himself was the proposer as well as approver of the decision relating to duration of lease as well as lease rent amount.

47. Then, just after two days, on 29.01.2015, the Special Officer-II, Law Department of U.P. Government, records on the file that the draft lease deed has already been vetted and, therefore, proceedings in accordance with the previous decision be undertaken. On 04.02.2015, a lease deed was executed between the State and the petitioner-Trust. We may record here that from the first page of the lease deed dated 04.02.2015 itself, it is clear that the same was executed on the request of the lessee, i.e. the petitioner-Trust. Apparently, Mohd. Azam Khan, being lifetime Chairman of the said Trust, was proposer behind the creation of lease and he himself was the beneficiary of the lease granted. The request of the lessee stands clearly reflected from the words "और चूँकि पट्टादाता ने पट्टेदार के अनुरोध पर जनपद रामपुर के ग्राम ठोठर की खतौनी नान जेड०ए० के खाता संख्या-46 की गाटा

संख्या..... कुल 8 किता रकबा 1.314 हे० जो मौलाना मोहम्मद अली जौहर प्रशिक्षण एवं शोध संस्थान, (अल्पसंख्यक कल्याण एवं वक्फ विभाग) के नाम श्रेणी 12(4) अन्य कारण अकृषिक भूमि के अन्तर्गत दर्ज अभिलेख है, तथा जिसमें 4252.07 वर्ग मी० निर्मित क्षेत्रफल एवं 8887.93 वर्ग मी० अनिर्मित (ओपेन) क्षेत्र है जिसका विवरण इस पट्टा - विलेख की अनुसूची में दिया गया है, को पट्टे पर पट्टेदार को देने पर सहमति व्यक्त किया है; और चूँकि उक्त भूमि पर अल्पसंख्यक कल्याण एवं वक्फ विभाग, उत्तर प्रदेश के अधीन मौलाना मोहम्मद अली जौहर प्रशिक्षण एवं शोध संस्थान, रामपुर का भवन स्थित है; और चूँकि इस निमित्त उत्तर प्रदेश सरकार (जिसे एतदपश्चात् "राज्य सरकार कहा गया है") कार्यालय ज्ञाप संख्या -- 1715/52-2-2014-2(102)/ 2013, दिनांक 20 नवम्बर, 2014 द्वारा पट्टेदार के नामे अभिव्यक्त अधिकारी, निर्बन्धनो एवं विभिन्न प्रसंविदाओं तथा अनुबंधो के अधीन मौलाना मोहम्मद अली जौहर प्रशिक्षण एवं शोध संस्थान की उक्त भूमि मय भवन मौलाना मोहम्मद अली जौहर ट्रस्ट को पट्टे पर दिये जाने के लिए सहमत हुए है।

(emphasis supplied)

48. On 03.03.2015, a Government Order was issued amending Clause 16 of the aims and objectives of the Research Institute, substituting higher education with primary and secondary education. This was got done to enable opening of one more branch of a CBSE recognised institution, viz Rampur Public School, in the building

of Research Institute. Rampur Public School was run by none other but the Petitioner-Trust itself. It already had several branches in District Rampur.

49. Apart from the aforesaid proceedings, if we examine the legal requirements qua creation/ grant of lease and various other aspects relating thereto, we find that the procedure prescribed under Clauses 361, 366 and 368 of Chapter XIX of Revenue Manual was not followed. Relevant portions of the said clauses are reproduced herein below:-

“361. (1) Government Lands may be disposed of-

(a) by sale at full market value or exchange with private land of equal value;

(b) by grant of favourable terms to a public Body or Association or to an individual for a public purpose subject to the condition that no concession shall be allowed in ground rent;

(c) by gift or grant to a public body or association or to an individual for a public purpose;

(d) by gift or grant to a private individual in remuneration for public services;

(e) by lease to individuals.

(2) The transfer contemplated in clauses (a) to (d) of sub-rule (1) above shall be made by the State Government in the Revenue Department while transfer mentioned in clause (e) shall be made by the officers authorised by the Government.

(3) No Government land of any kind shall be disposed of by lease or grant or in any other manner without the reservation of the right of Government to mines and minerals below the surface, and right of access to and reasonable facilities for working the same on the part of the Government or its assignees.

366. Normally the Government lands shall be managed by grant of lease under the Government Grants Act, 1895 for a specific purpose, such as for agricultural, residential, commercial, industrial or charitable purposes, with or without premium, subject to special instructions issued by the State Government in respect of some areas for special reasons.

368. The following rules shall govern the grant of building leases-

(i) The land categorised as culturable waste, abadi site or unculturable waste belonging to the Government may be leased out for building for housing, commerce, industry or charitable purposes.

(ii) In allotting land for building a house in rural areas, the following order of preference may be observed-

(a) an agricultural labourer or village artisan residing in the village and belonging to scheduled caste or scheduled tribe;

(b) Any other agricultural labourer or village artisan residing in the village.

(c) A bhumidhar or Asami residing in the village and holding land less than 1-26 hectares (3.125 acres).

Note- Only persons having no house shall be eligible for allotment of house site on Government land.

(iii) In allotting land for building a house in an urban area, the following order of preference may be observed:

(a) a person with annual income below Rs. 5000/-

b) a person belonging to low income group with annual income above Rs. 5000/- but still belonging to low income group."

(c) a person belonging to middle income group.

Note- No person belonging to higher income group shall be entitled to allotment of Government land for

residential purposes. Note- Only person having no house shall be eligible for allotment of house site on Government land.

(iv) The State Government may prepare a housing scheme on any piece of land for any group of persons in which case the order of preference prescribed in sub para (ii) and (iii) need not be observed.

(v) While allotting land for industrial purpose, preference will be given to cottage industry.

(vi) (1) The allotment of land for building purposes shall be carried out under the Collector's orders.

(2) Such lease shall, however, be sanctioned by-

(a) The Collector, if the value does not exceed Rs. 25,000.

(b) The Commissioner, if the value exceeds Rs. 25,000/- but does not exceed Rs. 50,000/-

(c) the Board of Revenue, if the value exceeds Rs. 50,000 but does not exceed Rs. 1,00,000 and

(d) The State Government in other cases.

(3) The lease deed shall be executed by the Secretary to the Government in the Revenue Department, the Board of Revenue, the Commissioner and the Collector Whosoever sanctions the lease.

The form of building lease should be prescribed by the Board of Revenue.

(vii) Whenever the Collector proceeds to allot house sites, he shall cause it to be announced by beat of drum in the village or in the vicinity in the town, the exact location of the sites to be allotted, the date and the venue of the allotment. The Collector will also depute an officer, not below the rank of a Land Records Inspector, for purposes of receiving applications for allotment of house sites.

The officer so deputed will scrutinise all claims and submit his report to the Collector through the S. D. O. and the Tahsildar. Where more than one person belonging to the same order of preference express their desire to be allotted a particular site, the Naib Tahsildar or the Tahsildar shall draw lots to determine the person to whom the site should be allotted. The Collector after considering the report will pass final order submit the proposal to the Commissioner, Board of Revenue, or the State Government depending on the value of the land being leased out.

(viii) For allotment of land for a building other than a house the above procedure will be followed as may be practicable with suitable modifications as the Collector may deem fit.

(ix) Lease Rent. The annual lease rent shall be leviable as under: Rural Area- Rent calculated at rates applicable for calculation of land revenue for similar land.

(emphasis supplied)

Urban Area

(1) For residential purposes- Rent shall be calculated at rates chargeable by Development Authorities of State.

(2) For other purposes- the annual rent shall be 2, 1/2 times of the rent chargeable for residential purposes.

Note- The lease rent on building leases in urban areas shall normally be realised for 90 years in lump sum at the time of execution of lease deed. The lessees of weaker sections to whom site measuring upto 40 sq metres is allotted shall have facility of making payment of rent annually at their option.

(x) Premium- No premium shall be charged for house sites measuring upto 80 sq metres in rural areas allotted to persons belonging to category (a) or (b) of sub-para (ii) above and measuring upto 40 sq metres in urban areas allotted to persons belonging

to category (a) of sub-para (iii) above. Premium shall be chargeable from all other persons and purposes at the rates-

(a) Rural Areas-40 times the annual rent payable,

(b) Urban Areas-Market Value calculated at rates fixed by Collector under Rule 340-A of Stamp Rules for purposes of Stamp duty.

(xi) All cases for leases which involve a concession in favour of the lessee, e.g. in which it is proposed to fix the rent at a lower rate than prescribed in subparagraph (ix) or in which it is proposed to charge premium lower than the market value, shall be submitted for the order of the State Government.

(xii)

(xiii) The conditions of the lease, unless provided otherwise in a particular case or class of cases by the State Government, shall be as under-

(a) The lease initially will be for a period of 30 years and a lessee shall have an option to get it renewed twice for a further period of 30 years each. The Government shall have a right to enhance the annual rent which shall not be less than 1, 1/2 times of the previous rent at time of each renewal,

(b)

(c)

(d)

(e) if the land is no more required for the purpose for which it was leased, the same will be surrendered to the Government without any claim for compensation.

(f)

(xiv) For matters relating to lease of land for building purposes in urban areas not covered under these Rule, the rules of the Nazul Manual shall be consulted.

(emphasis supplied)

50. The aforesaid provisions of U.P. Revenue Manual describe a step by step procedure to be followed in case of grant of government land also. We find that no such procedure nor any other transparent procedure was followed while creating lease in favour of petitioner-Trust. In fact, it was the Cabinet Minister who was completely instrumental in managing the affairs in his own way. All concerns and apprehensions expressed from time to time, by different officials, were conveniently overruled or got overruled by the Secretaries of his own Ministry. He succeeded in getting the period of lease as well as lease rent fixed in such a manner that property worth crores came to be settled in favour of his private trust for nothing.

51. We now proceed to examine whether in the facts and circumstances noted above, the grant of lease in favour of petitioner-Trust would be rendered vulnerable to attack on ground of "conflict of interest". It would be advantageous to first have an overview of the concept as prevalent globally and in our country.

'Conflict of Interest' in Global Paralance

52. The United States is the country with oldest and most developed conflict of interest Regulations. The Ethics laws in different States require elected officials including legislators to disclose financial information as a means of discouraging conflicts between official duties and private interests. For example, in State of Alabama, a 'conflict of interest' involves any action, inaction, or decision by a public official or public employee in the discharge of his or her duties which

would materially affect his or her financial interest or those of his or her family members or any business with which the person is associated in a manner different from the manner it affects the other members of the class to which he or she belongs.

53. A 'conflict of interest' shall exist when a member of a legislative body, public official, or public employee has a substantial financial interest by reason of ownership of, control of, or the exercise of power over any interest greater than five percent of the value of any corporation, company, association, or firm, partnership, proprietorship, or any other business entity of any kind or character which is uniquely affected by proposed or pending legislation; or who is an officer or director for any such corporation, company, association, or firm, partnership, proprietorship or any other business entity of any kind or character which is uniquely affected by proposed or pending legislation. Ala Code §36-25-5.

54. In State of Alaska, a 'conflict of interest' exists if the legislator or a member of the legislator's immediate family has a financial interest in a business, investment, real property, lease, or other enterprise if the interest is substantial and the effect on that interest of the action to be voted on is greater than the effect on the general public of the state. Alaska Stat. Ann. § 24.60.030.

55. In State of Arkansas, a 'conflict of interest' may exist if a legislator is required to take an action in the discharge of his or her official duties that may affect his or her financial interest or cause financial benefit or detriment to him or her, or a business in which he or she is

an officer, director, stockholder owning more than 10% of the stock of the company, owner, trustee, partner, or employee, which is distinguishable from the effects of the action on the public generally"

56. In State of California "no public official at any level of State or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest." Cal. Gov't Code § 87100. Subsequent statutory sections provide additional details and prohibitions regarding conflicts of interest.

57. In State of District of Columbia, a 'conflict of interest' exists if an official uses "his or her official position or title, or personally and substantially participate, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter, or attempt to influence the outcome of a particular matter in a manner that the employee knows is likely to affect on the employees' financial interest or the financial interest of a person closely affiliated with the employee. D.C. Code Ann. § 1-1162.23

58. In State of Florida, a 'conflict of interest' exists if there is "any matter that the officer knows would inure to his or her special private gain or loss." "Special private gain or loss' means an economic benefit or harm that would inure to the officer, his or her relative, business

associate, or principal, unless the measure affects a class that includes the officer, his or her relative, business associate, or principal. Fla. Stat. Ann. § 112.3143. In State of Georgia, "conflict of interest" means an individual has multiple interests and uses his or her official position to exploit, in some way, his or her position for his or her own direct, unique, pecuniary, and personal benefit." Ga. Code Ann § 45-10-90. In State of Maryland, "an interest of a member of the General Assembly conflicts with the public interest if the legislator's interest tends to impair the legislator's independence of judgment." Md. Gen. Provis. § 5-512.

59. Anne Peters and Lukas Handschin in their book 'Conflict of Interest in Global, Public and Corporate Governance' by Cambridge University Press, while defining 'Conflict of Interest' referred to old adage that one cannot serve two masters. Michael Davis in his book 'Conflict of Interest' defines it as 'a situation in which some intent of a person has a tendency to interfere with the proper exercise of his judgment in another's behalf'.

'Conflict of Interest' in Indian Paralance

60. In India, conflict of interest is, to some extent, taken care of under the Prevention of Corruption Act, 1988. Section 2(c) of the Act defines the term "public servant" to include any person who holds an office by virtue of which he is authorized or required to perform any public duty. Section 2(d) defines the term "undue advantage" as any gratification, other than legal remuneration, which a person is not legally entitled to.

61. The Prevention of Corruption Act, 1988, provides for stringent penalties for public servants who indulge in corrupt practices, including conflicts of interest. The Act prohibits public servants from obtaining any undue advantage for themselves or for anyone else by corrupt means. Any person found guilty of committing an offense under the Act is liable to imprisonment for a term of not less than six months and up to seven years, along with a fine.

62. There have been many instances of politicians holding multiple positions, which give rise to a conflict of interest. In such cases, the politicians may use their position or power for personal gain or to benefit their family members. To address this issue, the Election Commission of India has issued guidelines for political parties and candidates. The guidelines require the candidates to disclose their assets and liabilities, along with those of their spouses and dependents, before filing their nomination papers. Furthermore, the guidelines require that candidates must declare any criminal cases pending against them and their family members. The guidelines also prohibit candidates from holding multiple positions, which may give rise to a conflict of interest.

63. Unfortunately, in our country, we do not have any legal framework for the public representatives (legislator and ministerial) where they may have to mandatorily disclose their interest in the subject matter they deal with. This, at times, has led to charges of corruption, nepotism and favoritism. The courts of law have come across several cases of conflict of interest in course of decision making by the politicians and where the decision/action has been struck down on

the said ground. We may refer to some of the judgments of the Supreme Court to throw light on the doctrine.

64. The Supreme Court, in the case of **A.K. Kraipak Vs. Union of India**²⁵, while dealing with a case of selection process and presence of the Chief Conservator of Forests in the selection proceedings resulting in conflict of interest, observed in paragraph no.15 of the report as under:-

“it is unfortunate that Naqishbund was appointed as one of the members of the selection board. It is true that ordinarily the Chief Conservator of Forests in a State should be considered as the most appropriate person to be in the selection board. He must be expected to know his officers thoroughly, their weaknesses as well as their strength. His opinion as regards their suitability for selection to the All-India Service is entitled to great weight. But then, under the circumstances, it was improper to have included Naqishbund as a member of the selection board. He was one of the persons to be considered for selection. It is against all canons of justice to make a man judge in his own cause. It is true that he did not participate in the deliberations of the committee when his name was considered. But then the very fact that he was a member of the selection board must have had its own impact on the decision of the selection board. Further admittedly he participated in the deliberations of the selection board when the claims of his rivals particularly that of Basu was considered. He was also party to the preparation of the list of selected candidates in order of preference. At every stage of his participation in the deliberations of the selection board there was a conflict between his interest and

duty. Under those circumstances it is difficult to believe that he could have been impartial. The real question is not whether he was biased. It is difficult to prove the state of mind of a person. Therefore what we have to see is whether there is reasonable ground for believing that he was likely to have been biased. We agree with the learned Attorney General that a mere suspicion of bias is not sufficient. There must be a reasonable likelihood of bias. In deciding the question of bias we have to take into consideration human probabilities and ordinary course of human conduct. It was in the interest of Naqishbund to keep out his rivals in order to secure his position from further challenge. Naturally he was also interested in safeguarding his position while preparing the list of selected candidates”.

65. The judgment in the case of **A.K. Kraipak (supra)** has been followed by the Supreme Court in the case of **Board of Control for Cricket in India Vs. Cricket Association of Bihar**²⁶.

66. The Supreme Court, almost two decades back, in the case of **R. Sai Bharathi Vs. J. Jayalalitha and others**²⁷, dealt with the issue as to whether the respondent J. Jayalalitha, being a public servant, had committed offence under Section 169 IPC. The Supreme Court elaborately laid down the first principles to be observed by public servants in public life while dealing with matter where there is likelihood of conflict of interest between the office one holds and the act to be done. In paragraph no.59 of the report, it was observed as follows:-

“59. Report leading to IPC makes it clear that criminal law merely prescribes the minimum standards of behaviour, while

in public life, those who hold high offices should not take shelter under the umbrella of criminal law but stand by high probity. Further, criminal law is meant to deal with criminals ordinarily, while Code of Conduct is observed as gentlemen's agreement. Persons in public life, who are gentlemen, follow such Code instead of taking escape routes by resorting to technical pleas as arise in criminal cases. Persons in public life are expected to maintain very high standards of probity and, particularly, when there is likely to be even least bit of conflict of interest between the office one holds and the acts to be done by such person, ought to desist himself from indulging in the same. Such standards of behaviour were scrupulously observed in the earlier days after independence, but those values how now dwindled and instances of persons holding high elective offices indulging in self- aggrandisement by utilising government property or in distribution of the largesse of the Government to their own favourites or for certain quid pro quo are on the increase. We have to strongly condemn such actions. Good ethical behaviour on the part of those who are in power is the hallmark of a good administration and people in public life must perform their duties in a spirit of public service rather than by assuming power to indulge in callous cupidity regardless of self imposed discipline. Irrespective of the fact whether we reach the conclusion that A-1 is guilty of the offences with which she is charged or not, she must atone for the same by answering her conscience in the light of what we have stated not only by returning the property to TANSI unconditionally but also ponder over whether she had done the right thing in breaching the spirit of the Code of Conduct and giving rise to suspicion that rules and procedures were bent to acquire

the public property for personal benefit, though trite to say that suspicion, however strong, cannot take place of legal proof in a criminal case and take steps to expiate herself."

(emphasis supplied)

67. In the case of **Orissa Olympic Association through General Secretary Vs. State of Orissa and another**²⁸, the Supreme Court dealt with a case of conflict of interest where the son and son-in-law of the General Secretary of the Orissa Olympic Association were partners in M/s Incon Associates and, while referring to its previous judgment in the case of **Board of Control for Cricket in India (supra)**, it was held in paragraph no.59, as follows:-

"59. Another aspect which cannot be ignored relates to conflict of interest. Vide order dated 9.3.2016, this Court had noted that the son and son-in-law of Mr. Asirbad Behera, General Secretary of the Orissa Olympic Association, were partners. In this regard, we may refer to a two-Judge Bench decision in BCCI v. Cricket Assn. of Bihar (2015) 3 SCC 251 wherein the Court, taking note of the finding of the probe committee, has held that serious issues of conflict of interest adversely affect the game of cricket which is so popular in this county. It is bound to shake the confidence of the public in general. The said finding was recorded in the context of the affairs of BCCI. The concept of conflict of interest is well established. A person who is accountable to the public and deals with public affairs is not expected, as required under the law, to have any personal interest. He is not to act in a manner where it is perceived that he is directly or indirectly the beneficiary; or for that matter, extends the benefit to a person of immediate proximity."

(emphasis supplied)

68. We may also gainfully refer to the judgment of the Supreme Court in the case of **Common Cause (supra)** in which the Apex Court found the conduct of the petitioner in making allotments of petrol outlets as atrocious, specially those made in favour of Members, Oil Selection Board or their sons, etc., and found that it reflected a wanton exercise of power by the petitioner. Condemning the act of the Minister concerned, the Apex Court observed that the concerned petitioner does not, on becoming the Minister of State for Petroleum and Natural Gas, assume the role of a "trustee" in the real sense nor does a "trust" come into existence in respect of the government properties.

69. The Supreme Court, in the case of **Institute of Law, Chandigarh (supra)**, by referring to its previous judgments, observed that for achieving the goals of justice and equality set out in the Preamble, the State and its agencies/instrumentalities have to function through political entities and officers/officials at different levels. The laws enacted by Parliament and the State Legislatures bestow upon them powers for effective implementation of the laws enacted for creation of an egalitarian society. The exercise of power by political entities and officers/officials for providing different kinds of services and benefits to the people always has an element of discretion, which is required to be used in larger public interest and for public good and in our constitutional structure, no functionary of the State or public authority has an absolute or unfettered discretion. The very idea of unfettered discretion is totally incompatible with the doctrine of equality enshrined in the Constitution and is an antithesis to the concept of the rule of law.

70. Learned Advocate General in support of his plea pertaining to 'conflict of interest' also took aid of decision of the Supreme Court in the case of **Secretary, Jaipur Development Authority (supra)**. It was argued that the Supreme Court, in the said case, has held as under:-

“the Minister holds public office though he gets constitutional status and performs functions under the Constitution, law or executive policy. The acts done and duties performed by him are public acts and duties as the holder of public office. Therefore, he owes certain accountability for the acts done or duties performed. In a democratic society governed by rule of law, power is conferred on the holder of the public office or the authority concerned by the Constitution by virtue of appointment. The holder of the office, therefore, gets opportunity to abuse or misuse the office. The politician who holds public office must perform public duties with the sense of purpose, and a sense of direction, under rules or sense of priorities. The purpose must be genuine in a free democratic society governed by the rule of law to further socio-economic democracy. All actions of the Government are performed through/by individual persons in collective or joint or individual capacity. Therefore, they should morally be responsible for their actions. The Government acts through its bureaucrats, who shape its social, economic and administrative policies to further the social stability and progress socially, economically and politically. Actions of the Government, should be accounted for social morality. Therefore, the actions of the individuals would reflect on the actions of the Government. The actions are intended to further the goals set down in the Constitution, the laws or administrative policy. The action would, therefore, bear

necessary integral connection between the 'purpose' and the end object of public welfare and not personal gain”.

(emphasis supplied)

71. It was also held in **Secretary, Jaipur Development Authority (supra)** as under:-

“the Minister is responsible not only for his actions but also for the job of the bureaucrats who work or have worked under him. He owes the responsibility to the electors for all his actions taken in the name of the Governor in relation to the Department of which he is the head. If the Minister, in fact, is responsible for all the detailed workings of his Department, then clearly ministerial responsibility must cover a wider spectrum than mere moral responsibility. The so-called public policy cannot be a camouflage for abuse of the power and trust entrusted with a public authority or public servant for the performance of public duties. Misuse implies doing of something improper. The essence of impropriety is replacement of a public motive for a private one. When satisfaction sought in the performance of duties is for mutual personal gain, the misuse is usually termed as corruption. The holder of a public office is said to have misused his position when, in pursuit of a private satisfaction, as distinguished from public interest, he has done something which he ought not to have done. The most elementary qualification demanded of a Minister is honesty and incorruptibility. He should not only possess these qualifications but should also appear to possess the same.”

(emphasis supplied)

72. The Supreme Court, in paragraph 114 of **State (NCT of Delhi)**

(**supra**), has reiterated the ratio in the case of **Secretary, Jaipur Development Authority (supra)**.

73. On the other hand, learned Senior Counsel appearing for the petitioner submits that the aforesaid judgments have no application to the facts of the present case. He submits that in most of the cases, action of an individual minister was under scrutiny, whereas, in the present case, the decision which has been nullified by the impugned action, was a conscious decision of council of ministers. The learned Senior Counsel, while responding to the arguments of the State and by referring to the judgment of Apex Court in the case of **Kaushal Kishore (supra)**, and elaborating the arguments on ‘conflict of interest’ or the vicarious liability of the Government in relation to an act done by its Minister, vehemently argued that the statement made by a minister, traceable to any affairs of the State or for protecting the Government, cannot always be attributed vicariously to the Government itself in view of the principles of collective responsibility. The Government is responsible for the action of council of ministers in view of the concept of collective responsibility and not to any action of an individual minister. There was no conflict of interest in the present case even though the Cabinet Minister was involved in the decision making process. In any case, even if such a plea is examined, the record reflects “synergy of interest” and not “conflict of interest”, inasmuch as the purpose behind establishment of either Research Institute or Rampur Public School would remain a public purpose for advancement of education for the persons belonging to the minority community.

74. We immediately come to the judgment of **Kaushal Kishore (supra)**, the

sheet anchor of the case of the petitioner. It is a Constitution Bench judgment by five Judges' Bench. There were five questions which were answered by the Constitution Bench which were as follows: -

... “(1) Are the grounds specified in Article 19(2) in relation to which reasonable restrictions on the right to free speech can be imposed by law, exhaustive, or can restrictions on the right to free speech be imposed on grounds not found in Article 19(2) by invoking other fundamental rights?

2) Can a fundamental right under Article 19 or 21 of the Constitution of India be claimed other than against the "State" or its instrumentalities?

3) Whether the State is under a duty to affirmatively protect the rights of a citizen under Article 21 of the Constitution of India even against a threat to the liberty of a citizen by the acts or omissions of another citizen or private agency?

4) Can a statement made by a Minister, traceable to any affairs of State or for protecting the Government, be attributed vicariously to the Government itself, especially in view of the principle of Collective Responsibility?

5) Whether a statement by a Minister, inconsistent with the rights of a citizen under Part III of the Constitution, constitutes a violation of such constitutional rights and is actionable as 'constitutional tort'? ...”

75. The aforesaid questions arose in the backdrop of the then Minister for Urban Development, Government of U.P. having made certain statement in a press conference about an incident which happened with the petitioner (before the Supreme Court) while he was travelling from Noida to Shahjahanpur on National

Highway No. 91 to attend the death ceremony of a relative. His case was that a gang intercepted him on the highway and snatched cash and jewellery in his possession and his family members and they also gang raped his wife and minor daughter. He had lodged a First Information Report about the said incident and various newspapers and television channels also reported the ghastly incident. However, the Minister, in his press conference, termed the incident as a political conspiracy. The petitioner apprehended that there would not be fair investigation. He also felt offended by the irresponsible statement made by the Minister and therefore, filed writ petition before the Supreme Court under Article 32 for monitoring the investigation in the F.I.R. lodged by him and for transferring the trial of the case to some other State and also for registering a complaint against the Minister for making statements outraging the modesty of the victims. Another writ petition filed in public interest was from State of Kerala in the backdrop of a statement made by Minister for Electricity in the State which was considered to be highly derogatory to the women folk. Consequently, a direction was sought to the Chief Minister of the State to form a Code of Conduct for the Ministers and to take suitable action against the said Minister for his utterances.

76. Question no. 4 on which reliance was placed by Sri Saxena, was answered by the Supreme Court as follows:

“151. Therefore, our answer to Question 4 would be that a statement made by a Minister even if traceable to any affairs of the State or for protecting the Government, cannot be attributed vicariously to the Government by invoking the principle of collective responsibility.”

77. The argument for making the Government vicariously liable for statement of Minister was that his action was traceable to the discharge of public duty and is subject to scrutiny of law. A Minister, being a functionary of the State, represents the State while acting in his official capacity. Therefore, any violation of fundamental rights of the citizen by the Minister in his official capacity would be attributable to the State. In respect of Question no. 5, the contention was that official act of a Minister which violates the fundamental rights of the citizens, would make the State liable under Constitutional torts. The Principle of Sovereign Immunity of the State for the tortious acts of its servants would not be applicable in case of violation of fundamental rights.

78. However, these contentions were not accepted and the Constitutional Bench, in para 140 and 149 of the Law Report on which reliance has been placed by learned Senior Counsel appearing for the petitioner as well, held as follows: -

“140. What follows from the above discussion is, (i) that the concept of collective responsibility is essentially a political concept; (ii) that the collective responsibility is that of the Council of Ministers; and (iii) that such collective responsibility is to the House of the People/Legislative Assembly of the State. Generally, such responsibility correlates to (i) the decision taken; and (ii) the acts of omission and commission done. It is not possible to extend this concept of collective responsibility to any and every statement orally made by a Minister outside the House of the People/Legislative Assembly.

149. As all the literature on the issue shows, collective responsibility is that of the Council of Ministers. Each

individual Minister is responsible for the decisions taken collectively by the Council of Ministers. In other words, the flow of stream in collective responsibility is from the Council of Ministers to the individual Ministers. The flow is not on the reverse, namely, from the individual Ministers to the Council of Ministers. “

79. The Constitution Bench has defined the concept of “collective responsibility” and how it percolates downstream from Council of Ministers to the individual Ministers and not from individual Ministers to the Council of Ministers. It is for the said reason that it was also held that a statement made by a Minister inconsistent with the rights of a citizen under Part III of the Constitution, may not constitute a violation of the constitutional rights qua the Government. It would not become an actionable claim as Constitutional tort against the Government. However, the exception is in cases where as a consequence of such a statement, any act of omission or commission is done by the officers resulting in harm or loss to a person/citizen.

80. The concept of ‘collective responsibility of Council of Ministers’ is an entirely different concept and has no semblance with the doctrine of ‘conflict of interest’. While the former binds individual Minister to acts and omissions of the Council of Ministers, the latter prevents persons holding public office from indulging in self-aggrandisement and enrichment by utilizing Government property or in distribution of largesse of the Government to their own benefit, or their favourites. The former is a constitutional concept defining the extent of liabilities of individual Ministers qua the decision of the Council of Ministers, while the latter is a

gentleman's agreement to maintain high standards of probity in public life.

81. In order to judge whether an action falls foul of Article 14 of the Constitution on account of personal bias or conflict of interest, "the test is not whether bias was actually at work when the decision was taken. It is the reasonable likelihood of bias that determines whether the action can be faulted" (vide **Board of Control for Cricket in India vs. Cricket Association of Bihar**). In the said case, the main issue was whether any conflict of interest had arisen on account of Mr. Srinivasan, one of the Administrators of BCCI participating in the meeting of BCCI, in which decision was taken to award a hefty sum of compensation to India Cements Ltd., a company promoted by Mr. Srinivasan. The Supreme Court observed that "the fact that some others also participated in the decision making process as members of IPL Governing Council does not cure the legal flaw arising out of the benefactor also being the beneficiary of the decision."

82. The Supreme Court drew analogy from the judgment in **Kraipak's** case wherein Naqishbund participated in the selection proceedings even when he was himself a candidate in the selection. He had in fact recused himself from the proceedings when his own case was taken up for consideration. However, this did not impress the Supreme Court and it took the view that any such recusal did not make any material difference, as bias in such a situation operates in a subtle manner.

83. It is clear from the precedents noted above that for adjudging whether an action or a decision is bad in law on account of a conflict of interest, the test is only the reasonable likelihood of bias and

not whether actual bias had taken place or not. It is grounded on the principle that a person holding high public office is expected to maintain very high standards of probity and "when there is likely to be even least bit of conflict of interest between the office one holds and the acts to be done by such person, (he) ought to desist himself from indulging in the same" (vide **R. Sai Bharathi vs. J. Jayalalitha**).

84. The Supreme Court, in the case of **A.C. Muthiah Vs. Board of Control for Cricket in India and others**²⁹, accepted the contention raised on behalf of the appellant that conflict of interest does not require proof of any actual pecuniary gain or pecuniary loss as the principle of 'conflict of interest' is a much wider, equitable, legal and moral principle which seeks to prevent even the coming into existence of a future and/or potential situation which would inhibit benefit or promise through any commercial interest in which the principal actors are involved. Supreme Court found substance in the contention that the entire purpose of 'conflict of interest' rule is to prevent and not merely to cure situations where the fair and valid discharge of one's duty can be affected by commercial interests which do not allow the fair and fearless discharge of such duties.

85. In the case at hand, the Cabinet Minister was well aware that his family run Trust and School would be the main beneficiaries of the grant. Instead of disassociating himself with the decision making process, he not only played active role in ensuring that the Research Institute is given on lease to his own Trust, but also on terms decided by him. Indisputably, he was holding the portfolio of Minister of Urban Development, and Parliamentary

Affairs (w.e.f. 28.08.2003 till 13.05.2007) and Minister for Minority Welfare and Waqf, Government of Uttar Pradesh (w.e.f. 15.03.2012 till 19.03.2017). It was during this period that all crucial decisions were taken for creation of lease in favour of his family trust. He himself approved the Cabinet note and played active role in getting it approved. Also, he himself determined & fixed the premium of Rs.1000/- of valuable property valued Rs.20.44 crores and a paltry sum of Rs.100/- as annual lease rent. Being Minister in the same department, he was having full control over the file and its movement. He regretfully used his influence at every stage, camouflaging it behind public interest. It was a brazen misuse of power to perpetuate personal gains. The Minister knew that Rampur Public School was an affiliate of C.B.S.E. where the syllabus designed by the said Board would be taught and not Urdu or Arabic language, in clear departure of the main objective with which the Research Institute was established. The abolition of all posts of the Research Institute at the time of creation of lease on the pretext that same were not required, only proves that the intention was never to advance public interest, i.e. research and higher learning in Urdu and Arabic language but to promote his family run school. He succeeded in opening one more branch of CBSE recognized school apart from those already in existence. All the branches of Rampur Public School were controlled by the managing committee constituted by his family and he thereby came in control of the valuable property of the Government Research Institute.

86. It is noteworthy that when intervention application filed by Rampur Public School as well as its Principal was

allowed by this Court on 13.12.2023 in the present proceedings, this Court expressed its concern about the ongoing studies of 733 students in Rampur Public School who would be affected by impugned action and made a query to the State counsel as to how the State had secured the interest of the said students. An affidavit was directed to be filed from the State side in this regard. In pursuance thereof, an affidavit was filed on 18.12.2023 on behalf of the respondents no.1, 2, 3, 4, 6 and 7, inter alia, stating that the students who were studying in Rampur Public School, New Tehsil, Rampur, had been adjusted in/ transferred to other branches of the said school and also to other schools for the academic session 2023-24. It, therefore, follows that other branches of Rampur Public School were already functional in the same city and, hence, it is clear that the aim of the Minister was never to accomplish the objectives of the trust but to somehow or the other come in control of valuable State Land in guise of espousing a public cause.

87. It is clear that policy aspects, procedural aspects and financial aspects were deliberately given a complete go-by. The very grant of lease was an outcome of abuse and misuse of power by the Cabinet Minister. It is well established that what was not legally and directly possible and permissible, could also not be done indirectly, but the Hon'ble Minister acting without scruples and under influence of the public office he held, succeeded in circumventing the law. The submission advanced on behalf of the petitioner as regards 'collective or individual responsibility' and 'synergy of interest' is completely specious and untenable. The petitioner cannot avoid the consequences of the camouflaged actions of its Managing Trustee behind the veil of 'collective

responsibility'. The bias was obvious and manifest and 'conflict of interest', deep rooted and pervasive. The entire exercise, since inception to end, fails to pass muster of Article 14 of the Constitution.

88. As regards the provisions contained under U.P. Revenue Manual, learned Senior Counsel appearing for the petitioner, by referring to Clause 360, submits that land acquired for public purposes under any law relating to acquisition of land is to be managed by the acquiring department and utilized for the purpose for which the land has been acquired, whereas the land mentioned in Item No.6 of Clause 359 shall be managed in accordance with the Rules framed under special laws. He submits that the land belonging to the State Government under the management of any department, other than revenue department, will be managed by that department in accordance with the Rules and instructions of that department and that all other lands belonging to the State Government under the management of the revenue department are to be managed as per the Rules prescribed in Chapter XIX. He, by referring to Clause 361, submits that Government land may be disposed of by gift or grant to a public body or association or an individual for a public purpose and even lease can be created in favour of individuals. According to Sri Saxena, when the law contained in Chapter XIX permits such kind of grant, no illegality can be pointed out in respect of creation of lease in favour of the Trust. Further argument of Sri Saxena is that since the grant was made under the provisions of Government Grants Act, 1895, it would be saved by Section 3 of the said Act which clearly provides that all provisions, restrictions, conditions and limitations contained in any

grant shall be valid and shall take effect according to the tenor, notwithstanding any decree or direction of a court of law or any rule of law, statute or enactment of the Legislature to the contrary. Sri Amit Saxena, learned Senior Counsel for the petitioner also placed reliance on the decision of the Supreme Court in the case of **Ram & Shyam Co. (supra)**, in contending that where purpose of allotment is not revenue maximization but accomplishment of a constitutionally recognized public purpose, allocation by way of tender and auction is not mandatory and, according to the petitioner, the said judgment also recognizes the said principle.

89. There cannot be any dispute to the legal proposition laid down in **Ram & Shyam Co. (supra)** that in appropriate cases the Government can enter into contract without taking the route of tendering or auctioning, but it should demonstrably be in public interest. We have discussed in foregoing paragraphs how the very grant of lease itself was illegal and void. We have also noted how the Hon'ble Minister himself was instrumental in getting the essential terms of lease settled so as to result in enrichment of family run Trust at the cost of State exchequer. The power to grant largesse by the State cannot be doubted, but not in the manner, as was done in the instant case.

90. This Court is fully satisfied that the creation/ grant of lease of the Research Institute in favour the petitioner trust was dehors the provisions of law and a result of gross abuse of the public office held by the Hon'ble Minister. There was a direct conflict of interest and the entire proceedings, culminating in the grant of lease in favour of the petitioner trust were void ab initio. Therefore, issue no. 1 is

decided against the petitioner and in favour of the State-respondents.

Finding on Issue No.2

91. Now we proceed to analyze the contention as regards alleged violation of the principles of natural justice. There are two facets of the arguments. The first one is based on the law of equity and fairness. It was contended that the entire action, leading to cancellation of the lease and resumption of the premises, was done *ex-parte*. Neither show cause notice nor any opportunity of hearing was given to the petitioner before passing the impugned order dated 31.01.2023 whereby the Office Memorandum dated 20.11.2014 and all other subsequent orders were cancelled. The enquiry was also held by S.I.T. behind the back of the petitioner and without even letting it know of the exact charge against it. The impugned decision is a non-speaking one and thus non-est in the eyes of law. The second facet of the argument was that in case of breach of any condition of the lease agreement, the State Government, under Clause 10 of the lease, was obliged to serve thirty days notice on the petitioner-Trust before the forfeiture would become effective. However, no such notice was given. Therefore, the action of the State Government in terminating the lease on ground of violation of the conditions of the lease agreement was illegal and void.

92. On the adherence of principles of natural justice, emphasis has been laid by the petitioner upon two judgments of the Apex Court reported in **UMC Technologies Private Limited (supra)** and **Deepak Anand Patil (supra)**. Another authority cited on behalf of the petitioner in **Re: Natural Resources Allocation (supra)**

is on the point of fairness and reasonableness on the touchstone of Article 14 of the Constitution of India as regards an administrative action.

93. We may gainfully refer to some more judgments governing the first principles of the doctrine of *audi alteram partem* rule.

94. In the case of **State of U.P. Vs. Sudhir Kumar Singh (supra)**, the Supreme Court observed that “the natural justice is a flexible tool in the hands of the judiciary to reach out in fit cases to remedy injustice. Breach of the *audi alteram partem* rule cannot by itself, lead to the conclusion that prejudice is thereby caused. Where procedural and/or substantive provisions of law embody the principles of natural justice, their infraction per se does not lead to invalidity of the orders passed. Here again, prejudice must be caused to the litigant, except in the case of a mandatory provision of law which is conceived not only in individual interest, but also in public interest. No prejudice is caused to the person complaining of the breach of natural justice where such person does not dispute the case against him or it. This can happen by reason of estoppel, acquiescence, waiver and by way of non-challenge or non-denial or admission of facts. In cases where facts can be stated to be admitted or indisputable, and only one conclusion is possible, the Court does not pass futile orders of setting aside or remand when there is, in fact, no prejudice caused. This conclusion must be drawn by the Court on an appraisal of the facts of a case, and not by the authority who denies natural justice to a person. The ‘prejudice’ exception must be more than a mere apprehension or even a reasonable suspicion of a litigant. It should exist as a

matter of fact, or be based upon a definite inference of likelihood of prejudice flowing from the non-observance of natural justice.”

95. The question as to whether the Court, in exercise of powers under Article 226, is bound to declare an order of the government passed in alleged breach of principles of natural justice as void or whether the Court can refuse to grant relief on the ground that the facts of the case do not justify exercise of discretion to interfere or for the reason that defacto prejudice has not been shown fell for consideration in the case of **M.C. Mehta (supra)**, and it was held as under :-

"15. The question however is whether the Court in exercise of its discretion under Article 32 or Article 226 can refuse to exercise discretion on facts or on the ground that no de facto prejudice is established. On the facts of this case, can this Court not take into consideration the fact that any such declaration regarding the 10.3.1999 order will restore an earlier order dated 30.7.1997 in favour of Bharat Petroleum Corporation which has also been passed without notice to HPCL and that if the order dated 10.3.1999 is set aside as being in breach of natural justice, Bharat Petroleum will be getting two plots rather than one for which it has no right after the passing of the latter order of this court dated 7.4.1998?

16. Courts are not infrequently faced with a dilemma between breach of the rules of natural justice and the Court's discretion to refuse relief even though rules of natural justice have been breached, on the ground that no real prejudice is caused to the affected party."

(emphasis supplied)

96. On the point as to whether breach of principles of natural justice is, in itself, sufficient to grant relief and that no further de facto prejudice need be shown, the decisions in the case of **Ridge Vs. Baldwin**³⁰ and **S.L. Kapoor Vs. Jagmohan**³¹ were considered by the Supreme Court time and again and it was stated as follows:-

"20.

"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."

(emphasis supplied)

97. The proposition that if, on the admitted or indisputable factual position, only one conclusion is possible and permissible, the court need not issue a writ merely because there is violation of principles of natural justice and as to whether relief can be refused where the court thinks that the case of the applicant is not one of 'real substance' or that there is no substantial possibility of his success or that the result will not be different, even if natural justice is to be followed, has been considered in the judgments of **Malloch v. Aberdeen Corporation**³², **Glynn v. Keele University**³³, and **Cinnamond v. British Airports Authority**³⁴. In particular, the observations made by **Straughton, L.J., in R. v. Ealing Magistrates' court ex p Fannaran**³⁵ that it must be 'demonstrable beyond doubt' that the result would have been different, are of significance.

(emphasis supplied)

98. We may also gainfully refer to the case of **Malloch v. Aberdeen Corporation (supra)** wherein, considering a challenge to a resolution on the ground that the same had been passed in contravention of the principles of natural justice inasmuch as the Committee had refused to receive written representations or to afford to the appellant a hearing before they passed the resolution, the following observations were made by **Lord Wilberforce, J.**

"The appellant has first to show that his position was such that he had, in principle, a right to make representations before a decision against him was taken. But to show this is not necessarily enough, unless he can also show that if admitted to state his case he had a case of substance to make. A breach of procedure, whether called a failure of natural justice, or an essential administrative fault, cannot give him a remedy in the courts, unless behind it there is something of substance which has been lost by the failure. The court does not act in vain."

(emphasis supplied)

99. A similar view was taken in **Cinnamond v. British Airports Authority (supra)** wherein, considering a challenge on the ground of violation of principles of natural justice based on the contention that no opportunity to make a representation has been given, **Brandon LJ.** observed as follows :-

"If I am wrong in thinking that some opportunity should have been given, then it seems to me that no prejudice was suffered by the plaintiffs as a result of not being given that opportunity. It is quite evident that they were not prepared then, and are not even prepared now, to give any

satisfactory undertakings about their future conduct. Only if they were would representations be of any use. I would rely on what was said in *Malloch v. Aberdeen Corpn* (1971) 1 WLR 1578, first by Lord Reid and secondly by Lord Wilberforce. The effect of what Lord Wilberforce said is that no one can complain of not being given an opportunity to make representation if such an opportunity would have availed him nothing."

100. The applicability of the 'useless formality test' or the 'test of prejudice', in the context of the nature, scope and applicability of the principles of natural justice has been explained in **Dharampal Satyapal Ltd. Vs. Deputy Commissioner of Central Excise, Gauhati and others**³⁶ and it has been held that there may be situations where it is felt that a fair hearing 'would make no difference' - meaning that a hearing would not change the ultimate conclusion reached by the decision-maker; then no legal duty to supply a hearing arises and it may not be necessary to strike down the action and refer the matter back to the authorities to take a fresh decision after complying with the procedural requirements in those cases where non-grant of hearing has not caused any prejudice to the person against whom the action is taken.

(emphasis supplied)

101. Thus, in a case of a mere technical infraction of principles of natural justice where the facts are admitted and undisputed and no prejudice can be demonstrated, there is a considerable case law and literature for the proposition that relief can be refused if the Court thinks that the case of the petitioner is not one of 'real substance' or that there is no substantial possibility of his success or that the result

would not be different, even if fresh opportunity is to be granted.

102. A somewhat similar position arose before the Supreme Court in **Bishambhar Prasad vs. Arfat Petrochemicals Pvt. Ltd. and Others** (supra). The main issue in the said case was whether the decision of the Council of Ministers to form a Committee to review decision taken by the predecessor ruling party resulting in cancellation of the lease and permission for conversion and subdivision granted during the regime of the previous government in favour of the respondent was valid or not. Like in the instant case, one of the arguments was that the decisions were taken behind the back of the respondent and the second one, that the reasons behind the action should be part of the final decision itself and could not be supplemented by affidavits filed in the proceedings. In this regard, reliance was placed upon the judgement of the Supreme Court in **Mohinder Singh Gill vs. The Chief Election Officer** (supra). It was contended that change of government could not be the reason for cancelling the decisions of the previous government. Further, the lessee was kept in dark about the deliberations throughout and had no forum to advocate its case or to prove that the allotment and conversion of land were legal, sound and valid. While examining the said plea, the Supreme Court considered the fact that the Cabinet Committee constituted in pursuance of the decision of the Cabinet deliberated over the matter for considerable period. It took into consideration the legitimacy of the power in granting the lease. The Supreme Court also took into account the fact that though the issue was raked up with a political favour but eventually the final decision centered around the lack of authority of the

lessor. It was also noted that the presence of the lessee before the Cabinet Committee would not have made any difference and, accordingly, it was held that the contention based on breach of principles of natural justice would not come to the rescue of the lessee. The Supreme Court, in coming to the said conclusion, relied on the previous judgements in **S.L. Kapoor vs. Jagmohan** (supra) and **K. Balasubramanian (Ex. Capt.) vs. State of Tamil Nadu**³⁷. The relevant observations are extracted below:

“80. On the face of these findings, the question that arises is whether Respondent No. 1, which actively participated in RIICO's decision making process and secured benefits without any authority in law, can be permitted to complain of a deprivation of the opportunity of being heard. We are of the considered opinion that the principle of audi altrem partem should not be an empty formality nor a compulsory ritual that must always be performed. The principal issue that arose for consideration before the Cabinet Committee pertained to the legitimacy of the power assumed by RIICO in respect of LIA, Kota, and not whether the permissions granted to Respondent No. 1 suffered from any propriety or legality. It is true that the issue was raked up with a political flavour, but eventually the final resolution centred around the RIICO's lack of authority. We do not think that Respondent No. 1 could render any assistance to the Cabinet Committee in the formation of their views. In any case, we have carried out an in-depth analysis of the entire gamut of documents and statutory rules, and have come to a firm conclusion that it was the State Government alone which was competent to accord necessary permissions to Respondent No. 1 under the 1959 Rules, and not RIICO in purported

exercise of its powers under the 1979 Rules. Our holding is not confined to the decisions taken in favour of Respondent No. 1 alone, and shall encompass all other similarly placed lease-holders, with no discretion to the State Government to blow hot and cold and/or to take ad hoc decisions on a pick and choose basis. The only exception can be in a case where land has been expressly leased out to RIICO under Rule 11A of 1959 Rules and RIICO has further sub-leased the same land as per the scheme envisaged under clause (viii) of the said Rule.

83. These decisions fortify our conclusion that steps taken which are themselves vitiated, cannot form the basis for principles of natural justice to be applied. The supplementary lease deeds were signed by RIICO without any authority to do so. It similarly lacked the capacity to grant the permission for conversion of use for the land to commercial, and the allowance to subdivide the plot. Thus, no legally vested right of Respondent No. 1 has been infringed and it has no legitimate ground to seek an opportunity to be heard in a matter strictly between RIICO and State Government.”

103. In the instant case also, the decision of the previous Government has been cancelled. The record reveals that the Government did not act in any haste. Initially, the State Government constituted a Special Investigation Team, which enquired into the complaint and recorded statements of number of persons including Mr. Naseer Ahmad Khan, Member of Legislative Assembly/Secretary of the Trust, who happens to be a relative of the Hon’ble Minister and Mr. Sultan Khan, Principal, Rampur Public School. The S.I.T. submitted its detailed enquiry report

dated 31.01.2020 to the Home Department. The Home Department took cognizance of the S.I.T. report and a meeting of High Powered Committee was convened on 16.03.2020 headed by the Additional Chief Secretary, Home and attended by Officers of various departments. The report of the S.I.T. was deliberated upon by the High Powered Committee and the same was accepted by it. The recommendations made by the S.I.T. were circulated to all concerned vide letter dated 29.06.2020 for further action. Thereafter, the matter was placed before the Cabinet and on 28.01.2023 it resolved to cancel the lease and all subsequent resolutions and actions of the previous Government. Pursuant to the decision of the State Government, Office memorandum dated 31.01.2023 was issued cancelling the decision to grant lease and attach the petitioner-trust with the Research Institute as well as lease deed and rectification/amended deed and also various other office memoranda issued for the purpose.

104. The impugned Office memorandum dated 31.01.2023 clearly mentions that it was issued in furtherance of the Cabinet decision to cancel previous Office memoranda dated 20.11.2014, 30.01.2015, 03.03.2015, 17.03.2015 and the lease as well as amended lease deed. It does not mention about breach of any condition of the lease as a ground for taking the aforesaid action. Only in the consequential order issued by the Director, Minority Welfare, Lucknow dated 31.01.2023, addressed to different authorities to ensure compliance of Office Memorandum dated 31.01.2023, there is a passing reference to the breach of conditions of lease. However, it is evident from the original record that the paramount consideration for taking the action was the

fact relating to the Hon'ble Minister concerned being the driving force behind the decision of the previous Government, resulting in 'conflict of interest'.

105. In the facts and circumstances obtained above, an opportunity of hearing to the petitioner would have made no difference since the action was taken by Cabinet primarily on basis of the material existing on record. As noted above, during course of hearing we gave full opportunity to counsel for the parties to go through the original record, take notes and to address the Court on all possible points. Counsel for the parties even made submissions, extensively referring to the record. We have confined our decision on Issue No.1 primarily to the plea of 'conflict of interest' bearing in mind the fact that going into other aspects, may result in prejudice to the petitioner.

106. At this juncture, we may also note that while adjudging the impugned action of the State Government in cancelling the decision of the previous Government, we have taken into consideration only the facts and circumstances existing on record up to the date of grant of lease. We have consciously not considered any subsequent event nor the grounds relating to alleged breach of conditions of the lease as that would have, undoubtedly, required a notice and opportunity of hearing. As noted above, even main order of the State Government does not speak of forfeiture of lease but cancellation of the decision of the previous Government to grant lease. For the said reason, the argument based on Clause 10 of the lease deed is also rendered without any force.

107. In view of foregoing discussion, this Court is of the considered opinion that argument of the petitioner

regarding infraction of the principles of natural justice has no real substance. Issue no. 2 thus stands decided against the petitioner and in favour of the State Government.

Finding on Issue No.3

108. The Court now comes to the last issue as to whether discretionary and equitable jurisdiction of High Court under Article 226 of the Constitution of India should be exercised in the facts and circumstances of the instant case.

109. The Apex Court, in the case of **Gadde Venkateswara Rao (supra)**, has observed that in case an illegal order is set aside by the High Court and that setting aside would restore another illegal order, the High Court would be justified to refuse exercise of its extraordinary discretionary power in the facts and circumstances of a particular case. The Supreme Court, in the case of **M.C. Mehta (supra)**, has held that the Court can, under Article 32 or under Article 226 of the Constitution of India, refuse to exercise its discretion of striking down the order if such striking down will result in restoration of an illegal order.

110. In view of the finding on Issue No.1, this Court is of the considered opinion that even if the impugned decision of the State Government is assumed to be suffering from some procedural irregularity, any interference by this Court would result in revival of an absolutely illegal grant. We are of firm view that in order to save public property being frittered away in complete disregard of probity and good faith, we should decline to exercise discretionary and equitable jurisdiction under Article 226 of the Constitution in favour of the petitioner-trust. We, therefore,

decide Issue No.3 against the petitioner-trust.

CONCLUSION

111. For all the aforesaid reasons, the Court is not inclined to interfere with any of the order/ notice/ Office Memorandum/ decision impugned in the present writ petition or grant any other relief claimed by the petitioner.

112. The writ petition fails and is, accordingly, dismissed, however, without imposing any cost.

113. The Bench Secretary shall forthwith return the original record to Sri Sudhanshu Srivastava, learned Additional Chief Standing Counsel for being transmitted to the State Government.

(2024) 4 ILRA 1488
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.03.2024

BEFORE

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

Writ-C No. 7729 of 2024

M/s D. Kumars & Co. ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
 Sri Ishir Sripat, Sri Srijan Pandey, Sri Swetashwa Agarwal, Sri Rahul Sripat (Sr. Adv.)

Counsel for the Respondents:
 Sri Anuj Mandhyan, C.S.C., Sri Harsh Vardhan Gupta, Sri Rahul Sahai, Sri Vibhu Rai, Sri Anoop Trivedi (Sr. Adv.), Sri Ganjendra Pratap (Sr. Adv.)

Completion certificate-Impugned order-petitioner's application for issuing completion

certificate has not been accepted- initially a building plan was approved for construction of 16 units on the premises in question- but the construction of 16 units did not proceed - on account of inter se dispute-raised by the fifth respondent and other co-sharers- pending consideration in proceedings before the civil court-no injunction passed- petitioner voluntarily gave an affidavit that it would not proceed with the construction on unit Nos. 6 and 7 -and would await the outcome of pending litigation- on this basis subsequent permission for construction of 14 units was granted- authority having specifically granted permission - cannot go contrary to the stipulations made in its own order-mandamus issued.

Writ Petition allowed. (E-9)

(Delivered by Hon'ble Ashwani Kumar Mishra, J.

&

Hon'ble Syed Qamar Hasan Rizvi, J.)

1. This writ petition arises out of an order passed by the Vice Chairman, Prayagraj Development Authority, dated 15.2.2024, contained in Annexure No. 1 to the writ petition, whereby petitioner's application submitted for issuing completion certificate has not been accepted. The application itself was filed pursuant to the liberty granted by this Court in petitioner's previous writ petition no. 42231 of 2023. The petitioner submits that the order impugned is wholly arbitrary and is in teeth of the previous adjudication made by this Court in petitioner's earlier writ.

2. The impugned order of the Vice Chairman runs into eight pages. Paragraph No. 1 to 21 of the order notices facts relating to the controversy raised. The findings and conclusion in the order under challenge is contained in para 22, which is reproduced hereinafter:-

"22. बिन्दु सं०-21 तथ्यों पर, आधारित होने के कारण किसी टिप्पणी की आवश्यकता नहीं है।

उपरोक्त तथ्यों/पत्रावली का अवलोकन तथा माननीय उच्च न्यायालय के आदेश के क्रम में यह तथ्य विदित है कि-

(i) जोनल अधिकारी के पत्र सं०-17/जोन-2/उप०-2जी(27)/वि०प्रा०/2019-20 दिनांक 09.10.2023 द्वारा पार्ट आफ नजूल फ्री होल्ड प्लॉट नं०-35,35ए लूकरगंज, तहसील सदर, प्रयागराज का बगैर पूर्णता प्रमाण पत्र प्राप्त किये उपभोग किये जाने के कारण नोटिस निर्गत की गयी, जबकि अनुमति पत्र के प्रतिबन्ध संख्या-2 में यह व्यवस्था दिया गया है कि स्वीकृति अनन्तिम (Provisional) स्वीकृति के रूप में होगी पूर्णतया प्रमाण पत्र प्राप्त करने के बाद ही परिसर को वास्तविक उपभोग में लिया जा सकेगा।

(ii) विकासकर्ता द्वारा Exchange Deed दिनांक 06.05.2017 के पैरा-6 में ingress and egress से सम्बन्धित तथ्यों को छुपाते हुए मानचित्र स्वीकृत कराया गया है। विकासकर्ता के अनुरोध पर 14 आवासीय इकाईयों का शमन मानचित्र स्वीकृत किया गया। Exchange Deed के पैरा-6 में ingress and egress में दी गयी व्यवस्था के अनुसार 2 आवासीय इकाईयों (6 व 7 को छोड़कर) 14 इकाई का शमन मानचित्र स्वीकृत किया गया।

(iii) प्रश्नगत प्रकरण में प्राधिकरण द्वारा 16 आवासीय इकाईयों का मानचित्र परमिट संख्या-149/प्र०अ०(त०स०)/जोन-

2/प्रस्ता०/2018-19 दिनांक 11.03.2019 भू-विन्यास/टाईप डिजाइन प्रस्तावित मानचित्र स्वीकृत किया गया। विकासकर्ता द्वारा स्वीकृत मानचित्र से स्थल पर विचलन किये जाने के कारण तथा प्रतिवादी सं०-6 के शिकायत के क्रम में शमन मानचित्र 14 इकाई के रूप में स्वीकृत किया गया, ताकि Exchange/Sale Deed की शर्तों को पूरा किया जा सके। इस प्रकार प्राधिकरण द्वारा स्वीकृत 14 इकाईयों का पूर्णतया प्रमाण पत्र देने में किसी तरह की अड़चन नहीं है, परन्तु विकासकर्ता द्वारा Exchange/Sale Deed की शर्त सं०-6 के अनुसार रास्ते का प्राविधान करने अथवा माननीय सिविल जज (वरिष्ठ श्रेणी) गर्वी इलाहाबाद के समक्ष लम्बित प्रकरण में पारित होने वाले अन्तरिम/अन्तिम आदेश के अनुसार आवेदन करने पर नियमानुसार पूर्णता प्रमाण पत्र दिया जा सकता है। "

3. Although the Vice-Chairman has recorded in his order that there is no hindrance in issuance of completion certificate in respect of 14 units yet the completion certificate has not been issued to the petitioner.

4. In order to appreciate the controversy raised some of the background facts are required to be noticed. A building plan was initially approved by the Prayagraj Development Authority on 11th of March, 2019 in favour of the petitioner for construction of 16 residential units, on a parcel of land being part of freehold plot no. 35 and 35A, Lukerganj, Prayagraj. The construction project was got registered with U.P. Real Estate Regulation Authority on

15.10.2019. This registration was initially valid for a period of three years and is stated to have been extended upto 2.10.2023. It transpires that the plot on which these constructions were permitted to be raised belonged partly to the petitioner and rest to Rajesh Kumar Athwani, Deepak Kumar and Umesh Athwani. These private individuals had transferred part of their share earlier in favour of the present petitioner.

5. It transpires that an exchange deed was executed between petitioner's vendor and Respondent No. 5 in the present petition on 06.05.2017 as a result of which 133.4 sq. meter land falling in the project area was exchanged with 96.6 sq. meter land belonging to petitioner's vendor. This exchange deed contained a stipulation in Clause-6, which is reproduced hereinafter:-

"6. That the Second Party shall however have right to ingress and egress from the North side of their Property, to the property and main entrance of the property of the First Party as aforesaid from the Main Road, marked Red in the annexed Site Plan, whereby Main Entrance of the Property of the First Party from Main Road shall be common to entry to the Property of the Second Party."

6. The fifth respondent apparently objected to the ongoing constructions commenced by the petitioner in terms of the sanctioned map on the ground that their right to passage, existing between the 16 row houses would be obstructed and thereby the sixth clause of the exchange deed would stand violated. This was so as no passage was provided in terms of Clause-6 in the building plan sanctioned on 11.3.2019. Consequently, a suit being Original Suit No. 187 of 2021 came to be

instituted by respondent no. 5 and others before the Civil Court at Prayagraj. In the said suit the present petitioner is arrayed as the only defendant. Prayer in the nature of mandatory injunction has been claimed in the suit, which is reproduced hereinafter:-

"By means of mandatory injunction, the defendant be directed to erect 30 ft. wide common passage from North of the plaintiffs Land shown by letters. A.H.I.C. linking the same to 30 ft. wide common road erected by the defendant which goes from East to West and which has been shown in the map sanctioned by the P.D.A. on 11/03/2019, within the time provided by the court, failing which the decree complied with through the Court."

7. Other ancillary reliefs were also sought in the matter. It is admitted that the suit is pending and there is no interim injunction granted to the fifth respondent in the suit, so far.

8. It transpires that objections were also made by the private respondent/plaintiffs before the Development Authority on account of alleged breach of the covenants in the exchange deed. The petitioner was also confronted with this aspect of the matter. It is at this juncture that the petitioner submitted a compounding plan stating that they would not raise any construction on units Nos. 6 and 7 proposed to be constructed as per building plan sanctioned on 11.3.2019 awaiting adjudication of the suit in respect of Clause-6 of the exchange deed. The petitioners, therefore, claimed before the authority that they be permitted to raise construction on the remaining 14 units. This compounding plan/building permission was approved on 15th of

December, 2021, subject to Clause 5 to 7 of the sanction letter, which are reproduced hereinafter:-

“5. इकाई नं०-6 व 7 सील रहेगी, उक्त निर्मित इकाई पर कोई अतिरिक्त निर्माण/फिनिशिंग का कार्य नहीं किया जायेगा और न ही उक्त इकाई का विक्रय अथवा विक्रय अनुबन्ध सम्पादित नहीं किया जायेगा।

6. सन्दर्भित प्रोजेक्ट में ingress and egress के सम्बन्ध में वाद संख्या-187/2021 सिविल जज कनिष्ठ श्रेणी गर्वी इलाहाबाद के समक्ष वाद विचाराधीन है। उक्त के दृष्टिगत ingress and egress से आच्छादित 2 इकाई भवन सं०-6 व 7 को न्यायालय के निर्णय तक सील किया जाना उचित होगा। इकाई नम्बर-6 व 7 का शमन भी नहीं किया गया है। भवन संख्या-6 व 7 का विक्रय/विक्रय अनुबन्ध आवेदक/विकासकर्ता द्वारा नहीं किया जायेगा। इस हेतु दिये गये शपथ पत्र (IN-UP69191438669463T दिनांक 15.12.2021) का अनुपालन बाध्यकारी होगा।

7- वाद संख्या-187/2021 सिविल जज (कनिष्ठ श्रेणी) गर्वी इलाहाबाद में होने वाला अन्तिम निर्णय उभय पक्ष पर बाध्यकारी होगा। इस हेतु दिये गये शपथ पत्र (22AE921843 दिनांक 22.11.2021) का अक्षरशः अनुपालन बाध्यकारी होगा।”

9. As allowed by the authority vide permission dated 15.12.2021 the petitioner has not proceeded any further with the constructions on unit No. 6 and 7, which continue to remain sealed in terms of

Clause 5 of the regularization/permission dated 15.12.2021. There is no allegation that these two units have either been sold or any fresh rights have been created in favour of anybody over it.

10. In terms of the permission granted by the authority vide regularization order dated 15th of December, 2021, the petitioner has proceeded to raise construction of 14 units and allegedly completed it as per the approved plan. It is thereafter that the petitioner moved an application for issuance of completion certificate, which was not considered. It was in this context that the petitioner came earlier before this Court by filing writ petition no. 42231 of 2023. The authority resisted petitioner's claim on account of pendency of civil suit etc. The authority was confronted with the specific permission granted by it vide regularization order dated 15.12.2021. Faced with it, the authority undertook to examine petitioner's claim. The writ petition was consequently disposed of vide following orders:-

"Heard Sri Rahul Sripat, Senior Counsel assisted by Sri Swetashwa Agarwal for the petitioner and Sri Rakesh Pandey, Senior Counsel assisted by Sri Anuj Mandhyan for private respondent no. 6 as well as Sri A.P. Paul for the Prayagraj Development Authority, Prayagraj.

The petitioner is a Real Estate Company, which has undertaken constructions of certain villas on Plot Nos. 35 and 35-A, Lukerganj, Tehsil Sadar, District Prayagraj. The original lay-out was sanctioned by the Development Authority providing for construction of 16 houses. The right to raise constructions upon Plot Nos. 35 and 35A is derived from an authority given to petitioner by the owners of the plot. An area of 1137.04 sq.

mtrs. from Plot No. 35A and 360 sq. mtrs. out of Plot No. 35 have been purchased by the petitioner and in respect of other remaining land a "Builders Agreement" exists. The building plan was sanctioned. Subsequently, a compounding map has been submitted by the petitioner which has also been approved by the authority. The building plan, which has been approved by the authority, shows that houses exist on two sides of a 30 feet passage and at its rear end. An objection was raised by the sixth respondent contending that he was promised 30 feet wide passage from the north of his property under an agreement and construction of house nos. 6 and 7, in the sanctioned plan, would obstruct his ingress and egress. It would also be in teeth of the agreement entered into between the petitioner's vendor and the 6th respondent. An Original Suit No. 187 of 2021 has been instituted by the 6th respondent before the Civil Court, Prayagraj, which is pending. On account of the dispute between the 6th respondent and the petitioner's vendor, an undertaking has been given by the petitioner before the authority that it would not raise construction of house nos. 6 and 7 and that construction on such part of the land would abide by the determination made by the Civil Court. A plan for issuance of completion certificate in respect of remaining 14 houses has been submitted by the petitioner on 21.03.2023. Since such completion certificate has not been given, the petitioner is before this Court.

Learned Senior Counsel for the petitioner submits that Section 15-A of the U.P. Urban Planning and Development Act, 1973 (hereinafter referred to as 'Act of 1973') provides for issuance of the completion certificate. Such certificate is to be granted by the development authority, if the constructions are made as per the approved plan and a notice of such completion is

given to the authority. The proviso contemplates that if such certificate is not granted, the completion certificate shall be deemed to be granted within three months. Relying upon such provision, it is alleged on behalf of the petitioner that action of the respondents in not issuing the completion certificate is arbitrary. The petitioner is also aggrieved by a communication issued by the Zonal Officer dated 09.10.2023, which mentions that the condition mentioned in the sanctioned plan, that the constructed premises would be utilized only after completion certificate is issued, has been violated. It is further mentioned in the notice that without getting the completion certificate issued, the petitioner is utilizing villa no. 8, 9 and 11. A direction has been issued to the petitioner not to utilize the premises without getting the completion certificate issued. Submission is that once completion certificate in respect of 14 houses has been sought on 21.03.2023, and no decision upon it was taken, the authority is precluded from issuing the impugned communication, particularly when no construction was otherwise raised on unit nos. 6 and 7. According to the petitioner the completion certificate is deemed to have been issued.

Sri A.P. Paul, appearing for Development Authority states that in the event such facts are placed before the authority, an appropriate decision in terms of Section 15-A of the Act of 1973 would be taken by the authority. It is also urged that the authority shall verify whether the constructions made are as per the plan.

Sri Rakesh Pandey, Senior Counsel appearing for 6th respondent states that rights of the 6th respondent ought not to be allowed to be obstructed by issuance of completion certificate.

From the materials placed on records it is not disputed that a building

plan for construction of 16 houses has been sanctioned by the authority. There were apparent issues between the petitioner's vendor and the 6th respondent, and the petitioner has clearly undertaken not to raise any construction of unit no. 6 and 7. Any development of these two residential units would abide by the outcome of the Civil Court. The petitioner has already informed the authority that remaining 14 units have been constructed as per plan and a prayer has been made for issuance of a completion certificate. No objection appears to have been made by the authority against the application of petitioner for issuance of completion certificate.

In such circumstances, we permit the petitioner to place such facts before the authority along with certified copy of this order within a week from today. The Vice Chairman of the Development Authority shall ensure that petitioner's claim, noticed above, is accorded consideration in accordance with law within a further period of four weeks, thereafter. The writ petition is disposed of, accordingly."

11. It is, thereafter, that the Vice Chairman of the authority has denied issuance of completion certificate to the petitioner despite holding that there is no legal hindrance in issuance of such completion certificate, taking shelter of the inter se dispute between the petitioner and respondent No. 5.

12. The writ petition was entertained and as prima facie this Court was of the opinion that having granted permission to raise construction of 14 units vide regularization order dated 15.12.2021 it was not open for the authority to deny issuance of completion certificate. A further

opportunity was consequently allowed to the authority to revisit the matter vide order dated 11.3.2024. Paragraph Nos. 5 to 7 of the order dated 11th of March, 2024 are reproduced hereinafter:-

"5. The order of the Vice-Chairman depicts that the authority has not understood the directions issued in previous order passed by this Court. This Court had clearly permitted the petitioners to apply for issuance of completion certificate in respect of 14 houses for which alone compounding plan had already been sanctioned. The consideration at the level of the authority for issuance of completion certificate was limited to these 14 houses. The Vice-Chairman in his order states that there is no hindrance in issuance of completion certificate of 14 houses and that such a certificate can be given subject to ultimate adjudication to be made in the civil suit in respect of condition no.6, which pertains to the area beneath plot nos.6 and 7.

6. Once the officer found the plea of grant of completion certificate to be permissible in respect of 14 houses the natural consequence of such observation is that the completion certificate would be issued in the matter. Instead of doing so, the Vice-Chairman has again disposed of the matter without actually doing anything. This tendency to pass orders which effectively does not deal with the grievance of the litigant creates uncalled for litigation.

7. Before proceeding further, we call upon the Vice-Chairman to file his personal affidavit explaining and justifying his action in the context of the findings returned by the officer himself in the order under challenge. The officer shall specifically explain as to why the completion certificate has not been issued

once he found the issuance of completion certificate to be permissible for 14 houses in terms of his own order."

13. The Vice Chairman has filed his personal affidavit, in which it is stated that initially the plan was sanctioned for 16 dwelling units, and that a civil dispute is pending in Original Suit No. 187 of 2021. Paragraph Nos. 20 to 24 of the affidavit filed by the Vice Chairman makes an interesting reading and are reproduced hereinafter:-

"20. That is most humbly submitted that while requesting for completion certificate of those 14 Units the unauthorized construction/un-compounded constructions are required to be removed.

21. That is it humbly submitted submitted that the request of the petitioner is to issue completion certificate despite there being un-compounded/unauthorized constructions standing on the project site.

22. That the petitioner cannot obtain completion certificate as against the compounded layout/development plain.

23. That the completion certificate can be forthwith granted if the sealed constructions standing on the land of Unit no. 6 & 7 may be demolished, as they are the part of sanctioned plan the demand of the petitioner presently is clearly reflecting that he should be issued completion certificate despite existence of un-compounded constructions in the project.

24. That it is humbly submitted that the completion certificate can be immediately granted in case un-compounded/unsanctioned constructions are removed or compounded in accordance with law."

14. On behalf of the authority it is stressed that while uncompounded

structures over Unit No. 6 and 7 stand on the plot, it would not be open for the authority to consider issuance of completion certificate in respect of 14 units. It is, therefore, stated that unless Unit No. 6 and 7 are either demolished or compounded, it would not be open for the authority to issue the completion certificate.

15. We have heard Shri Rahul Sripat, learned Senior Counsel on behalf of the petitioner, Shri Anoop Trivedi, learned Senior Counsel for the Prayagraj Development Authority and Shri Gajendra Pratap, learned Senior Counsel for respondent No. 5 and have perused the materials on record.

16. The controversy raised in the writ petition is extremely limited and in the event the authority had carefully examined its records in the context of applicable provisions of law no occasion would have arisen for the petitioner to repeatedly approach this Court.

17. We have already taken note of the facts and it is apparent that though initially a building plan was approved for construction of 16 units on the premises in question, but the construction of 16 units did not proceed on account of inter se dispute, which came to be raised by the fifth respondent and other co-sharers. The fifth respondent essentially was claiming right of ingress and egress to the passage created in the project between the two set of row houses. Contention of the fifth respondent that petitioner would be bound by the covenants of exchange deed executed between the petitioner's vendor and fifth respondent is an aspect pending consideration in proceedings before the civil court. No injunction has been passed

by the Civil Court in Original Suit No. 187 of 2019. However, in order to avoid any further complications, the petitioner voluntarily gave an affidavit stating that it would not proceed with the construction on unit Nos. 6 and 7 and would await the outcome of pending litigation before the civil court. It was on the basis of this undertaking given by the petitioner that the subsequent permission for construction of 14 units was granted by the authority vide compounding plan dated 15th of December, 2021. The compounding plan clearly make it permissible for the petitioner to raise construction of 14 units and the two units i.e. unit Nos. 6 and 7 were specifically required to be left as it is and was to remain subject to the pending suit. The stipulation contained in Clause 5 to 7 of the compounding plan dated 15th December, 2021, categorically permitted the petitioner to raise construction of 14 units. It is pursuant to this permission granted by the authority on 15th of December, 2021 that the petitioners have applied for issuance of completion certificate.

18. Section 15-A of the U.P. Urban Planning and Development Act, 1973 provides for issuance of completion certificate and is reproduced below:-

"15-A. Completion Certificate.

(1) Every person or body having been granted permission under sub-section (3) of section 15, shall complete the development according to the approved plan and send a notice in writing of such completion to the Authority, and obtain a completion certificate from the Authority in the manner prescribed or provided in the bye-laws of the Authority. Provided that if

completion certificate is not granted and refusal to grant it is not intimated within three months after receipt of the notice of completion, it shall be deemed that the Completion certificate has been granted by the Authority.

(2). No person shall occupy or permit to be occupied any commercial building or use are permit to be used such building or part thereof affected building or work until completion certificate has been issued by the Authority, or

Authority has failed for three months after the receipt of notice of completion to intimate its refusal of grant of the said certificate.

Explanation. - For the purposes of this section, the expression 'commercial building' shall have the meaning assigned to it in the Uttar Pradesh Municipal Corporations Act. 1959."

19. The Statute is clear and categorical, inasmuch as an application for grant of completion certificate can be moved pursuant to a permission granted under Sub-Section 3 of Section 15 of the U.P. Urban Planning and Development Act, 1973. The permission granted by the authority on 15th of December, 2021 allowing 14 units to be constructed on the spot was thus a permission pursuant to which the completion certificate could be claimed by the petitioner. The petitioner has thus approached the authority for issuance of such completion certificate. The authority having allowed permission on 15.12.2021 to raise construction of 14 units, subject to the conditions contained in clause 5 to 7 of the order cannot be permitted to resile from its earlier stand and refuse issuance of completion certificate only on the ground that unit Nos. 6 and 7 have not been included in the permission granted by the authority on

15th of December, 2021. The authority having specifically granted permission to raise 14 units cannot go contrary to the stipulations made in its own order dated 15.12.2021.

20. The stand taken by the authority before this Court is completely at variance with its own order dated 15th of December, 2021. The permission granted by the authority on 15th of December, 2021 clearly provides that unit No. 6 and 7 would remain sealed and that no constructions would be raised upon it. It is further stipulated in the permission letter dated 15th of December, 2021 that the final adjudication in Original Suit No. 187 of 2021 would ultimately bind the parties in respect of the claim raised before the civil court. Having specifically so provided in the regularization order dated 15th of December, 2021, it is not open for the authority now to say that unless the constructions initially raised on unit No. 6 and 7 are demolished or compounded, the completion certificate cannot be issued to the petitioner.

21. Despite the orders passed on the previous occasion the authority has failed to examine the matter in correct perspective. Even, during the pendency of the writ petition we have confronted the Vice Chairman with the facts of the case, but we find that repeated opportunity granted in the matter have not been availed. The approach of the Vice Chairman in sticking to its stand notwithstanding the previous permission granted and the directions issued in the previous writ, cannot be appreciated. Due diligence on the part of the authority is to be appreciated, but the manner in which the authority has been

insistent upon its stand contrary to the statutory provisions as well as their own orders deserves to be deprecated. We stop at this.

22. Once the plan for construction of 14 units was approved on 15th of December, 2021, the prayer for issuance of completion certificate had to be accorded consideration in terms of Section 15-A of the Act of 1973. It is not open for the authority to fall back upon the ongoing private dispute between the petitioner and the fifth respondent to deny performance of its statutory duty or to take sides in that regard.

23. The writ petition, accordingly, succeeds and is allowed.

24. A writ of mandamus is issued to the Vice Chairman of the Prayagraj Development Authority to accord consideration to petitioner's application for issuing completion certificate in respect of 14 units constructed pursuant to the permission/regularization allowed by the authority on 15th of December, 2021 within a period of four weeks from today in light of the observations contained in this judgment. We clarify that issuance of completion certificate to the petitioner would not be to the prejudice of the fifth respondent, who will be entitled to press its claim before the civil court and no equity would be claimed in such civil proceedings by the petitioner on account of issuance of completion certificate pursuant to permission dated 15.12.2021.

25. No order is passed as to costs.

alleged therein that from the surrounding plots, soil upon a depth about 6 feet had been extracted for construction of a railway flyover. As a result, the land of the petitioner become much higher than the surrounding plots. This resulted in soil erosion from petitioners' plot during the rainy season. Therefore, the petitioner had merely leveled his plot using agricultural equipments and tractor.

7. In our considered opinion, the reply filed by the petitioner amounts to an admission of what has been alleged in the notice against him. In order to level his field to the level of the surrounding plots, to prevent erosion of soil, petitioner was necessarily required to remove soil up to a depth of 5 to 6 feet. Nothing less would prevent erosion of soil.

8. In the light of the above factual situation, this Court is required to analyze what is contained in Rule 3 of the Rules 2021. The explanation to this Rule, which is being relied upon by learned counsel for the petitioner reads as follows:-

"Explanation:- For the purposes of this rule manual digging or manual extraction of ordinary clay, ordinary earth for making bricks and pottery shall not be treated as mining operations:"

9. Perusal of the portion extracted above makes it clear that it is applicable only where manual digging or manual extraction of ordinary clay has been carried out and such excavation is not deeper than two meters. Only if these two conditions are fulfilled and the soil is excavated for making bricks or pottery, will the excavation of soil not amount to illegal mining and the petitioner would not be charged of illegal mining.

10. From the facts noticed in the initial part of this order, it is admitted that the so called leveling carried out by the petitioner was by using agricultural tools and tractor. Moreover, as already discussed above, if the petitioner's case is accepted in toto, the same necessarily amounts to removal of soil to make the plot of the petitioner equal in height with the adjoining plots.

11. It is not the case of the petitioner that this soil which had to be removed by using machinery was for making bricks and/or pottery.

12. Under the circumstances, the petitioner is not entitled to any benefit of the explanation to Rule 3. For the same reason, the impugned orders cannot be faulted with.

13. It is additionally submitted that no royalty could be imposed in view of the Entry 8 of the IIInd Schedule. The argument is of no consequence because no royalty has been demanded from the petitioner. The amount that is demanded by the impugned orders is only that of penalty which can be very well imposed in view of Rule 58 of the Rules, 2021.

14. Accordingly and in view of the above, the writ petition fails and is dismissed.

(2024) 4 ILRA 1498

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 19.03.2024

BEFORE

**THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE KSHITIJ SHAILENDRA, J.**

Writ C No. 8607 of 2024

Nishant Kumar

...Petitioner

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioner:

Sri Vivek Saran

Counsel for the Respondent:

C.S.C., Sri Ramesh Kumar Shukla

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002

-Aggrieved against a communication issued by the Bank stating that 25% of the sale price deposited by him- has been forfeited-as he had failed to deposit the remaining 75% of the sale price within fifteen days from the date of confirmation of sale- the balance amount of purchase price has to be deposited within fifteen days of confirmation of sale -said period could be extended as may be agreed upon in writing between the purchaser and the secured creditor- but it could not exceed three months-extension beyond fifteen days is based upon agreement -in instant case-the Bank has refused to extend the period- meaning there was no agreement between the parties for extension of time - no illegality or infraction of any statutory provision in the action of the Bank.

Writ Petition dismissed. (E-9)**List of Cases cited:**

1. Authorised Officer, Central Bank of India vs. Shanmugavelu reported in 2024 SCC OnLine SC 92

2. Authorized Officer, State Bank of India vs. C. Natarajan reported in 2023 SCC OnLine SC 510

(Delivered by Hon'ble Manoj Kumar

Gupta, J.

&

Hon'ble Kshitij Shailendra, J.)

1. The instant petition is directed against a communication dated 13.02.2024 issued by the Chief Manager, Punjab National Bank to the petitioner stating that 25% of the sale price i.e., Rs.30.03 lakh deposited by him, has been forfeited, as he had failed to deposit the remaining 75% of

the sale price within fifteen days i.e., by 11.01.2024 from the date of confirmation of sale.

2. The facts necessary for disposal of the instant petition are as follows:

M/s Laxmi Food Products, a proprietorship concern of father of the petitioner had taken loan from the respondent-Bank. As there was default in re-payment of the loan, the respondent-Bank had proceeded to auction the mortgaged property. E-auction was held on 27.12.2023 in which the petitioner was the highest bidder for an amount of Rs.120.10 lakh. As per terms and conditions of e-auction, the petitioner deposited 25% of the bid amount (inclusive of earnest-money) on the next date i.e., 28.12.2023 whereupon the sale was confirmed by order dated 28.12.2023. The order confirming the sale specifically mentioned that the petitioner would be required to pay the remaining 75% of the sale price within fifteen days. The petitioner filed an application before the respondent-Bank on 11.01.2024 seeking seventy five days' further time to deposit the remaining 75% of the sale price. He stated in his application that he had applied to a Bank for a home loan. Since there was no approved building plan of the land, which was subject matter of auction nor any declaration under Section 143 of U.P. ZA and LR Act, therefore, delay had occurred in approval of the loan. He should, therefore, be granted further time so that he gets the loan sanctioned and would then be in position to deposit the remaining amount.

3. The aforesaid prayer of the petitioner was turned down by the Bank by sending him an e-mail. A copy of the said communication has been placed before us

by learned counsel for the respondent-Bank and with regard to which, there is no dispute between the parties. The said communication is reproduced below:

“From: Circle Sastra Bijnore
Sent: 11 January 2024 07:14 PM
To: NISHANT KUMAR;
nks01180@gmail.com
Cc: Circle Sastra Bijnore
Subject: RE: Your letter dt.
10.01.2024 for extension of time to deposit
remaining sale amount
Attachments: Nishant_0001.pdf
दिनांक : 11-01-2024

**श्री निशांत कुमार पुत्र श्री अरविंद
कुमार**

**पता: ग्राम- रामठेरा, पोस्ट-
हबीबवाला,**

तहसील- धामपुर, बिजनौर

**विषय: नीलामी दिनांक 27.12.2023 में
खरीदी गयी संपत्ति की शेष राशि के जमा करने
के लिए आपके द्वारा प्राप्त पत्र 11.01.2024 संबंध
में**

महोदय,

जैसा कि आप अवगत हैं कि आपने बैंक द्वारा दिनांक 27.12.2023 को की गयी ई-नीलामी द्वार एक संपत्ति रुपए 1,20,10,000.00/- (एक करोड बीस लाख दस हजार रुपए) में खरीदी थी जिसकी 25% राशि नियमानुसार दिनांक 28.12.2023 तक जमा कर दिया था एवं शेष 75% राशि को जमा करने की लिए आपको 15 दिनों का समय दिया गया था जो कि आपको ईमेल दिनांक 27.12.2023 द्वारा भी सूचित

किया गया था कि आपको शेष नीलामी राशि को दिनांक 11.01.2024 तक जमा करना है किन्तु आपने अभी तक शेष राशि जमा नहीं की है तथा आपने ईमेल द्वारा अपने पत्र दिनांक 11.01.2024 के द्वारा अतिरिक्त 75 दिनों की मांग की है एवं आपने यह बताया है कि आपने ऋण के लिए आवेदन किया है और आपके द्वारा खरीदी गयी संपत्ति ना ही का नक्शा पास है एवं ना ही संपत्ति धारा 143 के अंतर्गत आवासीय घोषित है।

उपरोक्त पत्र के संदर्भ में आपको सूचित किया जाता है कि नीलामी की जानी वाली संपत्ति की सभी प्रकार की जानकारी आपको संपत्ति के खरीदे जाने से पूर्व की जानी चाहिए थी क्योंकि बैंक द्वारा सम्पत्तियों कि नीलामी "As is where is", "As is what is" and "Whatever there is" के आधार पर की जाती है एवं आपको यह भी सूचित किया जाता है कि आपके ऋण के आवेदन के स्वीकृत होने में होने वाले विलंब से बैंक का किसी भी प्रकार का सम्बंध नहीं है।

जो संपत्ति आपने ई नीलामी में दिनांक 27.12.2023 को खरीदी है वो संपत्ति मै० लक्ष्मी फूड प्रोडक्ट्स (NPA ऋण खाते) में बंधक है जिसमे आपके पिता श्री अरविंद कुमार पुत्र श्री लखपत सिंह प्रोपराइटर है जो की बैंक के डिफाल्टर भी है अतः आप इस संपत्ति के बारे में भली भांति अवगत थे।

अतः आपको शेष नीलामी राशि जमा करने के लिए अतिरिक्त समय देने का कोई आधार नहीं बनता है इसलिए आपके द्वारा शेष नीलामी राशि को जमा करने के लिए अतिरिक्त

75 दिनों की मांग अस्वीकार्य है एवं आपको तुरंत पूर्ण राशि तुरंत जमा करने की सलाह दी जाती है एवं पूर्ण नीलामी राशि के जमा ना होने की स्थिति में आपके द्वारा जमा की गयी समस्त राशि बैंक द्वारा नियमानुसार जब्त (forfeit) कर ली जाएगी और बैंक उचित एवं अग्रिम कार्यवाही के लिए स्वतंत्र होगा।

धन्यवाद

पंजाब नैशनल बैंक

सुनील कुमार वर्मा

प्राधिकृत अधिकारी (मुख्य प्रबन्धक)”

4. Learned counsel for the petitioner submits that the Bank had the power to extend the time up to ninety days. The petitioner had applied for a loan and since it was not sanctioned, therefore, delay had occurred. It is submitted that in such circumstances, the decision of the Bank to forfeit 25% of the amount deposited by the petitioner is wholly illegal. He places reliance on Rule 9 of the Security Interest (Enforcement) Rules, 2002 framed under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short ‘the Act’) in support of his contention.

5. On the other hand, learned counsel for the respondent-Bank submits that the time permissible for depositing the remaining amount was fifteen days from the date of confirmation of the sale. The said period was extendable at the discretion of the Bank provided there was justifiable ground and material to the said effect. It is urged that in the facts of the instant case, the Bank did not find any justifiable ground to extend the time limit.

6. Sub-rule (3), (4) and (5) of Rule 9, which are relevant, are extracted below:

“(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.

(4) The balance amount of purchase price payable shall be paid by the purchaser to the authorised officer on or before the fifteenth day of confirmation of sale of the immovable property or such extended period as may be agreed upon in writing between the purchaser and the secured creditor, in any case not exceeding three months.

(5) In default of payment within the period mentioned in sub-rule (4), the deposit shall be forfeited to the secured creditor and the property shall be resold and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may be subsequently sold.”

7. It is clear on a plain reading of the aforesaid provisions that twenty five percent of the amount of sale price inclusive of earnest money is to be deposited by the auction purchaser as soon as his bid is declared to be successful. The balance amount of purchase price has to be deposited within fifteen days of confirmation of sale of the immovable property. The said period could be extended as may be agreed upon in writing between the purchaser and the secured creditor but it could not exceed three months.

8. The extension beyond fifteen days is based upon agreement between the purchaser and the secured creditor. In the instant case, the Bank has refused to extend the period meaning thereby that there was no agreement between the parties for extension of time limit prescribed under the statute.

9. The loan was taken by the proprietorship concern of the father of the petitioner. The petitioner knew that it was an agricultural land and there was no approved building plan. He purchased it on "as is where is" and "as is what is" basis. He was well aware of the fact that under the terms and conditions of auction, he was required to deposit 25% of the purchase price within fifteen days and also the consequences of its failure.

10. In the **Authorised Officer, Central Bank of India vs. Shanmugavelu** reported in **2024 SCC OnLine SC 92**, the Supreme Court held that Rule 9(5) was consciously incorporated by the legislature to subserve the larger object of the Act i.e. timely resolution of the bad debts of the country. It has been held that any dilution of the forfeiture provided under Rule 9(5) would result in the entire auction process under the Act being derailed by mischievous auction purchaser(s) through sham bids, thereby undermining the overall object of the Act of promoting financial stability, reducing NPAs and fostering a more efficient and streamlined mechanism for recovery of bad debts.

11. In the aforesaid judgement, the Supreme Court dis-approved the decision of the High Court to reduce the extent of amount forfeited in view of the fact that subsequent sale of the secured asset had

fetched a higher price. It has been observed as follows:

"However, we are not in agreement with the aforesaid observations of the High Court. When an auction fails and a fresh auction is required to be conducted in respect of the Secured Asset, there looms a degree of uncertainty as to the extent of bids that may be received in the future auction or whether the fresh auction would even be successful or not. More often than not, with the efflux of time, the value of the Secured Asset erodes. In such a case it would be preposterous to tie or limit the forfeiture under Rule 9(5) of the SARFAESI Rules on an eventuality or a contingency of a subsequent sale of the secured asset if any.

The consequence of forfeiture of 25% of the deposit under Rule 9(5) of the SARFAESI Rules is a legal consequence that has been statutorily provided in the event of default in payment of the balance amount. The consequence envisaged under Rule 9(5) follows irrespective of whether a subsequent sale takes place at a higher price or not, and this forfeiture is not subject to any recovery already made or to the extent of the debt owed. In such cases, no extent of equity can either substitute or dilute the statutory consequence of forfeiture of 25% of deposit under Rule 9(5) of the SARFAESI Rules."

12. The Supreme Court in the said judgement also considered the scope of judicial review in respect of a decision taken by a secured creditor not to extend the time limit and to forfeit the amount deposited at the time of confirmation of the auction. The Supreme Court approved the previous judgment in **Authorized Officer, State Bank of India vs. C. Natarajan** reported in **2023 SCC OnLine SC 510**,

and held that it is only in very rare and exceptional case where extraneous conditions beyond the control of the purchaser had led to default in deposit of the balance amount that the Court could intervene. It has also been observed that while carrying out the said scrutiny the Court must be careful and cautious and direct their attention to examine each case in some depth to locate whether there is likelihood of any hidden interest of the bidder to stall the sale to benefit the defaulting borrower. The court should not be swayed by sentiments as sympathy, grace or compassion are outside the scope of the legislation. The relevant extract from the judgment in **C. Natarajan (supra)** on which reliance was placed by the Supreme Court in arriving at the above conclusion is extracted below:

"13.... If, however, circumstances are shown to exist where a bidder is faced with such a grave disability that he has no other option but to seek extension of time on genuine grounds so as not to exceed the stipulated period of ninety days and the prayer is rejected without due consideration of all facts and circumstances, refusal of the prayer for extension could afford a ground for a judicial review of the decision-making process on valid ground(s). One such exceptional circumstance led to the decision in *Alisha Khan v. Indian Bank (Allahabad Bank)* [2021 SCC OnLine SC 3340], where this Court intervened and granted relief because, due to COVID complications, the appellant had failed to pay the balance amount.

xxx xxx xxx

24. The up-shot of the aforesaid discussion is that whenever a challenge is laid to an order of forfeiture made by an authorized officer under sub-rule (5) of rule

9 of the Rules by a bidder, who has failed to deposit the entire sale price within ninety days, the tribunals/courts ought to be extremely reluctant to interfere unless, of course, a very exceptional case for interference is set up. What would constitute a very exceptional case, however, must be determined by the tribunals/courts on the facts of each case and by recording cogent reasons for the conclusion reached. Insofar as challenge to an order of forfeiture that is made upon rejection of an application for extension of time prior to expiry of ninety days and within the stipulated period is concerned, the scrutiny could be a bit more intrusive for ascertaining whether any patent arbitrariness or unreasonableness in the decision-making process has had the effect of vitiating the order under challenge. However, in course of such scrutiny, the tribunals/courts must be careful and cautious and direct their attention to examine each case in some depth to locate whether there is likelihood of any hidden interest of the bidder to stall the sale to benefit the defaulting borrower and must, as of necessity, weed out claims of bidders who instead of genuine interest to participate in the auctions do so to rig prices with an agenda to withdraw from the fray post conclusion of the bidding process. In course of such determination, the tribunals/courts ought not to be swayed only by supervening events like a subsequent sale at a higher price or at the same price offered by the defaulting bidder or that the secured creditor has not in the bargain suffered any loss or by sentiments and should stay at a distance since extending sympathy, grace or compassion are outside the scope of the relevant legislation. In any event, the underlying principle of least intervention by tribunals/courts and the overarching

objective of the SARFAESI Act duly complimented by the Rules, which are geared towards efficient and speedy recovery of debts, together with the interpretation of the relevant laws by this Court should not be lost sight of. Losing sight thereof may not be in the larger interest of the nation and susceptible to interference."

(Emphasis supplied)

13. One of the plea in the aforesaid case like in the instant case was inability of the auction purchaser to get the loan sanctioned. In the instant case as noted above, the petitioner was fully aware of his financial capacity still he participated in the auction and made bid of an amount which was beyond his means. The mortgaged property belonged to the firm of his father and there was every likelihood that the bid was made to create obstacle in the way of the secured creditor in recovering its dues. There was no extraneous condition pleaded by the petitioner as may have incapacitated him from depositing the balance amount. The factors pleaded for getting extension were his own creation and not attributable to any external force. Therefore keeping in mind the limited power of judicial review, we are of the considered opinion that there was no error in the decision of the secured creditor in rejecting the request to extend the time for payment of the balance amount.

14. It is noteworthy that by our previous order dated 15.03.2024, we granted time to the petitioner to make payment of the remaining amount by 18.03.2024 alongwith interest for the period of delay beyond 11.01.2024 and fixed today's date.

15. Shri Vivek Saran, learned counsel for the petitioner, at the outset,

submitted that the petitioner could not comply with the said order as he is not in position to deposit the remaining amount, inasmuch as the loan, which he had applied for, has yet not been sanctioned.

16. Keeping in mind the aforesaid facts, we are of the opinion that there was no illegality or infraction of any statutory provision in the action of the Bank.

17. The petition lacks merit and is, accordingly, **dismissed**.

(2024) 4 ILRA 1504
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.04.2024

BEFORE

THE HON'BLE DINESH PATHAK, J.

Writ-C No. 10173 of 2024

Smt. Adiba		...Petitioner
	Versus	
State of U.P. & Ors.		...Respondents

Counsel for the Petitioner:
 Sri M J Akhtar, Sr. Adv.

Counsel for the Respondents:
 C.S.C., Sri Dharam Vir Jaiswal, Sri Harsh Vikram,
 Sri Kushagra Vaibhav Singh, Sri Pradeep Kumar
 Singh

U.P. Panchayat Raj Act, 1947 - Section 95(1)(g) - Uttar Pradesh Panchayat Raj (Removal of Pradhans, Up Pradhans and Members) Enquiry, Rules, 1997 - Rule 5-
 Petitioner is an elected Pradhan in the Panchayat Election 2020-21-during his tenure being Pradhan, a complaint has been moved by private person- pointing out some embezzlement in the development work done by the petitioner- District Magistrate on behalf of State Government has constituted a committee- to conduct preliminary inquiry against the incumbent- petitioner has no right to participate

in the preliminary inquiry -before passing the order under Rule 5 of Enquiry Rules, 1997 he had been given effective opportunity to file her reply against the charges - no more res-integra that Rules are secondary in nature as subordinate legislation to help in governing law and are made to make the parent Act work-District Magistrate has not committed any error in passing the order to conduct a final enquiry and cease the financial and administrative power in exercise of power conferred u/s 95(1)(g) of Act, 1947 read with Rule 5 of the Enquiry Rules 1997.

Writ Petition dismissed. (E-9)

List of Cases cited:

1. Vivekanand Yadav vs. State of U.P. and others, 2010 (111) RD 699
2. Shamim v. State of U.P. and Ors.; (2018) 4 UPLBECH 2573

(Delivered by Hon'ble Dinesh Pathak, J.)

1. Heard learned counsel for the parties and perused the record on board.

2. The petitioner has invoked the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India assailing the order dated 29.02.2024 passed by District Magistrate, Bijnor (respondent no.2) under Section 95(1)(g) of U.P. Panchayat Raj Act, 1947 (in brevity Act, 1947) read with Rule 5 of Uttar Pradesh Panchayat Raj (Removal of Pradhans, Up Pradhans and Members) Enquiry, Rules, 1997 (in brevity Enquiry Rules, 1997) whereby administrative and financial power of the incumbent Pradhan (petitioner) has been ceased and, simultaneously, regular inquiry has been directed to be conducted.

3. The facts culled out from the record are that petitioner is an elected Pradhan in the Panchayat Election 2020-21.

During his tenure being Pradhan, a complaint has been moved by private person, namely, Khursheed and Rafeeq Ahmad pointing out some embezzlement in the development work done by the petitioner. Considering the severity of the matter, District Magistrate on behalf of State Government has constituted a committee, vide order dated 28.04.2023, consists of two members to conduct preliminary inquiry against the incumbent Pradhan intending to examine the allegations made against her. After due inquiry, Committee has submitted its preliminary inquiry report dated 09/10.11.2023, whereby four charges have been levelled against the present petitioner relating to the financial embezzlement. Having considered the preliminary inquiry report dated 09/10.11.2023, District Magistrate, Bijnor has issued notice to the petitioner, vide its order dated 28/25.11.2023 (Annexure No.3), affording opportunity to file her reply, if any, within 15 days. In pursuance thereof, petitioner has filed her reply dated 04.01.2024. Having considered the reply submitted by the Pradhan insufficient, learned District Magistrate has passed order dated 29.02.2024 under Section 95(1)(g) of Act, 1947 read with Rule 5 of the Enquiry Rules, 1997, by which Inquiry Committee has been constituted consist of Project Director, District Village Development Agency, Bijnor as well as Executive Engineer, P.W.D, Bijnor and, simultaneously, ceased the financial and administrative power of the Pradhan, which is under challenge before this Court.

4. Learned Senior counsel for the petitioner submits that in preliminary inquiry petitioner was not permitted to participate. Apart from that, report was submitted at a very belated stage on

09/10.11.2023 in pursuance of the order dated 28/25.4.2023, to wit, beyond the prescribed period of limitation as enunciated under Rule 4(2) of Enquiry Rules, 1997, therefore, preliminary enquiry report as well as the entire subsequent proceedings based on said report is nullity in the eye of law. It is further submitted that exonerating the Secretary from the allegations is not justifiable inasmuch as his conduct is also liable to be inquired along with the petitioner. In his third submission, learned Senior Advocate has tried to question genuineness/validity of the charges relating to GST and submit that all these charges are vague and result of misleading document. Lastly it is submitted that the instant writ petition may be allowed and the order impugned passed by the District Magistrate may be quashed being illegal, cryptic and unwarranted under the law.

5. Par contra, learned Standing counsel has vehemently opposed the submissions as raised by the learned counsel for the petitioner and supported the order impugned passed by the District Magistrate. He has contended that full opportunity has been afforded to the petitioner before passing the order impugned dated 29.02.2024. Petitioner, at this stage, has no right to raise any question qua charges inasmuch as regular inquiry is going on. It is further contended that submission of preliminary enquiry report even after prescribed period of limitation does not make it redundant in the eye of law. It is next contended that at this stage, while the final inquiry is going on, there is no justification to interfere in the order impugned dated 29.02.2024. Therefore, instant writ petition, being misconceived and devoid on merits, is liable to be dismissed.

6. Having considered the rival submissions advanced by learned counsel for the parties and perused of record, it is manifested that District Magistrate, having considered the preliminary inquiry report, has passed order impugned under Section 95(1)(g) of Act, 1947 read with Rule 5 of the Enquiry Rules, 1997. At the stage of moving complaint under Rule 3 of the Enquiry Rules 1997 and, thereafter, during the preliminary inquiry, there is nothing mandatory to hear the the Pradhan. The purpose of preliminary inquiry is nothing but to find out the truthfulness of the allegations as mentioned in the complaint. It is a fact finding process to make out a prima facie case for the purposes of regular enquiry to be conducted. Even otherwise, after receiving the preliminary inquiry report dated 09/10.11.2023, District Magistrate has passed the order dated 28/25.11.2023 to issue notice to the petitioner to file her reply against the charges/allegations as made out in the preliminary inquiry report. In its order dated 28/25.11.2023, District Magistrate has acknowledged the financial embezzlement to the tune of Rs. 5,79,599.00/- during the development work done by the petitioner. In response to said notice petitioner has filed her reply dated 04.01.2024 refuting the charges/allegations levelled against her in the preliminary inquiry report. District Magistrate, while passing the order impugned dated 29.02.2024, has considered the charges in detail in the light of the reply submitted by petitioner and found the case fit to be examined in the regular/final inquiry and, accordingly, constituted a committee of two members to submit their report. Simultaneously, in exercise of its power under proviso to Section 95(1)(g) of the Act, 1947, District Magistrate has ceased the administrative and financial power of

the Pradhan. Thus, it cannot be said that petitioner had not been accorded opportunity of hearing before passing the order dated 29.02.2024 under Rule 5 of Enquiry Rules, 1997. Discussing the scope and nature of the power entrusted upon District Magistrate under Section 95(1)(g) of the Act, 1947 read with Enquiry Rules, 1997 and the rights of the delinquent elected person as well there are two Full Bench judgments of this Court, which are required to be referred. In the matter of *Vivekanand Yadav vs. State of U.P. and others, 2010 (111) RD 699*, Hon'ble Full Bench of this Court, while answering the question referred, expounded that Pradhan is neither entitled to be associated in the preliminary inquiry nor is entitled to the copy of the preliminary report. However, he has to be given an opportunity to explain his conduct on the charges levelled against him before passing an order to cease his financial and administrative power. For ready reference question which was referred to the Hon'ble Full Bench and replied thereon is quoted herein below:

"Questions Referred

14. The Counsel for the parties have formulated the following questions from the referring orders that are referred to us: (i) Whether the pradhan is required to be associated in the preliminary enquiry under the proviso to section 95(1)(g) of the U.P. Panchayat Raj Act?

(ii) In case, the preliminary enquiry is adverse to the pradhan then, whether an opportunity is necessary before passing an order ceasing financial and administrative powers of the Pradhan?

(iii) If the District Magistrate has sufficient material to undertake a formal enquiry then, is he still required to hold a preliminary enquiry?

(iv) Whether the following observations in *Chunmun v. District Magistrate, Sonbhadra; 1998 (3) AWC 1892* (the Chunmun case) are correct:

"Conclusions

107. Our conclusions are as follows:

(a) The DM may ask the preliminary enquiry to be conducted by any officer defined under Rule 2(c) of the Enquiry Rules on a complaint or a report under Rule 3 or any other material or information. He has suo motu powers as well to order a preliminary enquiry;

(b) A Pradhan has no right to object that complaint or report is not in accordance with Rule 3 of the Enquiry Rules;

(c) A Pradhan is neither entitled to be associated in the preliminary enquiry nor is entitled to the copy of the preliminary report. However, before an order ceasing the financial and administrative power is passed, his explanation or point of view or the version to the charges should be obtained and considered;

(d) In the first and the third WPs, the impugned orders have been passed on the basis of preliminary report after obtaining and considering the explanation of the Pradhan. The impugned orders in these WPS cannot be faulted on this ground;

(e) In our opinion the word 'otherwise' in Rule 5 includes and the DM can rely upon the following reports only to cease financial and administrative power and direct the final enquiry:

A report of a person who is also defined as an enquiry officer under Rule 2(c) of the Enquiry Rules-- irrespective of whether he was directed by the DM to conduct the preliminary inquiry or not;

A preliminary enquiry report conducted by the DM himself.

(f) In the third writ petition, the report was submitted by the DPRO, who is defined as an enquiry officer under Rule 2(c) of the Enquiry Rules. The impugned order cannot be faulted on the ground that the DPRO was not asked by the DM to conduct the preliminary enquiry;

However, it is open to the petitioners in the first and third WPS to raise other points before the appropriate bench."

7. At subsequent stage scope of Section 95(1)(g) of the Act, 1947 has again been examined by Full Bench of this Court in the matter of *Shamim v. State of U.P. and Ors.*; (2018) 4 UPLBECH 2573. Relevant paragraph nos. 37-40 of the aforesaid judgment is quoted herein below:

"37. In *Vivekanand, Hafiz Ataulah Ansari* and thereafter reiterated in *Paras Jain* that the elected representative would have to be given an opportunity to raise objection to the findings returned in the preliminary enquiry and his/or her objections will have to be considered, though prima facie, by the State Government/District Magistrate before an order ceasing the financial and administrative power and functions is passed. The consequence of the order passed in exercise of power under Section 95(1)(g) is serious consequence as it divests the elected representative from exercising power until exonerated in final enquiry and the decision of the State Government is final. The decision taken by the State Government is not based on any expediency or policy of the State, rather, it is a statutory power conferred upon the State Government exercising inherent judicial power after confronting the elected

representative, with show cause notice based on the preliminary report, thereafter, taking a decision upon due application of mind on the objections of the elected Pradhan. Once such an order is passed, it is not open for the State Government to either review or modify the order during the course of final enquiry. The order, therefore, finally decides the issue between Pradhan and the Authority (State Government) in so far it relates to exercise of financial and administrative power. The office of the local body is an elected office of the constitutional democratic institution; the elected head is not a government servant and it would be improper to compare these proceeding with departmental proceeding in service jurisprudence. A head of a local body is elected for a limited term. If during the removal proceedings, he is denuded from exercising financial and administrative powers then even if he is exonerated in the enquiry the time spent during enquiry is lost, he does not get his period extended. The consideration about the presence of all or some of the trappings of a court is really not decisive. The main and basic test is whether the adjudicating power which a particular authority is empowered to exercise has been conferred on it by a statute and can be described as part of the State's inherent power exercised in discharging its judicial function. Applying this test there can be no doubt that the power which the State Government/District Magistrate exercises under proviso to Section 95(1)(g) is a quasi-judicial power exercised by a quasi-judicial authority.

38. Once the financial and administrative function is ceased, it affects the constitutional and statutory right of the Pradhan; no power of review having been conferred on the District Magistrate. He has to act according to the rules exercising the

inherent judicial power of the State Government and is not dictated by the policy or expediency of the State.

39. We accordingly proceed to answer the reference in the following terms:

(A). The District Magistrate exercising delegated authority of the State Government, is a Tribunal exercising quasi judicial power by a quasi judicial authority under the proviso to Section 95(1)(g) of the Panchayat Raj Act while proceeding to cease the administrative and financial authority of the Pradhan pending final enquiry.

(B) Re-Question (i): The decision of the Division Bench in Smt. Sonia vs. State of U.P. (supra) lays down the correct position of law.

40. The reference to the Full Bench accordingly stands answered. The special appeal shall now be placed before the regular Bench according to roster for disposal in light of the questions so answered."

8. It is, thus, elucidated that petitioner has no right to participate in the preliminary inquiry and before passing the order under Rule 5 of Enquiry Rules, 1997 he had been given effective opportunity to file her reply against the charges as mentioned in the preliminary inquiry report.

9. I am skeptical of the second submission raised by the learned Senior counsel for the petitioner as well questioning the legality and validity of the preliminary inquiry report, and subsequent proceedings on the basis thereof, having been it filed beyond the prescribed period of limitation as enunciated under Rule 4(2) of Enquiry Rules 1997. It is no more res-

integra that Rules are secondary in nature as subordinate legislation to help in governing law and are made to make the parent Act work. Once the decision is taken by the State Government/District Magistrate to cease the administrative and financial power of Pradhan, same cannot be revoked during course of the final enquiry inasmuch as said order is passed under the statutory power conferred upon the State Government exercising inherent judicial power after confronting with the elected representative. Limitation to submit preliminary enquiry report as enunciated under Rule 4(2) of the Enquiry Rules, 1997 is directory in nature in order to submit such report in pursuance of the order passed by the State Government/District Magistrate exercising its statutory power conferred under Section 95(1)(g) of Act, 1947. Statutory power conferred upon the State Government/District Magistrate under which he exercises its inherent judicial power to examine the conduct of the representative cannot be held redundant only on the pretext of delay in filing the preliminary inquiry report which could not be submitted under the prescribed period of 30 days of its having been so ordered. The phrase used under Rule 4(2) of Enquiry Rules, 1997 viz "as expeditiously as possible" does not confer a mandate upon the Preliminary Inquiry Officer to submit the report in strict time frame as prescribed under sub Rule 2. If submission in this regard, as advanced by the learned Senior Counsel for the petitioner, is taken to be convincing or valid, it would frustrate entire purpose of the statutory mandate as embodied under Section 95(1)(g) of the Act, 1947. Delay in submitting the preliminary inquiry report neither could frustrate the entire purpose of inquiry which has been proposed to be conducted to examine the misdeeds of the

representatives during their period in office nor render the entire proceedings illegal. The purpose of employing the phrase "as expeditiously as possible" is to expedite the preliminary inquiry so that entire proceeding under Section 95(1)(g) of the Act, 1947 including the final inquiry could be concluded expeditiously inasmuch as representatives elected under the Panchayat election are hold office for a limited period of five years and an enquiry, if any, proposed against them cannot be permitted to be continued for indefinite period. Purpose of legislation while employing the word "as expeditiously as possible" along with the prescribed period of limitation i.e. "30 days" is to indicate a minimum time frame so that Inquiry Officer could make a sincere endeavour to submit his preliminary inquiry report without unnecessary delay.

10. So far as third submission qua discrimination made with the petitioner inasmuch as Secretary is also responsible along with the petitioner is concerned, I am of the considered opinion that the District Magistrate in the realm of law has exercised his statutory power to conduct an enquiry against the petitioner qua the financial embezzlement committed during the development work done by him. Prima facie satisfaction of the District Magistrate is not to be questioned at this stage while the final enquiry is still going on. Accusation of Secretary, if any, can be considered separately by the State authorities in case they find it necessary. Petitioner has still in an opportunity to raise this question during the final enquiry before the Enquiry Officer.

11. Last submission advanced by learned Senior counsel for the petitioner is not persuasive as well whereby he has questioned the charges levelled against the

petitioner relating to excess payment of GST. In view of pendency of the final enquiry, in pursuance of the order impugned dated 29.02.2024, it would not be befitting for this Court to examine the factual aspect of the matter as to whether charges qua payment of excess GST are genuine or not. Petitioner has still an opportunity to counter this question before the Inquiry Officer.

12. In this conspectus, as above, having considered the ratio decided by the Hon'ble Full Bench as mentioned above, in the given circumstances of the present case, I am of the considered view that District Magistrate has not committed any error in passing the order dated 29.02.2024 to conduct a final enquiry and cease the financial and administrative power of the incumbent Pradhan (petitioner) in exercise of power conferred upon him under Section 95(1)(g) of Act, 1947 read with Rule 5 of the Enquiry Rules 1997. District Magistrate in its order impugned has unequivocally issued direction to submit the final enquiry report following the provisions as enunciated under Rule 6 and 7 of the Enquiry Rules, 1997. There is no illegality, perversity or irregularity in the order under challenge so as to warrant the indulgence of this Court in exercise of its writ jurisdiction under article 226 of the Constitution of India. There is nothing on the record to establish as to how petitioner is prejudice, or if there is any likelihood of causing miscarriage of justice to her, owing to the order under challenge. District Magistrate has validly exercised its statutory power to scrutinize the financial embezzlement as has been emanates during the preliminary inquiry.

13. Resultantly, instant writ petition, being devoid on merits and

misconceived, is dismissed with no order as to the costs.

14. Before parting the matter, having considered a little delay in an enquiry since the date of complaint moved by the complainants, namely, Mr. Khursheed and Rafeeq Ahmad, it would be appropriate to issue a direction for expeditious disposal of the enquiry and, thereafter, to take final decision, if any. As such, Inquiry Committee, as constituted in pursuance of the order dated 29.02.2024, is expected to complete inquiry and submit its report in accordance with law preferably within a period of two months from today and District Magistrate shall take decision, having considered the said report to be submitted, preferably within a period of one month, thereafter.

(2024) 4 ILRA 1511
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.04.2024

BEFORE

THE HON'BLE JASPREET SINGH, J.
THE HON'BLE MANISH MATHUR, J.

Writ-C No. 13556 of 2021

Ram Pal Soni & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
 Ambika Prasad Mishra

Counsel for the Respondents:
 C.S.C., Anand Kumar Singh, Gyanendra Mishra

Civil Law - SARFAESI Act, 2002 - Sections 13 & 17 -Reference by single Judge -specific reference to Sections 13 and 17(as amended in 2016) of SARFAESI Act- to arrive at a conclusion that since part cause of action in the dispute arose within territorial jurisdiction

of Lucknow-the securitization application would thus be maintainable at Lucknow - provisions of Section 17(1-A) indicates three clauses pertaining to local limits of the Debts Recovery Tribunal- within whose jurisdiction an application/appeal can be filed under Section 17(1) of the SARFAESI Act- if we apply the concept of ejusdem generis- it is evident that none of the three clauses indicate any common genus and operate in different and separate fields and therefore are clearly disjunctive- non obstante clause contained in Section 35 of the SARFAESI Act would have overriding effect over the Debt Recoveries Tribunals Act-since notice for e-auction was issued by the authorized officer at Lucknow- whereafter e-auction was actually conducted in terms of Section 13(4) of the Act by the very same officer at Lucknow-definitely constitute a part cause of action at Lucknow in terms of Section 17 (1-A) of the SARFAESI Act-Clause (a) of Section 17(1-A) of the SARFAESI Act is disjunctive from clauses (b) & (c) of Section 17 (1-A) of the SARFAESI Act and is to be read separately- Section 17(1-A) of the SARFAESI Act would have an overriding effect over provisions of the Recovery of Debts Due to Banks and Financial Institutions Act 1993- since part cause of action in the dispute arose within territorial jurisdiction of Lucknow-the securitisation application would thus be maintainable at Lucknow as well.

Held, that since notices under Section 13 were issued by the authorized authority situate at Lucknow from where the e-auction was also conducted, part cause of action in terms of Section 17(1-A)(a) was evidently at Lucknow where the securitisation application was thus maintainable. **(para 54)**

Held, that judgment rendered by the learned Single Judge in the case of Saurabh Gupta (supra) being per incuriam, does not lay down good law and is hereby overruled. **(para 65)**

Reference answered. (E-9)

List of Cases cited:

1. Y. Y. Abraham Ajith and others Vs. Inspector of Police, Chennai and another, (2004) 8 SCC 100

2. Swamy Atmananda and others Vs. Sri Ramakrishna Tapovanam and others, (2005) 10 SCC 51

3. Alchemist Ltd. and another Vs. State Bank of Sikkim and others, (2007) 11 SCC 335

4. A.B.C. Laminart Pvt. Ltd. & Anr. versus A.P. Agencies, (1989) 2 SCC 163

5. State of Rajasthan Vs. Swaika Properties, (1985) 3 SCC 217

6. Saurabh Gupta versus Union of India and another, 2018 (127) ALR 388 **(overruled)**

7. X versus Principal Secretary, Health and Family Welfare Department, Government of NCT of Delhi and another (2023) 9 SCC 433

8. Vivek Narain Sharma and others (Demonitisation case -5J versus Union of India (2023) 3 SCC 1

9. Adani Gas Limited versus Union of India (2022) 5 SCC 210

10. Siddeshwari Cotton Mills (P) Limited versus Union of India and others (1989) 2 SCC 458

11. Amar Chandra Chakraborti versus The Collector of Excise, Government of Tripura and others (1972) 2 SCC 442

12. A.B.C. Laminart Pvt. Ltd. & Anr. versus A.P. Agencies, (1989) 2 SCC 163

13. Ramsay Exim and Technology Private Limited and others versus ICICI Bank Limited and another, 2019 SCC Online Cal 2315

14. Amish Jain & others versus ICICI Bank Limited, 2018 SCC Online Del 8947

15. State of Madhya Pradesh versus Narmada Bachao Andolan (2011) 7 SCC 639

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

1. Heard Mr. Ambika Prasad Mishra learned learned counsel for petitioners, Mr. Dileep Kumar Tiwari learned State Counsel

for opposite party No.1, Mr. Anand Kumar Singh learned counsel for opp. parties 3 and 4 and Mr. Gyanendra Mishra learned counsel for opp. party No.5. Notice to opp. party No.2 stands dispensed with.

2. This reference has been made by Hon'ble the Chief Justice vide order dated 23rd April, 2022 and subsequently to this Bench vide order dated 18th May, 2023 in pursuance of questions referred by Hon'ble Single Judge vide order dated 29th September, 2021 passed in Writ C No. 13556 of 2021.

3. The questions framed and referred by the Hon'ble Single Judge are as follows:-

"(A) Whether in a case where part of cause of action to maintain an application under Section 17(1) of the SARFAESI Act, arises within the limits of territorial jurisdiction of Debts Recovery Tribunal, Lucknow, the Debts Recovery Tribunal, Lucknow will have the jurisdiction, power and authority to entertain and decide such application in view of Sub section (1-A) of Section 17 of the SARFAESI Act or not ?

(B) Whether Section 3 of the Recoveries of Debts Due to Banks and Financial Institutions Act, 1993, confers exclusive jurisdiction on Debts Recovery Tribunals established thereunder vide notifications of the Central Government?

(C) Whether Section 3 of the Recoveries of Debts Due to Banks and Financial Institutions Act, 1993, can be read as conferring exclusive jurisdiction on the Tribunals established thereunder, irrespective of Section 19 of the Recoveries of Debts Due to Banks and Financial Institutions Act, 1993 and Section 17(1A) of the SARFAESI Act, rendering Sections 19

and 17(1A) of the respective Acts as redundant or nugatory ?

(D) Whether the judgment in **Saurabh Gupta (supra)**, which lays down that the Debts Recovery Tribunal, Allahabad shall have exclusive jurisdiction to entertain and decide the applications arisen from 55 districts specified in the notification dated 05.12.2017, without noticing Section 19 of the Recoveries of Debts Due to Banks and Financial Institutions Act, 1993 and Section 17(1A) of the SARFAESI Act, as also the judgment of Hon'ble Supreme Court in case of **Sri Nasiruddin (supra)** lays down the law correctly ?

(E) Whether the judgment in **Saurabh Gupta (supra)** is contrary to the law laid down by the Hon'ble Supreme Court in the case of **Sri Nasiruddin (supra)** and is liable to be declared as not good law ? "

4. During course of hearing, this Court vide order dated 25th January, 2024 framed two additional questions which are as follows:-

"Question No.1:- Whether clause (a) of Section 17(1A) of the SARFAESI Act is to be read ejusdem generis with Clauses (b) and (c) or is disjunctive?

Question No.2:- Whether insertion of Section 17(1-A) in the SARFAESI Act would have any overriding effect over provisions of the Debts Recovery Tribunals Act? "

5. The factual matrix of present dispute is that the respondent bank being UCO Bank granted loan facility to the petitioner from its branch situate in district Amethi, Uttar Pradesh. The loan was secured by mortgage of property situate at Amethi. Borrower who is the petitioner

No.1 and the guarantor, petitioner No.2 committed default in repayment of loan whereafter a demand notice was issued by the authorized officer from the zonal office in Lucknow. Possession and sale notice were also issued from the zonal office in Lucknow whereafter the petitioners filed a securitization application bearing No. 541 of 2019 before the Debts Recovery Tribunal, Lucknow.

6. Upon service of notice upon the respondent bank, a preliminary objection was raised regarding jurisdiction of the Tribunal at Lucknow with the submission that territorial jurisdiction pertaining to district Amethi lies with the Debts Recovery Tribunal Allahabad. The aforesaid preliminary objection was rejected vide order dated 6th August, 2019 leading to filing of regular appeal No. 14 of 2020 by the respondent bank, which was allowed vide order dated 25th March, 2021 upholding the preliminary objection and transferring the proceedings of securitization application to the Tribunal at Allahabad.

7. The said decision dated 25th March, 2021 passed by the Debts Recovery Appellate Tribunal, Allahabad has been challenged in the writ petition in which an Hon'ble Single Judge of this Court vide order dated 29th September, 2021 has referred the issue for consideration by Larger Bench in view of his conflict of decision with judgment of another coordinate Bench in the case of **Saurabh Gupta versus Union of India and another, 2018 (127) ALR 388**.

8. The Hon'ble Single Judge has made specific reference to Sections 13 and 17 (as amended in 2016) of the Securitisation and Reconstruction of

Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as 'SARFAESI Act') to arrive at a conclusion that since part cause of action in the dispute arose within territorial jurisdiction of Lucknow, the securitisation application would thus be maintainable at Lucknow as well. For this purpose, the Hon'ble Single Judge differed from judgment rendered in the case of **Saurabh Gupta (supra)** which has been rendered considering the notification dated 15th February, 2017 passed under Section 3 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

9. For proper appreciation of the dispute, it would be apposite to refer to Sections 13 and 17 of the SARFAESI Act, which are as follows:-

Section 13 of the SARFAESI Act

"13. Enforcement of security interest.--(1) Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act.

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4).

Provided that—

(i) the requirement of classification of secured debt as non-performing asset under this sub-section shall not apply to a borrower who has raised funds through issue of debt securities; and

(ii) in the event of default, the debenture trustee shall be entitled to enforce security interest in the same manner as provided under this section with such modifications as may be necessary and in accordance with the terms and conditions of security documents executed in favour of the debenture trustee.]

(3) The notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.

(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 nonacceptance 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.

(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one

or more of the following measures to recover his secured debt, namely:--

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

Provided further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt;

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

(5) Any payment made by any person referred to in clause (d) of sub-section (4) to the secured creditor shall give such person a valid discharge as if he has made payment to the borrower.

(5A) Where the sale of an immovable property, for which a reserve price has been specified, has been postponed for want of a bid of an amount not less than such reserve price, it shall be lawful for any officer of the secured

creditor, if so authorised by the secured creditor in this behalf, to bid for the immovable property on behalf of the secured creditor at any subsequent sale.

(5B) Where the secured creditor, referred to in sub-section (5A), is declared to be the purchaser of the immovable property at any subsequent sale, the amount of the purchase price shall be adjusted towards the amount of the claim of the secured creditor for which the auction of enforcement of security interest is taken by the secured creditor, under sub-section (4) of section 13.

(5C) The provisions of section 9 of the Banking Regulation Act, 1949 (10 of 1949) shall, as far as may be, apply to the immovable property acquired by secured creditor under sub-section (5A).

(6) Any transfer of secured asset after taking possession thereof or take over of management under sub-section (4), by the secured creditor or by the manager on behalf of the secured creditor shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset.

(7) Where any action has been taken against a borrower under the provisions of sub-section (4), all costs, charges and expenses which, in the opinion of the secured creditor, have been properly incurred by him or any expenses incidental thereto, shall be recoverable from the borrower and the money which is received by the secured creditor shall, in the absence of any contract to the contrary, be held by him in trust, to be applied, firstly, in payment of such costs, charges and expenses and secondly, in discharge of the dues of the secured creditor and the residue of the money so received shall be paid to the person entitled thereto in accordance with his rights and interests.

(8) Where the amount of dues of the secured creditor together with all costs, charges and expenses incurred by him is tendered to the secured creditor at any time before the date of publication of notice for public auction or inviting quotations or tender from public or private treaty for transfer by way of lease, assignment or sale of the secured assets,-

(i) the secured assets shall not be transferred by way of lease assignment or sale by the secured creditor; and

(ii) in case, any step has been taken by the secured creditor for transfer by way of lease or assignment or sale of the assets before tendering of such amount under this sub-section, no further step shall be taken by such secured creditor for transfer by way of lease or assignment or sale of such secured assets.

(9) Subject to the provisions of the Insolvency and Bankruptcy Code, 2016, in the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than sixty per cent in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors:

Provided that in the case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956):

Provided further that in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realise his security instead of relinquishing

his security and proving his debt under proviso to sub-section (1) of section 529 of the Companies Act, 1956 (1 of 1956), may retain the sale proceeds of his secured assets after depositing the workmen's dues with the liquidator in accordance with the provisions of section 529A of that Act:

Provided also that liquidator referred to in the second proviso shall intimate the secured creditor the workmen's dues in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956) and in case such workmen's dues cannot be ascertained, the liquidator shall intimate the estimated amount of workmen's dues under that section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimate dues with the liquidator:

Provided also that in case the secured creditor deposits the estimated amount of workmen's dues, such creditor shall be liable to pay the balance of the workmen's dues or entitled to receive the excess amount, if any, deposited by the secured creditor with the liquidator: Provided also that the secured creditor shall furnish an undertaking to the liquidator to pay the balance of the workmen's dues, if any.

Explanation.--For the purposes of this sub-section,-

(a) "record date" means the date agreed upon by the secured creditors representing not less than sixty per cent in value of the amount outstanding on such date;

(b) "amount outstanding" shall include principal, interest and any other dues payable by the borrower to the secured creditor in respect of secured asset as per the books of account of the secured creditor.

(10) Where dues of the secured creditor are not fully satisfied with the sale proceeds of the secured assets, the secured creditor may file an application in the form and manner as may be prescribed to the Debts Recovery Tribunal having jurisdiction or a competent court, as the case may be, for recovery of the balance amount from the borrower.

(11) Without prejudice to the rights conferred on the secured creditor under or by this section, secured creditor shall be entitled to proceed against the guarantors or sell the pledged assets without first taking any of the measures specified in clauses (a) to (d) of sub-section (4) in relation to the secured assets under this Act.

(12) The rights of a secured creditor under this Act may be exercised by one or more of his officers authorised in this behalf in such manner as may be prescribed.

(13) No borrower shall, after receipt of notice referred to in sub-section (2), transfer by way of sale, lease or otherwise (other than in the ordinary course of his business) any of his secured assets referred to in the notice, without prior written consent of the secured creditor."

Section 17 of the SARFAESI Act

"17. Application against measures to recover secured debts].--(1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, may make an application along with such fee, as may be prescribed, to the Debts Recovery Tribunal having jurisdiction in the matter within forty five days from the date on which such measure had been taken:

Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.

Explanation.--For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under this sub-section.

(1A) An application under sub-section (1) shall be filed before the Debts Recovery Tribunal within the local limits of whose jurisdiction—

(a) the cause of action, wholly or in part, arises;

(b) where the secured asset is located; or

(c) the branch or any other office of a bank or financial institution is maintaining an account in which debt claimed is outstanding for the time being.

(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management or restoration of possession, of the secured

assets to the borrower or other aggrieved person, it may, by order,--

(a) declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the secured creditor as invalid; and

(b) restore the possession of secured assets or management of secured assets to the borrower or such other aggrieved person, who has made an application under sub-section (1), as the case may be; and

(c) pass such other direction as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of section 13, is in accordance with the provisions of this Act and the rules made thereunder; then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of section 13 to recover his secured debt.

(4A) Where--(i) any person, in an application under sub-section (1), claims any tenancy or leasehold rights upon the secured asset, the Debt Recovery Tribunal, after examining the facts of the case and evidence produced by the parties in relation to such claims shall, for the purposes of enforcement of security interest, have the jurisdiction to examine whether lease or tenancy,--

(a) has expired or stood determined; or

(b) is contrary to section 65A of the Transfer of Property Act, 1882 (4 of 1882); or

(c) is contrary to terms of mortgage; or

(d) is created after the issuance of notice of default and demand by the Bank under subsection (2) of section 13 of the Act; and

(ii) the Debt Recovery Tribunal is satisfied that tenancy right or leasehold rights claimed in secured asset falls under the sub-clause (a) or sub-clause (b) or sub-clause (c) or sub-clause (d) of clause (i), then notwithstanding anything to the contrary contained in any other law for the time being in force, the Debt Recovery Tribunal may pass such order as it deems fit in accordance with the provisions of this Act.

(5) Any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application:

Provided that the Debts Recovery Tribunal may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under sub-section (1).

(6) If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in sub-section (5), any part to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.

(7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the application

in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and the rules made thereunder.

10. It is relevant to indicate that the present format of section 17 is in pursuance of amendment incorporated in the SARFAESI Act vide Act No. 44 of 2016 with effect from 1.9.2016 whereby sub section (1-A) of Section 17 was inserted. Prior to the aforesaid amendment, Section 17 of the SARFAESI Act read as follows:-

"17. Right to appeal.--(1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, may make an application along with such fee, as may be prescribed, to the Debts Recovery Tribunal having jurisdiction in the matter within forty five days from the date on which such measures had been taken:

Provided that different fees may be prescribed for making the applications by the borrower and the person other than the borrower.

Explanation. --For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under sub-section (1) of section 17.

(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor for

enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management of the secured assets to the borrower or restoration of possession of the secured assets to the borrower, it may, by order, declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the secured assets as invalid and restore the possession of secured assets to the borrower or restore the management of the secured assets to the borrower, as the case may be, and pass such order as it may consider appropriate and necessary in relation to any of the of the recourse taken by the secured creditor under sub-section (4) of section 13.

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of section 13 to recover his secured debt.

(5) Any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application:

Provided that the Debts Recovery Tribunal may, from time to time, extend the said period for reasons to be recorded in

writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under sub-section (1).

(6) If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in sub-section (5), any party to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.

(7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and the rules made thereunder."

11. For proper appreciation of provisions of aforesaid sections of the SARFAESI Act, it would be necessary to appreciate the reasons for incorporation of the amendment to Section 17 whereby Clause 1-A was inserted in the year 2016.

12. As would be evident from the provisions of Section 17 prior to its amendment, right to appeal under Section 17 was available to any person, including a borrower aggrieved by any of the measures referred to in Sub Section (4) of Section 13 of the Act taken by a secured creditor or the authorized officer. The appeal was to be preferred to the Debts Recovery Tribunal having jurisdiction in the matter. It is relevant that the concept of jurisdiction of

the Debts Recovery Tribunal was not clarified in Section 17 which led to various litigations pertaining to jurisdiction.

13. The said anomaly was thereafter sought to be remedied by insertion of clause (1-A) to Section 17 whereby the concept of jurisdiction of the Debts Recovery Tribunal before which an appeal would lie, was explained.

14. The statement of objects and reasons in the Act No. 44 of 2016 clearly indicates that such amendment have been proposed in order to facilitate expeditious disposal of recovery applications. Evidently the amendment to Section 17 was incorporated to remove any doubt with regard to jurisdiction of a particular Debts Recovery Tribunal and to stymie litigations pertaining to same. It is in such circumstances that the amendment incorporated in Section 17 is required to be examined in a way to give effect to its purpose.

15. The concept of purposive interpretation of statutory provisions has been enunciated by Hon'ble Supreme Court in the case of X versus Principal Secretary, Health and Family Welfare Department, Government of NCT of Delhi and another (2023) 9 SCC 433 in the following manner:-

"34. In Principles of Statutory Interpretation by Justice G.P. Singh, it is stated that a statute must be read in its context when attempting to interpret its purpose. [Justice G.P. Singh, Principles of Statutory Interpretation, (Lexis Nexis, 2016), at p. 35.] Context includes reading the statute as a whole, referring to the previous state of law, the general scope of the statute, surrounding circumstances and

the mischief that it was intended to remedy. [Union of India v. Sankalchand Himatlal Sheth, (1977) 4 SCC 193 : 1977 SCC (L&S) 435; RBI v. Peerless General Finance & Investment Co. Ltd., (1987) 1 SCC 424] The treatise explains that:

“For ascertaining the purpose of a statute one is not restricted to the internal aid furnished by the statute itself, although the text of the statute taken as a whole is the most important material for ascertaining both the aspects of “intention”. Without intending to lay down a precise and exhaustive list of external aids, Lord Somervell has stated: “The mischief against which the statute is directed and, perhaps though to an undefined extent the surrounding circumstances can be considered. Other statutes in pari materia and the state of the law at the time are admissible.” These external aids are also brought in by widening the concept of “context” “as including not only other enacting provisions of the same statute, but its Preamble, the existing state of the law, other statutes in pari materia, and the mischief which the statute was intended to remedy”. In the words of Chinnappa Reddy, J.: “Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted.”

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36. In Bengal Immunity Co. Ltd. v. State of Bihar [Bengal Immunity Co. Ltd. v. State of Bihar, 1955 SCC OnLine SC 2 : (1955) 2 SCR 603 : AIR 1955 SC 661], the Constitution Bench applied the mischief rule in Heydon case [Heydon case, (1584)

3 Co Rep 7a : 76 ER 637] in the construction of Article 286 of the Constitution. In Kehar Singh v. State (UT of Delhi) [Kehar Singh v. State (UT of Delhi), (1988) 3 SCC 609 : 1988 SCC (Cri) 711], a three-Judge Bench of this Court held : (Kehar Singh case [Kehar Singh v. State (UT of Delhi), (1988) 3 SCC 609 : 1988 SCC (Cri) 711], SCC pp. 717-18, paras 231 & 233)

“231. During the last several years, the “golden rule” has been given a go-by. We now look for the “intention” of the legislature or the “purpose” of the statute. First, we examine the words of the statute. If the words are precise and cover the situation in hand, we do not go further. We expound those words in the natural and ordinary sense of the words. But, if the words are ambiguous, uncertain or any doubt arises as to the terms employed, we deem it as our paramount duty to put upon the language of the legislature rational meaning. We then examine every word, every section and every provision. We examine the Act as a whole. We examine the necessity which gave rise to the Act. We look at the mischiefs which the legislature intended to redress. We look at the whole situation and not just one-to-one relation. We will not consider any provision out of the framework of the statute. We will not view the provisions as abstract principles separated from the motive force behind. We will consider the provisions in the circumstances to which they owe their origin. We will consider the provisions to ensure coherence and consistency within the law as a whole and to avoid undesirable consequences.

* * *

233. For this purpose, we call in external and internal aids:

External aids are : the Statement of Objects and Reasons when the Bill was

presented to Parliament, the reports of the Committee, if any, preceding the Bill, legislative history, other statutes in pari materia and legislation in other States which pertain to the same subject-matter, persons, things or relations.

Internal aids are : Preamble, scheme, enacting parts of the statutes, rules of languages and other provisions in the statutes."

16. In the case of **Vivek Narain Sharma and others (Demonitisation case -5J versus Union of India (2023) 3 SCC 1** has also enunciated law pertaining to purposive interpretation of statute in the following manner:-

" 134. "Legislation has an aim, it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government. That aim, that policy is not drawn, like nitrogen, out of the air; it is evidenced in the language of the statute, as read in the light of other external manifestations of purpose ["Some Reflections on the Reading of Statutes" [(1947) 47 Columbia LR 527] , Columbia LR at p. 538]." This is how Justice Frankfurter succinctly propounds the principle of purposive interpretation.

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138. Aharon Barak, the former President of the Supreme Court of Israel, whose exposition of "doctrine of proportionality" has found approval by the Constitution Bench of this Court in *Modern Dental College & Research Centre [Modern Dental College & Research Centre v. State of M.P., (2016) 7 SCC 353 : 7 SCEC 1]* , to which we will refer to in the forthcoming paragraphs, in his commentary on "Purposive Interpretation in Law", has summarised

"the goal of interpretation in law" as under:

"At some point, we need to find an Archimedean foothold, external to the text, from which to answer that question. My answer is this : The goal of interpretation in law is to achieve the objective—in other words, the purpose—of law. [D. Brink, "Legal Theory, Legal Interpretation, and Judicial Review", 17 *Philosophy & Public Affairs* 105, 125 (1988).] The role of a system of interpretation in law is to choose, from among the semantic options for a given text, the meaning that best achieves the purpose of the text. Each legal text—will, contract, statute, and constitution—was chosen to achieve a social objective. Achieving this objective, achieving this purpose, is the goal of interpretation. The system of interpretation is the device and the means. It is a tool through which law achieves self-realisation. In interpreting a given text, which is, after all, what interpretation in law does, a system of interpretation must guarantee that the purpose of the norm trapped in the—in our terminology, the purpose of the text—will be achieved in the best way. Hence the requirement that the system of interpretation be a rational activity. A coin toss will not do. This is also the rationale—which is at the core of my own views—for the belief that purposive interpretation is the most proper system of interpretation. This system is proper because it guarantees the achievement of the purpose of law. There is social, jurisprudential, hermeneutical, and constitutional support for my claim that the proper criterion for interpretation is the search for law's purpose, and that purposive interpretation best fulfils that criterion. A comparative look at the law supports it, as well. I will discuss each element of that support below."

17. Upon appreciation of the aforesaid judgments in the present facts and circumstances, it is evident that interpretation of statutory clauses is required to be done in a manner which advances the object and scope of the Act particularly where the provisions are ambiguous requiring such interpretation. However even in cases where statutory provisions are unambiguous, the concept of literal interpretation has to be brought into play so as not to render any statutory provision otiose.

18. The concept of literal interpretation of statutory provisions has been enunciated by Hon'ble Supreme Court in the case of **Adani Gas Limited versus Union of India (2022) 5 SCC 210** in the following manner:-

" 75. In *Supt. and Remembrancer of Legal Affairs v. Abani Maity* [*Supt. and Remembrancer of Legal Affairs v. Abani Maity*, (1979) 4 SCC 85 : 1979 SCC (Cri) 902] , this Court observed as follows : (SCC p. 90, para 18)

"18. *Exposition ex visceribus actus* is a long-recognised rule of construction. Words in a statute often take their meaning from the context of the statute as a whole. They are therefore, not to be construed in isolation. For instance, the use of the word "may" would normally indicate that the provision was not mandatory. But in the context of a particular statute, this word may connote a legislative imperative, particularly when its construction in a permissive sense would relegate it to the unenviable position, as it were, 'of an ineffectual angel beating its wings in a luminous void in vain'. 'If the choice is between two interpretations', said Viscount Simon, L.C. in *Nokes v. Doncaster Amalgamated Collieries Ltd.* [*Nokes v.*

Doncaster Amalgamated Collieries Ltd., 1940 AC 1014 (HL)] : (AC p. 1022)

'... the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result.' "

19. Upon applicability of the aforesaid judgments in the present facts and circumstances, it is evident that the purpose of insertion of Clause (1-A) in Section 19 of the SARFAESI Act is primarily to explain away the deficiency in the original enactment regarding jurisdiction of the Debts Recovery Tribunal which would have jurisdiction over dispute pertaining to an application/appeal being filed under Section 17(1) of the said Act.

20. It is in the aforesaid light that we now propose to answer the additional question framed as Question No.1, which is as follows:-

"Whether clause (a) of Section 17(1-A) of the SARFAESI Act is to be read ejusdem generis with Clauses (b) and (c) or is disjunctive?"

Answer to Question No.1:-

21. The concept of proposition pertaining to ejusdem generis has been enunciated by Hon'ble Supreme Court in the case of **Siddeshwari Cotton Mills (P) Limited versus Union of India and others (1989) 2 SCC 458** in the following manner:-

7. *The expression ejusdem generis — "of the same kind or nature" — signifies*

a principle of construction whereby words in a statute which are otherwise wide but are associated in the text with more limited words are, by implication, given a restricted operation and are limited to matters of the same class or genus as preceding them. If a list or string or family of genus-describing terms are followed by wider or residuary or sweeping-up words, then the verbal context and the linguistic implications of the preceding words limit the scope of such words.

In Statutory Interpretation Rupert Cross (p. 116) says:

....The draftsman must be taken to have inserted the general words in case something which ought to have been included among the specifically enumerated items had been omitted....

The principle underlying this approach to statutory construction is that the subsequent general words were only intended to guard against some accidental omission in the objects of the kind mentioned earlier and were not intended to extend to objects of a wholly different kind. This is a presumption and operates unless there is some contrary indication. But the preceding words or expressions of restricted meaning must be susceptible of the import that they represent a class. If no class can be found, ejusdem generis rule is not attracted and such broad construction as the subsequent words may admit will be favoured. As a learned author puts it:

... if a class can be found, but the specific words exhaust the class, then rejection of the rule may be favoured because its adoption would make the general words unnecessary; if, however, the specific words do not exhaust the class, then adoption of the rule may be favoured because its rejection would make the specific words unnecessary.

[See : Construction of Statutes by E.A. Driedger p. 95 quoted by Francis Bennion in his Statutory Construction, pp. 829 and 830]

Francis Bennion in his Statutory Construction (pp. 830-31) observed:

For the ejusdem generis principle to apply there must be a sufficient indication of a category that can properly be described as a class or genus, even though not specified as such in the enactment. Furthermore the genus must be narrower than the words it is said to regulate. The nature of the genus is gathered by implication from the express words which suggest it....

It is necessary to be able to formulate the genus; for if it cannot be formulated it does not exist. 'Unless you can find a category', said Farwell L.J., 'there is no room for the application of the ejusdem generis doctrine'."

In S.S. Magnhild v. McIntyre Bros. & Co. [(1920) 3 KB 321] McCardie, J. said: (KB p. 330)

So far as I can see the only test seems to be whether the specified things which precede the general words can be placed under some common category. By this I understand that the specified things must possess some common and dominant feature.

In Tribhuban Parkash Nayyar v. Union of India [(1969) 3 SCC 99, 106 : AIR 1970 SC 540 : (1970) 2 SCR 732] the Court said: (SCC p. 106, para 13 : SCR p. 740)

.. This rule reflects an attempt to reconcile incompatibility between the specific and general words, in view of the other rules of interpretation, that all words in a statute are given effect if possible, that a statute is to be construed as a whole and that no words in a statute are presumed to be superfluous....

In U.P. SEB v. Hari Shanker [(1978) 4 SCC 16, 30 : 1978 SCC (L&S) 481 : AIR 1979 SC 65] it was observed: (SCC p. 30, para 15 : AIR p. 73)

... The true scope of the rule of 'ejusdem generis' is that words of a general nature following specific and particular words should be construed as limited to things which are of the same nature as those specified. But the rule is one which has to be 'applied with caution and not pushed too far'. ...

8. The preceding words in the statutory provision which, under this particular rule of construction, control and limit the meaning of the subsequent words must represent a genus or a family which admits of a number of species or members. If there is only one species it cannot supply the idea of a genus.

In the present case the expressions "bleaching, mercerising, dyeing, printing, water-proofing, rubberising, shrink-proofing, organdie processing" which precede the expression "or any other process" contemplate processes which impart a change of a lasting character to the fabric by either the addition of some chemical into the fabric or otherwise. "Any other process" in the section must share one or the other of these incidents. The expression "any other process" is used in the context of what constitutes manufacture in its extended meaning and the expression "unprocessed" in the exempting notification draws its meaning from that context. The principle of construction considered appropriate by the Tribunal in this case appears to us to be unsupportable in the context in which the expression "or any other process" has to be understood."

22. Similarly in the case of Amar Chandra Chakraborti versus The Collector of Excise, Government of

Tripura and others (1972) 2 SCC 442, the aforesaid concept has been explained in the following manner:-

"9. Before dealing with the contention relating to Article 19 we consider it proper to dispose of the argument founded on the ejusdem generis rule and Article 14 of the Constitution. It was contended by Shri Sen that the only way in which Section 43 can be saved from the challenge of arbitrariness is to construe the expression "any cause other than" in Section 43(1) ejusdem generis with the causes specified in clauses (a) to (g) of Section 42(1). We do not agree with this submission. The ejusdem generis rule strives to reconcile the incompatibility between specific and general words. This doctrine applies when (i) the statute contains an enumeration of specific words; (ii) the subjects of the enumeration constitute a class or category; (iii) that class or category is not exhausted by the enumeration; (iv) the general term follows the enumeration and (v) there is no indication of a different legislative intent. In the present case it is not easy to construe the various clauses of Section 42 as constituting one category or class. But that apart, the very language of the two sections and the objects intended respectively to be achieved by them also negate any intention of the legislature to attract the rule of ejusdem generis. "

23. It is thus evident that the concept of ejusdem generis is applicable where the preceding words in a statutory provision seek to control and limit the meaning of subsequent words and must represent a genus or a family which admits of a number of species. If there is only one species, it would not supply the idea of genus. Furthermore, the genus must be

narrower than the words it said to regulate and the specified things which precede the general words can be placed under some common category. The rule also makes an attempt to reconcile an incompatibility between specific and general words so that all the words and statute are given effect to and that no words are presumed to be superfluous.

24. Upon applicability of aforesaid judgments in the present facts and circumstances, it is evident that the provisions of Clause (1-A) of Section 17 indicates three clauses pertaining to local limits of the Debts Recovery Tribunal within whose jurisdiction an application/appeal can be filed under Section 17(1) of the SARFAESI Act. The three clauses indicated in the aforesaid provision are :-

- (a) The cause of action wholly or in part arises;
- (b) where the secured asset is located; or
- (c) the branch or any other office of a bank or financial institution is maintaining an account in which debt claimed is outstanding for the time being.

25. If we apply the concept of ejusdem generis, it is evident that none of the three clauses indicate any common genus or similarity where the preceeding words would indicate a limitation on the subsequent words of a provision. On the contrary, it is evident that all the three clauses of clause (1-A) of Section 17 of the Act operate in different and separate fields and therefore are clearly disjunctive. Although the three clauses may appear to be overlapping in nature but in the considered opinion of this Court,

actually indicate the place where a representation/appeal can be filed.

26. If examined from the aforesaid concept, it is thus evident that all the three clauses in Clause (1-A) of Section 17 of the Act operate in different spheres with a meaning attached differently to all the three clauses without any overlapping.

27. Considering the aforesaid facts and the law enunciated thereupon, it is evident that clause (a) of Section 17(1-A) of the SARFAESI Act is disjunctive from clauses (b) and (c) of the aforesaid section.

28. Question No.1 is answered accordingly.

29. Additional question framed as Question No.2 is as follows:-

"Whether insertion of Section 17(1-A) in the SARFAESI Act would have any overriding effect over provisions of the Debts Recovery Tribunals Act? "

Answer to Question No.2:-

30. The aforesaid question is clearly answered in view of section 35 of the SARFAESI Act which provides that the Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

31. Considering the non obstante clause contained in Section 35 of the SARFAESI Act, we have no hesitation in answering the question No.2 to the effect that the SARFAESI Act would have

overriding effect over the Debt Recoveries Tribunals Act.

32. Question No.2 is answered accordingly.

33. We now examine and answer the questions referred by the Hon'ble Single Judge as follows:-

34. Question No. (A) is as follows:-

"Whether in a case where part of cause of action to maintain an application under Section 17(1) of the SARFAESI Act, arises within the limits of territorial jurisdiction of Debts Recovery Tribunal, Lucknow, the Debts Recovery Tribunal, Lucknow will have the jurisdiction, power and authority to entertain and decide such application in view of Sub section (1-A) of Section 17 of the SARFAESI Act or not?"

Answer to Question No. (A) :-

35. Since we have already held in answer to question No.1 herein above that all the three clauses of section 17(1-A) of the SARFAESI Act are disjunctive and are therefore required to be examined separately, we have to examine the concept of 'cause of action' as indicated in Section 17(1-A) (a) of the SARFAESI Act.

36. The concept of cause of action has been enunciated by Hon'ble Supreme Court in the case of **Y. Y. Abraham Ajith and others Vs. Inspector of Police, Chennai and another, (2004) 8 SCC 100** in the following manner:-

" 14. It is settled law that cause of action consists of bundle of facts, which give cause to enforce the legal inquiry for redress in a court of law. In other words, it

is a bundle of facts, which taken with the law applicable to them, gives the allegedly affected party a right to claim relief against the opponent. It must include some act done by the latter since in the absence of such an act no cause of action would possibly accrue or would arise. 15. The expression "cause of action" has acquired a judicially settled meaning. In the restricted sense cause of action means the circumstances forming the infraction of the right or the immediate occasion for the action. In the wider sense, it means the necessary conditions for the maintenance of the proceeding including not only the alleged infraction, but also the infraction coupled with the right itself. Compendiously the expression means every fact, which it would be necessary for the complainant to prove, if traversed, in order to support his right or grievance to the judgment of the Court. Every fact, which is necessary to be proved, as distinguished from every piece of evidence, which is necessary to prove such fact, comprises in "cause of action".

16. The expression "cause of action" has sometimes been employed to convey the restricted idea of facts or circumstances which constitute either the infringement or the basis of a right and no more. In a wider and more comprehensive sense, it has been used to denote the whole bundle of material facts.

17. The expression "cause of action" is generally understood to mean a situation or state of facts that entitles a party to maintain an action in a court or a tribunal; a group of operative facts giving rise to one or more bases for sitting; a factual situation that entitles one person to obtain a remedy in court from another person. (Black's Law Dictionary a "cause of action" is stated to be the entire set of facts that gives rise to an enforceable

claim; the phrase comprises every fact, which, if traversed, the plaintiff must prove in order to obtain judgment. In "Words and Phrases" (4th Edn.) the meaning attributed to the phrase "cause of action" in common legal parlance is existence of those facts, which give a party a right to judicial interference on his behalf."

37. Similarly in the case of **Swamy Atmananda and others Vs. Sri Ramakrishna Tapovanam and others, (2005) 10 SCC 51**, the Hon'ble Supreme Court has held as follows:

"23. Osborn's Concise Law Dictionary defines 'cause of action' as the fact or combination of facts which give rise to a right or action. In Black's Law Dictionary it has been stated that the expression cause of action is the fact or facts which give a person a right to judicial relief. In Stroud's Judicial Dictionary a cause of action is stated to be the entire set of facts that give rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment.

24. A cause of action, thus, means every fact, which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded."

38. In the case of **Alchemist Ltd. and another Vs. State Bank of Sikkim**

and others, (2007) 11 SCC 335, Hon'ble Supreme Court has explained the aforesaid concept as follows:-

"20. It may be stated that the expression 'cause of action' has neither been defined in the Constitution nor in the Code of Civil Procedure, 1908. It may, however, be described as a bundle of essential facts necessary for the plaintiff to prove before he can succeed. Failure to prove such facts would give the defendant a right to judgment in his favour. Cause of action thus gives occasion for and forms the foundation of the suit.

21. The classic definition of the expression "cause of action" is found in Cooke v Gill. Wherein Lord Brett observed:

" 'Cause of action' means every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court".

22. For every action, there has to be a cause of action. If there is no cause of action, the plaint or petition has to be dismissed."

39. In the case of **A.B.C. Laminart Pvt. Ltd. & Anr. versus A.P. Agencies, (1989) 2 SCC 163** following has been held:-

"12. A cause of action means every fact, which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is

founded. It does not comprise evidence necessary to prove such facts, but every fact necessary for the plaintiff to prove to enable him to obtain a decree. Everything which if not proved would give the defendant a right to immediate judgment must be part of the cause of action. But it has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff".

40. Upon examination of the aforesaid law as propounded by Hon'ble Supreme Court, it is therefore evident that the term 'cause of action' consists of a bundle of facts which give cause to enforce or redressal of a lis or a grievance before any court of law or authority. It is some act done by an authority or person with which another person feels aggrieved since in the absence of such an act, no cause of action would arise.

41. As has been held by the Hon'ble Single Judge, in a restricted sense, cause of action means the circumstances forming the infraction of the right or the immediate occasion for the action. In the wider sense, it means the necessary conditions for the maintenance of proceeding including not only the alleged infraction, but also the infraction coupled with the right itself. All material facts on which a right to sue is based would therefore come within the scope of cause of action, which is not dependent merely upon the character or the relief prayed for.

42. In *Alchemist* (supra), the Hon'ble Supreme Court referred to its previous judgment in the case of **State of Rajasthan Vs. Swaika Properties, (1985) 3 SCC 217**, in which it was held that mere service of notice on the petitioner at

Calcutta under the Rajasthan Urban Improvement Act, 1959 could not give rise to a cause of action, unless such notice was 'an integral part of the cause of action'. It is not limited to the actual infringement of the right sued on, but includes all the material facts on which it is founded. The test is whether a particular fact is of substance and can be said to be material, integral or essential part of the lis between the parties, if it is, it forms a part of cause of action.

43. Upon applicability of the aforesaid concept of the term 'cause of action', it is evident in the present case that the demand and sale notice under Section 13 read with Rule 8(6) of the Security Interest (Enforcement) Rules 2002 was issued on 3rd May, 2019 from the zonal office at Lucknow for public e-auction of the property. The e-auction of the property was held on 28th June, 2019 by the zonal authority, again situate at Lucknow.

44. The provisions of Section 13 of the SARFAESI Act clearly envisages providing a notice under Section 13(2) by the secured creditor to the borrower in respect of a debt which is classified as a non performing asset in order to enable such borrower to discharge in full his liabilities to the secured creditor, failing which the secured creditor has been made entitled to exercise all or any of the rights provided under sub section (4).

45. Section 13(4) of the SARFAESI Act provides for actions or action which can be taken by the secured creditor in case the borrower fails to discharge his liability in full within period specified in sub section (2). Such action under Section 13(4) is thereafter challengeable under Section 17 of the SARFAESI Act.

46. It is thus quite evident that the notice under Section 13(2) of the SARFAESI Act must precede any action taken by the secured creditor under Section 13(4) of the aforesaid Act. In this view of the matter, it is evident that notice under Section 13(2) of the Act forms a chain with the action that can be taken by the secured creditor under Section 13(4) of the Act and would thus constitute a continuing cause of action either for the borrower or for the secured creditor.

47. Examining the present dispute in terms of aforesaid, it is evident that since notice for e-auction was issued by the authorized officer at Lucknow whereafter e-auction was actually conducted in terms of Section 13(4) of the Act by the very same officer at Lucknow, this Court is of the considered opinion that aforesaid will definitely constitute a part cause of action at Lucknow in terms of Section 17 (1-A) of the SARFAESI Act.

48. The Debts Recovery Appellate Tribunal, Allahabad in its judgment dated 25th March, 2021 has unfortunately failed to examine the scope of Section 17 (1-A) (a) pertaining to part cause of action in the light of aforesaid. The appellate tribunal clearly fell in error by examining only clauses (b) and (c) of Section 17(1-A) of the Act while ignoring the concept of part cause of action.

49. In paragraph 7 of the judgment, the appellate tribunal has held as follows:-

" 7. The issuance of notice cannot be treated as cause of action and rather it is an effect, which comes into force for initiation of recovery proceedings. Thus, the issue of notice is result of non payment of the dues."

50. The appellate tribunal has thereafter placed reliance on judgment rendered in the case of;

(a) Ramsay Exim and Technology Private Limited and others versus ICICI Bank Limited and another, 2019 SCC Online Cal 2315

(b) Amish Jain & others versus ICICI Bank Limited, 2018 SCC Online Del 8947

51. In the case of Ramsay Exim and Technology Private Limited (supra), the Calcutta High Court held as follows:-

" 26. A perusal of Section 19(1) of the DRT Act, in conjunction with Section 17(1A) of the SARFAESI Act, indicates that the primary consideration for ascertaining the jurisdiction of the tribunal is not restricted to the situs of the secured asset but is primarily based on the debt itself, be it with regard to the place where the cause of action, wholly or in part, arises or the branch or any other office of a bank or financial institution where it is maintaining an account in which the debt claimed is outstanding for the time being or (in the DRT Act) the defendant resides or works."

27. The only additional feature in subsection (1A) of Section 17 of the SARFAESI Act is clause (b) thereof, which confers jurisdiction additionally on the Debts Recovery Tribunal where the secured asset is located."

28. However, clauses (a), (b) and (c) of subsection (1A) are disjunctive and it is the option of the applicant in an application under Section 17 of the SARFAESI Act to choose any of the forums."

29. In such view of the matter, the location of the asset cannot be the sole determinant of the jurisdiction of the tribunal."

52. It is thus evident that the appellate tribunal misappreciated the judgment in the case of Ramsay Exim and Technology Private Limited (supra) which on the contrary has clearly held that location of the asset can not be the sole determinant of jurisdiction of the Tribunal and that clauses (a) (b) and (c) of sub section (1-A) of Section 17 of the SARFAESI Act are disjunctive in nature.

53. So far as reliance placed by appellate tribunal in the case of Amish Jain (supra) is concerned, it is evident that the same is also misplaced since the aforesaid judgment was rendered on 13th September, 2012 whereas Sub Section (1-A) was inserted in Section 17 by virtue of the Act No.44 of 2016 with effect from 1st September, 2016. The said judgment was thus inapplicable in the facts and circumstances of the case.

54. In view of aforesaid, it is held that since notices under Section 13 were issued by the authorized authority situate at Lucknow from where the e-auction was also conducted, part cause of action in terms of Section 17(1-A)(a) was evidently at Lucknow where the securitisation application was thus maintainable.

55. Question No.(A) stands answered accordingly in the affirmative.

56. Question Nos. (B) and (C) are as follows:-

"(B) Whether Section 3 of the Recoveries of Debts Due to Banks and Financial Institutions Act, 1993, confers exclusive jurisdiction on Debts Recovery Tribunals established thereunder vide notifications of the Central Government?"

(C) Whether Section 3 of the Recoveries of Debts Due to Banks and Financial Institutions Act, 1993, can be read as conferring exclusive jurisdiction on the Tribunals established thereunder, irrespective of Section 19 of the Recoveries of Debts Due to Banks and Financial Institutions Act, 1993 and Section 17(1A) of the SARFAESI Act, rendering Sections 19 and 17(1A) of the respective Acts as redundant or nugatory?"

Answer to Question Nos. (B) & (C):-

57. In the light of answer rendered by this Court to question No.2 which was additionally framed and in the light of Section 35 of the SARFAESI Act, it is evident that provisions of the SARFAESI Act will supersede the provisions of Section 3 of the Recovery of Debts Due to Banks and Financial Institutions Act 1993 and any notification issued thereunder, particularly dated 5th December, 2017 would also be subject to provisions of the SARFAESI Act.

58. Question No. B and C stands answered accordingly.

59. Question Nos. (D) and (E) are as follows:-

"(D) Whether the judgment in Saurabh Gupta (supra), which lays down that the Debts Recovery Tribunal, Allahabad shall have exclusive jurisdiction to entertain and decide the applications arisen from 55 districts specified in the notification dated 05.12.2017, without noticing Section 19 of the Recoveries of Debts Due to Banks and Financial Institutions Act, 1993 and Section 17(1A) of the SARFAESI Act, as also the judgment of Hon'ble Supreme Court in case of Sri

Nasiruddin (supra) lays down the law correctly ?"

"(E) Whether the judgment in Saurabh Gupta (supra) is contrary to the law laid down by the Hon'ble Supreme Court in the case of Sri Nasiruddin (supra) and is liable to be declared as not good law ?"

Answer to Question Nos. (D) & (E):-

60. With regard to judgment rendered by another learned Single Judge of this Court in the case of Saurabh Gupta (supra), it is evident that the said judgment has been rendered solely on the basis of notification dated 15th February, 2017 issued in pursuance of Section 3 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. The aforesaid notification conferred jurisdiction of 12 districts of Uttar Pradesh with the Debts Recovery Tribunal at Lucknow and 55 districts of Uttar Pradesh upon the Debts Recovery Tribunal at Allahabad.

61. Unfortunately the learned Single Judge has taken the aforesaid notification dated 15th February, 2016 to be the only determining factor while completely ignoring the provisions of Sections 13 and 17 (as amended in 2016) of the SARFAESI Act.

62. It is also evident that judgment has been rendered on an admission made by the learned Additional Solicitor General of India that it is within the sole domain of the Central Government to notify territorial jurisdictions of the Debts Recovery Tribunal under Section 3 of the Act of 1993 and therefore the aforesaid tribunals can exercise jurisdiction only in terms of notification dated 15th February, 2017. It is

on this premise that the learned Single Judge has held that it is only Debts Recovery Tribunal at Allahabad which can exercise jurisdiction pertaining to the 55 districts of State of Uttar Pradesh including district of Shahjahanpur whereas the jurisdiction of tribunal at Lucknow is restricted to the 12 districts notified in the notification dated 15th February, 2017.

63. Hon'ble Supreme Court in the case of **State of Madhya Pradesh versus Narmada Bachao Andolan (2011) 7 SCC 639** has expounded the concept of per incurium in the following manner.

"65. "Incuria" literally means "carelessness". In practice per incuriam is taken to mean per ignoratium. The courts have developed this principle in relaxation of the rule of stare decisis. Thus, the "quotable in law" is avoided and ignored if it is rendered in ignorance of a statute or other binding authority.

67. Thus, "per incuriam" are those decisions given in ignorance or forgetfulness of some statutory provision or authority binding on the court concerned, or a statement of law caused by inadvertence or conclusion that has been arrived at without application of mind or proceeded without any reason so that in such a case some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong."

64. Upon examination of the judgment rendered in the case of Saurabh Gupta(supra), it is evident that the following aspects have clearly escaped attention:-

" (i) that Section 17 (1-A) of the Securitization and Reconstruction of

Financial Assets and Enforcement of Security Interest Act, 2002, which specifically provides that an application under Section 17 (1) of the Act, 2002, shall be filed before the D.R.T. within local limits of whose jurisdiction, inter alia, (a) the cause of action wholly or in part arises, escaped consideration,

(ii) Section 19(1) of the Recoveries of Debts Due to Banks and Financial Institutions Act, 1993, which also provides that, where a bank or a financial institution has to recover any debt from any person, it may make an application to the Tribunal within the local limits of whose jurisdiction:- (a) the branch or any other office of the bank or financial institution is maintaining an account in which debt claimed is outstanding, for the time being; or (aa) the defendant, or each of the defendants where there are more than one, at the time of making the application, actually and voluntarily resides, or carries on business, or personally works for gain; or (b) any of the defendants, where there are more than one, at the time of making the application, actually and voluntarily resides, or carries on business, or personally works for gain; or (c) the cause of action, wholly or in part, arises; also escaped consideration."

65. In view of aforesaid, it is held that judgment rendered by the learned Single Judge in the case of Saurabh Gupta (supra) being per incuriam, does not lay down good law and is hereby overruled.

66. Questions No.(D) and (E) are answered accordingly.

67. In view of aforesaid, additionally framed Question No.1 and its answer is as follows:-

Question No.1:- "Whether clause (a) of Section 17(1A) of the SARFAESI Act is to be read ejusdem generis with Clauses (b) and (c) or is disjunctive? "

Answer to Question No.1:- Clause (a) of Section 17(1-A) of the SARFAESI Act is disjunctive from clauses (b) & (c) of Section 17 (1-A) of the SARFAESI Act and is to be read separately.

68. Additionally Framed Question No.2 and its answer is as follows:-

Question No.2:- "*Whether insertion of Section 17(1-A) in the SARFAESI Act would have any overriding effect over provisions of the Debts Recovery Tribunals Act?*"

Answer to Question No.2:- The insertion of Section 17(1-A) of the SARFAESI Act would have an overriding effect over provisions of the Recovery of Debts Due to Banks and Financial Institutions Act 1993.

69. The questions referred to are answered as follows:-

(A) *Notice issued under Section 13 of the SARFAESI Act would constitute part cause of action as per Section 17 (1-A) of the SARFAESI Act due to which the Debts Recovery Tribunal at Lucknow would also have jurisdiction to entertain the securitisation application filed by the borrowers.*

(B) and (C):- *Section 3 of the Recoveries of Debts due to Banks and Financial Institutions Act 1993 does not confer exclusive jurisdiction vide notifications issued by the Central Governments thereunder and such notifications would be subject to Section 17 (1-A) of the SARFAESI Act.*

(D) and (E) :- The judgment rendered in the case of Saurabh Gupta versus Union of India, 2018 (127) ALR 388 does not lay down good law and is therefore overruled.

70. The reference is answered accordingly.

71. Office is directed to place the record of writ petition before Hon'ble Single Judge for further orders.

(2024) 4 ILRA 1534
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.04.2024

BEFORE

THE HON'BLE SHEKHAR B. SARAF, J.

Writ -C No. 18282 of 2023

Sheel Mohan Bansal **...Petitioner**
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:
 Sri Sanjay Goswami, Sukumari Vallabh Goswami

Indian Stamp Act, 1899- Sections 27, 33,47-A 62, 62-A, 64 & 64-B- the authorities cannot proceed under Section 47-A of the Act - for levying stamp duty on a gift deed, the provisions of Section 47- A of the Act do not come into play-no requirement of determination of market value in case of gift deeds- impugned orders set aside.

Writ Petition allowed. (E-9)

List of Cases cited:

1. Sumit Gupta v. State of U.P. & Others reported in 2011 (3) ADJ 712;
2. Vijay Kumar vs. Chief Controller, Board of Revenue and others reported in [2017 (136) RD 364]

3. Sai Janseva And Another v. State of U.P. And 4 ors-Writ – C No.5185 of 2022 [Neutral Citation No. - 2024:AHC:21964]]

(Delivered by Hon'ble Shekhar B. Saraf, J.)
 (Judgement dictated in Court)

1. Heard Sri Sanjay Goswami, learned counsel appearing on behalf of the petitioner and Sri Siddharth Singh, learned Standing counsel for the State respondents.

2. This is a petition under Article 226 of the Constitution of India, wherein the petitioner assails the order dated November 18, 2022 passed by respondent no.2 and the order in Appeal dated March 13, 2023 passed by respondent no.3. By virtue of these orders, the authorities have claimed additional stamp duty with regard to a gift deed of a plot of land in question on the ground that the potential of the land would increase the market value of the land. Further ground has been enumerated stating that within 200 meters of land in question there are residential areas as well as within 50 meters there is a petrol pump.

CONTENTIONS OF THE PARTIES

3. Sri Sanjay Goswami, learned counsel appearing on behalf of the petitioner has submitted that the instrument in question being a deed of gift, the entire proceedings that have been initiated by the authorities under Section 47-A (3) of the Indian Stamp Act, 1899 (hereinafter referred to as "the Act") is without any basis in law. He has submitted that the authorities concerned does not have the power under Section 47-A of the Act to reassess the stamp duty paid by the petitioner on the grounds that duty would be chargeable on the market value of the property. To buttress his arguments, he

relies on the judgements in the matter of **Sumit Gupta v. State of U.P. & Others reported in 2011 (3) ADJ 712; Vijay Kumar vs. Chief Controller, Board of Revenue and others reported in [2017 (136) RD 364] and Sai Janseva And Another v. State of U.P. And 4 Others** (decided on February 7, 2024 in Writ – C No.5185 of 2022 [Neutral Citation No. - 2024:AHC:21964]) and submits that in the case of gift deed, the ‘value of the property’ is required to be taken and not the ‘market value’. He has emphasized the fact that under Article 33 of the Schedule 1-B of the Act, the description of the instrument wherein a gift is given the proper stamp duty is required to be paid for a consideration equal to the ‘value of the property’.

4. Per contra, counsel appearing on behalf of the respondents has relied on the inspection report to indicate that to the east of the property within 50 meters there is a petrol pump as well as agricultural activities are being carried out. He has further indicated that within 200 meters there are certain residential/commercial activities being carried out. He emphasized that the future potential of the land and the market value of the land would be more, and therefore, actual value should increase by 50%.

ANALYSIS AND CONCLUSION

5. Upon a perusal of the judgement of a coordinate Bench of this Court penned by Hon'ble Mr. Justice Pankaj Mithal, J. in Sumit Gupta (Supra) wherein it has been categorically examined whether in case of gift deed there was any application of Section 47-A, and the very concept of market value. The relevant paragraphs are delineated below:-

"The more important aspect involved in this writ petition is whether the authorities under the Act are competent under Section 47-A of the Act to determine the market value of the property referred to in the gift-deed in question for the purposes of levy of stamp duty.

A Gift-deed is chargeable to stamp duty under Article 33 of Schedule 1-B of the Act, which is reproduced as under:

	Description of instrument	Proper Stamp-duty
33.	Gift – Instrument of, not being a Settlement (No.58), or Will or Transfer (No.62) Hiring Agreement or Agreement of Service - See "Agreement" (No.5)	The same duty as a Conveyance No.23 clause (a) for a consideration equal to the value of the property

Note: Emphasis supplied

It provides that a gift is chargeable to stamp duty as a conveyance provided under Article 23 clause (a) for a consideration equal to the value of the property.

It may be noted that in the above Article words used are "value of the property" as distinguished from the "market value", meaning thereby that for the purposes of determining stamp duty on a gift-deed market value is not required to be mentioned/determined. The disclosure of the value of the property in the gift is sufficient for the purposes of payment of stamp duty.

A perusal of Section 47-A of the Act indicates that it comes into play only where the market value of the property in the instrument is disclosed to be lesser than that determined in accordance with the Rules made under the Act. So disclosure of

market value of the property is mandatory for the applicability of Section 47-A of the Act and it should be less than the market value determined under the Rules ie. the circle rate prescribed/notified under the Act/Rules.

Thus, there is a clear departure in the language used in Article 33 of the Schedule I-B of the Act and Section 47-A of the Act. Section 47-A of the Act uses the expression in "market value" whereas for levying stamp duty on a gift-deed Article 33 of Schedule I-B of the Act uses the expression "value of the property".

The legislature in its wisdom has differently used the words "value of the property" and "market value" in the Act. It is not without purpose. "Market value" refers to the value of the property prevailing in the market on which the prospective purchaser is ready and willing to purchase and seller is ready and willing to sell the property in the ordinary course of business. Therefore, market value is a bilateral transaction depended upon the will of two persons. On the other hand, 'value' simply connotes the estimated monetary worth of the property in the eyes of the seller and is in the nature of a unilateral act.

In conveyance, such as sale of property, generally two parties, ie. seller and purchaser are involved and the market value of the property is determined on the basis of the market forces ie., demand and supply of the commodity. In a deed of gift it is only the person making the gift who is relevant. It is up to him how he values his property. The value of the property in the eyes of the person receiving the gift is not material. This being the situation, the legislature has deliberately used the word "value of the property" in Article 33 while subjecting the gift to stamp duty and has refrained from using the term "market value".

6. In light of the above judgement, it is patently clear that for levying stamp duty on a gift deed, the provisions of Section 47-A of the Act do not come into play. Furthermore, there is no requirement of determination of market value in case of gift deeds. This judgement was accepted by the authorities and has attained finality. The aforesaid judgment was thereafter cited in **Vijay Kumar (Supra)** and a coordinate Bench has held that Section 47-A of the Act would have no application whatsoever. The said principle was thereafter, reiterated by a coordinate Bench of this Court in **Sai Janseva And Another (Supra)**.

7. Upon a perusal of the judgements provided above, it is clear that in case of a gift deed that has been accepted and registered, the authorities cannot take reference to Sub-section (3) of Section 47-A of the Act and suo moto seek additional stamp duty based on the market value of the property. However, the question arises that in the case of under valuation that may have been done by the executor of the instrument what recourse is available to the authorities.

8. In my view, the Indian Stamp Act, 1899 provides for various provisions that may be acted upon that are provided in Sections 27, 33, 62, 62-A, 64 and 64-B, wherein, if adequate stamp duty has not been affixed, the authorities can proceed against the executor for prosecution and collection of deficit stamp duty. However, the authorities cannot proceed under Section 47-A of the Act which is what has been done in the present case. It is also seen, that the respondents have not taken into account the judgements cited by the petitioner and proceeded to adjudicate upon their whims and fancies. It was incumbent upon the authorities to have taken note of

the judgements cited by the petitioner and pass a reasoned order on the same, which has clearly not been done in the present case. The authorities are directed to be far more cautious in their approach in *quasi judicial* activities being carried out by them.

9. In light of the above findings, impugned orders dated November 18, 2022 and March 13, 2023 are quashed and set aside.

10. The instant writ petition is allowed in aforesaid terms. Consequential reliefs to follow.

11. The amount that has been deposited by the petitioner is directed to be refunded to the petitioner within a period of six weeks from date along with interest at the rate of 5% from the date of deposit.

12. There shall be no order as to the costs.

(2024) 4 ILRA 1537
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.01.2024

BEFORE

THE HON'BLE SARAL SRIVASTAVA, J.

Writ -C No. 26636 of 2012

Mohd. Ashif Khan & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
 Sri Neeraj Pandey

Counsel for the Respondents:
 C.S.C.

Indian Stamp Act,1899 -Petitioners through sale deed purchased a piece of land-paid stamp

duty as per the circle rate prevailing in the area applicable for agricultural land-an inspection of the plot was conducted -report reflects that plotting activities are being carried out in the surrounding of the plot- and also another sale deed from the same plot was executed on which the stamp duty based on circle rate applicable to the residential area was paid-this fact cannot be ignored by the authorities below while determining the nature of the land on the date of execution of the sale deed.

Writ Petition dismissed. (E-9)

List of Cases cited:

1. Manorama Vs. Board of Revenue/CCA of Revenue and Stamp Ald and others, 2022 Lawsuit (All) 1661
2. Ajay Bahadur Vs. State of U.P. and Others, 2023 (12) ADJ 201
3. Smt. Pushpa Sareen Vs. State of U.P., 2015 (3) ADJ 136 (FB).
4. Smt. Saroj Verma Vs. State of U.P. and Others, 2022 (5) ADJ 368 (LB)

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

1. Heard learned counsel for the petitioners and Sri Rishi Kumar, Additional Chief Standing Counsel for the respondents.

2. The petitioners by means of the present writ petition have assailed the order dated 22.03.2010 passed by respondent no.3-Collector Stamp/District Magistrate, Shajahanpur in Stamp Case No.67/24/2009, under Section 47A (3) of the Indian Stamp Act determining the deficiency of stamp duty to the tune of Rs.14,53,410/- and, imposition of penalty of Rs.1590/- and interest at the rate of 1.5% per month, and the order dated 25.04.2012 passed by the respondent no.2-Chief Controlling Revenue Authority/Board of Revenue U.P. at

Allahabad in Stamp Appeal No.50/2011-12 affirming the order passed by the respondent no.3-Collector Stamp.

3. The facts, in brief, are that the petitioners through sale deed No.8006/2009, dated 13.04.2009, purchased a piece of land measuring area 1.166 hectares i.e. 11,660 sq. meters from plot No.64 having a total area of 2.485 hectares situated in the village Northern Area of the City outside Chungi near Village Chinnaur for agricultural purpose and paid stamp duty as per the circle rate prevailing in the area applicable for agricultural land i.e. Rs.9,42,000/- per hectare (hereinafter referred to as the 'plot').

4. According to the petitioners, the distance of the plot purchased by them from the road is about 1 kilometre and the Abadi is also about 1/2 kilometre from the plot. Since the use of the plot on the date of the sale deed was agricultural, therefore, the petitioners paid the stamp duty of Rs.77,000/-.

5. It appears that an inspection of the plot was conducted by the Sub Registrar, Sadar, Shahjahanpur on 11.08.2009. He found that Gata No.64 is situated on the road connecting to brick-klin (Bhatta), and the bricks have been stored on the plot, and plotting activities were also being carried out over the plot. The report of the Sub-Registrar further stated that another sale deed No.3613/09 was executed from the same plot. In the sale deed No.3613/09, stamp duty was paid as per the circle rate applicable to the residential area. The Assistant Collector (Stamp) registered a case based on the report of the Sub Registrar, under Section 47A(3) of the Indian Stamp Act as case No.67/24/2009 and issued notice to the

petitioners calling upon them to submit an objection about the deficiency in payment of stamp duty.

6. The petitioners submitted an objection contending inter-alia that the report of the Sub-Registrar is based upon incorrect facts. It is also stated that the plot is an agricultural plot and is surrounded by agricultural land, therefore, the petitioners have paid the correct stamp duty as per the circle rate applicable to the agricultural land.

7. The Collector (Stamp) rejected the objection of the petitioners by recording a finding that the stamp duty as per residential area was paid in respect to another sale deed No.3613/09 purchased from the same plot which establishes that the residential activities are being carried out in the vicinity of the plot, and the petitioners have submitted incorrect map along with the sale deed to pay insufficient stamp duty. Accordingly, he concluded that the petitioners are liable to pay the stamp duty applicable to the residential land. Consequently, he determined the deficiency of stamp duty to the tune of Rs. 14,53,410/- . He further imposed a penalty of Rs.1590/- and interest at the rate of 1.5% per month on the deficient stamp duty.

8. The order passed by the Collector Stamp was assailed by the petitioners in statutory appeal being Stamp Appeal No.50/2011-12. In the memo of appeal, petitioners have specifically stated that the report of the Sub-Registrar was ex- parte and no spot inspection was carried out by the Collector Stamp before determining the stamp duty. It is further stated that the sale deed No.3613/09 is not relevant for the determination of the present case.

9. The Respondent no.2-Chief Controlling Revenue Authority rejected the appeal of the petitioners vide order dated 25.04.2012 by recording a finding that though the petitioners have filed Khasra of the plot for Fasli Year 1415, 1416, 1417 which corresponds to the Year 2008, 2009 & 2010 which reflects that the crop of wheat and paddy were sown on the plot. However, he did not consider the Khasra on the ground that the plot is a big plot having an area of 2.485 hectares whereas the plot purchased by the petitioners is 1.166 hectares, and Khasra does not establish that the agricultural activity is being carried on over the area 1.166 hectare of plot purchased by the petitioners, and since another sale deed No. 3613/09 out of the same plot was executed on which the stamp duty applicable to the residential area has been paid, therefore, it cannot be denied that the land has a potential of residential land. Consequently, he held that the Collector (Stamp) had correctly determined the stamp duty.

10. Challenging the aforesaid orders, learned counsel for the petitioners has contended that the impugned order cannot be sustained since there is non-compliance with Rule 7(3)(C) of Uttar Pradesh Stamp (Valuation of Property), Rules, 1997 (hereinafter referred to as 'Rules, 1997'). It is submitted that except the report of the Sub-Registrar, there was no evidence on record to conclude that any residential activity was being carried out on the plot, and therefore, in such circumstances, it was incumbent upon the Collector Stamp to conduct an inspection as contemplated under the Rules, 1997 after giving due notice to the petitioners, and since, in the instant case it has not been done by the Collector, therefore, the orders impugned are per se illegal. He has placed

reliance upon the judgment of this Court in the case of ***Smt. Saroj Verma Vs. State of U.P. and Others, 2022 (5) ADJ 368 (LB)***. He has further submitted that on the date of execution of the sale deed, the plot was an agricultural plot and while determining the stamp duty, the future potentiality of the land is not to be considered or looked into and the stamp duty is to be paid as per the nature of the land on the date of execution of the sale deed.

11. It is submitted that in the instant case, since the plot was an agricultural plot, therefore, the correct stamp duty has been paid by the petitioners as applicable to the agricultural plot and the authority below failed to consider this aspect of the matter. Accordingly, it is submitted that the impugned orders are liable to be set aside on this ground alone. In support of his contention, he has placed reliance upon the judgment of this Court in the case of ***Manorama Vs. Board of Revenue/CCA of Revenue and Stamp Ald and others, 2022 Lawsuit (All) 1661***.

12. It is further submitted that in a proceeding under the Stamp Act, the burden is upon the State to prove that correct stamp duty has not been paid on the instrument, and since the State has failed to establish that on the date of execution of sale deed, the plot was a residential plot, therefore, the orders impugned cannot be sustained. In support of his submissions, he has placed reliance upon the judgment of this Court in the case of ***Ajay Bahadur Vs. State of U.P. and Others, 2023 (12) ADJ 201***.

13. Per contra, learned Standing Counsel would contend that in the instant case, the report of the Sub Registrar reflects that another sale deed No.3613/09 executed

from the same plot, the stamp duty as applicable to the residential plot was paid and this fact alone is sufficient to conclude that on the date of execution of sale deed, the land has the potential of residential use and the Collector Stamp has rightly concluded that there is deficiency to the tune of Rs.14,53,410/-.It is submitted that the fact that the sale deed No.3613/09 from the same plot was executed, the stamp duty applicable to the residential area had been paid on the said instrument, and sale deed No.3613/09 has not been denied, therefore, the State has discharged its burden of proving that on the date of execution of sale deed, the land has the potential of residential use. He further contends that it is not a case where the authority below has relied upon only the ex-parte report of the Sub Registrar, but also another documentary evidence i.e. sale deed No.3613/09 which was in respect of a plot carved out from the same plot from which the petitioners have purchased the plot, and which instrument has not been denied by the petitioners, therefore, there was enough evidence on record to conclude that the plot has the potentiality of residential use and in such view of the fact, the Collector Stamp didn't need to conduct any enquiry contemplated under the Rules, 1997. Accordingly, it is submitted that the petitioners have failed to make out any case for interference by this Court and the writ petitions lack merit and deserve to be dismissed.

14. I have considered the rival submissions advanced by the learned counsel for the parties and perused the record.

15. The facts as emanates from the record are that the petitioners purchased a plot having an area of 1.66 hectares by sale

deed No.8006/09 dated 13.04.2009 from plot No.64 having an area of 2.485 hectares situated in the Village Chinnaur for agriculture purposes. An inspection of the plot was conducted by the Sub-Registrar and he submitted the report which is reproduced below:-

“श्रीमान जी,

उपरोक्त विलेख द्वारा अन्तरित सम्पत्ति ग्राम चिनौर के लगे हुए स्थित है जो ग्राम चिनौर से गर्ग के भट्टे को जाने वाले मार्ग पर स्थित गाटा सं०64 का अंश है जिसमें मौके पर ईंटे गड़ी हुई है तथा प्लाटिंग हो रही है जिसमें कुछ प्लाटों की नींव भी भरी जा रही है। इसी गाटा में से आवासीय दर से बैनामा विलेख सं० 3618/09 हुआ है जिसमें निकटतम स्थित ग्राम चिनौर की आवासीय दर से मूल्यांकन किया गया है। ”

16. Perusal of the report reflects that the Sub-Registrar while inspecting the plot found that the plotting activities are being carried out in the surrounding of the plot of the petitioners and also another sale deed No.3613/09 from the same plot i.e. khasra No.64 was executed on which the stamp duty based on circle rate applicable to the residential area was paid. Accordingly, a case under Section 47A of the Indian Stamp Act was registered against the petitioners, and a notice was issued.

17. In the instant case, though the report of the Sub-Registrar was indeed an ex-parte report, and after institution of proceeding under Section 47 A (3) of the Indian Stamp Act, no inspection was conducted by the Collector (Stamp) as contemplated under the Rule 7 (3) (C) of

the Rules, 1997, but in the present case, there is an additional factor which needs to be noticed that another sale deed No.3613/09 of a plot which was carved out from the same plot from which the petitioners purchased the plot was executed in which stamp duty chargeable to residential area was paid. The fact that the sale deed No.3613/09 was executed from the same plot i.e. plot No.64 from which the petitioners have also purchased the plot, and the fact that the stamp duty applicable to residential land has been paid at the time of execution of sale deed No.3613/09 is not denied by the petitioners and is admitted fact between the parties.

18. In the light of the aforesaid fact, now the Court proceeds to consider the arguments advanced by the respective counsel.

19. So far as the first argument of learned counsel for the petitioners regarding the issue of non-compliance of Rule 7 (3) (C) of the Rules, 1997 is concerned, this Court may note that the power under Rule 7 (3) (C) of the Rules, 1997 conferred upon the Collector is only discretionary and is not mandatory in cases where there is other evidence on record from which nature of the land on the date of execution of the sale deed can be determined. Though it is true that the Collector is conferred with the power to do spot inspection of the property under Rule 7 (3) (C) of the Rules, 1997, the said power is to be exercised depending upon the facts of each case. The Collector while determining the deficiency of stamp duty is bound to follow Rule 7 (3) (C) of the Rules, 1997 where there is no evidence on record to determine the nature of the land on the date of execution of the sale deed,

since the ex-parte report of the Sub-Registrar cannot be relied upon against the assessee inasmuch as placing reliance on such report would violate the principles of natural justice.

20. The judgment of this Court in the case of **Smt. Saroj Verma (supra)** relied upon by the learned counsel for the petitioners has been rendered in a fact situation where the Collector Stamp has placed reliance upon the ex-parte report of the Sub-Registrar, and there was no other evidence on record which could establish the nature of the land on the date of execution of sale deed, and in such circumstances, this Court held that the Collector Stamp was bound to comply with Rule 7 (3) (C) of the Rules, 1997 to determine the stamp duty. This judgment is not applicable in the facts of the present case because of the admitted fact between the parties that on the sale deed No.3613/09 in respect of a plot carved out from the same plot from which petitioners' plot has been taken out, stamp duty applicable to the residential plot has been paid. This instrument itself is sufficient to determine the potentiality of land that the land has potential for residential use on the date of execution of the sale deed.

21. So far as the other argument of learned counsel for the petitioners regarding burden of proof is concerned, there is no quarrel to the proposition of law that the burden is upon the State to establish by leading cogent evidence on record that incorrect stamp duty has been paid on an instrument as has been held by this Court in the case of **Ajay Bahadur (supra)**, but in the instant case, the State has discharged its burden by placing reliance upon the sale deed No.3613/09, which instrument is not denied and on the said

sale deed stamp duty applicable to residential plot has been paid.

22. Now, coming to the last submission of learned counsel for the petitioners the potentiality of the land on the date of execution of the sale deed is to be seen and no future potentiality of the land is to be considered while determining the stamp duty. This Court may note that there is also no quarrel to the aforesaid proposition as has been held by the Coordinate Bench of this Court in the case of **Manorama (supra)** wherein this Court has also considered and reproduced in paragraph no.13 paragraphs no. 26 to 28 of Full Bench judgement of this Court in the case of **Smt. Pushpa Sareen Vs. State of U.P., 2015 (3) ADJ 136 (FB)**.

23. However, the facts of the present case are different from the facts in the case of **Manorama (supra)**. In paragraphs nos.14 to 16 of the said judgement, this Court records reasons for holding the order passed by the authority are not sustainable in law. Paragraphs no.14 to 16 are reproduced herein-below:-

“14. In the present case except the Naib Tehsildar report dated 06.11.1995, revenue record and the sale deed in question there was no evidence on record to hold that land in dispute is not an agricultural land as such the impugned orders cannot be sustained in the eye of law in which on the point of future potential of the land without any basis the stamp duty paid by the petitioner was found deficient.

15. The case law cited by learned counsel for the petitioner in Chotey Lal (Supra) is also applicable in the present controversy in which the full bench decision rendered in Smt. Pushpa Sarin (Supra) has been also considered.

16. Considering the facts and circumstances of the case as well as ratio law laid down in Smt. Pushpa Sarin (supra) and Chhotey Lal (Supra) the impugned order dated 29.01.1996 passed by the Additional Collector and order dated 14.05.2001 passed by the Board of Revenue Allahabad cannot be sustained in the eye of law as such the same are hereby set aside. The writ petition stands allowed. No order as to costs.”

24. The reading of para-14 reflects that except the report of Naib Tehsildar dated 06.11.1995, there was no other evidence on record to conclude that the land in question is not agricultural. In the instant case, it is not solely the report of the Sub-Registrar but also, there is sale deed No.3613/09 in respect of a plot which was carved out from plot No.64, from which the petitioners purchased the plot, in which the stamp duty applicable to the residential area was paid. This document is not denied by the petitioners in the memo of appeal or the writ petition.

25. At this juncture, it would be apposite to have a glance at paragraphs no.26, 27 & 28 of the Full Bench judgment of this Court in the case of **Pushpa Sareen (supra)** which are reproduced herein-below:-

“26. The true test for determination by the Collector is the market value of the property on the date of the instrument because, under the provisions of the Act, every instrument is required to be stamped before or at the time of execution. In making that determination, the Collector has to be mindful of the fact that the market value of the property may vary from location to location and is dependent upon a large number of circumstances having a

bearing on the comparative advantages or disadvantages of the land as well as the use to which the land can be put on the date of the execution of the instrument.

27. Undoubtedly, the Collector is not permitted to launch upon a speculative inquiry about the prospective use to which a land may be put to use at an uncertain future date. The market value of the property has to be determined with reference to the use to which the land is capable reasonably of being put to immediately or in the proximate future. The possibility of the land becoming available in the immediate or near future for better use and enjoyment reflects upon the potentiality of the land. This potential has to be assessed with reference to the date of the execution of the instrument. In other words, the power of the Collector cannot be unduly circumscribed by ruling out the potential to which the land can be advantageously deployed at the time of the execution of the instrument or a period reasonably proximate thereto. Again the use to which land in the area had been put is a material consideration. If the land surrounding the property in question has been put to commercial use, it would be improper to hold that this is a circumstance which should not weigh with the Collector as a factor which influences the market value of the land.

28. The fact that the land was put to a particular use, say for instance a commercial purpose at a later point in time, may not be a relevant criterion for deciding the value for the purpose of stamp duty, as held by the Supreme Court in State of U.P. and others vs. Ambrish Tandon and another (2012) 5 SCC 566. This is because the nature of the user is relateable to the date of purchase which is relevant for the purpose of computing the stamp duty. Where, however, the potential of the land

can be assessed on the date of the execution of the instrument itself, that is clearly a circumstance which is relevant and germane to the determination of the true market value. At the same time, the exercise before the Collector has to be based on adequate material and cannot be a matter of hypothesis or surmise. The Collector must have material on the record to the effect that there has been a change of use or other contemporaneous sale deeds in respect of the adjacent areas that would have a bearing on the market value of the property which is under consideration. The Collector, therefore, would be within jurisdiction in referring to exemplars or comparable sale instances which have a bearing on the true market value of the property which is required to be assessed. If the sale instances are comparable, they would also reflect the potentiality of the land which would be taken into consideration in a price agreed upon between a vendor and a purchaser."

26. In the instant case, the law postulated by the Full Bench in paragraph-27 & 28 answers the contention advanced by the learned counsel for the petitioners that though the potentiality of the land is to be seen on the date of execution of the sale deed, but if the land surrounding the property in question has been put to commercial use, it would be improper to hold that this is a circumstance which should not be considered by the Collector as a factor which influences the market value of the land.

27. In the present case, sale deed No.3613/09 was executed from plot No.64 on which the stamp duty applicable to residential land has been paid. Once execution of the sale deed No.3613/09 is not denied by the petitioners nor the fact

that stamp duty applicable to the residential plot has been paid in the sale deed No.3613/09, this fact cannot be ignored by the authorities below while determining the nature of the land on the date of execution of the sale deed. The sale deed No.3613/09 which is in respect of plot which was part of plot No.64 from which the petitioners have purchased the plot reflects that the plot purchased by the petitioners has the potential to be used for the residential plot on the date of execution of sale deed, and in such view of the fact, this Court is of the view that both the authorities below have not committed any error in determining the deficiency of stamp duty of Rs.14,53,410/-

28. It is also urged by the learned counsel for the petitioners that another sale deed No.8185/09 dated 04.08.2009 has been executed from the same plot i.e. plot no.64 on which the stamp duty applicable to the agricultural land has been paid. The said sale deed has been filed along with the supplementary affidavit dated 14.12.2022. Accordingly, it is submitted that the State cannot act arbitrarily and discriminate between the two assessee's identically circumstanced in charging stamp duty.

29. The said argument in the opinion of the Court is fallacious and is incorrect. The sale deed No.8185/09 was not placed before the authority below i.e. either before the Collector (Stamp) or before the appellate authority and this has been placed for the first time in the writ petition. This Court is not inclined to accept the said sale deed as evidence inasmuch as if it is treated to be evidence, then the opportunity of hearing has to be given to the respondents to explain under what circumstances the instrument i.e. sale deed No.8185/09 has been charged on

agricultural basis. Secondly, the petitioners have not stated whether any proceeding under Section 47A of the Indian Stamp Act has been drawn against the vendee of sale deed No.8185/09. Thirdly, Article 14 of the Constitution of India cannot come into play to perpetuate any illegality, and in the present case, there was sufficient material before the authority below to determine that the plot of the petitioners has the potentiality of residential use on the date of execution of sale deed, therefore, the petitioners cannot take advantage of sale deed No.8185/09.

30. Thus, for the reasons given above, this Court finds that the writ petition lacks merit. It is accordingly, *dismissed* with no order as to costs.

(2024) 4 ILRA 1544
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.02.2024

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.
THE HON'BLE JAYANT BANERJI, J.

Writ-C No. 39170 of 2023

M/s Suddhtam Enterprises ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sri Ashutosh Tiwari, Sri Himanshu Srivastava, Sri Madan Lal Srivastava, Sri Mukesh Prasad (Sr. Adv.)

Counsel for the Respondents:
 C.S.C.

**Civil Law - Constitution of India,1950-
 Article 226-an e-tender-cum-e-auction
 notice was issued on 11.09.2023 for
 mining rights in banda district, covering
 specific plots-four companies**

participated-Respondent no.6 offered highest bid of Rs. 231, while the petitioner offered the second highest bid of Rs. 205-The petitioner challenged the acceptance of Respondent no.6's bid, citing irregularities, specifically documents submitted (aadhar card, pan card, character certificate) were not self attested, violating tender notice conditions-Held,The chief Treasury Officer Banda had no authority to recommend cancellation of the e-auction as he was not part of the committee-The committee constituted by District Magistrate failed to scrutinize tender documents properly, leading to the financial bid of respondent no.6 being opened despite its non-compliance with condition no. 6of the tender notice-Thus, the petitioner's bid was valid and should have been declared the highest, as it was above the reserve price and complied with all tender conditions-The impugned orders were quashed-The petitioner's bid was ordered to be accepted.(Para 1 to 15)

The writ petition is allowed. (E-6)

(Delivered by Hon'ble Anjani Kumar
Mishra, J.

&

Hon'ble Jayant Banerji, J.)

1. Heard Shri Mukesh Prasad, learned Senior Advocate for the petitioner and Shri Ankur Tandon, learned Standing Counsel for the State-respondents.

2. The petitioner has challenged the letter/order dated 21.10.2023 passed by the Chief Treasury Officer, Banda as also an Advertisement No.784/Khanij-30, Banda dated 28.10.2023 issued by the District Magistrate, Banda.

3. It appears that e-tender-cum-e-auction notice no.344/Khanij-30 was published on 11.09.2023 inviting bids for short term permit, also regarding Gata

No.62 and 63/1 Area 42.00 acre, Village Khapatiha Kala, Tehsil Pailani, District Banda.

4. In the said e-auction, four companies participated for the aforesaid two plots. The highest bid was that of respondent no.6 M/s G.D.S. Infrastructure through its Proprietor, at Rs.231 while the petitioner's bid at Rs.205 was the second highest.

5. The petitioner is stated to have filed an application stating that the copies of the Aadhaar Card, Pan Card and Character Certificate filed by G.D.S. Infrastructure were not self attested and its bid was therefore irregular, contrary to the tender notice and not liable to be considered.

6. Thereafter, a letter was written on 21.10.2023 by the Chief Treasury Officer, Banda to the A.D.M. (Finance and Revenue) indicating that the deficiency in the bid documents had not been noticed at the time of opening of the technical bid and thereafter financial bids were wrongly opened. It was recommended that e-auction was cancelled and the fresh e-auction be resorted to. Thereafter a fresh e-auction notice was issued.

7. When the matter came up for admission, the Court directed learned Standing Counsel to seek instructions as to the role of the Chief Treasury Officer, Banda in the bidding process.

8. A copy of the instructions received have been made available for perusal by the Court.

9. In paragraph 2 of the instructions, it has been stated that the

District Magistrate, Banda had constituted a Committee to examine the applications received in response to the e-auction notice. This Committee opened the technical bids on 05.10.2023 and found that all required documents were attached along with bid of G.D.S. Infrastructure and other bidders. Thereafter, the financial bids were also opened on 05.10.2023. The bid of the G.D.S. Infrastructure was found to be the highest at Rs.231. The financial bid of G.D.S. Infrastructure was wrongly opened as condition no.6 of the tender notice had not been complied as some documents had not been self attested.

10. On coming to know of this fact that the documents accompanying e-bid of G.D.S. Infrastructure were not self attested, the opinion of the Chief Treasury Officer, Banda was sought, whereupon the letter dated 21.10.2023 was written. The e-auction was cancelled and a fresh e-auction notice was issued by the order of the District Magistrate on 27.10.2023, which is also under challenge in this writ petition.

11. From the instructions received, it emerges that a Committee had been constituted by the District Magistrate to process bids received consequent to publication of a e-tender notice. The constitution of this Committee has not been disclosed. However, what clearly emerges from the record is that this Committee did not perform its functions properly and did not scrutinize the tender documents. It was on account of this laxity that the financial bid of the respondent was opened, although it should not have been opened as it did not comply with all the conditions of the e-tender notice.

12. We also find substance in the submission of learned counsel for the

petitioner that since the bid of the petitioner was above the reserve price and did not suffer from any legal defect as it complied with all the conditions of the tender notice, the ineligible bid should have been discarded and the petitioner was liable to be declared the highest bidder and was liable to be awarded the contract and in failing to do so, the respondents have committed patent illegality.

13. It is also not clear from the instructions received as to who referred the matter to the Chief Treasury Officer, Banda. It is not the respondent's case that the Chief Treasury Officer was a member of the Committee constituted to examine and process the e-tenders and, therefore, the Chief Treasury Officer, Banda for all practical purposes was an unconcerned person. Therefore, he had no right to recommend cancellation of the e-tender notice as a whole.

14. There is also substance in the contention of learned counsel for the petitioner that petitioner is being penalized for no fault on his part, especially when his bid, amongst all valid bids, was the highest. The respondents have tried to gloss over the laxity and dereliction duty on the part of the Committee constituted to process the e-tenders received and the petitioner is being penalized for this fault.

15. Accordingly, the writ petition is liable to be and is hereby, allowed. The letter/order dated 21.10.2023 passed by the Chief Treasury Officer, Banda as also the Advertisement No.784/Khanij-30, Banda dated 28.10.2023 issued by the District Magistrate, Banda, are hereby quashed with the observation that the petitioners' bid being the highest among all valid and

complete bids, and was above the reserve price, the same was liable to be accepted.

16. It is ordered accordingly.

(2024) 4 ILRA 1547

**ORIGINAL JURISDICTION
CIVIL SIDE**

DATED: ALLAHABAD 07.03.2024

BEFORE

**THE HON'BLE MANOJ KUMAR GUPTA, J.
THE HON'BLE KSHITIJ SHAILENDRA, J.**

Writ -C No. 39901 of 2018

Om Prakash **...Petitioner**
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:
Sri Prateek Kumar

Counsel for the Respondents:
C.S.C.

Mines and Minerals (Development and Regulations) Act, 1957 -Burden of proof in Penal provision-Initial action of respondents was interfered with by this Court- firstly, by passing an interim order and thereafter by setting aside the order impugned itself in 2018 - liberty was granted to the respondents to take a fresh decision- the subsequent report dated 30.04.2018 clearly mentions that the digging depth was 1.30 meters- impugned order passed-casts a 'negative burden' upon the petitioner to establish the permissible depth - concerning digging activity prior to issuance of Government Order dated 24.12.2012 -order impugned is fiscal in nature- the burden to establish the guilt or wrong of the petitioner cannot be shifted to or fastened upon the petitioner to prove negatively- entitled to get the benefit of Government Order dated 24.12.2012-impugned order quashed.

Writ Petition allowed. (E-9)

List of Cases cited:

1. Ramvir Singh vs State of U.P. and 2 others, 2016 (5) AWC 5431

2. Bharat Barrel and Drum Manufacturing Company vs Amin Chand Payrelal, AIR 1999 SC 1008

3. Tolaram Relumal and another vs State of Bombay, AIR 1954 SC 496

4. M/s Virtual Soft System Ltd. vs. Commissioner of Income Tax, 2007 (9) SCC 665

5. Abhiram Singh vs C.D. Commachen (Dead) by L.Rs. and others, 2017 (2) SCC 629

6. Excel Crop Care Ltd. Vs Competition Commission of India and others, 2017 (8) SCC 47

7. Isher Das vs. State of Punjab, AIR 1972 SC 1295

8. Assistant Commissioner vs Velliappa Textiles, (2003) 132 Taxman 165

9. Krishi Utpadan Mandi Samiti and others vs Pilibhit Pantnagar Beej Ltd. and another, AIR 2003 SCW 6696

(Delivered by Hon'ble Kshitij Shailendra, J.)

1. Heard Shri Prateek Kumar, learned counsel for the petitioner, Shri Rajiv Gupta, learned Additional Chief Standing Counsel for all the respondents and perused the record.

2. Counter and rejoinder affidavits have been exchanged between the parties and, therefore, the writ petition is being finally decided.

3. The petitioner is aggrieved by the order impugned dated 15.11.2018 whereby the Additional District Magistrate (Finance & Revenue), Bulandshahr (respondent No. 2) has levied upon him a sum of Rs. 1,46,360/- (Royalty Rs. 21,060 + Mineral Value Rs.

1,05,300/- + compounding Fee Rs. 20,000/-) under Rules 3 and 70 of U.P. Minor Minerals (Concession) Rules, 1963 read with Section 4 of Mines and Minerals (Development and Regulations) Act, 1957.

4. The facts of the case are that the petitioner claims to be joint tenure holder of Bhumindhari land covered by Khasra Plot No. 133 measuring 2.3040 hectares situated at village Fatehpur Buzurg, Pargana Baran, Tehsil and District Bulandshahr; copy of revenue records annexed. It is pleaded that in pursuance of an inquiry dated 15.06.2012 held behind the back of the petitioner, a report was prepared by the Tehsildar, Sadar, Bulandshahr recording that the petitioner had indulged in mining of soil to the volume of 2340 cubic meters. A notice was, thereafter, said to be issued to the petitioner on 25.06.2012, but it remained unserved upon him and, based thereupon, the respondent No. 2 passed an order dated 19.09.2012 issuing recovery against the petitioner to the tune of Rs. 1,46,360/-. The petitioner, having come to know about the order, challenged the same by filing Writ C No. 64507 of 2012 (Om Prakash vs State of U.P. and others), in which an interim order was passed by this Court on 18.12.2012 restraining coercive steps against him in pursuance of the order dated 19.09.2012. Later on, the writ petition was disposed of vide order dated 05.07.2018 setting aside the order dated 19.09.2012 on the ground of violation of principles of natural justice, however, this Court permitted the authorities to pass fresh order after providing opportunity of hearing to the petitioner leaving it open to him to take all legal pleas permissible under the law. It appears that pending writ petition, a fresh inquiry was conducted culminating into a report dated 30.04.2018 prepared by the

Tehsildar recording that the petitioner had indulged in mining of 2340 cubic meters of soil upto the depth of 1.30 meters. Relying upon the said inquiry report, the order dated 15.11.2018, impugned in the instant petition, has been passed levying the aforesaid sums upon the petitioner.

5. The case of the petitioner, in a nutshell, is that the Government of U.P. had issued a Government Order dated 24.12.2012 providing that if any manual excavation of ordinary earth takes place and the depth of mining site is not more than two meters, the action would not fall under 'mining operations' and, hence, the impugned levy is liable to be set aside.

6. A counter affidavit has been filed on behalf of all the respondents stating that the petitioner's case based upon the Government Order dated 24.12.2012 has no substance inasmuch as the proceedings had begun in furtherance of inquiry report dated 15.06.2012, by which time, the Government Order dated 24.12.2012 had not come in existence. Further defence is that, even otherwise, the Government Order dated 24.12.2012 itself provides for payment of royalty for the excavation of soil for the purpose of brick-kiln and since the petitioner had admitted digging of soil by him, though it is less than two meters depth, but was done for commercial purpose, the levy upon him was justified as the activity undertaken by the petitioner would fall within the purview of 'mining operations'.

7. The rejoinder affidavit filed by the petitioner states that reliance placed on the Government Order dated 24.12.2012 having the Subject: "In Relation to U.P. Minerals (Concession) (35th Amendment) Rules, 2012", is perfectly justified as the

Government Order has already been interpreted by this Court in the case of **Ramvir Singh vs State of U.P. and 2 others, 2016 (5) AWC 5431**. It is further stated that since the impugned order has been passed on the basis of inquiry report dated 30.04.2018, by which time the Government Order dated 24.12.2012 had already come into existence, reliance placed by the petitioner on the said Government Order cannot be said to be misplaced.

8. We have heard the learned counsel for the parties and to appreciate the controversy involved in the instant case, it is first necessary to refer the aforesaid Government Order dated 24.12.2012, which reads as under:

"प्रेषक,

संख्या 3514/86-2012.235/2010

विवेक वाष्णीय

विशेष सचिव

उत्तर प्रदेश शासन।

सेवा में,

1. निदेशक भूतत्व एवं खनिकर्म,

उ०प्र०, लखनऊ।

2. समस्त जिलाधिकारी।

3. समस्त मण्डलायुक्त।

भूतत्व एवं खनिकर्म अनुभाग: लखनऊ

दिनांक 24 दिसम्बर, 2012

विषय: उत्तर प्रदेश खनिज परिहार
पैंतीसवाँ संशोधन नियमावली, 2012 के सम्बन्ध
में।

महोदय,

अवगत कराना है कि उपर्युक्त संशोधन
के अन्तर्गत ईट भट्ठों 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 निम्नवत् जोड़ दिया गया
है।

1. स्पष्टीकरण:- ईट बनाने हेतु
हस्तचालन से खुदायी द्वारा अथवा हस्तचालन
से सामान्य मिट्टी को निकालने की क्रिया
खनन संक्रियाओं के अंतर्गत नहीं आयेगी जब
तक कि खनन स्थल की गहराई 02 मीटर से
अधिक न हो।

2.1 - क नियम-3 में किसी बात के
प्रतिकूल होते हुये भी ईट भट्ठा मालिकों को
नियमावली की प्रथम अनुसूची में तत्समय
विनिर्दिष्ट दरों पर स्वामित्व का भुगतान करना
होगा।

इस संबंध में मुझे यह कहने का निर्देश
हुआ है कि ईट भट्ठों के संचालन के संबंध में
उपर्युक्तानुसार आवश्यक कार्यवाही करने का
कष्ट करें।

भवदीय,

विवेक वाष्णीय

विशेष सचिव

From-

No. 3514/862012235/2010

Vivek Varshney,

Special Secretary, Government of
Uttar Pradesh.

To-

1. The Director, Geology and
Mining, U.P.

2. All District Magistrates,

3. All Divisional Commissioners
Geology and Mining Section
Lucknow: Dated: 24th Dec, 2012

Sub: Uttar Pradesh Minerals
(Concession) (Thirty Fifth Amendment)
Rules, 2012 - Reg.
Sir,

It is to inform you that under the aforesaid amendment, in view of the essentiality of environment clearance certificate having been dispensed with for operation of brick kilns, "Clarification" has been added to Rule 3, and Sub Rule (1A) to Rule 211 of the amendment rules as under:

1. Clarification: For brick making, the act of taking out the ordinary earth by way of manual digging or hand movements shall not fall under mining operations unless the depth of the mining site is more than 2 metres.

2. 1A: Notwithstanding anything contrary in Rule 3, the brick kiln owners shall be liable to pay for their titles at the rate specified for the time being in the first schedule of the Rules.

In this regard, I am directed to say that for operation of brick kilns, please take necessary action as mentioned above.

Sincerely,
(Vivek Varshney)
Special Secretary"
(English translation by the Court)

9. A perusal of the aforesaid Government Order clearly reveals that if manual digging is done upto the depth of two meters, the activity shall not fall under 'mining operations' and, hence, no penal/fiscal action can be initiated against the person concerned.

10. In the instant case, though the proceedings had initiated pursuant to the Tehsildar's report dated 15.06.2012,

however, the order based thereupon was passed on 19.09.2012 and the action undertaken against the petitioner on that basis was initially stayed by this Court by an interim order dated 18.12.2012 passed in Writ C No. 64507 of 2012 and, later on, the writ petition was disposed of setting aside the impugned order therein on 05.07.2018 and when the matter was left open to be decided by the authorities afresh, the action was taken based upon another inspection report dated 30.04.2018 that came in existence pending the writ petition. The said report records that digging was done upto the depth of 1.30 meters to the extent of 2340 cubic meters. Surprisingly, the report dated 30.04.2018 does not mention the date of inspection, however, figure 2340 cubic meters is the same, which was mentioned in the initial report dated 15.06.2012. Additionally, depth of 1.30 mts. has been mentioned in the report dated 30.04.2018 that was not mentioned in the previous report dated 15.06.2012. Therefore, in absence of any material contrary to the defence of the petitioner, the report dated 30.04.2018 would be referable to the same period of time when the first report had come into existence in June, 2012.

11. The order impugned takes note of the defence of the petitioner based upon the Government Order dated 24.12.2012, however, it mentions that since the proceedings against the petitioner had begun in June, 2012, by which time the Government Order dated 24.12.2012 had not been issued, the petitioner would not get any benefit of the same. Additionally, the order impugned records as follows:

“उक्त के अतिरिक्त यह भी उल्लेखनीय है कि विपक्षी अथवा सहायक भू-वैज्ञानिक,

बुलन्दशहर की ओर से ऐसा कोई शासनादेश प्रस्तुत नहीं किया कि शासनादेश दिनांक 24.12.2012 के प्रभावी होने से पूर्व मिट्टी खनन की गहराई का कोई मापदण्ड हो कि कितनी गहराई तक खनन अवैध खनन की श्रेणी में नहीं आयेगा। ऐसी स्थिति में उक्त शासनादेश प्रश्नगत प्रकरण पर प्रभावी न होने के कारण विपक्षी द्वारा किया गया मिट्टी का खनन मिट्टी खनन की श्रेणी में आता है।"

12. Learned counsel for the petitioner has urged that the issue raised through this petition is squarely covered by Division Bench judgment of this Court in the case of **Ramvir Singh** (supra), wherein this Court had dealt with identical case of a farmer having bhumidhari rights in an agricultural land and, after interpreting the aforesaid Government Order dated 24.12.2012, the action impugned before this Court was found to be illegal and, consequently, this Court set aside the impugned recovery by allowing the writ petition and also imposed cost upon the State-respondents. He further submits that the respondents, in their counter affidavit, have admitted the depth of digging to be less than two metres and, therefore, the impugned levy is liable to be struck down.

13. On the other hand, Shri Rajiv Gupta, learned Additional Chief Standing Counsel, by referring to the counter affidavit, tried to distinguish the judgment in the case of **Ramvir Singh** (supra) on facts arguing that, in that case, digging had taken place in the year 2015 when the Government Order dated 24.12.2012 was in operation whereas, in the present case, the action had begun prior to issuance of the said Government Order and, therefore, the

petitioner would not get any benefit of the said judgment or the Government Order itself. He further submits that, even otherwise, irrespective of the depth of digging, the Government Order does not save those who are involved in brick making.

14. Having heard the learned counsel for the parties, the Court finds that the initial action of respondents that commenced pursuant to the report dated 15.06.2012 was interfered with by this Court, firstly, by passing an interim order in the year 2012 and, thereafter, by setting aside the order impugned itself in 2018 and, though liberty was granted to the respondents to take a fresh decision, the subsequent report dated 30.04.2018 clearly mentions that the digging depth was 1.30 meters. The order impugned, in fact, casts a 'negative burden' upon the petitioner to establish as to what was the permissible depth concerning digging activity prior to issuance of Government Order dated 24.12.2012 and it has been strangely observed in the order impugned that the petitioner has not brought anything to demonstrate that digging activity upto what extent would not fall within the meaning of "illegal mining operations".

(Emphasis Supplied)

15. The Court is not satisfied by the defence taken in the counter affidavit or the reasoning assigned in the order impugned for following multiple reasons.

16. It is well settled that the penal and fiscal provisions must be strictly construed and since the order impugned is fiscal in nature, the burden to establish the guilt or wrong of the petitioner, if any, lay upon the respondents and it cannot be

shifted to or fastened upon the petitioner to prove negatively; that is to say that, in case, the respondents wanted to saddle the petitioner with levy of royalty and other penal charges, it was for them to establish, beyond reasonable doubt, that the activity done by the petitioner, though in the June, 2012 and prior to issuance of Government Order dated 24.12.2012, would fall within the meaning and import of 'illegal mining operation'.

17. In a catena of decisions, the Supreme Court has held that in the fiscal matters, the burden to establish levy or any financial charge lay upon the revenue and it is not for the assessee to lead negative evidence to evade the liability. The Court may refer to the judgment of the Supreme Court in the case of **Bharat Barrel and Drum Manufacturing Company vs Amin Chand Payrelal**, AIR 1999 SC 1008 wherein the Apex Court, while dealing with a case arising out of Negotiable Instruments Act, 1881, in paragraph No. 12 of the report, held that "The Court may not insist upon the defendant to disprove the existence of consideration by leading direct evidence as existence of negative evidence is neither possible nor contemplated and, even if led, is to be seen with a doubt".

(Emphasis Supplied)

18. In the instant case, neither the counter affidavit states anything specific as to what is the evidence to establish illegal mining being carried by the petitioner nor could the learned Additional Chief Standing Counsel place before this Court any other material to demonstrate that manual digging activity carried out by the petitioner in his own agricultural field below two meters depth would fall under 'illegal mining operation' or that it would be in teeth of any statutory provision.

19. As far as the argument of learned Additional Chief Standing Counsel regarding brick-kiln based upon the Government Order dated 24.12.2012, the Court finds that the said Government Order contains clarification to the effect that for brick making, the act of taking out the ordinary earth by way of manual digging or hand movements shall not fall under mining operations unless the depth of the mining site is more than 2 metres. Even otherwise, there is no material on record to presume that the petitioner was engaged in brick making activity. Neither any report of the respondents nor even the order impugned speaks so. Hence, the Court cannot decide the case merely on hypothesis, presumption, conjecture and surmises that the petitioner was allegedly involved in brick-making activity. Therefore, this argument of the State side also does not have any force.

20. As regards interpretation of a penal or fiscal statute, it is well settled that if two views or constructions are possible, the Court must lean towards that view/construction which exempts the subject from penalty rather than the one which imposes penalty. It is also well settled that if there is a reasonable doubt or ambiguity, the principle to be applied in construing a penal provision is that such doubt or ambiguity should be resolved in favour of the person who would be subjected to penalty. Reference in this regard can be made to the following authorities:

(i) **Tolaram Relumal and another vs State of Bombay**, AIR 1954 SC 496

(ii) **M/s Virtual Soft System Ltd. vs. Commissioner of Income Tax**, 2007 (9) SCC 665

(iii) **Abhiram Singh vs C.D. Commachen (Dead) by L.Rs. and others**, 2017 (2) SCC 629.

(iv) **Excel Crop Care Ltd. Vs Competition Commission of India and others**, 2017 (8) SCC 47

(v) **Isher Das vs. State of Punjab**, AIR 1972 SC 1295

(vi) **Assistant Commissioner vs Velliappa Textiles**, (2003) 132 Taxman 165

(vii) **Krishi Utpadan Mandi Samiti and others vs Pilibhit Pantnagar Beej Ltd. and another**, AIR 2003 SCW 6696.

21. Having considered the entire material placed before this Court and the submissions advanced, this Court is of the view that the petitioner is entitled to get the benefit of Government Order dated 24.12.2012 and his case is covered by the principle of law laid down by this Court in the case of *Ramvir Singh (supra)*.

22. Consequently, the writ petition succeeds and is **allowed**.

23. The order impugned dated 15.11.2018 passed by the Additional District Magistrate (Finance & Revenue), Bulandshahr (respondent No. 2) is hereby **quashed**.

24. No order as to costs.

(2024) 4 ILRA 1553

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 14.03.2024

BEFORE

THE HON'BLE MRS. RENU AGARWAL, J.

Writ -C No. 40168 of 2023

Smt. Mamta & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:

Sri Umair Alam, Sri Sanjay Srivastava

Counsel for the Respondents:

C.S.C.

Civil Law - Constitution of India,1950- Article 226-The petitioners who were in an interfaith live-in relationship, sought protection against interference in their personal lives, particularly from the father of petitioner no.1 who allegedly threatened them-claimed protection under judgments like Lata Singh's case and Shafin Jahan's case which emphasized the rights of adults to choose their partners-Held, the court ruled that the petitioners lacked evidence of a long-term relationship akin to marriage(e.g. joint or financial arrangements)-petitioners had not followed the legal procedures for conversion or marriage under the Special Marriage Act-More so, personal law of petitioner no.2 did not support live-in relationship.(Para 1 to 29)

The writ petition is dismissed. (E-6)

List of Cases cited:

1. Lata Singh Vs St. of U.P. & anr.. (2006) 5 SCC 475
2. Shafin Jahan Vs Asokan K.M. & ors. (2018) 16 SCC 368
3. Nandkumar & anr. Vs St. of Ker.(2018) 16 SCC 620
4. Kamini Devi Vs St. of U.P. Writ. C No. 11108 of 2020
5. Razia & anr. Vs St. of U.P. Writ C No. 27338 of 2023
6. Kiran Rawat & anr.. Vs St. of U.P.
7. D.Velusamy Vs D.Patchajammal (2010) 10 SCC 469
8. Indra Sarma Vs V.K.V. Sharma (2013) 15 SCC 755

9. Asha Devi & anr. Vs State of U.P. & ors. Writ C No. 18743 of 2020

10. A Subhash Babu Vs St. of A.P.

11. Shayara Bano Vs U.O.I.

12. Lily Thomas & anr. Vs U.O.I. & ors.

13. Dir. of Settlement, A.P. Vs M.R. Apparao

14. Kalyan Singh Vs St.of U.P. (1962) AIR SC 1183

(Delivered by Hon'ble Mrs. Renu Agarwal, J.)

1. Instant writ petition under Article 226 of the Constitution has been filed by the petitioners with prayer for issuing writ, order or direction in the nature of mandamus directing the respondents not to interfere in the peaceful married life of the petitioners as husband and wife.

2. Heard learned counsel for the petitioners, learned Standing Counsel for State respondents and perused the record.

3. It is submitted that the petitioners are major and they have fallen in love with each other. They wanted to live with each other. Parents of the petitioner No. 1 (respondent No. 4) settled the marriage of petitioner No. 1 with a handicap person against her wishes which was refused by petitioner No.1. The respondent No. 4 started atrocities upon the petitioner No.1 and threatened to kill her therefore she left her house on 20.10.2023 and eloped with petitioner No. 2 with her own sweet will and they are living under the same roof since 20.10.2023. The petitioners No. 1 and 2 belongs to different castes and religion. It is submitted that the petitioners have right to take decision of their life, therefore they started living in relationship.

4. It is further submitted that the respondent No. 4 is interfering in the peaceful living of the petitioners. The petitioner No. 1 made an application before the Senior Superintendent of Police, Gautam Buddh Nagar dated 25.10.2023 stating that she is living in relationship with petitioner No. 2 but respondent No. 4 without any authority of law is trying to interfere in the peaceful living of the petitioners with the help of antisocial elements. The aforesaid application is on record as annexure No. 3, however, no protection has been provided by the police authorities therefore, the present petition is filed.

5. Learned counsel for the petitioners has relied upon the judgment of Supreme Court in the cases of ***Lata Singh Vs. State of Uttar Pradesh and another (2006) 5 SCC 475***; ***Shafin Jahan Vs. Asokan K.M. and Ors.*** reported in ***(2018) 16 SCC 368*** to contend that when the petitioners are major they are at liberty to choose partners of their choice irrespective of caste or faith and their choice cannot be interfered with even by their parents. No one including the parents of petitioners have any right to create disturbance in peaceful living of the petitioners.

6. Learned counsel for the petitioners has also relied upon the judgment of Supreme Court in the case of ***Nandkumar and another Vs. State of Kerala*** reported at ***(2018) 16 SCC 620*** to contend that the 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.

7. Learned counsel for the petitioners has also relied upon the

judgment of Division Bench of this Court in the case of ***Kamini Devi Vs. State of U.P Writ C No. 11108 of 2020 and Writ C No.27338 of 2023 Razia and another Vs. State of U.P.*** to contend that the live in relationship is no offence and if the petitioners are major, they are entitled for living in relationship.

8. Learned Standing Counsel on the other hand submitted that petitioners are interfaith couples and have not complied with the provisions of Sections 8 and 9 of the U.P. Prevention of Unlawful Conversion of Religion Act. No application for conversion has been moved, though the Act came into force on 04.03.2021. It is also submitted that the case laws relied upon by the learned counsel for the petitioners i.e., ***Lata Singh (supra)***, ***Shafin Jahan (supra)*** will not come to the aid of the petitioners since these pronouncements by the Hon'ble Apex Court are prior in time to the promulgation of the U.P. Prohibition of Unlawful Conversion of Religion Act, 2021.

9. Learned Standing Counsel has relied upon the judgment of Apex Court in the case of ***Kiran Rawat and Another Vs. State of U.P.*** to contend that a muslim cannot live in relationship even as per their personal laws and judgment of the Division Bench of this Court passed in the case of ***Asha Devi and Another Vs. State of U.P. and 3 Others***, and opposed the petition.

10. I have heard Shri Umair Alam, learned counsel assisted by Shri Sanjay Srivastava, learned counsel for the petitioners, Shri Ashwini Kumar Tripathi, learned Additional Chief Standing Counsel for the State and perused the record.

11. It is submitted that the petitioners are major and are living in

relationship. The petitioners have brought on record the high school marks sheet of petitioner No. 1 wherein her date of birth is recorded as 17.08.2001. The petitioner No. 2 has brought on record his Driving License wherein his date of birth is mentioned as 01.01.2001. The petitioners also belongs to different religion. Both the petitioners fell in love with each other and are living in relationship. Respondent No.4 is interfering in the living in relationship of the petitioners. Petitioner No. 1 has moved an application to the Senior Superintendent of Police, Gautam Buddh Nagar for protection of herself as well as petitioner No. 2 from the respondent No. 4 but no action has been taken by the police authorities in the matter hence, the present writ petition has been filed.

12. Learned counsel for the petitioners has relied upon the law laid down by Supreme Court in the case of ***Lata Singh Vs. State of Uttar Pradesh and another (2006) 5 SCC 475*** to contend that once a person has attained majority, he/she can live with whomsoever it like and their choice cannot be interfered with by anyone. It would be apposite to reproduce the relevant part of the judgment of Supreme Court in the case of ***Lata Singh (supra)*** for convenience and ready reference:

"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 are not harassed by any one nor subjected to threats or acts of violence, and any one 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. 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."

13. To contend the freedom of an individual who has attained majority to live with anyone whom he/she like reliance is also placed by learned counsel for the

petitioners on the judgment of Supreme Court in the case of ***Shafin Jahan Vs. Asokan K.M. and Ors.*** reported in **(2018) 16 SCC 368**, wherein the Supreme Court emphasized due importance to the right of choice of an adult person, which the Constitution accords to an adult person. The relevant part of the judgment of the Supreme Court in the case of *Shafin Jahan* (Supra) is reproduced below:-

"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/he 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"

14. Learned counsel for the petitioner has also placed reliance on the judgment of Supreme Court in the case of

Nandkumar and another Vs. State of Kerala reported at (2018) 16 SCC 620 to contend that the 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.

15. Reliance is also placed by the learned counsel for the petitioner on the decision of Division Bench of this Court in the case of **Kamini Devi Vs. State of U.P Writ C No. 11108 of 2020 and Writ C No.27338 of 2023 Razia and another Vs. State of U.P.** decided on 05.09.2023 to contend that the live in relationship is no offence and the petitioners if they are major are entitled for their living in relationship.

16. Learned Standing Counsel on the has relied upon the decision of Supreme Court in the case of **Kiran Rawat(Supra)**, to contend that a muslim cannot live in relationship as per their personal law there is no place for living in relationship, the relevant part of judgment of Supreme Court in the case of **Kiran Rawat (supra)** is reproduced below:

"21. However, in Muslim law no recognition can be given to sex outside marriage. "Zina" which has been defined as any sexual intercourse except that between husband and wife includes both extramarital sex and premarital sex and is often translated as fornication in English. Such premarital sex is not permissible in Islam. In fact any sexual, lustful, affectionate acts such as kissing, touching, staring etc. are "Haram" in Islam before marriage because these are considered parts of "Zina" which may lead to actual "Zina" itself. The punishment for such offence according to Quran (chapter 24) is hundred lashes for the unmarried male and

female who commit fornication together with the punishment prescribed by the "Sunnah" for the married male and female that is stoning to death." It is observed that in Muslim Law living-in-relationship is not permitted."

17. The judgments of Supreme Court relied upon by the learned counsel for the petitioners in the case of **Lata Singh (supra) and Shafin Jahan (supra)** though guarantee the fundamental right of choice of an adult person while marrying with inter-faith persons, however, will not come to the aid of the petitioners as after the promulgation of the U.P. Prohibition of Unlawful Conversion of Religion Act one cannot freely move with another except in accordance with the procedure prescribed in Section 8 and 9 of the aforesaid Act, or by marriage under the Special Marriage Act. Here in this case, it is an admitted case of the petitioners that they are living in relationship and there is nothing on record they they have moved any application for marriage under the Special Marriage Act. Learned counsel for the petitioners may contend that the petitioners herein are only living in relationship and as such compliance of Sections 8 and 9 of the U.P. Prohibition of Unlawful Conversion of Religion Act is not necessary for the petitioners.

18. In refutation to the aforesaid contention, reference may be made to the explanation attached to Section 3 of the U.P. Prohibition of Unlawful Conversion of Religion Act which runs as under:

"3(1) No person shall convert or 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 by any fraudulent means. No person shall abet, convince or conspire such conversion.

Explanation:- For the purposes of this sub-section conversion by solemnization of marriage or relationship in the nature of marriage on account of factors enumerated in this sub-section shall be deemed included"

19. In the case of **D.Velusamy Vs. D. Patchajammal** reported in (2010) 10 SCC 469, Supreme Court while considering the definitions given under Section 2 of the Domestic Violence Act dealt with the definition of "domestic relationship", as a relationship in the nature of marriage. It laid down the following requisite criteria in the relationship in the nature of marriage:-

"(2) The following factors are indicators of whether or not a de facto relationship exists between 2 persons, but are not essential-

(a) the length of the relationship between them.

(b) whether the 2 persons have resided together

(c) the nature and extent of common residence

(d) whether there is, or has been, a sexual relationship between them

(e) the degree of financial dependence or interdependence, and any arrangements for financial support, between them

(f) the ownership, use and acquisition of their property (including property the own individually);

(g) the degree of mutual commitment by them to a shared life;

(h) whether they care for and support children

(I) the reputation, and public aspect, of the relationship between them."

20. While dealing with **Kamini Devi (supra)** Division Bench of this Court quoted **Indra Sharma Vs. V.K.V Sharma** reported in (2013) 15 SCC 755 as follows.

46. The Domestic and Family Violence Protection Act, 2012 (Queensland) has defined the expression "couple relationship" to mean as follows":

"18. Meaning of couple relationship.-

*1) * * **

2) In deciding whether a couple relationship exists, a court may have regard to the following –

2) the circumstances of the relationship between the persons, including, for example-

(i) the degree of trust between the persons; and

(ii) the level of each person's dependence on, and commitment to, the other person;

b) the length of time for which the relationship has existed or did exist;

c) the frequency of contact between the persons;

d) the degree of intimacy between the persons.

3) Without limiting sub-section (2), the court may consider the following factors in deciding whether a couple relationship exists-

a) Whether the trust, dependence or commitment is or was of the same level;

b) Whether one of the persons is or was financially dependent on the other;

c) Whether the persons jointly own or owned any property;

d) Whether the persons have or had joint bank accounts;

e) Whether the relationship involves or involved a relationship of a sexual nature;

f) Whether the relationship is or was exclusive.

4) A couple relationship may exist even if the court makes a negative finding in relation to any or all of the factors mentioned in subsection (3).

5) A couple relationship may exist between two persons whether the persons are of the same or a different gender.

6) A couple relationship does not exist merely because two persons date or dated each other on a number of occasions."

47. The Property (Relationships) Act, 1984 of North South Wales, Australia also provides for some guidelines with regard to the meaning and content of the expression "de facto relationship", which reads as follows:

"4 De facto relationships.- (1) For the purposes of this Act, a de facto relationship is a relationship between two adult persons:

(a) who live together as a couple, and

(b) who are not married to one another or related by family.

(2) In determining whether two persons are in a de facto relationship, all the circumstances of the relationship are to be taken into account, including such of the following matters as may be relevant in a particular case:-

(a) the duration of the relationship,

(b) the nature and extent of common residence,

(c) whether or not a sexual relationship exists,

(d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties,

(e) the ownership, use and acquisition of property,

(f) the degree of mutual commitment to a shared life,

(g) the care and support of children,

(h) the performance of household duties,

(i) the reputation and public aspects of the relationship.

(3) No finding in respect of any of the matters mentioned in subsection (2) (a)-(i), or in respect of any combination of them, is to be regarded as necessary for the existence of a de facto relationship, and a court determining whether such a relationship exists is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the court in the circumstances of the case.

(4) Except as provided by section 6, a reference in this Act to a party to a de facto relationship includes a reference to a person who, whether before or after the commencement of this subsection, was a party to such a relationship."

48. "In Marriage of Lindsay, In re, and Latham v. Hennessey 87 Wn.2d 550 (1976), Pennington v. Pennington, the Courts in United States took the view that the relevant factors establishing a meretricious relationship include continuous cohabitation, duration of the relationship, purpose of the relationship, and the pooling of resources and services for joint projects. The Courts also ruled that a relationship need not be "long term" to be characterized as meretricious relationship. While a long term relationship is not a threshold requirement, duration is a significant factor. Further, the Court also noticed that a short term relationship may be characterized as a meretricious, but a number of other important factors must be present.

49. In *Stack v. Dowden* [2007] 2 AC 432, Baroness Hale of Richmond said:

"Cohabitation comes in many different shapes and sizes. People embarking on their first serious relationship more commonly cohabit than marry. Many of these relationships may be quite short-lived and childless. But most people these days cohabit before marriage..... So many couples are cohabiting with a view to marriage at some later date - as long ago as 1998 the British Household Panel Survey found that 75% of current cohabitants expected to marry, although only a third had firm plans: John Ermisch, *Personal Relationships and Marriage Expectations* (2000) Working Papers of the Institute of Social and Economic Research: Paper 2000-27. Cohabitation is much more likely to end in separation than is marriage, and cohabitations which end in separation tend to last for a shorter time than marriages which end in divorce. But increasing numbers of couples cohabit for long periods without marrying and their reasons for doing so vary from conscious rejection of marriage as a legal institution to regarding themselves 'as good as married' anyway: Law Commission, Consultation Paper No 179, Part 2, para 2.45."

50. In *MW v. The Department of Community Services* [2008] HCA 12, Gleeson, CJ, made the following observations:

"Finn J was correct to stress the difference between living together and living together 'as a couple in a relationship in the nature of marriage or civil union'. The relationship between two people who live together, even though it is a sexual relationship, may, or may not, be a relationship in the nature of marriage or civil union. One consequence of relationships of the former kind becoming

commonplace is that it may now be more difficult, rather than easier, to infer that they have the nature of marriage or civil union, at least where the care and upbringing of children are not involved."

51. In *Lynam v. The Director-General of Social Security* (1983) 52 ALR 128, the Court considered whether a man and a woman living together 'as husband and wife on a bona fide domestic basis' and Fitzgerald, J. said:

"Each element of a relationship draws its colour and its significance from the other elements, some of which may point in one direction and some in the other. What must be looked at is the composite picture. Any attempt to isolate individual factors and to attribute to them relative degrees of materiality or importance involves a denial of common experience and will almost inevitably be productive of error. The endless scope for differences in human attitudes and activities means that there will be an almost infinite variety of combinations of circumstances which may fall for consideration. In any particular case, it will be a question of fact and degree, a jury question, whether a relationship between two unrelated persons of the opposite sex meets the statutory test."

21. In view of the aforesaid case law the petitioners did not disclose that they are in any domestic relationship or voluntarily living held themselves out to the world as being akin to spouses for a significant period of time. There is nothing on record primarily to show that they are living as husband and wife except their affidavit. No proof of joint account, financial security, joint property or joint expenditure is produced before this Court. Petitioners have not applied for conversion so far.

22. A Division Bench of this Court in the case of **Asha Devi and Another vs. State of U.P. and Others** passed in **Writ (C) No.18743 of 2020**, the Hon'ble Division Bench of this Court formulated two questions as under:-

"(i) Whether the petitioners, who claim themselves to be living together as husband and wife; can be granted protection when the petitioner No.1 is legally wedded wife of someone else and has not taken divorce so far ?

(ii) Whether protection to petitioners as husband and wife or as live-in-relationship can be granted in exercise of powers conferred under Article 226 of the Constitution of India, when their living together may constitute offences under Sections 494/495 I.P.C. ?"

23. In the judgment of **Asha Devi (Supra)**, Hon'ble Division Bench of this Court has discussed the judgment of Hon'ble Apex Court in the case of **"D. Velusamy Vs. D. Patchaiammal"**, in which the Hon'ble Apex court held that:-

"32. In our opinion not all live in relationships will amount to a relationship in the nature of marriage to get the benefit of the Act of 2005. To get such benefit the conditions mentioned by us above must be satisfied, and this has to be proved by evidence.

If a man has a 'keep' whom he maintains financially and uses mainly for sexual purpose and/or as a servant it would not, in our opinion, be a relationship in the nature of marriage'."

(Emphasis supplied)

24. In the judgment of **Asha Devi (Supra)**, the Division Bench of this Court on the basis of various judgments of High

Court held that following relationship are not recognized or approved as live-in-relationship:-

*"(a) **Concubine** can not maintain relationship in the nature of marriage vide paras 57 & 59 of the judgment of Hon'ble Supreme Court in **Indra Sarma Vs. V. K. V. Sarma**.*

*(b) **Polygamy**, that is a relationship or practice of having more than one wife or husband at the same time, or a relationship by way of a bigamous marriage that is marrying someone while already married to another and/or maintaining an adulterous relationship that is having voluntary sexual intercourse between a married person who is not one's husband or wife, cannot be said to be a relationship in the nature of marriage vide para 58 of judgment in **Indra Sarma's Case (supra) & A Subhash Babu Vs. state of A.P.**4 (paras 17 to 21, 27, 28 & 29). Polygamy is also a criminal offence under Section 494 & 495 I.P.C., vide **Shayara Bano Vs. Union of India** 5 (paras 299.3).*

*(c) Till a decree of divorce is passed the marriage subsist. Any other marriage during the subsistence of the first marriage would constitute an offence under Section 494 I.P.C. read with Section 17 of the Hindu Marriage Act, 1955 and the person, inspite of his conversion to some other religion would be liable to be prosecuted for the offence of bigamy, vide **Lily Thomas and another Vs. Union of India and others**6 (Para 35). In para 38 of the aforesaid judgment, Hon'ble Supreme Court observed as under:-*

"38. Religion is a matter of faith stemming from the depth of the heart and mind. Religion is a belief which binds the spiritual nature of man to a super-natural being; it is an object of conscientious devotion, faith and pietism. Devotion in its

fullest sense is a consecration and denotes an act of worship. Faith in the strict sense constitutes firm reliance on the truth of religious doctrines in every system of religion. Religion, faith or devotion are not easily interchangeable. If the person feigns to have adopted another religion just for some worldly gain or benefit, it would be religious bigotry. Looked at from this angle, a person who mockingly adopts another religion where plurality of marriage is permitted so as to renounce the previous marriage and desert the wife, he cannot be permitted to take advantage of his exploitation as religion is not a commodity to be exploited. The institution of marriage under every personal law is a sacred institution. Under Hindu Law, Marriage is a sacrament. Both have to be preserved."

(Emphasis supplied)

*(d) If both the persons are otherwise not qualified to enter into a legal marriage including being unmarried, vide **D Velusamy Vs. D Patchaiammal (supra)** (para 31)."*

25. In the judgment of **Asha Devi (Supra)**, Hon'ble Division Bench of this Court has also discussed the judgment of Hon'ble Apex Court in the case of **"Director of Settlement, A.P. Vs. M.R. Apparao**, in which the Hon'ble Apex court has considered the High Court's power for issuance of mandamus and held as under:-

"17. One of the conditions for exercising power under Article 226 for issuance of a mandamus is that the Court must come to the conclusion that the aggrieved person has a legal right, which entitles him to any of the rights and that such right has been infringed. In other words, existence of a legal right of a citizen and performance of any corresponding

legal duty by the State or any public authority, could be enforced by issuance of a writ of mandamus. "Mandamus" means a command. It differs from the writs of prohibition or certiorari in its demand for some activity on the part of the body or person to whom it is addressed. Mandamus is a command issued to direct any person, corporation, inferior Courts or Government, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. A mandamus is available against any public authority including administrative and local bodies, and it would lie to any person who is under a duty imposed by statute or by the common law to do a particular act. In order to obtain a writ or order in the nature of mandamus, the applicant has to satisfy that he has a legal right to the performance of a legal duty by the party against whom the mandamus is sought and such right must be subsisting on the date of the petition."

26. The Hon'ble Apex Court in the case of **"Kalyan Singh Vs. State of U.P., AIR 1962 SC 1183** held as under:-

"Applying the principles of issuance of writ of mandamus on the facts of the present case, we find that the petitioners have no legal right for protection on the facts of the present case inasmuch as such the protection as being asked, may amount to protection against commission of offence under Section 494/495 I.P.C. It is well settled law that writ of mandamus can not be issued contrary to law or to defeat a statutory provision including penal provision. The petitioners do not have legally protected and judicially enforceable subsisting right to ask for mandamus."

27. Thus in view of the above discussions, it is clear that there is nothing on record to show that the petitioners fulfil the criteria for a domestic relationship as they are not living for a long period and as spouse, no proof of joint account, financial security, joint property or joint expenditure is produced before this Court, further no compliance of Section 8 and 9 of the U.P. Unlawful Conversion of Religion Act has been made by the petitioners, petitioners have not applied for conversion so far there is nothing on record to show that any application for marriage under the special marriage act has been moved by the petitioners.

28. The relationship of the petitioners cannot be called as a relationship akin to marriage, entitling them for protection and the fact that personal law of the petitioner No.2 also does not warrant the petitioner No. 2 to live in relationship. Right to freedom or right to personal liberty is not as absolute or unfettered right, it is qualified by some restrictions also. Petitioners cannot be provided protection of law in contravention of law of land.

29. In view of the above discussions the writ petition lacks merits and is accordingly dismissed.

(2024) 4 ILRA 1563

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 14.03.2024

BEFORE

THE HON'BLE ANJANI KUMAR MISHRA, J.

THE HON'BLE JAYANT BANERJI, J.

Writ-C No. 40994 of 2023

Rajendra Kumar Mishra ...Petitioner
Versus

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

Counsel for the Petitioner:

Mamta Pandey, Sri R.S. Pandey, Rajshree Malviya

Counsel for the Respondents:

Sri Archit Mandhyan, C.S.C., Sri Prateek Kumar, Sri Shailesh Kumar Shukla, Udai Chandani

A. Civil Law - Constitution of India,1950-Article 226-U.P. Krishi Utpadan Mandi Act,1964-Sections 9(2),24 & 33-The dispute involved a partnership firm where the petitioner and respondent no.4 were partners-a license for the firm had been granted in 1991 and renewed periodically-In the year 2019, respondent no. 4 sought renewal as the firm's proprietor without the petitioner's knowledge-The Secretary of the Krishi Utapadan Mandi Samiti lacks jurisdiction to decide disputes regarding the nature of firm(Partnership or proprietorship) or to unilaterally issue licenses without a resolution or delegation by the Mandi Committee u/s 9(2) and 24 of the Act-The delegation of revisional powers by the Board of the Director, as per section 33 of the Act,1964, is valid-The Director was competent to entertain and decide the revision filed by respondent no.4-An ex-parte decision by the revisional authority does not necessarily invalidate the proceedings if no prejudice is demonstrated-In the present case, the petitioner failed to establish that the lack of a hearing caused substantive prejudice-Disputes regarding the ownership or nature of a partnership firm must be resolved by a competent civil court, as the Mandi Parishad or its Secretary lacks authority under the Act and Rules- orders passed without jurisdiction, such as one issued by the Secretary on June 15,2022, cannot be revived even if subsequent orders are challenged- Hence, the writ petition is dismissed affirming the Director's revisional order.(Para 1 to 17)

The writ petition is dismissed. (E-6)

(Delivered by Hon'ble Anjani Kumar
Mishra, J.
&
Hon'ble Jayant Banerji, J.)

1. Short counter affidavit filed today in the Court is taken on record.

2. Heard learned counsel for the petitioner and learned counsel appearing for the Mandi Parishad at length.

3. Under challenge in the present petition are the orders dated 22.7.2022 passed by the respondent No. 2, Director, State Krishi Utpadan Mandi Parishad, U.P. Kishan "Mandi Bhawan" Bibhuti Khand, Gomati Nagar, Lucknow, passed in revision No.10 of 2022 (Kripa Shankar Pandey Vs. Secretary, Utpadan Mandi Samiti, Prayagraj), and the order dated 21.3.2023 passed by the respondent No. 2 on a recall application filed by the petitioner for recalling the aforesaid order dated 22.7.2022.

4. The contention of learned counsel for the petitioner is that the petitioner is a partner of a firm by the name of M/s Vikas Trading Company, with the other partner being the respondent No. 4, Kripa Shankar Pandey. It is stated that license for running the business was granted by Krishi Utpadan Mandi Samiti, Mundera, Prayagraj in 1991 in the name of the firm and since then business of the firm was being carried out in the allotted shop, the license being renewed from time to time. It is stated that in the year 2019, the respondent No. 4 illegally applied for renewal of the license in the name of the firm but projected himself as the proprietor of the firm without knowledge of the petitioner. It is stated that in view of the dispute so occasioned, the matter came to

be considered by the Secretary, Krishi Utpadan Mandi Samiti, Mundera, Prayagraj, respondent No. 3, who, by an order dated 15.6.2022, held that the firm M/s Vikas Trading Company is a partnership firm in which the petitioner and respondent No. 4 are partners and the respondent No. 4 would permit the petitioner to sit in the shop and carry on his commercial activities from there. It is stated that thereafter, the respondent No. 3 issued a license only in the name of the petitioner with effect from 1.7.2019 to 30.6.2024.

5. The respondent No. 4 then filed the aforesaid revision without making the petitioner a party. By the impugned order dated 22.7.2022, an illegal and ex parte order was passed by the respondent No. 2 without affording any opportunity of hearing to the petitioner.

Learned counsel has emphasized that denial of opportunity of hearing to the petitioner by the revisional authority has caused prejudice to the petitioner and as such the order is wholly illegal and deserves to be set aside. It is stated that even otherwise, against the order of the Secretary, an appeal would lie under Section 25 of the Uttar Pradesh Krishi Utpadan Mandi Act, 1964 and the revision itself was not maintainable.

6. It has been argued by the learned counsel for the petitioner that under the provisions of the Act, 1964, the revisional authority is the Board constituted under Section 26-A of the Act, 1964. No delegation of the revisional powers of the Board has been made and, therefore, the order passed by the respondent No. 2 is without jurisdiction. It is further stated that the Secretary is Chief Executive Officer,

who is competent to issue a license as provided in sub-section (2) of Section 9 of the Act, 1964 and, accordingly, the order dated 15.6.2022 issued by the respondent No. 3 is a valid order and the revisional authority ought not to have interfered in the order.

7. A short counter-affidavit of the respondent No. 3 has been filed by the learned counsel appearing for the Krishi Utpadan Mandi Samiti. In the short counter-affidavit, an order of the Board bearing No. 1/252/84-6830 dated 21.3.1974 has been enclosed. It appears therefrom that the revisional powers of the Board have been delegated to the Director in exercise of powers under Section 33 of the Act, 1964. With regard to the authority of the Secretary alone to pass the order dated 15.6.2022, in paragraph No. 4 of the short counter affidavit it has been submitted that that order was passed by the Secretary without any power being delegated to him.

8. Learned counsel for the petitioner has not been able to dispute the aforesaid order of the Board dated 21.3.1974 delegating certain powers provided under various provisions of the Act, 1964 to the Director. Learned counsel for the petitioner has also not been able to show any material to demonstrate that the Secretary, respondent No. 3 had the authority to pass the order dated 15.6.2022.

9. As a matter of fact, under sub-section (2) of Section 9 of the Act, 1964, it is the committee constituted under the Act, 1964 that is authorized to grant license to a person. Under Section 17 of the Act, 1964 the powers of the Committee include issuance or renewal of license and conditions and restrictions thereof,

suspension or cancellation of license issued or renewed under the Act and to levy and collect specified fees. The functions, powers, and duties of the Secretary are specified in Section 24, which reads as follows:

"24. Functions, Powers and duties of the Secretary.-(1) *The Secretary of a Committee shall be its chief executive officer, and shall, subject to the provisions of this Act, perform such functions, exercise such powers and discharge such duties, as may be prescribed, or provided for in the bye-laws or as the Board or the Director, may, by order in writing direct ;*

Provided that when more than one secretaries are posted in a Committee, the Director shall nominate one of the Secretaries to be its Chief executive officer and shall determine the functions to be performed, powers to be exercised and duties to be discharged by each of them.

(2) *Without prejudice to the generality of the foregoing provisions, but subject to the provisions of this Act and the rules and bye-laws made thereunder the Secretary shall —*

(a) *exercise all powers of superintendence and control over —*

(i) *all officers and servants of the Committee so as to ensure proper and efficient discharge of the duties assigned to them by or under this Act ; and*

(ii) *the affairs of the Committee ;*

(b) *report cases of neglect, misconduct or dereliction of duty by an employee of the Committee to the appointing authority for necessary action, and where so empowered, take disciplinary action against any of the employees of the Committee.*

(c) *ensure proper execution of all orders issued by the Board, the Chairman or the Committee ;*

(d) ensure proper maintenance of

(i) accounts of all moneys received and of all moneys expended for and on behalf of the Committee ;

(ii) records of disputes coming up for decision under this Act or the rules or bye-laws framed thereunder ; and

(iii) a record of the disputes settled by him in such form as may be prescribed.

(3) All licenses under this Act shall be issued under his signatures. "

10. The functions, powers, and duties of the secretary are prescribed in Rule 63 of the U.P. Krishi Utpadan Mandi Rules, 1965, which reads as follows:

"63. Functions, Powers and Duties of the Secretary [Section 24].—(1) The Secretary shall be the Chief Executive Officer of the Market Committee and shall carry into effect the resolutions of the Market Committee.

(2) All other Officers and Servants of the Committee shall be subject to his control. He shall also be responsible for directing their work in such manner as to ensure proper and efficient working of the Market Committee.

(3) It shall be the duty of the Secretary to supervise the work of the Officers and Servants of the Committee and to take necessary disciplinary action against any of the Officers and Servants of the Committee for their neglect, misconduct, dereliction of duty etc., subject to the approval of the Chairman or the Committee.

(4) The Secretary shall be responsible for the proper execution of all orders issued by the Chairman of the Committee. He shall take or cause action to be taken against any of the Officers and Servants of the Committee in accordance

with the directions given by the Chairman of the Committee.

(5) Subject to the control of the Chairman, or in his absence of the Vice-Chairman of the Market Committee, the Secretary shall be responsible for maintaining proper accounts of money received and/or expended for or on behalf of the Committee.

(6) The Secretary shall conduct all routine correspondence and attend to other office work and all correspondence with the Director or Officers subordinate to the Director shall be conducted through, the Chairman or with the previous approval of the Chairman.

(7) The Secretary shall be responsible for maintaining complete records of all the disputes which come up for decision before the Disputes Sub-Committee in such manner as may be specified in the bye-laws of the Committee.

(8) The Secretary shall maintain a record of the disputes settled by him in the form and manner as may be specified in the bye-laws of the Committee.

(9) On receipt of a complaint either written or oral regarding any matter concerning sale or purchase of specified agricultural produce, in the Market Area, the Secretary shall conduct an enquiry and shall make a report of the same to the Chairman for taking such action as he may think necessary, in accordance with the provisions of the Act, these rules and the bye-laws.

(10) It shall be the duty of the Secretary to ensure that proper payments to sellers in the Market Yards are made and no irregularities in making weighmen of the specified agricultural produce, in the Market Yards are committed.

(11) The Secretary shall advise the Committee and its Chairman in all matters relating to the regulation of the sale and

purchase of agricultural produce, in the light of the provisions of the Act, these rules and the bye-laws framed thereunder and his opinion shall be recorded in the proceedings of the Committee.

(12) The Secretary shall grant casual leave to the Officers and Servants of the Committee. For other kinds of leave, the Secretary shall recommend the same to the Chairman who shall take action to sanction such leave in accordance with the leave rules applicable to Officers and Servants of the Committee.

(13) The Secretary shall submit to the Chairman by thirtieth April each year his annual confidential remarks in respect of the work and worth of the Officers and Servants appointed by the Committee.

(14) The Secretary shall submit to the Chairman his recommendations in respect of the annual increments of the Officers and Servants appointed by the Committee within thirty days from the date any such increment falls due.

(15) The Secretary shall, on the orders or with the prior approval of the Chairman or on the orders of Director, call meetings of the Market Committee and shall have the right to attend, speak at, and otherwise take part in the Meeting of the Committee:

Provided that the Secretary shall not have the right to vote in the Meetings of the Committee."

11. No resolution or order of the Committee has been shown that authorized the Secretary to pass the order dated 15.6.2022. As a matter of fact, with regard to the licenses, sub-section (3) of Section 24 provides that all licenses under the Act shall be issued under the signature of the Secretary. Disputes with regard to the

licenses cannot be decided by the Secretary without an appropriate and approved resolution being passed by the Committee.

12. A perusal of the impugned revisional order dated 22.7.2022 passed by the respondent No. 2 reflects that it has solely considered the jurisdiction of the respondent No. 3, Secretary, in passing the order dated 15.6.2022 and has held that in the eyes of law, the order passed by the Secretary is not correct. It was observed that with regard to the partnership firm there is a dispute as to its ownership and neither in the Act nor in the Rules is there any provision for the Secretary to pass such an order. It is mentioned in the order that whether the nature of the firm is that of partnership or proprietorship is within the jurisdiction of the competent court, and, accordingly, the order dated 15.6.2022 was set aside.

13. Further on the recall application filed by the petitioner, the impugned order dated 21.3.2023 was passed in which it was observed that in the order dated 22.7.2022, the dispute between the parties with regard to the partnership was observed to be taken to the competent court where all relevant issues could be raised and, therefore, there was no reason to file the recall application. Accordingly, the application was rejected.

14. The contention of learned counsel for the petitioner is that the revisional court could not decide the matter, as a right of appeal lay under Section 25 of the Act, is misplaced. As is evident from the record, that the Director exercising revisional jurisdiction under Section 32 of the Act, 1964, has dealt only with the question of jurisdiction of the respondent No.3, Secretary, to pass the order dated

declined and this petition is, accordingly,
dismissed.

(2024) 4 ILRA 1568
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.04.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Writ -C No. 3000010 of 1996

Om Prakash Singh	...Petitioner
Versus	
State of U.P. & Ors.	...Respondents

Counsel for the Petitioner:
S.P. Singh, Ajay Pratap; Singh, Ashish Kumar
Pandey, M.E. Khan, Rajeiu Kumar Tripathi

Counsel for the Respondents:
C.S.C., Bal Gangadhar Tripathi, R.P. Singh,
Satyendra Pratap

Writ Petition dismissed. (E-9)

1. Hareshwar Dayal Seth versus II Additional District Judge and others: 1982 All C J 207

2. Ram Sagar versus Civil Judge, Bahraich and others: 1984 SCC OnLine All 404

(Delivered by Hon'ble Subhash Vidyarthi J.)

1. Heard Sri Rajeiu Kumar Tripathi Advocate, the learned counsel for the petitioner, Sri Dheeraj Ojha, the learned Standing Counsel for the State and perused the records.

2. By means of the instant writ petition filed under Article 226 of the Constitution of India, the petitioner has challenged the validity of the order dated 16.02.1993, passed by the opposite party no.2/Chief Revenue Officer, District Sultanpur in Case No.74 of 1985, under Section 10 (2) of U.P. Imposition of Ceiling on Land Holdings Act (which will be hereinafter referred to as 'the Ceiling Act'), declaring 30 bigha, 16 biswa and 13 biswanshi land of the petitioner to be surplus. The petitioner has also challenged validity of the order dated 01.01.1996, passed by the opposite party no.3/Additional Commissioner Judicial, Faizabad Region, Faizabad in Appeal No.79/Sultanpur under Section 13 of the Ceiling Act, whereby the appellate authority has declared the land of Gata Nos.1487, 1488, 1489, 1490, 1492, 1494, 1496, 1497, 1498, 2093 as unirrigated and has directed redetermination of the surplus land of the petitioner in accordance with the directions issued by the appellate court.

3. Briefly stated, the facts of the case are that Sri Badri Pratap Singh was the original tenure holder of the lands in dispute. On 22.04.1974, a notice under Section 10 (2) of Ceiling Act was issued to him proposing 32 bighas, 8 biswas and 14 dhur land situate in Village Tirhut to be declared as surplus. Sri Badri Pratap Singh has submitted his objections before the Prescribed Authority on 21.05.1974,

wherein he inter alia stated that he had sold away some lands.

4. On 01.11.1974, the Prescribed Authority had passed an order declaring 32 bigha, 8 biswa and 2 dhur land of Sri Badri Pratap Singh to be surplus.

5. Sri Badri Pratap Singh had filed a Ceiling Appeal No.54 of 1974 against the aforesaid order dated 01.11.1974, passed by the Prescribed Authority, which appeal was dismissed by means of an order dated 08.01.1977, passed by the Second Additional District Judge, Sultanpur.

6. Sri Badri Pratap Singh had challenged both the aforesaid orders by filing Writ Petition No.354 of 1977, which was allowed by means of a judgment and order dated 27.11.1978, passed by this court and the orders passed by the Prescribed Authority and the Appellate Authority were quashed. The learned Prescribed Authority was directed to re-determine as to whether the land of the petitioner was irrigated land in accordance with the principles contained in Section 4-A of Ceiling Act and to redetermine the ceiling area and the surplus land of the petitioner in accordance with law. It is recorded in the order dated 27.11.1978 that no other plea was urged before this court and while remanding the matter, this court made it clear that the petitioner shall not be entitled to re-agitate any other plea before the Prescribed Authority.

7. After remand of the matter by means of order dated 27.11.1978, the Prescribed Authority decided the matter by means of an order dated 14.04.1982 holding that all the gata numbers mentioned in Ceiling Form-3 are irrigated as per the provisions contained in Section

4-A of Ceiling Act and he declared 32 bigha, 8 biswa and 2 dhur land of Sri Badri Pratap Singh to be surplus.

8. It is further mentioned in the order dated 14.04.1982 that the tenure holder Sri Badri Pratap Singh had given an option that his entire land be taken from Khata Nos.293 and 885 in Village Gajanpur Dhuria and the entire land of Khata No.156 in Village Tirhut and in case same falls short, lands be taken from Khata No.40/1. The Prescribed Authority recorded that the land Forming part of Khata No.156 was not recorded in the name of Sri Badri Pratap Singh, rather it was recorded in the name of Sukhpal Vidyalay, Tirhut. Therefore, the land offered as option could not be taken for being declared surplus land.

9. The tenure holder Sri Badri Pratap Singh again filed Ceiling Appeal No.10/82, which was decided by the Second Additional District Judge, Sultanpur by means of a judgment and order dated 25.11.1982 holding that the irrigated land was not ascertained after perusal of the entries made in the relevant khasras as was directed by this court. The appellate authority again remanded the matter to the Prescribed Authority for being decided as per directions of this court.

10. After remand of the matter to the Prescribed Authority, the Principal Sukhpal Inter College Tirhut, Sultanpur filed his objections on 18.07.1984 inter alia stating that Sri Badri Pratap Singh died in the year 1981. He had established Sukhpal Vidyalay in his father's name. He had created a waqf of his land in favour of the school in July, 1951 while the school was a Junior High School. In December, 1971 Sri Badri Pratap Singh had created waqf of 15 bigha, 12 biswa, 10 dhur land in favour of

the school. Thereafter, the school needed some more land for obtaining recognition for High School – Agriculture and Sri Badri Pratap Singh had given 18 bigha, 19 biswa, 8 dhur land to the school for this purpose, but he could not execute a gift deed as ceiling proceedings were going on. The school was granted recognition for High School – Agriculture, but recognition for Intermediate – Agriculture was not given to the school. The school had given an application to the Chief Minister requesting that while determining the school land in proceedings under the Ceiling Act, the land in possession of the school be not take into consideration as the land of tenure holder Sri Badri Pratap Singh as although mutation could not be carried out in favour of the school, the school was in possession of the land. It was stated in the objection that subsequently school was granted recognition for Intermediate Agriculture, but the date of recognition has not been disclosed in the objection.

11. After remand, the Prescribed Authority passed an order dated 16.02.1993 whereby a total of 130 bigha, 16 biswa, 13 biswansi irrigated land was declared surplus. The Prescribed Authority found that the Khasra for the year 1978 mentions 2 crops on lands bearing Gata nos. 1474 to 1490 and the lands were irrigated from the tube-well installed in gata no. 1801. Two crops were recorded in respect of lands bearing Gata nos. 1492, 1494, 1495, 1496 and 1497. Khasra of 1378 Fasli mentions 2 crops on Gata nos. 2093 and 1495 and there is a sign of a tube-well on gata no. 1001. Therefore, all the gatas will be treated to be irrigated / unirrigated as per the preliminary report.

12. Sri Badri Pratap Singh died and the petitioner Sri. Om Prakash Singh

filed Appeal No.79, under Section 13 Ceiling Act against the order dated 16.02.1993 passed by the Prescribed Authority, claiming himself to be the successor of Late Badri Pratap Singh on the basis of his last. Two points for determination were framed in the appeal – (1) whether the land in respect whereof a waqf had been created in favour of Sukhpal Vidyalay, should be treated to be the land of the tenure holder or not and (2) Determination of irrigated and unirrigated land mentioned as such in the notice given under Section 10(2) of the Ceiling Act. The appeal was decided by means of an order dated 01.01.1996 which is under challenge in this writ petition.

13. While deciding the first question, the appellate Court observed that Sri Om Prakash Singh had filed additional objection on 24.01.1992 before the Prescribed Authority stating that certain land had been entrusted to Sukhpal Vidyalay on 31.12.1971 and those should not be taken into consideration while declaring surplus land of the original tenure holder. The appellate court found that the registered waqfnama dated 31.12.1971 had been executed after the reference date 24.01.1971. Moreover, the Management of Sukhpal Inter College had not filed any application for treating the land of the tenure holder to be belonging to the intermediate college. From this the appellate court inferred that the Management of the school and the objector were acting in collusion with each other. This plea had not been raised by any person since 31.12.1971, the date of execution of the registered deed. A notice under Section 10 (2) of Ceiling Act was given to the tenure holder in the year 1974. The matter had been decided by the Prescribed Authority on two previous occasions. This point was not raised even before this court in Writ Petition No.354 of

1977. In the order dated 27.11.1978, passed in the aforesaid writ petition this court had clarified that besides point of the land being irrigated or not, no other point will be raised before the Prescribed Authority. Therefore, it was not open to the appellant to raise this plea.

14. While deciding the second point for determination, the appellate authority observed that as per the order dated 27.11.1978 passed by this Court, the irrigated and unirrigated lands were to be determined as per the provisions contained in Section 4-A of the Ceiling Act. There were discrepancies in the copies of Khasra filed by the tenure-holder and the State Government and, therefore, those appeared to be suspicious. Either the copies of Khasra had not been prepared properly or entries had been modified in the original Khasra. A spot inspection report was submitted by the Naib Tehsildar, which stands affirmed by the Consolidation Form 41, 45 and base year khatauni against which none of the parties have filed any objection. The appellate Court found that the copy of last Khasra was filed by the State Government as paper no. 150 and it appears to be just to take a decision as per this document. It shows lands bearing Gata nos. 1487, 1488, 1789, 1490, 1492, 1493, 1494, 1495, 1496, 1497, 1498 and 2093 to be unirrigated. The appellate Court declared the land bearing Gata Nos.1487, 1488, 1489, 1490, 1492, 1494, 1496, 1497, 1498, 2093 as unirrigated and surplus land and affirmed the inspection report submitted by the Naib Tehsildar on 08.11.1983 which was sent to the Pargana Adhikari on 22.11.1993.

15. While assailing the validity of the aforesaid orders, the learned counsel for the petitioner has submitted that the

original tenure holder Sri Badri Pratap Singh had transferred the land in question irrecoverably in favour of Sukhpal Inter College on 31.12.1971 and, therefore, the aforesaid land ought not to have been taken into consideration while the ascertaining surplus land of Badri Pratap Singh. The learned Counsel for the petitioner has placed reliance on a written declaration dated 13.07.1970 (Annexure No. RA 2 to the rejoinder affidavit) made by Sri. Badri Pratap Singh on a stamp paper worth Rs.2.50 only, stating that he had established Sukhpal Vidyalay on 28.06.1951 and had created a Waqf of some of his properties for this purpose. He had further gifted some of his properties in favour of the school on 28.06.1970 as per the religious practices and that he will execute a legal document in respect of the entire gifted property or a part of it and till a mutation of names is carried out, he will continue to pay the land revenue.

16. The statutory provision in this regard is contained in Section 5 of the Ceiling Act, the relevant part whereof is being reproduced below: -

“5. Imposition of ceiling— (1) On and from the commencement of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act, 1972, no tenure-holder shall be entitled to hold in the aggregate, throughout Uttar Pradesh, any land in excess of the ceiling area applicable to him.

Explanation I — In determining the ceiling area applicable to a tenure holder, all land held by him in his own right, whether in his own name, or ostensibly in the name of any other person, shall be taken into account.

Explanation II — If on or before January 24, 1971, any land was held by a

person who continues to be in its actual cultivatory possessions and the name of any other person is entered in the annual register after the said date either in addition to or to the exclusion of the former and whether on the basis of deed of transfer or license or on the basis of a decree, it shall be presumed, unless the contrary is proved to the satisfaction of the prescribed authority, that the first mentioned person continues to hold the land and that it is so held by him ostensibly in the name of the second mentioned person.

(2) Nothing in sub-section (1) shall apply to land held by the following classes of persons, namely :

(a) the Central Government, the State Government or any local authority or a Government Company or a Corporation ;

(b) a University ;

(c) an intermediate or degree college imparting education in agriculture or a post graduate college ;

(d) a banking company or a co-operative bank or a co-operative land development bank ;

(e) the Bhoodan Yagna Committee constituted under the U. P. Bhoodan Yagna Act, 1952.

*** * ***

(6) In determining the ceiling area applicable to a tenure-holder, any transfer of land made after the twenty-fourth day of January, 1971 which but for the transfer would have been declared surplus land under this Act, shall be ignored and not taken into account ;

(a) a transfer in favour of any person (including Government) referred to in sub-section (2) ;

(b) a transfer proved to the satisfaction of the prescribed authority to be in good faith and for adequate consideration and under an irrevocable

instrument not being a benami transaction or for the immediate or deferred benefit of the tenure-holder or other members of his family. 3

Explanation I — For the purposes of this sub-section, the expression ‘transfer of land made after the twenty-fourth day of January, 1971’, includes —

(a) a declaration of a person as a co-tenure-holder made after the twenty-fourth day of January, 1971, in a suit, or proceeding irrespective of whether such suit or proceeding was pending on or was instituted after the twenty-fourth day of January, 1971 ;

(b) any admission, acknowledgment, relinquishment or declaration in favour of a person to the life effect, made in any other deed or instrument or in any other manner.

Explanation II — The burden of proving that a case falls within clause (b) of the proviso shall rest with the party claiming its benefit.

* * *

17. The Explanations appended to sub-section (6) of Section 5 of the Ceiling Act refer to declarations made after 24.01.1971 whereas Sri. Badri Pratap Singh had made the written declaration of 13.07.1970, which was not after 24.01.1971 so as to be covered by the Explanations appended to sub-section (6) of Section 5. Moreover, the content of the declaration was also vague, as the executed stated that he will execute a legal document in respect of the entire gifted property or a part of it. For the aforesaid reasons, this declaration will not be covered by the Explanations appended to Section 5 (6) of the Ceiling Act.

18. So far as the registered waqfnama dated 31.12.1971 is concerned,

it was executed after the reference date 24.01.1971 and, therefore, it will not fall within the purview of Section 5 (6). Moreover, on the date of the alleged transfer, Sukhpal Vidyalay, in whose favour the land was transferred, was not an intermediate or degree college imparting education in agriculture. As the transfer was not made in favour of any person mentioned in sub-section (2) of Section 5, it would not fall within the proviso (a) appended to sub Section 5 (6). The transfer was not made for any ‘adequate consideration’ and therefore this transfer would not fall within the proviso (b) appended to sub Section 5 (6).

19. In the written submissions, it has been contended that the Appellate Authority has found that the copies of Khasra for the years 1378 and 1380 Fasli years were incorrect, yet it has taken a copy of the khasra (paper no. 150) as true for the purposes of determination of the land being irrigated, which is in violation of the order dated 27.11.1998 passed by this Court as also the provisions of Section 4-A of the Ceiling Act.

20. Relying upon the judgments in the cases of **Hareshwar Dayal Seth versus II Additional District Judge and others:** 1982 All C J 207 and **Ram Sagar versus Civil Judge, Bahraich and others:** 1984 SCC OnLine All 404, Sri. Tripathi has submitted that the onus to prove that the land is irrigated, lies on the State.

21. Section 4-A of the Ceiling Act reads as follows: -

“4-A. The prescribed authority shall examine the relevant khasras for the years 1378 Fasli, 1379 Fasli and 1380 Fasli, the latest village map and such

other records as it may consider necessary, and may also make local inspection where it considers necessary, and thereupon if the prescribed authority is of opinion :—

Firstly, (a) that, irrigation facility was available for any land in respect of any crop in any one of the aforesaid years ; by —

(i) any canal included in Schedule no. 1 of irrigation rates notified in notification no. 1579-W/XXIII—62-W-1946, dated March 31, 1953, as amended from time to time ; or

(ii) any lift irrigation canal ; or

(iii) any State tube-well or a private irrigation work ; and

(b) that at least two crops were grown in such land in any one of the aforesaid years ; or

Secondly, that irrigation facility became available to any land by a State Irrigation Work coming into operation subsequent to the enforcement of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act, 1972, and at least two crops were grown in such land in any agricultural year between the date of such work coming into operation and the date of issue of notice under section 10 ; or

Thirdly, (a) that any land is situated within the effective command area of a lift irrigation canal or a State tube-well or a private irrigation work ; and

(b) that the class and composition of its soil is such that it is capable of growing at least two crops in an agricultural year ;

then the prescribed Authority shall determine such land to be irrigate land for the purposes of this Act.

Explanation I — For the purposes of this section the expression 'effective command area' means an area, the farthest

field whereof in any direction was irrigated —

(a) in any of the year, 1378 Fasli, 1379 Fasli and 1380 Fasli ; or

(b) in any agricultural year referred to in the clause 'secondly'.

Explanation II — The ownership and location of a private irrigation work shall not be relevant for the purpose of this section.

Explanation III — Where sugarcane crop was grown on any land in any of the years 1378 Fasli, 1379 Fasli and 1380 Fasli, it shall be deemed the two crops were grown on it in any of these years, and that the land capable of growing two crops in an agricultural year."

22. The Prescribed Authority has recorded a finding that Khasra for the year 1978 mentions 2 crops on lands bearing Gata nos. 1474 to 1490 and the lands were irrigated from the tube-well installed in gata no. 1801. Two crops were recorded in respect of lands bearing Gata nos. 1492, 1494, 1495, 1496 and 1497. Khasra of 1378 Fasli mentions 2 crops on Gata nos. 2093 and 1495 and there is a sign of a tube-well on gata no. 1001.

23. The appellate authority found that there were discrepancies in the copies of Khasra filed by the tenure-holder and the State Government, which indicates that either the copies of Khasra had not been prepared properly or entries had been modified in the original Khasra. A spot inspection report was submitted by the Naib Tehsildar, which stands affirmed by the Consolidation Form 41, 45 and base year khatauni against which none of the parties have filed any objection. The appellate Court found that the copy of last Khasra was filed by the State Government as paper no. 150 and it appears to be just to

take a decision as per this document. It shows lands bearing Gata nos. 1487, 1488, 1789, 1490, 1492, 1493, 1494, 1495, 1496, 1497, 1498 and 2093 to be unirrigated. Accordingly, the appellate Court declared the land bearing Gata Nos. 1487, 1488, 1489, 1490, 1492, 1494, 1496, 1497, 1498, 2093 as unirrigated and surplus land and affirmed the inspection report submitted by the Naib Tehsildar on 08.11.1983 which was sent to the Pargana Adhikari on 22.11.1993.

24. As per the provision contained in Section 4-A, the Prescribed Authority need not confine itself to examination of the relevant khasras for the years 1378 Fasli, 1379 Fasli and 1380 Fasli only. He has to examine the latest village map and such other records as it may consider necessary, and may also make local inspection where it considers necessary. It is settled law that the powers of the Appellate Authority are co-extensive with the original authority. When the copies of Khasra were found to be suspicious, the Appellate Court has not committed any error in relying upon those entry in the last khasra, which had been corroborated by other relevant material in the shape of spot inspection report was submitted by the Naib Tehsildar, which stands affirmed by the Consolidation Form 41, 45 and base year khatauni against which none of the parties have filed any objection. The petitioner having not filed any objection in this regard before the Appellate Court, is stopped from raising this objection for the first time before this Court.

25. Therefore, the State has discharged its onus and there is no violation of the principles of law laid down in **Hareshwar Dayal Seth versus II Additional District Judge and others:**

1982 All C J 207 and **Ram Sagar versus Civil Judge, Bahraich and others:** 1984 SCC OnLine All 404.

26. The learned Counsel for the petitioner lastly submitted that when the objection of the petitioner regarding land in possession of Sukhpal Vidyalay had been rejected and the land was treated to be land of tenure holder, the petitioner's option to declare that land as surplus ought to have been accepted.

27. The statutory provision in this regard is contained in Section 12-A of the Ceiling Act, which provides as follows: -

12-A. In determining the surplus land under section 11 or section 12, the prescribed authority shall, as far as possible accept the choice indicated by the tenure-holder to the plot or plots which he and other members of his family if any would like to retain as part of the ceiling area applicable to him or them under the provisions of this Act, whether indicated by him in his statement under Section 9 or in any subsequent proceedings ;

Provided that —

** * **

28. The Prescribed Authority has been given the discretion to accept the choice indicated by the tenure-holder as far as possible. Title in respect of the land, which the petitioner opted to be declared surplus, had been transferred to Sukhpal Vidyalay in violation of the provisions of the Ceiling Act. This point had not been raised by the tenure-holder since the alleged transfer made in the year 1971 and it was raised for the first time before the Appellate Court after remand of the matter, the Appellate Court found that the appellant and the management of the Vidyalay were

acting in collusion with each other. The land was not in physical possession of the petitioner and it was not available to be allotted to any other person. In these circumstances, the Appellate Court has not committed any illegality in not declaring the land which the petitioner and the Sukhpal Vidyalay claimed to have been transferred to the Vidyalay and in declaring other land held by the petitioner to be surplus.

29. No other point was pressed before me.

30. In view of the foregoing discussion, I find no illegality in the impugned orders. The Writ Petition is without any force and the same is hereby dismissed.

(2024) 4 ILRA 1576

**ORIGINAL JURISDICTION
CIVIL SIDE**

DATED: LUCKNOW 08.04.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Writ-C No. 3000076 of 2008

Dasoda Singh ...Petitioner

Versus

Ayukt Lucknow Division, Lko. ...Respondent

Counsel for the Petitioner:
V.K. Pandey

Counsel for the Respondent:
C.S.C.

Civil Law - U.P. Imposition Of Ceiling On Land Holdings Act, 1972 – Section 10(2) - 4.50 acre un-irrigated land of the petitioners' father was declared to be surplus –appeal-allowed - order was modified by reducing the surplus land area to 4.10 acres –after

Petitioner's father died - a notice u/s10(2) of the Ceiling Act was issued to the petitioners -filed their objections and the proceedings were closed -holding the same to be hit by the principles of res-judicata -State filed an appeal - allowed and the matter was remanded but even after remand-the Prescribed Authority closed the proceedings -another notice u/s 10(2) of the Ceiling Act-Section 4-A of the Ceiling Act – for a land to be determined as an irrigated land- it is necessary that it should have been irrigated in the years 1378 Fasli, 1979 Fasli and 1380 Fasli- no such material available on record -Section 29(b) of the Ceiling Act -after the date of enforcement of Act, 1972 -any un-irrigated land becomes irrigated as a result of "irrigation from the State irrigation work"- the Ceiling area shall be liable to be re-determined-no occasion for issuance of a fresh notice -not permissible in law.

Writ Petition allowed. (E-9)

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

1. Heard Sri V.K. Pandey, the learned counsel for the petitioner and Sri S.P. Maurya, the learned Standing Counsel.

2. By means of the instant writ petition filed under Article 226 of the Constitution of India, the petitioners have challenged the validity of an order dated 27.02.2007 passed by the Prescribed Authority Ceiling Act/Additional Collector, Kheri in Case No. 37/2004-05 under Section 10(2) Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act, 1972, whereby 5.38 hectares land of the petitioners situated in Village Sumerpur, Pargana and Tehsil Palia, District Lakhimpur Kheri was declared surplus and proceedings for taking possession of that land were initiated. The petitioners have also challenged the validity of an order dated 25.07.2008 passed by the Commissioner, Lucknow Division, Lucknow dismissing Appeal No. 102/2006-

07 under Section 13(2) of the U.P. Imposition Of Ceiling On Land Holdings Act, 1960 (hereinafter referred as “Ceiling Act”) filed against the aforesaid order dated 27.02.2007.

3. Briefly stated, the facts of the case are that 4.50 acre un-irrigated land of the petitioners’ father Gargaj Singh was declared to be surplus by means of an order dated 30.06.1979 passed by the Prescribed Authority in Case No. 73/1959 under Section 10(2) of the Ceiling Act. The petitioners’ father had filed an appeal against the aforesaid order, which was allowed by the learned District Judge by means of an order dated 16.01.1980 and the order was modified by reducing the surplus land area to 4.10 acres.

4. After Gargaj Singh died on 27.02.1990, a notice under Section 10(2) of the Ceiling Act was issued to the petitioners on 05.04.1995. The petitioners filed their objections and the proceedings were closed by means of an order dated 22.02.1996 passed by the Prescribed Authority, holding the same to be hit by the principles of res-judicata.

5. The State filed an appeal against the order dated 22.02.1996, which was allowed and the matter was remanded but even after remand, the Prescribed Authority closed the proceedings by means of an order dated 15.06.2001.

6. On 25.05.2005, another notice under Section 10(2) of the Ceiling Act was issued against the petitioners.

7. The petitioners filed their objections and the Prescribed Authority framed issues, including an issue regarding the effect of previous proceedings under

Section 10(2) of the Ceiling Act having attained finality. The Prescribed Authority held that the first notice issued to the father of the petitioners mentioned merely 7.46 hectares acres land to be irrigated and the rest land was mentioned to be un-irrigated whereas from the statements of the Lekhpal and Assistant Registrar, Kanungo recorded in the proceedings instituted on the basis of third notice, it appeared that the entire land was irrigated. While deciding the proceedings initiated on the basis of the second notice, the Prescribed Authority had summarily held that the land was un-irrigated and this finding was erroneous.

8. Assailing the aforesaid finding of the Prescribed Authority, the learned counsel for the petitioners has submitted that the statement of Lekhpal and Assistance Registrar, Kanungo merely mention that the land is irrigated in present time but it does not make a mention as to when was the land irrigated for the first time.

9. Section 4-A of **U.P. Imposition Of Ceiling On Land Holdings Act, 1960**, contains provisions regarding determination of irrigated land and it provides that *“the Prescribed Authority shall examine the relevant Khasras for the years 1378 Fasli, 1979 Fasli and 1380 Fasli, the latest village map and such other records as it may consider necessary, and may also make local inspection where it considers necessary and thereupon if the prescribed authority is of opinion that irrigation facility was available for any land in respect of any crop in any one of the aforesaid years while by any canal, any lift irrigation cannal or in any State tube-well or a private irrigation work.”*

10. A bare perusal of Section 4-A of the Ceiling Act indicates that for a land

to be determined as an irrigated land, it is necessary that it should have been irrigated in the years 1378 Fasli, 1979 Fasli and 1380 Fasli. There is no such material available on record as may establish that the land in question was an irrigated land in the aforesaid years.

11. Although, Section 29(b) of the Ceiling Act mentions that after the date of enforcement of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act, 1972 any un-irrigated land becomes irrigated as a result of **“irrigation from the State irrigation work”**, the Ceiling area shall be liable to be re-determined, it is not the State’s case that the petitioners’ un-irrigated land has become irrigated land as a result of irrigation from a State irrigation work.

12. Therefore, there was no occasion for issuance of a fresh notice without there being any material to establish either that the petitioners’ land was irrigated in the years 1378 Fasli, 1979 Fasli and 1380 Fasli or that it has become irrigated from a State irrigation work after enforcement of Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act, 1972. Therefore, fresh proceedings could not be initiated even as per the provisions of Section 29 (b) of the Ceiling Act.

13. In view of the aforesaid discussion, the issuance of a third notice to the petitioners is not permissible in law.

14. Moreover, a holding of Amarjeet Kaur wife of Iqbal Singh (petitioner no.3) has also been included while assessing the total holding of the petitioners.

15. In this regard, it would be relevant to have a look at the definitions of family, holding, person, surplus land and tenure holder, as given in sub-sections (c), (d), (f), (k) and (l) of Section 3 of the Ceiling Act, which are as follows: -

“(c) “Family” means as consisting of the holder of a holding and any or all of his following relations, not being tenure-holders in their own separate right:

(i) wife or husband, as the case may be;

(ii) dependent father and dependent mother;

(iii) son and son's son, as long as they are unseparated from the holder;

(iv) wife or widow of the persons mentioned in sum clause (iii);

(v) daughter and unseparated son's daughter, as long as they are unmarried.

Provided that where a relation falls under the above clause in more than one family, he shall nevertheless be a member of only one family in accordance with his choice, or if he is under any disability, in accordance with the choice of the person legally authorised to do so on his behalf.

(d) “Holding” means the land or lands held by a person as a bhumidhar, sirdar, asami of Gaon Samaj or an asami mentioned in section 11 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (U.P. Act I of 1951), or as a tenant under the U.P. Tenancy Act, 1939 (U.P. Act XVII of 1939), other than a sub-tenant, or as lessee where the period of the sub-lessee of a Government with the period of the lease;

(f) “Person” shall include a family, a limited liability company, and a society registered under any law;

(k) “Surplus Land” means land held by a tenure-holder in excess of the ceiling area applicable to him and shall

include buildings, wells and trees existing thereon;

(l) "Tenure-holder" means an individual or a person who is the holder of a holding;

16. Amarjeet Kaur wife of Iqbal Singh is not a member of the family of original tenure holder Gargaj Singh. Gargaj Singh or even Iqbal Singh is not the tenure holder of the land held by Amarjeet Kaur and the holding of Amarjeet Kaur wife of Iqbal Singh cannot be added while taking into consideration the total holding of Gargaj Singh or Iqbal Singh for the purpose of 10(2) of the Ceiling Act.

17. 0.587 hectares land bearing Gata No. 58 hectares in the name of Balwant Singh has also been treated as holding of the petitioners on the ground that Balwant Singh is not a resident of the village in question and as the land was found in possession of the petitioners, it has been presumed that the petitioners were holding land as its benami holders.

18. For declaring a land to be surplus land of a person, that person must be a bhumidhar, sirdar, asami of Gaon Samaj or an asami mentioned in section 11 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, or as a tenant under the U.P. Tenancy Act, 1939, other than a sub-tenant, or as lessee where the period of the sub-lessee of a Government with the period of the lease and unless the person falls in any of the aforesaid categories mentioned in Section 3 (d) of the Ceiling Act, he will not be the tenure holder of the land and the land cannot be said to be held by a tenure-holder in excess of the ceiling area applicable to him so as to warrant it being declared surplus land.

19. 0.587 hectares land bearing Gata No. 58 hectares in the name of Balwant Singh could have been considered to be benami property of the petitioners or of their predecessor in interest in case the land was recorded in their names prior to the same being entered in the name of Balwant Singh. As the land in question had never been held by the petitioners or their father and it has not been transferred by them to Balwant Singh, the same cannot be held to be surplus land of the petitioners holding the same to be their benami property merely because it was found in possession of the petitioners.

20. In view of the aforesaid discussion, the reasons given by the Prescribed Authority in the impugned order dated 27.02.2007 are unsustainable in law, which vitiate the order declaring 5.386 irrigated land of the petitioners as surplus land.

21. The Commissioner, Lucknow Division, Lucknow has dismissed the Appeal No. 102/2006-07 filed by the petitioners under Section 13(2) of the Ceiling Act against the aforesaid order dated 27.02.2007 passed by the Prescribed Authority, without taking into consideration the aforesaid aspects of the matter, which vitiates the Appellate order also.

22. Accordingly, the writ petition is **allowed** and the orders dated 27.02.2007 passed by the Prescribed Authority Ceiling Act/Additional Collector, Kheri in Case No. 37/2004-05 and 25.07.2008 passed by the Commissioner, Lucknow Division, Lucknow dismissing the Appeal No. 102/2006-07 are hereby quashed and the necessary consequences shall follow.

(2024) 4 ILRA 1580
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 01.04.2024

BEFORE

THE HON'BLE SUBHASH VIDYARTHI, J.

Writ -C No. 3000116 of 2002

Master Shantul @ Shiv Prasad & Anr.

...Petitioners

Versus

State of U.P. & Ors.

...Respondents

Counsel for the Petitioners:

P.L. Misra, Madan Gopal Misra

Counsel for the Respondents:

C.S.C.

U.P. Imposition of Ceiling on Land Holdings Act, 1960 — Sections 5(6) & 13

— Transfer after appointed date (24.01.1971) - Land purchased by petitioners' predecessor in 1973 - Ceiling proceedings initiated against original tenure-holder - Land included in surplus- Appeal and remand -Prescribed Authority reconsidered entire record and earlier orders -No evidence led by transferee to prove bona fide transfer for adequate consideration or absence of benami nature - Burden under S. 5(6) lies on transferee -No alternative land of original tenure-holder available for adjustment - Mere drafting error in confirming earlier order does not vitiate decision -Concurrent findings of authorities -No perversity or illegality - Article 226 jurisdiction not to be exercised on technical errors .

Writ Petition dismissed. (E-9)

(Delivered by Hon'ble Subhash Vidyarthi J.)

1. याचिकाकर्तागण के विद्वान अधिवक्ता श्री मदन गोपाल मिश्रा तथा विद्वान स्थायी अधिवक्ता श्री लक्ष्मी मोहन

खरे को सुना तथा पत्रावली का अवलोकन किया।

2. भारतीय संविधान के अनुच्छेद 226 के अन्तर्गत प्रस्तुत इस रिट याचिका द्वारा याचिकाकर्तागण ने अपर जिलाधिकारी (वित्त/राजस्व)/निहित प्राधिकारी सीलिंग, उन्नाव द्वारा वाद संख्या 5/8/5 अन्तर्गत धारा 2 उत्तर प्रदेश भूमि जोत सीमा अधिरोपण अधिनियम, 1960 (जिसे इसके उपरान्त इस निर्णय में 'सीमारोपण अधिनियम' कहा जाएगा) में पारित निर्णय तथा आदेश दिनांक 13.12.2001 तथा उक्त आदेश के विरुद्ध पारित अपील संख्या 11/2001-2002 में अपर आयुक्त (न्यायिक), लखनऊ मंडल लखनऊ द्वारा पारित निर्णय तथा आदेश दिनांक 05.10.2002 की वैधता को चुनौती दी है।

3. संक्षेप में प्रकरण के तथ्य इस प्रकार हैं कि याचिकाकर्तागण के पिता स्वर्गीय विनय कुमार शुक्ला ने गाटा संख्या 236 क्षेत्रफल 4 बीघा 14 बिस्वा 13 बिस्वांसी तथा गाटा संख्या 302 क्षेत्रफल 5 बीघा 6 बिस्वा स्थित ग्राम कल्याणपुर, परगना पाटन, तहसील पुरवा, जनपद उन्नाव की भूमि रानी रघुवंश दुलारी से विक्रय-पत्र दिनांक 07.11.1973 के माध्यम से क्रय की थी तथा भूमि का अध्यासन भी प्राप्त कर लिया था। ग्राम कल्याणपुर में चकबंदी की प्रक्रिया चल रही थी, जिस कारण से

याचिकाकर्तागण के पिता के पक्ष में नामान्तरण आदेश सहायक बंदोबस्त अधिकारी चकबंदी ने वाद संख्या 711 में दिनांक 07.11.1974 को पारित किया था। इसके उपरांत भी लिपिकीय त्रुटि के कारण रानी रघुवंश दुलारी का नाम खाता संख्या 184 के संबंध में 1389 और 1394 फसली वर्षों में अंकित रहा। याचिकाकर्तागण के पिता विनय कुमार शुक्ला ने अभिलेखों की दुरुस्ती के लिए धारा 33 उत्तर प्रदेश भू-राजस्व अधिनियम सपठित धारा 9 (क) उत्तर प्रदेश जोत चकबंदी अधिनियम के अन्तर्गत प्रार्थना पत्र दिया। उप जिलाधिकारी पुरवा, जनपद उन्नाव ने दिनांक 14.11.1983 को श्री विनय कुमार शुक्ला का नाम अंकित करने का आदेश दिया।

4. रानी रघुवंश दुलारी के विरुद्ध सीमारोपण अधिनियम के अन्तर्गत कार्यवाही चालू हुई तथा चुके उनका नाम राजस्व अभिलेखों में अंकित चला आ रहा था, भू-खण्ड संख्या 236 तथा 302 भूमि भी उनकी भूमि में सम्मिलित करते हुए अतिरिक्त भूमि घोषित कर दी गई।

5. विहित प्राधिकारी के उपरोक्त आदेश के विरुद्ध अधिनियम की धारा 13 के अन्तर्गत जनपद न्यायाधीश उन्नाव के समक्ष अपील प्रस्तुत की गई, जो दिनांक 06.09.1976 के निर्णय तथा आदेश से

स्वीकार की गई तथा विहित प्राधिकारी का आदेश अपास्त करते हुए प्रकरण को पुनः निर्णीत किए जाने हेतु प्रतिप्रेषित किया गया। विहित प्राधिकारी ने प्रकरण को पुनः निर्णीत किया तथा उसके निर्णय के विरुद्ध पुनः एक अपील प्रस्तुत हुई जो दिनांक 07.04.1980 को स्वीकार करते हुए प्रकरण को पुनः विहित प्राधिकारी को प्रतिप्रेषित किया गया।

6. विहित प्राधिकारी ने प्रकरण को पुनः दिनांक 21.03.1986 को निर्णीत करते हुए प्रश्नगत भूमि को रानी रघुवंश दुलारी की अतिरिक्त भूमि घोषित किया। उक्त आदेश के विरुद्ध रानी रघुवंश दुलारी ने पुनः एक अपील संख्या 2 सन 1985-1986 प्रस्तुत की तथा इसी आदेश के विरुद्ध याचिकाकर्तागण के पिता श्री विनय कुमार शुक्ला ने भी एक अपील संख्या 3 सन 1985-1986 प्रस्तुत की।

7. रिट याचिका में यह भी कहा गया है कि याचिकाकर्तागण के पिता ने विहित प्राधिकारी के समक्ष सिविल जज उन्नाव द्वारा पारित आदेश दिनांक 07.04.1980 के क्रियान्वयन के लिए भी एक प्रार्थना पत्र दिया था, जो विहित प्राधिकारी ने दिनांक 16.01.1989 को इस आधार पर निरस्त कर दिया कि विहित प्राधिकारी के आदेश दिनांक 31.03.1986 के विरुद्ध एक अपील लम्बित थी। उक्त आदेश

से व्यथित होकर याचिकाकर्तागण के पिता ने अपील संख्या 8 सन 1988-1989 प्रस्तुत की, जो कि अपील संख्या 2 तथा 3 सन 1985-1986 के साथ ही निर्णय दिनांक 30.01.1991 द्वारा निर्णीत की गई, जिसके द्वारा विद्वान अपर आयुक्त (न्यायिक) लखनऊ मण्डल ने अपील आंशिक रूप से स्वीकार करते हुए नियत प्राधिकारी का आदेश दिनांक 31.03.1986 इस सीमा तक निरस्त कर दिया कि याचिकाकर्तागण द्वारा क्रय किए गए भू-खण्ड को सीलिंग एरिया से मुक्त करते हुए रानी रघुवंश दुलारी की अन्य भूमि से समान क्षेत्रफल नियमानुसार अतिरिक्त भूमि घोषित किया जाए।

8. अपर आयुक्त द्वारा पारित उपरोक्त निर्णय तथा आदेश दिनांक 30.1.1991 से पूर्व पारित किसी भी आदेश की प्रतिलिपि इस रिट याचिका के साथ संलग्न नहीं की गई है।

9. प्रार्थीगण ने अपनी माता एवं संरक्षिका श्रीमती अरुणा शुक्ला के माध्यम से दिनांक 12.06.1997 को एक प्रार्थना पत्र नियत प्राधिकारी को इस आशय से दिया कि उपरोक्त आदेश दिनांक 30.01.1991 का क्रियान्वयन कराया जाए।

10. इसके उपरान्त अपर जिलाधिकारी वित्त/राजस्व/नियत प्राधिकारी सीलिंग उन्नाव ने दिनांक 17.06.1999 को आदेश पारित करके यह कहा कि अपीलीय

न्यायालय के आदेश दिनांक 30.01.1991 तथा याचिकाकर्तागण के प्रार्थना पत्र के आलोक में तहसीलदार बीघापुर से आख्या प्राप्त की गई तथा तहसीलदार बीघापुर ने अपनी आख्या दिनांक 17.09.1998 में यह कहा कि रानी रघुवंश दुलारी के नाम ग्राम कल्याणपुर में मात्र गाटा संख्या 847/0.439 व 849/0.482 में 1/5 भाग है जो मात्र 0.184 हेक्टेयर है तथा यह याचिकाकर्तागण के पिता द्वारा क्रय की गई भूमि संख्या 236 क्षेत्रफल 4 बीघा 14 बिस्वा 13 बिस्वांसी तथा गाटा संख्या 302 क्षेत्रफल 5 बीघा 6 बिस्वां के स्थान पर अतिरिक्त घोषित किए जाने हेतु अपर्याप्त है। उक्त आदेश में यह भी कहा गया है कि याचिकाकर्तागण द्वारा यह प्रार्थना पत्र उक्त आदेश पारित होने के लगभग 8 वर्ष बाद बिना विलम्ब क्षमा हेतु प्रार्थना पत्र दिए हुए प्रस्तुत किया गया था, जबकि सीमारोपण अधिनियम में अतिरिक्त घोषित भूमि पर तत्काल अध्यासन लेने का प्राविधान है। तदनुसार, याचिकाकर्तागण का प्रार्थना पत्र निरस्त करते हुए तहसीलदार बीघापुर को अतिरिक्त घोषित भूमि पर तत्काल अध्यासन प्राप्त करने का निर्देश दिया गया।

11. उपरोक्त आदेश के विरुद्ध याचिकाकर्तागण ने सीमारोपण अधिनियम की धारा 13 के अन्तर्गत अपील संख्या 5/1998-1999 प्रस्तुत की जो अपर आयुक्त (न्यायिक), लखनऊ मंडल ने निर्णय तथा

आदेश दिनांक 29.08.2000 से यह कहते हुए स्वीकार करी कि नियत प्राधिकारी ने मात्र तहसील आख्या के आधार पर प्रश्नगत आदेश पारित किया, जबकि उन्हें इसी प्रकरण में पूर्व पारित आदेश एवं उससे संबंधित पत्रावली का अध्ययन करना चाहिए था, जिससे यह ज्ञात हो सकता था कि नियत प्राधिकारी द्वारा मूल खातेदार की जोत में कुल कितनी भूमि सम्मिलित करते हुए अतिरिक्त घोषित की गई थी और पूर्व में अतिरिक्त घोषित भूमि मौके पर एवं अभिलेखों में अविवादित है अथवा नहीं तथा अपर आयुक्त ने पत्रावली इस निर्देश के साथ प्रतिप्रेषित की कि उक्त निर्णय में की गई विवेचना के परिप्रेक्ष्य में प्रकरण का निस्तारण पुनः किया जाए।

12. दिनांक 13.12.2001 को नियत प्राधिकारी ने पुनः निर्णय पारित किया, जिसमें यह अंकित है कि पक्षों को पुनः साक्ष्य प्रस्तुत करने हेतु अवसर दिया गया तथा नियत प्राधिकारी द्वारा पूर्व में पारित आदेश दिनांक 30.11.1978 एवं 31.03.1986 तथा पूर्ण पत्रावली का भी परिशीलन किया गया, जिससे स्पष्ट है कि रानी रघुवंश दुलारी की कुल 99 बीघा 15 बिस्वा 13.5 बिस्वांसी भूमि अतिरिक्त घोषित की गई थी और अब उनके पास 0.184 हेक्टेयर के अतिरिक्त कोई भी अविवादित भूमि शेष नहीं थी, जिसे याचिकाकर्तागण के पिता द्वारा क्रय की गई भूमि संख्या 236 क्षेत्रफल 4 बीघा 14 बिस्वा

13 बिस्वांसी तथा गाटा संख्या 302 क्षेत्रफल 5 बीघा 6 बिस्वा के बदले अतिरिक्त घोषित किया जा सके तथा इस संबंध में याचिकाकर्तागण की तरफ से कोई भी साक्ष्य प्रस्तुत नहीं किया गया।

13. उक्त निर्णय में यह भी अंकित है कि पत्रावली दिनांक 07.06.2001 से निस्तारण हेतु लम्बित थी और प्रार्थीगण तथा उनके अधिवक्ता अनुपस्थित थे। 29.11.2001 तक 11 तिथियां व्यतीत हो जाने के उपरांत उस दिन राज्य सरकार के अधिवक्ता के तर्कों को सुन लिया गया था और पत्रावली दिनांक 06.12.2001 को आदेश हेतु नियत की गई थी, किंतु तब भी याचिकाकर्तागण या उनके अधिवक्ता उपस्थित नहीं हुए और कोई भी साक्ष्य प्रस्तुत नहीं किया गया। इन परिस्थितियों में नियत प्राधिकारी ने पूर्व पारित आदेश दिनांक 17.06.1999 को ही पुष्ट करते हुए तहसीलदार को पुनः अतिरिक्त घोषित भूमि पर नियमानुसार कब्जे आवंटन की कार्यवाही हेतु आदेशित किया।

14. उक्त आदेश के विरुद्ध याचिकाकर्तागण ने अपील संख्या 11/2001-2002 प्रस्तुत की जो अपर आयुक्त (न्यायिक) ने आदेश दिनांक 05.10.2002 द्वारा निरस्त कर दी। उक्त निर्णय तथा आदेश दिनांक 05.10.2002 में अपीलीय न्यायालय ने अन्य तथ्यों के

साथ यह भी अंकित किया है कि अपीलकर्तागण के पिता द्वारा विक्रय-पत्र वर्ष 1973 में निष्पादित कराया गया, जो सीमारोपण अधिनियम में अंकित संदर्भ तिथि 24.01.1971 के बाद का है और ऐसा हस्तांतरण जब तक नेक नियती से तथा सद्भावनापूर्वक पर्याप्त प्रतिफल देकर निष्पादित किया जाना सिद्ध न किया जाए, तब तक क्रेतागण को ऐसे विक्रय-पत्र के आधार पर कोई अनुतोष नहीं दिया जा सकता है।

15. उपरोक्त निर्णयों की वैधता को चुनौती देते हुए याचिकाकर्तागण के विद्वान अधिवक्ता ने तर्क दिया कि नियत प्राधिकारी द्वारा पारित आदेश दिनांक 17.06.1999 अपीलीय न्यायालय के आदेश दिनांक 29.08.2000 द्वारा अपास्त किया जा चुका था तथा ऐसी परिस्थिति में नियत प्राधिकारी ने आलोच्य आदेश दिनांक 13.12.2001 द्वारा आदेश दिनांक 17.06.1999 को पुष्ट करने में वैधानिक त्रुटि कारित की है तथा नियत प्राधिकारी ने अपीलीय आदेश दिनांक 29.08.2000 में दिए गए निर्देशों का अनुपालन नहीं किया है।

16. अपीलीय आदेश दिनांक 29.08.2000 द्वारा नियत प्राधिकारी को यह निर्देश दिया गया था कि नियत प्राधिकारी प्रकरण के पूर्व पारित निर्णय तथा उससे संबंधित पत्रावली का अध्ययन करके में यह देखें कि मूल खातेदार की जोत में कुल कितनी भूमि

सम्मिलित करते हुए अतिरिक्त घोषित की गई थी।

17. नियत प्राधिकारी ने उक्त आदेश का अनुपालन करते हुए पूर्व पारित आदेश दिनांक 30.11.1978 एवं 31.03.1986 तथा पूर्ण पत्रावली का परिशीलन किया और यह पाया कि पूर्व खातेदार रानी रघुवंश दुलारी की कुल 99 बीघा 15 बिस्वा 13.5 बिस्वांसी भूमि अतिरिक्त घोषित की गई थी और अब उनके पास 0.184 हेक्टेयर के अतिरिक्त कोई अविवादित भूमि उपलब्ध नहीं है, जिसे कि याचिकाकर्तागण के पिता द्वारा क्रय की गई भूमि संख्या 236 क्षेत्रफल 4 बीघा 14 बिस्वा 13 बिस्वांसी तथा गाटा संख्या 302 क्षेत्रफल 5 बीघा 6 बिस्वा के बदले पूर्व खातेदार की अन्य भूमि अतिरिक्त घोषित की जा सके और इस संबंध में याचिकाकर्तागण की तरफ से भी कोई ठोस साक्ष्य प्रस्तुत नहीं किया गया।

18. उक्त से यह स्पष्ट है कि नियत प्राधिकारी अपीलीय आदेश के निर्देश का अनुपालन किया है। नियत प्राधिकारी द्वारा मात्र यह लिख देना कि पूर्व पारित आदेश दिनांक 17.06.1999 विधि सम्मत ढंग से पारित किया है, उचित नहीं प्रतीत होता है, किन्तु यह मात्र एक भाषा की त्रुटि प्रतीत होती है, क्योंकि नियत प्राधिकारी ने अपीलीय न्यायालय के निर्देश के अनुपालन में प्रकरण के समस्त तथ्यों की विवेचना करने के

उपरांत यह पाया कि याचिकाकर्तागण की भूमि के बदले पूर्व खातेदार की कोई भूमि को अतिरिक्त घोषित किया जाना संभव नहीं है, किंतु उपरोक्त आदेश का परिणाम वही हुआ जो कि पूर्व आदेश दिनांक 17.06.1999 का था। उपरोक्त परिस्थितियों में, यद्यपि नियत प्राधिकारी ने यह कहने में भाषा की त्रुटि की है कि पूर्व आदेश दिनांक 17.06.1999 पुष्ट किया जाता है, तथापि आदेश गलत अथवा अवैधानिक नहीं है। अतः मात्र भाषा की त्रुटि के कारण आदेश में कोई हस्तक्षेप करना उचित नहीं होगा।

19. अपीलीय आदेश दिनांक 05.10.2002 में अपर आयुक्त ने यह पाया है कि अपीलकर्तागण के पिता के पक्ष में विक्रय-पत्र वर्ष 1973 में हुआ था, जो कि सीमारोपण अधिनियम के संदर्भ तिथि 24.01.1971 के बाद का है। सीमारोपण अधिनियम की धारा 5(6) के अनुसार दिनांक 24.01.1971 के उपरांत किया गया अतिरिक्त भूमि का कोई भी अन्तरण तब तक वैध नहीं होगा, जब तक नियत प्राधिकारी को यह संतोष न हो जाए कि अन्तरण सदाशय से उचित प्रतिफल देकर किया गया हो तथा यह अन्तरण एक बेनामी अन्तरण न हो एवं उपरोक्त शर्तों को सिद्ध करने का भार ऐसे व्यक्ति पर है जो इस अन्तरण से लाभ का दावा कर रहा हो। याचिकाकर्ता ने उपरोक्त शर्तों को सिद्ध करने के लिए कोई भी साक्ष्य प्रस्तुत नहीं किया तथा ऐसी परिस्थिति में

संदर्भ तिथि दिनांक 24.01.1971 के पश्चात हुए विक्रय-पत्र के आधार पर कोई भी लाभ का दावा नहीं कर सकते हैं।

20. भारतीय संविधान के अनुच्छेद 226 के अन्तर्गत यह न्यायालय अपनी शक्तियों का प्रयोग न्यायहित में तब करती है, जब ऐसा न करने से न्याय के उद्देश्यों की पूर्ति न हो पाए तथा मात्र तकनीकी आधारों पर न्यायालय अनुच्छेद 226 के अन्तर्गत अपनी विवेकाधीन शक्तियों का प्रयोग नहीं करती है।

21. जब कि उपरोक्त विवेचना से यह स्पष्ट है कि आलोच्य आदेशों में कोई ऐसी त्रुटि नहीं है, जिससे याचिकाकर्तागण के साथ अन्याय हुआ हो, मात्र भाषा की त्रुटि अनुच्छेद 226 की शक्तियों को प्रयोग करने का उचित आधार नहीं प्रदान करती हैं।

22. तदनुसार, रिट याचिका बलहीन है और निरस्त की जाती है।

(2024) 4 ILRA 1585
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.03.2024

BEFORE

THE HON'BLE ASHUTOSH SRIVASTAVA, J.

Writ-A No. 1597 of 2024

Along With

Writ-A No. 1674 of 2024 and 1747 of 2024

Gauri Shankar Prajapati
Versus

Ravikul Bansal

...Petitioner

...Respondent

Counsel for the Petitioner:

Rishikesh Tripathi

Counsel for the Respondents:

Ashish Agrawal, Rahul Agarwal

A. Tenancy Law – U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 – Sections 21(1)(a) – Release of shop – Bona fide need – Alternative accommodation available to the landlord, how far adversely effect bona fide need – Landlord claimed need to set U.P. business of Digital Printing for son – Permissibility – Both court below gave finding of fact on bona fide in favour of landlord – Scope of Interference – Held, the need of the premises as set U.P. in the release application is required to be evaluated viz a viz the available alternate accommodation. A conclusion need not be drawn that the need of the landlord is not genuine or bona fide merely on the ground that he is in possession of alternative accommodation – The business of Digital Printing is to be carried out at one place and it would not be feasible to carry on the said business in different spaces. The other accommodations though available to the landlord can not be utilized for satisfying the need as set U.P. – Findings of fact have been recorded by both Authorities on the question of bona fide need and comparative hardship which findings are based on proper appreciation of the materials on record and consideration of the correct law. The findings of fact recorded do not call for any interference. (Para 13, 16 and 17)

Writ petition dismissed. (E-1)**List of cases cited :-**

1. Hasmat Rai & anr. Vs Raghunath Prasad; 1981 (3) SCC 103
2. Shiv SarU.P. GU.P.ta Vs Dr. Mahesh Chand GU.P.ta; AIR 1999 SC 2507: 1999 (6) SCC 222
3. M.M. Quasim Vs Manohar Lal Sharma; AIR 1981 SC 1113

4. Sarla Ahuja Vs United India Insurance Comp. Ltd.; 1998 (8) SCC 119

5. M/s Sait Nagjee Purushotham & Co. Ltd. Vs Vimalabai Prabhulal & ors.; 2003 (8) SCC 252

6. Badrinarayan Chemical Bhutada Vs Govindram Ramgopal Mundada; 2003 (2) SCC 320

7. Mohd. Ayub & anr. Vs Mukesh Chand; 2012 (2) SCC 155

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

1. All the above referred writ petitions involve identical questions of law and facts. The Writ Petition (A) No. 1597 of 2024 is being treated as the leading writ petition and the facts pertaining to the same is being considered for deciding the controversy involved.

2. Heard Shri Rishikesh Tripathi, learned counsel for the petitioner and Shri Rahul Agarwal, learned counsel for the caveator/respondent.

3. The instant writ petition, at the instance of the tenant/petitioner, has been filed assailing the judgment and order dated 6.1.2024 passed by the learned Addl. District Judge, Banda in Rent Control Appeal No. 8 of 2022 as also the judgment and order dated 24.5.2022 passed by the learned Prescribed Authority/Civil Judge (Sr.Div.), Banda in Rent Case No. 5 of 2018 (RaviKul Bansal versus Gauri Shankar Prajapati).

4. By the judgment and order dated 24.5.2022, the learned Prescribed Authority allowed the release application under Section 21 (1) (a) of U.P. Act No. 13 of 1972. By the judgment and order dated 6.1.2024, the Appellate Authority has

dismissed the Rent Appeal and upheld the judgment and order of the Prescribed Authority dated 24.5.2022.

5. The facts shorn of unnecessary details giving rise to the controversy involved between the parties are that the petitioner is a tenant in a shop @ Rs.500/- per month and is doing hardware business. The respondent is the landlord. A release application under Section 21 (1) (a) of the U.P. Act No. 13 of 1972 was filed by the respondent/landlord against the tenant/petitioner setting up a bona fide need of the premises under the tenancy of the petitioner for his son Anshul Bansal for installing a digital printing press, which will require an area of 2100 square feet. The business of digital printing press involves setting up of Colour Printing Machines, Paper Cutting Machines, Perfect Binding Machines, Book Binding Machines, Punching and Creasing Machine besides numerous computers. It was alleged that the landlord has got 2086 square feet area in his possession i.e. area in which the shop under the tenancy of the petitioner and other tenants is situate which is best suited for setting up the printing press.

6. The release application was contested by the tenant/petitioner by filing written statement stating inter alia that the landlord/respondent is a man of means possessed of about 35 shops and 10 to 15 suits have been filed for eviction of the tenants. The tenant/petitioner filed evidence in the form of an affidavit stating that the landlord/respondent has alternate accommodation to cater to his need. He also filed photographs of the vacant shops and also got issued Amin Commission.

7. The learned Prescribed Authority vide its judgment and order dated

24.5.2022 allowed the release application returning the finding of bona fide need in favour of the landlord/respondent and against the tenant/petitioner. The finding on the question of comparative hardship was also recorded in favour of the landlord/respondent and against the tenant/petitioner.

8. The tenant/petitioner assailed the order of the learned Prescribed Authority in rent appeal. During the pendency of the appeal, the tenant/petitioner came to know that some shops have come in possession of the landlord/respondent, which would satisfy the need set up and such information was sought to be brought on record by filing an application for adducing additional evidence under Order 41 Rule 27 CPC. The judgment in SCC Case No. 7 of 2015, judgment in SCC Case No. 3 of 2001, judgment in SCC Case No. 1 of 2005 and judgment in Case No. 2 of 2015 were brought on record to demonstrate that the subject matter of the SCC Suits decreed in favour of the landlord/respondent were in his possession. The premises released were two compounds in possession of Assistant Commissioner, Commercial Tax, one shop of tenant Mahboob Khan, one shop in possession of tenant Smt. Kamla Devi, one shop of Moti Lal Richhariya. The application for additional evidence was allowed.

9. Shri Rishikesh Tripathi, learned counsel for the tenant/petitioner has assailed the orders of the Prescribed Authority as also of the Appellate Authority on the ground that the learned Prescribed Authority without considering the evidence on record allowed the release application. The Appellate Authority also committed the same mistake even though it proceeded to take on record the additional evidence

adduced by the tenant/petitioner by allowing the application under Order 41 Rule 27 CPC. It is contended that the landlord/respondent was possessed with adequate alternate vacant accommodation which was suitable to satisfy the need set up but the Court below failed to consider the evidence and proceeded to allow the release application. Reliance has been placed upon the decision of the Apex Court reported in **1981 (3) SCC 103 (Hasmat Rai and another versus Raghunath Prasad)** to buttress the argument that subsequent events that take place during the pendency of the proceedings are required to be taken into consideration for assessing the bona fide need of the landlord which must continue to exist till final determination of the case. Reliance is also placed upon another decision of the Apex Court reported in **AIR 1999 Supreme Court 2507 (Shiv Sarup Gupta versus Dr. Mahesh Chand Gupta)** to buttress the proposition that requirement of the premises under the tenancy of a tenant by the landlord must be more than a mere desire and the availability of an alternate accommodation with the landlord may have a bearing on the bona fide need of the landlord which the Court is required to consider while deciding the question of bona fide need. Based on the above submissions, learned counsel for the tenant/petitioner submits that both the orders of the Prescribed Authority and Appellate Authority are not sustainable and deserves to be set aside and the writ petition is liable to be allowed.

10. Per contra, Shri Rahul Agarwal, learned counsel appearing for the landlord/respondent submits that both Authorities have upheld the bona fide need and comparative hardship in favour of the landlord/respondent. The findings are based on cogent grounds and the findings being

findings of fact are not liable to be interfered with under Article 226 of the Constitution of India. The writ petition is liable to be dismissed at the threshold. Reliance is placed upon decision of the Apex Court reported in **1998 (8) SCC 119, 2005 (8) SCC 252, 2003 (2) SCC 320, 2012 (2) SCC 155 and 2007 (4) SCC 465** to submit that it is not for the tenant to dictate terms to the landlord as to how else he can adjust himself, it is always the prerogative of the landlord that if he requires the premises in question for his bona fide use for expansion or for setting up his son, it cannot be said that the need is not genuine, if landlord is already running a successful business or that his sons are already employed, the owner of the property cannot be denied eviction and compelled to live poorly merely to enable tenants to carry on their flourishing business actively at the cost of the landlord, the landlord's requirement need be a dire necessity and that the landlord is the best judge of his requirement and Courts have no concern to dictate the landlord as to how and in what manner, he should live. The bona fide personal need is a question of fact and should not be normally interfered with. It is accordingly prayed that the writ petition warrants dismissal.

11. I have heard the learned counsels for the parties and have perused the record as also the case laws cited by the counsels.

12. In order to appreciate the rival submissions of the learned counsels for the parties, it would be apt to understand as to what is meant by the terms "bona fide". The Apex Court in the case of **Shiv Sarup Gupta vs. Dr. Mahesh Chand Gupta** reported in **1999 (6) SCC 222** held as under:-

“13. ..., the term bona fide or genuinely refers to a state of mind. Requirement is not a mere desire. The degree of intensity contemplated by “requires” is much more higher than in mere desire. The phrase “required bona fide” is suggestive of legislative intent that a mere desire which is the outcome of whim or fancy is not taken note of by the rent control legislation. A requirement in the sense of felt need which is an outcome of a sincere, honest desire, in contradistinction with a mere pretence or pretext to evict a tenant, on the part of the landlord claiming to occupy the premises for himself or for any member of the family would entitle him to seek ejectment of the tenant. Looked at from this angle, any setting of the facts and circumstances protruding the need of the landlord and its bona fides would be capable of successfully withstanding the test of objective determination by the court. The judge of facts should place himself in the armchair of the landlord and then ask the question to himself — whether in the given facts substantiated by the landlord the need to occupy the premises can be said to be natural, real, sincere, honest. If the answer be in the positive, the need is bona fide. The failure on the part of the landlord to substantiate the pleaded need, or, in a given case, positive material brought on record by the tenant enabling the court drawing an inference that the reality was to the contrary and the landlord was merely attempting at finding out a pretence or pretext for getting rid of the tenant, would be enough to persuade the court certainly to deny its judicial assistance to the landlord. Once the court is satisfied of the bona fides of the need of the landlord for the premises or additional premises by applying objective standards then in the matter of choosing out of more than one accommodation available to the landlord

his subjective choice shall be respected by the court. The court would permit the landlord to satisfy the proven need by choosing the accommodation which the landlord feels would be most suited for the purpose; the court would not in such a case thrust its own wisdom upon the choice of the landlord by holding that not one but the other accommodation must be accepted by the landlord to satisfy his such need. In short, the concept of bona fide need or genuine requirement needs a practical approach instructed by the realities of life. An approach either too liberal or too conservative or pedantic must be guarded against.”

13. The availability of an alternate accommodation with the landlord i.e. an accommodation other than the one in occupation of the tenant wherefrom he is sought to be evicted has a dual relevancy. Firstly, the availability of another accommodation suitable and convenient in all respects as the accommodation with the tenant may have an adverse bearing on the finding as to bona fide need of the landlord if he unreasonably refuses to occupy the available premises to satisfy his alleged need. Availability of such circumstances would enable the Court drawing an inference that the need of the landlord was not bona fide or the state of mind of the landlord was not honest, sincere and natural. Secondly, if alternate accommodation is shown to exist, the landlord is required to satisfy the Court that the available accommodation is not suitable for the need set up. In the opinion of the Court the need of the premises as set up in the release application is required to be evaluated viz a viz the available alternate accommodation. A conclusion need not be drawn that the need of the landlord is not genuine or bona fide

merely on the ground that he is in possession of alternative accommodation. In *M.M. Quasim Vs. Manohar Lal Sharma, reported in AIR 1981 SC 1113* the Apex Court has held that the landlord does not have an unfettered right to choose the premises but merely showing that the landlord has some other vacant premises in his possession may not be sufficient to negative the landlord claim if the vacant premises were not suitable for the purpose for which the landlord required the premises. In *Sarla Ahuja Vs. United India Insurance Company Limited, reported in 1998 (8) SCC 119*, the Apex Court held that the Authority considering the requirement of the landlord should not proceed on assumption that the landlords requirement should not proceed on the assumption that the landlords requirement is not bona fide when a landlord shows a prima facie case a presumption that the requirement of the landlord is bona fide is available to be drawn. It is not for the tenant to dictate terms to the landlord as to how else he can adjust himself without giving possession of the tenanted premises. While deciding the question of bona fides of the requirement of the landlord, it is quite unnecessary to make an endeavour as to how else the landlord could have adjusted himself.

14. The above legal position has further been reiterated by the Apex Court in the case of *M/s Sait Nagjee Purushotham & Co. Ltd vs Vimalabai Prabhulal & Ors.* reported in *2003 (8) SCC 252*, case of *Badrinarayan Chemical Bhutada Vs. Govindram Ramgopal Mundada* reported in *2003 (2) SCC 320*. In the case of *Mohd. Ayub & another Vs. Mukesh Chand* reported in *2012 (2) SCC 155* relied upon by learned counsel for the landlord/respondent.

15. Now coming to the need as set up in the release application, the Court finds that the landlord / respondent has set up the need for his son Anshu Bansal who wants to set up a business of Digital Printing. The said business requires setting up of Colour Printing Machines, Paper Cutting Machines, Perfect Binding Machines, Book Binding Machines, Punching and Creasing Machine besides numerous computers. The requirement is for approx 2100 square ft. space. The landlord/ respondent is in possession of approx 2086 square ft. space as has been depicted in the map along with the release application. If, the spaces depicted by unshaded portion in occupation of tenants including the petitioner whose tenancy is depicted by Letters B, B1, B2, B3 is released in favour of the landlord/respondent, he will have 2086 square ft. of space which will fulfill his bona fide need. The other tenanted premises under the tenancy of Sharda and Shyam Singh are the subject matters of the connected writ petitions.

16. In the opinion of the Court, the business of Digital Printing is to be carried out at one place and it would not be feasible to carry on the said business in different spaces. The other accommodations though available to the landlord cannot be utilized for satisfying the need as set up. The properties available with the landlord which have been brought on record by the application under Order 41 Rule 27 CPC as additional evidence are not at all germane for determining the bona fide need of the landlord.

17. This Court having gone through the judgment and orders of the learned Prescribed Authority as also the Appellate Authority finds that findings of fact have been recorded by both Authorities on the

question of bona fide need and comparative hardship which findings are based on proper appreciation of the materials on record and consideration of the correct law. The findings of fact recorded do not call for any interference by this Court in exercise of its powers under Article 226 of the Constitution of India particularly, in view of the settled legal position of law that it is for the landlord to decide how and in what manner, he should live his own life and cannot be guided, controlled or restricted by any third person including the Court.

18. In view of the above, the Court finds no merit in the writ petitions. Accordingly, all the aforesaid writ petitions are dismissed.

19. Parties to bear their own costs.

(2024) 4 ILRA 1591
ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.03.2024

BEFORE

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

Writ-A No. 15714 of 2023

Ashok Kumar Gautam **...Petitioner**
Versus
State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:
 Vinay Pratap Singh, Suman Kumar Yadav

Counsel for the Respondents:
 C.S.C., Abhishek Srivastava, Usha Kiran

A. Service Law – U.P. Power Corporation Limited Servants (Discipline and Appeal) Regulations, 2020 – Reg. 7 – Disciplinary proceeding – Punishment – Award of withholding two increments with cumulative effect beside recovery of Rs.

2,61422/- – Charge of sanctioning connection without erecting new line and by securing less metre cable than the distance between the premises and nearest pole was leveled – Inquiry report did not set out the charge against the petitioner – No consideration of any documentary evidence was made – Effect – Burden of proof, on whom lies – Held, charges laid by the Establishment against the employee cannot be taken to be proof of themselves. It is the burden of the Establishment to prove the charges, and like any other judicial proceeding – In the event, a proper charge-sheet was not issued to the petitioner, the proceedings go foul by one more step and oblige the respondents to issue a fresh and properly done charge-sheet as well. (Para 25, 26, 29 and 34)

Writ petition allowed. (E-1)

List of cases cited :-

1. Roop Singh Negi Vs P.N.B. & ors.; (2009) 2 SCC 570
2. Smt. Karuna Jaiswal Vs St. of U.P.; 2018 (9) ADJ 107 (DB) (LB)
3. St. of U.P. & anr. Vs Kishori Lal & anr.; 2018 (9) ADJ 397 (DB) (LB)

(Delivered by Hon'ble J.J. Munir, J.)

1. This writ petition has been instituted challenging the order dated 14.06.2021 passed by the Managing Director, Kanpur Electric Supply Company Limited, 14/71, Civil Lines, KESA House, Kanpur holding the petitioner guilty after disciplinary proceedings and awarding him the punishment of withholding two increments with cumulative effect, besides recovery of a sum of Rs. 2,09,138.40/-. Also under challenge is the appellate order dated 05.04.2023 passed by the Chairman, Uttar Pradesh Power Corporation Limited, Lucknow passed on the petitioner's

departmental appeal whereby the Chairman has rejected the appeal and enhanced the penalty awarded to withholding of three increments with cumulative effect and maintaining the recovery ordered by the Disciplinary Authority.

2. The facts giving rise to this petition are that the petitioner was appointed as an Assistant Engineer in the employ of the Uttar Pradesh Power Corporation in the year 1999. He was promoted to the post of Executive Engineer on 08.06.2008 and posted with the Electricity Distribution Division, Vikas Nagar, Kanpur Electricity Supply Company Limited, Kanpur Nagar (*for short, 'the KESCO'*). He worked on the said post up to 06.09.2014. On the 6th of September, 2014, the petitioner was transferred from Vikas Nagar to Sarvodaya Nagar. He joined his station of transfer where he commenced performing his duties.

3. According to the petitioner, on 19.08.2014, one Smt. Vimla Devi applied for a new service connection. She made an application for the purpose. The petitioner inspected her premises on 26.08.2014 and issued a certificate dated the 26th August, 2014, certifying the distance between the nearest pole and her premises to be 210 meters. After the premises had been inspected, the prospective consumer was informed by the petitioner about the distance charges to be borne and endorsed a remark on the application to the effect that the consumer is satisfied about the distance charges. The applicant/consumer deposited a sum of Rs. 61,200/- on 03.09.2014 under the head of miscellaneous fee chargeable for extra cable.

4. On the 15th of September, 2014, the Assistant Engineer, Ekdhar Charan

submitted a report asking the petitioner for approval in regard to the connection last mentioned. The petitioner signed his approval about the receipt of Rs. 20,925/- on account of security money, meter charges, service line charges, system loading charges *et cetera*.

5. The petitioner was relieved of his duties at the Electricity Distribution Division, Vikas Nagar, as already said, for the next posting at Sarvodaya Nagar.

6. A random inspection of the consumer's premises was done on 07.11.2014 by a team comprising the Superintending Engineer, the Executive Engineer, the Assistant Engineer and the Junior Engineer. The inspection team submitted a report saying that variable cost for 170 meters of cable had been deposited while the distance of the premises from the electrified area was found to be 600 meters. It was also remarked that without erecting a new line, the connection had been sanctioned and installed. Therefore, the service connection was temporarily disconnected.

7. The Superintending Engineer- IV, *vide* letter dated 11.11.2014, asked the Assistant Engineer, Ekdhar Charan to show cause why charges for 170 meters of cable alone had been secured when the distance between the premises and the nearest pole was more than 800 meters.

8. It is the petitioner's case that the estimate for the new service connection was drawn up by the Executive Engineer (Distribution), R.K. Soni, the Assistant Engineer (Distribution), Ajay Kumar and the Junior Engineer (Distribution), Shailendra Dwivedi which was passed by the Superintending Engineer, Circle-4th,

(D-4) on 17.11.2014. It appears to be incorrectly mentioned as 17.11.2017 in paragraph no. 12 of the writ petition.

9. On 19.11.2014, Arvind Kishore, Superintending Engineer- IV, KESCO, made a complaint to the Managing Director saying that Ekdhar Charan, the Assistant Engineer, without complying with the required procedure, had sanctioned a connection to Smt. Vimla.

10. On the 28th of September, 2017, R.K. Soni, Superintending Engineer (Commercial)/Enquiry Officer issued a charge-sheet to the petitioner and sought his reply. The petitioner submitted his reply to the charges through his written statement dated 29.10.2017.

11. It is the petitioner's case that without considering the petitioner's reply, the Inquiry Officer, the Superintending Engineer (Commercial) submitted inquiry report to the Managing Director, KESCO, the Disciplinary Authority. A detailed inquiry report was submitted on 08.05.2020 holding the petitioner guilty and submitted a further inquiry report signed by himself and the other member on the Inquiry Committee, the Senior Accounts Officer, holding the petitioner guilty and recording that a total loss of Rs. 5,87,314/- had been occasioned to the KESCO, in the matter of sanction of service connection to Smt. Vimla Devi. The responsibility for the loss was apportioned by the Inquiry Committee.

12. We would allude to the inquiry report dated 08.05.2020, on the foot of which the Managing Director of the KESCO and the Chairman of the Uttar Pradesh Power Corporation Limited (*for short, 'the Corporation'*) have proceeded to punish the petitioner, later in this judgment.

13. Based on the inquiry report, the petitioner was served with a show cause by the Chief Engineer, KESCO dated 11.05.2021. The petitioner denied the case against him with all technical details and facts consistent with his innocence and submitted his reply dated 11.05.2021.

14. The Managing Director, KESCO, according to the petitioner, without application of mind, passed the impugned order dated 14.06.2021 awarding a major penalty to the petitioner in terms that directing two annual increments be withheld with cumulative effect, besides the recovery of a sum of Rs. 2,61,422/-.

15. The petitioner appealed to the Chairman of the Corporation against the order punishing him. The Chairman, not only dismissed the petitioner's appeal *vide* order dated 05.04.2023, but enhanced the penalty by ordering the withholding of three increments with cumulative effect, instead of the two, ordered by the Disciplinary Authority, the Chairman, KESCO. The order for recovery of a sum of Rs. 2,61,422/-, on account of loss caused to the Corporation, was maintained by the Appellate Authority.

16. Aggrieved, the petitioner has instituted the present petition under Article 226 of the Constitution.

17. A counter affidavit has been filed on behalf of respondent nos. 2 and 3 on 19.11.2023.

18. Heard Dr. Suman Kumar Yadav, learned Counsel for the petitioner, Mr. Abhishek Srivastava, learned Counsel appearing on behalf of the Corporation-respondent no. 2, Ms. Usha Kiran, learned Counsel appearing for KESCO-respondent

no. 3 and Mr. Girijesh Kumar Tripathi, learned Additional Chief Standing Counsel appearing on behalf of the State.

19. It is argued by the learned Counsel for the petitioner that the Inquiry Committee, who submitted the report, have hardly considered the petitioner's reply and submitted a sketchy and unintelligible report, on the foot of which the petitioner could not be held guilty by the Disciplinary Authority or in appeal.

20. It is, particularly, argued on the strength of the amended pleas in paragraph nos. 35A, 35B and 35C of the writ petition that the Establishment have not produced any witnesses to prove the charges carried in the charge-sheet against the petitioner, in violation of Regulation 7 of the U.P. Power Corporation Limited Servants (Discipline and Appeal) Regulations, 2020 (*'the Regulations', for short*).

21. It is urged that it is imperative for the Establishment, as a matter of salutary principles governing a disciplinary inquiry leading to the imposition of a major penalty that, in the first instance, the charges are proved by the Establishment producing evidence before the Inquiry Committee/Officer. The evidence is to be produced through a presenting officer who must produce both documentary and oral evidence, particularly witnesses. The witnesses produced must be exposed to cross-examination by the delinquent. After the Establishment have produced their evidence and the delinquent has cross-examined the Establishment witnesses, the delinquent must be given opportunity to produce evidence in his defence which would comprise both documentary and oral evidence. The witnesses on behalf of the defence can also be likewise cross-examined.

22. The submission of the learned Counsel for the petitioner, Dr. Suman Kumar Yadav is that all this procedure has been given a go by and the Inquiry Committee have returned, whatever findings they have, by merely going through papers on record without any evidence being led or the charges being proved.

23. Mr. Abhishek Srivastava and Ms. Usha Kiran, learned Counsel appearing for the respondents, have strongly opposed the aforesaid submissions saying that there is no illegality vitiating inquiry, where the petitioner has been given a fair opportunity both before the inquiry and post inquiry, in terms of a show cause notice, prior to a decision about the petitioner's guilt by the Disciplinary Authority. In addition, the petitioner has also availed his remedy of departmental appeal where the Appellate Authority, considering the gravity of his misconduct, has enhanced the penalty of withholding of two increments to three with cumulative effects. The findings of the Authorities below are unassailable in the submission of the learned Counsel appearing for the KESCO, the Corporation as well as the state.

24. Upon hearing learned Counsel for parties, this Court finds that a perusal of the inquiry report dated 08.05.2020 *ex facie* shows it to be the handiwork of untrained men and novices who do not have even a faint idea about the salutary procedure of conducting an inquiry and writing an inquiry report dealing with the charges, the delinquent's defence, evidence on both the sides and the conclusions.

25. A perusal of the inquiry report shows that the Inquiry Committee has not only jumped to conclusions but virtually

started with them. For one, this Court was handicapped by the fact that a copy of the charge-sheet was not placed on record by either party. But, that would not have mattered much if the inquiry report had been written by a hand or a Committee, reasonably experienced, in holding departmental inquiries and writing reports. The inquiry report does not set out the charge against the petitioner or the statement of imputations. It starts off with conclusions as if the charge is well known to the reader of the report and so also the petitioner's defence.

26. There is a haphazard reference to some technical reports and conclusions drawn to the effect that the petitioner, by sanctioning the electricity connection after estimating the distance between the consumer's premises and the point where the source of power was located, has committed a lapse by not getting the estimate for the entire cost of the installation prepared. These are abrupt conclusions recorded, on what basis is not discernible from the inquiry report. There is no consideration of any documentary evidence or, more particularly evidence, that is to say, the testimony of witnesses which in this case we think was never recorded. The report at best may qualify for an investigative venture, like one that may be expected at the time of a preliminary inquiry, before a decision to initiate disciplinary proceedings is taken. A report of this kind cannot qualify for an inquiry report sans reference to the charge/charges, the petitioner's defence, the evidence led at least on behalf of the Establishment and then the Inquiry Committee's conclusions with reference to the evidence on record. The inquiry report is a piece of waste paper. The relevant part of the enquiry report for all that it says, records:

प्रबंध निदेशक, केस्को के कार्यालय जाप सं० 2451, दिनांक 21.08.2019 के माध्यम से उपरोक्त प्रकरण में दोषी कार्मिकों में से किस-किस कार्मिक द्वारा कितनी-कितनी धनराशि की आर्थिक क्षति पहुंचायी गयी, के निर्धारण हेतु दो सदसीय कमेटी गठित की गयी, जिसमें अधोहस्ताक्षरी को समिति का अध्यक्ष व श्री आशीष दीक्षित, लेखाधिकारी, केस्को को सदस्य बनाया गया। संलग्न पत्रावली के अध्ययन पश्चात् निम्न तथ्य प्रकाश में आये :-

1. श्रीमती विमला अग्रवाल द्वारा संयोजन हेतु आवेदन करने पर सम्बन्धित कार्मिकों द्वारा प्रांकलन के नाध्यग से वांछित धनराशि न जमा कराकर मात्र केबिल चार्ज के रूप में ₹0 61200.00 दिनांक 03.09.2014 को जमा कराकर संयोजन दे दिया गया, जबकि नियमतः उनके संयोजन हेतु प्रांकलन बनाना चाहिये था व प्रांकलन धनराशि जमा कराकर उपरोक्त संयोजन दिया जाना चाहिये था।

2. किसी भी संयोजन को निर्गत करने हेतु अवर अभियन्ता द्वारा साइट का निरीक्षण किया जाता है तथा रिपोर्ट के आधार पर ही उनके द्वारा प्रांकलन तैयार किया जाता है। उक्त प्रकरण में अवर अभियन्ता द्वारा साइट रिपोर्ट दिनांक 26.08.2014 द्वारा निरीक्षण आख्या में परिसर की निकटतम खम्बे से दूरी 210 मीटर दर्शायी गयी है (संलग्नक-A) जिसके आधार पर अण्डीय निपिक द्वारा लाइन चार्ज से ₹0 61200.00 का प्रांकलन बनाया गया (संलग्नक-B), जोकि श्रीमती विमला अग्रवाल द्वारा जमा किया गया तथा संयोजन निर्गत कर

दिया गया। तत्कालीन सहायक अभियन्ता श्री अजय कुमार द्वारा दिनांक 07.11.2014 को उक्त परिसर का निरीक्षण किया गया और पाया कि 600 मीटर है (संलग्नक-C)। उनके द्वारा संयोजन अस्थायी रूप से काट दिया गया।

3. अधीक्षण अभियन्ता मण्डल-चतुर्थ के कार्यालय पत्र सं० 1829, दिनांक 11.11.2014 के सन्दर्भ में तत्कालीन सहायक अभियन्ता श्री अजय कुमार ने अपने जवाब पत्र सं० 1403, दिनांक 17.11.2014 के द्वारा उक्त संयोजन को निर्गत करने हेतु एक प्रांकलन रु० 647314.00 प्रेषित किया गया था।(संलग्नक- D)

4. श्री ए०के० गौतम तत्कालीन अधिशासी अभियन्ता विकास नगर खण्ड, श्री एकधर चरण तत्कालीन अवर अभियन्ता, विकास नगर उपखण्ड एवं श्री अनिल कुमार यादव, तत्कालीन जे०एन०डी० विकास नगर खण्ड द्वारा प्रांकलन धनराशि रु० 647314.00 जमा न कराकर मात्र रु० 61200.00 जमा कर विद्युत संयोजन दे दिया है, जिससे विभाग को रु० 647314.00 - 61200.00 रु० 587314.00 रु० की आर्थिक क्षति हुयी।

निष्कर्ष

अतः समस्त अभिलेखों के अध्ययन उपरान्त समिति इस निष्कर्ष पर पहुँची है कि साइट रिपोर्ट का पूर्ण दायित्व अवर अभियन्ता का है। अतः तत्कालीन अवर अभियन्ता सबसे ज्यादा दोषी है जिन्होंने गलत साइट रिपोर्ट प्रेषित की। तत्पश्चात् बिना सहायक अभियन्ता की संस्तुति के अधिशासी अभियन्ता द्वारा

प्रशंकलन बनवाना भी गलत है। अतः तत्कालीन अधिशासी अभियन्ता का दोष द्वितीय स्थान पर आता है। उक्त के दृष्टिगत रु० 583314.00 की जो आर्थिक क्षति केस्को को हुई है उसकी वसूली 50 प्रतिशत श्री एकधर चरण, तत्कालीन अवर अभियन्ता, विकास नगर उपखण्ड, 40 प्रतिशत ए०के० गौतम तत्कालीन अधिशासी अभियन्ता, विकास नगर खण्ड एवं 10 प्रतिशत श्री अनिल यादव तत्कालीन जे०एन०डी०, विकास नगर खण्ड से की जानी चाहिये।

27. The report also seems to suggest that the Inquiry Committee was tasked with finding out the loss that was occasioned to the Corporation by the petitioner and the other functionaries held in fault. The inquiry report does not even suggest that a charge was at all drawn up and set out in the charge-sheet on the basis of which the petitioner could be judged guilty or exonerated. Apart from other things, the entire tenor of words carried in the inquiry report are so informal that we think that this kind of a report should never have been the foundation of any disciplinary action, much less the award of a major penalty. If the Disciplinary Authority or the Appellate Authority had bestowed some informed consideration to this report, the only course of action for them was to remit the matter to the Inquiry Committee for a fresh inquiry to be done in accordance with the salutary procedure to hold a departmental inquiry and followed by an inquiry report adhering to the minimum and essential standards of a valid report in a disciplinary matter.

28. In paragraph no. 8(iv) of the counter affidavit, filed on behalf of

respondent nos. 2 and 3, it is not disputed for a fact that no witnesses were examined by the Establishment in support of the charges. Rather, the respondents have attempted to justify their action in holding this kind of a slipshod inquiry by saying that witnesses are required to be examined under Regulation 7(7) of the Regulations, if their names are cited in the charge-sheet. Since, in this case, no witnesses have been cited, there was no requirement of examining any witness at all. We are afraid that this is not the law governing the salutary procedure to hold a valid departmental inquiry in matters which may entail the imposition of a major penalty.

29. According to the principles well settled for holding a departmental inquiry, it must be understood by the respondents, and more particularly, by the Inquiry Committee, that is charged with the responsibility of inquiring into the charges, that the charges laid by the Establishment against the employee cannot be taken to be proof of themselves. It is the burden of the Establishment to prove the charges, and like any other judicial proceeding, though a departmental inquiry is certainly not that, the Inquiry Committee/Officer must be mindful of the fact that the proceedings against the delinquent commence before the Inquiry Committee/Officer with a clean slate for the delinquent. It is for the Establishment to prove the charges by leading evidence, both documentary and oral.

30. In case of inquiry into charges, involving the imposition of a major penalty, it is imperative by salutary principle that witnesses, to prove the Establishment's case, must be examined. The Inquiry Committee or its Members, or if there be an Inquiry Officer sole, even if

otherwise an officer of the same Establishment, must distance himself from the master he serves. He must sit as an impartial Arbiter or Tribunal to inquire into the charges. It is then the burden, as already said, of the Establishment to prove the charges through a Presenting Officer. The proceedings have to be not as formal as a trial in a Court of law or a Judicial Tribunal, but also not so informal that the event passes through like any other business of the day in the Establishment's office. The rest of the procedure that must be followed before the Inquiry Committee or the officer has been alluded to hereinabove and need not be repeated.

31. The salutary principle about the Establishment's burden to prove the charges by producing documentary as well as oral evidence, particularly examining witnesses, in a case where the proceedings may entail the imposition of a major penalty, has been the subject of considerable judicial attention in the past. Some of the leading Authorities on the point need notice for a more complete guidance of the respondents in this matter and for the future. In this connection, reference may be made to **Roop Singh Negi Vs. Punjab National Bank and others, (2009) 2 SCC 570**, where it was observed by the Supreme Court:

“14. Indisputably, a departmental proceeding is a quasi-judicial proceeding. The enquiry officer performs a quasi-judicial function. The charges levelled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the investigating officer

against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the enquiry officer on the FIR which could not have been treated as evidence.”

32. Likewise, in **Smt. Karuna Jaiswal Vs. State of U.P, 2018 (9) ADJ 107 (DB) (LB)**, it has been held by a Division Bench of this Court sitting at Lucknow:

“15. The law in this regard is very well-settled and does not need a reiteration, however, we may refer to a judgment of Hon'ble Supreme Court in the case of *State of Uttar Pradesh and others v. Saroj Kumar Sinha*, (2010) 2 SCC 772, wherein it has clearly been held that Enquiry Officer acts as a quasi judicial authority and his position is that of an independent adjudicator and further that he cannot act as a representative of the department or disciplinary authority and further that he cannot act as a prosecutor neither he should act as a judge; his function is to examine the evidence presented by the department and even in the absence of the delinquent officer, has to see as to whether the un rebutted evidence is sufficient to bring home the charges.

16. Hon'ble Supreme Court has further held in the said judgment of *Saroj Kumar Sinha* (supra) that it is only in case when the Government servant, despite notice, fails to appear during the course of enquiry that Enquiry Officer can proceed ex parte and even in such circumstances it is incumbent upon the Enquiry Officer to record the statement of witness.

17. In the instant case, no oral enquiry was held, neither the petitioner was given any notice to participate in any oral enquiry by fixing date, time and place for oral enquiry. It is only that the Enquiry Officer after noticing that despite sufficient time having been given to the petitioner, she did not furnish her reply to the charge-sheet, he proceeded to submit ex parte report without conducting any oral enquiry by fixing date, time and place for such an oral enquiry. Accordingly, the Enquiry Officer, in this case, has violated the aforesaid principles, which clearly vitiates the enquiry proceedings and any punishment order based on such a vitiated enquiry, is clearly not sustainable.”

33. In **State of U.P. and another Vs. Kishori Lal and another, 2018 (9) ADJ 397 (DB) (LB)**, again a Bench decision of this Court, the necessity of holding an oral inquiry was emphasized in the following words;

“14. Now coming to the question, what is the effect of non-holding of domestic/oral inquiry, in a case where the inquiry officer is appointed, oral inquiry is mandatory. The charges are not deemed to be proved suo motu merely on account of levelling them by means of the charge-sheet unless the same are proved by the department before the inquiry officer and only thereafter it is the turn of delinquent employee to place his defence. Holding oral enquiry is mandatory before imposing a major penalty, as held by Apex Court in *State of U.P. and another v. T.P. Lal Srivastava*, 1997 (1) LLJ 831, as well as by a Division Bench of this Court in *Subhash Chandra Sharma v. Managing Director and another*, 2000 (1) UPLBEC 541.”

15. In another case in *Subhash Chandra Gupta v. State of U.P.*, 2012(4)

ADJ 4 (NOC), the Division Bench of this Court after survey of law on this issue observed as under:

"It is well-settled that when the statute provides to do a thing in a particular manner that thing has to be done in that very manner. We are of the considered opinion that any punishment awarded on the basis of an enquiry not conducted in accordance with the enquiry rules meant for that very purposes is unsustainable in the eye of law. We are further of the view that the procedure prescribed under the inquiry rules for imposing major penalty is mandatory in nature and unless those procedures are followed, any out come inferred thereon will be of no avail unless the charges are so glaring and unrefutable which does not require any proof. The view taken by us find support from the judgement of the Apex Court in State of U.P. and another v. T.P.Lal Srivastava, 1997 (1) LLJ 831, as well as by a Division Bench of this Court in Subash Chandra Sharma v. Managing Director and another, 2000 (1) UPLBEC 541."

16. A Division Bench decision of this Court in the case of Salahuddin Ansari v. State of U.P. and others, 2008(3) ESC 1667, held that non holding of oral inquiry is a serious flaw which can vitiate the order of disciplinary proceeding including the order of punishment has observed as under:

" 10..... Non holding of oral inquiry in such a case, is a serious matter and goes to the root of the case.

11. A Division Bench of this Court in Subash Chandra Sharma v. Managing Director and another, 2000 (1) UPLBEC 541, considering the question as to whether holding of an oral inquiry is necessary or not, held that if no oral inquiry is held, it amounts to denial of principles of natural justice to the delinquent employee. The aforesaid view was reiterated in

Subash Chandra Sharma v. U.P.Cooperative Spinning Mills and others, 2001 (2) UPLBEC 1475 and Laturi Singh v. U.P.Public Service Tribunal and others, Writ Petition No. 12939 of 2001, decided on 6.5.2005."

17. Even if the employee refuses to participate in the enquiry the employer cannot straightaway dismiss him, but he must hold an ex parte enquiry where evidence must be led vide Imperial Tobacco Co. Ltd. v. Its Workmen, AIR 1962 SC 1348, Uma Shankar v. Registrar, 1992 (65) FLR 674 (All).

18. The Division Bench of this Court in the case of Mahesh Narain Gupta v. State of U.P. and others, (2011) 2 ILR 570, had also occasion to deal with the same issue. It held:

"At this stage, we are to observe that in the disciplinary proceedings against a delinquent, the department is just like a plaintiff and initial burden lies on the department to prove the charges which can certainly be proved only by collecting some oral evidence or documentary evidence, in presence and notice charged employee. Even if the department is to rely its own record/document which are already available, then also the enquiry officer by looking into them and by assigning his own reason after analysis, will have to record a finding that those documents are sufficient enough to prove the charges.

In no case, approach of the Enquiry Officer that as no reply has been submitted, the charge will have to be automatically proved can be approved. This will be erroneous. It has been repeatedly said that disciplinary authority has a right to proceed against delinquent employee in ex parte manner but some evidence will have to be collected and justification to sustain the charges will have to be stated in detail. The approach of the enquiry officer

of automatic prove of charges on account of non filing of reply is clearly misconceived and erroneous. This is against the principle of natural justice, fair play, fair hearing and, thus, enquiry officer has to be cautioned in this respect."

19. The principal of law which emanates from the above judgments are that initial burden is on the department to prove the charges. In case of procedure adopted for inflicting major penalty, the department must prove the charges by oral evidence also.

20. From perusal of enquiry report it is demonstrably proved that no oral evidence has been led by the department. When a major punishment is proposed to be passed the department has to prove the charges against the delinquent/employee by examining the witnesses and by documentary evidence. In the present case no witness was examined by the department neither any officer has been examined to prove the documents on the basis of which charges are levelled on the claimant in the proceedings.

21. It is trite law that the departmental proceedings are quasi judicial proceedings. The Inquiry Officer functions as quasi judicial officer. He is not merely a representative of the department. He has to act as an independent and impartial officer to find out the truth. The major punishment awarded to an employee visit serious civil consequences and as such the departmental proceedings ought to be in conformity with the principles of natural justice.

22. Even if, an employee prefers not to participate in enquiry the department has to establish the charges against the employee by adducing oral as well as documentary evidence. In case charges warrant major punishment then the oral evidence by producing the witnesses is necessary."

34. In the opinion of this Court, therefore, for whatever has been said, all proceedings beyond the charge-sheet, if a properly done charge-sheet was issued to the petitioner, stand vitiated. In the event, a proper charge-sheet was not issued to the petitioner, the proceedings go foul by one more step and oblige the respondents to issue a fresh and properly done charge-sheet as well. This part is left to the respondents' wisdom and risk.

35. In the result, this petition **succeeds** and is **allowed**. The impugned order dated 14.06.2021 passed by the Managing Director, Kanpur Electric Supply Company Limited and the Appellate order dated 05.04.2023 passed by the Chairman of the Corporation are hereby **quashed**. The inquiry report dated 08.05.2020 is also **quashed**.

36. It will be open to the respondents to proceed afresh with the inquiry, either by issuing a fresh charge-sheet or if they are convinced that a valid charge-sheet has been issued, on the basis of the same charge-sheet and pass a fresh order in accordance with law, bearing in mind the guidance in this judgment. If the respondents elect to pursue fresh proceedings against the petitioner, a penalty higher than the one quashed by this judgment shall not be imposed.

37. There shall be no order as to costs.

38. Let this judgment be communicated to the Chairman, Uttar Pradesh Power Corporation Limited, Lucknow and the Managing Director, Kanpur Electric Supply Company Limited, 14/71, Civil Lines, KESA House, Kanpur by the Registrar (Compliance).

connected with it – It does not appear to be the *sine qua non* for maintaining an application u/s 21 (2) of the Act – Where the tenancy is admitted, no such information as contemplated u/s 4 of the Act is warranted. (Para 20 and 23)

Writ petition dismissed. (E-1)

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

1. Heard Sri Sharad Malviya, learned counsel for the petitioner and Shri Deepak Kumar as well as Shri Ashish Kumar Srivastava, learned counsels for the landlord/respondent no.3.

2. Learned counsel for the petitioner is permitted to delete the respondent nos. 1 and 2 from the array of parties.

3. The petitioners of first set of writ petitions are tenants of different shop numbers situated in building No. CK62/19, 20, 21 and 22 Kashipura (West), Ward Chowk, Tehsil and District Varanasi, whereas, the petitioners of second set of the writ petitions are tenants of different shop numbers situated in building B-30/5A, Vikram Building, situate at Lanka-BHU, Main Road, Varanasi.

4. The writ petition arise out of the proceedings undertaken under the U.P. Regulation of Urban Premises Tenancy Act, 2021 (UP Act No. 16 of 2021).

5. The controversy involved in both sets of the writ petitions are similar in nature and the impugned orders have been assailed on identical grounds. Hence, with the consent of the parties all the writ petitions are being finally decided at the admission stage itself.

6. The writ petition, being Writ A No. 2030 of 2024, is being treated as the leading writ petition and the facts pertaining to the same are being considered for deciding the controversy involved.

7. The writ petition, being Writ A No. 2030 of 2024, at the instance of the Tenant/ Petitioner has been filed assailing the order dated 16.01.2024 passed by the Rent Tribunal/ District Judge, Varanasi, in Rent Appeal No. 145 of 2023, whereby and whereunder the Rent Appeal has been dismissed and order of the Rent Authority/Additional District Magistrate (City), District- Varanasi, dated 30.06.2023 allowing the Release Application registered as Case No. 290 of 2023 has been upheld and the petitioner has been directed to vacate the shop No. 29 under his tenancy.

8. It is the case of the petitioner that he is a tenant of shop No. 29 situate in premises No. CK62/19, 20, 21 and 22 Kashipura (West), Ward Chowk, Tehsil and District Varanasi at a monthly rent of Rs. 230/- inclusive of Sewer and water charges. The respondent no. 3 is his landlord. The petitioner has paid the entire rent of the shop till July, 2013 under receipt, however the landlord/ respondent refused to accept the Rent from August 2013 and since then the rent is being deposited under Section 30 (1) of the U.P. Act No. 13 of 1972 in Misc. Case No. 28 of 2014. the Landlord/ Respondent no. 3 tried to dispossess the Tenant/Petitioner by force and petitioner was compelled to instituted a suit for permanent injunction being Original Suit No. 597 of 2014 in which temporary injunction was granted in favour of the petitioner that he shall not be evicted otherwise than in accordance with law. The respondent no. 3 thereafter filed SCC Suit No. 28 of 2014 before the Judge, Small

Cause Court for ejectment, recovery of arrears of rent and damages for use and occupation. The 6 of 16 petitioner appeared in the suit and filed his written statement. However meanwhile the UP Act No. 16 of 2021 was enacted and the respondent no. 3 withdrew the SCC suit No. 28 of 2014.

9. After withdrawal of the SCC Suit No. 28 of 2014, the respondent no. 3 filed an application under Section 21 (1) of the UP Act No. 16 of 2021 which proceedings were registered as Application No. 290 of 2023 seeking ejectment of the petitioner from the shop no. 29 alleging that the petitioner is tenant of the shop no. 29 of premises No. CK62/19, 20, 21 and 22 and despite notice the Tenant/Petitioner has failed to vacate the premises which was required for rebuilding of the entire premises under clause (f) of Section 21 (2) of the U.P. Act No. 16 of 2021. The tenant/petitioner is in arrears of rent of Rs. 33,753/- but rent from 01.01.2021 Rs. 9120/- is claimed. It was also stated that monthly rent of Rs. 230/- per month was last revised in February 2010 which reached Rs. 518/- per month under U.P. Act No. 16 of 2021. Damages for use and occupation pendente lite and further @ Rs. 20,000/- per month till delivery of possession was claimed. Pursuant to the notice issued by the Rent Authority the Tenant/Petitioner appeared in the proceedings and filed his written statement alleging inter alia that the rent of the shop is Rs. 230/- per month which was never revised by the landlord/ respondent no. 3. Before filing of the proceedings of suit No. 28 of 2014 the rent was being deposited under Section 30 (1) of the U.P. Act No. 13 of 1972 and after filing of the suit the amount was being deposited in the Suit no. 28 of 2014. The suit was got 7 of 16 withdrawn on 12.11.2022 and as such on

the date of the institution of the proceedings under the new Act of 2021 were not applicable as the respondent no. 3 is a Religious and Charitable Institution.

10. The Rent Authority after considering the materials on record vide order dated 30.06.2023 allowed the application under Section 21 (2) of the U.P. Act No. 16 of 2021 and directed the ejectment of the petitioner from the shop No. 29 recording a finding of fact that there existed a relationship of landlord and tenant between the respondent no. 3 and the petitioner. The respondent no. 3 has served notice upon the petitioner in terms of the U.P. Act No. 16 of 2021 requiring him to execute a Tenancy Agreement as per the requirement of the New Act and also demanded arrears of rent and when the Tenant/Petitioner failed to provide the information sought a notice dated 04.12.2022 was served terminating the tenancy. The Rent Authority also recorded the finding that the injunction order dated 30.10.2014 operating in favour of the Tenant/ petitioner was of no avail to the petitioner as the respondent no. 3 had drawn proceedings against the petitioner as per law and would have no bearing upon the proceedings under Section 21 (2) of the New Act of 2021. It also recorded the factum that there was no written Tenancy Agreement between the parties nor any evidence in this regard was brought on record during the course of the arguments and in the absence of a written agreement the provisions of Section 4 of the Act has been violated. Since the tenancy of the petitioner has already been terminated and the 8 of 16 Tenant/Petitioner has not vacated the premises the application of the respondent no. 3 landlord in form 7 is liable to be allowed and was allowed.

11. An appeal was preferred by the Tenant/petitioner against the order of the Rent Authority dated 30.06.2023 before the Rent Tribunal which was registered as Rent Appeal No. 145 of 2023. The Rent Tribunal under the order dated 16.01.2024 has dismissed the Rent Appeal.

12. In the Appeal it was urged that the provisions of the UP Act No. 16 of 2021 were not applicable and the Application under Section 21 (2) was not maintainable as the Landlord/ Respondent is a registered Public Charitable Trust and the Act does not apply to it by virtue of Section 3 (iv) of the Act. It was also urged that the Application under Section 21 (2) was not maintainable in view of Section 46 (2) of the Act inasmuch as the notice dated 22.09.2022 was given on which date the SCC Suit No. 28 of 2014 was maintainable and was liable to be continued as per Section 46 (2) but the same was withdrawn only on 07.10.2022. It was also urged that as per Section 31 of the Act a negotiated settlement of the dispute ought to have been attempted by both the Rent Authority and the Rent Tribunal and failure to attempt the same has rendered the orders passed illegal. It was further urged that the U.P. Act No. 16 of 2021 contemplates existence of a written Tenancy Agreement between the parties. Section 4 (3) of the Act requires the landlord to upload the details of the tenant on the portal and thereafter inform the tenant to get executed a Tenancy Agreement. No Tenancy Agreement was uploaded by 9 of 16 the Landlord/ Respondent on the portal and straight away notice was served upon the Tenant/ Petitioner to execute Tenancy Agreement on unreliable rent. The provisions of Section 4 (3) were clearly violated and no benefit could be derived therefrom by the landlord/respondent.

13. The Rent Tribunal found that the Tenant/ petitioner had not complied with the provisions of Section 35 (1) Proviso which provides that the Appellant to pre deposit 50% of the entire payable amount under the impugned order of the Rent Authority. The Rent Tribunal computed the amount to be Rs. 1,09,977/- of which 50% was required to be deposited but the Appellant admittedly deposited only Rs. 4600/-. It accordingly held the Appeal to be not maintainable. The Court finds no error in the approach adopted by the Rent Tribunal.

14. On the question of Landlord/Respondent no. 3 being a Public Trust or a Religious Charitable Institution the Rent Tribunal took note of the fact that the Tenant/Petitioner had taken contradictory stands regarding the character of the respondent no. 3 In the SCC Suit he took the stand that the premises in question was not the property of the Idol but is the property of a Private Trust. However, before the Rent Authority a contrary stand was taken that the respondent no. 3 is a charitable Religious Trust and exempted from the provisions of the UP Act No. 16 of 2021. The Rent Tribunal on the appreciation of the materials on record returned a finding that no Notification under Section 3 (iii) of the UP Act No. 16 of 2021 had been issued or if issued the same has not been brought on record. The Rent Tribunal accordingly concluded 10 of 16 that the Release Application under Section 21 (2) of the Act was maintainable.

15. This Court has examined the provisions of Section 3 (iii) and 3 (iv) of the Act and finds that the mandate of the Section is to exempt the applicability of the Act to premises owned by Religious or Charitable Institution as may be specified

by the notification by the State Government. The Rent Tribunal found that no such Notification by the State Government has been issued or filed on record. Likewise Section 3 (iv) provides exemption to premises owned by a Waqf registered under the Waqf Act 1995 or by any Public Trust under applicable law. The respondent no. 3 on the owning saying of the tenant petitioner is a Private Trust and as such properties owned by it are not exempt. In the opinion of the Court there is no error or illegality in the conclusion drawn by the Rent Tribunal.

16. So far as the submission of the learned counsel for the tenant/petitioner to the effect that the application under Section 21 (1) of the Act was not maintainable as a SCC Suit, being SCC Suit No. 28 of 2014 was liable to be continued in terms of Section 46 (2) of the U.P. Act No. 16 of 2021 is concerned, the Court is of the opinion that it is the prerogative of the landlord/respondent to have either continued with the proceedings of the SCC Suit No. 28 of 2014 or initiate fresh proceedings under the U.P. Act No. 16 of 2021. The provisions of the U.P. Act No. 16 of 2021 does not bar initiation of fresh proceedings under the Act if proceedings for the same relief are pending under other enactments. It is a matter of debate as to whether the proceedings of the SCC Suit No. 28 of 2014 could 11 of 16 or could not continue in terms of Section 46 (2) of the Act. However, this Court refrains from dwelling into the said aspect for the reason that pendency or otherwise of the suit proceedings would not affect the present proceedings as the Notice dated 4.12.2022 was served after the SCC suit had been withdrawn. The submissions made by the learned counsel for the petitioner does not merit consideration.

17. It is next submitted that Section 31 of the U.P. Act No. 16 of 2021 contemplates negotiated settlement of the disputes and the failure of the Rent Authority and the Rent Tribunal to attempt a settlement has rendered the orders passed illegal.

18. In the opinion of the Court, a perusal of the provision contained under Section 31 of the Act, certain discretion is assigned to the Rent Authority or to the Rent Tribunal to refer appropriate cases to the appropriate authority under the Legal Services Authority Act, 1987 to explore a settlement. The reference is not mandatory in all cases. Besides, settlement of dispute being an voluntary act is required to be availed and pressed. The learned counsel for the petitioner has not placed before this Court any material to demonstrate that a settlement of the dispute with the landlord/respondent was ever sought and pressed.

19. In the opinion of the Court, the non compliance of the provision of Section 31 of the Act is not fatal to the proceedings and the impugned orders cannot be set aside on this ground. 12 of 16

20. It has lastly been urged that the provisions of Section 4 (3) of the Act, which requires the landlord to upload the details of the tenant on the portal and thereafter inform the tenant to get executed a tenancy agreement, has been violated. No tenancy agreement was uploaded by the landlord/respondent on the portal and straight away notice was served upon the tenant/petitioner to execute Tenancy Agreement on unrealistic rent.

21. A perusal of the provisions contained in Section 4 of the Act, which

relates to Tenancy Agreement reveals that subsection (1) of Section 4 commences with a non obstinate clause and as such, has an overriding effect over the other provisions under the Act. It provides that no person after the commencement of the Act of 2021 shall let or take on rent any premises except by an agreement in writing which shall be informed to the Rent Authority jointly by the landlord and tenant in the form specified in the First Schedule provided the tenancy is not residential for a period of less than 12 months in which case no such information is required to be informed to the Rent Authority. Sub-section (2) relates to a situation when both the landlord and tenant jointly fail to inform the execution of the Tenancy Agreement in which case the landlord and tenant shall separately inform the Rent Authority about execution of the Tenancy Agreement within a specified time.

22. Sub Section (3) relates to a tenancy created before the commencement of the Act. Sub-clause (a) thereof deals with a situation where an agreement in writing was entered between the landlord and tenant in which case they shall jointly present 13 of 16 a copy thereof to the Rent Authority within three months of the commencement of the Act. Sub-clause (b) on the other hand deals with a situation where no agreement in writing was entered into between landlord and tenant in which case they shall enter into an agreement in writing with regard to that tenancy and present the case to the Rent Authority within three months of the commencement of the Act. The proviso takes into consideration a situation where the landlord or the tenant fail to present jointly a copy of the Tenancy Agreement or fail to reach agreement within specified period such landlord and tenant shall separately file the particulars about such tenancy with the Rent Authority within one

month from the date of expiry of the period mentioned in Clause (b) of subsection 3 of Section 4 in the Form specified in First Schedule. If the landlord has submitted his particulars within the time specified but the tenant fails to submit such particulars, the landlord may file an application for eviction of the tenant on that ground alone. Though the provision visualizes a situation where a tenant fails to comply with provisions of submitting particulars giving the landlord a ground to seek eviction of the tenant on the ground of default in submitting the particulars but the provision is silent about the outcome of a default at the instance of the landlord. The intention of the legislature is obvious that it would not affect the rights of the landlord to file for eviction of the tenant. Sub Clause 4 deals with providing the digital platform in Hindi and English enabling submission of the documents in such form and manner prescribed. The Sub-section (5) of Section 4 provides that the Rent Authority after receiving information about the execution 14 of 16 of Tenancy Agreement along with the documents specified in the First Schedule shall provide a Unique Identification Number to the parties. The Sub-section (6) of Section 4 provides that the terms of authorization of the Property Manager, if any, by the landlord to deal with the tenant shall be as agreed to by the landlord and tenant in the Tenancy Agreement. Sub-section (7) of Section 4 provides that the information provided under Sub-sections (1), (2) and (3) shall be conclusive proof of the facts relating to tenancy and matters connected therewith and in absence of any statement of information, the landlord may file an application for eviction on this ground alone.

23. A conjoint reading of the various sub-sections of Section 4 of the Act reveals that the intention of legislature for requiring both the landlord and the tenant

to inform to the Rent Authority in the form specified in the First Schedule within a certain time frame is to treat the information as conclusive proof of the facts relating to the tenancy and matters connected with it. It does not appear to be the sine qua non for maintaining an application under Section 21 (2) of the Act. Where the tenancy is admitted, in the opinion of the Court, no such information as contemplated under Section 4 of the Act is warranted. Where the tenancy or its terms are disputed, it is always open for the parties to adduce evidence in support of their respective cases before the respective authorities.

24. The Court finds no merit in the submission of the learned counsel for the petitioner. 15 of 16

25. Considering the totality of the circumstances, the Court finds no error or illegality in the order of the Rent Authority dated 30.6.2023 as also the order of the Rent Tribunal dated 16.1.2024 so as to warrant any interference in the exercise of its' extra ordinary powers under Article 226 of the Constitution of India. All the aforesaid writ petitions lack merit and are accordingly, **dismissed**.

26. Parties to bear their own costs.
